

REBELLIOUS LAWYERING, SETTLEMENT, AND RECONCILIATION: SOKO BUKAI V. YWCA

Bill Ong Hing*

The day we served the lawsuit on them, we had a press conference and public coverage. We had a performance by the Little Friends [preschoolers] who were learning taiko. Later we learned the [SF YWCA] found it intimidating, [complaining] "they had their drumbeaters in tow," [but] the taiko drummers just became a part of these public events. It has become a tradition—part of the community. It's amazing because the combination of emotions—anger and frustration and the insult and affront that has been put out by the [SF YWCA]—has coalesced into so much community goodwill. This is one issue that has brought people into agreement who normally don't see eye-to-eye about development in Japantown. This was partly because of the nature of the [Little Friends] and the Bukai.

—Karen Kai, Soko Bukai Legal Team Member, April 9, 2002.

I. INTRODUCTION

Who was the rightful owner of the 1830 Sutter Street building in San Francisco: the San Francisco Young Women's Christian Association (SF YWCA) or the Japanese American community that had raised funds for its purchase in the 1920s and approached the SF YWCA to hold the property in trust for the community because Japanese immigrants were barred from owning property? When the legal dispute over the ownership of a building in the heart of San Francisco's Japantown ended with Japanese American community groups agreeing to purchase the building for \$733,000 from the SF YWCA in February 2002, the result apparently provided vindication for a community victimized by alien land laws in the early 1900s and internment during World War II. As Reverend Lloyd Wake, a member of the plaintiff group, put it, "We can now say that this building belongs to the community We rededicate it and pray that it may continue to serve the community."¹ John Tateishi, executive director of the Japanese American Citizens League, noted, "This is a great reso-

* Professor of Law and Asian American Studies, University of California, Davis. Many thanks to Soko Bukai attorneys, Karen Kai, Robert Rusky, Donald Tamaki, and Tracie Brown for their cooperation and advice, and to the Japanese immigrant women of the 1920s for their inspiration. I received excellent research assistance from Lindsay Bennett, Christine Ichimura, Trang Doan, and Melyssa Minamoto. I also appreciate the hospitality of the symposium organizers, especially Lynne Henderson.

¹ Avy Mallik, *Japantown YWCA Victory Celebrated with Rededication*, ASIANWEEK, Aug. 2 – Aug. 8, 2002, available at http://www.asianweek.com/2002_08_02/bay_ywca.html.

lution It's so symbolic that a building of such significance from our history and our past is becoming the edifice for our future."²

The lawsuit and its settlement provide a unique opportunity to consider theories of dispute settlement in the context of community lawyering where many of the attorneys themselves are from the community. From the perspective of the Japanese American community, a number of questions are raised in this case: Was settlement the desired outcome in a case of such high social significance, or should the case have gone to trial and perhaps to a higher court for a definitive adjudication? In other words, should the community lawyers have pushed on to trial to seek a return of the property to the community at no cost? Did the settlement and mediation process provide enough room or opportunity for the community lawyers to educate younger members of the community about the history of the alien land laws and internment, and was that one of the purposes of the suit? What effect did community activism and participation have in the outcome of the case, and was that part of the strategy? How did the community lawyers work with the community, explain what was going on, demonstrate respect for the community, and what rebellious qualities did they use if any? Was one of the overall goals in the process to realize a sense of reconciliation for the community, and, if so, reconciliation with whom? Was maintaining a good relationship with the SF YWCA an important goal in the dispute?

II. BACKGROUND ON ALIEN LAND LAWS

After the exclusion of Chinese laborers from the United States was codified in 1882, farmers and plantation owners in Hawaii and the West Coast looked to Japan as a source of cheap, reliable farm workers. In the 1890s, 27,000 Japanese immigrated to work in Hawaii and the West Coast. Recruitment was then stepped up between 1901 and 1910, with 130,000 Japanese laborers entering the United States.³ However, just as animosity toward Chinese laborers had grown over job competition and race, resentment toward Japanese immigrants simmered and then boiled over as well. Calls for Japanese exclusion intensified by the late 1800s, but after the 1905 Japanese defeat of Russia in war, President Theodore Roosevelt determined that an outright legislated exclusion of Japanese laborers was not the wise course. Instead, Roosevelt dispatched representatives to Japan to negotiate an agreement, and an accord was reached in 1908. Under the so-called "Gentlemen's Agreement," Japan agreed to limit the number of laborers that could leave Japan to come to the United States. In exchange, Japanese nationals already in the United States could petition for their spouses and children to join them in the United States.⁴ The benefit of family unification was obvious; in spite of suffering resentment at the hands of some, Japanese immigrants in America could enjoy a family

² Deborah Kong, *Land Ownership Dispute Rooted in Now-Repealed Racist Laws*, SACRAMENTO GAZETTE, Mar. 8, 2002, at 7.

³ Bill Ong Hing, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990* 53 (1993).

⁴ *Id.* at 29. As part of the agreement, San Francisco public school authorities agreed to rescind an order that had segregated Japanese students. *Id.*

life. However, one unanticipated consequence of family life was that the number of Japanese Americans would grow naturally through the birth of new children.

Japanese American family life in the United States afforded some families the opportunity to settle in certain parts of the West where prospects to purchase farmland were presented. Many Japanese immigrants and their families were successful at this. In fact, by 1913 when California's first alien land law was enacted, 4,000 Japanese in the state operated farms, and another 20,000 were farm workers.⁵ Furthermore, while Japanese immigrants controlled only one percent of the farmland, their farms produced ten percent of California's produce.⁶ Many white farmers resented the competition and urged state legislators to figure out a way to stop the situation from expanding.

In 1913, California enacted the nation's first alien land law that limited land ownership to aliens "eligible to citizenship."⁷ Anyone who broke the law was subject to criminal penalties and their property would be forfeited to the state.⁸ The craftiness of the "ineligible to citizenship" bar was that it eliminated the need to specifically designate a racial or ethnic group for exclusion. Under a post-Civil War 1870 revision to the citizenship laws, only whites and immigrants of African descent were eligible for citizenship through naturalization. Chinese immigrants had been specifically excluded,⁹ and courts generally agreed that all immigrants of Asian descent were barred. A challenge to the naturalization bar to Japanese immigrants was pursued by Takao Ozawa before the United States Supreme Court in 1923, but the Court made it clear that Japanese immigrants were not intended to benefit from the post-civil war naturalization laws which were restricted to "free white persons" and those of "African descent".¹⁰

The determination that the words "white person" are synonymous with the words "a person of the Caucasian race" simplifies the problem, although it does not entirely dispose of it. Controversies have arisen and will no doubt arise again in respect of the proper classification of individuals in border line cases. The effect of the conclusion that the words "white person" mean a Caucasian is not to establish a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground outside of which, upon the one hand, are those clearly eligible, and outside of which, upon the other hand, are those clearly ineligible for citizenship. Individual cases falling within this zone must be determined as they arise from time to time by what this Court has called, in another connection (citation omitted) "the gradual process of judicial inclusion and exclusion."

The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numer-

⁵ *Id.* at 56.

⁶ *Id.* at 30.

⁷ See generally Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998).

⁸ HING, *supra* note 3, at 30; Petitioner Soko Bukai's Status Conference Statement, Nov. 27, 2001, at 2, 3 [hereinafter "Petitioner's Statement"].

⁹ In re Ah Yup, 1 F. Cas. 223 (C.C. Cal. 1878) (No. 104).

¹⁰ *Ozawa v. United States*, 260 U.S. 178 (1922).

ous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold.¹¹

A year later, the undesirability of Japanese immigrants was underscored when Congress enacted the national origins quota system to govern immigration policies. While the law's major targets were southern and eastern Europeans, a provision was added to exclude all aliens who were "ineligible to citizenship."¹² Nothing more needed to be stated. With that one phrase, Congress had enacted a blatant Japanese exclusion law.

The message of the 1913 California alien land law had been loud and clear as well: control of property by Japanese immigrants would not be tolerated. While the law went through different iterations over the years – mostly to close loopholes,¹³ the ban remained in force until 1952 when the California Supreme Court ruled the law unconstitutional.¹⁴

III. ESTABLISHING THE JAPANTOWN YWCA

In the early 1900s, the main facilities of the SF YWCA were not available to "Chinese, Japanese, or colored girls."¹⁵ So in 1912, a group of Japanese Christian women from the Soko Bukai churches decided to form their own "Japanese YWCA."¹⁶ Soko Bukai was and continues to be an association of Japanese Christian churches in San Francisco.¹⁷ Initially the group rented space for its services, but by 1920, the women realized that they needed something larger and more permanent.¹⁸ The women wanted to purchase larger space, but because they believed that California's alien land law barred them from owning property, they approached the SF YWCA for assistance in creating a trust to own the property in order to get around the laws.¹⁹ Although the organization maintained a segregationist policy at the time toward "Chinese, Japanese or other colored girls [with respect to its main] Boarding Home," the SF YWCA had established separate "International Institutes" to provide English classes and recreation for other immigrant women.²⁰

According to the diary of Yonako Abiko, one of the founders of the Japantown YWCA, on May 25, 1920, she and two board members of the SF YWCA (Mrs. Boardman and Miss Ellis) met with Guy Calden "about the legal matter regarding the purchase of Y.W.C.A. building."²¹ Calden was a prominent San Francisco attorney who was well versed in helping immigrants cir-

¹¹ *Id.* at 198.

¹² HING, *supra* note 3, at 32.

¹³ In the 1920s, even the U.S. Supreme Court ruled that the discriminatory impact of alien land laws did not violate equal protection guarantees of the constitution. *Webb v. O'Brien*, 263 U.S. 313 (1923).

¹⁴ *See* *Fujii v. State*, 38 Cal. 2d 718 (1952); *see also* *Masaoka v. People*, 39 Cal. 2d 883 (1952).

¹⁵ Petitioner's Statement, *supra* note 8, at 2.

¹⁶ *Id.*

¹⁷ *Id.* at n.1.

¹⁸ *Id.* at 2.

¹⁹ Bernice Yeung, *A Matter of Trusts*, SF WEEKLY, July 11, 2001, at ??.

²⁰ Mari J. Matsuda, *Race, Memory, and Civil Society: The Japanese YWCA Case*, at 12-13 (2001) (unpublished manuscript on file with author).

²¹ Petitioner's Statement, *supra* note 8, at 6.

cumvent the alien land laws, primarily through trust agreements.²² Three days later, on May 28, 1920, the SF YWCA board minutes noted a proposal that:

[T]he Japanese people rai[se] funds to purchase a house to be used for the Japanese Y.W.C.A. This property to be bought by the local Association and held in trust for the Japanese Y.W.C.A.²³

A week later, the YWCA board decided “to take no further action until the Japanese people had more money in hand.”²⁴

Accordingly, the Japanese community set about to raise funds. Several months later, on February 4, 1921, as the community eyed a particular piece of property on Pine Street, the SF YWCA board minutes noted:

The Japanese people have \$2,000 pledged, and they wished to authorize the Board of Trustees to offer not more tha[n] \$6,500 for the property and *to hold it in trust for the exclusive use of the Japanese Y.W.C.A.* Moved by Mrs. Hamilton [and] seconded by Mrs. Boardman that the Board of Trustees be authorized to investigate the house and lot . . . with a view to the purchase of it for the *permanent use* of the Japanese branch of the San Francisco Y.W.C.A. . . . Unanimously carried.²⁵

The Pine Street property was not purchased, but in June a different property surfaced as a possibility – 1830 Sutter Street, and a new motion was made and adopted by the SF YWCA board:

[T]he same recommendation that was made in regard to purchase of the property on Pine Street be made to apply to the purchase of the property on Sutter Street for this Association to carry on its Japanese work.²⁶

On July 7, 1921, Abiko and Boardman again met with attorney Calden and “discussed the ‘detail’ of the [Japanese YWCA] building purchase.”²⁷ Abiko “reported on the purchase of a society building” that afternoon to the Japanese YWCA group.²⁸ A day later, the SF YWCA board met:

Mrs. Boardman reported on the purchase of the house on Sutter Street for the *permanent use* of the Japanese Branch of the Japanese San Francisco Y.W.C.A. and asked that the following recommendations be adopted: “It is recommended that the sum of

²² *An 80-year-old Diary Helps End a Legal Dispute*, THE RECORDER, June 24, 2002, at 4; Petitioner’s Statement, *supra* note 8, at 6. Calden represented Japanese Americans in cases involving property ownership and the alien land laws in a number of reported cases. *See, e.g.*, Oyama v. California, 332 U.S. 633 (1948); Masaoka v. People, 39 Cal. 2d 883 (1952); Palermo v. Stockton Theatres, 32 Cal. 2d 53 (1948); People v. Fujita, 215 Cal. 166 (1932); *In re Estate and Guardianship of Tetsubumi Yano*, 188 Cal. 645 (1922). He is also credited with helping Japanese American farmers establish the Cortez Growers Association in Merced County, California in 1924. Calden had a reputation as:

[A]n expert on land laws who had created a partial road map to the American dream. [He] knew the ins and outs of corporation law . . . Calden used a legal loophole to create dummy corporations that could own land. He named the immigrants’ American-born children as corporation officers. The corporations were given American-sounding names such as Sunny Acre Farms Co. and T&M Vineyards, instead of names like Yotsuya Acres or Miyamoto Farms.

Patrick Giblin, *Cortez Growers Co-op that helped Japanese Americans chase their Dreams Celebrates 75 Years*, MODESTO BEE, Mar. 21, 1999, at A1.

²³ Petitioner’s Statement, *supra* note 8, at 3 (citing SF YWCA Board Minutes, May 28, 1920, 1).

²⁴ *Id.* at 3-4 (citing SF YWCA Board Minutes, June 4, 1920).

²⁵ Petitioner’s Statement, *supra* note 8, at 4.

²⁶ *Id.*

²⁷ *Id.* at 6-7.

²⁸ *Id.* at 7.

\$1,000.00 which has been withdrawn from the Federal Reserve Fund of the International Institute and be borrowed from that fund by the general fund of this Association It is recommended that the *repayment of this by the Japanese Centre* [sic] in installments of forty dollars (\$40.00) a month be accepted. *It is recommended that the attached resolutions be spread upon the minutes of this board since they have been accepted by our lawyer.*

Moved by Mrs. Boardman seconded by Mrs. Van Winkle that this be done –carried.

Mrs. Boardman also read the following resolution with the request that it be adopted:

If this property is sold or any income derived from it other than Japanese Y.W.C.A. uses, the funds shall be applied to Christian work for Japanese women and girls in San Francisco after consultation with the Japanese Y.W.C.A. *or their successors. No decision is to be made about the uses of this property without consultation with the Japanese Y.W.C.A. Board.*

Moved by Mrs. Boardman seconded by Mrs. Davis that the provisions of this resolution be carried out. Unanimously carried.²⁹

Thus, the 1830 Sutter building was purchased by the SF YWCA and was immediately used as the Japanese YWCA. The initial funding appears to include a \$250 deposit by the SF YWCA toward the \$6,500 purchase price and eventually a down payment of \$3,000 with a \$3500 mortgage.³⁰ The \$3000 initial payment consisted of a \$2000 pledge from the Japanese American community and a \$1000 loan from the Reserve Fund of the International Institute; the loan was to be repaid in \$40 monthly payments.³¹

The mortgage was paid from “Community Chest” funds that were made available to local charities in San Francisco.³² In 1922, the Community Chest system was instituted to help fund local charities. Organizations like the YWCA would fund raise for the Community Chest pool and, in turn, the Community Chest would redistribute funds to the organizations based on budget requests.³³ Records indicated that mortgage payments for the 1830 Sutter building were channeled to the YWCA from the Community Chest for that purpose.³⁴ Significantly, several elderly Japanese Americans who were deposed during the *Soko Bukai* litigation recall helping their parents and community groups with a variety of fundraising efforts during this period, including bake sales, door-to-door canvassing, movie ticket sales, and dinner parties.³⁵ The funds were then collected by the parents and turned over to the SF YWCA.³⁶ The 1830 Sutter building was put to community use for quite some time, but the parties did not live happily ever after.

²⁹ *Id.* at 4-5.

³⁰ Respondent’s Status Conference Statement, Nov. 27, 2001, 5 [hereinafter “Respondent’s Statement”].

³¹ *Id.*

³² *Id.* at 5-6.

³³ *Id.* at 5.

³⁴ *Id.* at 5-6.

³⁵ See, e.g., Deposition of Tomoye Takahashi, Aug. 30, 2001, 17-28; Deposition of Uta Hirota, Aug. 21, 2001, 33-58.

³⁶ *Id.*

IV. HISTORY OF THE BUILDING

Records from the 1930s reveal the intent to treat the property as being held in trust for the benefit of the Japanese American community. In 1932, the Japanese YWCA published a twenty year retrospective that stated: "[I]n January of 1931, we completed the payments for the full amount of the purchase' of the property, which the SF YWCA had financed through a . . . bank . . . '*this building of ours belongs not only to us but also to the Japanese community in general.*'"³⁷ Three years later when the International Institute decided to separate from the SF YWCA, the Japanese YWCA decided to remain part of the SF YWCA.³⁸ The SF YWCA board agreed that the Japanese YWCA would continue with the same structure and arrangements relating to the 1830 Sutter Street property:

That the building continue to be used for purposes of the Japanese YWCA and if at some future time, any change in the use of the building should be considered, such change would be submitted to the Japanese Board of Directors and its approval be secured before the change should be considered to be in effect.³⁹

Due to deteriorating conditions in 1929,⁴⁰ however, a decision was made to raze the building and a new structure was constructed in 1932. The proposal to erect a new building was put forward by the Japanese YWCA and was approved by the SF YWCA with the understanding that the Japanese American community would raise funds for the project.⁴¹ Famed architect Julia Morgan donated her services and the construction costs totaled about \$24,000.⁴² The parties in *Soko Bukai v. SF YWCA*, however, differ as to how much the Japanese American community contributed to the construction costs. The SF YWCA claims that the community contributions amounted to about \$3,000,⁴³ but the Japanese American community claims that its contribution includes the funds that were raised by the community and placed into the hands of the Community Chest system, which totaled \$22,650.⁴⁴

The new building was warmly received by the community's residents as their "permanent club house," dedicated to Japanese YWCA services for the Japanese American community.⁴⁵ Architect Morgan used Japanese architectural design and helped the community locate and furnish its interior with Asian art pieces and artifacts.⁴⁶ The building served as the Japanese YWCA until the 1942 internment of West Coast Japanese Americans.⁴⁷

³⁷ Petitioner's Statement, *supra* note 8, at 5.

³⁸ *Id.*

³⁹ *Id.* at 6.

⁴⁰ Interview with Peter Hart, attorney for SF YWCA (Apr. 11, 2002).

⁴¹ Petition to Enforce Charitable Trust and to Remove Trustee and Appoint Successor Trustee, Superior Court of California, City and County of San Francisco, No. 269330, Sept. 30, 1997, 6 [hereinafter "Petition to Enforce"].

⁴² *Id.* at 7.

⁴³ Respondent's Statement, *supra* note 30, at 6.

⁴⁴ Petition to Enforce, *supra* note 41, at 6-7.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.*

⁴⁷ *Id.*

Obviously, since the directors were interned along with 120,000 other Japanese Americans, the Japanese YWCA could not function during the war.⁴⁸ Nonetheless, the building was maintained for community purposes. Beginning in 1942, the American Friends Service Committee (AFSC) leased the building, providing services to internees during and after the war, while maintaining a public stance in opposition to internment.⁴⁹ The AFSC helped returning Japanese American women and girls and their families who were looking for shelter, employment, and schooling.⁵⁰

After Japanese Americans were released from the internment camps in 1946, the Japanese YWCA did not resume its activities. The SF YWCA portrays this failure as a lack of "desire and the resources" on the part of the community.⁵¹ Soko Bukai points out, however, that many internees did not return to San Francisco,⁵² and those who did faced a different San Francisco. Many African Americans had moved to the Western Addition during the war, as did Europeans fleeing the devastation of war.⁵³ The former internees were essentially told by the SF YWCA that an integration policy had been instituted and the Japanese YWCA could no longer function because single-race programs were no longer permitted.⁵⁴ The returnees were told that their old program was part of a larger Western Addition group. Not surprisingly, the returning women simply accepted these instructions; after all, the post-internment period was not a time to fight for a community that had just been released from custodial settings.⁵⁵ The idea was that the YWCA would run a joint neighborhood program with the YMCA in the YMCA's building several blocks away.⁵⁶ (The joint YMCA/YWCA program ceased in 1960.⁵⁷) In spite of that agreement, the 1830 Sutter building was used as a residential facility for Japanese women and girls returning from the camps. Moreover, while the AFSC was a tenant (through 1960), many Japanese American community programs and services were maintained in the building.⁵⁸

The property experienced other changes in the 1960s. In 1961, the SF YWCA purchased the adjacent lot (1834 Sutter), razed the building and developed a playground area and a small parking lot.⁵⁹ The City had considered the building at 1834 Sutter a nuisance, so its purchase and demolition actually enhanced the value of the 1830 Sutter property.⁶⁰ A preschool childcare program was implemented in the building in the mid-1960s.⁶¹ In 1966, the board

⁴⁸ Petitioner's Statement, *supra* note 8, at 7.

⁴⁹ *Id.* at 8.

⁵⁰ Petition to Enforce, *supra* note 41, at 9.

⁵¹ Respondent's Statement, *supra* note 30, at 8. The SF YWCA found one witness, Fred Hoshiyama, who said the community had no interest in reconstituting the Japanese YWCA. Interview of Peter Hart, *supra* note 40.

⁵² Petitioner's Statement, *supra* note 8, at 7-8.

⁵³ Petition to Enforce, *supra* note 41, at 9.

⁵⁴ Interview with Karen Kai, attorney and Little Friends board member (Apr. 9, 2002).

⁵⁵ *Id.*

⁵⁶ Petition to Enforce, *supra* note 41, at 9.

⁵⁷ Respondent's Statement, *supra* note 30, at 8.

⁵⁸ Petition to Enforce, *supra* note 41, at 9.

⁵⁹ Respondent's Statement, *supra* note 30, at 8.

⁶⁰ Petition to Enforce, *supra* note 41, at 10.

⁶¹ Interview of Karen Kai, *supra* note 54.

voted to cease sponsoring any groups with racial restrictions, and in 1969 the center was renamed the "Western Addition Center."⁶²

The property continued to serve community functions. In 1971, the SF YWCA contemplated selling 1830 Sutter,⁶³ but changed its mind after African American and Japanese American residents protested.⁶⁴ Instead, renovations were made to the property in 1973, and the San Francisco Redevelopment Agency deeded an 18-inch-wide parcel adjacent to 1830 Sutter to the SF YWCA in 1976.⁶⁵ Since 1972, the basement of the building had been leased to the Harrison Out-of-School Program, a non-YWCA program run by Dorothy Harrison which provided services to adolescent African American girls in the Western Addition.⁶⁶ In the 1970s, the building also housed Christ United Presbyterian Church, one of the member churches of the Soko Bukai.⁶⁷ And beginning in 1985, the building's large theater space was leased to the Nihonmachi Little Friends Preschool Program, serving Japanese American and Western Addition communities.⁶⁸ Little Friends, an important provider of child care and preschool programs since 1972, made improvements to the children's playground after moving in.⁶⁹

V. LITIGATION MOTIONS AND DISCOVERY

Faced with serious financial difficulties in 1996, the SF YWCA attempted to sell the Japanese YWCA for \$1.65 million and evict the long time nonprofit tenants that were providing services in the area.⁷⁰ The Japantown community felt shocked and betrayed by the SF YWCA, believing that its actions in the early 1920s amounted to a legally enforceable trust and that the SF YWCA violated the agreement by placing the property up for sale.⁷¹ The Japanese American community, however, wanted to resolve the dispute amicably.⁷² Before taking legal action, community leaders attempted to meet with SF YWCA representatives, and community groups offered to purchase the property for \$1.2 million. The SF YWCA, however, did not respond.⁷³ When efforts to resolve the matter informally failed, Soko Bukai brought an action in

⁶² Respondent's Motion for Summary Judgment, at 4.

⁶³ *Id.*

⁶⁴ Respondent's Statement, *supra* note 30, at 8-9.

⁶⁵ *Id.*

⁶⁶ Petition to Enforce, *supra* note 41, at 10-11; Interview of Karen Kai and Bob Rusky (Apr. 9, 2002).

⁶⁷ Petitioner's Statement, *supra* note 8, at 8.

⁶⁸ *Id.*

⁶⁹ Petition to Enforce at 10.

⁷⁰ Petitioner's Statement, *supra* note 8, at 1; Annie Nakao, *Fight Over Historic Japantown YWCA Ends in Settlement*, SF CHRONICLE, Feb. 27, 2002, at A15.

⁷¹ Petitioner's Statement, *supra* note 8, at 1.

⁷² Interview of Karen Kai and Bob Rusky, *supra* note 66.

⁷³ Memorandum from Robert Rusky, Oct. 17, 2004 (on file with author). The offer was made by the Japanese Cultural and Community Center of Northern California in September 1996. Later, in February 2000, Nihonmachi Little Friends offered \$300,000. Leaders felt this was a reasonable offer since the Chinese YWCA had been sold to the Chinese American community for in 1996 for \$800,000, and the Chinese YWCA was much larger, more ornate, and in much better condition. *Id.* See also Interview of Donald Tamaki, Apr. 15, 2002 (on file with author).

San Francisco Superior Court on September 30, 1997, seeking the enforcement of the charitable trust and the removal of the SF YWCA as the trustee.⁷⁴ Soko Bukai, the petitioner in this action, is a California non-profit corporation centered in San Francisco, California.⁷⁵ The Japanese term "Soko Bukai" means "San Francisco Church Organizations" and is also formally referred to as the San Francisco District for the Northern California Japanese Christian Churches Federation.⁷⁶ For almost a century, Soko Bukai has supported and coordinated social and-religious activities in the San Francisco Japanese American community.⁷⁷ Three principal churches make up the Soko Bukai: Pine United Methodist Church, Christ United Presbyterian Church, and Christ Episcopal Church.⁷⁸

The SF YWCA immediately filed a demurrer to the petition challenging Soko Bukai's standing, but on January 13, 1998, a superior court judge overruled the demurrer. Six months later, the same judge denied the SF YWCA's motion to sever the issues and bifurcate the trial. Undaunted, the SF YWCA filed a motion for summary judgment, attacking the existence of a trust with a host of theories, but on November 30, 1998, that motion was also denied. In the court's view, the SF YWCA's own historical board minutes presented triable issues of fact regarding the existence of the trust.⁷⁹

While the various motions were being filed, briefed, and argued in 1998, the parties conducted extensive discovery, inspecting thousands of documents and answering numerous interrogatories. Attempts at mediation were then instituted, but these efforts terminated unsuccessfully in April 2001. Intensive fact discovery followed. While Soko Bukai took eleven depositions, the SF YWCA took forty. Further document requests, interrogatories, and requests for admissions ensued. In total, Soko Bukai had to respond to over 215 special interrogatories.⁸⁰

The SF YWCA also filed some unusual motions. In November 1999, the SF YWCA successfully moved to disqualify Soko Bukai's initial trial counsel, McCutchen, Doyle, Brown and Enerson, from continuing its representation. Apparently the firm had represented the YWCA in previous matters and may have obtained confidential information relevant to this lawsuit.⁸¹ A new firm, Cooley Godward, substituted in as trial counsel in February 2000.⁸²

The SF YWCA, however, was not finished with its disqualification tactics. In July 2001, the SF YWCA moved to disqualify one Cooley attorney, two other Soko Bukai attorneys and one attorney for the Little Friends preschool. Even though that motion was denied,⁸³ the SF YWCA attorneys appealed these

⁷⁴ See generally *Petition to Enforce*, *supra* note 41.

⁷⁵ *Id.* at 3.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Petitioner's Statement*, *supra* note 8, at 9.

⁸⁰ *Id.* at 10.

⁸¹ *Id.* at 10.

⁸² *Id.*

⁸³ *Id.* The respondent accused Karen Kai, Bob Rusky, Tracie Brown, and Mari Mayeda of *ex parte* contacts with "a represented counsel and other ethical violations." Respondent's Statement, *supra* note 30, at 10.

issues to the Court of Appeals and then the California Supreme Court. The SF YWCA, however, lost in those forums as well.⁸⁴ The SF YWCA's omnibus motion to compel further discovery was also denied on October 3, 2001.⁸⁵ Apparently, the SF YWCA wanted to subpoena from the Japanese American History Archives a translation of the Japanese-language book, *Zai Bei Nihonjin Shi*.⁸⁶ The SF YWCA made two additional motions: a motion to continue the initial November 5 trial date and a motion to join as involuntary plaintiffs the three Soko Bukai churches, the Little Friends preschool, as well as six other Japanese American community groups.⁸⁷

The SF YWCA's continuance request was based on the fact that in July 2001, it learned of the existence and content of Japanese-language diaries kept by one of the founders of the Japanese YWCA that spanned the period from the founding of the Japanese YWCA in 1912 through her death in 1944. The "Abiko Diaries" were scribed in an "individualistic, cursive style," characteristic of the Japanese style of the early part of the twentieth century.⁸⁸ Photocopies were allegedly difficult to read and the original was in the Special Collections Department of the University of California at Los Angeles Library. In September 1998, Soko Bukai representatives became aware of the existence of these diaries and requested that its expert, a visiting Fulbright scholar at UCLA, review the Abiko Diaries in preparation for testifying about them at trial. This expert began her translations in the autumn of 1998 and produced written translations of selected sections in August of 1999.⁸⁹

The SF YWCA was disturbed that Soko Bukai did not mention the Abiko Diaries in response to any interrogatories or other discovery requests. The SF YWCA stated that it had become aware of the diaries by "pure chance."⁹⁰ Only then, according to the SF YWCA, did Soko Bukai reveal its intent to use excerpts to prove its case-in-chief. So on September 14, 2001, the SF YWCA requested a one-year continuance to translate the diaries; Soko Bukai suggested three months.⁹¹

In sum, the parties were engaged in an intense litigation battle. Whether an actual enforceable charitable trust was established by the actions taken by the parties in the early 1920s may not have been an easy question to answer for the Superior Court. The actions of the parties in seeking counsel from Guy Calden, an expert in helping Japanese immigrants circumvent the alien land

⁸⁴ Interview of Donald Tamaki, *supra* note 73.

⁸⁵ Petitioner's Statement, *supra* note 8, at 10.

⁸⁶ Respondent's Statement, *supra* note 30, at 11.

⁸⁷ Petitioner's Statement, *supra* note 8, at 10. Respondent felt that the three constituent churches of the Soko Bukai (Pine United Methodist Church, Christ United Presbyterian Church and Christ Episcopal Church) should be joined, along with other "indispensable parties": Nihonmachi Little Friends, The Northern California Japanese Church Federation or "Domei," the Japanese Cultural and Community Center of Northern California, Kimochi, Inc., the Japanese American Citizen's League, the Japanese American Democratic Club, and the Japanese Community Youth Council. Respondent's Statement, *supra* note 30, at 12.

⁸⁸ Respondent's Statement, *supra* note 30, at 11; see generally Donald Tamaki, *Soko Bukai v. the San Francisco YWCA*, 28 AMERASIA J. XXV (2002).

⁸⁹ Respondent's Statement, *supra* note 30, at 11.

⁹⁰ *Id.*

⁹¹ *Id.* at 11-12.

laws,⁹² and the language found in the SF YWCA board minutes (e.g., “to hold in trust for the exclusive use of the Japanese Y.W.C.A.”) certainly lend credence to Soko Bukai’s claim. The petitioner’s legal representatives alleged that the basic elements of a trust were present: intent, property, purpose, and a beneficiary.⁹³ On the other hand, the SF YWCA’s attorneys argued that Soko Bukai lacked standing to bring the action because the beneficiary of the alleged trust was the “San Francisco YWCA,” an organization that no longer existed.⁹⁴ They further asserted that the action was barred by the statute of limitations or the equitable doctrine of laches; after all, the alien land law was declared unconstitutional in 1952, Japanese-only programs were barred from the building in 1966, and the “building was renamed, removing the reference to ‘Japanese’” in 1969.⁹⁵

VI. COMMUNITY LAWYERING

Almost twenty years ago, in her study of how attorneys do their work in a variety of settings, Eve Spangler’s findings with respect to Legal Services attorneys who represent indigent and low-income clients was troubling: “Business lawyers are the least inclined to voice egalitarian politics, yet they are highly respectful of their clients’ wishes and in general they also admire their clients. By contrast, Legal Services attorneys are known for their left-of-center politics. Yet they have substantially less egalitarian relationships with their own clients than do the business lawyers.”⁹⁶ A typical statement from “overworked” Legal Services attorneys might be, “[We] preach client autonomy, but in reality, it’s a little impractical when the client isn’t educated or doesn’t know the system so she can make choices.”⁹⁷

The attorneys who represented Soko Bukai handled the case pro bono. However, it would be a real mistake to think of them in the same vein as the Legal Services attorneys that were studied by Spangler in the 1980s. They were community lawyers who might share a “left of center politics” with Legal Services attorneys, but they certainly did not call the shots in the course of the litigation, and they were greatly respectful of the wishes of their clients.

Karen Kai, Donald Tamaki, and Robert Rusky, three of the key members of the Soko Bukai legal team, were well known in the Japanese American community because they had been part of the group that successfully represented Fred Korematsu in his *coram nobis* action in the 1980s, convincing the federal district court to set aside Korematsu’s World War II era conviction for violating internment evacuation orders.⁹⁸ They were well versed in coalition work and widely respected in the broader civil rights community.⁹⁹ As experienced rebellious community lawyers, they had a wide base of community contacts

⁹² See *supra* note 22.

⁹³ Petitioner’s Statement, *supra* note 8, at 11.

⁹⁴ Respondent’s Draft Motion for Summary Judgment at 7-11.

⁹⁵ *Id.* at 14-15.

⁹⁶ EVE SPANGLER, *LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK* 170 (1986).

⁹⁷ *Id.* at 167.

⁹⁸ *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Ca. 1984).

⁹⁹ Matsuda, *supra* note 20, at 28-29.

and allies, media savvy, and government contacts that contributed to their effectiveness as top notch civil rights attorneys.¹⁰⁰

Kai, Tamaki, and Rusky were also very much a part of the affected community. Of course, working on the *Korematsu* case was enough to make them part of the community, but Kai and her husband, Rusky, were active with Nihonmachi Little Friends where they had sent their son as a preschooler. Kai was also on the board of directors of Little Friends.¹⁰¹ Kai grew up in the Japanese American community in San Jose, California, and went to school at San Francisco State University.¹⁰² She and Rusky attended law school at the University of San Francisco.¹⁰³ As Kai learned more about the history of the 1830 Sutter Street building, she realized what a unique legacy it represented – a legacy that would have been destroyed by the sale or destruction of the building. That loss, especially in light of all the other losses the community had sustained in the past, was “unthinkable.”¹⁰⁴ As for Tamaki, like many other Japanese Americans at the time, Tamaki’s father had circumvented the alien land laws by placing title to a Japantown hotel in the name of his citizen children as trustees; the last mortgage payment was made three days before Pearl Harbor.¹⁰⁵

Tracie Brown, who was an associate at Cooley Godward, also worked on behalf of Soko Bukai pro bono. Although she was not from the community, her mother was an immigrant from Japan. Brown felt a “connection” with the Issei women who founded the Japanese YWCA and clearly was moved by the “inspirational community base and showing of support.”¹⁰⁶ Because of the strong community involvement, however, Brown felt “pressure to live up to the [community’s] expectations and “not to let [the people] down.”¹⁰⁷ The pressure was born of passion for the community:

I did have to occasionally stop from thinking “oh my god, if we lose this, I am going to kill myself” because I will be so embarrassed to have let down so many people, including these wonderful, wonderful, gracious 90-year-olds who were so charming and giving everything they could.¹⁰⁸

Being teamed with the likes of Tamaki, Kai, and Rusky, an attorney like Brown who was new to the community could not help but be exposed to a rebellious style of lawyering that was deeply respectful of and collaborative with the community: “It really opened my eyes to a totally different type of litigation that was unbelievably rewarding. I’ve met a bunch of people in this community who are really incredibly strong people and very committed to the work that they do and that was wonderful to see.”¹⁰⁹

In Gerald López’s seminal work on collaborative, rebellious, community lawyering, he explains:

¹⁰⁰ *Id.* at 29.

¹⁰¹ Interview of Karen Kai and Bob Rusky, *supra* note 66.

¹⁰² Interview of Karen Kai, *supra* note 54.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Interview of Tracie Brown, Soko Bukai attorney (Apr. 18, 2002).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

In this idea – what I call the rebellious idea of lawyering against subordination – lawyers must know how to work with (not just on behalf of) women, low-income people, people of color, gays and lesbians, the disabled, and the elderly. They must know how to collaborate with other professional and lay allies rather than ignoring the help that these other problem-solvers may provide in a given situation. They must understand how to educate those with whom they work, particularly about law and professional lawyering, and, at the same time, they must open themselves up to being educated by all those with whom they come into contact, particularly about the traditions and experiences of life on the bottom and at the margins.¹¹⁰

A key element of López's vision is that the subordinated groups usually have expert knowledge of forces of repression and have developed skills for handling them. Survival requires that subordinated groups develop such understanding and the ability to anticipate the wishes and reactions of those forces. López urges lawyers to respect and tap such knowledge and skills and to endeavor to develop their own analogous "feel" for how things work in communities and institutions. Rebellious lawyers can do so primarily by honing their listening skills and powers of observation.¹¹¹ One need only think of the survival skills that racially-excluded and interned Japanese Americans had to develop in order to understand their problem-solving talents in the context of López's vision.

López does not argue that subordinated people's knowledge and stories are better than those of lawyers. In his vision, both groups are essential to the struggle "to fundamentally transform the world." To make such change, López explains, subordinated groups and their attorneys "do not want simply to add to each other's knowledge, a bit of this and a bit of that coexisting easily. Instead, they desire to challenge what each knows – how each gained it, what each believes about it, how each shares and uses it."¹¹² Rather than emphasizing their fragility or placing lower-income people on a pedestal, López urges lawyers to engage their clients as true equals, worthy of respect but also of caring confrontation. He calls for a collaboration of "co-eminent" practitioners, by whom he means lawyers, clients, and other potential problem-solvers such as community activists, organizers, media, administrators, policy makers, researchers, and funders.¹¹³ The existence and relevance of these other lay problem-solvers is a core element of López's vision. In his view, careful investigation of subordinated communities reveals many individuals, groups, and organizations working to challenge subordination. In López's vision, lawyers must be skilled legal technicians and engaged public citizens and activists. They must expertly navigate and integrate many worlds: the legal, interpersonal, social, and political.

Given the community origins of the Soko Bukai legal team, it is easy to see the basis for the extraordinary collaboration that took place between the team and the community in Lópezian fashion. The Soko Bukai legal team's respectful collaboration with allies – community, individual, government, and

¹¹⁰ GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 37 (1992)

¹¹¹ *Id.* at 57-62.

¹¹² *Id.* at 53.

¹¹³ *Id.* at 55.

even among themselves – was a model of rebellious community lawyering. Consider the following examples.

The case was generated by community interest and action in collaboration with the attorneys. When word of the SF YWCA's proposed sale came out, Kimochi (a senior citizens program in Japantown) expressed interest in purchasing the building. Paul Osaki, the executive director of the Japanese Community and Cultural Center of Northern California, called together several community groups to discuss the situation. One of the groups included in the discussions was Nihonmachi Little Friends, so attorney Kai, as a Little Friends board member, became involved. The goal was to take a united community approach to acquire the building for community use, rather than to allow it to be put to commercial use. In the summer of 1996, Kimochi was the organization that actively pursued purchasing the building from the SF YWCA. By then, community rumors were circulating, raising the question of who truly owned the building. Community members recalled contributing money toward the purchase of the building, and a sense emerged that at the very least, the SF YWCA had a moral responsibility to act equitably with the community. The community groups, however, found the SF YWCA frustrating to deal with even at this point.¹¹⁴ Kimochi assigned a volunteer with a financial background to research the history of the building, and he discovered the trust language in the YWCA minutes from the 1920s.¹¹⁵ Kimochi representatives were not sure if the language meant anything, so they consulted with Kai, since she was one of the only lawyers in the group. At this point, the group was looking for some leverage – perhaps legal leverage – with the SF YWCA because the community was experiencing communications problems with the SF YWCA.¹¹⁶ There was “community memory” of an analogous building just a few blocks from the SF YWCA. That building served as the Japanese community center during World War II and was never returned to the community. The Salvation Army operated the building and sold it to the Chinese government to serve as a consulate. While the Salvation Army did create a fund in response to protests by the community, the building was lost to the community and that experience was in the community's mind when the SF YWCA sale was proposed.¹¹⁷

Paul Osaki also turned to attorney Tamaki for assistance later in 1996.¹¹⁸ When legal claims of the trust needed to be asserted, the attorneys and the community decided that Soko Bukai was in the best position to assert these claims. Involving the churches was also critical in bringing in a real grassroots constituency, which provided the impetus for collaborative efforts to engage in community outreach and education on the issues. In fact, church leaders would not act without the support of their congregations. Tamaki focused on working

¹¹⁴ Interview of Karen Kai and Bob Rusky, *supra* note 66.

¹¹⁵ *Id.*; Memorandum from Robert Rusky, *supra* note 73; Brant T. Lee, *A Racial Trust: the Japanese YWCA and the Alien Land Law*, 7 *ASIAN PAC. AM. L.J.* 1 (2001). The volunteer, Al Gordon, was a retired bank executive, who recognized the importance of the trust language. Memorandum of Robert Rusky, *supra* note 73.

¹¹⁶ Interview of Karen Kai and Bob Rusky, *supra* note 66. Kimochi ultimately purchased a different building. *Id.*

¹¹⁷ Interview of Karen Kai and Bob Rusky, *supra* note 66; Interview with Tamaki, *supra* note 73.

¹¹⁸ *Id.*

with the community and creating informational messages. The churches and the Japanese American Citizens League (JACL) hired interns to work on community education pieces. A petition drive was conducted, and three thousand signatures in support of the action were gathered in a three-month period. JACL offices held fundraising events to support the education efforts.¹¹⁹

Ironically, the SF YWCA's own conduct in December 1996 inspired more action on the part of the community which, by then, had been learning more and more about the situation as a result of the ongoing community outreach. That month, the SF YWCA moved its administrative functions into the building, which had the effect of squeezing out Little Friends and the Harrison program. The building had never been used for administration, and the move escalated the conflict in the face of the community's formal assertions that a trust covered the building. The community was insulted and frustrated by those actions, and that was when the grassroots efforts grew stronger. The threat of kicking out a preschool outraged the community; however, at a public SF YWCA board meeting, board members refused to change their minds and stated that any response would be in the form of a press release. This shocked the community.¹²⁰ The SF YWCA threatened to close the building, but community protests managed to convince the SF YWCA to back off from that position.¹²¹

Much of the history that was an essential foundation to the case began to emerge in 1996, after community education efforts began. As more facts were revealed, the legal team and the community realized that they were dealing with a part of history that had been lost. The revelation was galvanizing, the facts lending real support and meaning to the slogans and the rhetoric that had preceded. "Amazing" community events brought out and united the entire community. Older Japanese Americans recalled what happened in the building, and younger generations were able to learn and reclaim their history.¹²²

Prior to the lawsuit, the Japanese American community attempted to put political pressure on the SF YWCA through the San Francisco Board of Supervisors as well as the city's Human Rights Commission. The hope was to make the SF YWCA realize that the issues involved far more than the private sale of real property. Through educating the public and the SF YWCA about the community's history and the building's role, the goal was to resolve the conflict without litigation. Kai then suggested approaching the Human Rights Commission. As a former member of the Commission, she knew that one of its responsibilities is to address intergroup tensions arising between communities in San Francisco. Community-based individuals took the lead at the Commission; Paul Osaki, Patty Wada of JACL, and Rev. Gary Barbaree from Pine Church worked with the Commission to hold hearings and ultimately to pass a resolution in favor of Soko Bukai's position. Commission vice-chair Frank Chong, an ally from the Chinese American community and the community college system, along with the chair, Martha Knutsen, appreciated the legal issue and tried

¹¹⁹ Interview of Karen Kai and Bob Rusky, *supra* note 66.

¹²⁰ *Id.*

¹²¹ Email from Karen Kai (Mar. 30, 2004).

¹²² Interview of Karen Kai and Bob Rusky, *supra* note 66.

to push the SF YWCA toward meaningful discussions with the community.¹²³ In the wake of the Commission hearing and resolution, the SF YWCA assured Little Friends that the program could remain in the building on a month-to-month basis, at least until it was sold. However, two weeks later, the SF YWCA announced that the building was going to be closed and that Little Friends would be evicted. The community felt betrayed once again: the SF YWCA could not be trusted and the building had to be secured in order to assure continued community use.¹²⁴

The Japanese American community had strong support from the San Francisco Board of Supervisors, led by Supervisors Mabel Teng and Reverend Amos Brown. Paul Osaki lobbied Teng and secured her involvement, but attorney Kai knew that Teng was a potential ally because Teng's children had attended the Nihonmachi Little Friends program as preschoolers. The Board of Supervisors held a hearing in March 1997 and passed a resolution in favor of Soko Bukai's position. A couple of years later, at a Day of Remembrance gathering, Tom Ammiano, president of the Board of Supervisors, and Supervisor Michael Yaki came out to the rally in support of the community.¹²⁵

The day the lawsuit was served on the SF YWCA, the legal team and community representatives held a press conference and received good media coverage. The event included a *taiko* drum performance by Little Friends preschoolers. Later the SF YWCA complained that the litigants "had their drumbeaters in tow."¹²⁶

After the lawsuit was filed, the community and the Soko Bukai attorneys continued to reach out to the media. Television news coverage featured stories on internment and its effects on the Japanese American community, and the *San Francisco Examiner* ran this favorable editorial:

It's one thing to hire combative lawyers to win a property law case on technicalities that don't take into account a horrid history of racism and segregation. It's quite another to emerge unwounded from the muddy battlefield of public opinion The YWCA, after considering the effect of this dispute on future fund-raising, should graciously return the property title to the churches that built it 65 years ago.¹²⁷

An important community event took place in February 1999, a couple years after the lawsuit had been filed, while the SF YWCA remained intransigent in its position. For many years, the Japanese American community had held a Day of Remembrance, comprised of a series of events as a somber memorial to World War II internment.¹²⁸ The theme of the 1999 event was "unfinished business,"¹²⁹ and a variety of community groups, churches, artists, performers, and individuals participated. While a number of items were discussed, the Japanese YWCA case was one of the main issues addressed.¹³⁰ In fact, the keynote speaker, Professor Mari Matsuda, selected the YWCA as the

¹²³ Email from Karen Kai, *supra* note 121.

¹²⁴ Interview of Karen Kai and Bob Rusky, *supra* note 66.

¹²⁵ Email from Karen Kai, *supra* note 121.

¹²⁶ Interview of Karen Kai and Bob Rusky, *supra* note 66.

¹²⁷ Matsuda, *supra* note 20, at 34.

¹²⁸ Interview of Donald Tamaki, Soko Bukai attorney, Apr. 15, 2002; Matsuda, *supra* note 20, at 29.

¹²⁹ Matsuda, *supra* note 20, at 29-30.

¹³⁰ *Id.*

central topic of her address.¹³¹ When the SF YWCA learned that it would be a target of criticism at the event, its leadership wrote a letter to the San Francisco Board of Supervisors and the city attorney charging that this was an abuse of city funding, because some city funds supported the event.¹³² Attorney Kai responded to the criticism before the Board of Supervisors: "When I look at a letter like this I'm saddened that an organization that calls itself a civil rights organization seeks to censor a community. They denigrated us, they sought to erase our history, and now they attack our own Day of Remembrance."¹³³ The city attorney responded that this was not a misuse of public funds, and an outraged Supervisor Michael Yaki joined protestors in addressing a news crew at the building, demanding that the SF YWCA retract its accusations.¹³⁴ The next day, the SF YWCA chose a different tactic by hoisting a banner over its building reading: "The YWCA honors the Day of Remembrance."¹³⁵ However, the last minute strategy did little to repair the damage. That evening, a dinner honoring the *Korematsu* legal team (that of course included Kai, Tamaki, and Rusky) was held just blocks away.¹³⁶ The ceremony ended with a candle-lighting and a pledge in honor of those who had been interned. Flag-bearing Boy Scouts led the hundreds of participants on a candlelight march directly toward the YWCA building. SF YWCA leaders were in the building holding its own reception, which did not include any members of the community. Attorney Kai, dressed in traditional *taiko* attire, pounded a *taiko* drum as part of a group of four generations of Japanese Americans, including the elderly, that surrounded the building. Community leaders delivered riveting speeches, including Supervisor Yaki who exclaimed, "[t]his building is a symbol of our community. It is a symbol of a community that we used to have here, before we were sent to camps And we will continue to fight for this building every day, until it is firmly committed and remains in the hands of the Japanese American community of San Francisco."¹³⁷ As a result, even greater community attention, focus and energy emerged, along with wider media coverage.¹³⁸

By spring 1999, Soko Bukai attorneys also garnered the support of the California legislature. Assemblyman Mike Honda, himself a former internee, contacted Patty Wada about preparing a resolution for the upcoming Day of Remembrance. Wada contacted Kai, who drafted a resolution that focused on the 1830 Sutter Street controversy. Honda decided that the resolution merited its own effort, and a team was formed to work on that effort. Kai and Rusky worked with Honda's office to refine the language and developed an information package for lobbying other state legislators. Honda (who has since been elected to the U.S. Congress) represented the San Jose, California area, so San Francisco state legislators, Carole Migden and Keven Shelley, were recruited as early co-sponsors. Patty Wada used her JACL expertise to help with the follow

¹³¹ Interview of Karen Kai and Bob Rusky, *supra* note 66.

¹³² Interview of Donald Tamaki, *supra* note 73; Matsuda, *supra* note 20, at 30.

¹³³ *Id.* at 31.

¹³⁴ Interview of Donald Tamaki, *supra* note 73.

¹³⁵ Interview of Karen Kai and Bob Rusky, *supra* note 66.; Matsuda, *supra* note 20, at 33.

¹³⁶ Interview of Karen Kai and Bob Rusky, *supra* note 66.

¹³⁷ Matsuda, *supra* note 20, at 33-34.

¹³⁸ *Id.*; Interview of Karen Kai and Bob Rusky, *supra* note 66.

up to the legislation. She worked with interns to develop an informational board that was prominently displayed in the State Capitol and coordinated lobbying visits to various legislators. Rusky and Kai participated in some of the lobbying trips with other community members. Despite an attempt by the SF YWCA to head off the legislation, Honda was able to secure unanimous passage of ACR (Assembly Concurrent Resolution) 32 on March 23, 1999.¹³⁹ The resolution process through the state legislature provided the community and the legal team a powerful vehicle to raise the issue of the lasting effects of the racism rooted in the alien land law. The idea that the State would make an affirmative commitment to redress the effects of a racially motivated statute moved the resolution beyond the status of an honorary declaration. The opportunity to have the story of the Issei women recognized in the State's official records gave the community a way to take the underlying historical discrimination issue statewide. By that time, the community's major target audience was no longer the SF YWCA. Given the SF YWCA leadership's prior indifference – even hostility – to community and official actions, the Soko Bukai legal team did not think that the legislature's action, no matter how extraordinary, would cause the SF YWCA to concede. For the community, however, the legislature's recognition of the issues, the facts and the injustice was very important.¹⁴⁰ ACR 32 declares:

WHEREAS, The California Alien Land Law was enacted in 1913 in an atmosphere of racial prejudice and barred Japanese immigrants and their charitable religious organizations from owning real property; and

WHEREAS, In response to the California Alien Land Law, Japanese Americans legally entered into trust agreements with non-Japanese to hold their property in another's name so they might establish their roots in this country and build a stable and lasting community; and

WHEREAS, Japanese immigrant women of the Soko Bukai, an association of Japanese Christian churches in San Francisco, established a Japanese YWCA in that city in 1912 to work with Japanese women and girls; and

...

WHEREAS, In 1920-21, the Japanese YWCA raised the funds to purchase the building and property, with the San Francisco YWCA Board agreeing to hold this property in trust for the permanent use of the Japanese YWCA; and

WHEREAS, Programs and services of the Japanese YWCA were abruptly ended in 1942 when Executive Order Number 9066 forcibly removed all Japanese Americans from the West Coast to inland concentration camps; and

WHEREAS, the Soko Bukai, whose Issei women members founded the Japanese YWCA, today reasserts the Japanese American community's claim to the Japanese YWCA building; and

WHEREAS, The San Francisco YWCA's refusal to honor the trust agreement and fulfill its duties as trustee allows the YWCA to profit from the racism of the California Alien Land Law; . . . now, therefore be it

Resolved by the Assembly of the State of California, the Senate thereof concurring, that the Legislature of the State of California declares that it shall be the policy of the state to eradicate any vestiges of the racism of the California Alien Land Law and to

¹³⁹ Email from Karen Kai, *supra* note 121.

¹⁴⁰ *Id.*

take steps to ensure the enforcement of charitable trust created in response to that law; and

Resolved that the Legislature pays tribute to the contributions, tenacity, and vision of the Issei women pioneers of the State of California.¹⁴¹

Community events and rallies did not subside as the litigation proceeded. In July 2001, a rally was held to demonstrate community support in anticipation of the upcoming trial. The event was held at the community center – right next to 1830 Sutter Street. The attorneys helped to plan the event and assisted in deciding who would appear on stage to discuss the connection to the past. Four hundred supporters and several members of the San Francisco Board of Supervisors attended. The Reverend Cecil Williams, the famous African American leader of Glide Memorial Church, delivered a stirring speech, praising the efforts of the community, especially elderly members of the Japanese YWCA in their nineties who were in attendance. Later, a dinner was held, where speakers reminded the audience of the founding Issei women and what the fight represented. Another candlelight march was held, inspiring and further energizing the participants and legal team members.¹⁴²

Through rebellious lawyering, the Soko Bukai legal team's actions were transparent, and the community's involvement, through education, outreach, and participation, gave the community ownership of the case. The team partnered with the community in a respectful way. Before the lawsuit was filed, a collaborative effort was used to try to reach an agreement with the SF YWCA, while community education efforts were implemented. After the suit was filed, pleadings, especially those prepared by pro bono counsel who were not as familiar with the community, were reshaped to reflect community perspectives. Pleadings were shared with the community in order to keep the community informed. Community meetings and education forums continued. The resulting relationship was clear: "Folks [throughout the community] view us as representing them. Folks on the street would walk up to us and ask us how the case is going. There was a general feeling of ownership of the issue – and as the lawyers we represent all those interests."¹⁴³ For the Soko Bukai legal team, this was not simply a matter of representing a client; this was about community building.¹⁴⁴

VII. SETTLEMENT

After the parties were finally assigned to a judge for the anticipated trial, a status conference was scheduled for November 27, 2001. At the status conference, the trial judge set the trial to begin in six weeks, but ordered the parties to try one more time to settle the matter before the trial. As Soko Bukai attorney Donald Tamaki noted, "when you are looking down the barrel of a trial date, it focuses people's minds. It has a way of bringing people to the table."¹⁴⁵ According to SF YWCA attorney Peter Hart, "[w]e were all set to go to trial.

¹⁴¹ H.R. 32, 1999 Leg., Reg. Sess. (Ca. 1999).

¹⁴² Interview of Tracie Brown, *supra* note 105.

¹⁴³ Interview of Karen Kai and Bob Rusky, *supra* note 66.

¹⁴⁴ Interview of Karen Kai, *supra* note 54.

¹⁴⁵ Interview of Donald Tamaki, *supra* note 73.

In early February they called us. I didn't have much expectation that the case would settle, but I said sure let's go ahead and do it. It took a couple of days."¹⁴⁶

Under the terms of the settlement, Nihonmachi Little Friends, the multicultural childcare center, would be permitted to purchase the "entire property" (the 1830 Sutter building and the 1834 lot) for \$733,000 and would bear an ongoing duty to provide community education on the history of the building and preserve the building for community use.¹⁴⁷ The \$733,000 figure deserves further scrutiny.

The media reported that the "parties settled the dispute" for \$733,000.¹⁴⁸ Cathy Inamasu, the executive director of Nihonmachi Little Friends, indicates that the property cost her program \$733,000.¹⁴⁹ And attorneys for Soko Bukai also point out that both the side lot and the building were obtained for \$733,000.¹⁵⁰ Yet curiously, perhaps demonstrating a bit of ego, the executive director of the SF YWCA directed a letter to the editor in response to a story stating that the parties had "settled the dispute" with the childcare center, "obtain[ing] ownership of the building for \$733,000, less than half the commercial value."¹⁵¹ Her letter stated that the "YWCA settled the case for a total of \$1.5 million, including proceeds from the sale of its building, not \$733,000."¹⁵² Moreover, the YWCA's attorneys stated that their client "received a very fair sum of money for the building."¹⁵³ Did the community actually pay more than the \$733,000? The answer is no.¹⁵⁴ Soko Bukai attorneys have confirmed that the SF YWCA received a total of \$1.5 million as part of the settlement, but only \$733,000 came from the community. The remainder came from an anonymous "non-community" source that the parties, or at least the attorneys, agreed to keep confidential.¹⁵⁵

Who was this "non-community" source? One educated guess is the SF YWCA's insurance company. In the early stages of the litigation, a question was raised over whether the respondent's insurance coverage included the defense of this type of legal dispute. The law firm of Wright, Robinson, Osthimer & Tatum was brought in to "put pressure on the insurance [company]"

¹⁴⁶ Interview of Peter Hart, *supra* note 40.

¹⁴⁷ Interview of Karen Kai and Bob Rusky, *supra* note 66.; Interview of Cathy Inamasu, Executive Director, Nihonmachi Little Friends (May 16, 2002).

¹⁴⁸ See, e.g., *An 80-year-old Diary Helps End a Legal Dispute*, THE RECORDER, June 24, 2002, at 4; Avy Mallik, *supra* note 1.

¹⁴⁹ Interview of Cathy Inamasu, *supra* note 147.

¹⁵⁰ Interview of Donald Tamaki, *supra* note 73; Interview of Karen Kai and Robert Rusky, *supra* note 66.

¹⁵¹ See Ann Kennedy, *Diary Played No Part*, THE RECORDER, July 3, 2002, at 2.

¹⁵² See *id.*

¹⁵³ Interview of Peter Hart, *supra* note 40.

¹⁵⁴ Cathy Inamasu, executive director of Nihonmachi Little Friends has been clear.

[The community attorneys] left it up to us as to what our max was because of course it would rely on us ultimately to raise the money. The board decided and based it on what we thought we could raise for the purchase. Luckily, it came under what our max was. We were happy about that. The entire property is costing \$733,000.

Interview of Cathy Inamasu, *supra* note 147.

¹⁵⁵ Interview of Karen Kai and Bob Rusky, *supra* note 66.

to fund the defense of the case.”¹⁵⁶ Succeeding in that effort, the same firm took over the case for the SF YWCA, representing the respondent in all phases of discovery, trial preparation, motions, and mediation.¹⁵⁷ As the SF YWCA began to be inundated by negative publicity, counsel for the respondent also put pressure on the insurance company to pay for a public relations consultant.¹⁵⁸ As the trial loomed and the outcome was uncertain with the prospect of having to pay damages and further attorney’s fees, it is not out of the question that the SF YWCA’s insurance company decided to make up the difference between what the community contributed (\$733,000) and a reasonable sale amount (\$1.5 million) through a contribution to the SF YWCA. Once the insurance carrier acknowledged a duty to defend, the prospect of paying out more and more attorney’s fees over prolonged litigation and appeals likely led to its decision to contribute over \$750,000 to the final settlement.¹⁵⁹ The attorney’s fees paid by the insurance company up to that point was likely over \$1 million; after all, Soko Bukai’s attorneys had already donated over \$2 million in legal time.¹⁶⁰

VIII. PROPRIETY OF SETTLEMENT

One basic description of the settlement – \$733,000 from the community for property that the Japanese Americans thought was theirs in the first place – may not evoke immediate praise from those who are sympathetic with the community’s perspective. Was the settlement *good*, and if so, from whose perspective? Presenting the basic description of *Soko Bukai v. YWCA* to students generally elicits a response along the lines of “why should the community have to pay anything for the property. It was theirs to begin with.”¹⁶¹

Obviously, deciding whether to settle any particular case involves weighing a number of factors, and certainly that was the situation in this case. In post-settlement interviews with the Soko Bukai legal representatives and the executive director of Nihonmachi Little Friends, the final settlement was justified on a number of grounds.

A. *Responsibility for the building and the trust.*

The petitioner, Soko Bukai, was not interested in becoming a property owner.¹⁶² A willing, non-party entity was needed, and Nihonmachi Little Friends (NLF or “Little Friends”) filled the need.

[Soko Bukai] is just a loose federation of the three churches. It felt that it wasn’t prepared to take on the building even if the court awarded it. We felt the YWCA breached its fiduciary duties as trustee so it was not fit to be trustee. But Soko Bukai was not inclined to be property owners. So a series of meetings were held to determine if there was interest among other community organizations to play that role – to

¹⁵⁶ Interview of Peter Hart, *supra* note 1.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; Interview of Karen Kai and Bob Rusky, *supra* note 66.

¹⁵⁹ Telephone interview of Robert Hing, attorney at law and insurance specialist, Scottsdale, Arizona (Mar. 7, 2004).

¹⁶⁰ Interview of Donald Tamaki, *supra* note 73.

¹⁶¹ See, e.g., Rebecca B. Jackson, Soko Bukai Negotiation Reflection, Mar. 4, 2004 (unpublished paper on file with author).

¹⁶² Interview of Donald Tamaki, *supra* note 73; Interview of Inamasu, *supra* note 147.

be offered to the court as a possible trustee of the building. Most of the other organizations were burdened by their own buildings. At the time NLF was looking for a building. They are a very stable organization and they are multi-cultural, multi-racial. They had been operating out of the building for 15 years. So they stepped up and said if they can pay a price they can afford, they would participate. So there was a sigh of relief. Everyone wants them in the community and wants them to stay.¹⁶³ [Soko Bukai] really didn't want to be the owners of the building – they did want to save and preserve the building. But it was outside their normal scope to have to own the building.¹⁶⁴

As Little Friends understood things:

[F]rom the beginning the attorneys were saying that if [Soko Bukai] won the case . . . the question of who would be trustee [had to be answered] . . . [T]he attorneys' idea was to set up a nonprofit organization . . . that would represent the different sectors of the community [and] would act as trustees for the building. . . . [NLF] would become master tenant So it wasn't the best scenario for us [S]ettlement was a whole different thing. We could negotiate with the [YWCA] that [NLF] would buy the whole place – everything.¹⁶⁵

As much as the Soko Bukai legal team would have liked to try the case, the settlement got the community to where it “wanted to be.”¹⁶⁶ Little Friends would have a “permanent place,” and it was “an appropriate group to carry on the trust purposes” of providing community service and education.¹⁶⁷

B. Avoiding further litigation and delay.

The SF YWCA placed a for sale sign on the building in 1996, the litigation began in 1997, and the case was finally settled in early 2002. If Soko Bukai had prevailed at trial, its attorneys were certain that the SF YWCA would have appealed, and the resolution of the case would have taken several more years.¹⁶⁸ Several of the witnesses for the petitioner were elderly, and it was important to give them a positive resolution to the conflict. Also, their effectiveness at a trial was in question. Thus, settlement provided “closure” on the case.¹⁶⁹

[W]e avoid two years, maybe three years, of appeals. The aggressive way the YWCA fought the case, they most certainly were going to appeal the case. An example of an incident that led us to [that belief] was that they made a borderline frivolous motion to disqualify certain members of our legal team for violating certain rules of discovery. I thought the chances of them winning on that motion was next to zero. They appealed it to the Court of Appeal and lost and they appealed to the California Supreme Court and lost again. Most litigants don't do that. It was a basic decision to grind us and the community down. For them, money was no issue.¹⁷⁰

¹⁶³ Interview of Donald Tamaki, *supra* note 73.

¹⁶⁴ Interview of Karen Kai and Bob Rusky, *supra* note 66.

¹⁶⁵ Interview of Cathy Inamasu, *supra* note 147. .

¹⁶⁶ Interview of Tracie Brown, *supra* note 105.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Interview of Donald Tamaki, *supra* note 73.

¹⁷⁰ *Id.* Robert Rusky put it this way:

[I]t struck me when Lily Abiko died in November 2001 that time was definitely not on our side, not because it prevented us from prevailing in the litigation – I was fairly confident about that – but because if the case dragged on for several more years through trial and appeals, we would be

So even if Soko Bukai had won at trial, "it would have been years before this case would be actually over in terms of post-trial briefing and appeals."¹⁷¹

C. *Inclusion of the Side Lot.*

If the case had proceeded to trial and Soko Bukai prevailed on issues related to the 1830 building, recovery of the "side lot" (1834 Sutter) for the community was not a sure bet.¹⁷² And the fair market value of the side lot was not insignificant:

[T]he side lot added a tremendous value to the property. This was added to the building in the [19]60s. It would have been very hard to win on the side lot. My thought is that we would have won the building, [but] we would have lost on the side lot. When we were in settlement agreements, we both got appraisers to appraise the side lot. Our appraiser appraised the side lot at \$400,000 and their appraiser valued it at \$1M. Who is right, I don't know. But the fact that we get both the side lot and the building for \$733K makes sense to me.¹⁷³

The side lot playground area was vital to the Little Friends daycare program.¹⁷⁴

We thought about if we didn't have access to the playground what would we do. Our other site is directly behind us and at one point we had talked to an architect about how we could connect the two properties so that we could have access from this building [1830 Sutter] directly back to the playground behind us. It's possible, [but] it wouldn't be the best situation for us. It would also take out part of the backstage [of our] theater . . . dressing rooms . . . and office . . . to make kind of like an elevator to get to the level of playground behind us. That wouldn't have been the best situation, but that was a possible scenario if we couldn't get the [1834 Sutter] playground lot. For us, the whole package was really the best.¹⁷⁵

D. *Maintenance fees owed to YWCA.*

The SF YWCA took a position that if Soko Bukai prevailed at trial, then the community would owe the SF YWCA \$3 million for maintaining the build-

losing the very few elders who were involved in the Japanese YWCA even as kids. I wanted them to have the satisfaction of seeing the community regain the building and to feel that the struggle that began in 1920-21 with the subterfuge to avoid the Alien Land Law had been completed. I wanted the community to see that completion with them. I wanted this not out of sentimentality, or even because of the symbolic meaning of their personal experience of completion, but because to be able to secure the building in their lifetimes was a measure of respect for and a way of honoring what they had given in their time.

Memorandum of Robert Rusky, *supra* note 73.

¹⁷¹ Interview of Tracie Brown, *supra* note 105.

¹⁷² Interview of Donald Tamaki, *supra* note 73.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Interview of Cathy Inamasu, *supra* note 147. Since Little Friends needed the playground space for the preschoolers, the attorneys felt that inclusion of the lot in any settlement was important. Given the valuation range for the side lot, the \$733,000 settlement from Little Friends could be justified for the purchase of the side lot alone. Seen in that light, the community was not buying a building the community had already paid for, but was securing a value for the building property that it may not have been able to obtain otherwise. Memorandum from Robert Rusky, *supra* note 73.

ing for so many years.¹⁷⁶ Perhaps the community could demand that the price be discounted for years that the SF YWCA did not pay rent, but these issues may have demanded separate or additional litigation.¹⁷⁷

E. Unclear trial outcome.

In post-settlement conversations, counsel for both parties expressed confidence in their positions. Peter Hart, one of the SF YWCA attorneys stated:

I think we [had a pretty strong case]. The biggest hurdle they face[d] was their motive for the trust did not seem to be there. The alien land laws did not seem to prohibit this. If you go one step further and say a trust was created but a merger occurred. If there was a trust and a merger occurred, then there is a laches argument and a statute of limitations argument. We also thought we had good points on the standing and capacity arguments.¹⁷⁸

The attorneys for Soko Bukai expressed similar confidence. Donald Tamaki felt that Peter Hart was "wrong on the historical point of view and legal point of view," and that the Soko Bukai legal team was "clearly prepared" for the opponent's motion for summary judgment.¹⁷⁹ Tracie Brown expressed "disappointment that we weren't going to trial since this would be a fabulous case to try."¹⁸⁰ And although Robert Rusky acknowledged that "Y's statute of limitations and laches arguments . . . raised some concern," the legal team was "confident we would prevail on those defenses."¹⁸¹

Given the confidence that both sides expressed in their positions, one could reasonably conclude that the actual outcome of a trial was not preordained. Of course, both sides were aware of the relative strengths of their own positions, which contributed to their willingness to settle.

While these factors may provide simple answers to why the case was settled, they do not necessarily answer the question of whether the case should have been settled. In other words, are there policy reasons why the case should not have been settled?

F. Was settlement appropriate under the circumstances?

Owen Fiss has raised several philosophical arguments against settlement.¹⁸² He is troubled by the general possibility that when a case is settled, justice in fact may not be achieved. Indeed, settlement may simply represent a "capitulation to the conditions of mass society." I agree that there is frustration inherent in litigation that prevents adjudication of many important issues — issues important to parties and society at large. Unfortunately, at times it seems that only parties with deep pockets are able to afford litigation; this is frustrating. So I understand the need to resist settlement, especially when a subordinated party is involved.

¹⁷⁶ Interview of Donald Tamaki, *supra* note 73.

¹⁷⁷ *Id.*

¹⁷⁸ Interview of Peter Hart, *supra* note 40.

¹⁷⁹ *Id.*

¹⁸⁰ Interview of Tracie Brown, *supra* note 105.

¹⁸¹ Interview of Karen Kai and Bob Rusky, *supra* note 66; Memorandum from Robert Rusky, *supra* note 73.

¹⁸² Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

Fiss is particularly and understandably concerned when one party is substantially poorer than the other party:

The disparities in resources between the parties can influence the settlement in three ways. First, the poorer party may be *less able to amass and analyze the information needed to predict the outcome of the litigation*, and thus be disadvantaged in the bargaining process. Second, he *may need the damages* he seeks immediately and thus be induced to settle as a way of accelerating payment, even though he realizes he would get less now than he might if he awaited judgment. All plaintiffs want their damages immediately, but an indigent plaintiff may be exploited by a rich defendant because his need is so great that the defendant can force him to accept a sum that is less than the ordinary present value of the judgment. Third, the poorer party might be forced to settle because he *does not have the resources to finance the litigation*, to cover either his own projected expenses, such as his lawyer's time, or the expenses his opponent can impose through the manipulation of procedural mechanisms such as discovery. It might seem that settlement benefits the plaintiff by allowing him to avoid the costs of litigation, but this is not so. The defendant can anticipate the plaintiff's costs if the case were to be tried fully and decrease his offer by that amount. The indigent plaintiff is a victim of the costs of litigation even if he settles.¹⁸³

Fiss' first two points do not seem relevant in *Soko Bukai v. YWCA*. Assuming for the sake of analysis that Soko Bukai is the "poorer party," the pro bono counsel that represented the petitioner appeared to be quite competent and able to "amass and analyze the information" in order to assess the outcome of a trial. At the very least, they seemed to have as much information as the YWCA's representatives to determine the likelihood of success at trial. Fiss' second point of whether the Soko Bukai or the Japanese American community needed "damages" immediately is also not relevant. The community was not seeking monetary damages. However, a corollary question that may indeed be relevant is whether a sense of urgency was attached to the community's desire to have the building. Certainly, one could argue that the community wanted to put the case to rest sooner rather than later and was too willing to come up with the money to accomplish that goal. Similarly, the YWCA, also a community service agency, may have wanted to settle the matter before drawing the matter out further so that it could get on with its community work and avoid further public criticism. Even if these theories were true, that is not the same type of pressure that Fiss is concerned with in terms of a poor party who needs cash right away to spend. Arguably, for the Japanese American community, the issue was not how soon it would receive damages, but rather how soon, if at all, it could formally claim the property and put it back to community use.

Thus, the issue remains whether Soko Bukai lacked the "resources to finance the litigation." On its face, disparity in resources is not the case here, at least in the sense that Fiss writes. While the resources of the YWCA were considerable (insurance company paying for the defense), the volunteer attorneys for Soko Bukai were determined to match the effort and time that went into litigation. At least the quality of Soko Bukai's legal representation did not

¹⁸³ *Id.* at 1076 (emphasis added). Richard Delgado also has questioned whether informal processes are unfair to disempowered and subordinated groups. See generally Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

appear to suffer from its lack of resources. Since Soko Bukai had the resources necessary to continue this case to trial, settlement was not some desperate ploy to get something out of this whole situation. Money was not as much of a motivating factor as it would have been if this case were based on a straight cash reimbursement. Soko Bukai and its counsel also had unquantifiable community resources, in terms of emotional and psychic support, and classic rebellious-style use of community and political allies. On the other hand, in terms of money to cover litigation expenses, Soko Bukai was less certain of future funds. Certainly, continued community fundraising success to cover litigation expenses is, at the very least, unpredictable. Also, even though the firms were doing the work pro bono, one has to wonder if these firms would encourage settlement rather than become involved in a lengthy, costly trial.

Yet, Tamaki, Kai, and Rusky might very well have been willing to devote their lives to this case. This "human capital" acts to level the playing field, so one side could not take advantage of the other as Fiss fears. Many pro bono lawyers working on public cases are in it for the long haul because of their dedication to the cause and the issues. Others like the good public image that flows from such representation; this may be more important than earning a fee. Since the lawyers were from the community, concerns that they were settling simply because of financial constraints or considerations may be alleviated. On the other hand, because the lawyers had a personal stake in the matter,¹⁸⁴ they may have settled to gain some assurance that the building would not be lost. In other words, were the Soko Bukai attorneys more eager to settle due to fear that if they lost the building, they would face hostility from their own community? Would more "objective" attorneys have been willing to take the risk of losing it all or winning it all in court? I think not. The Soko Bukai attorneys were beloved and appreciated by the community because of their efforts, not because of a win-loss record.

But Fiss does raise an interesting challenge to the Soko Bukai settlement based on the fact that the petitioners are representatives of a larger community:

These problems become even more pronounced when we turn from organizations and consider the fact that much contemporary litigation involves even more nebulous social entities, namely, groups. Some of these groups, such as ethnic or racial minorities, inmates of prisons, or residents of institutions for mentally retarded people, may have an identity or existence that transcends the lawsuit, but they do not have any formal organizational structure and therefore lack any procedures for generating authoritative consent.¹⁸⁵

Fiss is raising a question that has serious implications in the Soko Bukai settlement if we view Soko Bukai as a representative of a social group. He might believe that settlement was not appropriate here because the Japanese American community got less than what it deserved. And in settling, Soko Bukai and its attorneys spoke on behalf of the entire Japanese American com-

¹⁸⁴ As one of the attorneys for Soko Bukai stated:

I had Japanese American friends who would jokingly say, "We're going to win the building right?" That was the downside of having this wonderful community involvement because I thought if we lose, all these people will be so upset.

Interview of Tracie Brown, *supra* note 105.

¹⁸⁵ Fiss, *supra* note 182, at 1079.

munity – a community with members who may not have agreed with the terms of the settlement. This would not be surprising. We know that many African Americans back in the *Brown v. Board of Education* era may have preferred more resources for their separate schools rather than integration.¹⁸⁶ In other words, in the *Soko Bukai* case, many community members may have wanted the case to go to trial based on the firm belief that the Japanese American community deserved the building without having to pay anything for it. . Even if they lost at trial, some community members may have preferred a public trial of the issues related to the injustice of the alien land laws and the exacerbating effects of internment and economic injustices visited on Japanese Americans.

The Fiss critique raises the question of who *Soko Bukai* represented and who Kai, Rusky, and Tamaki represented. The attorneys acknowledge that this was an action that came “up out of the community.”¹⁸⁷ Community groups and individuals were upset at the injustice that the proposed YWCA sale represented, but there was no real client for purposes of a lawsuit until *Soko Bukai* “stepped up.”¹⁸⁸ The attorneys acknowledged that even “though *Soko Bukai* was our immediate client, we were responsible to the entire community.”¹⁸⁹ So one might be nagged by the question of whether the agents who decided to settle on behalf of *Soko Bukai* fully considered the wishes of the group (the Japanese American community) that they represented. In earlier phases of the lawsuit when the case was being mediated, the community could not be consulted because the mediation talks were confidential.¹⁹⁰ Also, whose wishes were relevant? Should it matter to the settlement how the current community, beyond those represented by the interests of *Soko Buaki*, wishes to use the property? Is maintaining the trust’s purpose more important than putting the building to a different use that may be more necessary in modern times?

The response to this Fiss critique may not be completely satisfactory, but it is a good one. Kai, Tamaki, and Rusky knew the community. They were from the community. They knew what the community valued. They knew its strengths and its limitations. They were rebellious community lawyers who respected the wide array of friends, relatives, and community workers who made up the community. Their community-centric sense of *phronesis* is unquestioned.¹⁹¹ In helping to hammer out the final settlement there is no dispute that if anyone could “generat[e] authoritative consent” from “nebulous

¹⁸⁶ For example, some black educators in Kansas City argue that instead of worrying about racial-balance quotas, schools should worry about providing a quality education to all students. See Doug Peters, ‘*Separate But Equal*’ Returns to Nation’s Schools, *ARK. DEMOCRAT-GAZETTE*, Sept. 30, 1997, at A1.

¹⁸⁷ Interview of Karen Kai, *supra* note 54.

¹⁸⁸ *Id.*

¹⁸⁹ Interview of Don Tamaki, *supra* note 73.

¹⁹⁰ “One of the downsides of the mediation was that because the mediation was confidential we couldn’t talk to the community about what was happening. The attempts to negotiate was frustrating because we couldn’t report to the community.” Interview of Karen Kai and Bob Rusky, *supra* note 66.

¹⁹¹ Louis Brandeis believed that lawyers were particularly qualified for public service because they embodied Aristotelian *phronesis*, or practical wisdom. Louis D. Brandeis, *The Opportunity in the Law, Address Before the Harvard Ethical Society (May 4, 1905)*, in *BUSINESS – A PROFESSION* 392 (1917).

social entities" that is Fiss's concern, it was these representatives. As they met with the Soko Bukai leaders and brought in Nihonmachi Little Friends, they surely acted in the best interest of a very well informed community. When the outcome was announced, great public support and sympathy for the settlement was expressed, further evincing the credibility of the settlement. Moreover, those in the Japanese American community who may have pushed for a more aggressive stance early on in the litigation likely had the chance to make their opinions known to Soko Bukai leaders as well as to the lawyers who were in the community. Hopefully, the attorneys for Soko Bukai settled with some sense that the majority of the community preferred settlement. If that is the case, greater good was achieved by settlement.

Furthermore, if no one like Soko Bukai had stepped forward to be "the client" so that an action could be brought, then, from all indications, the property could have been sold to condominium developers. In that case, Fiss's concern over justice for a nebulous social group would remain a mere theoretical "what-if-a-suit-had-been-brought" concern rather than the practical one that is being raised. Thus, the community was clearly better off that Soko Bukai became the representative so that retention of the building for community use could be facilitated.

Fiss is also troubled by the possibility that settlement may bring peace, but not necessarily justice:

In our political system, courts are reactive institutions. They do not search out interpretive occasions, but instead wait for others to bring matters to their attention. They also rely for the most part on others to investigate and present the law and facts. A settlement will thereby deprive a court of the occasion, and perhaps even the ability, to render an interpretation. A court cannot proceed (or not proceed very far) in the face of a settlement. To be against settlement is not to urge that parties be "forced" to litigate, since that would interfere with their autonomy and distort the adjudicative process; the parties will be inclined to make the court believe that their bargain is justice. To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone. The settlement of a school suit might secure the peace, but not racial equality. Although the parties are prepared to live under the terms they bargained for, and although such peaceful coexistence may be a necessary precondition of justice, and itself a state of affairs to be valued, it is not justice itself. To settle for something means to accept less than some ideal.¹⁹²

This case involved more than just the monetary value of the building. It was about justice and restitution for Japanese Americans, who were discriminated against initially (hence, the necessity of creating a trust) and now are victims once again. Perhaps if this case had gone to trial, it would have set a precedent for other Japanese Americans who had property held in trust as a result of internment. Maybe a court victory over the SF YWCA would have meant more to the Japanese American community than merely getting to buy the building at a fair price. There could have been more issues of right and wrong than just what price was fair. Soko Bukai was representing the interests of a community that was upset at the injustices of the past and disrespected by the strategies of the modern SF YWCA; perhaps Soko Bukai owed it to their

¹⁹² Fiss, *supra* note 182, at 1085-86.

supporters not to "give in" to the pressures of the SF YWCA and, in the view of Fiss, fight for justice rather than just settle for peace.

An argument can be made that, except for time (which, of course is a not small matter), Soko Bukai had nothing to lose by going to trial, and, therefore, should have gone to trial. What other offers did the YWCA receive? If the only offer was from the community anyway and if Soko Bukai failed at trial, the community may still have been able to purchase the property. So perhaps the risk of litigation was low for Soko Bukai in the scheme of things. With that in mind, the settlement caused the community to pay significant amounts of money for something that the community felt it already owned. In addition, they lost a chance for some of the emotional benefits that winning the litigation could have had for the community. Settlement seemed to only save time, ensure the community's ownership, and cost a lot of money. Perhaps the community would have been better served by going to trial under the circumstances.

But one cannot assume that justice was not served by the settlement. While arguing that the Soko Bukai settled for something less than ideal is appealing, assessing what is ideal involves fair consideration of several factors. Time was a concern in the sense that witnesses were elderly (and therefore in some cases unreliable) and the case could have dragged on for several more years. By the time the case settled, the SF YWCA was no longer in dire financial straits. If the SF YWCA had prevailed at trial, the building might have gone to condominium developers or the SF YWCA could have just maintained it for its own administrative use without permitting other community-based uses. And from the SF YWCA's perspective, achieving a sense of justice was not a simple matter. While prevailing at trial might appear at first blush to accomplish "justice" from the perspective that SF YWCA's position would have been legally vindicated, its reputation could have been further tarnished in the media and certainly in the Japanese American community. Counter-intuitively, if the SF YWCA did not want its reputation to be further sullied, settlement may have been a better course than winning at trial. As its counsel pointed out:

I think the Y recognized at the end of the day, through the efforts of the judge involved, that even if you [the SF YWCA] won the case, you [the SF YWCA] would still lose. There would be a segment of the population that would believe that the building was a community asset, that the Y was not entitled to it. Even if we were able to prove that there was no trust, the general feeling would have been that the only reason it happened was the passage of time. That if they [the Japanese community] had acknowledged their duties early on after the war, the people involved would have still been alive, and this would have gotten to the rightful solution. So my view is if we had won the case, we would still have people chained to the building. So it became a case in the Y's interest where it was better to settle than not to settle.¹⁹³

However, Fiss warns that in some cases, there may have been a "genuine social need for an authoritative interpretation of the law" that is foreclosed by settlement. He reminds us that "[a]ll cases are not equal [e.g., desegregation cases] The settlement movement must introduce a qualitative perspective;

¹⁹³ Interview of Peter Hart, *supra* note 40.

it must speak to these more 'significant' cases, and demonstrate the propriety of settling them."¹⁹⁴

From one perspective, the issue in this case concerns a public entity taking advantage of an historically underrepresented population. It also concerns other public issues of racial discrimination. These are issues that should be made public so that others can learn from these experiences, especially in light of the injustices committed and arguably now perpetuated against the Japanese American community. The case could have been helpful in clarifying the historical issues.

David Luban expands on this Fissian perspective:

[A]djudication, which produces rules and precedents, is instrumentally useful because these provide a normative framework for future transactions. However, legal rules and precedents are valuable not only as a source of certainty, but also as a reasoned elaboration and visible expression of public values. Law on this view amounts to what Hegel called "objective spirit" – the spirit of a political community manifested in a public and objective form.

....

When a case settles, it does so on terms agreeable to its parties, but those terms are not necessarily illuminating to the law or to the public. Indeed those terms *may be harmful to the public*. Instead of reasoned reconsideration of the law, we often find little more than a bare announcement of how much money changed hands . . .¹⁹⁵

This Luban/Fiss concern has some validity here. The *Soko Bukai* case presents a strong public-life issue. The suit involved property that was dear and symbolic to the San Francisco Japanese American community. It also involved historical prejudice against Japanese Americans. The case could have been a useful vehicle to fill a gap in the law. Without doubt, the recognition of a trust theory as advocated by the petitioners would have been desirable. The law was not clear, just as the facts evincing intent to form a trust were not clear. If a trial occurred, the parties would have had the opportunity to argue about proper jury instructions on the law. That would have set some precedent. Moreover, the instruction may have been appealed, and the appellate courts may have clarified the law respecting formations of trusts. Generally, settlement terms are not illuminating to the law or to the public; if more cases are being settled, there is the chance that laws will remain static instead of evolving with the times. Of course, if *Soko Bukai* were to have lost in court, is that the precedent the Japanese American community would have wanted? Obviously not, but the community likely would have taken full advantage of the loss to generate publicity over the injustice. Thus, the Luban and Fiss positions force us to look at this objectively, rather than through one party's eyes.

Alien land laws were important in Asian American history. Students, scholars, and informed citizens need to learn about the laws of the past. A written decision would allow those in the future to understand the complexity and impact of laws several decades after their enactment – win or lose – that is the public value. Similar or analogous cases could still be out there. If so, by settling, the opportunity to have a binding precedent was lost. That leaves soci-

¹⁹⁴ Fiss, *supra* note 182, at 1087.

¹⁹⁵ David Luban, *Settlement and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2626, 2639 (1995) (emphasis added).

ety with inconsistent and non-uniform settlement agreements until there is precedent. Actual adjudication could have affected how other groups dealt with the resolution of property ownership affected by the alien land laws. The community did lose out on a chance for the justice system to admit and recognize the harmful effects of the alien land laws and to acknowledge the injustice that resulted. Quite probably, some members of the community would rather have gone through the costly and drawn out litigation process to achieve that end. At the very least, there was a missed opportunity for a trial on the social historical issues that would have benefited the public. Thus, Luban and Fiss would be right to point out that some injustice occurred here.

While appealing, the missed-opportunity-for-precedent and attached-public-value-to-precedent themes represented by Fiss and Luban may be overstated in their application here. According to the SF YWCA, the legal argument presented by the petitioner has never been tested before in the courts, namely, that an implied trust could be granted to an organization that did not enter into an original trust agreement, but who represents similar interests as those who did enter into the original trust agreement. Assuming that what the SF YWCA claims is accurate, then such a fact pattern and legal argument will not likely come up again soon. Arguably the facts were so personal and wedded to this unique property that adjudication would not have established much precedent. The public concern over the evilness of the alien land laws working in confluence with internment and how some individuals or entities took advantage of Japanese Americans in that context were the big community issues. Those were the facts and issues that riled up the community. But were those issues going to be adjudicated in this case? Maybe not. Arguably, the *Soko Bukai* case facts are relatively unique – more Japanese immigrants used their children who were citizens to hold land; the trust notion was more anomalous.

Perhaps a written decision is not necessary if there are other avenues for expressing public values and sources of information in the future. In other words, public values statements may be achieved through other channels. Even before the settlement, other avenues for expressions of public values occurred – public demonstrations, local and state proclamations, and participation of local leaders and public officials were all examples of meaningful statements of public values. Many of those outlets were manifestations of the rebellious style of community lawyering and a fully engaged community.

Furthermore, Luban's argument that settlements produce no precedent to follow only applies to settlements that remain private; here, the settlement value did not stay private for long. The community's \$733,000 contribution to the settlement and the recovery of the building was announced, and the community rejoiced. In spite of the cash contribution, the community felt vindicated because the cash represented far less than the building's market value and the side lot was part of the deal. Certainly, the dispute might have benefited from a public trial, given the issues relating to internment and theft of property from the initial Japanese buyers. Luban hints at a "public morality" that is brought out by public discussion of disputes, and the community could have benefited from making this public, as it might heal old wounds in the Japanese American community over the injustice of internment and the financial problems it caused. But reconciliation can come in other forms as well, and

that was accomplished through settlement. Recovery of the building coupled with continued commitment on the part of the Nihonmachi Little Friends to engage in community education on the alien land laws and internment constitutes great public value that made settlement worthwhile. In the end, settlement has precedential value in the same way that it has decisional value – in the court of public opinion. And litigation and all of its corollary procedures was only driving a deeper wedge between the parties.

Carrie Menkel-Meadow helps respond to the Fiss/Luban concerns by warning us not to romanticize litigation:

[W]ith empirically unverified assumptions about what courts can or will do. More important, those who privilege adjudication focus almost exclusively on structural and institutional values and often give short shrift to those who are actually involved in the litigation. I fear, but am not sure, that this debate can be reduced to those who care more about the people actually engaged in disputes versus those who care more about the institutional and structural arrangements. I prefer to think that we need both adjudication and settlement.¹⁹⁶

The questions that Menkel-Meadow poses that seem relevant to Soko Bukai are as follows:

In a party-initiated legal system, when is it legitimate for the parties to settle their dispute themselves, or with what assistance from a court in which they have sought some legal-system support or service?

When is “consent” to a settlement legitimate and “real,” and by what standards should we (courts and academic critics) judge and permit such consent?

When, in a party-initiated legal system, should party consent be “trumped” by other values – in other words, when should public, institutional, and structural needs and values override parties’ desire to settle or courts’ incentives to promote settlement? In short, when is the need for “public adjudication” or as Luban suggests, “public settlement” more important (to whom?) than what the parties may themselves desire?¹⁹⁷

....

More often and more troubling to those who are concerned about justice, a litigated outcome will produce binary win-lose results that often do not capture the “just reality.” As John E. Coons argued so elegantly many years ago, compromise (or at least nonbinary solutions) may represent more “precise justice” when we cannot be absolutely certain about the facts, or when competing principles of law dictate different and sometimes opposed underlying values. Coons argued that courts (as well as settling parties) should be allowed to render fifty-fifty or other allocative verdicts when either unresolved factual doubt or legal ambiguities or contradictions make winner-take-all results unjust. Thus, for me, until litigation is permitted to recognize the ambiguities and contradictions in modern life by developing a broader “remedial imagination,” settlement offers the opportunity to craft solutions that do not compromise, but offer greater expression of the variety of remedial possibilities in a postmodern world.¹⁹⁸

Luban and Fiss warn us about compromising without principle. That is a very valid concern, especially in community law cases like Soko Bukai. However, principle seems to have been highly maintained here. As Menkel-

¹⁹⁶ Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2669 (1995).

¹⁹⁷ *Id.* at 2670-71.

¹⁹⁸ *Id.* at 2674-75.

Meadow notes, litigation, rather than settlement, has led to the “monetization” of legal disputes because money has become the proxy for all legal harms.¹⁹⁹ She recognizes that settlement offers the opportunity to craft solutions that do not compromise but offer greater expressions of the variety of remedial possibilities in a postmodern world. This is actually quite apparent in the Soko Bukai case. While money played a huge role in the settlement, ultimately there was creativity involved that would not have been possible in a courtroom trial. The ultimate buyer, Nihonmachi Little Friends, was clearly not a party; however, Soko Bukai’s concerns for community use were met because the buyer turned out to be a community organization, benefiting the Japanese American community and others. Additionally, while the price was an important aspect of the settlement, the SF YWCA was quite willing to avoid the ordeal of a trial, where negative publicity aimed at the organization was sure to be heightened – win or lose.

Settlement enables parties, in Menkel-Meadow’s view, to broaden the scope of the debate.²⁰⁰ Here, the issues were tried in the court of public opinion. Regardless of whether the trust was legally valid, the public felt strongly that the SF YWCA was wrong in claiming the building and attempting to sell it. In this sense, the public was able to enforce socially important values that might not otherwise have been rewarded had this case been tried via legal channels. Instead of representing a compromise where values were set aside, settlement arguably represented “a moral commitment to equality, precision in justice, accommodation, and peaceful coexistence of conflicting interests.”²⁰¹ The SF YWCA was able to sell the property, obtain fair compensation, and avoid further negative publicity. Soko Bukai and the community obtained the property with a contribution at far below market value; the building was dedicated to community use; community members and the general public were educated on the injustices of the alien land laws and internment; and additional years of legal wrangling were averted. In fact, the negotiation here yielded an outcome that more closely resembled “justice.” Both parties had legitimate claims to the property and the SF YWCA had expended money on the property over the years. From the Japanese American community’s perspective, a sense of reconciliation was achieved, at least with the larger community (although certainly one could claim that many in the larger community already understood and supported the Japanese American community’s claim to the building), and the SF YWCA was relieved of the burden of being portrayed as the villain.

Additionally, settlement allowed the parties to reach a more creative outcome than a trial would have produced. A clear sense of justice was achieved from the Japanese American community’s perspective. While a legal victory for Soko Bukai would have provided a great vindication of the discriminatory practices epitomized by the alien land laws and internment, the settlement facilitated quite a similar platform from which to declare a principled victory over the twin evils. In fact, if one sympathizes at all with the SF YWCA’s position,

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 2672.

²⁰¹ *Id.* at 2692.

the settlement may have been more principled than a potential legal outcome that gave the property outright to the community. Settlement allowed the parties to develop a broader range of possible solutions that responded to both the community and the SF YWCA's needs. Bringing Nihonmachi Little Friends and the SF YWCA's insurance company (if my speculation is accurate) into the mix as part of the final settlement is the best example of the creative outcome facilitated by the settlement. As such, the outcome provided a sense that justice had been achieved.

The settlement process here was more suitable for what was essentially a "multiparty" case that was clothed in a binary two-party litigation framework.²⁰² Although only two formal named parties were involved, the case was truly complex and multiparty. The SF YWCA tenants, the original Japanese immigrants who established the program, the older Japanese Americans who were still alive and got deposed, the younger generations of Japanese Americans who would have benefited from the trust, and the Japanese American church leaders all had interests and wished to chime in on the merits and goals of the case. A collaborative approach to settlement invited participation from these groups, and community-based counsel considered a variety of solutions that went beyond the named parties. If the case went to trial, then counsel would have concentrated only on marshalling the facts to prevail on the legal issues. This would not necessarily have been synonymous with the broad results recognized by the settlement. The "remedial imagination" of settlement talks can allow for a more just outcome because it reflects the real world and not the all-or-nothing approach of most courtroom situations. Soko Bukai and its constituents – historical and modern-day – were a nebulous group, changing over time and in composition. Perhaps settlement was also favorable because petitioners were more of an interest-based group, rather than conventional named plaintiffs. In this sense, settlement avoided having to put witnesses on the stand (such as the elderly Japanese women) who might weaken the position of Soko Bukai if they were ineffective. In settlement, they could remain more of a body of interests who were represented by counsel.

Moreover, the results of a binary win-lose jurisprudence may have been inappropriate in the *Soko Bukai* case. Compromise during settlement discussions is essential in cases where the facts are not certain, such as the legal creation of a trust, breaches of trust, and payments toward purchases in the context of decades-old laws and events with racial overtones. Settlement can offer a more just outcome than a judgment because the courts would have difficulty offering an accurate reflection of liability or fault under those circumstances. This case is riddled with uncertainties, "legal ambiguities, and "contradictions" where neither side could be definite about victory, and a "winner-take-all" result might be viewed as unjust.²⁰³ The law was unclear, witnesses were deceased or elderly, emotions ran high, community-based organizations sat on both sides, and a long legal battle was on the horizon. Settlement enabled the parties to forego the uncertainty of trial and devise a solution of their own. The parties were fortunate that a creative solution was

²⁰² *Id.* at 2692.

²⁰³ *Id.* at 2674.

devised that incorporated community and non-community funds, enabling both sides to walk away saving face.

Settlement was in the interest of the SF YWCA as well. A quick resolution was desirable because both organizations serve the community and rely on public support. Dragging the dispute out could have seriously damaged both parties' ability to serve their purpose. The historical context of the case played an important role in spawning a desire for settlement on the SF YWCA's part. If the case proceeded to litigation, public outcry against the SF YWCA would have been rampant and extremely damaging. The historical discrimination against Japanese Americans and their internment coupled with the politically active communities of San Francisco would have created hostility not only between the parties, but between other communities and the SF YWCA. Settlement allowed for the inclusion of non-legal solutions. From the SF YWCA's perspective, clearing its name in the public's eye was important. Even if they prevailed at trial, it is unlikely that this would have been accomplished; the SF YWCA would still have lost in the public's eye. More bad publicity was likely. Here, settlement provided the pressure for the SF YWCA to act morally – a pressure that would not have had as much clout in a courtroom. Settlement enabled the parties to go beyond the scope of litigation in several ways. While the validity of the trust could have been litigated, it would have been much more expensive and time consuming. The cost saved by settlement could have been at least the same amount lost (or gained), depending upon the outcome of the litigation. Therefore, it was mutually more beneficial, considering the uncertainty of the outcome, to come to an agreement that was more acceptable for both sides.

IX. RECONCILIATION AND THE COMMON GOOD

I have been amazed at the establishment of programs such as the South African Truth and Reconciliation Commission (TRC) which affords amnesty to many who committed human rights violations under apartheid. Advocating forgiveness in spite of the atrocities of the era is something to be marveled. According to the Commission's website, the TRC was set up by the Government of National Unity to help deal with what happened under apartheid. The conflict during this period resulted in violence and human rights abuses from all sides. No section of society escaped these abuses."²⁰⁴ According to Dullah Omar, former Minister of Justice, "a commission is a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation."²⁰⁵

The common-good values that flow from settlement that achieve a sense of reconciliation are absent from the positions that Fiss and Luban take in opposition to settlement. Fiss' criticism of settlement and Luban's respect for the precedential value of definitive rulings are based on critical tenets of American jurisprudence. But settlement helps to support and maintain another fundamental goal of the legal system and society at large – helping to construct the

²⁰⁴ See South African Truth and Reconciliation Commission, <http://www.doj.gov.za/trc/> (last visited Oct. 22, 2004).

²⁰⁵ *Id.*

common good. In order to accomplish that fundamental goal, give-and-take is necessary in part to achieve justice, but also as an expression of good faith. Certainly, advocating capitulation at the expense of exploitation is not the purpose here, but promoting agreement for the sake of peace and mutual respect in order to accomplish a larger purpose is worthy of support.

Settlement in the *Soko Bukai* case, and the attorneys' active promotion of settlement under the circumstances, is consistent with principles of lawyering that should be given recognition. Formal professional responsibility provisions provide support for the general notion that lawyers ought to work for the betterment of society. This notion is not limited to civic activities, political functions, or general volunteer work but also applies to daily client counseling.

Professional responsibility rules generally mandate deference to a client's wishes as long as they are within the bounds of the law. Therefore, problems may arise when trying to encourage a client to pursue strategies other than the most vigorous ones preferred by the client. For example, Ethical Canon (EC) 7-1 of the Model Code of Professional Responsibility provides that the "duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law."²⁰⁶ The Model Code of Professional Responsibility tells us that when choices affect the merits of a client's case or substantially prejudice a client's rights, "the authority to make decisions is exclusively that of the client and . . . such decisions are binding on his lawyer."²⁰⁷

But a variety of ethical provisions lend support to the lawyer who encourages a client to pursue a strategy that is less likely to damage community relations – even if that strategy will not yield the greatest pecuniary result or swiftest relief for the client. As early as 1908, the Canons of Professional Ethics declared that the lawyer "advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law."²⁰⁸ The preamble to the current Model Code of Professional Responsibility provides that "lawyers, as guardians of the law, play a vital role in the preservation of society Within the framework of [fundamental ethical] principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society."²⁰⁹

Existing provisions support not only an ethical duty for lawyers to consider the interests of society as a whole, but also a lawyer's responsibility to exercise independent judgment and counsel clients on the extralegal issues presented by a case. Model Rule 2.1 provides that "in representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be

²⁰⁶ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980) (footnotes omitted).

²⁰⁷ *Id.* at EC 7-7.

²⁰⁸ CANONS OF PROFESSIONAL ETHICS Canon 32 (1908).

²⁰⁹ MODEL CODE, *supra* note 204, at Preamble.

relevant to the client's situation."²¹⁰ Similarly, the ABA Model Code EC 7-8 states that:

[A]dvice of a lawyer to his client need not be confined to purely legal considerations In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions.²¹¹

The work of the Soko Bukai attorneys and the \$733,000 contribution on the part of Nihonmachi Little Friends toward the ultimate settlement of the dispute epitomize the spirit of working for the common good in the resolution of legal disputes. The Japanese American community took the high road in this case, and society as a whole benefited from a settlement rather than suffering through a full fledged litigation battle that could have gone on for many more years. The community simply wanted to continue using the building for community purposes, consistent with its original founding. Even though the community was in a position to further leverage its sympathetic position at the expense of the SF YWCA's image, the community had a fair goal in mind and was able to reach it without insisting on more. The building and the side lot were obtained without a trial for a price the community was willing to pay. The community was able to air its grievances and educate the public during the course of the litigation, end up with the property for community use, and center a community education program in the building permanently. In that way, the community was able to achieve a sense of reconciliation with the larger community over the extensive historical oppression that it had suffered from the twin evils of the alien land laws and internment, not to mention general racism. The community was willing to come up with money as a sign of good faith, for the sake of peace, to obtain a sense of reconciliation, and for the common good.

Although the SF YWCA may not have had the same sense of reconciliation (note the bitter tone of the letter to the editor issued by the SF YWCA's executive director),²¹² the agency received a good deal of money in the end, and its public relations nightmare was brought to a close. Part of the problem

²¹⁰ MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1993) (emphasis added). The comment to Rule 2.1 points out that legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations. *Id.* at cmt.

²¹¹ MODEL CODE, *supra* note 204, at EC 7-8 (emphasis added) (footnotes omitted). Note the use of similar language in EC 7-10: "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." *Id.* at EC 7-10.

²¹² See *supra* note 151 and accompanying text.

for the SF YWCA was that, whether or not it bore some culpability for the community's past suffering, it became the emblem for the alien land laws and internment. As such, it was de facto placed in the unenviable position of defending the nation's racist past, thereby exposing itself to being labeled racist. No institution – especially a community-based one – appreciates that label. Irrespective of what one may think about the hard ball litigation strategies of its counsel or its disrespectful and ill-stated public relations actions, the SF YWCA (historically or modern-day) likely was not consciously racist.²¹³ Yet, during the dispute, its representatives were portrayed that way because they were put in a position of representing old racist laws. But given the tension that flowed from the dispute, a peaceful resolution was important for the common good.

The Fissian concern for justice rather than simply peace and Luban's regard for the precedential public value of definitive rulings may very well subordinate the sense of reconciliation that a group like the Japanese American community here may have experienced. Fiss and Luban may also brush aside the fact that client satisfaction is commonly achieved through the ADR process. Parties often experience a sense of empowerment within the ADR context, which carries over into other arenas, as individuals are able to gain more control over their lives.²¹⁴ In this case, the lawsuit was significant to countless members of the Japanese American community. Non-party individuals and groups were invested in an attempt to seek redress for the injuries suffered by the community as a result of the historical racist laws enacted against their parents and grandparents. Thus, the lawsuit became a vehicle to revisit issues like the alien land laws, helping to generate a dialogue that extended beyond the Japanese American community. The process and the ability to engage in that effort provided great satisfaction to the community; the scope of activity around the issues was extremely significant.

Given the fact that this case was complicated, involving a petitioner who represented a community of individuals and entities of the past and the present, decades-old evidence and controversial historical actions, and a respondent that was also a community group with an arguably sympathetic position, a process to resolve the dispute that ultimately gave control to the parties made sense. One of the advantages of alternative dispute resolution (ADR) processes is that the parties are provided with greater control of the process.²¹⁵ This is important to a modern legal system, because "the spectrum of disputes in modern society demands a corresponding spectrum of resolutions methodologies."²¹⁶ In the *Soko Bukai* case, temporal factors were highly relevant to seeking a fair

²¹³ Certainly, institutions or individuals who rely on institutions, laws, and values that were constructed in a racist environment should, however, be aware of their own unconscious racism. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

²¹⁴ See Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS Redress (TM) Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 402 (2001).

²¹⁵ Jeffrey Scott Wolfe, *Alternative Dispute Resolution in the Twenty-First Century: Across the Ripple of Time: The Future of Alternative (or is it "Appropriate") Dispute Resolution*, 36 TULSA L.J. 785.

²¹⁶ *Id.*

resolution. Viewing the disposition of the case with an eye toward the contours of time, place, and manner, we realize that resolution of a case that literally took ninety years to evolve, relating to individuals who have appeared and passed on and transforming social values, is probably least appropriate for a conventional win-lose courtroom setting. Thus, ADR is probably the most appropriate setting for the lawyer as healer whose major goal may be to bring peace to the lives of her clients.²¹⁷ Certainly, an approach to lawyering that seeks "reconciliation, forgiveness, and healing" between the parties is a worthy purpose.²¹⁸ But in *Soko Bukai*, the healing and reconciliation for the Japanese American community was very much about its self-healing and reconciliation with the culpable institutions (social and public, private and governmental) of the past. The settlement process facilitated this deliberative healing and reconciliation by allowing the community lawyers, Soko Bukai members and leaders, and Nihonmachi Little Friends officials to help decide what would be best for the community. While the case was certainly about trying to gain possession of the building and conducting public education about the alien land laws, it was also very much about reconciliation with the past.

X. CONCLUSION

When is a building something more than just a building? A visitor walking by the 1830 Sutter Street building on a typical San Francisco weekday afternoon likely would hear and see children playing in the playground. The visitor might even look up and appreciate some features of the Julia Morgan style structure. The building's Japanese architectural design and the corners of the roof might deserve a second look; but to the untrained, the building might evoke nothing particularly special. We all know that a house is not necessarily a home. Something special must happen to make it a home, generally involving friends or family. Similarly, a building is just a building unless something special has occurred. In the 1920s, something special did take place at 1830 Sutter Street that transformed the building into a home for the community. The Issei women that opened its portals to their children, to others in the community, and to generations of other community residents who followed were unaware of the magic they had performed. Decades later, the building was not only a community center, but it had also become the symbol for the homes, the businesses, the real and personal property of Japanese Americans subjected to the confluence of the twin evils of alien land laws and internment.

The Soko Bukai legal team and the community pulled off a little magic of their own some eighty years later, reclaiming the historic 1830 Sutter community building and clearing any cloud to ownership. Yes, it took cash, but at far below market value. The rebellious strategies devised and implemented by lawyers, residents, and allies working in concert involved more than seeking victory on a legal issue. Taking the opportunity to educate the community and the public on the historical background to the building and the community was every bit a part of the social-legal strategy. In the end, through settlement,

²¹⁷ *Id.*; see also Edward D. Shapiro, *The Practice of Holistic Lawyering*, 16 CBA RECORD 38 (Feb./Mar. 2002).

²¹⁸ Shapiro, *supra* note 217.

extra-legal remedies became available, and a true sense of justice and reconciliation with the broader community was achieved. The Japanese American community demonstrated dignity and class, allowing the SF YWCA to walk away with a face-saving outcome, while attaining peace for the common good.