

REBELLIOUS LAWYERING IN BIG CASE CLINICS

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*On the 25th anniversary of the publication of Gerald López's *Rebellious Lawyering: One Chicano's Vision of Progressive Legal Practice*, this article contemplates the need to incorporate rebellious lawyering in law reform and international human rights clinics, or as referred in this article, "big case clinics." This article seeks to add to the existing scholarship on incorporating rebellious lawyering practices into clinical legal education by specifically focusing on big case clinics, and how big case clinicians can better prepare law students for the world they are entering into – a world where it is becoming increasingly harder to miss (or ignore) the power and strength of people fighting for their own liberation. This article focuses specifically on ways to channel rebellious lawyering principles that account for the unique challenges in big case clinics. It posits that big case clinics require a slightly different approach from other types of clinics, one that builds on the docket choices of community-oriented clinics and collaborative lawyer-client skills taught in small case clinics, but accounts for the limited and distant exposure of students to client communities. This clinic format requires an intentional teaching of rebellious lawyering theory, so that students can not only view their clinic fieldwork through a broader lens, but also learn how to apply this theory to their practice beyond the clinic. In addition to guided discussions on fieldwork during supervision and case rounds, the theory of social change undergirding rebellious lawyering should be unpacked in the clinic seminar – a space that is not tied to the uneven pace of big case work, but can rather help students step back and consider the role the clinic's tactics play (or fail to play) in the broader struggle for social justice.*

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Theory without practice is just as incomplete as practice without theory. The two have to go together.

—Assata Shakur¹

INTRODUCTION

As a civil rights and international human rights lawyer, I am what clinicians call a “big case” lawyer.² By “big,” I mean a lawyer who uses legal tactics in an attempt to respond to broad issues affecting entire communities, as opposed to direct service lawyers who use legal tactics to respond to issues affecting individual persons or groups (or those lawyers who do both). Direct service lawyers are just as, or oftentimes more, critical to the struggle for social justice.³

Over time, I have learned and agreed with many, if not all, of the progressive critiques of big case lawyering, yet, my work with certain organizers and communities has led me to believe that big case work is sometimes of use. I have come to understand that there is a time and place for big case strategies in the struggle for social justice. For me, the key questions are now as follows: how do I know *when it is the time and place* for big case strategies? And, as a new clinician in a big case clinic, how do I help my students understand how and when to deploy those strategies?

These questions are no more urgent than now. With the recent election of a President supported by white nationalist movements in the United States and who has quickly signed executive orders seeking to ban Muslims from the United States and ramp up mass deportation, vulnerable communities face an onslaught of state-sanctioned harms.⁴ As Amna Akbar notes, thanks to the momentum of formations such as the Movement for Black Lives, the Fight for \$15, #Not1More, and others – not to mention the plethora of protests following President Trump’s inauguration⁵ – the United States is witness-

¹ ASSATA SHAKUR, *ASSATA: AN AUTOBIOGRAPHY* 180 (1987).

² Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 *CLIN. L. REV.* 355, 373-74 (2008). See also Frank Askin, *A Law School Where Students Don’t Just Learn the Law; They Help Make the Law*, 51 *RUTGERS L. REV.* 855 (1999).

³ See generally Rebecca Sharpless, *More than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 *CLIN. L. REV.* 347 (2012).

⁴ See, e.g., Tal Kopan, *Trump’s executive orders dramatically expand power of immigration officers*, CNN (Jan. 28, 2017), <http://edition.cnn.com/2017/01/28/politics/donald-trump-immigration-detention-deportations-enforcement/>; Alan Yuhas and Mazin Sidahmed, *Is this a Muslim ban? Trump’s executive order explained*, THE GUARDIAN (Jan. 31, 2017), <https://www.theguardian.com/us-news/2017/jan/28/trump-immigration-ban-syria-muslims-reaction-lawsuits>.

⁵ See, e.g., Anemona Hartocollis & Yamichie Alcindor, *Women’s March Highlights as Huge Crowds Protest Trump: ‘We’re Not Going Away’*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/womens-march.html>; *US protests grow against Donald*

ing a full-on resurgence of national and international solidarity with the struggles that local communities across the country have been organizing around for decades.⁶ Frontline lawyers – from those who are providing critical direct services to keep people out of jail and support day-to-day survival to those providing much-needed consultation on community development initiatives – have built on a foundation of long-term relationships with local communities to step into this moment in the history of people’s struggles.⁷

Big case lawyers have also contributed to building the strength of these people’s movements. In Ferguson, Missouri alone, lawyers worked with organized communities to file a federal lawsuit to prevent the indiscriminate tear gassing of protestors⁸ and prepare a delegation of local Ferguson organizers to travel to Geneva to testify before the UN Committee Against Torture,⁹ as just a couple of examples. But we can count many examples over the course of history where big case lawyers have gone off on their own, advocating for law reform, filing large lawsuits, and reporting to UN human rights bodies, without the involvement of organized groups of people directly-impacted by the targeted oppression and fighting to dismantle it.¹⁰ At times, these efforts have even undermined those struggling at the grassroots.¹¹ This current moment has been no exception. So I have had to ask myself, how, as a big case clinician, do I teach students to step into this moment in a way that supports, rather than undermines, people’s struggles?

As this moment coincides with the 25th anniversary of the publication of Gerald López’s *Rebellious Lawyering: One Chicano’s Vision of Progressive Legal Practice*, I decided to start there. Exploring the lawyer-client relationship at a micro-level, López describes a rebellious approach to lawyering that has lawyers work with, rather than for, subordinated people. This approach to lawyering not only recog-

Trump’s immigration ban, AL JAZEERA (Jan. 29, 2017), <http://www.aljazeera.com/news/2017/01/protests-grow-trump-immigrant-ban-order-170129194912379.html>.

⁶ Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 354 (2015).

⁷ Some examples include the legal support provided by lawyers with the Community Justice Project in Miami, Florida and Gilmore Khandhar LLC, in Baltimore, Maryland, among others.

⁸ See Complaint, Motion, and Memorandum of Law for Temporary Restraining Order in *Templeton v. Dotson*, No. 4:14-cv-2019 (E.D. Mo. filed Dec. 8, 2014).

⁹ See Justin Hansford & Meena Jagannath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States after Ferguson*, 12 HASTINGS RACE & POVERTY L. J. 121 (2015).

¹⁰ See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (March 1976).

¹¹ See, e.g., William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994).

nizes the power and expertise of subordinated people, but recognizes that the power and expertise of subordinated people are *central* to dismantling the systems responsible for their subordination. López describes a collaborative, creative, and self-reflective approach to lawyering that operates on the belief that building power within subordinated communities and creating and leveraging networks in support of that power is how social change happens and how we move forward in the struggle for social justice – the theory of social change underlying rebellious lawyering. This theory of change has helped me recognize when big cases may add value in the struggle for social justice and when they may be harmful. As a relatively new clinician, I have sought to facilitate my students' understanding of how social change happens and expose them to the theory of change underlying rebellious lawyering in order to help guide them in their decision-making as future (hopefully rebellious) practitioners.

In this article, I seek to add to the scholarship on incorporating rebellious lawyering practices into clinical legal education by specifically focusing on big case clinics, and how we, as big case clinicians, can better prepare law students for the world they are entering into – a world where it is becoming increasingly harder to miss (or ignore) the power and strength of people fighting for their own liberation. Much of this effort builds on the pedagogical tools designed by rebellious lawyers past and present. I focus specifically on ways to channel rebellious lawyering principles that account for the unique challenges in big case clinics.

There is good reason to focus on what makes big case clinics unique. Small case clinics expose their students to multiple experiences from which to develop a theoretical analysis to take forward with them on their professional journeys. With sufficient guidance, students in small case clinics, in López's words, may be able to develop theories of how the world works and how justice can be achieved (*i.e.*, a theory of social change) "from the ground up," by paying "close attention to what people do and say, to the commingling of ideas and actions in daily life."¹² By contrast, big case clinics, because of the nature of the types of cases and projects we handle, are unable to expose our students to multiple experiences from which to begin understanding a theory of social change, an understanding of how social change happens. Cases or projects may drag on for multiple semesters, and even years, and require much back-end work, which may be removed from the daily struggles of client communities. As a result, students may perceive the court, legislative or administra-

¹² GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 66 (1992).

tive body, or human rights institution with which their particular project engages as playing a disproportionately larger role than these institutions actually have in the history of social justice struggles.

More recent clinical models designed around communities of people are able to make their theory of social change explicit, as they are both in name and in practice engaged in “collective mobilization-oriented work.”¹³ Big case clinics, however, were designed around particular skill sets rather than communities of people, and so while one answer may be to simply close down these clinics and re-open them as clinics oriented to particular communities, institutional constraints may prohibit such radical changes at a particular law school, at least in the near term. In addition, some clinicians have argued that methodology-focused clinics may offer a more effective pedagogical approach.¹⁴

As a result, big case clinics require a slightly different approach to incorporating rebellious lawyering, one that builds on the docket choices of community-oriented clinics and collaborative lawyer-client skills taught in small case clinics, but accounts for the limited and distant exposure of students to client communities. In this article, I propose that this clinic format requires an intentional teaching of rebellious lawyering *theory*, so that our students can not only view their clinic fieldwork through a broader lens but also learn how to apply this theory to their practice beyond the clinic. I further propose that in addition to guided discussions on fieldwork during supervision and case rounds, the theory of social change undergirding rebellious lawyering should be unpacked in the clinic seminar – a space that is not tied to the uneven pace of big case work, but can rather help students step back and consider the role the clinic’s tactics play (or fail to play) in the broader struggle for social justice.

As the words of Assata Shakur at the beginning of this article indicate, both theory and practice are critical to rebellious lawyering. While some clinics offer students sufficient exposure to rebellious lawyering principles and their value through guided practice, big case clinics, primarily due to the long-term nature of their fieldwork and at times, the geographic distance between the clinics and communities with which they work, require a deeper education of the theoretical framework behind rebellious lawyering to be able to analyze their fieldwork more broadly and apply their analysis to other settings. In part, this deeper education may be gained by periodic exposure to meetings with and events held by the organized communities whose

¹³ Ashar, *supra* note 2, at 389-90.

¹⁴ See generally David A. Binder & Paul B. Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLIN. L. REV. 191 (2003).

struggle the clinic case or project supports. Where the client communities are situated further away, students may seek out and attend events of organized communities relatively close to the law school that are engaged in a struggle similar to that of the clinic's client community.¹⁵ However, I have found that such exposure is often not enough. As a result, the seminar space remains critical to spark such reflection and analysis.

In short, my thesis is this: practice and theory must yield a certain amount of critical reflection on the part of students; when there is greater exposure to rebellious lawyering in practice, there can be less discussion of theory, but when there is less exposure to practice, there must be greater discussion of theory.

Part I of this article describes Jerry López's concept of rebellious lawyering and the critiques it has faced from social justice lawyers over the years. Part II then discusses the benefits and risks of big case work and how rebellious lawyering can help both increase those benefits and mitigate the attendant risks. Part III moves to rebellious lawyering in clinical legal education, and how big case clinics can build on the tremendous strides in other clinical settings to develop pedagogy and practice that exposes our students to rebellious lawyering. In this section, I offer an in-depth look at the theoretical concepts that can be taught in the clinic seminar while respecting the critical pedagogy of clinical teaching.

I put forward these thoughts with much humility. Much of what I have learned about lawyering has been not only from my own experiences, but also from those who have been practicing for years and decades longer than I have. And when I stepped into the role of clinical teacher, I immediately recognized how it is much more difficult than it looks. There is much one can read and write about, but putting it into practice is an entirely different question. Some of the tools that that I propose in this article have engaged even reluctant students, and other tools have yielded mixed results; I capture a full set of pedagogical tools here to invite experimentation and continued dialogue beyond this paper. Most importantly, I offer this article to help newer big case clinicians, like myself, understand how we can make the most of our clinical resources to carry forward López's powerful framework, which has helped so many of us to become stronger and more creative social justice lawyers.

¹⁵ For example, students working on behalf of a queer network in Uganda may attend events and gatherings of organized groups of queer people of color in the U.S.

I. REBELLIOUS LAWYERING

In *Rebellious Lawyering*, López posits a critique of “regnant” lawyering, a term used to describe lawyers who *formally represent* and *serve* clients and use their expertise in law to devise and carry out legal strategies in isolation from their clients, impacted communities, and professionals in other disciplines.¹⁶ According to López, the alternative to this form of lawyering – one more effective at addressing the struggles of subordinated people – is “rebellious lawyering,” or a form of lawyering that envisions lawyers “work[ing] with (not just on behalf of) subordinated peoples.”¹⁷ This approach to lawyering requires that advocates look at problem-solving beyond the law, and thus, recognize expertise beyond that held by lawyers. It “involves clients, lawyers, and other problem-solvers (professional and lay)” in “developing ways of identifying and responding to needs and aspirations” of subordinated people and “constructing problem-solving methods.”¹⁸

Importantly, rebellious lawyering seeks to “improv[e] everyone’s individual and collective know-how along the way.”¹⁹ It calls on lawyers to redesign their work relationships in a way that allows them to “take advantage of the overlap between professional and lay lawyering [or problem-solving], and to integrate into strategic thinking the wisdom and collaboration of allied problem-solvers.”²⁰ No moment is too small or too big for a rebellious lawyer to use as moment to simultaneously learn from and teach their collaborators in the struggle for social justice.²¹

López summarizes the following set of rebellious lawyering principles:

- to “work with (not just on behalf of)” subordinated people;²²
- to “collaborate with other professional and lay allies²³. . .in brainstorming, designing, and executing strategies aimed at responding immediately to particular problems and, more generally, at fighting social and political subordination”;²⁴
- to “educate those with whom they work, particularly about law and professional lawyering, and, at the same time, [] open []

¹⁶ LÓPEZ, *supra* note 12, at 24.

¹⁷ *Id.* at 37.

¹⁸ *Id.* at 70.

¹⁹ *Id.* at 70.

²⁰ *Id.* at 70.

²¹ *Id.*

²² *Id.* at 37.

²³ *Id.*

²⁴ *Id.* at 38.

up to being educated by all those with whom they come in contact, particularly about the traditions and experiences of life on the bottom and at the margins;”²⁵

- to “ground their work in the lives and in the communities of the subordinated themselves;”²⁶
- to “[c]ontinually evaluate the likely interaction between legal and ‘non-legal’ approaches to problems;”²⁷
- to “understand how to be part of coalitions, as well as how to build them, and not just for purposes of filing or ‘proving up’ a lawsuit”;²⁸ and
- to “[a]ppreciate how all they do with others requires attention not only to international, national, and regional matters but also to their interplay with seemingly more mundane local affairs.”²⁹

The last two decades has witnessed rebellious lawyering adopted by practitioners and clinicians alike. Some rebellious lawyers have focused on some of these principles more than others, and others have adapted these principles to fit particular contexts. An example of the latter can be found in the guiding principles articulated by the planning committee for Law for Black Lives, a collective of hundreds of people working in the legal field in support of the struggle for Black liberation.³⁰

A. *Common Criticisms Of Rebellious Lawyering*

There are still many social justice lawyers – from direct legal services to law reform and international human rights lawyers – who have either expressly resisted or subconsciously avoided adopting rebellious lawyering principles into their practice. In part, this may be due to a fundamental misunderstanding of what rebellious lawyering is. Rebecca Sharpless describes a widely-held belief that rebellious lawyers are “lawyers who work with grassroots organizations,” and thus, “direct service attorneys, impact litigators, and union lawyers” are all regnant lawyers.³¹

²⁵ *Id.* at 37.

²⁶ *Id.* at 38.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *Values*, LAW FOR BLACK LIVES, <http://www.law4blacklives.org/#values-section>. For example, the first principle listed is: “We believe in using law for the people and that legal tools should be used to build the power of movements. We are working to build a stronger, more cohesive legal arm for the movement for Black Lives.”

³¹ Sharpless, *supra* note 3, at 359-60.

Another basis for resistance may stem from the critique described by E. Tammy Kim that the notion of rebellious lawyering has “led to an unproductive pessimism about the law and ‘role confusion’ on the part of community lawyers.”³² As a result, this critique concludes, rebellious lawyering may have “produced an overly optimistic view of extralegal activism, which assumes a clear separation between legal and non-legal spheres and takes for granted that non-lawyers are immune to the dangers of cooptation and other threats to progress.”³³ This style of lawyering may also, in Lucie White’s words, “authorize well-meaning lawyers to intrude into the few spaces where poor people can work out their own strategies and priorities.”³⁴

B. Response: Focusing On The Theory Of Change Underlying Rebellious Lawyering

What Sharpless’ critique misunderstands about rebellious lawyering is that it is an approach to lawyering based on a set of principles that expressly *do not privilege* any type of legal tactic over any other legal or non-legal tactic. (For instance, at least two of the rebellious lawyers in López’s allegories – Sophie and Helen – are direct services attorneys.³⁵) Kim and White’s critiques merely raise risks lawyers face in their effort to practice rebelliously, not that rebellious lawyering necessitates such role confusion or intrusion into the political spaces of subordinated people.

Underlying these responses to both sets of critiques is that rebellious lawyering, at its core, requires lawyers to focus on how social change actually happens, not carry out a specific legal tactic or separate lawyers from legal work. The theory of change underlying López’s rebellious lawyering is that systems of oppression are dismantled when those most directly impacted by the oppression have the power to challenge it. Or, in the oft-cited words of Stephen Wexler, “[i]f poverty is stopped, it will be stopped by poor people.”³⁶

Rebellious lawyering next focuses us on the role of the lawyer in this theory of change. López points out that many progressive lawyers

³² E. Tammy Kim, *Lawyers as Resource Allies in Workers’ Struggles for Social Change*, 13 N.Y. CITY L. REV. 213, 219 (2009). See also Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 493-96 (2001).

³³ Kim, *supra* note 32, at 220. See also Orly Lobel, *The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

³⁴ Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLIN. L. REV. 157, 159-60 (1994). See also Kim, *supra* note 32, at 219-220.

³⁵ LÓPEZ, *supra* note 12, at 30-34, 133-62.

³⁶ Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970).

“never much understood the relationship between what they do and what they hoped to change.”³⁷ This step is critical and it is the step that is most often confused. The confusion may stem, in part, from López’s focus on the micro – on how rebellious lawyers can navigate their relationships with clients and other problem-solvers. What is implicit but never explicitly explored is the macro – the purpose of developing such collaborative relationships. Fortunately, actors in community past and present offer insight on the purpose underlying their rebellious practice.

Ella Baker, a decades-long organizer in the struggle for Black liberation, demonstrated three reasons why the struggle against oppression must be led by the oppressed: first, that people have *the right* to determine the nature of the struggle to dismantle the conditions of their subordination as they are the ones who face its consequences – making this approach *morally correct*; second, that the root cause of subordination is the lack of power to control the conditions of one’s own life and thus the building of such power in subordinated communities is imperative – making this theory *effective*; and third, that building power within subordinated communities enables them to solve future problems – making this approach *sustainable*.³⁸

Arthur Kinoy, who lawyered with organized groups of people for much of his legal career – from radical labor unions in the 1940s to the Black Freedom Movement in the 1960s (and collaborated with Baker) – similarly offered this guiding principle:

Victory has to be achieved by the people themselves, through their own organizational strength and activity, and the legal work of a people’s lawyer must be directed primarily toward helping to create an atmosphere in which the people can more readily function, organize, and move forward.³⁹

I believe Baker and Kinoy’s beliefs capture what López conveys through the various attempts of his rebellious lawyering characters to build relationships with grassroots organizations situated in their clients’ communities and his cautionary tale about “orthodox organizing.”⁴⁰

How this theory is put into practice depends on the level of organizational strength of a group of people. Some models have been de-

³⁷ LÓPEZ, *supra* note 12, at 5.

³⁸ See generally BARBARA RANSBY, *ELLA BAKER AND THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION* (2005).

³⁹ ARTHUR KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE’S LAWYER* 61 (1994).

⁴⁰ LÓPEZ, *supra* note 12, at 331-379 (offering a critique of a rote form of organizing that fails to facilitate the development of leadership within the community).

scribed with specificity by rebellious lawyers like Charles Elsesser,⁴¹ Bill Quigley,⁴² Betty Hung,⁴³ E. Tammy Kim,⁴⁴ and Michael Grinthal.⁴⁵ All of these practitioners warn against determining one's approach to lawyering without adjusting for a community's level of organization. Who the lawyer works with, the work the lawyer does, how the lawyer is held accountable, all depend on the depth of organizing in a particular community, whether that community is defined geographically or by the form of oppression they face (*e.g.*, tenants facing eviction, undocumented workers suffering from wage theft, youth subjected to criminalization).

The misunderstanding of rebellious lawyering that Sharpless describes may then be due to the failure to identify an underlying theory of rebellious lawyering – that social change occurs when communities have the power to dismantle the conditions of their subordination. As a result, many social justice lawyers attempting to practice rebelliously mistake tactics for a theory of change. In addition to filing a lawsuit, such a lawyer may seek to shift narratives in the media by writing op-eds, appearing on news shows, and educating journalists. They may develop “Know Your Rights” trainings so that impacted communities learn how the issues in the lawsuit or a victory in the lawsuit affect them. Finally, such lawyers may find other advocacy partners, usually other professionals working at non-profits like the lawyer's but in other disciplines, to create a coalition that advocates around the issue, such as lobbying for the passage of certain legislation. While all of these efforts display an attempt to consider problem-solving beyond legal tactics and collaborate with professional problem-solvers in other disciplines, they often ignore the problem-solving skills of impacted communities, the importance of *working with* – simultaneously learning from and teaching – subordinated people so that they may dismantle the conditions of their subordination. López cautions that unless “[e]verything from the spirit that energizes work to those ‘routine’ practical moments through which ideas get put into action [] reflect a mutual desire to learn and to teach,”⁴⁶ any extra-legal efforts on the part of the lawyer is “diffuse, marginal, and uncritical work,”

⁴¹ Charles Elsesser, *Community Lawyering – The Role of Lawyers in the Social Justice Movement*, 14 LOY. J. PUB. INT. L. 375 (2013).

⁴² W. Quigley, *supra* note 11.

⁴³ Betty Hung, *Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change*, 1 L.A. PUB. INTEREST L. J. 5 (2009).

⁴⁴ Kim, *supra* note 32.

⁴⁵ Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J. L. & SOC. CHANGE 25, 45 (2011).

⁴⁶ LÓPEZ, *supra* note 12, at 70.

often serving as an afterthought to legal efforts.⁴⁷ And lawyers remain the lead protagonist in their vision of the struggle for social justice, as regnant as ever.⁴⁸

The cause of role confusion for some rebellious lawyers and their intrusion into poor people's political spaces are harder issues. There are times when a lawyer may need to organize. But I would posit that those times are rare and can be done in a way that facilitates the development of indigenous leadership.⁴⁹ For example, Ella Baker, middle-class, educated, and living in New York City, was able to travel the poor, rural south supporting indigenous leadership in the Black Freedom Movement while avoiding taking up the little political space that existed in those communities.⁵⁰ Rebellious lawyers have much to learn from her ability to navigate circumstances that at times appear to be overwhelmingly complex.

More often, however, lawyers feel the need to don an organizer hat because, as López and Elsesser point out, they fail to see existing organizing efforts in less obvious settings, such as churches, self-help groups, support groups, parent or student groups, or other ways that people organize themselves.⁵¹ Alternatively, existing community organizations (whether formal or informal) may not identify the issue or solution that the lawyer is raising as a priority in their struggle. Sometimes this is because the lawyer's perceived priorities are simply not an immediate or even a root cause of the troubles facing the community or the solution proposed would disempower the community over the long term. Other times it is because the community's leadership or membership is not well-positioned to see underlying structures or systems responsible for the injustices they face and need assistance in making those connections. Facilitating such education does not require the lawyer to play the role of organizer or even take up subordinated people's spaces, but rather, to find indigenous leaders with whom to engage in López's mutual teaching and learning processes.

Ultimately, mindful and self-reflective lawyers can take steps to avoid the risks of role confusion.⁵² However, in light of the messiness of community struggle, this risk may arise for any lawyer involved in that struggle, even those who may begin their work believing that

⁴⁷ *Id.* at 24.

⁴⁸ Jennifer Gordan, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133 (2007).

⁴⁹ See, e.g., LÓPEZ, *supra* note 12, at 74-77.

⁵⁰ See generally RANSBY, *supra* note 38. While Ella Baker was an organizer rather than a lawyer, her central principle of developing indigenous leadership holds true for all actors working with subordinated communities.

⁵¹ LÓPEZ, *supra* note 12, at 371; Elsesser, *supra* note 41, at 387.

⁵² See, e.g., Grinthal, *supra* note 45, at 58-59.

their role is clear.

II. “BIG CASE” WORK AND ITS CRITICS

Big case work, as I define it in this article, consists of law reform efforts, primarily through domestic impact litigation and international human rights (IHR) advocacy, such as reporting to international institutions and litigating in U.S. federal courts under the Alien Tort Statute.⁵³

A. *Uses And Criticisms Of Domestic Impact Litigation*

Big case work has, at times, played a valuable role in the struggle for social justice in the United States. For example, Chuck Elsesser describes benefits of affirmative litigation: by creating forums where subordinated communities can dramatize their issues and demands to shape public opinion in their favor; provide subordinated communities access to information, via discovery, about the operations and activities of their opponents; and delay negative actions against subordinated communities.⁵⁴

From a historical perspective, Arthur Kinoy recounted in his memoir filing federal lawsuits that illustrate these tactical uses for affirmative litigation. Some examples include initiating suits for the purpose of exposing a conspiracy between union-busting corporations and members of Congress, in Evansville, Indiana in 1948;⁵⁵ enjoining laws used to prevent the Black community from engaging in demonstrations in Danville, Virginia in 1963;⁵⁶ and enjoining practices that prevented the removal of criminal cases against Black Mississippians attempting to vote from state to federal court, where individuals could be released on bail, in 1964.⁵⁷ Contemporary examples include a federal lawsuit brought by prisoners at Pelican Bay challenging prolonged solitary confinement⁵⁸ and a suit by Puente Arizona, a grassroots migrant justice organization, against former Maricopa County Sheriff Joe Arpaio challenging his anti-immigrant practices.⁵⁹

At the same time, big case work has been subject to a plethora of criticism by subordinated people’s movements, such as the Movement

⁵³ 28 U.S.C. § 1350.

⁵⁴ Elsesser, *supra* note 41, at 397-98.

⁵⁵ KINOY, *supra* note 39, at 68.

⁵⁶ *Id.* at 184-90.

⁵⁷ *Id.* at 237-39.

⁵⁸ See *After decades in solitary they joined forces. Here’s what happened*, CENTER FOR CONSTITUTIONAL RIGHTS (Sept. 1, 2015), <http://ccrjustice.org/home/get-involved/tools-resources/videos/after-decades-solitary-they-joined-forces-here-s-what>.

⁵⁹ See *Puente V. Arpaio: Stop the Raids!*, PUENTE MOVEMENT, <http://puenteaz.org/campaigns/puente-v-arpaio-stop-the-raids/>.

for Black Lives, and critical legal theorists, like Derrick Bell.⁶⁰ They argue that legal tactics merely serve to, as Amna Akbar puts it, “reify status quo power relations.”⁶¹ Through this lens, we see the legal system in the U.S. as facilitating successive and simultaneous genocidal regimes, including slavery and Native American extermination. This system of laws and institutions facilitates new atrocities, such as the “new Jim Crow” era of mass incarceration,⁶² over-policing in Black and Brown communities,⁶³ and a foster care system that removes Native American children and other children of color from their communities.⁶⁴

Big case work also been subjected to critiques specific to its operation. Domestically, critics have pointed to the case conventionally held up as the pinnacle of social justice, *Brown v. Board of Education*, as an example of how the role of impact litigation in social change has been largely overstated given *Brown*’s failure to actually integrate schools without substantial effort by organized communities,⁶⁵ and its failure to address the priorities of Black communities to send their children to quality schools.⁶⁶ At the core of this criticism is that impact litigators have often been blind to the “myriad ways beyond the courts that the law changes, the pressures to which it responds and through which it is constituted,”⁶⁷ and have narrowed communities’ visions of social justice into “judicially manageable or judicially enforceable terms,” that often simply reinforce the need for lawyers and rarely bring about substantive justice.⁶⁸ Further, the filing of a lawsuit in itself can at times produce more harm than good. As Elsesser warns, when lawsuits are used to seek “a definitive community victory,” they risk distracting from the subordinated community’s struggle to achieve a lasting political victory and diverting resources from

⁶⁰ See Akbar, *supra* note 6, at 355. See also *Policy Platform: A Vision for Black Lives*, THE MOVEMENT FOR BLACK LIVES (2016), <https://policy.m4bl.org/platform/> (seeking a “a complete transformation of the current systems”).

⁶¹ Akbar, *supra* note 6, at 355 n. 13.

⁶² See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010). But see James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond The New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012) (on discontinuities between historic Jim Crow and the current mass incarceration regime).

⁶³ See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000).

⁶⁴ See Laura Sullivan, *Incentives and Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011), <http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system>.

⁶⁵ Elsesser, *supra* note 41, at 382-83.

⁶⁶ Bell, *supra* note 10.

⁶⁷ Akbar, *supra* note 6, at 355.

⁶⁸ Elsesser, *supra* note 41, at 383 (quoting Professor Lani Guinier in Alexander, *supra* note 62, at 226).

or even foreclosing other avenues for change.⁶⁹

B. Uses And Criticisms Of International Human Rights Advocacy

International human rights advocacy has also played a valuable role in struggles for social justice. The NAACP's 1947 petition to the United Nations, *An Appeal to the World*, and the Civil Rights Congress' 1951 petition, *We Charge Genocide: The Crime of Government Against the Negro*, brought international attention to the United States' treatment of its Black community, effectively using the competition with the Soviet Union for hearts and minds in non-aligned countries to bring attention to the Black freedom struggle in the U.S.⁷⁰ More recently, Florida-based grassroots organization Dream Defenders and the family of Israel "Reefa" Hernandez, tasered to death by Miami police, advocated before the UN Committee Against Torture as part of their "Justice for Reefa" campaign, forcing the local police union to defend a police killing before an international body.⁷¹ Chicago-based grassroots organization We Charge Genocide (named after the 1951 petition) demonstrated at the United Nations during the torture committee's review of the U.S., which, as a part of a larger campaign, led to reparations by the city to survivors of police torture.⁷²

Like domestic impact litigation, international human rights advocacy is also subject to much criticism. At the outset, critics like Makau Mutua point out how the international legal order – upon which international human rights advocacy depends – has facilitated and managed "imperial expansion that subordinated non-European peoples and societies to European conquest and domination,"⁷³ and which continues to the present day, when international institutions maintain social, political, and economic control in "Third World"⁷⁴ countries.⁷⁵

⁶⁹ *Id.* at 397-98.

⁷⁰ See CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955* (2003).

⁷¹ See "Justice for Reefa" materials, available at <http://communityjusticeproject.com/policing/>.

⁷² Flint Taylor, *How Activists Won Reparations for the Survivors of Chicago Police Department Torture*, IN *THESE TIMES* (June 26, 2015), <http://inthesetimes.com/article/18118/jon-burge-torture-reparations>.

⁷³ Makau Mutua, *What Is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31, 31 (2000).

⁷⁴ I use the phrase "Third World" intentionally. Mutua explains: "The Third World is more truly a stream of similar historical experiences across virtually all non-European societies that has given rise to a particular voice, a form of intellectual and political consciousness. The *Third World* is different from *less-developed*, *crisis-prone*, *industrializing*, *developing*, *underdeveloped*, or *the South* because it correctly captures the oppositional dialectic between the European and non-European, and identifies the plunder of the latter by the former. It places the state of crises of the world on the global order that the West has created and dominates." *Id.* at 35 (emphasis in original).

IHR advocacy is likewise criticized for how it operates. For instance, civil rights lawyers have questioned the efficacy of IHR advocacy given the lack of formal mechanisms for enforceability of much of international human rights law.⁷⁶ Progressive activists in the U.S., who viewed international human rights law as a place to situate the struggle of communities in the U.S. whose civil and political *and* economic and social subordination was sanctioned by domestic law,⁷⁷ bore witness to the breaking up of the Universal Declaration of Human Rights into treaties that separated, and ultimately created a hierarchy among, civil and political rights and economic, social, and cultural rights at the behest of the U.S. government.⁷⁸

However, even more critics have voiced concerns about the way IHR advocacy has been *effective*. The most prominent critique in legal circles comes from Mutua who writes about the “Savages-Victims-Saviors” complex that exposes the international human rights project as one that views Western advocates as “saviors” of Third World “victims” of their own “savage” governments.⁷⁹ Mutua exposes this narrative as lacking “a historical understanding of the struggle for human dignity [that] locate[s] the impetus of a universal conception of human rights in those societies *subjected* to European tyranny and imperialism,” such as anti-slavery campaigns and anti-colonial struggles and promoting “a Eurocentric ideal. . . premised on the transformation by Western cultures of non-Western cultures into a Eurocentric prototype and not the fashioning of a multicultural mosaic.”⁸⁰ Post-colonial feminist Ratna Kapur further exposes the victim narrative in the women’s human rights movement as undermining emancipatory politics by serving to essentialize Third World women on the basis of their

⁷⁵ See, e.g., Dan Beeton, *Soldiers Without a Cause: Why Are Thousands of UN Troops Still in Haiti?*, NACLA REPORT ON THE AMERICAS (Spring 2012), <https://nacla.org/article/soldiers-without-cause-why-are-thousands-un-troops-still-haiti>; Ibrahim J. Gassamaa, *Africa and the Politics Of Destruction: A Critical Re-Examination of Neocolonialism and its Consequences*, 10 OR. REV. INT’L L. 327, 348-49 (2008).

⁷⁶ See Eric Posner, *The case against human rights*, THE GUARDIAN (Dec. 4, 2014), <https://www.theguardian.com/news/2014/dec/04/sp-case-against-human-rights>; Caroline Bettinger-Lopez, Davida Finger, Meetal Jain, JoNel Newman, & Sarah Paoletti, *Redefining Human Rights Lawyering through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 GEO. J. ON POVERTY L. & POL’Y 337, 364 (2011).

⁷⁷ Malcolm X, *Not just an American problem, but a world problem*, Address delivered in the Corn Hill Methodist Church, Rochester, New York, Feb. 16, 1965, available at <http://nationalhumanitiescenter.org/pds/maai3/community/text10/malcolmxworldproblem.pdf>

⁷⁸ ANDERSON, *supra* note 70. See also Posner, *supra* note 76.

⁷⁹ See generally Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201 (2001).

⁸⁰ *Id.* at 204-05. See also Balakrishnan Rajagopal, *Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy*, 27 THIRD WORLD QUARTERLY 767, 769-70 (2006).

culture and gender and render invisible their efforts to resist oppressive structures.⁸¹ As a result of the neo-imperialism inherent in a “Eurocentric movement that seeks to shame ‘other’ cultures as the inferior savage for operating outside of Western cultural norms promoted under the guise of human rights,”⁸² responses to human rights violations have ranged from threats of cutting Western donor aid (viewed by former colonies as reparations⁸³), resulting in scarce resources for public goods like healthcare,⁸⁴ to all-out war and occupation as “humanitarian intervention,” resulting in mass killings, rapes, cultural genocide, and long-term environmental damage, among other harms.⁸⁵

IHR lawyers have also been criticized for the manner of their intervention. For example, while IHR lawyers have increasingly focused their attention on injustices in the United States or by U.S. actors, dockets that focus exclusively on foreign abuses by foreign perpetrators bespeak U.S. exceptionalism.⁸⁶ But whether within the U.S. or elsewhere, as they carry out projects, IHR lawyers are frequently accused of helicoptering in and out of situations, missing the complexities and nuances of the communities in which abuses have occurred, the nature of the abuses suffered and their root causes, and

⁸¹ Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 2 (2002). Quoting Chandra Mohanty, Kapur’s article explains that “gender essentialism assumes that ‘women have a coherent group identity within different cultures. . . prior to their entry into societal relations,’” and as a result, “generalizations. . . represent the problems of privileged women, who are often (though not exclusively) white, Western, middle-class, heterosexual women.” *Id.* at 6. “Cultural essentialism,” on the other hand, portrays Third World women “as victims of their culture, which reinforces stereotyped and racist representations of that culture and privileges the culture of the West.” *Id.*

⁸² Bettinger-Lopez et al., *supra* note 76, at 355.

⁸³ See Jason Hickel, *Enough of aid – let’s talk reparations*, THE GUARDIAN (Nov. 27, 2015), <https://www.theguardian.com/global-development-professionals-network/2015/nov/27/enough-of-aid-lets-talk-reparations>.

⁸⁴ One example is when Ugandan human rights organizations warned against cuts to foreign aid that would threaten access to health services in response to the passage of draconian anti-LGBT legislation. See *Guidelines to National, Regional, and International Partners on How to offer Support Now that the Anti-Homosexuality Law Has Been Assented to*, Civil Society Coalition for Human Rights and Constitutional la, BLACK LOOKS (Mar. 3, 2014), <http://www.blacklooks.org/2014/03/guidelines-to-ugandan-national-regional-international-partners-on-support-around-the-anti-homosexuality-bill/>.

⁸⁵ There is international consensus that the 2003 U.S. invasion of Iraq serves as a prime example of the use of humanitarian language to justify an illegal war. See Corrie Hulse, *The “Responsibility to Protect” Is Buried in Iraq*, FOREIGN POLICY IN FOCUS (Aug. 1, 2014), <http://fpif.org/r2p-iraq/>. The long-term harms of the war are detailed in a report prepared by the Center for Constitutional Rights for the “Right to Heal Initiative” of the Federation of Workers Councils and Unions in Iraq, Iraq Veterans Against the War, and the Organization of Women’s Freedom in Iraq. See *The War is Not Over for Iraqis and U.S. Veterans*, RIGHTTOHEAL.ORG (2014), <http://righttoheal.org/2014-right-to-heal-report/>.

⁸⁶ See Bettinger-Lopez et al., *supra* note 76, at 363.

local efforts to seek justice, heal, and resist.⁸⁷ They take off from such visits without recognizing or adequately preparing for the potential negative consequences of their presence, such as acts of retaliation against victims or witnesses questioned, destabilization of the victim's support system, or disruption of local efforts to address the violations.⁸⁸ When IHR lawyers travel from the "field" to international advocacy spaces, they purport to serve as a "voice for the voiceless," simultaneously "put[ing] the 'victims' both onscreen and off," through "an inherently voyeuristic or pornographic practice" that "reinforce[s] a global divide of wealth, mobility, information, and access to audience."⁸⁹ Finally, questions of ethical standards are raised when the rules of professional responsibility appear irrelevant to the work of IHR lawyers. Many projects of IHR lawyers, such as fact-finding investigations and human rights reports for which there are no "clients," rarely establish relationships subject to professional rules, which provide for limited duties to third parties.⁹⁰

While the foundational critique of using the law affirmatively for social justice and the minefield within which big case lawyers operate demand serious attention, these conditions should not debilitate us. Mari Matsuda describes the multiple consciousness of subordinated people: "embrac[ing] legalism as a tool of necessity," while at the same time surfacing the farce of the legal system in lives of subordinated people.⁹¹ Subordinated people do not have the luxury of academic consistency; no tools or avenues – from status-quo-reifying big case lawyering to destabilizing, violent uprisings⁹² – are automatically foreclosed in the fight for liberation. But it is necessary to mitigate the attendant risks of big case lawyering described above so that minimally we "do no harm." López's *Rebellious lawyering* provides a guide in navigating this treacherous terrain.

⁸⁷ See *id.* at 363; Benjamin Hoffman & Marissa Vahlsing, *Collaborative Lawyering in Transnational Human Rights Advocacy*, 21 CLIN. L. REV. 255, 262 (2014); William P. Quigley, *A Letter to Social Justice Advocates: Thirteen Lessons Learned by Katrina Social Justice Advocates Looking Back Ten Years Later*, 61 LOYOLA L. REV. 623, 676 (2015).

⁸⁸ See, e.g., Nell Moley, *Confronting the Challenges of Ethical Accountability in International Human Rights Lawyering*, 50 STAN. J. INT'L L. 359, 360-61, 362-64 (2014).

⁸⁹ David Kennedy, *The International Human Rights Movement: Part of the Problem?*, THE DARK SIDE OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 29 (Princeton 2004).

⁹⁰ Moley, *supra* note 88, at 374-75.

⁹¹ Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297, 298 (1992).

⁹² See, e.g., FRANTZ FANON, *Concerning Violence*, THE WRETCHED OF THE EARTH 35-106 (1963); *The Un-Victim: Amitava Kumar interviews Arundhati Roy*, GUERNICA (Feb. 15, 2011), https://www.guernicamag.com/interviews/roy_2_15_11/.

C. *Incorporating Rebellious Lawyering Principles In Big Case Work To Address Criticisms*

Many of the critiques of big case lawyering listed above can be addressed by incorporating rebellious lawyering principles. First and foremost, Matsuda's multiple consciousness only surfaces in legal tactics when the expertise and leadership of subordinated people determines the course of the struggle – which strategies and tactics to use and when. Of course, this understanding does not exclude the role of the lawyer. Indeed, lawyers and other allied problem-solvers may offer an array of tactics for subordinated communities to choose from alongside their own.

Second, history has shown that involvement of affected communities in monitoring compliance with or enforcement of judicial decisions, and even recommendations by human rights bodies, makes them more likely to be enforced.⁹³ For affected communities to play this critical role in enforcement of judicial decisions, they cannot be brought in merely after-the-fact. The early involvement and investment of communities in the course of legal action, including filing, framing, arguments made, and remedies requested, lays the groundwork for effective involvement in enforcement efforts.⁹⁴ Further, working with, rather than on behalf of, affected communities and in coalitions with other problem-solvers can check the grand visions of what litigation can accomplish on its own, a view which often channels broader struggles into narrow legalist arguments. There is less pressure to seek to wholly remedy an injustice through the courts when the legal tactic was devised alongside multiple other strategies that communities carry forward to tackle complex injustices.

Third, particularly in (but not limited to) the international or transnational context, working with organized communities and in coalitions with other local actors in resistance, including on-the-ground community lawyers and other problem-solvers, in *meaningful collaboration*⁹⁵ and *for the purpose of building power* within affected commu-

⁹³ See, e.g., Elsesser, *supra* note 41, at 382-83. Regarding the implementation of decisions by human rights bodies, an illustrative example arises from post-earthquake Haiti. Following a series of evictions of those rendered homeless by the January 2010 earthquake living in tent camps, the Inter-American Commission on Human Rights issued precautionary measures advising the Haitian government to place a moratorium on evictions until a resettlement plan was in place. The decision sat in a desk drawer in a government office until an organized group of tent camp residents used the decision to pressure a private landowner to allow them to stay in their tent camp pending their resettlement by the government.

⁹⁴ See, e.g., Bell, *supra* note 10.

⁹⁵ Hoffman, *supra* note 87, at 266-67 (explaining that “collaboration” does not mean the lawyer can just arrive in a community with a particular strategy and and present it as a “take-it-or-leave-it” offer).

nities, mitigates the risk any legal or advocacy actions will serve to reinforce the Savage-Victim-Savior narrative, since the “victims” are building the narrative about themselves, their efforts to resist, and the perpetrators of their injustices. This approach can also complicate the “savage,” as it pushes advocates to see beyond obvious local antagonists and recognize more complex causes for injustice, such as the involvement of state and corporate actors that are also responsible for subordination of communities in the U.S. This level of analysis simultaneously undermines U.S. exceptionalism and creates opportunities for transnational collaboration.⁹⁶ Remedies are sought that promote the visions of justice held by affected communities instead of rich, white, heteropatriachal Eurocentric/Western ideals, and mitigate the risk of resulting in greater human rights violations, such as through militarized interventions and cuts in aid/reparations.

Fourth, rebellious lawyering principles also force lawyers to recognize and reinforce local sites of resistance, which assists in better understanding not only the nature of the injustices, their harms and root causes, but also available spaces for victims to seek justice, heal, and resist. Supporting local resistance efforts promotes sustainable interventions that minimize the negative consequences of fleeting, “in and out” consultations and investigations, and permit local actors to speak their own truths in international fora.

Finally, working with an organized community permits opportunities for accountability. For example, Earth Rights International (ERI) uses collaborative and negotiated retainer agreements with organized communities as an “opportunity for a frank discussion about the goals and expectations of both parties, and an opportunity to put in writing the commitments that each side is making in formalizing the relationship.”⁹⁷ When legal action is decided, ERI’s retainer agreements may also help ensure the lawyers understand the community’s goals for the legal strategy and provide for a process to reassess those goals periodically.⁹⁸

At all levels, rebellious lawyers aim to approach relationships in a manner that facilitates deep collaboration through which mutual teaching and learning takes place.⁹⁹ It is this mutual teaching and learning that prevents lawyers from centering our roles, values, and perspectives; allows us to be creative and thus, more helpful; and

⁹⁶ See, e.g., *IVAW Calls on the MD National Guard to Stand Down in Baltimore*, IRAQ VETERANS AGAINST THE WAR (Apr. 29, 2015), <http://www.ivaw.org/blog/ivaw-calls-md-national-guard-stand-down-baltimore>.

⁹⁷ Hoffman, *supra* note 87, at 270-71.

⁹⁸ Hoffman, *supra* note 87, at 271-72.

⁹⁹ LÓPEZ, *supra* note 12, at 70.

holds us accountable to subordinated people.

Yet, many big case lawyers – whether their work is domestic or international – tend to resist lawyering rebelliously. Often, they subscribe to a cause theory of lawyering¹⁰⁰ of the “elite/vanguard” variety – i.e., lawyers who represent principles, the “public interest,”¹⁰¹ or “norms.”¹⁰² For such lawyers, “[l]aw becomes an instrument of social change, and changing law—primarily through litigation—becomes an end itself.”¹⁰³ While these lawyers may also practice in “legislative or administrative forums. . .and work closely with the media or with social movements,” they “continue to represent their cause in a legalistic manner. . .oriented ‘up,’ speaking to elites.”¹⁰⁴ Under this approach to lawyering, the “individual client fades into the background [, w]ith the individual case a vehicle for the advancement of general principles.”¹⁰⁵ The lawyers “are in charge, determining strategy, fighting on the front lines of the case, often creating the cause themselves,” and the clients and advocacy coalitions are briefed only after strategic decisions are made.¹⁰⁶ Their practice is, in short, regnant.

They are “Teresa” in López’s allegory, the director of Advocates for Justice, a fictitious public interest impact litigation firm. Based on the view that cases are “highly technical actions and that clients don’t have to worry about investing much of their time and energy,” Teresa “hardly ever asks clients to help gather information, read materials, or study the law; to take part in planning, preparing, or attending meetings about the drafting of the complaint; to help frame and critique the stories she will be telling on the clients’ behalf; or to think about including their friends and supporters as part of anything other than the media show that the lawyer scripts, produces, and directs.”¹⁰⁷ She generally believes that “linking litigation with other strategies that fall outside her expertise is a luxury she feels she cannot regularly afford,” and only connects with other community institutions and groups “when their services can directly help a case” such as by finding clients or joining in on a press conference.¹⁰⁸

Despite having a character in López’s stories, many big case lawyers may be resistant to incorporating rebellious lawyering principles

¹⁰⁰ Bettinger-Lopez et al., *supra* note 76, at 341.

¹⁰¹ Thomas M. Hilbink, *You Know the Type. . .: Categories of Cause Lawyering*, 29 *LAW & SOC. INQUIRY* 657, 673 (2004).

¹⁰² Bettinger-Lopez et al., *supra* note 76, at 364.

¹⁰³ Hilbink, *supra* note 101, at 674.

¹⁰⁴ *Id.* at 677.

¹⁰⁵ *Id.* at 680.

¹⁰⁶ *Id.* at 680-81.

¹⁰⁷ LÓPEZ, *supra* note 12, at 15-16

¹⁰⁸ *Id.* at 16.

into their practice on belief that rebellious lawyering addresses the collaborative design of an individual lawyer-client relationship, which is not applicable to their mode of lawyering. However, the principles of rebellious lawyering are as critical to big case lawyering as any other kind of lawyering. Law reform and IHR lawyers purport to take on the great responsibility of creating, reforming, and/or enforcing laws in a manner that often affects entire communities, states, countries, or even, the world. With such great responsibility, there must be accountability. Rebellious lawyering's directive to meaningfully collaborate with subordinated communities from the perspective that the expertise and leadership of subordinated communities is central to social change, helps create that accountability.

III. REBELLIOUS LAWYERING IN CLINICAL LEGAL EDUCATION

Since *Rebellious Lawyering* was published, law school clinical programs have witnessed the growth of clinical models, pedagogical tools, and scholarship aimed at incorporating rebellious lawyering principles in different aspects of training law students to become social justice lawyers – from collaborative practices in client interviewing and counseling to assigning community education and political advocacy projects to students in addition to their individual client cases.¹⁰⁹

Some clinicians have designed the entire model of their clinics based on a rebellious approach to lawyering. Sameer Ashar describes clinical programs across the country “shaped by the legal needs of community collectives,” where organized communities serve as clinic partners, rather than simply clients, in the struggle for social justice.¹¹⁰ Such clinics “work primarily with populations in which there is political organizing” and less frequently, “support the project of organizing the unorganized,”¹¹¹ while engaging their students in much of the legal and advocacy functions practiced in other clinics. For example, while with CUNY's Immigrant & Refugee Rights Clinic, Ashar's students worked with the Restaurant Opportunities Center (ROC) to pursue the wage and hour violation claims of ROC's immigrant members as part of ROC's multi-faceted campaign to change working conditions.¹¹² Ashar explains that the work the students were doing was

¹⁰⁹ See generally Loretta Price & Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 N.Y.U. REV. L. & SOC. CHANGE 615 (2000-01); Bertha Social Justice Institute, *Movement Lawyering Guide* (Apr. 3, 2013), available at <https://billquigley.wordpress.com/2013/08/13/social-justice-lawyering-reading-list/>.

¹¹⁰ Ashar, *supra* note 2, at 356.

¹¹¹ *Id.* at 356.

¹¹² *Id.* at 391.

similar to cases they would be handling if the clinic conducted general intake for wage and hour claims.¹¹³ However, by working in partnership with ROC, they “ch[ose] to use the clinic’s scarce legal resources to support organizing and collective action for broader reform in an industry that has been shaped by accelerated migration and lowered labor standards and regulatory enforcement.”¹¹⁴ In other words, the students in this clinic, and many others like it at other law schools, are exposed through the design of the clinic docket to working collaboratively with a subordinated community to build power within the community to dismantle the conditions of its subordination.

The ability of such clinics to integrate rebellious principles into the design of their dockets is facilitated by the stated scope of the clinics. Rather than case-centered (small case v. big case) or skill-centered, these clinics are defined by a particular political community: immigrants, workers, etc.¹¹⁵ As a result, it is easier for the clinic to identify politicized collectives with whom to partner in developing a clinic docket.¹¹⁶ In a world where rebellious lawyering is the ideal progressive law practice, this community-oriented clinical model perhaps brings us closest to educating the most effective social justice lawyers. But where clinics cannot, for institutional or other reasons, be entirely redesigned, can big case clinics incorporate rebellious lawyering principles in the way we choose our cases and how and what we teach our students? And if so, how should students’ learning of those principles be facilitated given the challenges inherent in our clinics?

A. *Channeling Rebellious Lawyering In Big Case Clinics*

Big case clinics traditionally served as the response to the systemic issues that produced the repeat or “routine” cases filling the dockets of direct services, or small case, clinics. In the effort to expose students to the systemic nature or root causes of injustices that compel individuals from subordinated communities to seek the services of civil and criminal justice clinics, law reform and impact litigation clinics sprang up “to address broader social justice concerns related to the maldistribution of wealth, power and rights in society.”¹¹⁷ Beyond simply seeking to address these issues, big case clinics sought to bring the social justice mission of clinical legal education to the forefront,¹¹⁸ or in the words of Frank Askin, who founded the first law reform

¹¹³ *Id.* at 391.

¹¹⁴ *Id.* at 391.

¹¹⁵ *Id.* at 368-74, 391-97.

¹¹⁶ *Id.* at 390.

¹¹⁷ Stephen Wisner, *Beyond Skills Training*, 7 CLIN. L. REV. 327, 329 (2001).

¹¹⁸ *Id.* at 331.

clinic in a U.S. law school¹¹⁹: to “offer[] a practical vision of law as an instrument of social justice.”¹²⁰

In the tradition of law reform clinics, international human rights clinics began cropping up in law schools in the 1990s,¹²¹ seeking to expose students to social injustices at a global level and the role of lawyers in responding to injustices wherever they are found.¹²² Their mission is often described as helping students “apply seemingly abstract international legal principles to very real, concrete circumstances,”¹²³ understand how “international human rights law impact peoples’ everyday lives,”¹²⁴ and “prepar[e]. . .for practice in a global society.”¹²⁵

Despite the myriad of problems associated with big case work described in Part II, the value of the fundamental mission of big case clinics should not be overlooked. Much of law school simply teaches students how to understand the law as it is, leaving “the relationship of the processes of the law to the fundamental problems of contemporary society” a mystery to many students.¹²⁶ While the social justice mission of small case clinics may be hidden, with the intent of allowing students to uncover systemic injustices through the obstacles facing their clients and those of their fellow students, big case clinics seek to directly and expressly expose students to those systemic injustices and the notion that lawyers can “have real social impact and create new and better law under a system of self-government.”¹²⁷ IHR clinics, in particular, further expose students to the transnational nature of injustices and how the international community responds to such injustices.

However, big case clinics have faced nearly as many critiques on the question of pedagogy as big case work faces in practice. Comparing these clinics against small case clinics, “[l]ess emphasis is placed on the skills associated with the development of the lawyer-client relationship (interviewing and counseling and theory of the case) and more on acquisition of the differing substantive and procedural

¹¹⁹ PAUL L. TRACTENBERG, A CENTENNIAL HISTORY OF RUTGERS LAW SCHOOL IN NEWARK: OPENING A THOUSAND DOORS Appendix II (2010).

¹²⁰ Askin, *supra* note 2, at 856.

¹²¹ Bettinger-Lopez et al., *supra* note 76, at 362.

¹²² While some IHR clinics take on individual asylum clients, the work of IHR clinics has largely fallen into the big case clinic model. *Id.* at 341.

¹²³ Johanna Bond, *The Global Classroom: International Human Rights Fact-Finding as Clinical Method*, 28 WM. MITCHELL L. REV. 317, 327 (2001).

¹²⁴ *Id.* at 327.

¹²⁵ Sarah H. Paoletti, *Finding the Pearls When the World Is Your Oyster: Case and Project Selection in Clinic Design*, 5 DREXEL L. REV. 423, 424 (2013).

¹²⁶ Arthur Kinoy, *The Present Crisis in American Legal Education*, 24 RUTGERS L. REV. 1, 7 (1969).

¹²⁷ Askin, *supra* note 2, at 856.

knowledge in each phase of the litigation.”¹²⁸ It could be argued that such knowledge could be obtained just as easily in a simulation course, whereas the development of the client relationship requires the authenticity of a live person. Moreover, the pedagogical opportunities on such cases are dependent on “whether the case is leanly staffed or co-counseled by multiple senior lawyers who ‘first seat’ at major points in the litigation.”¹²⁹ They are also dependent on timing. Big cases often span years, leaving students in any given semester to only experience a small portion of the effort. As Nancy Maurer highlights:

Participation in complex cases may simply be too difficult for [some] students. There may not be enough time during a single semester to get some students up to speed to work on the case. Just as their skills begin to emerge and their interest peaks, the semester winds down. Students who are not able to quickly master the file, absorb the case history, understand the client and grasp the necessary law and procedure, are too easily relegated to observer status. Even with a two-semester commitment to the clinic, students may miss important case activity simply due to timing. It is not always possible to control court appearances and due dates.¹³⁰

Further, often when students enroll in clinic, they have had one to two years of education purely on the law. Clinic becomes their first opportunity to understand how much of lawyering and social justice require an understanding of facts and relationships, to some extent shaped by but often far removed from legal doctrines and judicial opinions. While students in direct services clinics are often dispelled of notions of “primacy of the law” very soon after they begin meeting with a client and negotiating with opposing counsel or bureaucratic institutions, students who enroll in big case clinics may never be challenged in this way.

IHR clinics face many of the pedagogical challenges facing big case clinics generally, such as the long-term nature of many projects and cases,¹³¹ as well as certain additional challenges. For instance, there may be a great geographic distance between a clinic and its clients, partners, or affected communities that “limit[s] opportunities for lawyer-client interactions” that would train students in the complexi-

¹²⁸ Ashar, *supra* note 2, at 374.

¹²⁹ *Id.* at 374.

¹³⁰ Nancy M. Maurer, *Handling Big Cases in Law School Clinics, or Lessons from My Clinic Sabbatical*, 9 CLIN. L. REV. 879, 892 (2003).

¹³¹ Jocelyn Getgen Kestenbaum, Esteban Hoyos-Ceballos, & Melissa C. del Aguila Talvadkar, *Catalysts for Change: A Proposed Framework for Human Rights Clinical Teaching and Advocacy*, 18 CLIN. L. REV. 459, 469 (2012).

ties of cross-cultural lawyering.¹³² The sites of advocacy are also frequently far away. Under-resourced IHR clinics are unable to support their students' travel to the United Nations headquarters in Geneva, for instance, to participate in the lobbying that takes place in UN hallways in the lead-up to country reviews by human rights bodies.

The critique extends to the skills taught in IHR clinics. Human rights advocacy often employs "'constituent elements of lawyering' – 'question-framing, listening, drafting, persuading, fact gathering, synthesizing and marshaling information, investigating, problem-solving and advising, to name a few.'"¹³³ However, David Kennedy has questioned whether "[t]he human rights movement degrades the legal profession by encouraging a combination of both sloppy humanitarian arguments and overly formal reliance on textual articulations which are anything but clear or binding. . . encouraging [IHR lawyers] to believe that their projects are more legitimate precisely because they are presented in (sloppy) legal terms."¹³⁴ Kennedy further notes that "[e]very effort to use human rights for new purposes, to 'cover' new problems, requires that [IHR lawyers] make arguments they know to be less persuasive than they claim."¹³⁵

Despite these challenges, big case clinics offer students an opportunity to be exposed to law and its role in creating and fighting injustice within and beyond the community in which their law school is situated. They are given an opportunity to engage with systemic oppression as it results in multi-local, state, regional, national, and transnational injustices. While the practice of big case lawyering is a minefield, exposure to the multi-level thinking this work requires can help new lawyers bring an analysis of interconnectivity to any rebellious practice. For instance, a student working on a Freedom of Information Act project in support of a transnational collaboration between a group of U.S. veterans of the Iraq war and organized Iraqi communities can bring an understanding of the relationships between U.S. abuses abroad (in Iraq) and at home (in Veteran communities) to any future work.¹³⁶

Given the ample barriers to teaching rebellious lawyering in big case clinics, it becomes critical to intentionally design all pedagogical avenues to expose students to rebellious lawyering principles that

¹³² *Id.* at 470.

¹³³ *Id.* at 467 (quoting Carrie Menkel-Meadow, *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education*, 4 *ANTIOCH L.J.* 287, 288-89 (1989)).

¹³⁴ Kennedy, *supra* note 89, at 27.

¹³⁵ *Id.* at 28.

¹³⁶ See Freedom of Information Act Request for Documents on the U.S.'s Use of Depleted Uranium, *available at* RighttoHeal.org.

challenge their preexisting notions of how law affects people and communities and the role of lawyers in the struggle for social justice. Despite the urgency of this project, as a group of IHR clinicians have noted, the “rich corpus of scholarship” aimed to improve clinical pedagogy are often overlooked by their colleagues based on the “overinflated” belief that “human rights clinics are different and therefore require a different pedagogy and set of lawyering tools.”¹³⁷ The same may be said of law reform clinics, where the lawyer-client relationship is often far removed from the work of the clinic, perhaps leaving clinicians to believe that the decades of exploration into “rebellious,” “collaborative,” “client-centered,” or “community” lawyering and clinical pedagogy to teach these approaches does not apply to their work.

The following section seeks to build on existing pedagogical tools to teach rebellious lawyering in order to address the unique challenges facing big case clinics.

B. Docket Design And Beyond

The primary way to put rebellious lawyering principles into practice in big case clinics is through docket design. Dockets that expose students to the power of organized communities can facilitate “disorienting moments” that, with sufficient guidance, can cause them to think critically about their pre-existing notions of how social change happens and the role of law and lawyers in that process.¹³⁸ In *Law Clinics and Collective Mobilization*, Ashar extensively explores ways for clinics to identify community partnerships that allow students to practice rebelliously by engaging in basic legal and advocacy functions to build power within directly impacted communities.¹³⁹ In *Redefining Human Rights Lawyering through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, a group of critically engaged IHR clinicians similarly present a framework for identifying cases for the docket of a rebellious IHR clinic.¹⁴⁰ Some examples from the international human rights side of my clinic include: representing a network of LGBT grassroots groups in Uganda in their Alien Tort Statute litigation against a U.S. actor alleged to be partially responsible for their persecution; representing a collective of U.S. veterans, working in collaboration with two community-led organizations in Iraq, in their Freedom of Information Act requests regarding the use and impact of

¹³⁷ Bettinger-Lopez et al., *supra* note 76, at 392, 394.

¹³⁸ Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLIN. L. REV. 37, 51 (1995).

¹³⁹ Ashar, *supra* note 2, at 389-405.

¹⁴⁰ Bettinger-Lopez et al., *supra* note 76, at 380-81, 384-91.

toxic munitions during the U.S.'s war on Iraq; and providing drafting support to grassroots groups in the Movement for Black Lives in their submissions to international human rights bodies. An example on the constitutional rights side of my clinic arose out of a relationship with a local community-based organization. Our clinic represented an organizer from that organization who was fired from her public school teaching position for teaching about radical Black history relevant to the day-to-day lives of her students in a majority-Black school district. Victory in her case not only permitted her to continue teaching racial justice, but re-established her access to a stable income in order to continue her organizing efforts.

In short, some essential considerations a rebellious big case clinic docket should take in account are: Is the case or project one that is developed collaboratively with the impacted community and/or organizers working within the community? Given the limited impact of big case victories in the day-to-day struggles of communities, does it form a part of a larger multifaceted advocacy strategy? And, are there ways to ensure continuing accountability to the community over the life of the case/project?

Of course, carefully constructed dockets alone usually will not result in disorienting moments for students. As Jane Aiken cautions, “[r]elying on pure case-handling. . . reflects a belief that we communicate values through our content choices rather than by engaging the student in the moral and ethical discourse about those choices.”¹⁴¹ Clinicians also engage students in thinking critically about their work during supervision meetings and rounds,¹⁴² by asking questions that elicit reflections that meet a set of teaching goals.¹⁴³ In a rebellious clinic, the teaching goals may be developed around rebellious lawyering principles.

As noted above, due to the timeline of the case or project and/or distance from the affected community, students’ fieldwork in big case clinics may not provide sufficient opportunities for disorienting moments that can be drawn out during supervision meetings, case rounds, or other self-reflection activities. To address these limitations, big case clinicians may need to develop additional pedagogical approaches in the seminar component of the clinic in order to ground students in theory that they can draw from to analyze their clinic field-

¹⁴¹ Jane H. Aiken, *Provocateurs of Justice*, 7 CLIN. L. REV. 287, 287-88 (2001).

¹⁴² Susan Bryant & Elliot S. Milstein, *Rounds: A “Signature Pedagogy” for Clinical Education?*, 14 CLIN. L. REV. 195, 197 (2007).

¹⁴³ Aiken, *supra* note 141, at 302. For example, Ashar describes clinicians who use “open source” syllabi co-constructed by the students through their fieldwork so as to facilitate these moments of critical reflection. Ashar, *supra* note 2, at 399.

work from a broader perspective than their narrowly defined assignment(s) for the semester. The mission of the seminar component can be to compel students to question how strategic decisions in their case or project are made, how narratives are constructed, and the role their case or project plays in dismantling the conditions of a communities' subordination. Without such reflection, students may overlook or minimize the importance of partnering with or representing organized communities, rather than view such relationships as central to social justice lawyering.

B. Constructing A Rebellious Seminar

Through a combination of provocative readings and class discussions, role plays, and simulations,¹⁴⁴ big case clinicians can use the seminar component to equip students with analytical tools to channel rebellious lawyering in their practice during and beyond their time in clinic. What follows are brief descriptions of foundational subjects to address in a rebellious seminar – topics I have attempted to address with varying levels of success in my own clinic seminar. It builds heavily off of a movement lawyering training workshop I co-designed in a team led by Purvi Shah at The Bertha Justice Center of the Center for Constitutional Rights¹⁴⁵ and advocacy trainings by Professor Jeff Unsicker and Laura Raymond.

Topic 1: Vision of Social Justice

As López explains, a rebellious lawyer “is constantly looking beyond the immediate result of any particular project” and “not only pays close attention to the actual workings of the projects themselves and to the participation of different people,” but also “fits them. . .into a broader vision of the collective fight for change.”¹⁴⁶ Thus, at the outset, I encourage my students to articulate, and challenge, their vision of social justice.

Law school causes students to “think only or principally like those in power” and leaving many to “pay entirely too much attention to formal challenges to terms.”¹⁴⁷ As a result, by the time students have entered into clinic, they have often lost sight of what social justice means outside of the law. For instance, when I have asked students about their vision of social justice, many have focused entirely

¹⁴⁴ See, e.g., Aiken, *supra* note 141, at 303-305.

¹⁴⁵ See The Bertha Justice Institute at the Center for Constitutional Rights, <http://ccrjustice.org/home/BerthaJusticeInstitute>. Other principal designers of the workshop include Nikki Demetria Thanos and Meena Jagannath.

¹⁴⁶ LÓPEZ, *supra* note 12, at 66.

¹⁴⁷ *Id.* at 61.

on procedural fairness within the bounds of U.S. law and have had trouble articulating what substantive fairness would look like and imagining beyond the boundaries of the U.S. legal system. In other words, students tend to have trouble conceiving of social justice as it could exist if the status quo were dismantled.

The exercise of not only articulating a vision of social justice but having that vision challenged is a critical exercise for social justice lawyers. The inability to do so can serve as a barrier to understanding the role of law in the lives of subordinated communities and their vision of liberation. It can also hide biases we hold about what we believe are worthy causes and what are not. By forcing ourselves to become aware of this bias, we are better able to recognize that the choices we make about which cases to take arise in part from our vision of social justice. And when rebellious lawyers take on work with a community with whom their vision of justice diverges, lawyers who are not aware of their own visions of justice may unintentionally or unconsciously attempt to impose their own views on the community. At the same time, even when we are self-aware, working with communities who have a different vision of social justice than ourselves may force us to negate our moral selves, causing conflict that can lead to burnout or disillusionment with social justice work.

In recognition of both of these risks, one rebellious practice, the Community Justice Project in Miami, identifies the communities with which it will work based on the community's vision of justice (as well as the community's theory of social change as discussed below) in order to ensure alignment at a fundamental level. While this sort of selection process would be inappropriate for dockets built from client intakes, some selection process is already central to big case practice where lawyers select cases or projects based on various personally- or institutionally-held views. And it is critical to rebellious big case lawyering where the goal is to build power within impacted communities, as opposed to protecting, narrowing, or expanding certain legal principles or securing certain procedural reforms. The cognitive dissonance that would result from building power within communities whose fundamental vision of social justice does not align with yours – such as a progressive lawyer using tactics to build power within a community whose vision of social justice is the maintenance of white supremacy or extreme wealth¹⁴⁸ – would be too much for any person to handle.

¹⁴⁸ This is distinct from defending the First Amendment rights of the Ku Klux Klan or corporations to preserve First Amendment principles for all. By contrast, attempting to lawyer rebelliously while representing the KKK or corporations means working to build the power of those entities by helping to expand their base and/or develop indigenous leadership.

This is not to say that a lawyer's vision of social justice cannot be, or should not be, challenged by communities with which they interact or engage. It is important that our visions of social justice are perpetually challenged and evolve as a result of those challenges (through López's mutual teaching and learning process¹⁴⁹), but that evolution is more likely to occur where there is some fundamental point of connection between the lawyer and the community's ultimate visions of justice.

Helping students develop a habit of articulating their evolving visions for social justice also helps them identify their client's vision. Understanding a subordinated community's vision for social justice allows everyone involved in the struggle to avoid, in the words of one of López's characters, "fetishizing" tactics, given that "means [] prefigure the ends," and helps us keep our eyes on the prize.¹⁵⁰ Additionally, making a habit of discussing the visions of social justice held by us and client communities can help prevent us from thinking issues a community is facing should elicit "routine" responses from lawyers such as filing a litigation or submitting human rights reports, and force us to continually expand the range of legal tactics we can offer a community.

Engaging our students in the expansiveness of this discussion requires some creativity. As a starting point, I ask my students to journal on their vision of social justice. Preparing for the fact that many students' journal entries will assume a level of validity of the norms and values underlying the U.S. legal system as it operates in the present moment, I use the seminar discussion to push the students to reach deeper into their imaginations to challenge those norms and values. I have found starting with quotes and talks by several different social justice activists that focus on different aspects of justice¹⁵¹ helps the students engage in a robust discussion on their own views of social justice and pushes them to reflect on the relationship between purely legal concepts and concepts rarely discussed in a law school, like joy.¹⁵² Readings that expand understandings of justice, truth, and

¹⁴⁹ LÓPEZ, *supra* note 12, at 70.

¹⁵⁰ LÓPEZ, *supra* note 12, at 377.

¹⁵¹ Some quotes that have sparked robust discussion include: "[W]e are not fighting for the freedom of the Negro alone, but for the freedom of the human spirit, a larger freedom that encompasses all mankind," Ella Baker; "The opposite of poverty is not wealth. In too many places, the opposite of poverty is justice," Bryan Stevenson; "If I didn't define myself for myself, I would be crunched into other people's fantasies for me and eaten alive," Audre Lorde; and "[T]ruth. . . is meant to imply a devotion to the human being, his freedom and fulfillment; freedom which cannot be legislated, fulfillment which cannot be charted," James Baldwin. *Rad Talks* at the Law for Black Lives Conference are a great resource for videos to show: <http://www.law4blacklives.org/#videos-section>.

¹⁵² See Vince Warren, *Rad Talks*, LAW FOR BLACK LIVES, <http://www.law4blacklives>

freedom, such as pieces by James Baldwin and Audre Lorde, can help prepare students for such a class discussion.¹⁵³

Considering the role of art, poetry, and literature in, as one writer puts it, “offer[ing] new ways to imagine what can be radically different realities,”¹⁵⁴ asking to students to journal about and discuss a piece of art, a poem, or a novel, can also facilitate an exploration of justice beyond the bounds of law as it stands today. Additionally, readings about initiatives by community groups that have radical visions of a future reality, such as around transformative justice¹⁵⁵ or solidarity economies,¹⁵⁶ can help students conceive of concretizing radical visions.

Topic 2: Systems of Oppression

Among his litany of reasons why regnant lawyers are not very effective in the struggle for social justice, López explains how they “have only a modest grasp on how large structures—regional, national and international, political, economic, and cultural—shape and respond to challenges to the status quo.”¹⁵⁷ Rebellious lawyering, by contrast, challenges lawyers to consider the role these large structures play in creating and maintaining subordination of a community. In other words, rebellious lawyers should not only consider institutional oppression, which “involves polices, practices, and procedures of institutions that have a disproportionately negative effect on [a particular community’s] access to and quality of goods, services, and opportunities,” but also systemic oppression, which encompasses oppressive structures at the interpersonal and institutional levels and is expressed through a “value system that is embedded in a society that supports

.org/#videos-section.

¹⁵³ See James Baldwin, *Everybody’s Protest Novel*, NOTES OF A NATIVE SON 13-23 (1949); Audre Lorde, *The Master’s Tools Will Never Dismantle the Master’s House*, SISTER OUTSIDER: ESSAYS AND SPEECHES 110-114 (Crossing Press 1984).

¹⁵⁴ Kate Kellaway, *Austerity Measures: The New Greek Poetry*, THE GUARDIAN (Apr. 3, 2016), <https://www.theguardian.com/books/2016/apr/03/austerity-measures-new-greek-poetry-review-karen-van-dyck>.

¹⁵⁵ For an overview and list of resources see, for example, *Transformative Justice*, U.S. PRISON CULTURE, <http://www.usprisonculture.com/blog/transformative-justice/>, and *Books & Articles*, TRANSFORM CHICAGO, <https://transformchicago.wordpress.com/resources/books-articles/>. One example of transformative justice in practice is the restorative justice model Power U Center for Social Change is working to establish in Miami-Dade County Public Schools to replace the School-to-Prison pipeline. See *We Are Winning Restorative Justice in Our Schools*, POWERU, [at poweru.org/our-schools/](http://poweru.org/our-schools/).

¹⁵⁶ For an overview and list of resources see, for example, Craig Borowiak, *Solidarity Economy Resources*, <http://cborowiak.haverford.edu/solidarityeconomy/>, and U.S. SOLIDARITY ECONOMY NETWORK, <https://ussolidarityeconomy.wordpress.com>. One example of efforts to create a solidarity economy is BASE Baltimore; to learn more see <http://basebaltimore.org/>.

¹⁵⁷ LÓPEZ, *supra* note 12, at 24.

and allows” subordination of that community.¹⁵⁸

This distinction is important in big case work. While small case clinics face enough challenges in facilitating their students’ understanding that the inter-personal oppression their client is facing may be the result of policies, practices, or customs of a particular institution, big case clinic projects are usually aimed at tackling institutional oppression, such as a challenge to racist policing practices of a police department. Our task then, as rebellious big case clinicians, is to view the *institutional* oppression as part of a broader *system* of oppression.

Understanding the system of oppression is important because issues in isolation are mistaken as one-dimensional. An analysis that stops at the institutional level risks missing the way that multiple institutions and sets of norms are often at play in causing or maintaining an injustice, the multiplicity of harms resulting from the injustice, the multiple, different communities impacted, and the root causes of the injustice. As a result, legal and non-legal tactics that could be used to dismantle the underlying system subordinating a community are overlooked, and the risk that tactics are fetishized and distract those involved in the struggle from the ultimate goal is raised once again.¹⁵⁹ Additionally, potential allies in the struggle are overlooked and those who are aligned with actors causing the community’s subordination are mistaken for allies.¹⁶⁰

To help them engage with the concept of systemic oppression, I assign my students readings that describe the way institutions and values interact with one another to create systems of oppression, such as Chapter 3 of Arthur Kinoy’s *Rights on Trial* describing the suppression of the labor movement in the 1940s-50s and Ta-Nehisi Coates’ “The Case for Reparations,”¹⁶¹ alongside shorter pieces addressing issues found in current headlines.¹⁶² In seminar, the students are asked

¹⁵⁸ Vernellia R. Randall, *What is Institutional Racism?*, 2008 PRESIDENTIAL ELECTION, RACE AND RACISM, <https://academic.udayton.edu/race/2008ElectionandRacism/RaceandRacism/racism02.htm>.

¹⁵⁹ See LÓPEZ, *supra* note 12, at 50-51: “What person or group at the local, regional, or national level might exact a meaningful apology or compensation from the person who wronged the client? Who might talk the landlord out of a rent increase? What stories and storytelling practices govern the remedial ceremonies (however informal) through which this audience exercises power? What strategies, old and new, might they draw on in planning how to approach this audience? What counter-strategies can they anticipate, preempt, or rebut?”

¹⁶⁰ LÓPEZ, *supra* note 12, at 376.

¹⁶¹ Ta-Nehisi Coates, *A Case for Reparations*, THE ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

¹⁶² For instance, in January 2016, I assigned Stephen Menedian, *Structural Racism in Flint, Michigan*, LA PROGRESSIVE (Jan. 19, 2016), <https://www.laprogressive.com/flint-water-crisis/> and *Solidarity Statement against ICE raids* (Jan. 11, 2016), <http://cispes.org/article/solidarity-statement-against-ice-raids>.

to collectively articulate the systems of oppression described in one of the readings and the various institutions, norms, and values making up those systems.

I then steer the discussion to the cases and projects on the clinic docket. The students are asked to situate the particular defendants or adversaries in their fieldwork within broader systems that facilitate the adversaries' actions towards our clients. For example, our clinic represents a Ugandan LGBT organization in its case against a U.S. anti-LGBT extremist, an evangelical pastor, for contributing the persecution of the Ugandan LGBT community. Without discussion of systems of oppression, students may view the case as simply challenging the role of U.S. evangelicals exporting U.S. "culture wars" abroad.¹⁶³ This analysis focuses on one institution – U.S. evangelism – in isolation. It ignores the role of past and present economic and military policies of the United States and European powers that have created an environment for Western anti-LGBT extremists to exercise such power in Uganda and other Third World countries. Having the students name heteropatriarchy, white supremacy, and imperialism as systems of oppression, and break down the various institutions and values that uphold these systems in the context of our clients' oppression, allowed them to see that our client's struggle was much broader than the victory or loss in our particular litigation.

Topic 3: Multiple Forms of Knowledge

Another characteristic of regnant lawyers, according to López, is that they "do not know and try little to learn whether and how formal changes in law penetrate the lives of subordinated people."¹⁶⁴ The knowledge a lawyer has of the law is often sharply different from the way that law operates in a community, and those best positioned to understand its operation are those in the community itself. As Paulo Freire explains:

Who are better prepared than the oppressed to understand the terrible significance of an oppressive society? Who suffer the effects of oppression more than the oppressed? Who can better understand the necessity of liberation?¹⁶⁵

However, this knowledge rarely, if ever, surfaces in legal training. In order to understand the benefits of collaborating with subordinated communities, students need to understand the critical knowledge that those communities bring to understanding an injustice, what justice

¹⁶³ See, e.g., Barbara Bradley Hagerty, *U.S. Exports Cultural War To Uganda*, NPR (Jan. 15, 2010), <http://www.npr.org/templates/story/story.php?storyId=122572951>.

¹⁶⁴ LÓPEZ, *supra* note 12, at 24.

¹⁶⁵ PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Bloomsbury 1968).

would look like in its place, and how to go about realizing that vision of justice.

To introduce students to broader conceptions of knowledge – beyond that created or understood within the walls of a law school – students are offered Freire as a theoretical foundation. For a more concrete and accessible understandings of Freire, I assign the students Lucie E. White’s story of Mrs. G¹⁶⁶ and/or the two different perspectives of López’s “orthodox” organizer’s efforts in a community afflicted with brown lung in rural North Carolina.¹⁶⁷ These readings highlight the gaps in knowledge between the “professionals” in these stories (lawyers or professional organizers) and the clients/members of the impacted community. Beyond the “parallel universe thinking” to which these stories expose students,¹⁶⁸ they also can be used to help students understand the wealth of knowledge held exclusively by those experiencing a given form of subordination.

Having students read the efforts of subordinated communities to realize justice outside of the status quo, such as community efforts to build transformative forms of justice and solidarity economies, described earlier, also exposes students to the richness of a subordinated community’s knowledge about how society can be structured to avoid zero-sum outcomes and for the benefit of all.

During seminar, I have had the students identify the knowledge held by the client or client communities in these readings that would be overlooked or otherwise inaccessible to a lawyer. I then have them think through the areas of knowledge their client communities possess, how that knowledge could or has informed objectives and/or strategies in their cases/projects, and how to go about learning from their client communities. We may also discuss other forms of knowledge held by professionals in other disciplines and how we can tap into such knowledge in our collaborations with client communities to expand everyone’s understanding of the injustice and potential solutions. One role-play I found helpful involved having the students break up into small groups, imagine each group is setting up a social justice law firm in a community, and discuss ways they would tap into various forms of knowledge about a particular injustice in that community.

¹⁶⁶ Lucie E. White, *Subordination, Rhetorical Survival Skills & Sunday Shoes: Noes on the Hearing of Mrs. G*, 38 BUFFALO L. REV. 1 (1990).

¹⁶⁷ LÓPEZ, *supra* note 12, at 338-351.

¹⁶⁸ Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33, 70-73 (2001).

Topic 4: A Power-Based Theory of Social Change

Underlying the theory of change espoused by rebellious lawyering is an understanding that law serves to “reify[] status quo power relations.”¹⁶⁹ If we understand the law in this way, we see that the root cause of the injustices facing a subordinated community is the community’s subordinated status in an existing order of power. Injustices are not merely *facilitated by* but are *required* to maintain the order of power, and the law serves to maintain that order of power. Regardless of how the language of the law or a court’s interpretation of the law changes, so long as the underlying power relations are undisturbed, injustices will continue.¹⁷⁰ For example, Michelle Alexander describes mass incarceration as the new form of Jim Crow segregation; while the courts struck down the specific policies and practices of Jim Crow, the system of oppression or power structure – white supremacy – was left intact, resulting in a “new Jim Crow.”¹⁷¹ Recognizing this arrangement of society and law’s role in it, rebellious lawyering revolves around the central importance of a subordinated community harnessing its power and leveraging it to counter the power of those sitting atop its subordination.

However, the end to subordination is not more subordination. As Freire explains,

The oppressors, who oppress, exploit, and rape by virtue of their power[] cannot find in this power the strength to liberate either the oppressed or themselves. Only power that springs from the weakness of the oppressed will be sufficiently strong to free both. . . [T]he oppressor, who is himself dehumanized because he dehumanizes others, is unable to lead this struggle.”¹⁷²

Organizers have translated this passage of Freire into the distinct concepts of “power over” versus “power with” and “power within,” i.e., how power can be exercised over a group of people, as opposed to how power can be exercised alongside a group of people and how power can be harnessed from within oneself or one’s community.¹⁷³ The end of subordination requires a rearrangement of the social order such that one group does not exercise “power over” another; rather,

¹⁶⁹ Akbar, *supra* note 6, at 355 n.13.

¹⁷⁰ Marshall Ganz’s work and writings have articulated this power-based theory of change. He once explained: “[A]s organizers we operate on a power-based theory of change, believing that if we win change by any means, but have not changed the underlying power dynamics, then we will continue to suffer the symptoms of a deeper problem of inequality.”

¹⁷¹ See ALEXANDER, *supra* note 62.

¹⁷² FREIRE, *supra* note 165.

¹⁷³ These concepts of power are often used in trainings for community organizers and leadership development.

collective power is harnessed to create an equitable and just world.

Regnant lawyers seek to change the law without disturbing underlying power relations. Further, as López explains, they tend to hold on to a belief “that subordination of all sorts cyclically recreates itself in certain subcultures, thereby preventing people from helping themselves and taking advantage of many social services and educational opportunities.”¹⁷⁴ Regnant lawyers, then, fail to see the power that exists within subordinated communities and how communities work to harness that power to change the existing order of power.

Thus, a rebellious practice requires an understanding of existing power relations, how the law serves to maintain those power relations, and how subordinated communities strive to harness power to destabilize the current order without replicating the subordination they suffered. The earlier discussion of systems of oppression served to expose students to an understanding of existing power relations. To help students understand the role of law in maintaining those power relations, I offer students readings by Critical Race Theorists such as Derrick Bell or Kimberlé Williams Crenshaw.

The last point – the harnessing of a community’s power – requires a deeper understanding of power, and of how and where it appears. I have the students begin with a theoretical framework offered by Michel Foucault, who describes multiple forms of power beyond simply domination.¹⁷⁵ To make Foucault more accessible, I may pair his piece with a chapter from Kinoy’s *Rights on Trial*, and have the students identify sites of power in Kinoy’s narrative, both within the structures responsible for the community’s subordination and within the subordinated community. This exercise is intended to help students understand the ubiquity of power and how it exists not simply in the form of “power over,” but also in the form of “power with” and “power within.” I may then also have the students replicate this exercise in their own cases/projects, to help students find areas where their client communities are already working to harness their power in this way.

To more deeply understand *how* communities can harness their power, we focus on, as Freire advises, the efforts of the subordinated to build power with one another. To that end, I assign students readings describing organizing efforts in history – using Ella Baker and

¹⁷⁴ LÓPEZ, *supra* note 12, at 24.

¹⁷⁵ Ascanio Piomelli, *Foucault’s Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395 (2004); MICHEL FOUCAULT, THE SUBJECT AND POWER, IN MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208-226 (1983). (Original Publication: LE SUJET ET LE POUVOIR (Gallimard, D&E Vol. 4 1982).

Rosa Parks¹⁷⁶ as examples – to demonstrate the central role of organizing in this process. Since the term “organizing” often evokes images of the “orthodox organizing” López cautions against,¹⁷⁷ I invite grassroots organizers to share their stories of deep involvement in community struggles – beyond highly visible (and valuable) protests and sit-ins – to help expose students to some of organizing’s complexities. I also seek to bring in organizers from different communities to help students understand how context-specific organizing efforts are.

Alternatively, or in addition, I have had students participate in the “Raining Rocks” exercise¹⁷⁸ used in organizing trainings. This training splits participants up into groups intended to role-play different responses to an issue a community is facing as a collective in order to demonstrate the process of people coming together to use their collective power to challenge the existing power structure.

Topic 5: The Role of the Lawyer

Rebellious lawyering, according to López, “fundamentally reorient[s] all the work engaged in by lawyers,” as it “involves clients, lawyers, and other problem-solvers (professional and lay)” in “developing ways of identifying and responding to needs and aspirations” and “constructing problem-solving methods,” while “improving everyone’s individual and collective know-how along the way.”¹⁷⁹ To understand the lawyer as just one of many problem-solvers, students need to understand problem-solving more broadly than legal work. This requires an understanding of how to develop strategies that refuse to privilege any one tactic over another, but rather seek to use all possible resources to obtain justice.

Strategic thinking outside of the contours of litigation or law reform efforts is often rare among law students. Thus, students are given readings on advocacy planning – i.e., the art of articulating a vision, goals that make up that vision, strategies to reach those goals, and specific tactics to carry those strategies. Students are given readings by Jim Shultz¹⁸⁰ and Jeff Unsicker,¹⁸¹ and asked to use the readings as

¹⁷⁶ I provide them with excerpts from JEANNE THEOHARIS, *THE REBELLIOUS LIFE OF MRS. ROSA PARKS* 32-35 (2013), and RANSBY, *supra* note 38, at 274-81, 301-34.

¹⁷⁷ LÓPEZ, *supra* note 12, at 331-79.

¹⁷⁸ See, e.g., School of Unity and Liberation, *Building Power, Sharpening Minds: Political Education Workshop Manual* (2007).

¹⁷⁹ LÓPEZ, *supra* note 12, at 70.

¹⁸⁰ JIM SHULTZ, *DEVELOPING A STRATEGY, THE DEMOCRACY OWNERS’ MANUAL: A PRACTICAL GUIDE TO CHANGING THE WORLD* Chapter 6 (2002).

¹⁸¹ JEFF UNSICKER & ROSA MARIA OLORTEGUI, *A Small Town in Peru Battles a Multinational Mining Corporation*, *CONFRONTING POWER: THE PRACTICE OF POLICY ADVOCACY* (2010).

tools to map out the advocacy strategies they understand their client communities are engaging in and the role their particular legal tactic plays in carrying out those strategies. In class, a social justice campaign director is invited to speak about how a community first developed a campaign from long-standing organizing efforts. The director is also asked to describe the various strategies and tactics – some involving lawyers, others not – the community decided to use to carry out the campaign and achieve its goals. Through this presentation, students are able to gain a bird’s-eye perspective of the role of organizing and advocacy planning by communities to dismantle the conditions of their subordination.

Students are at last brought to the role of the rebellious big case lawyer. Big case lawyers traditionally view our roles as dismantling institutions that use their power in a way that oppresses our clients. Rebellious big case lawyers need to do this in a way that builds power in subordinated communities to gain control and reshape those institutions so that they are responsive to the needs of communities. Thus, students are asked to consider the role of the lawyer in (i) carrying out the specific strategies the community has identified in dismantling their subordination *and* (ii) building power within a community to shift the underlying power arrangements that created that subordination. Students read stories of lawyers – big case as well as more multi-modal lawyers – to illustrate both of these roles. Kinoy and Elsesser provide helpful illustrations.¹⁸² Students are then asked to consider how the particular tactic their own case/project implements and various decisions made in the course of implementing that tactic serve to, or have missed opportunities to, build power within the client community, for instance, by helping to develop indigenous leadership within the community, facilitating the role of the organizer, or helping the community expand its membership of those directly impacted by the injustice.

Topic 6: Ethical Issues

In his criticism of “orthodox organizing,” López explains that orthodox organizers fear truly engaging with subordinated communities because of the complexities, tensions, and contradictions found within all communities that cast aside a neatly-packaged role for organizers and require them to look for and receive criticism.¹⁸³ Further, even when orthodox organizers speak of “community engagement” or “community empowerment,” López explains, they rarely assess

¹⁸² KINOY, *supra* note 39, at 151-160, 181-208; Elsesser, *supra* note 41.

¹⁸³ LÓPEZ, *supra* note 12, at 372.

whether they have actually “engaged” or “empowered” a community because they fail to “pay attention to the sorts of information that might tell [them] whether others have been enabled by their work with [them].”¹⁸⁴ The same criticism can apply to regnant lawyers, particularly regnant big case lawyers, who are used to working on narrow legal issues in the confines of their offices and engage in “community engagement” efforts as an afterthought.

Thus, in this final part of the seminar, students grapple with ethical questions addressed only tangentially by the rules of professional responsibility – such as questions of accountability, the amount of political space taken up by the lawyer, whether “community empowerment” or “engagement” merely impose upon communities the lawyer’s values and perceptions of how change happens or what social justice looks like, and questions of role confusion. Students read pieces that surface these issues, such as those by Quigley,¹⁸⁵ Hung,¹⁸⁶ Kim,¹⁸⁷ Grinthal,¹⁸⁸ or Rickke Mananzala and Dean Spade.¹⁸⁹ In teaching international human rights, students are given additional readings that address the nature of global power structures and the ethical issues they give rise to in transnational lawyering.¹⁹⁰

In class, students are given a narrative of a real life injustice and a description of the affected community, and are asked to use the various points of critique found in the readings to identify the ethical issues they should consider in working on this issue, approaching the community, working in collaboration with the community, holding themselves accountable, and defining their role. Students then discuss how these issues may have arisen in their own cases or projects.

¹⁸⁴ *Id.* at 372.

¹⁸⁵ W. Quigley, *supra* note 11.

¹⁸⁶ Hung, *supra* note 43.

¹⁸⁷ Kim, *supra* note 32.

¹⁸⁸ Grinthal, *supra* note 45.

¹⁸⁹ Rickke Mananzala & Dean Spade, *The Nonprofit Industrial Complex and Trans Resistance*, 5 *SEXUALITY RESEARCH & SOC. POL.* 53 (2008).

¹⁹⁰ Such readings include Malcolm X, *supra* note 77; Mutua, *supra* note 79; Teju Cole, *The White-Savior Industrial Complex*, *THE ATLANTIC* (Mar. 21, 2012), <http://www.theatlantic.com/international/archive/2012/03/the-white-savior-industrial-complex/254843/>; Sarah Coughtry, *Uganda’s Anti-Gay Bill: What the West Should Know*, *THE BILERICO PROJECT* (Jan. 8, 2014), http://www.bilerico.com/2014/01/were_all_complicit_in_ugandas_anti-homosexuality_b.php#hE5iuwKbXIg1fPTX.99; Kapur, *supra* note 81; Kennedy, *supra* note 89; Zoe Williams, *Poverty goals? No, it’s extreme wealth we should be targeting*, *THE GUARDIAN* (Oct. 19, 2015), http://www.theguardian.com/commentisfree/2015/oct/19/un-poor-wealth-sustainable-development-goals?CMP=fb_gu; Moley, *supra* note 88; and Samuel Moyn, *Why the Court Was Right About the Alien Tort Statute: A Better Way to Promote Human Rights*, *FOREIGN AFFAIRS* (May 2, 2013), <https://www.foreignaffairs.com/articles/united-states/2013-05-02/why-court-was-right-about-alien-tort-statute>.

CONCLUSION

Rebellious big case lawyers have much to offer communities organizing in resistance to their subordination. Helping students understand how to practice in a way that is accountable to the community, effective, and sustainable requires beginning with how the world operates and how it can be transformed. As the quote that opens this article explains, students need exposure to both theory and practice to engage in rebellious lawyering. While big cases have provided my students with critical legal research, writing, and oral communication skills, the seminar component, alongside guided discussions during supervision sessions, has helped them ground their legal work in a deeper understanding of social change that some have already applied to their “big” and “small” cases outside of the clinic. One student reflected at the end of the semester:

My conception of the role of the lawyer in social justice has completely changed. Previously, I viewed the lawyer as a shepherd for the people fighting social justice. This lawyer was the “enlightened one” who could translate the people’s goals and aspirations into a language that the legal system recognized. Although I still believe that the lawyer’s job is to translate the people’s goals and aspirations into a language that the legal system recognizes, the lawyer is no longer the shepherd. Now, people are collectively the “shepherd” and the lawyer is the sheep. I now view the role of the lawyer as strictly serving the needs of the community, *one among many tools* the people use to reach their goals and reach their needs.

The current moment – which makes plain the multiple crises facing communities within and outside of the United States and at the same time, demonstrates the awesome power of directly impacted communities leading the struggle against injustices – demands that big case lawyers and clinicians alike think critically about our role in the struggle for social justice. The principles articulated by López’s seminal work, and the narratives he uses to demonstrate these principles in action, have much to offer big case clinicians. Making use of this guidance can impact not only current efforts to fight against oppression but future efforts as well, as our students move forward into the legal field and mentor those that come after them.

