

The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism†

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INTRODUCTION

On September 27, 1987, Dong-lu Chen confronted his wife, Jian-wan, about her suspected infidelity. Jian-wan admitted that she was having an extramarital affair. Dong-lu was so enraged by his wife's infidelity that he rushed into another room, picked up a hammer, and then smashed it into his wife's head eight times.¹ Jian-wan subsequently died from five separate skull fractures.² Prosecutors initially charged Dong-lu Chen with second-degree murder, but a jury convicted him of the lesser charge of second-degree manslaughter. Justice Pincus of the New York Supreme Court (trial court) then imposed on Chen a sentence of five years probation—the lightest possible sentence for second-degree manslaughter.³

Chen presented a "cultural defense," which allowed him to introduce expert testimony⁴ on his cultural background to show his state of mind on the night of the crime. Justice Pincus placed special emphasis on that evidence in explaining the sentence he imposed on Chen: "[Chen] was the product of his culture. . . . The culture was never an excuse, but it is something that made him crack more easily. That was the factor, the cracking factor."⁵ In effect, because Chinese culture "produced" Dong-lu Chen, his criminal liability for his wife's homicide was reduced from murder to manslaughter.

The number of cases in which defendants have raised a "cultural defense" has increased tremendously in recent years. This expansion is

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1. Rorie Sherman, "Cultural" Defenses Draw Fire, *NAT'L L.J.*, Apr. 17, 1989, at 3, 28.

2. Nina Schuyler, *Cultural Defense: Equality or Anarchy?*, *S.F. WKLY.*, Sept. 25, 1991, at 1.

3. Sherman, *supra* note 1, at 3.

4. Sherman, *supra* note 1, at 28.

5. Schuyler, *supra* note 2, at 12 (alteration in original).

driven, at least in part, by an unprecedented influx of Asian⁶ immigrants⁷ following the 1965 Immigration and Nationality Act.⁸ Cases such as Dong-lu Chen's raise critical questions about the use and implications of the defense.

The current focus of academic and popular debate⁹ is on whether there should be a cultural "defense" at all, or, if so, whether the legal system's recognition of cultural factors should take a more limited form. In particular, the cultural defense highlights the tension between the need for clarity and generality in the criminal law's attempt to set limits on lawful behavior and the sometimes conflicting needs of diverse minority groups to express their cultural identities through practices that may embody values diverging from the values of the mainstream. The current discourse, however, will ultimately fail to produce a satisfactory analytical framework because its

6. I use the terms "Asian," and "Asian American," throughout this Comment. I specifically use "Asian" rather than Asian American in my historical analysis because the early Asian immigrants were denied the opportunities to become "American"—meaningful participation in civic and social life, and in the political democratic process itself—that were available to white European immigrants. Granted, early European immigrants suffered discrimination and prejudice as well, but their descendants became, by virtue of the shape of their eyes and color or their skin, "mere individual[s], indistinguishable in the cosmopolitan mass of the population." Robert E. Park, *Human Migration and the Marginal Man*, 33 AM. J. SOC. 881, 890 (1928) (quoting *Racial Assimilation in Secondary Groups*, in 8 PUBLICATIONS OF THE AM. SOC. SOC'Y (1914)). As white European immigrants with traditions rooted in the Greco-Roman, Judeo-Christian world, they already reflected America's white, European, Christian identity. In a certain sense, then, I am connecting "Asian" with "immigrant" and use the term particularly when referring to persons, as opposed to cultural practices, for example.

I use the term "Asian American" as a political term to denote how American-born Asian people have used it for self-identification. Cf. ELAINE H. KIM, *ASIAN AMERICAN LITERATURE: AN INTRODUCTION TO THE WRITINGS AND THEIR SOCIAL CONTEXT* xii (1982) (Asian American is "an externally imposed label that is meant to define us by distinguishing us from other Americans primarily on the basis of race rather than culture").

7. See BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850-1990* 1-5 (1993); Carolyn Choi, *Application of a Cultural Defense in Criminal Proceedings*, 8 UCLA PAC. BASIN L.J. 80, 81 (1990) (concluding that the increase in cultural defense cases can "partially" be explained by the increased number of immigrants from Asia); Sherman, *supra* note 1, at 3, 28 (stating that California attorneys have recently seen a number of cases involving the cultural defense); Myrna Oliver, *Cultural Defense—A Legal Tactic*, L.A. TIMES, July 15, 1988, at 1 ("Cultural Defense is riding a new wave of popularity because of the huge influx of Asians from diverse cultural backgrounds into the United States in the last 15 years.").

8. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

9. See, e.g., Choi, *supra* note 7, at 85; Sherman, *supra* note 1, at 3; Ann T. Lam, *Culture As a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 ASIAN AM. & PAC. ISLANDS L.J. 49 (1993); John C. Lyman, Note, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 99 (1986); Julia P. Sams, Comment, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335 (1986); Malek-Mithra Sheybani, Comment, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751, 779 (1987); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986); Martin Berg, "Cultural Defense" May Hurt, Help Rights, L.A. DAILY J., Nov. 20, 1987, at 5; Don J. DeBenedictis, *Judges Debate Cultural Defense*, A.B.A. J., Dec. 1992, at 28; Alison D. Renteln, *Culture and Culpability: A Study of Contrasts*, BEVERLY HILLS BAR ASS'N J., Winter 1987-88, at 17; Schuyler, *supra* note 2, at 1; Spencer Sherman, *Legal Clash of Cultures*, NAT'L L.J., Aug. 5, 1985, at 1 [hereinafter *Legal Clash*]; Spencer Sherman, *When Cultures Collide*, CAL. LAW., Jan. 1986, at 33.

participants misconceive the nature of the cultural defense and ignore the unique social and historical context in which it arises.

This Comment critically examines the ways that American society historically has conceived of and managed Asian "difference,"¹⁰ a useful background against which to examine the cultural defense debate. The importance of focusing the analysis on Asian American history in particular cannot be understated, since the cases in which cultural defense issues arise generally involve Asian immigrant defendants.¹¹ Without an historical understanding of the sociopolitical context in which the cultural defense has arisen, the debate about the defense can only replicate the traditional ways in which American society has marginalized Asian Americans.

Asians have a long history in the United States. The first Chinese arrived in Hawaii in the early 1800s and in California during the Gold Rush.¹² From their initial arrival, however, their presence has been problematic for white, mainstream society. To be sure, Chinese and other Asian cultures are, and always have been, different from that of the dominant American culture. While such differences can be handled in a variety of ways, American society historically has opted to construct this "difference"—racial, linguistic, cultural—into a metaphysical one, delineating and reinforcing the division between Asian and white America. White, mainstream society thus has engaged in racial essentialism in defining who constitutes "We the People,"¹³ painting Asian people as irreconcilably and perpetually "different" and "other."¹⁴

Through analysis of Asian American history and the cultural defense debate, this Comment seeks to recognize legitimate cultural imperatives,

10. The difference I speak of is not limited solely to racial or physical characteristics. Instead, I broadly use "difference" to refer to the totality of differences including, but not limited to, race, ethnicity, language, food, culture and shared social values that distinguish Asians from non-Asians.

11. See Oliver, *supra* note 7, at 1. Increased numbers of Asian immigrants can account for part of this trend. After Congress eased race-based immigration restrictions in 1965, levels of Asian immigration soared. Between 1970 and 1990, the Asian American population grew by a striking 384.9%. Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863, 865 (1993). Between 1924 and 1965, on the other hand, immigration from Asia, Africa, and Latin America was limited by strict race-based quotas. See HING, *supra* note 7, at 32.

12. SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 25-26, 28 (1991).

13. Ringer and Lawless note that

[T]he English created a society whose institutions were molded in their racial, religious, and national image. . . . [T]he people of the colonist society had certain basic rights and immunities, but only the white colonists could be part of the people.

As colonialists, the English subjected the nonwhites with whom they came into contact to force and fraud; and they subjugated, killed, or drove them off. . . .

. . . .

[R]acial minorities were caught up in a . . . web of arbitrary legal-political control imposed upon them by the dominant white society—a web of control that subjected them to repression and coercion and that enmeshed them in a racial creed of white superiority.

BENJAMIN B. RINGER & ELINOR R. LAWLESS, *RACE-ETHNICITY AND SOCIETY* xiii, xiv (1989).

14. See RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 6-18, 431-32 (1989).

while rejecting this metaphysical construction of Asian difference. Because this analysis is a necessary precedent to meaningful discussion of the cultural defense within the context of the criminal law, offering a concrete "solution" to the conceptual, social, and ideological difficulties that the defense presents is less of a concern than identifying the ways—both harmful and obfuscatory—in which people discuss the defense. The link between the cultural defense debate and the traditional modes of marginalizing Asian Americans that mainstream American culture historically has employed is what this Comment seeks to explore.

Part I of this Comment is devoted to an analysis of Asian American history. It shows that American society has developed three different modes of managing Asian difference, and that these modes are manifested in the legal treatment of Asian Americans. The modes follow a rough developmental progression of exclusion, assimilation, and an intermediate hybrid that I call "guilty liberalism."¹⁵ The first two modes are grounded in the irreconcilable, constructed metadifference that Asian people pose to white society. The exclusion approach essentializes what "American" culture is and should be, recognizing difference, but isolating it in order to preserve the essential, white mainstream.¹⁶ The assimilationist mode purports explicitly to ignore or deny the relevance of cultural difference, demanding instead non-whites' conformity to dominant values and norms.¹⁷ The guilty liberalism approach is a hybrid of exclusion and assimilation. Guilty liberalism appears on its face to recognize difference and purports to tolerate difference, but, like assimilation, actually finds sameness in difference.¹⁸ Like exclusion, guilty liberalism contains essentialist elements that determine which traits are worth social recognition.

Part II of this Comment focuses on the cultural defense debate. This debate has three main camps: support for an affirmative cultural defense,¹⁹ opposition to a cultural defense,²⁰ and an intermediate position that supports limited use of cultural factors to show a defendant's state of mind or to

15. Although I describe and analyze these management methods as developmental stages, I do not mean to assert that they are in any way fixed and determinate, or that they are mutually exclusive. Elements of exclusion appear in assimilationist treatment and vice versa, and both appear in the hybrid method. I seek only to create a framework that will aid in a critical assessment of the historical Asian American experience and, by extension, the cultural defense debate.

16. See *infra* notes 29-151 and accompanying text.

17. See *infra* notes 152-89 and accompanying text.

18. See *infra* notes 190-271 and accompanying text.

19. See Note, *supra* note 9, at 1294 (arguing different cultural values can preclude formulation of requisite *mens rea*); Lam, *supra* note 9, at 67 ("The purpose of the 'cultural defense' is to provide judicial fairness to cultural minority defendants.")

20. See Lyman, *supra* note 9, at 114-15 (arguing that cultural defense confuses the doctrines of criminal responsibility and culpability); Sams, *supra* note 9, at 338-45 (arguing ignorance of law and other available traditional criminal law defenses militate against the establishment of a cultural defense).

mitigate punishment.²¹ These positions on the cultural defense follow and reflect the principles of the three traditional difference-management modes. The affirmative defense position correlates to exclusion because it essentializes what "American" culture is, identifying those excluded from the definition as in need of special treatment. In addition, this position has the detrimental effect of silencing Asian women, who have traditionally played a subordinate role in Asian culture.²² The anti-defense position correlates with assimilation, in that it ignores cultural difference and compels adoption of dominant norms under penalty of criminal prosecution and punishment.²³ Finally, the intermediate hybrid correlates with the difference-as-sameness approach reflected in guilty liberalism. This approach ostensibly seeks to recognize different cultural factors that may have motivated the defendant, but necessarily fails because the recognition is of cultural sameness, not difference. As a result, the defendant benefits only to the extent that she shares the same values as dominant white culture. Therefore, white society is able to reinforce its prejudices through the other culture while purporting to act in tolerance of difference. In particular, this approach allows white society to reify sexism and reconstruct the subordination of women through the medium of another culture.²⁴

Part III goes beyond the cultural defense debate and analyzes the dangers of the defense and its framework. Drawing on feminist and critical race scholarship, I argue that the current dynamics of the cultural defense debate perpetuate dominant cultural values such as sexism and the subordination of women in the name of racial and ethnic solidarity. This terrible choice between racial/ethnic solidarity and the struggle for gender equality deprives Asian Americans, and particularly Asian American women, of the opportunity to develop our identities as multiple, complex, and sometimes contradictory, selves.

I

AMERICAN SOCIETY'S HISTORICAL MANAGEMENT OF ASIAN DIFFERENCE

This Part offers a brief sketch of the values in place at the founding and through the development of the United States. It then considers the history of Asians in America in some detail and argues that history reveals three ways in which American society has dealt with Asian "difference." Asians *are* different from white Americans on many levels. Obvious differ-

21. See Choi, *supra* note 7, at 88 (cultural factors are relevant to explaining defendant's state of mind or intent and are appropriate for mitigating charges or sentencing); Sheybani, *supra* note 9, at 783 (appropriate role for defendant's cultural beliefs is mitigation of punishment).

22. See *infra* part II.B.

23. See *infra* part II.C.

24. See *infra* part II.D.

ences include physical appearance,²⁵ language, religion, food, and cultural traditions. The significant point, however, is that the social vision of dominant white society has magnified and manipulated these differences into social constructs that marginalize and isolate Asian people in American society.

A. *The Founding Principles of American Society*

Underlying the management of difference in American history is the country's deep-rooted normative vision of what America is and who is American.²⁶ This vision has had profound effects on the treatment of all Americans of color.²⁷ I focus in particular upon Asian Americans.²⁸

The founding vision of America was not that of a multiracial, multicultural, or pluralistic society. To the contrary, the first settlers and leaders envisioned a country for pious, God-fearing, white Christians.²⁹ John Winthrop's hope was to create a "Citty upon a Hill" for all the world to see and admire.³⁰ Driven by their covenant with God,³¹ they were to settle the land and make of it a new and better (white) Christian society.³²

25. I choose not to use "race" because this term is socially constructed and has been used to connote a multitude of things, including inferiority and subordinated status, as well as to justify oppression. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960s TO THE 1980s* 57-69 (1986). "Racial categories and the meaning of race are given concrete expression by the specific social relations and historical context in which they are embedded." *Id.* at 60. Physical characteristics have been claimed to

provide visible clues to differences lurking underneath. Temperament, sexuality, intelligence, athletic ability, aesthetic preferences and so on are presumed to be fixed and discernible from the palpable mark of race. . . . Skin color "differences" are thought to explain perceived differences in intellectual, physical and artistic temperaments, and to justify distinct treatment of racially identified individuals and groups.

Id. at 63.

26. For a discussion of how this vision resonates today, see generally Hing, *supra* note 11.

27. I do not argue that the treatment and experiences of all people of color have been the same. I argue only that the normative vision of America has influenced significantly the development of race relations and the status of people of color in this country. See generally HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* (1980); RONALD T. TAKAKI, *IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY AMERICA* (1979).

28. I do not seek to provide a complete or definitive analysis of the history of Asians in America. That is an enterprise far beyond the scope of this Comment. I turn to history for events, stories, and experiences of Asians who came before me to search for an understanding of the society, laws, events and values that shaped their lives. Through understanding and analysis of past sociopolitical and cultural currents, I hope to derive principles or structures with which to analyze the present.

29. See, e.g., THOMAS JEFFERSON WERTENBAKER, *THE PURITAN OLIGARCHY: THE FOUNDING OF AMERICAN CIVILIZATION* 32 (1947) ("We came hither because we would have our posterity settled under the pure and full dispensations of the gospel, defended by rulers that should be of ourselves.") (quoting I COTTON MATHER, *MAGNALIA* 219 (1820)).

30. RICHARD D. BROWN, *MASSACHUSETTS: A BICENTENNIAL HISTORY* 28 (1978). The founding Pilgrims are said to have viewed their undertaking as "a holy adventure in which the future of all mankind was at stake." *Id.*

31. *Id.* at 27-28.

32. See BRADFORD'S *HISTORY OF PLYMOUTH PLANTATION 1606-46* 46-47 (William T. Davis ed., 1959). The Pilgrims had

Thus, the values of racial purity and homogeneity were among the organizing principles of the American polity.³³ The Constitution, for example, codified racial hierarchy by enslaving African Americans, and by recognizing them as only three-fifths of a person.³⁴ Benjamin Franklin expressed an early exclusionary note when he wrote that the English were the "principle Body of White People" in America and asked: "Why increase the Sons of *Africa*, by planting them in *America*, where we have so fair an Opportunity, by excluding all Blacks and Tawneys [Asians], of increasing the lovely White . . . ?"³⁵ Although Asians were not then present in America, the Founding Fathers' overarching conception of a stratified society remained unchanged by the time Asians finally did arrive.³⁶ In the nineteenth century, Asian immigrants would encounter the tangible manifestations of this vision as America began to deal with the first influx of Asians.

B. Exclusion

Chinese immigrants arrived first in Hawaii to work in the sugar plantations in the early 1800s,³⁷ and then in California during the Gold Rush to work the mines and build the transcontinental railroad.³⁸ The Chinese answered the need for labor, an essential element in America's transformation from an agrarian economy to an industrial one.³⁹ Notwithstanding

a great hope and inward zeall . . . of laying some good foundation, or at least to make some way therunto, for the propagating and advancing the gospell of the kingdom of Christ in those remote parts of the world; yea, though they should be but even as stepping-stones unto others for the performing of so great a work.

Id. at 46.

The Puritans derived their rights from the Bible: "Ask of me, and I shall give thee, the heathen for thine inheritance, and the uttermost parts of the earth for thy possession." ZINN, *supra* note 27, at 14 (quoting *Psalms* 2:8). Use of force against the Indians was justified as well: "Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation." *Id.* (quoting *Romans* 13:2).

33. To early Americans, non-whites, Africans and Native Americans, were savages without virtue or worth, and would therefore stain the values of racial purity and homogeneity. See TAKAKI, *supra* note 27, at 11-15.

34. U.S. CONST., art. I, § 2.

35. Benjamin Franklin, *Observations: Concerning the Increase of Mankind, Peopling of Countries, Etc.*, in 3 THE WRITINGS OF BENJAMIN FRANKLIN 63, 72, 73 (Albert Henry Smyth ed., 1970).

36. One scholar notes that the Chinese occupy "at best [an] obscure niche . . . in the historical consciousness of the average educated American." Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CALIF. L. REV. 529, 531 (1984).

37. See CHAN, *supra* note 12, at 26.

38. *Id.* at 28-32.

39. TAKAKI, *supra* note 14, at 23-24, 27-31. The bulk of my historical analysis focuses on the Chinese simply because they were the first Asian group to enter the United States. Due in part to American immigration legislation, other Asians—Japanese, Korean, Filipino, Asian Indian, Southeast Asian—arrived in subsequent waves with little demographic variety within each wave, at least until 1965 when racial quotas were eliminated. See CHAN, *supra* note 12, at 3-23.

Although much of the harassing and punitive legislation discussed in this Part targeted the Chinese, it was equally applicable to other Asians. See RINGER & LAWLESS, *supra* note 13, at 175. To avoid the

prevalent xenophobia,⁴⁰ the need for labor prevailed and America hesitantly opened its gates to these early immigrants.⁴¹

Entering a racially stratified society, the Chinese formed a new, small population of racially, culturally, and linguistically distinct people. They became a third racial "other" in American society, like the African Americans and Native Americans before them, as white society managed Asian racial and cultural difference through exclusion.

While the oppression of institutionalized slavery excluded African Americans from personhood and meaningful social or political life, and systematic genocide prevented Native Americans from participating in the larger society, the exclusion of Asians operated in two distinct ways. First, Asians were barred from meaningful participation in American society on every social and political level. This mode of exclusion targeted Asians already in America and erected barriers to prevent integration into and interaction with white society. I call this sociopolitical exclusion. Second, white society established restrictive, race-based immigration laws to control prospectively the racial composition of incoming immigrants and thereby of society at large. I call this immigration exclusion, because it targets would-be Asian immigrants. Together sociopolitical and immigration exclusion comprise the first way in which America dealt with the difference Asian immigrants presented.

1. *Sociopolitical Exclusion*

White society excluded Asians from meaningful participation in American life through a wide array of regulatory, restrictive, and punitive laws. First, American lawmakers denied Asians eligibility for naturalized citizenship. This barrier was one of the earliest and most effective restrictions on Asians' access to and participation in society because citizenship defines an individual's relationship with her country: a citizen gives her allegiance to her country and, in return, she is entitled to the protections of the rights and privileges of that country.⁴² Citizenship confers upon an individual the tangible benefits of suffrage and participation in the political process.⁴³ However, as expressed in the first Congressional debates,⁴⁴ only

claim of essentialism and inadequate representation, however, I acknowledge that the experiences and histories of different Asian ethnic groups are unique. I do not presume to speak for all Asian Americans, nor to present all of their histories.

40. See ELMER CLARENCE SANDMEYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 25 (1939).

41. *Id.* at 11.

42. See, e.g., ARISTOTLE, *THE POLITICS* 87 (Cames Lord, trans., 1984) ("The citizen in an unqualified sense is defined by no other thing so much as by sharing in decision and office [in governing society].").

43. American women did not have the right to vote until 1920 when the Nineteenth Amendment was ratified. See U.S. CONST. amend. XIX. African American men were also formally excluded from suffrage until ratification of the Fifteenth Amendment in 1870. See U.S. CONST. amend. XV.

44. 1 *THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES* 1147-62 (Joseph Gales, Sr. ed., 1834); 2 *id.* at 2264.

the "worthy part of mankind" was to be eligible for citizenship in the new country.⁴⁵ The Naturalization Law of 1790 thus limited naturalized citizenship to free, white men.⁴⁶

For Asians, denial of citizenship had a devastating impact, denying them many of the basic rights and privileges associated with citizenship.⁴⁷ Asians challenged the naturalization law in court, but the federal judiciary deferred to the exclusionary legislative intent by continually refining the definition of "white." For example, in 1878, a court ruled that Chinese were ineligible for naturalized citizenship.⁴⁸ The court reasoned that a Chinese person is not a white person, and that Congress had explicitly "retained the word 'white' in the naturalization laws for the sole purpose of excluding the Chinese from the right of naturalization."⁴⁹ Similarly, in *Ozawa v. United States*,⁵⁰ the Supreme Court limited naturalized citizenship to those of the "Caucasian race."⁵¹ Finally, the Court added an additional gloss in *United States v. Thind*,⁵² where the issue of race became an issue of color. The Court in *Thind* found that, within the meaning of the 1790 law, "white persons" was to be defined from the "understanding of the common [white] man."⁵³ Asian Indians, while Caucasian, were simply not white and thus could not obtain naturalized citizenship.⁵⁴ In effect, the Court linked "white" to geographic origin: that is, northern and western Europe.⁵⁵

45. 1 *id.* at 1150.

46. Naturalization Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (granting naturalized citizenship to alien whites). The Immigration and Nationality Act of 1952 finally eliminated the provision against the naturalization of nonwhite aliens. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1422 (1988)). See Su Sun Bai, Comment, *Affirmative Pursuit of Political Equality for Asian Pacific Americans: Reclaiming the Voting Rights Act*, 139 U. PA. L. REV. 731, 752 (1991).

47. "Aliens ineligible to citizenship" became the catchphrase for legislation that excluded Asians. See *infra* text and accompanying notes 74-78; see also, e.g., Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162 (repealed 1952); Hiroshi Motomura, *The Curious Evolution of Immigration Law*, 92 COLUM. L. REV. 1625, 1635 (1992).

48. *In re Ah Yup*, 1 F. Cas. 223, 224 (C.C.D. Cal. 1878) (No. 104).

49. *Id.*

50. 260 U.S. 178 (1922).

51. *Id.* at 198. Ozawa was born in Japan, but had lived in the United States for twenty years. He graduated from high school in Berkeley, California and attended the University of California at Berkeley. His children had been educated in American schools, and his family attended an American church. English was the primary language spoken in the Ozawa household. Based on these facts, the district court judge found Ozawa eminently qualified to become an American citizen, except for the fact that Ozawa was not white. *Id.* at 189-90. For a detailed discussion of this case, see Yuji Ichioka, *The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922 Ozawa Case*, AMERASIA, Spring 1977, at 1.

52. 261 U.S. 204 (1923).

53. *Id.* at 209. Moreover, as for race, it must apply "to a group of living persons *now* possessing in common the requisite characteristics." *Id.*

54. "It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today . . ." *Id.*

55. *Id.* at 213.

Voting restrictions also denied Asians participation in the body politic. Despite the ratification of the Fourteenth Amendment in 1868, which provided that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,"⁵⁶ states still regulated voting rights and denied Asian American citizens the right to vote.⁵⁷ The effect was that Asian Americans became, to borrow Justice Stone's words, a "discrete and insular minorit[y]" against whom prejudice "tend[ed] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."⁵⁸ Unable to vote,⁵⁹ Asian Americans had no effective or responsive political representation. As a result, Asian Americans were powerless to combat harassing, punitive, and marginalizing legislation.

In addition to the denial of fundamental civil rights and liberties, Asian Americans were not permitted to perform basic civic duties. In the 1854 case of *People v. Hall*,⁶⁰ the California Supreme Court prohibited Asians from testifying in court. By denying this civic responsibility, the court made Asian racial inferiority public policy, holding that it was reversible error to allow a Chinese witness to testify against a white man.⁶¹ The court found that the particular statute involved, in prohibiting blacks and Indians from testifying against whites, manifested a legislative intent to protect the life and property of citizens (whites only) from degraded castes.⁶² Since the Chinese were the most degraded of all castes, the court reasoned that the statute applied to them as well.⁶³ The public policy underlying the decision exemplifies exclusionary animus: if allowed to testify, the Chinese would inevitably demand other civic rights and responsibilities as well.⁶⁴

56. U.S. CONST. amend. XIV, § 1.

57. For example, the California Constitution provided that "no native of China, no idiot, [or] insane person" could vote. CAL. CONST. art. II, § 1 (amended Nov. 2, 1926).

58. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

59. It is doubtful whether suffrage would have made a significant difference, given the general tenor of white superiority and intense racial animosity. For instance, the Fifteenth Amendment granted African American men the right to vote in 1870, but actual exercise of that right did not occur until much later, with the enactment of civil rights legislation. Michal R. Belknap, *Introduction to CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT 1945-1968* at v (Michal R. Belknap ed., 1991).

60. 4 Cal. 399, 405 (1854).

61. *Id.*

62. The statute provided that "[n]o black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any white person. Every person who shall have one eighth part or more of Negro blood shall be deemed a mulatto, and every person who shall have one half of Indian blood shall be deemed an Indian." Act of Apr. 16, 1850, ch. 99, § 14, 1850 CAL. STAT. 229, 230, *repealed by* CAL. CIV. PROC. CODE § 18 (1872).

63. 4 Cal. at 402-03.

64. *Id.* at 404-05. The California Supreme Court wrote:

The anomalous spectacle of [the Chinese], living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language,

White society extended the scope of exclusion to deny Asian Americans other basic liberties, including gainful employment. For example, state licensing requirements prevented Asians, ineligible for citizenship, from pursuing employment in a wide range of fields. Asians could not become, for instance, attorneys, physicians, teachers, pharmacists, veterinarians, hairdressers, cosmetologists, barbers, funeral directors, peddlers, or hunters.⁶⁵

The scope of exclusion was not limited to civic responsibilities and rights; it encompassed the personal lives of Asians as well. Anti-miscegenation laws limited whom Asians could marry. For example, California's anti-miscegenation statute declared that "[a]ll marriages of white persons with negroes, Mongolians, or mulattoes are illegal and void."⁶⁶ Statutes like these reflected the deeply held anti-Asian sentiments of American society. Society viewed Asians as a dark, sexual menace to white women,⁶⁷ and white-Asian miscegenation was thus an unthinkable abomination: "Were the Chinese to amalgamate at all with our people, it would be the lowest, most vile and degraded of our race, and the result of that amalgamation would be a hybrid of the most despicable, a mongrel of the most detestable that has ever afflicted the earth."⁶⁸

opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.

Id.

65. Bai, *supra* note 46, at 751 n.95. These laws remained in effect until the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1422 (1988)) (forbidding right of naturalization to be denied on account of race, thus making Asians eligible for citizenship).

66. CAL. CIV. CODE § 60 (Deering Supp. 1905). California did not repeal this provision until 1948. *Perez v. Sharp*, 198 P.2d 17, 18 (Cal. 1948). The United States Supreme Court did not rule that such race-based anti-miscegenation statutes violated the Equal Protection Clause until 1967 in *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

67. For example, "Chinese men were seen as sensuous creatures, especially interested in white women." TAKAKI, *supra* note 14, at 101. A New York Times article reflected this attitude in its portrayal of a white girl in an opium den. When asked about her, the owner said, "Oh, hard time in New York. Young girl hungry. Plenty come here. Chinaman always have something to eat, and he like young white girl. He! He!" *Id.* (quoting N.Y. TIMES, Dec. 26, 1873 (page omitted)).

68. Megumi D. Osumi, *Asians and California's Anti-Miscegenation Laws*, in ASIAN AND PACIFIC AMERICAN EXPERIENCES: WOMEN'S PERSPECTIVES 1, 6 (Nobuya Tsuchida ed., 1982) (quoting 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF CALIFORNIA, 1878-9, at 632 (1880) (statement of John F. Miller at California's state constitutional convention)). The same sentiment applied to other Asians:

Near my home is an eighty-acre tract of as fine land as there is in California. On that land lives a Japanese. With that Japanese lives a white woman. In that woman's arms is a baby.

What is that baby? It isn't a Japanese. It isn't white. I'll tell you what that baby is. It is a germ of the mightiest problem that ever faced this state; a problem that will make the black problem of the South look white.

All about us the Asiatics are gaining a foothold.

Asians were also excluded from white public school classrooms. The California Legislature had previously excluded Indians and Africans,⁶⁹ and later excluded "children of Mongolian or Chinese descent" as well.⁷⁰ The Native Sons of the Golden West asked its members, "Would you like your daughter to marry a Japanese? . . . If not, demand that your representative in the Legislature vote for segregation of whites and Asiatics in the public schools."⁷¹ The California superintendent of education neatly captured the underlying sentiment: "The great mass of our citizens will not associate on terms of equality with these inferior races; nor will they consent that their children should do so."⁷² In 1927, the United States Supreme Court upheld the doctrine of "separate but equal" for Asians in education.⁷³

In addition, Asians were prohibited from owning property, one of the cornerstones of liberal democracy.⁷⁴ In 1913, California enacted legislation that made it unlawful for "aliens ineligible to citizenship" to own real property and prohibited such aliens from leasing agricultural land for a term of more than three years.⁷⁵ Other western and midwestern states, fifteen in all, enacted similar laws.⁷⁶ In 1920, California attempted to eliminate loopholes in the 1913 Act by prohibiting aliens ineligible to citizenship from leasing any agricultural land, or acquiring such land by using the names of corporations or American-born minors.⁷⁷ In 1923, the Legislature enacted a far more sweeping ban: aliens ineligible to citizenship could not "acquire,

ELIOT G. MEARS, *RESIDENT ORIENTALS ON THE AMERICAN PACIFIC COAST* 146 (Atno Press, 1978) (1927) (quoting FRANKLIN HICHBORN, *STORY OF THE SESSION OF THE CALIFORNIA LEGISLATURE OF 1913*, at 230-31 (date omitted)).

69. Act of April 4, 1870, § 56, 1870 CAL. STAT. 824, 839.

70. CAL. POL. CODE, pt. III, tit. III, art. X § 1662 (1885).

71. ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* 85 (1977) (internal quotation marks omitted). The San Francisco Board of Education ordered all Chinese, Japanese and Korean children to attend the Oriental school on October 11, 1906. YAMATO ICHIHASHI, *JAPANESE IN THE UNITED STATES: A CRITICAL STUDY OF THE PROBLEMS OF THE JAPANESE IMMIGRANTS AND THEIR CHILDREN* 236 (1932).

72. Stanford Lyman, *Strangers in the City: the Chinese in the Urban Frontier*, in *ROOTS: AN ASIAN AMERICAN READER* 159, 175 (Franklin Odo et al. eds., 1971).

73. *Gong Lum v. Rice*, 275 U.S. 78 (1927).

74. For a general discussion of the right to own property, see JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 16-30 (Thomas P. Peardon ed., The Bobbs-Merrill Co. 1952) (1690); ALAN RYAN, *PROPERTY AND POLITICAL THEORY* 14-48 (1984).

75. Act of May 19, 1913, ch. 113, § 2, 1913 CAL. STAT. 206, 207.

76. The other states were: Washington, Arizona, Oregon, Idaho, Nebraska, Texas, Kansas, Louisiana, Montana, New Mexico, Minnesota, Missouri, Utah, Wyoming, and Arkansas. TAKAKI, *supra* note 14, at 206-07; See also Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIF. L. REV. 7, 7-8 (1947).

For a general discussion of how Asian Americans avoided these laws, see TAKAKI, *supra* note 14, at 205-07. For specific examples, see TIMOTHY J. LUKES AND GARY Y. OKIHIRO, *JAPANESE LEGACY: FARMING AND COMMUNITY LIFE IN CALIFORNIA'S SANTA CLARA VALLEY* 59-60 (1985); Sun Bin Yim, *The Social Structure of Korean Communities in California, 1903-1920*, in *LABOR IMMIGRATION UNDER CAPITALISM: ASIAN WORKERS IN THE UNITED STATES BEFORE WORLD WAR II* 515, 529-31 (Lucie Cheng & Edna Bonacich eds., 1984); Robert Higgs, *Landless by Law: Japanese Immigrants in California Agriculture to 1941*, J. ECON. HIST., Mar. 1978, at 205, 216-23.

77. Initiative Act of 1920, 1921 CAL. STAT. §§ 3-5 lxxxvii, lxxxviii (1921).

possess, enjoy, use, cultivate, occupy, transfer, transmit [or] inherit real property, or any interest therein.”⁷⁸ Thus, the Chinese and other Asians were effectively denied a fundamental right of republican life.

Residential segregation was another tangible manifestation of Asian sociopolitical exclusion. Because white society practiced unofficial housing segregation, legislative measures were generally unnecessary. Whites relegated Asians to ethnic ghettos like San Francisco’s Chinatown and threatened violence against them were they to step beyond those bounds. Those who did were frequently stoned.⁷⁹ Moreover, white landlords would lease only ghetto area property to Asians.⁸⁰ By the time other Asian immigrants arrived in the United States, this *de facto* segregation pattern was set, and “there was no need for state, county, or municipal officials to pass any laws to specify where [Asians] could live.”⁸¹

Omnipresent sociopolitical exclusion effectively prevented Asians from becoming “Americans”—that is, members of the societal mainstream with the full rights and responsibilities of citizenship—because immigrants “become Americans through the exercise of the political rights and civic responsibilities bestowed . . . by the Declaration of Independence and the Constitution.”⁸² The denial of these rights and responsibilities pushed Asians to the outer margins of American sociopolitical life, perpetuated and reinforced real and constructed differences, and solidified the general pattern of exclusionary treatment.

2. *Exclusion Through Immigration Laws*

The second type of exclusion Asians in America encountered was formal exclusion through immigration laws. The United States’ first race-based immigration law targeted Asians. The Chinese Exclusion Act’s legacy of institutionalized racism continues to affect immigrants and immigra-

78. Act of June 20, 1923, ch. 441, 1923 CAL. STAT. 1020, 1021; *see also* Higgs, *supra* note 76, at 220-21.

79. VICTOR G. NEE & BRETT DE BARY NEE, *LONGTIME CALIFORN’: A DOCUMENTARY STUDY OF AN AMERICAN CHINATOWN* 60 (1973).

80. CHAN, *supra* note 12, at 57.

81. *Id.*

82. ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* 7 (1991).

tion laws today.⁸³ Quite simply, these exclusionary laws were designed to keep the "undesirable"⁸⁴ Asians out of the country.⁸⁵

Other legislation also targeted Asians. In 1870, California banned the "importation"⁸⁶ of Chinese, Japanese and Mongolian women into California for prostitution.⁸⁷ Congress enacted similar legislation in 1875 to bar the entry of Asian prostitutes.⁸⁸ In 1882, Congress passed the Chinese Exclusion Act, suspending the entry of Chinese laborers into the United States for ten years.⁸⁹ The U.S. Supreme Court upheld the constitutionality

83. See generally HING, *supra* note 7 (discussing the effects and influences of racism and immigration policy on American society in the past century); Hing, *supra* note 11 (discussing the dynamics of immigration policy and race relations).

84. The Chinese were dubbed "utter heathens, treacherous, sensual, cowardly and cruel." Henry George, *The Chinese in California*, N.Y. TRIB., May 1, 1869, at 1, 2. The Asiatic Exclusion League opined that "the insolence and presumption of Japanese, and the immodest and filthy habits of the Hindoos are continually involving them in trouble In all these cases, we may say the Oriental is at fault." H. BRETT MELENDY, ASIANS IN AMERICA: FILIPINOS, KOREANS, AND EAST INDIANS 193 (1977). Hindus were deemed undesirable because of "their lack of cleanliness, disregard of sanitary laws, petty pilfering, especially of chickens, and insolence to women." TAKAKI, *supra* note 14, at 297 (quoting *The Hindoo Question in California*, in PROCEEDINGS OF THE ASIATIC EXCLUSION LEAGUE 8-10 (1908) [hereinafter ASIATIC EXCLUSION LEAGUE]). They were also considered "enslaved, effeminate, caste-ridden and degraded." *Id.* at 298 (quoting ASIATIC EXCLUSION LEAGUE 8). The Filipino was thought to be "just the same as the manure we put on the land—just the same. He is not our 'little brown brother.' He is no brother at all!—he is not our social equal." *Id.* at 328 (quoting Resolution of the Chamber of Commerce of Northern Monterey County, Dec. 6, 1929 (copy on file in envelope 1, James Earl Wood Collection, Bancroft Library, University of California, Berkeley)).

85. Asians were compared to blacks and Native Americans and deemed a comparable threat to white American society: "We have four millions of degraded negroes in the South. . . . And if, . . . there were to be a flood-tide of Chinese population—a population befouled with all the social vices, with no knowledge or appreciation of free institutions or constitutional liberty, with heathenish souls and heathenish propensities . . . we should be prepared to bid farewell to republicanism and democracy." *The Growth of the United States through Emigration—The Chinese*, N.Y. TIMES, Sept. 3, 1865, at 4.

Like Native Americans, Asians stood in the way of white men's progress:

Today we are dividing the lands of the native Indians into States, counties and townships. We are driving off from their property the game upon which they live, by railroads. We tell them plainly they must give up their homes and property and live upon corners of their own territories, because they are in the way of our civilization. If we can do this, then we can keep away another form of barbarism which has no right here.

Letter from Horatio Seymour to Elias Mapes, August 3, 1870, reprinted in *Ex-Governor Seymour on the Coolie Question—Letter to the Working Men at Rochester*, N. Y. TIMES, Aug. 6, 1870, at 5.

86. Importation is a significant word choice as it connotes the Asian woman's status as chattel.

87. Act of Mar. 18, 1870, ch. 230, 1870 CAL. STAT. 330 (Supp. 1870). See also CHAN, *supra* note 12, at 193. The Marin Journal said that the Chinese woman is "a prostitute from instinct, religion, education, and interest, and [is] degrading to all around her." SANDMEYER, *supra* note 40, at 25 (quoting MARIN JOURNAL, Mar. 30, 1876).

88. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (requiring inquiry into whether a woman was brought into the country for "lewd and immoral purposes").

89. Chinese Exclusion Act, ch. 126, 22 Stat. 58, 59 (1882) (repealed 1943). Although the Act did not specifically exclude Chinese women, a federal appellate court held that the Act also denied entry to Chinese women because they automatically took on the same status as their husband. *Case of the Chinese Wife*, 21 F. 785, 788 (C.C.D. Cal. 1884). The Exclusion Act was the culmination of a virulent anti-Chinese movement in which all levels of society participated: labor, management, academics, writers, politicians, and intellectuals. See TAKAKI, *supra* note 14, at 108-12. Chinese were labelled "unassimilable." Bret Harte described them as "dark," "pagan," and "superstitious." TAKAKI, *supra* note 14, at 107 (quoting BRET HARTE, *Wan Lee the Pagan*, in HARTE'S COMPLETE WORKS 262, *passim*

of the law in 1889.⁹⁰ Congress excluded Japanese laborers in 1907.⁹¹ The 1917 Immigration Act⁹² prohibited the entry of immigrants from any of the "barred zones," which were essentially the countries of Asia other than China, Japan, and the Philippines.⁹³ The U.S. also limited Filipino immigration to fifty Filipinos per year by providing for Philippine independence.⁹⁴ The 1924 National Origins Act banned the immigration of any aliens ineligible for citizenship and essentially terminated all Asian immigration until 1965.⁹⁵

Exclusionary sentiment continues to flourish today in the immigration arena. Following the Vietnam War, for example, resettled Vietnamese refugees faced hostile communities that did not want them in the United States, let alone in their communities.⁹⁶ More recently, rhetoric driving both immigration "reforms" and the surrounding debate retains an exclusionary animus. Patrick Buchanan calls upon America to put America first and close the gates to immigration from Asia, Africa, and Latin America.⁹⁷ Buchanan objects to current immigration demographics because the immi-

(1983)). The rallying cry became, "The Chinese must go!" NEE & NEE, *supra* note 79, at 43. Politicians across the country were quick to join the movement, even politicians in states without a Chinese population. TAKAKI, *supra* note 14, at 111. Anti-Chinese violence increased. See SANDMEYER, *supra* note 40, at 45, 48. The movement gained strength and crested with race-based exclusionary legislation, even though the Chinese comprised a mere 0.02% of the national population in 1880. TAKAKI, *supra* note 14, at 110. For a general discussion of the anti-Chinese movement, see SANDMEYER, *supra* note 40; CHAN, *supra* note 12, at 45-52; ROGER DANIELS, *ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850* 29-66 (1988).

90. The Chinese Exclusion Case, 130 U.S. 581 (1889). The Act was extended several times. The Supreme Court upheld the constitutionality of these extensions in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). Congress extended the ban indefinitely on Chinese immigration in 1902. Exclusion Act of 1902, ch. 641, 32 Stat. 176.

91. The U.S. and Japan signed a "Gentlemen's Agreement" under which Japan stopped issuing passports to laborers. See CHAN, *supra* note 12, at 55. Korean immigration was already limited by the Japanese colonial administration in Korea. *Id.*

92. Immigration Act of 1917, ch. 29, § 3; 39 Stat. 874, 875-76 (repealed 1952).

93. This legislation "barred" immigrants from all of India, Burma, Thailand, Southeast Asia, Asian Russia, parts of then-Arabia, Afghanistan, most of the Pacific Islands, and the East Indian Islands (Indonesia). *Id.*

94. Tydings-McDuffee Act, ch. 84, 48 Stat. 456 (1934) (amended 1946). Exclusionary immigration laws did not previously apply to Filipino immigrants because of the Philippines' status as a U.S. territory. TAKAKI, *supra* note 14, at 331-32. Independence was thus the only viable solution. Senator Millard Tydings argued that "[i]t is absolutely illogical [to have] an immigration policy to exclude Japanese and Chinese and permit Filipinos en masse to come into the country . . ." 72 CONG. REC. S2590 (daily ed. Feb. 1, 1930).

95. For a general discussion of the history of Asian immigration, see Chin Kim and Bok Lim C. Kim, *Asian Immigrants in American Law: A Look at the Past and the Challenge Which Remains*, 26 AM. U. L. REV. 373 (1977) (analyzing legal issues surrounding status of Asian immigrants); Jeff H. Lesser, *Always "Outsiders": Asians, Naturalization and the Supreme Court*, AMERASIA, Winter 1985-86, at 83 (analyzing Asian immigration cases).

96. HING, *supra* note 7, at 4.

97. "If we had to take a million immigrants in—say, Zulus—next year, or Englishmen, and put them in Virginia, what group would be easier to assimilate?" John Hanchette, *Sharp Tongue, Quick Wit, Could Come Back to Haunt Buchanan*, GANNET NEWS SERVICE, Feb. 26, 1992, available in LEXIS, Nexis Library, GNS File (quoting Patrick Buchanan).

grants are not English-speaking whites from western Europe.⁹⁸ Anti-immigration groups not only launch virulent attacks on immigration policy, but on immigrants already resident in the United States.⁹⁹ Congress has amended immigration laws to restrict the entrance of Asian and Latino immigrants.¹⁰⁰ California governor Pete Wilson has declared that the state is under siege from illegal immigrants,¹⁰¹ and proposed a federal constitutional amendment to deny citizenship to children born in the United States to illegal immigrants.¹⁰²

From the beginning of its encounter with Asian difference—racial, linguistic, cultural—American society's primary response has been exclusion. One aspect of this response has been to prohibit Asians from entering the country entirely. The other has been to prohibit Asian immigrants from participating in any but the most marginal ways in American society.

3. *The Erosion of Formal Exclusion*

World War II forced America to confront the volatile issues of race and racism. Indeed, in the words of one historian, World War II "brought about a revolution in racial consciousness."¹⁰³ In opposing the master race ideology of German Aryan supremacy, America exposed its own racial hypocrisy.¹⁰⁴ Proclaiming its moral superiority to Hitler and fascist Europe, America was faced with the inconsistency between its claims of equality, freedom and democracy, and its own institutionalized racism, including widespread racial segregation and the exclusion of Asians from citizenship. In short, the United States had to "make good its claims to democracy."¹⁰⁵

Although the war led the U.S. Government to alter its exclusionary policies with respect to Asian Americans, these changes derived more from political considerations and necessity than from a recognition and renunciation of racism.¹⁰⁶ The American military's concerns about maintaining

98. *A Nasty Campaign of "Us" vs. "Them": Buchanan's Appeal to Voters' Fears*, L.A. TIMES, Mar. 5, 1992, at B6.

99. See, e.g., Carla Marinucci, *Foes of Immigrants Push for Arrests*, S.F. EXAMINER, Feb. 28, 1993, at A2 (reporting on anti-immigrant group STOP IT who urged INS to arrest and deport immigrant women who were going to testify in federal court on the abuse of immigrant women).

100. Senator Kennedy's immigration bill sought to restrict the influx of immigrants from Latin America and Asia while simultaneously providing extra independent and transition visas to Western Europeans only. See HING, *supra* note 7, at 7, 235 n.4.

101. Andrew Murr, *A Nasty Turn on Immigrants*, NEWSWEEK, Aug. 23, 1993, at 28.

102. *Seeking to Deny Citizenship to Some*, N.Y. TIMES, Aug. 11, 1993, at A10; Robert Reinhold, *A Welcome for Immigrants Turns to Resentment*, N.Y. TIMES, Aug. 25, 1993, at A1.

For criticism of this view, see Bob Scheer, *Immigrant Workers' Twin Burdens: They're Exploited, Blamed*, S.F. EXAMINER, July 18, 1993, at 1; Robin Abcarian, *What Would We Do Without Immigrants to Blame?*, L.A. TIMES (Orange County edition), Sept. 12, 1993, at E1.

103. JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR 4* (1986).

104. *Id.* at 4-5.

105. TAKAKI, *supra* note 14, at 362.

106. *Id.* at 357-405.

China as an ally against the Japanese¹⁰⁷ contributed in part to the relaxation of anti-Chinese immigration laws in 1943, leading to the admission of a token number of Chinese immigrants and the creation of a right to naturalization for a limited class of Chinese.¹⁰⁸ Similar military concerns regarding the strategic importance of India prompted Congress to admit a small number of Indian immigrants and extend naturalization rights to Indians as well.¹⁰⁹

The post-War era ushered in radical changes that overturned official exclusionary policies on the state and federal level. The California Supreme Court struck down its anti-miscegenation laws as "odious to a free people."¹¹⁰ The U.S. Supreme Court struck down racially restrictive covenants in the sale of property as violative of equal protection.¹¹¹ The Court also undercut laws prohibiting land ownership by non-citizens when it indicated that it would examine the classification of "aliens ineligible for American citizenship" for discriminatory effect.¹¹² In *Brown v. Board of Education*,¹¹³ the Court ruled that the doctrine of "separate but equal" violated the Constitution. Civil rights legislation was enacted to prohibit discrimination on the basis of race, national origin, religion, sex, and age in the areas of education, employment, and housing. In 1952, the Walter-McCarran Act formally granted to Asians the right to become naturalized U.S. citizens.¹¹⁴ Congress finally abandoned national origin as the basis for immigration policy when it passed the Immigration Act of 1965.¹¹⁵ Congress then replaced the national origin quotas with a preference system, and, at least officially, no longer differentiated between European, African, Latino, and Asian immigrants.¹¹⁶

4. Psychological Exclusion

While the erosion of sociopolitical and immigration exclusion benefited Asian Americans legally, the exclusion of Asian Americans continues

107. John Dower writes that "[a] retired Navy officer [testified to Congress] . . . that anti-Chinese legislation was worth 'twenty divisions' to the Japanese Army." DOWER, *supra* note 103, at 167.

108. Act of Dec. 17, 1943, ch. 344, §§ 1-2, 57 Stat. 600.

109. See TAKAKI, *supra* note 14, at 368-69.

110. *Perez v. Sharp*, 198 P.2d 17, 19 (Cal. 1948) (citation omitted).

111. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

112. *Oyama v. California*, 332 U.S. 633, 636 (1948).

113. 347 U.S. 483 (1954).

114. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1422 (1988)).

115. Act of Oct. 3, 1965, Pub. L. No. 89-235, 79 Stat. 911. Shrewd political calculation played no small role. Proclaiming itself champion of freedom and equality and leader of the free world in the midst of the Cold War, the United States was required to change its domestic racial hierarchy in order to win the hearts and minds of non-whites in Asia, Latin America, and Africa. CHAN, *supra* note 12, at 145-46.

116. HING, *supra* note 7, at 79. Congress, however, did not anticipate that this change in policy would substantially affect the levels of immigration from Africa, Asia, and Latin America. *Id.* at 79-80.

today in the form of psychological exclusion. Mainstream American society's definition of "American" still does not include Asian Americans.

More than passively refusing to embrace Asian Americans as "American," many in white society affirmatively act to preserve Asian Americans' status as outsiders, especially through speech.¹¹⁷ At the basest level, derogatory racial terms such as "chink," "jap," and "gook" are still common, and in many confrontations the stinging phrase, "Go home!," is added. This phrase contains the bitter reminder that despite living in America and making our homes here, Asian Americans still are not considered "real" Americans who belong here.¹¹⁸

Even when blatantly offensive terms are not used to demarcate the boundary between "American" and "outsider," the exclusionary impulse still manifests itself in common, everyday interactions. A Japanese American friend, for example, went with her British husband to obtain his green card. During their appointment, the INS clerk turned to the husband and said, "Sir, all I'll need is proof of your American citizenship, like a birth certificate, and then I can process your wife's application for her green card." Complete strangers often ask Asian Americans, "Where are you from?," and are not satisfied with New York or Ann Arbor as a response. The typical follow-up question is, "No, where are you *really* from?" Also prevalent is the perfunctory "How do you like America?"

The concept of Asian American as outsider has been disturbingly omnipresent in national issues and affairs for some time. The most compelling and tragic example of this phenomenon was the internment of 120,000 Japanese Americans on the West Coast of the United States during World War II.¹¹⁹ Ironically, while the Supreme Court affirmed its prior ruling that all race-based classifications are inherently suspect and subject to strict judicial scrutiny,¹²⁰ the Court nonetheless refused to hold that the internment policy failed to meet that standard, deferring instead to the judgment of the U.S. military. The Court accepted the argument that "[p]ressing public necessity may sometimes justify the existence of such restrictions."¹²¹ More recently, the former president of Boston University, John Silber, while campaigning for Massachusetts governor in 1990, called his state a "welfare magnet" that has "suddenly become popular for people who are accustomed to living in the tropical climate."¹²² He then asked, "Why

117. See TAKAKI, *supra* note 14, at 406-71. One Asian American writes, "we are not acceptable enough to run legislatures, schools, corporations. Our women may be marriage material for whites, but our men are still seen as gooks." Edward Iwata, *Race Without Face*, S.F. Focus, May 1991, at 50, 52.

118. In striking contrast, (native-born) white Americans are never told, "White boy! Go back to England!"

119. See TAKAKI, *supra* note 14, at 379-405. CHAN, *supra* note 12, at 122-42.

120. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

121. *Id.* at 216. For contemporaneous commentary, see Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945); see also PETER IRONS, *JUSTICE AT WAR* (1983).

122. Constance L. Hays, *Remarks Inflame Massachusetts Contest*, N.Y. TIMES, Jan. 27, 1990, at 10 (1990).

should Lowell[,] [Massachusetts] be the Cambodian capital of America? . . . Why should they all be concentrated in one place? This needs to be examined."¹²³

Moreover, Japan-bashing by politicians and the media has led to anti-Asian American sentiment and racial hostility.¹²⁴ As a result, Asian Americans have been and continue to be the targets of racially motivated crimes.¹²⁵ Senator Daniel Inouye was born in the United States and served in the 442nd Regiment, losing an arm and earning a Distinguished Service Cross for his valor during World War II.¹²⁶ And yet, during the 1987 Iran-Contra hearings, he became the target of telegrams and telephone calls containing racial slurs and telling him to "go home to Japan where he belonged."¹²⁷

Further, Asian Americans frequently appear in the popular consciousness only in the form of insidious stereotypes. Anglo-American literature contains images of Asian Americans as "[t]he power-hungry despot, the helpless heathen, the sensuous dragon lady, the comical loyal servant, and

123. *Id.*

124. Ronald Takaki, *Behind the Bashing of Japan*, *ASIAN WK.*, Feb. 14, 1992, at 2.

125. See UNITED STATES COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990s at 22-48 [hereinafter CIV. RTS. COMM'N] (documenting bigotry and violence against Asian Americans). Statistics from Philadelphia revealed that Asians are "more likely on a per capita basis to become victims of hate crimes than whites, blacks, Hispanics, or Jews." *Id.* at 46 (citing PHILADELPHIA COMM'N ON HUMAN RELATIONS, STATE OF INTERGROUP HARMONY: 1988 53-55). In Boston, a study found that "[w]hen compared to the population size of the various racial groups in the city of Boston, the Asian community in general, and the Vietnamese community in particular, suffer significantly higher rates of racial violence than other racial or ethnic groups in the city." *Id.* (quoting Jack McDevitt, *The Study of the Implementation of the Massachusetts Civil Rights Act*, Jan. 25, 1989, at 9 (1989)).

126. TAKAKI, *supra* note 14, at 6.

127. *Id.* Asian American literature captures much of these feelings of exclusion and displacement. Huynh-Nhu Le writes,

Vietnam:

A land I know not much,
A water I did not swim,
A mountain I did not climb.

Saigon:

My place of birth,
A beauty I know not much.

America:

A land I know quite well,
A river I might have drowned,
A mountain I have fallen.

Los Angeles:

My place of racism and hate,
An ugliness I know damned well.

Welcome to California,

Now GO HOME!

Huynh-Nhu Le, *Hearts & Minds*, AMERASIA, Spring 1991, at 98.

Other works include MAXINE HONG KINGSTON, *THE WOMAN WARRIOR: MEMOIRS OF A GIRLHOOD AMONG GHOSTS* (1976); FRANK CHIN, *CHICKENCOOP CHINAMAN* (1981); FRANK CHIN, DONALD DUK (1991); GUS LEE, *CHINA BOY* (1991); DAVID WONG LOUIE, *PANGS OF LOVE* (1991).

For a detailed discussion contextualizing Asian American literature, see KIM, *supra* note 6.

the pudgy, de-sexed detective who talks about Confucius."¹²⁸ Other themes include the brute hordes of the "yellow peril," the sinister villain, and the unassimilable alien.¹²⁹ More contemporary stereotypes of Asians include the passive engineer or computer nerd,¹³⁰ a twentieth century "high-tech coolie."¹³¹ The emphasis on Asian racial and cultural characteristics that differ from those of whites creates and perpetuates the notion of the forever-alien Asian.¹³²

These negative and stereotypical portrayals of Asian Americans "mask [our] complex and diverse humanity;"¹³³ they strip away our individuality and deprive us of opportunities to explore the complexities of our heritage so that we may decide for ourselves what it means, and, thus, construct our own identities and images. Frank Chin asserts that white society creates stereotypes that "exclude [Asian Americans] from American culture, and [that are] imposed upon us as a substitute for participation in American culture."¹³⁴ The results of this psychological exclusion are twofold: Asian Americans—complex, real people with real history—remain invisible in mainstream America's consciousness, while the insidious stereotypes and unflattering images that burden Asian Americans persist.¹³⁵

Furthermore, American society casts the discussion of race along black-white axes. "Race relations" implicitly are defined as black-white unless specifically noted otherwise.¹³⁶ In the racially motivated murder of

128. KIM, *supra* note 6, at 3.

129. *Id.* at 5-14.

130. For example, Long Duc Dong, a character in the John Hughes film *SIXTEEN CANDLES*, is a bespectacled nerd infatuated with blond women. It is difficult, though, to capture the utter offensiveness of this character in writing.

131. Winifred Yu, *Asian-Americans Charge Prejudice Slows Climb to Management Ranks*, WALL ST. J. (Western ed.), Sept. 11, 1985, at 37 (quoting Jim Tso, president of the Organization of Chinese Americans).

132. In nineteenth century America's eyes, the Chinese were "nothing more than starving masses, beasts of burden, depraved heathens, and opium addicts." CHAN, *supra* note 12, at 45. In the twentieth century, the Western Allies depicted the Japanese as "subhuman" and used "images of apes and vermin to convey this." DOWER, *supra* note 103, at 9. The modern equivalent is the "model minority" depiction. See *infra* Part I.C.2.b.

133. Elaine Kim, *Asian Americans and American Popular Culture*, in *DICTIONARY OF ASIAN AMERICAN HISTORY* 99 (Hyung-Chan Kim ed., 1986).

134. KIM, *supra* note 6, at 175 (citing Frank Chin, *Backtalk*, NEWS OF THE AM. PLACE THEATRE, May 1972, at 4).

135. A poem captures this duality of invisibility and stereotype:

... we are Asian being American/
being both/denying neither
a fraction of the population,
a detraction from the modern myths,
we are less who we are than
what they think we are . . .

Velina H. Houston, *A Taste of Honey*, quoted in Herman D. Lujan, *Asian Americans and the Quality of Education: A Policy View*, in *FRONTIERS OF ASIAN AMERICAN STUDIES* 291, 292 (Gail M. Nomura et al. eds., 1989) (omissions in original).

136. See generally, STUDDS TERKEL, *RACE: HOW BLACKS AND WHITES THINK AND FEEL ABOUT THE AMERICAN OBSESSION* (1992); Jack Miles, *Blacks vs. Browns*, ATLANTIC MONTHLY, Oct. 1992, at 41.

Vincent Chin, a federal jury failed to convict his killers in part because of the jury's perception of racial hatred "purely as a black-white problem."¹³⁷ This binary racial framework leaves no place for Asian Americans because we are neither white nor black.¹³⁸ While the killing of an African American youth in Bensonhurst received national headlines and raised a sense of national outrage, the contemporaneous, racially motivated murder of Jim Loo under similar circumstances received very little media coverage.¹³⁹

* * *

This discussion of historical exclusion—sociopolitical, formal, and psychological—is in no way meant to be a litany of Asian American victimization. Such an approach would be unproductive and futile. Professor Harris' critique of Catharine MacKinnon's focus on women as victims is instructive.¹⁴⁰ Professor Harris cautions women against identifying themselves through shared oppression because it leads to essentialism¹⁴¹ and prevents strategic and contingent focus on relationships.¹⁴² For Professor Harris, this approach, among other things, precludes the possibilities of progress and empowerment, and denies women the opportunity "to shape their own lives."¹⁴³ Borrowing from Professor Harris, we Asian Americans can

Patricia Williams notes that Public Health Service records have only three racial categories: "White, Black, and Other." PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 218 (1991).

137. CIV. RTS. COMM'N, *supra* note 125, at 28.

138. At the 1988 national convention of the American Council of Education, the roster contained only two Asian Americans among the more than 2,000 attendees. Ironically, the theme of the convention was minority participation in higher education. In addition, "there was no mention of Asian and Pacific Americans in the panels or on the program." Lujan, *supra* note 135, at 291.

139. CIV. RTS. COMM'N, *supra* note 125, at 28. Jim Loo, a Chinese American, had been playing pool with several Vietnamese friends when two white men started to call them "gooks" and "chinks" who were responsible for American deaths in Vietnam. One of the white men said, "I don't like you because you're Vietnamese. Our brothers went over to Vietnam, and they never came back," *id.* at 26 (quoting Seth Effron, *Racial Slaying Prompts Fear, Anger in Raleigh*, GREENSBORO NEWS & REC., Sept. 24, 1989), and "I'm gonna finish you tonight," *id.* (quoting *Asians in America: Old Stereotypes, Renewed Violence Confront the Country's Fastest-Growing Ethnic Population*, KLANWATCH INTELLIGENCE REP., June 1990, at 5). The white men left the pool hall and waited outside to attack Jim Loo and his friends as they left. The two men wielded a shotgun and a pistol, killing Jim Loo with a blow to the head that was intended to strike his companion. *Id.* at 26-27.

140. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). MacKinnon asserts that women "are all measured by a male standard for women, a standard that is not ours." CATHARINE A. MACKINNON, *On Exceptionality: Women as Women in Law*, in FEMINISM UNMODIFIED 70, 76 (1987). In MacKinnon's opinion, gender is a "question of power, specifically of male supremacy and female subordination." MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED, *supra* at 40 [hereinafter MACKINNON, *Difference and Dominance*]. Women thus become defined in terms of their subordination and victimization.

141. Professor Harris defines feminism's gender essentialism as "the pursuit of the essential feminine, [where] [w]oman [is] leached of all color and irrelevant social circumstance, issues of race are bracketed as belonging to a separate and distinct discourse." Harris, *supra* note 140, at 592. The result is that "white women now stand as the epitome of Woman." *Id.*

142. *Id.* at 612.

143. *Id.* at 613.

construct our own identities through an understanding and examination of our multifarious experiences.¹⁴⁴

Moreover, claiming and then telling our history can help to raise consciousness.¹⁴⁵ Conversely, to deny our history and other aspects of our heritage,¹⁴⁶ is to deny part of ourselves. Professor Pat Williams' story of her great-great-grandmother's rape by her white lawyer-owner—Professor Williams' great-great-grandfather—is a powerful example.¹⁴⁷ Preparing to go to law school she had to come to terms with her ancestral past and "reclaim that part of [her] heritage from which [she] had been disinherited . . . [and] use it as a source of strength and self-confidence."¹⁴⁸ Claimed history and heritage can be the basis for what Professor Mari Matsuda calls "multiple consciousness as jurisprudential method."¹⁴⁹ Grounded in experience, multiple consciousness avoids the pitfalls of abstraction and detachment characteristic of standard legal discourse.¹⁵⁰ Rooted in a multiple consciousness that encompasses a multitude of experiences and selves, Asian Americans will thus be able to "operate both within the abstractions of standard jurisprudential discourse, *and* within the details of our own special knowledge."¹⁵¹

C. Coercive Assimilation

The second way American society responded to Asian difference was to force Asians to adopt the norms and patterns of white society.¹⁵² White

144. For Professor Harris, identity is a "construction, not an essence—something made of fragments of experience, not discovered in one's body or unveiled after male domination is eliminated." *Id.* (construing Zora Neale Hurston, *How it Feels to Be Colored Me*, in *I LOVE MYSELF WHEN I AM LAUGHING . . . AND THEN AGAIN WHEN I AM LOOKING MEAN AND IMPRESSIVE* 152, 155 (A. Walker ed., 1979)).

145.

[An] oppressed group must at once shatter the self-reflecting world which encircles it and, at the same time, project its own image onto history. In order to discover its own identity as distinct from that of the oppressor, it has to become visible to itself. All revolutionary movements create their own way of seeing.

CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 84 (1989) (quoting SHEILA ROWBOTHAM, *WOMAN'S CONSCIOUSNESS, MAN'S WORLD* 27 (1973)).

146. These aspects include both the positive and the negative, such as long traditions of respect for elders, of filial piety, and of the subordination of women. For a powerful illustration of Asian traditions and their effects on women, see JONATHAN D. SPENCE, *THE DEATH OF WOMAN WANG* (1978) (discussing how Chinese traditions and values shaped the events in one Chinese woman's life). Maxine Hong Kingston deftly captures the pain and poignancy of Chinese American girlhood. HONG KINGSTON, *THE WOMAN WARRIOR*, *supra* note 127.

147. WILLIAMS, *supra* note 136, at 216-17.

148. *Id.* at 216.

149. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN'S RTS. L. REP.* 7, 7 (1989).

150. *Id.* at 8-9.

151. *Id.* at 9.

152. I draw in part on two of sociologist Milton Gordon's definitions of assimilation. He describes six sequential stages of assimilation, four of which are: (1) cultural or behavioral assimilation; (2) structural assimilation; (3) marital assimilation; and (4) identificational assimilation. MILTON M.

society viewed Asians and their culture as inferior, degraded, and uncivilized, and used criminal sanctions and punitive fines to force Asians to conform their behavior to white norms.

1. *Historical Assimilationist Treatment*

Whites perceived the Chinese difference in moral, cultural, and absolutist terms. Everything about the Chinese and later-arriving Asians¹⁵³ was said to be inferior, degenerate, immoral (or amoral), filthy, and alien.¹⁵⁴ An article in the *Marin Journal* succinctly captures the prevailing nineteenth century sentiment about the Chinese in California.¹⁵⁵ According to the paper, Californians believed of the Chinese immigrant

[T]hat he is a slave, reduced to the lowest terms of beggarly economy, and is no fit competitor for an American freeman.

That he herds in scores, in small dens, where a white man and wife could hardly breathe, and has none of the wants of a civilized white man.

That he has neither wife nor child, nor expects to have any.

That his sister is a prostitute from instinct, religion, education, and interest, and degrading to all around her.

That American men, women and children cannot be what free people should be, and compete with such degraded creatures in the labor market.

GORDON, ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS 71 tbl. 5 (1964).

Cultural assimilation is the process whereby members of an ethnic group take on the cultural characteristics and patterns of the host society. *Id.* Structural assimilation is the process by which members of the ethnic group gain entrance to "cliques, clubs, and institutions of host society, on [the] primary group level." *Id.* Marital assimilation refers to "[l]arge-scale intermarriage." *Id.* Identificational assimilation is the "[d]evelopment of [a] sense of peoplehood based exclusively on [the] host society." *Id.*

In this Comment I focus on the first two types of assimilation: cultural and structural. In my view, the salient features of assimilation are that the members of ethnic groups themselves adopt the characteristics of the dominant culture and gain entry to its social institutions. This definition of assimilation is separate and distinct from the dominant society's ascribing mainstream attributes to the ethnic group members and concluding that they are indeed assimilated.

153. What happened to the Chinese essentially set the pattern for subsequent treatment of later arriving Asians. The anti-Chinese laws created a "plural structure that . . . had an inherently flexible design and a generic mold that allowed it in time to be applied to the Japanese and other immigrants from Asia." RINGER & LAWLESS, *supra* note 13, at 175. This is not to say that the Chinese experience is the essential Asian American experience. I utilize this material to the extent that the Chinese experience is informative and illustrative of white society's compelling assimilative behavior of Chinese immigrants. Additionally, whites often assumed all Asians were Chinese. Nor is this assumption a historical relic; in my own experience, one of the most common racial slurs directed at Asians is "Chink!," regardless of that person's actual ethnicity.

154. It was said that the Chinese "moral condition is as bad and degraded as four thousand years of heathenism can make it, and that their physical condition is so low as the practice of all the crimes that have been known since history was written can make it." S. REP. NO. 689, 44th Cong., 2d Sess. 15 (1877).

155. SANDMEYER, *supra* note 40, at 25 (quoting MARIN JOURNAL, Mar. 30, 1876).

That wherever they are numerous . . . they defy the law, keep up the manners and customs of China, and utterly disregard all the laws of health, decency and morality.

That they are driving the white population from the state, reducing laboring men to despair, laboring women to prostitution, and boys and girls to hoodlums and convicts.¹⁵⁶

There is no question that Asians *were* (and continue to be) different from whites.¹⁵⁷ White society, however, failed to recognize and accept these cultural differences as legitimate ones, and instead demanded conformity to their own norms.¹⁵⁸ Commonly, reaction to these differences provided the impetus for, among other things, harsh and harassing municipal ordinances, prohibiting Chinese cultural practices and forcing adoption of white ones.

Indeed, municipal ordinances were among the most oppressive legislation aimed at the Chinese.¹⁵⁹ Since the Chinese were considered "moral leper[s]" whose habits engendered "disease wherever they reside[d]," and who crowded into "[a]partments that would be deemed small for the accommodation of a single American,"¹⁶⁰ San Francisco enacted a "Cubic Air Ordinance" that required every lodging house to provide five hundred cubic feet of air space per adult lodger.¹⁶¹ The city enforced the measure by jailing and fining violators and,¹⁶² in doing so, clearly sought to compel

156. *Id.*

157. Culturally, linguistically, and religiously, Asia and Europe have vastly different heritages. More importantly, some societies have organized these cultural differences into negative stereotypes and collapsed them into a category of "race" that has little to do with physiological characteristics. Racial categories then are used to symbolize such things as social inequality and economic disparities, and to justify racial subordination and oppression. See OMI & WINANT, *supra* note 25, at 66-69. "[R]acial meanings pervade US society, extending from the shaping of individual racial identities to the structuring of collective political action on the terrain of the state." *Id.* at 66. This dynamic affects the economic, political and cultural/ideological arenas of society. *Id.* at 67.

158. The relevant point from which to measure assimilation is that of the ethnic group member rather than the dominant society's perceptions. In this way I seek to distinguish mainstream society's understanding of assimilation from the "assimilatee's" understanding since the two can be quite distinct. Thus, mainstream society's perception and understanding of Asian Americans as assimilated differs greatly from Asian Americans' assessment of our assimilation. See *infra* notes 181-89, 200-01 and accompanying text; Beverly McLeod, *The Oriental Express: Asian-American Immigrants Are Seen As a "Model" Minority on a Fast Track to Success. Their Own View Is Less Idyllic*, PSYCHOL. TODAY, July 1986, at 48.

159. SANDMEYER, *supra* note 40, at 50.

160. SAN FRANCISCO BD. OF SUPERVISORS, S.F. MUN. REP. 233 (1870).

161. SAN FRANCISCO BD. OF SUPERVISORS, ORDER NO. 939, §§ 1-2, S.F. MUN. REP. 592 (1871-72). Violation of the ordinance was a misdemeanor punishable by a fine of ten to five hundred dollars and/or imprisonment from five days to three months. *Id.*

162. SANDMEYER, *supra* note 40, at 51 (citing BULLETIN, June 14, July 19, and July 26, 1870). Fifty-one men were fined ten dollars each on one day and were later arrested upon refusal to pay the fines. *Id.*

the Chinese to change their living arrangements,¹⁶³ and to curb Chinese depravity.¹⁶⁴

Other ordinances further intruded upon Chinese cultural practices. San Francisco enacted fourteen ordinances between 1873 and 1884 to regulate and restrict the nearly three hundred Chinese laundries operating in the city.¹⁶⁵ One laundry ordinance mandated that laundries in wooden buildings be licensed, or the owner would be subject to a \$1,000 fine or six months in jail.¹⁶⁶ The city also enacted an ordinance, ruled unconstitutional the following year, that levied a \$15 quarterly fee for laundry operators who did not use a horse-drawn carriage.¹⁶⁷ Another proposed city ordinance would have required every Chinese male sentenced to prison to have his queue—a single braid at the back of the head worn as a sign of loyalty to the Manchu emperor—cut off.¹⁶⁸ At the state level, California passed legislation that frustrated Chinese burial practices by prohibiting the disinterment of a body without a permit from a county officer.¹⁶⁹ Additionally, Asians were prohibited from taking fish in California waters by a law that made it unlawful for aliens incapable of becoming electors to fish there.¹⁷⁰

These laws provided effective financial deterrents and punishments for practicing customs different from those of the mainstream society. The cubic air ordinance punished the Chinese for crowded conditions in Chinatown and tried to compel residents to live more like whites, although the means—incarceration and monetary fines—did nothing to alleviate or improve those conditions. The queue ordinance, although never enforced, embodied a value judgment about appearance and sought to deploy the state's police power to compel conformity. The laundry ordinance was particularly egregious because it punished the Chinese for using the transportation device of their culture (pole), instead of that of American culture (horse and carriage). The cemetery law frustrated the Chinese from sending their dead to be buried in their homeland because it was culturally at odds with

163. See *Id.* at 37 (discussing how health inspectors accused Chinatown of afflicting the general community with its "stench, filth, crowding, and general dilapidation").

164. *Id.* at 51 (citing S.F. MUN. REP., *supra* note 160, at 233).

165. CHAN, *supra* note 12, at 94.

166. *Id.*

167. SANDMEYER, *supra* note 40, at 52. The Chinese used a pole and basket to transport goods, including laundry. The use of horse-drawn carriages was a western mode of transporting goods. The \$15 tax was equivalent to about \$150 in 1993 dollars. CIV. RTS. COMM'N, *supra* note 125, at 7 n.70.

168. SANDMEYER, *supra* note 40, at 51 (citing S.F. MUN. REP., *supra* note 161, at 592). Fortunately, the mayor vetoed the queue ordinance. *Id.*

169. Act of April 1, 1878, ch. 673, 1877-78 CAL. STAT. 1050. To obtain the permit, a statement had to be submitted, signed by the coroner or a reputable physician, and the remains had to be sealed in a metal casket. At least two years had to elapse between burial and removal and a reward was offered for information regarding violators. *Id.*

170. Act of Apr. 23, 1880, ch. 226 § 1, 1880 CAL. STAT. 388.

American practices.¹⁷¹ In sum, white society sought to coerce cultural assimilation through the intrusive exercise of the state's police powers.

Learning from the Chinese experience, subsequent Asian immigrants tried hard to assimilate to "American" norms. The Japanese, for example, abandoned their traditional mode of dress. New immigrants debarked in western-style suits. Brides newly arrived from Japan were whisked off to dress-makers by their husbands to exchange their kimonos and wooden clogs for Victorian dresses and shoes.¹⁷² Koreans also sought to minimize their cultural differences and to "[give] up old baseness, thought and behavior, and [become] more westernized."¹⁷³ They emphasized their Christianity and gratitude to America.¹⁷⁴

2. *Modern Assimilationist Treatment*

Today, white society continues to force Asians to assimilate. Although civil rights legislation, due process, and equal protection jurisprudence now protect against the blatantly discriminatory and culturally coercive legislation of the past, assimilationist pressures still exist. But the methods have become more refined, the arguments more sophisticated.

a. *English-Only Movement*

Presently, the most prominent assimilative force is the English-only movement. The movement posits that immigrants, upon coming to America, must learn English because English is the common linguistic thread that holds together our country and culture. For modern assimilationists, large influxes of non-English-speaking Asian and Latino immigrants thus pose a threat to the national identity.¹⁷⁵ To preserve the vitality of English, the solution is to promulgate English as the official language and to curtail or prohibit bilingual education and services. Nineteen states have made English their official language.¹⁷⁶ In Monterey Park, California, whose population is over fifty percent Chinese, a residents' association successfully campaigned the city government to make English the official lan-

171. SANDMEYER, *supra* note 40, at 54. Californians regarded the practice as "an expression of superstition and of contempt for America." *Id.*

172. CHAN, *supra* note 12, at 46.

173. TAKAKI, *supra* note 14, at 277 (quoting Hyung J. Moon, *The Korean Immigrant in America: The Quest of Identity in The Formative Years, 1903-1918*, at 157-59 (unpublished Ph.D. thesis, University of Nevada (Reno)) (1976).

174. *Id.*

175. "[A]ssimilation to fundamental American public values and institutions may be of far more importance to the future of the United States. . . . [A] community with a large number of immigrants who do not assimilate will to some degree seem unfamiliar to longtime residents." SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 412-13 (1981) (statement of Commissioner Alan K. Simpson, U.S. Senator).

176. See *Update on Legal Official Recognition of English in Missouri, Louisiana*, U.S. Newswire, Mar. 6, 1992, available in LEXIS, Nexis Library, USNWR File ("19 states . . . recognized our common language.").

guage of the city.¹⁷⁷ Similarly, the city council of Lowell, Massachusetts, enacted an "English-only" ordinance after Lowell's Cambodian population increased.¹⁷⁸

English-only laws embody a value judgment about the cultural—and by extension, linguistic—integrity of American culture. Significantly, the designation of English as the official language in these two communities occurred as a response to a concentration of non-English speaking Asian immigrants who threatened the cultural homogeneity, symbolized by language, of the white mainstream. English-only laws thus seek to dispel that perceived threat, even if only in symbolic terms.

Outside the legal realm, social pressure to speak English persists. A Chinese American friend, for example, recalls that her white friend's mother asked her why her family spoke Chinese at home. The young woman explained that, although her parents spoke English, Chinese was their mother tongue, and that her family therefore communicated more effectively in Chinese. The white mother then chastised her, "It's wrong for you to speak Chinese at home. You're in America now, and you should speak English with your parents."¹⁷⁹

This assimilationist approach represents a steadfast refusal to acknowledge the legitimacy of Asian immigrants speaking languages other than English. It is a command to relinquish that difference and adopt the ways of the dominant white society.¹⁸⁰

b. *Model Minority Myth*

Another aspect of modern assimilationist pressure is the portrayal by white mainstream society of Asian Americans as the "model minority,"¹⁸¹ successfully assimilated into American society. The inception of the model minority myth dates to the 1960s. One scholar attributes the genesis of the title "model minority" to a 1966 New York Times article describing the success of Japanese Americans.¹⁸² Subsequent media accounts have refined and perpetuated assimilationist explanations of Asian American "success."¹⁸³

177. Charles Choy Wong, *Monterey Park: A Community in Transition*, in *FRONTIERS OF ASIAN AMERICAN STUDIES*, *supra* note 135, at 113, 122.

178. *CIV. RTS. COMM'N*, *supra* note 125, at 45.

179. For a discussion of how cultural assimilation avoids terms of race but is, at bottom, about race, see Hing, *supra* note 11, at 870-75.

180. The movement also incorrectly assumes that the immigrants do not want to learn English. For a more detailed discussion, see *id.* at 877.

181. For a more detailed discussion and analysis of the model minority myth, see *infra* Part I.D.2.

182. Bai, *supra* note 46, at 744 (discussing William Petersen, *Success Story, Japanese-American Style*, N.Y. TIMES, Jan. 6, 1966, § 6 (Magazine), at 20).

183. See Sam Allis, *Kicking the Nerd Syndrome*, TIME, Mar. 25, 1991, at 64; David A. Bell, *The Triumph of Asian-Americans: America's Greatest Success Story*, NEW REPUBLIC, July 15 & 22, 1985, at 24; William R. Doerner, *Asians: To America With Skills*, TIME, July 8, 1985, at 42; Martin Kasindorf et al., *Asian-Americans: A "Model Minority"*, NEWSWEEK, Dec. 6, 1982, at 39; Susanna McBee, *Asian-*

In constructing and perpetuating this myth, white society congratulates Asian Americans for economic and educational achievements¹⁸⁴ that put us "conspicuously above the national norms on measures of income and educational achievement."¹⁸⁵ Asian Americans are thus held out as examples to other minorities—namely African Americans and Latinos—on how to be white, as measured by economic and educational achievement.

The rhetoric and symbolism are appealing: a group that is racially different from whites succeeds on white terms. White society thus sees Asian American economic "success" as evidence of assimilation to white norms and values. Asian Americans are "successful" because they have adopted the American cultural characteristics¹⁸⁶ of self-sufficiency, individuality, and hard work.¹⁸⁷ As the term "model minority" suggests, other minority groups would be well-served to do the same.

In his critical examination of this dynamic, Professor Takaki succinctly captures its underlying sentiment: "If Asian Americans can make it on their own, . . . why can't the poor blacks and whites on welfare?"¹⁸⁸ Dominant society's construction of Asian Americans thus operates to explain why the plight of the poor (read: African Americans) has not

Americans: Are They Making the Grade?, U.S. NEWS & WORLD REP., Apr. 2, 1984, at 41; Ellie McGrath, *Confucian Work Ethic*, TIME, Mar. 28, 1983, at 52; Anthony Ramirez, *America's Super Minority*, FORTUNE, Nov. 24, 1986; *Success Story of One Minority Group in U.S.*, U.S. NEWS & WORLD REP., Dec. 26, 1966, at 49; Reed Ueda, *False Modesty: The Curse of Asian American Success*, NEW REPUBLIC, July 3, 1989, at 16; and Louis Winnick, *America's "Model Minority"*, COMMENTARY, Aug. 1990, at 22.

For critical analysis of the general model minority concept, see DANIELS, *supra* note 89, at 318, 320; Keith Osajima, *Asian Americans as the Model Minority: An Analysis of the Popular Press Image in the 1960s and 1980s*, in REFLECTIONS ON SHATTERED WINDOWS: PROMISES AND PROSPECTS FOR ASIAN AMERICAN STUDIES 165 (Gary Y. Okihiro et al. eds., 1988) [hereinafter REFLECTIONS ON SHATTERED WINDOWS]; TAKAKI, *supra* note 14, at 474-80; David Quan, *Asian Americans and Law: Fighting the Myth of Success*, 38 J. LEGAL EDUC. 619 (1988); Bob H. Suzuki, *Education and the Socialization of Asian Americans: A Revisionist Analysis of the "Model Minority" Thesis*, AMERASIA, Spring 1977, at 23; Sumi K. Cho, *Racist Love: Racist Hate*, THE BERKELEY GRADUATE, Dec. 1988, at 1; Clarence Page, *Asian Americans Can't Be Dismissed as a "Model" Group*, CHI. TRIB., Apr. 19, 1989, § 1, at 21; Ronald Takaki, *Comparisons Between Blacks and Asian Americans Unfair*, SEATTLE POST-INTELLIGENCER, Mar. 21, 1985, at A15; Ronald Takaki, *Have Asian Americans Made It?*, S.F. EXAMINER, Jan. 10, 1984, at B3.

For critical analysis of the economic aspect of the model minority myth, see Laird Harrison, *U.S. Study Finds Few Asians in Management*, ASIAN WK., May 13, 1988, at 1; Yu, *supra* note 131.

184. These successes are exaggerated and misleading. Detailed statistics about income ignore the geographic concentration of Asian Americans in states with the highest incomes and the highest costs of living. Ronald Takaki, *A Tale of Two Decades: Race and Class in the 1880s and the 1980s*, in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 402, 407 (Herbert Hill & James E. Jones, Jr. eds., 1993). Moreover, representing the achievements of all Asian Americans through statistics relating to a single ethnic group within the broader category of "Asian Americans" is a misleading distortion. See *infra* note 199.

185. Takaki, *supra* note 184 at 407 (quoting CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* 55 (1984)).

186. This fits Milton Gordon's definition of cultural assimilation. See *supra* note 152.

187. For criticism of this view, see *infra* Part I.D.2.

188. Takaki, *supra* note 184, at 408.

improved despite the dismantling of formal segregation, the grant of formal legal equality, and the expansion of government services and programs, such as affirmative action. The implication, of course, is that African Americans and Latinos have not embraced the white virtues of hard work and self-sufficiency.

The model minority myth thus operates as a powerful rhetorical and symbolic tool. This image of Asian Americans is flawed, however, because the coercive dynamics at work in the myth obscure more realistic understandings of who Asian Americans are.¹⁸⁹

D. Difference as Sameness: Assimilationist and Exclusionary Hybrid of Guilty Liberalism

Another approach that American society has developed to deal with Asian difference is a hybrid of exclusionary and assimilationist elements. This approach does not exclude difference outright, nor does it coerce assimilation. Rather, the hybrid approach implicitly and superficially recognizes difference, but then devalues it in its self-conscious effort to emphasize how similar Asian Americans are to whites after all. Thus, white cultural norms and values still provide the standards for what is "American," as difference collapses into an artificial and constructed sameness. This, in essence, is how liberals approach difference and race.

1. The Liberal Approach to Race

Having reluctantly granted people of color access to white society through desegregation and civil rights legislation, white society now dictates that in order for people of color to participate fully in mainstream society, they must be like whites. Thus, conformity to white norms and values has supplanted race as the admission ticket to that society.

The United States has adopted integrationism—"the replacement of prejudice and discrimination with reason and neutrality"—as its approach to racial reform.¹⁹⁰ One of the underlying goals of this approach is to achieve a color-blind society where persons of different races are treated as individuals free of racial group identification and the stereotypes that such identification historically has implied.¹⁹¹ Race differences thus "make[]

189. See *infra* notes 195-213 and accompanying text.

190. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 760.

191. See Leonard J. Fein, *Community Schools and Social Theory: The Limits of Universalism*, in COMMUNITY CONTROL OF SCHOOLS 76 (Henry M. Levin ed., 1970). Fein writes,

[T]he central tenet of liberals, when dealing with race, has been to assert its irrelevance. The argument has been that color is an accidental characteristic, which, in the truly rational, liberated, social order, ceases to have any empirical correlates. . . . The main thrust of the civil rights movement has been, therefore, in the direction of persuading white America to become color-blind. The corollary of the liberal ethic that white people ought not pay attention to the blackness of Negroes was the proposition that Negroes ought not pay attention to their own blackness.

Id. at 91.

no real difference between people, except as unfortunate historical vestiges of irrational discrimination."¹⁹² Racial categories such as black and white become "neutral, apolitical descriptions, reflecting merely 'skin color' or country of ancestral origin. . . . [These terms] are unconnected to social attributes such as culture, education, wealth, or language."¹⁹³ Many whites mistakenly believe that integration into white society is a race-neutral process,¹⁹⁴ when in fact it is not.

2. *Assimilationist Strand*

Where the pure assimilationist method explicitly ignores difference and demands conformity to the dominant norms, the intermediate pluralist approach implicitly recognizes difference, but then transmutes that difference into sameness. Increasingly, white society has relied on this paradigm in dealing with the difference posed by Asian Americans.¹⁹⁵ The model minority myth and the ultra-femininity myth exemplify this process.

a. *Model Minority Myth*

While white mainstream society may rely on the model minority myth as evidence that Asian Americans have assimilated,¹⁹⁶ to Asian Americans, this myth represents something else entirely. In white society's eyes, the myth identifies Asian Americans as having adopted white values, the essence of cultural assimilation as defined by Milton Gordon.¹⁹⁷ The model minority myth, however, *presumes* that adoption when, in fact, Asian Americans have retained their own values, values that seem substantially similar to whites' values.

192. Peller, *supra* note 190, at 771.

193. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 4 (1991).

194. Peller, *supra* note 190, at 762.

195. Again, I do not argue that liberalism is the only approach white society takes. Strains of exclusion and assimilation still resound in the social discussion of Asian American issues. In addition, the difference I refer to here is a cultural difference more than a racial difference, because the discussion of Asian difference and sameness falls primarily along cultural lines.

196. See *supra* notes 181-89 and accompanying text.

197. See *supra* note 152.

The model minority theory posits that, because Asian Americans value family, education, and hard work,¹⁹⁸ they achieve economic success.¹⁹⁹ Since explanations for this success rely on cultural factors, they appear to acknowledge, validate, affirm and respect these cultural differences. But the myth conflates white and Asian cultural factors, and Asian difference disappears. The model minority myth rests on the assumption that, because Asian Americans succeed as white Americans do, Asian Americans must *be* like white Americans. In the rhetoric of the myth, Asian American success "offers affirmation of deeply rooted values of self-sufficiency and individualism."²⁰⁰

On the contrary, not only do Asian Americans work and achieve differently, but Asian Americans' hard work and success are not necessarily the result of the cherished American values of individualism and self-reliance. Instead, a broader sense of values set in a different context motivates Asian Americans.²⁰¹ One scholar asserts that within a specific context, "success in Asian and Pacific cultures is not measured in terms of the stereotypic western notion of individual gain or prominence, but rather by the enhancement of the family and those significant others who have either helped you directly or added something to your life."²⁰²

198. Asian American "success" is said to stem from the emphasis on the sanctity of the family. Fox Butterfield, *Why Asians Are Going to the Head of the Class*, N.Y. TIMES, Aug. 3, 1986, § 7 (Magazine), at 18, 21. A writer for *U.S. News & World Report* observes that "[i]f [a white] American child isn't doing well in school, his parents think the teacher or school has failed or the student just doesn't have it. The Asian parents' view is that the student isn't trying hard enough." McBee, *supra* note 183, at 42. Asian American children "are expected to attend school faithfully, work hard at their studies—and stay out of trouble." *Success Story of One Minority Group in U.S.*, *supra* note 183, at 49. Moreover, Asian Americans are said to have "an underlying devotion to scholarship [that has been] imprinted on [them] by a pantheon of ancestors." Malcolm Browne, *What Accounts for Asian Students' Success?*, OAKLAND TRIB., March, 30, 1986, at C9.

Asian Americans also benefit from a Confucian work ethic, *see* MacGrath, *supra* note 183, at 52, that emphasizes family, education and hard work. Robert B. Oxnam, *Why Asians Succeed Here*, N.Y. TIMES, Nov. 30, 1986, § 6 (Magazine), at 72.

199. The proof of this success derives from comparison to a white standard. In 1980, the median personal income of a Japanese American male was comparable to that of a white male. The media and pundits, however, fail to report that that is so even though the Japanese American male typically is better educated and works longer hours than his white counterpart. Takaki, *supra* note 184, at 408. Moreover, only certain statistics are cited and generalized as representative of Asian Americans as a group. Thus, not all Asian American males are "succeeding." In 1980, Korean men in California earned only 82% of a white male's income; Chinese only 68%; and Filipino men only 62%. *Id.*

200. Takaki, *supra* note 184, at 408.

201. Yuki Moore Laurenti notes that

achievement, however, was the key to success because as a minority I was taught that I had to be one step better than my peers, that there is a bias in our society and a good education cannot be taken away from you and it can begin to counteract and break down that bias.

Yuki M. Laurenti, *Tribute to Our Past*, PAC. CITIZEN, Dec. 20-27, 1985, at A4.

202. Lujan, *supra* note 135, at 293; *see also* Butterfield, *supra* note 198, at 21 ("In the Confucian ethic . . . there is a centripetal [sic] family orientation that makes people work for the honor of the family, not for themselves." (quoting William Liu, director of the Pacific-American Mental Health Research Center)).

A White House speech by then-President Ronald Reagan to Asian Americans illustrates the sort of white solipsism described above.²⁰³ Reagan stated that Asian Americans have achieved the "American dream."²⁰⁴ They have helped to "preserve that dream by living up to the bedrock values" of America, including "the sacred worth of human life, religious faith, community spirit and the responsibility of parents and schools to be teachers of tolerance, hard work, fiscal responsibility, cooperation and love."²⁰⁵ Notwithstanding their laudatory intent, words like Reagan's strip Asian Americans of their cultural identity. His celebration of values does not recognize Asian Americans as Asian.²⁰⁶ Instead, Reagan affirmatively recognizes certain values not for their own intrinsic worth or validity as Asian values, but because they are like white values.

New York University president John Brademas captures the essence of this dynamic: "When I look at our Asian-American students, I am certain that much of their success is due to Confucianism. And the more I see of Confucianism in action, the more I think it is the mirror image of the Protestant ethic."²⁰⁷ Asian American difference disappears into a stereotype that casts us as just like whites, only with one difference—our race—which is dissolved in color blindness.

The very term "model minority" neatly encapsulates this conflation process. Asian Americans are racial "others," and the term "minority" recognizes this difference. That difference is modified by "model," which glosses over that difference, identifying the "other" with the (white) "self." Thus, Asian Americans are not examples of those to be emulated in our differences—our values, language, physical appearance, and traditions—but rather we are seen as examples of those who successfully emulate the dominant paradigm of white culture. The categories of difference and sameness collapse into each other.

Familiar phrases from my experience bear this out. Countless white Americans have exclaimed to me, "You speak English so well!" or "I don't think of you as Oriental," or "How could you have experienced racism?" The subtext of these comments is that, even though I am physically and racially different, since I sound white, go to the same schools, and work in the same offices, I am therefore like them.

203. Adrienne Rich defines white solipsism as the tendency to "think, imagine, and speak as if whiteness described the world." ADRIENNE RICH, *Disloyal to Civilization: Feminism, Racism, Gynephobia*, in *ON LIES, SECRETS, AND SILENCE* 275, 299 (1979).

204. Ronald Reagan, Address Before Asian Pacific Americans (Feb. 23, 1984) in *ASIAN WK.*, Mar. 2, 1984, at 9.

205. *Id.*

206. I am explicitly connecting cultural values with ethnic-racial identity. In Asian and Asian American cultures, cultural traditions and values are crucial to ethnic identity. They are what distinguish Japanese from Chinese, Koreans from Vietnamese, and so forth.

207. Oxnam, *supra* note 198, at 74-75 (quoting John Brademas, president of New York University).

White society thus eradicates the racial difference of Asians by emphasizing the congruity of white and Asian values. The rhetoric of integration is useful in understanding this dynamic. Integrationism equates racial/ethnic separatism (nationalism) with white supremacy and institutionalized racism. If racial minorities remain separate in their own communities and embrace racial/ethnic nationalism, this looks very much like segregation,²⁰⁸ which is antithetical to integrationism's goal of color blindness transcending racial identification. The fatal flaw, however, is the failure to recognize that race and racial identity in American society are undeniably important in the construction of social relations.

The consequences of integrationism are twofold. One result is that white society fails to recognize the coercive assimilation in its integrationist vision. In Professor Peller's words, "deep-rooted assumptions of cultural universality and neutrality have removed from critical view the ways that American institutions reflect dominant racial and ethnic characteristics."²⁰⁹ Instead, white society views itself as universalist and embracing difference, when all it really achieves is recognition of conformity and sameness. The second consequence is a corollary to the first; it becomes a widely held but erroneous social "truth" that, since Asians are like whites, they cannot and do not suffer discrimination.²¹⁰ Moreover, the pursuit of color blindness and of integration into white society is ineffective at achieving real racial "equality." When racial or ethnic identity is transcended—that is, assim-

208. Across college campuses nation-wide, minority student associations are coming under severe criticism from white students. The common complaint is that if, for example, white students were to create a "White Law Students Association," it would be considered racist, even though a La Raza Law Students Association is not. This hostility "arises from white students' lack of recognition that the overwhelmingly white campuses themselves are in some sense large white cultural centers—ones in which black [and other minority] students are likely to have difficulty feeling at home." Darryl Brown, Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 315 (1990). As a result, the "white students' assertions that they only want all people treated the same, without the separatism of institutions such as black cultural centers, are often experienced by minority students as demands that they assimilate into white-dominated institutions and culture." *Id.* at 315.

209. Peller, *supra* note 190, at 762.

210. See, e.g., Michel McQueen, *Voters' Responses to Poll Disclose Huge Chasm Between Social Attitudes of Blacks and Whites*, WALL ST. J., May 17, 1991, at A16 ("Whites tend to be . . . skeptical that . . . Asian Americans are discriminated against; majorities believe they are receiving fair treatment. . . . [Furthermore,] nearly one in five black voters thinks that Asian-Americans receive 'too many special advantages.'").

My aim here is not to argue the merits of the model minority myth, though, I do believe that it is both false and dangerous, because it misrepresents the economic reality of Asian American status, essentializes the Asian American community and experience, and operates as a justification for withdrawing affirmative action programs for Asian Americans. I also believe that it serves to divide communities of color because Asians are viewed as the "good" minority who work hard and succeed, while other minorities are "lazy," and would succeed if they only were more like Asian Americans (read: whites). Thus, the myth generalizes about different races, ignoring the specific historical, political, and cultural contexts of each racial group in the United States. It also perpetuates a false vision of a meritocratic, color-blind society of equal opportunity. See sources cited *supra* note 183.

lated—all that remains is whiteness and white social institutions.²¹¹ The vision of integration fails racial minorities, because its practical consequences have been for racial minorities to move (slowly, if at all) into white social institutions only with the simultaneous adoption of white cultural practices.

Where the dominant society once ghettoized racial minorities, it now grants to some entry into its ranks, but the price of admission is to become, or at least act, like whites. African American friends tell of having to “talk white” at work and in school. Asian American friends tell of having to remember to speak English. Battered South Asian women, bereft of familiar support networks, are told at shelters that “You’re in America. Act like Americans now. You can’t do here what you did at home.”²¹² The failure of integration is thus complete.²¹³

b. Ultra-Femininity Myth

As it does with the model minority, white society extols the virtues of Asian femininity, which serves as a foil to the “non-femininity” of American women. In the last three decades American women have moved from the home, into larger society and the workforce. These gains—careers, higher income, personal autonomy—have in turn caused a backlash against (white) women in American society.²¹⁴ In pursuit of careers and independence, white women are scorned for their perceived “abandonment” of the traditional values of marriage and motherhood.²¹⁵ On the other hand, Asian women are portrayed and perceived as docile, devoted,

211. Stokely Carmichael called integration “a subterfuge for the maintenance of white supremacy.” STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 54 (1967).

212. Holly Metz, *Asian, American, Feminist*, *PROGRESSIVE*, June 1993, at 16 (quoting Professor Samita Das Dasgupta). The resulting implication is that these South Asian women “must separate from their community and culture in order to remedy [the] problems” of battery, abuse, and harassment. *Id.*

213. With this failure come new possibilities. Scholars of color in the legal academy have gone beyond the pale of integration and have instead offered normative solutions for race relations. See, e.g., Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of “Diversity,”* 1993 *WIS. L. REV.* 105 (arguing for a concept of diversity that affirmatively includes individuals from excluded and disempowered groups so as to empower them to decide for themselves against which standard they will be measured); Hing, *supra* note 11 (arguing that society must both expand its notion of who and what is American to include all races, ethnicities, languages, cultures, and foods, and accept separatism); Alex M. Johnson, Jr., *Bid Whist, Tonk and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 *CALIF. L. REV.* 1401 (1993) (arguing that the maintenance of historically black colleges is crucial to the vitality of African American culture so that African Americans can choose to integrate into the mainstream with a solid sense of identity and self); see also Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 *MICH. L. REV.* 953 (1993) (arguing that courts need to take into account white race consciousness and the privilege of racial transparency when assessing discriminatory intent).

214. See, e.g., SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991). I include white in parentheses because I believe that the terms of the backlash debate, as well as feminist theory in general, represent the experiences of white women to the exclusion of the experiences of women of color. See generally Harris, *supra* note 140.

215. FALUDI, *supra* note 214, at 296.

and traditional: their happiness derives from serving their men.²¹⁶ As such, Asian women displace independent white career women as "true" women. Tony Rivers' paean to Asian women expounds the disturbing and repugnant tenets underlying the ultra-femininity myth:

Oriental girls are about as foreign as you can get and, even better, the difference is compounded about a zillion times by their apparent ultra-femininity. . . . [O]riental girls (all half billion of them) are graced by a natural, deep-down femininity that makes the average bimbo look like Les Dawson.

. . . Given her extreme femininity, any macho displays designed to separate the boys from the girls would become redundant.

. . . .

. . . [She has] eyes [which are] almond-shaped for mystery, black for suffering, wide-spaced for innocence, high cheekbones swelling like bruises, cherry lips. . . . She is, of course, always young, a lot like a child, an obedient daughter. And she's a mother too, grateful for the chance to worry. She cares for you and always forgives, grants you refuge and soothes you with the stillest part of her female psyche. You lay down your western neurosis to this rice Madonna. . . .

When you get home from another hard day on the planet, she comes into existence, removes your clothes, bathes you and walks naked on your back to relax you. And then there is sex. She is sh-shh-shameless, of course. In the cultural mélange of your fantasy, the sex is pure She's fun you see, and so uncomplicated. She doesn't go to assertiveness training classes, insist on being treated like a person, fret about career moves, [or] wield her orgasm as a non-negotiable demand.

Does she exist? Of course she does. She's been around a long time now, and she's anything you want her to be. So compliant. She's the last refuge for the roué. She's there when you need shore leave from those angry feminist seas. She's a handy victim of love or a symbol of the rape of third world nations, a real trouper. . . .

. . . .

. . . She is Mai-Mai in *Tai-Pan* and she kowtows and says things like: "You are so bad to me, and I am so good to you. Let's make love." Afterwards, her lover reaches for the hot towels she has prepared for him. "No," she says, "let me. It gives me pleasure and it is my duty."

216. See Joan Walsh, *Asian Women, Caucasian Men*, S.F. EXAMINER, Dec. 2, 1990, (Image Magazine), at 12-13.

She's a hostess, a bar girl, a waitress, a geisha. *She serves*. In Chinese, a feminine form of "T" means "slave." But she is a slave who enraptures. She is a powerful idea.²¹⁷

Purporting to extol the virtues of Asian women who are "as foreign as you can get"²¹⁸ compared to white women, this description of western conceptions of Asian women actually represents the collapse of difference into sameness. White men have strictly defined the role of woman, and the role that Asian women play now is the same as that traditionally assigned to white women. In relation to white women, Asian women are perceived to be ultra-feminine because white women have defied this male-defined role.

Tony Rivers' description of the ultra-feminine Asian woman succinctly captures the dynamic that is the subject of Catharine MacKinnon's critique: "Sexualized objectification is what defines women as sexual and as women under male supremacy."²¹⁹ "Sex makes a woman a woman. Sex is what woman are for."²²⁰ For Tony Rivers and others like him, the Asian woman does not exist, has no identity, until the white man creates her and calls her into existence through his sexual desire.²²¹ Thus, to a man, having the power to define her, the Asian woman is "anything you want her to be. . . . She's a handy victim of love . . . a hostess, a bar girl, a waitress, a geisha. . . . [S]he is a slave who enraptures."²²² In MacKinnon's words, "men have power and women do not."²²³ When a man exercises that power to define the "powerful idea"²²⁴ of the Asian woman, she is not a person, nor does she expect to be treated as one. She is uncomplicated, has no needs or ambitions of her own, save the fulfillment of his sexual pleasure, because sex is what she is for. Asian women become a welcome respite and refuge from angry white feminists who challenge and fight white male dominance. Asian women are what women *should be*. As a result, the ultra-femininity myth collapses difference into sameness. The differences of Asian women—real or perceived—disappear into the category of "woman" that white men have constructed.

217. Tony Rivers, *Oriental Girls*, GQ (Brit. ed.), Oct. 1990, at 158. Rivers asserts that this "stereotype of the oriental girl is the greatest sexual shared fantasy among western men." Although he acknowledges that, "like all the best fantasies it is based on virtual ignorance and uncorrupted by actuality," *id.* at 158, Rivers' article perpetuates, rather than critiques the fantasy.

218. *Id.* at 158.

219. CATHARINE A. MACKINNON, *Desire and Power*, in FEMINISM UNMODIFIED, *supra* note 140, at 46, 50.

220. Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, in FEMINIST LEGAL THEORY 181, 191 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) [hereinafter MacKinnon, *Feminism, Marxism, Method and the State*].

221. A Thai woman, for example, is "a party girl to whom sex is simultaneously sacrament." Alan Rifkin, *Asian Women*, L.A. Men, BUZZ, Sept. 1993, at 73, 108.

222. Rivers, *supra* note 217, at 161-62.

223. MACKINNON, *Desire and Power*, *supra* note 219, at 46, 51. In one Hollywood film the gang rape, sexual abuse, and murder of a Vietnamese girl is the bonding and initiation process for a platoon of American soldiers in Vietnam. See CASUALTIES OF WAR (Columbia Pictures 1989).

224. Rivers, *supra* note 217, at 163.

3. *Exclusionist Strand*

Alongside the assimilationist strand that shapes the model minority myth and the ultra-femininity myth, the exclusionist strand of the liberal hybrid approach's management of Asian difference is equally powerful. Exclusion is the response to constructed metadifference that has shaped much of Asian American historical experience. The "including-while-excluding" approach operates most noticeably in two social spheres: the marketplace and the academy.

a. *The Marketplace*

In the marketplace, the liberal hybrid manifests itself in three ways: the "glass ceiling," occupational segregation, and scapegoating during hard economic times. The term "glass ceiling" refers to the barrier minorities and women face in employment promotion. Occupational segregation is the restriction of employment to the secondary labor market or peripheral jobs. Scapegoating describes the phenomena whereby the mainstream targets a group and blames it for a variety of social ills that stem from difficult economic times.

1. *The Glass Ceiling*

The glass ceiling exemplifies the including-while-excluding approach to racial difference. Asian Americans are ostensibly included in the workforce when they are first hired. However, Asian Americans soon reach a point beyond which they will not be promoted²²⁵ and are excluded from the realms of upper management. A survey of successful executives at Fortune 500 companies reveals that Asian Americans constitute only 0.3% of senior executives in the United States,²²⁶ although Asian Americans constitute 2.9% of the national population.²²⁷ Thus, at the senior executive level, Asian American representation is only one-tenth of their representation in the general population. Another study shows that "Asian descent has a negative effect on the probability of being [a] manager,"²²⁸ such that the probability that an Asian man will become a manager is seven to eleven percentage points lower than that for a white man.²²⁹ The study was adjusted for English-proficiency and was limited to American-born Asian Americans, so that language proficiency and cultural barriers could not account for these findings.²³⁰

225. John Schwartz et al., *A "Superminority" Tops Out*, NEWSWEEK, May 11, 1987, at 48 ("While employers readily snap up young Asians, promotions into upper management are rare.").

226. Civ. Rts. COMM'N, *supra* note 125, at 132-33.

227. *Id.* at 133 n.17.

228. U.S. COMM'N ON CIVIL RIGHTS, *THE ECONOMIC STATUS OF AMERICANS OF ASIAN DESCENT: AN EXPLORATORY INVESTIGATION* 74 (1988).

229. *Id.* at 74-75 & tbl. 7.7.

230. The control variables in the study included: education, work experience, English ability, region, location, marital status, disability, and industry. *Id.*

The same glass-ceiling findings hold true in other occupations as well. In engineering, for example, Asian American engineers are significantly less likely to be hired directly into management positions or promoted into management compared to white engineers with the same qualifications, as measured by education, experience, and other demographic factors.²³¹ In San Francisco, where Asian Americans comprise 28% of the population, only 13% of the city's social workers are Asian American.²³² A study of San Francisco's civil service concluded that "Asian professionals face the worst promotional opportunities of all groups."²³³ In the aerospace industry, data shows that although Asian Americans constituted a higher percentage of aerospace professionals than African Americans or Latinos, Asian Americans constituted the lowest percentage of managers in the field.²³⁴

Psychological exclusion through racism and harmful stereotyping is one of the causes of Asian American exclusion from management positions. In a survey of Asian American professionals and managers in the San Francisco Bay Area, about two-thirds reported that racism was a significant barrier to upward mobility.²³⁵ Fifty to seventy-five percent reported that management insensitivity and a lack of networks, mentors, and role models were also significant barriers.²³⁶ In contrast, the media point to the stereotype of quiet achievement, passivity, and language deficiencies²³⁷ as accounting for the discrepancy. Furthermore, "Asian Americans continue to be denied employment opportunities simply because they speak English with a foreign accent."²³⁸

Corporate recruitment practices also reinforce exclusionary employment outcomes for both minorities and women. Middle and upper management positions can be filled outside the formal recruitment process through

231. Civ. Rts. COMM'N, *supra* note 125, at 133.

232. Theresa Moore & Robert B. Gunnison, *Blacks and Asians Say the System is Insensitive*, S.F. CHRON., Mar. 3, 1994, at A4.

233. Civ. Rts. COMM'N, *supra* note 125, at 133 (quoting HENRY DER & COLLEEN LYE, *THE BROKEN LADDER '89: ASIAN AMERICANS IN CITY GOVERNMENT* 5 (1989)).

234. Civ. Rts. COMM'N, *supra* note 125, at 134 (citing U.S. GEN. ACCOUNTING OFFICE, *EQUAL EMPLOYMENT OPPORTUNITY: WOMEN AND MINORITY AEROSPACE MANAGERS AND PROFESSIONALS*, 1979-86 (1989)); see also *id.* at 134-36 (presenting compelling accounts of Asian Americans' "glass ceiling" experiences).

235. Amado Cabezas et al., *Empirical Study of Barriers to Upward Mobility for Asian Americans in the San Francisco Bay Area*, in *FRONTIERS OF ASIAN AMERICAN STUDIES*, *supra* note 135, at 85, 93 tbl. 3, 96.

236. *Id.* at 93 tbl. 3, 95-96.

237. Asian Americans are "seen as weaker, less capable of handling people. . . . [R]eal men aren't engineers or geeks with glasses playing the violin." Schwartz, *supra* note 225, at 48. With regard to language, accent discrimination can function as the equivalent of national origin discrimination. See, e.g., *Fragante v. City of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990). For a discussion of American society's ready acceptance of accent discrimination, see Beatrice Bich-Dao Nguyen, Comment, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 81 CALIF. L. REV. 1325, 1336-40 (1993), 1 ASIAN L.J. 117, 128-32 (1994).

238. Civ. Rts. COMM'N, *supra* note 125, at 138.

networking and word of mouth.²³⁹ The informality of employee referrals, the lack of record-keeping, and the lack of minorities and women engaging in referrals contribute to the dearth of minorities and women being hired or promoted in this way.²⁴⁰ Some corporations that use executive search firms do not ensure that these firms seek to identify qualified minorities and women.²⁴¹

Thus, although Asian Americans are included in the job market, through insensitivity, stereotypes, and corporate practices they are excluded from significant advancement into upper management. As Edward Iwata states, "[W]e are not acceptable enough to run legislatures, schools, corporations. . . . [Asian American] men are still seen as gooks."²⁴²

2. Occupational Segregation

Where the glass ceiling operates to exclude Asian Americans from moving up the corporate ladder, occupational segregation forces Asian Americans into the lower-tier primary-sector or secondary-sector labor market.²⁴³ One study found that most Asian American men and women are concentrated in lower-tier primary-sector and secondary-sector occupations such as office clerks, sewing machine operators, maids, assemblers, janitors, postal clerks, waiters, teachers, pharmacists, and computer programmers.²⁴⁴ As a result, there is extensive income inequality related to race, gender, and nativity.²⁴⁵ The study also reported that low returns on human capital investments, such as education, experience, and hours worked²⁴⁶ cause about 66% of the income gap between Asian American men and U.S.-born white men.²⁴⁷ The study found that race can be more important than U.S. nativity in determining return on human capital.²⁴⁸ The study further concluded that the "results point to structurally-based occupational segmentation along economic class positions apparently further overlaid by continuing race and gender discrimination."²⁴⁹

239. FRANCES NAMKOONG & DAVID NAMKOONG, *SHATTERING THE GLASS CEILING* 6 (1990).

240. *Id.*

241. *Id.*

242. Iwata, *supra* note 117, at 52.

243. Primary labor sector jobs have "higher pay, job security, upward mobility, initiative, and decision-making capability," while secondary labor sector jobs have "low pay, poor job security, minimal promotion aspects, and [involve] little decision-making." Amado Cabezas & Gary Kawaguchi, *Empirical Evidence for Continuing Asian American Income Inequality: The Human Capital Model and Labor Market Segmentation*, in *REFLECTIONS ON SHATTERED WINDOWS*, *supra* note 183, at 144, 156-57.

244. *Id.* at 156-57.

245. *Id.* at 145. For example, U.S.-born Asian American women make 50% less income than U.S.-born white men. *Id.* at 154-55.

246. *Id.* at 146, 162.

247. *Id.* at 157-62.

248. *Id.* at 162.

249. *Id.*

Like the glass-ceiling paradigm, the American labor market thus includes Asian Americans, but only in lower-tier jobs with poor pay and dim advancement prospects, and only while retaining structural barriers to exclude Asian Americans from primary-sector jobs with better compensation, benefits, and upward mobility.

3. *Scapegoating*

Scapegoating is the third manifestation of the including-while-excluding paradigm. Although cultural differences have always bred suspicion and fear, in "times of trouble, those fears tend to focus on particular groups of cultural outsiders as a source of danger. It becomes convenient to make scapegoats of 'them'—the people who look different from 'us' or whose language or behavior is foreign to our own."²⁵⁰ The result is that in difficult economic times cultural majorities have "sought to dominate and suppress the outsiders, separating them from the public life of the community."²⁵¹ In such an economic climate, Asian Americans are perceived as "other" and thus become convenient scapegoats for economic problems.

The logic of the model minority myth reinforces the including-while-excluding dynamic of scapegoating. White society ostensibly welcomes Asian Americans into the socio-economic mainstream, at least to the extent that they are viewed as productive members of society who work hard and who do not rely on welfare. But the forces of exclusion are roused during difficult economic times. The once industrious, hardworking Asian American becomes the enemy, the foreigner, the interloper taking jobs away from "real" Americans.²⁵² Fear needs an outlet, and the metaphysical racial difference of Asians always makes us an easy and reliable scapegoat.²⁵³

250. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 305 (1986).

251. *Id.*

252. We learn this lesson from history. As professor Takaki points out, America's tendency to exclude Asians has increased when hard economic times have hit. See Takaki, *supra* note 184, at 402-03. In the late nineteenth century, jobs appeared plentiful, given the rapid industrialization and expansion of the economy, but America soon experienced an unemployment problem. Competition for scarce jobs became fierce. *Id.* at 403-04. White laborers focused their rage and frustration on Chinese laborers, singling them out on the basis of race because the Chinese "preempted the opportunities for finding work, and their wage scale [was] . . . so low that white boys would not engage in it." SANDMEYER, *supra* note 40, at 30. The conflict was between white labor and white capital, but was expressed through anti-Chinese violence. In the aftermath of the 1877 Railroad Strike, the exclusion of Chinese immigrant laborers in 1882 helped to "alleviate class tensions within white society." Takaki, *supra* at 403; see also RACISM, DISSENT, AND ASIANS AMERICANS FROM 1850 TO THE PRESENT 17-59 (Phillip S. Foner & Daniel Rosenberg eds., 1993) (analyzing economic factors contained in excerpts of testimony before Congress on Chinese exclusion legislation).

253. One man commented on Vincent Chin's murder, "We got 16 percent unemployment in town. . . . There's lots of hard feelings. In my opinion, these people come in, they see a man, supposedly Japanese. They look at this guy and see Japan—the reason all my buddies are out of work." *Two Indicted In Racial Slaying*, S.F. CHRON., Nov. 3, 1983, at 8.

This kind of sentiment can erupt into anti-Asian violence.²⁵⁴ For example, in Detroit on June 19, 1982, a laid-off autoworker and his stepson accosted Vincent Chin, a Chinese American, called him a "Jap" and shouted, "It's because of you in[otherfucker]s we're out of work."²⁵⁵ The two men chased Chin and bludgeoned him to death with a baseball bat.²⁵⁶

One implication of the including-while-excluding dynamic is that white society does not recognize such violence as racially motivated. Asian Americans are like whites and therefore cannot and do not suffer from racist attacks. *Fortune* magazine, for example, expressed disbelief that Asian Americans suffer from stereotypes and discrimination.²⁵⁷ Some have speculated that the eventual acquittal of Vincent Chin's murderers stemmed from the jury's inability to comprehend the reality of anti-Asian sentiment.²⁵⁸

b. *The Academy*

Although exclusion and its manifestations are more severe in the economic context, the exclusionist strand persists in the academy. Current exclusionary animus is related to the high levels of college and university enrollment of Asian American students; Asian American presence becomes "over-representation." Headlines read, "Asian Influx at Cal Stirs Questions."²⁵⁹ Concerned alumni telephone their alma maters, demanding to know "what is going on" with the admissions process.²⁶⁰ White college students rework college acronyms into biting commentary on Asian American presence. MIT becomes "Made in Taiwan," UCLA becomes "University of Caucasians Living among Asians," and U.C. Irvine (UCI) becomes "University of Chinese Immigrants." In addition, the image of the diligent, well-rounded Asian American student devolves into that of the asocial, robotic, Asian American nerd who studies incessantly.²⁶¹

At the undergraduate level, the Asian American admissions debate has been the focus of extensive media coverage, ideological skirmishing between politicians, and Asian American activism since the 1980s.²⁶² In the

254. For a more detailed discussion of historical anti-Asian violence, see CHAN, *supra* note 12, at 48-54.

255. Ronald Takaki, *Who Really Killed Vincent Chin?*, S.F. EXAMINER, Sept. 21, 1983, at B3.

256. CIV. RTS. COMM'N, *supra* note 125, at 25.

257. Laurie Kretchmar, *Up From Inscrutable*, FORTUNE, Apr. 6, 1992, at 120 ("Easily the strangest document produced by the U.S. Commission on Civil Rights in recent years is its just-released report on the predicament, if that is the word, which we doubt, of Asian Americans.").

258. CIV. RTS. COMM'N, *supra* note 125, at 26.

259. Louis Freedberg, *Asian Influx at Cal Stirs Questions*, S.F. CHRON., Sept. 9, 1991, at A1.

260. Interview with Sumi K. Cho, Chairwoman of the University of California at Berkeley Graduate Student Assembly, in Berkeley, Cal. (1992).

261. See Freedberg, *supra* note 259, at A20.

262. See Don T. Nakanishi, *A Quota on Excellence?: The Asian American Admissions Debate*, CHANGE, Nov./Dec. 1989, at 39; Dana Y. Takagi, *From Discrimination to Affirmative Action: Facts in the Asian American Admissions Controversy*, SOC. PROBS., Nov. 1990, at 578; CIV. RTS. COMM'N, *supra* note 125, at 104-29.

mid-1980s, Asian Americans charged elite universities with using discriminatory quotas to limit the enrollment of Asian Americans. The schools included Harvard, Yale, U.C. Berkeley, UCLA, Stanford, and Princeton.²⁶³

The controversy has focused on disparities between Asian American and white admission rates.²⁶⁴ The academic qualifications of Asian American applicants have never been in doubt in this debate, nor have they been used to explain the lower admissions rates of Asian Americans.²⁶⁵ In fact, Asian American applicants as a group have a stronger academic profile as measured by grade-point average (GPA) and standardized test scores than whites. For example, the California State Auditor General's review of U.C. Berkeley's freshman application process from 1981-1987 revealed that in 37 of 49 categories of comparison between Asian Americans and whites, the admission rate was higher for whites than for Asian Americans, even though the Asian American applicants had higher academic qualifications in virtually all comparison groups.²⁶⁶ Moreover, Asian Americans who are admitted tend to have far stronger academic qualifications than other admittees.²⁶⁷ Harvard University acknowledged that Asian American admittees usually had higher test scores than whites, typically 40 points for combined SAT scores.²⁶⁸ Yet despite academic qualifications that are comparable and often superior to white applicants' academic qualifications, the Asian American admission rate has been as low as 66% of the white rate.²⁶⁹

Alarmed at low admission rates despite high academic qualifications and the dramatic increase in the size of the Asian American applicant pool, Asian American groups have called for investigation.²⁷⁰ Given Asian American applicants' impressive academic qualifications, their admission rates should be comparable to those of whites under a race-neutral meritocratic system.²⁷¹ But the racial bias reflected in the admissions results

263. Takagi, *supra* note 262, at 578. For discussion of the evolution of an upper quota limit for Asian American applicants, see Grace W. Tsuang, Note, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659, 660-61 (1989).

264. See Takagi, *supra* note 262, at 578.

265. Nakanishi, *supra* note 262, at 44.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* In 1987, the Asian American admission rate at Harvard University was 75% of that of whites' rate; at the University of California at Berkeley, the rate was 88% for the same year. *Id.* tbls. 1, 2. Between 1982 and 1985, the Asian American admission rate at Stanford ranged from 66% to 70% of whites' rate. *Id.* Put another way, whites less qualified than Asian Americans are being admitted.

University explanations for the disparate admission rates have included statistical skewing, Takagi, *supra* note 262, at 583-84, statistical simplicity, broader admissions goals than simple meritocracy, disproportionate Asian American interest in certain majors, and under-representation of Asian Americans in special groups (e.g., alumni legacies and athletes). Nakanishi, *supra* note 262, at 44-47. For criticism of these claims, see *id.*

270. See generally Takagi, *supra* note 262; Nakanishi, *supra* note 262.

271. After examination of its admission policies, Brown University acknowledged that Asian Americans had been "treated unfairly," and Stanford conceded the possibility of "unconscious bias." Takagi, *supra* note 262, at 578. University of California at Berkeley's Chancellor publicly apologized

imply the operation of a double standard. To mainstream America, Asian Americans are high academic achievers who can compete with whites for college admission on the "race-neutral" basis of merit. Social attitudes and admission rates, however, point to a race-specific exclusionary animus. As one California politician states, "I suppose the key question that we want to look at from a policy standpoint is whether we should adhere to the usual standards of merit, which are widely celebrated in American society, when merit comes to mean the emergence of a non-white minority as the largest potential bloc of a freshman class or university in our most prestigious campus."²⁷² Asian American "inclusion"—admission and enrollment in undergraduate institutions—is thus simultaneously undercut by exclusionary forces that challenge the notion and potential of a highly qualified but racially distinct Asian American student body.

* * *

In sum, the liberal tradition contains strands of both coercive assimilation and exclusion. The history and guiding themes within the tradition offer an important analytical framework through which to examine issues that affect the Asian American community, including the issue of the cultural defense. Accordingly, Part II examines the cultural defense debate through the lens of historical experience and the analytical framework set out in this Part.

II

THE CULTURAL DEFENSE DISCOURSE

This section first gives a sketch of the cultural defense and presents the three positions of the current cultural defense debate. I first describe the substantive aspects of each cultural defense position. I then critically examine each position and argue that the three modes of Asian Americans' historical treatment control the cultural defense debate today.

The first position on the cultural defense supports an affirmative cultural defense. I first analyze the merits of the defense and then examine the assumptions underlying this position within the historical framework of exclusion, assimilation, and pluralism presented in Part I. I conclude that, although it seems paradoxical, the strand of the cultural defense debate that favors an affirmative defense corresponds most closely to exclusion.

The second strand of the debate adamantly opposes a cultural defense. I argue that substantively, this position is the modern manifestation of coercive assimilation, because it compels adoption of white values and behavioral norms under penalty of criminal prosecution. I then argue that the

for past admissions policies that had a disproportionate impact on Asian Americans. Nakanishi, *supra* note 262, at 41.

272. *Asian-American Admissions at the University of California: Excerpts from a Legislative Hearing Before the Assembly Subcomm. on Higher Education 2* (Jan. 26, 1988) (statement of Tom Hayden, Chairman).

terms of the attendant debate also reflect the coercive assimilation approach to managing the metaphysical difference of Asian Americans that white society has constructed.

The last position in the cultural defense debate takes the intermediate approach of using evidence of culture to show the defendant's state of mind or to mitigate the charge or punishment. I analyze this as the pluralist hybrid approach to Asian American difference. I then argue that the application of this approach reflects the difference-as-sameness method of guilty liberalism.

A. *Background on The Cultural Defense*

Roughly summarized, "cultural defense" is the informal term used to describe how criminal defendants, predominantly Asian immigrants, present evidence of their native culture in defense to a prosecution. The defendant's actions, had they been committed in the defendant's home country and culture, either would not have been a crime under the laws of the defendant's native jurisdiction, or would not have been punished as severely. The defendant adverts to cultural influences and argues that her native culture would have excused her conduct, that cultural factors or patterns of behavior are relevant to a determination of her state of mind at the time of the criminal act, or that cultural factors warrant reduced charges or punishment.²⁷³

273. Within the context of American criminal law, issues such as these raise conflicts with the underlying premises of the criminal law. The idea of criminal responsibility deriving from one's culture conflicts with the basic tenet that guilt is based on individual responsibility. On the other hand, there are affirmative defenses to criminal charges that may exonerate the defendant notwithstanding her individual responsibility. See Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 213-39 (1982).

Justification provides one example. Under certain circumstances, society views the commission of a proscribed act as justified and therefore not appropriate for criminal punishment. See *id.* at 245-46. Excuse also operates as an affirmative defense, as in duress where the defendant asserts that she performed an otherwise criminal act under a third party's threat that reasonably caused her to fear immediate death or serious bodily injury if she did not perform the act. *People v. Sanders*, 256 P. 251, 254 (Cal. Dist. Ct. App. 1927). Under these circumstances, the defendant's conduct is excused, not justified. The distinction stems from the fact that criminal acts performed under duress are condoned by society rather than encouraged. It is the total mix of act and circumstances, rather than the act alone, that society excuses. See Robinson, *supra* at 221-29.

Still other defenses go to the prosecution's prima facie case, challenging the required proof beyond a reasonable doubt of all of the elements of the offense charged. See, e.g., MODEL PENAL CODE § 1.12(1); CAL. PENAL CODE § 1096 (West 1994); *In re Winship*, 397 U.S. 358 (1969) (due process requires that each element of the crime charged be proven beyond a reasonable doubt). For example, a defendant could assert she lacked the requisite *mens rea* element of the crime charged, and evidence of the cultural practices of the cultural defendant, for example, may be relevant to the negation of that element.

B. The Affirmative Cultural Defense Position

1. Principles of the Affirmative Cultural Defense Position

The affirmative cultural defense position holds that the criminal law should create and recognize an affirmative cultural defense. One commentator who supports this view envisions the defense operating as a formal excuse.²⁷⁴ The act itself would still be judged wrongful, but the defendant would be excused for her criminal behavior. Under this view, principles of individualized justice—fairness and equality—require the “tailor[ing of] punishment to fit the degree of the defendant’s personal culpability.”²⁷⁵ While it is fair to “impute knowledge of American law to persons raised in this country” because they have been exposed to the socializing institutions of American society, such as church, school, and family,²⁷⁶ new immigrants have not experienced the same socialization process. Thus, the position favoring an affirmative cultural defense views as unfair holding “cultural defendants” responsible for knowing the underlying norms of acceptable, non-criminal behavior.²⁷⁷ Moreover, the affirmative defense position asserts that even knowing the prohibitions of American law may not prevent a defendant from acting on deeply engrained cultural values. Obedience to the law becomes more effective when people “believe that the law embodies morally correct values.”²⁷⁸

The motivation underlying the affirmative defense position is that current criminal law defenses fail to meet the needs of cultural defendants²⁷⁹ because the law does not reflect the social and moral norms to which they are accustomed. Thus, the affirmative defense seeks to achieve for Asian immigrant defendants what white defendants already have: a criminal law whose defenses are a product of the same culture as the defendant. If current American criminal law reflected society’s multiracial and multicultural diversity, instead of reflecting only Anglo-American jurisprudential values, there would be no need for a cultural defense.²⁸⁰

Proponents of the cultural defense as excuse argue that it would further the important societal value of cultural pluralism by allowing people from different cultures to live their lives in accordance with their unique values.²⁸¹ To these proponents, repudiating a cultural defense “may send out a

274. Note, *supra* note 9, at 1296 n.17.

275. *Id.* at 1298.

276. *Id.* at 1299.

277. *Id.*

278. *Id.* at 1300.

279. See *id.* at 1296-98; see also *infra* notes 326-38 and accompanying text.

280. The battered woman’s defense is one example of a defense that was developed to meet the specific needs of battered women who kill their batterers. See Elizabeth Vaughn & Maureen L. Moore, *The Battered Spouse Defense in Kentucky*, 10 N. KY. L. REV. 399, 416-20 (1983); Cheryl Frank, *Driven to Kill*, A.B.A. J., Dec. 1984, at 25.

281. Note, *supra* note 9, at 1300.

broadier message that an ethnic group must trade in its cultural values for that of the mainstream if it is to be accepted as an equal by the majority."²⁸²

According to its advocates, a substantive cultural defense would also help to maintain social order, deter criminal conduct, and preserve immigrant groups' cultural values.²⁸³ One commentator argues that the cultural defense would "provide judicial fairness" and "prevent the majority culture from using the justice system to overpower and suppress a different culture or group."²⁸⁴ As one advocate asserts in support of the cultural defense, American society is "only pretending to accept cultural diversity if it rejects it when it really matters."²⁸⁵

2. *The Affirmative Defense Position as Exclusionary*

The substance of the cultural-defense-as-cultural-excuse position does not seem at first glance to be that of exclusion because the defense appears to recognize minority cultures and to support cultural pluralism. Deeper analysis reveals, however, that the same principles that animated the socio-political exclusion of Asians also animate this position.

Historically, exclusionary legislation targeted Asian immigrants on the basis of their racial and cultural differences. The resulting treatment ghettoized Asians, isolating them and subjecting them to special rules. Denial of citizenship provides the most compelling parallel. White society specifically limited citizenship to whites and actively targeted Asians for exclusion from the body politic.²⁸⁶ Once isolated and designated as "aliens ineligible to citizenship," Asian immigrants were subject to a vast array of punitive and harassing laws applicable only to them.²⁸⁷

Allowing an affirmative cultural defense also targets Asians for exclusion. The defense designates Asian immigrants as part of a limited class by virtue of their foreignness, both geographic and cultural.²⁸⁸ Raising the defense would trigger special rules applicable only to this class of defendants. Each person would be judged "according to the standards of her native culture."²⁸⁹ The affirmative defense would thus isolate Asian immigrants and, in the words of one commentator, "creat[e] different laws for different people."²⁹⁰

282. *Id.* at 1302.

283. *Id.* at 1305-06.

284. Lam, *supra* note 9, at 67-68.

285. DeBenedictis, *supra* note 9, at 28, (quoting Alison Dundes Renteln, lawyer and professor of political science, University of Southern California).

286. See *supra* notes 42-59 and accompanying text.

287. See *supra* notes 60-82 and accompanying text.

288. Recent commentary has suggested that the cultural defense be available to modern Third World immigrant defendants. DeBenedictis, *supra* note 9, at 29.

289. Note, *supra* note 8, at 1300.

290. DeBenedictis, *supra* note 9, at 29 (quoting Al Giannini, deputy district attorney for San Francisco).

The goal of proponents of the cultural defense—to make the justice system more responsive to the different cultural values of its citizens—is a worthy one, but as I have argued in Part I, American society has sought, through exclusion, to minimize the effect of Asian Americans' socially constructed, metaphysical difference. Cultural excuse would operate to mark Asian cultures as irreconcilably different from the American mainstream, isolating immigrants for that difference, and subjectively judging them on that ground.

The criminal justice system could be more sensitive to different cultural values not through adoption of different rules for those with different values, but by including people with those different values in the re-formulation of legal rules. As Sheila Foster observes, white society developed normative criteria "without certain cultural values and characteristics in mind and without the participation of those who historically had been excluded from institutions—namely racial and ethnic minorities."²⁹¹

Allowing a defendant to raise her culture as an affirmative defense to a criminal act also dangerously shifts the relevant focus of the judicial inquiry away from the nexus between the defendant's state of mind and her act to the merits of her culture. This shift in focus sacrifices a guiding principle in American criminal law: individual responsibility. In determining whether a defendant shall be convicted and punished, the judicial inquiry usually focuses on the link between the defendant's state of mind and her actions. However, the relationship between the act and the defendant's intent becomes attenuated when the inquiry centers instead on the issue of culture. In effect, the defendant is not on trial, her culture is. In Dong-lu Chen's case, the defense presented expert testimony on husband-wife relationships, divorce, infidelity, and resolution of such matters in Chinese culture.²⁹² The judge and jury thus focused on learning the norms and quirks of Chinese culture, rather than on assessing testimony about the sequence of events leading up to the confrontation and the ensuing homicide.

The affirmative cultural defense position also makes a fatal assumption. By designating culture as the operative factor for excusing the defendant's conduct, the position assumes that culture is a static element that can be quantified and neatly summarized.²⁹³ Rather, culture is a fluid, constantly evolving concept. For example, Laotian Hmong women have

291. Foster, *supra* note 213, at 157 n.209.

292. See Sherman, *supra* note 1, at 28.

293. The cultural defense should be distinguished from the battered woman's syndrome because, although the two may at first seem similar, they are not. The cultural defense seeks to encompass a vast range of factors that include social mores, beliefs, practices, and values about gender, family, government, and religion, to name only a few. The challenge of creating and mounting a cultural defense is to select from many cultural factors those that are relevant and applicable. The difficulty is in trying to encapsulate an entire culture in a single criminal law defense.

In contrast, the defining factor in battered woman's syndrome is battery by a husband or boyfriend. Moreover, to find that a woman suffers from the syndrome, there are specific events, symptoms, or characteristics that occur or appear repeatedly, such as the victim's attempts to calm the batterer, the

become aware of their legal rights in the United States and have increasingly objected to *zij poj niam*, the traditional practice of marriage by capture.²⁹⁴ Contact with different concepts of gender roles has influenced Laotian immigrant culture such that it would be exceedingly difficult to define what is Hmong "culture" and describe its relevant courtship rituals.

Statements defining a culture also make dangerous generalizations. What may be true about an individual is not necessarily true for an entire group. In *People v. Kimura*,²⁹⁵ the defendant, upon learning of her husband's infidelity, proceeded to follow the Japanese ritual of *oya-ko-shinju* (parent-child suicide). Members of the Japanese American community in Los Angeles stated that *oya-ko-shinju* is not considered murder in Japan. However, an examination of *oya-ko-shinju* cases in Japan did not produce a definitive conclusion about the state of Japanese law and culture with regard to *oya-ko-shinju*.²⁹⁶ Thus, this debate suffers from the inability accurately to describe and evaluate the significance of relevant cultural concepts.

The affirmative defense results in essentialization because it embodies a limited number of specific characteristics in encapsulating the totality of Asian culture. Not only does this reduce to a unitary quality the vibrancy and fluidity of culture, it also presents an "essential" Asian culture divorced from the realities of Asian American experience. Such a monolithic "understanding" of Asian culture sweeps away the diversity of ethnicity, religion, sexual orientation, traditions and other aspects within Asian American communities. As Professor Harris argues about race and gender essentialism in feminist legal theory, the result is that "some voices are silenced in order to privilege others," and the voices that are usually silenced and excluded are "the same voices silenced by the mainstream legal voice."²⁹⁷

batterer's uncontrollable rage, and his subsequent pleas for forgiveness. See Vaughn & Moore, *supra* note 280, at 416 n.37.

294. *Zij poj niam* is a marriage ritual practiced by Laotian Hmong tribesmen. The practice begins with ritualized flirtation and culminates in the man's capture of his bride-to-be and the consummation of their union at his family's home. The tradition requires that the woman weep, moan, and protest the abduction in order to appear virtuous and desirable. The Hmong suitor is required to ignore her protests and firmly lead her to the bedroom to consummate the marriage. If he is not assertive enough, he will appear weak and undesirable to the woman. See Alan Dershowitz, "Marriage by Capture" Runs Into the Law of Rape, L.A. TIMES, June 14, 1985, pt. II, at 5. Once the marriage is consummated, other Hmong men consider her unmarriageable. Sherman, *Legal Clash*, *supra* note 9, at 27.

295. No. A-091133 (Super. Ct. L.A. County Apr. 24, 1985), cited in Sherman, *Legal Clash*, *supra* note 9, at 1.

296. Some cases of *oya-ko-shinju* are prosecuted in Japan, leading one commentator to conclude that in Japan, "legal treatment is inconsistent with the socio-cultural definition of *oya-ko-shinju*, or legal treatment is consistent with a socio-cultural definition of *oya-ko-shinju* that is more complex than a monolithic notion of suicide It is quite possible that both are at work here." Taimie L. Bryant, *Oya-ko-Shinju: Death at the Center of the Heart*, 8 UCLA PAC. BASIN L.J. 1, 28 (1990).

297. Harris, *supra*, note 140, at 585.

Most notable of those silenced are women.²⁹⁸ In many, perhaps all, Asian cultures, the subordination of women is traditional and commonplace.²⁹⁹ When we privilege the voices of Asian men, who rely on their cultures' traditions of beating and killing their wives to excuse their acts, women are silenced. An Asian American community activist observes, "Asian women do not have access to the court system in their own countries and fear involving any government agency in domestic affairs."³⁰⁰ With the *Chen*³⁰¹ ruling, "new immigrant women battered by their husbands are even more fearful of involving the courts."³⁰² Consequently, Asian immigrant women are indirectly precluded from exercising their legal rights.

The defense also essentializes culture by defining it as the exclusive province of particular groups. Under affirmative defense proponents' conception of culture, some groups have culture, others do not. Where American society once essentialized Asian culture by stigmatizing and isolating the Chinese, the affirmative defense accomplishes the same result by demarcating whose cultural values are acceptable to excuse criminal conduct. By its very terms, the cultural defense is a strategy that is available only to those who have a culture different than white mainstream culture. The defense thus operates to reify the artificial metaphysical difference and distance between Asian Americans and white Americans.

Moreover, an affirmative cultural defense raises issues it cannot resolve. First, "culture" cannot be defined through bright line tests or concrete categorization because it is by nature ambiguous.³⁰³ Defining the

298. See *infra* text and notes 372-84, 421-28.

299. In the patriarchal system of traditional East Asian cultures, "the status of the wife is quite low; her position is lower than that of her husband, lower than that of her husband's parents, and lower than that of her husband's older siblings." Steven P. Shon & Davis Y. Ja, *Asian Families*, in *ETHNICITY AND FAMILY THERAPY* 208, 211 (Monica McGoldrick et al. eds., 1982). Under Confucianism, a woman has only three paths in life: obedience to her father, then her husband, and then her eldest son. *Id.* at 211-12. In addition,

sons are clearly more highly valued than are daughters. . . . During very difficult times newborn female infants were left to die. The family name and lineage is passed through the male side Females are raised for the families of others; sons are raised to marry, bring women into the family, and have [sons] who will broaden and extend the family line.

Id. at 212-13; see also Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 *STAN. L. REV.* 1311, 1317-20 (1991) (characterizing elements of Asian-Pacific culture as sanctioning violence against women); Flavia, *Violence Against Women*, *LAW. COLLECTIVE*, Mar. 1987, at 4 (discussing subordination of and violence against women in India).

300. Schuyler, *supra* note 2, at 12 (quoting Pat Eng, New York Asian Women's Center).

301. See *supra* text accompanying notes 1-5.

302. Schuyler, *supra* note 2, at 12 (quoting Pat Eng, New York Asian Women's Center).

303. Of course, not all criminal law categories are clear cut. For instance, the reasonableness test and heat of passion defense are quite ambiguous. In the objective reasonableness test, however, the focus is whether a reasonable man, as defined by the jurors, would have acted or reacted the same way the defendant did. Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 *LOV. L.A. L. REV.* 435, 451 n.95 (1981). Cf. *State v. Stewart*, 763 P.2d 572, 577 (Kan. 1988) (reasonable woman standard).

In the cultural defense situation, the focus is on an abstract notion of culture, rather than on the defendant's acts and her understanding of the circumstances. Thus, the difficulty of applying a cultural

parameters of a group who could raise the defense would require crafting a rule that would take into account the innumerable permutations of race, ethnicity, language, education, religion, culture, gender, length of residence in the United States, and age. Use of these factors to measure behavioral assimilation would be a difficult and subjective task at best.

Consider for example, a Chinese man who has resided in the United States for twenty years. He has always lived and worked in Chinatown and speaks minimal English. Now consider a Filipina woman who arrived in the United States one year ago for graduate school at U.C. Berkeley. Can either of them raise a cultural defense? Can both? Under a rule that would limit the availability of the defense to immigrants resident in the United States for ten years or less, the Chinese man would be ineligible, but it is doubtful that he has absorbed the norms underlying American criminal law, since he has had only minimal exposure to them, if any at all. The Filipina's enrollment in a graduate program would expose her to American social norms, but her recent arrival would allow her to raise a cultural defense under a ten-year limitation. This might be true despite the fact that the Philippines is a Catholic nation, a former American colony, and English was, until recently, the national language.

Creating a flexible rule that will be broadly applicable is both infeasible and untenable. Suggested judicial measurement of "the defendant's assimilation into the mainstream culture"³⁰⁴ is an unworkable proposition. Before such a "measurement" can occur, society, the legislature, or the legal system must first define assimilation and then create a standard with which to measure a defendant's assimilation into mainstream culture. The tendency to isolate or exclude Asian American metadifference may adversely impact the creation of a workable, sensible standard by destroying its objectivity. This tendency would be reinforced by the lack of diversity in government, giving sway to private biases in the creation of a standard applicable to Asian people. The same difficulties apply in selecting which cultural elements will be relevant to the defense. Those making the selection must necessarily rely on their own cultural experiences and values. Thus, the cultural elements selected may not reflect the actual importance of the element in the native culture.

On a practical level, a myriad of procedural and implementational issues exist regarding when to raise the defense and under what circumstances. One commentator implicitly limits the use of the defense to new immigrants, or to those who have not yet absorbed American criminal law's

defense test as one would apply a reasonableness test is that the difference-as-sameness approach would prevail. See *infra* Part II.D.2. In other words, only those cultural aspects of the defense that were perceived as being substantially similar to aspects of white America's culture would be deemed "reasonable."

304. Note, *supra* note 9, at 1310; Lam, *supra* note 9, at 51.

underlying norms.³⁰⁵ Another commentator has suggested limiting the availability of the defense to the first ten years an immigrant is in the country.³⁰⁶ Immigrant status alone, however, is an unreliable indicator. The logical extension of using immigrant status as a proxy for acculturation would make naturalization the last point before which an immigrant defendant could raise a cultural defense.

Ultimately, the danger that the affirmative defense position poses does not derive from the actual use of the defense because it is extremely unlikely as a practical matter that any jurisdiction will create or adopt the defense as an excuse for criminal acts.³⁰⁷ Rather, the real danger lies in the reproduction and perpetuation of stereotypes about Asian Americans present in the debate itself. Implicit in the discussion of Asians' socializing to white American norms is the assumption that Asian cultural norms are vastly different from and inferior to white mainstream norms.³⁰⁸ For example, one commentator asserts that Asian and American cultures represent opposite extremes, and that Asian immigrants face "greater disparity in social mores than do their European counterparts."³⁰⁹ Historical images of Asian immigrants as different and mysterious outsiders will resonate in any discussion that advocates the creation of a special set of rules applicable only to Asian immigrants. While the ostensible purpose of the advocacy of a cultural defense is to benefit Asian Americans, application of special rules only perpetuates the historical management of Asian American difference. The old exclusionist method varies in form, but not in substance.

C. *Against the Cultural Defense*

1. *Principles of the Anti-Defense Position*

This widely held position explicitly rejects the notion that a defendant's cultural background can operate as an excuse for criminal conduct. Its supporters believe that the current provisions in the criminal law are sufficient to meet the defense needs of defendants who commit culturally motivated crimes. Additionally, as one commentator has noted, in prosecuting such cultural crimes, the "American criminal justice system is instructing the foreigner that his acts are an unacceptable social behavior, and contrary to public policy in the United States."³¹⁰ The opponents of the cultural defense assert that an individual must conform to the laws that society

305. See *id.* at 1299. Whether the two categories are mutually exclusive is unclear.

306. DeBenedictis, *supra* note 9, at 29 (referring to statement by Judge Joan Dempsey Klein, California Court of Appeals, co-founder, National Association of Women Judges).

307. Neither federal nor state courts have adopted a formal cultural defense, nor do the Model Penal Code or California Penal Code recognize the defense. Lam, *supra* note 9, at 49.

308. I do not dispute that Asian norms and values are different. I argue only that American society has constructed a metaphysical divide between things Asian and things white, constituted in significant part by the judgment that Asian people are inferior and that Asian values are wrong.

309. Lyman, *supra* note 9, at 91.

310. Sheybani, *supra* note 9, at 781.

derives from its moral and cultural heritage.³¹¹ Failure to conform requires and justifies punishment. The "punishment of newcomers under the criminal law aids [enculturation] by bringing United States laws to the attention of the immigrant communities."³¹² According to this view, penalizing defendants "inform[s] them that they have to conform to American concepts."³¹³ Defendants will then "alter those traditions that directly conflict with [American] laws."³¹⁴ Without criminal prosecution, the defendants "will not as readily conform their customs to those laws."³¹⁵ Asian immigrants who do not share the same heritage, customs, or values must assimilate and "abando[n] . . . some of the 'old ways.'"³¹⁶

Cultural defense opponents believe that to allow such a defense would be both unfair and unnecessary. Unfairness arises because a cultural defense would "single out aliens for preferential treatment in criminal proceedings. It would provide an excuse for illegal conduct which is not available to the majority of American society."³¹⁷ Finally, a cultural defense is said to be unnecessary because current defenses in criminal law are sufficient.³¹⁸

2. *The Anti-Defense Position as Coercive Assimilation*

At first blush, the anti-defense position seems not only logical, but correct. Immigrants who come to this country must respect and obey its laws. To the extent that the immigrant must relinquish her own cultural values, this is a necessary casualty of becoming "American."

Such sentiments are the modern counterparts of the coercive assimilationist legislation of the late nineteenth and early twentieth centuries. Similar to that legislation, the position that Asian immigrants, regardless of their beliefs or customs, must conform their conduct to societal norms as reflected in federal or state criminal codes does not recognize the validity of Asian cultural practices. The different cultural values that underlie these Asian practices are to be eliminated through the same historical method of coercive assimilation: criminal prosecution and penalties. Implicit in this position is the judgment that American ways are better, while foreign ways are inferior and wrong.³¹⁹

311. See Lyman, *supra* note 9, at 87, 88, 100.

312. Sams, *supra* note 9, at 349.

313. Sheybani, *supra* note 9, at 781.

314. Sams, *supra* note 9, at 349.

315. *Id.* at 353.

316. Lyman, *supra* note 9, at 88.

317. *Id.* at 116.

318. Sams, *supra* note 9, at 337.

319. For instance, CAL. PENAL CODE § 598(b) (Deering Supp. 1993) criminalizes the possession, importation, selling, buying or accepting of an animal traditionally kept as a pet with the sole intent of killing the animal for use as food. The law was aimed at immigrants from cultures whose cuisines include dog meat. Mary Roach, *Don't Wok the Dog*, CALIFORNIA, Jan. 1990, at 18.

The first premise of the anti-defense position is that laws develop from society's moral and cultural heritage and help to maintain social order. Each society embeds its particular values in law. The problem with applying this premise to Asian Americans is that Asian cultural values and norms have not been incorporated into the law.

Implicit in the claim that disallowing a cultural defense will help maintain social order is the belief that a society can function properly only if the mainstream subsumes and controls the difference of those who have different values and practices. For instance, one commentator claims that "[w]e would be living in a state of anarchy if each foreigner's culture and law was [sic] the determinant factor of what is right and wrong. There is a need for uniformity in the law."³²⁰

This argument ignores how Asian Americans have been excluded from contributing to the development of American law, such that American law does not embody values relevant to adjudicating the culpability of Asian Americans who have committed certain crimes. To claim that Asian Americans should obey the law because the law embodies *their* cultural norms is false, misleading rhetoric that obscures the assimilationist dynamic and principles.

This assimilationist argument cloaks itself in cultural terms, but appeals both to the white majority's xenophobia and to its fear of the disintegration of law and order. In spirit, both strands of the the appeal resurrect and amplify nineteenth century anti-Asian rhetoric. The fear of anarchy recalls the nineteenth century belief that allowing the Chinese (and other Asians) to enter the United States would sound the death knell for democratic government in America: the Chinese were said to be "a population befouled with all the social vices, with no knowledge or appreciation of free institutions or constitutional liberty, with heathenish souls and heathenish propensities [W]e should be prepared to bid farewell to republicanism."³²¹ These sentiments reverberate in the statement that anarchy would ensue "if each foreigner's culture and law was [sic] the determinant factor of what is right and wrong."³²²

The anti-defense position's exclusionary animus derives from nineteenth century anti-Asian sentiment. The California Supreme Court's opinion in *People v. Hall*³²³ provides a useful backdrop to the position which opposes the cultural defense. The court stated that the Chinese

recogniz[e] no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; . . . [they are] a race of people whom nature has marked as inferior, and who are incapable of progress or

320. Sheybani, *supra* note 9, at 782-83.

321. *The Growth of the United States through Emigration—The Chinese*, *supra* note 85, at 4.

322. Sheybani, *supra* note 9, at 782-83.

323. 4 Cal. 399 (1854).

intellectual development beyond a certain point, as their history has shown.³²⁴

The motivation behind the arguments for disallowing the cultural defense draws heavily from this legacy. Its opponents perceive the adoption of the cultural defense as impermissible because it is crucial that Asians, once in America, rid themselves of their "prejudices and national feuds" (read: different cultural practices), in which they engage in "open violation of law."³²⁵ This is accomplished by stripping the defendant of her culture and treating her as an "American." The force of the state's police power will exorcise the unfitting and un-American cultural practices, resulting in coercive assimilation. The terminology has shifted from race to culture, but the paradigm is the same.

Insistence on the adequacy of current criminal law defenses follows directly from the initial proposition that the criminal law embodies the guiding norms and values of the society that created it. Recognizing that the criminal law does not include Asian values weakens this claim. A law that does not incorporate Asian values cannot produce defenses capable of meeting the needs of Asian American defendants. The result is a vicious, futile cycle of repetition: indirectly prohibited from contributing cultural values to the development of law, Asian Americans act on culturally-ingrained norms that subject them to criminal prosecution under white cultural standards.

Furthermore, traditional criminal law defenses offer little protection to a cultural defendant for valid cultural differences. For example, the insanity defense removes criminal responsibility for an act committed during mental illness.³²⁶ However, differing cultural practices cannot be equated to mental illness. Moreover, civil commitment following a determination of insanity can last indefinitely. Such punishment is completely inappropriate and unrelated to the nature of a cultural crime. In jurisdictions with a diminished capacity defense, the cultural values of the defendant would be equated to "an abnormal mental condition at the time of the crime, [where] the condition was not sufficient to constitute legal insanity."³²⁷

324. *Id.* at 404-05.

325. *Id.*

326. Under the *M'Naghten* test, the defendant is entitled to acquittal if she proves that a disease of her mind caused a defect of reason such that she lacked the ability at the time of her actions either to know the wrongfulness of her actions, or understand the nature and quality of her actions. *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843). The "irresistible impulse" test requires that a mental disease have prevented the defendant from controlling her conduct. *Parsons v. State*, 2 So. 854 (Ala. 1887). The *Durham* test requires that the criminal conduct be a product of mental disease. *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954), *overruled by* *United States v. Brawner*, 471 F.2d 969 (1972). Under the Model Penal Code, a defendant must show that she suffered from a mental disease or defect and, as a result, lacked substantial capacity either to appreciate the criminality of her conduct, or to conform her conduct to the requirements of the law. MODEL PEN. CODE § 4.01 (1962).

327. Sams, *supra* note 9, at 341. California no longer recognizes diminished capacity. See CAL. PENAL CODE § 25 (West 1992).

The mistake of fact defense is also ill-suited to the cultural defendant. The very cultural factors that propel a defendant to commit a proscribed act may preclude fulfillment of the defense's requirements since the defendant did not act under a mistake of fact at all.³²⁸ Similarly, self-defense will apply only under specific circumstances and is of no use to the defendant unless those circumstantial requirements are met.³²⁹

The argument for the sufficiency of traditional defenses assumes that cultural defendants are sufficiently like ordinary criminal defendants to make effective use of those defenses where they apply. A cultural defendant, however, does not fit neatly into traditional criminal law categories. She is not necessarily a "garden variety" criminal, whose crimes may place an entire community in danger. When Fumiko Kimura, for example, learned of her husband's infidelity, she did not seek out the mistress and her husband, nor did she threaten neighbors, passers-by, or strangers with the violence of her reaction. She undertook the Japanese ritual of *oya-ko-shinju* and tried to kill herself and her children.³³⁰ Kong Moua was charged with rape and kidnapping, but he believed that the woman's protests were part of the Hmong ritual of marriage consummation.³³¹ Kong Moua was not a serial rapist terrorizing a neighborhood. This was not stranger-rape and kidnapping. In Helen Wu's case, she feared for the well-being of her son at the hands of his indifferent and unreliable father. Unable to protect and care for her child in this life, she felt her only recourse was for them, mother and son, to be together in the afterlife.³³² Helen Wu did not threaten random children with serious bodily harm. Like the other defendants,

328. Defendants in cultural defense cases often will have acted solely under the dictates of cultural norms, and not under a mistaken understanding of fact. See, e.g., *People v. Kimura*, No. A-091133 (Super. Ct. L.A. County Apr. 24, 1985), cited in Sherman, *supra* note 1, at 28 (defendant learned of her husband's infidelity and followed the Japanese ritual of *oya-ko-shinju* (parent-child suicide) to rid herself and her children of shame); *People v. Wu*, 286 Cal. Rptr. 868, 884-85 (1991) (defendant killed her illegitimate son to care for him in the afterlife rather than leave him to be ill-treated by his father), *withdrawn*, 1992 Cal. LEXIS 310 (1992); see also Sherman, *Legal Clash*, *supra* note 9, at 1; Lam, *supra* note 9, at 56.

329. It is, of course, possible that cultural issues could be incorporated into self-defense law, as was the case in Hooty Croy's trial. In Croy's trial for killing a police officer, defense experts testified about white racism and the legacy of violence and subjugation of Native Americans, all of which contributed to Croy's belief on the night of the shootings that "the things [his] grandmother had told [him] were coming true, that they were going to kill us all." Katherine Bishop, *One Indian's Revolving Path to Prison*, N.Y. TIMES, May 26, 1991, at 24. However, it is important to note that although the defense presented the history and legacy of racism and discrimination against Native Americans in the United States, it was never argued that there was a trait in Native American culture that condoned the killing of a police officer. Schuyler, *supra* note 2, at 12.

330. Sherman, *Legal Clash*, *supra* note 9, at 1. Kimura survived the suicide attempt. Her children did not. *Id.*

331. Sherman, *supra* note 1, at 28.

332. See *Wu*, 286 Cal. Rptr. at 872.

Helen Wu acted under the specific stresses of her cultural norms. Her crime is culture-specific, and its participants share her cultural worldview.³³³

To the extent that a cultural defendant's crimes may have caused danger to the wider community, prosecuting and punishing the defendant under applicable laws could "serve to restore faith in the legal system's ability to preserve social order."³³⁴ It is necessary, however, to be wary of and guard against preserving law and order under the aegis of coerced assimilation.³³⁵

Cultural defense opponents offer one last option to the cultural defendant: "the discretion available to a sympathetic prosecutor."³³⁶ In practice, prosecutors could decline prosecution, reduce the charges, or recommend a lighter punishment. However, these procedures offer "neither guarantees of procedural safeguards nor guidelines on the relevance of cultural factors."³³⁷ Further, the lack of racial and ethnic diversity in the bar, the judiciary, and prosecutors' offices may result in attitudes of indifference or insensitivity to cultural issues, as well as the persistence of stereotypic notions about Asian Americans.

Such governmental discretion and the absence of guidelines are reminiscent of the historical circumstances that led to the institutionalization of prejudice against Asian Americans years ago. Reliance on a sympathetic or understanding prosecutor assumes that the prosecutor is sympathetic, has freedom from other pressures to exercise prosecutorial discretion, and will choose to exercise it for the benefit of the defendant.³³⁸

Another recurring argument against a cultural defense is that only Asian immigrants would be able to raise it, and this constitutes unacceptable unfairness to the majority of Americans who cannot raise a cultural defense.³³⁹ Underlying this complaint is the fiction that everyone is equal before the law, and that differences—race, gender, religion, age, and sexual

333. Compare *People v. Kimura*, No. A-091133 (Super. Ct. L.A. County Apr. 24, 1985), cited in Sherman, *supra* note 1, at 28 (defendant pleaded guilty to two counts of manslaughter for death of her children in ritual parent-child suicide attempt) and *People v. Moua*, No. 315972-0 (Super. Ct. Fresno County Feb. 7, 1985), cited in Sherman, *Legal Clash*, *supra* note 9, at 27 (defendant allowed to plead guilty to misdemeanor false imprisonment instead of rape and kidnapping in "marriage by capture" custom) and *People v. Wu*, 286 Cal. Rptr. at 887 n.6 (second degree murder conviction reversed and remanded for new trial with instructions for jury to consider effect of defendant's cultural background on state of mind in killing her son) and *People v. Chen*, discussed in Sherman, *supra* note 1, at 28 (husband killed wife after learning of her infidelity) with Sams, *supra* note 9, at 353 (allowing a cultural defense will cause "United States residents [to be] threatened by the crimes of newcomers.").

334. Note, *supra* note 9, at 1306 n.65.

335. In a society that is increasingly multicultural, albeit reluctantly and under protest, see sources cited *infra* note 346, it will be more difficult to remain culturally insulated. The marriage-by-capture case is illustrative: Among women are turning to the police and courts to protect their rights against kidnapping and rape. See *supra* text and notes 294-310.

336. Lyman, *supra* note 9, at 117.

337. Note, *supra* note 9, at 1297.

338. For a general discussion of the limitations on both prosecutorial charging and plea bargaining power, and on judicial sentencing discretion, see Gary I. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61 (1993).

339. Sams, *supra* note 9, at 350-51.

orientation, among others—are irrelevant because the law and legal concepts embody neutral principles that ensure determinate and objectively fair results.

To give Asian immigrants an extra benefit, an extra defense that white Americans do not have, seems to some like preferential treatment suspiciously reminiscent of race-based preferential policies like affirmative action. However, this position misses the fact that white Americans would not be able to raise a cultural defense because they have no need for a cultural defense. Modern American criminal law already embodies their mainstream values and mores. Because white society created the dominant culture and its rules, there is no culture clash between mainstream traditions and the requirements of the criminal law. The *entire system* is white America's privilege.³⁴⁰

In contrast, Asians have been excluded from meaningful sociopolitical participation, and that exclusion has repercussions today. Unable to vote and thus to contribute their cultural values to societal norms through the legislative-representative process, Asian American voices have been silenced in the past. As the result of this silencing, patterns of coercive assimilation and exclusion have duplicated themselves with alarming similarity. Criminal laws prohibit the practice of certain customs and traditions such that Asian Americans still are not recognized in the "societal norm" and the acceptable customs it creates.

In the nineteenth century, municipal ordinances criminalized the Chinese cultural practices of using poles and baskets to transport laundry and attempted to criminalize the wearing of queues.³⁴¹ Asians were prohibited from fishing in California's waters, and Chinese burial practices were effectively halted because of extensive administrative requirements.³⁴² In the nineteenth century, the white mainstream successfully sought both to isolate and exclude Asian cultural values from the American social fabric. In the late twentieth century, this exclusionary legacy survives, as attested to by the popularity and success of the English-only movement and its rhetoric.³⁴³ The California Penal Code provision that criminalizes aspects of Asian cuisine, such as the sale and/or possession of a pet for gastronomic purposes, is the modern incarnation of the queue ordinance.³⁴⁴

Furthermore, the stereotypes that justified the coercion of Asian immigrants a century ago still exist to justify the coercion of Asian Americans today. Where Asian immigrants were once labelled as degraded and inferior, the modern analogue is the indirect labelling of Asian culture as inferior

340. See Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE AND FREEDOM, July/Aug. 1989, at 10.

341. See *supra* text and notes 167, 168.

342. See *supra* text and notes 169-70.

343. See *supra* text and notes 175-78.

344. CAL. PENAL CODE § 598(b) (Deering Supp. 1993); see also Roach, *supra* note 319, at 18.

to white mainstream culture. In the nineteenth century, white society viewed Asian people as barbaric and uncultured in comparison to white people.³⁴⁵ The twentieth century corollary is that while Asian people are neither inferior nor backwards, their culture is.

Thus, to maintain the integrity of American society, it becomes necessary to exclude those unsavory, inferior Asian elements. By excluding a cultural defense, white society coerces conformity with specific cultural values by threatening prosecution and incarceration. Only after Asian Americans give up their cultural practices and values will mainstream society consider treating them as equals. Mainstream society thus dictates the terms of cultural acceptance and withholds that acceptance until the outsider complies.³⁴⁶

This fierce and relentless social pressure to conform exacts a heavy toll on Asian Americans. At best, society's message is that Asian culture is "exotic" when our values overlap with white American values, such as the sexual (de)valuation of women.³⁴⁷ Usually, however, it is viewed as patriarchal, sexist and inferior to white American culture.³⁴⁸ The American criminal justice system decrees that the Asian practice of eating dog meat is inhumane and criminal. The underlying message to Asians is: "Be American. Eat American food. If not, you will go to jail."³⁴⁹ A companion to the gastronomy lesson is the message to Asian nien: "Don't kidnap

345. Chinese people's "mendacity is proverbial; [they are] a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown . . . between whom and ourselves nature has placed an impassable difference." *People v. Hall*, 4 Cal. 399, 405 (1854).

346. Critics would argue that mainstream culture is no longer purely white. While popular culture might exhibit some diversity—writers such as Toni Morrison, Fae Myenne Ng, and Sandra Cisneros, and musicians such as Wynton Marsalis and Jon Jang are examples—there is also a marked backlash against multiculturalism. For some, multiculturalism is the essence of true evil and the root of America's problems, and American culture is the fixed property of white, Western European Christians. See, e.g., SCHLESINGER, *supra* note 82 (referring to the declining influence of Western tradition in American culture and society); ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987) (lamenting the increasing de-emphasis on Western culture in American education); DINESH D'SOUSA, *ILLIBERAL EDUCATION* (1990) (attacking trends of multiculturalism at major universities as weakening the traditional curriculum).

347. See *supra* Part I.D.2.b.

348. The image of Asian immigrant culture is that of a "stagnating, perverse, semi-civilized breeding ground for swarming inhuman hordes." STUART C. MILLER, *THE UNWELCOME IMMIGRANT* 11 (1969). Ethnicity and cultural heritage become "a handicap to be overcome, something to be ashamed of, and to be avoided. . . . [T]o be different is to be deviant, pathological, or sick." DERRALD WING SUE & DAVID SUE, *COUNSELING THE CULTURALLY DIFFERENT* 35 (2d ed. 1990).

A recent poll showed that more than four in ten blacks and Latinos, and 27% of whites surveyed agreed that Asian Americans are "unscrupulous, crafty and devious in business." *Minorities Biased Against Each Other*, S.F. CHRON., Mar. 3, 1994, at A8; see also TZVETAN TODOROV, *THE CONQUEST OF AMERICA: THE QUESTION OF THE OTHER* 129-30, 153-54, 237-54 (1990) (questioning whether white Western European traditions and cultures can accept representatives of other cultures as different, yet equal and worthy of respect, given the historical treatment of "different" people as "inferior").

349. One wonders whether the consumption of horse or rabbit meat by French immigrants would result in criminalization.

and rape your girlfriend. Be American. Women are not chattel anymore."³⁵⁰

Of course, it can be argued that the values mainstream society is forcing Asian immigrants to give up—sexism, infanticide, and the subordination of women—are harmful ones that should be relinquished for positive, less oppressive values.³⁵¹ However, the relevant focus here is not on values per se, nor on the merits of those values. It is on cultural coercion and its ramifications: namely, the ways by which mainstream society compels Asian Americans to change their values and the impact this has on Asian Americans. Mainstream American society forces Asian Americans to give up our cultural practices before we can react to different concepts—of culinary ingredients, gender roles, language, and gender equality—and modify or adapt our values and practices in light of these ideas. Coercive assimilation preempts any alternative measures that would recognize the validity and legitimacy of our cultural differences and preserve the community autonomy necessary to decide for ourselves what we value. Criminalizing, excluding, and devaluing Asian values thus leaves Asian Americans with no ground between our inherited culture and American culture whence we may shape our own complex, multiple identities as Asian and American, as men and women.

Excluding a cultural defense is part and parcel of these coercive phenomena. Asian cultural defendants, caught in the impossible assimilationist trap between their own cultural world and that of mainstream America, often act under the dictates of their native values, but are judged and sentenced under a white value standard. Without a cultural defense, they are left with only one alternative: assimilation.

350. Given the grim estimate that one in three women can expect to be raped in her lifetime, Judy Mann, *The Statistic No One Can Bear to Believe*, WASH. POST, Dec. 5, 1990, at D3, the "message" to male Asian immigrants could just as likely be: "Don't be so obvious and most important of all, don't get caught." See *infra* Part II.D.2.

For additional estimates concerning the incidence of rape in America, see David Johnston, *Survey Shows Number of Rapes Far Higher Than Official Figures*, N.Y. TIMES, Apr. 24, 1992, at A14 (683,000 women raped in 1990; 12.1 million women raped at least once in their lifetimes); Helaine Olen and Ronald J. Ostrow, *Date-Rape Gains Attention After Years as Taboo Topic*, L.A. TIMES, Apr. 23, 1991, at A16 (in a 1984-85 study of college students, 80% of rape victims knew their attacker, and more than half were raped by a date).

351. Kimberlé Crenshaw argues that the cultural defense "effectively deflects criticisms of sexist attitudes and practices that subordinate Black women and other women of color in our communities." Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 SO. CAL. L. REV. 1467, 1472 (1992).

Moreover, the argument for giving up old, oppressive ways for better, more enlightened, egalitarian values hinges on the dangerous and faulty premise that these negative values do not exist in American culture, or that if they do, they are isolated and inconsequential. In relative terms, perhaps some American women are "better off" than their Asian counterparts, at least with regard to social attitudes regarding education, work, and motherhood. Nonetheless, American valuations of women have their share of critics. In one feminist scholar's analysis, gender "equality" is a false concept. Catharine MacKinnon writes that American law and society "hold women to a male standard and call that sex equality." MACKINNON, *Difference and Dominance*, *supra* note 140, at 34. For other general feminist critiques of the treatment of women in America, see FEMINIST LEGAL THEORY, *supra* note 220.

Forcing Asian Americans to "give up [our] way of doing things"³⁵² prevents us from constructing our own identities. Sexism and subordination of women *are* parts of our culture and histories; we cannot change that. It can be part of our stories and part of our consciousness without white society decreeing it negative, inferior, or shameful when judged in reference to white American practices. This is a part of what Professor Harris means when she speaks of having multiple and contradictory selves.³⁵³

For Asian American women, parts of ourselves struggle to reconcile the cultural traditions that subordinate us with those parts that reject this domination. Danger arises if the conflict turns into the terrible choice between race-ethnicity loyalty and feminism.³⁵⁴ But if white society strips us of our cultural traditions through coercive assimilation, and if it instead "work[s] to make sure that the Western heritage belongs to everyone,"³⁵⁵ we will not have the opportunity to construct the fragments of race and ethnicity with the fragments of woman into one identity.

D. The Intermediate Approach

1. Principles of the Intermediate Approach

The affirmative defense position would excuse criminal conduct based on culture, and in so doing would perpetuate exclusionary treatment of Asian Americans as different, mysterious outsiders. The anti-defense position would treat cultural defendants no differently than other criminal defendants, and in so doing would ignore the reality that there are cultural differences and cultural cases where traditional defenses are grossly inadequate. The intermediate approach seeks to reconcile the two positions and balance the concerns of each. This moderate position advocates criminal responsibility and culpability for cultural defendants, with cultural background offered to determine the defendant's state of mind and for sentence mitigation or charge reduction. In this way, the hybrid approach appears to recognize cultural difference.

The intermediate approach supports the limited use of cultural factors to show the defendant's state of mind (*mens rea*) at the time the criminal act was committed. The defendant's culture can operate as a "factor by which an individual's state of mind may be gauged. It can illustrate the existence of facts which support a lack of specific intent; it cannot negate a showing

352. Cathy Young, *Feminists' Multicultural Dilemma*, CHI. TRIB., July 8, 1992, at 15 (quoting Margaret Fung, executive director, Asian-American Legal Defense and Education Fund).

353. See Harris, *supra* note 140, at 584 ("[C]onsciousness is . . . a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated.").

354. For a powerful and compelling portrayal of this dilemma, see HONG KINGSTON, *THE WOMAN WARRIOR*, *supra* note 127.

355. Young, *supra* note 352.

of general criminal intent.”³⁵⁶ For example, in *People v. Chen*,³⁵⁷ an expert witness testified about adultery in Chinese culture,³⁵⁸ and this evidence “help[ed] explain why Dong-lu Chen . . . became temporarily deranged upon learning of his wife’s extra-marital affair.”³⁵⁹ In *People v. Wu*, a clinical psychologist testified at trial that Helen Wu’s “cultural background was very intertwined with her emotional state on the evening of the killing.”³⁶⁰ The California Court of Appeal ruled that she was entitled to a new trial where the jury might consider “evidence of defendant’s cultural background in determining the existence or nonexistence of the relevant mental states.”³⁶¹

A second aspect of the intermediate approach allows the prosecutor to consider cultural factors when charging the defendant, although such consideration is discretionary, and mandatory penalty provisions may severely constrain prosecutorial discretion.³⁶² The practical result and the inherent flaws of relying on prosecutorial discretion are the same as under the anti-defense position.³⁶³

Cultural factors can also “mitigate the punishment for a crime, without serving to exculpate the defendant completely.”³⁶⁴ Evidence is admissible if it is relevant, and the trier of fact may consider any admitted evidence.³⁶⁵ Cultural factors can be relevant to the defendant’s motivations, premeditation or deliberation, provocation or heat of passion, and to the defendant’s understanding and perception of the circumstances leading up to and immediately following the charged crime.

2. *The Intermediate Approach as Exclusion-Assimilation Hybrid*

The intermediate approach to the cultural defense combines the two aspects of exclusion and coercive assimilation. Like the model minority myth, the moderate position ostensibly recognizes the salience of cultural difference, allowing its proponents to feel good about their cultural tolerance, while in fact the position recognizes only cultural sameness. Thus, the end result of this position is the collapse of difference into sameness.³⁶⁶

Dong-lu Chen’s case, in which the defendant killed his wife after learning of her infidelity, illustrates this dynamic. At trial, the jury heard an

356. Lyman, *supra* note 9, at 115.

357. Discussed in Sherman, *supra* note 1.

358. See *infra* text accompanying notes 367-71.

359. Sherman, *supra* note 1, at 3.

360. *People v. Wu*, 286 Cal. Rptr. 868, 886 (1991), *withdrawn*, 1992 Cal. LEXIS 310 (1992).

361. *Id.* at 887.

362. See generally Lowenthal, *supra* note 338, at pt. II. Mandatory penalty enhancements include stiffer penalties for use of a firearm, the age of the victim, etc.

363. See *supra* text and notes 336-38.

364. Choi, *supra* note 9, at 88.

365. FED. R. EVID. 402, 403; CAL. EVID. CODE § 351 (Deering 1986 & Supp. 1993).

366. “Cultural sensitivity does not involve abandoning one’s own laws.” Renteln, *supra* note 9, at 25.

expert witness, an anthropology professor, testify that "[i]n traditional Chinese culture, a wife's adultery is considered proof that a husband has a weak character, making him undesirable even after a divorce Moreover, divorce is considered a great shame upon one's ancestors."³⁶⁷ Though the notion of "shame upon one's ancestors" is foreign to mainstream American culture, the anger of the wronged husband is not. The classic Anglo-American manslaughter paradigm is that of the husband catching his wife *in flagrante delicto* and killing her, or her lover, or both.³⁶⁸ Having acted in the heat of passion, his criminal culpability is reduced from murder to manslaughter. The values underlying this reduction are startlingly similar to those in Chinese culture about which the expert testified in the *Chen* case: a wife's adultery is a stain on the husband's honor as a man. Women once were chattel in American society, as were women in Chinese society.³⁶⁹ The subordination of women and the privileging of the male sex-right are common to both cultures.

The expert testimony presented on Dong-lu Chen's behalf serves to underscore these cultural similarities. The jury will process evidence about another seemingly foreign and different culture only to the extent that the jury can relate to it and understand it. Thus, where the jury finds common ground with the defendant, its deliberation and verdict become an exercise in recognizing cultural sameness, not difference. There is no need to compel the defendant to conform to "those customs which are approved by the majority of the members of . . . society."³⁷⁰ The defendant already has the same values. Mr. Chen's subsequent conviction for the lesser charge of second-degree manslaughter³⁷¹ thus comes as no surprise. Here, cultural evidence serves only to reinforce traditional mainstream values and to perpetuate negative images of Asians.

*People v. Moua*³⁷² provides another example of the difference-as-sameness approach. Kong Moua followed the Hmong courtship practice of

367. Sherman, *supra* note 1, at 28.

368. See, e.g., *People v. Bridgehouse*, 303 P.2d 1018, 1022 (Cal. 1956). In fact, Texas codified this paradigm into justifiable homicide: "Homicide is justifiable when committed by the husband upon the person of any one taken in the act of adultery with the wife; provided, the killing take place before the parties to the act of adultery have separated." TEX. PENAL CODE, tit. XV, ch. 11, art. 672 (White 1901). However, justifiable homicide was the strict prerogative of the husband alone. Compare *Cook v. State*, 180 S.W. 254, 256 (Tex. 1915) (if husband caught wife and her lover "in such amorous relations, he would be entitled to kill the wife, as well as the seducer of his wife."), *overruled by Billings v. State*, 277 SW. 687 (Tex. 1925) with *Reed v. State*, 59 S.W.2d 122, 124 (Tex. 1933) (wife killing husband's lover is not within scope of statute that makes homicide justifiable when husband kills his wife's lover).

369. Historically, women in Chinese society were obedient to their fathers, their husbands, and their sons. JOHN K. FAIRBANK & EDWIN O. REISCHAUER, CHINA: TRADITION & TRANSFORMATION 16 (1978). Furthermore, women had no property rights, *id.*, and at times their husbands sold them for cash. See SPENCE, *supra* note 146, at 101.

370. Lyman, *supra* note 9, at 111.

371. Sherman, *supra* note 1, at 3; see also Schuyler, *supra* note 2, at 1 (stating that defense tactics reduced the charge to second degree manslaughter).

372. No. 315972 (Super. Ct. Fresno County 1985), cited in Sherman, *supra* note 1, at 28.

*zij poj niam*³⁷³ and took his bride-to-be to his family home over her protests and then consummated their union. The woman filed a criminal complaint, and the district attorney charged Kong Moua with kidnapping and rape.³⁷⁴ In his disposition of the case, the judge considered the evidence, including literature documenting Hmong marital customs.³⁷⁵ Kong Moua was allowed to plead guilty to lesser charges of misdemeanor false imprisonment; the rape and kidnapping charges were dropped.³⁷⁶ Kong Moua then received a sentence of ninety days in jail.³⁷⁷

The outcome in *Moua* reflects the judge's recognition of cultural sameness, not difference.³⁷⁸ The judge ostensibly sought to consider the cultural practices of the Hmong defendant, but both the judge and the defendant shared the same cultural traditions of rape and sexual subordination. Kong Moua expressed surprise that the woman filed charges against him,³⁷⁹ presumably because the capture and rape of women is an accepted part of the normal course of courtship. The Hmong marriage practice centers on and celebrates the male sex-right: kidnapping for marriage and consummation by force is marital sex, not rape. Presumably, rape is committed by someone else and under different circumstances. Likewise, in Catherine MacKinnon's analysis, American men also believe that rape "must be by someone else, someone unknown," not by them.³⁸⁰ American rape law "adjudicat[es] the level of acceptable force starting just above the level set by what is seen as normal *male* sexual behavior, rather than at the victim's or women's point of violation."³⁸¹ Thus, rape "is a sex crime that is not a crime when it looks like sex."³⁸²

For the judge in *Moua*, race-based cultural issues did not exist. The organizing principles of sex and rape are similar in both cultures, although the Hmong version is much more straightforward and explicit. Normal Hmong male sexual behavior was to capture a bride and consummate their union, through force, at his home. This Hmong form of sex approximates explicit conceptions of rape in American culture. However, the judge based his determination on a consideration of "normal" male sexual behavior, not on whether the Hmong woman believed she had been violated. The prosecutor and the judge both believed that the woman did not genuinely con-

373. See *supra* note 294.

374. Sherman, *supra* note 1, at 28.

375. Oliver, *supra* note 7, at I-1.

376. Sherman, *Legal Clash*, *supra* note 9, at 27.

377. *Id.*

378. In fact, the judge was later quoted as saying that the plea bargain was essential in allowing him the "leeway to get into all these cultural issues and to try to tailor a sentence that would fulfill both [American] needs and the Hmong needs." Sherman, *When Cultures Collide*, *supra* note 9, at 36 & 60 (quoting Judge Gene M. Gomes, Fresno County Super. Ct.).

379. Sherman, *supra* note 1, at 28.

380. MacKinnon, *Feminism, Marxism, Method, and the State*, *supra* note 220, at 188.

381. *Id.* at 189 (emphasis added).

382. *Id.*

sent, but they also believed that the defendant genuinely thought that the woman was consenting to the marriage ritual.³⁸³ It comes as no surprise, then, that the judge approved the defendant's guilty pleas to the lesser charge of false imprisonment. Alan Dershowitz's conclusion that the "American Hmongs will have to change their culture to conform with American concepts of sexual equality"³⁸⁴ seems already fulfilled. But there was never any need for "change"; Hmong and American sexual concepts are the same.

The difference-as-sameness approach results in the recognition of the defendant's culture only when there is explicit or implicit congruence between her cultural values and the mainstream's cultural values. A comparison between the *Kimura* and *Bui* cases illustrates this result. Fumiko Kimura's two children died when she walked into the Pacific Ocean with them after discovering that her husband was having an affair. Kimura received a sentence of five years' probation with psychiatric counseling.³⁸⁵ The public viewed Kimura with sympathy and felt that her sentence of probation was appropriate.³⁸⁶ The sympathy stemmed from identification with the parental anguish of surviving the death of one's child. Fumiko Kimura's harshest punishment would not be meted out by the justice system itself, it would derive from the fact of "surviving and having your kids gone, and knowing you did this horrible thing. . . . [T]he greatest punishment of all [is] that she would be suffering every day of her life, knowing that she killed these two beautiful children."³⁸⁷ The judge and prosecutor shared this view. The presiding judge declared that Kimura "will likely experience punishment for as long as she lives."³⁸⁸ The prosecutor stated that "the pain and suffering Mrs. Kimura has inside is enough punishment. . . . [T]o punish somebody like this woman by sending her to state prison, I don't think society would benefit from it."³⁸⁹

In the context of Kimura's Japanese cultural values, however, the story is somewhat different. Kimura killed her children and tried to kill herself because she had failed in her role as wife and mother.³⁹⁰ The deaths of her children were a result of her inability to separate their fate from her own as

383. Dershowitz, *supra* note 294, at 5.

384. *Id.*

385. Robert W. Stewart, *Probation Given to Mother in Drowning of Her Two Children*, L.A. TIMES, Nov. 22, 1985, pt. II, 1.

386. Deborah Woo, *The People v. Fumiko Kimura: But Which People?*, INT'L J. SOC. LAW, Apr. 1989, at 403, 405, 422-23 (1989). See Stewart, *supra* note 385, at 1 ("Despite a bailiff's warnings, spectators applauded when [Judge] Thomas announced that he would place Kimura on probation for five years. The judge said he had received petitions with 25,000 signatures supporting Kimura . . .").

387. Woo, *supra* note 386, at 422 (statement of deputy district attorney Lauren L. Weis following the *Kimura* case).

388. Stewart, *supra* note 385, at II-1.

389. *Id.* at II-1 & 8.

390. Katie K. Hayashi, *Understanding Shinju, and the Tragedy of Fumiko Kimura*, L.A. TIMES, Apr. 10, 1985, pt. II, at 5.

a failed wife, and her own survival was simply another failure.³⁹¹ Her anguish as a parent, therefore, derives less from simply having killed her children, and more from having killed her children and then having failed in her attempt to kill herself as well.³⁹²

Kimura's sentence of probation and counseling highlights how the mainstream recognizes similarity (or assumes similarity) when different cultural values or precepts are perceived to be congruent. The favorable legal treatment of Fumiko Kimura derives from the Anglo-American cultural view that women who kill their children are "victims in need of sympathy, support, and psychiatric treatment."³⁹³ Women are "assumed to be inherently passive, gentle, and tolerant; and mothers are assumed to be nurturing, caring and altruistic. It is an easy step, therefore, to assume that a 'normal' woman could surely not have acted in such a way. She must have been 'mad' to kill her own child."³⁹⁴

The circumstances of Kimura's case accorded with these mainstream cultural precepts. The defense gathered evidence to show that Kimura felt despondent and under severe stress.³⁹⁵ Psychiatrists concluded that Kimura was "suffering from psychotic depression and delusions when she walked into the sea."³⁹⁶ One doctor concluded that her actions were "an impulsive, unpremeditated act."³⁹⁷ To the prosecutor, the statements Kimura made after the incident "showed she was not a rational person at the time."³⁹⁸ As a result, Kimura "did not possess an intent to kill since she considered her children as an extension of herself."³⁹⁹ As a mother who killed her children, Kimura was treated with great sympathy and leniency, receiving a sentence of probation and counseling. This conflation of difference and sameness results in construction by the mainstream of a "psychological pathology which was devoid of any socially based understanding" of *oya-*

391. *Id.* at 411-13. Kimura also said that "she felt guilty and believed that she was a bad mother and an inadequate wife; that she was responsible for her husband's infidelity." Stewart, *supra* note 385, at 8. If she walked into the ocean without her children, "the youngsters would be abused, because they would be seen as extensions of her and would be hated as well." *Id.*

392. Although understandable within Japanese culture, suicide is still shameful because it represents failure. Woo, *supra* note 386, at 413.

393. Ania Wilczynski & Allison Morris, *Parents Who Kill Their Children*, 1993 CRIM. L. REV., Jan. 1993, at 31, 35. With regard to psychiatric treatment, the sanity of women has been an important theme in the Western history of women who kill their children. See Kathryn L. Moseley, *The History of Infanticide in Western Society*, 1 ISSUES L. & MED. 345, 357 (1986) (in the Middle Ages, unwed mothers who killed their children escaped prosecution because of "insanity" deriving from the birth process and the "demonic nature" of the child); Laura E. Reece, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide*, 38 UCLA L. REV. 699 (1991) (discussing postpartum psychosis as a mother's insanity defense to killing her children).

394. Wilczynski & Morris, *supra* note 393, at 36.

395. Woo, *supra* note 386, at 416; Stewart, *supra* note 385, at 8.

396. Stewart, *supra* note 385, at 1, 8.

397. *Id.*

398. *Id.* (quoting deputy district attorney Lauren L. Weis).

399. Woo, *supra* note 386, at 418 (citation omitted).

ko-shinju (parent-child suicide).⁴⁰⁰ Kimura's cultural difference disappears and all that remains is Kimura as a victim "in need of sympathy, support, and psychiatric treatment."⁴⁰¹

The circumstances of Quang Ngoc Bui's case offer a striking contrast to Fumiko Kimura's case, highlighting how the dynamics of the intermediate approach recognize only cultural similarity and punish dissimilarity. Mr. and Mrs. Bui had three children and had been having marital difficulties for several years.⁴⁰² The couple had separated several times and Mr. Bui suspected that his wife was seeing other men and "running around on him."⁴⁰³ On February 5-6, 1986, around midnight, the police responded to a disturbance call and went to the Buis' home. There, they found Mr. Bui lying on his bed, suffering from self-inflicted knife wounds. Next to him on the bed were his three children, dead from knife wounds to the throat.⁴⁰⁴ Bui stated to the police that he had "cut [his] kids" and that he wanted to "die with [his] babies."⁴⁰⁵ Bui was indicted for capital murder, convicted, and sentenced to death.⁴⁰⁶ At trial, Bui called an expert in "cross-cultural counseling" to testify.⁴⁰⁷ The expert testified that Bui was depressed and trying to save face in light of his wife's suspected infidelity.⁴⁰⁸

The *Bui* case is the mirror-image of the Kimura case—spousal infidelity causes great shame, and the betrayed parent kills the children and unsuccessfully attempts suicide. However, the outcomes in the two cases are harshly divergent. Kimura received probation while Bui received the death penalty. This vast discrepancy in punishment reflects the pitfalls of the intermediate approach. In the *Kimura* case, cultural resonance and recognition led to approved leniency. In contrast, the circumstances of the Bui case strike no sympathetic chord with American culture. Bui stated that he was afraid that if his wife remarried, his children could be hurt.⁴⁰⁹ Thus, to prevent her from having (and thus harming) his children, he killed his children and tried to kill himself, to "die with [his] babies."⁴¹⁰ Unlike women, men in Anglo-American culture who kill children are "perceived as 'wicked' and in need of punishment."⁴¹¹ The judge and jury could not find common ground with the values underlying Bui's actions, unlike in the

400. Woo, *supra* note 386, at 418.

401. Wilczynski & Morris, *supra* note 393, at 35.

402. Bui v. State, 551 So. 2d 1094, 1099 (Ala. Crim. App. 1988), *vacated on other grounds sub nom.* Bui v. Alabama, 499 U.S. 971 (1991).

403. *Id.* at 1099.

404. *Id.* at 1098.

405. *Id.* at 1099 (second alteration in original).

406. *Id.* at 1098.

407. *Id.* at 1101.

408. *Id.* at 1102. The expert also testified that he was not aware of any criminal laws in Vietnam that address the homicide of children by an aggrieved father with an adulterous wife. *Id.*

409. *Id.* at 1123.

410. *Id.* at 1099.

411. Wilczynski & Morris, *supra* note 393, at 35.

Kimura case. In upholding the trial court, the appellate court stated that the evidence "amply supports the conclusion that [Bui's] murders were conscienceless, pitiless, and unnecessarily torturous to the victims," and that the circumstances of the offense were "especially heinous, atrocious [and] cruel."⁴¹² Bui's death sentence was thus upheld.⁴¹³

The difference-as-sameness approach acknowledges that there are indeed significant differences between Asian and American cultural values, including race, culture, and language, for example. The officers of the court in the four cases discussed all recognized that the defendants were different from other defendants charged with murder, manslaughter, rape, or kidnapping. In each case, the result seeks to reflect recognition of the defendant's difference. In reality, however, the results come about because the tribunal has recognized the sameness of the defendant, not her difference.

There is an alarming theme running through these cultural defense cases, one which should be particularly disturbing to Asian American women. In all four cases discussed above, difference collapses into sameness, as influenced by the dominant culture's perception of appropriate gender roles. Dong-lu Chen's bludgeoning of his adulterous wife struck a chord with the jury, and he was convicted of second-degree manslaughter rather than murder. Similarly, the judge sympathized with Kong Moua's cultural traditions and allowed him to plead guilty to misdemeanor false imprisonment rather than rape. Finally, *Kimura* was seen as a "victim," while Bui was condemned as conscienceless and pitiless.

In the results of these cases we can see the ultra-femininity assimilationist construct at work. White men such as Tony Rivers value Asian women as a sexual accessory whose existence is dedicated to his needs and pleasure alone.⁴¹⁴ The Asian woman's role is to serve and please; she is childlike and is grateful to be able to serve her man. Obedience is her duty.⁴¹⁵ When she does not obey, it is only natural to punish her. That punishment blurs into violence is inevitable: her correlate identity is that of victim,⁴¹⁶ and images of violence abound. The Asian woman's cheekbones

412. 551 So. 2d at 1109.

413. *Id.* at 1118.

414. See *supra* notes 217-07 and accompanying text.

415. See Rivers, *supra* note 217, at 163 ("So compliant. She's the last refuge of the roué.").

416. Among its many popular manifestations, this theme has been readily incorporated into film and the dramatic arts. See, e.g., GIACOMO PUCCINI, *MADAME BUTTERFLY* (opera in which Butterfly commits suicide because her American lover has abandoned her and their son); SAYONARA (film in which actress Miyoshi Umeki commits suicide when she cannot follow her American GI husband back to the U.S. from occupied Japan); GILBERT & SULLIVAN, *SOUTH PACIFIC* (France Nguyen loves and loses an American lieutenant in the film version of the musical); THE WORLD OF SUZIE WONG (Nancy Kwan as a prostitute with a heart of gold who suffers at William Holden's hands); CASUALTIES OF WAR, *supra* note 223 (Vietnamese girl is victim of gang rape by American GIs as part of the soldiers' wartime rite of passage); Miss SAIGON (Broadway musical version of *Madame Butterfly* set in wartime Vietnam). See also Kim, *supra* note 133, at 108.

"swell[] like bruises."⁴¹⁷ Her eyes are "black for suffering."⁴¹⁸ She is a convenient and appropriate victim of love; she is a symbol of rape. For white men, threatened by white feminists, this Asian woman becomes the true woman.

This construction of the true woman informs the results of the cultural defense cases previously discussed. The judicial process becomes an opportunity for white society to reify sexism and to reinforce and reconstruct the subordination of women through another culture.

While claiming to serve justice and balance conflicting cultures and values in cultural defense cases, judges, prosecutors, attorneys, commentators and academics actually reinforce the subordination of women under patriarchy. The results of these cases illustrate the impoverished methods American society uses to deal with difference.

III

BEYOND THE DEBATE

Ts'ai Yen was captured and spent five years among the barbarians. While among them she sang about China and her family. Later, she "brought her songs back from the savage lands, and one of the three that has been passed down to us is 'Eighteen Stanzas for a Barbarian Reed Pipe,' a song the Chinese sing to their own instruments. It translated well."⁴¹⁹ Ts'ai Yen chose the songs of her captors to sing and, in doing so, made them her own.

* * *

This section offers some normative observations and concluding remarks about the cultural defense and the larger issues of cultural pluralism, racial solidarity, and the subordination of women.

Through this Comment I have sought to sound a note of caution within the Asian American community, as well as within the larger social debates—popular and academic—about how we think about the cultural defense debate and the implications of our conclusions. Too often, without close analysis and critical examination, the rush to advocate one position or another can result in the reproduction and acceptance of old stereotypes.

An examination of the Asian American Legal Defense and Education Fund's acceptance and support of the use of the cultural defense is illustrative. Margaret Fung stated that barring the use of a cultural defense "promote[s] the idea that when people come to America, they have to give up their way of doing things. That is an idea we cannot support."⁴²⁰ Implicit in this statement is a binary structure that pits maintenance of our inherited and unique culture against the state's forces of coercive assimilation. The

417. Rivers, *supra* note 217, at 161.

418. *Id.*

419. HONG KINGSTON, *supra* note 127, at 209.

420. Young, *supra* note 352, at 15.

adversary is white society. To break ranks on crucial issues of inherited cultural traditions and values is to betray those traditions and values, to betray our race to white society. Racial solidarity creates strength and unity for minorities in a predominantly white and oftentimes hostile environment. United we stand, divided we fall.

Though the need and desire for unity in the face of prejudice and discrimination are important, the implications of accepting the cultural defense are alarming. One of the most important consequences is that, through the workings of the cultural defense, the subordination of women is reconstructed and reinforced.⁴²¹ Jian-wan Chen, to take only one example, died at the hands of her husband because she was having an affair. It is not enough to qualify endorsement of the cultural defense with the caveat that "[w]e just didn't agree with the use of a cultural defense in the Chen case."⁴²² Such a disclaimer does little to lessen the impact of the defense on women's lives. Asian women in America are suffering, being beaten and killed under the rubric of tradition and culture, as the perpetrators invoke their cultural values.

The ultimate trap for a woman of color is the casting of gender power against racial solidarity, a deep conflict that underlies the cultural defense debate. Should she choose gender over race, she is spurning cultural and racial affinity for white feminism. Should she remain silent, she legitimates sexism in her community.⁴²³ Like African American women who oppose patriarchy in their community,⁴²⁴ Asian American women who reject the subordination of women in the Asian American community are roundly excoriated as race traitors or as lackeys for white feminists.

Critical reactions within the Asian American community to Maxine Hong Kingston's *The Woman Warrior* illustrate this tension. While the standard critique of *The Woman Warrior* views it as a Chinese American novel,⁴²⁵ it is much more than that. Kingston writes, in the words of one critic, on "canonical women's issues: circumscription, madness, and voice."⁴²⁶ More specifically, Kingston "challenges . . . the legacy of female capitulation"⁴²⁷ in Chinese culture in order to "magnify[] those traces [of

421. See generally Rimonte, *supra* note 299.

422. Schuyler, *supra* note 2, at 12 (quoting Pat Eng).

423. This Catch-22 phenomena is by no means limited to Asian American women. African American women experience the same dynamic. See Kimberlé Crenshaw, *Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in *RACE-ING JUSTICE, EN-GENDERING POWER* 402 (Toni Morrison ed., 1992).

424. Such African American women are "ostracized and branded as either man-haters or pawns of white feminists, two of the more predictable modes of disciplining and discrediting black feminists." *Id.* at 432.

425. Elaine H. Kim, *Visions and Fierce Dreams: A Commentary on the Work of Maxine Hong Kingston*, *AMERASIA*, Spring 1981, 145, 147-54.

426. THOMAS J. FERRARO, *ETHNIC PASSAGES: LITERARY IMMIGRANTS IN TWENTIETH-CENTURY AMERICA* 157 (1993).

427. *Id.* at 159.

antipatriarchal energy], rewrit[e] the legends, reshap[e] that history to legitimate and inspire the project of expanding the limits of Chinese-American women's lives."⁴²⁸

One of her harshest critics, Benjamin R. Tong, took aim at Kingston after she published *The Woman Warrior*. According to Tong, Kingston was trying to cash in on a feminist fad.⁴²⁹ In so doing, she was "selling out . . . her own people" by addressing her work to a white audience.⁴³⁰ Frank Chin, Jeffrey Paul Chan, Lawson Fusao Inada, and Shawn Wong pointedly excluded Kingston's novel from the reissue of their Asian American literary anthology.⁴³¹ They argue that *The Woman Warrior* is a Chinese American collaborationist work that incarnates "the racist mind" of white supremacist America.⁴³² In Chin's view, *The Woman Warrior* is a "stroke of white racist genius [that] attacks Chinese civilization, Confucianism itself, and where its life begins: the fairy tale."⁴³³ Kingston's rewriting of Fa Mulan, a Chinese fairy tale figure, into a champion of Chinese feminism is a call to "dump the Chinese race and make for white universality."⁴³⁴ As for Amy Tan's use of a fairy tale, Chin flatly states that "[t]he fairy tale is not Chinese but white racist. It is not informed by Chinese intelligence."⁴³⁵ Chin alludes to Hong Kingston's and Amy Tan's work as

ventriloquizing the same old white Christian fantasy of little Chinese victims of the original sin of being born to a brutish, sado-masochistic culture of cruelty and victimization fleeing to America in search of freedom from everything Chinese and seeking white acceptance, and of being victimized by stupid white racists and then being reborn in acculturation and honorary whiteness.⁴³⁶

Whereas Professor Crenshaw points to the attempt by African American men to minimize the projection of negative stereotypes into white society as part of the rationale behind their silencing African American women,⁴³⁷ I believe that the rationale that underlies criticism of Asian American women by Asian American men is different. Consider the tenor and content of the criticism leveled at Asian American women writers.

428. *Id.* at 160.

429. See Benjamin R. Tong, *Critic of Admirer Sees Dumb Racist*, S.F. JOURNAL, May 11, 1977, at 6 (*The Woman Warrior* "is fiction passing for autobiography and a fashionably feminist work written with white acceptance in mind.").

430. *Id.*

431. THE BIG ANTHOLOGY: AN ANTHOLOGY OF CHINESE AMERICAN AND JAPANESE AMERICAN LITERATURE xv (Jeffrey P. Chan et al. eds., 1991).

432. FERRARO, *supra* note 426, at 156. According to Frank Chin, there is an "absence of anything real [i.e., culturally Asian] in the writing of Kingston and her literary spawn, David Henry Hwang and Amy Tan." Frank Chin, *Come All Ye Asian American Writers of the Real and the Fake*, in THE BIG ANTHOLOGY, *supra* note 431, at 50.

433. THE BIG ANTHOLOGY, *supra* note 431, at 27.

434. *Id.*

435. *Id.* at 2.

436. *Id.* at xi-xii (internal quotation marks omitted).

437. Crenshaw, *supra* note 423, at 432-33.

Frank Chin asserts that Chinese American men have been silenced: "Our white-dream identity being feminine, the carriers of our strength, the power of the race belongs to our women."⁴³⁸ Tong argues that, in order to cater to the expectations of white audiences, Kingston portrays Chinese American women as victims of "perpetual torment at the hands of awful yellow men."⁴³⁹ For Chin, the Chinese woman in *The Woman Warrior* is a "pathological white supremacist victimized and trapped in a hideous Chinese civilization"⁴⁴⁰ which does not deserve to survive because it is so misogynistic.⁴⁴¹ The claim is that Asian American women's challenge to patriarchy repudiates the validity, integrity, and worth of Asian culture and traditions.

Throughout this criticism run the common strands of betrayal and identity. When Asian American women rebel, break the rules, and criticize things Asian, we are pandering to racist exoticism or white feminists, but most of all, we are race traitors.⁴⁴² Our rebellion threatens the community

438. Frank Chin, *Confessions of the Chinatown Cowboy*, 4 BULL. CONCERNED ASIAN SCHOLARS 58, 67 (1972).

439. Benjamin R. Tong, *Chinatown Popular Culture: A Critical Psychological Anthropology* 2 (Oct. 9-11, 1980) (unpublished manuscript, on file at Asian American Studies Library, University of California at Berkeley).

440. THE BIG ANTHEM, *supra* note 431, at 3.

441. *Id.* at 9.

442. Asian American poetry captures the deep-rooted feelings of anger and ambivalence that both Asian American men and women share:

Hypno-genocide

Walking down Telegraph

What's this I see?

An Asian woman

With a white man

Or should I say

A white man with

His Asian Woman

We are approaching

My mind races

My body stiffens

We're getting closer

Deep inside something is released

It rushes upwards, growing

Pain spread through my body

I hurt, I hate, I hurt

We're getting closer

I am catapulted into the past

Ugly visions machine-gunning through my mind

My father hurt, dreams shattered

His daughters drugged and kidnapped by Racist America

White boys challenging my masculinity

Fighting and fighting hard

My victories never acknowledged by racist peers

White men killing Vietnamese, Koreans, Japanese

White men killing men like me

White men killing me

We are very close now

She clinging to him

With puppy dog eyes

He, a hyena with his own women

and culture, and cripples Asian American male identity. Our charge, then, in the name of racial solidarity, is to obey without question our cultural traditions, preserve them, and transmit them unchanged and intact.

In this paradigm, Asian American identity becomes predicated on adhering to cultural traditions that were created by men and that privilege men. In such an equation, an attack on culture becomes an attack on male identity. This rush to preserve culture prevents us from engaging in the important task of examining how power and subordination work in particularly gendered ways in our communities. In the intersection between culture and gender—notably, in the cultural defense debate—culture prevails and gender disappears. Such bracketing of gender to preserve culture essentializes the Asian American woman's identity as a cultural caretaker and leaves Asian American women with fragmented selves. We can only exist as the essential Asian American women that Asian American men want us to be. Our identities will be forever unfinished and unconstructed.

More disturbing is that this paradigm can pit Asian American men and women against each other: his identity derives from her preservation and transmission of a culture that often privileges him by subordinating and devaluing her; her identity is shaped by challenge to, as well as exploration and acceptance of, that same culture. Asian American women's challenge

But now a lion with this woman
Should I strike
First her, then him?
Traitor, traitor,
Murderer, murderer
Our eyes meet
His at mine
Hers at him
We pass
How can I quench this hate, forget the past
In a land where
I am a victim
And my women occupied

Eugene Hum Chang, *Hypno-genocide*, in *WINTERBLOSSOMS* 34 (Alvin Planas & Diana Chow eds., 1978).

the yellow man hates me
the yellow man hates me
because my sister
dated, fucked and married
white men
he glares at me through jaded eyes
disgusted with my presence;
a stigma to his race
he has no need for me
my smiles unwanted
my touch rejected;
i have nothing to offer
except a reason to hate more
so he conveniently lumps me into his
condemning category of race traitors;
no wonder i hate him too

Colleen Hsieh, *the yellow man hates me*, *AMERASIA*, Spring 1991, at 93.

to patriarchy is forbidden trespass on the cultural terrain of Asian male prerogative. Asian American women's construction and reconstruction of Asian and Asian American culture through this process of questioning and challenge are savagely attacked and their efforts derided as fake,⁴⁴³ illegitimate, unauthorized, and unauthentic. But challenge is not repudiation. Reconstruction is not betrayal. Reworking subordinating myths to inspire and empower is a vital and necessary enterprise. We can debate the merits of Maxine Hong Kingston's exploration of Chinese American culture and there is ample room for disagreement, but to excoriate and condemn her (and other Asian American women) for exploring new cultural terrain and identity, and for expanding the limits of Asian American women's lives, serves no other purpose than the continued privileging of men through the subordinating and silencing of women. For Asian American women, identity is not and cannot be an essence distilled from unquestioned acceptance of tradition.

As Asian American women, we must be free to construct our own multiple and varied selves, selves which leave room for all the multi-layered, complex threads of our cultures and traditions. Asian American women need and deserve the opportunity to confront inequities and imbalances of power, and the hidden assumptions of race, gender, culture, and tradition. In the cultural defense debate and in larger society, the focus must allow for uncertainties and unknowns, and identities must be constructed, not essentialized. Identities of shifting, multiple selves, in which no aspect dominates. Identities in which contradictions and contradictory selves remain.

443. THE BIG ANIIIIIIII, *supra* note 431, at xv.

