Luck Was Not a Factor:
The Importance of a Strategic Approach to Civil Rights Litigation

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Looking at the topic of the symposium, “Rekindling the Spirit of Brown v. Board of Education,” I think about the meaning of that title. Rekindling means that something has died, the flame has ebbed, or something needs a fire or match to light it. I hope that is not the case. I hope that is not the case considering the tremendous victory in the Supreme Court of the United States1 and, in California, the defeat of Proposition 54.2 You have buried it here in California.

I.
DEVELOPING SOPHISTICATED STRATEGIES

We learn lessons from the occasional defeats that we experience. Proposition 2093 was a wake-up call, and—had our strategy been a little different—I think we could have prevailed. But you know what they say, “Fool me once, shame on you. Fool me twice, shame on me.” We will not go that way again. With Proposition 54, civil and human rights communities faced a very sophisticated strategy that was not specifically about race. To combat this strategy, we talked about issues that impacted a larger community, things like health issues and the kinds of medical research we wanted done. Our arguments appealed to a larger population, and that is why we won. For example, we asked, “How should the medical research be structured to determine who suffers from certain kinds of illnesses? What kind of research do we need to do?”

Developing arguments that appeal to a larger population is a challenge, especially as we deal with race and ethnicity issues. It is a tough challenge, but it is one we have to meet if we are going to move anywhere. Someone approached me after the Supreme Court oral arguments in Gratz v. Bollinger and Grutter v. Bollinger4 and said, “Oh, Elaine, what luck that it was Gratz and Grutter. The

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2. Proposition 54 was an expansive attempt to eliminate the state government’s ability to collect data on the race of persons receiving or affected by government programs and proceedings.
3. Proposition 209 eliminated affirmative action programs in all California government institutions. It was passed by California voters in 1996. See CAL. CONST. art I. § 31.
Supreme Court could have heard some other case.” And I said, “Luck? Luck? No, no, no; you are missing some very important information.” We in the community—the larger community that cares about these issues—knew for at least seven or eight years that the Supreme Court was going to take a case addressing affirmative action. We did not know whether it would be in the context of employment, or scholarships, or higher education, but we knew *Bakke* would be challenged. Today, *Bakke* is twenty-five years old and we know what we faced throughout the 1980s. For the past twenty years, we have endured through the Justice Department’s vigorous attempts to turn back the clock on previous civil rights victories. It was inevitable that a case was going to go through the Supreme Court of the United States. We just did not know the context.

**A. Attempt to Intervene Early: Hopwood v. Texas**

What does that mean? It means that you do not just sit and wait for it to happen. You do not just say, “Alright, the Court’s going to take one and if it’s one that we didn’t bring, we will have to file an amicus or try to affect the outcome some other way.” No. You get in there early and employ the same strategy that Thurgood Marshall did in *Brown*. And that’s just what we did.

These victories are not accidents. *Hopwood*, the University of Texas case, was the first case leading to the strategy in *Grutter*. When *Hopwood* was decided in 1996, the Fifth Circuit Court of Appeals just simply overruled the Supreme Court in *Bakke*. I did not know the court of appeals could do that, but that is the position they took. The court said that it was virtually impossible for race to be a compelling interest and that the Texas program could never meet the test under the Fourteenth Amendment. It held that this program was unconstitutional under the Fourteenth Amendment. In a special concurrence, the Fifth Circuit discussed *Bakke* at length, calling Justice Powell’s opinion “a lonely opinion.” In his concurrence, Judge Wiener criticized the court for deciding the issue too broadly. He thought that diversity might be a compelling interest, but concluded that the program at issue was not narrowly tailored, balanced, and reasonable. In other words, he did not try to overrule the Supreme Court. But his colleagues on the circuit court disagreed and thus effectively overruled the U.S. Supreme Court.

So we were in trouble in *Hopwood v. Texas* because when you get these cases—when a public university is sued—who is supposed to defend it? The Attorney General of the state is supposed to defend the university. But in this instance, Dan Morales, the Texas Attorney General, lacked any sense of strategy and

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6. *Id*.
7. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (overturning the University of Texas race-conscious admissions program).
8. *Id*.
9. *Id.* at 945-46.
10. *Id.* at 945.
11. *Id*.
12. *Id.* at 962 (Wiener, J., concurring).
13. *Id*.
immediately held a press conference in which he conceded the difficulty of defending the affirmative action program at the University of Texas.

Simultaneously, we tried to intervene in Texas, to represent the interests of the students of color. Morales opposed our intervention, declaring, "You can't come in." We fought along side of and worked with the Mexican American Legal Defense and Education Fund (MALDEF) to intervene with the hope of affecting the record and the evidence. The Attorney General and those who should have defended the program fought against LDF's intervention. Then a petition was filed requesting the Supreme Court of the United States to take the case. I was very nervous about the possibility of the Supreme Court's ruling on Hopwood. When you get a case in the United States Supreme Court with no trial, based on a summary judgment motion, on an issue as important as this, you have got real problems.

Yet there we were on the brink of having this case heard in the Supreme Court. Many in the academic, legal, education, and social science communities were saying, "Well, we want the court to take the case and put this issue to rest once and for all." My thoughts were: "No, please, no, no, not this case." When the Supreme Court denied certiorari, Justice Ginsburg wrote, "This Court... reviews judgments not opinions." In other words, the program had changed between when the case was initially filed until it reached the United States Supreme Court; therefore, there was nothing to review.

**B. Develop the Record: Piscataway Township Board of Education v. Taxman**

The next case that came up was *Piscataway Township Board of Education v. Taxman*, a case out of New Jersey. This case had been percolating for some time. It arose in the employment context: a white teacher, a black teacher, and a situation in which there was a layoff. However, the Supreme Court had already spoken on the question of layoffs in *Wygant v. Jackson Board of Education* in severely restricting the use of race in the layoff context.

In *Piscataway*, the white teacher was laid off and the black teacher kept for the reason stipulated in the record: because she was the only black teacher. Within a few months the white teacher was rehired. Now we have the issue. The white teacher brings suit based on impermissible use of race. The Piscataway School District loses in the district court. The case then goes up to the Third Circuit; the school district loses in the Third Circuit. I woke up one morning and saw the Supreme Court had granted certiorari in the *Piscataway* case.

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17. Taxman, 91 F.3d at 1551.
19. Taxman, 91 F.3d 1547.
Considering the record developed in Piscataway—which was practically nonexistent—and the stipulations by counsel, any judge would have struggled to decide in favor of the school district. Important details were missing. The African-American teacher had a Master’s degree, and the white teacher did not. But in the record it was stipulated that the African-American teacher was kept only because of her race. The facts make a case, and seeing what was on the record you could see that case was on its way to defeat.

If Piscataway had gone to the Supreme Court of the United States, it would have been a loss. Had we lost in this context, I doubt that we would have seen a case like Gratz or Grutter come up. I woke up at 4:00 a.m. one morning, looked around the room, and said out loud to myself, “The Supreme Court may have granted cert in the case. However, the parties should settle this matter.” One person can make a difference if she cares enough. We have resources at our fingertips that we do not even know we have, but first we must have the will to act. There was no record of persuading a case to settle after certiorari has been granted and the case was set for argument. However, this case had to settle and a way had to be found.

C. Broker a Settlement

When you first you look at Piscataway, you see that the only remedy sought in the case is money; it is not about any injunctive relief or any systemic relief. It is about money. The white teacher was laid off for a few weeks and then brought back. So, she was owed back pay and counsel’s fees; that was it. If the Court had heard the case, we could possibly have had a constitutional holding from the Supreme Court that could have wiped out the whole notion of diversity for years to come. So the question is: What do you do? You invite counsel on both sides to take another look at the record and realize the impact of the loss.

It is a heady thing when lawyers get an opportunity to argue before the Supreme Court of the United States; you have an uphill battle. Win or lose, they want to be heard in the high court. Initially, the lawyer for the school district wanted to go forward. However, upon reflection he thought settlement was in the best interests of his client.

Also it had to be determined what the case was worth. How much is counsel due? When the worth of the case was determined and the respondent could be made whole, the lawyers could agree.

We must ask what else gets them to agree? When lawyers are involved with issues that have an impact on social justice in incalculable ways, we must represent the clients and be aware of the context of that representation. As in Brown, we have issues we cannot lose. In that situation, you really must be willing to help lawyers come to the table. It is a coalitional effort. LDF cannot go off and do what it wants in this kind of litigation. Neither can the American Civil Liberties Union (ACLU) or MALDEF or any other litigator. One must consult to litigate in the public interest, protecting the best interests of your client. We do not have time for Rambo tactics; too much is at stake. In the end, the Piscataway case was settled. It was in the headlines of the New York Times and the Washington Post the next day: Piscataway settles.21

21. E.g., Linda Greenhouse, Affirmative Action Settlement: The Overview: Settlement Ends
After the case settled, LDF was asked to come on Nightline to talk about settling the case. The details of the settlement were important. Although the case had settled, it still remained on the active docket of the U.S. Supreme Court. It had not yet been dismissed. Can you imagine LDF appearing on Nightline and talking about the settlement strategy when the Supreme Court still had jurisdiction over the case? That would have been inappropriate and LDF did not appear. Kweisi Mfume from the NAACP went on Nightline and discussed the settlement. Because LDF and the NAACP are separate—we are completely separate organizations—he could speak freely.

**D. Work with Others:** Johnson v. Board of Regents of the University of Georgia

With *Piscataway* settled, we faced *Johnson v. Board of Regents of the University of Georgia*, the University of Georgia case.\(^2\) Now, if ever there has been discrimination at an institution of higher education, it is at the University of Georgia. A cursory reading will show you Georgia’s deep history of racial discrimination in public higher education.

Case records do not make themselves—lawyers get help from experts, social scientists, and demographers in developing the record. In Georgia, we had a situation where the Attorney General was responsible for defending the University of Georgia. The Attorney General, with some difficulty, mounted a defense of the affirmative action program at the University of Georgia. Such cases do not win votes. Once again, we found ourselves pushing against a state Attorney General, trying to intervene on behalf of the black and brown students who enrolled at the university, with the state failing to support LDF in the courts.

The Attorney General would not develop evidence to support a remediation rationale of the kind that the Court eventually heard in *Gratz* and *Grutter*. The university made the diversity argument, claiming that it was its First Amendment right to have a diverse student body. We at the LDF were in there pushing the remediation argument, which is the right of the student to be included. When LDF makes the remediation argument (a history of discrimination) in a case, we believe it may move courts closer to a diversity position, in some quarters a more palatable basis of decision.

That Georgia case was lost in the district court.\(^3\) It went up to the court of appeals, which also ruled against the program.\(^4\) Then the Attorney General announced that he was going to go to the Supreme Court of the United States to defend the rights of these African-American and Latino students at the University of Georgia. It made for great press and no one paid attention to the poor development of the evidentiary record in the court below. After all, the program was going to be vindicated in the Supreme Court of the United States.

Within two weeks of September 11th, I got on a plane with LDF’s Associate Director Counsel and the head of the Education Department at LDF. We took a jumbo jet out of LaGuardia airport—a big, empty plane with six people on it.

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went to Atlanta, and met with the Attorney General. Now, he was somewhat impressed by this. I said, “We’ve been in this case with you for a couple years now and the LDF would like to cooperate.” He and his staff did meet with us to fully discuss the matter. A couple of weeks later, he flew to New York. We were able to work out a settlement with the University of Georgia. He did not seek certiorari in a review by the Supreme Court of the United States.

II. SUCCESSFUL CAMPAIGNS: GRATZ AND GRUTTER

LDF had been involved with Gratz from the beginning. LDF intervened in Gratz, which was the undergraduate case. We could not intervene in the law school case because LDF’s Associate Director Counsel had been on the faculty of the University of Michigan law school and a member of the committee that drafted the law school’s affirmative action program.

In Gratz and Grutter, the University of Michigan’s leadership strongly supported its affirmative action program. Lee Bollinger, who was dean of the law school at the time the lawsuit was filed and who later became president of the University, and Jeff Lehman, who succeeded Bollinger as dean of the law school, both supported the case.

The university did have some problems. A university has a lot of pressures on it, especially a public university. When both the law school and the undergraduate college were sued, there had to be some unhappiness on the Board of Trustees. The General Counsel, Marvin Krislov, and the Board of Trustees rallied for this important moment in history. Mary Sue Coleman, the current president of the university, continued unwavering support throughout the Supreme Court’s consideration of the cases. The leadership at the University of Michigan stayed on point because they understood that this was a defining struggle. They paid through the nose for defending their affirmative action policies, and the university marshaled the necessary financial resources, which were substantial.

LDF intervened in Gratz, the undergraduate case. We stayed with the case throughout. The day of lawyers going to court with briefcases, unveiling a novel legal theory to change the world (if there ever were such a day, and I do not know that there ever were) is now over. These issues are campaigns which require many strategies over an extended period of time.

Brown was such a campaign. When you are engaged in a campaign, you have to engage your resources: communications, political coalitions, and all of the intellectual force and power you have at your disposal. You have to be organized and know your goals. You have to be clear about your mission. Finally, you must have the resources, because we are fighting against anti-affirmative action campaigns that were organized in the early 1980s. This means pooling resources, deciding what the strategy is, and understanding that you need the resources of grassroots organizations. You need the support and resources of all of the people engaged in the community, from the grassroots to the top leadership.

Gratz and Grutter would not have been won just with lawyers going to court. The engagement of students all over this country made a difference. The engagement of the press, people writing the op-eds, the meetings with the editorial
boards and others were all part of a massive public, political, legal, and social campaign. That is how you can win these victories.

A successful campaign examines the goals and the obstacles. Brown was such a campaign involving five jurisdictions: Delaware, Virginia, Kansas, South Carolina, and D.C. It is no accident that it was those five cases.

A small staff in New York headed by Thurgood Marshall litigated the Brown cases. The staff included Thurgood’s principal deputy Bob Carter, Jack Baker, Jack Greenberg, and Constance Baker Motely. They worked for LDF throughout the years. They reached out. They were creative in their thinking. They were joined by pro bono intellects such as Bill Coleman, Lou Pollack, Jack Weinstein, and cooperating attorneys such as Oliver Hill (Virginia), Lou Redding (Delaware), and James Nabrit, Jr. (D.C.). Charles Hamilton Houston, Thurgood’s mentor, was the master strategist who conceived Brown in the early 1930s. Brown was a twenty-five-year campaign.

A. LDF’s Strengths: Diversity

Why has the LDF been able to accomplish all that we have? One of our strengths is that we practice what we preach. We argue for and promote diversity, and we believe in it. Our beliefs are reflected in our staff and our board of directors. I would not dream of having a legal team with everybody looking like me. I need Asian-American lawyers, Latino lawyers, white lawyers. I need both genders. I need everybody at the table because we handle these jury trials, arguing before these judges; you have to know how people think.

Now, that not only reflects the staff, it is true of the LDF board. LDF came into existence in 1940. The NAACP came into existence in 1909. LDF was born out of the NAACP in 1940 because the lawyers got separately incorporated. The lawyers could get tax-exempt status, while the NAACP could not. We were the first law firm to be a non-profit law firm. The courts of New York thought it was an oxymoron. They could not understand the concept. Lawyers working for nothing—they could not understand that. The firms of Paul Weiss, and its partner Bill Dewind, represented us. Bill Dewind was our counsel, and stayed with us for over a year to persuade the New York courts to incorporate LDF as its first 501(c)(3) non-profit law firm.

Our belief in diversity is also reflected in our legal strategy, because strategy means everything to and for our clients. Our issues are racial and ethnic inclusion. One of our big issues now is the runaway incarceration system that is beyond anything we have ever known, as something created on our watch.

With a lot of these issues we can say, “Well, our grandparents or great-grandparents did that, we had nothing to do with it.” But we had a lot to do with this prison system, which started in the mid-1980s. It started really with the Rockefeller drug laws, and then when Congress got in the act in the mid-1980s. Now there are two million people incarcerated and we are ruining budgets, because the money comes out of the budgets of higher education and goes into the prison system. This is a major issue for LDF.

26. See N.Y. PENAL LAW § 220.00-220.65 (Consol. 2003).
B. Addressing Clients' Issues: McKennon v. Nashville Banner

When I talk about diversity of clients, it is not the race of the client to which I refer. Although most of our clients are black and brown, and in some instances Asian, some of our clients have been white. Why? It is the issue that the client raises that is important to us.

Take, for example, a case we had a few years ago in the Supreme Court, McKennon v. Nashville Banner.27 Ms. McKennon, was a sixty-two-year-old white female who worked for a corporation in Tennessee.28 She thought she was about to be unjustly fired, and she wanted to assert her rights under the Age Discrimination in Employment Act.29 To protect herself, Ms. McKennon took home some documents from the corporation to prove that her employer would have been acting unlawfully.30 Later, during the course of her deposition, it was learned that she had taken the documents, an act entitling the corporation to dismiss her.31 So, the corporation argued first to the district court, “Look, we didn’t discriminate, but even if we did, that discrimination was negated by the fact that she took home the documents.”32 The district court created a new rule called the After Acquired Evidence Rule.33

Under the After Acquired Evidence Rule, created by the district courts to get cases off the docket, Ms. McKennon would have had no claim. When the case went up to the Sixth Circuit Court of Appeals, that court reaffirmed the district court and said, “She’s out.”34 Her lawyer came to LDF and said, “Look, I really need some help with this case. We want to go to the Supreme Court. We want LDF to help us write a cert. petition and get involved in the case.”

LDF has to be very, very careful in our case selection because we operate on a limited budget of fourteen million dollars a year. That is it for the whole country—fourteen million dollars a year. Thurgood had those same problems and had to be very careful about case selection. Analyzing the case, I asked myself “Why should we help Ms. McKennon?” First, she was discriminated against because of her age. Although the race and ethnicity statutes are different and are treated differently, I call these statutes—the age discrimination, the disability, race, ethnicity, and gender statutes—sister statutes. I care about what happens to all of those statutes because it can come back to affect me. I need to be very, very careful about litigation in these areas. So, I said, “All right, this is something to look at and to look at very closely.”

Second, I considered the implications of this being an age discrimination case. It occurred to me if this issue came up in the context of race or gender, the court might have a few problems understanding what we were talking about. However, I thought the age conflict might receive a more sympathetic inquiry in the Supreme Court. Remember, the issue was not about whether Ms. McKennon should

28. Id.
29. Id. at 354-55.
30. Id. at 355.
31. Id.
33. Id. at 606.
prevail; it was whether she could survive a motion for summary judgment and get her day in court. I believed that if the After Acquired Evidence Rule seeped into the law in the context of the Age Discrimination and Employment Act, I would see it applied to a race, gender, ethnicity, or disability statute sooner or later. I did not want to see this procedural rule wipe out civil rights claims.

We took the case on the stipulation of an agreement with the lawyer. We said, “Look, we’ll take the case. We will bring you to New York. We will see that you are ready to argue the case. We will write the cert. petition to get the Court to grant cert. We don’t know that they will, but we’ll do the best that we can. But if we don’t think you are able to argue this case, we want you to agree now that you will let another lawyer argue it. That is the condition upon which we will take it.” In basing our acceptance of the case on these conditions, we were really testing whether or not Ms. McKennon’s lawyer really cared about his client’s winning. He said yes.

He came up to New York. We mooted him. We wrote the cert petition, and the Supreme Court granted cert. Ms. McKennon’s lawyer argued the case superbly, seconded by one of the LDF lawyers. We won that case 9-0. That was the end of the After Acquired Evidence Rule. We have to sustain this collaborative lawyering because these cases are too important to lose.

III.

POLITICS AND K-12 EDUCATION

As we look at Brown v. Board of Education, we can see where the country has gone. The Supreme Court decided Brown in 1954, Brown II in 1955, and addressed similar issues of discrimination in per curiam opinions throughout the 1950s and 1960s. The Supreme Court really reaffirmed Brown in Cooper v. Aaron, Green v. County School Board, and Swann v. Charlotte Meklenberg. Up until 1972, the Supreme Court stayed the course. But what happened then was what usually happens in cases involving social justice. Politics become involved.

The Nixon administration was unhappy with school desegregation and bussing as remedies. You could see it throughout the Justice Department and throughout the actions of Congress and the Department of Justice. Read the history and you can see it. After the Court began to tire in its perseverance to promote racial equality in education, we got San Antonio Independent School District v. Rodriguez, a very important case from Texas that was filed in 1973, attacking the state’s system of financing public education based on property taxes in school districts. People across the country are amazed when they learn that education is not a fundamental right; it’s not a fundamental right that’s articulated forcefully and

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clearly stated in the Constitution of the United States. If you have any doubt about that, go back and read Brown and Rodriguez.

In Rodriguez, Mexican-American parents, whose children attended the Edgewood Independent School District, filed a complaint in the summer of 1968. It was heard before a three-judge court in 1969, and went straight to the Supreme Court. The panel rendered its decision in 1971, and it was argued in October of 1972 before the Supreme Court decided it in March of 1973. Justice Powell wrote the opinion in Rodriguez. Clearly citing Brown, he wrote, "In Brown a unanimous court recognized that education is perhaps the most important function of state and local governments. What was said there in the context of racial discrimination has lost none of its vitality with the passage of time." (We are very good with lofty sayings.) He quoted from Brown: "Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship." This is language right out of Brown.

"Today it is a principle instrument in awakening the child to cultural values, in preparing him," or her, my amendment, "for later professional training, and in helping him," or her, "to adjust normally to his," or her, "environment." In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it is a right which must be made available to all on equal terms."

Compare what the Supreme Court said in Brown. On this question, the Supreme Court in Rodriguez said,

Education of course is not among the rights afforded explicit protection under our federal constitution, nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this court to depart from the usual standard for reviewing a state’s social and economic legislation.

After the door was shut on us in Rodriguez, we have been scrambling as you are in California, looking at these state constitutions and trying to find some remedies under state law to get some equal education opportunity to these students of color locked into these school districts. LDF read every state constitution in the country and looked for the one with the most favorable provisions some years ago, and we found it in Connecticut. So we filed a lawsuit in Connecticut to protect the children of Hartford under the state constitution to get those kids some equal quality
education. After twelve years of negotiating, we ended up with a settlement last year, which is not a bad settlement. It requires Hartford in four years to make sure that at least 40% of its students are in a desegregated environment and that there are considerable changes that one can see within the next four years.

However, it leaves the "how" question up to legislatures. When you file these lawsuits under state constitutions to bring resources to poor school districts, you are going to end up litigating in the state Supreme Court and working with the state legislatures. Now prying appropriations out of those legislatures in this economic environment is not an easy thing to do; however, these are the challenges.

IV.

NEXT STEPS: LEARNING AND DRAWING STRENGTH FROM THE PAST

What remains after the Supreme Court decisions in Grutter and Gratz? They are good wins. However, they are mere steps on a long road. These victories affect higher education and the First Amendment rights of the university, but other issues remain.

It is important to be engaged. It is important to assess accurately a problem without viewing it as being too large. All of these social justice issues are huge, but Margaret Mead told us that it is thoughtful men and women who are committed who make the difference, and I believe that. My personal experiences tell me this is true. I was the first African-American female student to attend the University of Virginia Law School, an experience which has shaped my views on the hard work it takes to further the cause of school desegregation.

I would like to conclude by citing our twenty-sixth president, Teddy Roosevelt. He understood the need to engage actively and participate in building solutions when he said,

It’s not the critic who counts; it’s not the one who points out how the strong man [or woman] stumbles, or how the doer of good deeds might have done them better. The credit belongs to the man [or woman] who is actually in the arena, who strives valiantly, who knows the great enthusiasms and the great devotions and spends himself [or herself] in a worthy cause, so that his [or her] place should never be with those cold and timid souls who know neither victory nor defeat.54

REKINDLING BROWN: 6 AFR.-AM. L. & POL'Y REP. 219 11 ASIAN L.J. 301
15 BERKELEY LA RAZA L.J. 92 19 BERKELEY WOMEN'S L.J. 420    CALIF. L. REV.