PART I

INTRODUCING THE CRITICAL CHALLENGE OF USING LAW FOR EQUAL JUSTICE

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CHAPTER 1

LOOKING TO THE BOTTOM IS STEP ONE IN SYSTEMIC ADVOCACY

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OPENING THOUGHTS

Practice needs theory and theory needs practice just like fish need clean water.

—Paulo Freire

We saying that theory's cool, but theory with no practice ain't shit.

—Fred Hampton

Critical Legal Theory . . . allows the student to better understand how laws have operated historically and what ideologies were employed to maintain certain narratives that denied rights to people and communities.

—Chaumtoli Huq, (inter)Generation Movement Lawyer 2.0, Law at the Margins (2014)

I have a vision of a very strong, vocal and articulate critical movement that forwards a theory and a practice that challenges the judiciary's departure from good faith reasoning and its cynical instrumentalization of racial egalitarianism in the maintenance of sheer white supremacy.

—Sumi K. Cho, Essential Politics, 2 Harv. Latino L. Rev. 433, 435–36 (1997)

INTRODUCTION

Despite a century or more of legal reforms and social changes, everyday headlines make plain that the U.S. constitutional commitment to "Equal Justice Under Law" remains illusory for many individuals and for some entire communities. Today's front-burner legal and social issues and targets of group struggle range from equal pay for equal work to mass incarceration and police violence, voter suppression, student debt, climate adaptation, marriage equality, immigration justice, healthcare access, and many more topical controversies. Some are new, while most connect to injustices, struggles, and aspirations of past generations. The same is true globally.

Advocacy groups around the world use the term "systemic injustice" to identify injustice perpetrated systematically, almost automatically, because it has been ingrained and institutionalized by law. In response, advocates and activists have begun to develop myriad approaches to "systemic advocacy." Systemic advocacy aims to counter systemic injustice in a collective way that achieves systemic justice. In this work, law is central—both to systemic injustice and to systemic advocacy. Law permits collective inequality to persist. And law is an essential part of the solution. Advocates, activists, and others thus face the pressing Critical Challenge this book details:

How does one help translate law's noble promises into lived social realities for all?

Or, to put it simply, how does one use law for equal justice and social equity in material, practical, and ethical terms?

A common thread binds global efforts to oppose injustice and advance justice systemically: a focus on groups, legal systems, persistent inequalities, and on developing multidisciplinary tools to both critically diagnose and strategically address systemic injustice. Such work prioritizes collaboration based on views of those living the injustice—views from "the bottom" of a persistent, systemic problem.

Reflecting these common themes and aspirations, the mission statement of the Systemic Justice Project at Harvard Law School describes itself as confronting entrenched sources of persistent injustice:

> [SJP] is a policy innovation collaboration, organized and catalyzed by Harvard Law School students devoted to identifying injustice, designing solutions, promoting awareness, and advocating reforms to policymakers, opinion leaders, and the public. While targeting specific policy challenges, SJP is devoted to understanding common and systemic sources of injustice by analyzing the historical, cultural, political, economic, and psychological context of particular problems. Toward that end,

> SJP is committed to collaborating with scholars, lawyers, lawmakers, and citizens and to working with existing institutions in promoting attainable, pragmatic, and lasting policy solutions.[1]

This mission statement makes clear that traditional notions of legal "relevance" and analysis are insufficient for systemic justice. Not only is the conceptual framework for understanding problems transformed in the context of systemic advocacy, so are traditional notions of typical legal action as discrete, individualized dispute resolution and of typical relationships among advocates, clients, and communities. The Legal Department of the New Orleans Worker Center for Racial Justice, for example, described its work with an emphasis on collaboration that aims to address social problems, build power accountable to "the bottom," and shift legal and cultural understandings of foundational notions like equality and justice:

> NOWCRJ's five attorneys work closely in integrated campaign teams with organizers, advocates, and communications staff to build collective leadership by affected workers and communities, use litigation to document and legitimize their experience, change the terms of the public debate, and build transformative coalitions. Our campaigns have transformed allies and opponents, won innovative legislative and regulatory changes at the federal and local level, and developed innovative opportunities for workers and communities to bargain with the state and with their "real boss" on complex global supply chains. [Our work] supports grassroots leaders in developing demands rooted in a transformative vision of freedom and equality, develops the policy proposals and community-based enforcement system to make policy real, and delivers the power for these vibrant, transformative campaigns to win and to develop long term organizational forms.[2]

As these examples—and many others you will see throughout this book—jointly make plain, a focus on systemic injustice and systemic advocacy employs and expands the conventions and resources of legal analysis and problem solving to reach the root causes of familiar, entrenched, collectivized inequalities. This expansion focuses on identities, groups, interests, and power as crucial elements of the Critical Challenge facing advocates around the world today.

Systemic advocacy consequently is not limited to the United States or to any other country or region. For example, in Canada, The Representative for Children and Youth of Nunavut (a Canadian territory

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[1] https://systemicjustice.law.harvard.edu.

[2] New Orleans Worker Center for Racial Justice, Legal Department Overview (not available online).

populated mostly by indigenous Inuit residents) ascribes four elements to their understanding of systemic advocacy. By their definition, a "systemic" issue:

1. Affects many children or youth;
2. Often happens when government policies and practices are not working;
3. If left alone will probably happen again; and
4. May require an organization to change its policies, practices or even legislation.[3]

In Australia, the Family Advocacy organization explains that, "[s]ystemic advocacy is not individual, though it can be undertaken by just one person advocating on behalf of a group. The aim of systemic advocacy is to make positive change for a whole group of people. While this kind of advocacy takes time, strategy, and resources, in the medium or long term it is more effective than negotiating [the same] systemic barrier person by person, over and over again."[4] This work prioritizes collaboration based on the views of those living the situation or the injustice—that is, views from "the bottom" of the systemic problem. Clearly, then, neither systemic advocacy nor the Critical Challenge is confined by geography or locale. As a practical matter, systemic advocacy must be collaborative and coalitional, as well as local and global, because systemic injustice is collective, entrenched, and globalized.

As indicated by these examples, the systemic nature of a persistent social problem may be evidenced by its continuing recurrence in many "individual" instances, which cumulatively establish patterns of outputs upon which systems are judged. These examples explain why systemic advocacy must connect particularities to reveal, and change, patterns—why advocacy must account for both the micro and the macro. These individualized outputs, and their patterns, reflect the ways in which law interlocks with other systems (social, political, economic) based on social, group identities. In response, activists, organizers, groups, and advocates long have collaborated for bottom-up progress, as they still do.

To support this ongoing, transgenerational work, this chapter (and the book as a whole) inter-connect key concepts and core skillsets for systemic advocacy, beginning below with:

- anchoring advocacy in knowledge drawn from "the bottom"—those who experience social problems directly and who engage in social struggle to advance equal justice;

[3] www.rcynu.ca/families-public/our-work/what-we-do/systemic-advocacy.

[4] www.family-advocacy.com/what-we-do/systemic-advocacy/.

- using criticality—critical and self-critical reflection—to center knowledge from the bottom and to expose the interplay of identities, groups, interests, and power in law and social struggle;
- learning from the realist and critical Schools of legal analysis and the field-based advocacy Approaches that deepen understanding of systemic behaviors and outputs and provide advocacy strategies to counter them in favor of justice;
- developing a dual consciousness to both operate effectively as a legal insider deploying legal tools and to maintain a critical outsider perspective on law's limits and intentional systemic failures;
- collaborating across many disciplines and many sorts of social differences in teams and coalitions to build shared values, principles, goals, and movements; and
- managing time with conscious strategic intent to impede opposition or advance progress toward equal justice.

As the first two points explicitly state, systemic advocacy reflects and applies the insights of "critical" knowledge produced "from the bottom" through collective struggle and self-critical reflection. This kind of experiential knowledge and self-critical reflection is personal as well as systemic. This critical, bottom-up knowledge must be sourced in varied contexts through research and analysis using both traditional *and* nontraditional methods of learning and fact-finding. Experience—personal and professional, individual and collective—and its lessons always can (and often does) provide a starting point for critical understandings of problems and bottom-up solutions to them.

The critical Schools and the advocacy Approaches outlined in this chapter spotlight from the get-go that knowledge is power when made actionable—*and* when action is organized for the long haul and held accountable to those at the social bottom. These various bottom-up bodies of critical knowledge produced by successive generations of scholars, practitioners, organizers, and activists—in law and other disciplines—teach the same lessons that activists like Georgia's Stacey Abrams of Fair Fight preach and practice daily: systemic advocates must acknowledge the context, center the bottom, build sustainable groups, and act on bottom-up knowledge diligently, innovatively, and courageously. Youthful organizers of March for Our Lives aimed to "get ready and stay steady" in their own work after the 2018 mass shooting at their Florida high school in Parkland.

But there are no panaceas. We have no silver bullets for systemic injustice. Instead, we have ourselves, each other, what we collectively know, and what we can learn as we build systemic advocacy projects and

engage in social movement activism. Gerald López, a pioneer of the rebellious lawyering approach to systemic advocacy, explained the challenge for advocates this way:

> None of these people has thoroughly worked out the answers to all the questions they confront. None of them has entirely escaped the inconsistencies and contradictions. None is immune from frustrations and failures. What each does understand, however, is that there's no self-executing blueprint for changing law practice any more than there is a magic plan for changing the world. Their work reflects . . . a profound appreciation that lawyering, no less than other activist vocations, must itself reflect and occasionally even usher in the world we hope to create.[5]

Evolving U.S.-centric and law-centric bodies of knowledge are not the only sources of critical knowledge from the bottom important to systemic advocacy, but they do reflect how law, as a system, is central both to persistent patterns of injustice and to effective solutions. Historically and presently, these (and associated) bodies of critical knowledge are an intellectual and practical response to the persistence of identity-based group inequalities within and beyond the United States.

1.1 LAW ISN'T ALWAYS WHAT IT SEEMS TO BE—IF YOU LOOK AT IT FROM THE BOTTOM

The opening excerpt below presents a prominent example of a core practice in contemporary approaches to systemic advocacy: reflection that is critical, as well as self-critical, to help us better understand persistent "gaps" between law and justice. At the time of this reflection, U.S. elites had organized an extravagant, coast-to-coast campaign of self-congratulation to mark the 200th anniversary of the constitution, drafted in 1787 and adopted in 1789. But to Justice Thurgood Marshall—the first non-white U.S. Supreme Court Justice, confirmed in 1964—the occasion commemorated events, choices, and actions not worthy of celebration. The difference was in perspective. Justice Marshall's perspective reflected the history of collective experience with law of those at "the bottom" of the system erected by that document, while the celebrants reflected the perspective from above—those who collectively had benefitted at the expense of those below. Marshall's reflection supplies our point of departure for proficiency in systemic advocacy today: law isn't always what it seems, or purports, to be if you take time to look at it from the bottom in critical and self-critical ways.

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[5] Gerald P. López, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1992).

REFLECTIONS ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION

Thurgood Marshall

101 Harv. L. Rev. 1 (1987)

The year 1987 marks the 200th anniversary of the United States Constitution. A Commission has been established to coordinate the celebration. The official meetings, essay contests, and festivities have begun.

The planned commemoration will span three years, and I am told 1987 is "dedicated to the memory of the Founders and the document they drafted in Philadelphia." We are to "recall the achievements of our Founders and the knowledge and experience that inspired them, the nature of the government they established, its origins, its character, and its ends, and the rights and privileges of citizenship, as well as its attendant responsibilities."

Like many anniversary celebrations, the plan for 1987 takes particular events and holds them up as the source of all the very best that has followed. Patriotic feelings will surely swell, prompting proud proclamations of the wisdom, foresight, and sense of justice shared by the framers and reflected in a written document now yellowed with age. This is unfortunate—not the patriotism itself, but the tendency for the celebration to oversimplify, and overlook the many other events that have been instrumental to our achievements as a nation. The focus of this celebration invites a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the "more perfect Union" it is said we now enjoy.

I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today. When contemporary Americans cite "The Constitution," they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.

For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: "We the People." When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America's citizens. "We the People" included, in the words of the framers, "the whole Number of free Persons." On a matter so basic as the right to vote, for example, Negro slaves were

excluded, although they were counted for representational purposes—at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years.

These omissions were intentional. The record of the framers' debates on the slave question is especially clear: the Southern states acceded to the demands of the New England states for giving Congress broad power to regulate commerce, in exchange for the right to continue the slave trade. The economic interests of the regions coalesced: New Englanders engaged in the "carrying trade" would profit from transporting slaves from Africa as well as goods produced in America by slave labor. The perpetuation of slavery ensured the primary source of wealth in the Southern states.

Despite this clear understanding of the role slavery would play in the new republic, use of the words "slaves" and "slavery" was carefully avoided in the original document. Political representation in the lower House of Congress was to be based on the population of "free Persons" in each state, plus three-fifths of all "other Persons." Moral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought: the self-evident truths "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." . . .

As a result of compromise, the right of the Southern states to continue importing slaves was extended, officially, at least until 1808. We know that it actually lasted a good deal longer, as the framers possessed no monopoly on the ability to trade moral principles for self-interest. But they nevertheless set an unfortunate example. Slaves could be imported, if the commercial interests of the North were protected. . . .

No doubt it will be said, when the unpleasant truth of the history of slavery in America is mentioned during this bicentennial year, that the Constitution was a product of its times, and embodied a compromise which, under other circumstances, would not have been made. But the effects of the framers' compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.

The original intent of the phrase, "We the People," was far too clear for any ameliorating construction. Writing for the Supreme Court in 1857, Chief Justice Taney penned the following passage in the *Dred Scott* case, on the issue of whether, in the eyes of the framers, slaves were "constituent members of the sovereignty," and were to be included among "We the People":

> We think they are not, and that they are not included, and were not intended to be included. . . . [T]hey had no rights which the

> white man was bound to respect. . . . [A]ccordingly, a negro of the African race was regarded . . . as an article of property, and held, and bought and sold as such. . . . [N]o one seems to have doubted the correctness of the prevailing opinion of the time.

And so, nearly seven decades after the Constitutional Convention, the Supreme Court reaffirmed the prevailing opinion of the framers regarding the rights of Negroes in America. It took a bloody civil war before the thirteenth amendment could be adopted to abolish slavery, though not the consequences slavery would have for future Americans.

While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of *all* persons against deprivations without due process, and guaranteeing equal protection of the laws. And yet almost another century would pass before any significant recognition was obtained of the rights of black Americans to share equally even in such basic opportunities as education, housing, and employment, and to have their votes counted, and counted equally. In the meantime, blacks joined America's military to fight its wars and invested untold hours working in its factories and on its farms, contributing to the development of this country's magnificent wealth and waiting to share in its prosperity.

What is striking is the role legal principles have played throughout America's history in determining the condition of Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law. Along the way, new constitutional principles have emerged to meet the challenges of a changing society. The progress has been dramatic, and it will continue.

The men who gathered in Philadelphia in 1787 could not have envisioned these changes. They could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendent of an African slave. "We the People" no longer enslave, but the credit does not belong to the framers. It belongs to those who refused to acquiesce in outdated notions of "liberty," "justice," and "equality," and who strived to better them.

And so we must be careful, when focusing on the events which took place in Philadelphia two centuries ago, that we not overlook the momentous events which followed, and thereby lose our proper sense of perspective. Otherwise, the odds are that for many Americans the bicentennial celebration will be little more than a blind pilgrimage to the shrine of the original document now stored in a vault in the National Archives. . . .

Thus, in this bicentennial year, we may not all participate in the festivities with flag-waving fervor. Some may more quietly commemorate the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled. I plan to celebrate the bicentennial of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights.

This opening reflection highlights the "omissions" and "contradictions" that have generated entrenched patterns of collectivized injustice in the 200-plus years since the U.S. system's establishment. These intentional omissions and contradictions occurred because elite groups used their power to further their group interests over general principles of liberty, equality, and freedom that they simultaneously professed. This use—or abuse—of power violated the egalitarian principles that elites proclaimed were their reasons for revolting against British rule, the lawful system then in place. These privileged elites defined themselves, as well as those targeted for exclusion or subordination, on the basis of social identities (like race and sex) and on the basis of belief systems based on those social identities (like white supremacy and patriarchy). Privileged elites were quite overt about the whole thing. Charting today's systemic advocacy agendas begins with understanding these now-entrenched patterns of collectivized injustice. Changing these patterns has become the Critical Challenge for advocates: the challenge of using law for equal justice.

1.2 COLLECTIVE KNOWLEDGE "FROM THE BOTTOM" ANCHORS ADVOCACY IN GROUP STRUGGLES

Marshall's bicentennial reflection illustrates that critical forms of knowledge are indispensable in understanding legalized injustice and that critical forms of knowledge must emanate from the bottom to inform advocacy. This method has become central to groups and advocates aiming to expose law's original omissions and continuing contradictions. Those calculated omissions and contradictions create a design—a systemic architecture—that ensures collectivized inequalities from generation to generation. Over time, the Critical Challenge of using law for equal justice begins to appear—on purpose—as normal and insurmountable. But this appearance too is false.

Groups originally excluded and subordinated in the delivery of justice, joined by others, have sustained struggles for equality that demand the system deliver on its promises and principles. Those difficult struggles, and

the critical, bottom-up knowledge they have produced, have prevented the systemic consolidation of this Critical Challenge and its biases as a "hegemony"—an unquestioned and unquestionable status quo maintained by top-down power and (at least by some) bottom-up acquiescence, as we explore more fully in Part VI.

Supplementing Marshall's bottom-up perspective, critical legal scholar Mari Matsuda describes and considers "looking to the bottom" as critical method. Matsuda also explains how knowledge from the bottom helps groups and advocates to dissect—or "deconstruct"—root causes of persistent collectivized inequalities. This excerpt illustrates how critical, bottom-up knowledge is actionable—or practical—knowledge, and underscores the centrality of *self*-criticality to all critical analyses of group hierarchies.

LOOKING TO THE BOTTOM: CRITICAL LEGAL STUDIES AND REPARATIONS

Mari J. Matsuda

22 Harv. C.R.-C.L. L. Rev. 323 (1987)

Introduction

When you are on trial for conspiracy to overthrow the government for teaching the deconstruction of law, your lawyer will want black people on your jury. Why? Because black jurors are more likely to understand what your lawyer will argue: that people in power sometimes abuse law to achieve their own ends, and that the prosecution's claim to neutral application of legal principles is false. This article discusses the similar perspectives and goals of people of color and critical legal scholars. It also suggests that the failure of the two groups to develop an alliance is tied to weaknesses of the Critical Legal Studies (CLS) movement.

. . . This article suggests that those who have experienced discrimination speak with a special voice to which we should listen. Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice. . . .

. . . The method of looking to the bottom can lead to concepts of law radically different from those generated at the top. Reparations is suggested . . . as a "critical legalism," a legal norm suggested by the experience of people of color. . . .

Critical Legal Studies and the Minority Scholar

The movement known as Critical Legal Studies [CLS] is characterized by skepticism toward the liberal vision of the rule of law, by a focus on the role of legal ideas in capturing human consciousness, by agreement that

fundamental change is required to attain a just society, and by a utopian conception of a world more communal and less hierarchical than the one we know now.

This movement is attractive to minority scholars, because its central descriptive message—that legal ideals are manipulable and that law serves to legitimate existing maldistributions of wealth and power—rings true for anyone who has experienced life in non-white America. . . .

. . . [W]hat is needed now is an expanded method of inquiry, akin to feminist consciousness-raising.

Looking to the bottom can help. . . .

The dissonance of combining deep criticism of law with an aspirational vision of law is part of the experience of people of color. . . . Applying the double consciousness concept to rights rhetoric allows us to see that the victim of racism can have a mainstream consciousness of the Bill of Rights, as well as a victim's consciousness. These two viewpoints can combine powerfully to create a radical constitutionalism that is true to the radical roots of this country. . . .

. . . Consciousness-raising in the feminist context is the collective discussion and consideration of the concrete, felt experience of gender in order to identify commonalities and build a theory of the cause, effect and means of eradication of sexist oppression. Consciousness-raising deliberately examines the detail of life in a gender-biased society. As method, it differs from the typical top-down, abstract method of male-dominated jurisprudential inquiry. The method can, however, respond to the same inquiries: what is law, how does it work, what can it be, what should it be?

. . . To the question "How can one know that a rule or principle is just?" the CLS scholar could reply, "Ask someone who has suffered and fought against oppression, study their experience, and understand their world vision. They will help you find the right answer." . . .

Reparations as a Critical Legalism: An Example of Law Derived From the Bottom

. . . Reparations is a legal concept generated from the bottom. It arises not from abstraction but from experience. . . .

The Native Hawaiian Claim for Reparations

Native Hawaiians are . . . seeking reparations from the United States for the overthrow of native Hawaiian rule and loss of native lands. Native Hawaiians are unique among indigenous Americans in that they lived prior to annexation under a western-style constitutional government, whose sovereignty was recognized internationally as well as by the United States. That sovereignty ceased, however, upon the overthrow of the Hawaiian

monarchy—an overthrow in which the United States participated. The Hawaiians' claim for loss of their government as well as their land forms a unique basis for reparations.

The Hawaiians descended from Polynesian voyagers who settled in the Hawaiian Islands, establishing a communal, agrarian society governed by a regime of custom and ruled by hierarchical leadership. The Hawaiian leaders, who governed the islands for over a thousand years before the arrival of Captain Cook, proved adept at responding to the influx of outside influence during the nineteenth-century period of Pacific exploration and trade. King Kamehameha used Western military devices to consolidate control of the islands, and his royal descendants instituted a Western-style constitutional monarchy in order to establish Hawaiian sovereignty in Western eyes. The major international powers, including the United States, formally recognized Hawaiian sovereignty.

The Hawaiian monarchy quickly adopted Western laws and acquired Western tastes in royal accoutrements. . . .

White Americans, a growing economic presence in the islands, resented the Hawaiian leadership. These planters, merchants and traders desired annexation by the United States. They accused the Hawaiian monarchy of incompetence, waste and anti-democratic rule. Dissatisfaction came to a head in 1893, when a handful of foreigners and white subjects of the Kingdom carried out a revolution.

Native Hawaiians, the overwhelming majority of the population, together with white loyalists, opposed the quest for annexation. U.S. government representatives, however, saw the threatened revolution as an opportunity to wrest the islands from indigenous control. United States Minister for Hawaii John L. Stevens had written earlier to the State Department, "The Hawaiian pear is now fully ripe, and this is the golden hour for the United States to pluck it."

The self-appointed revolutionaries were a small band of poorly-armed merchants and planters. Alone, they were no match for Queen Liliuokalani's military forces. However, Stevens landed U.S. troops on the islands to secure the Queen's surrender. The Queen, desiring to avoid bloodshed and trusting that the United States government would adhere to its treaties respecting Hawaiian sovereignty, temporarily surrendered and appealed to the President to restore her to the throne. . . .

Newly-installed President Grover Cleveland dispatched an emissary to investigate the U.S. involvement. He determined that the takeover was indeed a result of American military intervention against the will of the majority of Hawaiian citizens, a violation of international law as well as American foreign policy. The government's commitment to legality, however, faltered in the face of powerful political considerations, including strategic and economic benefits, that favored annexation. The Hawaiian

government was never restored to power, and after a five-year congressional stand-off between anti-imperialists and annexationists, Hawaii became a [U.S.] territory in 1898.

Native Hawaiians never voted in any plebiscite on either the overthrow or annexation. In fact, the highly literate and politically astute Hawaiians overwhelmingly supported their native government and mourned the U.S. takeover.

In the process of the takeover, the United States obtained vast acreages of land that had belonged to the Kingdom and had been held in trust for the Hawaiian people. Some of this land remains in federal hands today, as vast military bases, national parks and open spaces. The remainder was returned to the State of Hawaii, which agreed to hold the land in trust for the native Hawaiian people. The State, however, has never complied with the trust mandate. Proceeds from trust land are commingled with other revenue and are not targeted to benefit the indigenous Hawaiian community. . . .

Native Hawaiians seek reparations for the overthrow of the Hawaiian government and loss of land. They request a formal recognition of the illegal destruction of Hawaiian sovereignty and an apology from the United States. They also seek resumption of Hawaiian rule, return of at least part of the lands presently held by the federal and state governments, and monetary compensation. . . .

Reparations Claims Within the Context of Liberal-Legalism

This section considers standard objections to reparations and suggests critical responses that can be strengthened by looking to the bottom.

Standard Doctrinal Objections to Reparations

The standard doctrinal objections to reparations claims fall under four general categories:

1. factual objections and excuse or justification for illegal acts;
2. difficult identification of perpetrator and victim groups;
3. lack of sufficient connection between past wrong and present claim;
4. difficulty of calculation of damages.

. . . [T]he preliminary question presented here is whether, assuming the fact of past illegal and unjustified acts directed against particular ethnic groups, reparations makes sense to the legal mind. . . .

Identification of Victims and Perpetrators

The problem of specific identification of wrongdoers and victims is a common objection to reparations. This reservation reflects a penchant for

horizontal and vertical logic in legal doctrine. Privity, standing, and nexus are typical conceptual expressions of this compulsion for close and ordered relations between individual disputants. Reparations challenges this rigid order by suggesting new connections between victims and perpetrators.

The standard legal claim resembles:

Plaintiff A (individual victim)

v.

Defendant B (perpetrator of recent wrong-doing)

A claim in reparations looks like this:

Plaintiff Class A (victim group members)

v.

Defendant Class B (perpetrator descendants and current beneficiaries of past injustice)

. . . Looking to the bottom helps refute the standard objections to reparations. In response to the problem of horizontal connection among victims and perpetrators, a victim would note that as the experience of discrimination against the group is real, the connections must exist. The hierarchical relationship that places white people over people of color was promoted by the specific wrongs of the past. The destruction of Hawaiian sovereignty . . . [is] tied to the idea of white dominance and non-white difference. Each specific act of oppression against a minority group reinforces, entrenches, and promotes the assumption that non-whites are different and appropriately treated as different.

. . . The continuing group damage engendered by past wrongs ties victim group members together, satisfying the horizontal unity sought by the legal mind. Indigenous Hawaiians, for example, are on the bottom of every demographic indicator of social survival: they have lower birth weights, higher infant mortality, and, if they survive, higher rates of disease, illiteracy, imprisonment, alcoholism, suicide and homelessness. Hawaiians realize their forgotten status in their own land. Poor and rich, Democrat and Republican, commoner and royalty—native Hawaiians largely agree that they have been robbed. . . .

A horizontal connection exists as well within the perpetrator group. Members of the dominant class continue to benefit from the wrongs of the past and the presumptions of inferiority imposed upon victims. They may decry this legacy, and harbor no racist thoughts of their own, but they cannot avoid their privileged status.

Any non-native resident of Hawaii, for example, benefits from the loss of Hawaiian sovereignty and the demise of the Hawaiian land ownership. If Hawaiians had not lost their land, others would not be living on it. If the

Hawaiians had not been pushed to the bottom of the socioeconomic pile, non-natives would not hold as many positions of power and influence. . . . Beneficiaries not required to prove their intelligence, responsibility, and worth to the same extent as victim group members are protected by a subtle magic they may not notice because they have never had the experience of life without it. In addition, the abundance of material comforts in this nation results in part from the labor of the non-white workers who have been relegated to some of the hardest, most dangerous, and least compensated work. This list includes black slaves, Chinese railroad workers, Chicano miners, and legions of today's undocumented toilers in factory and field. One cannot be detached from privilege while enjoying the benefits of this country's high standard of living; in that sense, we are all part of the beneficiary class. Victims and perpetrators belong to groups that, as a matter of history, are logically treated in the collective sense of reparations rather than the individual sense of the typical legal claim. Looking to the bottom, we can expand our narrow vision of what a legal relationship should look like, addressing the historical reality before us.

Linkage Between Act and Present Claim

The linkage of victims and perpetrators for acts occurring in the immediate past is another trait of standard legal claims. Concepts such as the time-bar, proximate cause, and laches ensure that claims are fresh, capable of factual determination, and reasonably connected in time and space to the act of an individual wrongdoer. These rules promote efficiency by allowing people to go about their business without waiting for the ax of the long-gone past to fall. They also satisfy a sense of fairness: the sins of the past should not forever burden the innocent generations of the future, nor should the consequences of one false step create disproportionate fault into eternity.

. . . Traditional discourse limits these doctrines through standard exceptions. Plaintiffs operating under a disability are not required to press their claims until the disability is removed; a continuing wrong does not start the clock running under a statute of limitation until the wrong culminates in an act of finality; fraud in concealing the availability of or grounds for an action is another standard exception. All of these exceptions apply to claims for reparations. Indeed, the need for reparations arises precisely because it takes a nation so long to recognize historical wrongs against those on the bottom. . . .

Reparations claims are based on continuing stigma and economic harm. The wounds are fresh and the action timely given ongoing discrimination. Furthermore, the injuries suffered—deprivation of land, resources, educational opportunity, person-hood, and political recognition—are disabilities that have precluded successful presentation

of the claim at an earlier time. Outright fraud and factual misrepresentation have also delayed presentation of claims. . . .

. . . It would have required no clairvoyant skill to predict the harm that would befall Hawaiians from the loss of their nation and land. . . . What a reasonable person would have predicted would occur, did in fact occur, thus satisfying one classic test for proximate causal connection. . . .

The reparations concept also serves the goal of retribution. The decision to award reparations is an act of contrition and humility that can ease victims' bitterness and alienation. A classic legal justification for imposing public liability—avoiding the chaos of individual, private revenge-seeking—is advanced, thereby strengthening the social order.

Relief

Finally, the impossibility of a fair damage assessment is a standard doctrinal objection to reparations. How can we attach a monetary figure to the loss of a right? Amorphous ideas such as sovereignty, dignity, personhood and liberty are incapable of uniform valuation. We risk under-valuing the right to avoid bankrupting the government, or, conversely, over-valuing it in relation to actual economic losses.

This objection should carry little weight. Judges and juries calculate non-quantifiable damages all the time. As Richard Delgado points out, the refusal to formulate compensation for racial hate messages is in itself racist, given a tort law system that calculates damages for loss of such intangibles as privacy, reputation and mental tranquility. Similarly, the selective choice to refuse to quantify damages for reparations claimants is suspect. . . .

. . . Given the doctrinal basis for reparations thus revealed, the question becomes one of whether, given our conception of justice and our social goals, we wish to exercise that doctrinal option. . . .

The Refrain of Reparations Within the Victims' Constitution

In interpreting the Constitution and distilling its values, those on the bottom have found the inspiration for a new order. . . .

For those Americans, the constitutional promise of liberty holds special meaning. Liberty, viewed from the bottom, has encompassed physical liberty from constraint of the person. It has encompassed life itself—freedom from life-threatening abuse as well as the right to seek the nurturance and livelihood human beings need for survival. Liberty has meant personhood and participation—the recognition of one's existence as a human being, free and equal, with power and control over the political processes that govern one's life. The promise of liberty, for those on the bottom, has meant freedom from public and private racism, freedom from inequalities of wealth distribution, and freedom from domination by

dynasties. This interpretation of liberty, implicit in the founding document of this nation, is the interpretation that has convinced so many on the bottom to work for, rather than against, the Constitution. That so many have believed in this version of the Constitution, and fought to establish and preserve the union on the basis of that belief, lends historical support to the victim's interpretation.

This interpretation supports a doctrine of reparations. Reparations recognizes the personhood of victims. Lack of legal redress for racist acts is an injury often more serious than the acts themselves, because it signifies the political non-personhood of victims. The grant of reparations declares, "You exist. Your experience of deprivation is real. You are entitled to compensation for that deprivation. This nation and its laws acknowledge you." . . .

Conclusion: "The Pen is Ours to Wield"

Critical legal scholars have much to offer people of color. They also have much to learn from them. Looking to the bottom will expand the critical scholar's ability to work toward positive change. . . .

Matsuda demonstrates how principled applications of conventional legal doctrines should produce remedies for systemic injustice—but don't because the view (and dominant interests) from the top disallow it. Conventional appeals that simply ask for accepted principles to be applied consistently are necessary and yet insufficient. Using reparations to illustrate bottom-up methodology and knowledge production, Matsuda also emphasizes a recurring theme throughout this book: the materiality—the tangibility—of collective inequality and systemic injustice. The next excerpt amplifies these points with an added emphasis on democracy, rather than adjudication, as a venue of organized group struggles for equal justice. Both examples demonstrate how looking to the bottom can make a difference in strategy and in outcome.

Critical race scholars Lani Guinier and Gerald Torres turn our attention to advocacy that is not court or litigation-centric. Guinier and Torres call upon advocates to learn not only the lessons of group struggle in judicial venues—the "jurisprudence" or doctrine resulting from litigation and its limits—but also the lessons of "demosprudence" derived from direct group struggles over law and policymaking in the trenches of group struggle. Guinier and Torres thus help bring into focus another recurring theme of this book: building strong organizations capable of direct collective action.

CHANGING THE WIND: NOTES TOWARD A DEMOSPRUDENCE OF LAW AND SOCIAL MOVEMENTS

Lani Guinier and Gerald Torres

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Introduction

I say here's how you recognize a member of Congress. They're the ones walking around with their fingers up in the air. And then they lick their finger and they put it back up and they see which way the wind is blowing.

You can't change a nation by replacing one wet-fingered politician with another. You change a nation when you change the wind. . . . [W]e've got to now be wind-changers. Not lobbyists, but wind-changers. How do we—by our service, by our doing in our lives—how do we then join together and knit together a movement that holds politics accountable?

—Reverend Jim Wallis

. . . We believe that the role played by social movement activism is as much a source of law as are statutes and judicial decisions. Our goal, therefore, is to create analytic space to enable a greater understanding of lawmaking as the work of mobilized citizens in conjunction with, not separate from, legal professionals. Our aim is to better understand and recognize the important roles played by ordinary people who succeed in challenging unfair laws through the sounds and determination of their marching feet. The role played by legal professionals—from judges to legislators to lawyers—is essential. Yet the civil rights movement grew in its efficacy in the 1950s and 1960s—helping to expand the "constitutional canon"—by putting its boots on the ground. It was the mobilization of ordinary people willing to play a significant role in shifting the law both locally and nationally that had a decisive effect.

Thus, this essay argues that social movements have played key roles in redefining the meaning of our democracy by creating the necessary conditions for a genuine "community of consent." . . .

Like Martin Luther King, Jr., we believe that it is often by the thick action of concerted social movement through which "we the people"—meaning, in our view, the people who reflect a genuine community of consent—discover and legitimize the principles on which our democracy presumably rests. We use the "wind changers" metaphor to test the following four-part hypothesis:

1. For those interested in social change, it is useful to view lawmaking from the perspective of popular mobilizations, such as social movements and other sustained forms of contentious politics and collective action that serve to make formal institutions, including those that regulate legal culture, more democratic.

2. One of the important functions of law resides in its power to translate lived experience into a series of stories about individual and social fairness and justice. Although courts and lawyers are important participants in the creation of these narratives through the shaping of the discourse of law, social movements and organized constituencies of non-expert participants also play an important role in the creation of authoritative interpretative communities.

3. A fundamental claim of legal liberalism is that social movements achieve their goals when they translate their claims into law. The most efficient way of achieving social change, therefore, is directly through litigation and legislative actions. A commitment to legal liberalism drives the litigation and policy focus that is the priority of conventional cause lawyering. We posit almost the reverse: for legal change to reflect real social change it must take account of, and engage with, alternative or contending sources of power. Such change must also, in some measure, transform the culture.

4. We do not want to minimize the importance of legislative change, especially legislation of constitutional dimension. Our main point is that such legislative change—and to a large extent judicially driven change—gets its enduring force from "We, the People."

. . . We seek in this essay to . . . propose a new paradigm that we call demosprudence. Demosprudence is the study of the dynamic equilibrium of power between lawmaking and social movements. Demosprudence focuses on the legitimating effects of democratic action to produce social, legal, and cultural change. Although democratic accountability as a normative matter includes citizen mobilizations organized to influence a single election, a discrete piece of legislation, or a judicial victory, we focus on the interaction between lawmaking and popular, purposive mobilizations that seek significant, sustainable social, economic, and/or political change. Put differently, we seek to understand, analyze, and document those social movements that increase the extant democratic potential in our polity, and which do so in a way that produces durable social and legal change. Whereas jurisprudence examines the extent to which the rights of "discrete and insular" minorities are protected by judges interpreting ordinary legal and constitutional doctrine, demosprudence explores the ways that political, economic, or social minorities cannot simply rely on judicial decisions as the solution to their problems. Rather than turning over their agency to lawyers, they must find a way to integrate lawyers not as leaders but as fellow advocates. Borrowing a phrase from social theory, proponents of progressive social change must be advocates in themselves and for themselves and others. Understanding the roles played by social movements in producing durable social and legal change is central to our inquiry.

Introducing Demosprudence

As a method, demosprudence requires us to ask two overarching questions: (1) How and when do disadvantaged or weak minorities (whether political, economic, or identitarian) mobilize to protect their own rights in a majoritarian democracy?; and (2) Does the mobilization of these constituencies have a democracy-enhancing effect? By democracy enhancing, we mean that the mobilization opens up space to those previously excluded or marginalized and enables them to participate more fully in helping to make decisions that affect their lives. Demosprudence, therefore, is the study of the relationship between social movements and law in the creation of authoritative meaning within a democratic polity. . . .

Scholars of demosprudence . . . draw attention to the "dynamic constituencies" who call power to account through their participation in "contentious" politics and other forms of legal meaning making that also call democracy to account. Constituencies refer to those actors who make up the body of support for leaders and elites in the process of governing or policy change. We use the term "constituencies of accountability" to refer to those groups who are not committed primarily to any particular person or leader, but rather to a particular vision of change against which they measure the effectiveness of those using state power. . . .

As a practice, demosprudence trains its sights on the lawyer or public citizen who functions as a crucial source of moral authority and democratic legitimacy in facilitating the interaction between social movements and formal lawmaking. Demosprudence is a way to examine how lawyers and other public citizens represent social movements to make law. . . .

The demos in demosprudence are those people who are collectively mobilized both to make change and to create constituencies of accountability to which their representatives (including non-elected elite decision makers) must answer. . . . They succeed when they (1) shift the rules that govern social institutions, (2) transform the culture that controls the meaning of legal changes, and (3) affect the interpretation of those legal changes by providing the foundation for naturalizing those changes into the doctrinal structure of law and legal analysis. . . .

Nomos and Narrative: All of Us is Tired

"We didn't come all this way for no two seats . . . all of us is tired."

In August 1964, the Mississippi Freedom Democratic Party [MFDP] challenged the right of the all-white segregationist Mississippi Democratic Party to represent Mississippi at the Democratic National Convention. The Freedom Democratic Party, an insurgent organization open to all Mississippians, arrived in Atlantic City poised to make a public stand against segregation. Its delegation, including Fannie Lou Hamer, Victoria Jackson Gray, and Annie Devine, was composed of ministers, farmers,

sharecroppers, domestics, and the unemployed. Activists spanned the Mississippi black community, and they demanded to be seated at the convention as official Mississippi delegates.

The party was founded in the spring of 1964 after unsuccessful attempts to secure black participation in the local branches of the Democratic Party and in the midst of a violent backlash in Mississippi against the gains that were being made nationally, such as the civil rights bill of 1963 (signed into law as the Civil Rights Act in 1964). Telling the Credentials Committee at the Democratic National Convention why they created the MFDP, Hamer explained:

> We formed our own party because the whites wouldn't even let us register [to vote]. . . . We followed all the laws that the white people themselves made. We tried to attend the precinct meetings and they locked the doors on us or moved the meetings and that's against the laws they made for their ownselves. So we were the ones that held the real precinct meetings. At all these meetings across the state we elected our representatives, to go to the National Democratic Convention in Atlantic City. But we learned the hard way that even though we had all the law and all the righteousness on our side—that white man is not going to give up his power to us.

. . . Hamer mesmerized a national television audience at the 1964 Democratic National Convention with her stark but riveting description of the struggle to register to vote. However, Hamer's physical sacrifice and spellbinding performance were not enough to convince either Lyndon Johnson, the Democratic Party's presidential candidate, or Hubert Humphrey, its eventual vice-presidential candidate, to take on the state segregationists in a face-off with the Freedom Democrats. Instead, the Democratic national party leaders cobbled together a compromise: they would pledge to ban segregation at future conventions, but for now, the MFDP would have to settle for two seats as at-large delegates.

. . . [T]he Freedom Democratic Party refused to be placated: Hamer said simply, but firmly, "We didn't come all this way for no two seats, 'cause all of us is tired."

Fannie Lou Hamer's convention speech was political theater in service of a profound challenge to both the national and the local party's understandings of democracy. . . .

Hamer spoke to the nation on behalf of an organized and mobilized constituency that reimagined the structure of democratic representation. The MFDP didn't travel from Mississippi just to play normal politics. The MFDP came to Atlantic City to contest the way in which representation was understood. They were not just there to be able to get a seat on the floor, but to dispute the legitimacy by which the seats were allocated.

Hamer and the other MFDP delegates were clear. Their role in democratic life should be taken seriously. For the MFDP, this was a moral not just a political struggle. . . .

For Joe Rauh, MFDP's attorney, it was a different matter. He knew the game of politics. He arrived at the Democratic National Convention as an insider. . . .

His MFDP clients had charged him to bargain for nothing less than what other challengers had gotten: shared seats with the regulars. Yet, Rauh expressed enthusiasm for the two-seat compromise, focusing on the practicalities of negotiation and bargaining rather than justice, law, and the rights of black Mississippians to participate. In an interview at the Convention, shortly after the announcement of the compromise, a self-satisfied Rauh declared:

> We've got an offer to our people, we've got a great deal out of this. I think to call this a loss is a bad . . . mistake. I think we've made a terrific gain. You always talk "no compromise" in a Convention until you get the best you can then you quit.

. . . [D]espite his genuine commitment to the MFDP cause, Rauh misunderstood the power of the MFDP, which he tried to channel into conventional deal-making. The MFDP power came from the evident justice of their claim that the Mississippi delegation was patently illegitimate. Their position was not about accommodating two reasonable sides to a political contest. They saw this as a right side and a wrong side. The meaning of democratic participation meant seating the truly legitimate party, the one party that offered to represent everyone. The challenge was not about getting the best deal; the challenge was not to abandon fundamental values. . . .

What Rauh did not grasp is that Hamer . . . had a vision of democracy that did not begin and end with "politics" or with "put[ting] a point over." Moreover, the MFDP did more than represent a broader and more participatory view of democracy. As an uneducated though eloquent sharecropper, Hamer's mere presence—televised to the nation—put conventional ideas about leadership in jeopardy, as well. Hamer and the other delegates of the MFDP sought to expand the democratic potential in Mississippi and in Atlantic City by saying that the right to participate belonged to all, not just to those deemed qualified by elites, whether black or white. Merely securing the right to vote, or gaining access to a convention seat for two "representatives," was not the same as "freedom." "By representing the poorest of Mississippi's residents, people without the 'qualifications' that accompanied middle-class status, the MFDP repudiated traditional criteria of leadership."

This fight was not about abstract rights for invisible people. Voting rights were a precondition to mobilization, not its end. The goal was to

organize, to develop the power of the local people to change their own circumstances. As Mississippi activist Lawrence Guyot explained, voting rights assure the right to begin to fight "in the way we want to fight." And the way they wanted to fight involved ordinary people speaking for themselves. . . .

The dominance of elite thought reveals a tension in the ways even the most sympathetic elites "represent" non-elites at the moment of action. For example, Martin Luther King, Jr. lobbied for the compromise and against it simultaneously. . . . [I]n trying to balance the competing pressures, King equivocated. "So, being a Negro leader, I want you to take this, but if I were a Mississippi Negro, I would vote against it." . . .

[In this context, Hamer] was clear where her power and authority came from. She was speaking for, to, and with every Mississippi Negro who took the promise of democracy seriously.

. . . Hamer's stand made the national leadership aware of a constituency that would try to hold them accountable to a larger vision of justice. Hamer's stand was an exhortation as well as an implicit critique of King's conception of representation and leadership. The role that Hamer played was exemplary of the capacity for members of a mobilized constituency to change the rules of the game and to hold those who would claim the mantle of leadership accountable. . . .

In juxtaposing King's ambivalence with Hamer's . . . steadfastness, we see how social movement actors can tell a competing story of democracy that reframes the idea of participation, the meaning of representation, and the sources of democratic authority. Hamer and the other MFDP delegates changed the idea of participation from an obligation to obey to an obligation to speak out. They were no longer content to be the passive objects of power; they became active subjects of legitimate authority. Hamer also embodied a different meaning of representation. Unlike King's fundamental confusion as to the source of his power and to whom he was obligated, Hamer rejected the offer of representation when it was presented as a bribe of individual access dressed up as power. Hamer's conception of representation bound her to the community, which was a reservoir of their power, not hers. She knew that the source of her authority came from the struggle of the activists in Mississippi, rather than the boardrooms of Washington or any other polished corridor of power from which those activists, to be sure, would have been excluded. . . .

. . . The stories of [MFDP] members also play an important role in understanding the wellspring of movement "successes." They illustrate the vital role of the MFDP as an alternative interpretative community that helped drive rule shifts and changes in law. The MFDP—here exemplified by the person of Fannie Lou Hamer but also embodied in the actions of many of her cohorts—helped create obligations, not just new incentives for

those with formal power to change the rules. . . . [T]he formal rules of the Democratic Party ultimately changed because they excluded large numbers of the Democratic Party base.

The MFDP, as an alternative interpretative community and a constituency of accountability, . . . forced two issues to the fore: (1) whether they would be granted a role in the national party that claimed to represent their interest, and (2) whether they would even be allowed to vote as full citizens. . . .

Fannie Lou Hamer and her MFDP associates exemplify an alternative but important source of lawmaking power that is not controlled entirely by elections, legislatures, executives, or courts. . . .

We now turn to the Montgomery Bus Boycott to further examine some of the same issues—considering again the perspective and practice of lawyers who "represent" a dynamic constituency.

The Montgomery Bus Boycott

On the night of December 5, 1955, Dr. King put succinctly the relationship between law on the books and law as experienced. Well before King became a "national" leader, he delivered his very first speech as head of the Montgomery Improvement Association (MIA). Earlier that day, Rosa Parks had been convicted of disorderly conduct for refusing to acquiesce to the Jim Crow laws of the segregated bus system. . . . At the mass meeting celebrating the first day of the bus boycott, King asserted: "We are here because of our love for democracy, because of our deep-seated belief that democracy transformed from thin paper to thick action is the greatest form of government on earth." . . .

. . . [F]ifty thousand black people in a single city refused to ride the segregated buses for more than a year.

At the time, black Montgomery attorney Fred Gray was bright, aggressive, and a year out of law school. Gray, who moonlighted on weekends as a preacher, wanted to challenge the city's segregation laws even before Rosa Parks was arrested for refusing to obey them on a city bus. Yet Gray waited to file his case until the MIA leadership voted to grant him that authority. More significant than Gray's apparent self-restraint were the institutional restraints imposed on him by the MIA, whose executive board and strategy committee rendered Gray unable to dominate their broader extra-legal strategies. . . .

Gray supported rather than led the boycott organized by the MIA, whose key resources grew out of grassroots mobilization and mass action. Moreover, the deliberately non-bureaucratic structure of the MIA, an "organization of organizations," extended to, and endured because of, the MIA's grassroots fundraising. The MIA's carpool and other capital-dependent activities were initially supported by collections at the mass

meetings, which literally "refueled" the boycott. Although money soon flowed from outside, these funds were raised in large part by black churches, organizations (including NAACP branches), and individuals, as well as some northern white individuals and organizations. . . .

The MIA was a constituency of accountability, capable of holding lawyers like Gray to the discipline of shared power. . . . Although it was the intervention of the Supreme Court, ruling on the case Fred Gray brought in federal court, that ultimately declared the segregated buses unconstitutional, it was the social movement activism embedded in a biblical belief in justice that shortened the distance between our democracy's reality and its potential to be the "greatest form of government on earth." Story-making by community members became mantras of the movement. One memorable mantra was Mother Pollard reassuring MLK that: "My feets is tired, but my soul is rested." Told in their own words, these narratives of justice repositioned blacks in Montgomery from victims with a grievance to citizens with a cause. They captured the dignity of the community's effort, inspired protests in other cities, built other insurgent organizations such as SCLC [Southern Christian Leadership Conference], and ultimately influenced blacks North and South to believe in their own agency to transform our democracy from "thin paper to thick action." . . .

As a result of the supportive and influential role of Fred Gray, and the community-driven power of the MIA, the boycott's successes went beyond the litigation victory that decisively desegregated the buses. . . .

The bus boycott involved a theory of popular mobilization and a theory of representative democracy. . . . By interrogating their collective discourse in the same ways lawyers and scholars carefully analyze Supreme Court oral arguments and the resulting decisions, we can begin to understand the way social movement actors author legal meaning.

The mass mobilization created a shared purpose and was symbolized by the middle class black community committing its private automobiles to the creation of an alternative public transportation system. . . . This was vital to the cross-class integrity of the protest that led to its success and power. It could not have lasted as long as it did without this crucial contribution. . . . The community was able to leverage its resources that would individually be relatively meager but in combination provided the critical capacity to resist.

. . . [We see] at least two independently important results of the local, regional, and national coverage of the events in Montgomery. First, it validated a new model of protest and created a place where what black people knew to be the truth could be validated without the mediation of institutions that were controlled by others. . . . [T]he perspectives of black people [were] given a central place. The concrete meaning of inequality could be exposed in the disparate distribution of both public and private

wealth. Also, the minor indignities and multitudinous microaggressions could be understood as part of the system of white racial supremacy. This may have had an effect on local federal judges that encouraged or enabled them to act more quickly to do justice despite the wrath of their peers: keep it in the courts and not on the streets. Second, it mobilized a local black community—tempered through the months of struggle—that was able to pressure the city into complying with the Supreme Court's order because noncompliance put too much at risk for the city.

Of longer term significance was the formation of new organizations, both the MIA and the SCLC. These organizations helped institutionalize the idea of mass mobilization and hastened the transformation of the church by centering it on the social gospel and locating its claims in politics and morality. The success helped launch a national movement and created a new cadre of young leadership. Equally important is that it gave agency and dignity to participants. It validated their experience in a way that others had to credit. The national publicity educated whites and others outside of the South, and in this way would help transform the national debate about race. . . .

Conclusion: Democracy at Its Best is a Social Movement

The point of the stories we have told, which are only exemplary, is that the courts alone are not the voice of change. At best, the courts ratify change. The social movement activists—through their political mobilization and their transformation of the culture—made the actions of the Supreme Court seem appropriate and long overdue.

In the case of both the Mississippi Freedom Democratic Party and the Montgomery Bus Boycott, black activists did not just want a chance to compete for a seat at a convention or on a bus. To allow two individuals to represent the whole, as Joseph Rauh and Martin Luther King, Jr. did in the MFDP conflict, takes the power away from the community they claim to represent. In Montgomery, the MIA did not want just more seats, or even the mere desegregation of the buses; they wanted to eliminate the private enforcement of Jim Crow laws by the bus drivers. Thus activists in both Mississippi and Montgomery claimed an alternative source of power, one that took the promise of democracy seriously. They restructured the meaning of opportunity at the same time that they restructured the meaning of representation. . . .

. . . [L]egal advocates and cause lawyers also often lose perspective when they move to study and learn from the places where lawyers are most in control during these public conflicts. The conflict may be translated into the legal documents they study, but they often forget that it is a translation for a specialized audience using a rarefied way of talking about and understanding the world. It is not that the legal elites are wrong; it is just that their representation is only a partial view of the cathedral. They zoom

in on the brief Rauh wrote [to the Credentials Committee at the Democratic National Convention] citing the relevant statutes, organizational rules, and court decisions. They may even parse the legal documents and subsequent case law in search of the conflict's enduring meaning. For these inquisitors, what matters over time is the way elite actors ultimately give meaning to the actions of non-elite activists. We are arguing that the reverse is often closer to the truth. The elite actors often derive the social meaning of their actions from the efforts of non-elite activists like Fanny Lou Hamer and all of the others standing behind and beside her.

The boycotters in Montgomery and the activists of the MFDP moved from marginal characters to members of authoritative interpretative communities. What they were reinterpreting was the meaning of American constitutional justice. They ultimately restructured the politics of the possible. They gave their actions a plausible explanation, one that formed the basis for shared understanding. That understanding initially grew from an internal explanation that allowed a sense of community to exist. But it ultimately had to persuade external actors, as well. These two communities became authoritative because other members of the polity found themselves having to come to terms with their interpretations. In a heroic version of the actions of the Montgomery boycotters and the MFDP activists, they demonstrated that institutional change was necessary in order to validate the rhetoric of democracy and equality. These two movements illustrate . . . [that] rule shifting without culture shifting is not enough to produce real and sustained change.

While the black people in Montgomery and the MFDP activists wanted seats, the metaphor should not be lost. Their stories are "texts" in what we have come to call demosprudence. Defying the rules for seating on a bus or at a national political convention both implicated and challenged the private use of state power. The Mississippi and Alabama activists were not, however, merely confronting the authority of the state. They were also confronting the claims of what constituted justice. They removed the mantle of authority from what claimed to be authoritative but which was shown to be false. They challenged the "is" with a vision of the "ought" and pushed the larger society to contemplate "what might be" if justice would be made real. Most importantly, they helped shift the cultural norms, not just the rules. They enacted a "normative" or "motivating" vision of a just society that was both remedial and aspirational. It was through their actions that dramatic interventions in the status quo were enacted rather than merely contemplated. . . .

. . . By expressing what the law means to those subject to it, activists create new grounds on which to interpret the law and make it harder for elites to say it means something other than what those on the street thought it should mean if it were talking to their experience. Any substantial disjunction is felt as injustice. It is through this potential

feedback effect that those who sing the music of law can have a role in composing its logic.

By defining winning in its narrowest possible terms, as Joe Rauh did with the MFDP, lawyers may prompt litigants to celebrate important tactical victories. At the same time, the strategic vision essential to sustainable long-term change can be lost. . . . Because lawyers occupy both an elite and expert position and often do not reflect on the impact of their expertise on their imagination, their role in social movements deserves more attention.

. . . Lawyers, in particular, too often assume that their maximum opportunity to influence the law is through formal argument in judicial settings. . . .

By contrast, we contend that democratic societies are organized to produce a variety of authoritative interpretive communities. . . .

Hamer and the other MFDP delegates were exemplary "wind changers." Their goal was to widen the scope of meaningful participation in decision-making. They questioned the limited definition of what is legitimate representation; they redefined meaningful participation; and they insisted on a wider scope for who should be included in decision-making. By contrast, the politicians and the national leaders, as members of the state apparatus, stood with their wet fingers in the wind without noticing that the weather was changing.

The roles played by Fred Gray and other lawyers in the Montgomery Bus Boycott, the story that law ultimately tells, the driving ideal of equality, the assumption about the source of power to make change, and the definition of success all reflect the distinctive interpretive communities to which the lawyers felt they were accountable. In the case of the bus boycott, law is practiced tactically. It retains its link to a mobilized community that is seeking change to produce justice. . . . Through their collective struggle and communal resourcefulness they gain a sense of agency and create a constituency of resistance that builds a new organization and inspires a series of national movements.

The texts of their stories were written with the ink of consummate courage by a mobilized community that actively represented itself. These social movement actors changed the background against which questions of legality and justice were understood. They marched. They sang. They declaimed in their unschooled voices. They changed the wind. And in the process, they transformed the "thin paper" of democracy to the "thick action" of government of, by, and for the people.

As Guinier and Torres show, knowledge from the bottom affects goals as well as tactics and strategies. Insights from the bottom produce different calculations of both risk and benefit that can substantially affect advocacy plans and outcomes. We thus see that critical knowledge from the bottom is actionable, both as jurisprudence and as demosprudence, and that it can determine both means and ends. As we explore further in Part II, critical knowledge of jurisprudence and of demosprudence is actionable knowledge largely because it helps advocates to "unlearn and relearn"—or to pierce through—the many myths of the legal system instilled in and internalized by individuals and groups across the social order from cradle to grave, and thus to chart and navigate toward more effective systemic solutions for persistent group injustice.

NOTES AND QUESTIONS

1. *Sites of Advocacy and Struggle*. After the Supreme Court's iconic ruling in *Brown v. Board of Education* (excerpted in Chapter 2), the battle in the courts over schools racially segregated by law shifted to school busing. Pursuant to court orders, students were transported over long distances to or from racially isolated neighborhoods. Busing may have aimed to ensure public schools were more integrated, but it did nothing to address the segregation of U.S. neighborhoods that continues today. The Montgomery Bus Boycott arose in the related but different context of public transportation. A 2017 national study found that transit riders (bus, subways, and the like) most often are traveling to and from work, and 40 percent of riders say they lack money or a vehicle to travel by other means. Most transit riders are people of color, and more women than men use public transportation.[6] Thus, public transportation is a context laden with social identity, such as race, gender, class, and disability. In 1956, the Supreme Court summarily affirmed a lower court's order under the U.S. Constitution requiring that the city of Montgomery and the state of Alabama desegregate public buses, *Gayle v. Browder*, 352 U.S. 903 (1956). The Court supplied the same formal legal equality in public transportation that it had dictated two years earlier in *Brown* for public schools. But did these formal rights, obtained through adjudication and hard-fought struggles to ensure equality in bus and classroom "seats," prove transformative—did they fundamentally change the lived realities of those at the bottom of societal castes? How can an understanding of demosprudence help explain these struggles and their outcomes?

[6] American Public Transportation Association, Who Rides Public Transportation (Jan. 2017), https://www.apta.com/wp-content/uploads/Resources/resources/reportsandpublications/Documents/APTA-Who-Rides-Public-Transportation-2017.pdf.

1.3 DEPENDING ON CIRCUMSTANCE AND CONTEXT, BOTTOMS (AND TOPS) CAN SHIFT—SO MUST ADVOCATES AND ADVOCACY

Advocates are tasked with learning from the bottom to make progress under a system designed both to promise and deny justice. But details of systemic injustice vary from context to context. Although the four key elements of the Critical Challenge are always present—identities, groups, interests, and power—they combine in various ways to produce similar results across diverse times, places, and circumstances. For this reason, advocates must understand that bottoms of legal and societal hierarchies—and tops—can vary according to context and can shift over time and due to circumstance. Systemic advocates concern themselves both with the particularities of their context *and* with the patterns that recur or persist across contexts.

In the following excerpt, critical race feminist Athena Mutua examines this complex reality, comparing groups and contexts. She asks, "What group should be at the center" of a project or agenda? Mutua notes that histories of identities, groups, interests, and power are necessary to a critical understanding of context. She introduces a prominent theme throughout this book: the importance of context. To appreciate how systemic injustice works, notice the patterns already emerging from "different" contexts; can you see correlations between tops or bottoms as social groups and specific social identities, like race, ethnicity, or sex?

SHIFTING BOTTOMS AND ROTATING CENTERS: REFLECTIONS ON LATCRIT III AND THE BLACK/WHITE PARADIGM

Athena D. Mutua

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. . . "What group should be at the center of a given study or enterprise? Whose "faces are at the bottom of the well;" and, what model shall we use to analyze a given situation?"

At first glance, the questions seem simple and the answers self-evident: everybody should be the center of attention sometime—many of the groups are at the bottom together, or at one point or another; and the model you use depends on what it is you are trying to analyze. Actually, the questions are complex, and the answers unclear because limited resources of time, space, money and energy often pit group against group when priorities must be set. More significantly, the problems of building coalitions and developing political agendas bring us face-to-face with the reality that different racial and ethnic groups have distinct histories and interests, some of which collide. . . .

Historical Context: [Defining "Bottoms"]

The history of the United States is complex and anything but linear. However, a cursory look reveals that the United States was a de jure racial dictatorship from its founding until the Voting Rights Act was passed in 1965. The white American dictatorship went far beyond the mere failure to extend the [right to vote]. It exterminated Indians and appropriated their land; enslaved blacks and appropriated their labor; excluded and oppressed Chinese and other Asians; conquered and annexed the land of Mexicans; interred the Japanese, and, employed Jim Crow, immigration, citizenship and property laws, among other tools, to maintain this racial dictatorship. The theory was Anglicized white supremacy; the goal, a White nation. However, the nation moved from one ruled through brutal dictatorship to one ruled through hegemony after the 1960's. Today, it is hegemony informed by Anglicized white supremacy and privilege. It is also hegemony influenced by the struggles and survival of the [subordinated] other, as well as new constituent groups.

In this process of constructing a nation, American race, races, racism, and racialism were born. So too were white power's obsessions. These obsessions are many, varied and changing, but even today are ultimately informed by the same Anglicized, White, upper-class male perspectives that ruled the historical dictatorship. This perspective reflects the "core culture" of U.S. society, which is "white, Protestant, English-speaking, Anglo-Saxon," and, one might add, heterosexual. Moreover, this perspective views itself as being superior to others, having dominated the country since its inception. Consistent with its dominant position, this perspective has projected its own reflection onto the nation, all too often defining itself as the only legitimate America. The social goals envisioned by this perspective include ideas of liberty and equality. Yet, these ideas are organized around its core culture and are limited by its values as well as one of its primary goals—maintaining itself in Power. At the same time, this perspective defines, and is defined by, aspects of others' group identities, usually those aspects that most challenge white power's conception of itself and its social vision. In the assertion of these aspects of group identity, an assertion that often embodies meanings and visions contrary to those imposed by white power, people bearing these aspects of identity will be bitterly opposed. This is particularly so when the bearers are significant in number. The opposition will manifest itself in many kinds of institutional and societal oppression, despite opportunities for society to do otherwise. This oppression calls forth resistance, which further fuels the obsession, unless the resistance is crushed or is successful in altering power relations. It is these factors which constitute the "bottom."

Although there is a danger in imposing upon contextualized histories a universalized American construct about how white power maintains

itself, thinking about our varied oppressions in this way provides some intellectual insight and clears the path for our coalition efforts.

The Mark of Blackness: [Color and Culture]

It is often said that blacks are at the "bottom" of the American racial hierarchy. Is this true? And if so, what does it mean? The statement is correct to the extent we are talking about a colorized racial hierarchy and noting the tremendous influence that this colorized racial system has had in the United States. As to its meaning, most obviously it suggests when the races are ranked from most degraded to most exalted, blacks are in the lowest rank and whites in the highest. Let us, however, parse this a bit more. I wish to posit equivalence between these two propositions: blacks, as a race, are at the "bottom;" and, one of white power's greatest racial obsessions has been with "blackness" and the black body. In fact, I would assert that the black body consistently has been the primary symbol of "race." From this perspective, it is the intensity of white obsession marked by conceptual opposition (or "otherness") and continuous oppression despite societal changes that determine the "bottom." Furthermore, in the context of colorized racial categories, blackness has had no close competition for at least the past four hundred years.

. . . [T]he long history of white oppression of blacks and blackness will demonstrate why . . . [b]lack people represent the metaphorical bottom of a colorized racial hierarchy . . . people marked by blackness have . . . posed the most direct challenge to white Power's conceptualization of itself and its social vision as white and consequently privileged; . . . and, black people have resisted this oppression, thereby reinforcing White Power's obsession with blackness.

White Power's obsession with blackness begins with slavery. White power created blackness, parasitically defining itself in opposition to it and seeking to oppress and suppress it in order to maintain the power it derived from blackness, in both tangible and psychological terms. White power, wealth, and privilege required both blackness as subjugation and black people as slaves; and therefore, black humanity could not be tolerated.

Conceptually, whiteness as the polar opposite of blackness had meaning in European history long before slavery. Whiteness was a symbol of cleanliness, purity, virtue, godliness, etc., and was in stark contrast to blackness. Blackness, on the other hand, signified the devil, evil, dirtiness. These notions undoubtedly influenced Europeans during their initial contact with Africans, their most salient feature in European eyes being blackness. . . . In slavery the conceptual opposition between blackness and whiteness would be experienced. . . .

In . . . white minds, slavery, a system of labor coercion, combined with color-delineated races, reinforce[ed] both. This fusion between slavery and color-delineated "races" was partly a result of how slavery came to function

in America[,] a function White Power consolidated and encoded into law. Slavery operated primarily along differences in skin color, embracing descent. It thereby created the color line where "white" came to mean free and "black" came to mean slave. Cheryl Harris, explains:

> "Black" racial identity marked who was subject to enslavement, whereas "white" racial identity marked who was "free" or, at a minimum, not a slave. . . . Because the "presumption of freedom [arose] from color [white]" and the "black color of the race [raised] the presumption of slavery,["] whiteness became a shield from slavery, a highly volatile and unstable form of property. . . . Because Whites could not be enslaved or held as slaves, the racial line between white and black was extremely critical.

The color line, therefore, functioned not only to define people marked by black skin as presumptive slaves, but it also defined white people as privileged. This "privileging" of white people started the process of whites consolidating themselves as a racial group. Poor whites aligned themselves with upper class whites in opposition to, and parasitic upon, people marked by black skin. For example, . . . in Virginia, Bacon's Rebellion, a lower class white rebellion, was resolved in part by expanding the African slave trade. . . . This resolution united lower and upper class whites against blacks in a way that slavery alone might not have accomplished. Thus, racial [black] slavery provided the glue for white racial solidarity vertically aligning white interests across class lines. As a result of this merger of slavery with race, or rather slavery with the color line that delineated the races, White Power was enriched, white people privileged, and white racial identity coalesced.

In this context, whiteness became more than just a concept, it became a valuable commodity. Cheryl Harris has argued persuasively that whiteness became a property interest, shielding people defined as white from slavery and privileging them during slavery and thereafter. Blackness, on the other hand, came to mean everything that whiteness was not. Whiteness was free, powerful, superior, privileged, civilized, industrious, intelligent, and beautiful, while blackness was slave, subjugation, inferior, savage, lazy, dumb, and ugly. In other words, while slavery functioned to enrich White Power, blackness functioned to further define and privilege it.

Ultimately, White Power came to view those who possessed whiteness as human while those marked by blackness were viewed as subhuman, three-fifths human, chattel. The color line separated people of African descent from their humanity. And, White Power, defining itself in opposition to blackness, denied humanity and human treatment, particularly the freedom desired by the human spirit, to the people marked by blackness. Consequently, what emerged from slavery was not the

Asante, Yoruba, Bakongo, and other [African] groups that initially entered slavery, but rather, a race of people. These people, marked by blackness as subjugated and inferior, were organized in solidarity around the black body. Their culture was a mixture of various African cultures and the emerging "American" culture, which was heavily influenced by the experience of slavery and resistance. They were identified as, and identified themselves as, Coloreds, Negroes, Blacks, and African-Americans in a century-long contest over the meaning of blackness. . . .

. . . As the number of African slaves grew, so did the apparatus to control Blacks. The laws however, made clear that the threat of insurrection was one of White Power's overriding concerns. Insurrection, humanity asserting itself in a black face and possibly resulting in black freedom, increased White Power's obsession with blackness because insurrection not only threatened the wealth of some Whites, but it also undermined the concept of white as free, privileged and in control. In order to prevent rebellion and to reassert this conception, White Power had to codify law and exercise violence that severely regulated all black life. Consequently, no detail of black life was too petty to note and White Power obsessively regulated every aspect of life for those marked as black. The more numerous the slaves, the harsher the codes, even in areas with sizable free black populations. What emerged therefore, was a particular kind of slave law, namely race control laws. . . . [L]abor extraction, the goal of slavery, was privatized, meaning the owner himself had to coerce labor from slaves, while race control, managing the movements and activities of blacks in society generally, became a matter of public concern and legislation. Ostensibly, the public control of black lives facilitated the extraction of labor by keeping slaves in their place in white homes and plantations. But ultimately all black life, both slaves lives, and the lives of free Blacks had to be regulated and denigrated. What lingered after slavery's demise was the concept and practice of race control meant to devalue black humanity and to maintain blackness as subjugation and inferiority.

Black freedom posed innumerable challenges to White Power's conception of itself and its social order on the eve of Reconstruction. . . . The Civil War, Emancipation, Reconstruction, and the passage of the Thirteenth and Fourteenth Amendments, all of which embroiled the nation into considerations of what slavery and blackness meant, marked instances where White Power could have reconstructed whiteness and blackness as something other than in opposition. But it did not. These efforts only appear to have hardened the color-line and increased the obsession. . . . White Power invented new and different institutional and systematic oppressions to maintain blackness as subjugated and black people as oppressed. These new institutional mechanisms were evidenced by legal segregation, new forms of labor exploitation, excessive legal violence and

discrimination. At the same time, people marked by blackness and organized around blackness resisted oppression. However, such resistance, in the form of establishing functioning and prosperous black towns, was often met with fire and destruction; independence was met with lynching; and defiance was met with violence. Resistance seemed to fuel the obsession and rebound with additional violence despite the altered conditions.

Similarly, the civil rights movement asserted black power; pronounced black as beautiful, and demanded just and human treatment for black people. It therefore presented White Power with another lost opportunity to re-create itself as something other than in opposition to blackness and to provide blackness with alternative meanings in white minds. Although the Civil Rights movement brought about some progress, many have noted the progress was limited. It appears the claims of the movement proved too contradictory to both the practice and concept of black as subjugated and inferior.

The endurance of the obsession and oppression of blackness and blacks, despite the tremendous opportunities for change, has led some to believe the position of blacks on the colorized racial bottom is permanent. . . . [T]he seeming permanence of these relations and meanings, is a crucial insight of the "bottom" metaphor. . . .

Shifting Bottoms: A Language Hierarchy and Multiple Racial Systems

Nonetheless, Blacks likely are not on the "bottom" with regard to language oppression within the United States, as the "Black over White" paradigm might suggest. Instead, it appears Latinos/as are on the "bottom" because they embody, so to speak, a shared language uniting them that is the object of White Power's obsession. While the suppression of language might be characterized as a form of either ethnic or racial oppression, both characterizations implicate White Power's obsessions, and neither the "White Over Black" paradigm nor the notion of Blacks as the colorized racial "bottom" contributes much illumination. Here, White Power's obsession is either with brown bodies or the Spanish language; black bodies have little to do with it as a distraction or fundamental point. In this country, Spanish translates to a central site or category of oppression, thereby relegating its speakers to the metaphorical "bottom" of this society in those specific terms.

Many writers have noted that language is an aspect of ethnic identity. Language is central to culture and fundamental to ethnicity. We not only communicate through language, but language structures how we think.

The Spanish language, having been spoken by Latinos three centuries before Anglo expansion and up to the present day, is central to the Latino

identity. It is a basis for cohesion in the community, and historically, has been a basis upon which they have been discriminated. . . .

. . . Spanish spoken in the United States challenges White Power's conception of itself and its social goals in two significant ways. First, the increasing numbers of Latinos/as portend significant political power for a group that speaks a language other than English. This threatens White Power's mythical vision of a solitary nation united around one language, occupied by one people descended from the same ancestor. Second, Spanish is associated with a racialized group and culture.

. . . [T]he "English Only" movement is linked to efforts to dismantle bilingual education, toughen immigration laws, and to deny social welfare benefits to immigrants. In trying to eliminate Spanish as a basis of cohesion for the Latino/a community, while simultaneously limiting their participation in American society, White Power is reinforced and its cultural hegemony left firmly intact.

[In sum,] the "bottom" metaphor leads us to the idea that the groups represented at the "bottom" shift, depending on the issue and circumstance. The shifting "bottom" directs us to shift our focus, shift our thinking, and perhaps shift our analytical tools when we are trying to understand the experiences of different groups. It instructs us to look specifically at how different groups and issues are constructed and experienced both in similar and dissimilar ways. This essay suggests that although Blacks are at the bottom of a colorized racial hierarchy, Latino/as are at the bottom of a racialized language hierarchy, at a minimum, and perhaps at the bottom of a racial system marked by the Spanish language, among other things. The "bottom" has indeed shifted.

. . . Only through [a] commitment to cross-racial knowledge production can we hope collectively to overcome the legacies of White Supremacy that still deny equal justice to *all*.

Group hierarchies can and do shift from one context to another, although all may still be interconnected by design. One response to this complexity that Mutua suggests is to "map out our similarities and differences while building the theory and coalitions necessary to articulate a different, fairer future." She thus emphasizes another recurrent theme and core practice of systemic advocacy: the need to collaborate contextually across multiple kinds of difference based on shared values, principles, and goals.

NOTES AND QUESTIONS

1. *Complexity of Hierarchical Tops and Bottoms*. Although the Latinx group may be at the "bottom" when language oppression is centered, Blacks do not necessarily become the "top." Moreover, some contexts and issues reveal

multiple bottoms, or tops. For example, in thinking about the experience of police violence, which group or groups constitute the bottom? Equally important, what opportunities (and problems) for coalition-building do Mutua's insights reveal?

1.4 CRITICAL "SCHOOLS" AND ADVOCACY "APPROACHES" PROVIDE WELLS OF KNOWLEDGE FOR "DIFFERENT" GROUPS AND THEIR ADVOCATES

Law is a continually contested system—in complicated ways, law remains part of the systemic justice problem and of potential solutions to it. Nonetheless, "formalism" has dominated law—and still dominates legal culture—even while challenged by the realist and critical Schools of legal knowledge and field-based advocacy Approaches. In the traditional formalist school of legal knowledge, as we will see more fully in Part IV, legal decisions are made by applying legal principles to legally cognizable and relevant facts to reach conclusions insulated from actual outcomes in individual lives and communities. Below, we survey how sustained resistance to formalism within the legal profession gave rise to the Schools (of realist and critical theory) and advocacy Approaches (to the use of law for justice) as distinct yet overlapping formations within legal culture, whose decades of insight inform this book.

"Legal realists" in the late 19th and early 20th century began to criticize the legal fictions that justified persistently unequal outcomes and introduced a less "mechanical" approach to legal analysis and problem solving. To emphasize their more sociological approach, realists called for advocates and courts to align doctrine with reality. Legal realists asserted that formalist approaches to law "created an illusion of certainty that masked the unspoken social and political assumptions guiding much judicial decision making. The exposure of this illusion of certainty led to Realist pronouncements of the indeterminate nature of the law."[7]

Realists insisted that both the actual operations of legal processes and their concrete outcomes should be studied to improve legal problem solving in complex societies.[8] Realists like Oliver Wendell Holmes, Karl Llewellyn, Jerome Frank, Felix Cohen, and others argued that law could not be understood as a disembodied, acontextual process of deducing legal outcomes from principles. Holmes, for instance, cautioned in 1897 that "law" is what lawyers and judges actually do and that no one should believe

[7] Emily M.S. Houh, Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law, 88 Cornell L. Rev. 1025, 1055–56 (2003).

[8] See Benjamin Cardozo, The Nature of the Judicial Process (1921); Jerome Frank, What Courts Do In Fact, 26 Ill. L. Rev. 645 (1932); Karl Llewellyn, The Common Law Tradition: Deciding Appeals (1960).

that law is "a system of reason that is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions."[9] From this sociological perspective, the problem with the entrenched legalisms of the mechanical or formalistic approach to law was that social facts, processes, and outcomes were ignored: "Justice in concrete cases ceases to be their aim. Instead, [judges] aim at thorough development of the logical content of established principles through rigid deduction."[10] Realists thus advocated for law to incorporate social fact-finding. Advocates put the insights of Holmes, Roscoe Pound, and other realists to practical use by expanding the techniques of legal research and writing to incorporate the gathering and use of sociological data. The now-famous "Brandeis brief"—in which the lawyer peppers the legal brief with social facts—illustrates this legal turn toward society. Legal culture, as a whole, became consciously more guided by documented social facts.

The Brandeis brief became a mechanism for introducing sociological information and analysis into legal proceedings. The first such brief was filed in *Muller v. Oregon* in 1908, a case considering whether the state had authority to restrict working hours for women to protect their health.[11] Statements from experts and workers and sociological data were presented to elaborate on the effects of overwork on women. More recently, "thick pleadings" and "voices briefs" have been used as mechanisms for incorporating socially-grounded and diverse facts, stories, and analysis into briefs.[12] These developments increasingly questioned the narrow version of legal "relevance" that formalism had established for analysis and action.

Legal realists and others continued to deepen their critiques of formalism over the decades. According to critics, the dominant framework fails in part because formalism ignores interests, power, and experience. Benjamin Cardozo criticized formalism in 1921:

> My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces dominate depends largely upon the comparative importance or value of the social interests that will be thereby promoted or

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[9] Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457 (1897).

[10] Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, 23 Harv. L. Rev. 591, 596 (1911).

[11] *Muller v. Oregon*, 208 U.S. 412 (1908).

[12] See Herbert A. Eastman, Speaking Truth to Power: The Language of Civil Rights Litigators, 104 Yale L.J. 763, 789 (1995); Linda H. Edwards, Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation, 29 Yale J. of L. and Feminism 29 (2017) (describing the "daring" amicus brief including stories about abortions from more than 100 women lawyers, law professors, and former judges submitted in *Whole Women's Health v. Hellerstedt*).

> impaired. . . . The most fundamental social interest is that law shall be uniform and impartial. . . . Uniformity ceases to be a good when it becomes uniformity of oppression.[13]

The realist cure was the production of more social facts—the critical incorporation of more cross-disciplinary knowledge—that would always be external to law in origin but employed internally in legal venues to guide legal actions. The turn to realism spread across legal culture, from education to adjudication to practice. Social statistics, empirical methods, and cross-disciplinary knowledge increasingly informed legal choices and constructions. In this way, notions of legal relevance slowly and reluctantly began to expand.

Realist sensibilities set the stage for introducing cross-disciplinary and transnational knowledge in U.S. legal culture, as well as for "critical" challenges to formalism. Legal realism gradually opened the door to critically-minded "schools" or efforts focused on identity. These schools all seek, in varied ways, to make law more socially just as applied. These schools of legal criticality thus follow from realist insights, intuitions, and initiatives. Although each may use a "different" social identity, like race or sex, as a point of entry, they all investigate wider patterns of systemic injustice based on the interplay—or intersection—of varied identities in concrete settings.

Starting in the 1970s, for instance, the Law and Society Association (LSA) and Clinical Legal Scholarship emerged as two key developments in this historical process of knowledge production. As its name suggests, LSA scholarship devotes itself to understanding and reforming law as applied, as empirically experienced, and as informed by disciplines beyond law. Likewise, Clinical Legal Scholarship focuses on, and is rooted in, applications of law in socially sensitive settings. Often, but not primarily, these bodies of scholarship focus on social group identities, especially in class-conscious frameworks designed to attack persistent patterns of poverty.

In the 1980s, two other key movements emerged as pioneers of the critical Schools from which today's systemic advocates draw. Critical Legal Studies (CLS) questioned the claimed legitimacy of law as a principled system, focusing chiefly on class hierarchies and obfuscating legalisms. CLS highlighted law's many inexplicable inconsistencies and showed how the manipulation of legal indeterminacy obscures discretionary uses of power to protect group privilege and justify patterns of subordination. Focusing on gender as its point of critical inquiry, Feminist Legal Theory (FLT) mounted the same challenges to systemic legalisms that helped to normalize patriarchal hierarchies. During this decade, these two

[13] Cardozo, Nature of the Judicial Process, at 112.

movements effectively linked "critical" studies with "identity" analysis to question the legitimacy and utility of law as a guarantor of equal justice.

Taking the next step, Critical Race Theory (CRT) and Critical Race Feminism (CRF) in the late 1980s and early 1990s then centered social identity, in the form of race and gender and their interplay, alongside CLS and FLT. Similarly, other genres of identity-sensitive scholarship soon developed, helping to further chart and connect "different" identities and systems to the same unjust patterns. By the mid-1990s, the critical Schools of legal knowledge were coalescing into overlapping networks of critical studies (known collectively as Critical Outsider Jurisprudence). Critical Outsider Jurisprudence focused on varied, overlapping "outsider" social identities, based on ethnicity, nationality, indigeneity, sexuality, disability, class, and religion. These critical and outsider—or OutCrit—networks launched and nurtured QueerCrit, LatCrit (Latina and Latino Critical Legal Theory), ClassCrit, DisCrit (Dis/ability Critical Race Studies), and similar schools to better connect law with justice and reality across "different" identity groups in increasingly multicultural, globalized contexts.

During these same decades, scholarly movements focused on Law and Social Change and on Therapeutic Jurisprudence aimed to make law and its remedies more socially holistic and principled in relation to its equal justice promise. Other initiatives, like the various "Law-and" schools of inquiry, sought to introduce insights of other disciplines including, notably, critical approaches to the social sciences and humanities. Other fields like subaltern studies, political economy, and critical ethnic studies are expanding the critical edge of actionable knowledge.

Likeminded bodies of scholarship furthermore have connected these efforts across the borders of cultures and nation-states. New Approaches to International Law and Third World Approaches to International Law (NAIL/TWAIL) developed in similar ways across various legal systems shaping transnational legal (and social) realities. From the 1970s to this day, the creation of this deep well of post-realist knowledge—and the ongoing development of critical lessons drawn from advocacy Approaches below—have sharpened the tools of systemic advocacy (despite the top-down perspectives and interests advanced during this same period by schools of legal knowledge like "law and economics" or "public choice" theory).

We know the bottom-up Schools and Approaches provide potent resources for effective advocacy and organized struggle because of the collective fear, anxiety, and retaliation that they provoke from the most traditional elite quarters. In the 1990s, high-profile institutions organized purges of "critical" legal scholars associated with these Schools and Approaches. Continuing direct attacks on Critical Race Theory—one of the

bottom-up Schools—attests to the fundamental power of critical knowledge as actionable knowledge. The most recent attack, coming in August 2020 at the direction of then-President Trump, was the Director of the Office Management and Budget banning any federal government training related to Critical Race Theory, labeling it "anti-American propaganda." Swift responses defending the contributions of CRT included one from the five law deans of the University of California:

> The OMB memorandum equates Critical Race Theory to two inaccurate and wildly oversimplified tenets: (1) that the United States is "an inherently racist or evil country" and (2) that white people are "inherently racist or evil." This characterization reduces a sophisticated, dynamic field, interdisciplinary and global in scope, to two simplistic absurdities. In fact, a central principle of Critical Race Theory is that there is nothing "inherent" about race. Rather, CRT invites us to confront with unflinching honesty how race has operated in our history and our present, and to recognize the deep and ongoing operation of "structural racism," through which racial inequality is reproduced within our economic, political, and educational systems even without individual racist intent.[14]

The collective, cumulative wells of critical knowledge provide actionable tools and insights in varied contexts, but they also record and remember potent bottom-up truths—both historical and current. These critical truths are put at a premium whenever a society is subjected systematically to escalating top-down campaigns of deception or disinformation, as appeared to be occurring in the United States by the early 1990s, and as confirmed particularly by the intensified campaigns of increasingly bald deception surrounding (and in between) recent presidential elections. Only two decades into a new millennium, systemic and social realities increasingly were morphing as George Orwell had imagined in his famed novel, *1984*. During the past quarter of a century, the Big Lie in the United States has mushroomed into a big systemic problem—for law and society at large, and for systemic justice and advocacy in particular.

In this state of affairs, the constant manufacture and delivery of misinformation, including outright falsehoods, become official, daily policy. In this systemic scheme, the "Big Lie" perhaps is the single most powerful weapon in elites' knowledge-control arsenal: as pioneered in the 1930s, this "Big Lie" strategy describes a top-down approach to controlling the public premised on the theory that the biggest lies are the most believable simply because "reasonable" people will tend to disbelieve that a lie so big could be told so openly, so repeatedly, so authoritatively, so audaciously—even if

[14] www.taxprof.typepad.com/taxprof_blog/2020/09/deans-of-all-five-university-of-california-law-schools-defend-critical-race-theory-against-trumps-at.html.

easily disproved. And so public opinion (and compliance) are shaped and reshaped, from top to bottom. When Big Lies proliferate, systemic advocates must understand how they work, and how to work against them. The Schools and Approaches provide key starting points for current analysis *and* follow-up action.

As we will see repeatedly throughout this volume, critical knowledge is not "merely" a bunch of academic theories that complicate the urge to act quickly. On the contrary, it helps advocates to unlearn and relearn advocacy before wading into systemic problem-solving, just like knowledge of swimming helps swimmers to swim better before jumping into the water and splashing about. Systemic advocacy draws from previous experience, knowledge, and action to develop "theory" for future analyses and actions in never-ending cycles that fuse theory with practice.

Illustrating how critical scholars invoke, apply, and contribute to the Schools—and how the Schools themselves, as evolving bodies of knowledge, overlap and reinforce each other—TWAIL scholar Antony Anghie examines below the origins of international law from the bottom. In particular, Anghie unpacks the top-down legal conception of sovereignty—and international law as a system—as a legal invention used to justify the domination of those placed at the top and the subjugation of those pushed to the bottom. Sovereignty specifically, and international law generally, became (and remain) legal levers for collectivized privilege and collectivized subordination based on the key elements of identities, groups, interests, and power.

LATCRIT AND TWAIL

Antony Anghie
42 Cal. W. Int'l L.J. 311 (2012)

. . . Sovereignty is the foundation of the discipline of international law. Indeed, international law is commonly understood as the law that governs relations between sovereign states. My interest lies in understanding what historical narratives support conventional approaches to international law and in trying to recover other histories in order to suggest a new analytical framework—a set of ideas that might make us better appreciate and illuminate the ways in which these ostensibly neutral doctrines have affected (and continue to affect) the lives of the people who are often the victims of these processes.

. . . [T]he conventional history of international law is based on three fundamental premises. The first premise is that international law is created through the history and experience of the West or, even more particularly, Europe. This idea is powerfully reinforced by the notion that sovereignty itself, the very foundation of the discipline, was created in Europe. . . .

The second closely-related premise is that the non-European world is peripheral to the making of international law. That is, doctrines such as sovereignty were created in the European world and then extended out to encompass the non-European world. . . . This is what basically occurred in the latter half of the nineteenth century. . . .

The third related premise is the notion that the major issue confronting the discipline of international law is how law can be created among equal and sovereign states. Put differently, is international law really "law" when the international system lacks an overarching sovereign that can legislate and enforce the law? Specifically, how can international law be created in a system of horizontal authority in which all sovereign states are equal, at least juridically? . . .

By contrast, I suggest that each of these premises or structuring principles is either wrong or seriously inadequate in terms of its characterization—both in the role of non-European peoples in the making of international law, and in terms of appreciating the effects of international law on non-European peoples.

. . . [I]nternational law was not created in Europe and then transferred to the non-European world. Rather, international law was created out of the imperial encounter. That is, sovereignty was structured in such a way as to empower one side, the West, and disempower the other side, the non-West. The conventional argument suggests that the non-European world was somehow lacking sovereignty and this sovereignty had to be gradually bestowed upon them by Europe. But how was it decided that non-European peoples were lacking in sovereignty in the first place? . . . [T]he sovereignty doctrine, as it emerged from the imperial encounter, plays the crucial role of stripping non-European peoples of their sovereignty. Once this is done, these people, dispossessed of the legal personality that would enable them to participate in the international system and claim rights within it, can be the object of conquest and violence by imperial European states. While this conventional approach to sovereignty presents it as a benevolent process that extends out to empower the marginalized and disempowered, I would argue that the sovereignty doctrine has mechanisms of exclusion built within it that are continuously developed, refined, and adapted by encounters with the new "others." These "others" are the new challengers to the ever-expanding reach of international law and the powers it represents. This process of empowerment/disempowerment is an enduring one.

[Dominant legal] doctrines such as the sovereignty doctrine, the foundation of international law, are based on particular identities, which is not a great revelation for international lawyers, who insist—and in some cases celebrate—the fact that international law was very explicitly based on European values. International law was based on the *jus publicum*

Europaeum, the public law of Europe. However, this European identity did not emerge in splendid isolation. Imperialism, far from being peripheral to the discipline, is central to its very existence and character. It could not be otherwise. Historically, it was only through the process of imperialism that non-European states were incorporated into a system of law that was essentially European. Equally important, in the violence of this encounter, European international law devised doctrines that would diminish and de-legitimize non-European peoples. Further, it was vital for these European states to formulate the doctrines and principles that would enable them to take control of the resources of those people and would justify colonial governance over them. It is from these colonial origins that international economic law and arguably, international human rights law emerged. . . .

But how do we write a history that is adequate for the purposes of telling the story of the relationship between European and non-European peoples? What are the themes and principles that emerge if we use that history as exemplary and formative to the source of the doctrines and principles of international law? As I have argued above, such a history, if approached critically might indicate that sovereignty should be seen not as a doctrine of empowerment, but of exclusion. . . .

Anghie traces the origins of international law to identity-based hierarchies meant to further elite interests, confirming that systemic injustice is embedded in all forms of law, whether deemed domestic or international. As a set, Anghie and the preceding excerpts demonstrate how the critical Schools of legal knowledge comprise overlapping networks or scholars and activists. Recognizing and working with the promises and limits of law, these overlapping Schools highlight the missing elements in traditional legal analysis central to this book—identities, groups, interests, and power—to go beyond the blindfolds of legal formalism and to push for equal justice. Both the Schools (listed only partially in Chart A) and the Approaches (outlined only partially in Chart B) sometimes originate with activists and scholars situated within or employed by prestigious universities and institutions, but their principal purpose is to produce critical knowledge from those privileged perches to support bottom-up group struggles. As we will see further below, advocates (if lawyers) generally share similar credentials, training, and privileges, and similarly will be called upon to deploy their professional privileges as system "insiders" on behalf of bottom-up, outsider groups. Even though these Schools and Approaches may have different points of emphasis, their common purpose is to make law more principled and accountable as equal justice for all.

Chart A: Critical "Schools" of Legal Knowledge

Asian American Scholarship: Centers the Asian and Pacific Islander experience with law. Shows how Asian Americans are considered "perpetual foreigners" even if U.S. born. Connects nationality and ethnicity to race.

ClassCrits Theory: Critiques neoliberalism and classical economics to uncover their fallacies. Targets root sources of material inequality. Relates class to other social identities, like sex and race.

Clinical Legal Scholarship: Promotes experiential legal training. Spearheads legal clinics based in law schools and related teaching techniques. Aims to provide legal services to poor or vulnerable populations.

Critical Legal Studies: Focuses on class and hierarchy by law. Exposes legal indeterminacy and discretion in decision making. Situates law as raw power.

Critical Race Theory/Critical Race Feminism: Use race as a principal lens of study. Aims to dismantle white supremacy and privilege. Also developed intersectionality.

Disability Legal Studies (and DisCrit (Dis/ability Critical Race Studies)): Places disability alongside other identity-focused Schools. Deconstructs legal notions of ability and disability. Concerned with accessibility of social and legal aspects of life.

Environmental Justice: Maps relationship between social identities and environmental risks. Strives to stop environmental degradation. Transnational.

Feminism: Examines gender relations socially and legally. Questions dominant notions of sameness and difference, especially between men and women. Confronts patriarchy in law and society.

Indigenous/Indian Scholarship: Studies indigeneity in the U.S. and globally as distinct from race, ethnicity, or nationality. Examines colonialism and its legacies for native peoples. Key concerns include land, resources, identity, culture, and self-determination.

LatCrit Theory: Focuses on Latinx populations. Links the local to the global. Prioritizes praxis and community-building.

Law and Society: Analyzes "law in action"—as applied—rather than as written. Emphasizes empirical and transnational approaches to law. Employs interdisciplinary studies to understand law.

NAIL/TWAIL: "New Approaches"/"Third World Approaches" to International Law: Focuses on the international legal system and present-day effects of colonialism. Associated with subaltern studies.

Queer Theory/Trans Studies: Employs sex, sexual orientation, and gender identity to combat the legal subordination of sexual minorities, both cis and trans. Challenges homophobia, transphobia, and heterosexism socially and legally. Seeks formal equality as well as social liberation.

Realism: Responds to the "mechanical" jurisprudence of legal formalism. Shifts attention from abstract logic to social facts. Sometimes called "sociological" jurisprudence.

Therapeutic Jurisprudence: Centers individual and social wellbeing as a key purpose of the legal system. Chronic legal distress contradicts equal justice. Legal remedies should promote social healing and wellness.

It is no coincidence that these Schools reflect the collective concerns of groups based on social identities ranging from class, race, and ethnicity to sex, sexuality, and disability. These are among the identity-based groups pushed to the bottom of the social and economic order by law as a system. This Chart therefore provides an overview of the social identities used by dominant groups during or since colonial times, as well as the responses from legal scholars attempting to produce knowledge relevant to bottom-up solutions to injustice.

Similarly, an array of advocacy Approaches also emerged in recent decades to center the critical insights of group experience with struggles against systemic injustice. These bottom-up Approaches developed "in the field" both independently and in dynamic interaction with the realist and critical Schools (and vice versa); these two historical developments—the Schools and Approaches—were mutually reinforcing in ways both intentional and inadvertent. Not surprisingly, then, these Schools and Approaches share common ideas, projects, actors, and aspirations. Like the Schools, these advocacy Approaches provide key lessons, insights, concepts, terms, and techniques for systemic advocates.

Today, then, the Schools and Approaches *jointly* are the wells from which systemic activists and advocates draw critical knowledge based on experience from the bottom both with injustice and with struggles against it. That cumulative experience includes struggling together with community groups to address persistent social problems systemically, struggling within the profession to sustain sites and resources for systemic advocacy, and struggling with oneself to change personal and professional practices that impede progress. Built on the shoulders and lessons of advocates who fought before, the Schools and Approaches are, themselves,

products of historical struggle and continuing perseverance and continue to thrive despite systemic efforts from above to shut them down. Both the Schools and Approaches are venues and instruments of ongoing struggles against the Critical Challenge.

In the excerpt below, longtime advocate Gary Bellow describes one Approach, which he denominates "political lawyering" to underscore that law is always "political" because "the practice of law always involves exercising power." Bellow founded Harvard Law School's clinical program after working with such diverse clients as the United Farm Workers and the Black Panther Party. In this "self-conscious" law practice, as Bellow explains, "social vision is part of the operating ethos." Note the importance of critical and self-critical analysis in "vision-making" as a foundational aspect of this Approach.

STEADY WORK: A PRACTITIONER'S REFLECTIONS ON POLITICAL LAWYERING

Gary Bellow

31 Harv. C.R.-C.L. L. Rev. 297 (1996)

. . . In some of the efforts, we sought rule changes or injunctive relief against a particular practice on behalf of an identified class. In other situations, we pursued aggregate results by filing large numbers of individual cases. Some strategies were carried out in the courts. At other times we ignored litigation entirely in favor of bureaucratic maneuvering and community and union organizing. Even when pursuing litigation, we often placed far greater emphasis on mobilizing and educating clients, or strengthening the entities and organizations that represented them, than on judicial outcomes. And always, we employed the lawsuit, whether pushed to conclusion or not, as a vehicle for gathering information, positioning adversaries, asserting bargaining leverage, and adding to the continuing process of definition and designation that occurs in any conflict. Like politics itself, it is doubtful that political lawyering can be defined easily by the means it employs. Rather, what the examples seem to have in common is a particular, "politicized" orientation to the goals, commitments, and relationships reflected in the following strands of a practitioner's approach to legal work.

In each of these efforts, the legal work was done in service to both individuals and larger, more collectively oriented goals. We were not detached professionals offering advice and representation regardless of consequences; we saw ourselves responsible for, and committed to, shaping those consequences. Indeed, we made each move and maneuver with an eye to its impact on adversaries, decision makers, various parties concerned with the particular dispute, and our own clients. Moreover, the visions we embraced, particularly those that sought radical extensions of democracy, equality, and racial justice, were focused on deep-seated,

structural, and cultural change. . . . Experienced in this way, it is virtually impossible to have been involved in any of the examples I have set out and not have thought of our law work as politics.

Inevitably, there were many more contradictions, hierarchies, and hypocrisies in our hopes than any of us recognized. And, more often than I wish were the case, our vision, or more particularly, the policies, practices, and programs that we believed our vision entailed, was flawed or shortsighted. Even when such policies, principles, and programs made sense, we compromised and adapted them to new circumstances less often than we might have—but such are always the pitfalls of passionate politics.

What has always puzzled me in my efforts to teach and recruit other lawyers to this perspective is the often made claim, and related unease in less articulated reactions, that there was some deep impropriety connected with our view of how and to what ends our legal skills should be employed. Law should not be practiced, used, or instrumentalized in how and to what ends our legal skills should be employed. Law should not be practiced, used, or instrumentalized in this way, it was said.

Yet, the practice of law always involves exercising power. Exercising power always involves systemic consequences, even if the systemic impact is a product of what appear to be unrelated cases pursued individually overtime. Lawyers influence and shape the practices and institutions in which they work, if only to reinforce and legitimate them. Clients, similarly, bring to their legal advisers and representatives claims and concerns that arise from and are examples of underlying institutional arrangements and culturally created controls. It would be a poor corporate lawyer who did his or her work without regard to the long-term systemic and aggregate effects on clients and others of any particular course of action or strategy. In many ways, we did no more than that, and we argued with those of our contemporaries who shared our politics and our commitments that they should do no less.

Social vision is part of the operating ethos of self-conscious law practice. The fact that most law practice is not done self-consciously is simply a function of the degree to which most law practice serves the status quo. Self-conscious practice appears to be less important, and is always less destabilizing, when it serves what is, rather than what ought to be. The kind of political lawyering embedded in the foregoing examples is distinguishable from general law work by the degree to which it was fueled by a more dissatisfied and change-oriented self-consciousness than the law practice of most of our contemporaries. . . . It surely requires a new generation to define an adequate social vision and self-consciousness for today's complicated times. It seems enough here to say that "vision-making" work is fundamental to the activist strategies political lawyering inevitably embodies.

The advocacy Approaches, in Bellow's words, are "self consciously" rooted in field-based experiences and add to the body of practical and theoretical knowledge in law. These overlapping Approaches—variously called "public interest" lawyering, "community" lawyering, "rebellious" lawyering, "third dimensional" lawyering, "cause" or "movement" lawyering, and so forth—are not mutually exclusive. Rather, like the Schools, they share a sense of vision and mission and can be mined for insights and used in action in creative combinations.

These Approaches do not represent a consensus on "best" practices in every circumstance but a dynamic, exploratory, self-critical, and ongoing dialogue to sharpen all advocacy for social justice. The Approaches, focused as they are on producing and testing theory in practice, are useful across identity groups and issue areas, such as health, environmental justice, labor, immigration, gender justice, disability, housing, civil rights, economic development, LGBTQ anti-discrimination, and indigenous rights. These "newer developing wisdoms are tentative, and the explorations continue apace. It is therefore a great time to be a progressive lawyer, even if the role may not be an entirely comfortable one."[15] These Approaches—together with the Schools—provide a platform for competence in bottom-up research, analysis, and action toward equal justice.

Importantly, the names for these Approaches (like the Schools above) were developed primarily by practitioners and academics embedded in U.S. and Western institutions and culture, although drawing often on work with marginalized communities locally and globally. Because developed primarily with this Western bent, the principles or practices have been used, modified, and rejected in other contexts, and this process of local-global development continues from generation to generation. With these caveats, Chart B provides a partial snapshot of advocacy Approaches, describing the concerns on which they are most focused.

Chart B: "Approaches" to Systemic Advocacy

Approaches	Key Problem-Solving Concerns
Cause lawyering, Community lawyering, Integrative lawyering, Guerrilla lawyering, Law and organizing, Movement or mobilization lawyering, Revolutionary lawyering	Relationships of advocates to groups, organizing strategies, sites of practice, and social movements

[15] Paul R. Tremblay, Critical Legal Ethics Review of Lawyers Ethics and the Pursuit of Social Justice: A Critical Reader, Susan D. Carle ed., 20 Geo. J. Legal Ethics 133, 134 (2007).

Client-centered lawyering, Collaborative lawyering, Critical lawyering, Facilitative lawyering, Rebellious lawyering, Reconstructive poverty lawyering, Therapeutic lawyering	Relationships, voice, decision making, and empowerment among clients, advocates, and other team members
Democratic lawyering, Political lawyering, Legislative lawyering, Poverty lawyering, Public interest lawyering, Third dimensional lawyering, Civil rights lawyering, Legal pragmatism, People's lawyering, Progressive lawyering, Social justice lawyering	Professional and social decision-making processes, roles, public resistance, and material outcomes for subordinated groups

By distinguishing the Schools and Approaches in these charts, we do not recycle the division between theory and practice that is so characteristic of formalism. Instead, we aim to appreciate how both the Schools and the Approaches create theory, and how both help to craft actions, albeit perhaps in different sites of practice and by sometimes-different methods. And we emphasize that mutual cross-pollination is the norm, not the exception. Critical knowledge and theory have developed from both academy-based and field-based experiences—a historical process that continues to this day, as this book itself demonstrates. By exploring Approaches and Schools as wells of actionable knowledge, advocates garner ever-greater insights to sharpen continually their capacity for systemic advocacy.

This fusion of action based on theory and theory based on practice allows advocates to create a "praxis" that maximizes their effectiveness and integrity. Oversimplified, praxis amounts to applied theory—the active, self-critical use of knowledge from previous experience to future plans and actions. As we see throughout this text, the concept of praxis describes systemic advocacy for systemic justice.

Our concluding excerpt on the Schools and Approaches also begins our study of "narratives and experiences" as tools of bottom-up advocacy. Gerald López, who sparked a critical interrogation among advocates when he introduced "rebellious lawyering" in the early 1990s,[16] reflects on, and recounts, his own upbringing, training, and advocacy. Showing how personal experience and reflection can provide a starting point for systemic

[16] López, Rebellious Lawyering.

analysis and advocacy, López agrees with the basics of Bellow's "political" Approach. Connecting the micro to the macro, the "rebellious" Approach López pioneered asks advocates to change themselves in order to change systems and "bring about positive changes that improve our collective existence"[17] from the bottom up.

CHANGING SYSTEMS, CHANGING OURSELVES

Gerald P. López
12 Harv. Latino L. Rev. 15 (2009)

. . . In thinking about transforming systems, I find myself returning to events earlier in my life. . . . I want to highlight certain ideas and attitudes that came to feel central to a rebellious vision: the inevitable intermingling and mutually defining character of obedience and rebellion, of lay and professional problem solving, of the way we work and the way we live.

Let me share three experiences that, together, suggest why I believe changing systems inevitably entails changing ourselves.

Three Formative Experiences

In one, I am about eight years old. I already felt bewildered and infuriated by the overlapping systems that all too powerfully and, thankfully, all too imperfectly limited the lives of those of us who called East Los Angeles home. I'm talking about the educational system. The health care system. The criminal justice system. The electoral system. I'm also talking about the racial and cultural and class systems that shaped and reflected housing and labor markets and public and private and civic relations. How did such systems (from gargantuan institutions to personal interactions) come into being and maintain themselves?

I realized that systems of every sort knew both how to target and how to neglect residents of East L.A. They seemingly tracked our every move through law enforcement practices and truancy policies and immigration laws, for example. And they apparently never cared about our lack of access to quality health care, K–12 public education, and financial services, to name only some obviously important means of everyday survival and social mobility. If the systems in L.A. appeared at times to carry forward robotically or naturally, their patterns revealed human bias in operation.

These biased systems traced their origins—as do all systems—to a mix of deliberate design, capricious choice, and accidental rites. To target us

[17] Angelo N. Ancheta, Community Lawyering, 81 Cal. L. Rev. 1363, 1367 (1993). Ancheta is a proponent of "community lawyering," another advocacy Approach, which shares the rebellious emphasis on bottom-up leadership from affected communities. Like the Schools, and like advocacy in general, the Approaches draw controversy and self-critical analysis. See, e.g., Rebecca Sharpless, More Than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy, 19 Clinical L. Rev. 347 (2012) (critiquing the seeming disregard in rebellious lawyering literature for direct service providers that diminishes the contributions particularly of women of color to public interest advocacy).

and to neglect us reflected and reinforced accepted wisdom about how you get the most out of, and maintain control over, a people with an especially limited capacity to contribute. The stock stories and arguments that shaped law and life in the 1950s defined Mexicans (Mexican-Americans, Mexicanos, Chicanos) as genetically and culturally inferior. Regarded as unworthy of the fully equal citizenship that in principle defined membership in the national community, we Mexicans instead got what we merited, what a mixed-race mongrel breed deserved. No more and no less.

Not everyone bought into these stereotypes, of course. Mexicanos and Mexican-Americans I knew challenged them. So did Blacks and Asians in other parts of L.A., and so did Natives who had worked alongside my grandparents in Arizona mining towns. So did White teachers and merchants and nuns and priests and coaches. . . .

Surrounded by such staunch oppositionists, I found it all the more confusing that the diverse systems that considered Mexicans everlastingly inferior appeared to engender remarkably broad allegiance. I saw pronounced loyalty in those contentedly benefiting all the way to those painfully subordinated. Some formally defended the status quo; others would not openly confront systems that they perceived as so deeply ingrained as to be virtually unchangeable; others still seemed to smilingly stomach dreadful disrespect. I witnessed many who combined these behaviors, accustomed, if not attached, to the way things were.

Fortunately for me, my parents raged against degrading stereotypes. They understood the connection between these stereotypes and the systems that at once unfairly targeted and neglected those of us who lived in places like East L.A. My Dad and Mom raged . . . [t]hrough their active political involvement, helping to mobilize registration and get-out-the-vote campaigns for state and national elections, and leading efforts to incorporate East Los Angeles.

My Mom and Dad proudly celebrated the defiant—the mundane and not-so-mundane efforts on the part of others to stand up to systems that denied in practice the very principle of democratic equality central to our country's professed convictions. At their best, my Mom and Dad treated each moment as a potential opportunity to live out a largely counterfactual world, one they could now and then glimpse, but only by behaving as if the world they imagined were already in place.

Every bit as fortunately for me, my parents raged while struggling to get by day-to-day. They coped with those jobs they could get, without the health insurance we needed, and with the many individuals and institutions refusing to afford them the basic decency and honor that lies at the heart of justice. . . .

. . . I started to appreciate that the very people who with all their hearts hope to change a system simultaneously live within its jurisdiction. . . .

I began to practice seeing in others, and all around me, the rebelliousness that otherwise might escape my notice. . . .

. . . In another experience, I'm twenty-one, a few months into the first year of law school. A brute fact is dawning on me for the first time: legal education has incredibly little to do with lawyering—the dynamic problem solving dwelling within what every lawyer does. Instead, the focus of law school is law or, more particularly, a stylized parsing of edited appellate judicial opinions. When legal educators do talk about lawyering, they talk typically in terms of "doing legal analysis," "reasoning legally," "thinking like a lawyer." And when they use these terms they refer to an elusive and perhaps even indescribable way of thinking, apparently different from and superior to how humans otherwise think, certainly fundamentally different from and superior to how people who hail from places like East L.A. think.

. . . I had expected law school to introduce me to and provide the means for me to advance toward a deep understanding of what lawyers do, of what lawyers do when they do it well, and of what lawyers do to improve over the course of a career. . . .

While studying law principally through edited appellate judicial opinions seemed like an extremely limited way of studying lawyering, talking about how lawyers think as something discontinuous from how humans otherwise think was perplexing. Initially I found the incomplete explanation of and enigmatic aura surrounding "thinking like a lawyer" outrageous, pompous, and silly. Who regards themselves that way? . . .

. . . [But to] regard thinking like a lawyer as special, ineffable, even unique, made a certain symmetrical sense. An entirely separate way of thinking would account for what we could not initially fathom and what we might someday master as insiders.

That reconciliation proved powerfully seductive for many. I watched as some students embraced this notion. I realized many faculty members and practicing lawyers did too. The test seemed obvious: If you are willing to put to the side who and what you are, including how you think and feel, you can perhaps enter the ranks of those who can operate comfortably within and even command what otherwise cannot be fully described and yet informs so much of those very systems that together rule our lives. You too can become influential clergy.

The closer I looked, however, the more I doubted this story. More than anything else, the cultivated foreignness of the legal culture seemed to reflect certain historical arcs, institutional efficiencies, and profession-protecting aims. . . .

What bothered me most, however, was that the exaggerated mysteriousness of the legal culture tended to obscure the connections between professional law practice and everyday problem solving. . . . I believed we should begin by understanding how we all solve problems and then understand professional lawyering as a variation on shared cognitive and cultural mechanics.

In any event, beginning to see the relationship between legal and everyday problem solving made me examine afresh my interpretation of the approach to law practice I already had found dismaying among the first wave of activist lawyers to hit East L.A. In my limited experience, these lawyers too rarely worked with us—with individual clients, with families, with extended networks of diverse people, organizations, coalitions, and communities. They often appeared unable or unwilling to imagine how our knowledge of the problems we faced and the strategies we already employed might mesh well, enhance, or even potentially revolutionize what they did as professionals. I concluded that these activists, having explored a range of explicit options, consciously chose to practice the way they did.

I likely had figured wrong, however. . . . Even the best activist lawyer would seem to have been immersed in training that typically treated how lawyers think as different than—and superior to—how everyone else thinks. Such training made robust teamwork appear unrelated and perhaps antithetic to productive practice. . . .

Instead, the habits of mind and heart inculcated by law schools cast grave doubt on the very idea of systematic collaboration. . . . And legal education made deeply inconceivable (or at least absurdly utopian) the idea of regularly joining forces as equals with others, especially with those who live in places like East L.A. No matter how well-intentioned, the first wave of activist lawyers I had observed would have had to overcome legal education—on top of and mixed in with every other operable stereotype—if they were to team up as equals with us and with others like us.

I found myself at twenty-one beginning what would be a lifetime exercise—an exercise that worked from different directions toward the same aim. I tried to make the habitual unfamiliar again: to see what I could not typically see in our everyday problem solving by excavating and making explicit what we've made so routine that we no longer remain mindful of what we're doing. At the same time, I tried to decode the law: to identify in what felt foreign about professional legal culture all that seemed rooted in ordinary life. . . .

This new exercise was not an attempt to prove that professional lawyering was a fiction or that everyday people I knew in places like East L.A. were superhuman. I did not believe either was true then, and I do not believe either is true today. I simply had not found persuasive the standard account of how lawyers think in ways disconnected from how everyone else

thinks. And I needed to develop my own view of expertise, one that sorted through both my own experiences and other available evidence of how humans think and behave. To do so, I wanted to see as far as I could through the sumptuous trappings and cultivated awe that make the work of lawyers feel nearly beyond description to large numbers of law school teachers, students, and graduates. And I wanted to see as far as I could through the plainclothes wrap and nurtured dullness that make the problem solving ordinary people pursue appear to many (including most scholars) utterly unworthy of sustained study.

Searching for continuities helped me begin to appreciate—and strive to explicitly describe—both what we all do in solving problems and what lawyers (and other professionals) do in helping others solve problems. . . .

In the final experience, I'm now twenty-four. After taking time off, I chose to return to my third year.

. . . I understood [now] more explicitly than when I began law school that what lawyers do well is an extension of, and should be connected to, what everyone does when trying to cope and thrive within overlapping systems they at once accept and challenge. . . . I pledged to see each case and every discussion as an opportunity to examine what lawyers did with others in addressing particular problems within systems that could indeed declare truths and yet not entirely control perceptions, plans, and trajectories.

. . . In trying to see law school through lawyering eyes, at least now and then I understood a bit differently than before what I already had experienced in my first two years. I knew legal education mainly encouraged lawyers to believe they did not need to know much at all about the client communities and larger systems with which they dealt. But in my third year, I sensed law school training instilled in future lawyers the belief that what lawyers do does not typically require understanding how a wide variety of others frame problems, how to design and implement strategies, or how to monitor and evaluate feedback. How could such training promote respect for what others know, for making the most of limited resources, or for enabling collective growth about solving problems more effectively? . . .

. . . [Eventually I] could detect, I think, a partially articulated idea of how lawyers might work as equals with people historically regarded as inferior. Certainly, there was a shared sense that something much different from what dominated our training and our experiences could express how we just might team up. In circulation was a powerfully attractive and evocative image: lawyers within networks of collaborating problem solvers, learning from one another, taking on "all-powerful" systems, sorting through and naming what together they found themselves doing. . . .

Rebellious Vision Briefly Sketched

In several years time, the expanse between my performance and my aspirations had shrunk some. And, with the help of many, I already had begun to see two significant ways of living—the reigning vision and the rebellious vision. Within each way of living, I saw a corresponding idea of problem solving. And as one instance and one part of each respective way of problem solving, I pictured a corresponding vision of progressive law practice.

Consider only some questions to which regnant and rebellious visions offer opposing answers: Who qualifies as an expert? What counts as valuable knowledge? With whom do experts collaborate in framing problems and vetting strategies? Monitoring and evaluating interventions? In what ways do problem-solving and living practices define one another? On close inspection, these two ways of living and problem solving reveal conflicting empirical assumptions about human behavior and contrasting normative aspirations about future communal trajectories. Perhaps miniature sketches will stir up the contrasts that mold these two visions and our experiences.

Experts rule in the reigning vision. They behave—and others come to rely upon them—as if they can see panoramically. In framing problems and choices, identifying and implementing worthy strategies, and deciding how much and whose feedback qualifies as necessary for effective monitoring and evaluation, these experts collaborate principally and often exclusively with one another. They issue mandates. Through diverse intermediaries, subordinates typically comply in order to be regarded as doing their jobs as workers and as citizens.

The reigning vision pervades most systems in which we work and live—across public, private, and civic realms. Through these systems, we learn and teach which people should be regarded as experts and which people should be regarded as worthy collaborators. Who gets classified as an expert and as a worthy collaborator can vary from context to context. But, across contexts, in the reigning approach we typically pick ahead of time those worth listening to and learning from. And in most systems, we pick elites.

It's not just elites selecting and defending the selection of elites. The reigning vision inclines us all to think and feel we should pick elites to collaborate with one another and to govern our lives. . . .

In mounting a challenge to the reigning vision, the rebellious rival unites key fundamentals in pursuit of radical democracy, where equal citizenship is a concrete everyday reality and not just a vague promise. In the rebellious vision, everyone collaborates in problem solving, seeking out and sharing knowledge about existing problems, available resources, and useful strategies. Varied problem solvers connect those who face problems

with those in public, private, and civic realms who help address them, building networks of valuable know-how among diverse problem solvers and helping shape and meet common goals.

Whenever problems remain unaddressed even after making such connections, problem solvers attempt to fill voids by scavenging around for resources, leveraging what is available with what may never have been tried, and assembling, as needed, one-time trouble-shooting squads or more permanent full-fledged partnerships. Committed routinely to monitoring and evaluating strategies, rebellious practitioners aim always to enhance problem-solving capacity. Problem solving rebelliously pursued melds street savvy, technical sophistication, and collective ingenuity into a compelling practical force.

Working in this way aims to produce, and depends upon, networks of co-eminent institutions and individuals collaborating with one another. Such collaborators consistently engage and learn from one another, neither bottom-up nor top-down, but every which way at once. . . .

This way of problem solving aims to support and reinforce—and, now and then, take the lead in demonstrating—how we might live together in a fully robust democracy. That goal cannot be achieved easily, much less automatically. Ideology does not work in this way. But rebellious variations of problem solving (lawyering, prominent among them) and radical democracy parallel and enrich one another. Trying collectively to secure cooperation in the midst of unavoidable complexity, difference, and vulnerability—a synonym for rebellious problem solving—takes as its point of departure and declares as its goal engaging equals in understanding and enhancing life.

Some Thoughts You Almost Certainly Have Anticipated

In thinking and speaking about transforming the world, Latinas and Latinos too often focus on the need to change people other than ourselves and practices other than our own. In this sense, as in others, we are like everyone else. "If we could only get rid of them." "If we could only alter their ways of doing things." "If we could only," we'd be on our way to better days. . . .

But it's a decisive mistake to think we can change systems without changing ourselves. We're implicated in everything we may aim to alter. . . . And, even without knowing the word hegemony, many in kitchens and factories and fields have pointed out our collective acquiescence in, and defense of, systems we otherwise claim to regard as deeply antihuman.

But we're all better at acknowledging our collusion than embracing the implications of this admission. . . . Our stock of stories and arguments blame "them" and immunize "us" more than they do anything else. We

emotionally distance ourselves from the involvement we formally acknowledge.

It's not that we're incapable of reflection. We know how to critique. We may even call into question our own decisions. The trouble is, we too often critique and then do nothing more. Like witnesses to the Holocaust, like the children of the witnesses, we seem unable or at least unwilling to face in a sustained way what we might have done differently. Familiar critiques serve as just another available rationalization of our own collusion. Through them, we anesthetize ourselves—and perhaps wish to immunize ourselves. . . .

. . . What we face is the need for a concerted effort to work with one another to learn how better to avoid reinforcing what we claim to want to transform. By vowing to meet this challenge, we would call ourselves to account in the way the best among us already do. And, in coming clean about our own mix of obedience and rebellion, we just might enable ourselves to be more fully human.

Effectively changing ourselves as part of changing systems turns out to be as gruelingly difficult as it is joyously rewarding. We take our stands, like everyone else, from within the very blend of forces that makes opposition uncertain and perilous. Deep biases pervade systems of every sort. Think only of how class, gender, and sexuality historically have altered interactions between individuals, groups, and neighborhoods. . . . Race and racism remain central. Some will regard me as unable to let go of the past. But I am talking about right now. The truth today about race and racism is both less sweet and more complicated than "colorblind" advocates acknowledge.

I profoundly appreciate the great contrast between how race and racism work today and how race and racism worked in the mid-1950s. When I was eight, people all over L.A. regarded as justified the subordination of those of us who lived in places like East L.A., Watts, Pacoima, San Pedro, Gardena. When I was in my early twenties, a surprising number had absorbed the anger and passion and justice of the modern Civil Rights Movement, had downsized considerably (at least in mixed company) their racist name-calling, and considered remedying institutional discrimination against various targeted and neglected groups. Today, in 2009, the sophisticated stock account proclaims that race does not much matter and probably should not matter at all. Racism, in this popular portrayal, has diminished greatly and perhaps even vanished in everyday life, except of course for vulgar holdouts whose numbers are typically trivial and whose presence should not trouble us much.

If, like me, you find today's sophisticated stock account inconsistent with experience, you should know that modern science sides with us. A wide range of scholars have gathered evidence that reveals potent bias

towards people of color and other outgroups. . . . Today, bias and discrimination and subordination sculpt the very same world in which so many insist "we're over all that." . . .

Neither my own work, nor the experiences of others, nor the very best ideas offered by talented scholars amount to a proven "de-biasing" game plan. But not knowing exactly what to do about our current condition hardly argues for silence or denial or both. We can and should talk about race and racism—especially when others would have us regard them both as irrelevant. And we should consciously probe for ways in which we can not only formally condemn racism's presence but clean up its pernicious consequences.

Already, though, we can see how the pervasiveness of human bias—perhaps particularly racism—might explain our limited inclination toward the collaboration presupposed by and sought through the rebellious vision. How can we find compelling a vision of problem solving that insists we must team up with others we believe to be less than equal? . . . We would be sacrificing expertise, and our own collective health, to quixotic aims.

Roughly at this point in the debate about collaboration, those of us who espouse the rebellious vision often get turned into cartoon figures. Others accuse us of wanting to substitute street wisdom for elite knowledge—as if turning the hierarchy upside down is what we are really about. . . .

. . . To acknowledge that anyone might teach you, might even turn your ideas inside out, frightens those whose rule—whose identity—centers around supposedly knowing lots about what others supposedly know far less.

In the rebellious vision, even the best among us, especially the best among us, should want to learn from anyone. . . . If someone proves us wrong, if anyone proves us wrong, we should shout, "Hallelujah!" If we cannot be wrong, we cannot learn. And if we cannot learn, we have renounced a central part of what it should mean to be human. . . .

None of us can plausibly speak of "changing the system" as if systems are somehow out there, unrelated to us and what we know and what we do. None of us should desire to be so disentangled, so above it all, so panoramically positioned.

Some people mock the label "rebellious." They insist the last thing we need in problem solving, or in living, is the experimentation of those who have yet to outgrow their dreams. I dissent. In fact, to borrow from my wonderful friend Tom Elke, I understand working to make dreams come true "as a job fit for grown-ups." If young folks want to join us, great. But do not expect me to believe that adulthood requires abandoning or even limiting our imagination. I do not agree. In fact, I will rebel. And I hope you will with me. Time and again.

López reflects on the mutually reinforcing connections between systems and selves from the perspective of a "rebellious vision" that looks at law critically, and from the bottom up. He not only illustrates how scholars and advocates contribute to the development of advocacy Approaches but also how systemic injustice connects individuals to systems—how systems impose macro scripts that then govern life at the micro, or individual, level—both in professional and in personal situations. This excerpt thus emphasizes another recurrent theme of this book: the top-down connection of micro and macro injustice and, hence, its importance to bottom-up struggles for equal justice.

NOTES AND QUESTIONS

1. *Is Realism Transformative?* As detailed above, the "Brandeis brief" was first used in the *Muller* case, with over 100 pages of interdisciplinary information that supported the Supreme Court's eventual ruling to uphold Oregon law restricting a woman's workday in a factory or laundry to 10 hours. Relying on a perceived difference between the sexes, the Court found it essential "to preserve the strength and vigor of the race" by protecting women from long workdays that could endanger their motherhood. 208 U.S. 412 (1908). This perceived identity difference "allowed" the Court to distinguish precedent, just three years before, in *Lochner v. New York*, 198 U.S. 45 (1905), striking down state law limiting the workday and workweek of bakery employees without regard to gender. Earlier, in 1872, the Supreme Court had let stand a state's refusal to issue a married woman a license to practice law. See *Bradwell v. State*, 83 U.S. 130 (1873), with a concurring Justice writing that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." At the time of the Oregon legislation and the Court's decision, all the legislative and judicial actors were male. Does knowing that fact affect your view of those decisions? What/who was "the bottom" in that time and context? Did the outcomes improve their lives? Is that context of long workdays in potentially hazardous workplaces a relic of the past? Which group(s) experience them today, and why? Can legal reform ameliorate the problem as it seemingly did in Oregon for one identity group?

2. *Elites Respond to the Schools and Approaches*. As noted above, in September 2020, President Trump ordered the Director of the Office of Management and Budget to issue a memo defining cross-cultural sensitivity and skills training based on critical race theory as "anti-American propaganda." The memo directed federal agencies and bureaus to identify any trainings that use terms like "white privilege" or "critical race theory" so that contracts can be severed with those training providers.[18] Under that order, for

[18] See Russell Vought, Memorandum for the Heads of Executive Branch Departments and Agencies (Sept. 4, 2020) (stating that critical theory-inspired trainings "not only run counter to the fundamental beliefs for which our Nation has stood since its inception, but they also engender

example, this book could never be used among lawyers and others in federal agencies. In addition to the law deans' response noted above, Laura E. Gómez, director of UCLA's Critical Race Studies Program, replied to these top-down attacks, noting that: "Far from being anti-American, as Trump's administration alleges, critical race theory aspires to the ideal of equality represented in our post-Civil War Constitution, an ideal we are far from achieving even 150 years later."[19] Any thoughts or reactions?

3. *Reflection Exercise*. Reflect on your education thus far. Does your experience mirror that of López or differ? In your view, what might or should be better?

1.5 DECONSTRUCTION AND DUAL CONSCIOUSNESS EMPOWER SUBORDINATED GROUPS

The collective, transgenerational process that produced the Schools and Approaches remains vibrant despite pushback from above. Critical scholars, activists, and advocates continue to expand and adapt their work to promote equal justice. They continue drawing and innovating from these wells of critical knowledge precisely because they represent the cumulative critical lessons of group experience with collaboration and reflection as part of long-term struggle. Deepening these points and themes, critical race scholar Susan Serrano applies two key concepts/practices: deconstruction and dual consciousness. Deconstruction is the first step toward a critical understanding of subordination, and dual consciousness allows advocates to stay realistic about law's perils and limits. In turn, deconstruction and dual consciousness jointly provide the platform for critical analysis and knowledge, as Serrano shows so clearly. Using these analytical tools, Serrano documents how Puerto Ricans' struggles in Hawai'i a century or more ago confirm three corresponding bottom lines for today: (1) how and why critical and self-critical reflections from the bottom yield insights that lead to collective action; (2) how and why collaboration that is multidisciplinary, multicultural, and accountable to the bottom sparks and sustains organized long-term struggles; and (3) how and why systemic advocates draw on the Schools and Approaches to guide their advocacy. As the following chapters elaborate, these and similar insights are key parts of the critical "toolkit" for systemic advocacy.

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division and resentment within the Federal workforce" and demanding that executive branch offices "cease and desist from using taxpayer dollars to fund these divisive, un-American propaganda training sessions"), www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf.

[19] Laura E. Gómez, Trump's White House Says Critical Race Theory is Anti-American. Here's the Truth (Sept. 11, 2020), www.nbcnews.com/think/opinion/trump-s-white-house-says-critical-race-theory-anti-american-ncna1239825.

DUAL CONSCIOUSNESS ABOUT LAW AND JUSTICE: PUERTO RICANS' BATTLE FOR U.S. CITIZENSHIP IN HAWAIʻI

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Introduction

Only weeks after the passage of the Jones Act—which in 1917 collectively naturalized "citizens of Puerto Rico" as U.S. citizens—Manuel Olivieri Sánchez, a Puerto Rican residing in the Territory of Hawai'i, travelled to the Honolulu county clerk's office to register to vote in the upcoming Hawai'i elections. David Kalauokalani, the county clerk, refused to place Olivieri Sánchez's name on the great register of voters. . . . Across the territory, Puerto Ricans who attempted to register to vote were turned away.

Olivieri Sánchez fought back. He filed a writ of mandamus to compel the clerk to register him and other Puerto Rican residents. In the first and only case to rule upon the citizenship of Puerto Ricans in Hawai'i following the Jones Act, the lower court ruled that Olivieri Sánchez did not become a U.S. citizen upon the Act's passage. According to the court, Congress intended to make Puerto Ricans U.S. citizens only if they "remained inhabitants of Porto [sic] Rico, giving them thereby a citizenship anal[o]gous to State citizenship . . . which would be lost by removal from Porto Rico." Puerto Ricans in Hawai'i were declared a people "without a country."

Six months later, the Supreme Court of the Territory of Hawai'i reversed. In *Sanchez v. Kalauokalani*, the court held that Olivieri Sánchez became a U.S. citizen pursuant to the Jones Act even though he had moved to Hawai'i in 1901. According to the court, under the Jones Act, all "citizens of Porto Rico" (as defined by the 1900 Foraker Act) acquired U.S. citizenship. Nothing in the Act, it found, evinced Congress' intent "to exclude . . . citizens of Porto Rico, . . . who were at the date of the act of March 2, 1917, absent from Porto Rico." . . . Hawai'i's Puerto Ricans celebrated this hard-fought legal victory. As newly recognized U.S. citizens—and because of Olivieri Sánchez's advocacy and the community's solidarity—Puerto Ricans in Hawai'i attained the right to vote in the Territory and a measure of economic mobility.

At the same time, U.S. citizenship changed little about the legal and social climate for Puerto Rican laborers in Hawai'i. They were still cast as "vagrants" and "lawbreakers," rounded up and imprisoned based on actions of a few, forced to live in some of the worst plantation housing, and marginalized based on the fear that they—as U.S. citizens—would gain increased political power. Puerto Ricans therefore continued to protest laws that governed the territory, both on and off of the sugar plantations. They sent petitions to newspapers in Puerto Rico and to the federal and

local governments asserting that they were denied basic rights, treated inhumanely on the plantations, arrested and punished without cause, and left without recourse. . . .

Sanchez v. Kalauokalani—decided amidst harsh plantation practices and vagrancy laws deployed to subjugate Puerto Ricans and other workers of color—sheds light on Puerto Ricans' experiences with law and legal process in Hawai'i. Rather than rejecting the law as a tool only of the powerful, or blindly embracing the law as a silver bullet, I contend that Hawai'i's Puerto Ricans embraced what W.E.B. Du Bois termed a "double consciousness" about their experience with law and rights assertion. Puerto Ricans held both a deep criticism of the ways in which laws were used to benefit those in power as well as an aspirational and transformative vision of law as a vehicle to validate their place in the U.S. polity. They knew the value of rights under law—and fought for them—but at the same time were aware that legal recognition as U.S. citizens would not mean freedom from discriminatory treatment through policy and by the populace. This duality served as a source of resilience in the face of injustice.

As critical theorists recognize, the double consciousness of those at the bottom "accommodates both the idea of legal indeterminacy as well as the core belief in a liberating law that transcends indeterminacy." Indeed, outsiders have intimate knowledge of the legal system's injustice against subordinated others, and acknowledge that aspects of that subordination would continue even if they achieve "legal rights." But these outsiders also have "passionately invoked legal doctrine, legal ideals, and liberal theory in the struggle" against injustice and have succeeded in part because of the "passionate response that conventional legalism can at times elicit." For this reason, critical race theorists underscore the importance of rights assertion for oppressed peoples and communities of color as a vehicle to compel powerful actors and institutions to recognize disempowered people's dignity and humanity.

Drawing on realist and critical theory insights, and through archival research, this article explores how Puerto Ricans in Hawai'i, despite their small numbers and lack of political clout, asserted their claims to U.S. citizenship in the same courts and political climate that regularly contributed to their subjugation. They did so knowing that it would be difficult to achieve judicial recognition of new legal rights and that, even if so recognized, mere possession of those rights would not necessarily transform their treatment or status in society. By simultaneously being "aware of the historical abuse of law" while embracing "law as a tool of necessity," they made "legal consciousness their own in order to attack injustice." Indeed, although the sugar oligarchy controlled the legal system, Puerto Ricans perceived the distinct value of rights and fought for and attained U.S. citizenship in *Sanchez*. While recognizing that formal U.S.

citizenship would not automatically confer "first class" citizenship, they saw the need to push for the attendant rights of that citizenship as well as against cultural vilification and inferior treatment in their daily lives. . . .

Puerto Ricans In Hawai'i: A Brief Overview

When the first group of Puerto Ricans arrived in Hawai'i in 1900, Westerners controlled nearly all aspects of Hawai'i's economic and political life. In the mid-1800s, Europeans and Americans acquired vast tracts of land when Native Hawaiian communal land tenure was converted into a Western private property system. Native Hawaiian lands were divided, confiscated, sold away. Plantations diverted water from agrarian Hawaiian communities. Native Hawaiians were separated from the land, thereby severing cultural and spiritual connections.

Private land ownership and the Reciprocity Treaty of 1875—which lifted tariffs on Hawai'i-grown sugar exported to the United States—paved the way for massive sugar plantations and impending U.S. control. Following the illegal overthrow of the Hawaiian nation in 1893, American military and plantation owners lobbied hard for Hawai'i's annexation to the United States. With a military base at Pearl Harbor and sugar at stake, the United States annexed Hawai'i in 1898 and took control of the provisional government as well as all former Hawaiian government and royal lands.

Desperate for cheap labor to support large-scale sugar production, planters began importing "plodding Chinese coolie[s]" under low-wage contracts. To induce competition and racial divisions between workers, the sugar planters shipped in laborers from Japan and Portugal, and later, from Korea, Puerto Rico, the Philippines, and even the U.S. South. Important to this enterprise was the Westerners' belief in their racial superiority and "the notion that the white race could not perform labor under the difficult conditions of tropical and subtropical plantations." Plantation owners used physical force and tight economic control to dominate these workers of color. The stage was set for what would become a highly racially stratified plantation system throughout the 1900s.

At the same time, debates swirled over the United States' new "imperial" role and how to handle the "racially inferior people inhabiting the conquered areas." Decision-makers warned against bestowing constitutional guarantees upon the "ignorant" and "half-civilized" peoples of Puerto Rico and the Philippines. Even those who supported "an honorable and fruitful association" with Puerto Rico "accept[ed] the proposition that the United States could not and would not 'incorporate the alien races, [or the] civilized, semi-civilized, barbarous, and savage peoples of [the] islands into [the U.S.] body politic.' " In the infamous *Insular Cases*, the U.S. Supreme Court worried that Puerto Rico's "racially different others" threatened the very heart of white Anglo-Saxon dominance: Justice

Brown's opinion in *Downes v. Bidwell* warned that the offspring of the colonies' inhabitants, "whether savages or civilized," would be "entitled to all the rights, privileges and immunities of citizens."

Race was also key in legitimizing the Hawai'i sugar oligarchy's confiscation of land and exploitation of laborers of color from around the globe. While the sugar planters "used race to legitimize conquest, denigrating, in racial terms, those colonized," they also sought to civilize those colonial people "through the acquisition of [W]estern values and work discipline." At that time, cheap labor was in desperate demand: Hawai'i's annexation to the United States halted the importation of Chinese and alien contract laborers, and Japanese were considered overly "demanding." The planters thus found a solution in "Porto Ricans and . . . Negroes from the Southern States." With false promises of high wages, plantation owners recruited Puerto Ricans to work as cheap labor and strikebreakers. About 5,000 Puerto Ricans arrived in Hawai'i between 1900 and 1901.

The powerful white plantation oligarchy easily exploited Puerto Rican laborers because of their ambiguous citizenship status. The Treaty of Paris between the United States and Spain, which ended the Spanish-American War in 1898, did not confer citizenship on the "native inhabitants" of Puerto Rico, and the 1900 Foraker Act establishing a civil government for Puerto Rico described them as "citizens of Porto Rico"—not citizens of the United States. In 1904, the United States Supreme Court ruled that Puerto Ricans were not "alien immigrants" and could not be barred from entering the United States, but they were not U.S. citizens, either. . . .

Hawai'i's sugar planters . . . sought to ensure that Puerto Ricans did not have the same rights as U.S. citizens. In 1902, only two years after the first group arrived, sixty Puerto Rican laborers sent a petition to the *San Juan News* chronicling widespread mistreatment by sugar planters and police in the Territory of Hawai'i. The Hawai'i Republican Territorial Committee immediately asked the Territory Attorney General to determine whether Puerto Ricans were U.S. citizens entitled to vote. The Committee was alarmed that "if [Puerto Ricans] were allowed to vote it would . . . introduce[ ] a new element into the political situation of the Hawaiian Islands of a rather uncertain quality." The Attorney General, of course, determined that Puerto Ricans were not U.S. citizens and thus had no right to vote in Hawai'i Territory. Because citizenship was an "indispensable qualification for the suffrage in [Hawai'i] Territory," the Attorney General wrote, "[i]t follows that Porto Ricans cannot vote here without being first naturalized."

To justify its treatment of Puerto Ricans as unworthy of participating in the polity, Hawai'i's sugar oligarchy strategically characterized them as uncivilized and inferior. . . . U.S. decision-makers had already deployed some of these depictions to bolster the United States' conquest of Puerto

Rico, and U.S. agribusiness and Hawai'i's government spread these images to destabilize and dehumanize Puerto Ricans as a means of controlling and suppressing labor.

Puerto Ricans in Hawai'i were thus acutely aware from the start that Hawai'i's legal system reflected the interests and values of those most powerful. But, as discussed below, they invoked legal doctrine and the language of "rights" to pursue their justice claims to citizenship, and later their claims to the rights attendant to that citizenship—because those claims held transformative potential. The law, for them, could both sanction oppression and also provide openings to liberation.

"Double Consciousness" About Law and Legal Process

The awareness of this tension between the law's ability to oppress and liberate developed partially as critical race theory's response to critical legal studies. Critical legal studies scholars in the 1970s and 1980s deconstructed formalist methods of legal analysis and understandings of law as inherently neutral and objective. Taking their cue from the legal realist movement as well as poststructuralism and postmodernism, critical legal scholars demonstrated that the law is indeterminate, contradictory and politically charged; and that legal decision-making is deeply influenced by judges' ideological views, history, and political conditions.

. . . [C]ritical legal scholars exposed how the law maintains hierarchies, particularly those regarding class. They contended that legal language tends to mask politics and reflect the interests of those in power, and that the law's images and technical language operate to convince people that legal arrangements are natural and inevitable.

Critical legal scholars also maintained that the rhetoric of liberalism and the seductiveness of "rights" deceives oppressed groups, resulting in a "false consciousness" about the fairness of the legal system. According to Marxist thought, members of subordinate classes suffer from false consciousness—they are unable to see the ways in which surrounding social relations of production conceal the realities of exploitation and domination embodied in those social relations. In the legal setting, critical legal studies scholars employed the concept of false consciousness to mean that liberalism's claims of equality and fairness have duped subordinated groups into blindly accepting an oppressive legal system.

Thus, many critical legal scholars "trashed" rights-based approaches to equality. They argued that rights are malleable, offer artificial hope, and alienate people from each other. As a result, critical legal scholars claimed that individuals and groups "should abandon a rights-centered approach to social justice, replacing it with more informal, often undefined, mechanisms for the attainment of justice."

Despite its pathbreaking insights, critical legal studies was challenged as elitist, overwhelmingly white, and disconnected from the concrete struggles of ordinary communities. It also failed to fully resonate with marginalized groups who were acutely aware of the law's ability to subordinate, but who also refused to wholly abandon the legal system because of its potential to uplift and liberate in certain contexts.

Critical race theorists in the 1980s embraced many of the methodologies and insights of critical legal studies. . . . But for critical race theorists, critical legal studies lacked an understanding of the role of race and racism in both the U.S. legal system and in society itself. . . .

. . . [C]ritical race theorists exposed the "legal manifestations of white supremacy and the perpetuation of the subordination of people of color." . . . Critical race theorists therefore offered scholarship and discourse that "looks to the bottom"—to the experiences of the most oppressed—to contextualize and give meaning to their theory.

Drawing from complex litigation experiences, critical race theorists also embraced W.E.B. Du Bois' concept of "double consciousness," which describes the way in which African Americans held two perspectives at once—the majority perspective (which demonized and despised them) as well as their own. . . .

. . . For critical race theorists, this duality laid a foundation for understanding oppressed groups' limited but compelling legal and political challenges to existing social arrangements. . . .

Critical race theorists therefore maintain that oppressed groups can have a profound cynicism about law and legal process while acknowledging the historical and social role that rights have played in both liberating (even if imperfectly) and elevating the psyche of subordinated groups. Rather than a mere "false consciousness," critical race scholars contend that marginalized groups possess a "critical consciousness": the subordinated can both "understand subordination and derive means of liberation from it." . . .

For these reasons, critical race theorists underscore the importance of rights assertion for oppressed peoples and communities of color. . . . Critical race theorists thus viewed critical legal studies' "rights trashing" as divorced from communities' complex experiences with law and legal process.

. . . This double consciousness—the simultaneous acknowledgment of the oppressive effect of differential power in the enforcement of law, and the value in rights discourse and legal claims even if they may fail—is, therefore, a source of strength.

As described below, Hawai'i's Puerto Ricans also possessed a critical consciousness: they both comprehended subordination and derived

methods of liberation from it. They possessed a deep distrust of law and legal process, stemming from their lived experience on Hawai'i's sugar plantations. At the same time, they saw the important role that the fight for U.S. citizenship—and the rights attendant to that citizenship—played to compel powerful actors and institutions to recognize their humanity and dignity.

Puerto Ricans' Dual Consciousness

Hawai'i's Puerto Ricans were uniquely situated among the racial groups on Hawai'i's sugar plantations. While they experienced oppression in common with other racial communities, they also faced particular hardships because they inhabited an undefined space between citizen and alien. From this vantage point, they grappled with the subordinating effects of law, but they also embraced the American promises of "rights" and "justice." And, as discussed below, the *Sanchez* case provided an opening for Puerto Ricans to compel enforcement of their rights and secure a measure of legal equality. Even after obtaining U.S. citizenship, however, Puerto Ricans knew that freedom from discriminatory treatment would not come easily.

Life on the Sugar Plantation: The Subordinating Effects of Law

Puerto Ricans in Hawai'i learned very early that the white plantation oligarchy wielded inordinate power over Hawai'i's legal, political and economic systems. Five former missionary families-turned-multinational corporations, known as "The Big Five," spun their "web of control" over nearly every facet of life, from banking and shipping to the courts and governmental decision-making. The Hawaii Sugar Planters' Association (HSPA), controlled by the Big Five, exerted considerable direct influence over the growth of agribusiness in the United States, helping to transform agriculture from small farms into multi-national corporate-controlled "big business."

To further Hawai'i's agribusiness trade, plantation owners had to exert control over recalcitrant workers. Working in conjunction with local authorities, sugar planters used vagrancy laws to maintain order on the plantations and to capture and selectively criminalize "deserters." When Puerto Ricans left their assigned plantations because of maltreatment or lack of services, the sugar planters and territorial authorities characterized Puerto Ricans as lazy "vagrants" and began rounding them up for that reason. . . .

Employing the language of rights, Puerto Ricans resisted in ways big and small. In 1904, Puerto Rican laborers sent a petition to the Territorial Governor calling for an investigation into their inhumane treatment on a plantation on the island of Kaua'i. They contended, among other things, that other racial groups' rights were valued, but that they were "unprotected" in their American "home."

. . . Puerto Ricans were acutely aware of the law's ability to subordinate. They were jailed at a disproportionate rate, offered "nothing more than . . . small and poor habitations," and had no representative to "fight[ ] for their rights." At the same time, they refused to wholly abandon the legal system because of its potential to uplift and liberate in certain contexts. For them, the American promise of rights under law was a "guaranty of [their] future." The *Sanchez v. Kalauokalani* case, discussed below, and its affirmation of U.S. citizenship for Hawai'i's Puerto Ricans reflects Puerto Ricans' understanding that even though the law could often be subordinating, it could at times provide small openings toward justice.

Sanchez v. Kalauokalani and U.S. Citizenship: A Transformative View of Law

Indeed, in 1917, Hawai'i's Puerto Ricans turned to the same courts that had historically denied their rights to full participation. In Hawai'i, as elsewhere, their turn to the courts can be explained in part by their desire for the full participatory selfhood that rights elicit; they, like others, while recognizing the sharp limits of the law, embraced a transformative vision of law as a vehicle to validate their place in the U.S. polity. Their fight for U.S. citizenship in *Sanchez v. Kalauokalani* offered that transformative potential.

In April 1917, about one month after the enactment of the Jones Act, Manuel Olivieri Sánchez, a Puerto Rican former plantation laborer-turned-court reporter residing in the Territory of Hawai'i, attempted to register to vote in the local Hawai'i elections. The clerk of the city and county of Honolulu, David Kalauokalani, refused to register Olivieri Sánchez, "claiming that [Sánchez] was not and is not a citizen of the United States and therefore not entitled to register as a voter."

Olivieri Sánchez took the case to court. Represented by a small law office, he filed a petition for writ of mandamus to direct the clerk to place his name on the voting register. At the same time, he rallied other fellow Puerto Ricans to refuse the draft—to which they had recently become eligible as U.S. citizens—if they were not allowed to vote. . . .

In October 1917, the Supreme Court of the Territory of Hawai'i . . . unanimously held that Olivieri Sánchez became a U.S. citizen pursuant to the Jones Act even though he had moved to Hawai'i in 1901. . . .

Thus, while often questioning law's efficacy to remedy the "inhuman[e]" treatment on the plantations, Hawai'i's Puerto Ricans "passionately invoke[d] legal doctrine [and] legal ideals" in their quest for U.S. citizenship. Indeed, *Sanchez* represents their fight for formal recognition as members of the U.S. polity—their quest for a sense of definition, a marker of their "participatoriness." At the same time, as discussed below, they pursued their claims knowing that the plantation laws still controlled much of their daily lives and that mere possession of

formal U.S. citizenship would not automatically transform their treatment or status in society. They continued to protest laws that governed the territory for that reason.

Sanchez's Aftermath: The Law's Conflicting Capacity Simultaneously to Oppress and Open Paths Toward Liberation

As newly recognized U.S. citizens, Hawai'i's Puerto Ricans obtained the right to vote in Hawai'i elections, but because of their numbers, still held little political clout. They also experienced some economic benefit, such as eligibility for defense industry jobs (particularly at Pearl Harbor) and increased job opportunity and mobility. And for some, U.S. citizenship also contributed to a sense that, notwithstanding the challenges, Hawai'i would become their permanent home.

For many, however, the acquisition of U.S. citizenship changed little about their treatment. In many instances, Puerto Ricans were pitted against other racial groups on the plantations, were targeted by plantation and governmental authorities, and faced discrimination in broader Hawai'i society.

For this reason, as illustrated below, Puerto Ricans in Hawai'i possessed a critical consciousness—they understood oppression and "derive[d] means of liberation from it." In the face of ongoing derogatory treatment, even as U.S. citizens, "[t]heir consciousness . . . of the ultimate legitimacy of their fight" permitted them to hold "unpopular and ultimately transformative opinions with confidence, and to risk retribution from powerful opponents." Through grassroots and media advocacy, they called on authorities to remedy deprivations of their liberty and to extend basic human rights on the plantations, all while acknowledging that they would not easily escape unjust treatment or damaging characterizations as "lawbreakers" and "illiterates." . . .

Thus, rather than rejecting the law and rights assertion as futile, or blindly embracing the law as a cure-all, Hawai'i's Puerto Ricans, like Olivieri Sánchez, embraced a complex "double consciousness" about their experience with law and legal process. As shown by their acts of protest, Puerto Ricans were deeply critical of the ways in which laws were used to benefit the powerful. At the same time, they held an aspirational vision of law as a vehicle to validate their place in the U.S. polity, and fought for and attained U.S. citizenship in *Sanchez*.

They realized, however, that mere legal recognition as U.S. citizens would not mean true equality on the plantation and in society. But they had an "unalterable conviction that something must be done, that action must be taken" within the law and beyond; that they needed to take the fight simultaneously to judges, policymakers, bureaucrats and the general populace. Indeed, they continued to fight for both the rights attendant to citizenship and against continued cultural oppression and unequal

treatment, all while acknowledging the law's dual power to oppress and open small paths toward liberation. As critical race theorists recognize, their double consciousness embraced the concept of legal indeterminacy alongside "the core belief in a liberating law that transcends indeterminacy." . . .

Serrano shows why and how systemic advocacy is stronger when advocates engage in the core practices of (1) rooting advocacy in knowledge from the bottom, including history, (2) working in collaboration across disciplinary and identity-group divisions, and (3) drawing on the critical Schools and Approaches to develop and deploy dual consciousness. These three points depend on a critical and self-critical awareness that simultaneously recognizes the potential of law for justice, as well as its systemic complicity in persistent injustice. These points thus depend also on critical histories of "knowledge" (or epistemology) itself, as the concluding section next illustrates.

1.6 SYSTEMIC INJUSTICE IS EPISTEMIC INJUSTICE

Fundamentally, the Schools and Approaches represent intergenerational collective efforts in bottom-up knowledge production to counter the imposition of power from above through and since settler colonialism. For five centuries or more, this top-down process entailed not only physical, material, actual conquest but also cultural, intellectual, and symbolic domination. Experience from below was trivialized or suppressed to privilege interests and perspectives from above—an incremental, long-term process that suppresses native knowledge and enforces European preferences. This material and epistemic process attributed an intrinsic inferiority to people, groups, nations, and cultures targeted for subordination, and helps explain the importance of the Schools and Approaches as a bottom-up response to that violence and its legacies.

To elaborate, indigenous peoples scholar Rebecca Tsosie outlines the relationship between Western and indigenous conceptions and uses of "knowledge" to illustrate how they affect justice. She argues that Western conceptions of "science" are used to displace native understandings of reality in material and symbolic terms. This displacement produces an epistemic kind of injustice that subordinates the viewpoints of those already at the bottom *as part of* their subordination. By looking to the bottom, systemic advocacy flips this framework locally and globally.

INDIGENOUS PEOPLES AND EPISTEMIC INJUSTICE: SCIENCE, ETHICS, AND HUMAN RIGHTS

Rebecca Tsosie

87 Wash. L. Rev. 1133 (2012)

. . . Native Nations and The Jurisprudence Of "Discovery": Indigenous Peoples and Nineteenth Century Science

. . . *The Differences Between Western and Indigenous Thought*

. . . [C]onflicts between Western scientists and indigenous peoples typically arise because indigenous peoples are treated as the "objects" of Western scientific discovery rather than as equal participants in the creation of knowledge or public policy (as a shared endeavor). This is not the fault of science or scientists. It is largely the fault of a public policy discourse that uses terms such as "knowledge" and "benefit" as though they are neutral and fully capable of intercultural exchange. In fact, the terms are often used as political devices to advance or suppress particular interests and values.

The Impact of Nineteenth Century Science Policy upon Indigenous Peoples

. . . [T]he genesis of American science as a public policy tool in the nineteenth century . . . had the most enduring impact on the rights of indigenous peoples in the United States. . . .

The nineteenth century was America's enlightenment era, and the scientific quest for "new knowledge and understanding" was pivotal to the formation of a new nation. . . . Discovery has remained a dominant theme of scientific inquiry and one that is protected by the United States Constitution, which is the foundation for property rights in technology and innovation. Thus, for indigenous peoples, "discovery" is a theme that has operated continuously within American policy to impair their rights to land and cultural heritage. . . .

The European Doctrine of Discovery only pertained to "civilized nations" that could acquire "title" to newly discovered lands merely by virtue of being the first to "discover" the lands and establish a minimal settlement upon them.

The Doctrine of Discovery may have originated in the international law authorizing European colonialism, but it was ultimately incorporated into domestic law. In the 1823 case *Johnson v. M'Intosh*, Chief Justice John Marshall held that the United States acquired the title by discovery as the successor to Great Britain, and that the Indian Nations had only a "title of occupancy," which could be extinguished by the United States through "purchase or by conquest." At the material level, the Lewis and Clark Expedition [starting in 1803] gave the United States the information it needed to extinguish Native land titles and promote westward expansion

by white settlers—the only group entitled to U.S. citizenship at the time. . . .

. . . Native American peoples inhabiting these lands were involuntarily incorporated into the United States not as citizens, but as "wards" of the federal government.

This "guardian/ward" relationship is a cornerstone of federal Indian law . . . [as] represented in the *Cherokee Cases*, which, like *Johnson v. M'Intosh*, are also authored by Chief Justice John Marshall. The *Cherokee Cases* stated that as the "guardian," the United States had the power to coerce Native peoples into accepting the "arts of civilization." . . . The United States carefully employed a combined policy of war and peace to coerce the tribes' submission as "dependents" of the United States. . . .

Contemporary Science Policy and the Legacy of the Past

. . . [T]he political status of Indians as "wards" and their exclusion from U.S. constitutional citizenship (though the 1924 Indian Citizenship Act naturalized Indians to citizenship by virtue of federal law) has complicated the notion of equal citizenship for Native peoples. . . .

Science and Ethics: The Problem of Epistemic Injustice

. . . Understanding Epistemic Injustice

As demonstrated above, many of the conflicts between indigenous peoples and scientists revolve around fundamental differences in their respective systems of thought, particularly as these concern the categories of experience that are relevant to understanding the natural world. These epistemological differences, in turn, heavily influence the formation of public policy and can operate to cause forms of "epistemic injustice" for the affected groups.

. . . [I]ndigenous peoples have been excluded from full participation in shaping domestic law and public policy. . . .

Testimonial Injustice

. . . [T]estimonial injustice commonly arises from a dysfunction in a testimonial practice that is related to identity. For example, listeners may evaluate some speakers as more credible due to the speaker's gender, age, class, income, accent, or appearance. Conversely, others will experience a "credibility deficit" due to the same factors.

Many of these practices exist at the level of informal social interaction, but others are formalized into our legal, social or political structures, which leads to "systemic testimonial injustice." . . .

Courts are unlikely to recognize tribal members as having the same credibility as an "expert witness," although certain tribal cultural

practitioners, including tribal historians and traditional healers, may have recognized cultural expertise in specific areas. . . .

In *Tee-Hit-Ton Indians v. United States*, the tribe brought a Fifth Amendment takings claim against the United States in connection with the government's decision to authorize timber harvesting from the tribe's traditional lands in Alaska. . . . The Tee-Hit-Ton Indians maintained that they were the rightful owners of these lands and thus had a property interest in the timber that sustained their takings claim. The Supreme Court disagreed, noting that the testimony offered by the tribal member selected to be the group's expert witness merely proved the tribe's "group" claim to the area in accordance with the tribe's "hunting and fishing stage of civilization." The Court saw this "primitive" form of land use as merely establishing the group's claim to "aboriginal title" on the same level as other Indians but not establishing a true "property interest" within the meaning of the U.S. Constitution. . . .

The Supreme Court's interpretation of the testimony provided by the tribal [expert] witness was based on a shared social experience of "property rights" informed by Western thought, and it had no resonance with the experience of the Native claimants. . . . Not surprisingly, the dominant society's interpretive norms routinely exclude indigenous categories of experience.

Hermeneutical Injustice

. . . [H]ermeneutical injustice is "the injustice of having some significant area of one's social experience obscured from collective understanding" because the group . . . cannot participate on an equal basis in creating a shared meaning for the social experience. . . .

Hermeneutical injustice is what occurs with many Native American claims to protect aspects of their cultural identity from harms that are not recognized standard categories of law. . . .

. . . The Native Village of Kivilina is losing its entire land base as a result of global climate change and sea level rise. Thus far, the Native Village of Kivilina has not prevailed in its attempt to sue several oil companies for the harm of public nuisance. This is because the courts have been unable to find any particular liability given the multiple interactions that are responsible for rising levels of greenhouse gas emissions. Indeed, no cause of action currently exists for the loss of an entire nation . . . [due to] a "natural" phenomenon like flooding, as opposed to military conquest.

[In this case and others,] the harms asserted include cultural and spiritual claims that do not fall within an available category of experience or thought within the Western legal system. However, the harms are felt by indigenous peoples. This is their experience, and it is shared among many different indigenous groups because they possess a different

understanding of the world. . . . In each case, Western science's limited framework is used to justify the exclusion of Native experience for purposes of establishing a legal cause of action.

Structural Forms of Epistemic Injustice Impair Equal Citizenship

Why should American society care about these structural deficiencies within its pluralistic democracy? [Because] the capacity to give knowledge is a fundamental capacity of human beings. When a society treats some groups as incapable of giving knowledge on an equal basis, it treats those groups as less than fully human, an intrinsic harm. Society also hinders the groups' further development by discounting their intellectual abilities, an epistemic harm. As illustrated by the Doctrine of Discovery and its incorporation into U.S. law, American legal and educational institutions have historically treated Western knowledge as a privileged form of knowledge, discounting the ability of indigenous peoples to generate knowledge or convey it in . . . public policy discourse. In the process, American society has prevented indigenous peoples from articulating their own social experience, including the harms they have experienced as a result of the dominant society's public policies. . . .

As Tsosie shows, systemic injustice often tracks specific social identities and includes epistemic injustice—the dismissal and suppression of knowledge from below to justify the violence of collectivized injustice from above. This epistemic subordination historically and presently declares bottoms incapable of knowing social realities or contributing to knowledge about them. Rejecting this dehumanizing hierarchy, systemic advocacy relies affirmatively yet critically on knowledge from the bottom to navigate the complexities of systemic injustice.

CHAPTER RECAP

This chapter introduced the Critical Challenge of using law for systemic justice, including how advocates use knowledge from the bottom to ground analysis and action. In addition to personal experience, the Schools and Approaches—and other disciplines, like history—offer relevant, actionable knowledge. This critical and self-critical advocacy depends on actionable insights from all these sources, including "deconstruction" and "dual consciousness"—a critical unpacking of complex problems that appreciates both the potential and the perils of trying to use law for justice.

CHAPTER 2

FRAMING THE DIMENSIONS AND DYNAMICS OF THE CRITICAL CHALLENGE

■ ■ ■

Table of Sections

OPENING THOUGHTS

All we say to America is, "Be true to what you said on paper."

—**Dr. Martin Luther King Jr.,** Memphis speech the day before he was assassinated

Equality between men and women cannot remain a paper right found only in the constitution.

—**Adrien Katherine Wing**, Critical Race Feminism and International Human Rights, 28 U. Miami Inter-Am. L. Rev. 337, 358 (1997)

You have to act as if it were possible to radically transform the world. And you have to do it all the time.

—**Angela Davis**

Dispossession is a name for . . . Europeans' expropriation of land, labor, and resources. Dispossession refers to the outcomes of the relationship between dislocation, destitution, and decimation; that is, removal from territory (death, reservations, boarding schools), appropriation of resources, and

subjugation to another (colonial or national) political entity. Not much conceptual work is required to see that these . . . terms refer back to one crucial signifier—violence.

—**Denise Ferreira da Silva**, An Outline of a Global Political Subject: Reading Evo Morales's Election as a (Post-) Colonial Event, 8 Seattle J. Soc. Just 25 (2009)

INTRODUCTION

Persistent social problems seem intractable—poverty, lack of healthcare, inadequate education, violence, tainted food and water, low incomes, harassment, mass incarceration—and the list goes on. Systemic injustice persists when rights, power, resources, and security are distributed unevenly among members of different social groups in systematic ways, ensuring that group-wide social problems rooted in these inequalities continue over long, indefinite periods of time. Systematic thus means by design. Over time, systemic outputs reproduce "social problems" and their identity-based group inequalities, becoming simply "business as usual." These unjust (but made to appear justified) outcomes gradually fade into the background, becoming so normalized that they almost are invisible "officially." Elites use systems to establish hegemonies, but recurrent unjust outcomes are never quite accepted by all groups without objection and resistance. Advocates and activists struggle together to combat systemic injustice, and the Schools and Approaches mentioned in Chapter 1 gather insights from this experience to inform future action.

The Schools and Approaches make clear that law plays a key role in both systemic injustice and struggles against it. After all, law is the system humans designed ostensibly to resolve social problems and to deliver equal justice, *for all*. Equal justice is the solemn promise the legal system makes to produce accountable and principled decision making through democracy and adjudication. Fulfilling this promise is a core source of law's practical utility and moral legitimacy. Advocates, and people in general, expect "Equal Justice under Law" because it is the promise literally etched onto the marble portico of the U.S. Supreme Court and written into other foundational documents. "Establish[ing] Justice" is second among the systemic purposes of law expressed explicitly in the Preamble of the U.S. Constitution:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

This purpose and promise are foundational to law not only in the United States but in other legal systems, including the system of international

law. But unequal justice remains a reality for entire social groups because the commitment to equal justice has been trumped by something else. That something else has been a volatile combination of four elements sketched immediately below and developed throughout the book: identities, groups, interests, and power:

1. By social *identities,* we refer to markers such as gender, race, ethnicity, sexual orientation, and others. Social identities are not natural or immutable but socially constructed to serve interests—usually to elevate those with certain markers and subordinate those who are "different." The traits or experiences associated with individuals who share an identity are not the same for all group members; identities thus are not "essentialist." Identities do not operate in isolation but are multiple and "intersectional" both at the individual and the social levels.

2. Social identities define membership in social *groups*. Social identities are given meaning, organized hierarchically, and used to classify individuals into social groups. For example, cis male and cis female are two of many gender identities; if you are determined by society to be cis male, you are put into the group cis "men." Similarly, identities are used to create social groups identified as women, black, white, old, young, and so on. In this process, "elite" groups are dominant and privileged, receiving identity-based advantages; "other" social groups are subordinated and disadvantaged. Among racialized and gendered elites, some have great wealth and power, while others may have fewer material resources; like bottoms, tops too are intersectional and not essentialist. In addition to identity-based social groups, advocates also work with varied kinds of groups, most notably organized collectives that are actors in social struggles. In systemic advocacy, important groups include many kinds of intentional communities, like congregations, community groups, unions and cooperatives, or any number of advocacy organizations, whether highly organized or relatively inchoate.

3. Because inequalities track broad identity-based social groups in consistent ways, groups have collective *interests*. Group interests may converge or diverge, and can include anything valued by the group, whether tangible or intangible. Some indicators reflecting various potential interests span income, wealth, infant mortality, and educational access, for example. Because these markers vary by social identity, bottoms generally have an interest in change and progress and tops, conversely, have an interest in preserving the status quo that privileges them. Both tops *and* bottoms organize groups to advance their personal and collective interests.

4. *Power* is, in simple terms, the ability to obtain desired outcomes. Power comes and is deployed in varied ways and forms that morph and adapt all the time. Groups aim to build and exercise collective power in all

its forms to achieve specific and general objectives, whether in the short or long term. Ruling elites and their allies use power to win discrete battles from day to day and generation to generation, to build their own power along the way, and to suppress the capacity for organized action by bottom groups. Subordinated groups and their advocates also aim to win discrete amelioration while building bottom-up power for transformative aims.

However, the interactive roles of identities, groups, interests, and power in law are routinely denied, ignored, or cabined because ruling elites aim to convince others that their wins were achieved fairly—in accord with fair rules established by a principled and accountable legal system, not through exercises of unjust privilege or raw power. To fashion and maintain this Critical Challenge, the legal system both establishes the "rules of the game" for democratic and adjudicative decision making *and* creates the justifications that disguise manipulations that favor elites. In this way, patterns of systemic injustice become entrenched, normalized, and inculcated.

As we survey throughout this book, today's entrenched castes result from centuries of top-down manipulation, using these four elements within and as law to produce, enforce, and obscure the Critical Challenge under inspection here. A caste system of group hierarchies "elevates and empowers members of a 'dominant caste' at the perpetual expense of a 'subordinate caste.' "[1] As Black journalist and Pulitzer Prize winner Isabel Wilkerson details the origins, interests, and evolution of U.S. caste:

> The creation of a caste system was a process of testing the bounds of human categories and not the result of a single edict. It was a decades-long sharpening of lines whenever the colonists had a decision to make. When Africans began converting to Christianity, they posed a challenge to religious-based hierarchy [until race superseded it to keep blacks on the bottom]. Their efforts to claim full participation in the colonies was in direct opposition to the European hunger for the cheapest, most pliant labor to extract the most wealth from the New World. . . .
>
> The colonists had been unable to enslave the native population on its own turf and believed themselves to have solved the labor problem with the Africans they imported. With little use for the [indigenous] inhabitants, the colonists began to exile them from their ancestral lands and from the emerging caste system.
>
> This left Africans firmly at the bottom [during and after slavery]. . . .

[1] Fatima Bhutto, Caste by Isabel Wilkerson Review—A Dark Study of Violence and Power, The Guardian (July 30, 2020), www.theguardian.com/books/2020/jul/30/caste-the-lies-that-divide-us-by-isabel-wilkerson-review.

> The dominant caste system [later] devised a labyrinth of laws to hold the newly freed people on the bottom rung ever more tightly, while a popular new pseudoscience called eugenics worked to justify the renewed debasement. People on the bottom rung could be beaten or killed with impunity for any breach of the caste system, like not stepping off the sidewalk fast enough [for a white person] or trying to vote. . . .
>
> Thus, each new immigrant—the ancestors of most current-day Americans—walked into a preexisting hierarchy, bipolar in construction, arising from slavery and pitting the extremes in human pigmentation at opposite ends. . . .
>
> To gain acceptance, each fresh infusion of immigrants had to enter into a silent, unspoken pact of separating and distancing themselves from the established lowest caste. Becoming white meant defining themselves as furthest from its opposite—black. They could establish their new status . . . by joining in on violence against [blacks] to prove themselves worthy of admittance to the dominant caste.[2]

England-based Indian journalist Fatima Bhutto adds:

> *Caste* is a dark history of the inexhaustible scope of human violence.
>
> . . . Caste is why Robert E Lee, the Confederate general who went to war against his own country for the right to enslave other humans can be honoured by 230 memorials across the land. It is why Alabama was the last state in the union to throw out its law banning interracial marriage, which it did in 2000, 36 years after the Civil Rights Act ended segregation. And it is why Lyndon B Johnson, who signed that act into law, was the last Democrat ever to win the presidency with the majority of the white electorate.[3]

As these excerpts indicate, in the United States (and other places or systems), castes are group hierarchies characterized by their deep rootedness in supremacist ideologies that grip both law and society—that permeate life both as culture and as force. Caste systems aim for complete, absolute, totalizing top-down domination and bottom-up obedience. This

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[2] Isabel Wilkerson, Caste: The Origin of Our Discontents ch. 4 (2020). Throughout this book we emphasize that bottom-up struggle rooted in bottom-up knowledge and leadership is the foundation of resistance to systems of caste, including U.S. and other colonial identity castes. For a critique of Wilkerson's framing of caste and her top-down approach to its dismantling see Charisse Burden-Stelly, Caste Does Not Explain Race, Bost. Rev. (Dec. 15, 2020), http://bostonreview.net/race/charisse-burden-stelly-caste-does-not-explain-race (contesting Wilkerson's view that perception and attitudes among elites sustain structural inequality and relying on Oliver Cromwell Cox, Caste, Class, and Race: A Study in Social Dynamics (1948), who documented how the U.S. racial order is rooted instead in political economy and, as top-down material exploitation, can be dismantled only from the bottom).

[3] Bhutto, Caste.

elite aspiration amounts to, as we see and explain further below, a hegemony—that is, an unquestioned and unquestionable status quo that (at least some of) the bottoms willingly and earnestly support, thus participating in the perpetuation of their own (and others') subordination, both personally and collectively.

But systemic injustice has never been accepted by majorities in groups most affected by it. Consequently, resistance and social struggle are hallmarks of modern societies. Just as systemic injustice and social problems are ongoing, so are resistance and struggle against it. Law inevitably plays a pivotal role in this ongoing contestation. Against this backdrop, what we call Critical Justice is gauged by lived social realities, not simply by the "glittering generalities"[4] of legal doctrine and procedure as words on paper. In accordance with basic principles of systemic analysis we review below in Part II, Critical Justice extends beyond the symbolic attainments of rights and encompasses materiality—equality judged by actual outcomes at both the micro (individualized) and macro (group-wide and systemic) levels of human relations.

In this chapter, we survey the Critical Challenge of using law for equal justice, faced today by countless advocates worldwide in all kinds of settings established historically by law. We use a commonly-known example of law understood as (much-delayed) justice: the 1954 and 1955 unanimous U.S. Supreme Court opinions in *Brown v. Board of Education,* which reversed decades of rulings declaring that "separate but equal" facilities in education and elsewhere satisfied the legal promise of equality for all. In known fact, the segregated facilities were manifestly not "equal" although they were brutally kept separate. Until 1954, generations of judges (and advocates) propagated, upheld, and enforced the fictions that this segregationist judicial doctrine obscured. Politicians—policymakers—did the same. Law, both as doctrine and as legislation, mandated widespread group-based inequalities tied to social identities and interests while proclaiming the opposite.

This status quo is known as formal equality because it is characterized by lofty formal declarations of equality with contrary social and economic facts on the ground. By committing itself to its twin ideals of accountable democracy and principled adjudication, law as a system presents itself formally as a tool for impartial justice in "public" (democracy) and "private" (adjudication) disputes. But, by making group inequalities seem normal, inevitable, and even deserved, law also is, in practice, a tool for legalizing collectivized injustice—systems of caste that trump the rule of law itself. Today's resulting status quo *is* the Critical Challenge for systemic advocates, both in the United States and elsewhere.

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[4] *Rice v. Cayetano*, 528 U.S. 495, 527 (2000) (J. Stevens dissent).

2.1 REFLECTIONS AND LESSONS ON THE CRITICAL CHALLENGE OF USING LAW FOR EQUAL JUSTICE—ADJUDICATION, LAWYERING, AND FORMAL EQUALITY

Most U.S. students are exposed to *Brown v. Board of Education*, the case declaring separate but ostensibly equal public schools inherently unequal and therefore unconstitutional because they stigmatize the group subordinated by the segregation. The NAACP Legal Defense and Educational Fund calls *Brown* "the most celebrated victory in its storied history."[5] It easily makes the list of what *USA Today* in 2015 called the 21 most famous Supreme Court decisions,[6] joining many "famous" cases we will consider in this text—some "infamous" such as *Dred Scott*, *Plessy,* and *Korematsu*, and others celebrated as victories against identity-based subordination, such as *Roe v. Wade* and *Obergefell v. Hodges*. As we see throughout history, the legacies of each remains contested.

But, back in the 1950s, *Brown* prompted the *Washington Post* to conflate the abstract "equality of opportunity" of this judicial outcome on paper with the lived facts on the ground for groups at the bottom by proclaiming: "Now, at last, the equality of opportunity which is a fundamental premise of the American society is to become a fact in regard to education—which is, after all, the key to opportunity."[7] Did that aspirational prediction come to pass? We begin with the Court's 1954 unanimous opinion.

BROWN V. BOARD OF EDUCATION

347 U.S. 483 (1954)

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race.

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5 www.naacpldf.org/case/brown-v-board-education.

6 www.usatoday.com/story/news/politics/2015/06/26/supreme-court-cases-history/29185891/.

7 Equal Education For All, Wash. Post (May 19, 1954), www.washingtonpost.com/news/post-nation/wp/2014/05/16/how-the-washington-post-covered-brown-v-board-of-education-in-1954/?noredirect=on&utm_term=.898f7dc7976a.

This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537 [1896]. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. . . . Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

. . . [Here] there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

. . . In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the

performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

. . . To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. . . .

Addressing segregation in Kansas schools, the Supreme Court ruling in *Brown* also encompassed similar cases in Delaware, South Carolina, and Virginia. Although the Kansas litigation had determined that teachers,

buildings, and other aspects of the separate Black schools were equal to those for whites, lower courts in the other three states ruled the Black schools in fact were inferior to the white schools. This background helps explain why the Court in *Brown* focused on racial separation—common to all the cases before the Court—rather than the equality of the schools in terms of teachers, infrastructure, funding, and curriculum. All nine Supreme Court justices acknowledge in the opinion the symbolic as well as material aspects of group-wide inequalities to conclude that either, alone, is insufficient: equal justice requires the combination of symbolic and material equality. The disjunction between the symbolic *and* the material that "separate but equal" upheld was set aside unequivocally. Yet, somehow, the new legal regime of *Brown*—formal equality—nonetheless replicated the disjunction between symbolic and material equality. How?

One reason, as we see next below, is sheer systemic complexity. Another is the power of top-down obstruction, which generates ever-more baroque complexities in conceptual and material ways. After centuries of de jure discrimination conferring privilege and advantage on white residents, legalized inequality was deeply embedded everywhere. Group-wide inequalities were entrenched nationally as well as locally. The legalized supremacy of the white identity groups was a matter of consistent systemic enforcement and fierce local politics. Deferring to systemic complexity and local flexibility, the Supreme Court a year after *Brown I* issued the following opinion (*Brown II*) concerning its implementation.

BROWN V. BOARD OF EDUCATION (II)

349 U.S. 294 (1955)

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

. . . The opinions of [May 17, 1954], declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. . . . There remains for consideration the manner in which relief is to be accorded. . . .

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting

and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. . . . To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. . . .

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. . . . [T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. . . .

To handle the complex task of dismantling white supremacy in both symbolic and material terms, the Supreme Court invoked the inherent equity powers of courts to fashion effective remedies as needed by local circumstances. But this complex task would also take time. It had taken much time to entrench and normalize race-based supremacy as being consistent with equal justice, and it would take time to disentangle supremacy from equality. It would take time, to use the Court's language, to manage the complexities needed for "elimination" of racist symbolic *and* material injustice in public education. In effect, *Brown* handed the solution back to the wrongdoers for its implementation; however well intentioned, the unanimous Court placed the fox back in the henhouse, where it stayed for the years to come.

Identities and groups—and their interests and power—have played a key role in this U.S. story of race and legalized injustice. To illustrate, constitutional law scholar Erwin Chemerinsky provides an account of *Brown's* aftermath, and how judicial "sabotage" helps perpetuate the Critical Challenge. The decades since *Brown* testify to the power of elites and kindred groups accustomed to controlling law and dominating society, as well as to the commitment of subordinated groups to personal struggles for collective equality.

THE SEGREGATION AND RESEGREGATION OF AMERICAN PUBLIC EDUCATION: THE COURTS' ROLE

Erwin Chemerinsky

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Schools in the South and throughout the country are resegregating. Why is this occurring, and why were desegregation efforts limited in their success? This Essay argues that the Supreme Court is largely to blame. In a series of decisions in the 1970s, the Court ensured separate and unequal schools by preventing interdistrict remedies, refusing to find that inequities in school funding are unconstitutional, and making it difficult to prove a constitutional violation in northern de facto segregated school systems. In a series of decisions in the 1990s, the Court ordered an end to effective desegregation orders. Lower federal courts have followed these rulings and, in many areas, have ended remedies despite the likelihood that resegregation will follow. As *Brown v. Board of Education* nears its fiftieth anniversary, American public schools are increasingly separate and unequal. The institution that provided the impetus for desegregation and offered so much hope—the courts—is responsible for this failure.

Introduction

A half century of efforts to end school desegregation have largely failed. Gary Orfield's powerful recent study, Schools More Separate: Consequences of a Decade of Resegregation, carefully documents that, during the 1990s, America's public schools have become substantially more segregated. . . .

. . . From 1964 to 1988, there was significant progress. . . . But since 1988, the percentage of African-American students attending majority white schools has declined. . . .

Quite significantly, Professor Orfield's study shows that the same pattern of resegregation is true for Latino students. The historic focus for desegregation efforts has been to integrate African-American and white students. The burgeoning Latino population requires that desegregation focus on this racial minority too. The percentage of Latino students attending schools where the majority of students are of minority races, or almost exclusively of minority races, increased steadily over the 1990s. Professor Orfield notes that "[Latinos] have been more segregated than blacks now for a number of years, not only by race and ethnicity but also by poverty."

The simple and tragic reality is that American schools are separate and unequal. As Professor Orfield documents, to a very large degree, education in the United States is racially segregated. By any measure, predominately minority schools are not equal in their resources or their quality. Wealthy suburban school districts are almost exclusively white; poor inner city schools are often exclusively comprised of African-American

and Hispanic students. The year 2004 will be the fiftieth anniversary of *Brown v. Board of Education*, and American schools will mark that occasion with increasing racial segregation and gross inequality.

There are many causes for the failure of school desegregation. None of the recent Presidents—neither Reagan, nor either Bush, nor even Clinton—have done anything to advance desegregation. None have used the powerful resources of the federal government, including the dependence of every school district on federal funds, to further desegregation. "Benign neglect" would be a charitable way of describing the attitude of recent Presidents to the problem of segregated and unequal education; the issue has been neglected, but there has been nothing benign about this neglect. A serious social problem that affects millions of children has simply been ignored.

Nor has the federal government, or for that matter have state or local governments, acted to solve the problem of housing segregation. In a country deeply committed to the ideal of the neighborhood school, residential segregation often produces school segregation. But decades have passed since the enactment of the last law to deal with housing discrimination, and efforts to enhance residential integration seem to have vanished.

There is not a simple explanation for the alarming trend toward resegregation. In this Essay, I argue that the courts must share the blame; courts could have done much more to bring about desegregation, and instead, the judiciary has created substantial obstacles to remedying the legacy of racial segregation in schools. . . .

Desegregation will not occur without judicial action; desegregation lacks sufficient national and local political support for elected officials to remedy the problem. Specifically, African Americans and Latinos lack adequate political power to achieve desegregation through the political process. This relative political powerlessness was true when *Brown* was decided and remains true today. The courts are indispensable to effective desegregation, and over the last thirty years the courts, especially the Supreme Court, have failed. . . .

. . . The judiciary's failure lies in its actions, not in inherent limits to its power. Had the Supreme Court decided key cases differently, the nature of public education today would be very different. Although there are many causes for segregated schools, the overarching explanation for the Court's rulings is simple: Justices appointed by Republican presidents have undermined desegregation. Four Justices appointed by President Richard Nixon are largely to blame for the decisions of the 1970s; the cases were 5–4 decisions, with those four Justices helping to make up the majority. Five Justices appointed by Presidents Ronald Reagan and George H.W. Bush are responsible for the decisions of the 1990s that have contributed

substantially to resegregation of schools. The resegregation of schools is largely a result of the Court's decisions, not of the inherent limits in the judicial process. . . .

The Decisions of the 1970s: The Supreme Court Contributes to the Resegregation of American Public Education

The 1970s were a particularly critical time in the battle to desegregate American schools. From *Plessy v. Ferguson* in 1896 until Brown in 1954, government-mandated segregation existed in every southern state and many northern states. . . . After *Brown*, southern states used every imaginable technique to obstruct desegregation. Some school systems attempted to close public schools rather than desegregate. Some school boards adopted so-called "freedom of choice" plans which allowed students to choose the school where they would enroll and resulted in continued segregation. In some places, school systems outright disobeyed desegregation orders. The phrase "massive resistance" appropriately describes what occurred during the decade after Brown.

. . . For a decade after *Brown*, the Court largely stayed out of the desegregation effort. It was not until 1964 that the Court lamented that "[t]here has been entirely too much deliberation and not enough speed" in achieving desegregation.

Too few scholars have focused their attention on whether the Court could have done more in the decade after *Brown* to hasten desegregation. The conventional wisdom seems to be that the resistance was so great and the techniques of obstruction so varied as to require years of conquering opposition to achieve desegregation. While this view is worthy of merit, it may be too generous to the Supreme Court. . . .

Had the Court dictated timetables, outlined remedies, and been more actively involved from 1954 to 1964, results might well have been different, at least in some places.

By the 1970s, as described above, the nation finally saw substantial progress towards desegregation. But . . . crucial problems emerged [in response to that progress]: white flight to suburbs threatened school integration efforts . . . and pervasive inequalities existed in funding, especially between city and suburban schools. The Court's handling of these issues was critical in achieving desegregation. In each instance, the Court, with four Nixon appointees in the majority, ruled against the civil rights plaintiffs and dramatically limited the effectiveness of efforts at desegregation and equal educational opportunity.

White Flight

By the 1970s, a crucial problem had emerged: white flight to suburban areas. White flight came about, in part, to avoid school desegregation and, in part, as a result of a larger demographic phenomenon, namely

endangered successful desegregation. White families moved to suburban areas to avoid being part of desegregation orders affecting cities. In virtually every urban area, the inner city was increasingly comprised of racial minorities. By contrast, the surrounding suburbs were almost exclusively white and what little minority population did reside in suburbs was concentrated in towns that were almost exclusively African-American. School district lines parallel town borders, meaning that racial separation of cities and suburbs results in segregated school systems. . . .

Thus, by the 1970s, effective school desegregation required interdistrict remedies. . . . As Professor Smedley explains:

> Regardless of the cause, the result of this movement [of whites to suburban areas] is that the remaining city public school population becomes predominately black. When this process has occurred, no amount of attendance zone revision, pairing and clustering of schools, and busing of students within the city school district could achieve substantially integrated student bodies in the schools, because there simply are not enough white students left in the city system.

. . . In 1974, the Supreme Court started to take a different turn in its jurisprudence of granting broad powers to federal courts in desegregation cases. In *Milliken v. Bradley*, the Court imposed a substantial limit on the courts' remedial powers in desegregation cases. *Milliken* involved the Detroit-area schools and the reality that, like so many areas of the country, Detroit was a mostly African-American city surrounded by predominately white suburbs. A federal district court imposed a multi-district remedy to end de jure segregation in one of the districts. The Supreme Court ruled that this desegregation technique is impermissible:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.

Thus, the Court concluded that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."

Milliken has a devastating effect on the ability to achieve desegregation in many areas. In a number of major cities, inner-city school systems are substantially African-American and are surrounded by almost all-white suburbs. Desegregation requires the ability to transfer students between the city and suburban schools. There simply are not enough white students in the city, or enough African-American students in the suburbs, to achieve desegregation without an interdistrict remedy. Yet, *Milliken*

precludes an interdistrict remedy unless plaintiffs offer proof of an interdistrict violation. In other words, a multidistrict remedy can only be formulated for those districts whose own policies fostered discrimination or if a state law caused the interdistrict segregation. Otherwise, the remedy can include only those districts found to violate the Constitution. While such proof is often unavailable, plaintiffs in relatively rare cases have met *Milliken's* requirements.

. . . The segregated pattern in major metropolitan areas—African Americans in the city and whites in the suburbs—did not occur by accident, but rather was the product of myriad government policies. Moreover, *Milliken* has the effect of encouraging white flight. Whites who wish to avoid desegregation can do so by moving to the suburbs. If *Milliken* had been decided differently, one of the incentives for such moves would be eliminated. The reality is that in many areas the *Milliken* holding makes desegregation impossible. . . .

Inequality in School Funding

By the 1970s, substantial disparities existed in school funding. In 1972, education expert Christopher Jencks estimated that, on average, the government spent 15% to 20% more on each white student's education than on each African-American child's schooling. This disparity existed throughout the country. For example, the Chicago public schools spent $5,265 for each student's education; but the Niles school system, just north of the city, spent $9,371 on each student's schooling. The disparity also corresponded to race: in Chicago, 45.4% of the students were white and 39.1% were African-American; in Niles Township, the schools were 91.6% white and 0.4% African-American. . . . There is a simple explanation for the disparities in school funding. In most states, education is substantially funded by local property taxes. Wealthier suburbs have significantly larger tax bases than poor inner cities. The result is that suburbs can tax at a lower rate and still have a great deal to spend on education. Cities must tax at a higher rate and nonetheless have less to spend on education.

The Court had the opportunity to remedy this inequality in education in *San Antonio Independent School District v. Rodriguez*. The Court, however, profoundly failed and concluded that the inequalities in funding did not deny equal protection. *Rodriguez* involved a challenge to the Texas system of funding public schools largely through local property taxes. Texas's financing system meant that poor areas had to tax at a high rate, but had little to spend on education; wealthier areas could tax at low rates, but still had much more to spend on education. One poorer district, for example, spent $356 per pupil, while a wealthier district spent $594 per student.

The plaintiffs challenged this system on two grounds: it violated equal protection as impermissible wealth discrimination and it denied children

in the poorer districts the fundamental right to education. The Court rejected the former argument by holding that poverty is not a suspect classification and thus discrimination against the poor need meet only rational basis review. The Court explained that where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. In thoroughly viewing the Texas system for funding schools, the Court determined that the system met the rational basis test.

Moreover, the Court rejected the claim that education is a fundamental right:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Justice Powell, writing for the majority, then concluded that "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." . . . The Court also noted that the Texas government did not completely deny an education to students; the challenge was to inequities in funding. In concluding, the Court found that strict scrutiny was inappropriate because neither discrimination based on a suspect classification nor infringement of a fundamental right occurred. The Court found that the Texas system for funding schools met the rational basis test.

. . . Education is essential for the exercise of constitutional rights, for economic opportunity, and, ultimately, for achieving equality. Chief Justice Warren eloquently expressed this view in *Brown*:

> . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

. . . Education is so basic to the exercise of other constitutional rights, and so basic for success in society, that the Court should have found a fundamental right to a quality education.

The combined effect of *Milliken* and *Rodriguez* cannot be overstated. *Milliken* helped to ensure racially separate schools and *Rodriguez* ensured that the schools would be unequal. American public education is characterized by wealthy white suburban schools spending a great deal on education surrounding much poorer African-American city schools that spend much less on education.

Why Have Courts Failed?

. . . Desegregation likely would have been more successful, and resegregation less likely to occur, if the Supreme Court had made different choices.

. . . What, then, explains the Court's choices? The answer is obvious: its decisions result from the conservative ideology of the majority of the Justices who sat on the Court when these cases were decided. *Milliken* and *Rodriguez* were both 5–4 decisions, and the majority included the four Nixon appointees who joined the Court in the few years before those rulings. . . .

The cause for the judicial failure could not be clearer: conservative Justices have effectively sabotaged desegregation. . . .

Conclusion

. . . The Supreme Court seems intent on declaring victory over the problem of school segregation and withdrawing the judiciary from solving the problem. But as Professor Orfield demonstrates, the problem has gotten worse, not better. The years ahead look even bleaker as courts end successful desegregation orders.

People can devise rationalizations to make this desegregation failure seem acceptable: that courts could not really succeed; that desegregation does not matter; that parents of minority students do not really care about desegregation. But none of these rationalizations are true. *Brown v. Board of Education* stated the truth: separate schools can never be equal. Tragically today, America has schools that are increasingly separate and unequal.

Chemerinsky tracks how top-down reaction and opposition to equal justice coopted *Brown* as law and progress within a few decades. Continued inequality in education is, in great measure, the deliberate consequence of "opinions" by successive generations of elite judges—virtually all of them white men. The "cause for the judicial failure could not be clearer: conservative Justices have effectively sabotaged desegregation." This sabotage is a collective act carried out by decision makers over decades—generations—of time.

Below, Derrick Bell grounds analysis of *Brown's* consequences in the lives of those most affected by segregation, desegregation, and resegregation. Bell was a founder of critical race theory—a key School of knowledge informing systemic advocacy—and worked as a lawyer on cases implementing *Brown*. Here, he reflects on uses of litigation to "win" desegregation victories, asking self-critically whether those "victories" solved the persistent social problem of unequal education from the point of