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—which explains in part the duality Matsuda emphasized above. 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."[6]

[6] 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).

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.[7] 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 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."[8] 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."[9] 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.[10] 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.[11] These developments increasingly questioned the narrow version of legal "relevance" that formalism had established for analysis and action.

---

[7] 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).

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

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

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

[11] 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. Hellderstedt*).

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 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.[12]

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.

---

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

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 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.[13]

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 U.S. 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 U.S. has mushroomed into a big

[13] 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.

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 easily disproved. And so public opinion (and compliance) is 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—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."[14] 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.

[14] 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).

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
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,[15] reflects on, and recounts, his own upbringing, training, and advocacy. Showing how personal experience and reflection can provide a starting point for systemic 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"[16] 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?

---

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

[16] 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).

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 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. at 412. This perceived identify 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.[17] Under that order, for 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, also 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."[18] 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 introduced earlier by Matsuda: 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.

---

[17] 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 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.

[18] 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.

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.

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

Susan K. Serrano
29 Centro J. 164 (2017)

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.