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FOREWORD

TWO KINDS OF PARTICIPATORY LEGAL SCHOLARSHIP

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Cross-pollination tends to improve legal writing.¹ Examine an issue of a law review from fifty years ago and you will be struck at the stilted, inward-looking, formalistic, heavily-footnoted writing encapsulated in articles discussing other articles and cases that in turn rest on earlier cases for precedential value.² Authors published in legal journals from that period cited law review articles almost exclusively, and only very rarely worked in other disciplines such as history, literature, or even economics.

Starting a few decades ago, this started to change as writers began creating new forms of legal scholarship, some of which were spurred by developments in other fields such as law and literature³ or law and

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¹ By “tends,” I mean that experiences of this kind can often improve a writer’s work-product, even if only slightly.

² See Richard Delgado, *Groundhog Law*, 21 *J.L. Soc’y* 1, 14–17 (2021) (describing how the imperative of citation to previous authors can hinder innovation).

³ See generally James Boyd White, *The Legal Imagination* (45th Anniv. ed. 2018) (a foundational text of the law and literature movement).

economics.⁴ Empirical studies⁵ and law-in-action⁶ showed how law works in the real world. Critical race theorists⁷ and critical legal studies exponents⁸ examined the racial and economic underpinnings of our social system.

No longer were the pages of top law reviews a succession of doctrinal articles.⁹ By most accounts, this change was much for the better.

Rachel López's *Participatory Law Scholarship* is an important addition in this process of expansion.¹⁰ She points out that authors who write with the goal of understanding and improving conditions for a vulnerable group, such as prisoners—and, presumably, others such as people with disabilities, mental inmates, young schoolchildren, and single moms—can often benefit from taking on co-authors from these groups.¹¹

Tapping resources like these can enable a legal writer to ponder real-life circumstances he or she could easily overlook as a person who wears

⁴ See generally Richard A. Posner, *Economic Analysis of Law* (9th ed. 2014) (setting out the main ideas in this field).

⁵ See Empirical Legal Studies, Legal Info. Inst., https://www.law.cornell.edu/wex/empirical_legal_studies [<https://perma.cc/9RZ7-9R78>] (last updated Oct. 2022) (outlining the contours of the field).

⁶ See Our Law-in-Action Tradition, Univ. Wis. L. Sch., <https://law.wisc.edu/law-in-action/> [<https://perma.cc/LU78-NH9K>] (last visited Mar. 28, 2024) (explaining the contributions of such writers as Willard Hurst and Stewart Macauley, who emphasized the importance of studying the actual effects of legal doctrine in the world of people, institutions, and corporations).

⁷ E.g., Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* 3–4 (4th ed. 2023) (discussing the origins and main ideas of this school of thought).

⁸ E.g., David Kairys, *The Politics of Law: A Progressive Critique* 3–4, 16 (3d ed. 1998); Mark Kelman, *A Guide to Critical Legal Studies* (1987) (describing the movement's main concepts).

⁹ See, e.g., Kim Lane Scheppele, Foreword: Telling Stories, 87 *Mich. L. Rev.* 2073, 2073–75 (1989) (an early exposition of the narrative-study movement).

¹⁰ Participatory Law Scholarship is written in collaboration with individuals who are not legal scholars but have personal knowledge of some aspect of society, such as life in a total institution. See Rachel López, *Participatory Law Scholarship*, 123 *Colum. L. Rev.* 1795, 1798–1800 (2021) [hereinafter López, *Participatory*]; Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 *Nw. U. L. Rev.* 315, 319–20 (2021) [hereinafter Carter et al., *Redeeming*]. For a significant forerunner, see V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 *Cardozo L. Rev.* 1453, 1468 (2019).

¹¹ As López puts it: “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 . . . [which is] written in collaboration with authors who have no formal training in the law but rather expertise in its function and dysfunction through lived experience.” López, *Participatory*, supra note 10, at 1795.

a neat suit and goes to work in a law building or library every day.¹² One's co-author may know things the primary writer does not know or may push her in directions she might not have considered.¹³

For these reasons, Participatory Law Scholarship can enrich the work of almost any legal writer, bringing her into contact with people and ideas beyond the ones she encounters daily in a world of casebooks, treatises, and law journals.¹⁴

Just think what some of the new vistas might be. Professor López has already contributed two sparkling articles that focus mainly on the rights of the incarcerated.¹⁵ But other articles in the same vein might center on children trapped in classrooms that demean and disrespect them at every turn and deny them the possibility of realizing their potential.¹⁶ They might include pieces co-authored with mentally ill individuals who are

¹² See, e.g., *id.* at 1853 (noting that this form of writing can “improve[] legal scholarship by tethering it to the tangible” and that it enabled López to improve her thinking and scholarship as well).

¹³ E.g., *id.* at 1800–01 (noting how López's incarcerated co-authors—organic intellectuals in the manner of Antonio Gramsci—had access to knowledge that she lacked).

¹⁴ See *id.* at 1815–16 (noting that partnering with members of an outgroup can help an academic writer see reality more fully than she can see alone); Carter et al., *Redeeming*, *supra* note 10, at 318–19; see also *supra* notes 10–11 and accompanying text (elaborating on the perspective-enhancing quality of participatory scholarship).

¹⁵ López, *Participatory*, *supra* note 10, at 1797–99; Carter et al., *Redeeming*, *supra* note 10, at 324 (describing participatory scholarship with co-authors who are incarcerated).

¹⁶ E.g., Jonathan Kozol, *Savage Inequalities: Children in America's Schools* 104–07 (1991) (discussing some of the horrors of underfinanced, crowded public schools). For a critical view of life in school, see Paulo Freire, *Pedagogy of the Oppressed* (Myra Bergman Ramos trans., 2005).

incarcerated,¹⁷ immigrants struggling to negotiate the Darien Gap,¹⁸ or people working for a minimum wage.¹⁹

Participatory Legal Scholarship provides readers with concrete examples of lived experience, coupled with a sense of urgency to effect change. But writing processes undertaken in partnerships between legal scholars and those with expertise through personal experience can also result in scholarship that is clear and accessible.²⁰ Consider, for example, an article about talented minority youth caught up in the school-to-prison pipeline.²¹ Many schoolchildren are excellent writers, without the many tics and mannerisms some of us reveal when we are unsure of where we are going.²² Moreover, young students might easily know things that we might not: for example, how a single teacher who takes a dislike to a child can poison an entire teaching staff by a few choice remarks in the faculty lounge.

¹⁷ E.g., *Titicut Follies* (Bridgewater Films 1967) (recounting the atrocities of life in an institution for the mentally ill).

¹⁸ See *Behind the Lens: On Migration Paths in Latin America*, Associated Press (Dec. 16, 2022, 2:54 PM), <https://apnews.com/article/colombia-south-america-panama-f586b73668dcd15649b82e79b1929cf> [<https://perma.cc/W8PD-ZNBA>] (graphically depicting life along the pipeline); Jeanine Cummins, *American Dirt* 8–9 (2019) (describing the experiences of a Mexican bookseller forced to leave Mexico with her son to escape retribution by cartels and make their way to the United States as undocumented immigrants); Polly Rosenwaike, *American Dirt Offers a Thrilling Adrenaline Rush*, *Wash. Post* (Jan. 13, 2020, 12:16 PM), https://www.washingtonpost.com/entertainment/books/american-dirt-offers-a-thrilling-adrenaline-rush--and-insights-into-the-latin-american-migrant-experience/2020/01/13/c52e6ea4-3005-11ea-9313-6c89b1b9fb_story.html [<https://perma.cc/XQ9G-4DYK>] (describing the hair-raising events surrounding the main character’s decision to abandon her middle-class life in Acapulco, Mexico and flee to avoid the clutches of vicious cartels angered by her husband’s journalism).

¹⁹ Barbara Ehrenreich, *Nickel and Dimed: On (Not) Getting by in America* 1–3 (2001) (discussing life on a minimum wage).

²⁰ See López, *Participatory*, *supra* note 10, at 1836 (“[O]ur partnership . . . was forged . . . 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.”).

²¹ E.g., *What Is the School-to-Prison Pipeline?*, ACLU (June 6, 2008), <https://www.aclu.org/documents/what-school-prison-pipeline> [<https://perma.cc/V6NE-36HW>] (explaining how minor disciplinary actions may lead a schoolchild into a life of crime and incarceration). A judge might easily miss this connection because the narrative is foreign to his or her experience. See López, *Participatory*, *supra* note 10, at 1822–23 (discussing how even a well-intentioned judge can “kill” narratives that strike him or her as implausible).

²² See, e.g., Elisabeth Egan, *Bronx Students Embraced a Book That Spoke to Them*, *N.Y. Times*, Mar. 18, 2024, at C1.

Thus, in addition to the substantive advantages of greater concreteness and immediacy, co-authorship can simply result in better writing.²³ Adult writers in other disciplines and fields do not write as badly as many of us in the legal profession do. Lynn Hunt, for example, showed how early novelists like Charles Dickens²⁴ and Samuel Richardson²⁵ were able to reach across the page and move readers who formerly knew—or cared—little about women, factory workers, or wretches locked up in debtors' prison.²⁶ Nonfiction writers like Alex Haley and Malcolm X reached large audiences and changed minds.²⁷ And cinéma vérité movie directors like Frederick Wiseman brought viewers inside the world of mental patients locked up in asylums, winning awards and large audiences for their efforts.²⁸

A SECOND SOURCE: THE WORLD WITHIN

Not every legal writer will find it feasible to write in such a fashion. Some will be disabled or located far from the penitentiary or immigrant detention center housing the people with whom he or she would like to write.²⁹ The institution, school, or asylum may have rules against working with the inmates or even gaining access to them.³⁰ You may be disabled and unable to cover the distance between you and them.

Even for the able-bodied, the partners you choose may not cozy up to you. You may be too academic for them. They may not trust people from your world. You two may hit it off, but they may turn out to have little to add to what you know and were prepared to say. After all, you had to

²³ See, e.g., Lani Guinier & Gerald Torres, *Changing the Wind: Toward a Demosprudence of Law and Social Movements*, 123 *Yale L.J.* 2742, 2799–800 (2014).

²⁴ E.g., Charles Dickens, *Oliver Twist* 498–504 (London, Chapman & Hall 1897) (discussing conditions in Newgate prison).

²⁵ E.g., Samuel Richardson, *Clarissa* iii–vii (London, S. Richardson 1748) (covering the fortunes of a young woman of talent trapped by convention and a poor hand dealt her by fate).

²⁶ Lynn Hunt, *Inventing Human Rights: A History* 38–39 (2007) (describing how early novels enabled readers to identify with the fortunes of new groups, such as the poor or women).

²⁷ See generally Malcolm X, *The Autobiography of Malcolm X* (1965) (covering his upbringing, participation in the Nation of Islam, and activism).

²⁸ *Titicut Follies*, *supra* note 17.

²⁹ Michael Olivas, for example, once lamented how his immigration law students were located far from the nearest detention center. *Personal Conversation with Olivas* (c. Fall 1999).

³⁰ In similar fashion, this Author's students have commented that a detention center located only thirty miles away makes it difficult for them to gain access to the inmates once they were there.

make a preliminary decision that they might be the kind of person you would like to work with. This preliminary decision may set parameters, so that you end up telling each other things that the other already knows. Your choice to write participatory research may turn out to require a prefiguring decision to choose this person or that, so that you and your readers gain little beyond what you could each have written alone.

By the same token, your choice of partners may cause confusion because it turns out that the client community is interested in one thing, while you and your legal colleagues are interested in something else. Derrick Bell once described a Black community in the South that was interested in better-funded schools with the same Black teachers and administrators that it had had all along.³¹ Often, though, the lawyer from a think tank or legal defense fund may be more interested in establishing a new legal theory, perhaps one in which schools are integrated by race.³² Or, as Lucie White warned, the client may just want a new pair of Sunday shoes.³³

If you find yourself constantly encountering obstacles such as these, a second place to look for new insights that sidestep many such barriers is, simply, inside yourself—what one might call self-participatory legal scholarship. Thus, a person with a disability might write about the frustration of trying to patronize a favorite restaurant only to encounter a door too narrow to accommodate his or her wheelchair.³⁴ A member of a racial minority may find a book written by this Author that suggests that life is turning him or her into an insect and write about how she felt upon

³¹ Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *Yale L.J.* 470, 477–78 (1976) (discussing divergent aims and interests between clients and lawyers in cases challenging school segregation in the South).

³² *Id.* at 475–77.

³³ How disappointing, the lawyer thinks; why should they settle for that? See Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *Buff. L. Rev.* 1, 48–49 (1990).

³⁴ See, e.g., Ruth Colker, *Law of Disability Discrimination* 603–05 (6th ed. 2007) (discussing remedies for wrongs like these). Incidents like these can be frustrating. See ADA Compliance for Restaurants, *Webstaurant* (Nov. 27, 2023), <https://www.webstaurantstore.com/article/152/ada-compliance-for-restaurants.html#doors> [<https://perma.cc/47G6-JXY8>]; see also *I Went into a Restaurant Last Week and Their Bathroom Doors Were Not ADA Compliant. My Wheelchair Could Not Fit Through*, *Just Answer Legal*, <https://www.justanswer.com/law/ll1m8-went-restaurant-last-week-bathroom-doors.html> [<https://perma.cc/ZAT8-PBCP>] (describing a humiliating encounter with a restaurant’s bathroom door that was too small).

the realization.³⁵ A writer like Peter Gabel might consult a therapist and learn that he and many people like him wonder whether reality and consciousness may be different sides of the same thing.³⁶

Legal writing attenuates the role of the self. It is desiccated. We are taught not to use the word “I.” But you can reconnect with yourself by simply looking within to see if you have a hidden partner that you have yet to bring out into the open, ready to engage during your next adventure in law review writing.

If you are bashful about too much self-disclosure, you can co-author with an academic in a field different from yours but located in the same campus or even law building. Jean Stefancic and I once realized we were both interested in the shape of legal knowledge and ended up co-authoring an article on this subject.³⁷ If you are, like many in this audience, classroom teachers, clinical professors are often located nearby, right in your law school. Maybe they know a great deal about your teaching area from a real-world perspective. David Binder, for example, once told me that one’s theory of the case shifts and changes as the lawyer learns more about it in the course of meetings and interviews with the client and witnesses.³⁸ This realization suggested that legal knowledge itself might be similarly dialogic.

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Today reminds me in some respects of a joyous moment in 1989, when a dozen or so young professors met at a convent outside Madison, Wisconsin, to discuss common interests and coin a name for future civil

³⁵ Richard Delgado, *Metamorphosis: A Minority Professor’s Life*, 53 U.C. Davis L. Rev. Online 1, 1 (2019) (discussing how a sequence of put-downs and minor affronts turned a high-achieving fictional academic into an insect). See generally Delgado, *supra* note 2 (in which the Author takes on an imagined persona to perform an analysis of currents in legal scholarship).

³⁶ Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 Tex. L. Rev. 1563, 1563–64 (1984) (noting that “prevailing legal ideas . . . acquire social meaning and . . . this social meaning helps to constitute the social world”).

³⁷ Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 Stan. L. Rev. 207, 208 (1989) (discussing how widely used research tools can hinder legal innovation).

³⁸ Binder was a Clinical Professor of Law at UCLA during the period in question. See David A. Binder, LLB ’59, June 10, 1934–September 15, 2020, *Stan. Law. Mag.* (Oct. 30, 2020), <https://law.stanford.edu/stanford-lawyer/articles/david-a-binder-llb-59-june-10-1934-september-15-2020/> [<https://perma.cc/72XQ-4YYV>] (discussing his career).

rights scholarship.³⁹ Or another a few years earlier, when an even smaller group met at a historic hotel in Los Angeles to propose a new element for the critical legal studies movement.⁴⁰ Both occasions exhibited the same ferment and the same joy in finding, at last, a group of the like-minded, as does this one in Charlottesville. If someone prepares T-shirts memorializing this symposium, I hope somebody sends me one. I want to wear it around my law school while I'm pondering my next article and wondering who has the nitty-gritty background that I need to make it as engaging and reality-based as it can be.⁴¹

³⁹ Viz, "critical race theory." The ideas had been developing for some time, although they lacked a name and organizational structure. These early authors included Bell, Jr., *supra* note 31; Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049 (1978); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 *Harv. C.R.-C.L. L. Rev.* 133 (1982).

⁴⁰ This was the Critical Legal Studies ("CLS") annual meeting at the Biltmore Hotel in Los Angeles that included a panel session on the advisability of including race, in addition to class, as an explanatory principle for analyzing U.S. society. See Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 *Harv. C.R.-C.L. L. Rev.* 301, 301 n.2 (1987) (describing the event in question).

⁴¹ Angela Harris, *Foreword to Delgado & Stefancic*, *supra* note 7, at xiii, xiii-xvii (describing the small gathering in Madison that she attended as a recent law school graduate, the sense of euphoria and invention the participants experienced, and the T-shirt she wears even today on special occasions).