

# Michigan Journal of Race and Law

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Volume 5

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1999

## Lawyering for Social Change: What's a Lawyer to Do?

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### Recommended Citation

Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201 (1999).

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# LAWYERING FOR SOCIAL CHANGE: WHAT'S A LAWYER TO DO?

Kevin R. Johnson\*

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## INTRODUCTION

Although interethnic conflict often grabs the headlines,<sup>1</sup> it generally has gone unexplored in legal scholarship. In *Critical Race Praxis: Race Theory*

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1. See generally Joel Millman, *Going Nativist: How the Press Paints a False Picture of the Effects of Immigration*, COLUM. JOURNALISM REV., Jan./Feb. 1999, at 60–64 (criticizing sensationalistic articles suggesting that conflict and other social ills are attributable to immigration).

and Political Lawyering Praxis in Post-Civil Rights America,<sup>2</sup> Professor Eric Yamamoto significantly contributes to the existing body of civil rights literature by highlighting how such conflict demands our utmost attention.<sup>3</sup> At various times in the United States, African Americans, Asian Americans, Latino/as, Native Americans, and other minority groups have suffered from conflict with each other as well as from their subordinated status in American society.<sup>4</sup> The sensitive issues implicated make inter-

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2. Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Praxis in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997). Professor Yamamoto expands on his theories regarding critical race praxis in ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 128-149 (1999).

3. Other commentators also have considered various aspects of conflict between minority groups, although not as directly in the context of lawyering as Professor Yamamoto does. See, e.g., Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 885-902 (1993) (noting that diversity of opinion among various communities of color presents barriers in recognizing cultural pluralism); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 973-74 (1995) (contending that "[t]raditional race-based classifications and even generic 'minority' categories cannot withstand the pressures of escalating conflicts within our increasingly multiracial minority population," and arguing instead for multicultural empowerment).

In scrutinizing conflict between racial groups, we should be cognizant of tensions within groups that may arise in litigation and political action. See, e.g., *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1118 (9th Cir. 1998) (addressing a discrimination claim by a Hopi Indian against a Navajo employer); Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197, 199-206 (1998) (analyzing conflict between the established Mexican American community and immigrants from Mexico); Yamamoto, *supra* note 2, at 894-95 (recognizing how litigation claiming discrimination against Asian American students by school district divided an Asian American community); Lynda Gorov, *A Divisive Echo of Vietnam: Immigrants in a Free-Speech Standoff*, BOSTON GLOBE, Feb. 19, 1999, at A1 (reporting dispute in California's Vietnamese community about whether Vietnamese shop owner could display a poster of communist leader Ho Chi Minh and a communist flag). Although minority groups may appear homogeneous to the outside observer, this is far from the case. Internal schisms can prove as troublesome as conflicts between groups.

4. See, e.g., THE PRESIDENT'S INITIATIVE ON RACE, THE ADVISORY BOARD'S REPORT TO THE PRESIDENT, ONE AMERICA IN THE 21ST CENTURY—FORGING A NEW FUTURE 33 (1998) (noting existence of controversy on President Clinton's race relations advisory board between Angela Oh, a Korean American, and Dr. John Hope Franklin, a African American, about whether the project should go beyond the "black-white paradigm"); Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"*, 66 S. CAL. L. REV. 1581 (1993) (analyzing Korean American and African American conflict in South Central Los Angeles); Reginald Leamon Robinson, *"The Other Against Itself": Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15 (1993) (discussing the conflict between African American and Korean American communities in Los Angeles); Jack Miles, *The Struggle for the Bottom Rung: Blacks vs. Browns*, ATL. MONTHLY, Oct.

ethnic conflict difficult to discuss, much less analyze. To ignore any racial tensions, however, is to risk the eruption of unfortunate violence like that seen in South Central Los Angeles in May 1992.<sup>5</sup> As a society, we must address the underlying causes of such outbursts or be prepared to face the consequences.

Professor Yamamoto asks that lawyers and scholars squarely confront the interracial divisions that plague our society.<sup>6</sup> In order for such confrontation to take place, he contends that Critical Race Theory, with its focus on racial subordination in American life,<sup>7</sup> must develop a link between legal theory and practice.<sup>8</sup> He proclaims the need for a "[c]ritical race praxis" that "focuses pragmatically on what theories and concepts provide workable approaches for understanding and diminishing oppressive racial conditions."<sup>9</sup> This praxis should "combine[ ] critical pragmatic

1992, at 41, 51 (analyzing conflict between African Americans and Latin American immigrants).

5. See generally *READING RODNEY KING/READING URBAN UPRISING* (Robert Gooding-Williams ed., 1993) (offering various perspectives on the causes of violence).

6. See Yamamoto, *supra* note 2, at 825-27.

7. Critical Race Theory (CRT) considers racial subordination to be a central organizing principle of U.S. society. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). Critical Race theorists, among other things, critique the ability to secure meaningful change in the racial status quo through law. See Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462-63 (1993) (summarizing various CRT tenets, including critique of liberalism). For collections of readings in this area, see *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995), and *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995).

8. As Professor Yamamoto states:

Race theorists, particularly legal race theorists, and political lawyers often seem to operate in separate realms: the former in the realm of ideologies, discursive strategies, and social constructions; the latter in the realm of civil rights statutes, restrictive doctrinal court rulings, messy client management, discovery burdens, and politically conservative judges . . .

Yamamoto, *supra* note 2, at 832 (footnote omitted); see also Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747, 1751 n.12 (1994) (book review) (observing that "[c]ritical race scholars have lagged in their analysis of practice") (citations omitted).

9. Yamamoto, *supra* note 2, at 882; see also John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2161 (1992) (stating that Critical Race Theory's "theory-practice approach, a praxis, . . . finds a variety of emphases among those who follow it, and the concepts are now rather open and still being explored") (footnote omitted); Raneta J. Lawson, *Critical Race Theory as Praxis: A View From Outside the Outside*, 38 HOW. L.J. 353, 366-69 (1995) (calling for Critical Race Theory to develop practical applications for use by minority communities and professionals).

socio-legal analysis with political lawyering and community organizing for justice practice by and for racialized communities.”<sup>10</sup>

Professor Yamamoto in effect advocates bridging the gap between the theoretical and the practical in the law. Although he has progressive ends in mind, this call has come from sources spanning the political spectrum, including the American Bar Association,<sup>11</sup> a prominent federal judge,<sup>12</sup> and critical Latino/a, or LatCrit, theorists who focus on how law contributes to the subordination of Latino/as and others in the United States.<sup>13</sup> Distinct from the general call for practical skills and much like LatCrit theory, Professor Yamamoto’s position has definite political ends. In advocating a practical turn, he explores how attorneys might bring about progressive social change through the courts while reducing conflict between minority groups.<sup>14</sup> His analysis implicates two major questions addressed here: (1) What is the potential for bringing about social change through the legal system? and (2) What duties do attorneys seeking social change owe to their clients?

At the outset, I must confess that my experiences as a lawyer and law professor have indelibly informed my thinking on lawyering for social change. Over the years, both before and after joining the legal academy, I have represented immigrants in administrative and judicial proceedings. Some cases involved individuals seeking asylum who feared political persecution if returned to their respective homelands; other cases dealt with impact litigation<sup>15</sup> in which deeply committed attorneys represented classes of asylum-seekers and other immigrants challenging the immigration laws and their enforcement.<sup>16</sup> As a law professor, I have studied the

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10. Yamamoto, *supra* note 2, at 875 (footnote omitted).

11. See, e.g., AMERICAN BAR ASS’N, SECTION ON LEGAL EDUCATION & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) (advocating increased skills training in law schools).

12. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (expressing concern about disjunction between legal education and profession).

13. See Laura M. Padilla, *LatCrit Praxis to Heal Fractured Communities*, 2 HARV. LATINO L. REV. 375, 378 (1997); Francisco Valdes, *Foreword: Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1, 53 (1997); see also Kevin R. Johnson & George A. Martinez, *Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship*, 53 U. MIAMI L. REV. 1143, 1144–50 (1999) (analyzing longtime activism of Chicano/a Studies scholars and relevance to critical Latino/a theory). See generally THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998) (collecting important LatCrit readings).

14. See Yamamoto, *supra* note 2, at 873–95.

15. See *infra* text accompanying notes 80–88 (defining and discussing impact litigation as a tool for social change).

16. See, e.g., American Immigration Lawyers Ass’n v. Reno, 18 F. Supp. 2d 38, 49–52 (D.D.C. 1998) (dismissing on standing grounds a challenge to the lawfulness of recent

intricacies of the immigration and civil rights laws, as well as the limits of litigation in achieving meaningful social change.<sup>17</sup>

This article analyzes two questions that are raised by Professor Yamamoto's provocative article. Part I argues that any significant transformation of the social structure of United States society is far more likely to occur through mass political movements than through litigation. Consequently, advocates of social change, especially those trained in law, should not expect too much reform from the courtrooms. They instead should consider how traditional legal action might complement and encourage—not replace—community activism and political involvement. Put simply, an exclusive focus on litigation will not accomplish fully the desired objective.

Part II contends that attorneys' ethical duties to their clients limit lawyers' ability to shape the world in the ways they see fit. The constraints increase considerably after the attorney agrees to represent the client. At that point, she must zealously pursue the case in a way that furthers the client's best interests. The attorney primarily must represent the client, although she does have control over how to conduct that representation and may be able to shape the client's case in important ways.

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changes to immigration laws that expedite the removal of asylum applicants from the United States); *aff'd*, 2000 U.S. App. LEXIS 254 (D.C. Cir. Jan. 11, 2000); 2000 U.S. Barapind v. Rogers, No. 96-55541, 1997 WL 267881, at \*6 (9th Cir. May 15, 1997) (reversing denial of asylum claim by Sikh applicant from India); Ceballos-Castillo v. INS, 904 F.2d 519, 520 (9th Cir. 1990) (affirming denial of claim of Guatemalan asylum applicants based on adverse credibility finding); Committee of Cent. Am. Refugees v. INS, 795 F.2d 1434, 1435 (9th Cir. 1986), *amended by* 807 F.2d 769, 770 (9th Cir. 1987) (challenging the lawfulness of Immigration & Naturalization Service policy of detaining and transferring asylum applicants to remote locations where it was virtually impossible for them to secure legal representation); Brief for *Amici Curiae* Law Faculty and Instructors in Support of Respondent, INS v. Elramly, 518 U.S. 1051 (1996) (No. 95-939) (seeking *certiorari* in case involving deportation of noncitizen convicted of certain crimes); Brief for *Amicus Curiae* American Immigration Lawyers Association in Support of Respondent, INS v. Elias-Zacarias, 502 U.S. 478 (1992) (No. 90-1342) (arguing that deference to agency's denial of asylum to Guatemalan teenager was unwarranted); Brief for *Amici Curiae* Members of the United States Senate and Members of the United States House of Representatives in Support of Respondent, INS v. Doherty, 502 U.S. 314 (1992) (No. 90-925) (contending that Attorney General could not permissibly consider foreign policy in denying asylum claim of former Provisional Irish Republican Army member).

17. See, e.g., Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347, 362-67 (1997) (questioning whether law is the best method for bringing about changing the status of people of color in the United States); Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 45-56 (1995) [hereinafter Johnson, *Civil Rights and Immigration*] (expressing concern over the viability of law as an instrument for improving the Latino/a condition).

Combining these two points, I contend that the potential for social change through litigation is limited, and that the discretion of attorneys to promote change through traditional legal remedies is similarly constrained. Consequently, visionaries advocating social change must look well beyond these limited horizons.<sup>18</sup>

My contentions directly relate to Professor Yamamoto's call for a "critical race praxis" with a focus on litigation. In light of the limited ability of litigation to secure change, one must question the ability of a litigation-oriented praxis to achieve such change. Moreover, the attorney's professional responsibilities to clients, specifically to zealously represent one's clients within the bounds of the law, limit his or her power to proceed independently on a path seeking true social transformation. This too affects Professor Yamamoto's endorsement of praxis. Given these constraints, the rare litigation implicating interracial conflict should not be surprising (given the lawyer's duty to clients whatever the conflict) or troubling (given the limits inherent to litigation).

#### I. LITIGATION VERSUS POLITICS IN TYING THEORY TO PRACTICE

Social reformers long have pondered the best means to achieve meaningful and lasting social change. Litigation often has been heavily relied upon as a means to that end.<sup>19</sup> History reveals, however, that the most penetrating changes in society have occurred when litigation complemented a mass political movement, such as the civil rights struggle of the 1950s and 1960s.<sup>20</sup>

Focusing primarily on the impact of lawsuits seeking redress from the courts,<sup>21</sup> Professor Yamamoto considers the place of lawyers in securing social change through litigation. Some critical theorists, however, forcefully contend that litigation alone cannot achieve meaningful change.<sup>22</sup> Many critics argue instead that political organizing, not legal

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18. To some readers, these points might appear rather obvious. Nonetheless, legal scholarship in this realm tends to ignore these truisms. Efforts to improve our society certainly deserve scholarly inquiry. At the same time, we must be realistic about the promise of litigation and lawyers to secure change.

19. See *infra* text accompanying notes 80–88.

20. See generally MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961* (1994) (documenting the efforts by Justice Thurgood Marshall to secure civil rights through litigation as part of the larger civil rights movement).

21. See Yamamoto, *supra* note 2, at 830–39 (analyzing "disjuncture" between Critical Race Theory and legal practice).

22. See generally RICHARD DELGADO & JEAN STEFANCIC, *FAILED REVOLUTIONS: SOCIAL REFORM AND LIMITS OF LEGAL IMAGINATION* (1994) (examining barriers limiting the

remedies, should be the centerpiece of any transformative agenda.<sup>23</sup> In their view, mass mobilization has vastly greater chances of changing the status quo than attempts at using the courts to enforce the conservative rule of law.<sup>24</sup> In Gerald Rosenberg's words:

Normative and constitutional concerns about whether courts ought to be used to further social reform are misplaced if the conditions under which they can do so are so rare as to make the production of that change unlikely. Of greater concern are the implications of seeking significant social reform through the courts for political participation, mobilization, and reform. *Social reformers, with limited resources, forgo other options when they elect to litigate. Those options are mainly political and involve mobilizing citizens to participate more effectively.*<sup>25</sup>

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imaginations of lawmakers and society with regard to bringing about social change); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN THE COURTS BRING ABOUT SOCIAL CHANGE?* 1-8 (1991) (examining limited ability of courts to implement change); GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* 5 (1993) (arguing that, "for structural reasons, the institutional role that the [United States Supreme] Court is destined to play . . . is the role of assuring the continued subordination of racial minority interests").

This principle has also been ably documented in Mexican American civil rights litigation. See George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555, 557-60 (1994) [hereinafter Martinez, *Legal Indeterminacy*]; see also MARY ROMERO, *MAID IN THE U.S.A.* (1992) (documenting abusive practices directed at home service workers despite many legal protections); Guadalupe T. Luna, *En El Nombre de Dios Todo-Poderoso: The Treaty of Guadalupe Hidalgo and Narrativos Legales*, 5 SW. J.L. & TRADE AM. 45, 72-75 (1998) (reviewing the dispossession of Chicano/as from the lands through legal means despite the legal guarantees of the Treaty of Guadalupe Hidalgo); George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 326-27 (1997) (analyzing how Mexican immigrants who successfully established in courts that they were "white" for purposes of naturalization were still denied the societal benefits of "whiteness"). Further discussion of the Court's role in focusing public attention and affecting social change can be found in *LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE* (David A. Schultz ed., 1998).

23. See, e.g., JEREMY BRECHER, *STRIKE!* at vii (1972) (documenting the organization of "ordinary working people" to strike and revolt against industry); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1977) (analyzing critically the history and success of political movements); cf. Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1278 (1993) (articulating how the Supreme Court has offered little protection to poor persons by engaging in toothless review of laws disadvantaging them).

24. See *supra* note 22 (citing authorities).

25. ROSENBERG, *supra* note 22, at 343 (emphasis added); see also Richard L. Abel, *Lawyers and the Power to Change*, 7 LAW & POL'Y 5, 9 (1985) ("[L]egal means of resolving



It is far easier, intellectually and otherwise, for legal scholars and lawyers to focus on intricate litigation strategies. Trained in law, lawyers and law professors almost reflexively look to the law for solutions. However, the total effect of these strategies on the change equation, even if successful, ultimately may prove marginal.

Consider the interaction in recent years between litigation and political action with respect to affirmative action. A successful political response to *Hopwood v. Texas*,<sup>26</sup> the highly publicized court of appeals decision invalidating the University of Texas Law School's affirmative action admissions plan under the Constitution, shows how political action may trump litigation. After much political wrangling in the wake of the court's decision in *Hopwood*, the Texas legislature passed a law making the top ten percent of students from every high school in the state eligible for admission to the University of Texas, thereby ensuring the eligibility of students at predominantly minority high schools.<sup>27</sup> This swift political re-

problems should be avoided whenever possible, for they tend to reinforce the client's experience of powerlessness."); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 742 ("Litigation may falsely raise in the community the expectation that appeal to 'the law' can somehow give it power. Thus, the community may put its energy into litigation instead of the much more difficult work of organizing itself.") (citation omitted). Consistent with the observation that litigation has its limits, evidence suggests that some poverty lawyers have moved away from the adversary process in efforts to help their clients. See Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121, 1169 (reaching this conclusion based on empirical research).

In addition, litigation in certain circumstances will prove of marginal utility without changing the law. See, e.g., Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 344 (1994) (showing discrimination against Latino/as caused by employer sanctions program created by immigration laws); Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1502-06 (1998) (analyzing how conventional wisdom about European immigrants' smooth assimilation into society has influenced development of immigration laws and modern immigration debate).

26. 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). For an analysis of *Hopwood* in light of Supreme Court precedent, see Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1105-11 (1997).

27. According to the Texas statute:

Each general academic teaching institution shall admit an applicant for admission . . . if the applicant . . . is applying for admission from a public or private high school . . . with a grade point average in the top 10 percent of the student's high school graduating class.

TEX. EDUC. CODE ANN. § 51.803(a) (West 1998). The circumstances culminating in the passage of this law are discussed in David Montejano, *On Hopwood: The Continuing Challenge*, in REFLEXIONES 1997: NEW DIRECTIONS IN MEXICAN AMERICAN STUDIES 133

sponse to the judicial prohibition of affirmative action holds the promise of a more diverse student body at the University of Texas than existed in the heyday of affirmative action.<sup>28</sup> Importantly, it highlights the critical distinction between politically- and litigation- oriented means of social change.

Of course, litigation may prove, and historically has proven, to be a valuable tool for successful social movements.<sup>29</sup> This is true even though litigation is far from the exclusive—or optimal—means for securing social change. Rather, one could envision a successful change program employing a mix of political strategies and traditional legal strategies, with the proper allocation of resources devoted to each open to debate.<sup>30</sup>

Distinguishing between litigation and political strategies becomes vitally important in any attempt to make critical theory more practical. Political mobilization is a tricky business beyond the pale of many, perhaps most, lawyers and legal scholars. Depending on diverse historical, social, cultural, economic, and political factors, some activism succeeds while some fails. For example, although a political response prevailed in

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(Neil Foley ed., 1998); see also *The American Bar Association Showcase Program—The Geography of Race in Elections: Color-Blindness and Redistricting*, 14 J.L. & POL. 109, 118–20 (1998) (comments of Professor Gerald Torres describing political dynamics culminating in this response to *Hopwood*); David Orentlicher, *Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L. REV. 181 (1998) (analyzing the possible benefits in the improvement of elementary and secondary education due to the Texas law).

The Texas rule, however, has come under attack from students at predominantly white high schools not in the top 10% of their class who claim that less qualified applicants are being admitted into the University of Texas over them. See Patrick Healy, *Admissions Law Changes the Equations for Students and Colleges in Texas*, CHRON. HIGHER EDUC., May 3, 1998, at A29.

28. See William E. Forbath & Gerald Torres, *Merit and Diversity After Hopwood*, 10 STAN. L. & POL'Y REV. 185 (1999) (offering early results of Texas' plan and stating that it ultimately may lead to steps that would increase diversity at the University of Texas). But see Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 246 (1999) (discussing genesis of Texas law and its limited impact to this point in time in increasing minority enrollment).

29. See ROSENBERG, *supra* note 22, at 342–43 (noting assistance offered to social movements by litigation); Johnson, *Civil Rights and Immigration*, *supra* note 17, at 55–56 (articulating the need for Latino/as to employ a mix of political and legal strategies to achieve social change).

30. See NAN ARON, *LIBERTY AND JUSTICE FOR ALL* 85–114 (1989). This is not to suggest that changes to the laws brought about by political action instantly result in social reform, which is far from true. See, e.g., Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 UCLA L. REV. 677, 743–44 (1997) (analyzing limited impact of school desegregation statutes in securing integrated schools).

Texas in the wake of *Hopwood*,<sup>31</sup> California and Washington saw political forces eliminate affirmative action and other race-conscious remedial programs through a racially-divisive initiative process in which the courts declined to intervene.<sup>32</sup> Political efforts to enact a watered-down version of the Texas plan met substantial resistance in California before it ultimately was adopted.<sup>33</sup>

Given the limits of litigation to achieve change, critical theory focused on litigation rather than political action, as envisioned by Professor Yamamoto, can only hope for incremental change at the margins. Consider the Immigration Law Clinic at the University of California at Davis,<sup>34</sup> part of a national network of eminent immigrant rights advocates. This clinic represents many clients, including ones with difficult cases in which the Immigration & Naturalization Service (INS) seeks to remove them as noncitizens with criminal convictions from the country. Students

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31. See *supra* text accompanying notes 26–28.

32. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 711 (9th Cir.) (upholding Proposition 209, California initiative barring the state from considering race and gender in state programs), *cert. denied*, 522 U.S. 963 (1997); Steven A. Holmes, *Victorious Preference Foes Look for New Battlefields*, N.Y. TIMES, Nov. 10, 1998, at A25 (reporting that Washington voters passed Initiative 200, which eliminated racial preferences); see also Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 194–95 (1997) (analyzing the lawfulness of Proposition 209). The end of affirmative action at the University of California came at a time when African Americans and Latino/as students and faculty were seriously underrepresented as compared to the general population. See Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 616–18 (1998).

One benefit of the recent attacks on affirmative action is that colleges and universities are beginning to seriously reconsider admissions criteria. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 956 (1996) (advocating innovative reevaluation of admissions standards). See generally WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) (studying the benefits of affirmative action); CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (1997) (offering arguments in favor of affirmative action).

33. See Emily Bazar, *Senators Seek Major UC Admissions Reforms*, SACRAMENTO BEE, Feb. 11, 1999, at A4 (discussing opposition in California legislature to proposal that four percent of graduating students from each high school in the state be eligible for admission, combined with demand for sweeping reforms to improve access to the University of California). Despite the resistance, the Board of Regents of the University of California ultimately approved the four percent plan. See Kenneth R. Weiss, *UC Regents OK Plan to Admit Top 4%*, L.A. TIMES, Mar. 20, 1999, at A18.

34. See Kevin R. Johnson & Amagda Pérez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory Into Practice and Practice Into Theory*, 51 SMU L. REV. 1423, 1459 (1998) (analyzing work of this clinic and relationship of clinical legal education to critical theory). Although I serve as an informal advisor to the clinic, I do not hold a formal position in it.

in the Immigration Law Clinic have made a difference in the lives of many clients by successfully resisting the removal of, among many others, a disabled Mexican immigrant, a Mexican asylum applicant fleeing Chiapas, a Laotian woman convicted of a crime, and countless Central American asylum applicants.<sup>35</sup> Moreover, by energizing the student body and spawning interest in immigrant and refugee rights in the community, the clinic has helped raise the consciousness of the local and greater community regarding the United States government's treatment of immigrants. Through presentations and community workshops, as well as efforts to publicize the plight of immigrants, the clinic has combined community education with effective client representation. Clinic alums now work for immigrants and disenfranchised communities with organizations such as California Rural Legal Assistance, Legal Services of Northern California, and AYUDA ("Help" in Spanish), an organization providing much-needed assistance to immigrant women.<sup>36</sup>

Far from unique, the Immigration Law Clinic is one of many programs across the country with attorneys and students working long hours with little fanfare for a good cause.<sup>37</sup> Nonetheless, the nativist beat surged in the 1990s and, due to strong political pressures,<sup>38</sup> Congress responded with radically restrictive immigration legislation and heightened deportation efforts.<sup>39</sup> Consequently, immigration clinics, as well as many

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35. See *id.* at 1440–45. The clinic has also done important impact work, including a recent *amicus curiae* brief involving a Guatemalan asylum applicant in the Supreme Court. See Brief for *Amicus Curiae* in Support of the Respondent, *INS v. Aguirre-Aguirre*, 119 S. Ct. 1439 (1999) (No. 97-1754) (filed on behalf of numerous immigration and human rights organizations).

36. See Johnson & Pérez, *supra* note 34, at 1451–52.

37. See, e.g., Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1495–98 (1998) (describing work of International Human Rights Clinic at St. Mary's University School of Law); Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741, 762–65 (1997) (discussing the Tribal Law Clinic created at the University of Arizona that allows students an opportunity to serve indigenous peoples); see also Johnson & Pérez, *supra* note 34, at 1427 n.18 (listing many law school immigration clinics).

38. For a flavor of the political concerns contributing to the passage of the laws as articulated by one of the leading congressional proponents of restrictive immigration reforms, see Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 883–92 (1997).

39. See PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* 143 (1998) (characterizing 1996 reforms to immigration laws as "the most radical reform of immigration law in decades—or perhaps ever"); see also Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997) (analyzing the impact of 1996 immigration reforms); see, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 423, 440–42, 110 Stat. 1214, 1272, 1276–80 [hereinafter AEDPA] (eliminating judicial review of many removal decisions); Illegal Immigration Reform and

organizations that provide free or low-fee legal advice to noncitizens, now face a vastly increased caseload as more noncitizens require help in the face of accelerating INS deportation efforts.<sup>40</sup> Onerous new legal requirements also make successful representation more difficult.<sup>41</sup> The UC Davis Immigration Law Clinic, for example, found it increasingly difficult to represent its clients as some cases became virtually impossible to win, while others increased substantially in the necessary time commitment. Ultimately, one would have to conclude that litigation-related successes have produced limited benefits to the greater immigrant community.<sup>42</sup> Politics quickly achieved retrograde change in the face of litigation successes and, in the larger scheme of things, litigation offered little resistance.<sup>43</sup>

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Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (IIRIRA) (limiting judicial review of removal decisions, restricting relief from removal, and amending immigration laws in other ways); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 401-51, 110 Stat. 2105, 2261-76 (making many immigrants ineligible for certain federal public benefit programs). See generally IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997) (presenting a collection of essays documenting the resurgence of nativism in the United States).

40. See Mirita Ojito, *Change in Laws Sets Off Big Wave of Deportations*, N.Y. TIMES, Dec. 15, 1998, at A1.

41. See Johnson & Pérez, *supra* note 34, at 1454-55.

42. See *supra* text accompanying notes 19-25. Similarly, if too successful, clinics may suffer political attacks. For example, because of the success of the Tulane Environmental Law Clinic in litigating against toxic polluters, the Louisiana Supreme Court enacted restrictions that effectively barred clinical representation in such cases. See Terry Carter, *One Chief Justice's Political Gumbo*, A.B.A. J. Dec. 1998 at 26, 26.; *Where Business Meets Justice: Louisiana's Legal Clinics*, ECONOMIST, Sept. 12, 1998, at 30-33.

43. See *supra* text accompanying notes 19-33. However, successful litigation softened some of the harshness of the 1996 changes to the immigration laws. See, e.g., *Henderson v. INS*, 157 F.3d 106, 122, 130-31 (2d Cir. 1998) (holding that habeas corpus review of certain removal orders survived new immigration laws), *cert. denied sub nom.*, *Reno v. Navas*, 119 S. Ct. 1141 (1999); *Goncalves v. Reno*, 144 F.3d 110, 112-13 (1st Cir. 1998) (same), *cert. denied*, 119 S. Ct. 1140 (1999). But see *Richardson v. Reno*, 162 F.3d 1338, 1356 (11th Cir. 1998) (holding that habeas review is not available), *vacated and remanded*, 119 S. Ct. 2016 (1999); *Yang v. INS*, 109 F.3d 1185, 1195-96 (7th Cir.) (same), *cert. denied*, 522 U.S. 1027 (1997). The current situation facing immigrants is reminiscent of a century ago, when despite litigation victories and political mobilization, the Chinese American community could not halt the punitive federal, state, and local measures directed at them. See generally CHARLES J. McCLAIN, IN SEARCH FOR EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH CENTURY AMERICA (1994) (documenting the history of legal and social discrimination directed at Chinese and Chinese Americans in the United States).

One initially might conclude that immigration law and policy is exceptional because noncitizens have precious few rights<sup>44</sup> and cannot participate in the political process.<sup>45</sup> However, such exceptionalism is far from self-evident. Legal services, prison, and civil rights organizations across the country face remarkably similar problems. Congress, for example, has shackled federally-funded legal service groups serving poor and working people through drastic budget cuts; strict limitations on political and lobbying activities; elimination of potential attorney fee recovery in successful litigation; bars on class actions, and thus impact litigation; preventing participation in abortion, prison, and welfare litigation; and prohibitions on the representation of noncitizens in immigration matters.<sup>46</sup> The Antiterrorism and Effective Death Penalty Act has limited habeas corpus review of death penalty cases.<sup>47</sup> Similarly, Congress passed the Prison Litigation Reform Act<sup>48</sup> in 1996 with the intent of eliminating the changes secured by past litigation and discouraging future civil rights lawsuits by prisoners.<sup>49</sup>

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44. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (emphasizing the legislature's power to exclude noncitizens with very limited judicial oversight); *Mathews v. Diaz*, 426 U.S. 67, 69 (1976) (holding that Congress could restrict public benefits to legal immigrants). The so-called "plenary power doctrine" effectively precludes judicial review of Congress's substantive immigration law decisions. See, e.g., GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996).

45. See Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1139 (analyzing political vulnerability of noncitizens).

46. See *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 759 (2d Cir. 1999) (refusing to enjoin many of the Congressional restrictions on Legal Service Corporation (LSC) funding); *Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017, 1021-22 (9th Cir.) (upholding various Congressional restrictions imposed in 1996 in the face of First Amendment and other challenges), *cert. denied*, 119 S. Ct. 539 (1998). See generally J. Dwight Yoder, Note, *Justice or Injustice for the Poor?: A Look at the Constitutionality of Congressional Restrictions on Legal Services*, 6 WM. & MARY BILL OF RTS. J. 827 (1998) (compiling restrictions imposed on LSC funding and outlining constitutional challenges to them).

47. See AEDPA, *supra* note 39; see also Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2550 (1998) (discussing how habeas corpus provisions of AEDPA, along with other new laws, "sought to limit not merely federal as distinguished from state court authority, but judicial authority generally . . .") (footnote omitted).

48. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-10, 110 Stat. 1321, 1321-66-1321-77 (1996) (PLRA) (codified as amended at 18 U.S.C. § 3626, 28 U.S.C. § 1915, 28 U.S.C. § 1346, 42 U.S.C. § 1997).

49. Various provisions of the AEDPA and PLRA have been the subject of criticism. See Deborah Decker, Comment, *Consent Decrees and the Prison Litigation Reform Act of 1995: Usurping Judicial Power or Quelling Judicial Micro-Management*, 1997 WIS. L. REV. 1275, 1276 (analyzing the constitutional issues raised by the PLRA's limitation of consent

Not ignoring this dynamic, Professor Yamamoto observes that the critique of traditional civil rights law reform efforts "leave[s] unaddressed the ways in which political lawyering can meet contemporary demands of frontline antistatization practice."<sup>50</sup> This, however, leaves open the question of what precisely "political lawyering" is. Matters are complicated by the fact that the most pessimistic of the critics downplay the changes that can be achieved through law and, by implication, through any sort of "lawyering."<sup>51</sup> It is therefore unclear why there should be a significant focus on lawyering of any kind, political or otherwise.

This is not simply an esoteric, semantic quibble. Political lawyering could mean bringing lawsuits as part of a comprehensive impact strategy.<sup>52</sup> Alternatively, it could involve politicization of a trial to obtain publicity for a case or cause.<sup>53</sup> Still again, political lawyering might mean that a lawyer would focus her efforts on political activities, such as community organizing or lobbying the legislature.<sup>54</sup> At bottom, the concept of politi-

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decrees); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 74 (1997) (arguing that laws either will have no effect or will have unintended detrimental results); Ira Bloom, *Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389, 407 (1998) ("The purposes of the PLRA were to end what was thought to be overly intrusive intervention by the federal judiciary in the management of prisons and to curb what was described as frivolous inmate litigation.") (footnote omitted). Among other changes, the PLRA limited prospective remedies in actions in which prison inmates may prevail and took steps to reduce prisoner access to the courts. See PLRA, *supra* note 48, §§ 802-803 (limiting recovery and attorneys' fees).

The limits of litigation, and its potential trumping by the political process, also are demonstrated by developments in other areas of the law. A non-civil rights example of successful litigation provoking a political response is the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, which imposed increased pleading and other requirements on securities fraud actions to deter the filing of such suits. See generally Symposium, *F. Hodge O'Neal Corporate and Securities Law Symposium: The Implications of the Private Securities Litigation Reform Act*, 76 WASH. U. L.Q. 447 (1998) (analyzing various restrictions imposed on private securities fraud litigation by new law).

50. Yamamoto, *supra* note 2, at 836 (footnote omitted).

51. See *supra* text accompanying notes 19-25.

52. See *infra* text accompanying notes 80-88 (discussing advantages and limits of pursuing impact litigation).

53. See Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 NYU REV. L. & SOC. CHANGE 369, 379-89 (1982-83) (offering examples of attorneys politicizing trials to influence public consciousness); see also JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 289-91 (1976) (highlighting the political nature of William Kunstler's lawyering in famous "Chicago Eight" trial).

54. See generally MARY S. PARDO, *MEXICAN AMERICAN WOMEN ACTIVISTS: IDENTITY AND RESISTANCE IN TWO LOS ANGELES COMMUNITIES* (1998) (analyzing successful community activism by Mexican American women in Los Angeles); RICHARD STEVEN

cal lawyering needs additional investigation. Put differently, in the political realm, what's a lawyer to do?

Of all the tools for change, political action holds the most transformative potential. The political response to *Hopwood*<sup>55</sup> and the anti-affirmative action initiatives in California and Washington are clear examples. Similarly, recent immigration and welfare "reform,"<sup>56</sup> criminal law,<sup>57</sup> and legislation in other areas<sup>58</sup> demonstrate the promise of political activism. In the grand scheme of things, litigation has a marginal impact. This cold truth naturally restricts the impact that attorneys may have in promoting social change. Lawyers serious about social change therefore should see how litigation strategies fit into the community's political activities.

It is important to appreciate these limits on attorneys, even those committed visionaries with deep creativity and shining brilliance. Such constraints ultimately limit the potential of attorneys to achieve meaningful civil rights improvements for subordinated peoples through litigation.

## II. THE DUTIES OF LAWYERS TO CLIENTS AS A CONSTRAINT ON SOCIAL CHANGE

Professor Yamamoto focuses on litigation as part of critical race praxis. To illustrate his point, he discusses interracial conflict arising in *Ho v. San Francisco Unified School District*<sup>59</sup> and *United Minorities Against*

STREET, ORGANIZING FOR OUR LIVES: NEW VOICES FROM RURAL COMMUNITIES (1992) (discussing various organizing strategies employed by California Rural Legal Assistance); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992) (analyzing the need for community organizing to attack environmental racism).

55. See *supra* text accompanying notes 26–28, 31–33.

56. See *supra* note 39 (citing laws).

57. See, e.g., AEDPA, *supra* note 39; PLRA, *supra* note 48; Recent Legislation, Criminal Procedure—Sentencing—California Enacts Enhancements for Prior Felony Convictions—Act of March 7, 1994, 1994 Cal. Legis. Serv. Ch.12 (A.B.971) (to be codified at Cal. Penal Code § 667) 107 HARV. L. REV. 2123, 2123 & n.1 (1994) (noting that California has joined a growing number of states adopting "Three Strikes" laws requiring life sentences for three time felony offenders); see also Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 767–69 (1995) (studying political pressures on judges in death penalty cases and advocating reform).

58. See *supra* text accompanying note 46.

59. 147 F.3d 854 (9th Cir. 1998); see Yamamoto, *supra* note 2, at 821–27; see also Selena Dong, Note, "Too Many Asians": The Challenge of Fighting Discrimination Against Asian Americans and Preserving Affirmative Action, 47 STAN. L. REV. 1027 (1995) (offering background of, and analyzing various difficulties posed by, this litigation); Ramirez, *supra* note 3, at 971–72 (discussing interracial conflict caused by this case). The *Ho* case is often



*Discrimination v. City and County of San Francisco*.<sup>60</sup> In *Ho*, a class of Chinese schoolchildren alleged unlawful discrimination on the basis of race under a consent decree entered in a school desegregation case brought by African Americans and Latinos.<sup>61</sup> In *United Minorities*, African Americans and Latino/as sued the City and County of San Francisco for allegedly discriminating against them in hiring and promotion in favor of Chinese Americans.<sup>62</sup> These cases at some level pitted minority groups against other minority groups. Perhaps more importantly, they raised the specter of creating law that undermines affirmative action and civil rights protections for all people of color in the guise of providing legal redress to minority plaintiffs.<sup>63</sup>

Professor Yamamoto aptly describes the difficulties facing the attorneys in *Ho* and *United Minorities*. Three rough conceptions of the lawyer for social change help us to better appreciate the problems facing attorneys seeking to resolve interracial conflict or, for that matter, any social problem, in the midst of litigation. Fortunately, such schisms between minority groups, though arising occasionally, do not seem to be typical of civil rights cases.<sup>64</sup>

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referred to as the "Lowell High School case" because the plaintiffs claimed that they were denied admission to this "public magnet school in San Francisco, [which] enjoys a reputation for academic excellence and produces illustrious graduates." *Id.* at 971.

On the eve of trial, the parties in the *Ho* case settled and agreed to eliminate racial quotas and banned the practice of requesting racial or ethnic identification on admission forms. See Mary Curtius, *California and the West Schools Drop Race Factor in Admissions Education: Lawsuit Settlement Avoids Divisive Trial While Leaving Some Elements of Desegregation System Intact*, L.A. TIMES, Feb. 18, 1999, at A3 (stating that "[a]ll parties said the settlement prevented a potentially divisive trial that would have brought racial tensions to the surface . . .").

60. Third Amended Complaint for Monetary, Declaratory, and Injunctive Relief, *United Minorities Against Discrimination v. City and County of San Francisco*, No. C-91-2350 (N.D. Cal. filed Nov. 9, 1994) cited in Yamamoto, *supra* note 2, at 855-57, n.162.

61. See *Ho*, 147 F.3d at 856-57. The consent decree provided that no single group could constitute more than 40% of the student body. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 53 (N.D. Cal. 1983).

62. See Yamamoto, *supra* note 2, at 855-57 & n.162 (listing the allegations).

63. See Dong, *supra* note 59, at 1045-56 (discussing how the Lowell High School litigation threatened to create generally negative affirmative action law).

64. See *infra* text accompanying notes 103-109.

A. *Conceptions of the Social Change Attorney and the Attorney's  
Professional Responsibilities to Clients*

The lawyer's role in our adversarial system greatly impacts her ability to ease interracial tensions caused by litigation strategies. Consider three perspectives on the role of the public interest lawyer.

1. The Zealous Advocate

The lawyer as a "zealous advocate" embodies the traditional conception of the lawyer in our adversary system. Founded in the rules of professional responsibility governing attorney conduct, the model generally requires attorneys to zealously represent their clients within the bounds of the law.<sup>65</sup> This duty is not without its limits.<sup>66</sup> The zealous advocate ideal, however, represents the traditional conception of the attorney and her primary loyalty to the client.<sup>67</sup>

The zealous advocate model reflects a client-centered view of professional responsibility, which some criticize for failing to consider the

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65. See MODEL RULES OF PROFESSIONAL CONDUCT pmbl. 5, para. 2 (1996) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."). The Model Rules further state that:

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. *Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.*

*Id.* at 6, para. 7 (emphasis added); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-19 (1986) ("The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.") (citation omitted); Catherine J. Lancot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 958-64 (1991) (discussing parameters of the duty of zealous advocacy and its evolution in the rules of professional responsibility). For analysis of the tension between this duty and the obligations imposed on attorneys as officers of the court, see Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 90-91 (1989); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 10-11 (1988); Lancot, *supra*, at 965-67.

66. See generally Symposium, *Litigating Zealously Within the Bounds of the Law*, 87 KY. L.J. 903 (1998-99) (reviewing duty of zealous advocacy from number of vantage points); Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671 (1997) (analyzing limits on duty of zealous advocacy).

67. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 8 (1998) (stating that the "Dominant View" of a lawyer's ethical duties are encapsulated by the "mandate of 'zealous advocacy within the bounds of the law' . . .") (quoting MODEL RULES OF PROFESSIONAL CONDUCT (1969), and MODEL RULES OF PROFESSIONAL CONDUCT (1983)). This view "legitimate[s] the lawyer pursuing any arguably lawful goal of the client through any arguably lawful means." SIMON, *supra*, at 8.

attorney's multiple roles.<sup>68</sup> Commentators emphasize the need to consider other values in the representation of clients, such as the morality of the client's position<sup>69</sup> and the need to promote racial harmony.<sup>70</sup>

This model at times flounders in its application to public interest law because of ambiguities in the identity of "the client"<sup>71</sup> who the attorney must zealously represent. For example, in a class action—a means of law reform frequently utilized by civil rights groups<sup>72</sup>—is the "client" the class representative (which is how the representative might view it), the class as a whole (as the law sees it),<sup>73</sup> or some greater community value or set of

68. See Margaret Chon, *Multidimensional Lawyering and Professional Responsibility*, 43 SYRACUSE L. REV. 1137, 1138–39 (1992) (analyzing multidimensional responsibilities of attorney to clients, courts, and society); see also Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 994–99 (1997) (analyzing inadequacies of zealous advocacy concept in litigation involving group rights).

69. See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988) (contending that, in civil practice, the attorney's "basic consideration should be whether assisting the client would further justice"); David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 2023–24 (1993) (arguing that "[l]aw schools should promote the ability of their graduates to effectively counsel their clients on moral issues").

70. See Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901 (1995).

71. See JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 699–700 (7th ed. 1997); F. RAYMOND MARKS ET AL., THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY 224–38 (1972); Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709, 732–63 (1989); see also Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1111–28 (1992) (analyzing conflicts between group participation and individual autonomy in public interest litigation); Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class-Action Cases*, 64 FORDHAM L. REV. 1435, 1440–42 (1996) (noting how Federal Rules of Civil Procedure and Rules of Professional Responsibility fail to answer questions about class counsel's duty to class); Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1, 2 (1993) ("Despite the prominence of the class action mechanism as a form of representation, there is very little guidance on how class action lawyers should understand the nature of their duty to represent the members of a class."); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 481–82 (1994) (observing that current ethical rules "assume[] a Lincoln-esque lawyer strongly bonded to an individual client[,] which is not the case in mass tort class actions).

72. See FED. R. CIV. P. 23(a)–(c) (defining requirements for bringing class action). See generally Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 682–93 (1979) (responding to criticisms of Rule 23 and class actions generally, including many still made over twenty years after the article's publication).

73. See *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir. 1982) ("The courts have recognized that the duty owed by class counsel is to the entire class and is not dependent on the special desires of the named plaintiffs.").

values (as the attorney often considers it)?<sup>74</sup> In a classic article, Professor Derrick Bell explores the difficulties posed to the attorney facing conflicting demands of class members in a school desegregation case.<sup>75</sup> He asks, "how should the term 'client' be defined in school desegregation cases that are litigated for decades, determine critically important constitutional rights for thousands of minority children, and usually involve major restructuring of a public school system?"<sup>76</sup> The answer to this fundamental, deeply perplexing question greatly affects the nature of the zealous advocacy pursued by the attorney. The lack of clarity about "the client" allows an attorney representing a class greater discretion to pursue her own aims than is ordinarily tolerated.<sup>77</sup>

Zealous advocacy can be seen in the lawyering in *United Minorities*, in which plaintiffs' attorneys alleged discrimination claims on behalf of Latino/a and African American clients but failed to identify in the complaint and briefs either the individuals who allegedly had discriminated or

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74. See DAVID LUBAN, *LAWYERS AND JUSTICE* 341-57 (1988). This problem has vexed class action attorneys and judges in many different types of cases. See *Parker*, 667 F.2d at 1214 (affirming approval of class action settlement despite objection of ten of eleven class representatives and emphasizing that class attorney represents class as a whole rather than class representatives individually); Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 202 (1990) (advocating elimination of class representative requirement as not serving any useful purpose to litigation and as class attorney is not bound to follow the representative's instructions); Matthews, *supra* note 71, at 1436 (analyzing class action attorney's duties to children in structural reform litigation); Morawetz, *supra* note 71, at 59 (analyzing difficulties of class conflicts in evaluating settlement of class action); cf. Michael J. Glennon, *Who's the Client? Legislative Lawyering Through the Rear-View Mirror*, 61 LAW & CONTEMP. PROBS. 21, 21-22 (1998) (stating difficulties with determining who the "client" was of legal counsel to Congressional committee). See generally STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 238-66 (1987) (analyzing how social concerns with racial discrimination, consumer protection, and environment interacted with procedural rules in modern class action litigation); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997) (studying difficulties in reconciling disputes among clients and attorneys in public interest litigation).

75. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976); see also Ellmann, *supra* note 71, at 1111-28 (analyzing difficulties facing attorneys who represent groups); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1186-91 (1982) (offering a variety of types of intraclass conflicts in impact litigation).

76. Bell, *supra* note 75, at 471.

77. See Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385, 394 (1987) ("[T]he lawyer [in a class action] exercises unparalleled control because not all potential class beneficiaries are present or watching; thus, it is not necessary or realistic in class suits to obtain authorization to make many decisions, which in ordinary two-party litigation are made only after client consultation.") (footnote omitted).

the alleged, mostly Chinese American, beneficiaries of the discrimination.<sup>78</sup> The failure can be explained by the fact that the plaintiffs' aim of proving unlawful discrimination was hindered by the race of the alleged discriminators and beneficiaries. As Professor Yamamoto suggests, the fact that the alleged perpetrators and beneficiaries were minorities greatly complicates the discrimination allegations from a legal perspective and might well undermine the equities supporting the plaintiffs' claim.<sup>79</sup> Consequently, their zealous advocates omitted these facts in order to tell the story in the way most favorable to the plaintiffs' case.

## 2. The Impact Lawyer

The second conception of the lawyer focuses on attorneys who pursue impact litigation, called "movement" lawyers by some. These attorneys want to win cases to establish good precedent for future cases.<sup>80</sup> Careful in selecting their cases, they pursue only those actions likely to advance the law in the direction they want it to go.<sup>81</sup> The carefully or-

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78. See Yamamoto, *supra* note 2, at 857-59. Various filings in the case make it clear that the primary beneficiaries of the alleged discrimination and many of the decisionmakers who allegedly discriminated were Chinese American. See *id.* at 856.

79. See *id.* at 857.

80. See JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994) (recounting the story of civil rights litigation from the perspective of movement lawyers); ARTHUR KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER* (1983) (relating biography of "people's lawyer" who focused on impact litigation); see also John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927 (1999) (examining professional responsibilities associated with cause lawyering on behalf of inner city poor). See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281, 1281 (1976) (articulating changing nature of litigation toward broad social reform cases, often involving government, rather than litigation between private parties); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1 (1979) (analyzing "structural reform" litigation); Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374, 444-45 (1982) (expressing concerns with power of judges to "manage" modern litigation, especially impact litigation). For an examination of the professional responsibilities of attorneys in impact cases, see *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Austin Sarat & Stuart Scheingold eds., 1998).

81. A succinct history of law reform efforts by advocacy groups in the United States can be found in Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 *STAN. L. REV.* 207 (1976). See generally JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978) (analyzing general efforts at social change through law).

chestrated desegregation strategy culminating in *Brown v. Board of Education*<sup>82</sup> is a much-heralded example of successful impact litigation.

Like the zealous advocate conception, the impact lawyering model raises questions about the identity of "the client." It also implicates a deeper conceptual problem. The civil rights attorney often decides first on the desired "impact" of a piece of litigation and *then* selects clients. Many impact lawsuits arise from instances in which the attorneys identifies the legal problem, which affects many people adversely, and then searches for "good" clients to represent the class.<sup>83</sup> This does not seem all that uncommon or problematic, at least assuming that the attorney is truly committed to vindicating the interests of the class representatives and the class as a whole.<sup>84</sup> Importantly, the class representative's interest generally coincides with the attorney's impact goals.<sup>85</sup> For example, in a challenge to a reduction in public benefits, both the client and the attorney want to maintain the level of benefits. Exact congruity of interests is not necessarily the case, however. A class representative may be more interested in personal relief (benefits to himself or herself) than in benefits to the class of similarly situated persons.<sup>86</sup>

Moreover, because impact litigation is attorney-driven, it "may do little in the long run to empower the disempowered. Impact litigation in particular often treats class members as little more than passive observers, pawns of well-meaning attorneys pursuing social change."<sup>87</sup> In essence,

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82. 347 U.S. 483 (1954). See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975) (providing an overview of the events and strategy surrounding this seminal school desegregation decision); TUSHNET, *supra* note 20 (analyzing history of legal strategy of lawyers seeking civil rights for African Americans of which *Brown* was a critical part).

83. See, e.g., *American Immigration Lawyers Ass'n v. Reno*, 2000 U.S. App. LEXIS 254 (D.C. Cir. Jan. 11, 2000) (dismissing on standing grounds challenge to lawfulness of recent changes to immigration laws expediting removal of asylum applicants from the country); *Committee of Cent. Am. Refugees v. INS*, 795 F.2d 1434, 1435 (9th Cir. 1986), *amended by* 807 F.2d 769 (9th Cir. 1987) (challenging the lawfulness of an INS policy of detaining and transferring asylum applicants to remote locations where it was virtually impossible for them to secure legal representation).

84. See Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 661 (1994) ("Clearly, the majority of class action litigation is initiated by attorneys.").

85. This observation comports with my experiences as a lawyer in impact litigation. See *supra* note 83 (citing cases).

86. See *supra* text accompanying notes 71-77 (discussing and citing sources analyzing the difficulties faced by class action attorneys).

87. Johnson, *supra* note 45, at 1226 (footnotes omitted); see also Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 544-45 (1987-88) (arguing that welfare litigators often put the lawyer's agenda for reform before the client's interest); Nancy D. Polikoff, *Am I My*

attorneys may use the "clients" as tools to achieve their larger impact desires. This creates theoretical, ethical, and practical problems. Specifically, what limits are there on attorneys and what stops them from using the courts for their own personal, as opposed to the client's or society's, ends?

Ultimately, the class action attorney or impact lawyer possesses great power over the direction of a lawsuit. Though theoretically bound to further the interests of the class, the attorney as a practical matter has much leeway in determining what is in the best interests of the class. This discretion—like all discretion—may be used to achieve good or bad ends, although it seems difficult to identify many cases of abuse in the civil rights context.<sup>88</sup>

### 3. The Critical Lawyer

Concern with client disempowerment due to the impact litigation strategy spurred creation of the "critical lawyering" model, in which the empowerment of clients is at the forefront. The critical lawyering conception of the lawyer emerges in important legal scholarship by, among others, Gerald López, Anthony Alfieri, and Lucie White, which focuses on how lawyers may empower clients through law so that they might be able to fend for themselves in a world without lawyers.<sup>89</sup> "Critical law-

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*Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443 (1996) (exploring distinction between activist lawyer's goals and client's legal needs). There are, of course, other disadvantages to impact litigation, including the high costs of litigating class actions. See Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 238 (1997) ("The costs of litigating class actions are so enormous that few firms can afford to handle the litigation at all, and each firm can only litigate a few cases simultaneously.").

88. Some might claim, however, that suits brought by conservative organizations, such as the Pacific Legal Foundation, seeking to vindicate the property rights of citizens in the face of environmental and zoning regulations, or other groups seeking to dismantle affirmative action, in fact constitute abuse of impact litigation in the name of civil rights. See generally JEAN STEFANCIC & RICHARD DELGADO, *HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* (1996) (documenting how well-funded conservative foundations have, among other things, funded impact litigation to pursue conservative ends).

89. See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 74 (1992) ("When the aim to educate itself becomes a core of any acceptable notion of providing sound help, familiar practices like interviewing, counseling, planning, negotiating and litigating take on a different look and feel."); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2145-46 (1991) [hereinafter Alfieri, *Reconstructive Poverty Law Practice*] (explaining the need for poverty lawyers to educate their clients regarding the law, thereby empowering clients to defend themselves); White, *supra* note 87, at 544-45 (calling on attorneys to educate their clients). Some literature also analyzes how race and racial identity factor into the lawyer's professional obligations. See, e.g., Anthony V.

ying aims to provide subordinated people with greater access to legal representation and to promote more social change."<sup>90</sup> Critical lawyers collaborate with clients who, through lessons learned in the litigation process, may in the future act on their own behalves in other spheres, such as community organizing and politics. Reformers by nature, critical lawyers differ from traditional impact litigators in their methods which focus on collaboration with clients to empower them, rather than lawyer-driven litigation goals. Although sharing a similar perspective with other critical theorists about the need for social change, critical lawyers firmly believe that lawyers and lawyering can make a difference, a proposition that some critical theorists reject.<sup>91</sup>

Professor Yamamoto presumably would laud the critical lawyering movement, which strives to link theory and practice and move critical thinking beyond futility.<sup>92</sup> The open question, however, remains whether critical lawyering will achieve its ambitious aims. Specifically, does this version of lawyering in fact have the potential to assist in bringing about social transformation? In addition, it ultimately is unclear just how substantially the "critical lawyer" differs from the liberal attorney seeking incremental improvements for disenfranchised communities. Both seek change through law, although the importance of the client to the attorney's representation may differ.

### B. Application to *Ho* and *United Minorities*

The three conceptions of lawyering outlined here are not mutually exclusive. It is possible in certain instances to satisfy the client's legal needs, reform the law, and empower clients in one litigation.<sup>93</sup> That, however, is not necessarily the case. Tensions between these goals become clear in cases like *Ho* and *United Minorities*, which trouble Professor

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Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1293 (1998) (studying the effects "of race, lawyers, and ethics in American law"); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502 (1998) (discussing the conflicting pressures felt by Black lawyers and attempting to articulate a method allowing these pressures to co-exist in harmony).

90. Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415, 416 (1996) (footnote omitted).

91. See *supra* note 22 (citing authorities criticizing liberal conception of change).

92. See Yamamoto, *supra* note 2, at 873-75 (beginning analysis of "critical race praxis" with discussion of critical lawyering literature).

93. See Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 89, at 2146 (describing strategy that empowered a client, secured her food stamps, and reformed a food stamp program).



Yamamoto because of the interracial conflict that they might generate.<sup>94</sup> But what is the role of the lawyer and the role of the law in the litigation process? Is the lawyer representing the plaintiffs in *Ho* and *United Minorities* supposed to be concerned primarily with winning the case, with the potential impact of the case on the evolution of the law, or with empowering clients? Or, as Professor Yamamoto suggests,<sup>95</sup> should the attorney strive to minimize interracial tension, perhaps even abandoning the case if that would best accomplish this end?<sup>96</sup> Put most bluntly, what's a lawyer representing the plaintiffs in these cases to do?

Light can be shed on the problem of the attorney's role in easing interracial conflict by viewing it from the three conceptions of the attorney sketched previously. Under the zealous advocate model, the attorney must do whatever is necessary, within the bounds of the law, to increase the chances that her clients will prevail. Once the attorney has accepted the case, she has pledged—indeed has a professional obligation—to take positions to ensure lawful treatment of Chinese American schoolchildren (*Ho*) and to halt unlawful discrimination against African Americans and Latino/as in employment (*United Minorities*).<sup>97</sup> Focused on the sacrosanct duty to clients, the zealous advocate would have relatively little concern about the possible ripple effects of the case's outcomes on the relations between minority groups.

An impact attorney focused on the outcome of litigation as it fits into a larger change strategy presumably would decide *before* accepting the case whether the action, if successful, would likely have the desired impact. Once the attorney selects the desired impact, the case, and the "client," she zealously would represent the plaintiffs' cause while being careful not to take positions that ultimately might undermine the desired result. This may well have been the tactic of the attorneys representing the plaintiffs in *Ho* and *United Minorities*. Indeed, in *Ho*, a law professor served as counsel for the California State Board of Education, which sided with the plaintiffs on appeal.<sup>98</sup> This professor may well have hoped

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94. See Yamamoto, *supra* note 2, at 855–66.

95. See *id.* at 889–95.

96. See *id.* at 837–39 (noting interracial justice claims that go unaddressed in cases and suggesting need for attorneys, scholars, and activists to pay attention to such concerns).

97. Professor Bill Hing, who advocates that attorneys have the professional responsibility to advise their clients *before* filing legal actions about solutions that diminish, as opposed to exacerbate, interracial tensions, seemingly would agree that the lawyer's duties change once the client has selected a remedy. See Hing, *supra* note 70, at 922–23.

98. See *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 856 (9th Cir. 1998) (listing Professor John C. Yoo from University of California at Berkeley School of Law (Boalt Hall), as counsel for California Board of Education).

to convince the court to adopt reasoning that would undercut the legal underpinnings for race-conscious admissions programs.<sup>99</sup>

Traditional civil rights impact attorneys, however, would be less likely to take cases like *Ho* and *United Minorities*. Civil rights organizations make difficult judgments about which lawsuits to pursue on a daily basis, and must decline representation of clients with potentially meritorious cases because of the possible negative impact on the development of civil rights law.<sup>100</sup> Although an unfortunate result for potential clients who may be unable or may find it difficult to secure representation, such outcomes are necessary for civil rights groups marshaling limited resources in the hope of moving the law in a certain direction.

A critical lawyer, of course, wants to win, but would consider other impacts of the litigation, especially the impact on client empowerment. Informed by Professor Yamamoto's concerns, the critical attorney would seek to collaborate with the plaintiffs in *Ho* and *United Minorities* and attempt to constructively address and ameliorate interracial conflict, possibly even trying to build multiracial coalitions to achieve change.<sup>101</sup> This strategy raises a number of important questions: What is empowerment in these circumstances? Does it matter whether the power sought allows for, or even requires, diminution of the power of other subordinated groups? Could it result in in-fighting among groups of minorities rather than combating the more general evil of discrimination against people of color? These difficult questions lack ready answers.

Even with these conceptions of the attorney in mind, I am not sure what we realistically can expect of attorneys representing plaintiffs in cases like *Ho* and *United Minorities*. Attorneys have duties to clients and should,

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99. Cf. John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1123-24 (1996) (questioning inherent remedial powers of federal courts to ameliorate discrimination through imposing structural remedies on state institutions).

100. See Susan P. Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 U. MICH. J.L. REFORM 1, 9 (1993) (stating that the impact litigation "model emphasizes the importance of selecting cases based on their potential impact on the law and their likely ripple effect on institutions not before the courts") (footnote omitted); see, e.g., Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1054-55 (1970) (describing the moral difficulties facing poverty lawyers in turning away clients).

101. See George A. Martínez, *African Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 CHICANO-LATINO L. REV. 213, 214 (1998) (calling "for an epistemic coalition comprised of all minority groups so that each group achieves knowledge about themselves and their place in the world"); Francisco Valdes, *Foreword: Under Construction—LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1094 (1997) (stating that LatCrit theory "seeks to expand and connect anti-subordination struggles, [and therefore] the LatCrit exercise thus far has been a collective design . . . always rooted in the ideal of community and the aspiration of coalition").

and do, take care in choosing them. The acceptance of representation narrows an attorney's options substantially. In these cases, the attorneys agreed to represent the plaintiffs and pursue their discrimination claims. It may well be too much to ask an attorney *after* accepting a case to consider all the possible conflicting interests. This, however, is precisely what Professor Yamamoto seems to advocate.<sup>102</sup>

Ultimately, in analyzing the practical turn of critical theory, we need to determine what role law and lawyers are to play. Only after we make this determination, we will have a better idea about the duty lawyers have in these types of cases.

### C. How Prevalent is Interracial Conflict in Civil Rights Litigation?

The extended discussion of *Ho* and *United Minorities* might suggest that civil rights litigation frequently generates interracial conflict. It is not clear, however, that it arises all that often.<sup>103</sup> Indeed, the long history of minority coalitions in school desegregation litigation suggests that any recent rifts may not be representative. In a major Mexican American school desegregation case that served as a precursor to *Brown v. Board of Education*,<sup>104</sup> Thurgood Marshall filed an *amicus curiae* brief for the National Association for the Advancement of Colored People supporting the legal challenges, as did the Japanese American Citizens League.<sup>105</sup> More recently, minority activist organizations have been united in important affirmative action litigation, such as *Bakke* and *Hopwood*.<sup>106</sup>

102. See Yamamoto, *supra* note 2, at 884–89 (analyzing social meaning of justice system and contending that various actors in system should consider messages sent to society by litigation).

103. *But cf.* Johnson, *Civil Rights and Immigration*, *supra* note 17, at 57–63 (discussing division within civil rights coalition on immigration law and policy); Rachel F. Moran, *Getting a Foot in the Door: The Hispanic Push for Equal Educational Opportunity in Denver*, 2 KAN. J.L. & PUB. POL'Y, Summer 1992, at 35 (analyzing conflict between Latino/a and African American interests in school desegregation litigation in Denver); Ramirez, *supra* note 3, at 969–74 (outlining conflicts between minority groups in voting rights, school desegregation, and employment cases).

104. See *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 781 (9th Cir. 1947). (holding that a class of persons of Mexican ancestry were denied their Equal Protection rights because they were forced to attend segregated schools).

105. See Martinez, *Legal Indeterminacy*, *supra* note 22, at 577–79 (analyzing the importance of *Mendez* to the *Brown* litigation); see also Constance Baker Motley, *The Historical Setting of Brown and Its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9, 13–14 (1992) (articulating how part of litigation strategy culminating in *Brown v. Board of Educ.* was “inspired” by *Mendez*).

106. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (*amicus curiae* briefs filed by a variety of African American, Latino/a, and Asian American organizations); *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996) (recording that Mexican

Although interracial conflict unquestionably occurs in certain instances, we must take great care to ensure that it does not divert attention from larger social justice concerns. As Professor Charles Lawrence articulates:

The ideology and culture of white supremacy turn communities of color against one another by creating hierarchies of privilege and access and by assigning racially subordinated groups to different places within those hierarchies. Those of us who are assigned a higher status on this ladder find that our belief in another group's inferiority gives us an investment in white privilege.<sup>107</sup>

The divide-and-conquer strategy in which minorities are pitted against minorities historically has been employed to fragment and isolate minority communities. Consequently, coalitions challenging the status quo are inherently unstable. This occurs, however, more in the political arena than in the litigation trenches, as seen in the public debate over such divisive issues as affirmative action and immigration.

As Professor Yamamoto fears, litigation in certain circumstances may exacerbate interracial conflict.<sup>108</sup> That should not be surprising because litigation is, in fact, institutionalized conflict. Although we must be vigilant in trying to minimize interracial strife to the greatest extent possible,<sup>109</sup> it remains to be proven that it is a major problem in modern civil rights litigation.

## CONCLUSION

Professor Yamamoto's call for "critical race praxis" is more than necessary. If truly dedicated to social transformation, critical theorists must create a practical constructive alternative to the racial status quo in

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American Legal Defense and Education Fund filed *amicus curiae* brief supporting the position of the NAACP Legal Defense and Education Fund).

107. Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 831 (1995) (footnote omitted); see Johnson, *Civil Rights and Immigration*, *supra* note 17, at 57-63 (contending that focus on conflict between minority groups deflects attention from larger social problems of poverty, racism, and the like in the United States); Angela E. Oh, *Race Relations in Los Angeles: "Divide and Conquer" is Alive and Flourishing*, 66 S. CAL. L. REV. 1647, 1650 (1993) (highlighting the portrayal of the conflicts between African Americans and Korean Americans during the Los Angeles riots).

108. See Yamamoto, *supra* note 2, at 821-27; see also *supra* note 103 (citing authorities).

109. See Hing, *supra* note 70.

the United States. Efforts to connect the intellectual discourse with the community is central to such efforts.

At the same time, Professor Yamamoto's advocacy of community-based lawyering must confront the barriers to bringing about change through litigation. First, there are constraints on the extent to which the law can be utilized to secure meaningful social change. Consequently, the role of the attorney seeking social change through the law is an extremely difficult one. As a practical matter, law is not politics, though it is inherently political. The litigator's tools for change—enforcing the rule of law—are far narrower than the politician's tools—creating or changing the law. This difference affects the ability of litigation to secure change.

Second, the professional obligations imposed on attorneys by the legal profession limit the ability of attorneys to serve as freewheeling agents of social change. Under the rules of professional responsibility, attorneys have duties to "clients" in social change litigation that inhibit their ability to pursue their own agenda, no matter how laudable the aims. As Professor Yamamoto discusses, attorneys in civil rights litigation occasionally face problems with interracial conflict. Generally speaking, lawyers' professional obligations require that such conflicts must be considered and evaluated by the attorney *before* agreeing to represent the client. Fortunately, civil rights litigation generally does not appear to spawn significant interracial conflict with regularity.

Ultimately, Professor Yamamoto has raised important questions that should give us all pause to think. Perplexing issues about the role of the attorney seeking social change promise to remain with us well into the next millennium. Calls for better focus on the methods for achieving social transformation always will be on the horizon. The tying of theory and practice in legal scholarship, as well as the general meaning and purpose of scholarship,<sup>110</sup> will remain with us as well. Professor Yamamoto has blazed a trail that we must follow, or hazard the consequences.

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110. See Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992) (attempting to elaborate theory for evaluating legal scholarship).