

# THE CULTURE OF NON-PROFIT IMPACT LITIGATION

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*To honor ways of observing, listening, and bearing witness embodied in and inspired by Gerald P. López’s Rebellious Lawyering, this article depicts the self-glorifying culture shared by a cluster of impact civil rights litigation organizations and coalitions. The culture expresses a corrupted brand of regnant lawyering, incapable of ambitiously and effectively realizing the “experts-rule” problem solving openly espoused by some democratic theorists and in fact practiced by many lawyers. For those who aim to practice rebelliously, the article aims to outline an ethos, initially, too inconceivable to regard as credible and, in short time, too awful to tolerate for very long at all. Especially with the electoral triumph of Trumpism and Trump, the article urges an open challenge (by employees, clients, board members, funders—to name only some) to this disturbing culture and all those who nourish its hypocrisies.*

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\* A special thanks to Gerald P. López for your nurturing love, radical acceptance, and unwavering friendship. Your teachings are an infinite blessing that I cherish every day. Thanks to Brenda Montes, Sahar Durali, Raul Ocampo, and Sofia Encarnación for your friendship, support, and understanding over the years, and in particular, during the hardest of times. Thanks to my former colleague staff attorneys at MALDEF for your dedication to social justice, commitment to excellence, and personal sacrifice. Special thanks to Jana Whalley for your careful edits.

## INTRODUCTION

Almost immediately following the publication of *Rebellious Lawyering—One Chicano's Vision of Rebellious Law Practice*,<sup>1</sup> reactions divided lawyers who worked for radical, progressive, and public interest organizations.<sup>2</sup> Some heralded the rivaling visions as deeply re-

<sup>1</sup> GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) [hereinafter LÓPEZ, *REBELLIOUS LAWYERING*].

<sup>2</sup> To appreciate the breadth and depth of López's vision, any curious reader should read López's work published before and after the 1992 book—covering such topics, to name only some examples, as radical political theory, the political economy, the Constitution, economic development, financial literacy, race, relationships within groups of color, pathological portrayals of Blacks and Latinos, academic cultures, contracts, criminal justice, immigration, the promise and limits of civil rights litigation, the Chicano Movement, affirmative action, Proposition 187, undocumented Mexican migration, teaching and learning, the Living Wage Movement, fair and healthy workplaces (especially within secondary labor markets), public health, health of undocumented Mexicans in New York City, and the fundamental transformation of legal education. For a chronological sequence of many published articles and books and community guides, mobilizing manuals, large empirical surveys, see Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981); Gerald P. López, *Foreword: Latinos and Latino Lawyers*, 6 CHICANO L. REV., 1 (1983); GERALD P. LÓPEZ ET AL., *CONTRACT LAW AND ITS APPLICATION* (3d ed. 1983); GERALD P. LÓPEZ ET AL., *TEACHING SUGGESTIONS FOR INSTRUCTORS USING CONTRACT LAW AND ITS APPLICATION* (3d ed. 1983); Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) [hereinafter López, *Lay Lawyering*]; Gerald P. López, *A Declaration of War by Other Means*, 98 HARV. L. REV. 1667 (1985) [hereinafter López, *Declaration of War*]; Gerald P. López, *The Idea of a Constitution in the Chicano Tradition*, 37 J. LEGAL EDUC. 162-166 (1987) [hereinafter López, *Constitution in the Chicano Tradition*]; Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989) [hereinafter López, *Training Future Lawyers*]; Gerald P. López, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989) [hereinafter López, *Work We Know So Little About*]; Gerald P. López et al., *Scholars' Reply to Professor Fried*, 99 YALE L.J. 163-168 (1989); LÓPEZ, *REBELLIOUS LAWYERING*, *supra* note 1; Gerald P. López, *Latino Political Visions* (Stanford Ctr. for Chicano Research, Working Paper Series, 1992); Gerald P. López, *Economic Development in the "Murder Capital of the Nation,"* 60 TENN. L. REV. 685 (1993); Gerald P. López, *I'll Tell You What's Pathological* (Stanford Ctr. for Chicano Research, Working Paper Series, 1993) [hereinafter López, *What's Pathological*]; Gerald P. López, *Cleaning Up Our Own Houses* (Stanford Ctr. for Chicano Research, Working Paper Series, 1994) [hereinafter López, *Cleaning Up Our Own Houses*]; Gerald P. López, *An Aversion to Clients: Loving Humanity and Hating Human Beings*, 31 HARV. C.R.-C.L. L. REV. 315 (1996); Gerald P. López, *Visions, Coalitions, Mobilizations* (Stanford Ctr. for Chicano Research, Working Paper Series, 1996); Gerald P. López, *Still Looking for America: Beyond the Latino/a National Political Survey* (Stanford Ctr. for Chicano Research, Working Paper Series, 1994); Gerald P. López, *What We've Only Begun to Learn About Latinos and the Political Economy* (Berkeley Chicano/Latino Policy Project, Working Paper Series, 1995); Gerald P. López, *An Aversion to Clients*, 31 HARV. C.R.-C.L. L. REV. 315 (1996); GERALD P. LÓPEZ, ENID COLSON, & COURTNEY SCHABERG, *AN AFFIRMATIVE ACTION MANUAL* (1996); Gerald P. López, *Living with 187, Living with Ourselves* (Stanford Ctr. for Chicano Research, Working Paper Series, 1996); Gerald P. López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice*, in *CLINICAL ANTHOLOGY READINGS FOR LIVE-CLIENT CLINICS* 192 (Alex J. Hurder et al. eds., 1997); Gerald P. López, *The Well-Defended Aca-*

vealing. Even when forced to acknowledge their own complicity in aspects of practice they had all-too-mindlessly continued to pursue, they proved remarkably open to questions and even scrutiny. Indeed, they welcomed the opportunity to face squarely a choice in how their organizations should conceive of their work and how they should practice.<sup>3</sup> They became part of the Rebellious Lawyering Movement, mainly comprised of diverse communities across the country, practitioners (mainly but not exclusively lawyers) who do not publish, and a

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*demio Identity* (Stanford Ctr. for Chicano Research, Working Paper Series, 1991), reprinted in *THE LATINO/A CONDITION: A CRITICAL READER* 408 (Richard Delgado & Jean Stefancic eds., 1998); Gerald P. López, *How Much Responsibility Does the U.S. Bear for Undocumented Mexican Immigration?*, in *THE LATINO/A CONDITION: A CRITICAL READER* 92 (Richard Delgado & Jean Stefancic eds., 1998); Gerald P. López, *Lay Lawyering*, in *THE LATINO/A CONDITION: A CRITICAL READER* 92 (Richard Delgado & Jean Stefancic eds. 1998); Gerald P. López, *Working with Communities and Organizations*, in *SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW* 158 (Martha R. Mahoney et al. eds., 2003); Gerald P. López et al., *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59 (2004) [hereinafter López, *Shaping Community Problem Solving*]; GERALD P. LÓPEZ, *THE CENTER FOR COMMUNITY PROBLEM SOLVING GUIDE TO HIRING PEOPLE WITH CRIMINAL RECORDS* (2004); GERALD P. LÓPEZ, *THE CENTER FOR COMMUNITY PROBLEM SOLVING REENTRY GUIDE: A HANDBOOK FOR PEOPLE COMING OUT OF JAILS AND PRISONS AND FOR THEIR FAMILIES AND COMMUNITIES* (2005); Gerald P. López, *Living and Lawyering Rebelliously*, 73 *FORDHAM L. REV.* 2041-2054 (2005); GERALD P. LÓPEZ, *THE CENTER FOR COMMUNITY PROBLEM SOLVING STREETWISE WITH MONEY: A HANDBOOK ON FINANCIAL LITERACY FOR LOW-INCOME, OF COLOR, AND IMMIGRANT COMMUNITIES* (2006); Gerald P. López, *Why Should We Honor Steve Shiffrin?*, 41 *LOY. L.A. L. REV.* 41-44 (2007); Gerald P. López, *A Rebellious Philosophy Born in East L.A.*, in *A COMPANION TO LATINA/O STUDIES* 240-50 (Juan Flores & Renato Rosaldo eds., 2007); Gerald P. López, *Changing Systems, Changing Ourselves*, 12 *HARV. LATINO L. REV.* 15-39 (2009); Gerald P. López (with art by Andrea Matsuoka), *Don't We Like Them Illegal?*, 45 *U.C. DAVIS L. REV.* 1711-1816 (2012); Gerald P. López, *The Health of Undocumented Mexicans in New York City*, 32 *CHICANO/A-LATINO/A L. REV.* 1 (2013); Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 *HASTINGS RACE & POVERTY L.J.* 1 (2014). This list does not include all of his work.

<sup>3</sup> See, e.g., Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 *HARV. C.R.-C.L. L. REV.* 297 (1996) [hereinafter Bellow, *Steady Work*]; Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619 (1992); Angelo N. Ancheta, *Community Lawyering* 81 *CAL. L. REV.* 1365 (1993); Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 *VA. ENVTL. L.J.* 687 (1995); Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 *CLIN. L. REV.* 433 (1998); Dean Hill Rivkin, *Reflections on Lawyering for Reform: Is the Highway Alive Tonight?*, 64 *TENN. L. REV.* 1065 (1997); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 *STAN. L. REV.* 1731 (1993) [hereinafter Shalleck, *Constructions of the Client*]; Lucie White, *Paradox, Piece-Work, and Patience*, 43 *HASTINGS L.J.* 853 (1992) [hereinafter White, *Paradox, Piece-Work, and Patience*]; Anthony V. Alfieri, *Book Reviews: Practicing Community*, 107 *HARV. L. REV.* 1747 (1994) (reviewing LÓPEZ, *REBELLIOUS LAWYERING*, *supra* note 1); Milner S. Ball, *Power from the People*, 92 *MICH. L. REV.* 1725 (1994) (reviewing LÓPEZ, *REBELLIOUS LAWYERING*, *supra* note 1 (1992)).

range of practitioners and clinicians who do, and whose literature illuminates lawyering like little produced in the history of the United States.<sup>4</sup>

Others, however, thought they had been too realistically portrayed—not inaccurately rendered, mind you, just without the glamorization they customarily received and had come to expect.<sup>5</sup> They saw

<sup>4</sup> For illustrative literature suggesting, exploring, and developing the rebellious vision, see, for example, Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLIN. L. REV. 355 (2008); Bellow, *Steady Work*, *supra* note 3; Bill Ong Hing, *Coolies, James Yen, and Rebellious Advocacy*, 14 ASIAN AM. L.J. 1 (2007); Bill Ong Hing, *Nonelectoral Activism in Asian Pacific American Communities and the Implications for Community Lawyering*, 8 ASIAN PAC. AM. L.J. 246 (2002); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993); Shin Iinai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLIN. L. REV. 195 (2002); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLIN. L. REV. 147 (2000); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLIN. L. REV. 427 (2000) [hereinafter Piomelli, *Appreciating Collaborative Lawyering*]; Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLIN. L. REV. 541 (2006) [hereinafter Piomelli, *Democratic Roots*]; Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395 [hereinafter Piomelli, *Foucault's Approach to Power*]; William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994); Dean Hill Rivkin, *Lawyering, Power, and Reform: The Legal Campaign to Abolish the Broad Form Mineral Deed*, 66 TENN. L. REV. 467 (1999); Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043 (2004); Shalleck, *Constructions of the Client*, *supra* note 3; Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996); Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER, RACE & JUST. 405 (1998); Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. FOR STUDY LEGAL ETHICS 199 (1999); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLIN. L. REV. 157 (1994); Lucie E. White, *Mobilization on the Margins of the Law-suit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88); White, *Paradox, Piece-Work, and Patience*, *supra* note 3; Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 [hereinafter White, *To Learn and Teach*]; Christine Zuni Cruz, *[On The] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLIN. L. REV. 557 (1999); Kim Taylor-Thompson, *The Politics of Common Ground*, 111 HARV. L. REV. 1306 (1998) (reviewing RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997)).

<sup>5</sup> Published accounts insisting regnant lawyers had not been sympathetically enough air-brushed often entire miss or consciously caricature what López, what Lucie White, what Anthony Alfieri, what Bill Ong Hing, what Shauna Marshall, what Ascanio Piomelli, what Kim Taylor-Thompson and what others still offer, instead myopically responding only to what they already know or to what they insist is right about the very regnant lawyering they for some reason refuse openly to endorse and critically to evaluate. See, e.g., Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763 (1993) [hereinafter Schuck, *Public Law Litigation*] (criticizing López's failure to explicate a positive vision of the social change rebellious lawyers seek to effect); Ann Southworth, *Taking the Lawyer Out of Progressive Lawyering*, 46 STAN. L. REV. 213 (1994) (arguing that López undervalues pro bono lawyers' provision of technical legal expertise to community organizations). Others ostensibly respect the rebellious vision and then immediately describe difficulties

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themselves in the lawyers who at least appeared to practice regnantly, and they regarded López as failing to grasp the pressures that make such a practice unavoidable, prudent, even admirable in its limited expectations of everyone, especially clients. Why could they not see themselves in the professional lawyers and lay advocates struggling to practice rebelliously, often against great regnant pressures (Chapters 2, 3, and 4, for example)? Why could they not see themselves in the two community organizers, one seasoned and one far less experienced, who openly identify and deeply explore the unacknowledged (and, yes, widely denied) divide between regnant and rebellious organizing practices (Chapter 5)? In all these chapters, the rivalry between regnant and rebellious problem solving visions lies within—far more than between—characters and institutions

Behind closed doors, some non-profit impact litigators openly defended regnant practice, just as they robustly favored a “top-down” or “experts-rule” vision of democracy and, for that matter, work of every sort. They did so by strongly insisting they and other experts almost always do know better, and they did so by mocking *Rebellious Lawyering* as impracticably dreamy.<sup>6</sup> What almost no one did—among non-profit impact lawyers or any other constellation of practitioners—was in publicly visible ways defend, much less champion, the regnant vision of practice López had so hauntingly exposed. Instead they insisted their “culture of practice” had taken an unfair hit. Acutely aware of having been called out, they simply moved forward with their work. They figured they would find comfort and support in everything remaining pretty much the same as it always had been. They demonstrated confidence in sensing this “rebellious nonsense” would fade and vanish. We do (as López routinely insists in his teaching, lawyering, and writing) typically regress to the mean.

But those among non-profit impact litigation organizations who resented *Rebellious Lawyering*—and, really, the work of others building and evoking the vision—did not passively wait to see what would happen. Instead, they calculatingly made at least three related moves to hasten the defeat of López’s challenge to their domain. For founda-

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(impossibilities?) of ever implementing in real life, in ways that feel far more preemptive and defensive than plausibly grounded in any experience, including experiences many clients, communities, and lawyers have documented. *See, e.g.*, Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for “Facilitative” Lawyering?*, 1 CLIN. L. REV. 639 (1995); Paul N. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947 (1992).

<sup>6</sup> In this sense, these non-profit impact litigators failed to openly publish their robust defense of regnant rule in the way, for example, that Richard Posner did in his enthusiastic defense of “experts-rule” democracy, a contribution much to Judge Posner’s credit. *See* RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003).

tions and certain public gatherings, they learned (if often far from credibly) to mouth just enough rebellious rhetoric to sound as if they appreciated radicalizing practice as part of transforming political and social life. For professional and scholarly publications and settings, they insisted, time and again, even to this day (against all evidence and even in the face of utterly convincing rebuttals) that rebellious practitioners “romanticized” all subordinated communities, focused excessively on work settings and relationships totally at the expense of “structural issues,” and exaggerated the pathologies of regnant culture.<sup>7</sup> For their own staffers and for the shifting coalitions of civil rights organizations involved with impact cases, they engaged in their own brand of code-switching, both doubling down on what they had always done while, when necessary, nodding now and then in the direction of varied rebellious aims and methods.

When I began drafting this article, I was a civil rights lawyer employed by a national civil rights organization that revolves around impact litigation. With great passion and dedication, and with great willingness to learn and to grow, I entered my profession to work as a rebellious lawyer. I had hoped—I had presumed, really—that I would find a true home in an organization that pursues justice for my communities. I had little idea what I would find in my own organization and in the allies doing impact work alongside us—in the national and statewide nonprofits, in the pro bono units of large corporate firms,

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<sup>7</sup> Certainly among law professors, including clinicians, some chose to falsely portray the work of López, White, Alfieri and others, in what any careful read would regard as a tacit defense of regnant practice. See Gary L. Blasi, *What's a Theory For: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063 (1993-1994); Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 MIAMI L. REV. 1099 (1994). In response to such caricatures, Ascanio Piomelli provided the most powerful point-by-point response, in what remains a tour de force far too little read or at least cited. Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4. And Steven Winter demonstrates, contrary to Simon's and Handler's depiction, that Foucault's idea of power entails positive as well as negative roles and effects. See Steven L. Winter, *Cursing the Darkness*, 48 U. MIAMI L. REV. 1115 (1994). At least from outside the academy, the reactions to these exchanges appears strange indeed. Work like Piomelli's and Winter's demonstrates that Blasi, Handler, Simon routinely employed the post-truth practices attributed to Donald Trump and his followers. Yet many scholars, perhaps themselves tacitly defending the same regnant vision, continue to cite Handler, Blasi, and Simon as if Piomelli and Winter had not shredded them – had not proven them false. Indeed, they dutifully cite Handler, Blasi, Simon and others without citing Piomelli and Winter and others. This is emphatically not “scholars legitimately disagreeing,” as some might insist. And again, from outside the academy, those of us within the rebellious movement wonder the racial and racist dimensions – the class and gender dimensions—in the baseless attacks on the work of, say, López and Lucie White? Do other academics, including clinicians, share Handler's, Blasi's, and Simon's views? Or do they fear calling out Senior White Males within what remains notably a mainly White Male profession?

and in relatively small boutique firms. Perhaps I had imagined that everyone would be like Joaquin Avila, with deeply democratic and egalitarian assumptions, methods, and aspirations, thoroughly rebellious before López coined the term.<sup>8</sup> Or perhaps I had bought into too many of the mission statements about how connected every organization now is to communities they worked with, a constellation of practitioners working as I imagined politically radical lawyers would sensibly work.

In any event, I now know in concrete and systematic ways what I did not know starting my job and, frankly, could not have imagined when I graduated from law school. After engaging in a remarkable range of civil rights litigation, and a number of illuminating experiences, I feel I can depict accurately (yes, accurately, not airbrushed) what is going on in some of these organizations and with many of the lawyers I have worked with, often at great length and through thick and thin. I can describe the dominant culture pervading impact litigation in 2016. I can begin to explain, in ideological terms, how “the natural order of things” reflect deliberate design, conscious preferences for far too many of those within the impact litigation world about what matters and what doesn’t. At least as revealingly, I can describe how initiates like myself, relative novices both to the practice of law and to this culture, variously react to what they realize about their workplaces, their coalitions, and the crews of people who dominate the civil rights impact world.

Almost 25 years after the publication of his widely influential book, López may be surprised to learn that, if anything, the culture in at least a cluster of very prominent non-profit impact litigation organizations and in some organizations and firms that work with them has grown far more perverse and dysfunctional than he depicted in his book and in many subsequent articles. This cultural mutation has absolutely nothing to do with “what’s inherently true of litigation” or with “what’s inescapably true of civil rights practice” or with “what’s ineluctable in the face of pressures on those of us who work in non-profit impact litigation organizations.”<sup>9</sup> Instead, this shift reflects in-

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<sup>8</sup> One of the 20th century’s great civil rights lawyers, perhaps the nation’s leading voting rights practitioner, former leader of MALDEF, and a deserving MacArthur Prize winner, Joaquin Avila grew up in Compton (yes, that Compton), a city my family and I called home for a good chunk of my formative years. See, e.g., MACARTHUR FELLOWS PROGRAM: JOAQUIN AVILA (July 1, 1996), <https://www.macfound.org/fellows/528/>. A careful reading of *Rebellious Lawyering* suggests what turns out to be true: Avila and López are close friends, tracing back to their years together at law school.

<sup>9</sup> Rosenberg’s influential book is sometimes read by practitioners as implying such assertions. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

tentional choices made by many, alone and in loose concert, about what they care to prize and what they feel comfortable diminishing in importance. In this article I shall bring to the surface, identify, and name a definable alteration in the cultural force that shapes the everyday work we do.<sup>10</sup> After depicting, I shall analyze at the deepest levels a culture largely hidden from view, certainly never openly acknowledged, much less defended, by those with insider knowledge.

I shall depict hypocrisies and horrors as repugnant as they are recurring. How foundation pitches sound awfully rebellious when the pivotal practices are, certainly on the part of leaders and their cronies, utterly regnant. How the treatment of decent and rebellious lawyers feels both terribly manipulative and unrepentant. How the unfairness toward decent and rebellious lawyers both runs across categorical lines but, with regular enough frequency, lands hardest on whatever “out group” refuses to kowtow (women, men of color, queer persons, those from a lower income background). How the community and often even a well-intentioned board learns almost nothing of these practices, instead imagining the organizations merit not just financial and political support but even admiration and reverence. The unfairness turns downright emotionally and ideologically abusive, whenever decent and rebellious lawyers choose to speak their minds. Truth to power proves a complicated and even dangerous confrontation.

I do not regard what I have experienced as having been immersed in a respectable regnant practice. Those who openly favor and put into action an “experts-rule” idea of lawyering can behave with integrity, transparency, and accountability.<sup>11</sup> I may disagree with the assumptions, methods, and aspirations of those who work this way. Yet I can admire their candor, their integrity, their ideology. Instead what I am describing is a perversely degraded brand of regnant practice. Healthy regnant practitioners cringe every bit as much as I do in confronting the culture I have discovered. Much as my own disgust originates from rebellious origins, but I do not for a moment think I am any more repulsed than the many regnant lawyers who practice with honor. Per-

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<sup>10</sup> My account of the cultural force at work has been inspired by the work of many, though the distinctive contributions of cultural anthropologist Renato Rosaldo merit special mention, only in part because he has been part of trainings for those within the rebellious movement. See RENATO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* (1992); Renato Rosaldo, *Grief and a Headhunter's Rage*, in *TEXT, PLAY, AND STORY*, 1983 PROCEEDINGS OF THE AMERICAN ETHNOLOGICAL SOCIETY 178 (Edward Bruner ed.).

<sup>11</sup> “Experts-rule” is the theoretical and practical synonym for regnant, as defined by those within rebellious lawyering, López, *Shaping Community Problem Solving*, *supra* note 2; Piomelli, *Democratic Roots*, *supra* note 4, and by those who articulate and defend such a vision of democracy. See POSNER, *supra* note 6; JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942).



haps they feel even more horrified than I do, since it is their vision being desecrated.

Please make no mistake, though, I love being a civil rights litigator. I love my work with my clients, my in and out-of-court battles against our adversaries, and my co-counseling with other rebellious lawyers—yes, even with deeply responsible and open-minded “experts-rule” lawyers. I love the technical side of my work: helping clients to choose whether or not litigation makes sense, where to file the suit, what claims get to the heart of the discrimination and stand a chance (even if against the odds) of winning, and what remedies to seek. I love helping to build a doctrinal strategy consistent with our theory of the case. I love discovery (especially with difficult and even hostile defendants), and I love motion work of all sorts, both the writing and the arguing of the motions.

I love pre-trial preparation, in all its complicated messiness, in the search for consolidations of categories, stories, and arguments profoundly persuasive. I love trial itself, helping clients and our other witness speak the truth as they know it, being part of a drama unfolding, at once, slowly and lightning fast. And I love defending our victories in post-trial motions and attacking our losses on appeal. As it turns out, I am one of the sorts who loves exactly what so many absolutely abhor about frenetic and anxiety-producing civil rights litigation. If I wasn’t born to do this work, I sure have adapted quickly and well. I get an old-school high out of litigation itself, and I am proud to say so.

For all my love for litigation, though, I am as excited to engage in ambitious and sustained outreach, education and mobilization as I am to file a lawsuit. And I have been and shall continue to regard myself and my work as part of larger social movements. On the ground and in theory, those of us experiencing and imagining the world rebelliously perceive absolutely no tension between our transformative politics and law.<sup>12</sup> Indeed, in López’s vision, and in my own direct experience, no strategy should be presumptively ranked higher than others. (A seemingly endless preoccupation of scholars, typically far removed from any action beyond university boundaries, has been to debate the hierarchies of strategies and roles.<sup>13</sup>) Our job as problem

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<sup>12</sup> For reasons many of us practitioners find baffling, and for reasons work elaborating the rebellious vision ought already to have buried, legal academics have become again enamored with dissecting this question, roughly starting up again with Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

<sup>13</sup> For just one familiar stroll through scholarship recycling this debate, insisting on one or another strategic hierarchy, as if inherently or materially or ideologically these hierarchies make grounded sense, as if López, White, Taylor-Thompson, Shalleck, Cole, Piomelli, Hing, and Alfieri had not already—at length and in detail—offered us all an image of

solvers is to assess what ensembles of strategies might best work together to address situations. Whatever I may find myself doing, with my clients and others, I have learned how much better we can be at challenging racism, for example, within a work culture aiming always to support the professed mission. Our assessment of strategies always should be, as López has long insisted, ad hoc, concrete, and provisional.<sup>14</sup> And through whatever combination of strategies we pursue, we all should be militant abolitionists, through and through.

Changing a culture may be as difficult as moving a cemetery.<sup>15</sup> Still, the ethos I have experienced exhausts good will and good people. And the article will detail exactly how. Even more pointedly, we know enough to make the tough call: either we succeed in transforming the dysfunctional culture I so routinely experience within non-profit impact litigation or we should shut down the organizations refusing to change. Besides, López should not be the only one maligned for forcing us all to look in the mirror.

#### *Above All Else, Self-Glorifying*

You can begin to glimpse the architecture and content of the culture the article shall reveal through several interlocking truths. Most of all, those leading and bolstering this cultural shift openly seek self-glorification. They do so in choosing “sexy cases” over others, in making oral arguments in cases they often know little about, in jockeying for the, say, three speaking slots (one goes to the American Civil Liberties Union (ACLU), another to Southern Poverty Law Center (SPLC), so who shall get the third?) in dealing with print and video journalism.

So pervasive and normalized have these maneuvers become that,

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radical political practice responsive to the questions posed afresh by each half-generation of academics. See, e.g., ROSENBERG, *supra* note 9; Michael McCann, *Social Movements and the Mobilization of Law*, in SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS (Anne N. Costain & Andrew S. McFarland eds., 1998); Owen Fiss, *The Autonomy of Law*, 2 YALE J. INT'L L. 517 (2001); Lobel, *supra* note 12; Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25 (2011).

<sup>14</sup> López, *Declaration of War*, *supra* note 2.

<sup>15</sup> The quip paraphrases a quote attributed to Woodrow Wilson, when as a university president, he stated, “Changing a curriculum is like trying to move a graveyard.” See Frank I. Michelman, *The Parts and the Whole: Non-Euclidean Curricular Geometry*, 32 J. LEGAL EDUC. 352, 352 (1982). Michelman’s gracefully forceful article was part of an effort to document and to bolster deep and sustained efforts to change legal education, beginning in the 1970s, extending through 1980s, and continuing right up through early 1990s, with remarkable coalitions and leaders, and a deeply resistant status quo, providing lessons for anyone trying even today to transform law schools and impact litigation firms. See e.g., Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984); López, *Training Future Lawyers*, *supra* note 2; López, *Work We Know So Little About*, *supra* note 2.

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within the civil rights impact litigation world, only a small number of dissenters (myself included) seem capable of any longer being shocked, outraged, or even annoyed. And if we dissenters openly speak our minds in staff meetings or conference calls, even if we speak what others know to be true, rarely will we hear a word of support. To challenge self-glorification is to mount a profoundly unwanted, suppressed, and resented insurrection against the new status quo. Expect ostracism—the “social death penalty.”<sup>16</sup> Expect retaliation—in all ways credibly deniable.<sup>17</sup>

### [1] *Dominance Over And Within Coalitions*

Large civil rights cases are often brought by coalitions of non-profit impact litigation outfits, backed by a large law firm offering pro bono services. These coalitions tend to reveal hierarchies within them that mirror the hierarchies of society. The more dominant non-profits assert control to maintain prominence over and within the coalitions. In terms of resources, dominant entities could file some cases alone. Often enough, they have the plaintiffs, money, and lawyers needed to litigate a big lawsuit. Yet, they know it would look bad if they fought an LGBT, Latino, Asian, Native or Black issue without an “identity organization” that represents that specific demographic. In other instances, the identity organizations might represent some keys plaintiffs needed for standing. On far rarer occasions, the power line-up recognizes certain lawyers with chops so formidable they must be included, even permitted to scramble the typical pecking order. As a result, even if it wanted to, the dominant organization cannot always exclude the less prominent organization. Yet, through a cluster of reliable techniques, it can still maintain control over and ensure it remains the lead throughout the litigation.

The less prominent organizations do not like being treated as second class. Still, they, will accept an invitation to join the coalition. They want to be on the case and, somehow, they want to ascend within the hierarchy. If a less prominent organization represents key plaintiffs needed for standing, they might negotiate a higher position in the social order. All along, the less prominent organizations claim the dominant powers are unfair/racists/sexist/homophobic—certainly within their own circles, now and then directly to the more prominent organizations.

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<sup>16</sup> For an illuminating set of contributions, see KIPLING D. WILLIAMS, JOSEPH P. FORGAS, & WILLIAM VON HIPPEL, *THE SOCIAL OUTCAST: OSTRACISM, SOCIAL EXCLUSION, REJECTION, AND BULLYING* (2005).

<sup>17</sup> See THOMPSON INFORMATION SERVICES, *UNDERSTANDING AND PREVENTING WORKPLACE RETALIATION* (2012)

Outwardly, the less prominent appears to be expressing righteous indignation. Perhaps there is a genuine sense of grievance. Through claims of racism, sexism, homophobia, and general unfairness, though, the less prominent organizations aspire to become more dominant. Indeed, if and when the less prominent achieves greater power (however situational and transitory), they mimic the behavior of the big shots. The more and less prominent all want the same thing: To be on top.

As coalitions form, they usually develop sub-alliances, in various combinations, through strong ties or weak.<sup>18</sup> Some examples: A dominant entity with an identity organization (typically identity group second in the pecking order). Or two or three smaller identity groups align to deal collectively with the power of a dominant entity. This is done in secret, of course. Mainly to strengthen voting blocs on decisions within the larger coalition. The allies meet covertly to decide how they will vote on various matters—including the order in which the organizations will be listed on the pleadings, who will draft what sections of a brief, who will deliver oral argument. Within the larger coalition, the voting blocs are obvious. Each entity treats its allies as presumptively more competent, more reasonable, more correct. Of course, no one ever attempts to measure these suppositions. In future coalitions, the same presumptions will extend to current antagonists.

Throughout the litigation, voting outcomes reflect the interests of alliances. Of course the sub-alliances are only sometimes wholly successful. But you can identify the patterns, large to small. Decisions made certainly reflect how best to leverage power and perhaps what proves best for the clients' lawsuit. Surprisingly often, the best editors are not assigned to pull together and polish a brief. Even more frequently, those delivering oral arguments are not in the same league as the best available courtroom lawyers and may even be mediocre to poor. Fair enough, if you buy into the notion that oral arguments do not typically influence a judge's or a panel's decision, and perhaps even that briefs matter less than most believe, you can rationalize away such choices. But even those who prefer to offer such explanations, sincerely or pretextually, can never gauge whether a superb brief or a superb oral argument might well have proved persuasive. Leveraging power within the coalitions typically trumps other aims. Yes, by definition, I mean to make explicit leveraging power trumps assembling the very best team to "win the case."

Even in those instances where various impact-litigation nonprofits more constructively collaborate, there is a commonly accepted

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<sup>18</sup> For a strongly influential article about how networks operate through weak ties at least as much as through strong links, see Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360 (1973).

code of behavior that goes unchallenged. Imagine a large federal immigrant rights case in a southern state, and imagine a group of legal nonprofits attempting to work in collaboration. Which organizations will be invited in, and which will be left out? Well folks at the ACLU are interested, so they're in. The anti-immigrant law is in the south, so naturally the SPLC cannot be excluded. Oh, the law infringes on the rights of all the immigrants in the state, including Asians and Latinos, so we must have one organization that represents Latinos and another that represents Asians. For the Latinos, will it be the National Immigration Law Center (NILC), Latino Justice, or the Mexican American Legal Defense and Educational Fund (MALDEF)? For the Asians will it be Asian Americans Justice Center (AAJC), Asian Law Caucus, or perhaps an Asian partner at a big firm?<sup>19</sup>

Often when the big shots include less prominent identity organizations, the coalition can feel more like a façade than anything else, a front to indicate "we are not the White Saviors here."<sup>20</sup> On the ground, though, there is no commitment to share agency. So who is in or who is out proves frequently to be more a product of what the dominant non-profit, say for example, the ACLU, can get away with. And that decision can turn on behind-the-scenes deals. Maybe the ACLU can negotiate something with a smaller or up-and-coming identity organization where it retains complete control. Or maybe the ACLU can get NILC to agree to its terms so long as NILC appears right below the ACLU on the pleadings, on the press releases, on letters, and everything else that follows. If so, no need for the ACLU to seek out any other Latino organizations. Why invite headaches?

Sometimes, though, back-room deals do not stop the wrangling.<sup>21</sup> As news spread of a possible or likely lawsuit, the leaders of Asian, Latino, and LGBT organizers not already included will take offense. They'll often invoke the rhetoric of indefensible exclusion: how can you even imagine bringing this litigation without us? Perhaps their

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<sup>19</sup> Recognize, of course, the perversion of the conviction, offered by illuminating radical theorists, that lawyers could respond responsibly to movements of groups of color. See, e.g., Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 *UCLA L. REV.* 474 (1985).

<sup>20</sup> For only a sample of the better literature, typically revolving around the African American struggle for liberation, see, e.g., KENNETH MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2012); David B. Wilkins, *Social Engineers or Corporate Tools? Brown v. Board of Education and the Conscience of the Black Corporate Bar*, in *RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION* 137 (Austin Sarat ed., 1997).

<sup>21</sup> López's view, of course, is that the wrangling never ends: All the way down, it's conflict interrupted by truces, and truces toppled by conflict, whether in describing the United States Constitution, everyday life, or the election of a new President. See, e.g., López, *Constitution in the Chicano Tradition*, *supra* note 2.

pressure proves persuasive. Or perhaps all along the ACLU just wanted all the bigger identify organizations to fight to be involved. In any event, the ACLU may not create a big tent. And with everybody on board, the typical hierarchies rule, and the perhaps sub-alliances will form. But absolutely nothing is unfamiliar, to any of the organizations. The negotiation may have been sequenced and layered. But the same ethos rules. The battle for power continues.

And that battle can be about items outsiders might regard as trivial or vain or both. But to insiders, such items can be huge. Take the jockeying over where exactly the organizations' names will appear on the pleadings. Each organization wants its name showcased. Whose name will appear first, second, third, and so forth? If the captain has two columns for counsel of record, is it possible to have the organization listed immediately next to a lawyer's name, so that it is not exactly at the same level? Although roughly only two centimeters on paper, this demarcation will signal that an organization is more important than the one listed in the adjacent column. Leaders or lead lawyers for organizations spend hours vying for hierarchically superior positions, with painstaking attention to fine distinctions.

Sub-alliances within the big-tent coalition will assert all the power they can muster. Some will propose, with credible reasons, that the locally-based organization should be listed first. And intriguingly, sometimes not even the dominant organization will attempt to openly dispute this. Someone will propose, based on its own organization's name, to list the organizations by alphabetical order. Another umbrella organization, with various geographical offices involved in the lawsuit, will insist that each of its office gets a vote and then propose that the majority vote will determine the sequence. Another organization will emphasize its much needed organizational plaintiffs (for standing in a key claim, for example) to demand a higher position. Through a tedious process (unbearable to some of us), the ranking finally gets established—though maneuvering never ceases.

## [2] *Self-Serving Case Selection*

Impact-litigation nonprofits have to be selective about the cases they take. They should feel constrained by their mission, their practice areas, and their grant deliverables. At least as potently, they have finite resources and capacity. These constraints are real—all too real. And frequently these limits are ignored in conferences and in academic and professional writings. How within constraints can an impact litigation organization manage its obligations transparently and accountably?

That does not at all mean there isn't real freedom within which to

choose. That's precisely why sophisticated rebellious approaches to these decisions entails collective thinking, from various perspectives, about how to define the problem; about how diverse ways of framing the problem may suggest different strategies in any ensemble pulled together; about how to coordinate the different constituencies involved any assemblage of strategies; about how to implement effectively, always adapting as events unfold.<sup>22</sup> Civil rights litigation is one power strategy among many, defined as are all strategies by promise and limits, examined for their relative worthiness within defined time and space.<sup>23</sup> What does a grounded evaluation reveal about whether or not to litigate and, if so, how and why?<sup>24</sup>

The realities of case selection among non-profit impact litigation outfits, though, are typically far more tawdry—or at least more lawyer-obsessed than client-serving. When it comes to case selection, the more splash the better. As it happens, important matters can sometimes make for very splashy cases. The organizations know this, obviously. And picking media-appealing cases appears to have absolutely no downside with charitable foundations and even with communities themselves. To some degree, that reaction may reflect how little non-profit organizations openly and honestly explain their decision-making processes. In any event, impact-litigation organizations base case selection on what they can gain for themselves (and perhaps, coincidentally, for clients).

Obviously this selection process reveals race and class hierarchies. When in 1976 Derrick Bell challenged the Legal Defense Fund about prioritizing its social vision over the desires of its clients, he obviously meant to be calling out some White leaders who had long led the litigation efforts.<sup>25</sup> But, just as obviously, he should have been

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<sup>22</sup> For just one of many examples of this formulation of problem solving within the rebellious vision, see López, *Shaping Community Problem Solving*, *supra* note 2.

<sup>23</sup> The initial book reviews of *HOLLOW HOPE*, published by Gerald Rosenberg in 1992, suggest the complexity of such evaluations—both about whether or not to file a lawsuit and about the effects of such a lawsuit, if any, on social life. See, e.g., Stephen L. Carter, *The Courts and the Constitution: Do Courts Matter?*, 90 MICH. L. REV. 1216 (1992); Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993); L.A. Powe, Jr., *The Supreme Court, Social Change, and Legal Scholarship*, 44 STAN. L. REV. 1615 (1992); Schuck, *Public Law Litigation*, *supra* note 5.

<sup>24</sup> For examples of how early leaders of the modern legal services movement and early leaders of the modern clinical movement within legal education, notably Gary Bellow and Earl Johnston, emphasized the importance of sophisticated strategic thinking, see EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAMS* (1978); Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337 (1980).

<sup>25</sup> See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

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understood as drawing attention to class divides within the Black community. Black professionals regarded their own aspirations as more important, perhaps vastly more important, than the desires or needs of the Black clients they represented. And those Black clients were typically less well-educated, poorer, and wanting a better life (even if segregated) than a life integrated with Whites (and Black professionals).<sup>26</sup>

To be sure, self-aggrandizement can lead to conflicting evaluations. Less influential organizations might seize an opportunity top dogs regard as beneath them. That might well reflect that the less influential look more closely and discover important grievances that should be converted into litigation.<sup>27</sup> Or it may reflect only that the less influential pick from the leftovers. Sex appeal, in the current culture, means winnable cases about matters currently high-profile. Or if not obviously winnable, then certainly centering around controversially significant equal protection, due process, freedom of speech, or preemption as defined by the United States Constitution. Even if state courts provide certain tactical advantages, lawyers tilt toward bringing these cases in federal court. There litigators expect to find greater glamour, perhaps for no other reason than the conventional wisdom that smarter judges with smarter law clerks work there.<sup>28</sup> In matters of desirability, perception often becomes reality.

If currently unfolding law, ideology, and culture permit, the litigators may well win at the trial level. Even if they do not, they often get at least as excited about having the case before a federal appeals court. Thinking in terms of “setting precedent,” they absolutely feel the pull of arguing before a three-court panel.<sup>29</sup> If they win, they push

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<sup>26</sup> Regina Austin’s work remains as powerful as any examination of how Blacks ought deal with and conceive of divisions within their own communities. *See, e.g.,* Regina Austin, *A Politics of Identification and a Jurisprudence of Redemption: Reconciling ‘The Black Community’ and Its Lawbreakers*, S. CAL. L. REV. (1992). Much of López’s work—lawyering, teaching, writing—revolves around class, within and across both groups of color and Whites. *See, e.g.,* López, *What’s Pathological*, *supra* note 2; López, *Cleaning Up Our Own Houses*, *supra* note 2. Perhaps the embrace of empirical methodology will invite more legal scholars, including Critical Race Theory scholars, to examine more routinely and more deeply the class divisions within and across groups of color. *See, e.g.,* Kimani Paul Emile, *Foreword: Critical Race Theory and Empirical Methods*, 83 FORDHAM L. REV. 2953 (2015).

<sup>27</sup> For the important scholarship elaborating the phenomenological and sociological process of naming, blaming claiming, and gender and race and class dimensions, see KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); William Felstiner, Richard Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*. . . , 15 LAW & SOC’Y REV. 631 (1981); López, *Work We Know So Little About*, *supra* note 2.

<sup>28</sup> For perhaps the most well-known article asserting this claim, see Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

<sup>29</sup> The idea of “setting precedent” other judges will follow turns out to be remarkably



the victory, an all-out social media blitz. Even if they lose, they aim for the case get picked up by the United States Supreme Court. Of course the odds are long, very long. But the opportunities for glory? Extensive briefing and oral argument and media coverage. Like few others, leading not only to social media and to funder-happiness, but to new possibilities for getting invited to prestigious universities, think-tanks, and interviews. Maybe even a TEDTalk.

But these priorities come at a price, usually one paid by the client communities and particular clients. I have seen impact-litigation nonprofits ignore, dismiss, run from hugely important fights squarely within their mission. Threats against large sectors of immigrant communities, whether in the context of driver's licenses, in-state tuition for youth, or on other fronts too. What made these fights inferior to the highly coveted cases? Typically, the articulated reasons revolved around building a case to do battle with this threat has little or no chance of success. Why prioritize a loser? Often that explanation would not hold up under scrutiny. And that's not even asking whether the fight itself is the victory, particularly when no one else stepped up to represent the damaged communities.

Or I've heard—often, not only now and then—the organization has too many immigrant rights cases already, so let this one pass. But could this decision have anything to do with the fact that these cases are “small” in comparison to the other eroticized behemoths (for example, challenging S.B. 1070 in Arizona), that they would turn out to be in state superior courts, with little to no national media, with one or two causes of action, without a chance of going on appeal to a circuit court, much less the United States Supreme Court? Again, closely examined, these unwanted cases, if measured by the ability to fight for the constitutional rights of thousands of individuals, were indistinguishable from as the heavily desired ones. Now and then, when a big dog offers that explanation, a less influential organization just may step up—or at least seek its glory through this important situation. As a result of partly perverse reasoning by less influential organizations, worthy clients now and then got represented, often by lower-ranked lawyers able and willing to give them all to do them justice.

### [3] *Dominance Drives the Division of Work*

Within the coalition, the work is divided along the power grid.<sup>30</sup>

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more complex than typically portrayed. *See, e.g.,* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

<sup>30</sup> Within the Rebellious Lawyering literature, in addition to López's published and unpublished work, Ascanio Piomelli and Lucie White have contributed significantly. *See, e.g.,* Piomelli, *Foucault's Approach to Power*, *supra* note 4; White, *To Learn and Teach*,

Power can be exercised by doing nothing but taking credit; or by taking the best assignments and taking credit; or by opportunistically stepping into particular parts as they surprisingly begin grabbing attention. All organizations want “leading” roles, regardless of who is best suited to that task. Once divided, each attempts to exert power over the other, for example through editing, sometimes entirely re-drafting (especially if the draft comes from an organization outside of your alliance), even if the exercise of power makes the writing less lucid and fluid and convincing. Each claims they could have done it better than the other. Sometimes the appearance of dominance matters more than dominance.

Some prominent organizations want to do the bulk of the shiny work (equal protection, preemption) and provide all the resources necessary. Others claim to be preeminent, demand the glitziest claims, and then fail. They may lack the resources, they may target available resources, they may simply refuse to do the necessary work. That may sound unlikely, but it happens every day, sometimes by the same organization over and over, sometimes by different organizations. In these instances, the coalition must step in to fill the vacuum. To make matters more twisted still, the organization that failed will still take full credit for the final product and continue to present itself as prominent and prominently expert. Having actual expertise in an area may even be less important than resolutely projecting that image. These organizations know other organizations will not publicly out them. And the rest of the coalition will dump the hard work on a good to great associate, all as part of the cover. Masters of denial indeed.<sup>31</sup>

Dividing the work is rough, grubby, and acrimonious. Who will get to draft the eye-catching portions of the complaint, the preliminary injunctive, and all other substantive briefs? Predictions matter. Will the equal protection claim, preemption argument, and the First Amendment action get the most traction? Well, say most, with projected confidence, definitely not the statutory claims. The most important prize in the room, however, is the oral argument, particularly for non-discovery related motions. (Obviously fighting over arguing before the Court of Appeals, much less the Supreme Court, can produce and has generated blockbuster battles, even between apparent friends.) Most often vying factions project rationality, disinterest, diplomacy. In the end (yes, really), maybe a lottery or a coin toss will decide. No matter what happens, the coalition cannot avoid feeling frayed. All for the spotlight.

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*supra* note 4.

<sup>31</sup> For what remains perhaps the best work on denial, see ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENSE* (1936).

What of the grunt work? Few will eagerly volunteer to review and tag thousands of documents, to research and draft discovery-related motions, to respond to voluminous discovery demands, or to draft internal legal memoranda on procedural issues. When such assignments get framed, silent delays almost always ensue. Then a responsible lawyer, usually solid, sometimes spectacular, might raise his or her hand. No glory follows, even if every good lawyer in the room (or on the conference call) knows cases get made through just such work. Perhaps later, if a dynamite trial lawyer becomes part of the team, genuine thanks will be offered. That courtroom master knows, as most senior civil rights litigators do not, how much the build-up provides what you need if you're to succeed at trial.

How can that be? How can organizations mainly pursuing civil rights litigation not prioritize the most important chunks of work? The most optimistic explanation is that the culture of self-glorification has created a blind spot.<sup>32</sup> Management values hiring and rewarding lawyering whose entire expertise amounts to trying to win as a “matter of law,” the sort increasingly favored by the media. As a result, expert lawyers within the non-profit litigation world may be solid (perhaps better) at research and writing and acceptable (not usually sterling) at oral argument. But they have little exposure to—or interest in—in the rest of the litigation cycle. They can be remarkably lacking experience in jury trial work, having long since turned their attention to another case that just might get decided as a matter of law or on summary judgment.

If an influential organization lack expertise in developing and trying a lawsuit, or at least has not staffed a particular lawsuit with a lawyer with a well-rounded game, of course the less influential notice. They may then attempt to take control of the litigation. And the influential may be more than willing to relinquish top dog status. Of course both sides are laying down a bet. But here's a perverse twist. If a less influential organization takes control and succeeds, the victory is less likely to receive the coverage it might otherwise have garnered. Still, the less influential typically regard the effort as worthwhile. Control means getting the alluring assignments. And, just maybe, the organization can wield more power in the next go-round.

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<sup>32</sup> As in the workplaces portrayed in *Rebellious Lawyering*, gender and class (sometimes the law school from which a lawyer has graduated) influence the distribution of grunt work, all deserving of many and repeated empirical studies. See, e.g., LÓPEZ, REBELLIOUS LAWYERING, *supra* note 1.

[4] *Leaders Use the Non-Profit As The Means To Realize Their Own Ends*

In this culture, leaders use the non-profit for their own career growth. Their focus—perhaps more accurately, their practice—is about building their public persona and positioning themselves for the next step. The staff attorneys and co-counsel, and of course all the support staff, where it exists, shoulder the burden of producing the work necessary for the leader to have successful product. The leader needs to “project” expertise—but need not possess it.<sup>33</sup> Indeed, with final authority over everything, the leader does not need to know how to do the work or even direct its unfolding. Yet the leader, naturally, takes all the credit; if circumstances allows, some even avoid praising others. If positive exposure proves tempting enough, the leader will “take over.” Nothing quite brings this out like Supreme Court arguments, press conferences, and appearances before elite institutions or groups.

Leaders of impact litigation nonprofits function according to the unchallenged premise that self-glorification is part of the deal, for them and for a strand of their staff attorneys. This postulate obviously means radically different things for each member of the organization. Executives and high-ranking officers are allowed, if they so choose, to use the organization and its work to advance their careers above all else. All victories will be publicized as the accomplishment of the executive and the high ranking officers, even when all the work has been completed by nameless others. Inclusions and exclusions on press releases reflect deliberate judgments not inadvertent outcomes.

[5] *The Workers*

When self-glorifying leaders depend upon “product” to realize their own ends, you would think they hire only the smartest, hardest workers around. Yet an insider’s view of any of the organizations within the non-profit impact litigation world—and within the pro bono firms contributing staffers—suggests a more mangled reality. To begin to reveal the wild and perhaps incoherent mix of forces at work, we would need a wonderful research team, headed by someone who thinks about how legal organizations manage themselves, how cultures evolve. And we would need them to do well-funded longitudinal studies.<sup>34</sup>

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<sup>33</sup> By projecting, I mean the strong sense captured in many fictional and non-fictional literatures, including the focus on what it means to “act White.” See, e.g., DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN “POST-RACIAL” AMERICA* (2014).

<sup>34</sup> David Wilkins—and his research team—would serve us well. See, e.g., David B. Wil-

Simplified, permutations looks like this: Management will hire smart hardworking lawyers, believers in the professed mission, who will do anything needed, from the grunt work to elite work, for which they shall receive virtually no credit, and these lawyers will include decent minded and even some rebellious lawyers. Far less sensibly, management will hire staffers who do their best to evade the work, and who tout their own “expertise,” mainly to attract highly competent co-counsel, then do their best to take credit. Of course those whose qualities mimic management will lean on the decent co-counsel’s integrity to keep their incompetence hidden or at least disguised. And they will direct work to the smart hard workers at every possible opportunity.

Collectively, recruiting practices frequently lead to the hiring of a sizeable enough number of decent-minded lawyers, with a sprinkling of fully prepared rebellious lawyers, ardently willing to do what clients need and desire. Enhancing the quality of the team in this way, though, produces conflicting consequences. Work gets done, even mighty amounts by far too few people. But those doing the work represent a counter-culture of sorts, perhaps even a rebellious culture, and the tensions within organizations and litigation teams can sometimes prove uncomfortably palpable. The self-glorifiers try, at all costs, either to avoid these interactions or to dominate them. If the decent and the rebellious practitioners refuse to back down, then tension heightens, typically producing in the self-glorifier contrived outrage, no less virulent or threatening because of its shaky foundations.

#### [6] *Wages*

Yet perhaps the oddest or at least the most unlikely truth is this: the self-glorifiers, represented disproportionately by the leaders of organizations, rarely pay the decent-minded (including the rebellious) lawyers what either the market or sometimes even the non-profit’s board regards as a solid living wage. At first that would seem implausible. After all, you need these lawyers to do the work (grunt to elite) to produce the successes others want to claim. Wouldn’t that seem to suggest a fair wage (by non-profit standards, measured against organization’s operating budget) would substitute for no glory?

Yet the truth is far more perverse (though perhaps neo-classical economists would disagree). The glory-seekers know that some fair

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kins & Mitu G. Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998); DAVID B. WILKINS, *THE BLACK BAR: THE LEGACY OF BROWN V. BOARD OF EDUCATION AND THE FUTURE OF RACE AND THE AMERICAN LEGAL PROFESSION* (Oxford University Press forthcoming).

percentage of decent-minded and rebellious lawyers will continue to work despite being fully aware that they ought to be getting paid far better. Their clients need them; their communities depend upon their competence and sometimes their brilliance; they believe in the professed mission. Of course all good things must come to an end. Sooner or later, most decent-minded and rebellious lawyers leave. But the glory-seekers depend upon the market offering their organizations credible replacements. And perhaps that proves over the middle- to long-run to be true, though a short-run human resource assessment would suggest not.

Of course a careful study might reveal the “rationality” of these organizational policies and practices. But, to my knowledge, no one within these organizations seriously asks that question, much less engages people who could indeed study the trade-offs, through neo-classical or behavioral models.<sup>35</sup> Certain back-of-the-napkin analyses ought to be made plain, though. At some non-profits impact organizations, executive salaries are 4 to 5 times larger than the salaries of staff attorneys (\$240,000 to \$52,000, for example). If staff lawyers openly challenge this disparity, risking excommunication, they’ll hear what I now have come to realize is a stock response: *Wages beyond the minimum starting salary come in the form of getting the opportunity to build experience on important cases, which translates an enhanced ability to secure a subsequent job and to demand a market wage.* After all appropriate protestations at this explanation, lawyers sometimes ask for the empirical evidence supporting this story. I’ve yet to meet anyone to whom management offered data.

Of course wages and the like are regarded as “proprietary information.” I am among those who asked repeatedly to see a salary scale and never got to glimpse one. Of course, after developing trust, we staff attorneys pooled information. That proved as debilitating as enabling. Regardless of experience, we all made between \$52,00–\$55,000. Some of us agreed to begin being as transparent about our wages as we could be. In social and professional settings, we would share what we make. In response, most were openly startled. Those who were not proclaimed “rebellious lawyers” ought to be regarded as martyrs. And

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<sup>35</sup> In a law school simulated clinical course taught by López, comparing the problem-solving approaches and methods of diverse professions and disciplines and crafts and trades, we studied any number of economists whose work would shape any studies I would find intriguing. See, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2007); Oren Bar-Gill, *Exchange—The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008); Herbert Simon, *Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955); Cass R. Sunstein, Christine Jolls, & Richard H. Thayer, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1997-1998).

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for martyrs, they would say, we staff lawyers were getting paid very well.

In these exchanges, I hold back my ecclesiastical lecture about martyrs. I keep in my pocket the one I learned from some Jesuits at Loyola Marymount and the one I learned from some faculty at the Harvard Divinity School. The idea of martyrs does not survive in either theological account.

[7] *The Rotation*

Almost everyone who is at all good will leave these organizations. People leave because they understandably need to earn a fair salary to meet basic responsibilities of adult life—including to parents and children, in the now-classic arrangement. To be sure, some stay longer than they might otherwise because they love the work. For as long as possible, the organizations try to exploit the good lawyer's love of justice. These entities know how financially restrained their lawyers are. In some instances they do because small coalitions of lawyers have forced management to understand their circumstances

Yet leadership does not care to change its way of doing things. Management simply starts up the search for worthy replacements. And, most often, they find replacements quickly enough, though not as often are the replacements worthy. What is true is that most law school graduates apply for and accept offers even when they have been "Mirandized." Even with blunt insider information, new hires simply cannot imagine a non-profit impact civil rights organization could possibly be such a difficult place to work.

Meanwhile, those who leave form a sort of survivors club. To one another, they speak the truth about their experience. But hardly anyone goes public.

[8] *The Worker Comes To Consciousness*

Were this a novella, I would demonstrate how years unfold, for those working in an office, for clients on various cases, and for members of coalitions. The unfolding would most especially demonstrate the workers' slow coming to consciousness about just how extreme the culture is, how much those in power aim to block that coming to consciousness (insist upon "collective denial"), how much when all becomes plain, management work to caricature those coming to consciousness as "problematic," just wanting to "jump the queue," "to be lead counsel" before they have earned the right.<sup>36</sup>

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<sup>36</sup> As alternatives to a novella, I have in mind of Chapters Three and Five of *Rebellious Lawyering*, *supra* note 1, and of *Lay Lawyering*, *supra* note 2, in their own ways phenomenologies of the sort worthy of expressing experiences.

If I compressed years into one slender line of thought, though, one hyper spare narrative, what would that look like? The build-up begins slowly. Earnest and eager, the new staffer assumes the best, about the organization, its leaders, and everybody else. As the first assignments come in, all quite substantial, the high ranking officer will set the tone quickly: *I hope you understand that these briefs need to be signed by a senior attorney because of the magnitude of these cases.* The staffer, with no hesitation and complete buy-in, will say: *Of course, we should do what is best for the case.* In retrospect, the result seems almost meaningless, because all this does is ensure that the high ranking officer's name appears in the public filing, which probably few will ever read. You never know, though. Maybe the media will reach out. The staffer will continue to do the work, sometimes or even frequently without even being listed on the pleadings, but its business as usual. Even against mounting evidence, the staffer will not yet doubt the nonprofit.

Over time, patterns seem no longer possible to block from view, and the pretense impossible to sidestep. Imagine for example, that a particular case escalates—hugely so. The staffer finds she has to work every night and weekend just to keep up or not far too far behind. After many humble attempts to get some help (in the office lingo, get further support), the staffer might say: *As I have tried really hard to convey, this case is now a monster, and I am working around the clock, often sleeping only a few hours a night over extended months, and I am in desperate need of help, and I need more lawyers on this, perhaps, maybe, with all due respect, we should co-counsel?* The response: *Well, we would hate to have co-counsel come in and take credit for our hard work. We prefer to handle this ourselves. Let's see if we can get you some internal support.*

The staffer, about to break, goes around the high-ranking officer and directly to the boss to explain the circumstances. The response, with an inappropriate hint of pride, includes an unusual twist: *You know, when I was a staff attorney I also worked as hard as you; I was regularly here on Saturdays alone, working; everyone else should be like us.* The staffer thinks to herself: *No! I did not come to get a pat on the back; I came for much needed support because this case and I desperately need it. And, no, others should not also be like "us." It is simply unsustainable.* Would my organization subject a staffer to this treatment simply to ensure that, should we prevail, we get the credit, to be certain the leader and a strand of bosses get all the acclaim?

The staffer feels an obligation to the client and musters the energy to keep pushing. After many months (or is it actually a few years?), as the case approaches trial, the team has been expanded to



two staff attorneys. By now, though, all internal support has been exhausted. Both lawyers feel overwhelmed. But, at this point, that's not their biggest focus. They realize they need of quite specific expertise: an experienced trial attorney to take the case to trial. Because there's not a one within the organization. Even the self-glorifiers will have to concede. Without a dynamite courtroom lawyer, there might be no victory at all.

To everyone's surprise, a highly qualified trial counsel comes in at this late juncture. Every lawyer will have to be 100% invested at this point. Even the high-ranking manager, who had previously forced the staffer to do nearly all the important grunt work (depositions, motion arguments, and all) will have to work like an associate under the direction of the trial counsel. Anything less will impose an unfair burden on the already strained staffers and fail to support the new co-counsel, who presumes the organization's leadership is as committed as he is. Trial counsel, fully unaware, will soon obtain an intimate glimpse into the perverse culture at the nonprofit impact litigation outfits.

In a bizarre twist, even within a strange culture, the nonprofit's leaders almost immediately try to treat experienced trial counsel as if he is just another of their subordinates. Instead of doing any work, much less any of the hard work, the leaders point to the staffers' earlier work as evidence that the organization has provided an extraordinary contribution to the case. Instead of regarding the trial counsel's presence as one of life's great work blessings, management continues to pretend they're above getting dirty with the lawsuit. They appear to experience no cognitive dissonance. They're unapologetic. Indeed, they may even behave more arrogantly than usual, as if haughtiness itself is proof of their qualities as trial lawyers.

As farfetched as the situation has become, there is one huge advantage. Along with trial counsel, hardworking staffers now fully appreciate what's up. No more rationalizations, no more getting suckered into believing the counter-factual. Protests must wait, though. Mountains to climb with clients. Trial counsel will lean on the staffers, and they will follow his lead. Oddly the organization's leaders cannot hide the relief they feel. They no longer fear being exposed at trial. They pull back even more from any actual work, losing the opportunity to work with a remarkable lawyer, perhaps beginning to learn what for so many years they have merely faked. In this culture, keeping up appearances proves far more important than actually growing.<sup>37</sup>

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<sup>37</sup> In the clinical literature to which I have been exposed through López's law school and post-law school training, stories and stories about stories prove critical. See, e.g., Anthony Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37

*[9] Code of Silence*

There is a code of silence that protects incompetent leaders or even competent leaders who are narcissistic and predatory. Even if someone speaks up, no one would believe it. People react as if the speaker is crazy and unhinged; or worse, people react as if there is nothing unusual with the state of reality.

Those who know the truth do not speak up to support the rare souls who do. Even when many lower ranking attorneys within the coalition openly discuss and know entirely what's up, they do not discuss them out in public. It is like protecting an abusive family member. There is a palpable fear of retaliation and career suicide.

There is a professional code of silence among co-counsel, which is deeply puzzling and utterly enigmatic. When high-ranking leaders, good ones, of non-profit impact organizations discover that one of the coalition groups (including its leader) is a phony, even an abusive phony, the outrage will be discussed with other good and hard working members of the coalition, but, rarely if ever will they confront the predators, and never will they go public.

More than a few people have offered, in part, what amounts to an explanation. They seem to suggest that certain organizations are understood to be legitimate, and that it is good to associate with them, even if all the rest of us do all the work. Working with these organizations, some insist, provides valuable enough benefits to put up with all that's scummy. But as much as I respect the opinion of these great leaders, I am dumbfounded by their accounts. They offer ungrounded speculation as proven truth. After all, it's not like there is an empiricist running opinion polls about what client communities, others civil rights organizations, pro bono lawyers or anyone else believes. Is it a national phenomena? Regional? A phenomena at all?

Behind closed doors, there is open criticism across organizations; there is frank discussion about the quality of work, almost always pointed, spot on, and deeply thoughtful. How can a person be considered a seasoned civil rights leader who knows little to nothing about major aspects of litigation? Whose capacity to work—work as a lawyer and not as an attention-grabber is so embarrassingly limited? Even the leaders who see it, who recognize it, who train around it, remain unable and unwilling to speak openly. No one blows the whistle, even very good lawyers with genuine power.

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N.Y.L. SCH. L. REV. 55 (1992); Anthony Amsterdam, *Telling Stories and Stories About Them*, 1 CLIN. L. REV. 9 (1994); Anthony Amsterdam et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLIN. L. REV. 1 (2005).

## CONCLUSION

By contrast to many who publish in legal academic journals, let me be emphatic: I have written nothing “original,” I am not “the first to say” what I have said, and I am certainly not proposing a “new vision.” What I have done, as have others before me, is to put into action what López has taught us to look for and to see and to address.<sup>38</sup> To look for and see in the organizations and institutions and cultures within which we work and through which we challenge wider injustices. To look for and see not just in others but, even more importantly, in ourselves. To address what’s credibly rebellious? What’s honorably regnant? What’s a forgery of both? What’s a largely tacitly defined mangled version, a mutant more than a hybrid, of any coherent vision of problem solving and of democracy?

Many within the civil rights impact litigation culture can fairly be described as the unnamed co-authors of this article. They have joined me in challenging daily the patterns I have described. They have discussed, at length, how most accurately to describe what we have commonly experienced. They’re hopeful this article will help others we know well to speak openly about what we feel so strongly about and care so much about changing. Our shared aims are as straight-ahead as they are apparently difficult: to expose the hypocrisies pervading the culture of non-profit impact litigation and to insist on practices as filled with integrity as the public mission statements themselves insist.

With the arrival of Trump and Trumpism, a large number of people within the civil rights community (and others still) regard “internal critiques”—of our allies, of ourselves, of our practices—as utterly ill-advised and ill-timed. With so much to fight on so many fronts, should we really be “tearing down” one another? To denounce even modestly unsparing assessments of the culture of civil rights movements as “tearing us down” is hardly new, of course. During the 1950s, 1960s, and 1970s many condemned women for openly speaking about the misogyny within the Chicano and the Black movements. “We Got The

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<sup>38</sup> For remarkably high-quality examples appearing as part of this Symposium, see Anthony V. Alfieri, *Rebellious Pedagogy and Practice*, 23 CLIN. L. REV. 5 (2016); Stephen Carpenter, *Family Farm Advocacy and Rebellious Lawyering*, 24 CLIN. L. REV. \_\_\_\_ (forthcoming 2017); Eduardo R. C. Capulong, *Client as Subject: Humanizing the Legal Curriculum*, 23 CLIN. L. REV. 37 (2016); Patience Crowder, *What’s Art Got To Do with It: A Rebellious Lawyer Mindset in Transactional Practice*, 23 CLIN. L. REV. 53 (2016); Tara Ford, *Pegasus Legal Services for Children Taking Stock of a Rebellious Non-Profit Practice in New Mexico*, 23 CLIN. L. REV. 107 (2016); Bill Ong Hing, *Contemplating a Rebellious Approach to Representing Unaccompanied Immigrant Children*, 23 CLIN. L. REV. 167 (2016); Brenda Montes, *A For-Profit Rebellious Immigration Practice in East Los Angeles*, 23 CLIN. L. REV. 707 (2017); Daria Fisher Page, *Etta & Dan: Seeing the Prelude to a Transformative Journey*, 23 CLIN. L. REV. 251 (2016); Shauna Marshall, *Rebellious Deaning*, 24 CLIN. L. REV. \_\_\_\_ (forthcoming 2017).

Man To Fight” and “It’s The *Gabacho* Who Oppresses Us, Babe” excused the same injustices ostensibly imposed only from the “outside.”<sup>39</sup>

But breaking down this imagined wall between the “outside” and the “inside” is among the central accomplishments of *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice*. Of course impact civil rights litigators cannot be anywhere near as ambitious and effective as they ought to be—or, many insist, as we now *need* them to be—unless they comprehend the convincing correlation between how they run their organizations and coalitions and how they represent others in lawsuits. But López’s point runs far deeper still. We cannot change systems unless we’re willing to change ourselves. “Big structures” and “personal relationships” define one another. The more radical the world we hope to realize, the more obviously necessary that we foreshadow that future in the very way we practice. If we’re persuasively to offer a rebellious alternative to the fascistic vision unfolding before us, we must offer to and realize that alternative with and through one another.

Join the pragmatically utopian quest or get out of the way.

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<sup>39</sup> For a wonderful poem, routinely assigned in Rebellious Lawyering Conferences and Trainings, evoking this dynamic, see Bernice Zamora, *Notes From A Chicana “Coed,”* in GLORIA ANZALDÚA, *MAKING FACE, MAKING SOUL/ HACIENDO CARAS: CREATIVE AND CRITICAL PERSPECTIVES BY FEMINISTS OF COLOR* 131 (1990).