

ESSAY

PARTICIPATORY LAW SCHOLARSHIP

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Drawing from the experience of coauthoring scholarship with two activists who were sentenced to life without parole over three decades ago, this piece outlines the theory and practice of Participatory Law Scholarship (PLS). PLS is legal scholarship written in collaboration with authors who have no formal training in the law but rather expertise in its function and dysfunction through lived experience. By foregrounding lived experience in law's injustice, PLS unearths and disrupts the prevailing narratives undergirding the law. Through amplifying counternarratives to the law's dominant discourse, this methodology creates more space for social and legal change. By design, PLS also reminds us of the humanity behind the law, acting as a moral check and balance. Building from the tradition of Critical Race Studies and an emerging body of Movement Law Scholarship, PLS thus aims to press the boundaries of what legal scholarship traditionally looks like by evoking lived experience as evidence and developing legal meaning alongside social movements. Its methodology raises critical questions about how

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knowledge is produced and by whom, asking what role legal academics should play in facilitating social change in the material world. The piece also responds to skeptics who believe this approach abdicates a scholar's "moral obligation" to truth, explaining why PLS is not just legitimate but urgently needed to address the fissures and fault lines law has created.

PREFACE: REFLECTIONS ON <i>REDEEMING JUSTICE</i>	1797
INTRODUCTION	1803
I. SITUATING PARTICIPATORY LAW SCHOLARSHIP	1809
A. Situating PLS Within the Participatory Action Research Framework.....	1810
B. PLS's Alignment With Critical Participatory Action Research	1812
C. Participatory Methods in Legal Scholarship.....	1814
II. THE THEORY OF PLS.....	1818
A. PLS's Theory of Knowledge.....	1818
B. The Legal Theory of PLS.....	1820
1. <i>Nomos</i> and Narrative	1820
2. <i>Nomos</i> , Narrative, and the Law	1822
3. Envisioning a Democratic Future Through Participatory Methods	1823
4. PLS as a Tool for Critical Legal Imagination	1824
III. THE PRACTICE OF PLS	1825
A. The Inherent Risks of PLS.....	1826
B. Strategies for Equitable PLS Partnerships	1827
1. Fostering Critical Self-Reflection	1827
2. Combatting Academic Institutionalization	1828
C. Relationship Is Resistance.....	1831
1. Embracing <i>Convivência</i> and <i>Simpatia</i> to Redeem Justice	1832
2. Embracing <i>Convivência</i> and <i>Simpatia</i> to Resist the Academic Political Economy	1834
3. Grappling With My Own Institutionalization.....	1835
4. Cultivating a Partnership Mentality	1836
IV. RESPONDING TO THE SKEPTICS	1837
A. A Scholar's Moral Obligation to "Truth"	1840
B. Dangers of Activism in Scholarship.....	1846
C. The Banking Concept of Legal Scholarship.....	1849
D. Toward a Relational Theory of Knowledge.....	1852
CONCLUSION	1853

PREFACE: REFLECTIONS ON *REDEEMING JUSTICE*

During the heart of the pandemic, at a time when citizens were being brutalized by police for protesting the murder of George Floyd, a Black man who was killed while in police custody,¹ an unconventional idea for a law review article took shape—an idea that would culminate in the liberation of one of my coauthors and, in some ways, mine too.² The pandemic hindered a project undertaken by a group of men sentenced to a life without parole (LWOP). That project aimed to produce greater recognition of a right to redemption, a concept collectively conceived of as a human right by members of the group, who called themselves the Right to Redemption (R2R) Committee.³ With the Committee unable to meet or speak due to a prolonged prison lockdown, it became imperative to find another way to carry the work forward. Upon learning that human rights jurisprudence echoed the legal framework first articulated by these men on the inside, I proposed writing a law review article with two leaders of the group, Terrell “Rell” Carter and Kempis “Ghani” Songster. Centering the group’s Right to Redemption analytical framework as well as Rell’s and Ghani’s lived experiences, the article, I explained, would contend that the capacity for change is an innate human characteristic, fundamentally intertwined with human dignity.⁴ Together, we would argue that this aspect of the human condition should be reflected in the law.⁵ And so it was that *Redeeming Justice* was born. Through countless 2000-character messages via the Pennsylvania Department of Corrections messaging portal and fifteen-minute monitored calls made during the thirty-minute increments that my incarcerated coauthor Rell was permitted to be outside his cell, the article came to life.

1. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. Times (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (on file with the *Columbia Law Review*) (last updated Jan. 24, 2022).

2. Press Release, UN Off. of the High Comm’r on Hum. Rts., USA: UN Experts Urge Far-Reaching Reforms on Policing and Racism (Feb. 26, 2021), <https://www.ohchr.org/en/press-releases/2021/02/usa-un-experts-urge-far-reaching-reforms-policing-and-racism> [<https://perma.cc/US3J-H45M>]; see also Letter from ACLU of Pa. & Andy and Gwen Stern Cmty. Lawyering Clinic to U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Nov. 23, 2020), https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/RES_43_1/NGOsAndOthers/andy-gwen-stern-community-lawyering-clinic-aclu-pennsylvania-add.pdf [<https://perma.cc/9NYC-UZAN>] (documenting violence by the Philadelphia Police Department against protesters in wake of the murder of George Floyd for submission to the UN Special Procedures).

3. For more information about the Right to Redemption Committee, see Right to Redemption, <https://right2redemption.com/> [<https://perma.cc/3TDY-WMTW>] [hereinafter R2R Mission] (last visited Aug. 5, 2023).

4. See Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 Nw. U. L. Rev. 315, 318–19, 324–35 (2021).

5. *Id.* at 380–82.

That article would spur what is now becoming an emergent movement in the legal academy—a genre of legal scholarship called Participatory Law Scholarship or PLS. PLS is legal scholarship written in collaboration with authors like Rell and Ghani who have no formal training in the law but rather expertise in its function and dysfunction through lived experience. This current piece, written from my perspective as an academic partner in PLS, is the first in a series that will map the contours and contributions of PLS to the legal academy, the law, and society more generally. But before we get there, it feels important to take a moment to reflect on what came before—in other words, what partnering to create *Redeeming Justice* meant for and revealed to me.

As I step back from *Redeeming Justice* and reflect on my own motivations for coauthoring the piece, I must acknowledge my own discomfort in doing so. While *Redeeming Justice* was foregrounded in the lived experiences of my coauthors, Ghani and Rell, my voice was notably absent. Ghani pushed this issue at one point in a podcast interview we did together. He wanted to know what motivated me, both generally and specifically in relation to this article. I remember dodging the question. Part of the reason was I never had to justify my scholarly choices based on my moral commitments before.⁶ Since grade school, I had been taught to remove the “I” from my writing—to write myself out of my writing, essentially to erase myself. And as an academic, rigor is often marked by distance from the subject of study. So, we academics often strip ourselves from our work, as if we are not the ones forming and framing the ideas in the context of our own lived experience.⁷ This project was different. Instead of being a ghost writer or pushing myself to be a distant observer of suffering, it gave me an opening to be closer to my work, to the reader, and to my own ideas. PLS involves not just bringing others to legal scholarship, but for the academic partners in PLS, bringing more of ourselves to legal scholarship.

But this scholarship is not just about self. It also involves another profoundly human element, one that is fundamental to the ethos and epistemology of Participatory Law Scholarship: *camaraderie*. Over the years, I have built partnerships with those who have been caught in the dragnet of the carceral state for decades, seemingly with very little opportunity to be treated as human beings or for emancipation no matter how they’ve changed. Because I know them as mentors, friends, and colleagues, I feel this injustice—and feel it deeply. Some legal scholars view

6. I owe a debt of gratitude to Lauren Katz Smith for helping me to come to this realization.

7. See, e.g., Angel E. Sanchez, In Spite of Prison, 132 Harv. L. Rev. 1650, 1653 (2019) (“When I . . . arrived at a university, I was led to believe that my personal experiences had no place in my academic writing. It was not enough to be neutral; I had to appear impersonally objective. . . . I created a pacified distance between my experience and me, hiding behind my writing.”).

this as a liability, but as I document in Part III of this Piece, I see it as a tremendous asset to my scholarship.

But you might be wondering, why scholarship? Why not instead cabin my work to legal reports and litigation, the traditional province of legal advocates? Primarily, it is because these modalities limit the possibilities of true transformation, not just of laws, but of the systems that create, enforce, and maintain them.⁸ Legal advocacy in other forums can be limiting because you must frame your argument under existing laws and legal structures. It often does not allow dreaming. Without denying that there are some real constraints in the format and conventions of legal scholarship, one of the attributes of legal scholarship is that scholars are not required to fit their arguments into existing legal doctrine or structures. Legal scholars regularly reject doctrine as unjust and imagine new legal rules and realities that might not be immediately realizable given current real-world constraints. You can think big. And, at this moment, what is needed most is not a new law, a successful lawsuit, or even a hard-hitting report, but a profound rethinking of the understandings, narratives, purposes, and structures on which law is built. This is not the work of a well-crafted policy paper or litigation strategy, which are essentially reformist strategies—it is the work of boundary-pushing thinkers and theorists wherever they are found. As I will explain further below, it is my conviction that those most impacted by laws and legal structures are best positioned to reimagine them because they know those structures more intimately than most.

On the other hand, some might question the wisdom of investing the time and energy needed to write a lengthy law review article, essentially aimed at legal elites, when that time could be put to better use in building extralegal movements. At a webinar on *Redeeming Justice* organized by the Carr Center for Human Rights Policy at the Harvard Kennedy School, Professor Andrew Crespo raised this question. Noting that the article lifted up two strategies for change, the “community organizer’s strategy” and the “lawyer’s strategy,” which in his view are somewhat in tension with each other, he asked why *Redeeming Justice* centered lawyers, law, and judges, rather than focusing on organizing and building the power of the people in R2R.⁹ It is certainly a fair question, given, as Crespo reminded us, the role lawyers have played in “kill[ing] off more groups by helping them than ever would have died if the lawyers had never showed up.”¹⁰ But according to the organizer who shared these cautionary words, the lawyer

8. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2428–29 (1989) (explaining how the “linguistic code required by the court sterilize[s]” the facts and renders them muted and devoid of outrage).

9. Harvard Carr Ctr. for Hum. Rts. Pol’y, *Redeeming Justice*, YouTube, at 50:18 (Oct. 7, 2021), <https://www.youtube.com/watch?v=dIXkivdXh8> (on file with the *Columbia Law Review*).

10. William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 Ohio N.U. L. Rev. 455, 457 (1994).

“kills the leadership and power of the group” by taking momentum away from the group.¹¹ Lawyers “want to advocate for others and do not understand the goal of giving a people a sense of their own power.”¹² What distinguishes PLS, however, is that it does not center lawyers as problem-solvers. Rather, it shifts power to people who are not lawyers, establishing them as experts in their own legal realities. Moreover, instead of displacing grassroots organizers, PLS aims to push the boundaries of how society and the legal academy understand their interventions. In the spirit of what law professors Amna Akbar, Jocelyn Simonson, and Sameer Ashar suggest in *Movement Law*, PLS appreciates movements as sites of knowledge production and creativity.¹³ It amplifies the making of legal meaning central to movement building but often less visible to the outside observer.¹⁴

Indeed, people with lived experience confronting the daily realities of injustice and organizing the disenfranchised are often theorists, whose perspectives are sorely needed to reimagine broken legal structures.¹⁵ Informed by this expertise, they, much like academically trained scholars, craft theories of change based on factual investigation and power analyses. This was certainly the case with the members of the R2R Committee. Critically reflecting on their circumstances as well as the narratives that informed them, the R2R members collectively constructed an alternative narrative to disrupt the status quo, a theory of change to match, and prescriptions about what solutions are needed. That is the work of theorists. And as Professor Seema Saiffee suggests, this work does not begin and end with the work of the R2R Committee; rather their work is an example of a larger movement for decarceral solutions emanating from individuals who are incarcerated.¹⁶ This knowledge

11. *Id.* at 458.

12. *Id.*

13. See generally Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 *Stan. L. Rev.* 821, 879 (2021) (arguing that legal scholars should center collective processes of ideation by producing legal scholarship in solidarity with social movements). I adopt the definition articulated by these authors of social movements as “collective effort[s] to change the social structure that uses extra-institutional methods at least some of the time.” *Id.* at 824 n.1 (internal quotation marks omitted) (quoting Debra C. Minkoff, *The Sequencing of Social Movements*, 62 *Am. Soc. Rev.* 779, 780 n.3 (1997)).

14. See Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 *Yale L.J.* 2740, 2756–57 (2014) (documenting how various social movements in the United States “forge[d] new understandings of the status quo . . . [by] creating an alternative narrative of constitutional meaning”).

15. Delgado, *supra* note 8, at 2414–15 (describing how counternarratives “can open new windows into reality, showing us that there are possibilities for life other than the ones we live . . . [and can] enrich imagination and teach that by combining elements from the story and current reality, we may construct a new world richer than either alone”).

16. See Seema Tahir Saiffee, *Decarceration’s Inside Partners*, 91 *Fordham L. Rev.* 53, 59 (2022) (arguing that legal scholars and all those committed to large-scale decarceration should look to the ideation of those behind prison walls for decarceral solutions).

production is happening organically in prisons across the United States.¹⁷

The authors of *Subversive Legal Education: Reformist Steps to Abolitionist Visions* adopt the term “organic jurists” to describe those who, like the members of the R2R Committee, are “legal scholars without traditional educational prerequisites.”¹⁸ The authors derive this term from philosopher Antonio Gramsci’s concept of “organic intellectuals.”¹⁹ While Gramsci believed that all people are intellectuals, organic intellectuals, according to Gramsci, are those leaders from nondominant groups who organize others to take transformative action to replace the dominant ideology and alter their own realities.²⁰ But the work of organic jurists like the members of the R2R Committee goes further than community legal education. They are also organic legal theorists, in that they generate knowledge and liberatory theory through critical reflection on their lived experience. For example, the R2R Committee did more than educate themselves about their rights; they theorized a new right—the right to redemption—that better addressed the cruelty of their specific condition of confinement and created a path to freedom. Their process was “organic” in the sense that their theorizing was derived from living material without interference from the artificial agents of academic assimilation, which can produce rather formulaic scholarship devoid of innovation and conviction.

To be clear, I am not arguing that the training and education obtained at academic institutions are inconsequential. To the contrary, PLS involves a partnership with academically trained legal scholars for two principal reasons. First, because it is part of our jobs as academics, we have the time, training, and resources to engage in deep research to develop further support for the episteme of organic jurists, by bolstering it with other empirical evidence, grounding it in legal doctrine, and connecting it with other theories and literature. The role of the legally trained academic can be as rudimentary as identifying supporting sources and putting citations into *Bluebook* format or as profound as collectively building knowledge with organic jurists, grounded in legal academics’ training in law and exposure to legal scholarship. In essence, PLS does not displace traditional doctrinal analysis but complements it and offers necessary context and perspective. Consequently, this collaboration can help both PLS partners to deepen

17. *Id.*

18. Christina John, Russell G. Pearce, Aundray Jermaine Archer, Sarah Medina Camiscoli, Aron Pines, Maryam Salmanova & Vira Tarnavska, *Subversive Legal Education: Reformist Steps Toward Abolitionist Visions*, 90 *Fordham L. Rev.* 2089, 2092 (2022).

19. *Id.*

20. Antonio Gramsci, *Intellectuals and Education*, in *The Gramsci Reader: Selected Writings, 1916–1935*, at 300, 304–05, 310 (David Forgacs ed., 2000) (explaining that all people have the capacity to be intellectuals, but what distinguishes “intellectuals” from others is their function in society as leaders, educators, and organizers of other people, with the aim of maintaining or supplanting, respectively, the dominant group’s ideology).

their understanding of the changes needed to make the law more just and equitable.

Second, academics also have the privilege, platform, access, and connections needed to amplify the knowledge produced by organic jurists to new audiences, including judges, policymakers, and other legal scholars. This contribution to PLS can take the form of identifying venues for publication, organizing symposia, soliciting funding to compensate organic theorists for their contributions, and facilitating introductions to others who can also play a role in amplifying the episteme of organic jurists. Much like community lawyers, who envision marginalized communities as vital partners in problem-solving and achieving structural change and who use their legal training to advance communal goals, legal academic partners use their expertise in law and knowledge of the scholarly enterprise to amplify the analytical work of their non-academically trained partners.²¹

As will be explored more fully in a second article, participatory law scholarship's goal is not only to expose those in power to alternative ways of understanding the law and the social issues that it is meant to address, but also to make legal scholarship, and consequently law, more theoretically accessible to those who are not lawyers.²² The law is hoarded by the powerful. The technicalities of the law make those who are not formally trained in law feel disconnected from the law and encourage apathy toward the law as a vehicle of social change. This mystification of the law inhibits organizing and leaves existing power structures intact. Legal scholarship aids and abets this disconnection from law because its identification of the problem and potential solutions can feel so detached from reality that it is rendered irrelevant to activists and practitioners. To counter this obfuscation of law, PLS aims to pull back the layers so that those for whom the law is most consequential can see themselves reflected in it and know that they are and can be a part of the making of legal meaning. PLS does this by ensuring that people who are formally educated in the law are not the only people who are able to contribute to legal scholarship and the development of legal theory. By validating alternative ways of knowing what the law is and what changes are needed for it to realize its full potential, PLS thus aims to democratize the law.²³ As Rell

21. For more background on community lawyering, see Susan L. Brooks & Rachel E. López, *Designing a Clinic Model for a Restorative Community Justice Partnership*, 46 Wash. U. J.L. & Pol'y 139, 149–51 (2015) (“While community lawyering appears to take many forms—such as litigation, transactional work, and dispute resolution—and span a range of practice areas, those who self-identify as community lawyers share a set of fundamental principles regarding what is necessary to alleviate poverty and oppression.”).

22. Terrell Carter & Rachel López, *The Demosprudential Potential of Participatory Law Scholarship* (n.d.) (unpublished manuscript) (abstract on file with the *Columbia Law Review*).

23. See José Wellington Sousa, *Relationship as Resistance: Partnership and Vivencia in Participatory Action Research*, in *Handbook on Participatory Action Research and Community Development* 396, 404 (Randy Stoecker & Adrienne Falcón eds., 2022) (“On

and I will explain further in our next article, by involving organic jurists in legal thinking, PLS has the potential to make the law more accessible to the broader public, thereby hopefully making them more inclined to participate in the making of legal meaning in scholarship and elsewhere.

INTRODUCTION

Taking inspiration from the experience of coauthoring *Redeeming Justice*, in this Piece, I outline the theory and practice of what we are calling Participatory Law Scholarship. PLS is legal scholarship written in collaboration with authors who have no formal training in the law but rather expertise in its function and dysfunction through lived experience. While scholars in other disciplines have embraced research resulting from collaborations between academics and non-academically trained community leaders, such participatory methods are rarely employed in legal scholarship. Lawyers and legal scholars often evoke stories of nonlawyers in their work but almost never share authorship with them.²⁴ For that reason, when we wrote *Redeeming Justice*, we were uncertain how it would be received, whether it would have any impact, or even if it would be published at all. Yet, perhaps due to an unusual combination of timing, readiness for novel approaches to entrenched legal problems, and the incredible ingenuity of my coauthors, *Redeeming Justice* has been not only accepted but embraced. It was published in the *Northwestern Law Review* and awarded the 2022 Law and Society Association (LSA) Article Prize for the best socio-legal article published in the past two years. *Redeeming Justice* also helped lay the groundwork for a complaint to the United Nations alleging that the United States is committing torture by condemning people to “death by incarceration” (DBI) through extreme sentences like life without parole—thereby putting into action a call for such an appeal made in the R2R Committee’s mission statement.²⁵ It also has been cited in several amicus briefs challenging LWOP sentences.²⁶ Most importantly, it contributed to the liberation of one of my coauthors when the Philadelphia District Attorney’s office named the article as one reason for

one hand, these are institutional incentives towards university–community partnerships and contribute to the creation of a knowledge democracy by validating different ways of knowing.”).

24. Binny Miller, Telling Stories About Cases and Clients: The Ethics of Narrative, 14 *Geo. J. Legal Ethics* 1, 4 (2000) (“Yet surprisingly, while clients are in the forefront of many law review articles, they are almost invisible in the decision making process about which story to tell or whether to tell a story at all.”).

25. For more information about this UN Complaint, see *Death by Incarceration Is Torture*, <https://www.deathbyincarcerationistorture.com> [<https://perma.cc/QC7Q-9GD7>] (last visited Aug. 5, 2023); see also R2R Mission, *supra* note 3.

26. See, e.g., Brief of Amicus Curiae Def. Ass’n of Phila. in Support of Appellants Marie Scott, Normita Jackson, Marsha Scaggs, and Tyreem Rivers at 20, *Scott v. Pa. Bd. of Prob. & Parole*, 284 A.3d 178 (Pa. 2022) (No. 16), <https://ccrjustice.org/sites/default/files/attach/2021/10/Amicus%20Curiae%20Brief%20Defender%20Association%20of%20Philadelphia.pdf> [<https://perma.cc/7M5W-UAWZ>].

why it supported Rell's commutation, which the Governor of Pennsylvania granted on July 14, 2022.²⁷

For some, these “material outcomes,” or at least a scholarly motivation to achieve them, render scholarship like *Redeeming Justice* suspect.²⁸ While some academics believe that scholarship like *Redeeming Justice* is urgently needed to advance social justice, others resist its classification as legal scholarship at all, claiming that it lacks the objectivity necessary to qualify.²⁹ For instance, in a recent editorial, London School of Economics law professor Tarunabh Khaitan characterizes legal scholars who engage with others outside of academia to inform the production of knowledge as compromising the “moral obligations” of a scholar.³⁰ As I will detail below, this debate inherently turns on one's theory of how knowledge is produced and whether you believe that human beings can perceive the external world through their own consciousness alone or instead believe that reality is collectively constructed.

Consequently, in part in response to these skeptics, this Piece begins to chart the epistemology—or theory of knowledge—that drives PLS. In line with the emancipatory pedagogy of Paulo Freire,³¹ which provides its theoretical foundation, PLS rejects the narrow and detached notion of expertise that often informs the law and legal scholarship. This detached notion of expertise is epitomized by Khaitan, who believes that the sanctity of knowledge production depends on legal scholars abandoning their “activist impulse” and retreating from the world to discover “truth.”³²

27. Documentation on file with the *Columbia Law Review*.

28. See Tarunabh Khaitan, On Scholactivism in Constitutional Studies: Skeptical Thoughts, 20 *Int'l J. Const. L.* 547, 548 (2022) [hereinafter Khaitan, On Scholactivism].

29. See, e.g., Ian Leslie, Activism Isn't for Everyone: Why Academics and Journalists Shouldn't Take Sides, *The Ruffian* (Aug. 20, 2022), <https://ianleslie.substack.com/p/activism-isnt-for-everyone> [<https://perma.cc/52L7-K4VF>] (explaining why not all people can engage in the work activists do); Orin Kerr (@OrinKerr), Twitter (July 13, 2022), <https://twitter.com/OrinKerr/status/1547287325209530368> [<https://perma.cc/9HX8-JR74>] (“The challenge, I think, is that scholarship requires willingness to change your mind. You need to go where the best arguments take you, including to a realization that everything you've ever thought before was wrong.”).

30. Khaitan, On Scholactivism, *supra* note 28, at 548.

31. Paulo Freire, *Pedagogy of the Oppressed* 48 (Myra Bergman Ramos trans., 2014) [hereinafter Freire, *Pedagogy of the Oppressed*] (describing the Pedagogy of the Oppressed as “a pedagogy which must be forged with, not for, the oppressed (whether individuals or peoples) in the incessant struggle to regain their humanity”).

32. See, e.g., Khaitan, On Scholactivism, *supra* note 28, at 555 (“Once the broad topic is selected, the scholar takes over. Framing the question, determining the appropriate method, literature survey, evidence gathering, argumentation, writing, workshopping, revising—these are all scholarly activities that must be undertaken with a deep commitment to intellectual virtues shaped solely by the goal of knowledge creation.”); Tarunabh Khaitan, Facing Up: Impact-Motivated Research Endangers Not Only Truth, but Also Justice, *Verfassungsblog* (Sept. 6, 2022), <https://verfassungsblog.de/facing-up-impact-motivated-research-endangers-not-only-truth-but-also-justice/> [<https://perma.cc/5ZPX-2CRR>] [hereinafter Khaitan, Facing Up] (“My project in the original piece was not to

Indeed, his prototypical methodology reflects his belief that legal scholars do their work best when they take “distance” from the subject being studied and adopt “an attitude of skepticism.”³³ In contrast, PLS adopts a Freirean understanding of knowledge production, whereby legal scholars can better understand how the law functions in the world by examining it in concert with those who have experienced its bluntest consequences. According to Freire, because our individual knowledge is inherently subjective, “truth” can only be revealed through engaging in dialogue with others so that we can see a fuller picture of the world.³⁴ Drawing on Freire’s dialectical process of learning through dialogue with others, this work presents an alternative theory of knowledge, based on the belief that we arrive at truth collectively, not singularly. PLS is thus grounded in a belief that we cannot fully understand the law’s effects in the material world through our own consciousness alone. In other words, we cannot understand the law only by looking at how it appears on the page. Rather, law is best understood in conversation and solidarity with others who see law from a different vantage point.

I thus contend that partnership with those who have no formal training in law—but who have expertise in law’s dysfunction—can help us to see the law more clearly. By foregrounding the lived experience and analysis of nonlawyers who are frequently marginalized, not just by the law, but in legal scholarship as well, PLS creates a fuller account of the law. As I set forth below, laws are often constructed and interpreted by those who are not directly affected by the problems the laws are meant to address.³⁵ For that reason, undergirding the law are nascent narratives about how the world works that at times do not reflect the realities of those most profoundly impacted by those laws.³⁶ At worst, these dominant discourses

evaluate any academic work, but to discuss an *internal* dilemma concerning scholarly ethics: ‘how should I, as a scholar with activist impulses, approach my vocation.’”)

33. Khaitan, *On Scholactivism*, supra note 28, at 551. Khaitan asserts activism often “(i) has shorter time and space horizons, (ii) demands an attitude of certainty, and (iii) celebrates and rewards those who realize material change.” *Id.* Khaitan argues these key features of activism “are in tension with the academy’s need to provide time and distance for research and reflection, inculcate an attitude of skepticism, and reward truth-seekers and knowledge-creators.” *Id.*

34. Wayne Au, *Epistemology of the Oppressed: The Dialectics of Paulo Freire*, 5 *J. for Critical Educ. Pol’y Stud.* 175, 184–85 (2007) (“[T]hrough dialogue human beings both know what they know and know what they don’t know[] and . . . can then improve . . . their ability to transform reality. . . . To learn in dialogue [involves] . . . a social act, a process which in turn helps you understand it for yourself.”).

35. In this way, PLS echoes Professor Mari J. Matsuda’s call to “look[] to the bottom” for insights into how best to design laws that serve social justice ends. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *Harv. C.R.-C.L. L. Rev.* 323, 324 (1987).

36. As Richard Delgado and Jean Stefancic observe:

In legal discourse, preconceptions and myths, for example, about black criminality or Muslim terrorism, shape mindset—the bundle of received wisdoms, stock stories, and suppositions that allocate suspicion,

reflect a white heteronormative subjectivity and reproduce structural racism.³⁷ Indeed, because of an enduring fiction that interpreting the law is an objective, impartial, and politically neutral act, racial politics and power imbalances can remain hidden in judicial opinions and legal scholarship, lurking behind the technicalities and legalese of law.³⁸ As I will explain further in this Piece, this is particularly true in the realm of criminal law.³⁹

PLS seeks to disrupt law's flawed construction by elevating critical lived experience that contradicts the dominant narratives that lay beneath laws.⁴⁰ In lifting up these critical stories, PLS seeks to pull out common threads shared by those who bear the consequences of law in order to expose where the law might be missing its mark and in need of upending. Often these common experiences fuel movements, which act as vehicles to alter how society understands the functionality and inevitabilities of law.⁴¹ Accordingly, attention to episteme produced by movements is often a core component of PLS methodology. One of the primary goals of PLS is to expose counternarratives to the law, thereby creating spaces for social and legal change. By design, PLS also reminds us of the humanity behind the law, acting as a moral check and balance to the law. Building from the tradition of Critical Race Studies and an emerging body of Movement Law

place the burden of proof on one party or the other, and tell us in cases of divided evidence what probably happened. These cultural influences are probably at least as determinative of outcomes as are the formal laws, since they supply the background against which the latter are interpreted and applied.

Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* 50 (3d ed. 2017).

37. Kimberlé Williams Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 *Nat'l Black L.J.* 1, 3 (1988) [hereinafter Crenshaw, *Race-Conscious Pedagogy*] (describing how “what is understood as objective or neutral is often the embodiment of a white middle-class world view”).

38. See E. Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 *UCLA L. Rev.* 1462, 1476–84 (2021) (discussing how the “colorblindness” of legal opinions obfuscates the racial dimensions of U.S. and international law).

39. See Alice Ristroph, *The Curriculum of the Carceral State*, 120 *Colum. L. Rev.* 1631, 1635–36 (2020) (arguing that the supposed neutrality of criminal law contributes to mass incarceration); see also *infra* section IV.A.

40. Cf. Delgado, *supra* note 8, at 2413–15 (noting that “Derrick Bell, Bruno Bettelheim, and others show[] [that] stories can shatter complacency and challenge the status quo” by providing counternarratives and disrupting mindsets).

41. See, e.g., Daniel Farbman, *Resistance Lawyering*, 107 *Calif. L. Rev.* 1877, 1881–82 (2019) (describing how abolitionist lawyers used the court cases of alleged fugitive enslaved people that arose under the Fugitive Slave Law of 1850 as an opportunity to wage “a vigorous rhetorical proxy battle against slavery”); Guinier & Torres, *supra* note 14, at 2756–59 (describing how social movements start as local sources of power that challenge the dominant understanding of law by providing alternative narratives); Matsuda, *supra* note 35, at 362–73 (documenting how Native Hawaiian and Japanese American claims for redress helped to shape emerging norms and a legal theory of reparations generated from the bottom).

scholarship, PLS thus aims to press the boundaries of what legal scholarship traditionally looks like by evoking lived experience as evidence and developing legal meaning alongside social movements.⁴²

This Piece, the first of several in a series that will grapple with the participatory epistemology and methods needed to democratize the law, is written from my perspective as a legal academic partner in PLS. Part I situates PLS as part of a broader cross-disciplinary Participatory Action Research (PAR) movement to reposition subjects of research as partners in research. In doing so, it explores how participatory methods could inform legal scholarship but also identifies where PLS diverges from other forms of PAR. Specifically, unlike some forms of PAR, PLS's central purpose is *not* to work with those affected by the subject of the research to collect information in their community using traditional research methods like focus groups or interviews. Instead, through a collaborative process, the goal of PLS is to generate legal theory grounded by the analysis of those with lived experience in law's injustice, along with technical and research support from legal scholars. In line with Freire's emancipatory pedagogy, which centers the marginalized as those most equipped to liberate themselves from oppression,⁴³ PLS posits that true liberation cannot occur unless any reimagination of the law or legal systems involves analyzing the law along with those marginalized by it through praxis—a process of action and reflection.

Part II sets out the theoretical underpinnings of PLS. First, grounded in Freire's relational understanding of knowledge production, this Part articulates an alternative theory of knowledge, based on the belief that we arrive at truth collectively, not singularly. Drawing from this collaborative theory of knowledge, I contend that partnering in legal scholarship with

42. Amna A. Akbar, Sameer M. Ashar, and Jocelyn Simonson explain that:

In this Article, we identi[f]y a methodology for working alongside social movements within scholarly work. We argue that legal scholars should take seriously the epistemological universe of today's left social movements, their imaginations, experiments, tactics, and strategies for legal and social change. We call this methodology *movement law*.

Movement law is not the study *of* social movements; rather, it is investigation and analysis *with* social movements. Social movements are the partners of movement law scholars rather than their subject.

Akbar et al., *supra* note 13, at 825. Similarly, Critical Race Theory (CRT) often employs “legal storytelling” to offer “counter-accounts of social reality by subversive and subaltern elements of the reigning order.” Kimberlé Crenshaw, Introduction, *in* Critical Race Theory: The Key Writings that Formed the Movement, at xiii, xiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 3d ed. 1995) [hereinafter CRT Key Writings]; see also Delgado & Stefancic, *supra* note 36, at 77–78 (arguing that the racial narratives behind civil rights-era workplace discrimination statutes limit their applicability); Delgado, *supra* note 8, at 2437–38 (arguing that outgroups tell stories and “[b]y becoming acquainted with the facts of their own historic oppression—with the violence, murder, deceit, co-optation, and connivance that have caused their desperate estate—members of outgroups gain healing”).

43. See Freire, *Pedagogy of the Oppressed*, *supra* note 31, at 44–45.

organic jurists who have expertise in law's injustice can help us see the "truth" of the law more clearly. Second, drawing from Robert Cover's pluralistic conception of the making of legal meaning,⁴⁴ this Part continues by setting out the legal theory for PLS. Like Cover, PLS takes as its starting point the conviction that the law has multiple meanings and that its interpretation necessarily depends on the worldview of its translator.⁴⁵ This Part contends that PLS enhances the formation and contestation of law by lifting up critical stories that counter the dominant discourses, which inform the law and its interpretation, sometimes expressly, other times covertly. By exposing and challenging these narratives, Part II describes how PLS can act as a check on arbitrary state power and violence. It further envisions legal scholarship, if participatory methods are employed, as one site where new legal worlds can be imagined.

Part III then turns to PLS's *praxis*—which Freire defines as "reflection and action upon the world in order to transform it"⁴⁶—describing PLS's underlying ethos and methodology. Specifically, it describes how participatory methods are inherently relational in nature, explaining why forging PLS in trusting and solidaristic partnerships is the key to ensuring that it is nonexploitative. Part III also explores some of the features of the legal academy that might inhibit PLS from realizing its full potential and methods for overcoming them. To that end, it outlines the need for critical self-reflection by academic partners in PLS on how their positionality in academic institutions might limit their understanding of expertise and imaginative thinking and inform behaviors that propagate hierarchy.

Finally, Part IV responds to critics who believe that scholars should commit themselves to pursuing "objectivity" in legal scholarship and thus denounce "scholactivism."⁴⁷ In essence, these scholars argue that pursuing real-world objectives through legal scholarship and doing so in collaboration with nonacademics, as I did in *Redeeming Justice*, compromises a scholar's "special moral obligations" to "truth-seeking and knowledge dissemination."⁴⁸ This Part addresses those criticisms head on, exposing the risks of adopting a moral commitment to neutrality and objectivity in scholarship.

Ultimately, however, this Piece is directed at others like me who "yearn to build research collaboratively and respectfully with communities

44. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 13 n.36 (1983) (describing how the process of making legal meaning is always dependent on cultural norms and thus inherently pluralistic since cultural norms differ across groups).

45. *Id.* at 11 (arguing that "the creation of legal meaning—*jurisgenesis*—takes place always through an essentially cultural medium").

46. Freire, *Pedagogy of the Oppressed*, *supra* note 31, at 51.

47. See, e.g., Khaitan, *On Scholactivism*, *supra* note 28, at 548–49 (arguing that "scholactivism is inherently contrary to the 'role morality' of a scholar").

48. *Id.* at 548.

outside the academy.”⁴⁹ It has been developed in conversation with my coauthors of *Redeeming Justice*, Rell and Ghani, yet it is not meant to supplant their voices or speak for them. Rather, it is undertaken as a vehicle to reflect on and be transparent about the commitments and epistemology that led me to be part of this enterprise.⁵⁰ Principally, in this work, I explain why I believe that PLS is not just a legitimate form of scholarship but one that is urgently needed to address the fissures and fault lines that law, particularly criminal law, has created.

I. SITUATING PARTICIPATORY LAW SCHOLARSHIP

Participatory Law Scholarship is not the first of its kind. PLS is part of a broader movement in the academy to integrate participatory methods into research across different disciplines. The aim of this Part is to situate PLS within the broader cross-disciplinary Participatory Action Research movement to reposition subjects of research as partners in research. Section I.A describes the PAR movement and its efforts to break down the researcher–researched dichotomy. Section I.B then locates PLS as being most similar to a strand of PAR called Critical Participatory Action Research (CPAR), which centers questions of power and seeks to democratize knowledge production by involving all people, not just researchers, in the development of theory. Section I.C contrasts PLS with former attempts to bring participatory methods into the legal academy. Legal PAR so far has mirrored the PAR methodologies developed in the social sciences, in which certain community participants are identified and trained to perform research in their communities but often play a more limited role in generating theory to combat oppression and do not routinely coauthor the publications resulting from their research.⁵¹ By contrast, PLS necessitates that organic jurists and scholars have solidaristic relationships that pre-date and outlast the discrete research project at hand such that they may create legal meaning together from a place of trust and common understanding.

49. Michelle Fine & María Elena Torre, *Essentials of Critical Participatory Action Research* 5 (2021) (“It is to graduate students and faculty that we share these considerations, commitments, and questions as a way to help you deepen inclusion and participation on your research teams and with those who participate in your studies . . .”).

50. It is an attempt to gain clarity on my own purpose akin to what Freire describes as meditation. See Freire, *Pedagogy of the Oppressed*, supra note 31, at 88 n.3 (describing “profound meditation [as] men . . . withdrawing from [the world] in order to consider it in its totality . . . [which] is only authentic when the meditator is ‘bathed’ in reality; not when the retreat signifies contempt for the world and flight from it, in a type of ‘historical schizophrenia’”).

51. See Sousa, supra note 23, at 402–04 (describing how, as PAR gained legitimacy, it became “less defined as a community-led or popular process of knowledge production to transform structures of oppression”).

A. *Situating PLS Within the Participatory Action Research Framework*

Participatory Law Scholarship draws from the inspiration and insights of a broader cross-disciplinary Participatory Action Research movement, sometimes also called Community-Based Participatory Research (CBPR), to reposition subjects of research as partners in research.⁵² This section aims to map the contours of the Participatory Research movement in order to locate PLS in its midst. While PAR takes many forms, the overarching goal of this movement, which has yet to take root in legal scholarship, is to break down the researcher–researched dichotomy.⁵³ Participatory Action Researchers share a fundamental belief that research should be driven by “disenfranchised people so that they can transform their lives for themselves.”⁵⁴

The philosophical underpinnings of PAR are drawn primarily from the teachings of two prominent theorists from the Global South: Freire, who is Brazilian, and Colombian sociologist Orlando Fals Borda.⁵⁵ Deriving from the emancipatory pedagogy of philosopher of education Freire, PAR is framed as a counterhegemonic approach for dismantling social, economic, and political structures that reproduce poverty and oppress the marginalized.⁵⁶ PAR reflects the teachings of Freire that true liberation is only possible when people have the power to make decisions for themselves and to develop their own praxis.⁵⁷ According to Freire, praxis is “the action and reflection of men and women upon their world in order to transform it.”⁵⁸ Freire envisions a dialectic process in which human beings engage in critical reflection about the material world in

52. See *id.* at 404; see also Rachel Pain, Geoff Whitman & David Milledge, *Participatory Action Research Toolkit: An Introduction to Using PAR as an Approach to Learning, Research and Action* 2, <https://www.dur.ac.uk/resources/beacon/PARtoolkit.pdf> [<https://perma.cc/NV94-2GYV>] (last visited Aug. 5, 2023) (defining PAR and listing the various names used to describe it, including “Community-Based Participatory Research”); Barbara A. Israel, Amy J. Schulz, Edith A. Parker & Adam B. Becker, *Review of Community-Based Research: Assessing Partnership Approaches to Improve Public Health*, 19 *Ann. Rev. Pub. Health* 173, 177–80 (1998) (examining how community-based and related forms of research could inform the public health field); Flora Cornish, Nancy Breton, Ulises Moreno-Tabarez, Jenna Delgado, Mohi Rua, Ama de-Graft Aikins & Darrin Hodgetts, *Participatory Action Research*, 3 *Nat. Rev. Methods Primers*, no. 34, 2023, at 1, 3–7, <https://www.nature.com/articles/s43586-023-00214-1> [<https://perma.cc/43A9-7BYZ>] (setting out the key steps in designing a PAR project).

53. Sousa, *supra* note 23, at 399–401.

54. See *id.* at 403 (internal quotation marks omitted) (quoting Peter Park, *What Is Participatory Research? A Theoretical and Methodological Perspective*, in *Voices of Change: Participatory Research in the United States and Canada* 1, 1 (Peter Park, Mary Brydon-Miller, Budd Hall & Ted Jackson eds., 1993)).

55. See *id.* at 403–08.

56. Pablo Alejandro Leal, *Participation: The Ascendancy of a Buzzword in the Neo-Liberal Era*, 17 *Dev. Prac.* 539, 540 (2007); Sousa, *supra* note 23, at 403–08.

57. Sousa, *supra* note 23, at 403 (stating that praxis is a process of becoming fully human and by becoming critically conscious of the way one exists in the world).

58. Freire, *Pedagogy of the Oppressed*, *supra* note 31, at 79.

conversation with each other to develop a critical consciousness and then, based on this critical consciousness, take transformative action to change the world for the better.⁵⁹ Likewise, Fals Borda believed that academic texts portrayed a skewed version of reality, so knowledge generated by the working class has an important role to play in disrupting the hegemonic discourses of history and society.⁶⁰ Guided by these principles, “PAR becomes a tool for ‘the systematic creation of knowledge that is done with and for community for the purpose of addressing a community-identified need.’”⁶¹

Embedded in such participatory approaches is also a critique. Viewed through the lens of PAR, conventional research seems disconnected, time-limited, and unaccountable to its subjects. While some conventional researchers may engage with the communities most affected by their subject of choice, their engagement can ultimately become extractive. “Extractive research” mines communities for information and stories that can be presented as “evidence” to other academics, jurists, and policymakers.⁶² While the use of stories in legal scholarship can be powerful, it can also feel rather instrumental, used to support the academic’s perception of what is needed, rather than the storyholders’.⁶³ A scholar may stretch a story in one direction or dilute it in another to make their argument stronger.⁶⁴ In part, this is also a question of who reaps the most benefits from the story. Academics often benefit more than the individuals and communities who share their stories because these stories become material for publications, which in turn can help advance careers.⁶⁵ On the other hand, researched individuals and communities are unlikely to ever see any benefits from this research, much less see the

59. Au, *supra* note 34, at 182.

60. Sousa, *supra* note 23, at 401.

61. *Id.* at 404 (quoting Kerry Strand, Sam Marullo, Nick Cutforth, Randy Stoecker & Patrick Donohue, *Community-Based Research and Higher Education: Principles and Practices* 8 (2003)).

62. Sousa, *supra* note 23, at 400; see also Christine Zuni Cruz, [On the] Road Back In: Community Lawyering in Indigenous Communities, 5 *Clinical L. Rev.* 557, 561–63 (1999) (discussing the appropriation of Native voices by academics in scholarship).

63. See Lori D. Johnson & Melissa Love Koenig, Walk the Line: Aristotle and the Ethics of Narrative, 20 *Nev. L.J.* 1037, 1043 (2020) (“Specifically, scholars active in the current Applied Legal Storytelling movement have ‘encourage[d] scholars to use storytelling to enhance their understanding of what skills lawyers practice and how to improve those skills.’” (alteration in original) (quoting Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, From Clinic to the Classroom*, 7 *J. Ass’n Legal Writing Dirs.* 37, 38 (2010))); Miller, *supra* note 24, at 18–21 (exploring the ethical dilemmas raised by storytelling in legal scholarship).

64. See Miller, *supra* note 24, at 5 (“Authors typically change the names of their clients or the content of the stories as they were initially told, but only a handful seem to have explicitly discussed the written product with their clients or given their clients an opportunity to change the content.”).

65. See Sousa, *supra* note 23, at 398–400 (providing anecdotal evidence that community members do not always benefit from academic research).

researcher again.⁶⁶ Participatory frameworks question the hierarchy and power imbalances that characterize most Western knowledge production and recognize the legitimacy and value of experiential knowledge.⁶⁷

Despite these emancipatory aspirations, participatory research is still sometimes critiqued as being driven by the researcher.⁶⁸ This is also reflected in the processes described in many guides for how to conduct PAR as well as the methodologies described in PAR studies.⁶⁹ In some instances, the purpose or subject of study is still identified by the researcher, who then assembles a group of impacted people, provides them with reading, and trains them on research methodologies.⁷⁰ In other studies, the community partners act as consultants to the researcher as the researcher develops their research topic, design, and outcomes.⁷¹ One guide describes the role of community partners as keeping “residents engaged” and keeping “the project aligned with community needs and action.”⁷²

B. *PLS’s Alignment With Critical Participatory Action Research*

By contrast, PLS is most aligned with the strand of PAR known as Critical Participatory Action Research, or CPAR, in that it marks a break from “conventional approaches in which academics research and write ‘about’ or ‘on’ communities as objects of study.”⁷³ The premise of CPAR is

66. See *id.* at 400.

67. See, e.g., Marie-Claude Tremblay, Debbie H. Martin, Alex M. McComber, Amelia McGregor & Ann C. Macaulay, Understanding Community-Based Participatory Research Through a Social Movement Framework: A Case Study of the Kahnawake Schools Diabetes Prevention Project, 18 *BMC Pub. Health*, no. 487, 2018, at 1, 2, <https://bmcpublichealth.biomedcentral.com/counter/pdf/10.1186/s12889-018-5412-y.pdf> [<https://perma.cc/C962-2R5J>] (explaining this as the core of Community-Based Participatory Research).

68. See Sousa, *supra* note 23, at 402 (explaining how as PAR gained momentum, it became “less defined as a community-led or popular process of knowledge production to transform structures of oppression”).

69. See, e.g., Andrew Seeder, Reann Gibson, Andrew Binet, Yael Nidam, Rebecca Houston-Read, Shayanna Hinkle-Moore, Vedette Gavin & Mariana Arcaya, A Participatory Action Research Field Guide From the Healthy Neighborhoods Study 12–13 (2020), <https://www.clf.org/wp-content/uploads/2021/01/PAR-Field-Guide.pdf> [<https://perma.cc/Q5K4-BLF4>] (describing the process of identifying a community partner and training them on ethics and research methods).

70. See Simon Newitt & Nigel Patrick Thomas, Participating in Social Exclusion: A Reflexive Account of Collaborative Research and Researcher Identities in the Field, 20 *Action Rsch.* 105, 113–15 (2020).

71. Alma M. Ouanesisouk Trinidad, Community-Based Participatory Research, *Encyc. of Soc. Work* (2021), <https://doi.org/10.1093/acrefore/9780199975839.013.69> [<https://perma.cc/8H8C-3QH7>] (“These partnerships focus on issues and concerns identified by community members and create processes that enable all parties to participate and share influence in the research and associated change efforts.”).

72. Seeder et al., *supra* note 69, at 13.

73. Fine & Torre, *supra* note 49, at 3.

that all people, not just academics, should be empowered to “ask critical questions about the systems and practices that shape their lives, and to imagine—through research—how they might be otherwise.”⁷⁴ In this spirit, the “objects of study,” in collaboration with traditionally trained researchers, generate research questions, inform research design, analyze evidence, and develop theory.⁷⁵

Grounded by a strong commitment to “knowledge justice,”⁷⁶ the method of CPAR can look quite different from other PAR projects. Research is developed through a process of participatory inquiry guided by those who are most impacted by the issue which is the subject of study.⁷⁷ CPAR is “critical” in the sense that, like other critical studies, it is “rooted in a range of social theories focused on questions of power, structural and intimate violence, and inequities” and “anchored by those most impacted by injustice.”⁷⁸ CPAR researchers might decry other “depoliticized” versions of PAR for abandoning PAR’s more emancipatory roots and criticize them for “inevitably serv[ing] to justify, legitimise, and perpetuate current neo-liberal hegemony.”⁷⁹ CPAR thus differs from these forms of PAR because it intentionally centers “questions of power and injustice, intersectionality and action.”⁸⁰ In addition, CPAR’s fundamental goal is “democratic knowledge production.”⁸¹ It represents a “modest move to democratize and decolonize research as praxis with communities under siege, one dedicated to research that bends toward action.”⁸²

Like CPAR, PLS is democratizing in two key respects. It both gives voice to people whose viewpoints are crucial in understanding law and society (i.e., those people who bear the bluntest consequences of law’s injustice) and expands the reach of scholarly inquiry to engage with the broader public, rather than just a small group of legal scholars. It thus forces traditional researchers educated in the academy to question the function, method, and audience of most scholarship, in ways that might feel threatening to academics who have built their careers on conventional understandings of expertise.⁸³ For academically trained researchers, it also

74. *Id.*

75. *Id.* at 3–4.

76. *Id.* at 5.

77. *Id.*

78. *Id.* at 6.

79. Leal, *supra* note 56, at 544.

80. Fine & Torre, *supra* note 49, at 6.

81. *Id.* at 8.

82. *Id.* at 4.

83. Cf. Koen P.R. Bartels & Victor J. Friedman, *Shining Light on the Dark Side of Action Research: Power, Relationality and Transformation*, 20 *Action Rsch. J.* 99, 100 (2022) (“The dark side of action research . . . [is that it] may signal ‘identity costs’ for action researchers, that is, becoming aware of the limitations of their presumed identity and having to work through conflicts among deeply-held beliefs” (citation omitted) (quoting Hendrik Wagenaar, *Philosophical Hermeneutics and Policy Analysis: Theory and Effectuations*, 4 *Critical Pol’y Analysis* 311, 323 (2007))). These beliefs stem from the desire

widens the scope of our understanding of social issues, broadens the evidence we consider, and expands the ways that we express our findings to the world.⁸⁴ For this last reason, it may also differ in its outputs. While the results might be published in traditional venues, such as academic journals, they might also be adapted to other forums, like street theater, spoken word, documentary films, popular magazines or books, science fiction, comics, digital shorts, music, and classroom curriculum.⁸⁵

C. *Participatory Methods in Legal Scholarship*

While there are examples of legal scholars employing participatory methods to varying degrees in their scholarship,⁸⁶ Professors Emily M.S. Houh and Kristin Kalsem are the only U.S. academics that I am aware of to make a robust case for bringing PAR practices into legal scholarship.⁸⁷ They did so under an approach they called Legal Participatory Action Research, or Legal PAR, framing it as a way for legal scholars and activists

to promote “the value and impact of their work, preserv[e] their professional integrity, and advanc[e] their careers.” *Id.*

84. Fine & Torre, *supra* note 49, at 6.

85. *Id.* at 7.

86. See, e.g., Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 *Colum. J. Race & L.* 557, 558–59 (2022) (building from Ashley Albert’s experience of voluntarily surrendering her parental rights to argue that adoption should be separate from the family regulation system); Lauren Johnson, Cinnamon Pelly, Ebony L. Ruhland, Simone Bess, Jacinda K. Dariotis & Janet Moore, *Reclaiming Safety: Participatory Research, Community Perspectives, and Possibilities for Transformation*, 18 *Stan. J. C.R. & C.L.* 191, 193 (2022) (offering a community-based participatory research study about safety following protests over racialized police violence); Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 *Alb. L. Rev.* 1281, 1281 (2015) (introducing participatory defense as a model for reforming public defense and challenging mass incarceration); Jeremy Perelman & Katharine Young with the participation of Mahama Ayariga, *Freeing Mohammed Zakari: Rights as Footprints*, in *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* 123–35 (Lucie E. White & Jeremy Perelman eds., 2011) (invoking the story of Mohammed Zakari to illustrate how the process of rights-claiming evolves over time); Charles D. Weisselberg & Linda Evans, *Saving the People Congress Forgot: It Is Time to Abolish the U.S. Parole Commission and Consider All “Old Law” Federal Prisoners for Release*, 35 *Fed. Sent’g Rep.* 106 (2022) (consisting of scholarship coauthored with Linda Evans, who served sixteen years in federal prison).

87. See Emily M.S. Houh & Kristin Kalsem, *It’s Critical: Legal Participatory Action Research*, 19 *Mich. J. Race & L.* 287, 296 (2014) (advocating “that PAR has much to offer legal scholars and scholarship”). Monica Bell has also noted the need to incorporate participatory methods into legal scholarship. See Monica C. Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 *Du Bois Rev.* 197, 211 (2019) (“This framework supports, for example, Participatory Action Research, which sees members of marginalized communities as creators of valuable knowledge, not just passive subordinates and consumers of the criminal justice apparatus.”); see also Susan R. Jones & Shirley J. Jones, *Innovative Approaches to Public Service Through Institutionalized Action Research: Reflections From Law and Social Work*, 33 *U. Ark. Little Rock L. Rev.* 377, 384–86 (2011) (arguing that action research methodologies should be incorporated into service learning within law schools).

to “explicitly incorporate[] Participatory Action Research into [Critical Race Theory], [Critical Race Feminism], feminist legal scholarship, or the growing legal literature on fringe economies and economic justice.”⁸⁸ In many respects, the underlying premises of Legal PAR and PLS are the same. Drawing from Professor Mari J. Matsuda’s seminal article urging scholars to “look to the bottom” for legal insight,⁸⁹ Legal PAR requires not only “‘looking to the bottom’ in a theoretical sense, but also . . . treating those ‘at the bottom’ as equal research partners who are presumptively best situated to identify, analyze, and solve the problems that directly affect them.”⁹⁰ PLS adopts this approach as well.

PLS differs from Legal PAR, however, in four main respects. First and foremost, the modality and goals of these approaches are different. The driving motivation behind PLS is the making of legal meaning and legal theory alongside organic jurists. In the exemplary projects Houh and Kalsem describe, the methods employed resemble PAR in the social sciences in that the community participants were identified and then trained to collect data on important social issues with legal implications. These issues focused on payday lending; the data was collected through interviews, questionnaires, and focus groups, and that data was used by the group to support broader advocacy efforts.⁹¹ By contrast, PLS’s primary focus is not to collect information on lived experience through focus groups or interviews but rather to generate legal theory that is grounded in the critical reflection and analysis by organic jurists on their own lived experience. There are no “subjects” of research in PLS. Instead, PLS requires coauthorship with organic jurists to ensure shared decisionmaking in developing the descriptive account of their own realities, the normative assessment of how things should be, and the prescriptive analysis of what is needed for social change.⁹² As Freire emphasized, “Every prescription represents the imposition of one individual’s choice upon another, transforming the consciousness of the person prescribed to into one that conforms with the prescriber’s consciousness.”⁹³ PLS thus necessitates coauthorship with organic jurists, so that they can control the use of their own stories and generate the prescriptions that flow from them. Coauthorship is one way that PLS

88. Houh & Kalsem, *supra* note 87, at 294–96.

89. See Matsuda, *supra* note 35, at 324–25 (describing “looking to the bottom” as scholars “adopting the perspective . . . of groups who have suffered through history” to better conceptualize law and justice).

90. Houh & Kalsem, *supra* note 87, at 294.

91. See *id.* at 294, 321–22, 329 (describing the authors’ project done in partnership with Public Allies Cincinnati, an AmeriCorps program whose goal is “to identify, develop, and train a new ‘generation’ of diverse community leaders and organizers”).

92. Cf. Leal, *supra* note 56, at 545 (“[S]haring through participation does not necessarily mean sharing in power.” (internal quotation marks omitted) (quoting Sarah C. White, *Depoliticising Development: The Uses and Abuses of Participation*, 6 *Dev. Prac.* 6, 6 (1996))).

93. Freire, *Pedagogy of the Oppressed*, *supra* note 31, at 47.

redistributes power between academic and nonacademic partners. Further, while PLS is inherently collaborative, the default position of legal scholars should be to play a supportive role as organic jurists engage in critical reflection and theorize solutions.⁹⁴

Second, and relatedly, the explicit goal of PLS is to engage in knowledge production with organic jurists to transform structures of oppression. For that reason, PLS involves more than just collecting information and formulating reforms, which is the typical method of mainstream PAR. Indeed, since PLS aims to expose and counter the dominant discourses that undergird the law, it necessitates prefigurative legal analysis. In this way, it resonates with what Professors Amy J. Cohen and Bronwen Morgan call “prefigurative legality,” which involves “efforts to use the language, form, and legitimacy of law to imagine law otherwise.”⁹⁵ Namely, PLS is grounded in the belief that participation as a methodology is more likely to serve emancipatory goals when it is in the service of broader struggles by marginalized groups to transform legal frameworks.⁹⁶ Thus, PLS posits that true liberation cannot occur unless any reimagining of the law or legal systems involves those marginalized by the law.⁹⁷ Drawing from Freire, Professor Pablo Alejandro Leal argues that “[if] there is no collective analysis of the causes of oppression or marginalisation and what actions can be taken to confront and affect those causes, then any efforts are unlikely to be empowering.”⁹⁸ PLS is more than the inclusion of someone else’s story to illustrate a point or make an argument. At its best, PLS should be understood in the tradition of Muhammad Rahman, a PAR theorist and practitioner from Bangladesh, who describes participatory research as a “people’s own

94. See Sousa, *supra* note 23, at 402–03 (noting that scholars play a supportive role, and the “real” researchers” are the organic intellectuals).

95. Amy J. Cohen & Bronwen Morgan, *Prefigurative Legality*, 48 *Law & Soc. Inquiry* (forthcoming 2023) (manuscript at 1), <https://ssrn.com/abstract=4268294> [<https://perma.cc/26QR-LXFS>].

96. See Leal, *supra* note 56, at 544 (citing Sam Hickey & Giles Mohan, *Relocating Participation Within a Radical Politics of Development: Insights From Political Action and Practice*, in *Participation: From Tyranny to Transformation* 159, 159 (Samuel Hickey & Giles Mohan eds., 2004)).

97. See Freire, *Pedagogy of the Oppressed*, *supra* note 31, at 66–67 (discussing how legitimate liberation requires the involvement of marginalized populations). He argued for collective liberation via praxis:

But while to say the true word—which is work, which is praxis—is to transform the world, saying that word is not the privilege of some few persons, but the right of everyone. Consequently, no one can say a true word alone—nor can she say it *for* another, in a prescriptive act which robs others of their words.

Id. at 88.

98. Leal, *supra* note 56, at 545 (citing Freire, *Pedagogy of the Oppressed*, *supra* note 31, at 46).

independent inquiry” primarily belonging to them.⁹⁹ PLS thus advances self-determination.

Third, PLS thus often involves amplifying the analytical interventions of existing movements. Like CPAR, PLS is often “in, by, and for movements for justice.”¹⁰⁰ With this focus on movements, PLS can be seen as part of an emerging body of scholarship, which Akbar, Ashar, and Simonson call “Movement Law.”¹⁰¹ Movement Law is an approach to legal scholarship grounded in solidarity, accountability, and engagement with grassroots organizing and left social movements, and it is a methodology that can be employed by scholars across substantive areas.¹⁰² Akbar, Ashar, and Simonson contrast this approach with scholarship that focuses on law and social movements—a field of study that unpacks the relationship between lawyers, legal process, and social change.¹⁰³ As the authors elucidate, “Movement law is not the study *of* social movements; rather it is investigation and analysis *with* social movements.”¹⁰⁴

The fourth way that PLS is distinguishable from Legal PAR is its central epistemological focus on disrupting the narratives that undergird the law through the lived experience of organic jurists. This approach is informed by the tradition of Critical Race Theory (CRT), which at times employs storytelling to reveal alternative accounts of our social and legal realities.¹⁰⁵ As Richard Delgado has extolled, “Stories attack and subvert the very ‘institutional logic’ of the system.”¹⁰⁶ Like CRT, PLS’s aim is to render visible the voices, experiences, and logics that have otherwise disappeared in legal scholarship.¹⁰⁷ As the next Part will describe in further detail, the centrality of narrative sets it apart from other forms of PAR, is particular to the discipline of law, and informs the theory behind PLS.

99. Sousa, *supra* note 23, at 404 (internal quotation marks omitted) (quoting Muhammad Anisur Rahman, *The Theoretical Standpoint of PAR, in Action and Knowledge: Breaking the Monopoly With Participatory Action-Research* 13, 17 (Orlando Fals-Borda & Muhammad Anisur Rahman eds., 1991)).

100. Fine & Torre, *supra* note 49, at 6 (“There are many variations of participatory action research (PAR) An important distinction is that CPAR focuses intentionally on questions of power and injustice, intersectionality and action.”).

101. See generally Akbar et al., *supra* note 13, at 825–26 (outlining an emerging genre of legal scholarship they call “movement law”).

102. *Id.* at 826.

103. See *id.* at 825–26.

104. *Id.* at 825.

105. See Delgado & Stefancic, *supra* note 36, at 45.

106. Delgado, *supra* note 8, at 2429.

107. See *id.* at 2414–15 (describing the power of counterstories to challenge received wisdom and expose alternative realities).

II. THE THEORY OF PLS

In this Part, I turn to the theoretical foundations of PLS. Section II.A describes the theory of knowledge that drives PLS, describing it as fundamentally relational. Namely, PLS is grounded in the belief that human beings arrive at truth collectively, not individually. Therefore, partnering with those who have no formal training in the law but expertise in law's injustice can help us to see the "truth" of the law more fully. Following from that analysis, section II.B grounds PLS in Cover's legal theory of *nomos* and narrative. Cover argued that *nomos* and narrative inform our worldview and in turn shape how we create and interpret the law.¹⁰⁸ Building from Cover, this Part argues that PLS provides a mechanism for analyzing existing law more thoroughly, because it includes the *nomos* and narrative of those who have developed expertise in the law through experiencing its bluntest consequences.

A. *PLS's Theory of Knowledge*

PLS is fundamentally a relational epistemology, much like Freire's well-known relational *Pedagogy of the Oppressed*, which is focused on the collective construction of "truth."¹⁰⁹ PLS's guiding philosophy is that knowledge and truth are collectively constructed through dialogue. Relationships are intrinsic to the PLS approach because PLS is grounded in the belief that knowledge is attained collectively and in dialogue with others.¹¹⁰ PLS starts from the premise that human knowledge is by its nature, imperfect.¹¹¹ But through dialogue with other human beings, we become more aware of what we know and what we have failed to perceive, thereby improving our own understanding of reality and our ability to change it.¹¹² If you understand knowledge production as "intrinsically relational," then partnership in research is not a liability but "an ontological necessity."¹¹³

Much like Freire's *Pedagogy of the Oppressed*, PLS draws its theory of knowledge from dialectical philosophy, which is far more relational than the individualist rational logic of the Enlightenment.¹¹⁴ In contrast to the rationalist tradition, which studies objects in the material world in isolation from one another, fixed in time and space, dialectics is grounded in the

108. See Cover, *supra* note 44, at 4–6.

109. See Sousa, *supra* note 23, at 410 (explaining how Freire's pedagogy is grounded in the idea of *companheirismo*).

110. Cf. *id.* at 401 (explaining that "the quality of the relationships, particularly partnerships, in this 'coming together' is a fundamental aspect for successful knowledge creation, action, and consequently to move towards desired outcomes").

111. Cf. Au, *supra* note 34, at 184 (noting that for Freire, human beings recognize the imperfection of their collective consciousness through dialogue).

112. See *id.*

113. Sousa, *supra* note 23, at 407.

114. See Au, *supra* note 34, at 177.

belief that human beings can only perceive things in relation to each other, so our reality “cannot be analyzed as independently existing pieces.”¹¹⁵ Additionally, dialectical philosophy is grounded in the belief that human beings cannot understand the material world (or discover “truth”) through our own consciousness alone; rather, a fuller picture of reality is only possible in fellowship and solidarity with others.¹¹⁶ According to Freire, “[O]nly through communication can life hold meaning.”¹¹⁷ Freire thus built his theory of knowledge on dialectical philosophy, adding a fundamentally social understanding of knowledge production and discovery of truth.¹¹⁸ In *Politics and Education*, he explains that “[c]onsciousness and the world cannot be understood separately, in a dichotomized fashion, but rather must be seen in their contradictory relations. Not even consciousness is an arbitrary producer of the world or of objectivity, nor is it a pure reflection of the world.”¹¹⁹ In short, Freire believed that humans are unable to perceive the world objectively through our own consciousness; instead, he maintained that we learn what the material world is only through sharing our subjective lens with others to reveal the bigger picture.¹²⁰

Consequently, Freire understood objectivity and subjectivity to be intertwined in the pursuit of knowledge.¹²¹ One “cannot exist without the other.”¹²² In order to truly see the world as it is objectively, we must embrace our inherent subjectivity. That is, we must understand that we see the world through the lens of our own lived experience, which will only ever be subjective. In Freire’s estimation, dialogue with others allows humans to better discern the material world, because through that dialogue we are not limited to our own subjective understandings.¹²³ Engagement with others fosters critical thinking about our own

115. Id.

116. See Freire, *Pedagogy of the Oppressed*, supra note 31, at 85–86 (arguing from a materialist and dialectical standpoint that knowledge and consciousness exist only through collective relations); Au, supra note 34, at 184–85 (explaining that dialectics as a dialogue expand human beings’ knowledge of the material world by laying bare to them “what they know” and “what they don’t know”).

117. Freire, *Pedagogy of the Oppressed*, supra note 31, at 77.

118. See Au, supra note 34, at 184–85 (noting how “dialogue about an object of study” is central to the process of gaining knowledge).

119. Paulo Freire, *Politics and Education* 19 (1998).

120. Au, supra note 34, at 178.

121. See Freire, *Pedagogy of the Oppressed*, supra note 31, at 38 (“For this individual the subjective aspect exists only in relation to the objective aspect (the concrete reality, which is the object of analysis). Subjectivity and objectivity thus join in a dialectical unity producing knowledge in solidarity with action, and vice versa.”).

122. Id. at 50 (“On the contrary, one cannot conceive of objectivity without subjectivity. Neither can exist without the other, nor can they be dichotomized.”).

123. See Au, supra note 34, at 184–85 (elaborating on Freire’s theory that the “social act” of dialogue expands human beings’ capacity for knowledge).

perception of reality and thereby facilitates deeper understanding of the material world more broadly.¹²⁴

Furthermore, Freire understood truthseeking as dynamic, because “reality is really a *process*, undergoing constant transformation.”¹²⁵ Because the world is not static, the process of seeking truth involves ongoing dialogue and critical reflection with others.¹²⁶ If you agree with Freire that “ultimately our consciousness is first and foremost a social consciousness” in that it is not formed alone,¹²⁷ it follows that one cannot discover the truth or attain knowledge in isolation. Instead, we can only discover truth or attain knowledge through our engagement with the world and others who inhabit it. Because our perception of reality is inherently informed by our imperfect subjective consciousness, relationships become central to knowledge production.

B. *The Legal Theory of PLS*

The relational process of knowledge production described above is uniquely valuable in the context of the law. As I experienced firsthand while writing *Redeeming Justice*, partnering with those who have no legal training but have expertise in law’s dysfunction can help us to see the “truth” of the law more clearly. This section goes further by explaining the legal theory behind PLS.

Specifically, drawing from Cover’s profound insights into how cultural norms and coconstitutive narratives shape law’s formation, this section explains how participatory methods can help create a fuller account of the law. Since laws are often constructed and interpreted by those who are not directly affected by the problems they are meant to address, they can be inadequate to address the most pressing problems of our time.¹²⁸ PLS charts a path to developing a more holistic and democratic account of law through collaboration with nonlawyers who intimately know the law by their experience of its injustice.

1. *Nomos and Narrative*. — The legal theory of PLS is best situated in the pluralist account of the making of legal meaning developed by Cover. Cover uniquely understood how narrative informs societies and influences their making of legal meaning, detailing the relationship between *nomos*

124. See *id.* (noting how, for Freire, dialogue helps society arrive at a deeper understanding of reality).

125. Freire, *Pedagogy of the Oppressed*, *supra* note 31, at 75.

126. Au, *supra* note 34, at 185 (“Epistemologically, then, for Freirian liberatory pedagogy, it is through dialogue about an object of study that, ‘we try to reveal it, unveil it, see its reasons for being like it is, the political and historical context of the material. This . . . is the act of knowing . . .’” (omissions in original) (quoting Ira Shor & Paulo Freire, *A Pedagogy For Liberation: Dialogues on Transforming Education* 13 (1987))).

127. Au, *supra* note 34, at 180 (noting that Freire believed that “our consciousness comes from dialectical interaction with th[e] world”).

128. In this way, PLS echoes Matsuda’s call to “look[] to the bottom” for insights into how best to design laws that serve social justice ends. Matsuda, *supra* note 35, at 324.

and narrative in his seminal article of the same name.¹²⁹ As defined by Cover, *nomos* is the normative universe in which we situate ourselves.¹³⁰ *Nomos* exists somewhere between reality and vision—that is, between the material world we inhabit and the imagined community we wish we did.¹³¹

Cover argues that *nomos* cannot be constructed without narrative.¹³² Cover describes narrative as “[t]he codes that relate our normative system to our social constructions of reality and to our visions of what the world might be.”¹³³ Narrative also connects the “is” to the “ought.”¹³⁴ As Cover posits, “The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative.”¹³⁵ Others who share our vision of right and wrong communally create the narratives that inform *nomos*.¹³⁶ We may act individually, but we do so in relation to a common script about how the world works.¹³⁷ This vision of narrative and its function echoes how Delgado, a scholar of CRT, understood the role of narrative in “construct[ing] social reality by devising and passing on stories—interpretive structures by which we impose order on experience and it on us.”¹³⁸

Put more simply, *nomos*, and the narratives that inform it, “frame” the world for us. Sociologists use the concept of “framing” to describe the “interpretive lens, which guides people to see the world differently and compels them to act according to that new understanding.”¹³⁹ Frames not only inform our worldview, they also help us communicate our

129. See Cover, *supra* note 44, at 4–5 (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.”).

130. *Id.* at 4 (“We inhabit a *nomos*—a normative universe.”).

131. *Id.* at 9 (“A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A *nomos* is a present world constituted by a system of tension between reality and vision.”).

132. *Id.* at 5. (“In this normative world, law and narrative are inseparably related.”).

133. *Id.* at 10.

134. *Id.* (“[L]iv[ing] in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires . . . integrat[ing] not only the ‘is’ and the ‘ought,’ but the ‘is,’ the ‘ought,’ and the ‘what might be.’ Narrative so integrates these domains.”).

135. *Id.*

136. See *id.* at 10–11 (describing the communal character of forming narratives that inform our behavior and *nomos*).

137. *Id.* at 10.

138. See Delgado, *supra* note 8, at 2415 (explaining how we use stories and storytelling to make sense of our own context and social reality).

139. See Katharine G. Young, Redemptive and Rejectionist Frames: Framing Economic, Social, and Cultural Rights for Advocacy and Mobilization in the United States, 4 *Ne. U. L.J.* 323, 324 (2012) (extending Cover’s analysis of *nomos* and narrative to the economic, social, and cultural rights movement in the United States).

worldview to others.¹⁴⁰ Frames can “unite actors, discredit opponents, persuade bystanders, and change minds.”¹⁴¹

2. *Nomos, Narrative, and the Law.* — *Nomos* and narrative have significant implications for how we frame the law too. They shape how laws are made, interpreted, justified, and critiqued.¹⁴² As Cover vividly illustrated, law itself is constructed based on *nomos*, informed by narratives, which in turn frames our understanding of the world.¹⁴³ Narratives, as the bridges between the “is” and the “ought,” are inseparable from prescriptions about what is needed for a society to function best, which, as Cover pointed out, are embedded in the law.¹⁴⁴ Narratives, and the moral commitments that inform them, influence not only our individual actions but also how we collectively make meaning of the law.¹⁴⁵ There is not one singular *nomos* that drives any one legal system. Rather, Cover contended that there is a “range of meaning that may be given to every norm” by different groups and that how any norm is interpreted turns on not only the plain language of legal text itself but also on the interpreter’s “multiplicity of implicit and explicit commitments.”¹⁴⁶ It is the connection between narrative and law that exposes any group’s commitments.¹⁴⁷ Narratives provide the “resources for justification, condemnation, and argument by actors within the group, who must struggle to live their law.”¹⁴⁸ Cover describes this process of making legal meaning as “jurisgenesis,” which is inherently a cultural and subjective practice.¹⁴⁹

Judges also interpret law in the image of their own *nomos* and narrative. Unlike other legal theorists, such as H.L.A. Hart, Hans Kelsen, and Ronald Dworkin, who focused on the indeterminacy of the law in a few “hard cases,”¹⁵⁰ Cover believed that the problem with judicial

140. *Id.*

141. *Id.*

142. See Cover, *supra* note 44, at 9 (explaining how a place’s legal tradition is “part and parcel of a complex normative world”).

143. See *id.* at 4–5 (“Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.”).

144. See *id.* at 5 (“In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose.”).

145. See *id.* at 9 (“A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it.”).

146. See *id.* at 46 (explaining how groups form narratives that communicate their commitments).

147. *Id.* (“The narratives that any particular group associates with the law bespeak the range of the group’s commitments.”).

148. *Id.*

149. See *id.* at 11 (describing the social process of creating legal meaning).

150. Legal theorists like Hans Kelsen, H.L.A. Hart, and Ronald Dworkin focused much of their analysis and resultant legal theories on how judges should make meaning of the law when it does not provide a clear answer to a given legal question. See, e.g., H.L.A. Hart, *The*

decisionmaking is not that the law is “unclear,” but rather that there is “too much law.”¹⁵¹ Namely, he argued that the law has multiple meanings, because different nomic communities have their own principles and precepts that inform their understanding of and interaction with the law.¹⁵² Consequently, when a judge analyzes and interprets legal doctrine, they do so within the context of their own *nomos*.¹⁵³ In doing so, judges, backed by state power, “kill” variants of law other than their own.¹⁵⁴ For that reason, Cover characterizes judges as “people of violence.”¹⁵⁵ Judges might not even realize the harm they are inflicting on the law or those subject to it because their perception of and exposure to the world is limited to their own experience or to that of those in their nomic community who experience the world in a similar way.¹⁵⁶ In making prescriptions about the law, legal scholars regularly make similar decisions, consciously or unconsciously, about whether they wish to embrace a particular nomic interpretation of law. The problem is that when a narrow group of elites—whether lawmakers, judges, or scholars—develop the law through their own *nomos* and narratives, the law can reflect a version of reality that is inapposite to the way people experience it in their daily lives.

3. *Envisioning a Democratic Future Through Participatory Methods.* — Instead of killing alternative interpretations of the law, Cover believed that democratic legal regimes should embrace the alternatives and view the plurality of *nomos* and narratives as a check on arbitrary state power and violence.¹⁵⁷ In explaining his reasoning, Cover predicted the following:

Concept of Law 124–54 (2d ed. 1994) (describing the law as “open textured” because it is unable to anticipate every legal issue that might arise); Hans Kelsen, *Pure Theory of Law* 349–50 (Max Knight trans., 2d ed. 1967) (arguing that the law cannot foresee every possible circumstance and so is inherently indefinite); Ronald Dworkin, *Hard Cases*, 88 *Harv. L. Rev.* 1057, 1058 (1975), reprinted in *Taking Rights Seriously* 81, 82 (“Statutes and common law rules are often vague and must be interpreted before they can be applied to novel cases.”).

151. See Cover, *supra* note 44, at 42 (“Modern apologists for the jurispatic function of courts usually state the problem not as one of *too much law*, but as one of *unclear law*.”).

152. See *id.* (arguing that “different interpretive communities will almost certainly exist and will generate distinctive responses to any normative problem of substantial complexity”).

153. See Benjamin Levin, *Criminal Justice Expertise*, 90 *Fordham L. Rev.* 2777, 2815 (2022) (explaining that even appointed judges “are political actors in that they are embedded in a political culture and decide cases filtered through the lens of their political commitments”).

154. See Cover, *supra* note 44, at 53 (“Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispatic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.”).

155. *Id.*

156. *Id.* at 67 (“[Judges] interpret and they make law. They do so in a niche, and they have expectations about their own behavior in the future and about the behavior of others.”).

157. See *id.* at 68.

The statist impasse in constitutional creation must soon come to an end. When the end comes, it is unlikely to arrive via the Justices It will likely come in some unruly moment—some undisciplined jurisgenerative impulse, some movement prepared to hold a vision in the face of the indifference or opposition of the state. Perhaps such a resistance—redemptive or insular—will reach not only those of us prepared to see law grow, but the courts as well. The stories the resisters tell, the lives they live, the law they make in such a movement may force the judges, too, to face the commitments entailed in their judicial office and their law.¹⁵⁸

As the public's trust in the U.S. Supreme Court erodes and movements protest the police's murder of citizens in the streets, this moment may have already come. Imaginative generation of new legal theory and thought more tethered to on-the-ground realities seems more needed now than ever. Law's natural instinct might be retrenchment, but Cover argued that instead of "circumscribing the *nomos*[,] we ought to invite new worlds."¹⁵⁹

4. *PLS as a Tool for Critical Legal Imagination.* — PLS proposes legal scholarship as one site where these new worlds of law can be imagined. As others have highlighted, the "prevailing legal narrative [in legal scholarship] is one created by lawyers for lawyers," though their writing has the power to shape the lives of others who are not part of their *nomos*.¹⁶⁰ Like other critical legal traditions, PLS shares the view that it is critically important to "contest the terrain and terms of dominant legal discourse" because they often legitimize repressive power structures.¹⁶¹ In particular, PLS and CRT share a belief in the power of stories to expose misconceptions and debunk stereotypes "by calling attention to neglected evidence and reminding readers of our common humanity."¹⁶² Likewise, PLS creates space for those directly impacted by law's injustices to have a role in shaping future laws through their own narratives and *nomos* and to delegitimize legal structures that marginalize or dehumanize them.¹⁶³ As summarized by Jocelyn Simonson, "[T]he responsibility to change the injustices of our criminal justice system lies not only with prisoner administrators and legislators[] but also with those of us with the ability to tell stories and to create the space in which others can tell theirs as well."¹⁶⁴

158. *Id.* at 67–68.

159. *Id.* at 68.

160. John et al., *supra* note 18, at 2119.

161. CRT Key Writings, *supra* note 42, at xxii.

162. See Delgado & Stefancic, *supra* note 36, at 51.

163. See *id.* at 50–51 ("Stories can give [silenced groups] a voice and reveal that other people have similar experiences. Stories can name a type of discrimination (e.g., microaggressions, unconscious discrimination, or structural racism); once named, it can be combated.").

164. Jocelyn Simonson, Foreword—Breaking the Silence: Legal Scholarship as Social Change, 41 *Harv. C.R.-C.L. L. Rev.* 289, 298 (2006).

Some skeptics might question why certain people's lived experiences should be highlighted over others. PLS does not intend to create a hierarchy of lived experience. Rather, it is built on the insight that nonlawyers experience law in distinct ways and that those who experience law's injustice should have multiple avenues, including through legal scholarship, to express those injustices and shape legal meaning in ways that minimize harm to them. It is also driven by a belief that those who experience harm from the law have unique insight into how law operates, above and beyond what is on the page, and acutely understand where law must be altered or abandoned to avoid unnecessary suffering. In other words, lived experience in law's reality can aid in the imagination of new legal realities.¹⁶⁵ As Cover would put it, "To know the law—and certainly to live the law—is to know not only the objectified dimension of validation, but also the commitments that warrant interpretations."¹⁶⁶ For these reasons, these organic jurists should play a role in the making of legal meaning through PLS.

III. THE PRACTICE OF PLS

With the theory of PLS delineated above, what then constitutes PLS's praxis? This Part is meant to address that question, sketching out the contours of what PLS looks like in practice. The practice of PLS is probably more akin to an approach or a mindset than a methodology, so those looking for a step-by-step guide to how such partnerships can be realized will be sorely disappointed. PLS is much more relational and organic than existing legal research methodologies and thus cannot be reduced to a specific formula. It depends on trust, developing solidarity between coauthors, and each author's ability to engage in critical self-reflection to examine how they might, in their minds and through their actions, be perpetuating hierarchy and inequity. Drawing from the experience of coauthoring *Redeeming Justice*, this Part focuses on the process of building camaraderie across difference between coauthors and explores what critical self-reflection might entail for academic partners in PLS. Section III.A introduces the risks partners must be aware of to ensure PLS is not exploitative. Section III.B turns to the strategies needed to ensure equitable partnerships in PLS. It contends that self-reflection is an essential element of PLS, requiring academics to explore the ways in which they have been institutionalized by the legal academy. Finally, section III.C contends that relationship is resistance to the political economy of the legal academy that might otherwise create perverse incentives for academics to capitalize on PLS for their own gain. It also illustrates the

165. Cover, *supra* note 44, at 46; see also *id.* at 10 ("To live in a legal world requires that one know not only the precepts[] but also their connections to possible and plausible states of affairs.").

166. *Id.* at 46.

importance of being proximate to struggles for social justice and developing a partnership mentality.

A. *The Inherent Risks of PLS*

With that in mind, a caveat is in order. As we turn our attention to the methods and techniques of PLS, there is a risk that PLS will become technocratic and formulaic, thereby undermining its intended emancipatory potential, which can too readily be assumed merely due to its participatory nature.¹⁶⁷ Just as with other scholarship that uses others' stories in service of legal argument, there is an acute risk that PLS could transform into the same brand of scholarly extractive industry that PLS seeks to dismantle. There is also a risk that it could become co-opted as CPAR scholars allege happened to PAR methodologies as they became mainstream.¹⁶⁸

Likewise, as PLS gains ground, researchers may be incentivized to manufacture partnerships and extract stories from their coauthors. Especially in the existing academic political economy, in which scholarship is the coin of the realm, researchers might be "inclined to perceive relationships through a utilitarian and instrumental lens and consequently as a necessary strategy" for career advancement.¹⁶⁹ Whereas academically trained researchers have built-in incentives to engage in scholarly endeavors, the same incentives might not exist for organic jurists. Academics must thus be careful not to impose participation in PLS, especially given that past research has "show[n] how action researchers may unintentionally impose participation on partners while ignoring power differences stemming from structural factors."¹⁷⁰ Some researchers have suggested that it is not uncommon for PAR academics to adopt a utilitarian approach to relationships, in which relationships are a means to an end or part of a broader strategy to achieve material goals.¹⁷¹ While some degree of mutual instrumentalization by all authors in PAR is common and usually benign as long as both parties experience mutual benefits from the relationship, there is a perpetual, lingering risk that the

167. See Leal, *supra* note 56, at 544 (explaining how participation can be undermined through technification and formalization).

168. See Sousa, *supra* note 23, at 404–05 (explaining how the emancipatory potential of PAR was undercut as it gained legitimacy).

169. *Id.* at 396.

170. Bartels & Friedman, *supra* note 83, at 101 (citing Daniella Arieli, Victor J. Friedman & Kamil Agbaria, *The Paradox of Participation in Action Research*, 7 *Action Rsch.* 263 (2009)).

171. See, e.g., *id.* at 103 ("Relationality and critical reflexivity are our guiding principles for staying true to participatory intentions and transformative ambitions."); Sousa, *supra* note 23, at 402 ("PAR becomes a tool for 'the systematic creation of knowledge that is done with and for community for the purpose of addressing a community-identified need.'" (quoting Kerry Strand, Sam Marullo, Nick Cutforth, Randy Stoecker & Patrick Donohue, *Community-Based Research and Higher Education: Principles and Practices* 8 (2003))).

PAR partnership can become one-sided, especially because it is often the academic who holds much of the access to resources and power in the partnership.¹⁷² “Nevertheless, when people see each other as holders of intrinsic worth, they are more likely to put people first, which leads to a more relational reciprocity.”¹⁷³

B. *Strategies for Equitable PLS Partnerships*

So how, then, do PLS authors ensure that their partnership is based on mutual respect and appreciation? The remainder of this Part is devoted to this question. As a starting point, simply adding a coauthor who has lived experience with the injustice of a particular law or legal regime is insufficient to ensure that PLS will realize the liberatory ambitions envisioned here.¹⁷⁴ Coauthorship in PLS is not immune from all the racial, economic, and gender hierarchies that exist in the world. In fact, PLS is probably more apt to be infused with oppressive forces because, like CPAR, it is “shaped in conversation and dialogue, across lines of power and difference.”¹⁷⁵ By its nature, PLS involves struggling to equalize power differentials. Consequently, PLS’s methodology, if it can be characterized as such, depends on restructuring the relationship between researcher and research subject to one between collaborators.¹⁷⁶

Drawing from the experience of coauthoring *Redeeming Justice*, here, I will highlight some of the strategies that PLS authors can employ to guard against abusive power relations and strive for more equal partnerships while producing scholarship. This section will explore the process of critical self-reflection that PLS coauthors must undertake as part of this process. Since this piece is written from my vantage point as an academic partner in PLS, I will focus primarily on how the culture and structure of academic institutions might undercut participatory values and methods and how critical self-reflection can loosen institutions’ grip on our mindset and behaviors.

1. *Fostering Critical Self-Reflection.* — Coauthors in PLS must be ever vigilant of how their positionality might affect the power dynamics of coauthorship. Thus, one of the most difficult tasks of PLS scholars is ensuring that they are not “reinforcing the very structural inequalities and powers that they [seek] to transform.”¹⁷⁷ PLS is not just about “changing

172. See Bartels & Friedman, *supra* note 83, at 101.

173. Sousa, *supra* note 23, at 406.

174. See Leal, *supra* note 56, at 544 (“By placing emphasis on the *techniques* of participation, rather than on its meaning, empowerment is thus presented as a *de facto* conclusion to the initiation of a participatory process . . .”).

175. Fine & Torre, *supra* note 49, at 5.

176. See Sousa, *supra* note 23, at 411. (“[V]ivencia is not a methodology per se, but a way of being in the world. In the same way, PAR is not a research approach per se, but community in action, a social movement to transform the world.”).

177. See Bartels & Friedman, *supra* note 83, at 101 (reminding the reader that laudable intentions are not enough to free researchers from hegemony).

something ‘out there’” but is “also about both changing ourselves and our mental models, and our relationships between the out there and the in here.”¹⁷⁸ Critical self-reflection is therefore an essential part of the creative process.¹⁷⁹ Without greater reflexivity in research processes, the power differences that exist between PLS participants may lead them to reenact the relations and norms that uphold the repressive legal order they aim to unsettle.¹⁸⁰ PLS challenges academics to engage in deep critical self-reflection as a tool for rooting out “perspectives borne through hegemonic privilege and oppression.”¹⁸¹ The reflective process also must be continual.¹⁸² Despite our best efforts to resist and challenge hegemony, PLS authors simply cannot fully “escape its acquiescing forces and relational power dynamics.”¹⁸³

The academic partner in particular “must be willing to embrace the hard work of examining how [their] multiple identities shape and inform engagement with community members.”¹⁸⁴ As with Movement Law scholarship, academic partners must be “mindful and engaged about how our professional and other identities, including race, gender, class, sexuality, and disability, may impact how one shows up in movement spaces, and how those identities shape what it means to engage in solidarity.”¹⁸⁵ PLS requires a level of vulnerability and epistemological humility that is not usually rewarded in the legal academy that can only be gained through critical examination of how academics’ positionality in law schools frames their understanding of the world.¹⁸⁶

2. *Combatting Academic Institutionalization.* — As anthropologist Mary Douglas put it in her influential book *How Institutions Think*, an academic’s

178. *Id.* at 103 (internal quotation marks omitted) (quoting Hillary Bradbury, Steve Waddell, Karen O’Brien, Marina Apgar, Ben Teehankee & Ioan Fazey, *A Call to Action Research for Transformations: The Times Demand It*, 17 *Action Resch.* 3, 8 (2019)).

179. See Freire, *Pedagogy of the Oppressed*, supra note 31, at 60 (“Those who authentically commit themselves to the people must re-examine themselves constantly.”); see also Bartels & Friedman, supra note 83, at 101; Newitt & Thomas, supra note 70, at 113.

180. See Newitt & Thomas, supra note 70, at 114 (observing that existing power imbalances between participants may self-perpetuate without reflexivity in research processes).

181. See Fine & Torre, supra note 49, at 7 (describing the process of engaging in collective reflection to explore how lived experience informs perspective and analysis).

182. See Freire, *Pedagogy of the Oppressed*, supra note 31, at 60 (arguing that former oppressors who convert to the cause of the people must engage in constant self-reflection).

183. See Bartels & Friedman, supra note 83, at 100 (suggesting that self-reflexivity alone cannot overcome hegemonic power differences).

184. See Houh & Kalsem, supra note 87, at 337–38 (internal quotation marks omitted) (quoting Mary Brydon-Miller, Michael Kral, Patricia Maguire, Susan Noffke & Anu Sabhlok, *Jazz and the Banyan Tree: Roots and Riffs on Participatory Action Research*, in *The SAGE Handbook of Qualitative Research* 387, 389 (Norman K. Denzin & Yvonna S. Lincoln eds., 4th ed. 2011)).

185. Akbar et al., supra note 13, at 879.

186. See Freire, *Pedagogy of the Oppressed*, supra note 31, at 90 (explaining that “dialogue cannot exist without humility”).

best “hope of intellectual independence is to resist, and the necessary first step of resistance is to discover how the institutional grip is laid upon our mind.”¹⁸⁷ Sociologist Pierre Bourdieu’s theories of “doxa” and “habitus” can help to uncover how institutional forces might undermine the partnership necessary for the liberatory potential of PLS to be fully realized. Bourdieu understood power to be constantly reinforced by a potent mixture of agency and structure.¹⁸⁸ Under Bourdieu’s theory, our propensities to think, feel, and act a certain way, or as he puts it, our habitus, are guided to some extent by doxa, which is a broader adherence to relations of order that are in turn informed by the institutions and societies we inhabit.¹⁸⁹ Doxa is so ingrained in us that we are often unconscious of how it drives us and leads us to view such ordering as self-evident.¹⁹⁰ Our identities as researchers can blind us to understanding how research itself can be “a contested and ideologically privileged site.”¹⁹¹

So, if we understand that academics have an interest in the survival of the legal academy, we will start to identify ways in which academics have restructured their thinking in order to effectively participate and advance within that institution.¹⁹² As Douglas described, over time academics start to view the norms and cultural practices that perpetuate the legal academy as natural and necessary.¹⁹³ For example, one of the challenges of implementing PLS is that academic culture tends to be highly individualistic.¹⁹⁴ This is an especially high hurdle in the legal academy, as legal scholarship tends to be a uniquely solitary endeavor.¹⁹⁵ As compared to other disciplines, the legal academy has a strong preference for the single author.¹⁹⁶ Consequently, a proprietary impulse may infect or

187. Ristroph, *supra* note 39, at 1686–87 (internal quotation marks omitted) (quoting Mary Douglas, *How Institutions Think* 92 (1986)). Mary Douglas’s work explores how humans structure their thoughts and actions in ways that perpetuate the institutions of which they are members in order to ensure their survival. *Id.*

188. Newitt & Thomas, *supra* note 70, at 114.

189. See *id.* (explaining how, under Bourdieu’s conception, habitus and doxa work together to influence decisionmaking).

190. See *id.* (describing how human beings adhere to a world order that we take for granted as self-evident).

191. *Id.*

192. See Ristroph, *supra* note 39, at 1686–87 (arguing that institutional survival depends on members of the institution participating in and perpetuating the institution).

193. See *id.* (“Douglas argued that for an institution to survive, it must structure the thinking of the individual humans who will participate in and perpetuate that institution. People must come to view the institution as necessary and natural.”).

194. Sousa, *supra* note 23, at 396, 406.

195. See Michael I. Meyerson, *Law School Culture and the Lost Art of Collaboration: Why Don’t Law Professors Play Well With Others?*, 93 *Neb. L. Rev.* 547, 563–64 (2014) (describing how legal academia is characterized by a lack of collaboration).

196. See, e.g., Benjamin P. Edwards, *Co-Authoring & Essays in the Legal Academy*, *PrawfsBlawg* (Aug. 15, 2016), <https://prawfsblawg.blogs.com/prawfsblawg/2016/08/co-authoring-essays-in-the-legal-academy.html> [<https://perma.cc/87LT-BSAY>] (noting

inhibit PLS partnerships because our institutions tend to evaluate us based on what we have produced alone rather than collectively. Indeed, junior researchers are often advised not to coauthor work because coauthored articles are likely to be dismissed by other academics since it will be unclear who authored what.¹⁹⁷

Also, when writing with organic jurists, regardless of how conscious we are of “our position in policing the borders of legal academic discourse,” we may still blindly follow “the conventional structures of legal scholarship [that] in turn restrict us as both thinkers and editors.”¹⁹⁸ For this reason, academic partners must be ever vigilant not to silence organic jurists through the editing process. For example, Simonson described that as a student editor, she “made fewer changes to sentence structure and word choice than [she and her fellow editors] have with other authors in the past” when editing an incarcerated individual’s piece that was published in her journal.¹⁹⁹ Simonson also discussed the need to “identify where we should silence our criticisms in the interest of preserving [the] author’s voice.”²⁰⁰ As the convening author of *Redeeming Justice*, I was tasked with gathering all our contributions and merging them into one cohesive whole, which required an analogous editing process. This was a particularly challenging task as I wanted to be very careful not to edit my coauthors’ words to fit the conventions of legal scholarship, thereby editing out their voices. Rell, a gifted creative writer, has described to me how he writes to a tempo, which is evident to anyone who has read his carefully crafted sentences. The rhythm in his writing doesn’t always conform to the sentence structures that line the pages of law reviews, but that is part of its power. It sings to you. When editing his or Ghani’s writing, I always ran even the smallest changes by them before sending the finished product along to the editors. In addition, when choosing where to publish, we consciously chose a law review with editors who we knew understood and valued the unique voices embedded in our scholarship.

Another convention in legal scholarship that sometimes gets in the way of imaginative thinking is the propensity to require extensive sourcing of all legal arguments. To be clear, I am not arguing that authors should not have sources to substantiate their claims but rather that legal imagination can be stunted if claims must always be grounded in past

that single-author pieces are valued more in legal academia than coauthored pieces); Ari Ezra Waldman (@ariezrawaldman), Twitter (Aug. 13, 2022), <https://twitter.com/ariezrawaldman/status/1558495682734039040?s=20&t=9Wx-wisqAi5UldKF1T3-rw> [<https://perma.cc/US77-EXL6?type=image>] (“[S]ome faculty have, in my experience, dismissed co-authored pieces bc [sic] hard to know what the applicant wrote. In other fields, co-authoring is the norm. It’s more common in law now, but not yet there.”).

197. Edwards, *supra* note 196; Waldman, *supra* note 196.

198. Simonson, *supra* note 164, at 295.

199. *Id.* at 294.

200. *Id.* at 295.

propositions, which themselves can be limiting and regnant.²⁰¹ Critical scholars often evoke stories for this very reason.²⁰² Stories provide a means of injecting the traditional canon of scholarship with fresh ideas and perspectives that are otherwise absent from the volumes of law reviews that came before.

C. *Relationship Is Resistance*

How then do academic partners uncover what are often unconscious subjugating tendencies inherent to their positionality in academic institutions? Simply put, relationship is resistance. Instead of seeing relationships as threats to research, PLS sees them as generative and as a necessary check on one's own positionality. As Professor José Wellington Sousa put it, “[R]elationship becomes a resistance against a dehumanizing institutional culture that alienates us from one another.”²⁰³ In explaining the concept of *companheirismo*, Freire gives us insights into the two core components that should inform any PLS partnership: (1) *convivência*—to live with; and (2) *simpatia*—to support; to have appreciation and care for someone.²⁰⁴ Embracing *convivência* requires “leaving” spaces of comfort that reinforce status.²⁰⁵ This “leaving” goes beyond “leaving” physical spaces of our institutions; it also requires “leaving” the institutional mindset that allows us to view others as research subjects.²⁰⁶ Accordingly, academic researchers must leave behind the “participant observation” model—in which the researcher objectifies “its” subject—and instead

201. “Regnant” is a term developed by Gerald López and “refers to lawyering for poor people in a fashion that relies upon conventional remedies and institutions, and upon lawyer expertise and dominance, even while seeking the client’s ‘best interests.’” Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 *Hastings L.J.* 947, 950 n.12 (1992) (citing Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 *Geo. L.J.* 1603, 1609 (1989)). While López uses the term “regnant” to refer to a particular modality of lawyering, described as a “strain of legal activity characteristic of liberal and progressive lawyers who care about social justice, but who are too enmeshed in their law oriented environment to perceive its limitations and harms,” the term is also apt to describe some brands of legal scholarship. *Id.* at 953 (citing Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 *Geo. L.J.* 1603, 1609 (1989)).

202. See, e.g., Delgado & Stefancic, *supra* note 36, at 37–49 (discussing the multiple ways in which storytelling in legal discourse can amplify underrepresented voices); Patricia A. Cain, *Feminist Legal Scholarship*, 77 *Iowa L. Rev.* 19, 20 (1991) (“One must listen carefully to women’s life stories to develop a feminist point of view.”); Delgado, *supra* note 8, at 2411–12 (explaining that legal scholars have increasingly been utilizing stories because “stories create their own bonds[] [and] represent cohesion, shared understandings, and meanings” for “outgroups”).

203. Sousa, *supra* note 23, at 404–05, 408, 410 (explaining how PAR became co-opted in the development context and arguing that building stronger partnerships with directly impacted communities is key to getting back to PAR’s emancipatory roots).

204. *Id.* at 408.

205. *Id.* at 411.

206. *Id.* at 410–11.

inhabit “the world they are learning from.”²⁰⁷ In the words of Professor Bryan Stevenson, “[W]e . . . [can’t] change the world by staying just on Harvard’s campus [I]f we care about injustice, if we care about inequality . . . we’re going to have to get close enough to [affected communities] . . . to understand.”²⁰⁸

This section will explore how relationships are one method for resisting the dehumanizing institutional culture that alienates us from one another. It will then discuss methods for establishing trusting and solidaristic partnerships between PLS coauthors. Finally, it will describe how PLS coauthors must alter their mindsets. Specifically, coauthors must adopt a partnership mentality, which requires coming to the partnership without any preconceived idea of what will be created and recognizing the expertise of both nonacademic and academic partners in PLS.

1. *Embracing Convivência and Simpatia to Redeem Justice.* — To build solidaristic partnerships, academics must immerse themselves in the conditions and daily experience of law’s injustice and identify themselves with those who regularly experience this reality.²⁰⁹ In this way, it is not just the organic jurist’s lived experience that informs legal analysis and prescription but also the academic partner’s firsthand witnessing of injustice.²¹⁰ Academic partners in PLS can see “truth” more clearly because we “place our own being in a wider, more fulfilling context.”²¹¹ For instance, some of my insights into the cruelty of LWOP sentences that informed *Redeeming Justice* were gleaned from representing clients serving that sentence over the years. In that capacity, I have witnessed firsthand the cruelty of the law, the callousness of the Department of Corrections, and the systems’ inability to recognize when circumstances and people have changed. One of the clients who has stuck with me was an elderly man with a spotless prison record who was unable to walk, but who was not near death enough to be granted compassionate release so that he could spend his remaining days with his family. Another one of my clients was a man in his seventies who was denied temporary release to attend his wife’s funeral even though she was the mother of his children and stood by him for over fifty years. Through these firsthand experiences, I developed a solidaristic stance with those most affected by law’s injustice—in this case, those serving LWOP sentences—which *simpatia* requires.²¹²

207. *Id.*

208. Harvard Kennedy Sch., 4 Rules for Achieving Peace and Justice, at 00:26–00:52, YouTube (Jan. 31, 2019), <https://www.youtube.com/watch?v=9vI7UPuCUrE> (on file with the *Columbia Law Review*).

209. See Sousa, *supra* note 23, at 410–11.

210. See *id.*

211. See *id.* at 410 (internal quotation marks omitted) (quoting Orlando Fals Borda, Some Basic Ingredients, *in* Action and Knowledge: Breaking the Monopoly With Participatory Action-Research 3, 4 (Orlando Fals Borda & Mohammad Anisur Rahman eds., 1991)).

212. See *id.*

Consequently, instead of objectifying those who experience law's injustice as "research subjects," these experiences helped me to relate to nonacademic partners as *companheiros*, or as friends and colleagues.²¹³ Moreover, because trust is built with time and broader commitment to struggles against injustice, sometimes an academic researcher might be called to support their coauthors in other contexts as well and strive to find "multiple and continuous ways to give back that go[] beyond any one-time project."²¹⁴ As explained in the Preface, *Redeeming Justice* was conceived after my clinic students and I had already been regularly meeting with Rell and other members of the R2R Committee in a state prison outside of Philadelphia. Collectively, we sought to develop a project on the Right to Redemption, but the pandemic stifled further advancement of that project. Because of those early meetings, which mostly involved listening to the group explain how it understood the Right to Redemption, I had a robust understanding of the philosophy and experiences that informed the concept long before Rell, Ghani, and I ever embarked on writing an article together. Similarly, when I approached Ghani, a formerly incarcerated founding member of the R2R Committee, about coauthoring *Redeeming Justice*, we were already working together on a joint report documenting the risk of COVID-19 to the inside members of the group and recommending legal avenues for their release. It was this proximity to and support of the group's struggle for liberation that laid the groundwork for the trusting relationship that produced *Redeeming Justice*.

This solidaristic stance has continued even after *Redeeming Justice* was published, when my legal clinic supported Rell in his successful petition for commutation. At first, I was hesitant for my clinic to take his case, because I feared that the power imbalances frequently described as endemic to the attorney–client relationship would undermine the equal partnership that we had built as coauthors. In the end, however, I discovered that the equal partnership we developed in the process of writing *Redeeming Justice* enhanced my ability to be an effective advocate in his commutation case. First, because I knew Rell so well and wholeheartedly believed that he deserved to have his sentence commuted, I was in a better position to advocate for him in our written submission and zealously advocate for his release. Second, instead of creating a power imbalance, our past collaboration and the trust already built between us meant that Rell felt comfortable pushing back when my clinic didn't get something right. Rell put faith in our advice because he knew that we had his best interests at heart. We had created what others have called a "participatory contact zone," which is a space where PLS partners "can speak and listen, argue differences and disagreements, develop trust

213. See *id.* at 409–10 ("[W]e became *companheiros* because our ties of affection bring with it a purpose of learning through community-driven initiatives.").

214. See *id.* at 410 (citing Gautam Bhan, Moving From 'Giving Back' to Engagement, 10 J. Rsch. Prac., no. N14, 2014, at 1, 2).

together, stumble, say I am sorry, learn from mistakes, challenge each other, grow new analyses, and build a more critical and imaginative knowledge base—precisely because we dare to inquire together.”²¹⁵ While we did so organically, some PAR researchers describe intentionally building such zones, by collectively adopting commitments to certain group practices and methodologies that are “antiracist, antisexist, anti-homophobic, anti-xenophobic, anti-Islamophobic, [and] anti-ableist.”²¹⁶ Critically, when someone falls short of these commitments, there is a process for acknowledging, questioning, and growing from the experience.²¹⁷

2. *Embracing Convivência and Simpatia to Resist the Academic Political Economy.* — PLS’s methodology may have the added positive effect of helping academics to overcome the alienation often felt in academic spaces.²¹⁸ By embracing *convivência* and *simpatia*, the academic partner is also more able to resist the academic political economy, because we draw our sense of purpose and meaning from outside of the perverse incentives and individualism that drive academic culture in our institutions.²¹⁹ PLS helps us to better see ourselves and feel more connected to our work through our relationships to our coauthors.

According to Sousa, Freire described this as a process of conscientization (*conscientização*) in which we become more fully conscious through self-reflection and action in community with others.²²⁰ For Freire, the underlying goal of *Pedagogy of the Oppressed* was to use this process to help people more fully realize their humanity and therefore more fully understand their reality.²²¹ Through engagement with organic jurists, academic partners can become more aware of how our institutions are limiting our imaginations by framing what seems possible, how we understand the law vis-à-vis our relation to it, and what change in the legal order is needed. In essence, “This is an invitation for academics and community members to live with and experience life with one another as an ontological given and the basis for consciousness and transformative action.”²²² This posture echoes calls from Black feminist scholars like Toni Cade Bambara and Audre Lorde to adopt “[a]n ‘irresistible’ pedagogy,”

215. Fine & Torre, *supra* note 49, at 9.

216. *Id.*

217. See *id.* (“Our participatory contact zones carve out a ‘holding environment’ where we can speak and listen, argue differences and disagreements, develop trust together, stumble, say I am sorry, learn from mistakes, challenge each other, grow new analyses, and build a more critical and imaginative knowledge base” (citation omitted)).

218. See Sousa, *supra* note 23, at 410 (“For academics, the kind of relationship that *companheirismo* and *vivencia* suggest means resisting the academic political economy and being committed to the humanization of both themselves and community members.”).

219. See *id.*

220. *Id.* at 403–04.

221. *Id.* (citing Freire, *Pedagogy of the Oppressed*, *supra* note 31, at 81).

222. *Id.* at 412.

which is an anti-oppressive pedagogy that rejects the “violence of institutional academic spaces premised on white patriarchal exclusivity of knowledge” and on the scaling of hierarchies of knowledge and power.²²³ Instead, this model of teaching embraces “a collaborative poetic posture”—that is, one that is mutual, coalition-driven, curative, and pushes us toward “creative’ visions of change.”²²⁴

3. *Grappling With My Own Institutionalization.* — Through the process of writing *Redeeming Justice*, I came to realize all the ways that I was institutionalized as well. I had been policing myself to fit the conventions and situate myself in the hierarchy of the legal academy. The legal academy is rife with rigid binaries: teaching through a clinic versus at the podium; legal advocacy versus legal scholarship; and theory versus practice. I have found these binaries to limit creativity and innovation.

The legal academy has its own caste system, with clinical and legal writing faculty often occupying the lower ranks.²²⁵ I have described in past scholarship that as a law professor who sometimes teaches in a clinic and sometimes at the podium, I have at times felt the need to erase a part of my professional identity out of fear that my scholarship will be discounted.²²⁶ Even at my institution, where faculty of all stripes have tenure and produce groundbreaking legal scholarship, I was advised to write scholarship that looked “traditional” out of fear that peer reviewers might discount pieces that appeared more “clinical” during the tenure process.

223. Mecca Jamilah Sullivan, Pedagogies of the “Irresistible”: Imaginative Elsewheres of Black Feminist Learning, *J. Feminist Scholarship*, Spring 2022, at 1, 2, <https://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1211&context=jfs> [<https://perma.cc/5SUP-GDTN>].

224. *Id.* at 2–3.

225. See, e.g., Renee Nicole Allen, Alicia Jackson & DeShun Harris, The “Pink Ghetto” Pipeline: Challenges and Opportunities for Women in Legal Education, 96 *U. Det. Mercy L. Rev.* 525, 527 (2019) (explaining that women in legal academia disproportionately occupy skills positions, which are characterized by not being on the tenure track, lower status and pay, less job security, and limited freedom to choose the subject matters on which they teach); Ruth Gordon, On Community in the Midst of Hierarchy (and Hierarchy in the Midst of Community), in *Presumed Incompetent: The Intersections of Race and Class for Women in Academia* 313, 326–27 (Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González & Angela P. Harris eds., 2012) (“[M]any of us spend our professional lives contesting hierarchy and exclusion—whether on the basis of race, gender, or class—but when it comes to academia—and I would suggest especially legal academia—we appear to have finally found a hierarchy we can believe in.”); see also Susan Ayres, *Pink Ghetto*, 11 *Yale J.L. & Feminism* 1, 2 (1999) (describing the feeling of invisibility that female legal writing professors feel in relation to tenured male professors); Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 *J. Legal Educ.* 562, 562–65 (2000) (arguing that there is a pink ghetto in the legal academy made up of legal writing professors); Rachel López, *Unentitled: The Power of Designation in the Legal Academy*, 73 *Rutgers U. L. Rev.* 923, 925–28 (2021) [hereinafter López, *Unentitled*] (arguing that academic titles perpetuate stereotypes and entrench existing racial and gender hierarchies in the legal academy, although they appear race- and gender-neutral).

226. López, *Unentitled*, *supra* note 225, at 929–31.

I came to see my occupation of the borderlands in academia as a strength through the process of writing *Redeeming Justice* with Ghani and Rell. Often, Rell and Ghani would challenge me to stretch my understanding of what is possible and embrace the passion and commitments that drove my research. In fact, Ghani, in his very generous way, critiqued a piece I wrote on the ballooning elderly population behind bars as so technical and legalistic that it lost sight of the humanity of the situation.²²⁷ He was right. The doctrine I invoked obscured the full picture—almost sanitizing the issue with legalese. The insight Ghani shared with me is in part what sparked the original idea of *Redeeming Justice*.²²⁸

4. *Cultivating a Partnership Mentality.* — Another critical aspect of PLS is that it is forged, not made. Because every individual comes to the partnership with their own *nomos*, PLS authors must come together in partnership without any preconceived idea of what will be created. While PLS collaborations are driven by a common higher purpose of making a law or legal practice more just, their expression and form are created together through a meeting of the minds. This process is time-consuming and distinctly relational in the sense that it must be built on a foundation of trust in and respect for your coauthors.²²⁹ It is not the sort of collaboration that can be manufactured or generated in a short period of time. In the case of *Redeeming Justice*, our partnership in PLS was forged in the context of my longtime collaboration with members of the R2R Committee, which started in 2014 when members of the group trained me in community-based learning practices as part of a workshop for Drexel faculty engaged in experiential learning.

When forging PLS, legal academics must adopt a partnership mentality, which necessitates valuing the expertise of those who are directly impacted, and at times harmed, by the law. This partnership mindset is quite distinct from the service mentality so common among lawyers, who envision their role as providing “legal services” to meet the needs of clients.²³⁰ The service mentality is also present among academically trained legal scholars who believe that the legal academy alone holds the answers to alleviate poverty, dismantle racial injustice, and

227. See generally Rachel López, *The Unusual Cruelty of Nursing Homes Behind Bars*, 32 Fed. Sent’g Rep. 264 (2020) (using legal and statistical principles instead of human narratives to describe the incarcerated elderly population).

228. I also have Wendy Greene, Taja-Nia Henderson, and Brian Frye to thank for expanding my horizons, so that I could see all the possibilities of legal scholarship.

229. See Freire, *Pedagogy of the Oppressed*, supra note 31, at 91 (“Founding itself upon love, humility, and faith, dialogue becomes a horizontal relationship of which mutual trust between the dialoguers is the logical consequence. It would be a contradiction in terms if dialogue—loving, humble, and full of faith—did not produce this climate of mutual trust . . .”).

230. This distinction between a partnership mentality versus a service mentality was brought to my attention by Kirsten Britt, one of my clinic’s community partners.

advance social change. In other words, it manifests in a belief that only academic expertise is needed.

The service mentality exacerbates the silencing of those already marginalized by the law.²³¹ Criminal defendants' voices are especially silenced as they are usually spoken for by their attorneys in criminal proceedings.²³² As Professor Alexandra Natapoff points out, the criminal legal process systematically "excludes defendants from the social narratives that shape the criminal justice system itself, in which society ultimately decides which collective decisions are fair and who should be punished."²³³ The resulting deprivation of the right to speak their own reality is what Freire would call "dehumanizing aggression," which must be overcome for true liberation to occur.²³⁴

Instead, the PLS mindset is distinguished by its mutual recognition and respect for each partner's expertise. PLS is animated by a commitment to amplifying the voices of those who are regularly silenced by the law, a belief that those most intimately impacted by the law should have a role in building it, and an implicit protest of the need for "objectivity" in legal scholarship. To be an academic partner in PLS requires epistemological humility and decentering institutional benchmarks of expertise.

IV. RESPONDING TO THE SKEPTICS

Since the publication of *Redeeming Justice*, there has been an uptick in lawyers and legal scholars deriding scholarship with social justice aims like *Redeeming Justice*. This Part addresses those criticisms head on.

London School of Economics Professor Tarunabh Khaitan provoked the current debate in an editorial published a few weeks after *Redeeming*

231. See, e.g., Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *Yale L.J.* 2107, 2130–31 (1991) (describing how some lawyers reproduce their clients' stories in a disempowering way); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 *Mich. L. Rev.* 2459, 2465 (1989) (describing a case in which a judge effectively put words into a silent defendant's mouth, entering a not guilty plea on their behalf); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 *Hastings L.J.* 861, 873 (1992) ("In order to win cases, poverty lawyers must fit their clients' stories into law's established terms by squeezing client identities, histories, and problems into universalized narratives."); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *Buff. L. Rev.* 1, 28–31, 39, 45–47 (1990) (demonstrating through the story of Mrs. G. how subordinated groups must fit their stories into narratives that judicial decisionmakers find sympathetic).

232. See, e.g., Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 *Geo. J. on Poverty L. & Pol'y* 249, 269 (2004) (arguing that the silencing of criminal defendants in court contributes to inaccurate public perceptions about crime); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 *N.Y.U. L. Rev.* 1449, 1458–59 (2005) (describing how the adjudicatory process systematically silences criminal defendants).

233. Natapoff, *supra* note 232, at 1449.

234. Freire, *Pedagogy of the Oppressed*, *supra* note 31, at 88–89.

Justice received the Law and Society Association Article Prize.²³⁵ Khaitan's editorial unleashed a flurry of scholarly debate about the role of advocacy in legal scholarship, with scholars on both sides of the debate weighing in.²³⁶ In the editorial, he criticizes what he calls "scholactivism" as being "inherently contrary to the 'role morality' of a scholar."²³⁷ Khaitan frames "scholactivism" as research driven by "a motivation to directly pursue specific material outcomes (i.e. outcomes that are more than merely discursive) through one's scholarship."²³⁸ In his view, striving to achieve change in the real world compromises the "special moral obligations that attach to a scholar qua one's role as a scholar."²³⁹ He names "discovering truth and disseminating knowledge" as two such moral obligations unique to being a scholar.²⁴⁰ "Truth," he says, "concerns reality itself."²⁴¹ As I will detail below, he believes that seeking a material outcome undermines a scholar's ability to discover the truth, and therefore vitiates a scholar's moral obligations.

The current debate about what constitutes legal scholarship and what role legal scholars should play in the material world echoes earlier debates in the legal academy. In the 1990s, Daniel Farber and Suzanna Sherry, among others, criticized CRT scholars for their use of storytelling in legal

235. Khaitan, On Scholactivism, *supra* note 28; LSA 2022 Annual Awards Announced, Law & Soc'y Ass'n (June 21, 2022), <https://www.lawandsociety.org/2022/06/21/lsa-2022-annual-awards-announced/> [<https://perma.cc/4QTW-XYD4>].

236. See, e.g., Debate: #Scholactivism, Verfassungsblog, <https://verfassungsblog.de/category/debates/scholactivism-debates/> [<https://perma.cc/3725-UEH8>] (last visited Sept. 29, 2023) (collecting a multitude of responses to Khaitan's original piece on scholactivism); see also, e.g., Alberto Alemanno, Letter to the Editor, "Knowledge Comes With Responsibility": Why Academic Ivory Towerism Can't Be the Answer to Legal Scholactivism, 20 *Int'l J. Const. L.* 561, 561–62 (2022) (criticizing Khaitan's argument against "scholactivism"); Paul Horwitz, Constitutional Scholactivism, Foreign and Domestic, *Jotwell* (Aug. 2, 2023), <https://conlaw.jotwell.com/constitutional-scholactivism-foreign-and-domestic/> [<https://perma.cc/4F23-TGAT>] (noting that Khaitan's article has occasioned "a good deal of pushback" abroad, but criticizing the fact that these debates had yet not appeared in U.S. journals as "a sign of defects in the machinery of American legal scholarship").

237. Khaitan, On Scholactivism, *supra* note 28, at 548 (quoting Judith Andre, Role Morality as a Complex Instance of General Morality, 28 *Am. Phil. Q.* 73, 73 (1991)). Khaitan adopts the term "scholactivism" from a 2016 article in *University World News*, which defines it as "an umbrella term for the approach taken by an increasing number of academics who believe they have a role to play in creating social justice[—]and who do something about it." See Rebecca Farnum, Scholactivism—A Growing Movement of Scholar-Activists, *Univ. World News* (June 3, 2016), <https://www.universityworldnews.com/post.php?story=20160530142606345> [<https://perma.cc/9KNR-JB4K>]. The *University World News* article on which he relies expressly names "participatory research methods" like those employed in *Redeeming Justice* as a form of scholactivism. *Id.*

238. Khaitan, On Scholactivism, *supra* note 28, at 548 (emphasis omitted).

239. *Id.* (citing David Luban, Lawyers and Justice: An Ethical Study 104–05 (1988); Judith Andre, Role Morality as a Complex Instance of Ordinary Morality, 28 *Am. Phil. Q.* 73 (1991)).

240. *Id.* at 549.

241. *Id.* at 548.

scholarship as an abdication of their obligation to search for truth.²⁴² In reviewing Farber and Sherry's book, Judge Richard Posner also criticized CRT scholars for "forswearing analysis in favor of storytelling" and questioning the existence of objective truth, and for that reason, labeled them as "lunatic[s]," "childish," and "intellectually limited."²⁴³ His dismissal of storytelling is grounded in his belief that understanding someone's experience and having empathy for that experience lacks normative value.²⁴⁴

While each iteration of this debate has different dimensions and touchpoints, those concerned with upholding the sanctity of legal scholarship tend to be united in their concern with several central questions: (1) Should scholars strive to be neutral and objective? (2) Should scholars aim to have a real-world impact? (3) Who should produce, engage with, and consume legal scholarship? (4) How is "truth" discovered by scholars? This Part addresses each of these concerns in turn.

Namely, section IV.A responds to critics who believe that scholars should commit themselves to pursuing "objectivity" in legal scholarship and thus denounce "scholactivism." It contends that legal scholarship is never neutral or devoid of moral commitments. While critics suggest legal scholarship should at least appear neutral, this section outlines the ways in which doing so can be more harmful than when scholars are transparent about their motivations. Section IV.B addresses the argument that combining scholarship with activism compromises the accuracy of research because advocates are less open to the possibility that their views are wrong. Section IV.C challenges the notion that legal scholarship should be created in isolation, or perhaps in consultation with other academics, and then deposited on the public. It contends that scholarship produced in this manner portrays an incomplete understanding of law. Finally, section IV.D argues that the "scholactivism" debate turns on distinct perceptions about how truth and knowledge are produced. Whereas Khaitan and others believe that researchers can perceive the external world through their own consciousness alone, as described more fully in section II.A, PLS is grounded in a more collective epistemology, which centers collaborative knowledge production with organic jurists.

In sum, the purpose of this Part is not to reject other methodological or epistemological approaches to legal scholarship, but rather to demonstrate that PLS is principled and grounded, despite what others

242. Daniel A. Farber & Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* 73–74 (1997) (claiming that "radical scholars" and the use of storytelling they advocate threaten to degrade legal scholarship's function as a "reality check").

243. Richard A. Posner, *The Skin Trade*, *New Republic*, Oct. 13, 1997, at 40, 40–43 (reviewing Farber & Sherry, *supra* note 242).

244. Richard A. Posner, *Overcoming Law* 381–82 (1995) ("[T]he internal perspective—the putting oneself in the other person's shoes—that is achieved by the exercise of empathetic imagination lacks normative significance.").

might claim. We will argue that PLS simply derives from a different theory of knowledge than that relied upon by others who might dismiss PLS as purely partisan or lacking the intellectual rigor of other scholarly pursuits.

A. *A Scholar's Moral Obligation to "Truth"*

The skepticism about scholarship with social justice aims like *Redeeming Justice* chiefly derives from a belief that such scholarship undermines a scholar's ability to pursue "truth," a quality which, under a skeptic's view, separates scholars from everyone else. As noted above, Khaitan grounds his argument against "scholactivism" in his belief that pursuit of real-world objectives inhibits "truth-seeking," which he characterizes as constitutive of being a scholar.²⁴⁵ Likewise, Jan Komárek, a scholar Khaitan references in his editorial, reminds scholars that "the academic task is to discover truths rather than adhere to truths already established."²⁴⁶ He describes the pursuit of knowledge as the academy's "core purpose."²⁴⁷ Relatedly, Farber and Sherry object to the use of storytelling in CRT scholarship because they believe that it is inherently subjective and therefore undercuts truthseeking.²⁴⁸ They warn that "first-person storytelling is fraught with exactly the kind of dangers that scholarship is designed to avoid: creating, through interpretation, a biased, misleading, and nonverifiable account of the world."²⁴⁹ They criticize CRT scholars for their "casualness about truth," because, in their words, "truth matters."²⁵⁰

Interestingly, however, a closer look at this scholarship reveals these scholars' underlying ambivalence about the existence of objective truth. Khaitan claims that he is not demanding pure objectivity, nor that scholars "stay out of partisan or political disputes."²⁵¹ Indeed, in subsequent writing, he recognizes that law can have multiple interpretations that should be evaluated based on their plausibility and reasonableness, a

245. See Khaitan, *On Scholactivism*, supra note 28, at 548 ("Whereas truth-seeking and knowledge dissemination are constitutive of the role of a scholar, scholactivism-driven research is distinguished by the existence of a *motivation to directly pursue specific material outcomes . . .*").

246. *Id.* at 549; Jan Komárek, *Freedom and Power of European Constitutional Scholarship*, 17 *Eur. Const. L. Rev.* 422, 441 (2021) [hereinafter Komárek, *Freedom and Power*] (internal quotation marks omitted) (quoting Stanley Fish, *Versions of Academic Freedom: From Professionalism to Revolution* 50 (2014)).

247. Komárek, *Freedom and Power*, supra note 246, at 436.

248. See Farber & Sherry, supra note 242, at 95–117 (arguing that storytelling that does not aim at objective truth "distorts discourse both within and without the narrator's immediate community").

249. *Id.* at 111.

250. *Id.* at 97, 100, 117.

251. Khaitan, *On Scholactivism*, supra note 28, at 549; Tarunabh Khaitan (@tarunkhaitan), Twitter (Aug. 8, 2022, 1:07 PM), <https://twitter.com/tarunkhaitan/status/1556688618160275457> [<https://perma.cc/N2GR-MC78>] ("I don't call for pure objectivity, and explicitly endorse the value of democratising knowledge . . .").

concept he concedes to be “fuzzy.”²⁵² In short, Khaitan seems to be saying that identifying the truth, while not limitless, might well be subjective. At the same time, Khaitan believes that there is value in striving toward objectivity, even if it is elusive.²⁵³ While Khaitan cites Komárek as demanding “value neutrality in scholarship,”²⁵⁴ Komárek himself also disputes that it is possible to achieve value neutrality, particularly in legal scholarship, which is inherently normative.²⁵⁵ This commentary also echoes the perspective of CRT critics Farber and Sherry. Like Khaitan, they “do not defend the existence of objective truth, but rather argue that it is pragmatically useful to assume that objective truth exists, or that we create truth as ways of organizing what otherwise would be a chaotic experience.”²⁵⁶

Except for Khaitan, whose views on neutrality are addressed in the next section, these scholars seem more concerned with upholding the appearance of neutrality than with defending the existence of objective truth.²⁵⁷ Thus, to some extent, this disagreement about the ethics of legal scholarship centers not on whether truth is obtainable, but rather whether scholars ought to be transparent about the motivations and political or moral commitments behind their scholarship. These scholars maintain that an appearance of neutrality serves such high ideals as academic freedom, justice, and democracy. While Komárek acknowledges that scholarly findings “will never be value-free,”²⁵⁸ he nonetheless urges scholars to strive to give the “appearance of neutrality,” even when engaged in political acts.²⁵⁹ In a later piece, he even calls the need to keep up the appearance of neutrality a “performative constraint” on scholars.²⁶⁰ Komárek believes that it is necessary to uphold this façade in order to

252. See Khaitan, *Facing Up*, *supra* note 32.

253. See Tarunabh Khaitan (@tarunkhaitan), Twitter (Aug. 8, 2022, 1:24 PM), <https://twitter.com/tarunkhaitan/status/1556692799822635008> [<https://perma.cc/TP98-SS4W>] (“[B]ut it’s not possible to achieve perfect justice, complete civility, kindness in everything we do: surely these are all still worthwhile goals to aspire and try to get closer to?”).

254. See Khaitan, *On Scholactivism*, *supra* note 28, at 549.

255. See Jan Komárek, Letter to the Editor, “Scholarship Is About Knowledge, Not Justice”, 20 *Int’l J. Const. L.* 558, 558 (2022) [hereinafter Komárek, *Scholarship Is About Knowledge*].

256. Daria Roithmayr, *Guerrillas in Our Midst: The Assault on Radicals in American Law*, 96 *Mich. L. Rev.* 1658, 1674 (1998) (reviewing Farber & Sherry, *supra* note 242) (citing Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 *Minn. L. Rev.* 1331, 1338–39 (1988); Suzanna Sherry, *The Sleep of Reason*, 84 *Geo. L.J.* 453, 472–73 (1996)).

257. As will be discussed more later in this section, Khaitan diverges from these scholars on this point in that he is concerned less with the appearance of neutrality and more with the internal motivation of the scholar. See Khaitan, *Facing Up*, *supra* note 32 (arguing that motivation to make a material impact through scholarly work is risky for the pursuit of truth).

258. Komárek, *Scholarship Is About Knowledge*, *supra* note 255, at 558.

259. Komárek, *Freedom and Power*, *supra* note 246, at 438.

260. Komárek, *Scholarship Is About Knowledge*, *supra* note 255, at 558.

maintain public confidence in academic institutions.²⁶¹ He portrays the failure to do so as an existential threat to the ability of academics to produce legal scholarship.²⁶² Harking back to our earlier discussion in section II.B of Bourdieu's theory of *habitus*, one might wonder then if an institution-preserving instinct may be driving some of the resistance to scholarship in action. In addition to arguing that keeping up the appearance of neutrality helps to maintain academic freedom, Komárek argues that maintaining the appearance of neutrality in legal scholarship may help to uphold democracy.²⁶³ He is not the first to make such an association. Farber and Sherry devote an entire chapter in their book to this topic. According to Farber and Sherry, "To condemn scientific objectivity and the aspiration toward universal truth, then, is to place democracy at risk."²⁶⁴

I think that it is important to ask: What is the appearance of neutrality concealing? As the critics would likely concede, legal scholars often, if not always, draw from their own personal or professional experiences to inform their production of legal scholarship.²⁶⁵ Some do so explicitly.²⁶⁶ Others do so implicitly with their life experiences informing what questions they are asking and how they understand the function of law in society.²⁶⁷ Legal scholarship is also often informed by its authors' political

261. See Komárek, *Freedom and Power*, supra note 246, at 436–38 (explaining the importance of integrity to academic institutions' pursuit of knowledge and the tension created by institutional indebtedness to public and private funders).

262. See *id.* at 430–31, 436 (arguing that failure to maintain academic protocols threatens the scholarly work which those protocols protect).

263. *Id.* at 438 ("So it may help liberal democracy if extramural speeches at least seek to keep an appearance of neutrality and try to see beyond ideology.").

264. Farber & Sherry, supra note 242, at 108.

265. See Akbar et al., supra note 13, at 872 ("All legal scholarship is biased: Inevitably our views of the law are shaped by our underlying moral understandings and commitments, by our experiences and social location.").

266. See generally Terence Andrus, *Reflection on Andrus v. Texas*, 134 *Harv. L. Rev. Forum* 78 (2020) (reflecting on the author's changed view of the American legal system based on the appeal of his own death sentence); Brian L. Frye & Maybell Romero, *The Right to Unmarry: A Proposal*, 69 *Clev. St. L. Rev.* 89 (2020) (arguing based on the authors' own difficulties finalizing their divorces that roadblocks to divorce violate a constitutional right to unmarry); Jill Wieber Lens, *Tort Law's Devaluation of Stillbirth*, 19 *Nev. L.J.* 955 (2019) (discussing the law's inadequacy in valuing claims based on stillbirth in parallel with the author's stillbirth experience); Melissa Murray, *Foreword: The Milkmaid's Tale*, 57 *Cal. W. L. Rev.* 211 (2021) (describing the racialized nature of judging parents for feeding their babies formula based on the author's own experiences); Maybell Romero, *Ruined*, 111 *Geo. L.J.* 237 (2022) (discussing, in the context of the author's own experience as a survivor of sexual assault, the problematic nature of using "broken" language to describe victims of sexual assault).

267. For examples of academics whose experiences inform their work, see responses to Rachel E. López (@Rachel_E_Lopez), Twitter (Aug. 17, 2022), https://twitter.com/Rachel_E_Lopez/status/1559898159605743619?s=20 [<https://perma.cc/QX4V-ALDF>]. For examples of scholarship informed by the scholar's lived experience, see, e.g., Deborah N. Archer, "Black Rage" and the Architecture of Racial Oppression, in *Fight the Power: Law*

and moral commitments, which can be hidden under the veil of neutrality.²⁶⁸ In this way, Cover might say that legal scholars, like judges, interpret the law and produce legal scholarship informed by their own *nomos*. Scholars can also have commitments to feminism, antiracism, or abolition, which inform their methodological choices, including the decision to evoke lived experience in scholarship.²⁶⁹ Even the critics accept that legal scholarship, because of its normative nature, is intrinsically subjective, in part because it often involves evaluating claims about morality.²⁷⁰

Yet, a significant risk inherent to feigning neutrality is that white subjectivity is often mistaken for objectivity. For some time, numerous scholars have argued that what is considered “neutral” or “objective” in

and Policy Through Hip-Hop Songs 231 (Gregory S. Parks & Frank Rudy Cooper eds., 2022); Deborah N. Archer, Classic Revisited: How Racism Persists in Its Power, 120 Mich. L. Rev. 957 (2022); Michael Fakhri, Images of the Arab World and Middle East—Debates About Development and Regional Integration, 28 Wis. Int’l L.J. 391 (2011); Jordana R. Goodman, Ms. Attribution: How Authorship Credit Contributes to the Gender Gap, 25 Yale J.L. & Tech. 309 (2023); Jon J. Lee, Catching Unfitness, 34 Geo. J. Legal Ethics 355 (2021); Robyn M. Powell, Disability Reproductive Justice, 170 U. Pa. L. Rev. 1851 (2022); Ruqaiyah Yearby, Internalized Oppression: The Impact of Gender and Racial Bias in Employment on the Health Status of Women of Color, 49 Seton Hall L. Rev. 1037 (2019). These authors have confirmed that their lived experience informed their research. Other scholarship focuses on how the lived experience of notable legal scholars influenced their research. See, e.g., Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (2006); Eliav Lieblich, Assimilation Through Law: Hans Kelsen and the Jewish Experience, in *The Law of Strangers: Critical Perspectives on Jewish Lawyering and International Legal Thought* 51 (James Loeffler & Moria Paz eds., 2019); Edward A. Purcell Jr., A Subjective Jurisprudence: The Structural Constitution, in *Antonin Scalia and American Constitutionalism: The Historical Significance of a Judicial Icon* 56 (2020). Correspondence confirming the aforementioned pieces were informed, in part, by the various authors’ life experiences is on file with the *Columbia Law Review*.

268. See generally Evan Selinger & Robert P. Crease, Introduction to *The Philosophy of Expertise* 1, 3 (Evan Selinger & Robert P. Crease eds., 2006) (“[T]he authority so conferred on experts . . . risks elitism, ideology, and partisanship sneaking in under the guise of value-neutral expertise.”); Akbar et al., *supra* note 13, at 872–74; David M. Trubek, Where the Action Is: Critical Legal Studies and Empiricism, 36 Stan. L. Rev. 575, 618 (1984) (“For the Critical scholar, the pretense that social science methods lead to objective and value neutral knowledge hides an implicit and conservative political message behind a neutral and technocratic facade.”).

269. See, e.g., Delgado & Stefancic, *supra* note 36, at 45 (“Critical race theorists have built on everyday experiences with perspective, viewpoint, and the power of stories and persuasion to come to a deeper understanding of how Americans see race.”); Cain, *supra* note 202, at 20; Delgado, *supra* note 8, at 2411–12.

270. Komárek, *Freedom and Power*, *supra* note 246, at 423 (“Constitutional scholarship may not be the same as politics and power, but it is certainly difficult to separate them. This relates to what Kaarlo Tuori calls the ‘imposed normativity of all legal scholarship’. Normativity (and power) is ‘imposed’ because it can never be fully escaped by legal scholars.” (quoting Kaarlo Tuori, *Ratio and Voluntas: The Tension Between Reason and Will in Law*, at xiii (2011))); Khaitan, *Facing Up*, *supra* note 32 (“I believe moral claims are truth claims . . .”).

the academy reflects a white middle-class worldview.²⁷¹ Scholars have called the demand that scholars adopt an impersonal voice “false neutrality,” which is meant to preclude “the possibility of grounding a scholarly voice in the material, aesthetic, emotional, and spiritual experiences of people of color.”²⁷²

This approach also might reinforce what Professor Kimberlé Williams Crenshaw calls “perspectivelessness,” which is the pervasive belief in academia that legal analysis and discourse can be “objectiv[e],” in essence removed from any cultural, political, or other context.²⁷³ Moreover, scholarship that is completely divorced from perspective runs the risk of reducing racism to something that exists outside of and apart from law, while characterizing the law itself as race neutral.²⁷⁴ According to civil rights attorney and professor Derrick Bell, such colorblind notions of law mask its role in producing and concretizing white dominance.²⁷⁵ For this reason, CRT scholars “reject[] the prevailing orthodoxy that scholarship should be or could be ‘neutral’ and ‘objective,’” primarily because of a belief that legal scholarship about race “can never be written from a distance of detachment or with an attitude of objectivity.”²⁷⁶

Moreover, only engaging with other academics in scholarship may have the unintended consequence of reinforcing white heteronormative subjectivity. As Professor Bennett Capers recently underscored, law schools are essentially “white spaces,”²⁷⁷ where learning how to “think like a lawyer” is often code for learning “a white middle-class world view.”²⁷⁸ In addition, consulting only with other academics inhibits exposure to a more diverse array of perspectives and counternarratives. Under the Freirean understanding of knowledge production, it also “diminishes the

271. See, e.g., Elizabeth Mertz, *The Language of Law School: Learning to “Think Like a Lawyer”* 1 (2007) (explaining that the seemingly neutral manner in which legal thinking is presented in American law schools conceals the social context in which the law operates); Crenshaw, *supra* note 37, at 3 (arguing that the positioning of legal thinking as an objective mode of analysis is harmful to minority students); Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 *Fordham L. Rev.* 2953, 2956 (2015) (“[T]he social sciences’ implicit claims of ‘objectivity’ and embrace of ‘neutrality’ in knowledge production stand in contrast to CRT’s contention that these claims mask hierarchies of power that often cleave along racial lines.”).

272. See CRT Key Writings, *supra* note 42, at 314.

273. See Crenshaw, *supra* note 37, at 2.

274. See, e.g., CRT Key Writings, *supra* note 42, at xxiv.

275. See Derrick Bell, *Racial Realism*, 24 *Conn. L. Rev.* 363, 369 (1992) (“As every civil rights lawyer has reason to know—despite law school indoctrination and belief in the ‘rule of law’—abstract principles lead to legal results that harm blacks and perpetuate their inferior status.”).

276. CRT Key Writings, *supra* note 42, at xiii.

277. Bennett Capers, *The Law School as a White Space?*, 106 *Minn. L. Rev.* 7, 35–37 (2021).

278. *Id.* (internal quotation marks omitted) (first quoting Mertz, *supra* note 271, at vii; then quoting Crenshaw, *supra* note 37, at 3).

conversation through which we create reality,” leading to an impoverished understanding of the truth and limiting creativity.²⁷⁹

According to Richard Delgado, we should be suspicious of “objectivity” because it “often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints. Implying that objective, correct answers can be given to legal questions also obscures the moral and political value judgments that lie at the heart of any legal inquiry.”²⁸⁰

On the other hand, because lived experience is only understood within a broader cultural context,²⁸¹ it is inherently subjective or *perspective-full*.²⁸² In current legal scholarship, lived experience operates on three planes: (1) the good; (2) the bad; and (3) the invisible. The *good* scholarship is based on insights drawn from professionalized experience working as a judge or political appointee, which is commonly seen as providing someone with special insights into legal issues.²⁸³ The *bad* is lived experience at a personal level, mostly experienced by those at the margins of law.²⁸⁴ The *invisible* lived experience is informed by white lived experience that is taken for granted as natural or typical, because it reaffirms the status quo.²⁸⁵ Realities constructed from invisible narratives can be problematic because they can inhibit our imagination, making us believe that certain situations are inevitable and blinding us from seeing new possibilities.²⁸⁶

279. See Delgado, *supra* note 8, at 2439.

280. *Id.* at 2441.

281. See Au, *supra* note 34, at 189 (“With progressive education, respect for the knowledge of living experience is inserted into the larger horizon against which it is generated Respect for popular knowledge, then, necessarily implies respect for cultural context.” (internal quotation marks omitted) (quoting Paulo Freire, *Pedagogy of Hope: Reliving Pedagogy of the Oppressed* 85 (Robert R. Barr trans., 1994))).

282. Cf. Delgado, *supra* note 8, at 2411–12 (discussing how a narrative approach necessarily presents one’s culturally informed account of events).

283. See Richard A. Posner, *Legal Scholarship Today*, 115 *Harv. L. Rev.* 1314, 1315–17 (2002).

284. Cf. Delgado, *supra* note 8, at 2412 (“Many, but by no means all, who have been telling legal stories are members of what could be loosely described as outgroups, groups whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has been suppressed, devalued, and abnormalized.”).

285. See *id.* at 2412–13 (“The dominant group creates its own stories, as well. The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.”); *id.* at 2440–41 (“Traditional legal writing purports to be neutral and dispassionately analytical, but often it is not . . . [i]n part . . . because legal writers rarely focus on their own mindsets, the received wisdoms that serve as their starting points, themselves no more than stories, that lie behind their quasi-scientific string of deductions.”).

286. See *id.* at 2416–17 (explaining that accepted narrative patterns become “habitual” and lock us into the notion that the way things are is “inevitable”).

Despite the critics' claims that maintaining the appearance of neutrality helps to promote justice, portraying doctrinal analysis as a neutral act can have stark unintended consequences in law and lead to a more unjust society. For instance, in *The Curriculum of the Carceral State*, Alice Ristroph documents how Herbert Wechsler, one of the primary architects of modern criminal law,²⁸⁷ championed the "neutral," "color-blind" principles of criminal law as a way to build the legitimacy of the criminal legal regime, which at the time was seen as marginal.²⁸⁸ He and his contemporaries depicted criminal law as "an egalitarian system that imposes obligations without reference to race."²⁸⁹ Yet this "egalitarian" legal system ushered in the era of mass incarceration, widely understood today to be "rife with racial disparities."²⁹⁰

Perhaps then what we should be more concerned with is those scholars who have moral and political commitments that inform their research questions, methodology, and theoretical lens, but who feign neutrality.²⁹¹ Like Movement Law scholarship, PLS accepts that scholarship is biased.²⁹² Contrary to the approach preferred by the skeptics, PLS's methodology necessitates transparency about moral and political commitments in legal scholarship. That is part of its strength. More harm is done to democracy in darkness than in light.

B. *Dangers of Activism in Scholarship*

In contrast to Komárek, Farber, and Sherry, Khaitan is less concerned with the outward appearance of neutrality and more concerned with a scholar's internal motivation to achieve change in the material world.²⁹³

287. Ristroph, *supra* note 39, at 1635.

288. Jonathan Simon, *Wechsler's Century and Ours: Reforming Criminal Law in a Time of Shifting Rationalities of Government*, 7 *Buff. Crim. L. Rev.* 247, 257–265 (2003); see also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 29–34 (1959) (expressing concern that some of the Supreme Court's racial equality opinions, including *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954), were not adequately supported by "neutral principles").

289. Ristroph, *supra* note 39, at 1635.

290. *Id.*

291. This sentiment accords with the theories of several other legal scholars. Bernard Harcourt raised the concern that policy experts portray their decisionmaking as neutral when their decisions "necessarily entail normative choices about political values at every key step." Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 *J. Legal Stud.* 419, 421 (2018). Benjamin Levin has asked, "[S]hould we be concerned about decision-makers' ability to wrap their decisions in the language of science or the potentially unassailable trappings of authority?" Levin, *supra* note 153, at 2816 (2022).

292. Akbar et al., *supra* note 13, at 872 ("All legal scholarship is biased: Inevitably our views of the law are shaped by our underlying moral understandings and commitments, by our experiences and social location.").

293. See Khaitan, *On Scholactivism*, *supra* note 28, at 548 ("[S]cholactivism-driven research is distinguished by the existence of a motivation to directly pursue specific material

According to Khaitan, “[A]ll that may separate a normative scholar from a scholactivist is the absence of an activist *motive* to pursue a direct, non-discursive outcome in a proximate case through one’s scholarship.”²⁹⁴ Principally, he believes that combining scholarship with activism makes academics too susceptible to abusive power and carries a risk of undermining truthseeking.²⁹⁵

What drives Professor Khaitan’s skepticism about activism? In his view, activism compromises a scholar’s ability to seek truth because it “(i) has shorter time and space horizons, (ii) demands an attitude of certainty, and (iii) celebrates and rewards those who realize (material) change.”²⁹⁶ According to Khaitan, “These features are in tension with the academy’s need to provide time and distance for research and reflection, inculcate an attitude of skepticism, and reward truth-seekers and knowledge-creators.”²⁹⁷ Since PLS inherently involves working with organic jurists, many of whom also identify as activists, to advocate material change to legal systems of oppression, I want to address each of these concerns in turn.

First, Khaitan portrays activism as “requir[ing] quick responses to concrete problems in particular places” and concludes that this urgency undermines the quality of scholarship by not permitting time to properly vet one’s scholarship.²⁹⁸ He bases his argument on a rather narrow understanding of activists and their goals. Indeed, the worries that Khaitan articulates—failing to get the law right and providing short-sighted solutions that apply only in narrow circumstances—would be just as problematic for advocates who base their success on their reputation for quality work.²⁹⁹ Short-sightedness is just as costly to activists as it is to scholars. For instance, in her seminal article on human rights fact-finding, Professor Diane Orentlicher articulated the reputational costs for human rights organizations of getting it wrong.³⁰⁰ Advocates, particularly the successful ones, rely on their reputation and credibility to make change.³⁰¹

outcomes (i.e. outcomes that are more than merely discursive) through one’s scholarship.”).

294. *Id.* at 549.

295. *Id.*

296. *Id.* at 551.

297. *Id.*

298. *Id.* at 552.

299. See *id.* at 552–53 (“Because activism’s practically oriented horizons tend to be limited in time and space, a scholactivist motivated by the pursuit of specific outcomes in particular cases is at greater risk of overlooking the potential unintended consequences of their normative claims beyond the temporally and spatially proximate issue at hand.”).

300. See, e.g., Diane Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 *Harv. Hum. Rts. J.* 83, 91 (1990) (showing by historical example that political adversaries will seek to find and publicize mistakes made by human rights organizations).

301. See *id.* at 92–93 (describing the credibility of NGO factfinding as NGOs’ “stock-in-trade”).

As Orentlicher illustrated by documenting the heated attacks against human rights groups by the Reagan administration, which were meant to undermine the groups' credibility, advocates' targets have a strong incentive to discredit them, making the costs of getting it wrong very high.³⁰² As Orentlicher put it, "For NGOs, the stakes in surviving such scrutiny could not be higher. The credibility of their fact-finding is their stock-in-trade."³⁰³ Moreover, activists who are only concerned with short-term wins are unlikely to be successful in the long term.³⁰⁴

Second, Khaitan fears that activism requires "an attitude of certainty" that is ill-suited for the task of producing legal scholarship.³⁰⁵ Khaitan believes that "a 'research' project whose hypothesis the 'researcher' is irrefutably committed to confirming *even before the research has begun* is either not worth pursuing (because the conclusion is known) or simply not real scholarship."³⁰⁶ Khaitan implies that advocates do not have the same "commitment to truth" as scholars do because they aren't open to the possibility that their views are wrong or able to revise their findings in light of evidence contrary to their position.³⁰⁷ Such an approach to legal scholarship is a rather robotic and incomplete understanding of scholarly production. First, it discounts other ways of "knowing." In particular, it diminishes the value of accumulated knowledge (i.e., knowledge built over time through scholarly engagement as well as through practical experience) that might come before putting pen to paper. For the purposes of PLS, it fails to recognize lived experience as a method of knowing. It would disqualify people like my coauthors, Ghani and Rell, from producing scholarship, because their process of building knowledge by reflecting on their experience and theorizing occurred before they decided to coauthor *Redeeming Justice* with me. Second, because PLS often emerges from existing relationships with organic jurists and is best executed when academics are in close proximity to the issues they are studying, the "research" process starts much earlier. In essence, academics engaged in PLS are indeed constantly revising their views in light of contradictory evidence, albeit outside of the formal research process that might begin for a professor when they sit down to start a discrete project.

Scholarly reliance solely on doctrinal analysis also narrows "knowing" down to the interpretation of the black letter of the law—portraying a law

302. See *id.* at 89–92.

303. *Id.* at 92.

304. *Id.* at 93 ("[F]act finding 'works' when it convinces the target audience that the published allegations are well founded.").

305. Khaitan, *On Scholactivism*, *supra* note 28, at 551.

306. *Id.* at 550.

307. See *id.* at 553 ("[A] commitment to truth requires a commitment to skepticism and revisability: a scholar must unqualifiedly and abidingly remain open to the possibility that her hypotheses may be disproved rather than confirmed The default activist attitude of certainty is inherently in tension with the prized scholarly instinct of revisability.").

as discoverable just by looking at the page. If we were to base all our understanding of law solely on what is written in statutes, constitutions, and codes, we would have a very shallow understanding of what the law is. In contrast, learning through the lived experience of those with expertise in law's injustice can reveal the reality of how law functions in a way that simply reading case law or even courtroom observation never could. Moreover, the distinction that Khaitan makes between discursive and material goals is shallow.³⁰⁸ Words have the power to motivate action. To Freire, words are praxis, in that they innately involve reflection and action and "to speak a true word is to transform the world."³⁰⁹ In this view, a word "deprived of its dimension of action" is "an empty word, one which cannot denounce the world, for denunciation is impossible without a commitment to transform, and there is no transformation without action."³¹⁰ When one voices only empty words, critical reflection is undermined too.³¹¹

C. *The Banking Concept of Legal Scholarship*

Another feature shared by the critics of scholarship with social justice aims is their understanding of *who* should produce, engage with, and consume legal scholarship. Namely, in their view, scholarship is the province of academics and best suited exclusively for law reviews. For example, Komárek describes the legal academy as an "enterprise maintained by (and for) all academics."³¹² For that reason, in deciding which activities are deserving of the protections of academic freedom, he believes that the institutions in the legal academy should be the ones deciding "what passes as 'academic.'"³¹³ He also believes that the venue where speech appears should be determinative of whether it is academic.³¹⁴

To a lesser extent, this gatekeeping of legal scholarship by the academy is also reflected in Khaitan's prescription for how to ensure truthseeking in legal scholarship. According to Khaitan, scholars may allow activists and activism to inform their topic of inquiry and post-publication engagement, but the research and theory-building phases risk being corrupted by collaboration with activists and by scholars' own activist

308. See Khaitan, *On Scholactivism*, supra note 28, at 548 (emphasizing the distinction between scholars engaged in "truth-seeking and knowledge dissemination" and those motivated by "specific material outcomes").

309. Freire, *Pedagogy of the Oppressed*, supra note 31, at 87.

310. *Id.*

311. See *id.* ("When a word is deprived of its dimension of action, reflection automatically suffers as well; and the word is changed into idle chatter . . .").

312. See Komárek, *Freedom and Power*, supra note 246, at 437.

313. *Id.*

314. See *id.* at 434.

impulses.³¹⁵ As Khaitan puts it: “Once the broad topic is selected, the scholar takes over. Framing the question, determining the appropriate method, literature survey, evidence gathering, argumentation, writing, workshopping, revising—these are all scholarly activities that must be undertaken with a deep commitment to intellectual virtues shaped solely by the goal of knowledge creation.”³¹⁶

In Khaitan’s view, during this phase of research, working with activists to achieve a material goal also compromises the earnest pursuit of knowledge.³¹⁷ Only after knowledge has been produced is it acceptable to collaborate with practitioners and activists, seemingly because it is within their “*pro tanto* expertise” to translate and disseminate the scholar’s knowledge to the wider public “through [the] regular channels of democratic politics,” like newspapers, legal briefs, interviews, conferences, etc.³¹⁸ Khaitan describes dissemination as “providing explanations that give reasons to others to justifiably accept their truth claims,” but the truth at this stage has already been preordained by the scholar and is immutable.³¹⁹ The scholar’s job, in collaboration with others outside of academia, is to proselytize it.

This understanding of legal scholarship resembles Freire’s “banking concept” of pedagogy, in which teachers deposit their knowledge with their students, who passively receive and collect knowledge.³²⁰ Freire describes the banking method as the following two step process:

The banking concept (with its tendency to dichotomize everything) distinguishes two stages in the educator’s actions. During the first, he cognizes a cognizable object while he prepares his lessons in his study or his laboratory; during the second, he expounds to his students about that object.³²¹

The first stage resembles the understanding of knowledge production, depicted in Khaitan’s scholarly process, in which the scholar “in his study or his laboratory” discovers truth in isolation without undue influence from the outside world. Then, during the second stage, analogous to how teachers “deposit” knowledge under Freire’s banking conception of pedagogy, Khaitan describes the process of how scholars

315. Khaitan, *On Scholactivism*, supra note 28, at 548 (“[W]hile the pre-research choice of the topic of inquiry and post-publication public engagement and dissemination are permitted to the activists inside us, the pursuit of specific material impact through our scholarship is not.”).

316. *Id.* at 555.

317. *Id.* at 551–55 (describing a hypothetical academic as “a *moderate* scholactivist” whose research is compromised because she responds to a call from activists to write an article about pending legislation and overlooks “the potential unintended consequences of [her] normative claims beyond the temporally and spatially proximate issue at hand”).

318. *Id.* at 555–56.

319. *Id.* at 549.

320. Freire, *Pedagogy of the Oppressed*, supra note 31, at 75.

321. *Id.* at 80.

“disseminate . . . knowledge” to the public.³²² As described by Freire, knowledge becomes “a gift bestowed by those who consider themselves knowledgeable upon those whom they consider to know nothing.”³²³ In line with the banking method, the pupil and the wider public are both “receptacles” to be filled with knowledge.³²⁴ Much like the teacher justifies their existence through the absolute ignorance of their pupil, the scholar exists because the rest of society cannot know their reality without the scholar unveiling it.³²⁵ In this view, the scholar’s role is to “regulate” what “truth” is received by the public through a process of filtering out nontruth claims.³²⁶

His solution for checking the activist impulse (or one’s subjectivity) is self-awareness and workshopping scholarship, “especially with colleagues who are likely to be unsympathetic towards [your] claims.”³²⁷ While workshopping scholarship can help a scholar refine their ideas, under a Freirean understanding of knowledge production, gaining self-awareness is not possible in isolation from the broader world. Limiting scholarly engagement to academics, even those who don’t agree with you, results in a distorted sense of the world, informed only by the subjective experience of those who have similar experiences, assumptions, and expertise to your own. This is especially so in the realm of legal scholarship, where academics share a common foundation of a particular modality of legal education that informs one’s understanding of the law. Moreover, with the move toward hyper-credentialism, the legal academy is rife with intellectuals who all have the same markers of success, and those markers are ones of extraordinary privilege and good fortune. Recent statistics suggest that to secure a tenure-track position in the U.S. legal academy, which facilitates the production of legal scholarship, one now must have a degree from Yale or Harvard Law School, a PhD, a clerkship, or an academic fellowship.³²⁸ This path dependence breeds scholarship that is informed by a very narrow breadth of professional and life experience.

In a sense, PLS demands the same level of reflection on one’s own perspectives as Khaitan describes, but through employing a different method. Rather than trying to push aside one’s own positionality, PLS

322. See Khaitan, *On Scholactivism*, supra note 28, at 555.

323. Freire, *Pedagogy of the Oppressed*, supra note 31, at 72.

324. *Id.* (describing how the banking concept of pedagogy turns students “into ‘containers,’ into ‘receptacles’ to be ‘filled’ by the teacher”).

325. *Id.* (“The teacher presents himself to his students as their necessary opposite; by considering their ignorance absolute, he justifies his own existence.”).

326. This replicates “the banking notion of consciousness” in which the “educator’s role is to regulate the way the world ‘enters into’ the students.” *Id.* at 76.

327. Khaitan, *On Scholactivism*, supra note 28, at 555.

328. Sarah Lawsky, *Reported Entry-Level Law School Hiring Spring 2023*, *PrawfsBlawg* (May 15, 2023), <https://prawfsblawg.blogs.com/prawfsblawg/2023/05/lawsky-entry-level-hiring-report-2023.html> (on file with the *Columbia Law Review*).

calls for academically trained researchers to push through it. It requires overcoming “alienating intellectualism” by embracing collective subjectivity as a vehicle for getting closer to the truth.³²⁹ In order to engage in PLS, academics must examine their priors—their prior perspectives, prior academic training, and prior understanding of expertise and how knowledge is produced—through critical dialogue and collective inquiry.

D. *Toward a Relational Theory of Knowledge*

Overall, the debate about the morality of “scholactivism” inherently turns on one’s theory of knowledge. Whereas Khaitan believes that knowledge can only be produced by academics when they are insulated from their desires to obtain change in the material world and from others who share those desires, Freire understands knowledge as emerging “through the restless, impatient, continuing, hopeful inquiry human beings pursue in the world, with the world, and with each other.”³³⁰ The debate thus depends on whether you believe that the “truth” is discovered best in isolation or whether it can only be discovered in dialogue with those viewing it from different vantage points. This divergence in ideology is reflected in how these two intellectuals describe the process of producing knowledge. Khaitan claims that workshopping scholarship can help to ensure its objectivity, but his audience is limited to other scholars.³³¹ In contrast, Freire believes that “[a]uthentic thinking, thinking that is concerned about reality, does not take place in ivory tower isolation, but only in communication.”³³² To Freire, it is not possible to be in dialogue with the world if you “start from the premise that naming the world is the task of an elite.”³³³ This also resonates with how Delgado understands “[r]eality [as] not fixed, not a given” but rather “construct[ed] . . . through conversations, through our lives together.”³³⁴

Freire’s understanding of knowledge production is contrary to the conception of scholarship that Khaitan proposes. If communal dialogue is essential to learning and social transformation, then a researcher cannot simply name social problems on behalf of someone else and then “deposit” their ideas into the world to be consumed.³³⁵ Rather, a researcher must engage with the world and others in it to gain critical consciousness. As described in section II.B, this idea is central

329. Freire, *Pedagogy of the Oppressed*, supra note 31, at 86.

330. *Id.* at 72.

331. Khaitan, *On Scholactivism*, supra note 28, at 555 (noting scholars must engage in “workshopping” and be “generous towards colleagues”).

332. Freire, *Pedagogy of the Oppressed*, supra note 31, at 77 (emphasis omitted).

333. *Id.* at 90.

334. Delgado, supra note 8, at 2439.

335. Au, supra note 34, at 185 (internal quotation marks omitted) (quoting Freire, *Pedagogy of the Oppressed*, supra note 31, at 89).

to Freire's conception of "praxis," which is the core of his epistemology.³³⁶ Freire's liberatory pedagogy in essence requires that researchers interact with the world, which is "inherently ideological, political, and decidedly not neutral."³³⁷ Social change is also intertwined in the process of knowledge production and learning, because the transformation of one's circumstances for the better is the goal.³³⁸

CONCLUSION

Redeeming Justice made me understand legal scholarship's full emancipatory potential. It gave me a living example of how solidaristic scholarship, forged with those with expertise in law's injustice, not only improves legal scholarship by tethering it to the tangible but can also have tangible impacts in the world. While the use of the term "emancipatory" in scholarship can sometimes seem like a buzzword, in the case of *Redeeming Justice*, it is not hyperbole. In many ways, it laid the groundwork for the liberation of my coauthor Rell from a death-by-incarceration prison sentence. This is not to say that I freed him through this piece or with my legal work. Without a doubt, Rell wrote his own way to freedom. *Redeeming Justice* did, however, offer him a platform to make the case for redemption, both his and others'. And through the process of writing *Redeeming Justice*, I came to know him as a friend and advisor, outside of the confines of the attorney-client relationship, which ultimately made me a better advocate for him when the time came for me to argue for his freedom as his attorney later on.

Some might find this mix of advocacy and scholarship unseemly, maybe even immoral, but for me it has been life changing. Writing *Redeeming Justice* was freeing for me too. PLS has allowed me to embrace my entire professional identity, which sometimes includes, but is not limited to, lecturing at a podium or employing doctrinal analysis in legal scholarship. At other times, it involves working in solidarity with community leaders while teaching in a clinic. Both facets of my professional life enrich my thinking and scholarship. Going forward, I might at times follow the conventions of scholarship, but when I do, it won't be out of fear for how others will perceive me. It will be a choice about when doctrinal analysis is needed or when a certain theoretical framework advances my thinking. In full candor, it has also helped me to let go of some aspirations that were inhibiting this embrace. I accept

336. Id. at 180 ("This process of human critical reflection on the world and taking conscious, transformative action on that world is how Freire conceives of 'praxis' . . . which is the core of his epistemology." (citations omitted) (citing Rex Davis & Paulo Freire, *Education for Awareness: A Talk with Paulo Freire*, in *Literacy and Revolution: The Pedagogy of Paulo Freire* 59 (1981))).

337. Id. at 187.

338. Id.

that my devotion to this “unconventional” form of scholarship will likely pose obstacles to the acceptance of me and my work in some circles of the legal academy. But I hold fast in my commitment to PLS because I believe that it can improve the law for the better, and as a dear colleague wisely advised me, you “don’t need a particular status or position to do the work that matters most. What you need is a platform.”

Accordingly, the goal of this piece and our broader PLS project is to build a bigger platform—one that can fit not just Rell, Ghani, and me, but other academic and nonacademic scholars like us.