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ARTICLE

THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AND ITS VISION FOR SOCIAL CHANGE

Robert S. Chang†

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INTRODUCTION

In 1942, Fred Korematsu was a young man working as a welder in shipyards in Oakland, California. After the attack on Pearl Harbor by Japan, when the government ordered Japanese Americans on the West Coast to leave their homes to report to "assembly centers" on their way to concentration camps,[1] Fred Korematsu felt that it was wrong and refused to go.[2] His refusal to

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Finally, I'd like to thank the Korematsu family for entrusting us to further Fred Korematsu's legacy.

1. I use concentration camp and incarceration rather than the euphemism "internment," following Aiko Herzig-Yoshinaga, *Words Can Lie or Clarify: Terminology of the World War II Incarceration of Japanese Americans*, DISCOVER NIKKEI (Feb. 2, 2010),

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obey the exclusion order led to his arrest and conviction in 1942.[3] Korematsu took his challenge all the way to the United States Supreme Court, which upheld his conviction on the ground that the removal of Japanese Americans was justified by "military necessity."[4]

Forty years later, Fred Korematsu filed suit to reopen his case. Aiko Herzig-Yoshinaga and Peter Irons had discovered evidence that the Department of Justice had, "during the pendency of Fred's World War II case, suppressed, altered, and destroyed material evidence undermining the government's claim of military necessity."[5] Based on this and other evidence, Judge Marilyn Hall Patel of the United States District Court for the Northern District of California granted his petition in 1983 and vacated his conviction.[6]

Fred Korematsu then spent the remaining two decades of his life championing the cause of civil liberties through education and advocacy. He spoke to audiences around the country in order to educate them about the past so that they could be better equipped to prevent future injustices. His courageous stance during World War II and his civil rights and civil liberties advocacy led President Clinton in 1998 to award Fred Korematsu the Presidential Medal of Freedom, the nation's highest civilian honor. During the ceremony, Clinton remarked, "In the long history of our country's constant search for justice, some names of ordinary citizens stand for millions of souls: Plessy, Brown, Parks. To that distinguished list, today we add the name of Fred Korematsu."[7]

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http://www.discovernikkei.org/en/journal/article/3246/, Roger Daniels, *Words Do Matter: A Note on Inappropriate Terminology and the Incarceration of the Japanese Americans*, DISCOVER NIKKEI (Feb. 1, 2008), http://www.discovernikkei.org/en/journal/2008/2/1/words-do-matter/ MICHI WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS (1996), and A Resolution of the National Council of the Japanese American Citizens League to Support the "Power of Words" Proposal Which Relates to Euphemisms and Misnomers in Reference to the World War II Experience of Japanese Americans (May 14, 2011), *available at* http://www.nps.gov/tule/forteachers/loader.cfm ?csModule=security/getfile&PageID=37375.

2. Lorraine K. Bannai, *Taking the Stand: The Lessons of Three Men Who Took the Japanese American Internment to Court*, 4 SEATTLE J. SOC. JUST. 1, 8-9 (2005) (discussing Fred Korematsu's experience during World War II).

3. Korematsu v. United States, 323 U.S. 214, 215 (1944).

4. *Id.* at 217-24.

5. Bannai, *supra* note 2, at 31, 39 & n.152.

6. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (Judge Patel ruled from the bench on November, 10, 1983, although the written opinion was not released until April 19, 1984). For full accounts of the effort to overturn the wartime convictions of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, see PETER IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (1989); UNFINISHED BUSINESS: THE JAPANESE-AMERICAN INTERNMENT CASES (New Video Group 1984).

7. William J. Clinton, Remarks on Presenting the Presidential Medal of Freedom (Jan 15, 1998) in 1 PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES WILLIAM J. CLINTON 1998, at 56, 58 (1999), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=1998_public_papers_vol1_misc&page=1&position=all.

Korematsu became especially active after 9/11 when Arab American and Muslim communities became the target of legal and extralegal violence.[8] In September 2004, he published an op-ed condemning the racial profiling of Arab Americans.[9] That same year, Korematsu filed amicus curiae briefs challenging improper government conduct in its war on terror. In *Rasul v. Bush*, Korematsu filed an amicus in support of Guantanamo Bay detainees who had "been imprisoned incommunicado, without access to counsel and with no opportunity to contest in any forum the factual or legal basis for their confinement."[10] Later that year, he filed a brief that questioned the government's detention of Jose Padilla, asking, "[W]hat circumstances, if any, justify the indefinite detention of an American citizen for suspicious activities, without charges or access to counsel?"[11]

Several lessons can be learned from his example. The first is the importance of saying no to injustice, even when doing so comes at tremendous risk and personal harm. By taking a stand against injustice, he serves as a model for us. The second is to recognize that it can take many years before an injustice is redressed, if at all, and that one needs to be persistent and guided by hope even in the face of daunting odds. The third is that advancing the cause of justice requires both knowledge and advocacy, but that ultimately, education is the key to achieve long-lasting change.

The Fred T. Korematsu Center for Law and Equality at Seattle University School of Law takes its name and inspiration from this man. Entrusted with honoring and furthering his legacy, the Korematsu Center, although not speaking as or for him, constructs its identity through its activities as an actor in the legal community and more broadly in the public. The Korematsu Center is very self-consciously engaged in developing a distinct personality as a collective entity that exists not just as a collection of the individuals or projects

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8. Over 1000 incidents of hate violence were reported in the first eight weeks after 9/11. Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 20 SOC. TEXT 72, 103 (2002). During that same period, over 1200 noncitizens, the majority of whom appear to be Middle Eastern, Muslim, and South Asian, were detained by federal authorities, with the precise number unknown because the federal government refused to release updated figures after November 2001. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1577, 1599 & n.6 (2002). Over 5000 males between the ages of eighteen and thirty-three of Middle Eastern and South Asian ancestry holding visas from countries having Al Qaeda operations have been targeted for questioning by federal and local authorities. Rebecca Carr & Tasgola Karla Bruner, *3,000 Foreigners Sought for Terror Questioning*, ATLANTA J.-CONST., Mar. 21, 2002, at A3.

9. Fred Korematsu, *Do We Really Need to Relearn the Lessons of the Japanese American Internment?*, S.F. CHRON., Sept. 16, 2004, http://articles.sfgate.com/2004-09-16/opinion/17443369_1_civil-liberties-act-japanese-americans-spy.

10. Brief for Fred Korematsu as Amicus Curiae in Support of Petitioners at 1, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

11. Brief for Fred Korematsu et al. as Amicus Curiae in Support of Respondents at 5, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027).

within the center.[12] The Korematsu Center is constituted by its commitments, by what it says and does, and by the relationships it develops with individuals, institutions, and organizations.

Below, I present the Korematsu Center's approach to its work that integrates research, advocacy, and education. I discuss two of our major initiatives, our Civil Rights Amicus Project and our efforts to address racial disproportionality in Washington State's criminal justice system. Both of these efforts show how our integrated approach that combines research, advocacy, and education can provide a model for how a center located within a law school can help to achieve durable social change.

THE CIVIL RIGHTS AMICUS PROJECT

The courts are a quintessentially undemocratic institution.[13] Courts make decisions in cases and establish precedents that affect many people beyond the litigants in a particular case. Non-litigants whose rights are at stake in the case typically have no voice. If the case involves justice claims based on race, gender, sexual orientation, and disability, the undemocratic nature of the courts is especially problematic because the groups affected are those that are historically and currently less powerful politically. The undemocratic nature of the institution is amplified with regard to individuals or groups that are less politically powerful or have fewer resources. One commentator has suggested that "[g]roups inherently weak in the political arenas or unequally endowed with resources of wealth or skills have quite naturally been the leaders in the use of the [amicus] brief."[14]

Amicus curiae briefs, "friend of the court" briefs, allow interested individuals and groups that are not parties in the litigation to offer their perspectives for consideration by the court. The Korematsu Center has devoted significant resources toward developing its Civil Rights Amicus Project. In addition to low resource efforts such as joining as an amicus on briefs authored by others, we author our own briefs and will be offering a Social Justice

12. *Cf.* Jennifer A. Quaid, *The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis*, 43 MCGILL L.J. 67, 72 (1998) ("[B]lame for wrongful acts of collective entities can and must be borne by the entity itself and not by its constituent members . . . [deriving] from the distinct personality of a collective entity, which subsumes the individual personalities composing it.").

13. Part of this notion is captured in what has been described as the "countermajoritarian difficulty": "the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy." Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002). Scholars come out on different sides on whether this is an intractable problem or a laudable feature in our system. *See generally id.*

14. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 720 (1963).

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Lawyering Class and a Civil Rights Amicus Clinic to be taught by a Korematsu Clinical Teaching Fellow starting in Fall 2011. We engage in this work and invest resources mindful of the way that amicus briefs allow individuals and organizations to participate in the legal process and to have an impact on litigation outcomes. We are also mindful of the limitations of litigation to effectuate social change.[15]

There is a rich academic debate about the promise and perils of pursuing litigation to bring about social change. In one narrative, the courts, at least by the start of the civil rights movement, are the engines for social change, producing cases such as *Brown v. Board of Education*[16] that vindicate the rights of the politically powerless even in the face of strong public opposition.[17] By taking these courageous stances, the courts are the harbingers for social change, thus justifying the expenditure of resources for litigation.[18] However, Gerald Rosenberg offers significant evidence that when a court acts ahead of changes in public opinion, all that is really achieved is a symbolic legal victory that brings little real change and offers this pessimistic assessment:

> [T]he celebration of *Brown* may serve an ideological function of assuring Americans that they have lived up to their constitutional principles of equality without actually requiring them to do so. Celebration of *Brown* relieves Americans of the obligation to confront the systematic racial biases that permeate society. It encourages them to look to legal solutions for political and cultural problems. In this way, *Brown* serves a deeply conservative function of diverting resources away from substantive political battles, where success is possible, to symbolic legal ones, where it is not.[19]

Rosenberg's object lessons are that seeking to achieve social change through litigation offers a "hollow hope" at best and, more significantly, may retard progress because it diverts resources from more fruitful avenues and may actually make things worse because "[s]uccessful litigation for significant social reform runs the risk of instigating countermobilization."[20] Similarly, legal historian Michael Klarman argues that "court decisions produce backlashes by commanding that social reform take place in a different order than might otherwise have occurred."[21]

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15. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 3 (2d ed. 2008).

16. Brown v. Board of Education, 347 U.S. 483 (1954).

17. ROSENBERG, *supra* note 15, at 2 ("Starting with the famous cases brought by the civil rights movement and spreading to issues raised by women's groups, environmental groups, political reformers, and others, American courts seemingly have become important producers of political and social change.").

18. *Id.*

19. *Id.* at 424-25.

20. *Id.* at 425.

21. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 477 (2005).

However, both Rosenberg and Klarman's backlash theses presume that there is some naturalistic force at work and that social reform operates independent of litigation. It is also interesting to note that Klarman states, "[i]n the short term, *Brown* retarded progressive racial reform in the South,"[22] but a few pages later after recounting incidents of violence that resulted from the countermobilization to *Brown,* Klarman states, "[b]y helping to lay bare the violence at the core of white supremacy, *Brown* accelerated its demise."[23] Thus, even in Klarman's account, *Brown* ultimately did help to bring about change, although perhaps to Klarman this was merely accidental—it could not have been an intentional social change strategy to try to win in the courts in order to spark violent backlash that would ultimately turn the tide to achieve racial progress. If these are the lessons of *Brown*, what can justify the Korematsu Center's investment of resources in our Civil Rights Amicus Project?

One problem with both Rosenberg's and Klarman's backlash arguments is that they present an unprovable counterfactual: that school desegregation would have happened more quickly if its proponents had not pursued or focused on a litigation strategy. Further, a false choice is presented: that one must choose between a litigation versus a political strategy, as though they are mutually exclusive, and that those seeking social change ought not "succumb to the 'lure of litigation.'"[24]

Both Rosenberg and Klarman extend the backlash thesis to critique the litigation efforts that have taken place in the context of the marriage equality movement.[25] Rosenberg accuses those pursuing marriage equality through the courts as having "confused a judicial pronouncement of rights with the attainment of those rights"[26] and suggests that "[t]he battle for same-sex marriage would have been better served if they had never brought litigation, or had lost their cases."[27]

Scott Cummings and Douglas NeJaime offer a strong response to Rosenberg and Klarman.[28] Cummings and NeJaime examine and reject the factual basis for the premises underlying the backlash thesis in the context of the marriage equality movement.[29] But more importantly for our purposes, they reject the false choice between litigation and politics, noting that "[e]fforts to isolate court-centered strategies from the broader advocacy context in order to

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22. *Id.* at 454.

23. *Id.* at 458.

24. Gerald N. Rosenberg, *Tilting at Windmills: Brown II and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation*, 24 LAW & INEQ. 31, 46 (2006).

25. Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 796-97 (2006); Klarman, *supra* note 21, 460-61.

26. Rosenberg, *supra* note 25, at 813.

27. *Id.*

28. Scott Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010).

29. *Id.* at 1318-27.

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fit litigation into the standard binary framework—is litigation good or bad?—are artificial and antiquated."[30] Instead of operating within this binary framework, Cummings and NeJaime's case study of the marriage equality movement in California found that

> LGBT movement lawyers prioritized a nonlitigation strategy over litigation, and conceptualized litigation as a tactic that succeeds only when it works in conjunction with other techniques—specifically, legislative advocacy and public education. Accordingly, lawyers constructed a legislative record that would further eventual litigation efforts at the same time that they pursued litigation that aided their legislative agenda and public education efforts.[31]

Instead of operating under what Rosenberg understands to be a naïve and misguided reliance on the courts, LGBT movement lawyers had a sophisticated political understanding and understood that effective advocacy required multiple strategies. Cummings and NeJaime describe this as "'multidimensional advocacy,' defined as advocacy across different domains (courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education)."[32] This description of multidimensional advocacy fits pretty closely with the Korematsu Center's approach to our amicus work and to our broader advocacy efforts.

We engage in this work cognizant of the "debate over the promise and perils of social change litigation"[33] though we operate one degree removed, coming in as amicus in litigation that is already in progress. Despite the critiques that litigation represents a "hollow hope" that results in no meaningful social change, or that reform movements are co-opted and "unwittingly tend to rationalize, legitimate, and 'mystify' rather than to challenge existing injustices and hegemonic relations,"[34] we believe that courts play an important role in protecting or vindicating the rights of politically disempowered groups, and in this way, play an important role in helping to bring about positive social change.

Since the launch of the Korematsu Center on April 19, 2009, we have been working to develop our voice and to fulfill our vision of democratizing the courts through amicus participation. Last year, we submitted amicus briefs in two cases before the Washington State Court of Appeals. The first, in *Turner v. Stime*, involved juror racial bias directed against the plaintiff's Japanese American attorney.[35] During jury deliberations, the attorney was referred to at

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30. *Id.* at 1242.

31. *Id.* at 1312.

32. *Id.* at 1242.

33. *Id.* at 1237.

34. Michael McCann, *How Does Law Matter for Social Movements*, *in* HOW DOES LAW MATTER? 76, 77 (Bryant G. Garth & Austin Sarat eds., 1998) (discussing the critical legal studies critique of rights).

35. Turner v. Stime, 153 Wash. App. 581 (2009).

times as Mr. Kamikaze, Mr. Miyagi, and other names.[36] The day the verdict was handed down in favor of the defendant, one juror was heard saying either that the derogatory names for the attorney or the verdict itself were almost appropriate given that it was December 7, the anniversary of the bombing of Pearl Harbor.[37] The Korematsu Center submitted an amicus brief that drew from history and social science to argue that if courts are impotent to act in the face of such juror bias, this would have a serious impact on diversity in the legal profession and for underserved minority communities. We are pleased to report that the appellate court upheld the granting of a new trial in this case.[38]

Our second brief, in *In re Marriage of Katare,* challenged severe travel restrictions that were placed on an Indian-born United States citizen who was not permitted to travel abroad with his children because of concerns about international child abduction that arose primarily from profiles based on national origin and culture.[39] The Korematsu Center filed an amicus brief that challenged the improper use of profiles based on national origin and culture and brought to the attention of the court that the trial court had relied on improper characterizations of Indian civil process. In an unpublished opinion, though the appellate court affirmed the trial court regarding the travel restrictions, it found that the trial court had abused its discretion in admitting profiling evidence based on national origin and culture.[40] Because we believe that there are unresolved issues about the role that national origin and culture can play in family law matters, we are currently working on an amicus brief in support of the father's petition for review by the Washington Supreme Court.[41]

We are also engaged in developing teaching materials about the issues raised in both of these cases for inclusion in law school educational materials.

In doing our amicus work, we have developed the following guideposts:

1. Get involved early and stay involved. Do not wait until something goes up to the United States Supreme Court. We have observed that amicus participation increases dramatically for cases before the Supreme Court. On the one hand, this greater level of involvement makes sense because of the potential impact a Supreme Court ruling may have. Because the stakes

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36. *Id.* at 593.

37. *Id.* at 584.

38. *Id.*

39. In re Marriage of Katare, 159 Wash. App. 1017 (Wash. Ct. App. 2011).

40. *Id.* at *11.

41. In re Marriage of Katare, 171 Wash. 2d 1021 (2011) (granting review).

42. Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 824-25, 827 (2004).

41. In re Marriage of Katare, 171 Wash. 2d 1021 (2011) (granting review).

42. Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 824-25, 827 (2004).

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are so great, many organizations seek to express their views before this Court with the hope of influencing the litigation outcome. On the other hand, this hope of having an impact may be misplaced, as research indicates that, with the exception for briefs from important or well-known amici, the impact of amicus briefs before the Supreme Court is uncertain and perhaps marginal.[42]

Instead of looking for opportunities based on the Supreme Court docket, look for amicus opportunities in state courts and in lower federal courts. Fewer amicus briefs are filed in those courts and they are more likely to have an impact.[43] This mode of participation is consistent with the traditional rationales for amicus briefs, that the court might be influenced by hearing from the affected group[44] or by receiving additional information.[45]

2. Engage in a public education strategy around the issues and the cases. Strategic communication includes placing op-eds. Similar to our point in Guidepost 1 about not waiting for something to make it to the Supreme Court, do not focus on trying to place "home-run" op-eds in national papers such as the *New York Times*. Instead, look for op-ed opportunities in local papers, including the ethnic press which might include arranging for translations.

Use cases as an opportunity to engage with different communities to educate them about the issues at stake and how they might be impacted.

3. Engage communities through sign-on strategies. Here we are guided by a vision of democratizing the courts through amicus participation. As discussed earlier, courts are an undemocratic institution. However, amicus participation affords an opportunity to participate that courts have welcomed. One commentator noted: "The judges have sought to gain information from political groups as well as to give them a feeling of participation in the process of decision. Access to the legal process on

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. Ct. App. 2011).

43. *See generally* Sarah F. Corbally, Donald C. Bross & Victor E. Flango, *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960-2000*, 25 JUST. SYS. J. 39, 53 (2004) (discussing trends in amicus filings in state supreme courts and noting that amicus briefs were cited by United States Supreme Court in 18% of cases in which amicus briefs were filed according to one study as compared with 31% in state supreme court opinions in their sample).

44. "[T]he affected group hypothesis, holds that amicus briefs are efficacious because they signal to the Court that a wide variety of outsiders to the suit will be affected by the Court's decision."" Collins, *supra* note 42, at 808.

45. "[T]he information hypothesis asserts that amicus briefs are effective, not because they signal how many affected groups will be impacted by the decision, but because they provide litigants with additional social scientific, legal, or political information supporting their arguments." *Id.*

the part of such organizations is a logical extension of realistic awareness of law as a process of social choice and policy making."[46]

Marginalized communities can be empowered by feeling that they can participate in meaningful ways, that their voices are being invited and heard. It is important, though, to be cognizant of the mistakes sometimes made by lawyers engaging with marginalized communities. Gerald Lopez, in *Rebellious Lawyering*, recounts his early experience as a Chicano in East Los Angeles who watched as civil rights attorneys descended and directed community members on what to do.[47] Communication is a two-way street. An effective social change strategy, informed by a multidimensional advocacy framework, has to have more than the signing onto the brief as its goal. The real goal is to develop relationships that persist beyond the immediate litigation. Remember that in asking individuals or organizations to sign onto a brief, you are asking for their help. Be ready to listen to their needs and to be open to their requests for assistance. Relationships based on reciprocity will endure and can be the basis for developing durable coalitions that persist beyond a particular issue.

4. Take a long view. A positive litigation outcome is certainly cause for celebration, but remember the lessons of the backlash thesis, that victory for one side can mobilize the losing side. Be prepared to counter the backlash. In the same manner, do not be discouraged by a negative litigation outcome. You can use a loss to galvanize a community, fostering civic engagement in areas beyond litigation, especially in the political realm.[48]

An example of how an amicus brief can have this kind of impact can be seen in the way that an amicus brief was "an effective tool to engage and educate community-based organizations and their constituencies"[49] and through that process helped to organize the Asian American community in California to support marriage equality.[50]

5. Create durable knowledge products, especially educational materials. Here, we offer a different understanding of the life cycle of an advocacy project that moves from the immediate advocacy effort to create durable knowledge products as well as educational materials. The work does not end with the filing of the brief or with the court opinion. As a

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46. Krislov, *supra* note 14, at 721.

47. GERALD LOPEZ, REBELLIOUS LAWYERING 1 (1992).

48. For a wonderful explication of the positive potential of a negative litigation outcome, see Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV 941 (2011).

49. Robert S. Chang & Karin Wang, *Foreword: Democratizing the Courts: How an Amicus Brief Helped Organize the Asian American Community to Support Marriage Equality*, 14 ASIAN PAC. AM. L.J. 22, 23 (2008).

50. *Id.* at 31 (crediting in part the organizing work around the amicus brief in the Asian American community for the fact that "Asian American voters moved more rapidly towards support for marriage equality than the general electorate").

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starting point, make the amicus brief available, whether through publication or on the internet. Consider different audiences and how educational materials around the amicus brief and the litigation can be created. With regard to the bench and bar, consider developing continuing legal education programming.

Consider how you might get educational materials into classrooms. If we can get materials into classrooms, then that's a strong basis for long-lasting change. Our analysis here is that advocacy organizations do not have the resources to make this happen, or that it is not part of their advocacy plan. A problem also exists with regard to academics, who have strong incentives to create educational materials such as casebooks and treatises where they are given authorship credit, but who otherwise have weaker incentives to develop shorter educational materials around the issues raised in an amicus brief or the broader litigation.

A center's incentives, though, are different. The Korematsu Center, located in an educational institution, believes that education is the key to durable change. With that belief, our game plan is to canvas existing educational materials—casebooks, treatises, etc.—and find in them where they treat or do not treat the subject matter of the amicus brief and case. We will then develop different educational materials such as edited cases with notes; excerpts from the amicus brief; a problem that is constructed based on the issues; a note that could be added to already existing materials; a footnote that could be dropped that refers to the case and/or brief. We will develop thin and thick slivers of material to offer as options to professors. We will then send these educational materials to all the authors of casebooks and treatises with the suggestion of how they might incorporate these materials into their casebooks and treatises. We will also make these materials available to those teaching in this area so that they can use them immediately, keeping in mind that our efforts to get the materials into casebooks and treatises may not be successful, or if successful, will still take time to get into published materials.

6. Training students and professors. The Korematsu Center is committed to training students through a prerequisite social justice lawyering class that precedes the Civil Rights Amicus Clinic. The students in the clinic will be taught by a Korematsu Clinical Teaching Fellow. This fellowship is designed to provide mentoring with regard to teaching and scholarship that will enable the person to enter the legal academy. The goal is to nurture, one by one, teacher/scholar/advocates who will carry with them the Korematsu Center's social justice vision. The courses and the fellowship will begin in the 2011-2012 academic year.

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TASK FORCE ON RACE AND THE CRIMINAL JUSTICE SYSTEM

A controversy erupted when the *Seattle Times* in late October 2010 reported that two sitting Washington State Supreme Court Justices, on October 7, 2010, opined that racial minorities are overrepresented in the prison population solely because they commit more crimes and not because any bias exists in the criminal justice system.[51] The comments themselves betrayed a common misunderstanding about whether this issue is more complex than a cursory review of certain crime commission rates might imply. Conviction rates are not a valid proxy for commission rates.

In the wake of these comments by Supreme Court Justices, concerned community members came together to discuss the Justices' remarks and what kind of response would be appropriate. At the invitation of Judge Steven C. González, chair of the Washington State Access to Justice Board, the Korematsu Center has taken on the coordinating role to develop a system-wide response to the problem of bias in the criminal justice system.

In early November 2010, the first meeting of the ad hoc Task Force on Race and the Criminal Justice System took place and was attended by representatives from the Washington State Bar Association Board of Governors, Washington State Access to Justice Board, the Washington State Gender and Justice Commission, the Washington State Minority and Justice Commission, the Loren Miller Bar Association, the Latina/o Bar Association of Washington, Washington Women Lawyers, QLaw, the Asian Bar Association of Washington, the Vietnamese American Bar Association of Washington, the Korean American Bar Association, Filipino Lawyers of Washington, the Middle Eastern Legal Association of Washington, the King County Prosecutor's Office, The Defender Association, faculty members from the three Washington law schools (Gonzaga University, Seattle University, and the University of Washington), and various community and advocacy organizations. Since that first meeting, our membership has grown as more and more organizations and institutions have recognized the importance of this issue, not just to the affected racial and ethnic groups, but in how it relates to the best aspirations we have as a state. A broad range of organizations and individuals have joined the Task Force for this multi-year project.[52]

We met because the simplistic notion that black overrepresentation in our prisons occurs because blacks commit more crimes did not fit with our sense of how racial and ethnic minorities are treated in today's society and in our criminal justice system. We realized quickly, though, that it was important not

51. Steve Miletich, *Two State Supreme Court Justices Stun Some Listeners with Race Comments*, SEATTLE TIMES, Oct. 21, 2010, http://seattletimes.nwsource.com/html/localnews/2013226310_justices22m.html.

52. For the current list of participating organizations, see *Participants*, SEATTLE UNIV. SCH. OF LAW http://www.law.seattleu.edu/Centers_and_Institutes/Korematsu_Center/Race_and_Criminal_Justice/Participants.xml (last visited July 23, 2011).

to proceed on assumptions that unfair treatment existed. We decided at the first meeting that the work required several coordinated phases. The first phase would involve developing informational resources on racial bias in the criminal justice system. The second phase would bring into conversation all levels of the criminal justice system and to develop a set of recommendations to address racial bias at the systemic level. The third phase would work to implement the recommendations. Throughout, we planned to develop educational projects to reach judges, the bar, law enforcement, students, and the public.

By our second meeting in early December 2010, we had refined the project with tasks assigned to five Working Groups: Oversight, Community Engagement, Research, Recommendations and Implementation, and Education.

Working Group	Tasks
1. Oversight	1. General oversight. 2. Resource development. 3. Develop metrics for assessing progress. 4. If our work is successful, export model to other states.
2. Community Engagement	1. Engage in community outreach efforts to ensure that we are listening to interested or affected communities. 2. Plan dialogue among the interested parties involved in the criminal justice system. 3. Specifically, this will include public events that might be planned at each of the three law schools.
3. Research	General: develop informational resources and preliminary findings. 1. Pull together the research and findings that exist that are specific to Washington; where this doesn't exist, pull together national statistics, or state specific statistics if demographics and other social conditions justify comparison. 2. Assess the research, including identifying strengths and weaknesses. 3. Develop abstracts and executive summaries,if they don't already exist. 4. Identify areas where further work is necessary or beneficial; interface with Working Group 1 to assess feasibility of follow-up research, and follow through. 5. Make this work accessible to the public—through the three law schools and possible internet presence.

	6. Develop the findings in a publishable form and, together with Working Group 4, the recommendations and implementation plan. Work to get all three law schools' law reviews to co-publish this material. In order to emphasize collective work that went into this, rather than individual authors, publish as the work product of Working Groups 3 and 4.
4. Recommendations and Implementation	1. Develop recommendations that flow from Working Group 3's work product. 2. Refine recommendations for structural reform targeted at institutional actors within system. 3. Develop implementation plan. 4. Interface with Working Group 1 to assess progress.
5. Education	General: develop educational programming for the following: 1. Bench 2. Bar 3. Law enforcement 4. Public 5. Law schools 6. Colleges 7. High schools and below

While each of the Working Groups has been busy, the bulk of the work in the early stages has been done by the Community Engagement and Research Working Groups.

The Research Working Group's mandate was to investigate disproportionalities in the criminal justice system and, where disproportionalities existed, to investigate possible causes. This fact-based inquiry was designed to serve as a basis for making recommendations for changes that would promote fairness, reduce disparity, ensure legitimate public safety objectives, and instill public confidence in our criminal justice system. As we engaged in this work, the Research Working Group reported back to the broader Task Force.

For this report, the Research Working Group reviewed evidence on disproportionality in Washington's criminal justice system and reviewed whether crime commission rates accounted for this disproportionality. We found that crime commission rates by race and ethnicity are largely unknown and perhaps unknowable, but that many researchers simply take arrest rates as good proxies for underlying commission rates for all crimes. We found that use of arrest rates likely overstates black crime commission rates for several reasons unrelated to actual commission rates. Even if arrest rates are used as a

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proxy for underlying crime commission rates, the extent of racial disproportionality is not explained by commission rates. In 1982, 80% of black imprisonment in Washington for serious crimes could not be accounted for based on arrest rates, though by 2009, this had dropped to 36%.[53]

We then identified and synthesized research on nine issues for which evidence exists regarding the causes of Washington's disproportionality: (1) Juvenile Justice; (2) Prosecutorial Decision-Making; (3) Confinement Sentencing Outcomes; (4) Legal Financial Obligations; (5) Pretrial Release; (6) Drug Enforcement; (7) Asset Forfeiture; (8) Traffic Stops; and (9) Driving While License Suspended. In each of these areas, the research, data, and findings pertain specifically to Washington State.[54]

We also reviewed evidence regarding bias, especially research on unconscious or implicit bias. We found that cognitive neuroscience and social psychology help us to understand better the existence and behavioral consequences of unconscious or implicit racism.

The evidence we gathered demonstrates that within Washington State's criminal justice system, race and ethnicity matter in ways that are inconsistent with fairness, that do not advance legitimate public safety objectives, and that undermine public confidence.

The Task Force presented its findings in a special meeting with the Washington Supreme Court on March 2, 2011.[55] We are now working on next steps.

CONCLUSION

With the Civil Rights Amicus Project and the Task Force on Race and the Criminal Justice System, the Korematsu Center has consistently applied its integrative approach that combines research, advocacy, and education, and we suggest that there is great power in this integrative approach. Basically, our starting point when we are deciding whether to pursue a project is to fill out the following chart:

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53. *See* TASK FORCE ON RACE AND THE CRIMINAL JUSTICE SYSTEM, RESEARCH WORKING GROUP, PRELIMINARY REPORT ON RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM 8 (2011), *available at* http://www.law.seattleu.edu/Documents/korematsu/race%20and%20criminal%20justice/preliminary%20report_report_march_1_2011_public_cover.pdf.

54. The informational resources and preliminary findings were made available to the Recommendations and Implementation Working Group to help inform their policy recommendations.

55. The three hour presentation and discussion is available online. *Presentation of the Research Working Group and Recommendatins/Implementation Working Group*, SEATTLE UNIV. SCH. OF LAW (Mar. 2, 2011), http://www.law.seattleu.edu/x8777.xml.

	Research	Advocacy	Education
Project	Objective(s): Audience(s): Product(s): Staffing: Other required resources: Timelines:	Objective(s): Audience(s): Product(s): Staffing: Other required resources: Timelines:	Objective(s): Audience(s): Product(s): Staffing: Other required resources: Timelines:

Rather than conceiving of a project as being located in only one dimension, research, advocacy, *or* education, we try to think beyond the starting point for a project. That is precisely what we are trying to do with our Civil Rights Amicus project. Instead of thinking about an amicus brief as just an advocacy project, we consider the other dimensions, such as research and education, and even after the brief is filed and the opinion handed down, we ask the questions, "Are we done? Are there additional ways that we might take our work and have an impact?"

Through this work, we seek to accomplish our vision of social change that Fred Korematsu inspired. We offer it as a model that others might follow.

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