

## Pedagogy of Prefiguration

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**ABSTRACT.** As our social problems deepen and movements rise to meet those challenges, lawyers must expand their repertoire to support transformative visions. Social-movement organizations are not only developing policy platforms, but also experimenting with legal advocacy and institutional development that meet human needs and strive to resist liberal cooption. Movements are engaged in *prefigurative* thinking, outside of the terms and constraints of our present late-neoliberal moment of global climate emergency and democratic crisis. Building on the work of Davina Cooper on everyday utopias, the Marxist and anarchist theorists of prefigurative politics, and Stefano Harney and Fred Moten on the undercommons, this Essay asks how we may teach ourselves—lawyers and law students—to work with social-movement organizations on projects that prefigure utopian social arrangements. Is utopian imagination antithetical to training for legal practice? How can we help extend utopian imagination to the core social problems on which we work in clinical legal education? Along with several cautionary notes, this Essay suggests three methods with which to experiment: social analysis, radical imagination, and dialogical relationship with collaborators.

### INTRODUCTION

In the last decade—in the teeth of the breakdown of the neoliberal political order, the rise of fascist and white supremacist movements, and accelerating climate change—progressive movement formations in the United States have generated radical critiques of social, political, and legal structures. Movements have intervened across fields of contention, including policing and criminal incarceration, migrant detention and deportation, and global warming and resource extraction. Examples include the policy platform of the Movement for Black Lives,<sup>1</sup>

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1. *Policy Platform, VISION FOR BLACK LIVES* (2022), <https://m4bl.org/policy-platforms> [<https://perma.cc/GU9U-TK6Y>].

the Free Our Future manifesto authored by Mijente,<sup>2</sup> the Green New Deal advocated for by the Sunrise Movement,<sup>3</sup> and the Red Deal by The Red Nation.<sup>4</sup> These movement platforms start by opposing policing and criminalization, surveillance and militarization, fossil-fuel extraction and dependency. Then, they pivot to defining new horizons for public safety, migration, and protection of land and water. Movement activists collectively acquire critical understandings of interlocking structures of power in their areas of focus (as well as across areas of focus), and they think toward drastically redistributing power and reconstructing institutions.

I speculate in this Essay on pedagogies that may enable law students to engage in utopian thinking alongside social-movement collaborators.<sup>5</sup> In the law clinic that I direct, the University of California, Irvine (UCI) Workers, Law, and Organizing Clinic (WLO), I work with law students in collaboration with immigrant- and worker-rights movement organizations. WLO is one of a growing number of law-school clinics that practice law in collaboration with community and movement organizations.<sup>6</sup> In WLO and preceding immigrant-rights clinics that I directed at UCI and City University of New York (CUNY) School of Law,

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2. *Free Our Future: An Immigration Policy Platform for Beyond the Trump Era*, MIJENTE (June 2018), [https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform\\_0628.pdf](https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform_0628.pdf) [<https://perma.cc/X8R7-9DNT>].
  3. See Recognizing the Duty of the Federal Government to Create a Green New Deal, H.R. Res. 109, 116th Cong. (2019); *What is the Green New Deal?*, SUNRISE MOVEMENT (2022), <https://www.sunrisemovement.org/green-new-deal/#resolution> [<https://perma.cc/K2ZD-E58W>].
  4. See *The Red Deal: Indigenous Action to Save Our Earth*, RED NATION, <https://therednation.org/about-maisha> [<https://perma.cc/5TGS-NAUU>].
  5. This Essay is inspired in part by Afrofuturism, as discussed in the clinical pedagogical context. See Norrinda Hayat, *Freedom Pedagogy: Toward Teaching Antiracist Clinics*, 28 CLINICAL L. REV. 149, 162-66 (2021). It is also a pedagogical counterpart to my work on movement law, which is otherwise largely focused on the production of legal scholarship. Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021). While we were writing *Movement Law*, Swethaa Ballakrishnen alerted me to the work of Davina Cooper (cited below), which has been influential in my turn to prefiguration.
  6. For a comprehensive treatment of “community lawyering,” see ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 304-34 (2012). For a detailed treatment of “movement lawyering,” see Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1689-1716. Examples of clinics with similar aims and methods include the City University of New York’s (CUNY’s) Community and Economic Development Clinic, led by Missy Risser-Lovings and John Whitlow, and the University of Illinois Chicago’s Community Enterprise and Solidarity Clinic, led by Renee Hatcher. See *CUNY Community & Economic Development*, CUNY SCH. OF L. (2022), <https://www.law.cuny.edu/academics/clinics/ced> [<https://perma.cc/489E-U97T>]; *Community Enterprise & Solidarity Economy Clinic*, UNIV. OF ILL. CHI. <https://law.uic.edu/experiential-education/clinics/community-enterprise> [<https://perma.cc/U6NC-UA58>].

we have represented migrants in deportation proceedings as well as low-wage workers in cases to recover unpaid wages and combat employer retaliation. We have also worked on policy and know-your-rights campaigns, all with the shared aim of building the bases of our community and movement partners. Our core goal is to deploy law and legal advocacy to help client organizations challenge skewed distributions of economic, social, and political power in their fields of work, whether defined geographically or by issue or sector.<sup>7</sup>

The first part of this Essay briefly focuses on one dimension of social crisis – racialized labor extraction in the low-wage sector – to contextualize the work of WLO. As our social problems deepen and movements rise to meet those challenges, lawyers must expand their repertoire to support transformative visions. Social-movement organizations are not only developing policy platforms, but also experimenting with legal advocacy and institutional development that meet human needs and strive to resist liberal cooption. As discussed further in Part II, movements are engaged in *prefigurative* thinking,<sup>8</sup> outside of the terms and constraints of our present moment of global climate emergency and democratic crisis. I ask in this Essay how we may teach ourselves – lawyers and law students – to work with social-movement organizations on projects that prefigure utopian social arrangements. Is utopian imagination antithetical to training for legal

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7. See Sameer Ashar & Annie Lai, *Access to Power*, 148 *DÆDALUS* 82, 83-85 (Winter 2019) (describing the University of California, Irvine Immigrant Rights Clinic’s theory of intake and case triage).

8. Harsha Walia offers a movement-based definition of “prefiguration” very much in line with the aims of this Essay:

Prefiguration is the idea [that] we have to build our movement cultures and our leftist institutions in the model of the world we are seeking to create. For me, prefiguration is primarily an organizing ethic stemming from feminist and trans and disability justice communities of care. The entire logic of capitalism and colonialism, in addition to being extractive and exploitative, is to break communal ways of living, to sever ties to the land especially for Indigenous communities, to foreclose kinship as a political process and instead generate competitive, individualistic, atomized ways of relating to one another. Prefiguration, then, is a communal ethic: everything that I think and say comes not from me as one individual organizer or writer but as one person in a constellation of comrades and mentors.

*Prefiguring Border Justice: Interview with Harsha Walia*, 6 *CRITICAL ETHNIC STUD.*, Spring 2020, <https://manifold.umn.edu/read/prefiguring-border-justice-interview-with-harsha-walia> [<https://perma.cc/XH6U-YH24>]. Before it was named as such, prefigurative thinking was embedded in the anticolonial and civil-rights movements of the twentieth century. See PAUL RAEKSTAD & SOFA SAIO GRADIN, *PREFIGURATIVE POLITICS: BUILDING TOMORROW TODAY* 4-8 (2020). It defies easy definition, as “it can show you something that can’t be properly explained through words alone: what free, equal, and democratic forms of social organization might really be like.” *Id.* at 12. For further explication of prefigurative thinking, see *infra* Part II.

practice? How can we help extend utopian imagination to the core social problem on which we work in WLO, the challenge of endemic low-wage labor exploitation in the United States? In Part III, this Essay begins to offer provisional answers to these difficult questions using two representative projects currently on our docket: (1) a state-court case against an employer that fired workers during the pandemic due to the workers' health- and safety-focused organizing activities, and (2) a nascent collaboration with an organization developing worker cooperatives in Southern California. The projects prompt and illustrate the need for three interdependent pedagogical methods: shared social analysis, radical imagination, and dialogical engagement with client groups.

These methods are not restricted to law-school clinics. They may be used in a range of pedagogical settings, as well as amongst lawyers in legal-practice organizations and units. Ultimately, the depth of the problems that we face necessitate a redistribution of power and reimagination of institutional arrangements. I argue that with new knowledge bases, liberatory thoughtways, and new ways of learning and knowing from clients, lawyers can facilitate and advance the utopian thinking of social movements. This Essay notes caution on several fronts in Part IV and then concludes.

#### I. RACE, LABOR, EXTRACTION

The problem area in which we work in WLO is that of exploited and expropriated labor.<sup>9</sup> Worker organizing has been constrained by law.<sup>10</sup> At the same

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9. Nancy Fraser distinguishes between the *exploitation* of everyday wage laborers, in relations that skew sharply in the direction of employers, and the *expropriation* of labor, as in slavery, wherein "the commandeered capacities get incorporated into the value-expanding process that defines capital." Nancy Fraser, *Expropriation and Exploitation in Racialized Capitalism: A Reply to Michael Dawson*, CRITICAL HIST. STUD. 163, 167 (Spring 2016). Veena Dubal uses the term *dispossession* to describe how rideshare drivers were stripped of their legal status and forced to bear the risk of a deadly infection. Veena Dubal, *Essentially Dispossessed*, 121 S. ATL. Q. 285, 289 (2022). For the purposes of this Essay, I will refer to these forms of coercion by a single term, *extraction*, which analogizes the use of migrant labor to the acquisition of natural resources in the Global South. In the simplest terms, capital seeks to extract the maximum amount of surplus labor that a worker may have to give, above and beyond the amount of labor that they need to perform to provide for their own subsistence. See 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 647 (Ben Fowkes trans., Penguin Books 1976) (1867).
  10. See, e.g., Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 13-46 (2016); James B. Atleson, *Reflections on Labor, Power, and Society*, 44 MD. L. REV. 841, 842 (1985); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 268-70 (1978).

time, the state has expanded regimes of criminalization, including policing, detention and incarceration, and expulsion and banishment.<sup>11</sup> While these enforcement regimes are ostensibly color-blind, economic elites and the state have used race and racism to justify, implement, and expand these immiserating dynamics.<sup>12</sup> Against this background of worker alienation and carcerality, there are at least three forces that enable the extraction of labor from low-wage workers in the United States:

*Illegality.* The state's withholding of authorization to work is a legal construction; it contributes to maintaining a hierarchical system that enmeshes white supremacy and capitalism.<sup>13</sup> This legal construction takes material form in the federal and state budgets for immigration enforcement, the rapid expansions since 9/11 of agencies such as the U.S. Immigration and Customs Enforcement (ICE) and Customs and Border Patrol, and a hybrid migrant-detention system composed of federal prisons, county jails, and private facilities.<sup>14</sup> This machinery propels the life/death power of the sovereign.<sup>15</sup> The withholding of legal status reinforces racialization and stereotypes about race and criminality and facilitates

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11. On carceral logic across state systems, see DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 32-33 (2022), which discusses child welfare; Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040 1077, 1082-83 (2021), which discusses immigration law; Fanna Gamal, *The Miseducation of Carceral Reform*, 69 UCLA L. REV. 928, 936-42 (2022), which discusses schooling; and Ji Seon Song, *Cops in Scrubs*, 48 FLA. ST. U. L. REV. 861, 863-68 (2021), which discusses healthcare.

12. See, e.g., Song, *supra* note 11, at 869-72.

13. See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 7-9 (2014).

14. See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS* (2021); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 215-40 (2015).

15. See Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 12 (Libby Meintjes trans., 2003). Mbembe writes,

My concern is those figures of sovereignty whose central project is not the struggle for autonomy but *the generalized instrumentalization of human existence and the material destruction of human bodies and populations*. Such figures of sovereignty . . . are what constitute the *nomos* of the political space in which we still live. Furthermore, contemporary experiences of human destruction suggest that it is possible to develop a reading of politics, sovereignty, and the subject different from the one we inherited from the philosophical discourse of modernity. Instead of considering reason as the truth of the subject, we can look to other foundational categories that are less abstract and more tactile, such as life and death.

*Id.* at 14.

racialized law enforcement.<sup>16</sup> At the same time, illegality keeps immigrant labor vulnerable to incarceration and banishment.

*Austerity.* In many parts of the United States, particularly regions deeply impacted by deindustrialization, the only respite from the hollowing out of the social-welfare state in the twenty-first century is funding provided for guard labor:<sup>17</sup> police, prisons, and detention centers.<sup>18</sup> Policy entrepreneurs with a focus on carceral approaches to social problems have found common cause with public and private interests that rely on policing and incarceration for revenue.<sup>19</sup> For example, CoreCivic and the GEO Group lobbied Congress to expand the number of detention beds that it required ICE to fill on any given day.<sup>20</sup> In the public sphere, local sheriffs who control county jail facilities are amongst the most ardent supporters of immigration-enforcement crackdowns.<sup>21</sup> Indeed, the Central Valley of California, where WLO is litigating the COVID retaliation case described in Part III, is a region deeply impacted by austerity and carcerality. GEO Group owns and operates an immigrant detention center in proximity to the plant that employed our clients.

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16. See Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 608-12 (2016) (describing how immigration enforcement is “layered” on racialized criminal legal dysfunction).
  17. See Samuel Bowles & Arjun Jayadev, *Guard Labor* 6-9 (Santa Fe Inst., Working Paper No. 2005-07-030), <https://doi.org/10.7275/1069195> [<https://perma.cc/N7RW-42WR>].
  18. See Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DÆDALUS 74, 75-77 (2010). See, e.g., Sarah Tory, *How Western Towns Profit from Detaining Immigrants*, HIGH COUNTRY NEWS (Nov. 3, 2015), <https://www.hcn.org/articles/in-the-rural-west-confining-illegal-immigrants-means-big-business> [<https://perma.cc/KN9N-VGFK>]; Jessica Villagomez, *A Look at the Midwestern Town of Brazil, the Home of Indiana’s Only Immigration Detention Facility*, LATINO USA (Apr. 9, 2018), <http://latinousa.org/2018/04/09/brazilindianadetentioncenter> [<https://perma.cc/A4Q6-4HA5>]; Jeremy Redmon, *Exclusive: A Look Inside Georgia’s Newest Immigration Detention Center*, ATLANTA J.-CONST. (Mar. 7, 2018), <https://www.ajc.com/news/state--regional-govt--politics/exclusive-look-inside-georgia-newest-immigration-detention-center/MSCIdeHtNOZSOTYyZELDeO> [<https://perma.cc/DMF8-ACL2>].
  19. See S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1442-83 (2012) (advancing a theory of state and local immigration-enforcement expansion driven by policy entrepreneurs and backed by colusive public and private interests).
  20. Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL’Y INST. (May 2, 2018), <https://www.migrationpolicy.org/article/profitting-enforcement-role-private-prisons-us-immigration-detention> [<https://perma.cc/7DDF-DZ3D>].
  21. See, e.g., Jazmine Ulloa, *Sacramento’s Sheriff Asked Trump’s Immigration Chief for Help Fighting California’s ‘Sanctuary State’ Bill*, L.A. TIMES (June 30, 2017, 3:10 PM PT), <http://www.latimes.com/politics/la-pol-sac-sheriff-jones-immigration-forum-20170630-story.html> [<https://perma.cc/Q355-U5U3>].

*Domination.* The criminal-immigration legal system<sup>22</sup> subdues workers who may otherwise exercise voice and autonomy in the workplace.<sup>23</sup> As portrayed in the work of sociologist Shannon Gleeson, employers screen for precarity—in part, borne of legal liminality—when they hire, and they possess the tools to suppress workers who complain or organize.<sup>24</sup> The lack of worker complaints or demands, in turn, keeps severely underresourced labor-protection authorities out of low-wage workplaces.<sup>25</sup> This immiserates migrant low-wage workers, who are bedeviled by grueling schedules and unsafe work conditions, multiple jobs, and constant economic pressure to make ends meet. These conditions have only intensified during the extended COVID-19 pandemic in the United States as low-wage workers have been compelled to work by classification as “essential workers.”<sup>26</sup>

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22. This Essay is premised on the existence of an increasingly integrated immigration and criminal enforcement regime. See, e.g., Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137-40 (2009); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 77-91, 119-35 (2d ed. 2021); Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613, 616-19 (2020); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 379-95 (2006).
23. Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1116, 1143 (2013).
24. See SHANNON GLEESON, PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES 6-7, 133-36 (2016); see also Janet McLaughlin & Jenna Hennebry, *Pathways to Precarity: Structural Vulnerabilities and Lived Consequences for Migrant Farmworkers in Canada*, in PRODUCING AND NEGOTIATING NON-CITIZENSHIP: PRECARIOUS LEGAL STATUS IN CANADA 175, 176 (Luin Goldring & Patricia Landolt eds., 2013) (arguing that employer tactics seen in Canadian foreign-worker programs facilitate the illegalization of workers); Kati L. Griffith & Shannon M. Gleeson, *The Precarity of Temporality: How Law Inhibits Immigrant Worker Claims*, 39 COMPAR. LAB. L. & POL'Y J. 111, 123-27 (2017) (describing the power employers of H-2 visa holders have over those immigrant workers); Susan Bibler Coutin, Sameer M. Ashar, Jennifer M. Chacón & Stephen Lee, *Deferred Action and the Discretionary State: Migration, Precarity and Resistance*, 21 CITIZENSHIP STUD. 951, 953-54 (2017) (defining legal liminality and considering deferred action as a path to liminal status).
25. See, e.g., Fatima Hussein & Tiffany Stecker, *California Warehouse Quotas Law Depends on Those It Shields*, BLOOMBERG L. (Nov. 12, 2021, 5:31 AM), <https://news.bloomberglaw.com/safety/california-warehouse-quotas-law-depends-on-those-it-shields> [https://perma.cc/SJ8-M69P].
26. Aziza Ahmed & Jason Jackson, *Race, Risk, and Personal Responsibility in the Response to COVID-19*, 121 COLUM. L. REV. F. 47, 63 (2021); see also Mechele Dickerson, *Protecting the Pandemic Essential Worker*, 85 LAW & CONTEMP. PROBS. 177, 186-90 (2022) (explaining the incapacity of low-wage workers to demand COVID protections); James J. Brudney, *Forsaken Heroes: COVID-19 and Frontline Essential Workers*, 48 FORDHAM URB. L.J. 1, 7-9 (2020) (describing the vulnerability of frontline essential workers); Sherley E. Cruz, *Essentially Unprotected*, 96 TUL. L. REV. 637, 666-73 (chronicling forced work and weak protections in meat processing); Ruqaiyah Yearby & Seema Mohapatra, *Systemic Racism, The Government's Pandemic Response, and Racial Inequities in COVID-19*, 70 EMORY L.J. 1419, 1433-50 (2021) (same); Catherine Powell, *Color of Covid and Gender of Covid: Essential Workers, Not Disposable People*, 33 YALE J.L. &

WLO works in partnership with migrant-worker centers and progressive union locals to combat these conditions and build worker power in the low-wage sector. Unions in the United States have been diminished in size and power by a nearly seventy-five-year war on labor, waged by capital and supported by politicians across the political spectrum.<sup>27</sup> This war eliminated more progressive threads within the union movement and elevated conservative union leaders who for many years refused to organize migrant workers and sought their deportation and exclusion.<sup>28</sup> Mainstream unions supported the withholding of work authorization for undocumented migrants in the 1986 Immigration Reform and Control Act.<sup>29</sup> Migrant-worker centers rose to fill the organizing gap and pioneered creative, confrontational organizing campaigns in the low-wage sector.<sup>30</sup> They organized through national-origin affinity, as well as by industry. Some worker centers have grown in the last two decades from local organizations into national networks, such as Restaurant Opportunities Centers United,<sup>31</sup> National Domestic Workers Alliance,<sup>32</sup> and National Day Laborer Organizing Network.<sup>33</sup> WLO supports both national and more fledgling local migrant-worker centers, as well as those that now collaborate extensively with unions.<sup>34</sup>

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FEMINISM 1, 15-18 (2021) (explaining the vulnerability of women of color in the COVID economy).

27. See Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOCIO. REV. 513, 513 (2011); Megan Dunn & James Walker, *Union Membership in the United States*, U.S. BUREAU OF LAB. STAT. 2, 5 (Sept. 2016), <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf> [<https://perma.cc/QFQ9-J6GZ>].
28. See John S. Ahlquist, *Labor Unions, Political Representation, and Economic Inequality*, 20 ANN. REV. POL. SCI. 409, 424 (2017) (discussing the historical alliance between labor unions and the Democratic party yet the lack of Democratic-led movement on labor-specific national policy); Rachel Ida Buff, *The Deportation Terror*, 60 AM. Q. 523, 535-536 (2008) (tracing the connection between resistance to the labor movement and conservative efforts to deport foreign-born workers).
29. See NANCY HUMEL MONTWIELER, *THE IMMIGRATION REFORM LAW OF 1986: ANALYSIS, TEXT, AND LEGISLATIVE HISTORY* 10 (1987).
30. See JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 7-26 (2006) (tracing the origins and activities of worker centers in the United States).
31. REST. OPPORTUNITIES CTRS. UNITED, <https://rocunited.org> [<https://perma.cc/W6MR-9DAJ>].
32. NAT'L DOMESTIC WORKERS ALL., <https://www.domesticworkers.org> [<https://perma.cc/36JS-5TMP>].
33. NAT'L DAY LABORER ORG. NETWORK, <https://ndlon.org> [<https://perma.cc/H2NL-9XLY>].
34. See Victor Narro & Janice Fine, *Labor Unions/Worker Center Relationships, Joint Efforts, Experiences*, in *NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY, AND MOVEMENT IN A NEW ECONOMIC AGE* 67, 67-90 (Janice Fine, Linda Burnham, Kati Griffith, Minsun Ji, Victor Narro & Steven Pitts eds., 2018) (describing collaboration between worker centers and unions).



## II. PREFIGURATION IN THE UNDERCOMMONS

So how might prefigurative practice enrich these partnerships? This moment is filled with peril for all but those with extreme wealth. Labor remains relatively weak, and left movements persist in the face of strong countercurrents. It is a moment that requires radical experimentation with new, utopian institutional and social forms. Those utopian forms are relatively small in scale or narrow in application due to the power of capital and the disciplining force of the state. But they implement new institutional arrangements and help us imagine more just and equal social relations on a wider scale.<sup>35</sup> Prefigurative projects fight the despair of ostensibly unchangeable institutional and social conditions and provide a means by which we may engage in collective utopian thinking, unfettered by the ongoing and deprecating operations of capital facilitated by law.<sup>36</sup>

Prefiguration is a particular type of utopian thinking that gestures toward new organizational forms and, as I explore further below, may especially invite a particular form of generative legalism. In order to flesh this out, it is helpful to understand with slightly more precision what we mean when we talk about prefiguration. Writing from a Marxist standpoint, Carl Boggs argues that the prefigurative tradition

expresses three basic concerns:

1. fear of reproducing hierarchical authority relations under a new ideological rationale;
2. criticism of political parties and trade unions because their centralized forms reproduce the old power relations in a way that undermines revolutionary struggles; and
3. commitment to democratization through local, collective structures that anticipate the future liberated society.<sup>37</sup>

Benjamin Franks builds on this third point with an anarchist lens and argues that prefigurative practices “contest existing forms of domination and . . . foreshadow its transformation.”<sup>38</sup> He goes on to say that “the values, activities, and

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35. DAVINA COOPER, *EVERYDAY UTOPIAS: THE CONCEPTUAL LIFE OF PROMISING SPACES* 11 (2014) (“[E]veryday utopias . . . are hugely fruitful places from which to think differently and imaginatively about concepts, particularly when such thinking is oriented to a socially transformative politics.”).

36. *Id.* at 12 (“Everyday utopias condition participants to think, feel, hope, imagine, and experience life differently . . .”).

37. Carl Boggs, *Marxism, Prefigurative Communism, and the Problem of Workers’ Control*, 11 *RADICAL AM.* 99, 103 (1977).

38. Benjamin Franks, *Prefiguration*, in *ANARCHISM: A CONCEPTUAL APPROACH* 28, 33 (Benjamin Franks, Nathan Jun & Leonard Williams eds., 2018).

identities that [prefigurative practices] presently foreshadow are only a synecdoche (a small fragment of the whole), which is necessarily incomplete and provisional. Further, practices are always evolving and can transform with new values arising that represent a radical transcendence of the existing activity.”<sup>39</sup> Chris Dixon situates organizing as prefigurative because it entails “bringing people together in ways that build their collective power—with a horizontal orientation. This orientation aims to foster people’s capacities for critically analyzing the world, taking initiative with competence and confidence, engaging in strategic action, and democratically running their own affairs.”<sup>40</sup>

Building on Marxist and anarchist threads in the literature and focused on experimentation on the left, Amy Cohen and Bronwen Morgan argue for the co-constitutive nature of prefigurative practice and legality.<sup>41</sup> Four characteristics distinguish “prefigurative legality”: (1) the innate pluralism and indeterminacy of law provide a sense of possibility and encourage the use of “legal techniques, meanings, and practices;”<sup>42</sup> (2) in unpredictable and alchemical ways, people acting collectively draw on “legal logics and thoughtways” to constitute themselves;<sup>43</sup> (3) people persist in using legal power “notwithstanding their dissatisfaction, and sometimes deep loss of faith, in the capacity of traditional state-based modes of law reform;”<sup>44</sup> and (4) people do not allow uncertainty about outcomes to inhibit experimentation with legal change.<sup>45</sup> This Essay builds on Cohen and Morgan’s essential synthetic work by asking how lawyers, as agents of legality, may themselves engage in and facilitate prefigurative practice.

These concepts—social critique, local and democratic experimentation, visionary organizing, and generative legality—take us beyond a universe anchored in current social arrangements, one circumscribed by state repression, legislative compromise, and U.S. constitutionalism. In his reading of the George Floyd protests of 2020, Veryl Pow describes “acts of prefiguration to create a sustainable space, free from police violence or state intervention, where land is commonly accessed and resources are managed and distributed directly among grassroots

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39. *Id.* at 38.

40. CHRIS DIXON, ANOTHER POLITICS: TALKING ACROSS TODAY’S TRANSFORMATIVE MOVEMENTS 132 (2014).

41. Amy J. Cohen & Bronwen Morgan, *Prefigurative Legality*, 48 LAW & SOC. INQ. (forthcoming 2023).

42. *Id.* (manuscript at 10).

43. *Id.* (manuscript at 10-11).

44. *Id.* (manuscript at 11).

45. *Id.* (manuscript at 11).

participants.”<sup>46</sup> Drawing on the experiments of the Occupy movement, Michael Haber describes “prefigurative tools” developed by anti-authoritarian activists, including means by which to structure and defend autonomous communities and to ensure that power within groups is shared horizontally.<sup>47</sup> Prefigurative thinking provides a framework for projects that social-movement organizations may use to defy the inevitable retrenchment that follows from significant challenges to the status quo. This way of thinking sharpens our capacity to see nascent prefigurative practice in the world as it is.

Unfortunately, it is not preordained that educational institutions teach students how to engage in prefigurative thinking. The writer Ursula K. Le Guin has written extensively about the hostility in U.S. schooling to imagination, to thinking beyond the here and now:

Imagination is not a means of making money. It has no place in the vocabulary of profit-making. It is not a weapon, though all weapons originate from it, and their use, or non-use, depends on it, as with all tools and their use. The imagination is an essential tool of the mind, a fundamental way of thinking, an indispensable means of becoming and remaining human . . . .<sup>48</sup>

And yet imagination remains under siege in U.S. educational systems, which are under pressure to prepare students to obediently serve capital and develop historical understanding that reinforces current distributions of wealth and power.<sup>49</sup>

Law schools are especially hostile to progressive prefigurative thinking. In Duncan Kennedy’s words, they reproduce hierarchy and conformity.<sup>50</sup> Law—

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46. Veryl Pow, *Grassroots Movement Lawyering: Insights from the George Floyd Rebellion*, 69 UCLA L. REV. 80, 97 (2022). Pow goes on to root prefigurative practices in the Black and queer radical traditions, *id.* at 110-22, and identify new horizons for property law in the prefigurative experiments that took place during and following the George Floyd protests, *id.* at 122-53.

47. Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 FORDHAM URB. L.J. 295, 333-38 (2016).

48. URSULA K. LE GUIN, *The Operating Instructions*, in WORDS ARE MY MATTER 3-4 (2016).

49. See Henry A. Giroux, *When Schools Become Dead Zones of the Imagination: A Critical Pedagogy Manifesto*, 12 POLICY FUTURES IN EDUCATION 491, 497 (2014) (“Neo-liberalism is a disimagination machine that remakes social identity by turning civic subjects into consuming and marketable subjects. As a public pedagogy, it works aggressively in multiple sites—extending from the new screen culture and mainstream media to the schools—to produce desires, needs and values as a form of second nature, internalized as a habit and common sense.”).

50. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 607 (1982) (“Legal education structures the pool of prospective lawyers so that their hierarchical organization seems inevitable and trains them in detail to look and think and act just like all the other lawyers in the system.”).

both its omnipresence as a force of social control and near-total absence as a constraint on capital—is a central arena of movement contestation. Law is exceptionally fraught terrain for radical political imagination due to its use as an instrument of social control,<sup>51</sup> as well as its use to discipline and domesticate disruptive social movements.<sup>52</sup> Legalism in left movement spaces has been the subject of sustained critique,<sup>53</sup> including of its tendency to permeate movement strategy, which social theorist Dylan Riley calls the “juridification of the imagination.”<sup>54</sup>

Stefano Harney and Fred Moten are deeply critical of the university as compromised and carceral, but they also suggest that spaces remain in which academic workers may engage in critical work:

The university needs what [the subversive intellectual] bears but cannot bear what she brings. And on top of all that she disappears. She disappears into the underground, the downlow lowdown maroon community of the university, into the undercommons of enlightenment, where the

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Allegra McLoed emphasizes corporate dependency and conformity:

Law schools are particularly beholden to the corporate sector as the schools depend on law firm salaries and corporate largesse to fund institutional projects and service student debts. Most law school faculty have been trained and shaped by time spent in the nation’s three or four most elite law schools and at elite corporate law firms— institutions wedded to the status quo.

Allegra McLoed, *Law, Critique, and the Undercommons*, in *A TIME FOR CRITIQUE* 254 (Didier Fassin & Bernard E. Harcourt eds., 2019).

51. See Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law’s Uncertain Fate in Modern Society*, 37 *ARIZ. ST. L.J.* 759, 759, 778-801 (2005) (describing the expanding role of the state and its criminal legal system in policing society, particularly at the margins so as to stave off successive crises of capitalism).
52. See, e.g., WARD CHURCHILL & JIM VANDER WALL, *AGENTS OF REPRESSION* (2002) (documenting tactics used by the FBI against the Black Panther Party and the American Indian Movement); Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, 49 *AM. SOCIO. REV.* 552 (1984) (describing the use of the legal system to subdue civil-rights-movement formations).
53. See, e.g., Wendy Brown & Janet Halley, *Introduction to LEFT LEGALISM/LEFT CRITIQUE* 1, 5-16 (Wendy Brown & Janet Halley eds., 2002) (surfacing critiques of the use of legalism in both liberal and left ideation).
54. See Ishan Desai-Geller, *How Useful Is Theory in Moments of Crisis?*, *NATION* (Oct. 28, 2022) (interviewing Dylan Riley, who observes: “[T]here’s a further level of specificity, which is the institutional centrality of the Supreme Court in the United States. This shapes very profoundly the structure of social movements, so that they tend to be oriented toward the court. That’s what I was trying to think about with this idea of the ‘juridification of the imagination.’ History becomes imagined as a series of struggles to rectify the Constitution. . . . [I]f you are imagining history in that way, you are trapped within the context of formal equality and the bourgeois state.”).

work gets done, where the work gets subverted, where the revolution is still black, still strong.<sup>55</sup>

While there are no signs on campus pointing toward the undercommons, we can begin to see “where the work gets done” at a university: amongst the cleaners, kitchen staff, and gardeners; the adjunct faculty who teach large classes for little money; and the teaching assistants who nurture intellect for an uncertain future in the academy. Perhaps we can also glimpse “where the work gets subverted”: small, unfunded projects that matter to families and communities, projects of the head *and* the heart run by dissident graduate students and marginalized faculty, union campaigns of staff workers and teachers, unrelenting critique in journals and on social media, and courageous acts of direct action targeting racist iconography.<sup>56</sup> And there may well be spaces on campus in which “the revolution is still black, still strong”: spaces of solidarity and mutual aid.<sup>57</sup> The question I ask in this Essay is whether law-school clinics may act as an undercommons and bring students, faculty, and movement actors together to enact prefigurative projects, against all the pressures mounted against such work in the university.

Law clinics have the capacity to advance prefigurative thinking because of their position within, but at the edges of, both legal education and legal practice. Excellent legal education teaches about the plasticity of law: the meaning of texts remains contestable, and the application of law to fact situations requires adaptation. Good lawyers devise interpretations of legal texts that advance the interests of their clients and causes, bearing in mind principles and values both internal and external to the texts themselves.<sup>58</sup> Moreover, transactional and legislative lawyers draft new legal texts that structure institutions and relationships.<sup>59</sup> Law

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55. STEFANO HARNEY & FRED MOTEN, *THE UNDERCOMMONS: FUGITIVE PLANNING & BLACK STUDY* 26 (2013).

56. See, e.g., Zoe Greenberg, *Yale Drops Case Against Worker Who Smashed Window Depicting Slaves*, N.Y. TIMES (July 12, 2016), <https://www.nytimes.com/2016/07/13/nyregion/yale-worker-john-c-calhoun-window-slaves.html> [<https://perma.cc/U6VM-Z8QE>].

57. It would be improbable to find such a space at a law school. See Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 21-41 (2021) (describing the ways – numerosity, architecture, curriculum, and pedagogy – in which law schools remain white spaces); Swethaa S. Ballakrishnen, *Law School as Straight Space*, FORDHAM L. REV. (forthcoming 2023) (describing queer marginality in the legal profession and legal education and the importance of looking to the periphery).

58. See William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 552-67 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)) (detailing how “[s]tatutory interpretation is a normative enterprise”).

59. Cf. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1900 (1987) (“Because we use legal symbols to make meaning, our interpretations of these symbols

clinics shaped and driven by collaborations with social-movement and community organizations extend and contextualize classroom lessons about the plasticity and possibility of law through student work on a small sample of cases and projects. Clinical education exists beside both traditional classes focused on legal doctrine, interpretation, and adaptation and seminars in which students take up normative questions untethered from client interests. This proximity and juxtaposition make law clinics potentially well-suited to serve as laboratories of prefigurative legalism.<sup>60</sup>

Further, the relationship of law clinics to legal practice reinforces the potential for prefigurative practice. Clinics are at the edges of legal practice, in most cases because of low case volume, but also due to their funding model. Public-interest legal organizations that represent poor and marginalized people operate under great pressures of case volume and—in the case of federally funded civil legal services—regulatory constraints. By contrast, excellent clinics are funded on an ongoing basis from law-school budgets, as opposed to being dependent on short-term university fundraising or philanthropic grants. Both the duty of loyalty to clients and the principle of academic freedom enable clinical teachers to construct dockets with a rare degree of independence,<sup>61</sup> shielded from the market and state pressure that most progressive civil-society organizations face to reinforce (or not challenge) status-quo distributions of wealth and power.<sup>62</sup> Law clinics are institutions of practice but also exist outside of practice.

Policy platforms, movement demands, and nonreformist reforms<sup>63</sup> find expression in prefigurative projects. Law clinics may engage in experimentation

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can challenge other kinds of power. Legal language itself is powerful.”); Swethaa S. Ballakrishnen, Intha Gnalumum Poy Thaano, *Imagining the Other in Contract*, in *THE CABINET OF IMAGINARY LAWS* 78, 83 (Peter Goodrich & Thanos Zartaloudis eds., 2021) (“Thus, arguing for the imagined, even at the risk of sounding self-indulgently existential, is crucial for us to appreciate sociality, solidarity, and, therefore, contract.”).

60. Excellent clinics have their own accompanying seminar classes that deploy these methods in even closer proximity to client-focused work. See Susan Bryant & Elliott Milstein, *The Clinical Seminar: Choosing the Content and Methods for Teaching in the Seminar*, in *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* 33, 33-56 (Susan Bryant, Elliott S. Milstein & Ann C. Shalleck eds., 2014).
61. See Robert R. Kuehn & Peter A. Joy, *Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility*, 59 *J. LEGAL EDUC.* 97, 107 (2009) (noting the significant discretion of clinicians but also cases in which that discretion was impinged upon by nonlawyers).
62. See Dylan Rodríguez, *The Political Logic of the Non-Profit Industrial Complex*, in *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX* 21, 21-40 (IN-CITE! Women of Color Against Violence ed., 2007).
63. See Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 *UCLA L. REV.* 1544, 1552-53 (2022).

that sets a foundation for ongoing radical visioning and sustains social movements through periods of retrenchment and repression. In the undercommons, visionary movement organizations and movement lawyers may crack open the conflicts that offer a view to new worlds, and they may repoliticize spaces that have been bled of agonistic life by neoliberalism.<sup>64</sup> In this way, clinics may be sites of prefigurative collaboration but also prefigurative themselves. They may sketch the outlines of a different kind of learning community and legal practice collective, of institutions that are accountable to movements and communities rather than to private wealth and state discipline.

### III. METHODS

How can lawyers and law students build a pedagogy that supports and defends prefigurative practice in the heat of the crises that we face together? Can this collaborative work be subversive or even revolutionary? To work through this question, I offer two examples from WLO's docket. We create potentiality in the way that we construct these projects with our collaborators.

In June 2020, a group of workers gathered outside of the packing plant in which they work in the Central Valley of California. They started a picket with signs, as their supervisors watched from inside of the chain link fence at the edges of the work site. Some workers who had tested positive for COVID joined the line from inside of their cars. Led by a forty-two-year-old mother of two, a packing-plant veteran, the workers called on their employer to adopt protective measures in the wake of the rash of COVID infections that ravaged the workforce. In May, coworkers had started to fall sick, bringing the illness to the children and elders in their homes. The company had initially not provided or required the use of PPE in the plant; later, it charged workers eight dollars per mask. By July, 150 workers had been infected in a workforce of approximately 400, and one worker had died.

The conditions at the plant were part of a larger story of essential workers in the low-wage sector subjected to sickness and premature death.<sup>65</sup> COVID tore through communities of Latinx immigrant workers in the Central Valley, much as it did in meat-packing plants in Tennessee and Minnesota.<sup>66</sup> These were essential workers, as defined by the company under federal and state guidelines,

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64. See David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1, 6 (2014) (“[N]eoliberalism has had the consistent purpose of promoting capitalist imperatives against countervailing democratic ones.”).

65. Cf. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (2007) (“Racism, specifically, is the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death.”).

66. See sources cited *supra* note 26.

ensuring that the company could continue to earn revenue from sales of food during the pandemic. They were unable “to control their risk of exposure” to COVID.<sup>67</sup>

With help from the United Farm Workers (UFW),<sup>68</sup> the worker-leaders spoke to reporters and generated a spate of stories on the conditions of work in the plant during the first wave of the pandemic. They led a second walkout the following week after a poor response by the company. The company then began an extended campaign of discipline and terminations aimed at the worker-leaders. One worker was prevented from using the computer that workers used to tally products on the plant floor and eventually discharged. Another was fired immediately. Others, who were hired through temporary staffing agencies, were told that their contracts had been terminated.

UFW was not planning to organize the plant, but it sought to honor the solidarity demonstrated by the workers. WLO came to represent the fired worker-leaders with UFW through the union’s primary outside counsel, Martínez Aguilasochó Law, Inc.<sup>69</sup> Working with UFW lawyers, the WLO clinic team researched potential claims, interviewed workers, and began informal discovery. We drafted a complaint for use in state court.<sup>70</sup> In undertaking these tasks, we continued to guide the work by asking a set of questions: In the context of this type of traditional litigation case, how might a clinic advance a more critical understanding of the conditions to which “essential workers” were subject during the pandemic? How do we accentuate and elevate the worker solidarity that provoked the terminations? How might we depart from standard representation in litigation to think prefiguratively with our clients and collaborators? Toward what future might this work gesture?

A second project is the clinic’s aspiration to help grow worker cooperatives in Orange County, California, in close collaboration with the organization Cooperación Santa Ana (CoopSA).<sup>71</sup> According to Carmen Huertas-Noble, Missy

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67. Ahmed & Jackson, *supra* note 26.

68. *United Farm Workers*, UNITED FARM WORKERS, <https://ufw.org> [<https://perma.cc/P9WQ-6HVC>]. Secretary Treasurer Armando Elenes was the key node of contact between the workers and the UFW.

69. *Our Firm*, MARTÍNEZ AGUILASOCHO L., INC., <https://www.farmworkerlaw.com/ourfirm> [<https://perma.cc/U5KG-ZZNE>]. Edgar Aguilasochó is our co-counsel in the case, and investigator Lizbeth Valdez and paralegals Amanda Muñoz and Aida Sotelo are key facilitators in our contacts with workers and government agencies.

70. Draft Complaint (on file with author). The clinic students who investigated this matter and drafted the complaint were Erin Black, Mason Doidge, and Ethan Smith, supported by Jonas Agle, Victor Avila, and Matthew Sigala.

71. *CooperAcción Curso de Cooperativas de Trabajadores*, COOPERACION SANTA ANA, <https://www.cooperacionsantaana.org> [<https://perma.cc/2JTF-Z33A>]. Project manager Ana



Risser-Lovings, and Christopher Adams, “[W]orker cooperatives subordinate capital to labor—profits are distributed based on the workers’ labor, not their capital investment.”<sup>72</sup> Optimally, workers have a controlling voice in governance through cooperative agreements, benefit from profit-sharing and equitable pay structures, and keep profits in their communities.<sup>73</sup> Moreover, as manifestations of community solidarity, cooperatives are more likely than other corporate entities to preserve and enrich the local environment.<sup>74</sup> However, cooperatives make up a miniscule portion of U.S. economic production for a variety of reasons, most notably the small size of most cooperative businesses, the lack of significant patient capital,<sup>75</sup> and the challenge of building a sustainable market for goods made or services rendered by relatively inexperienced participants.<sup>76</sup> CoopSA seeks to build an ecosystem of worker cooperatives, particularly in sectors in which there is greater economic opportunity in the region. Our work with CoopSA raises questions: Can social enterprises such as worker cooperatives replace or supplement wage labor, particularly in the absence of capital? How can worker cooperatives resist market imperatives and protect collective well-being while generating revenue? The established labor movement is based on a model of industrial production that is significantly diminished in the United States. Our work on cooperatives asks about the ways in which we may organize our economic lives to ensure community autonomy, sustainability, resilience, and prosperity, particularly in the face of climate change.

So how might we develop a set of pedagogical approaches that honors and nurtures prefigurative work and that might reimagine the university and legal practice? Legal educators already unremarkably engage in procapitalist prefigurative work, helping students realize a vision of their lifelong service to capital.

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72. Carmen Huertas-Noble, Missy Risser-Lovings & Christopher Adams, *Scaling Worker Cooperatives as an Economic Justice Tool for Communities in Crises*, in *CRISIS LAWYERING: EFFECTIVE LEGAL ADVOCACY IN EMERGENCY SITUATIONS* 229, 234 (Ray Brescia & Eric K. Stern eds., 2021).
73. *See id.*
74. *See id.*
75. *See* Richard Deeg, Iain Hardie & Sylvia Maxfield, *What Is Patient Capital, and Where Does It Exist?* 14 *SOCIO-ECON. REV.* 615, 615-16 (2016) (“Patient capital, in this context, is long term and not normally withdrawn in the face of short-term vicissitudes of financial markets or temporary falls in [entity] profitability or cash flow.”). *But see* Cary Martin Shelby, *Profiting from Our Pain: Privileged Access to Social Impact Investing*, 109 *CALIF. L. REV.* 1261, 1266-67 (2021) (criticizing social investing as a potential means by which to facilitate further exploitation for its exclusive investor base).
76. *See* Hilary Abell, *Worker Cooperatives: Pathways to Scale*, *DEMOCRACY COLLABORATIVE* 9 (June 2014), <https://institute.coop/sites/default/files/resources/WorkerCoops-PathwaysToScale.pdf> [<https://perma.cc/L6UG-77QT>].

How do we end this functionality in the clinic and turn our resources toward pro-social, radical visions of a future life buoyed by solidarity and love? I suggest three pedagogical methods: deriving a common social analysis, exercising radical imagination, and engaging dialogically with client groups.

*A. Social Analysis*

First, I suggest that a shared social analysis or “sociological imagination”<sup>77</sup> amongst collaborators is essential. We must examine the root causes of the racialized labor extraction of migrant labor in capitalism and ask: how do we understand global historical structures of inequality and the ways in which they manifest in our current moment? A shared knowledge base and analysis could elevate our utopian, prefigurative aspirations and abate the instrumentalization and domestication of legal practice and the university. By understanding background distributions and structures of power, we can alter the work that we do with movements and challenge conventional approaches to public-interest representation. Oscillating between ideas and practice, between history and the present, fuels pedagogical growth, and it disrupts complacency and acquiescence to an established economic and social order.<sup>78</sup>

My students, our movement partners, and I need to engage in social analysis to have clarity about the structural conditions that we face across our projects.

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77. This term was suggested to me by Leonardo Custódio, drawing on C. Wright Mills:

What we experience in various and specific milieux, I have noted, is often caused by structural changes. Accordingly, to understand the changes of many personal milieux we are required to look beyond them. And the number and variety of such structural changes increase as the institutions within which we live become more embracing and more intricately connected with one another. To be aware of the idea of social structure and to use it with sensibility is to be capable of tracing such linkages among a great variety of milieux. To be able to do that is to possess the sociological imagination.

C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* 10-11 (40th anniversary ed. 2000).

78. See COOPER, *supra* note 35, at 37 (“Since neither imagination nor material practice can ever adequately capture or respond to the other, oscillation remains inevitable and ceaseless.”).

Our study of the Black radical tradition and its animating critique of racial capitalism—as set forth by W.E.B. Du Bois,<sup>79</sup> Neville Alexander,<sup>80</sup> Cedric Robinson,<sup>81</sup> Ruth Wilson Gilmore,<sup>82</sup> and Robin D.G. Kelley<sup>83</sup>—can prompt new understanding and cause us to think structurally against the individuation of hegemonic neoliberal discourse. In Gilmore’s words, “capitalism requires inequality and racism enshrines it.”<sup>84</sup> Racial categorization and gendering,<sup>85</sup> amongst other ways in which we divide ourselves, facilitate the relative exploitation of vulnerable subjects at the bottom of social hierarchies,<sup>86</sup> as is occurring with migrant workers globally.<sup>87</sup> Our broader systemic understanding is not

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79. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (Henry Louis Gates ed., Oxford Press 2007) (1935).

80. Peter James Hudson traces the South African thread on racial capitalism to Neville Alexander: [T]he theory of racial capitalism found a home within the writing of many South African activists and intellectuals who had emerged with the Pan Africanist Congress and within the Black Consciousness movement, especially in the wake of the Soweto Uprising. The most prominent figure in this regard was Neville Alexander, an activist and academic from the Eastern Cape involved in the Azanian People’s Organization, the Cape Action League, and the National Forum Committee.

Peter James Hudson, *Racial Capitalism and the Dark Proletariat*, BOS. REV. (Feb. 20, 2018), [https://www.bostonreview.net/forum\\_response/peter-james-hudson-racial-capitalism-and](https://www.bostonreview.net/forum_response/peter-james-hudson-racial-capitalism-and) [<https://perma.cc/2JKV-XVZA>].

81. CEDRIC ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (Univ. of N.C. Press 3d ed. 2000) (1983).

82. GILMORE, *supra* note 65.

83. Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism?*, BOS. REV. (Jan. 12, 2017), <https://www.bostonreview.net/articles/robin-d-g-kelley-introduction-race-capitalism-justice> [<https://perma.cc/WZP2-888W>].

84. Ruth Wilson Gilmore, *The Worrying State of the Anti-Prison Movement*, SOC. JUS. (Feb. 23, 2015), <http://www.socialjusticejournal.org/the-worrying-state-of-the-anti-prison-movement> [<https://perma.cc/QUV8-ZZHK>].

85. See Saru M. Matambanadzo, *Gender, Expulsion, and Law Under Racial Capitalism*, 2 J.L. & POL. ECON. 202, 206 (2022) (“In the system of racial capitalism, gender and race are co-constituting frameworks for the operation of accumulation.”); Charisse Burden-Stelly, *Modern U.S. Racial Capitalism: Some Theoretical Insights*, MONTHLY REV., July-Aug. 2020(2020) (drawing on the work of Claudia Jones to argue that “a focus on the racial foundations of capitalism can open up, as opposed to foreclose, more complex analyses,” including a race/gender analysis); Hudson, *supra* note 80 (citing historian Walter Johnson’s call for “centering black women in the history of the regimes of accumulation and reproduction that created the modern world”).

86. DU BOIS, *supra* note 79, at 2.

87. See HARSHA WALIA, *BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM* 83 (2021) (“In racial-capitalist economies marked by debt and austerity, the consolidation of carceral governance correlates with wealth hoarding, deindustrialization and outsourcing, the dismantling of public services, spatialized segregation between gated mansions and ghettos, and the simultaneous production and policing of precarious employment and unemployment.”).

fixed and uniform across clinic participants and collaborators. We seek a deeper descriptive understanding of the contexts in which racialized labor extraction emerges, so as to develop a more sophisticated and effective praxis. Workers, organizers, students, and teachers engage in social analysis as we build our own knowledge bases—gradually, collectively, and iteratively—and we act on the basis of theories of change that evolve with experience.<sup>88</sup>

Our responses to those structural conditions will fall short time after time if we as teachers and students do not engage in social analysis of the problems on which we are working. For example, there are strong internal and external incentives for clinics to work on small individual cases to recover unpaid wages. Our organizational partners are often flooded with individual claims and struggle to transform individual claims-making into organizing for larger, collective goals. These unpaid-wage cases can provide short-term pedagogical benefits, as they may be used to teach foundational lawyering skills such as fact investigation, client interviewing, and trial advocacy. And they offer a sense of accomplishment, in cases in which we manage to get small but significant sums of money into the pockets of vulnerable workers and their families. However, in working on these cases, we accept the definition of the problem we address to be *wage theft*, rather than *racialized labor extraction*. We may draft a report on wage theft and work with client groups to criminalize it, thereby expanding the carceral system and policing in neighborhoods in which low-wage workers live and work, with far-reaching consequences.<sup>89</sup> We may target companies that are especially bad actors. But we will not be working on the larger problem of *racialized labor extraction*. The autocracy of “private government” in the workplace—in Elizabeth Anderson’s words<sup>90</sup>—will remain intact. We will not critically evaluate the broader context and seek opportunities to attack the interlocking regimes of public and private racialized violence to which low-wage workers are subject.

The pull to act on the basis of fixed knowledge is gravitational. But by engaging in ongoing social analysis, undergirded by critical historical knowledge and collaboration with social movement organizations, lawyers and law students can expand their understanding beyond dominant paradigms. Ongoing social analysis, undergirded by critical historical knowledge, causes teachers and students to make leaps of understanding while collaborating with social movement organizations. Even with shared social analysis, we may not successfully identify and challenge the world-historical conditions that determine how workers fare

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88. See Paulo Freire, *PEDAGOGY OF THE OPPRESSED* 79 (Bloomsbury Academic 2014) (1970) (“Liberating education consists of acts of cognition, not transferrals of information.”).

89. See Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429, 1496–1506 (2021) (tracing the carceral turn in worker-rights advocacy).

90. ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* 6 (2017).

in the low-wage economy. But without it, we do not stand a chance of overcoming the flood of individual unpaid wage claims and, with movement partners, successfully pivoting toward worker solidarity.<sup>91</sup> If we practice solely in a *wage theft* frame, we are likely to channel the energy of our movement partners toward reforms that entrench employer autocracy and exploitation.<sup>92</sup>

Apart from docket selection, clinic participants' shared social analysis deeply informs how we make framing and narrative choices in cases. Recall that in the UFW case that I describe above,<sup>93</sup> five workers lost their jobs after leading protests against their employer and talking to the press in the midst of the pandemic. COVID disproportionately impacted Latinx workers in the Central Valley, as workers were compelled to work in agricultural and food processing without adequate protective measures in place.<sup>94</sup> Families could have been spared the loss of loved ones had employers and the state valued the lives of workers. It was essential that our draft complaint capture the disproportionate impact of the pandemic on Latinx workers and surface the avoidable choices that led to sickness and death. The clinic team included references in the complaint to press accounts and public health studies to substantiate this focus.<sup>95</sup> When we turned to the adverse employment actions, we sought to accentuate the workers' courage in leading protests as they were closely observed by their bosses.<sup>96</sup> The

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91. See Gary L. Blasi, *What's a Theory for? Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIA. L. REV. 1063, 1091 (1994) ("Structuralist theories may not capture all that exists, but ignoring structure risks missing nearly everything.").

92. Amna A. Akbar explicates the radical critique of liberal reform:

Reformism becomes amelioration rather than attack—legitimization rather than delegitimization. . . . Reformism telegraphs to the public that the system, institution, or set of relations it seeks to tweak are fundamentally here to stay. It insulates routine violence and exploitation as unremarkable. Reformism also indicates that the problem is not structural or symptomatic but stray. In form and substance, then, reformism shields the status quo and its protectorate from direct challenges necessary to contest their power and build another world.

Amna A. Akbar, *Reform and Struggles over Life, Death, and Democracy*, 132 YALE L.J. (forthcoming 2023) (manuscript at 43).

93. See *supra* notes 66-70 and accompanying text.

94. See Rong-Gong Lin II, Melody Gutierrez & Anita Chabria, *Coronavirus Ravages California's Central Valley, Following a Cruel and Familiar Path*, L.A. TIMES (Jul. 28, 2020), <https://www.latimes.com/california/story/2020-07-28/coronavirus-ravages-californias-central-valley-following-a-cruel-and-familiar-path> [<https://perma.cc/G9JG-K7NU>]; see also Alejandro Lazo, *As California Struggles with COVID-19, Farmworkers Are Among Most Affected*, WALL ST. J. (Aug. 17, 2020), <https://www.wsj.com/articles/as-california-struggles-with-covid-19-farmworkers-are-among-most-affected-11597665116> [<https://perma.cc/LM5E-7EG4>].

95. Draft Complaint, *supra* note 70, at 2, 5-7.

96. See *id.* at 10-11.

employers continued to view the workers as expendable, just as they had before offering protections from COVID. They assumed that workers would have limited access to state agencies and the press. They were focused on preventing workers from expressing solidarity in the workplace and on penalizing those who had the temerity to defy their power. We could have drafted the complaint without an emphasis on the workers' racially and economically skewed vulnerability to COVID, and we could have merely focused on the employer's violation of retaliation laws.<sup>97</sup> But it was important that it be known—to the judge, the press, the public, opposing counsel, the employers, and the workers themselves—that this was a case about the suppression and elimination of Latinx worker solidarity in the midst of a global public health crisis. This was domination at work. We aspired to convey the strength and bravery of those who were terminated, who through their actions cared about their community of workers and families and undertook direct action to defend it.

The draft complaint in this case is enriched by the broader theoretical understanding and sociological imagination that the frame of racialized labor extraction offers. It is also a pedagogical tool within the clinic, as the structures and conditions about which we read and consider in abstract terms are substantiated by specific facts in direct exchanges with our clients, the experts on the ground.<sup>98</sup> In the course of drafting the complaint, we have the opportunity to try different frames, to see what the evidence supports and which narrative coheres. It may be that some students resist the underlying theory of racial capitalism, and that is fine. My larger pedagogical goal is to demonstrate the unremarkable nature of specific horrific facts, to tie those facts to the conditions facing many others, and to elevate the agency and solidarity of vulnerable workers. It is both the sociological imagination in this particular context and the relationship of theory to facts that students take with them from their clinical practice. However, to advance prefigurative thinking, we need critical social analysis married to radical imagination, to which this Essay now turns.

### *B. Radical Imagination*

Clinics must develop the capacity of teachers and students to imagine new trajectories with our partners and clients. Legal educators generally presume that clinics undertake projects for social impact with the limited pedagogical goal of

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97. See Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 *YALE L.J.* 763, 808-09 (1995) (distinguishing between code pleading, relying on brevity and plain language, and thicker common-law pleading).

98. See Binny Miller, *Give Them Back Their Lives: Client Narrative and Case Theory*, 93 *MICH. L. REV.* 485, 554 (1994).

preparing students for postgraduate practice. We tend to suppress more transformative pedagogical aims. I myself have found that it is challenging, as a neoliberal subject and as a lawyer, to maintain my imaginative capacity in the face of economic and social pressure. Our work with CoopSA is nascent. We have done intakes with a few groups of cooperative collaborators and are just beginning to think alongside CoopSA about an ecosystem of cooperatives in the region. We bring a degree of skepticism as to the sustainability of cooperative business models. We wonder: Can a collective of service professionals succeed in Santa Ana? Can a café or food establishment survive in a highly competitive environment? It is challenging to suspend judgment and to appreciate the broader vision of organizers who are thinking in terms of a regional ecosystem of inter-related businesses.

In the context of litigation, organizers ask us to structure backwards-looking litigation, such as in the UFW case, to honor workers who exercised solidarity and lost their jobs. Organizers help lawyers and clients make the leaps we need to make for these projects to be prefigurative. And yet the prevailing legal ethical rules prescribe particular roles for lawyers and clients and bar third parties from that relationship.<sup>99</sup> The rules structure relationships in which clients have limited say as to the conduct of their cases and are prohibited from explicitly bringing organizers into their decision-making.<sup>100</sup> But it is organizers who often help workers envision possible futures, above and beyond the ones in which they are mired. As lawyers, we must imagine beyond the constraining rules of our profession and the material and ideational austerity so deeply inscribed in our culture and ourselves. In a context in which our clients alone work or starve (or, in many cases, work or go to jail<sup>101</sup>), the voices and visions of organizers enable prefigurative thinking in our collaborations.

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99. See William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 162 (2004). Simon writes,

The professional responsibility norms that inhibit the lawyer from establishing relations with both individuals and organizations with which they are affiliated preclude or constrain some of the more plausible monitoring relations. Unions and insurance companies are sometimes in a good position to monitor the quality of service given to their members or insureds, but the bar has successfully resisted such efforts on the ground that they would jeopardize confidentiality and independence of judgment on behalf of the client.

*Id.*

100. See MODEL RULES OF PRO. CONDUCT r. 1.8, 5.4(c) (AM. BAR ASS'N 2021) (prohibiting third party involvement in client decision-making).

101. See Noah Zatz, Tia Koonse, Theresa Zhen, Lucero Herrera, Han Lu, Steven Shafer & Blake Calenta, *Get to Work or Go to Jail: Workplace Rights Under Threat*, UCLA INST. FOR RSCH. & EMP. 1-2 (Mar. 2016), <https://irle.ucla.edu/wp-content/uploads/2016/03/Get-To-Work-or-Go-To-Jail-Workplace-Rights-Under-Threat.pdf> [<https://perma.cc/887J-WQH7>]; Noah

Davina Cooper describes prefigurative experiments in which collectives and subdivisions of the state act as if the rules and structures granting legitimacy to those actions already exist.<sup>102</sup> In the work that I describe above, we accompany groups of low-wage workers and community residents who prefigure class consciousness, collectivity, and creative generativity.<sup>103</sup> Our clients at the packing plant exercised solidarity and demonstrated what is possible, even under conditions of stress and threat. The workers saw that their well-being was incidental to their employers' aim of maximum production. They worked to convince others to join them outside of the plant. They implicitly threatened ongoing production. They acted collectively to defend everyone in that plant. In doing so, they prefigured an economy centered on the needs of low-wage workers. They neither formed a union nor went on strike, but they did reimagine "their conditions of possibility"<sup>104</sup>: they acted as if the rules and structures legitimizing solidarity, worker control of production, and community care already existed. The worker-leaders were then terminated for these acts.<sup>105</sup>

The litigation documents both the prefigurative nature of the protest activities and the costs imposed on the protagonists.<sup>106</sup> In our effort to tell the story of our clients' courage against outsized obstacles, we engage with them and the UFW organizers and lawyers in prefigurative thinking. How we construct that story makes meaning, beyond the alleged violations of the law.<sup>107</sup> We seek to extend the workers' contestation of the conditions of possibility, stopping the employers from using their power to terminate at-will employees and contracts to reconsolidate power relations in the low-wage sector. Similarly, in the case of our cooperative clients, we are asked to imagine a city of worker-owned businesses, of workers and residents united in their concern for community well-

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Zatz, *Better than Jail: Social Policy in the Shadow of Racialized Mass Incarceration*, 1 J.L. & POL. ECON. 212, 225 (2021) (setting forth a carceral baseline for the low-wage labor market that is lower than the "work or starve" libertarian baseline).

102. Davina Cooper, *Towards an Adventurous Institutional Politics: The Prefigurative 'as If' and the Reposing of What's Real*, 68 SOCIO. REV. 893, 895-97 (2020).

103. See *supra* notes 66-76 and accompanying text.

104. Cooper, *supra* note 102, at 896.

105. Cf. *id.* at 897 ("[S]uch a reimagined environment can also prove shaky and be, at times, sharply contested").

106. But see Carrie Menkel-Meadow, *Unsettling the Lawyers: Other Forms of Justice in Indigenous Claims of Expropriation, Abuse, and Injustice*, 64 U. TORONTO L.J. 620, 631-39 (2014) (arguing for looking beyond litigation and toward "process pluralism" in the context of deeper moral and historical claims).

107. Cf. Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797, 1801-06 (1990) (describing the essential work of progressive lawyers in maintaining historical consciousness and engaging in analytic storytelling).



being. We are asked to provide the legal basis for new relations of trust and mutual aid between groups of producers and creators. This is prefigurative thinking as captured in networks and agreements.<sup>108</sup>

How do we prepare ourselves to engage in these leaps, particularly after a first-year law curriculum that mostly narrows our imaginaries? Most clinics engage in early-semester training that focuses on core areas of substantive law, along with the legal skills that students need to launch into practice immediately. These skills include navigating lawyer-client relationships, interviewing and counseling clients, and conducting basic legal research. As with movement lawyering more generally, it is essential that we teach the canonical lawyering skills with more creativity. We can ask: how might we develop our capacity to exercise radical imagination in relationships with clients? For example, instruction on building lawyer-client relationships should embrace pluralism, indeterminacy, and generativity. There are many ways to build an effective relationship with clients. Gerald López's "rebellious lawyering"<sup>109</sup> and Lucie White's "third dimensional lawyering"<sup>110</sup> speak to that sense of possibility: the idea of an open-source relationship from which many strategies and outcomes are possible. Team collaboration is another skill that many clinics often feature early in the semester, sometimes drawing on business-school literature as teaching material. Instead, we might consider using adrienne maree brown's *Emergent Strategy: Shaping Change, Changing Worlds*, particularly her focus on "collaborative ideation."<sup>111</sup> In brown's telling, "Black Lives Matter" is a product of the collaborative ideation of social movement participants from around the world.<sup>112</sup> It is an example of Afrofuturism, of imagining a circumstance that has not yet arrived: "[W]e bend the world to assert and embody that Black lives matter."<sup>113</sup> By centering Black thought and movement voices over standard materials on collaboration, we

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108. See Amy J. Cohen, *The Rise and Fall and Rise Again of Informal Justice and the Death of ADR*, 54 CONN. L. REV. 197, 228 (2022) ("Hence, relationship building is prefigurative—or perhaps more accurately, it is a way of insisting that transformative justice already exists. One recognizes in the relationships they already have the kinds of reciprocal, solidaristic, nonstatist networks they wish to create at a larger scale. And, in so doing, one aims to build mass grassroots political power.").

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

110. Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 754-66.

111. ADRIENNE MAREE BROWN, EMERGENT STRATEGY: SHAPING CHANGE, CHANGING WORLDS 164-66 (2017).

112. *Id.* at 98.

113. *Id.*

begin to develop radical imagination.<sup>114</sup> While in most cases these will not be the spaces of Black Study to which Harney and Moten refer when they describe the undercommons, imaginative clinics may yet become spaces in which “the work gets subverted.”<sup>115</sup> Brown says, “Imagination is one of the spoils of colonization, which in many ways is claiming who gets to imagine the future for a given geography.”<sup>116</sup> Teaching toward radical imagination is an effort to develop lawyers’ capacity to dream with our collaborators and to work against the mobilization of law in the extension of settler-colonialism.<sup>117</sup> We embark on this work for the pedagogical development of all participants, including law students, worker-clients, organizers, teachers, and allies. We aim to grow our collective capacity to exercise radical imagination, to recognize the co-constitutive relationship between material reality and ideology, and to stave off the threat of instrumentalization, commodification, and domestication. We must do this work together, across our role categories, in dialogue with clients and organizational partners – dialogue to which this Essay turns.

### C. *Dialogical Relationship*

Legal representation fosters a dialogical relationship between law and social movement, as captured and personified in the exchanges between workers, lawyers, and organizers. In the past, I have largely relied on the imaginative capacity of the organizers with whom we work.<sup>118</sup> Drawing on lessons from the literature

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114. See JARED A. LOGGINS & ANDREW J. DOUGLAS, *PROPHET OF DISCONTENT: MARTIN LUTHER KING JR. AND THE CRITIQUE OF RACIAL CAPITALISM* 91 (2021) (“Black study in an afterlife of King’s critique requires not only ideological and epistemic work, but also a fully embodied confrontation with the technologies of racial capitalism: its mechanisms, its material circuits, its institutions that enable and sustain its reproduction.”). I do not mean to fetishize Black thought or movement voices. But freedom, love, and struggle has sharpened the Black Radical Tradition, a set of ideas and ways of knowing that has not received the attention and engagement that it is owed in academic and public discourse. See Robin D. G. Kelley, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* (2002).

115. HARNEY & MOTEN, *supra* note 55.

116. BROWN, *supra* note 111, at 163.

117. Cf. Maggie Blackhawk, *On Power and the Law: McGirt v. Oklahoma*, 2020 SUP. CT. REV. 367, 405 (citation omitted) (“Marginalized and excluded from making meaning within the dominant ideology, Native peoples have long engaged in a process that theorists have termed ‘hermeneutical dissent’ or the creation of new terms in order to make sense of their experience. Generations of advocacy have aimed to codify this new vernacular into law – sovereignty, power, and conquest – thereby making the experience of Native people legible to formal law-making institutions.”).

118. See Sameer M. Ashar, *Fieldwork and the Political*, in *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* 288, 289–90 (Susan J. Bryant, Elliott

on lawyer domination in public-interest cases, lawyers have been taught to defer to clients, organizers, and community organizations in cases and campaigns.<sup>119</sup> While lawyers have great skill that can be used to advance community campaigns, the argument goes, radical vision is not part of the typical lawyer's skill-set.<sup>120</sup> Instead, social movement organizations look to organizers and members to develop campaign goals and the far horizons toward which they aim.

Lawyers in an earlier era of public-interest practice have had close and sometimes contentious relationships with movement collaborators.<sup>121</sup> However, as Scott L. Cummings argues, scholarly accounts of the role of law and lawyers in historical social movements (e.g., school desegregation, abortion rights) “have coalesced around a critical vision . . . that centers on foundational problems of *efficacy* and *accountability*.”<sup>122</sup> Critics have imagined these problems as interwoven: lawyers are less than fully accountable to their social-movement clients and, therefore, end up advancing elite, court-centered legal strategies that undermine movements rather than preserving movements' efficacy.<sup>123</sup> These accounts have traveled into public interest practice and reshaped the field.<sup>124</sup> However, a “new canon” of law and social movements narratives (e.g., immigrant rights, anti-

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S. Milstein & Ann C. Shalleck eds., 2014) (encouraging collaboration with movement organizers to access radical vision).

119. Deference to clients has been canonized in public interest practice as a result of the widespread adoption of client-centered lawyering. See DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 16-19 (1991) (setting out the client-centered approach); CHEN & CUMMINGS, *supra* note 6, at 290-304 (providing a thoughtful survey of the literature, positive and negative, on client-centered lawyering). For my critique, in part, of the client-centered model on the grounds of isolation and diffuse accountability, see Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 *CLINICAL L. REV.* 355, 374-77, 385-89 (2008).
120. See White, *supra* note 110, at 765 (“Nevertheless, fluency in the law – that is, a deep practical understanding of law as a discourse for articulating norms of justice and an array of rituals for resolving social conflict – will greatly improve a person’s flexibility and effectiveness at ‘third-dimensional’ work. An understanding of law as discourse on norms will help him work with the clients to deepen their own consciousness of their injuries and their needs. Knowledge of the law’s procedural rituals will give the group access to a central arena for public resistance and challenge. It is also possible, however, that professional identification as a lawyer can narrow one’s strategic imagination. Perhaps the best arrangement is for lawyer-outsiders to work side by side with outsiders trained in other fields.”).
121. See, e.g., Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 *HARV. C.R.-C.L. L. REV.* 297, 302-04 (1996) (reflecting on the honest – and sometimes argumentative – mutuality of relationships with public interest clients).
122. Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 *WIS. L. REV.* 441, 450 (2018).
123. *Id.* at 450-51.
124. See, e.g., Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 *UCLA L. REV.* 1464, 1490-91 (2017).

sweatshop activism, Black Lives Matter) have cast a new light on relationships between lawyers and social movements.<sup>125</sup> Lawyers can engage in “integrated advocacy,” in which they work in close coordination with organizers and constituents using a range of legal advocacy tactics in and out of court, nested in a broader political campaigns.<sup>126</sup> This orientation leads lawyers out of the trap of deference or domination.<sup>127</sup> Both deference and domination inhibit collaborative prefigurative thinking. As Cohen and Morgan argue convincingly, legality can be generative and core to prefigurative practice.<sup>128</sup> Integrated advocacy permits lawyers to engage in that generative collaboration with movement actors and, therefore, to access the full range of possibility available to social movements.<sup>129</sup>

However, the norms and practices of the legal profession and the collapse of unionism may obstruct truly dialogical relationships between lawyers and worker-clients. Lawyering’s core purpose is traditionally projected narrowly as helping clients navigate systems of legal process. There are provisions in the code of professional conduct that allow lawyers to engage beyond the terms of a case or deal, but these are understood to be exceptional rather than normative.<sup>130</sup> Some corporate lawyers, particularly in-house attorneys, are paid to engage in longer-term dialogical counseling relationships with their clients.<sup>131</sup> However, in worker representation, with the decline of unions as intermediaries, lawyers are less likely to have the capacity or means to engage in long-term dialogical

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125. Cummings, *supra* note 122, at 451-94.

126. *Id.* at 494-95.

127. See William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIA. L. REV. 1099, 1102-08 (1994) (describing public-interest lawyers’ unavoidable values-laden investment in collective struggles, behind a façade of deference).

128. Cohen & Morgan, *supra* note 41 (manuscript at 11).

129. Susan D. Carle’s conception of a power-based calibration of the relationship between lawyers and clients has strong descriptive and normative justifications. See Susan D. Carle, *Power as a Factor in Lawyers’ Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 148-68 (2006). I think it argues for a deeper and more dialogical relationship between lawyers and clients with relatively less power than their adversaries.

130. See Deborah Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1330-33 (2006) (describing lawyer resistance to an expansive moral advisor role). Rhode argues that lawyers who do not act as independent moral actors in relation to their corporate clients thereby threaten the public interest and diminish respect for law. I think lawyers refrain from engaging clients in wide-ranging exchanges on strategy and goals across the private and public sectors. Lawyers may be called upon to challenge social movement organizations that fall prey to the economic pressures mounted against them through philanthropy and other manifestations of capitalist reproduction. Rodríguez, *supra* note 62, at 23-30.

131. However, the cooptation of lawyers in these relationships with corporate clients is well documented. See, e.g., *id.*; Carle, *supra* note 129.

relationships with their clients.<sup>132</sup> Organizers—the intermediaries who would initiate, foster, and facilitate such relationships—are blocked from having a formalized role in the relationship.<sup>133</sup> And class-action practice does not usually foster prefigurative thinking in dialogic relationships between lawyers and clients.<sup>134</sup> The law (and the rules of professional conduct) structures and immunizes the collectivization of and coordination by the owners of capital, and it formally delegates authority to entity managers.<sup>135</sup> By contrast, nonunionized workers are generally alienated and isolated, including in their relationships with lawyers. It is as if corporate lawyers could only have relationships with individual shareholders, but not the entity intermediaries who may speak for the corporation. Workers’ involvement in union and nonunion movement activities and a broader reading of the rules of professional conduct<sup>136</sup> may enable deeper prefigurative collaboration with lawyers.

Our representation of the packing-plant workers demanded a dialogical relationship between the clinic, the workers, and our UFW collaborators. Essential workers forced by law to work during the pandemic turned to a trusted friend in the UFW, who in turn connected them to lawyers. The UFW lawyers filed and lost an initial National Labor Relations Board claim on behalf of the fired workers. They then brought in the clinic to investigate potential retaliation claims under state law. Law students engaged in extended exchanges with the worker-leaders, facilitated and sometimes interpreted by paralegals at the UFW law firm. The case was built by the worker-leaders and an assemblage of UFW staffers, legal workers, and clinic students. Recall the second and third features of Cohen

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132. Jennifer Gordon tells the story of an earlier time when the UFW’s in-house legal department coordinated closely with union leadership and helped build power for workers. Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers’ Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 44-53 (2005).

133. See *supra* notes 99-100 and accompanying text.

134. Cf. Nicholas Alejandro Bergara, Note, *Nipping It in the Bud: Fixing the Principal-Agent Problem in Class Actions by Looking to Qui Tam Litigation*, 97 N.Y.U. L. REV. 275, 280-89 (outlining the gap between principal and agent in class-action litigation). However, in the context of litigation involving holders of Temporary Protected Status (TPS), the National TPS Alliance appears to present a recent exception to the generalized accountability problem that besets most class-action cases. The litigation is nested in legislative and direct-action campaigns and held together by periodic assemblies of holders of TPS from around the country. See *About the National TPS Alliance*, NAT’L TPS ALL., <https://www.nationaltpsalliance.org/about-us> [<https://perma.cc/G3VL-PZEG>]; \*Updated\* *TPS Lawsuit Information*, NAT’L TPS ALL. (2023), <https://www.nationaltpsalliance.org/tps-lawsuit> [<https://perma.cc/QL45-ATML>].

135. Cf. Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 428 (2020) (“[A]ntitrust allocates coordination rights to business firms as such—and . . . these coordination rights are in many cases functionally indistinguishable from those that antitrust denies to activity beyond firm boundaries.”).

136. See, e.g., Carle, *supra* note 129.

and Morgan's prefigurative legality: people constitute themselves collectively in part by drawing on "legal logics and thoughtways" and they persist in doing so in spite of their deep skepticism and loss of faith in liberal legality.<sup>137</sup> Workers, lawyers, and organizers engage in co-constitution and keep each other going in the face of overwhelming odds, losses, cooptation, and retrenchment. They bring their experience in each case and campaign, including the dialogical nature of their relationships with allies new and old, to the subsequent contexts to which their lives take them.

Prefigurative practice requires the pluralist, indeterminate, and generative client relationships described above, rather than the cramped conventional vision captured in the code of professional conduct and often applied in the representation of subordinated clients. Lawyers need to find ways to work dialogically with organizations and collectives in client relationships, so that they may serve as intermediaries and repositories of collective imagination and project new horizons for the work.

#### IV. RESISTING CORRUPTION

We must radically alter our social arrangements if we are to abate economic inequality, re-democratize the state, and adapt to environmental change collectively. But radical posturing in the classroom, even with the use of creative pedagogies, does not necessarily yield radical outcomes. We can use the language of prefiguration but still remain mired in a neoliberal order with antidemocratic elements gathering force.<sup>138</sup> Even accounting for the inherently small scale of prefigurative experimentation, what if these approaches are corrupted<sup>139</sup> before they bear any fruit? Three cautions prompt this question: first, whether deep-seated ideological hostility may compromise the radical politics underlying prefigurative thinking; second, whether lawyers, as agents of the state, can participate in efforts to disrupt authority and move toward just social arrangements and institutions; and third, whether academics might appropriate and dilute radical ideation from movement spaces. This Part examines and responds to each, and it argues for lawyers to take up prefigurative thinking with these cautions in mind.

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<sup>137</sup>. See Cohen & Morgan, *supra* note 41 (manuscript at 10-11).

<sup>138</sup>. See Michael J. Klarman, *The Supreme Court, 2019 Term – Foreword: The Degradation of American Democracy – and the Court*, 134 HARV. L. REV. 1, 106-77 (2020) (examining causes of the incremental abandonment of democratic principles in the United States).

<sup>139</sup>. Corruption, in this sense, means "a departure from the original or from what is pure or correct." *Corruption*, MERRIAM-WEBSTER (Nov. 14, 2022), <https://www.merriam-webster.com/dictionary/corruption> [<https://perma.cc/GSK8-K5MX>].

First, the automatic and nearly unconscious effort to distance oneself from radical ideologies in the United States may detach prefiguration from its Marxist and anarchist foundations, domesticating and deradicalizing the experimentation that we attempt in law clinics. In law, the mainstream of the discipline has viewed collectivity and solidarity with suspicion, instead elevating measures of individualized utility – or law and economics – as the core currency in lawmaking and legal interpretation.<sup>140</sup> Neoliberal austerity has placed questions of social welfare outside of the realm of the contestable, outside of politics.<sup>141</sup> So, can we fathom truly radical prefigurative projects in the midst of our current order?<sup>142</sup> We may not have the imaginative capacity required to envision and realize a social vision untethered from our current dystopian reality. Indeed, one thread of Marxist critique holds that prefiguration is impossible in a feudal or capitalist order and that a movement pursuing revolutionary change may need to deploy means out of accord with the radical pro-social arrangements that the movement seeks to establish.<sup>143</sup> Anarchist principles are, if possible, made even more invisible in our current social context.<sup>144</sup>

Despite this skepticism about the potential of prefigurative practices to yield radical outcomes, there are signs of life, of radical futures. Abolitionist ideation

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140. See Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784, 1801-06 (on the spread of law and economics); Sanjukta Paul, *A Radical Legal Ideology Nurtured Our Era of Economic Inequality*, *AEON* (June 19, 2019), <https://aeon.co/ideas/a-radical-legal-ideology-nurtured-our-era-of-economic-inequality> [<https://perma.cc/ED3C-KHYE>] (describing the rise and dominance of law and economics in the legal academy and the return to pre-New-Deal Lochnerism); Laura Beth Nielsen, Robert L. Nielsen & Ryon Lancaster, *Individual Justice or Collective Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 *J. EMPIRICAL LEGAL STUD.* 175, 178-80 (2010).
141. See Zoë Irving, *The Legacy of Austerity*, 20 *SOC. POL'Y & SOC'Y* 97, 101-04 (2021); Grewal & Purdy, *supra* note 64, at 2-3 (describing the prioritization of capitalist imperatives over democratic demands).
142. See COOPER, *supra* note 35, at 29 (“Trying to build progressive normative concepts out of dominant social practices remains mired in the effects such practices have on the concepts generated – a stuckness that may prove as hard to identify as it is to remove.”).
143. Samuel Farber, *Reflections on “Prefigurative Politics,”* *INT’L SOCIALIST REV.*, Spring 2014, <https://isreview.org/issue/92/reflections-prefigurative-politics/index.html> [<https://perma.cc/M67T-9FQY>].
144. See Benjamin Franks, *Anarchism*, in *THE OXFORD HANDBOOK OF POLITICAL IDEOLOGIES* 385, 385-86 (Michael Freeden & Marc Stears eds., 2013) (“[A]narchism’s rejection of statist politics is misconceived as a rejection of politics in the widest sense . . . and therefore as irrelevant. . . . This widening of the application of the term ‘anarchist’ to obscure its more precise theoretical underpinnings is sometimes the result of a deliberate strategy by opponents. By associating their ideological competitor with any number of social ills, the aim is to discredit it.”).

and solidarity exist today in all corners. People are generating ideas and institutional arrangements that fundamentally counter neoliberal austerity, policing, surveillance, racialization, criminalization, militarization, and human and natural exploitation. People are queering institutions, disrupting hierarchies, and investing in mutual-aid projects.<sup>145</sup> In tangible terms, the vitality of the land and the water persists in spite of every human effort to despoil and exploit. Prefiguration occurs today in the context of our current institutional arrangements. Almost by definition, prefigurative struggle toward a more just, safe, and autonomy-enhancing existence occurs in conditions likely to be hostile to radical ideologies and social arrangements. In a moment of conjuncture,<sup>146</sup> it is incumbent on lawyers to join the struggle with workers and organizers to originate radical arrangements that build with our solidarities and other utopian resources. And perhaps we might ultimately co-develop institutions and ideological precepts that transcend our current reality.

A second caution: as agents of state discipline, lawyers may seem suspect for this prefigurative role. However, it is precisely because law is used to impose social control and disrupt progressive social movements that we must act against its bounds. In the clinic, we see the limits of our liberal political order in every unpaid-wage case that we litigate before agencies and courts. We document conditions of racialized labor extraction in each of these cases. Generations of public-interest lawyers have been taught to build Sisyphean careers in courts that manage unyielding neoliberal immiseration rather than dispense justice.<sup>147</sup>

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145. See DEAN SPADE, *MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT)* (2020) (citing many examples of left movement-based mutual aid projects).

146. See Stuart Hall & Doreen Massey, *Interpreting the Crisis*, *SOUNDINGS*, Spring 2010, at 57, 57 (“A conjuncture is a period during which different social, political, economic and ideological contradictions that are at work in society come together . . . [H]istory moves from one conjuncture to another rather than being an evolutionary flow. . . . Crises are moments of potential chance, but the nature of their resolution is not given.”); John Whitlow, *If You Can Unmake It Here: Crisis, Contingency, and Law in the Making and Unmaking of Neoliberal New York*, 121 S. ATL. Q. 339, 341 (2022) (“Our present, shot through as it is with crises, is best conceived as a terrain of struggle upon which disparate social forces are fighting to dismantle the reigning, if somewhat fractured, common sense of the status quo and to construct a new political economic and ideological architecture out of neoliberalism’s ruins.”).

147. See Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1248 (2022) (“The systematic and low-cost way in which these civil courts process cases – devaluing and commodifying the individuals subject to them and disregarding their procedural and substantive rights – contributes to the narrative that these individuals are not worthy of the justice system that society upholds as the ideal. Instead, the courts interpret and apply law and procedure in ways that facilitate and maintain a racialized underclass that can be used to generate profit for dominant individuals and corporations.”); Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 9 (2022) (“Criminal courts . . . are sites where the cruel minutiae of the carceral system is perpetrated and legalized, allowing the millions of stops, searches, and arrests



By contrast, prefigurative practice permits lawyers and law students to use our powers of observation and documentation to work toward social arrangements that reconfigure the terrain on which we operate in everyday legalism. We teach our students to operate within the bounds of the law as it is, but also to conceive of law as it might be.<sup>148</sup> Prefigurative practice opens vistas to lawyers and law students that are otherwise kept hidden from us. And it provides a means by which to join organizers and other movement activists in imagining alternative legal social orders.<sup>149</sup> Because we are all—lawyers, organizers, workers—subject to capitalist discipline, it is incumbent on all to engage in prefigurative thinking and to prompt each other to persist. Ruth Wilson Gilmore says that “subjectivity is historical becoming.”<sup>150</sup> This Essay is a call for lawyers’ historical becoming through prefigurative practice.

Finally, as Harney and Moten argue, the university is a mechanism of community exploitation that reinforces our current unjust order.<sup>151</sup> Might we as academics be extracting generative ideation from the workers, organizers, and movements with which we work? Clinical professors risk putting movement ideation in the service of our roles providing career skills training and our tenure and promotion cases. But as Harney and Moten also note, academics at the margins of the university may choose to deploy their efforts and the institutional remnants that come into their possession toward radical experimentation.<sup>152</sup> We

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by police each year to become 2.3 million people imprisoned and separated from their families and more than 4.5 million people on probation and parole.”).

148. See Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7, 9 (1989) (“The multiple consciousness I urge lawyers to attain is not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed.”); Kennedy, *supra* note 50, at 599-600 (“What is needed is to think about the law in a way that will allow students to enter into it, to criticize without utterly rejecting it, and to manipulate it without self-abandonment to an alien system of thinking and doing.”).
149. See Whitlow, *supra* note 146, at 341 (“Law, as an instrument of both consent and force, plays a vital and constitutive role in cementing together the social formation under the leadership of a power bloc. As [Stuart] Hall’s work shows, in moments of conjuncture, when the prevailing order is unstable, struggles over law—across various spheres and scales—can mark the emergence of a new crisis settlement, as well as the ascent of a new common sense.”).
150. CUNY Graduate Ctr., *Change: A World Without Prisons—Ruth Wilson Gilmore in Conversation with Mariame Kaba*, YOUTUBE, at 47:40 (Sept. 16, 2020), <https://www.youtube.com/watch?v=oeQmVpnRMYE> [<https://perma.cc/7CYT-HWHR>].
151. HARNEY & MOTEN, *supra* note 55, at 41-43.
152. *Id.* at 28 (“Yet against these precautions stands the immanence of transcendence, the necessary deregulation and the possibilities of criminality and fugitivity that labor upon labor requires. Maroon communities of composition teachers, mentorless graduate students, adjunct Marxist historians, out or queer management professors, state college ethnic studies departments, closed-down film programs, visa-expired Yemeni student newspaper editors, historically black college sociologists, and feminist engineers. And what will the university say of them?”)

create spaces in the undercommons in which we may study together, along with workers and organizers, to challenge social arrangements and originate new ones. Perhaps prefigurative practice also suggests a reconceptualization of law student as legal worker, which surfaces their potential exploitation and challenges traditional academic hierarchy.<sup>153</sup> The law clinic must recreate itself to serve as an undercommons, as a small-scale experiment in what the university and legal practice may become. Prefigurative pedagogies in the undercommons incorporate vigilance against the reproduction of hierarchy. And on a societal level, through prefigurative practice, law clinics might advocate for, document, and support movements as they fight deradicalization, cooption, and retrenchment.

These responses are partial. But in the conjunctural moment in which we exist, lawyers and law students – and the law schools and legal practice organizations in which they work – have little choice but to attempt to generate new approaches and new arrangements. The structure and limits of the law clinic offer a defined space in which to experiment with movement collaborators. It is essential that we use the experimental spaces that we have.

## CONCLUSION

The core purpose of this Essay is to speculate on how lawyers, law schools, and legal practice organizations may participate in the unfolding, imaginative endeavor of left social movements. Lawyers have the capacity to engage in prefigurative thinking with movement partners against significant obstacles, including anesthetizing educational methods and blinkered legalism. The law school clinic may serve as an undercommons: a site of critical social analysis, radical imagination, and expansive dialogical relationships with movement collaborators. In such a law clinic, we can prefigure the world we seek to create. Prefigurative thinking requires that we formulate an expansive, critical understanding of the social problems on which we work in law school clinics. It demands that we work against the neoliberal order in which we are immersed to build solidarities with clients, social movement organizations, and one another. These are audacious and perhaps utopian aspirations. But the current period of evolving disaster demands nothing less of us. How we reconstruct our institutions will determine whether we have a collective future.

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It will say they are unprofessional. This is not an arbitrary charge. It is the charge against the more than professional. How do those who exceed the profession, who exceed and by exceeding escape, how do those maroons problematize themselves, problematize the university, force the university to consider them a problem, a danger?”)

153. Kennedy *supra* note 50, at 602-08 (describing the modeling of hierarchical relationships in legal education).

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