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## Introduction: Critical Race Praxis and Legal Scholarship

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## INTRODUCTION: CRITICAL RACE PRAXIS AND LEGAL SCHOLARSHIP

*Keith Aoki and Margaret Chon\**

The publication of this symposium issue is an occasion for three distinct and yet related celebrations. First, we honor the Western Law Teachers of Color, whose sixth annual meeting on the sublime Oregon Coast in 1998 provided the occasion for organizing the papers published here. Dean Strickland's preface, as well as Professors Linda Greene's and Jim Jones's essays examine the historical significance of this occasion in greater detail. Second, we engage in a festschrift of a particular member of this group—Professor Eric K. Yamamoto<sup>1</sup>—whose publication of a book this year<sup>2</sup> is a significant capstone to fifteen years of scholarship on racial justice. The articles in this symposium issue address one of Yamamoto's many path-breaking concepts: critical race praxis. Finally, the various pieces published here form a testament to the growing maturity of legal scholarship on race and law, as well as—sadly—the still highly contested legitimacy of this kind of scholarship within the mainstream legal academy as an editorial board of one of the Western Law Teachers participating law schools' law reviews decided against publication despite an earlier commitment.<sup>3</sup> The very fact that there was a politicized dispute elsewhere over the articles published here demonstrates the on-going nature of racial struggle inside the walls of law schools, as well as the strategic importance of law students committed to the principle of racial justice. Thus our obligatory first footnote, which thanks those on the editorial board of the *Michigan Journal of Race & Law*, does not begin to convey the complexity of the interracial dynamics—both alliances and fractures—that undergird this particular legal scholarship project.

Our introduction also has multiple identities. We want to situate both Professor Yamamoto's work and the articles that respond to it. We also want to follow Yamamoto's advice and “perform”<sup>4</sup> critical race praxis

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\* Respectively, Associate Professor, University of Oregon School of Law, and Associate Professor, Seattle University School of Law. Special thanks to the editorial board of the *Michigan Journal of Race & Law*, and especially Anthony Miles, for sharing the vision of the symposium authors and organizers.

1. Professor, William S. Richardson School of Law, University of Hawai'i.

2. See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999) [hereinafter YAMAMOTO, *INTERRACIAL JUSTICE*].

3. Documents on file with Margaret Chon.

4. See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 879–80 (1997) [hereinafter Yamamoto, *Critical Race Praxis*]. Yamamoto writes:

as it might relate to legal education and legal scholarship. Thus, the latter part of this introduction takes the form of an epistolary exchange, culled loosely from various e-mail messages between Professors Aoki and Chon. It is intended (in both form and content) to illustrate how conceptual tools that Yamamoto provides can be used to address the intergroup racial justice issues that permeate law schools.

### I. SITUATING THE SYMPOSIUM

Our decision to focus the symposium on the concept of critical race praxis happened quite naturally and, at first, without controversy. There was a simultaneous recognition in many quarters of the importance of an article originally published by Professor Yamamoto in the *Michigan Law Review*, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*.<sup>5</sup> In it, he defines critical race praxis as a stance that

combines critical, pragmatic, socio-legal analysis with political lawyering and community organizing to practice justice by and for racialized communities. Its central idea is that racial justice requires antisubordination practice. In addition to ideas and ideals, justice is something experienced through practice. . . . It requires, in appropriate instances, using, critiquing, and moving beyond notions of legal justice pragmatically to heal disabling intergroup wounds and forge intergroup alliances. It also requires, for race theorists, enhanced attention to theory translation and deeper engagement with frontline practice; and for political lawyers and community activists, increased attention to a critical rethinking of what race is, how civil rights are conceived, and why law sometimes operates as a discursive power strategy.<sup>6</sup>

Professor Yamamoto's call for critical race praxis incorporates and expands upon some ideas that he had previously introduced into the discourse of critical theory. Like many critical race theorists, he has writ-

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Performance comes in at least two parts . . . . What practical steps are responsive [to] . . . the underlying disparaging cultural images and exercises of group power that intensify historical intergroup grievances? . . . . [And] should scholar-theorists engage with the lawyers, organizations, and institutions and endeavor to influence the storytelling and decision-making of a controversy? The praxis response is a strong yes.

*Id.*

5. *Id.* at 821.

6. *Id.* at 829–30.

ten about the specific ways in which civil rights law, even if deployed “successfully,” is an inadequate tool for multicultural reconciliation over racial wounding.<sup>7</sup> Apologies and other non-legal remedies are undervalued.<sup>8</sup> And yet, he has also noted that racial reparations are important but not a panacea, especially when certain racial groups are left out.<sup>9</sup> Yamamoto enunciated an early form of his simultaneity thesis: that in order to capture the full complexity of racial justice grievances, people of color must see themselves simultaneously as oppressors and victims.<sup>10</sup> Related to that is the notion that people of color are not simply victims, but that they have an important if constrained agency.<sup>11</sup> Yamamoto also has shown elegantly how the legal process is a type of cultural narrative that either stymies or contributes to racial redress.<sup>12</sup>

The articles presented in this symposium by Professors Caldwell, Gassama, and Hutchinson respond to the critical race praxis emphasis on intergroup dynamics. Each of them pushes the boundaries of existing race theory by foregrounding, deconstructing, and then re-narrating some interracial group dynamics that often function as unexamined discursive wedges among different racial minority groups. From a Black nationalist standpoint, Professor Caldwell interrogates the theoretical critique of the Black-White paradigm of race within the United States. Ultimately, she locates the disjuncture between critical race theory and civil rights practice less in the growing inadequacy of the civil rights framework (historically based in a binary racial paradigm) and more in the failure of our political institutions to guarantee socioeconomic empowerment to racial minority groups.<sup>13</sup> The intergroup alliance she proposes is thus one that insists upon socioeconomic as well as political equality as a core part

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7. See generally Eric K. Yamamoto, *Friend, Foe, or Something Else: The Social Meanings of Redress and Reparations*, 20 DENV. J. INT'L. L. & POL'Y 223 (1992).

8. See generally Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER, RACE & JUST. 47, 49–52 (1997) (discussing South Africa's Truth and Reconciliation Commission); Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 U.C.L.A. ASIAN PAC. AM. L.J. 33, 65–69 (1995) [hereinafter Yamamoto, *Rethinking Alliances*] (sketching group healing concepts from law, theology, social psychology, political theory and indigenous practices).

9. See Yamamoto, *Rethinking Alliances*, *supra* note 8, at 43–47.

10. See *id.* at 51.

11. See *id.* at 47–65.

12. See generally Eric K. Yamamoto et al., *Courts and Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990).

13. Paulette M. Caldwell, *The Content of our Characterizations*, 5 MICH. J. RACE L. 53 (1999).

of our concept of “civil rights.”<sup>14</sup> In a very different vein, but still focusing on intergroup alliances, Professor Gassama focuses on transnational racial justice, seeing in Yamamoto’s work an example of “progressive race scholarship [that moves] away from racial or national exceptionalism or myopia toward a more meaningful appreciation of global interconnectedness.”<sup>15</sup> Lastly, in another move that cosmopolitanizes race theory by insisting on intergroup understanding, Professor Hutchinson explores the cost of suppressing “internal criticism” of racial or other singular identity movements on those such as gay Blacks who experience multidimensional subordinated identities.<sup>16</sup>

Professor Yamamoto is concerned with more than facilitating intergroup understanding and forging alliances. Much of his article also emphasizes the pragmatic need to link narrow definitions of legal justice to broader forms of racial justice. Along these lines, Professor Johnson unpacks the term political lawyering into its component parts—politics and law—and examines the sometimes hidden tensions between the two in a practice committed to racial justice.<sup>17</sup> Finally, the book review by Professor Chang<sup>18</sup> illustrates how Yamamoto’s total vision of interracial justice as expressed in his book embraces theories of situated group power and agency that are only hinted at in his article—theories including “simultaneity, positionality, differentiation, and dominance-transformation.”<sup>19</sup>

## II. APPLYING PRAXIS TO THE LEGAL ACADEMY

The second part of this introduction will take these four additional theoretical frames—simultaneity, positionality, differentiation, and dominance-transformation—and will apply them to some of the racial justice issues that permeate legal education.<sup>20</sup>

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14. See *id.*

15. Ibrahim J. Gassama, *Transnational Critical Race Scholarship: Transcending Ethnic and National Chauvinism in the Era of Globalization*, 5 MICH. J. RACE L. 133 (1999).

16. Daren Lenard Hutchinson, *Beyond the Rhetoric of “Dirty Laundry”: Examining the Value of Internal Criticism Within Progressive Social Movements and Oppressed Communities*, 5 MICH. J. RACE L. 185 (1999).

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

18. Robert S. Chang, *Facing History, Facing Ourselves: Eric Yamamoto and the Quest for Justice*, 5 MICH. J. RACE L. 111 (1999).

19. Yamamoto, *Critical Race Praxis*, *supra* note 4, at 891.

20. As explained earlier, the second part takes the form of an epistolary exchange, culled loosely from various e-mail messages between Professors Aoki and Chon.

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Keith,

I'm really looking forward to this collaboration. One of the most important ways I've been able to wrestle the legal academy on my terms is by reaching out for extra muscle from the Asian American law professors who teach in institutions other than mine. If I were to cut a CD, you and Eric and others would be among the first in an endless list of thanks.

Before we talk about Eric's work, I think you wanted to talk about him as a person . . . .

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Maggie,

I think Eric has been building an internally consistent body of work for well over a decade now and am glad to see that the importance of his work is being recognized.

As for Eric as a person, hmmmmm, let's see. I think the first time I met him was at the second Western Law Teachers of Color Conference at Lake Arrowhead in late March of 1994. This was close to the end of my first year of teaching law and I had my arm twisted by Sumi Cho to attend—I tried pulling my “I'm way too busy to attend because this is my first year teaching blah blah blah. . .” but Sumi insisted I attend and so there I was. Interestingly, some of the roots for the First Asian Pacific American Law Professors Conference were being laid there in part by Neil Gotanda and Sumi.

Eric was extremely friendly and was interested in hearing how my first year of law teaching had been going. I mentioned the possibility of having him come to Oregon to give a talk sometime in the future, and he said we should try and stay in touch.

The 1993–94 school year ended and as I've recounted elsewhere, Sumi Cho asked me to do an “Asian Americans in U.S. Law and Culture” class at the University of Oregon. I spent the entire summer in a heavy autodidact mode getting ready for teaching the class and preparing the materials. I went to my dean and asked if I might be able to get some funds to pay expenses for speakers for the class. Graciously, he agreed to fund three speakers who agreed to come to Eugene and speak to my class. (To show my naiveté—inexcusable in retrospect—the three speakers I asked to come were: Eric Yamamoto, Neil Gotanda, and Lisa Ikemoto. Neil told me later that I could maybe get away with having three Japanese American speakers once, but the issue of representation was of growing importance in the APA communities.)

In 1994, I found out that Eric is a consummate story teller, because I heard him three times in two weeks. Each presentation was different.

When he talked to the students in my Asian Americans in U.S. Law & Culture class, Eric described the detailed work and coordination it took to get the idea of reparations for the Japanese American internment off the ground in the late 1970s and early 1980s, how it took careful explanations to unite different generations, some of whom wanted to forget or were deeply ashamed of the internment with a younger generation of activists who had cut their teeth in the civil rights and feminist struggles of the 1960s and 1970s.

After carefully describing the backdrop, Eric described the three teams of Asian American lawyer activists who were seeking to overturn the outcomes of the three internment cases: the *Korematsu*<sup>21</sup> case that arose in California, the *Yasui*<sup>22</sup> case that arose in Oregon (and interestingly involved a University of Oregon Law School graduate, Minoru Yasui) and the *Hirabayashi*<sup>23</sup> case from Washington state. Eric was part of the team that worked on getting Fred Korematsu's *coram nobis* petition into court. *Coram nobis* was an extraordinary writ at English common law that allowed a case that had long been closed to be reopened because dispositive significant new evidence had come to light. In Fred Korematsu's case, Eric recounted, the direct evidence consisted of the War Department and the Department of Justice's outright lies when they maintained that the resident Japanese and Japanese American population was a threat to national security in early 1942. The FBI had given the Justice Department and War Department information stating that they knew the small number of potential saboteurs and Japanese loyalists and that the rest of the Japanese American population did not pose a security threat. Armed with this information, the three teams of lawyers sought to overturn Korematsu, Yasui, and Hirabayashi's convictions for violating the West Coast evacuation order.

Eric was an eloquent storyteller, weaving past and present, describing Korematsu's personality and how even his son did not know until the 1970s that his father's name was attached to one of the most famous (or rather infamous) Supreme Court cases in history. Eric described in part the Nisei generation after World War II, struggling mightily to assimilate, many widely dispersed across the country. Eric's talk really brought the issues surrounding the internment vividly alive, especially when he described how Judge Marilyn Patel of the Federal Court for the Northern District of California overturned Fred Korematsu's criminal conviction.

In his talk to my law faculty and law students, Eric told a different story, a story of political activism and progressive lawyering for social

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21. See *Korematsu v. United States*, 319 U.S. 432 (1943).

22. See *Yasui v. United States*, 320 U.S. 115 (1943).

23. See *Hirabayashi v. United States*, 320 U.S. 81 (1943).

justice. He described his role in attempting to seek redress for Native Hawaiians. Eric described some of the difficulties at reaching accord over reparations and redress for the Native Hawaiians who were dispossessed when U.S. warships steamed into Pearl Harbor in 1898 to dethrone Queen Lili'uokalani and take possession of the sovereign nation of Hawai'i as a U.S. territory (1898 was a high water mark, if you will, for U.S. imperialism, as Puerto Rico and the Philippines became U.S. possessions in that year as well).

Setting aside the contentious politics of coalition and the burdens of history, Eric focused on an example of land reparation where the United Church of Christ donated/gave back as partial reparations a stretch of land on one side of a big mountain they had come to own on one of the other islands that the Native Hawaiians wished to use to grow taro, a tradition staple subsistence crop. However, the problem in this case was that the Native Hawaiians did not have access to the water to irrigate their taro crops because a sugar plantation, owned by a multinational company, owned the water rights and refused to give them up, sell them, or divert water to the Native Hawaiian group. Through words, Eric summoned up a vivid picture of the mountain between the Native Hawaiians and the sugar plantation and the ways that rivers had been diverted from their flow so that the plantation side of the mountain received the lion's share of the water. He described the taste and texture of taro. Into this picture, enter the "law."

Eric spoke in careful detail about Hawaiian water law, which was derived from the New England states that used a combination of "natural flow" and "reasonable use" rules. These rules derived from early missionaries who used water for themselves, but also left enough for others to use. In contrast, water laws in the western United States presently focuses on the idea of first-in-time takes all or "prior appropriation" rules. With this backdrop, it was clear that the way the sugar corporation was behaving went against Hawaiian water law. The final kicker was that the lawyers for the Native Hawaiian group took photographs from a helicopter that showed the corporation allowing tens of thousands of gallons of fresh water to dump in the ocean rather than share any of it with other people on the island. The Native Hawaiian group in this case won the right to water to irrigate its taro.

At the first Conference of Asian Pacific American Law Faculty at Boston College a week later, Eric used the same facts as he did in the talk to my law faculty and students, but with a markedly different emphasis—like a jazz musician who can take a familiar theme and ring new variations on it. Eric focused instead on the difficult and fraught politics of coalition. He spoke of the numerous splintered Native Hawaiian groups and what a term like "Asian American" (which may attain a momentary



coherence on the mainland) might mean in a post-colonial multicultural society like contemporary Hawai'i.

For example, in the deliberations within the United Church of Christ which ultimately led to an apology for the dispossession and dethroning of the sovereign nation of Hawai'i, a flash point occurred between some representatives of the Chinese American community and the Japanese American community over whether there should even be an apology at all. A Chinese American member of the talks maintained that his ancestors were at least as badly put upon as those of the native Hawaiian community, and that if Native Hawaiians received reparations and apologies, so too should Chinese Americans. At the very least, he saw little for the Chinese to apologize for. Members of the Japanese American community, cognizant of the relatively recent reparations and apology by the U.S. government for the Japanese American internment, disagreed with the Chinese Americans and advocated reparations and redress to the Native Hawaiians as a step in atoning for past injustice to promote reconciliation and healing.

This theme of taking responsibility for "color-on-color" violence and oppression is an important feature of Eric's growing body of work. Yes, Japanese Americans may have been unjustly interned, and the Chinese Americans before them have taken more than their fair share of abuse, as has virtually every other Asian American group throughout U.S. history (e.g., the South Asians, Filipinos, Koreans, etc.). Yamamoto importantly reminds us that sometimes when we meet the oppressor, he (or she) is us. A sobering but important thought.

Never a sanguine "why-can't-we-all-get-along-together" storyteller, Eric claimed that he did not have the answer. He spoke of individual and racial group agency and the importance of not copping out by taking either a simple-minded "colorblind" approach, such as that advocated by many U.S. conservatives, or an equally simple-minded "my-group-right-or-wrong" nationalism. If you recall, at this inaugural Asian Pacific American law professor event in fall 1994, many of us were still trying to figure out what the 1992 Los Angeles uprising/rebellion/civil unrest meant. Eric at the very least, brought home the fact that in late 20th century America, we definitely were not in Kansas anymore.

One aspect that tied all of Eric's three 1994 talks together was his attitude of humility. Let me explain. A student asked how she, as a law student and soon-to-be-lawyer, might get involved in social justice of the sort that Eric was describing. Well, Eric told her, that is a tough question. The best advice he had was to do whatever one does the best one can, sharpening and honing the mundane day-to-day lawyer skill, do things carefully, get things absolutely right. And, Eric said, keep your antennae out, pay attention to what is happening in the world. He quoted Thomas

Jefferson, and said “Chance favors the prepared”—if your skills are honed by experience, then when and if a chance arises, like working on the *coram nobis* petition to overturn Fred Korematsu’s wartime conviction for resisting the internment order or when a Native Hawaiian group comes to you and says that the big sugar corporation will not let us have water, you will be prepared. In a hyper-aggressive legal profession that glorifies Terminator-type of legal battles involving going to the ethical edge and beyond, Eric’s chastened advice was refreshing.

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Hi Keith,

Yes, I have watched Eric in action and he has a healer’s touch. In March of this year, in Chicago, he intervened in a dynamic First Annual National People of Color Legal Scholarship Conference. There had been an extremely hotly debated assertion made by someone regarding the scientific validity of LSAT scores—basically an assertion that there was nothing wrong with the LSATs, and that any underperformance on the exam could not be attributed to cultural bias.

Because a number of people in the audience felt differently, the temperature in the room went up quite a bit. Person after person stood up to voice indignation and concern, and there was a palpable feeling of anger. At the end of this very impassioned and honest debate, Eric got up and said that it was important to have had the conversation within our community about this issue. He reminded us that it was also important to make sure that we do not let our righteousness get in the way of communicating. He told us that what had just happened was a “good” thing even though it was full of the expression of anger. He led us in a Native Hawaiian chant—*Imua*—that was about reconciliation and forgiveness. *Imua* literally means “forward,” but when said collectively by a group from its gut, it is transformed into “forward together.”

The moment was magical. I had been to many law teachers of color conferences in which intergroup differences were either not aired or aired very messily. This was a step forward. Part of it was that many people in the room had worked and played with each other over the years, and thus had developed a basis of trust. But a large part of it was that Eric saw and seized the opportunity for a dialogue about healing.

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Maggie,

Your story about Eric raises an interesting point about outside/inside categories. What exactly is “inside” or “private” for purposes of debate, as in “keeping disputes within a family ‘private’”? And how does the assertion of “insider-ness” work as a license to vent? When does “venting”

turn destructive or how may it be transformed into something from which a lesson may be drawn? It sounds as though Eric was able to negotiate a fraught set of circumstances.

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Keith,

The questions related to insider/outsider status are of critical importance: who is inside? When is a person inside or outside? Why? How? And does insider or outsider status depend on where? For those of us engaged in racial justice work (rectifying insider/outsider status along racial lines), Eric's thinking on inter-minority group conflict, and his concept of critical race praxis, as well as his related concepts of simultaneity, positionality, differentiation, and dominance-transformation are very relevant.

Eric's understanding of simultaneity is "that a racial group can be viewed as uplifting and subordinating, oppressed and oppressive, depending on the power relationships involved."<sup>24</sup> His concept of positionality is "that racial group agency needs to be understood as multirelational. Each social actor is engaged in multiple relationships . . . [e]ach axis of power forms a context within which domination can occur."<sup>25</sup> By differentiation, he reminds us that "racial groups are racialized differently—that varying historical experiences and current socio-economic conditions create different racial images, status and power among racial groups, and that those differences contribute to intergroup conflict."<sup>26</sup> Finally, by dominance-transformation, he tells us that the "extent of a racial group's power over another is determined in part by its alignment with other social (often institutional) actors within the group's field or socio-political setting . . . One group can have power over another under certain circumstances, and the power relationship can be reversed in other situations."<sup>27</sup>

Eric does not shirk, either in theory or in practice, from the complexities inherent in these questions about insider and outsider status. In the anecdote I related above about Eric's healing touch, he was *practicing* a type of dispute resolution—something that we supposedly teach in law schools but rarely model in our real life conflicts with others. In that setting, the main conflict was between people of color who valued direct social change as a means for reaching equality, and a single person of color who seemed to advocate "going along with" the status quo. The significance that should be accorded LSATs in law school admissions is

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24. Yamamoto, *Critical Race Praxis*, *supra* note 4, at 891.

25. *Id.*

26. *Id.* at 892.

27. *Id.* at 893.

something that is of direct *practical* importance to many of our minority students. I emphasize the words *practicing* and *practical* here because I think they are essential to what Eric is trying to say and do through the critical race *praxis* concept. One aspect of this approach is to “think locally, act globally” rather than the other way around. It is to understand fully the micropolitical dynamics in one’s own immediate surroundings, and then to take that understanding “to link with others different in culture or race but similar in efforts to restructure attitudes and institutions.”<sup>28</sup>

You described in an earlier message Eric’s observations of the reluctance of some Asian Americans in Hawai’i to acknowledge their complicity in the overthrow of the Hawaiian indigenous peoples. I’d like to move our conversation to his observations about Asian Americans in the educational sector, in which you and I operate as law professors committed to racial change. It might help other legal academics of color (and those sympathetic to racial justice within the legal academy) to have a public conversation about how we may be complicit in some of the very things we critique. As you stated, paraphrasing Eric, sometimes when we meet the oppressor, he (or she) is us.

The first real life example in Eric’s critical race praxis article is the *Ho v. San Francisco Unified School District* case involving Chinese American plaintiffs’ challenge to a consent decree fashioned between the NAACP and the school district. Essentially, as you know, this was a fight about who would be able to attend the most prestigious public high school in San Francisco—a fight that has been reproduced (with White female plaintiffs funded by neoconservative litigation support groups) in the great state university systems such as Texas,<sup>29</sup> Washington,<sup>30</sup> and now Michigan.<sup>31</sup>

The *Ho* situation is a vexing and significant example to Asian Americans precisely because of the splintering among political strategies towards racial discrimination within the Asian American community. What is that “Asian American” community? Of course, as you and I recognize, the racial category of “Asian American” contains strong differences based upon ethnic origin, class, gender, sexual orientation,

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28. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 2, at 209.

29. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

30. *See* Smith v. Univ. of Wash. Law Sch., 194 F.3d 1045 (9th Cir. 1999).

31. *See* Gratz v. Bollinger, No. 97-CV-75231-DT (E.D. Mich., filed Oct. 14, 1997); Grutter v. Bollinger, No. 97-CV-75928-DT (E.D. Mich., filed Dec. 3, 1997).

immigration status, and so on—the “heterogeneity, hybridity, multiplicity” that ironically underlies our Asian American group identity and status.<sup>32</sup>

A lot of Asian Americans who are aligned with the goals and ideals of the African American-catalyzed civil rights movement did not know how to deal with *Ho*. The alignment of the Asian American plaintiffs with neoconservative rhetoric and political/legal strategies shows how Asian Americans play the “insider.” What *Ho* illustrates, among other things, is that insider/outsider status is ever-shifting. The Chinese American plaintiffs based part of their claim of current discrimination on the history of exclusion of Chinese from mainstream educational institutions until recently. And yet, these plaintiffs were claiming a current injury based on theories of meritocracy (test scores that were higher than others’ who were admitted) that have been and continue to be used to justify exclusion of many racialized and subordinated people. On the one hand, Asian Americans can invoke outsider status, and on the other, we can pick up and play the insider cards. It makes us, frankly, quite dangerous to other people of color who are negatively impacted by our “meritocratic” strategy of pounding away at the doors through super-normal test scores and grades.

Speaking as a survivor of that Horatio Alger strategy, I know that it exacts a tremendous personal and group cost, not to mention the cost to intergroup coalitional social change. I look around from my own current summit, and feel that I have worked twice as hard to get about half as high as others who were born with all the right privileges, including color. More importantly, I have done very little to challenge the false assumption of a level playing field that underlies the meritocratic ideology most comfortable to the majority. I do not think I have made it easier for others who come after me—at least not as much as I could have or should have. The conference theme of “generations” chosen by Rennard implies a critical race praxis question: how do we prepare the ground for those who are to come after us? We have often joked about you, Keith, taking the model minority model very seriously on a personal level even as you critique it on a theoretical level.

As this symposium is going to press, I read about how the Bill and Melinda Gates Foundation is excluding Asian Americans from their one billion dollar educational scholarship program because there is no national-level group that represents the interests of Asian Americans in the educational domain. Some Asian American neoconservatives would applaud this. I think it is symptomatic of a larger issue: because Asian

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32. See generally LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS (1996).

Americans have adhered so much to individual solutions to educational discrimination, we have played right into the hands of those who would exclude us (yet who are delighted to have us be examples of the “good minority” when we are willing to serve as such), and at the same time, we have been left out by those who might have included us in a more inclusive coalitional stance towards social change and social justice. And to the extent that we buy into the meritocratic solution to educational discrimination, we are disabling ourselves from addressing employment discrimination or other forms of discrimination that more definitely negatively impact Asian Americans as a group.

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Maggie,

Indeed, as you and Eric have discussed, the example of affirmative action poses a vexing problem for Asian Americans, raising squarely the questions of (group and individual) self-interest and coalition. As Pat Chew has pointed out, there is a paradoxical quality to the Asian American experience in the legal academy. Elsewhere, I have half-jokingly said that Asian Americans are the “quantum minority” (harking back to the early twentieth century debate in particle physics as to whether light was correctly understood to be a “wave” or a “particle”—without digressing into physics too far, the actual answer was “both”). Eric wrote an essay entitled *We Have Arrived, We Have Not Arrived* that nicely sums up this paradox.<sup>33</sup>

First, in response to your point about the double-consciousness insider/outsider roles we play in our academic lives, I would push the “outsider” button and question, all things considered, how “inside” are we really? Consider Wen Ho Lee, the Chinese American implicated in the release of U.S. atom bomb secrets from Los Alamos? Consider media treatment of Vice President Al Gore’s fundraising at the Buddhist Temple in California? Closer to home, consider how many Asian Americans there are (or might be) on a typical U.S. law faculty? I would put it to you that there is virtually no law school in the United States where you will find, now or in the relatively near future, more Asian American faculty members than you can count on one hand.

As one who has studied the checkered histories of different immigrant Asian groups within the United States over the past 150 years, I hesitate to proclaim too strongly the “insider-ness” of Asian Americans. Without a doubt many members of the “traditional” Asian American groups (i.e., Japanese Americans, Chinese Americans, Korean Americans,

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33. See Eric K. Yamamoto, *Foreword: We Have Arrived, We Have Not Arrived*, 3 *ASIAN L.J.* 1 (1996).

Filipinos, etc.) have elites to varying degrees, but the negotiations remain highly contested and fluid. Particularly in the legal academy, why are there no Asian American “Kingsfields” or Arthur Millers? It is because up until about 15 years ago, if an Asian American law student wanted to pursue an academic path, that path led exclusively into law library administration and definitely *not* at the front of a law school classroom. Most U.S. law schools do not have and have never had an Asian American law professor—out of more than 6,000 law professors teaching at U.S. law schools, *a little over 1% are Asian American* (APAs are approximately 3.5% of the U.S. population and APA law students are around 6.2%).<sup>34</sup>

My point is that the gains of Asian Americans in the legal academy while real, may also be extremely fragile for a number of internal and external reasons that Eric’s work wisely catalogs. There are at least three axes of fragility:

1. the contingency of “insider” status (the very terms of our group and individual achievement often can and will be used against us);
2. the contingency of our categories (they hide as much as they conceal, and sometimes take on a life of their own, leading to unforeseen and undesired outcomes; look, for example, at the strange history of an idea like “colorblindness” or at how to generate political and organizational institutions around a quicksilver-like term like “Asian American”); and
3. the contingency of our coalitions (how can different groups with different agendas work together?).

First, the gains Asian Americans have made in legal academia, while real, may also be numerically small. Granted, that the 1%+ of Asian American law professors that have teaching jobs (and the even smaller percentage that have tenure) are “insiders.” Nevertheless, the question should be asked, “at what cost?” The point I make is that Asian Americans that become “insiders” make a choice, to be a “token” or to be a “pioneer.” “Tokens” play a distinct regulatory function, they normalize and inoculate an institution from charges of systemic racism as well as serve as a pressure release valve for pent-up institutional frustrations. By contrast, “pioneers” enter an institution to fundamentally alter the conditions of entry to that institution for others that follow.

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34. See generally Pat K. Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 *ASIAN L.J.* 7 (1996); Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 *ASIAN L.J.* 39 (1996).

Derrick Bell has used the example of how residential housing markets “tip” when a formerly White neighborhood begins acquiring “too many” new Black residents to show the asymmetry in perceptions of a neighborhood’s relative level of integration. For example, White residents in a neighborhood might feel that the neighborhood was “integrated” comfortably, if it had say, 7–10% Black residents. By contrast, Black residents might feel an “integration” comfort level if the neighborhood were, say 25–30% Black (still a White majority). “Tipping” occurs when the upper limit of the White comfort level with the neighborhood is approached and no White homeowner wants to be the last homeowner to sell when the housing values drop precipitously because all the White homeowners sell their houses, leading to a glut and a price blowout.

Law school faculties and housing markets may have more in common than it seems at first blush. First, houses and careers are “big ticket” items that take a long time and lots of actual and human capital to acquire and maintain. Second, both houses and careers are subject to fluctuations in value over the course of time and individual self-interest works to try and ensure that such price fluctuations are upward, rather than downward. Third, subjective group and individual irrationalities in perception of values (such as racial or gender biases) can become objectified through market mechanisms such as pricing and grades in ways that distributively distort the markets in both houses and careers.

What does this have to do with “tokens” and “pioneers”? “Tokens” work to maintain the mainstream group’s comfort level with how institutions should look and operate (whether neighborhood housing markets, law school student bodies or law faculties). By contrast, “pioneers” seek to fundamentally alter the conditions attached to entry into an institution once they have entered that institution, so that the very system that produced the skewed market in housing or faculty positions must reformulate its entry criteria.

When you mention how we joke with each other to “stop being such model minorities,” you put your finger right on the existential (and intensely political) question of: Now that we have done what it takes to become “insiders,” what do we do next?

The gains Asian Americans have made, while real, occur at the expense of papering over some fairly serious fault lines—gender, sexual orientation, national origin, citizenship status, and class, to name a few. Here, I refer to the limited but very important utility of a pan-ethnic term like “Asian American.” I remember having a conversation with my uncle, a Nisei in his late 60s who had been interned during World War II at Gila River Camp in Arizona. My uncle who made his living as a tomato farmer in Woodland, California and now serves as a freelance irrigation consultant, was on his way up to Portland when he stopped and



visited me in 1996. Proposition 187 was on the California ballot that year and I asked him what he thought about it. Proposition 187, as you may recall, was a ballot measure that targeted undocumented workers within California who, according to then-Governor Pete Wilson, were exerting a devastating drag on the delivery of California social services. I assumed my uncle's experience of being a vilified and interned racial minority before and during World War II would find him more sympathetic to the plight of undocumented persons in 1990s California. I was surprised when he unleashed a vitriolic and angry diatribe, not only against Mexican agricultural workers but also against Vietnamese gangs, whom he claimed were dangerously out of control in cities such as Sacramento. I asked him if he thought that the anti-Japanese Californians that had discriminated against him and his family before and during World War II were correct in describing Japanese Americans as "dangerous," thereby justifying their mass internment beginning in February 1943. "Of course not," he said, "that was different. We were good people, not like these new immigrants." During the rest of the evening he refused to admit the connection between the internment and anti-immigrant measures such as Proposition 187. Proposition 187 was ultimately passed and was eventually judicially struck down. However, my conversation with my uncle comes back to haunt me as a reminder of both the limits of and need for racial exceptionalism as well as the need for some viable theory, such as Eric has been constructing, to help us map the contours and structure of those limits.

The cost of my uncle's vision of Japanese American exceptionalism (superpatriots, model minorities) may be that the very real and very contemporary economic and social disadvantages and burdens facing Vietnamese, Cambodian, Thai, and other Southeast Asian immigrant communities within the U.S. is not exposed to institutions like the Bill and Melinda Gates Foundation. These Southeast Asian communities might be paradigmatic examples of people who might benefit from education philanthropy as well as robust affirmative action programs. However to the extent "we" have our "model minority" blinders on, these communities disappear or exist as the margins of our consciousness as dangerous and threatening "shadows" amplified by the media who take their place in the political economy of spectacle alongside dark, swarthy immigrant brutes and "inner city youth" (whose menace is further underwritten by actual spatial and social distances in our cities and suburbs).

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Keith,

To bring this back to Eric's work, I think much of what we have just described can be recast, using his terms of simultaneity, positionality, differentiation, and dominance-transformation.

Eric's notion of simultaneity contains the recognition that we can simultaneously be oppressors and oppressed. In the educational world, the small percentage of Asian American law professors relative to our proportion in the general population attests to historical structural discrimination that prevented Asian Americans from graduating from law school in large numbers until recently. The tiny percentage that we represent in the legal academy means that we have achingly little real political power. Yet, even in small numbers, Asian Americans are in powerful positions, such as law teaching, that can hurt other racial minority groups when we uncritically accept the ideology of meritocracy, or if we remain silent, when we are used as token symbols of success against other minority groups who have endured greater historical discrimination than we have.

Depending on who we align ourselves with or against, in shifting and dynamic group relationships, we might exercise racial domination over others. This is Eric's positionality point. If Professor X is the only Asian American on her law faculty (something that is quite common for most of us), she might respond by aligning with the White interest in maintaining racial status quo, in the same way that your uncle aligned himself with the proponents of Proposition 187. Or, she may forge alliances with others committed to anti-subordination and the rectification of racial injustice, in an effort to "tip" and transform our institutions. (When I use a hypothetical "she," I am also thinking of the huge difference that gender makes in positionality—something that we do not even begin to discuss here.) Another factor too that we have talked about many times is the political construct often imposed upon Asian Americans by their White conservative or liberal colleagues prior to our exercising political agency. It is common for Asian American progressives to be prejudged as not a "real" minority simply because we occupy a racial middle zone. This complicates the racial power dynamics even further.

Your reference to whether Asian American law professors are a "wave" or a "particle" implies that we often occupy contradictory paradigms at the same time or in the same space. We have different experiences and histories from those of other racial minority groups, and yet much of what we experience is simply different manifestations of the same illness: racial inequality. We may let our different experiences get in the way of what might be important commonalities.

One reason that conferences like the Western Law Teachers of Color are so important is that they give us the opportunity to

communicate about those commonalities: student and administrative hostilities, feelings of isolation, being over-burdened by diversity demands, lack of mentoring and support—all the factors that prevent the playing field from being level.

We also find common ground around the kind of scholarship that we think matters, and Eric's critical race praxis concept clearly struck a chord among us. Racial justice is an intensely practical as well as theoretical concern. Without some connection to a core sense of justice, law cannot have legitimacy. So we should strive to identify and ameliorate the sources of the disconnect between law and racial justice, between civil rights practice and critical race theory. This, at least, is what Eric prescribes, with a sophisticated set of conceptual and rhetorical tools.