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## Asian Americans: The "Reticent" Minority and Their Paradoxes

Pat K. Chew

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## ASIAN AMERICANS: THE "RETICENT" MINORITY AND THEIR PARADOXES

PAT K. CHEW\*

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\* Professor of Law, University of Pittsburgh School of Law. J.D. 1982, M.Ed. 1974, University of Texas; A.B. 1972 Stanford University.

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*I begin with a story about my own reticence.<sup>1</sup> As reported in a February 7, 1985, National Law Journal article:*

Derrick A. Bell, Jr., dean of the University of Oregon School of Law, resigned in protest over a faculty decision not to hire a Chinese-American woman as a professor. Dean Bell, the first black dean of a major law school whose student body is not predominantly made up of minorities, quit at the end of a tumultuous two-hour faculty meeting February 6. "I'm not charging my faculty with racism," he said in an interview. "I just couldn't deal with the hypocrisy inherent in my remaining as dean and presiding over an ever-dwindling number of minorities on law faculties."

The dispute, according to Dean Bell, centered on a female teaching candidate who had been recommended for a position by a 3-2 vote of the appointments committee. The woman, whose name the dean declined to disclose, is a corporate associate at a large San Francisco law firm.<sup>2</sup>

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1. I have interspersed my own experiences with Asian American paradoxes throughout this Article—usually in the form of a story. While I do not speak for others, I believe my sentiments resonate with many Asian Americans who, with reticence, are finding their voices. I also refer to and quote from other Asian law faculty who responded to a national survey I conducted in the Spring of 1993 (on file with the *William and Mary Law Review*) [hereinafter Survey]. I am grateful to these faculty who shared their own experiences with the assurance of anonymity. Their stories and thoughts both informed and inspired me. (The survey results are to be discussed thoroughly in a work-in-progress.)

While there has been active legal scholarship about African Americans and race theories in general, and to an extent about Latinos and Native Americans, there is surprisingly little legal scholarship about Asian Americans. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243 (1993) (describing need for Asian American legal scholarship); Neil Gotanda, "Other Non-Whites" in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186 (1985) (book review) (encouraging research on "other non-whites"). Mari Matsuda, Richard Delgado, and others note the importance of different ethnic and personal perspectives. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). But see Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (criticizing the legitimacy and contribution of minority voices).

2. David A. Kaplan, *Faculty Rejects Minority Professor; Ore. Law Dean Resigns in Protest*, NAT'L L.J., Feb. 25, 1985, at 4; see also *Law School Dean Quits in Race Dispute*, UPI, Feb. 8, 1985, available in LEXIS, Nexis Library, UPI File.

*The press nonetheless tracked me down, eager for an expose of the "racism." I was reluctant, however, to be involved in the public controversy—even hesitating to confirm that I was the denied applicant.*

*I did not witness the faculty's decision-making; I did not know their reasoning or motivations. I was concerned that the entire faculty might be unfairly characterized, when only a "substantial minority" may have been involved. I also did not want notoriety because of my "minority" status. I was not sure that as an Asian American I should be a beneficiary of affirmative action policies. Besides, I thought, I did not want or need that labeling.*

*. . . Even now, I am ambivalent about revealing that I was the candidate.*

Asian Americans are a "reticent" minority group.<sup>3</sup> Compared to the other major ethnic groups in this country, for instance, Asian Americans are less politically organized and vocal.<sup>4</sup> Their

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3. I make this statement about Asian Americans cautiously. While various documentation supports this conclusion, the situation is complicated. See, e.g., *infra* note 4 (discussing the level of political activism as an index of reticence); *infra* text accompanying notes 105-12 (discussing the diversity of the Asian American population); *infra* text accompanying notes 187-97 (questioning the stereotype of Asian American nonassertiveness). When other statements about Asian Americans are made in this Article, similar complexities exist. I cite the social science studies, statistical data, and personal experiences that serve as the basis for my generalizations so that readers can assess the appropriateness of these generalizations themselves.

A tension also exists between my questioning the use of Asian American stereotypes by others and my own use of generalizations. I believe that the particular stereotypes I question are based on insufficient or inaccurate information or are characteristics erroneously attributed to individual Asian Americans from data about Asian Americans as a group. My more general intent, however, is to urge all of us to question and consider the risks of stereotyping and generalizing about others. See ELLIOT ARONSON, *THE SOCIAL ANIMAL* 229-31 (4th ed. 1984) (defining "stereotyping" of people and its dangers).

Thus, it is with caution that I also generalize in this Article about American society, whites, and other minority groups. Again, I provide the basis for my statements, but appreciating the diversity of these groups, I acknowledge that the generalizations are not descriptive of all members in those groups.

4. U.S. COMMISSION ON CIVIL RIGHTS, *CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S* 157 (1992) [hereinafter *CIVIL RIGHTS ISSUES*]; Alton Chinn & Barry Parr, *Asian-Americans: Affluent, Educated—Politically Silent*, L.A. DAILY J., Oct. 19, 1982, at 4; Jay Mathews, *The Next Best Wave*, L.A. DAILY J., Aug. 1, 1991 (Cal. Republic Supp.), at 13; see also Khanh-Van T. Bui & David T. Takeuchi, *Ethnic Minority Adolescents and the Use of Community Mental Health Care Services*, 20

reticence, combined with other cultural factors, has made it difficult for all Americans—whites, Asian Americans and other minority groups—to understand who Asian Americans are.<sup>5</sup>

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AM. J. COMMUNITY PSYCHOL. 403 (1992) (showing that Asian Americans and Latinos are under-represented in the use of public mental health facilities in Los Angeles County and suggesting that this cultural reticence is identifiable even in adolescent Asian Americans); Esther Ngan-Ling Chow, *The Development of Feminist Consciousness Among Asian American Women*, 1 GENDER & SOC'Y 284 (1987) (describing relative lack of participation of Asian American women in the mainstream feminist movement); Stanley Sue et al., *Community Mental Health Services for Ethnic Minority Groups: A Test of the Cultural Responsiveness Hypothesis*, 59 J. CONSULTING & CLINICAL PSYCHOL. 533 (1991) (finding that Asian Americans and Latinos underutilize services and discussing cultural explanations); George K. Hong, *Contextual Factors in Psychotherapy with Asian Americans*, in JEAN LAU CHIN ET AL., TRANSFERENCE AND EMPATHY IN ASIAN AMERICAN PSYCHOTHERAPY 3, 5-6 (1993) (describing Asian Americans' reluctance to use mental health services because it is contrary to cultural values, such as the stigma attached to seeking help from others); Su Sun Bai, Comment, *Affirmative Pursuit of Political Equality for Asian Pacific Americans: Reclaiming the Voting Rights Act*, 139 U. PA. L. REV. 731 (1991) (discussing how low political participation reflects exclusionary policies of political parties and systems).

Beginning signs of increased Asian American political activism do exist. See, e.g., Yvonne M. Lau, *Political Participation Among Chicago Asian Americans*, in ASIAN AMERICANS: COMPARATIVE AND GLOBAL PERSPECTIVES 137 (Shirley Hune et al. eds., 1991) [collection as a whole hereinafter PERSPECTIVES]; Ai Leng Choo, *Woo Hopes to Set Political Precedent in L.A. with the Support of African American Voters*, ASIAN WALL ST. J. WKLY., Apr. 12, 1993, at 1, 22 (describing Woo's strong position in the mayoral race, in part attributable to support by both the Asian American and African American communities); Michael J. Hall, *Asian-American Lawyers Beaming over New Group*, L.A. DAILY J., Nov. 14, 1989, at 1, 11 (describing formation of National Asian Pacific American Bar Association); Arthur S. Hayes, *Asian Americans Go to Court To Fight Bias*, WALL ST. J., Sept. 3, 1991, at B8 (describing response of Asian American groups to the killing of a Chinese immigrant because his assailants thought he was Vietnamese); Susan D. Rice, *One Scapegoated Minority Fights Back*, L.A. DAILY J., Dec. 26, 1991, at 7 (discussing a Japanese-American attorney's role in increasing the national voice of Asian Americans).

Historical examples of political activism exist. See, e.g., Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529 (1984); Phillip Nash, *Asian Americans and Their Rights for Employment and Education*, in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 897, 899 (Hyung-Chan Kim ed., 1992) [collection as a whole hereinafter ASIAN AMERICANS AND THE SUPREME COURT] (describing how Chinese American laundry owners collectively fought San Francisco laundry licensing ordinances that unconstitutionally discriminated against them).

5. In a survey, whites acknowledged that they know less about Asian Americans and Latinos than about African Americans. Lawrence Bobo & James R. Kluegel, *Modern American Prejudice: Stereotypes, Social Distance, and Perceptions of Discrimination Toward Blacks, Hispanics, and Asians*, 16-17, Fig. 3 (Aug. 1991) (unpublished

Instead, Americans have pieced together images of Asian Americans as a successfully assimilated minority group which has fulfilled the Asian immigrant's dream of the "Golden Mountains."<sup>6</sup> While retaining vestiges of their cultural identity and ancestry, they are considered economically and socially assimilated. Although there may have been isolated incidents of discrimination in the past, society believes that Asian Americans today generally do not experience discrimination.<sup>7</sup> If there is a flaw in this perceived success story, it is Americans' difficult-to-articulate but uncomfortable feeling that perhaps Asian Americans are becoming too successful.

This simple image of Asian Americans is replete with "paradoxes"<sup>8</sup>—the reality is much more complicated and much less positive. As Part I of this Article reveals, the belief that Asian Americans have suffered discrimination only in past isolated instances and do not currently experience discrimination is contradicted by the facts. Society's image of the model minority that has achieved economic success and social equality is inconsistent with the plight of many Asian Americans and contrary to other images and stereotyping of Asian Americans. Broad assumptions that Asian Americans are well-integrated into all the professions is an overgeneralization.

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paper presented at the Annual Meetings of the Am. Soc. Ass'n).

While various terms are used to describe Americans of various ancestries and racial origins, I will use the terms whites, African Americans, Latinos, and Asian Americans. These terms seem to be the current preference of each group and appear in the legal literature. No political statement is intended by the use of these particular terms.

6. Early Chinese immigrants called California specifically and the United States more generally the "Golden Mountains" ("Gam Saan" in Cantonese). RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 80 (1989); SHIH-SHAN HENRY TSAI, *THE CHINESE EXPERIENCE IN AMERICA* 8 (1986). While originally the reference was to the gold rush in California, the term later came to epitomize the dream of finding one's fortune and a better life in the United States. *Id.*

7. See *infra* notes 10-61 and accompanying text.

8. "Paradox" is defined as "a statement or proposition seemingly self-contradictory or absurd but in reality expressing a possible truth." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 964 (Unabridged ed. 1969). Since the public perceptions of Asian Americans are consistent on their face, there are no contradictions. As this Article explains, these public perceptions are overgeneralizations, misconceptions, or are otherwise flawed. Thus, the reality about Asian Americans does contradict the perceptions.

As Part II explains, these paradoxes of public perception and contradictory reality have cumulative and pervasive legal and social consequences.<sup>9</sup> Believing the composite image of the successfully assimilated Asian American, American society tends to ignore Asian Americans' problems and to dismiss their complexity and diversity as people. Believing the stereotypes about Asian Americans' limited capabilities, society has confined Asian Americans to certain roles and foreclosed other opportunities. Resenting the purported success of Asian Americans and protective of their own interests, some non-Asian Americans have responded defensively and violently.

The impact of these paradoxes on Asian Americans has been divergent. For some, the positive public images confirm individual efforts and achievements. For others, societal expectations exert numerous pressures and create a sense of marginality in a society that does not appear to accept or to welcome them. For other minority groups, the general American attitude regarding Asian Americans sometimes results in their own demoralization and fuels their animosity toward Asian Americans.

Finally, Part III assesses the ramifications of these paradoxes, especially in the context of affirmative action. Universities' affirmative action policies regarding faculty hiring and student admissions are examined as a case in point. This examination can lead to a better understanding of the trend toward excluding Asian Americans from preferential treatment. Many of the rationales for this exclusion are based on the image of Asian Americans as successfully assimilated Americans and on the consequences explored in Part II. These rationales, however, are based on questionable premises. In addition, these rationales tend to lead to divisive discourses. Rather than concluding with a plea for the inclusion of Asian Americans in all affirmative action programs, this Article instead argues that Asian Americans should not be *excluded* without some well-informed, ratio-

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9. Many writings discuss the various legal consequences of race discrimination and false beliefs about minorities. See, e.g., Alexander T. Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325 (1992); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1 (1991); Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).



nal basis that directly relates to the purposes of the particular affirmative action plan.

### I. DISTORTIONS AND PARADOXES

Societal beliefs that Asian Americans are not generally discriminated against, are the model minority, and are well-represented throughout most industries and professions form a three-legged stand for the composite image of a successful and assimilated minority group. These beliefs, however, turn out to be precarious distortions of reality.

#### *A. Paradox: Asian Americans Are Not Discriminated Against, but They Are*

Many Americans believe that society does not discriminate against Asian Americans and that Asian Americans enjoy social equality.<sup>10</sup> The reality is that Asian Americans have been the target of both historical and ongoing discrimination.<sup>11</sup>

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10. One recent study, for instance, indicated that a majority of Americans hold this belief. Michael McQueen, *Voters' Responses to Poll Discloses Huge Chasm Between Social Attitudes of Blacks and Whites*, WALL ST. J., May 17, 1991, at A16. In addition, another extensive study found that only 10% of whites on average thought that Asian Americans experience "a lot" of job and housing discrimination and nearly 40% thought that they experience "a little" or "none." Bobo, *supra* note 5, at 19, 23-24, Fig. 7. In contrast, whites were more likely to believe that African Americans and Latinos were the targets of discrimination. *Id.*

11. One California study indicated that 49% of the Asian Americans surveyed said they had experienced discrimination, compared with 36% of Latinos and 62% of African Americans. See *Study Says Asians Feel Bias More Than Hispanics*, L.A. DAILY J., Dec. 12, 1985, at 1. At the same time, Asian Americans were less likely to file race discrimination claims against employers. *Id.*; see also Gargi R. Sodowsky et al., *Moderating Effects of Sociocultural Variables on Acculturation Attitudes of Hispanics and Asian Americans*, 70 J. COUNSELING & DEV. 194 (1991) (showing that Asian American university students, especially first generation immigrants and political refugees, perceived racial discrimination significantly more than Latino students).

### 1. *History of Express Discrimination*

*My grandfather eagerly told me about parts of his life: He immigrated to the United States from southern China in 1915; he fought for the U.S. Army in World War I; he established a successful grocery business in El Paso, Texas; he was active in the Chinese Baptist Mission and in his community; and he had over a dozen grandchildren born in this country. About these things, he was proud of himself and his new country.<sup>12</sup>*

*My grandfather didn't want to talk about other parts of his life. Because of U.S. immigration laws, my grandmother couldn't join him for 25 years. Because of anti-Asian hostility, there were community and legislative attempts to force him and other Chinese grocers out of business.<sup>13</sup> He hesitated sharing his memories of being denied the use of "whites only" swimming pools and other public facilities, and of not being allowed to sit with the rest of the congregation at the local churches—even though everyone prayed to the same God.<sup>14</sup>*

Although it is not widely known, Asian Americans have been victims of lynching, race riots, and slavery.<sup>15</sup> They have experi-

12. Some of these events about my grandfather also are discussed in TOM WOO, *BIOGRAPHY OF MR. CHEW DIN* (1980).

13. For a discussion of these and other discriminatory policies and events in the early and mid-1900s, see Edward J.M. Rhoads, *The Chinese in Texas*, 81 S.W. HIST. Q. 1, 24-26 (1977).

14. *Id.*

15. For example,

[i]t was in Negro Alley [in Los Angeles] that a mob of several hundred whites shot, hanged, and stabbed 19 Chinese to death on October 24, 1871. The massacre occurred after a white man was killed accidentally when he tried to stop a shooting duel between two Chinese rivals. Six years after the massacre, several Chinese buildings in Negro Alley were razed by arsonists, who went unpunished.

TSAI, *supra* note 6, at 67. Tsai also discusses other brutal violence targeting Chinese residents and includes a map documenting anti-Chinese riots that occurred in over 50 cities in the western states in the late 1800s. *Id.* at 67-72.

During the mid-1800s, there was also a substantial slave trade of Chinese to the American continent, largely organized by American shippers. *Id.* at 4-8. Between 1847 and 1859, "the number of Chinese coolies transported by American shippers to Cuba alone averaged over 6,000 per year." *Id.* at 4. Poor Chinese peasants were deceived by misleading promises. *Id.* Others "were kidnapped while asleep in their junks or taken out of their fields or gardens with hands and feet tied." *Id.* During their transport and at their destination, they often were treated inhumanely. *Id.* For

enced long-term, widespread, and legally sanctioned discrimination infringing on the most fundamental of human rights: equal rights to citizenship, employment, education, and ownership of property.<sup>16</sup> Antimiscegenation laws even abridged the right to marry.<sup>17</sup> There are numerous illustrations of governmentally and judicially sanctioned, and publicly supported discrimination against Asian Americans.<sup>18</sup>

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instance, "[o]f the 4,000 coolies who had been fraudulently consigned in 1860 to the guano pits of Peru, not one survived." *Id.* at 5. While the United States government prohibited the coolie trade into the United States, for years it allowed American shippers to organize and profit from the lucrative trade to other parts of the American continent. *Id.* at 7.

For another illuminating description of the Chinese slave trade, see Gary Y. Okihiro, *African and Asian American Studies: A Comparative Analysis and Commentary*, in PERSPECTIVES, *supra* note 4, at 17. As John Higham describes, throughout American history there has been a tradition of "nativism," in which ethnic or religious groups have been the victims of resentment and discrimination. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (1955) [hereinafter *STRANGERS IN THE LAND*]; JOHN HIGHAM, *SEND THESE TO ME: JEWS AND OTHER IMMIGRANTS IN URBAN AMERICA* (1975) [hereinafter *SEND THESE TO ME*]. He believes, however, that "[n]o variety of anti-European sentiment has ever approached the violent extremes to which anti-Chinese agitation went in the 1870s and 1880s." *STRANGERS IN THE LAND*, *supra* at 24.

16. Hyung-Chan Kim, *An Overview*, in *ASIAN AMERICANS AND THE SUPREME COURT*, *supra* note 4, at 1, 2, 7; Nash, *supra* note 4, at 897; Thomas E. Stuenkel, *Asian Americans and Their Rights for Land Ownership*, in *ASIAN AMERICANS AND THE SUPREME COURT*, *supra* note 4, at 603; see also MILTON R. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* (1946).

17. PAUL R. SPICKARD, *MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA* 374-75 (1989) (summarizing the states' laws on interracial marriage). The following states had laws forbidding marriages between whites and Asians: Arizona, California, Georgia, Idaho, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, South Dakota, Utah, and Wyoming. *Id.* Although these laws were found unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that such racial classifications violate the Fourteenth Amendment), some Americans apparently still support them. Cf. *Whites Retain Negative View of Minorities, a Survey Finds*, N.Y. TIMES, Jan. 10, 1991, at C19 (revealing that 76% of white Americans disapprove of laws against interracial marriages, likely indicating that some whites still support laws prohibiting interracial marriages).

18. The most publicized example was the internment of over 100,000 Japanese Americans during World War II. By Executive Order 9066, President Roosevelt authorized the Secretary of War to designate military areas "with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the . . . Military Commander may impose in his discretion." Exec. Order No. 9066, 3 C.F.R. 1092, 1093 (1938-43); TAKAKI, *supra* note 6, at 391. With generally less than a week's notice and permission to bring only what they could carry, these American citizens and long-time residents were forced to sell their properties at a

As eloquently captured by Harold Koh:

The history of Supreme Court cases determining the rights of Asian Americans is a tale of almost unbroken sadness; not of

fraction of their value or abandon them. *Id.* at 393; CIVIL RIGHTS ISSUES, *supra* note 4, at 9. The humiliation continued at the "control centers," where each family was known only by the assigned number hanging from their coat lapels. TAKAKI, *supra* note 6, at 393. Seeing the armed soldiers at the train station, one evacuee later wrote: "Like a dog / I am commanded / At a bayonet point. / My heart is inflamed / With burning anguish." *Id.* at 394-95. Herded into crowded trains, having no idea where they were going, most would be taken to one of ten internment camps, most of which were in remote desert areas in the western United States. *Id.* at 394-95. The internees were assigned to barracks lined in orderly rows, surrounded by barbed wire fences and guard towers. *Id.* at 395.

Irrational prejudice against all those of Japanese ancestry was clearly documented. For example, President Roosevelt had been contemplating a "list" of Americans of Japanese ancestry five years before Pearl Harbor with the intention that they be placed in a "concentration camp in the event of trouble." *Id.* at 390. Moreover, after Executive Order 9066 was issued, he learned that the War Department was considering applying the order to Germans and Italians on the East Coast. *Id.* at 391. He made it clear in correspondence to Secretary of War Stimson that the Order was to be applied only to Japanese Americans because they were "strangers from a different shore." *Id.* at 391-92.

The Congressional Commission of Wartime Relocation and Internment of Civilians confirmed the tragic injustice of the internment process in 1980:

The promulgation of Executive Order 9066 was not justified by military necessity, and the decisions which followed from it—detention, ending detention and ending exclusion—were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership. Widespread ignorance of Japanese Americans contributed to a policy conceived in haste and executed in an atmosphere of fear and anger at Japan. A grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.

COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 102D CONG., 2D SESS., PERSONAL JUSTICE DENIED 18 (Comm. Print No. 6, 1992).

For further discussions, see Peggy Choy, *Racial Order and Contestation: Asian American Internees and Soldiers at Camp McCoy, Wisconsin, 1942-1943*, in PERSPECTIVES, *supra* note 4, at 87; Michio Kaku, *Behind Barbed Wire: The Wartime Incarceration of the Japanese-Americans*, in TO BE A VICTIM: ENCOUNTERS WITH CRIME AND INJUSTICE 315 (Diane Sank & David Caplan eds., 1991); Lorraine K. Bannai & Dale Minami, *Internment During World War II and Litigations*, in ASIAN AMERICANS AND THE SUPREME COURT, *supra* note 4, at 755; JOHN ARMOUR & PETER WRIGHT, MANZANAR (1988) (photographic essay on internment camp in the Sierra desert in California, including photographs by Ansel Adams and commentary by John Hersey).

victors and justice, but of victims and injustice. It is a story of a people who have largely been objects, not shapers, of a legal system they do not fully understand, a language they do not fluently speak, a melting pot into which they have not been allowed to assimilate.<sup>19</sup>

A review of this country's immigration and naturalization laws substantiates a long history of racial discrimination.<sup>20</sup> Moreover, it reveals that people of Asian ancestry have been consciously denied the basic rights of entry and citizenship in this country.<sup>21</sup> Courts and legislators, reflecting the public sentiment, repeatedly determined that individuals of Asian ancestry were not wanted.<sup>22</sup>

In 1790, shortly after the Constitution was ratified, a new law provided that only "free white person[s]" could become citizens.<sup>23</sup> The Framers' original intention presumably was to exclude African Americans and Native Americans.<sup>24</sup> After the Civil War, the Fourteenth Amendment was adopted, providing that "[a]ll 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."<sup>25</sup> Despite the adoption of the Fourteenth Amendment, Congress did not remove the "free white persons" requirement in the naturalization

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19. *Foreword*, in *ASIAN AMERICANS AND THE SUPREME COURT*, *supra* note 4, at xi.

20. See generally BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY* (1993); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Kim, *supra* note 16 (describing the five periods of trans-Pacific immigration of Asian people into the United States between 1609 and the present).

21. See generally sources cited *supra* note 20.

22. *Id.*

23. 1 Stat. 103 (1790) (extending the period of residence necessary to be "free" to five years) (repealed 1 Stat. 414 (1795)); see also Elizabeth Hull, *Naturalization and Denaturalization*, in *ASIAN AMERICANS AND THE SUPREME COURT*, *supra* note 4, at 403, 406; KONVITZ, *supra* note 16, at 79-117.

24. See *infra* notes 26-28 and accompanying text.

25. U.S. CONST. amend. XIV, § 1. Despite this clear language, some early courts refused to recognize that the children of Chinese aliens born in this country were U.S. citizens. Finally, in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Court concluded that all children born in this country, even those born to Asian parents ineligible for naturalization, are citizens.

laws.<sup>26</sup> Instead, it modified the laws to allow "aliens of African nativity," and "persons of African descent" to become naturalized.<sup>27</sup> At the same time that the legislators extended the right of citizenship through the naturalization process to those of African ancestry, the legislators considered and rejected a proposal to extend these naturalization rights to Asian immigrants.<sup>28</sup> This rejection reflected the hostile and violent anti-Chinese sentiment in the western states.<sup>29</sup>

Federal immigration laws confirmed the government's discriminatory policies towards Asians.<sup>30</sup> In 1882, Congress passed the Chinese Exclusion Act,<sup>31</sup> the first major immigration policy that restricted entry on the basis of race.<sup>32</sup> Under this law, which was extended in 1892, 1902, and in 1904 for an indefinite period, no additional Chinese laborers were permitted to enter the country.<sup>33</sup> Reflecting the anti-Asian beliefs of some jurists,<sup>34</sup> various cases interpreting the Chinese exclusion laws

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26. Hull, *supra* note 23, at 404.

27. *Id.*

28. The national legislators apparently acted in deference to their colleagues from the western states, who feared that Chinese immigrants would qualify for citizenship. *Id.* at 404; KONVITZ, *supra* note 16, at 79-97.

29. See *supra* note 15 and accompanying text.

30. The varied immigration histories and laws of the different Asian emigrant groups are discussed at length in HING, *supra* note 20 (including a useful chronology of selected events and policies affecting Asian immigration at 195), and in TAKAKI, *supra* note 6.

31. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (generally suspending the immigration of Chinese laborers for ten years, except for those who were already resident in the United States as of Nov. 17, 1880) (repealed 1943).

32. John Braeman, *Deportation and Expulsion*, in ASIAN AMERICANS AND THE SUPREME COURT, *supra* note 4, at 77, 88. Other laws excluded "lunatics" or "idiots," those likely to become "a public charge," and contract laborers. Immigration Act of 1882, ch. 376, 22 Stat. 214 (1882), Act of Feb. 26, 1885, ch. 164, 23 Stat. 332 (1885). The laws later added those "suffering from loathsome or a dangerous contagious disease, persons who have been convicted of a felony or . . . misdemeanor involving moral turpitude [and] polygamists." Immigration Act of 1891, ch. 376, 26 Stat. 1084, 1084 (1891).

33. Certain classes were exempted, including teachers, students, and merchants and their families. TSAI, *supra* note 6, at 66.

34. As Supreme Court Justice Field wrote in a personal correspondence:

[T]he manners, habits, mode of living, and everything connected with the Chinese prevent the possibility of their ever assimilating with our people. They are a different race, and, even if they could assimilate, assimilation would not be desirable. If they are permitted to come here, there will be

held that private employers could disregard the rights of Chinese laborers secured by treaties and federal laws if Congress found it necessary for the "public good, by any consideration of private interest."<sup>35</sup>

State laws, particularly in California, embodied this exclusionary sentiment.<sup>36</sup> The state's 1879 Constitution prohibited California corporations and government entities from hiring any Chinese employees and forbade Chinese residents from owning land.<sup>37</sup> Another California law provided that all foreign miners ineligible for U.S. citizenship were required to pay an exorbitant tax.<sup>38</sup> As intended, virtually all of the \$1.5 million collected under the tax came from Chinese miners.<sup>39</sup>

As the populations of other non-Chinese Asian groups increased, federal and local governments instituted similar exclusionary policies against them.<sup>40</sup> Perhaps because of Japan's economic strength, Americans viewed the Japanese immigrants as militaristic and aggressive—the potential "yellow peril."<sup>41</sup> In addition to various treaties and federal laws restricting Japanese immigration, the Supreme Court in *Ozawa v.*

at all times conflicts arising out of the antagonism of the races which would only tend to disturb public order and mar the progress of the country. . . . I belong to the class, [sic] who repudiate the doctrine that this country was made for the people of *all* races. On the contrary, I think it is for our race—the Caucasian race.

Letter from Stephen J. Field to John Norton Pomeroy (Apr. 14, 1882), in HOWARD J. GRAHAM, *EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM* 105 (1968).

35. See also *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889) (confirming broad congressional power over subject matter within its control such as immigration, despite conflicting treaty terms). The U.S. government also pressured the then weak Chinese Imperial government to modify treaty terms. Braeman, *supra* note 32, at 79. In 1880, for example, a modification of the Burlingame Treaty "allowed the United States to 'regulate, limit, or suspend' the immigration of Chinese laborers whenever their entry or residence . . . 'affects or threatens to affect the interests of the United States.'" *Id.*

36. Kim, *supra* note 16, at 9-10.

37. *Id.*

38. *Id.* at 6 (noting that 98% of the tax income came from Chinese miners).

39. *Id.*

40. Braeman, *supra* note 32, at 88-90 (discussing and citing the experiences of Americans of Japanese, Korean, Filipino, and Asian Indian origins).

41. *Id.*

*United States*<sup>42</sup> confirmed that Japanese immigrants were ineligible for citizenship.<sup>43</sup>

Takao Ozawa was born in Japan, but as the Court noted:

[i]ncluding the period of his residence in Hawaii, appellant had continuously resided in the United States for twenty years. He was a graduate of the Berkeley, California, High School, had been nearly three years a student in the University of California, had educated his children in American schools, his family had attended American churches and he had maintained the use of the English language in his home. That he was well qualified by character and education for citizenship is conceded.<sup>44</sup>

In claiming his "fitness for citizenship," Ozawa argued that the Japanese were distinguishable from Chinese immigrants, who were expressly excluded from naturalization under the Chinese exclusion laws.<sup>45</sup> Instead, Ozawa urged, as required by the immigration laws, individuals of Japanese ancestry were "white persons" entitled to citizenship.<sup>46</sup> Responding with an anti-integration bias, Justice Sutherland indicated that the test for citizenship could not be the "mere color of the skin" because

even among Anglo-Saxons, [the range] by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the

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42. 260 U.S. 178 (1922); see also Hull, *supra* note 23, at 406.

43. For a time prior to *Ozawa*, however, Japanese immigrants were not subject to the same exclusionary policies as the Chinese. In addition, a number of Japanese immigrants also were able to become citizens as "white" persons. Hull, *supra* note 23, at 405.

44. *Ozawa*, 260 U.S. at 189.

45. *Id.* at 184-85.

46. *Id.* Various state and federal courts apparently had agreed with Ozawa's argument. At least 14 cases of the naturalization of Japanese immigrants had been reported at the time of *Ozawa*. *Id.* at 183. Presumably Ozawa thought it absurd for him to argue that he was "of African descent" and hence eligible for naturalization under the Fourteenth Amendment. In *People v. Hall*, 4 Cal. 399 (1854), however, the California Supreme Court, in peculiar reasoning, concluded that a Chinese witness could not testify under a state statute providing that "[n]o Black, or Mulatto person, or Indian shall be allowed to give evidence for or against a White person." *Id.* at 403. The court offered alternative theories: Chinese were "Indian" under an expanded definition of the native American Indian, or Chinese were "Blacks" because "Black" could be viewed as a generic term meaning any non-white. *Id.* at 404.



brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation.<sup>47</sup>

Instead, the term "white person" was meant to "indicate only a person of what is popularly known as the Caucasian race."<sup>48</sup> The Justice concluded that Ozawa, being of Japanese ancestry, was clearly "not Caucasian and therefore belongs entirely outside the zone on the negative side."<sup>49</sup>

The Supreme Court sanctioned exclusionary discrimination against Asians in general in *United States v. Thind*,<sup>50</sup> when the Court similarly concluded that a "high caste Hindu of full Indian blood" born in Punjab, India also was ineligible for citizenship.<sup>51</sup> Claiming that his ancestors were Aryan, Bhagat Singh Thind argued that he was of the "Caucasian race."<sup>52</sup> He emphasized that ethnologists have traced the people from northern India, including the Punjab, to the Aryan race and that India's caste system effectively precluded the intermixing of those of Aryan ancestry with others.<sup>53</sup>

Having declared in *Ozawa* that the test for citizenship was whether someone was of the Caucasian race,<sup>54</sup> the Supreme Court was now forced to clarify. Appearing to backtrack in his reasoning, Justice Sutherland responded, "[i]t 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."<sup>55</sup> Then, speculating on what the drafters of the original 1790 naturalization law intended,

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47. *Ozawa*, 260 U.S. at 197.

48. *Id.* This reasoning was consistent with the government's position that "[t]he men who settled this country were white men from Europe . . . . They were eager for men of their kind to come, and it was to men of their own kind that they held out the opportunity for citizenship in the new nation." *Id.* at 187.

49. *Id.* at 198.

50. 261 U.S. 204 (1923).

51. *Id.* at 206.

52. *Id.* at 205.

53. *Id.* at 204-06.

54. *Ozawa*, 260 U.S. at 197; see *supra* text accompanying note 47.

55. *Thind*, 261 U.S. at 209.

Justice Sutherland added:

[t]he immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forebears had come. When they extended the privilege of American citizenship to "any alien being a free white person," it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind.<sup>56</sup>

Thus, Justice Sutherland continued, the drafters of this and other subsequent laws intended to exclude "Asiatics" from naturalization and citizenship.<sup>57</sup> Despite this conclusion and the Court's anti-Asian analysis, Justice Sutherland disclaimed any invidious motive. "It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation."<sup>58</sup>

Given these emphatic precedents, Congress did not completely repeal federal immigration and naturalization laws expressly denying entry and citizenship rights on the basis of one's Asian race until 1952.<sup>59</sup> This change in national policy was largely prompted by the increasingly irreconcilable discrepancies between the United States' various foreign policy positions during and after World War II and its anti-Asian laws.<sup>60</sup> In the place

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56. *Id.* at 213.

57. *Id.* at 214-15.

58. *Id.* at 215.

59. Prohibitions against naturalization were removed at different times for the different Asian groups. Congress repealed prohibitions against the Chinese with the Chinese Repealer, 57 Stat. 600 (1943), and against the Filipino and Asian Indians with the Filipino and Indian Naturalization Act, 60 Stat. 416 (1946), but prohibitions on Japanese and Koreans remained in force until the Immigration and Nationality Act, 66 Stat. 163 (1952). See also HING, *supra* note 20, at 36-38, 215-17 (providing excerpts from these laws).

60. For instance, the U.S. government was applauding the Chinese government as an ally while at the same time criticizing Nazi Germany's racist actions. In part to reconcile these public positions with its incongruent anti-Asian immigration and naturalization laws, in 1943 the government repealed the Chinese Exclusion Act. TAKAKI, *supra* note 6, at 376-78; see also HING, *supra* note 20, at 36-38; TAKAKI, *supra* note 6, at 357-405 (discussing generally the effects of World War II on the immigration, naturalization, and other rights of different Asian American groups).

of these general prohibitions, however, Congress introduced restrictive quotas for Asian immigrants.<sup>61</sup>

## 2. *Ongoing Express Discrimination.*

*It was only two houses and a parking lot from my house to Cadwallader Elementary School in El Paso, Texas, but I still dreaded the walk to my first grade class. "Chinita, Chinita," some Mexican American children along the way chanted, pulling their eye openings into slits. One child picked up a handful of sandy dirt and flung it at me. I cried, but I didn't let them see.<sup>62</sup>*

*Twenty years later, I walked along Mesa Street in downtown El Paso, late for a shopping date with a friend. I turned a corner where a couple of Latino men were passing the time: "Chi-na Chi-na" they called at me, followed by kissing and hissing sounds that seared the hot summer air. As usual, I tried not to notice. As usual, it still stung.*

*Last week (and decades later) in Pittsburgh, Pennsylvania, my six year old daughter returned from summer day-camp upset and bewildered. She explained that a group of young boys were taunting her with "Chi-na eyes, Chi-na eyes," while pulling their eye openings into slits. "I don't understand, Ma-ma, why they wanted to hurt me."*

Numerous federal government reports confirm that racist actions against Asian Americans are ongoing.<sup>63</sup> As stated in a

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61. While the 1952 immigration law ended the express exclusion of Asians, a national origins quota system effectively frustrated and minimized Asian immigration. See HING, *supra* note 20, at 38; TAKAKI, *supra* note 6, at 417-18. It was not until changes in the immigration laws in 1965 that Asian countries had the same comparable access as individuals from other countries to immigrate to the United States. See HING, *supra* note 20, at 38-41; TAKAKI, *supra* note 6, at 419-20; William R. Tamayo, *Asian Americans and Present U.S. Immigration Policies: A Legacy of Asian Exclusion*, in ASIAN AMERICANS AND THE SUPREME COURT, *supra* note 4, at 1105.

62. I relate these stories as accurately as I can. My intention is not to suggest that Mexican Americans, for instance, are any more likely than other Americans, including Asian Americans, to use hurtful and racially discriminatory language.

63. CIVIL RIGHTS ISSUES, *supra* note 4, at 13-18; see also U.S. COMMISSION ON CIVIL RIGHTS, VOICES ACROSS AMERICA: ROUNDTABLE DISCUSSION OF ASIAN CIVIL RIGHTS ISSUES (1991); U.S. COMMISSION ON CIVIL RIGHTS, THE ECONOMIC STATUS OF AMERICANS OF ASIAN DESCENT: AN EXPLORATORY INVESTIGATION (1988); U.S. COMMISSION ON CIVIL RIGHTS, RECENT ACTIVITIES AGAINST CITIZENS AND RESIDENTS OF

recent report, "[m]any Asian Americans are forced to endure anti-Asian bigotry, ranging from ignorant and insensitive remarks, to stereotypical portrayals of Asians in the media, to name-calling, on a regular basis. Asian Americans are also the frequent victims of hate crimes, including vandalism, assault, and sometimes even murder."<sup>64</sup>

As the following sampling of incidents illustrates, Asian Americans become targets of discrimination because of their (sometimes mistaken) ethnicity. Typically, the only provocation is their Asian appearance. Given the blatant and even violent racism that some of these incidents reveal, one might expect widespread public outrage and official condemnation. Instead, these incidents are more likely met with little public attention and unresponsive official reactions.

Discrimination mars the everyday lives of Asian Americans:<sup>65</sup>

- "[A] Cambodian man was hit on the head by a rock hidden in a snowball thrown by neighbors as he was playing in the snow with his children. When he approached his neighbors, one of them said, 'Go back where you came from, gook.'"<sup>66</sup>
- "[V]andals spray painted hateful messages, including 'No Chinks, Go Home to China,' on a Chinese American church in Chandler, Arizona, and fired five rounds of ammunition through the church's doors. The incident, which occurred on September 11, 1990, was the second time the church had been attacked within [two] months."<sup>67</sup>

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ASIAN DESCENT (1986); U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* (1980).

64. CIVIL RIGHTS ISSUES, *supra* note 4, at 22.

65. For additional descriptions of incidents of discrimination against Asian Americans, see Helen Zia, *Asians Are America's Forgotten Victims*, L.A. DAILY J., Sept. 17, 1991, at 6 (noting various incidents throughout the country including police racism); David Bacon, *The Civil Rights Act's Slap at Asians*, L.A. DAILY J., Jan. 29, 1992, at 6 (describing how a Supreme Court case interpreting the Civil Rights Act of 1991 discriminates against Asian Americans); Bruce Feffer & Earle Tockman, *Asian-Americans Pin Hopes of Voting on Court and Congress*, N.Y.L.J. July 30, 1992, at 2 (describing how a recent New York case may ameliorate widespread discrimination against Asian-American voters in New York's Chinatown city elections).

66. CIVIL RIGHTS ISSUES, *supra* note 4, at 31.

67. *Id.* at 32.

- Students of Asian descent at the University of Connecticut at Storrs were repeatedly harassed, spat on, and called "Chinks" "Gooks" and "Oriental faggots" by other students during the semiformal Christmas dance sponsored by two University dorms.<sup>68</sup> To the students and the larger Asian American community, the "administration's treatment of them was as bad as the original incident. Perhaps worse."<sup>69</sup> A subsequent report found that "deep-seated prejudice [at the university] has bred a climate in which harassment based on race, sex, ethnic background and sexual preference is tolerated by administrators, students, faculty and staff members."<sup>70</sup>
- "Jimmy Breslin, a prominent columnist for *Newsday*, angered at criticism of one of his columns by a female colleague who is Korean American, publicly referred to her as a 'yellow cur' and 'slant-eyed.'"<sup>71</sup>
- A Philadelphia report indicates that Asian Americans were more likely on a per capita basis to become victims of hate crimes than whites, African Americans, Latinos, or Jews.<sup>72</sup>

When 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. Out of 452 incidents, 104 involved Asian victims, of whom 53 were Vietnamese. Asians were unlikely to be perpetrators of racial incidents.<sup>73</sup>

In addition to these discriminatory occurrences that mar everyday life, the specter of life-threatening racially motivated

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68. David Morse, *Prejudicial Studies: One Astounding Lesson From the University of Connecticut*, NORTHEAST/HARTFORD COURANT, Nov. 26, 1989, at 10-32.

69. *Id.*

70. Katherine Farrish, *UConn Students Reflect on State of Race Relations*, HARTFORD COURANT, Apr. 16, 1989, at B1.

71. CIVIL RIGHTS ISSUES, *supra* note 4, at 44 (citing Constance L. Hays, *Asian-American Groups Call for Breslin's Ouster over Racial Slurs*, N.Y. TIMES, May 7, 1990, at B3).

72. *Id.* at 46 (citing PHILADELPHIA COMM'N ON HUMAN RELATIONS, STATE OF INTERGROUP HARMONY 53-55 (1988)).

73. *Id.* at 46-47 (citation omitted) (citing data provided by the Boston Police Department during 1983-87).

violence also haunts Asian Americans:<sup>74</sup>

- As reported in the *Washington Post*:

A Korean American mother of four was shot to death in the middle of the afternoon yesterday in her District [of Columbia] dry cleaning store, which friends said she had opened after 10 years of saving her wages from a series of low-paying jobs . . . [Bo Hua] Cha was the 45th person killed during a robbery in the District so far this year, and the seventh Asian American shopkeeper.<sup>75</sup>

- Vincent Chin, a twenty-seven year-old Chinese American, met with some friends in a Detroit bar to celebrate his upcoming wedding.<sup>76</sup> He was accosted by Ronald Ebens and Michael Nitz, two white automobile factory workers, who reportedly called him a "Jap" and blamed him for the loss of jobs in the automobile industry.<sup>77</sup> Ebens and Nitz chased Chin out of the bar, and when they caught up with him, Nitz held Chin while Ebens beat him numerous times in the chest and head with a

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74. Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1927 n.11, 1929-30 (1993) (identifying numerous acts of violence against Asian Americans). The author concludes that perpetrators of violence against Asian Americans are motivated by either (1) rational targeting of Asian Americans because of generalizations that Asian Americans are more likely to be wealthy and carry cash, less likely to be physically confrontational, and are reluctant to complain; or (2) racist violence against Asian Americans because of interpersonal hostility toward people of Asian descent. *Id.*; see also Haya El Nasser, *Koreans Brace for Possibility of Violence*, USA TODAY, Mar. 4, 1993, at 7A (discussing the concerns of Korean American merchants over the threat of racial crimes); *Asian Crime Victims Need a Hotline of Their Own*, L.A. DAILY J., May 7, 1991, at 6 (describing the victimization of Asian residents by Asian gangs).

75. Cindy Loose & Santiago O'Donnell, *Merchant Killed in Her NW Shop*, WASH. POST, Sept. 28, 1993, at E1, E6.

76. *United States v. Ebens*, 800 F.2d 1422, 1427 (6th Cir. 1986). Born in China, Chin was adopted at age six by a Chinese American couple. *Id.* Four years later, he became an American citizen. *Id.* Unlike most of these incidents, the Vincent Chin case was widely publicized. *Id.* at 1425. Organized by the Asian American community, many other groups voiced their condemnation of the defendants' conduct. See Mary Thornton, *U.S. Probes Beating Death in Detroit: Two Men Sentenced to Probation in Killing of Chinese American*, WASH. POST, Aug. 5, 1983, at 1 (noting the uproar among civil liberties groups over the sentencing).

77. *Ebens*, 800 F.2d at 1427.

baseball bat.<sup>78</sup> Chin died of his injuries four days later.<sup>79</sup>

Ebens pled guilty to the crime of manslaughter, and state trial court Judge Kaufman fined him \$3,720 and placed him on probation.<sup>80</sup> Ultimately, Ebens and Nitz were acquitted.<sup>81</sup>

- Hung Truong, a fifteen year-old Vietnamese boy living in Houston, Texas, was walking down the street with friends when they were accosted by individuals in two cars that stopped alongside them.<sup>82</sup> After several minutes, one of the cars followed them, stopped, and two eighteen year-old men, Derek Hilla and Kevin Michael Allison, came out of the car, one of them carrying a club.<sup>83</sup> One of Truong's friends later testified that the two men had shouted "White Power."<sup>84</sup> They chased Truong, who became separated from his friends, and kicked and beat him.<sup>85</sup> Allison later testified that Truong had begged them to stop, saying, "God forgive me for coming to this country. I'm so sorry."<sup>86</sup> Truong died shortly after arriving at the hospital.<sup>87</sup>
- On the evening of July 28, 1989, Jim Loo and six other Asian American men were playing pool at a bar in Raleigh, North Carolina.<sup>88</sup> Lloyd Ray Piche and his brother, Robert, began to harass them, calling them "slanty eyed gooks," "rice eaters,"

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78. *Id.* at 1428.

79. *Id.*

80. *Id.* at 1425.

81. CIVIL RIGHTS ISSUES, *supra* note 4, at 25-26. Ebens originally was sentenced to 25 years in prison, but the Sixth Circuit Court of Appeals overturned the conviction for technical reasons. *Id.* In the retrial of the case in the Eastern District of Michigan, he was acquitted. *Id.* "Some have speculated that the main reason that the Cincinnati jury acquitted Ebens is that the jury could not comprehend the reality of anti-Asian bias . . . ." *Id.* at 26.

82. Robert Stanton, *Jurors Convict 2 "Skinheads" in Teen's Death*, HOUSTON POST, Jan. 24, 1991, at A23; Robert Stanton, *Victim's Friend Says Before Attack, 2 Men Yelled "White Power"*, HOUSTON POST, Jan. 17, 1991, at A30; see also CIVIL RIGHTS ISSUES, *supra* note 4, at 29.

83. See sources cited, *supra* note 82.

84. See *id.*

85. See *id.*

86. Robert Stanton, *Youth Says He Battered Asian Teen: Accused "Skinhead" Testifies on Own Behalf*, HOUSTON POST, Jan. 19, 1991, at A31.

87. See sources cited, *supra* note 82.

88. *United States v. Piche*, 981 F.2d 706, 709-11 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2536 (1993).

and "chinks."<sup>89</sup>

The brothers said that they hated the Vietnamese because their brother had been killed in Vietnam, and that the Vietnamese should never have come to America. Lloyd threatened the men by making kung fu gestures and pretending to fire a machine gun at them . . . . Throughout the harassment, the victims remained quiet and attempted to avoid or ignore the Piches.<sup>90</sup>

Eventually, the bartender sent everyone outside.<sup>91</sup> Using a shotgun and pistol, the brothers began to attack Loo and another of the Asian American men.<sup>92</sup> "Robert swung the pistol at Loo, hitting him on the left side of his head around the eye. Loo fell immediately to the ground, bleeding heavily from his face."<sup>93</sup> Bystanders saw "Lloyd smiling, laughing, making sarcastic remarks, and saying that the victim 'deserved this' . . . .

Loo was taken to the hospital, where he never regained consciousness. He died two days later from brain injuries."<sup>94</sup> Robert Piche was convicted in state court of second degree murder and assault with a deadly weapon and sentenced to thirty-seven years' imprisonment.<sup>95</sup> His brother was convicted of misdemeanor assault and conspiracy.<sup>96</sup>

- Patrick Edward Purdy, dressed in military garb, entered the schoolyard at Cleveland Elementary School in Stockton and repeatedly fired an AK 47 assault rifle, killing five Indochinese children and wounding thirty others.<sup>97</sup> He then turned the rifle on himself.<sup>98</sup> The children who died were Raphanar Or, nine; Ram Chun, eight; Thuy Tran, six; Sokhim An, six;

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89. *Id.* at 710.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 711.

95. *Id.* at 709.

96. *Id.*

97. Jay Matthews & Matt Lait, *Rifleman Slays Five at School; 29 Pupils, Teacher Shot in California; Assailant Kills Self*, WASH. POST, Jan. 18, 1989, at A1.

98. *Id.*



and Ogun Lim, eight.<sup>99</sup> Four of the dead children were Cambodian, and one was Vietnamese.<sup>100</sup>

"The possibility that the killings were racially motivated was hardly addressed in the national press."<sup>101</sup> A subsequent investigation indicated, however, that it was "highly probable that Purdy deliberately chose Cleveland Elementary School as the location for his murderous assault in substantial part because it was heavily populated by Southeast Asian children. His frequent resentful comments about Southeast Asians indicate a particular animosity against them."<sup>102</sup>

*B. Paradox: Asian Americans Are the Model Minority, but They Are Not*

The belief that Asian Americans are successfully assimilated into American society is strongly buttressed by the image of Asian Americans as the "model minority." However, as with the societal perception that Asian Americans do not experience discrimination, the "model minority" image is fallacious.

A *New York Times Magazine* article coined the phrase "model minority" to applaud the achievements of Japanese Americans,<sup>103</sup> but this phrase has been used subsequently to describe Asian Americans in general. "Model minority" conveys the belief that Asian Americans, through their hard work, intelligence, and emphasis on education and achievement have been successful in American society.<sup>104</sup>

Americans are quick to embrace the idea of a model minority. This concept embodies a belief central to the American dream—anyone who works hard can do well. The idea of a model minority allows Americans to believe that their social system functions properly and does not impede the progress of those

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99. *Id.*

100. *Id.*

101. CIVIL RIGHTS ISSUES, *supra* note 4, at 30.

102. *Id.* at 31 (quoting NELSON KEMPSKY, A REPORT TO ATTORNEY GENERAL JOHN K. VAN DE KAMP ON PATRICK EDWARD PURDY AND THE CLEVELAND SCHOOL KILLINGS (Oct. 1989)).

103. The phrase has been traced to William Petersen, *Success Story, Japanese-American Style*, N.Y. TIMES MAG. Jan. 9, 1966, at 20-21, 33, 36, 40-41, 43.

104. See TAKAKI, *supra* note 6, at 474.

committed to the Puritan ethos embodied in the Horatio Alger stories. The image is similarly attractive to some Asian Americans. They consider it a compliment—an affirmation that their ceaseless efforts and sacrifices have resulted in their achieving the American dream.

The model minority label is misleading to the extent that it connotes that virtually all Asian Americans are economically successful and socially accepted into American society. As the following discussion explains, Asian Americans should not be thought of as a monolithic group. The positive image of the model minority contradicts other less positive societal realities of Asian Americans.

### 1. *Non-Monolithic Asian Americans*

Defining Asian Americans as the model minority is, at best, an overgeneralization.<sup>105</sup> Asian Americans are a diverse population. The Census Bureau definition of Asian American includes individuals from over sixteen countries of origin or ethnic groups and over twenty Pacific Island cultures.<sup>106</sup> In addition, U.S. immigration policies and restrictions over different time periods

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105. For other writings that have questioned the accuracy of the model minority label, see *The State of Asian Pacific America: Economic Diversity, Issues & Policies* (Executive Summary) (1994); Ashley Dunn, *Southeast Asians Highly Dependent on Welfare in U.S.*, N.Y. TIMES, May 19, 1994, at A1, A13; Elizabeth S.W. Ahn Toupin & Linda Son, *Preliminary Findings on Asian Americans: "The Model Minority" in a Small Private East Coast College*, 22 J. CROSS-CULTURAL PSYCHOL. 403, 404-05 (1991); Won Moo Hurh & Kwang Chung Kim, *The "Success" Image of Asian Americans: Its Validity, and Its Practical and Theoretical Implications*, 12 ETHNIC AND RACIAL STUD. 512, 513-18 (1989); see also Bai, *supra* note 4, at 746 (describing the model minority image as having three political messages: a "benefit denying" function, a "system preserving" function, and a "minority blaming" function). But see Reed Ueda, *False Modesty*, THE NEW REPUBLIC, July 3, 1989, at 16 (arguing that the model minority image has served Asian Americans well and should be stressed).

106. U.S. GEN. ACCOUNTING OFFICE, ASIAN AMERICANS: A STATUS REPORT 13, Table 1.1 (1990) [hereinafter STATUS REPORT]. According to the 1990 Census data, Asian and Pacific Islander groups total 7,226,986. Of the Asian American group (6,876,394), the major subgroups and their percentages are as follows: Chinese 24%, Filipino 21%, Japanese 13%, Asian Indian 13%, Korean 12%, Vietnamese 9%, Cambodian 2%, Laotian 2%, Hmong 1%, Thai 1%, Other Asian 4%. Of the Pacific Islander American group (350,592), the subgroups include Polynesians, Micronesians, and Melanesians. Search of 1990 Census of Population and Housing, Summary Tape File 3C [hereinafter Census].

have resulted in waves of immigrants from different occupational, educational, religious, and socioeconomic backgrounds.<sup>107</sup> The different immigration patterns of Asian American men and women also resulted in different experiences.<sup>108</sup> At the very least, three factors—country of origin, length of residence in the United States, and gender—create a three-dimensional matrix which complicates any attempt to classify Asian Americans as a monolithic group.<sup>109</sup> A multi-dimensional matrix with other variables including religion, age, socioeconomic status, occupation, place of residence in their country of origin and in the United States, and reason for immigration further dramatizes the heterogeneous nature of the Asian American population.<sup>110</sup>

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107. See HING, *supra* note 20, at 43-78 (describing immigration and assimilation experiences of Chinese, Japanese, Filipino, Korean, and Asian Indian groups before 1965); *id.* at 79-120 (describing experiences of these groups after 1965); *id.* at 121-38 (describing experiences of Vietnamese Americans).

108. For example, because Chinese women were barred from entering the United States between 1875 and 1943, Chinese men created bachelor communities, virtually void of wives and children. *Id.* at 36. In contrast, the "gentlemen's agreement" between Japan and the United States allowed Japanese women and children to join Japanese men during the early 1900s. *Id.* at 54-55. During this same period, Filipino men, faced with the paucity of Filipino women, married non-Filipino women, particularly Mexicans. *Id.* at 62-63. While antiscegenation laws prohibited Asians from marrying whites, the states apparently considered women of Mexican descent as non-white. *Id.* at 45.

These three patterns resulted in disparate experiences. My grandmother, like so many other Chinese wives, was left for years at a time in China by her emigrant spouse. She created a separate life, raising children and managing the Chinese household. After she was allowed to immigrate to the United States in the 1940s, she was 48 years old and found the assimilation process into American and married life filled with frustrating and difficult transitions.

For narratives and poetry from the perspective of Asian American women, including descriptions of immigration and assimilation experiences, see MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN (Asian Women United of CA. ed., 1989) [collection as a whole hereinafter MAKING WAVES].

109. For example, Asian American groups make various distinctions. Japanese Americans identify individuals born in Japan as *Isei*, the first generation born in the United States as *Neisei*, and the second generation as *Sansei*. Chinese Americans sometimes use derogatory slang expressions to indicate how recently individuals have immigrated (e.g., "FOB" describes a recent immigrant who is "fresh off the boat") or their degree of acculturation (e.g., someone who is a "banana" is "yellow on the outside, but white on the inside" or someone who is a "lemon" is "yellow on the outside and still yellow on the inside").

110. Noting that I am a first-generation Chinese American woman, for instance, implicates various interacting cultural and historical influences about me. If you add

Because no monolithic "Asian American" or "Asian American experience" exists, one cannot attribute a monolithic "model minority" image to it.<sup>111</sup> Given these differences, it is evident that Asian Americans vary considerably in their socioeconomic status and acculturation to American society.<sup>112</sup> Generalizations about the achievements of Asian Americans are difficult. Making the same generalizations about recent immigrants, nat-

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that my family immigrated from Sunwui, one of the "Four Districts" (Sze Yup) in Guangdong Province, China to California and then to El Paso, Texas, where they had a grocery store, my identity becomes even more differentiated from other Asian Americans. See JACK CHEN, *THE CHINESE OF AMERICA* 16-17 (1980) (mapping regions from where many early Chinese immigrants to the United States originated); Rhoads, *supra* note 13 (describing the histories of the Chinese American communities in El Paso, Texas, where my father's family settled and San Antonio, Texas, where my mother's family settled).

111. Similarly, as Angela Harris and others have argued, there is no monolithic "women's experience." See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (criticizing those who assume the commonality of all women, urging instead "multiple consciousness"); cf. STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991) (cautioning against treating African Americans monolithically); Tracy Robinson, *The Intersections of Gender, Class, Race, and Culture: On Seeing Clients Whole*, 21 J. MULTICULTURAL COUNSELING & DEV. 50 (1993) (exploring the dynamic intersections of gender, race, culture, and class in the formation of an individual's identity; cautioning against homogenizing these characteristics in therapeutic counseling; and using the example of an Asian American woman lawyer to illustrate).

112. Various studies have noted the differences between people of different ethnic groups, generations of immigration, and genders. See, e.g., John K. Matsouka & Donald H. Ryujin, *Asian American Immigrants: A Comparison of the Chinese, Japanese, and Filipinos*, J. SOC. & SOC. WELFARE, Sept. 1991, at 123; Gargi Roysircar Sodowsky, et al., *Moderating Effects of Sociocultural Variables on Acculturation Attitudes of Hispanics and Asian Americans*, 70 J. COUNSELING & DEV. 194, 198-200 (1991) (finding that Vietnamese Americans were less acculturated than Japanese and Korean Americans, and first generation Americans and refugees were less acculturated than the comparison groups); Paul R. Brandon, *Gender Differences in Young Asian Americans' Educational Attainments*, 25 SEX ROLES 45 (1991) (suggesting that young Asian American women reach high levels of educational attainment more quickly than young Asian American men and that the differences are particularly noteworthy among immigrants).

Others have cautioned against making generalizations about Asian Americans in counseling and therapy. See, e.g., Harry H.L. Kitano, *A Model for Counseling Asian Americans*, in COUNSELING ACROSS CULTURES 139 (Paul B. Pedersen et al. eds., 1989); Paul Leung & Robert Sakata, *Asian Americans and Rehabilitation: Some Important Variables*, J. APPLIED REHABILITATION COUNSELING, Winter 1988, at 16; Stephen S. Fugita, *Demographics, Economics, and Politics*, in PERSPECTIVES, *supra* note 4, at 119; Robinson, *supra* note 111.

uralized American citizens, American born Asian Americans, and individuals of all Asian American ethnic groups is inappropriate.

As documented by various government reports and other sources, the assumption that Asian Americans as a class are excelling is fallacious.<sup>113</sup> Many individuals who emigrated from Southeast Asian countries, for instance, live in dismal economic and social circumstances.<sup>114</sup> Asian Americans of Vietnamese, Cambodian, Hmong, and Laotian origins have incomes that are only a fraction of the average American—ranging from \$1,600 to \$3,200 a year.<sup>115</sup> A significant portion of southeast Asian Americans, ranging from thirty-five percent of Vietnamese Americans to sixty-seven percent of Laotian Americans, live below the poverty level.<sup>116</sup> These particular groups have much lower education rates and higher unemployment rates than the national average.<sup>117</sup>

Southeast Asian immigrants, moreover, are not unique; the model minority image is an exaggeration for many other Asian Americans as well. The average individual income for all Asian Americans is slightly lower than the national average.<sup>118</sup> In fact, with many Asian American groups, including those of Chinese, Pakistani, Korean, Thai, and Indonesian origins, the percentage of individuals living below the poverty level exceeds the percentage in the general U.S. population.<sup>119</sup> If Asian immigrants were largely unskilled and uneducated, these low incomes could be explained in part. Given that almost half of all Asian-born immigrants have four or more years of college and

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113. See sources cited *supra* note 63.

114. STATUS REPORT, *supra* note 106, at 22.

115. *Id.* The annual per capita income of the average American is \$7400. *Id.*

116. *Id.* at 23.

117. *Id.* at 2-3, 26-27.

118. *Id.* at 22. The average Asian American income is \$6,900 compared to \$7,400 for the average American. *Id.* The higher average annual household incomes of Asian Americans (\$23,700) as compared to the U.S. population (\$20,300) is explained in part by the larger size of Asian American households. *Id.* at 2. More than one family or extended family may live together. *Id.* In addition, certain Asian American groups, such as those from Asian Indian and Japanese origins, have both household and per capita incomes that significantly exceed U.S. averages. *Id.* at 2, 22.

119. *Id.* at 23.

arrive in the United States possessing extensive professional skills, however, the poverty and social hardships of these groups are difficult to understand.<sup>120</sup>

Other research confirms both the diversity of Asian American people and the myriad health,<sup>121</sup> social,<sup>122</sup> psychological,<sup>123</sup> and academic problems<sup>124</sup> that many face. For example, many elderly Asian Americans who experienced first-hand the "historic" discrimination of American immigration, employment, and education laws now face health, economic, and social injustice.<sup>125</sup> Southeast Asian refugees suffer high rates of tuberculosis and hepatitis B and experience substantial nutritional and mental health problems.<sup>126</sup> They also are haunted by the physi-

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120. Diane Crispell, *People Patterns: Some Immigrant Groups Surpass Native Yanks*, WALL ST. J., Mar. 5, 1993, at B1 (noting that although Asian American immigrants have more education than their native counterparts, they have a higher unemployment rate).

121. E.g., Arthur L. Klatsky & Mary A. Armstrong, *Cardiovascular Risk Factors Among Asian Americans Living in Northern California*, 81 AM. J. PUB. HEALTH 1423 (1991) (demonstrating ethnic differences in risk factors and recommending public health efforts targeted at Asian American men for obesity, Filipino Americans for hypertension, and Asian American women for smoking).

122. E.g., Christine K. Ho, *An Analysis of Domestic Violence in Asian American Communities: A Multicultural Approach to Counseling*, 9 WOMEN & THERAPY 129 (1990) (suggesting that traditional Asian values of close family ties, harmony, and order may not discourage physical and verbal abuse in the home but may instead support minimizing and hiding such problems; also suggesting that Asian American women's cultural values of fatalism, perseverance and self-restraint may reduce their incentive to change their oppressive situations).

123. Evelyn Lee & Francis Lu, *Assessment and Treatment of Asian-American Survivors of Mass Violence*, 2 J. TRAUMATIC STRESS 93-94, 100-04 (1989) (noting that a significant number of recent immigrants and refugees are survivors of war, concentration camps, rape, forced immigration, and torture, and discussing recommended treatment for post-traumatic stress disorders considering cultural coping styles that might conceal disorders).

124. E.g., Toupin & Son, *supra* note 105, at 408 (describing a study finding that Asian Americans performed at a lower academic level than non-Asians); Diana T. Slaughter-Defoe et al., *Toward Cultural/Ecological Perspectives on Schooling and Achievement in African- and Asian-American Children*, 61 CHILD DEV. 363 (1990).

125. Jik-Joen Lee, *Asian American Elderly: A Neglected Minority Group*, J. GERONTOLOGICAL SOC., Summer 1986, at 103, 112-14 (dispelling the assumption that Asian American families always care for their elderly and describing the plight of many Asian American elderly who are unmarried, live alone, have limited English-language ability, are forced to work long hours, and lack any employment benefits or health insurance).

126. See, e.g., Lee & Lu, *supra* note 123.

cal and psychological effects of war, concentration camps, mass violence, and forced emigration from their country of origin.<sup>127</sup>

Studies of college students also reveal the flaws in the model minority image.<sup>128</sup> Although most research compares the aggregate Asian American population and the aggregate white population,<sup>129</sup> one study of a northeastern university compared Asian American students and white students matched by gender, comparable scores on college entrance exams, and socioeconomic backgrounds as indicated by their parents' educational

127. *Id.*

128. See, e.g., Toupin & Son, *supra* note 105. Ironically, the model minority image itself may be the source of problems. Reinforced by the image, some Asian Americans have come to believe that society and their families expect them to excel. See generally Joan E. Rigdon, *Exploding Myth—Asian American Youth Suffer Rising Toll from Heavy Pressures: Suicides and Distress Increase as They Face Stereotypes and Parents' Expectations*, WALL ST. J., July 10, 1991, at A1. Immigrant Asian Americans define success as making a reasonable living and helping their children gain access to American society. *Id.* Their children, the so-called first generation Asian Americans, however, may see their mission as excelling in American society. *Id.* For these individuals, the model minority image has been transmuted to mean that the norm for performance is super-achievement. *Id.* If they do not meet these standards, they have not fulfilled their families' or society's expectations. *Id.*

Although less than stellar performance is unacceptable, average or below average performance is perceived as failure. *Id.* Furthermore, if they accept the monolithic model minority image, they believe that their peer Asian Americans are meeting these goals and that they should be able to do the same. *Id.*

These lofty goals may provide an incentive to work harder and to continue striving beyond what might be necessary for merely adequate performance. *Id.* The norm of super-achievement, however, also can be debilitating and destructive. *Id.*

Internal conflicts also may occur when Asian American students' desires differ from those of their parents. As described by one student:

By deciding to be a writer, I did not have my parents' future in my consideration, and this selfish quest in one's own passion torments my conscience relentlessly. I believe this illuminates one of the greatest cultural conflicts young Asian men and women endure in America today: The Western notion of pursuing one's own dreams and the Eastern philosophy of filial piety posed against one other.

Toupin & Son, *supra* note 105, at 414-15; see also Valerie O. Pang, *The Relationship of Test Anxiety and Math Achievement to Parental Values in Asian-American and European-American Middle School Students*, J. RES. & DEV. EDUC., Summer 1991, at 1 (indicating that higher test anxiety may be prompted in part by efforts to please parents).

129. Richard Nagasawa & Dula J. Espinosa, *Educational Achievement and the Adaptive Strategy of Asian American College Students: Facts, Theory, and Hypotheses*, 33 J.C. STUDENT DEV. 137 (1992).

backgrounds.<sup>130</sup> Contrary to the model minority profile, the Asian American students had lower grade point averages, were more likely to be on academic probation, were more likely to withdraw for medical reasons, and were less likely to graduate than their white counterparts.<sup>131</sup> Moreover, numerous other studies have shown that Asian American students experience more anxiety and stress than other students.<sup>132</sup> These Asian American students apparently experience pressures that manifest themselves in various ways, including low self-concept,<sup>133</sup> poor academic performance,<sup>134</sup> and, as one study indicated, a higher rate of suicide attempts.<sup>135</sup>

Thus, while some data suggest that the fictional "average" Asian American is faring at least as well economically, educationally, and socially as the average American, a more thorough analysis indicates that many Asian Americans are faring poorly in American society.<sup>136</sup>

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130. Toupin & Son, *supra* note 105, at 406-12.

131. *Id.*

132. Jennifer S. Abe & Nolan W.S. Zane, *Psychological Maladjustment Among Asian and White American College Students: Controlling for Confounds*, 37 J. COUNSELING PSYCHOL. 437 (1990) (citing numerous studies and finding that foreign-born Asian Americans, especially those from Southeast Asia, had the greatest levels of interpersonal stress); David Sue & Stanley Sue, *Cultural Factors in the Clinical Assessment of Asian Americans*, 55 J. CONSULTING & CLINICAL PSYCHOL. 479 (1987) (questioning the perception that Asian Americans are very well-adjusted and noting the inadequacies in current psychological assessment tools).

133. *E.g.*, Abe & Zane, *supra* note 132; Joy K. Asamen & Gordon L. Berry, *Self-Concept, Alienation, and Perceived Prejudice: Implications for Counseling Asian Americans*, 15 J. MULTICULTURAL COUNSELING & DEV. 146 (1987); W. Glenn White & Edith Chan, *A Comparison of Self-Concept Scores of Chinese & White Graduate Students and Professionals*, 11 J. NON-WHITE CONCERNS 138 (1983) (finding that Chinese American graduate students had lower self-concepts).

134. *E.g.*, Toupin & Son, *supra* note 105, at 413.

135. Donna Jean Akiye Kato, *Depression, Hopelessness, and Suicide Ideation Among Asian-American Students* (dissertation 1989); *see also* Rigdon, *supra* note 128.

136. It is important to keep in mind that statistical surveys and analyses vary extensively depending upon the definitions and classifications employed by the statistician or researcher.



## 2. Model "Minority," but Not Model "American"

The model minority label also suggests that Asian Americans, through their achievements, have been accepted as equals by others in American society. As models, the inference is that they have risen above historic subordination and societal perceptions of inferiority.

Recent and extensive studies of what Americans think of Asian Americans, however, suggest that these positive inferences from the model minority label may be more aspirational than real.<sup>137</sup> Whites were asked whether Asian Americans as a group tended to be (1) wealthy or poor, (2) hard-working or lazy, (3) violence-prone or not violence-prone, (4) intelligent or unintelligent, and (5) whether Asian Americans preferred to be self-supporting or to live off welfare.<sup>138</sup> Respondents also were asked the same questions about other minority groups, including African Americans and Latinos.<sup>139</sup> Consistent with the model minority image, the study found that whites perceived Asian Americans more positively on these traits than African Americans and Latinos.<sup>140</sup>

Significantly, however, whites did not view Asian Americans as positively as they view themselves.<sup>141</sup> Asian Americans were considered less intelligent, more violence-prone, lazier, and more likely to prefer living off welfare. Thus, whites apparently considered Asian Americans superior to other minorities but inferior to whites. While whites believed Asian Americans were model "minorities," they did not yet perceive them as equals, in other

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137. See Tom W. Smith, *Ethnic Images*, GEN. SOC. SURV. TOPICAL REP. No. 19 (1990) (describing analysis of data based on 1990 nationally representative survey of 1372 respondents); Bobo & Kluegel, *supra* note 5 (same).

138. Smith, *supra* note 137, at 16.

139. Whites also were asked about Jewish Americans and southern whites. *Id.*

140. In other words, Asian Americans are more likely to be thought of as wealthier, more hard-working, and more intelligent than other minorities. Bobo & Kluegel, *supra* note 5, at 21 Fig. 1, 9 & Table 1; Smith, *supra* note 137, at 9. In contrast to African Americans and Latinos, Asian Americans as a group were viewed more positively than negatively. Bobo & Kluegel, *supra* note 5, at 15-17.

141. Smith, *supra* note 137, at 9; Bobo & Kluegel, *supra* note 5, at 31. A promising note about the future is that the youngest and most highly educated whites did characterize Asian Americans "in terms essentially equal on average to other whites." *Id.* at 21.

words, as "model Americans."<sup>142</sup>

While these images of Asian Americans and other minorities are more subtle than Jim Crow-like racism and practices, they continue to shape American society's attitudes on a range of topics.<sup>143</sup> These studies suggest, for instance, that derogatory perceptions of Asian Americans and other minorities impact societal support for government assistance for minorities, affirmative action, and school integration.<sup>144</sup> Furthermore, images of inferiority appear to contribute to negative feelings about Asian Americans and other minorities in more personal relationships, such as neighbors and marriage partners.<sup>145</sup>

### 3. Casting as "Foreigners"

*When people first meet me, it is not unusual for them to comment, "You speak so well, you don't have an accent," intending their observation to be a compliment. "Where are you from?" they continue, expecting my response to be a more foreign and exotic place than Texas or Pennsylvania.*

*A tall red-haired, causally dressed gentleman that I didn't know recently knocked on my office door. "Yes?" I greeted. "Sorry to interrupt you," he stammered, "I was visiting the law school and I saw the name on your door, and old family friends are named 'Chew,' and I thought you might be related, but," he paused, "I can see I'm wrong. They're American."*

When society labels Asian Americans the model minority, the frame of reference is to an "American" minority group.<sup>146</sup> Con-

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142. Interestingly, Jewish Americans as a group were perceived more positively than whites as a group. Smith, *supra* note 137, at 9. Would this result suggest that Jewish Americans, in contrast to Asian Americans, are considered "model Americans?"

143. See Bobo & Kluegel, *supra* note 5, at 35-36 (discussing the decline of Jim Crow ideology and evolving attitudes about minorities).

144. *Id.* at 33-38; Smith, *supra* note 137, at 7-8.

145. See *infra* text accompanying notes 299-302.

146. "Model minority" is an American societal construct, and, as such, refers to Asian Americans inside the boundaries of an American context. See *supra* notes 103-

trary to this frame of reference, however, Americans often think of Asian Americans as foreigners.<sup>147</sup> Asian Americans' physical appearance and immigration history, in addition to societal perceptions, help explain Americans' impression.

Like African Americans, Asian Americans' skin color and other facial features physically distinguish them.<sup>148</sup> While they can dress, speak, anglicize their names and even think like other Americans, Asian Americans are physically distinguishable from whites.<sup>149</sup> As Justice Sutherland noted in *United States v. Bhagat Singh Thind*,<sup>150</sup> "it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry."<sup>151</sup>

Asian Americans have found it difficult to transcend both their "foreignness" and what many consider the logical corollary that they are "not American."<sup>152</sup> Their immigration history partially explains this difficulty. Because American laws precluded Asian immigrants from becoming naturalized citizens until 1952,

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45 and accompanying text.

147. Raul Ramirez, *Ethnic Students Often Treated as Foreigners*, S.F. EXAMINER, May 7, 1990, at A9 (including Asian Americans). Neil Gotanda argues that non-African American minorities, including Asian Americans, Latinos, and Arab Americans, experience a dualism: even though legally they may be "citizens," socially they are considered "aliens" and foreigners. Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* in ASIAN AMERICANS AND THE SUPREME COURT, *supra* note 4, at 1087, 1095-98.

148. The increasing number of children of mixed Asian and white ancestry, however, eventually may blur the physical and ethnic distinctions. See Sharou M. Lee & Keiko Yamanaka, *Patterns of Asian American Intermarriage and Marital Assimilation*, 21 J. COMP. FAM. STUD. 287 (1990).

149. Latinos and Jewish Americans, on the other hand, can be physically indistinguishable from whites.

150. 261 U.S. 204 (1923).

151. *Id.* at 215. While African Americans are also physically distinguishable from whites, they are generally less likely to be considered foreigners unless they are dressed in foreign attire. One common perception is that African Americans trace their ancestry to the southern slaves. They are, therefore, long-time residents with American roots as firmly established as those of European Americans who immigrated at the same time.

152. Contrasting the status of Chinese and blacks, Justice Harlan stated in *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting), that "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." *Id.* at 561.

the immigrants involuntarily retained alien status despite years of residence in the United States.<sup>153</sup> The courts repeatedly suggested what has perhaps become inculcated into the American psyche—individuals of Asian descent are too different to assimilate.

Because of restrictive immigration laws and sometimes because of political events in their countries of origin, there also have been repeated waves of “recent” immigrant Asians.<sup>154</sup> These immigrant groups bring with them the cultural and religious differences and limited proficiency in English that distinguish them from other Americans.

Yet, even when Asian Americans are born here, have lived here many years, are highly educated and dressed in American attire, and have no distinguishable foreign accent, Americans still may unconsciously perceive them as foreigners.<sup>155</sup>

*Shopping at the local Giant Eagle grocery store, I was approached by another customer, a middle-aged, stylishly dressed white woman who apparently needed some help locating something. She politely asked me in the slow cadence and animated tone that adults reserve for speaking to babies and foreigners, “DO . . . YOU . . . SPEAK . . . ENGLISH?”*

Some Americans have a narrow view of what is “American.” While Americans boast about a melting pot, they demand that the resulting stew look and sound a certain way. Often, American society finds it difficult to incorporate those who look Asian into their definition of American, especially if they speak

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153. See *supra* notes 23-61 and accompanying text.

154. There was a notable influx of Asian immigrants in the 1890s, 1900s, and 1910s although they represented only a small percentage of total immigration. HING, *supra* note 20, at 3. Beginning in the 1950s and 1960s, Asian immigration began increasing steadily so that during the 1980s, Asian immigrants approached three million. *Id.* Between 1971 and 1991, over 35% of all legal immigrants were from Asian countries. Michael J. Mandel & Christopher Farrell, *The Immigrants: How They're Helping to Revitalize the U.S. Economy*, BUS. WK., July 13, 1992, at 114 (citing data from the Urban Institute, Census Bureau Immigration & Naturalization Service).

155. Light-skinned individuals of white ancestry who reside in Asia are treated analogously. They are considered “foreigners” no matter how long they have lived there. In contrast, when I visited China for the first time at the age of 39, I was greeted by the Chinese with “welcome home.”

with accents.<sup>156</sup> The media reinforces this tendency. Movies cast Asian-looking actors in limited roles, often as citizens or soldiers of enemy countries during wars between the United States and Asian countries.<sup>157</sup> Press coverage focuses on Asians from other countries, such as Japanese managers who are described as America's economic enemies.<sup>158</sup>

This perception of Asian Americans as foreigners and as adversaries also prompts some Americans to attribute acts by actual foreigners to Asian Americans. For example, as in the Vincent Chin and Jim Loo cases,<sup>159</sup> Asian Americans are somehow viewed as responsible for the harm purportedly caused by the companies, citizens, or governments of Asian countries. This might be analogous to the preposterous presumption that one could generalize about all whites and white-owned businesses in the world or that all whites are to blame for the atrocities of Nazi Germany.

Historically, the most infamous example of attributing the

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156. For a discussion of American attitudes towards different accents, see Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

157. For example, Asian Americans portrayed the Vietnamese in "The Deer Hunter" (1978) and "Apocalypse Now" (1979). See also Susan Spillman, *Spurning Stereotypes: Films Expand Views of Asian America*, USA TODAY, May 5, 1993, at D1 (noting that the film industry is beginning to portray Asian Americans in less stereotypical roles but ironically featuring photos of Asian Americans as Vietnamese women during the Vietnam War and Bruce Lee in a kung-fu pose).

158. David Boaz, *Yellow Peril Reinfests America*, WALL ST. J., Apr. 7, 1989, at A14 (describing anti-Asian policies in the United States that affect direct foreign investment policies). Some politicians also engage in Japan-bashing. United States Senator Ernest Hollings told South Carolina factory workers to "draw a mushroom cloud and put underneath it: 'Made in America by lazy, illiterate Americans and tested in Japan.'" *On Asian Americans . . . Evidence of Pervasive Bias*, L.A. DAILY J., Mar. 18, 1992, at 6. Hollings later said it was only a joke, but added, "I'm glad I said it." *Id.*

159. See cases cited *supra* notes 76-81, 88-96 and accompanying text. In *United States v. Piche*, 981 F.2d 706 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2356 (1993), "the brothers said that they hated the Vietnamese because their brother had been killed in Vietnam, and that the Vietnamese should never have come to America. Lloyd threatened the men by making kung fu gestures and pretending to fire a machine gun at them." *Id.* at 710. In *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986), "Ebens seemed to believe that Chin was Japanese," commenting that "it's because of you little mother fuckers that we're out of work" and "making remarks about foreign car imports." *Id.* at 1427.

acts of a country broadly and unreasonably to Asian Americans was the treatment of individuals of Japanese ancestry during World War II.<sup>160</sup> Fear and hostile sentiments against Japan were extended to all individuals of Japanese ancestry living in the United States, including American-born Japanese American citizens.<sup>161</sup>

No evidence established that Japanese Americans were disloyal to the United States and therefore might require internment due to "military necessity."<sup>162</sup> The United States government, however, convinced the Supreme Court in *United States v. Korematsu*<sup>163</sup> that the Court should take "judicial notice" of certain characteristic "facts" about Japanese Americans that would predispose them to espionage and sabotage.<sup>164</sup> As Justice Murphy explained in his dissent, "[i]ndividuals of Japanese ancestry are condemned because they are said to be 'a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.'"<sup>165</sup>

Even the aftermath of the Japanese American internment tragedy illustrates some Americans' tendency to treat Japanese Americans as citizens of Japan. In the 1988 debates over whether Japanese Americans should receive reparations for their World War II internment, Senator Jesse Helms argued that reparation should not take place unless the Japanese government compensated the families of Americans killed during the attack on Pearl Harbor.<sup>166</sup> His argument overlooked the fact that virtually all those incarcerated in the internment camps were American citizens or long-time American residents, not

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160. For references on the treatment of Japanese Americans during World War II generally, see *supra* note 18.

161. See *supra* note 18.

162. Bannai & Minami, *supra* note 18, at 770-71.

163. 323 U.S. 214 (1944).

164. See *id.* Rule 201(b) of the Federal Rules of Evidence provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known . . . or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." FED. R. EVID. 201(b) (1993).

165. *Korematsu*, 323 U.S. at 237 (Murphy, J., dissenting).

166. Roy H. Salgo, *The Barriers of Racism: Righting the Wrongs of Past & Present*, CHANGE, Nov.-Dec. 1989, at 8.

Japanese nationals or residents.<sup>167</sup>

#### 4. *Negative Stereotyping*

During World War II, *Time* magazine published the following guide for its readers:

HOW TO TELL YOUR FRIENDS FROM THE JAPS: Virtually all Japanese are short. . . . Japanese are likely to be stockier and broader-hipped than short Chinese. Japanese . . . are seldom fat; they often dry up and grow lean as they age. . . . Although both have the typical epicanthic fold of the upper eyelid, . . . Japanese eyes are usually set closer together. . . . [T]he Chinese expression is likely to be more placid, kindly, open; the Japanese more positive, dogmatic, arrogant. . . . Japanese are hesitant, nervous in conversation, laugh loudly at the wrong time. Japanese walk stiffly erect, hard heeled. Chinese, more relaxed, have an easy gait, sometimes shuffle.<sup>168</sup>

The model minority image is supposed to be a composite of positive and laudatory traits. Contrary to that image, however, are the sometimes conflicting and often negative stereotypes that American society attributes to Asian Americans. Asian Americans, for instance, have been described as nonassertive and deferential, intelligent but devious, and mathematically and technically oriented rather than verbally skilled.<sup>169</sup> This stereo-

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167. *Id.*

168. *TIME*, Dec. 22, 1941, at 33. Prior to Pearl Harbor, Chinese Americans also were publicly maligned. After China became an ally, however, deliberate but sometimes dehumanizing efforts were made to distinguish the groups. *Id.* These instructions from *Time* were used to distinguish between the Chinese "friend" and the Japanese "enemy." *Id.* Two accompanying photographs illustrated the differences between the Japanese and the Chinese. *Id.*; see also TAKAKI, *supra* note 6, at 370-71 (quoting *TIME*, *supra*, at 33).

169. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1270-73 (1992) (describing negative stereotypes of Asian Americans and other minorities throughout American history as depicted in the media and other popular culture); Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 LEGAL STUD. F. 243 (1991) (examining how movies depict minorities negatively); Bobo & Kluegel, *supra*, note 5 (studying stereotypes and perceptions of Asian Americans). As an Asian American professor describes, "I am often believed to be 'inscrutable, exotic, brilliant in math and extraor-

typing may not be intentionally harmful. Some Americans instead may intend these characterizations to be positive, or they may reflect unconscious impressions cultivated by typical American socialization.<sup>170</sup>

While there are various societal sources of Asian stereotypes, the media has affirmed and sometimes created these stereotypes. Paul Spickard describes how three media images of Asian American men helped shape these stereotypes between the 1930s and the 1970s.<sup>171</sup> The first image was of Dr. Fu Manchu, the "diabolical genius bent on destroying Western civilization and compromising the virtue of White womanhood . . . [who, over the years, was] transformed into the sickening Kamikaze pilot, grinning devilishly and intoning mystical poetry as he plunged his plane into the side of an American battleship."<sup>172</sup> The second image was more benevolent but still not flattering. It was of a suffering Asian peasant or soldier who died nobly along side the leading role played by Alan Ladd or John Wayne.<sup>173</sup> The third and perhaps most dominant image was the character of Charlie Chan, the detective who outsmarted others with his cleverness.<sup>174</sup> Unlike white American males acting in leading roles, Chan was depicted as sexless or effeminate.<sup>175</sup> The clever Chan was played by white actors, while Chan's bumbling Number One Son was played by Asian American actors.<sup>176</sup>

Spickard also contrasts the stereotypes of Asian American women from the 1930s to modern times.<sup>177</sup> Reinforced by such movies and writings as James Michener's depiction of Asian and

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dinarily hard working.' As a lawyer, I try to use these stereotypes to my client's benefit." Survey, *supra* note 1.

170. See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (proposing that the "innocent white victim" argument in the affirmative action debate reveals the unconscious racism in all of us); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (exploring unconscious racism in American society).

171. SPICKARD, *supra* note 17, at 36-38.

172. *Id.* at 37.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 38-41.



Polynesian women in *Tales of the South Pacific*,<sup>178</sup> American society often thinks of Asian American women as "small, quiet, beautiful, submissive, soft, loving, self-sacrificing, uncomplaining, and eager to serve."<sup>179</sup>

*a. Effects of Stereotyping*

These images, however, may offend Asian Americans and prove debilitating. Casting Asian Americans in certain ways, for instance, is not limited to the movies and magazines. It carries over into the employment arena, triggering generalizations that may or may not be true. These generalizations obscure individual differences and the diversity of Asian Americans. Employers might tend to see Asian Americans as homogeneous and suited for certain defined roles that are consistent with society's image. Thus, it might seem appropriate for Asian Americans to be in certain roles and inappropriate for them to be in others.

The perceived incompatibility of Asian Americans in managerial and executive roles and as lawyers exemplifies the restrictive impact of stereotyping. Some employers apparently believe that Asian Americans do not make good managers because they presumably lack skills associated with leadership.<sup>180</sup> These employers view Asian Americans as insufficiently aggressive, not politically astute, or interpersonally weak; instead the employers perceive them as being too quantitative and technical.<sup>181</sup>

Similarly, stereotypes about Asian Americans suggest that

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178. JAMES A. MICHENER, *TALES OF THE SOUTH PACIFIC* (1947).

179. SPICKARD, *supra* note 17, at 39 (describing *Playboy* and *Penthouse* persistence in using these stereotypes as late as 1981); see also Kimberlè W. Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, in MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 111, 119 (1993) (describing a scene in the movie *Year of the Dragon*, in which a New York police officer verbally abuses with racial insults and physically abuses an Asian American female TV newscaster, as an example of the way American culture depicts race and gender images).

180. *E.g.*, Vivian Louie, *For Asian-Americans, A Way to Fight a Maddening Stereotype*, N.Y. TIMES, Aug. 8, 1993, at 9F (describing how stereotypes limit management and other employment opportunities); Robert D. Hof, *High Tech's Huddled Masses: Making a Mark in Silicon Valley*, BUS. WK., July 13, 1992, at 120 (Asian American entrepreneur confirming stereotypes).

181. It is unclear how these beliefs about Asian American managers are reconciled with the belief that the Japanese are consummate managers.

they do not possess the attributes commonly associated with lawyers. "Ideal" lawyers are aggressive, articulate, and single-minded about their client's interest. In contrast, as one Asian American law professor explained, "people do not expect Asians to be articulate, assertive, theoretical, or progressive."<sup>182</sup> Instead, some perceive Asian Americans, especially those with "foreign accents," as having poor communication skills and lacking assertive interpersonal skills. While society may consider Asian Americans hard working and intelligent, especially in math, Asian American faculty may be considered "too nice" to be intellectually demanding and rigorous professors and scholars. These impressions of Asian Americans may reveal themselves in subtle ways. As one Asian American law professor described his experience as a student, "professors and students refused to engage me intellectually even though I had high grades. My questions were never really answered."<sup>183</sup>

Based on these beliefs, employers may pass over otherwise qualified Asian American professionals for special projects, particular responsibilities, and promotions. Given this stereotyping, the lack of Asian American managers and executives in both business and other settings is not surprising.<sup>184</sup> It also helps explain the "glass ceiling" and "glass box" barriers in their career paths.<sup>185</sup>

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182. Survey, *supra* note 1.

183. *Id.*

184. See *infra* note 217 and accompanying text.

185. See *infra* notes 216-30 and accompanying text.

b. *Erroneous Stereotypes*

These stereotypes and their inferences deserve more thorough study.<sup>186</sup> Research by social scientists Stanley Sue, David Sue, Nolan Zane, and others, for example, questions whether the stereotype of the nonassertive Asian American is accurate or broadly generalized.<sup>187</sup> One study found that although Asian Americans described themselves as unassertive, they actually were as behaviorally assertive as their white counterparts in role-plays.<sup>188</sup> In another study, assertiveness was assessed in various ways for nine situations: three situations involving acquaintances, three involving intimates, and three involving strangers.<sup>189</sup> The researchers found that in the situations with intimates and acquaintances, Asian Americans were as assertive as their white counterparts.<sup>190</sup> Notably, some of these situations resemble those that managers or lawyers encounter, such as voicing an opposing opinion in a committee meeting, voicing disapproval of co-workers' irresponsible behavior on the job, or telling a friend of his or her personal shortcomings.

Employers' cultural perspectives may shape their determination of an applicant's nonassertiveness. Some Asian cultures encourage harmonious social interactions, requiring a sensitivity to the needs and interests of others.<sup>191</sup> Asian Americans' atten-

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186. Despite the common stereotype that Asian Americans are not verbal, studies of Asian American students have consistently shown that they are as verbally proficient as other students. Brian J. Stone, *Prediction of Achievement by Asian-American and White Children*, 30 J. SCH. PSYCHOL. 91, 96-98 (1992); Marsha N. Cotton, *Comparisons of Aptitude and Achievement Patterns of Asian-American and Caucasian-American Students* (1991) (dissertation). This proficiency is true even though there is evidence that verbal abilities tests may be biased against Asian Americans. Stone, *supra*.

Some Asian Americans may be trying to reconcile these stereotypes. *E.g.*, *Racial Reflections: Dialogues in the Direction of Liberation*, 37 UCLA L. REV. 1037, 1087-89 (Derrick Bell et al. eds., 1990) [hereinafter Bell et al.] (describing how a Korean American law student has accepted with ambivalence some of the stereotypes about Asian American men).

187. See *infra* notes 188-89 and accompanying text.

188. David Sue et al., *Nonassertiveness of Asian Americans: An Inaccurate Assumption?*, 30 J. COUNSELING PSYCHOL. 581, 584-87 (1983).

189. Nolan Zane et al., *Asian-American Assertion: A Social Learning Analysis of Cultural Difference*, 38 J. COUNSELING PSYCHOL. 63, 65-68 (1991).

190. *Id.* at 68.

191. See Abe & Zane, *supra* note 132, at 438 (citing other studies). Because of

tion to others, what some social scientists have called "other-directedness,"<sup>192</sup> may well result in more self-effacing behavior and modesty. Contrary to what an American cultural perspective may suggest, this behavior is not indicative of insecurity, anxiousness, or passivity.<sup>193</sup>

The influence of cultural background and the possible misreading of behavior is supported by a study of white and Chinese American therapists.<sup>194</sup> The therapists were asked to assess Chinese American and white clients during a videotaped interview.<sup>195</sup> The Chinese American therapists perceived the Chinese American clients as adaptable, alert, dependable, friendly, and practical.<sup>196</sup> In contrast, the white clinicians rated the same clients as anxious, awkward, confused, nervous, quiet, reserved, "less socially poised and as having less capacity for interpersonal relationships."<sup>197</sup>

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historical interaction and proximity, Asian countries, especially those in the Pacific area, share many cultural features. Principles of Confucianism, Buddhism, and Taoism, for instance, strongly influenced the cultures of China, Japan, Korea, and other Asian countries. See generally HEINRICH DUMOULIN, *A HISTORY OF ZEN BUDDHISM* (Paul Peachey trans., 1963).

192. Abe & Zane, *supra* note 132, at 438.

193. In other words, if Asian American individuals behave in a manner that might be self-effacing or modest as a result of cultural influences from their Asian roots, such activity is not an indication of insecurity, anxiousness, or general passivity.

194. See Diana Li-Repac, *Cultural Influences on Clinical Perception: A Comparison Between Caucasian and Chinese-American Therapists*, 11 J. CROSS-CULTURAL PSYCHOL. 327 (1980); Sue & Sue, *supra* note 132, at 483-84.

195. Li-Repac, *supra* note 194, at 331-33.

196. *Id.* at 335.

197. *Id.* at 335-36. Interestingly, the two sets of therapists also perceived the white clients differently. White clinicians rated the white clients as affectionate, adventurous, and capable while the Chinese American clinicians rated the same clients as active, aggressive, rebellious, and more seriously disturbed. *Id.* at 335, 338.

c. *Erroneous Inferences*

In addition, the premise that personality traits that Asian Americans supposedly lack indicate or impede professional effectiveness may be faulty. For example, the perception that lawyers need to have a particular personality or preference is questionable. A recent study of the personality types of over 3,000 lawyers indicated that lawyers have a range of personalities with no more than eighteen percent sharing a personality type.<sup>198</sup> In addition, contrary to the popular image, some studies suggest that more lawyers are introverted than extroverted.<sup>199</sup>

Even if Asian Americans manage resources, practice law, or teach differently, it does not mean that their approach is less valuable or less effective. America's traditional litigation model equates an aggressive, adversarial manner with effectiveness in resolving disputes. Studies indicate, however, that effective negotiators in American business are not necessarily aggressive.<sup>200</sup> Cooperative negotiators who are thoroughly prepared, perceptive, reasonable, analytic, convincing, and self-controlled can be as or more effective than their aggressive opposing counsel.<sup>201</sup> Moreover, many Asian cultures emphasize a more holistic and informal approach to resolving disputes.<sup>202</sup> If the parties want or must have ongoing relationships, an approach that

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198. See Larry Richard, *The Lawyer Types: How Your Personality Affects Your Practice*, A.B.A. J., July 1993, at 74, 78. The lawyers' personality types were determined by a widely used instrument called the Myers-Briggs Type Indicator (MBTI), which assesses one's personality on four dimensions. *Id.* at 74. The various combinations yield 16 different personality types. *Id.* at 78. 17.8% of the group were more introverted (I) than extraverted (E), more sensing (S) than intuitive (N), more thinking (T) than feeling (F), and more judging (J) than perceiving (P), resulting in an ISTJ type. *Id.* The next most frequent personality types were INTJ (13.1%), ESTJ (10.3%), and ENTP (9.7%). *Id.*

199. *Id.* at 75. More lawyers were introverted (57%), intuitive (57%), thinking (78%), and judging (63%). *Id.*; see *supra* note 198.

200. Gerald R. Williams, *Effective Negotiation*, in DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK 333, 340-44 (John H. Wilkinson ed. 1990, 1992 Supp.); see also ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981) (advocating a less adversarial, more cooperative negotiating posture).

201. See Richard, *supra* note 198.

202. See Pat K. Chew, *A Procedural and Substantive Analysis of the Fairness of Chinese and Soviet Foreign Trade Arbitrations*, 21 TEX. INT'L L.J. 291, 330-34 (1986).

acknowledges both parties' faults and values both parties' needs may be most effective for achieving amicable and constructive long-term resolutions.

Innovative researchers in business also question whether traditional beliefs about what constitutes an exemplary manager or professional are correct. In contrast to what many managers might predict, one study found that the most productive scientists and engineers are not necessarily the individuals who are the most intelligent, the most ambitious, or the most aggressive.<sup>203</sup> Instead, what distinguished the "star" performers from others is the strategic way they performed their jobs.<sup>204</sup> In particular, the successful managers were said to master nine different work strategies including taking initiative; obtaining and sharing technical expertise with their co-workers; self-managing their work commitments, performance levels, and career growth; formulating and helping build consensus on common goals; and seeing their job in its larger organizational and market context.<sup>205</sup> Because mastering these strategies does not require innate ability, these researchers were able to train professionals who were not yet proficient at, or aware of, these strategies.<sup>206</sup> Significantly, women and minorities who received training showed marked productivity improvements, while those who did not receive training actually decreased in their productivity over the same time period.<sup>207</sup>

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203. Robert Kelley & Janet Caplan, *How Bell Labs Creates Star Performers*, HARV. BUS. REV., July-Aug. 1993, at 128, 129.

204. *Id.* at 129.

205. *Id.* at 131-33.

206. *Id.* at 134-38.

207. *Id.* at 136, 138.

*C. Paradox: Asian Americans Are Well-Represented Throughout the Professions, but They Are Not*

The belief that Asian Americans are well-represented throughout different industries and professions also is consistent with the image of the successfully assimilated Asian American. However, the data indicate a contrasting reality: there is evidence that society perceives Asian Americans' qualifications differently than other groups.

*1. The Glass Box*

In the absence of a more meaningful method, the number of minority group members in a particular occupation is often used as a gross index of the status of that minority group.<sup>208</sup> If their representation is disproportionately low relative to their representation in the general population,<sup>209</sup> one might infer that they encounter obstacles, such as racial discrimination, that prevent their inclusion. On the other hand, if their representation is proportionate, one might infer that they are not encountering obstacles that preclude their access to these positions and that they are becoming assimilated.<sup>210</sup>

Given that Asian Americans constitute approximately 2.9% of the U.S. population, one would expect their representation in particular occupations to be similar.<sup>211</sup> As 1990 Census data

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208. See, e.g., *Teamsters v. United States*, 431 U.S. 324, 339 (1977) (noting the usefulness of gross statistical disparities as evidence of employment discrimination); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308-13 (1977) (using the *Teamsters* analysis).

209. The determination of what is the appropriate comparison group may be problematic. See, e.g., *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183-86 (4th Cir. 1979) (discussing whether the general population or some subset of the labor pool is more appropriate in employment discrimination cases); *EEOC v. International Union of Operating Eng'rs*, 553 F.2d 251, 254 (2d Cir. 1977) (same).

210. Further study also might reveal that individual members of under-represented minority groups in certain occupations choose not to pursue such employment for reasons of personal or cultural preference, and that these choices explain in part their under-representation.

211. African Americans represent 12.1%, Latinos (individuals of Hispanic origin, including those from Mexico, Puerto Rico, Cuba, and other Hispanic countries) represent 9%, Asians or Pacific Islanders represent 2.9%, and Native Americans, Eskimos, and Aleuts represent .8% of the total U.S. population of 248,710,000 in 1990. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 17 (112th ed. 1992)

indicate, Asian Americans are indeed amply represented in certain fields, particularly those in, or related to, the sciences and mathematics.<sup>212</sup> In some of these occupations, such as accounting, civil and electrical engineering, computer science, and medicine and dentistry, the percentage of Asian Americans exceeds their percentage in the general population.<sup>213</sup>

In contrast, however, Asian Americans are under-represented in many other occupations, as shown in Table 1.

TABLE 1: REPRESENTATION OF ASIAN AMERICANS IN SELECTED OCCUPATIONS (1990)<sup>214</sup>

OCCUPATION	REPRESENTATION (percent of total)
<i>Managerial Occupations:</i>	
Chief executives and general administrators in public administration	1.40%
Administrators and officials in public administration	1.88%
Administrators in protective services	1.04%
Administrators in education and related fields	1.94%
Postmasters and mail superintendents	0.87%
Managers in property and real estate	1.93%
Managers in service organizations	1.56%

[hereinafter STATISTICAL ABSTRACT]. Thus, African Americans and Latinos are proportionately represented in a particular occupation if their representation approximated 12% and 9% respectively.

212. See *infra* note 213.

213. The Asian American representation in these occupations is as follows: accountants (6.81%), civil engineers (8.07%), electrical engineers (7.91%), computer scientists (7.22%), physicians (10.83%), and dentists (5.53%). As computed from data in the 1990 Equal Employment Opportunity (EEO) File, Managerial & Professional Specialty Occupations, based on the 1990 Census [hereinafter EEO File].

214. *Id.*



TABLE 1: *CONTINUED*

OCCUPATION	REPRESENTATION (percent of total)
<i>Law Related Occupations:</i>	
Lawyers	1.40%
Judges	1.02%
Legislators	1.42%
<i>Social Service Related Occupations:</i>	
Psychologists	1.42%
Social workers	1.71%
<i>Education Related Occupations:</i>	
Elementary education teachers	1.27%
Secondary education teachers	1.05%
Education and vocation counselors	1.87%
<i>Media and Communications Occupations:</i>	
Authors	1.62%
Actors and directors	1.41%
Editors and reporters	2.04%
Announcers	1.19%

The data reveal the relative paucity of Asian Americans in, for instance, managerial occupations, law-related professions, education and the social services, and media and communications positions. Instead of the approximate 2.9% representation one would expect, Asian American representation is markedly less.<sup>215</sup>

Access to these occupational areas may be more illusory than the public believes. In some cases, such as with public adminis-

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215. *Id.*

trators and officials, psychologists, counselors and teachers, and directors and actors, the under-representation of Asian Americans is more extreme than the under-representation of African Americans.<sup>216</sup> The so-called "glass ceiling" to supervisory posi-

216. Table 2, below, illustrates the under-representation of minority groups in various professions:

TABLE 2: REPRESENTATION OF MINORITY GROUPS IN SELECTED OCCUPATIONS			
OCCUPATION	ASIAN AMERICANS	AFRICAN AMERICANS	LATINOS
Public administrators and officials	.65	.93	.40
Administrators in education and related fields	.67	.70	.46
Lawyers	.49	.21	.18
Psychologists	.49	.64	.42
Social workers	.59	1.81	.80
Elementary teachers	.44	.73	.37
Secondary teachers	.36	.60	.38
Counselors	.64	1.28	.41
Actors and directors	.49	.87	.53
Editors and reporters	.70	.37	.31
Announcers	.41	.52	.58

The ratios of the percentage of each minority group in an occupation over the percentage of each minority group in the general population provide these comparisons.

For example, among public administrators and officials, the ratios were determined in the following way: Asian Americans: 1.88 (percentage in occupation) over 2.9 (percentage in the general population)=.65; African Americans: 11.30 (percentage in occupation) over 12.1 (percentage in general population)=.93; and Latinos: 3.6 (percentage in occupation) over 9.0 (percentage in general population)=.40.

As the ratio moves toward 1.0, the minority group's representation becomes more proportionate; as the ratio moves away from 1.0, the minority group's representation is less proportionate. Thus, these ratios indicate that African American public administrators are proportionately represented in that occupational area, Asian Americans are under-represented, and Latinos are even more under-represented. In contrast, the ratios in the Table above indicate that all three groups are under-represented among lawyers, with African Americans and Latinos being more under-represented than Asian Americans.

tions that hampers other minority groups applies to Asian Americans as well.<sup>217</sup> The data for managerial occupations substantiate the relative lack of Asian Americans in executive roles.

For many Asian Americans, the analogy of a "glass ceiling" can be extended to a "glass box." Even when Asian Americans gain access to particular professional areas, invisible barriers creating "glass walls" apparently preclude entry into certain career paths within those professions. Discrimination hinders both upward and lateral mobility.

Asian Americans in the communications fields illustrate this "glass box." The positive publicity surrounding Connie Chung's coanchoring position on CBS News, for instance, gives the impression that Asian Americans have ready access to all types and levels of broadcasting positions. Her singular visibility obscures the reality.<sup>218</sup> Asian Americans are under-represented in various media occupations, including editors, reporters, announcers, actors, directors, and executive and management roles.<sup>219</sup> In addition, according to the Radio-Television News Directors Association, Asian Americans hold only two percent of broadcast newsroom jobs.<sup>220</sup> Asian American men, in particu-

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For the data used to generate this Table, see STATISTICAL ABSTRACT, *supra* note 211, at 392 (providing 1991 data on African Americans and Latinos); EEO File, *supra* note 213 (providing 1990 data on Asian Americans).

217. In a national study of county human service workers, for example, there was a disproportionate under-representation of Asian Americans in both managerial and supervisory roles. R.L. McNeely, *Job Satisfaction and Other Characteristics of Asian American Human Service Workers*, SOCIAL WORK RES. & ABSTRACTS, Winter 1987, at 7-8. See also Eric Schine, *A Hard Climb in a Downturn*, BUS. WK., July 8, 1991, at 58 (indicating that at Hughes Aircraft Co., 24% of their 5,000 junior engineers are Asian, but only one has become a division head); Paula Dwyer, *The 'Other Minorities' Demand Their Due*, BUS. WK., July 8, 1991, at 62 (stating that Asian Americans face difficulties attaining positions of authority); Keith L. Alexander, *Minority Women Feel Racism, Sexism Are Blocking the Path to Management*, WALL ST. J., July 25, 1990, at B1 (confirming lack of representation and bias against minority women in business); Steven Keeva, *Unequal Partners*, A.B.A. J., Feb. 1993, at 50 (discussing the difficulties minorities face in major law firms); Sucheng Chang, *Beyond Affirmative Action: Empowering Asian American Faculty*, CHANGE, Nov.-Dec. 1989, at 48 (describing lack of Asian Americans in leadership positions in universities and exploring strategies to overcome resistance to sharing power).

218. See *supra* note 216.

219. *Id.*

220. Leon E. Wynter, *Business & Race: Asian-American Men Are Left Adrift in TV News*, WALL ST. J., June 14, 1993, at B1.

lar, have not been able to gain access to the coveted anchoring posts.<sup>221</sup>

The participation of Asian Americans in the legal profession also illustrates the glass ceiling and glass box barriers. The percentage of Asian Americans among law students now approximates the percentage of Asian Americans in the general population.<sup>222</sup> This progress, however, is relatively recent.<sup>223</sup> Significant disparities persisted as late as 1986-87, when Asian Americans represented only 1.95% of law students.<sup>224</sup> Furthermore, given the representation of Asian Americans in the legal profession, it appears that access to certain types of positions has been denied. Whereas approximately 3.50% of law students are Asian American, only approximately .90% of law faculty are Asian American.<sup>225</sup> Whereas 1.40% of lawyers are Asian American,<sup>226</sup> only 1.02% of all judges<sup>227</sup> and a mere .70% of the federal judiciary are Asian American.<sup>228</sup> Similar disparities

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221. *Id.*; see also Felicia Lowe, *Asian American Women in Broadcasting*, in MAKING WAVES, *supra* note 108, at 183 (noting market surveys indicating that Asian American male and white female anchor teams are not acceptable to audiences).

222. In 1989-90, for instance, Asian Americans and Pacific Islanders represented 2.95% of total J.D. enrollment. AMERICAN BAR ASS'N, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES: FALL 1992, at 67, 69 (1993) (comparing minority group survey results with legal education and bar admission statistics) [hereinafter ABA].

223. Between 1980-81 to 1987-88 Asian Americans, Native Americans, and Latinos have experienced a significant growth rate in law school J.D. graduates, ranging from 37.6% to 43.9%. LAW SCHOOL ADMISSIONS SERVICES, MINORITY PARTICIPATION IN LEGAL EDUCATION AND THE PROFESSION: A COMPENDIUM OF DATA 70 (1990). African Americans, on the other hand, have a much less significant growth rate of 9.2%. *Id.*

224. ABA, *supra* note 222, at 67, 69.

225. LAW SCHOOL ADMISSIONS SERVICES, *supra* note 223, at 81-83. *But see* EEO File, *supra* note 213 (suggesting that 1.14% of law faculty are Asian American). The EEO data include law teachers from all post-secondary institutions whereas the Law School Admissions Services data are limited to law school faculty. Note, too, that law school faculty is defined narrowly in many of these studies. *See* LAW SCHOOL ADMISSIONS SERVICES, *supra* note 223.

226. EEO File, *supra* note 213.

227. *Id.*

228. ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT, ANNUAL REPORT, THE FEDERAL COURTS AT A CROSSROADS 4-5 (1992). Although the representation of other ethnic minorities on the federal judiciary also is dismally low, the growth rate of Asian American judges has been worse. *Id.* at 4. In 1976, there were three Asian American judges, constituting .56% of the bench; in 1992, there were six Asian American judges, constituting .72% of the bench. *Id.* The figures for these dates for

exist in private practice, where the relative percentage of Asian American partners is notably less than the relative percentage of Asian American lawyers.<sup>229</sup>

The explanation that these disparities are merely attributable to a "pipeline" problem is not entirely comforting. The pipeline explanation, as applied to the legal profession, for instance, is that faculty, judges, and partners are positions that require post-law school experience and training that Asian Americans who are now just entering the pipeline have not yet obtained. The assumption is that as Asian Americans complete these training experiences, they will inevitably rise to these more competitive and senior positions. Given the stereotypes of Asian Americans and the few Asian American judges, partners, and faculty members that make these hiring decisions, however, it is questionable whether Asian Americans are able to enter the pipeline in adequate numbers at all.<sup>230</sup>

## 2. *Disparate Outcomes*

Even the premise that proportionate representation of Asian Americans in the professions is indicative of nondiscriminatory treatment may be faulty. It is unclear, for example, whether employers treat Asian American employees comparably to others with similar credentials and skills. Although in the aggregate, Asian Americans have high educational levels,<sup>231</sup> they do not receive the same income as those with comparable educational

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African Americans were .34% and 5.13%, respectively, and .94% and 4.18% for Latinos. *Id.* While the number of African Americans and Latino judges increased significantly between 1976 and 1981, the number of Asian American judges did not. *Id.* Since that time, there has been virtual stagnation in the increase of minorities on the bench. *Id.* The number of African Americans actually declined between 1989 and 1992. *Id.*

229. Asian Americans represented .53% of all partners, 1.9% of all associates, and 1.3% of all lawyers surveyed in 1989. Rita H. Jensen, *Minorities Didn't Share in Firm Growth*, NAT'L L.J., Feb. 19, 1990, at 1, 28.

230. In 1988-89, for instance, there was only one Asian American out of 313 new full-time law faculty. AALS STATISTICAL PROFILE OF NEW FULL TIME LAW TEACHERS 1 (1988-89) (on file with the *William and Mary Law Review*).

231. 510,855 Asian Americans (347,743 men and 163,112 women) hold graduate or professional degrees, representing 5.33% of all Americans holding these degrees. EEO File, *supra* note 213, at Educational Attainment Levels.

levels.<sup>232</sup> Studies indicate that "Asian American [university] faculty, especially those that are foreign born, are likely to receive lower rank and salary than might otherwise be expected given their credentials, experience, and productivity."<sup>233</sup>

A comparison of the number of Asian Americans in managerial and professional positions versus the number of Asian Americans with bachelor and graduate degrees evidences this disparity. One would generally expect individuals with bachelor or graduate degrees to hold managerial or professional positions. For example, 23.6 million whites hold bachelor or graduate degrees and, comparably, 26.5 million whites hold managerial or professional positions—a ratio of 1.12.<sup>234</sup> Accordingly, one would expect the number of Asian Americans with this education level to correspond to the number of Asian Americans in these positions. Instead, the number of Asian Americans with these degrees (1.3 million) is significantly higher than the number in managerial or professional positions (1 million)—a ratio of 0.77.<sup>235</sup> Thus, one can infer that many Asian Americans are "underemployed" relative to their educational background.

This disparity is especially striking when one makes a comparable analysis of other minority groups in the United States, as summarized in Table 3, below.<sup>236</sup>

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232. Claudette E. Bennett, U.S. DEPT OF COMMERCE, *Asian and Pacific Islander Population in the United States: March 1991 and 1990*, at 8 (1992) (finding that the median earnings of Asian Americans with a high school education was lower than comparable whites). Given that a significant number of Asian Americans received their graduate degrees abroad, it is unclear how much of this discrepancy is attributable to a bias against foreign institutions and degrees.

233. Nagasawa & Espinosa, *supra* note 129, at 138 (citation omitted) (discussing various studies and articles about this disparity).

234. As computed from EEO File, *supra* note 213, at Educational Attainment Levels.

235. *Id.*

236. *Id.*

TABLE 3: RATIO BETWEEN NUMBER IN OCCUPATIONAL AREAS AND NUMBER AT EDUCATIONAL LEVELS (1990) (numbers in millions)			
	Number in Managerial and Professional Occupations	Number with Bachelors' and Graduate degrees	Ratio
Whites	26.63	23.67	1.12
Asian Americans	1.04	1.34	0.77
Latinos	1.31	0.93	1.40
African Americans	2.12	1.68	1.26
Native Americans	0.13	0.08	1.62
Total	31.26	27.73	1.12

Whereas the ratio for Asian Americans is 0.77, the ratio for all other groups exceeds 1.00.<sup>237</sup> Thus, some whites and non-Asian minorities who do not have bachelors' degrees are obtaining management and professional positions, even though Asian Americans who have earned bachelors' or advanced degrees are not.<sup>238</sup> The difference in these numbers indicates that some employers consider non-Asian Americans with less education more attractive as professional and management employees than more educated Asian Americans.

The disparate treatment suggested by these numbers supports what many Asian immigrants and Asian Americans generally believe about employment in the United States—they must work

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237. *Id.*

238. *Id.*

harder and perform at a higher level than others in order to achieve the same rewards. These Asian Americans have long assumed that a fact of American life is that their efforts and accomplishments are discounted.

*"Keep studying," my mother told me.*

*"But I'm done with my homework," I retorted.*

*"Then it's time to keep studying," my mother repeated, in the same matter-of-fact tone she would use to note the weather outside.*

## II. CUMULATIVE CONSEQUENCES OF THE DISTORTIONS AND PARADOXES

Asian Americans live three paradoxes: (1) society believes that Asian Americans have not experienced historic and ongoing discrimination when the facts prove otherwise; (2) Americans perceive Asian Americans as the model minority, but that is a fallacious overgeneralization; and (3) society assumes that Asian Americans are well-represented in all facets of all professions although they are not. Together the three distortions synergistically reinforce and affirm a circular reasoning. Each serves as a premise for the others.

For instance, individuals who believe that Asian Americans are the model minority and are adequately represented could cite these "facts" as support for the argument that Asian Americans do not experience discrimination. The rationale for this argument is that if Asian Americans did experience substantial societal and economic discrimination, such discrimination would create obstacles that would prevent Asian Americans from being successful. Their model minority status and purported adequate representation, however, confirm that they are successful and thus must not experience meaningful discrimination. Similarly, if one believes that Asian Americans are no longer discriminated against, their adequate representation is a logical inference. After all, if Asian Americans are not discriminated against, then they should have access to all professional opportunities. Because these distortions seem internally consistent, questioning one may implicate the credibility of another. Unfortunately, the



result may be an inclination not to question any of the three premises of the successfully assimilated Asian American.

These paradoxes emphasize the distortions about Asian American life. Likewise, the fallacious conclusion that Asian Americans have successfully assimilated has significant and deleterious effects on Americans in general and other minority groups, including Asian Americans, in particular. While Part I explained each paradox and its effects separately, Part II explores important cumulative consequences of the three paradoxes and the composite image of the successfully assimilated Asian American. It reveals how the myths and the troubling realities of Asian American life have led to American society's indifference, protectionism, confinement, and rejection of Asian Americans.

### A. Indifference

The image of the successfully assimilated Asian American makes it difficult to acknowledge that there are needy, struggling, and unsuccessful Asian Americans. This perceived success allows everyone, including Asian Americans,<sup>239</sup> to obscure, minimize, or even disregard the many real economic, legal, social, psychological, and medical problems facing many Asian Americans.<sup>240</sup>

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239. There is also evidence that some Asian Americans have a tendency to keep their problems private and to try to resolve them without public intervention. Leigh-Wai Doo, *Dispute Settlement in Chinese-American Communities*, 21 AM. J. COMP. L. 627 (1973) (discussing the evolution and functioning of dispute settlement systems within the Chinese American community); Hong, *supra* note 4, at 5-6 (discussing the tendency in Asian cultures to resolve problems within the familial context); Hiroshi Motomura, *Law in Japan, Law Among Japanese-Americans: An Introductory Essay*, in TEACHING ABOUT LAW AND CULTURES 17-24 (1992). Asian Americans believe and think others believe that their problems are their failure and draw attention to their inability to meet their responsibilities. Public awareness and requests for help, therefore, would be an embarrassing acknowledgement of their inadequacies. Others, believing that Asian Americans are not generally discriminated against, may attribute racial slurs and other discriminatory conduct directed at them as isolated events that are best ignored.

240. See discussion of illustrative problems, *supra* notes 113-35 and accompanying text. Some claim that Asian Americans may even be unfairly blamed for others' problems. Susan D. Rice, *One Scapegoated Minority Fights Back*, L.A. DAILY J., Dec. 26, 1991, at 7 (discussing attempts by the Asian American community to develop a strong national voice to combat Asian American scapegoating).

When the issue of assistance to Asian Americans is raised, the belief that Asian Americans do not need help makes it easy to deny aid. Because Americans view Asian Americans as hard-working, self-sufficient, and self-motivated individuals, the assumption is that Asian Americans do not want or would even be offended by the offer of help. Even if the public acknowledges Asian Americans' problems, a belief that they are not discriminated against would persuade some that assistance would be inappropriate. Some would argue that the problems must be attributable to internally created obstacles—a belief that it is "their" fault, not "ours." Whichever reasoning is applied, the most predictable reaction to the issue of assistance to Asian Americans is indifference.

This indifference is illustrated by some Americans' lack of sensitivity to the possibility of racial discrimination against Asians and Asian Americans. Even when discrimination is recognized, there is the tendency to be nonchalant or indifferent about it rather than to condemn it.<sup>241</sup> In the Vincent Chin case, defendant Ebens pled guilty to manslaughter.<sup>242</sup> To the astonishment of the Chinese American community, the trial court judge placed Ebens on probation and fined him a mere \$3,720.<sup>243</sup> In 1943-44, the Supreme Court in *Hirabayashi v. United States*<sup>244</sup> and *Korematsu v. United States*<sup>245</sup> upheld

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241. See, e.g., Jim Trotter, *Asians Feel Neglected by Justice System*, L.A. DAILY J., Aug. 31, 1990, at 6 (describing brutal attack on Laotian American boy because he was in the company of two white girls and the lack of police responsiveness in prosecuting the assailants who could have been easily traced and identified). Another example was evident in the Los Angeles riots following the Rodney King trial. Although, there was widespread coverage of the plight and frustration of the African American community, there was little discussion of the violence targeted at Korean American businesses by the angry rioters.

When I searched Nexis I found that abuses against Asian Americans are generally not covered by the national media. To the extent they are reported, it occurs in more local, community oriented publications such as the *Los Angeles Daily Journal*. See also Gotanda, *supra* note 147, at 1087 (describing the widespread popular belief that racism directed at Asian Americans is insignificant or nonexistent, calling it the "Miss Saigon Syndrome").

242. *United States v. Ebens*, 800 F.2d 1422, 1425 (6th Cir. 1986); see *supra* notes 76-81 and accompanying text.

243. *Ebens*, 800 F.2d at 1425.

244. 320 U.S. 81 (1943).

245. 323 U.S. 214 (1944).

Executive Order 9066 imposing curfews and authorizing the massive internment of Japanese Americans. These cases were not overturned until the mid-1980s.<sup>246</sup> President Ford did not formally rescind Executive Order 9066 until 1976,<sup>247</sup> and not until 1988, over forty years after the end of the internment camps, did Congress authorize compensation for the living survivors of the camps.<sup>248</sup>

The recent killing of Yoshihiro Hattori, a 16 year-old Japanese exchange student in Louisiana, also illustrates this point.<sup>249</sup> Hattori, accompanied by his American host Webb Haymaker, mistook Rodney and Bonnie Peairs' house as the location of a Halloween party.<sup>250</sup> When Bonnie Peairs answered the door, Haymaker said, "We're looking for the party."<sup>251</sup> Hattori was quickly approaching the door.<sup>252</sup> Frightened, Mrs. Peairs called for her husband to get his gun.<sup>253</sup> Without asking questions, Rodney Peairs retrieved his .44 caliber pistol.<sup>254</sup> Coming to the door, Mr. Peairs pointed the gun and shouted, "Freeze!"<sup>255</sup> Apparently not understanding the order, Hattori continued toward the door and was fatally shot.<sup>256</sup>

"Three days of testimony made it clear that the teenager had been killed almost by reflex. Little more than a minute passed between the time Mr. Hattori rang the Peairs' doorbell and the time Mr. Peairs shot him."<sup>257</sup> Taking just over three hours to

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246. *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986) (vacating conviction for violating war time measures against Japanese Americans, noting government failure to disclose key information), *aff'd in part and rev'd in part*, 828 F.2d 591 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (same).

247. See Proclamation No. 4417, 41 Fed. Reg. 7741 (1976).

248. Civil Liberties Act of 1988, 50 U.S.C. app. § 1989(b) (1988) (providing that \$20,000 be paid out to each eligible individual).

249. *Acquittal in Doorstep Killing of Japanese Student*, N.Y. TIMES, May 24, 1993, at A1 [hereinafter *Doorstep Killing*]; David E. Sanger, *After Gunman's Acquittal, Japan Struggles to Understand America*, N.Y. TIMES, May 25, 1993, at A1.

250. See sources cited, *supra* note 249.

251. *Doorstep Killing*, *supra* note 249.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

deliberate, the jury acquitted Mr. Peairs of manslaughter, concluding that he "acted reasonably as a frightened homeowner" using permissible "deadly force to protect himself from an intruder."<sup>258</sup>

Hattori's killing did not initially receive widespread coverage in the American press. Only after the incident became highly publicized in the Japanese press as an example of the harm caused by the lack of gun control in the United States did the American media begin reporting it.<sup>259</sup> Moreover, neither the American journalists nor the lawyers, including those for the prosecution, explored the role that race might have played in the incident or in the jury's decision.<sup>260</sup> For instance, the Peairs agreed that Mrs. Peairs' fear precipitated the shooting, but neither would explain what caused that fear.<sup>261</sup> The Peairs also could not explain why they shouted to a neighbor to "go away" when the neighbor wanted to help the dying Mr. Hattori lying in the Peairs' carport.<sup>262</sup>

Could Hattori's Asian appearance help explain why Mrs. Peairs was so "inexplicably" frightened? Did the jury consider that Hattori was Japanese in determining whether Peairs acted "reasonably?" Would the jurors have considered Peairs's conduct less reasonable if, for instance, Haymaker was shot instead? Why did Peairs not shoot at Haymaker? In other words, was it more likely that Hattori was shot and Peairs was acquitted because Hattori was Asian?<sup>263</sup> The role of racial prejudice in Peairs's "reasonable" self-defense arguments would seem integrally relevant, yet the questions remain unanswered.<sup>264</sup>

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258. Sanger, *supra* note 249.

259. Interview with Hiroko Otani, Visiting Teacher from Tokyo, Japan, Carnegie Mellon Child Care Center, in Pittsburgh, Pa. (Nov. 15, 1992).

260. In contrast, the Japanese press did suggest that race conflict was a cause of the shooting. One major Japanese newspaper, *The Mainichi Shimbun* described Louisiana's "shoot the burglar law" as a "manifestation of the discrimination that exists in the community where burglary charges are made predominantly against blacks." Sanger, *supra* note 249, at A7.

261. *Doorstep Killing*, *supra* note 249, at A11.

262. *Id.*

263. What if Hattorio were black? One wonders if American society is more likely to attend to black/white confrontations than to confrontations between other groups.

264. Clarence Darrow, for instance, used the fact of the jurors' racial prejudice in his representation of an African American defendant and his self defense argument.

The American public's reaction to the killing and Peairs's acquittal was also revealing. Rather than expressing outrage, the public and press were intrigued by how the American and Japanese "cultures" viewed the gun control issues differently.<sup>265</sup> Rather than condemnation or even critical scrutiny of the Peairs' conduct, there was apparent community support.<sup>266</sup>

### *B. Protectionism and Defensiveness*

The image of the successful (or perhaps the overly successful) Asian American may prompt some Americans to react defensively.<sup>267</sup> They may be both envious of Asian American "prosperity" and resentful that Asian Americans are getting more than their "fair share." A protectionist reaction is more likely as competition for limited resources or rewards increases and as Asian Americans appear to be increasingly successful at acquiring those resources or rewards. When Americans feel threatened by military concerns or economic pressures, they may tend to view Asian Americans as adversaries rather than allies. As demonstrated by the World War II internment of Japanese Americans<sup>268</sup> and the Vincent Chin<sup>269</sup> and Jim Loo<sup>270</sup> cases, Americans' misperception of Asian Americans as foreigners may prompt some Americans to conclude that Asian Americans are less entitled to the protection, rights, opportunities, and rewards proudly guarded for "true Americans." Two situations illustrate this point. The first took place in the Galveston Bay in Texas and the other occurred at some of the country's most prestigious universities.

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Yale Kamisar, *When the Jury Was Told it Was Racist*, NEWSDAY, May 5, 1992, at 95; see also Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (exploring whether the fact that the victim was African American should be permitted as part of the defendant's self-defense arguments).

265. Sanger, *supra* note 249, at A17.

266. *Doorstep Killing*, *supra* note 249, at A11; Peter Applebome, *Verdict in Death of Student Reverberates Across Nation*, N.Y. TIMES, May 26, 1993, at A14.

267. See Note, *supra* note 74, at 1929-39 (arguing that stereotypes of Asian Americans prompt violence and hostility toward them).

268. See *supra* notes 160-67 and accompanying text.

269. See *supra* notes 76-81 and accompanying text.

270. See *supra* notes 88-96 and accompanying text.

In 1980, some American fishers from the Kemah-Seabrook area near the Texas Gulf coast became concerned as new Vietnamese residents began earning their livings by operating competing commercial shrimping boats.<sup>271</sup> The American fishers complained that "there are just too many Vietnamese people."<sup>272</sup> Based in part on their general resentment of people of Vietnamese ancestry, the fishers strategized to stop or at least substantially reduce the shrimping activities of the Vietnamese fishers.<sup>273</sup> With the assistance of the Ku Klux Klan, the American fishers intimidated and threatened the Vietnamese residents with cross burnings, a "boat ride" while wearing Klan robes and shooting cannons, burning of Vietnamese owned or operated shrimp boats, and pointing pistols at the Vietnamese fishers or their family members.<sup>274</sup>

In an effort to stop the violence against them in their adopted home, the Vietnamese fishers filed suit, arguing that the American fishers were violating their civil rights.<sup>275</sup> A federal district court agreed with the Vietnamese fishers and enjoined the American fishers' "self help tactics of threats, violence and intimidation"<sup>276</sup> so that the Vietnamese fishers could "pursue their chosen occupation free of racial animus."<sup>277</sup>

In a very different competitive setting, the student admissions committees at various prestigious universities also acted defensively against Asian Americans.<sup>278</sup> During the 1980s, Asian

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271. *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198 (S.D. Tex. 1982) (granting permanent injunction); *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981) (granting preliminary injunction).

272. *Vietnamese Fishermen's Ass'n*, 518 F. Supp. at 1002. City of Seabrook Chief of Police R.W. Kerber testified that the American fishers believed "there are just too many Vietnamese people . . . [and they will be] satisfied only when some of the Vietnamese leave the area." *Id.*

273. *Id.* at 1002, 1003.

274. *Id.* at 1001, 1003 n.3, 1004.

275. *Id.* at 999-1000.

276. *Id.* at 1016-17.

277. *Id.*

278. See CIVIL RIGHTS ISSUES, *supra* note 4, at 104-29 (discussing case studies of three universities: Brown, the University of California at Berkeley, and Harvard); Grace W. Tsuang, Note, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659 (1989) (discussing methods for mounting a legal challenge to a university's admissions process); Robin Wilson, *U.S. Studies Policies at*

American student groups were noting an inexplicable pattern: although the number of Asian American applicants was dramatically increasing, the number of Asian Americans admitted was not increasing proportionately.<sup>279</sup> This discrepancy was particularly surprising because the evidence indicated that Asian Americans' academic credentials were becoming more impressive during this time period.<sup>280</sup>

When Asian American applicants and students were not as numerous, they were lauded as the model minority and they sometimes even benefited from affirmative action programs. As their numbers increased, however, some university administrators and admissions committees reacted differently: they considered the increasing numbers excessive and undesirable.<sup>281</sup> They shifted from a belief that Asian Americans were under-represented and should be given preferential treatment to the view that they were over-represented and needed to be protected against.<sup>282</sup> Somehow the contributions and diversity offered by Asian Americans, once they reached a certain nebulous point, seemed less valuable to admissions committees.

As reported by a faculty member who served on one of Princeton's graduate school admissions committees, "we were going over the applicant list and we came to a clearly qualified Asian American student. One committee member said, 'We have enough of them.' Someone else turned to me and said, 'You have

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*Harvard, UCLA on Admitting Asians*, CHRON. HIGHER EDUC., Nov. 30, 1988, at A1 (discussing an Education Department study concerning possibly illegal admissions limitations on Asian Americans at Harvard and UCLA); Scott Jaschik, *U.S. Accuses UCLA of Bias Against Asian Americans*, CHRON. HIGHER EDUC., Oct. 10, 1990, at A1 (citing Education Department finding that UCLA had violated the civil rights of Asian American students who had applied to its graduate mathematics program); *On Asian Americans: Slow Probe of Admissions Bias*, L.A. DAILY J., Sept. 17, 1992, at 6 (discussing the slow pace at which follow up to the Education Department's inquiry of possible discriminatory admissions practices at California Universities had taken place).

279. CIVIL RIGHTS ISSUES, *supra* note 4, at 105-06.

280. *Id.*

281. See Tsuang, *supra* note 278; see also Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025 (1994) (describing how society may shift from support and sympathy toward reform movements to viewing reformers as offensive and imposing).

282. Tsuang, *supra* note 278, at 673.

to admit, there are a lot."<sup>283</sup>

Administrators at prestigious schools such as Harvard, Berkeley, and Brown devised an array of policies that negatively affected Asian Americans when compared to other applicants. A Brown University policy directed that once the number of Asian American students reached a benchmark quota, they were denied admission regardless of their credentials.<sup>284</sup> Another admissions procedure included an evaluation of the applicant's personality and character. An assessment of these "non-academic" qualifications, however, appeared to be influenced by the classic Asian American stereotypes, leading admissions committees to conclude unfairly that such applicants were not well-balanced individuals.<sup>285</sup> Another policy increased the minimum level for an applicant's automatic admission on the basis of grade point averages, but did not alter the minimum level for automatic admission on the basis of admission test scores.<sup>286</sup> Since Asian Americans historically were more likely to be admitted automatically on the basis of their grades, this change effectively reduced their numbers.<sup>287</sup> A policy at another school preferred legacies and athletes, despite the fact that Asian Americans are disproportionately under-represented in these groups.<sup>288</sup> These

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283. Michael Winerip, *Asian-Americans Question Ivy League's Entry Policies*, N.Y. TIMES, May 30, 1985, at B1.

284. CIVIL RIGHTS ISSUES, *supra* note 4, at 112. Brown University Corporation Committee on Minority Affairs issued a report stating that "Asian American applicants have been treated unfairly in the admissions process," and calling for "immediate remedial measures." *Id.* at 111 (citing 1984 report). The report disclosed the use of a historical benchmark figure for Asian American applicants. *Id.* at 112; *see also* Tsuang, *supra* note 278, at 667, 669 (noting use of quotas imposed on Jewish American applicants at prestigious school during the 1920s).

285. CIVIL RIGHTS ISSUES, *supra* note 4, at 112, 126 (describing review of non-academic "qualifications" of applicants at Brown and at Harvard, including descriptions of Asian Americans in stereotypical ways). An Office for Civil Rights report noted that while other applicants at Harvard were described, for instance, as "science/math oriented, quiet, shy, reserved, self-contained, and soft-spoken," these descriptions were more frequently ascribed to Asian Americans. *Id.* at 126.

286. *Id.* at 116 (describing the policy at Berkeley).

287. *Id.*

288. *Id.* at 127-29 (describing the policy at Harvard); *see also* Tsuang, *supra* note 278, at 670-71 (discussing legacy and athletic preferences); Scott Jaschik, *U.S. Finds Harvard Did Not Exclude Asian Americans*, CHRON. HIGHER EDUC., Oct. 17, 1990, at A1, A26 (noting the small number of Asian Americans that are recruited as athletes



policies effectively made it more difficult for Asian American applicants, as compared to other applicants, to be admitted. Instead of receiving preferential treatment, Asian Americans appeared to be discriminated against in the admissions process.<sup>289</sup>

### C. Confinement

Despite the belief that Asian Americans are well integrated throughout occupational areas, they encounter "glass ceiling" and "glass box" barriers which have confined them to a limited array of options and foreclosed many opportunities.<sup>290</sup> The previously discussed examples of the perceived but unfounded inappropriateness of Asian Americans as managers and lawyers highlight this phenomenon.<sup>291</sup> The discrimination Asian Americans face, their casting as foreigners, the questionable stereotyping of their personalities and capabilities, and the ongoing perceptions about their inferiority all help explain this result.

Perhaps one way American society has tried to control Asian Americans is to try to confine them. Concerned about the increasing numbers of Asian immigrants, former laws restricted their immigration and prohibited their right to citizenship.<sup>292</sup> Concerned about the increasing numbers of Asian American students, some universities developed admissions policies that restricted their access.<sup>293</sup> Concerned about the increasing numbers of Asian Americans in the workforce, employers confine them to certain positions.

Denying Asian Americans certain professional positions deprives not only Asian Americans of the opportunity for individu-

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or who are the children of alumni) [hereinafter *Harvard*]; Scott Jaschik, *Doubts Are Raised About U.S. Inquiry on Harvard Policies*, CHRON. HIGHER EDUC., Feb. 6, 1991, at A19 (discussing the Education Department's failure to challenge Harvard's legacy preference that resulted in a lower relative rate of acceptance of Asian Americans).

289. *But see Harvard*, *supra* note 288 (finding Harvard's special treatment of recruited athletes and children of alumni did not constitute discrimination in the admissions process).

290. *See supra* notes 208-30 and accompanying text.

291. *See supra* notes 180-83 and accompanying text.

292. *See supra* notes 20-61 and accompanying text.

293. *See supra* notes 278-89 and accompanying text.

al professional achievement, but it also deprives the private sector and government employers of the contributions that Asian American managers, lawyers, historians, educators, reporters, and other workers could make. The paucity of Asian Americans in leadership positions, such as judges, law firm partners, law school faculty, legislators, and their counterparts in other professional areas, has significant societal consequences. These roles are highly influential and powerful in both society and the legal profession; denying Asian Americans access to these roles denies them the influence and power these positions embody.

For instance, individuals in these roles are arbiters of whether discrimination will occur or has occurred. Partners make hiring decisions, set personnel policies, and serve as models for the practicing bar. Through their teaching and writing, law professors influence how law will be practiced in the future. Judges assess the parties' arguments, making determinations of legal sufficiency. While relying on rational reasoning and established legal principles, jurists must also apply that reasoning and implement those principles in the broader context of their human experiences and fundamental perceptions of the world.

Denying Asian Americans access to these roles denies the Asian American perspective on decisions that invariably affect them. Recall, for example, that despite indisputable evidence that Asian Americans are discriminated against, most Americans believe Asian Americans do not experience discrimination.<sup>294</sup> Asian Americans, on the other hand, know and feel the reality of discrimination.<sup>295</sup> Courts, however, perhaps incorporating a belief that society in general does not discriminate against Asian Americans, may be less likely to interpret events in a particular case as discriminatory or racially motivated.

For example, in cases that require a determination of racial

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294. See *supra* note 10 (discussing a recent study indicating that a majority of Americans hold this belief).

295. See *supra* note 11 (discussing a California study finding 49% of the Asian Americans surveyed said they had been the victim of discrimination).

intent, such as Title VII cases<sup>296</sup> or hate crime cases,<sup>297</sup> the courts may be inadvertently insensitive in their analysis of the facts to the possibility of racially motivated conduct. The scarcity of Asian American judges only exacerbates the inability of the judicial process to empathize with Asian American litigants. As the number of Asian Americans increases, the denial of the Asian American perspective in these kinds of rights-determining processes seems particularly imprudent and indefensible. Ironically, the absence of Asian Americans in these roles may help perpetuate discrimination against them.

#### *D. Rejection and Marginality*

*I grew up in El Paso, Texas, where the residents were about fifty percent Mexican and fifty percent white. As an Asian American, I did not fit into either culture's world. I spent many summers and weekends at my parents' grocery store on the U.S. and Mexican border, among Mexican and Mexican American employees and customers. I went to school with classmates that reflected the diversity of the community. While ostensibly my family was part of both cultures, we were never accepted into either. My father had cordial business relations, and I had friends, but our roles were clearly defined and never too personal. While I was acceptable to my classmates' parents as their children's friend, I was not acceptable to many as a "girlfriend."*<sup>298</sup>

Asian Americans, like other citizens, want to believe they are accepted in a very basic and egalitarian way into American society. When they acknowledge the many problems that Asian Americans confront or when they reflect upon various professional and social slights they have experienced or observed, however, many conclude they are not fully accepted. Asian Americans believe that others perceive them as too different to

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296. See CHARLES SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 5.4.1 (2d ed. 1988) (noting that "[p]roof of intent to discriminate is critical in proving a case of disparate treatment discrimination").

297. See LU-IN WANG, HATE CRIMES (1993).

298. Some of this social separateness was supported by my parents. For instance, they adamantly opposed any serious dating between me and my non-Chinese teenage friends.

be considered "white."

Asian Americans' conclusion that many Americans reject them may be justified. A recent and extensive study assessed how whites felt about Asian Americans and other minorities in social relationships.<sup>299</sup> In particular, whites were asked their attitudes about living in a neighborhood where half of their neighbors were Asian Americans and about having a close relative or family member marry an Asian American.<sup>300</sup> Over thirty-five percent opposed or strongly opposed living near Asian Americans and forty-seven percent opposed or strongly opposed a family member marrying an Asian American.<sup>301</sup> Although whites perceive Asian Americans to have positive personal traits, at least relative to other minorities, many whites continue to reject them in more personal relationships and to believe that Asian Americans are inferior.<sup>302</sup>

While not fully accepted by whites, Asian Americans also may not feel fully accepted by other minority groups. Ironically, they are criticized as "not different enough" to be "true minorities."<sup>303</sup> Not being accepted into either group causes a feeling of marginality<sup>304</sup> leading to a lack of identity. "[In] a society that

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299. Bobo & Kluegel, *supra* note 5.

300. *Id.*

301. *Id.* at Fig. 6.

302. See *supra* notes 138-45 and accompanying text. Interestingly, while a significant number of whites consider Asian Americans more intelligent, wealthy, and hard-working than Latinos, Bobo & Kluegel, *supra* note 5, at 22, they disliked living with and marrying persons from either minority group with about the same intensity. *Id.* at Fig. 6. White sentiments about African Americans were the most negative, with over 45% opposed to living in the same neighborhood with African Americans and 65% opposed to marrying them. *Id.*

303. The irony of Asian Americans being viewed as "too different" to be white but "not different enough" to be a "true minority" was noted by a number of Asian American law professors. See Survey, *supra* note 1. Asian Americans are not the only ones who confront this situation. Larry Rohter, *Black-Cuban Rift Extends to Florida Law School*, N.Y. TIMES, Mar. 19, 1993, at B16 (noting that some African American lawyers and officials contended that Cuban Americans are not a "true minority" and therefore should not receive preferential treatment).

304. Helen Zia, *Asians Are America's Forgotten Victims*, L.A. DAILY J., Sept. 17, 1991, at 6 (suggesting that American society recognizes only black and white and not Asian); see Toupin & Son, *supra* note 105, at 414. "I've never been allowed to blend, in a natural and healthy manner, with the culture and civilization of the West. This contradiction of being both Western and a man of color creates a psychological distance, so to speak, between me and my environment." *Id.* (quoting R.

recognizes only black and white, those of us who don't fit the color scheme have become shadows."<sup>305</sup> It is like being in the "margin of insignificance."<sup>306</sup>

This lack of identity is exacerbated for many Asian Americans because Asian Americans as a group are so fractionalized. Given their varied backgrounds, ethnicities, and propensity against monolithic political activism, they do not define themselves as a cohesive group. The feeling of marginality is also induced by their own ambivalence. Asian Americans struggle to reconcile the paradoxes in their lives. If they embrace their Asian heritage, are they not reaffirming others' perception of them as foreigners?<sup>307</sup> If they are so successful, why do they feel so unwelcome? If they are so assimilated, why do they feel like they do not belong? Feeling marginalized by the majority and other minorities and fractionalized from within, Asian Americans are misunderstood by others and misunderstand themselves.

Some Asian Americans allow society's lack of acceptance of them to negatively affect their self-image.<sup>308</sup> A lack of a cohesive sense of racial and ethnic identity also may contribute to lower self-esteem and ambivalence about their role in society.<sup>309</sup> Asian Americans may begin to believe that their marginality is their fault and their failure. This lower self-concept and reduced confidence, even in circumstances where it is clearly unjustified,<sup>310</sup> may subtly and not-so-subtly inhibit

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Leona, *Asian American Studies*, Contemporary Issues Proceedings, East Coast Asian American Scholar Conference at Cornell University, Ithaca, N.Y., Oct. 24-26, 1986).

305. Survey, *supra* note 1.

306. *Id.*

307. Gotanda, *supra* note 147, at 1097.

308. Asamen & Berry, *supra* note 133, at 155 (indicating that Japanese and Chinese Americans who feel more alienated will have lower self-concepts than do their counterparts who feel less alienated).

309. Ethnic identity apparently is central to the self-concept of minority individuals. Jean S. Phinney, *The Multigroup Ethnic Identity Measure: A New Scale for Use with Diverse Groups*, 7 J. ADOLESCENT RES. 156 (1992); see also Tomoko Makabe, *Ethnic Identity Scale and Social Mobility: The Case of Nisei in Toronto*, 16 CANADIAN REV. SOC. & ANTHROPOLOGY 136 (1979) (concluding that ethnic identity is stronger among those individuals who experience relatively less occupational mobility). Furthermore, studies have suggested that low levels of racial identity are associated with low self-esteem and feelings of inferiority and anxiety, at least for African American students. See Jean S. Phinney & Victor Chavira, *Ethnic Identity and Self Esteem: An Exploratory Longitudinal Study*, 15 J. ADOLESCENCE 271, 272-73 (1992).

310. Romeria Tidwell, *A Psycho-Educational Profile of Gifted Minority Group Stu-*

Asian Americans in various pursuits.

Asian Americans have found various ways to cope with this marginality. One Asian American professor developed an affinity with her African American colleagues and friends.<sup>311</sup> They structured a social and support system around their common identity as "minorities."

More commonly, Asian Americans seek assimilation into mainstream white society, identifying with and seeking acceptance by individual whites even if whites as a group do not identify with or accept them. The higher rate of interracial marriages between Asian Americans and whites than between other races, for instance, suggests this strategy.<sup>312</sup> In addition, a study of census data responses is revealing. When interracial couples were asked to identify the race of their children, Asian American and white couples were much more likely than other interracial parents to declare their children as white rather than as the other race.<sup>313</sup>

Some Asian Americans ostensibly may seek assimilation into mainstream white society. However, they may confine themselves, perhaps unconsciously, to the roles that whites are more likely to find acceptable. One wonders, for instance, if the disproportionately high number of Asian Americans in the math, science, and engineering fields is attributable to some combination of Asian Americans' acceptance of confining stereotypes and a mechanism for coping with anticipated rejection. As noted by a social scientist, "immigrant parents believe that a technical position is better for their offspring because they will face less

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*dents Identified Without Reliance on Aptitude Tests*, 9 J. NON-WHITE CONCERNS 77 (1981) (reporting that Asian-American gifted children have lower self-concepts than other gifted minority children).

311. Survey, *supra* note 1.

312. Lee & Yamanaka, *supra* note 148, at 291.

313. Diane Crispell, *People Patterns: Interracial Children Pose Challenge for Classifiers*, WALL ST. J., Jan. 27, 1993, at B1. "In the 1980 census, 66% of children with one black and one white parent were listed as black; 56% of American Indian/white children were listed as American Indian; and just 35% of Asian/white children were listed as Asian. *Id.* There are particularly vexing identity questions for children of parents who are from different races. Gloria Chieko Saito, *A Case of Biracial Identity Confusion*, in CHIN ET AL. *supra* note 4, at 65 (describing particular identity problems of a 26-year-old American-born Chinese-black man, including a feeling of isolation from Chinese American, African American, and white societies).

discrimination and that the use of one's technical abilities as a measure of skill and not of one's verbal skills or assimilation to Western ways is less subject to racial bias."<sup>314</sup>

Yet another way to cope with this lack of acceptance is discussed by social scientists Richard Nagasawa and Dula J. Espinosa.<sup>315</sup> They suggest that a primary reason Asian American students tend to group together and isolate themselves from the general student population is to cope with the subtle racism and alienation by other students.<sup>316</sup> The students create their own supportive social subculture in order to achieve their academic goals.<sup>317</sup> This isolated subculture, however, does not give Asian Americans access to the job networks or teach them the skills and norms characteristic of the white middle-class that are necessary for professional success.<sup>318</sup> Thus, Nagasawa and Espinosa hypothesize that the Asian American students' strategy for succeeding in their school lives paradoxically appears to hinder their chances for success in their professional lives.<sup>319</sup>

### *E. Relationships Among Minority Groups*

Like many white Americans, other minority groups also may believe the distortions about Asian Americans. Although one might expect that different minority groups would be more empathic and knowledgeable about each other, that is not necessarily the case.<sup>320</sup>

Some Americans have exploited this lack of knowledge by

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314. Toupin & Son, *supra* note 105, at 415 (quoting T.E. Hassan, *Asian American Admissions: Debating Discrimination*, SPECIAL REPORT: BLACK ISSUES IN HIGHER EDUCATION, Apr. 1987, at 9).

315. Nagasawa & Espinosa, *supra* note 129.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. The survey of Asian American law professors, for instance, revealed a range of relationships between themselves and other minority colleagues and between Asian American students and other minority students. Survey, *supra* note 1. Some described identification and support from other minorities; others described a civil but guarded and sometimes antagonistic relationship. *Id.* With no ill intent, minorities, including Asian Americans, may be as susceptible to unconscious stereotyping of other minorities as whites. *Id.*

exaggerating distortions about Asian Americans to demoralize or to anger other minority groups and disadvantaged people.<sup>321</sup> Because the premise of the model minority image is that minorities who work hard, have certain values, and are reasonably intelligent can be successful, the message to minorities and others who are not successful is that they are lazy, their values are misplaced, or they do not have the inherent capabilities to succeed. The implication is that the plight of unsuccessful minorities is their own fault, not the fault of American society.<sup>322</sup> Because their efforts and values are determinative, any failures are under their control—even perhaps their choice.<sup>323</sup>

Non-Asian minorities have different reactions to these condescending stereotypes and distortions.<sup>324</sup> Minorities who accept

321. White southerners and those who are unemployed, for instance, may be vulnerable. As described in Smith, *supra* note 137, at 5, 9-11, whites perceive white Southerners more negatively than themselves but generally more favorably than African Americans, Latinos, and Asian Americans. *Id.* at 11. However, Asian Americans are perceived as less lazy, less violence-prone, and more intelligent than white southerners. *Id.* at 9. *But see* Mari Matsuda, *We Will Not Be Used*, THE REP., July 1990, at 1, 5 (arguing that Asian success should not be used against struggles of other minority groups and calling for solidarity in struggling for common goals).

322. *Poll Finds Whites Use Stereotypes*, N.Y. TIMES, Jan. 10, 1991, at B10 (indicating that a majority of whites believe African Americans and Latinos are more likely than whites to be "lazy, violence-prone, less intelligent and less patriotic"); *see also* Bobo & Kluegel, *supra* note 5, at 31 (noting that "[g]roups that are viewed as having made greater economic strides are credited with more desirable qualities").

323. There is evidence, however, that negative attributions about minorities are erroneous. For instance, social science research "has found no important differences between blacks and whites in work values or the desire to be self-supporting." Bobo & Kluegel, *supra* note 5, at 32 (citing A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (Gerald Jaynes & Robin M. Williams, Jr. eds., 1989)). Contrary to common impressions, a study indicated that education is the number one social issue for 45% of African Americans and 36% of Latinos but only for 29% of Asian Americans. Diane Crispell, *Minority Groups Give Education Top Priority*, WALL ST. J., Apr. 13, 1993, at B1.

324. These derogatory messages surface in various ways. Social science research in educational achievement, for example, tends to focus on the anticipated successes of Asian Americans and the anticipated failures of African Americans. Slaughter-Defoe et al., *supra* note 124, (reviewing the literature). Researchers instead could learn much from studying the problems of Asian Americans who perform poorly and the characteristics of African Americans who excel academically. The explanations for achievement are complex. One study discussed the effects of parenting style and peer support on the school performances of Hispanic American, African American, Asian American, and white American teenagers. Lawrence Steinberg et al., *Ethnic Differences in Adolescent Achievement*, 47 AM. PSYCHOLOGIST 723 (1992).



these criticisms may be demoralized—questioning whether their efforts actually have been inadequate and their capabilities are inferior.<sup>325</sup> Minorities who reject this reasoning may be angered by the comparisons. At the same time, other minority groups cannot easily reconcile why Asian Americans have become the model minority. At times, they may direct their animosity toward Asian Americans, resenting their apparent successes. They also may become more protective of their self-interests, gravitating toward a more competitive and adversarial rather than cooperative and collaborative position toward Asian Americans.<sup>326</sup>

The hostile conflicts between Korean American merchants and their predominantly African American neighbors and customers in a number of large metropolitan U.S. cities demonstrate the

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Rather than relying on the societal stereotypes, researchers should consider the diversity within these groups including the influence of different economic backgrounds, immigration patterns, and language uses. Past studies, for instance, have focused on lower-income African American children and the effects of father absence. See Slaughter-Defoe et al., *supra* note 124, at 369, 373. There has been little differentiation between individuals who are the direct descendants of American slaves and other groups, such as immigrants from the West Indies. *Id.* at 369, 370. Finally, most research has emphasized the faults of African Americans, rather than what constructive adjustments society can make. *Id.* at 375-77. An exception is research by Brice-Heath that studied school intervention strategies for language performance, suggesting that teachers understand and teach about the differences between how minority children speak at home and at school. *Id.* at 376.

325. Some success at demoralizing minority groups is suggested by a survey finding that 29.6% of African Americans and 35.1% of Latinos rated themselves as less intelligent than whites. Smith, *supra* note 137, at 6.

326. There are various theories that try to explain race relations and conflicts, although most are premised on white-black, dominant group-subordinate group relationships and thus have questionable applicability to intra-minority group conflicts. See Edward T. Chang, *New Urban Crisis: Intra-Third World Conflict in PERSPECTIVES*, *supra* note 4, at 169, 170-71 (explaining ethnic succession theory, class-based theories, internal colonial model, and rational choice theory). The secessionist theories view competition between ethnic minority groups as an inevitable consequence of one minority group moving up the socio-economic ladder and being succeeded in their old position by another group. *Id.* Class-based theories suggest that the capitalist class promotes racist attitudes and policies when it serves capitalist goals. *Id.* For example, racist beliefs helped Virginia farmers separate white indentured servants from black slaves and helped railroad owners appease Irish railroad workers who did not "protest the importation of Chinese workers because their influx elevated the status of the Irish workers." *Id.* Historically, working class Americans have united by ethnic group affiliation rather than as members of class-based union movements. *Id.*

mutual animosities that may develop.<sup>327</sup> Given their different experiences and cultures, the two minority groups may view the issue quite differently. Social scientist Edward Chang suggests that the African American residents, following the tradition of the civil rights movement, may see political activism as their most effective survival tool.<sup>328</sup> At the same time, they are not optimistic about the future, given the ongoing realities of poverty, unemployment, drugs, and crime.<sup>329</sup> The Korean American businesses are visible signs of success, provoking African Americans' resentment of entrepreneurial opportunities they have been denied. Further antagonism is generated if the merchants are "treating black customers with disrespect, overcharging them, failing to hire blacks, and diverting profits from the community."<sup>330</sup>

In contrast, Chang believes, the Korean American merchants are suspicious and uncomfortable with the political process.<sup>331</sup> They have pinned their hopes for economic survival on individual efforts rather than on collective political activities; thus they compete just as intensely with fellow Korean American mer-

327. For discussions of these conflicts, see CIVIL RIGHTS ISSUES, *supra* note 4, at 32-40 (describing both the Brooklyn boycott of Korean American merchants and a racially-motivated attack on Korean merchants by white assailants in Castro Valley, California); Chang, *supra* note 326, at 173-76; Reginald L. Robinson, "The Other Against Itself": Deconstructing the Violent Discourse Between Korean and African Americans, 67 S. CAL. L. REV. 15 (1993); Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581 (1993).

328. Chang, *supra* note 326, at 173-76.

329. *Id.*

330. These were charges of James H. Clever, then executive director of the *Sentinel*, the largest black newspaper in the Los Angeles area, in calling for a boycott of merchants. *Id.* at 173; see also Bell, *supra* note 186, at 1063-64 (comments of a Korean American law student):

I cannot deny that many Korean immigrant shopkeepers harbor intense racist feelings toward Blacks and Latinos and that many, indeed, are ambitious, self-interested entrepreneurs who seek to reap all of the benefits of a Black or Latino consumer community without ever thinking of obligations to contribute to that community in turn. Nonetheless, I think that Black anger against Korean-Americans is largely misplaced.

*Id.*

331. See Chang, *supra* note 326, at 174 (explaining why political activities are viewed with suspicion and as diversion from their economic goals); see also TAKAKI, *supra* note 6, at 436-45 (describing Korean immigration experience).

chants as they do with African American merchants.<sup>332</sup> To justify their hard life, immigrants must believe in the American dream. Given the demeaning role of merchants in Korea, owning small businesses in poor black neighborhoods is seen as a last resort. Unable to pursue other occupations despite their educational levels,<sup>333</sup> they view their shops and their entrepreneurship more as a means to survive than as a symbol of success.

Given the increasing animosity between the Korean American merchants and their African American neighbors, both groups have become increasingly defensive and paranoid. Moreover, the political power of the African Americans and the economic power of the Korean Americans, Chang posits, gives each group a kind of parity that increases the probability of violent confrontations.<sup>334</sup> For example, a hostile argument between a Korean American cashier and a Haitian American customer led to a year long boycott of Korean merchants in Brooklyn, New York.<sup>335</sup> Likewise, an argument over a bottle of orange juice that resulted in a Korean American merchant fatally shooting an African American teenager in South Central Los Angeles<sup>336</sup>

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332. TAKAKI, *supra* note 6, at 444-45 (describing how Korean entrepreneurs exploit other more recent Korean immigrants as employees). *But see* Equal Employment Opportunity Comm'n v. Consolidated Serv. Sys., 989 F.2d 233 (7th Cir. 1993) (describing, but ultimately rejecting, EEOC allegation that Korean American business owner illegally favored Korean American employee applicants).

333. One survey indicated that 78% of Korean greengrocers in New York had college degrees. TAKAKI, *supra* note 6, at 442.

334. Chang, *supra* note 326, at 175 (describing prior examples of unequal power where one racial group was subordinated). The media reflects and perhaps reinforces this violence. *See, e.g.,* Stephen Holden, *Teen-Agers Living Under the Gun*, N.Y. TIMES, May 26, 1993, at C13 (describing movie scene of violent murder of Korean American grocer by young African American man in South-Central Los Angeles).

335. Arnold H. Lubasch, *Woman Who Touched Off Boycott Describes Attack*, N.Y. TIMES, Jan. 5, 1991, at 25; *These Boycotts Are Racist, and Wrong*, N.Y. TIMES, Aug. 31, 1990, at A26; Bethany Kandel, *Tensions Ease Year After NYC Grocery Boycott*, USA TODAY, Jan. 4, 1991, at 8A; Todd S. Purdum, *Dinkins Supports Shunned Grocers*, N.Y. TIMES, Sept. 22, 1990, at 1.

336. *People v. Superior Court*, 7 Cal. Rptr. 2d 177 (Ct. App. 1992); Neil Gotanda, "Race-ing," Racial Non-Recognition, and Racial Stratification: Re-Reading Judge Joyce A. Karlin's Sentencing Colloquy in *People v. Soon Ja Du* (1993) (unpublished manuscript on file with the *William and Mary Law Review*) (arguing that Judge Karlin's comments at the time of Du's sentencing revealed the judge's improper reliance on stereotypes of both Asian Americans and African Americans).

illustrates how simple arguments and accusations may result in tragic violence followed by widespread community tensions.

### III. UNIVERSITY AFFIRMATIVE ACTION POLICIES

As described by an Asian American professor:

[W]e are not included in affirmative action efforts, except when the administration is counting up its minorities. We do not receive preferential treatment in hiring, promotion, benefits. In fact, I know of instances where we are discriminated against. At the same time, others believe that we do get preferential treatment. Other minorities resent us because they think we are not a "true minority." Whites resent us because they think we don't deserve or need preferential treatment. We lose both ways.<sup>337</sup>

The design and implementation of university affirmative action programs and policies offer a specific example of how the paradoxes about Asian Americans as described in Part I and their cumulative consequences as considered in Part II play out.<sup>338</sup> In particular, there is a trend not to include Asian Americans in affirmative action and diversity enhancement programs for faculty hiring and student admissions.<sup>339</sup> Asian

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337. See Survey, *supra* note 1.

338. The term "affirmative action" is used here to mean the institution's deliberate and usually preferential treatment in the recruiting, selecting, developing, and promoting of minority or other targeted groups. See JAY A. SIGLER, MINORITY RIGHTS: A COMPARATIVE ANALYSIS 133-48 (1983) (describing purposes and issues in affirmative action policies in both the United States and in India). Although the particular terms of affirmative action policies and programs often are required by a court's consent decree, universities and other employers more typically have discretion in shaping their policies and programs. See, e.g., GEORGE R. LANOUE & BARBARA A. LEE, ACADEMICS IN COURT 177, 201-03, 206-09, 213-16 (1990) (describing the negotiation of a consent decree in which the University of Minnesota agreed to certain changes in its hiring policies to avoid future discrimination and to compensate an Asian Indian chemistry professor who claimed sex discrimination). Federal regulations, for instance, only provide broad guidelines. See, e.g., Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65) (Equal Employment Opportunity Policy); 1972 HEW Guidelines, 37 Fed. Reg. 24687.

339. While federal affirmative action guidelines include Asian Americans as a "protected class," universities have discretion in implementing these guidelines. According to faculty at the University of Wisconsin, that University's much heralded Madison Plan was limited to "under-represented" minorities and did not include Asian Ameri-

Americans are expressly or effectively excluded from special recruitment efforts targeting minority faculty candidates. Similarly, they are not included in recruitment efforts and preferential admissions procedures aimed at minority student applicants. Part III posits that these determinations are based on the image of the successfully assimilated Asian American. Further, exclusion from affirmative action programs unconsciously reflects the indifference, protectionism, defensiveness, confinement, rejection, and marginality of Asian Americans.

While this discussion centers on the university setting with which I am most familiar,<sup>340</sup> many of the same issues discussed here regarding the inclusion or the exclusion of Asian Americans in affirmative action programs apply to business and government employers.<sup>341</sup> Determining who will be recipients of affirmative action preferences causes many difficult and sensitive concerns to arise. This process requires employers to allocate limited resources while acknowledging competing interests, often within a politically charged environment. In addition to philosophical dimensions, there are practical implications as well. The process should, but often does not, prompt university and other employers to clarify their goals for diversity while questioning their current rationales for inclusion and exclusion.

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cans except for Native American Hawaiians. See Survey *supra* note 1. Numerous other examples were given by law faculty in Survey, *supra* note 1. See also MEETING THE NATIONAL NEED FOR MINORITY SCHOLARS AND SCHOLARSHIP (Myrna C. Adams & Elizabeth L. Wadsworth eds., 1989) (excluding Asian Americans as a targeted group); CASE WESTERN RESERVE UNIVERSITY, GENERAL BULLETIN 1993-1995, at 56 (1993) (describing the university-wide Minority Scholars Program for members of "under-represented" minorities, and listing only "African Americans, Hispanics, Native Americans, Eskimos, and Pacific Islanders" as eligible).

340. For example, I have been a member the Association of American Law Schools (AALS) Committee on Recruitment and Retention of Minority Law Teachers, the Executive Committee of the Minority Section of the AALS, the University of Pittsburgh's Affirmative Action Committee, and numerous hiring committees at law schools.

341. As confirmed by interviews in September 1993 with Robert Kelley, Professor at the Graduate Studies of Industrial Administration), Carnegie Mellon University; Syed Shariq, Assistant to the Deputy Director for Science and Industry, National Aeronautics and Space Administration; and Johnna Torsonne, Vice President, Human Resources, Pitney Bowes Corporation.

### A. *Current Rationales for Inclusion and Exclusion*

African Americans are the focus of most affirmative action and diversity enhancement programs because there is societal consensus that they have been the targets of historic and ongoing discrimination.<sup>342</sup> This discrimination has resulted in societal subordination and a lack of opportunities. These inequities, affirmative action proponents argue, can be remedied with preferential treatment at various points in the appropriate decision-making processes.<sup>343</sup>

In addition, attracting African Americans to professions and schools in which they are under-represented serves other societal needs.<sup>344</sup> Because African Americans have a distinct cultural and sociological background, they offer a different and valuable perspective to educational communities that prize diversity. They also serve as role models for both minority and majority students, verifying that African Americans are as talented and can be as successful as anyone else. Finally, increasing the diversity of the university community fulfills an institutional responsibility, comparable to various other ethical although not mandatory duties that an institutional citizen may assume.<sup>345</sup>

342. See, e.g., JOHN E. FLEMING ET AL., *THE CASE FOR AFFIRMATIVE ACTION FOR BLACKS IN HIGHER EDUCATION* (1978).

343. The effectiveness, legitimacy, and limitations of affirmative action programs have been much debated. See, e.g., Jerome M. Culp, Jr., *Diversity, Multiculturalism, and Affirmative Action: Duke, the NAS, and Apartheid*, 41 DEPAUL L. REV. 1141 (1992) (defending the programs); Robin D. Barnes, *Politics and Passion: Theoretically a Dangerous Liaison*, 101 YALE L.J. 1631 (1992) (book review) (noting the benefits of these policies); STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991) (criticizing affirmative action as a method for minority advancement); DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 12 (1991) (arguing that these policies actually harm minorities).

344. See, e.g., Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (arguing that affirmative action would improve the quality of legal education); Ian Haney-Lopez, *Community Ties, Race, and Faculty Hiring: The Case for Professors Who Don't Think White*, RECONSTRUCTION, 1991, at 46 (arguing that minority legal scholars and faculty will enrich legal scholarship and serve as role models).

345. Writings in the corporate law and ethics area, for instance, propose that the corporation may want to voluntarily undertake certain activities, such as affirmative action or environmental protection, because of its role as a corporate citizen. E.g., Richard A. Rodewald, *The Corporate Social Responsibility Debate: Unanswered Questions About the Consequences of Moral Reform*, 25 AM. BUS. L.J. 443 (1987).

In contrast to these societal views about African Americans, Asian Americans are perceived as the successfully assimilated minority group.<sup>346</sup> Americans believe Asian Americans in general, and Asian American faculty and student candidates in particular, do not generally experience discrimination and are numerically well-represented.<sup>347</sup> Since there are no apparent inequities to remedy, they do not need any proactive intervention.<sup>348</sup>

Believing these images and unaware of the more complex and troubled reality of Asian American life, universities, not surprisingly and often without conscious deliberation, consider Asian Americans inappropriate for inclusion in affirmative action programs.<sup>349</sup> In fact, given these beliefs, Asian Americans who want preferential treatment would appear gratuitously and unfairly self-serving. Whites and other minority groups might well be resentful of Asian Americans who are included in affirmative action programs.

This rationale, that Asian Americans are not particularly deserving or needy of preferential treatment, is the predicate for a second rationale for not including Asian Americans in affirmative action programs: Asian Americans would displace other, more deserving, minorities.<sup>350</sup> The argument is that while whites may believe Asian Americans are not particularly deserv-

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346. See *supra* notes 103-36 and accompanying text.

347. SIGLER, *supra* note 338, at 138 (noting that because Japanese Americans and Chinese Americans have done "relatively well in economic terms," the issue of the legitimacy of denoting Asians as beneficiaries of affirmative action is raised).

348. *Id.*

349. *Id.*

350. I learned more about this second rationale while serving on a university committee dealing with faculty recruitment issues in 1991. At a committee meeting, a special university faculty diversity-enhancement program was described. Under this program, the university would consider funding additional faculty positions expressly for African Americans. This program was a particularly enticing incentive for departments to recruit African Americans, because at that time the funding for faculty positions in general was frozen. When I inquired as to the rationale for targeting African Americans while not including any other ethnic groups, the university administrator at the meeting explained without elaboration that African Americans were particularly "under-represented." After the meeting, an African American committee member and friend explained to me that African American faculty, citing this displacement rationale, had informally and successfully lobbied against the inclusion of Asian Americans in the program.

ing of preferential treatment, when compelled to participate in affirmative action programs, whites prefer Asian Americans to other minorities as their token minorities for quota purposes. They presumably opt for Asian Americans because they are perceived as hard-working, nonassertive, and nonpolitical.<sup>351</sup> In other words, whites believe Asian Americans will not disrupt the status quo. In the alternative, Asian Americans may be preferred over other minorities because of their academic credentials.<sup>352</sup> These credentials, combined with the model minority image, give them an unacceptable competitive advantage. The supposed result of these preferences for Asian Americans would be either conscious or unconscious exclusion of African American and other minority faculty.

In addition, Asian Americans' contributions to diversity may be thought to be less substantial than other minority groups. They are viewed as politically inactive and less outspoken about diversity issues.<sup>353</sup> Because they are considered more assimilated into mainstream American society, their views and values are presumed to be more similar to established norms. Thus, their displacement of other minority groups arguably defeats the affirmative action program's purpose of increasing diverse perspectives in the university community.

### *B. Analysis of the Rationales*

These rationales, although understandable, reflect the societal reactions toward Asian Americans described in Part II.<sup>354</sup> Assuming that Asian Americans do not suffer the adverse effects of discrimination, universities are less attentive to the possibility of Asian American problems, diversity, and discrimination. Other minorities and whites, protective of their own interests, may become defensive about competition from Asian Americans. As will be discussed below, the consequences are that Asian Americans have limited access to schools and jobs.<sup>355</sup> If not accepted

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351. See *supra* notes 192-93 and accompanying text.

352. See *supra* note 231 and accompanying text.

353. See *supra* note 181 and accompanying text.

354. See *supra* notes 239-336 and accompanying text.

355. See *infra* notes 377-82 and accompanying text.



as either part of the minority cause or the white mainstream, Asian Americans once more are subjected to a marginal existence. Furthermore, scrutiny of the rationales raises questions about their accuracy.

### *1. Are Asian Americans Deserving?*

From the perspective of some Asian Americans, the argument that Asian Americans do not deserve the benefits of affirmative action is ironic and flawed. Exclusion of Asian Americans may instead illustrate the inexplicable disparate treatment given to them.

Other minority groups justifiably receive affirmative action treatment because they have historically experienced legally and societally sanctioned discrimination and continue to be subjected to discrimination and particular problems. Yet, as substantiated in Part I, Asian Americans are similarly situated. To the extent that they do not receive the same affirmative action treatment as other similarly situated minorities, Asian Americans arguably are treated unfairly. Although the nature of each minority group's problems and concerns may vary, all may experience significant discrimination and inequitable treatment. A particularly undesirable and dismal situation for one group should not preclude serious attention to the real problems of another group.

The university setting offers examples of Asian Americans' problems.<sup>356</sup> The publicized disparate treatment of Asian American applicants for admissions to Brown, Harvard, Berkeley and other universities indicates how university administrators and admissions committees allow their concerns about "over-representation" of Asian American students to take priority over principles of merit and fairness.<sup>357</sup> In addition, the highly publicized image of the Asian American honor student is

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356. See JAYJIA HSIA, *ASIAN AMERICANS IN HIGHER EDUCATION AND AT WORK* (1988) (discussing in depth statistical data on Asian Americans' access, achievements, and status in higher education). Other commentators have described the experiences of minority faculty. *E.g.*, Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299 (1992); Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989).

357. See discussion *supra* notes 278-89.

overgeneralized. While many Asian Americans do excel academically, many do not.<sup>358</sup> Furthermore, some of the pressures and problems that seem related to their academic efforts might be causes for concern rather than admiration.

Even in university disciplines where Asian Americans are well-represented on faculties, they may be experiencing problems camouflaged by the numbers. Asian American plaintiffs in race discrimination cases under Title VII believe they were treated unfairly.<sup>359</sup> A search revealed seven cases that reached the merits where the plaintiff was a university faculty member or candidate of Asian ancestry.<sup>360</sup> In all these cases, the plaintiffs lost.<sup>361</sup>

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358. See *supra* notes 129-34 and accompanying text.

359. See also Dinesh Khosla, *Select Journal Entries on Entry Fee for Inclusion*, 2 COLUM. J. GENDER & L. 173 (1992) (describing an Asian Indian American faculty's negative experiences as a faculty candidate and professor).

360. Guntur v. Union College, 60 Fair Empl. Prac. Cas. (BNA) 156 (N.D.N.Y. Aug. 19, 1992); Sinha v. State Univ. of N.Y., 764 F. Supp. 765, (E.D.N.Y. 1991); Lam v. University of Haw., 59 Fair Empl. Prac. Cas. (BNA) 113 (D. Haw. Aug. 13, 1991); Kumar v. University of Mass., 566 F. Supp. 1299 (D. Mass. 1983), *rev'd*, 774 F.2d 1 (1st Cir. 1985), *cert. denied*, 475 U.S. 1097 (1986); Kim v. Coppin State College, 662 F.2d 1055 (4th Cir. 1981) (involving Korean American and white plaintiffs at predominantly African American college); Peries v. New York Univ., No. 78 Civ. 3409 (LBS) (S.D.N.Y. Sept. 20, 1979); Huang v. College of the Holy Cross, 436 F. Supp. 639 (D. Mass. 1977).

361. On one hand, this outcome is not surprising given the generally unfavorable outcome of plaintiffs in academic discrimination cases. For instance, a study of all academic discrimination cases litigated under Title VII, the Equal Pay Act, the Age Discrimination in Employment Act, and the Rehabilitation Act between 1971 and 1984 in the federal courts found 160 cases that reached the merits. LANOUE & LEE, *supra* note 338, at 23-34. Plaintiffs won only 34 of the 160 decisions that reached the merits (six were split decisions in which both parties won and lost on different issues). *Id.* The only type of case in which plaintiffs have been more successful is when whites sued black institutions, where plaintiffs won 8 out of 12 times. *Id.* at 34. On the other hand, the 21% of cases won by plaintiffs in general in the Lanoue & Lee study, *id.* at 30, is better than the 0% of cases won by Asian American plaintiffs in their race discrimination cases. See *id.* at 23-34. In addition, in the one case in which an Asian American sued an African American institution, the plaintiff, unlike most white plaintiffs in this type of case, lost. See *id.*

However, a review of discrimination cases beyond race discrimination cases, such as conducted by Lanoue & Lee, *supra* note 338, may reveal more successful Asian American plaintiffs. *E.g.*, Jew v. University of Iowa, 749 F. Supp. 946, 947 n.2 (S.D. Iowa 1990) (a Chinese American professor was successful in her sex discrimination suit but did not make race discrimination claims); University of Pa. v. EEOC, 493 U.S. 182 (1990). In *University of Pa.*, a Chinese American woman was successful

In *Kumar v. University of Massachusetts*,<sup>362</sup> an Asian American with an exemplary research record was denied tenure when doubts about his teaching were raised.<sup>363</sup> These doubts were raised despite the fact that his Dean described him as "perfectly lucid in his language," "articulate," and the "content of his courses [as] impeccable, his rigor unmatched, and the best students praise[d] him highly."<sup>364</sup> Apparently, the concern was based on ratings from students in the "introductory courses where the non-majors and less [quantitatively] competent students [found] him less pleasing"<sup>365</sup> and because "his modes of communication [were] not that of a native born American."<sup>366</sup> In *Sinha v. State Univ. of New York*,<sup>367</sup> an Asian American professor cited evidence that the chair of his department said that "as an Indian, he has difficulty working with women,"<sup>368</sup> and a colleague at a department meeting called him a "Goddamn Indian" who "should be eliminated."<sup>369</sup>

The assumption that Asian Americans may not contribute as much to goals of diversity also are questionable. Asian Americans reflect an enormous diversity in culture, language, and experiences.<sup>370</sup> While some Asian Americans, like members of other minority groups, have had more typical middle- or upper-class American upbringings, many have had both nontraditional and disadvantaged backgrounds. The ongoing immigration from different Asian countries further assures the presence of unasimilated and diverse Asian Americans.

The image of the politically inactive Asian American also may

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in arguing that her tenure file documents were not protected from disclosure. *Id.* The merits of her race and sex discrimination claims, however, were not reached. *Id.* The dispute was resolved instead by settlement. See *Statement*, CHRON. HIGHER EDUC., Aug. 5, 1992, at A35 (describing settlement).

362. 566 F. Supp. 1299 (D. Mass. 1983), *rev'd*, 774 F.2d 1 (1st Cir. 1985), *cert. denied*, 475 U.S. 1097 (1986).

363. *Id.* at 1309.

364. *Id.*

365. *Id.*

366. *Id.*

367. 764 F. Supp. 765 (E.D.N.Y. 1991).

368. *Id.* at 770.

369. *Id.*

370. See *supra* notes 107-10 and accompanying text.

be an overgeneralization.<sup>371</sup> Consider, for example, the highly visible work of Asian American critical race theorists in the legal field.<sup>372</sup> Furthermore, society's commonly held belief that Asian Americans are nonassertive and less verbally oriented may not hold true in many circumstances.<sup>373</sup> These generalizations, therefore, are minimally useful in predicting how a particular Asian American will act.

Furthermore, the processes that universities use to assess whether Asian Americans deserve preferential treatment warrant additional study. Some affirmative action programs expressly exclude Asian Americans, while others ostensibly benefit Asian Americans but in practice do not. For example, one approach used in minority student admissions programs is to allow Asian Americans to benefit from affirmative action programs if they can justify their inclusion by meeting additional requirements not imposed on other minority applicants.<sup>374</sup> These additional requirements presumably focus on the applicant's potential to enhance the diversity of the academic community or the discrimination he or she has faced. While rarely directly articulated to the applicants, admissions committees may assess application forms, especially the open-ended essay questions, for information that seems relevant.<sup>375</sup>

Thus, in addition to being a member of a minority group, Asian American applicants also may have to substantiate (1) that they identify with their minority group, and (2) that

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371. See *supra* note 4 (identifying examples of past and present lack of activism).

372. E.g., MATSUDA ET AL., *supra* note 179 (book by minority scholars exploring the relationship between assaultive speech such as hate speech, the First Amendment, and critical race theory); Gotanda, *supra* note 9 (arguing that the Supreme Court's color-blind analysis in constitutional law promotes white supremacy and offering alternative interpretation models); Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487 (1992) (discussing how court-ordered medical treatment of pregnant women illustrates gender and race discrimination); Williamson B.C. Chang, *The "Wasteland" in the Western Exploitation of "Race" and the Environment*, 63 U. COLO. L. REV. 849 (1992).

373. See *supra* notes 188-89 and accompanying text.

374. Based on interviews with various minority student program administrators at law schools during 1993.

375. E.g., CIVIL RIGHTS ISSUES, *supra* note 4, at 125-26 (describing Harvard's "ethnic reads" review in its admissions process).

their minority status has been an impediment to their academic and professional achievements. Determining an Asian American applicant's potential contributions to diversity or experience with discrimination on the basis of the application information, however, may be faulty. Many Asian immigrant parents have taught their children societal coping mechanisms that would discourage Asian American applicants from reporting this information. Many Asian Americans believe that they are more likely to be successfully assimilated into American society if they do not publicly identify their minority status.<sup>376</sup> At the same time, they are socialized to focus on factors that they can personally control while ignoring societally created impediments, such as racism. Ironically, the mechanisms that Asian Americans believe will increase the probability of their success in American society generally also may result in their exclusion from affirmative action programs.

## 2. *Are Asian Americans Displacing Other Minorities?*

Other minorities and their supporters may perceive Asian Americans as "spoilers" who take opportunities and reap benefits that more properly belong to candidates of their ethnicity or race.<sup>377</sup> The premise for this second rationale for excluding Asian Americans warrants scrutiny.

In many university subject areas, as shown in Table 4, the representation of Asian American faculty is low compared to their representation in the general population.<sup>378</sup>

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376. This may partially explain the tendency of Asian and white parents to identify their interracial children as white instead of Asian. See Crispell, *supra* note 323.

377. At the same time, some whites may consider Asian Americans "freebies," who they can hire at minimum cost and with minimum disruption to the status quo. Their involuntary casting as both "spoilers" and "freebies" illustrates the no-win situation in which Asian Americans sometimes find themselves.

378. As computed from EEO File, Postsecondary Teachers, *supra* note 213.

TABLE 4: ASIAN AMERICAN FACULTY REPRESENTATION IN  
SELECTED UNIVERSITY DISCIPLINES (1990)

SUBJECT AREAS	REPRESENTATION
History	0.29%
Education	0.69
Law	1.14
Theology	1.60
English	1.66
Psychology	1.93
Physical Education	2.13
Business and Commerce	2.84
Art, Drama and Music	2.84
Political Science	2.89

(The percentage of Asian Americans in  
the general population is 2.90%.)

Although representation of Asian Americans is especially high in engineering and mathematical sciences, it is disproportionately low in other disciplines.<sup>379</sup> Like other minority group members, Asian Americans have difficulty competing with white males who fit the more traditional professorial image. Moreover, in some subject areas such as education and history, the degree of Asian American under-representation is more extreme than that of other minority groups.<sup>380</sup> These data suggest that Asian

379. *Id.* The representation of Asian Americans on natural sciences, mathematical sciences, and engineering faculties is 3.34%, 6.06%, and 6.94%, respectively. *Id.*

380. *Id.* Each minority group's representation in a discipline divided by each minority group's representation in the general population results in these ratios:

Americans are not displacing other minorities in these areas. Instead, it implies that Asian Americans have been less successful than other groups in obtaining these positions.<sup>381</sup>

Moreover, despite other minorities' concerns that Asian Americans are displacing them, Asian Americans may actually be the ones displaced. This displacement may occur even when Asian Americans are not expressly excluded from diversity efforts. The hiring process for university faculty illustrates this less obvious effect.<sup>382</sup> In departments in which additional diversity is a goal,

TABLE 5: PROPORTIONALITY OF REPRESENTATION OF MINORITY GROUPS IN SELECTED UNIVERSITY DISCIPLINES			
Discipline	Asian Americans	Latinos	African Americans
History	.10	.24	.26
Education	.23	.59	.92
Law	.39	.21	.44
English	.57	.35	.36
Psychology	.66	.30	.33

As the ratio moves toward 1.0, the minority group's representation becomes more proportionate; as the ratio moves away from 1.0, the minority group's representation is less proportionate. For further discussion of the methodology, see *supra* note 217. These ratios indicate, for instance, that African American faculty are proportionately represented among education faculty, that Latinos are under-represented, and that Asian Americans are even more under-represented. In contrast, the ratios in the table above indicate that, while all three groups are under-represented among psychology faculty, African American and Latinos are more under-represented than Asian Americans. Finally, among history faculty, while Asian Americans are the most under-represented, representation of all three groups is dismally low.

381. Another example is law school admissions, where Asian Americans had a lower admissions rate than African Americans and Latinos with comparable qualifications. LAW SCHOOL ADMISSIONS, *supra* note 223, at 46 (describing data from 1988-89 application year).

382. See also Barbara A. Nenno, Faculty Search Committees and Affirmative Action Policy 1989 (dissertation) (studying the faculty hiring process and the implementation of the affirmative action policy of a public research university). Nenno documents the idiosyncratic, misinformed, and unsystematic approach that faculty committees use in implementing the university's affirmative action policy (as based on interviews of faculty search and selection committees, deans, and other administrators; observations of committee meetings; and archival research). *Id.*

ethnic minority and sometimes women candidates often are separated from the original pool of candidates. The intent is to focus preferentially on these minority candidates, perhaps scrutinizing less critically traditional qualifications and looking more creatively at less traditional attributes. Asian American candidates may well be included in this first "cut" of minority applicants. As the review process continues, however, Asian American candidates often are dropped from further consideration because although a "minority," they are not the "targeted minority." Thus, they are not actually given preferential consideration, although initially labeled as minority. In a way, the targeted minorities have displaced them by fulfilling the faculty's accommodation to diversity.

Whether hiring committees return Asian Americans to the original candidate pool depends upon the conscientiousness and procedures of the committee. Most probably they are not returned because their applications have already been "processed." Perhaps a candidate with stellar credentials is retrieved. The qualified but not stellar Asian American candidate, however, effectively is never seriously considered. These applicants inadvertently fall through the process's cracks.

### *C. An Alternative Approach: Avoiding a "Race to the Bottom"*

#### *1. The Process*

The process for determining whether Asian Americans should be included in affirmative action programs should be no different than for any other minority group. Rather than relying on understandable but unquestioned rationales, the process should begin with a clear articulation of well-reasoned objectives of the affirmative action policy. Rather than an attitude of indifference, protectionism, confinement, or rejection, the university should formulate an affirmative action policy with an attitude of acceptance and interest in the different minority groups, including Asian Americans. Rather than reflecting the lack of knowledge of American society toward minorities, the university should develop a well-informed, carefully studied, and sensitive approach. As with society in general, the university's presumption should be one of inclusion rather than exclusion.



Additionally, minorities should not be mere recipients of affirmative action policies and programs. They should be active architects and builders engaged in a collaborative and honest process with the university and other affected constituencies. They should be leaders and equal participants in identifying problems and shaping the solutions. Rather than allowing others to define the minority pie that minorities should then fight over, minorities instead should work with the university in determining what the institutional and minority needs and priorities are. They should help decide not only the size of the pie, but indeed if it should be cookies, cakes, or some other part of the bakery that is necessary to address those needs.<sup>383</sup>

An understanding of the interrelationships between minority groups, as well as between each minority group and whites, also is essential to a study of the competing and common interests of the participating groups. The study should be constructive. Dialogue that defensively focuses on which minority group is worse off, and thus most deserving of attention and help, is divisive. For a minority group to engage in this kind of "race to the bottom" rhetoric against another minority group is not constructive.<sup>384</sup> A "race to the bottom" tactic may appear to serve the

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383. One widely disseminated newsletter, for instance, literally used pie charts on minority enrollment in law schools in 1982-83 and in 1992-93, depicting the percentage that each minority group contributed to the total minority student population at each time period. *Minority Enrollment Composition*, CONSULTANT'S DIGEST (Office of the Consultant on Legal Education to the American Bar Association, Indianapolis, Indiana) May 1993, at 5. No information was given on the proportional representation of each minority group in total law school enrollment. This kind of depiction unintentionally suggests competition between minority groups and an arbitrary limit to minority enrollment.

384. The term "race to the bottom" is sometimes used to describe a corporate law theory. See, e.g., Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913 (1982); Roberta Ramano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987). State legislators presumably draft corporate laws to induce corporate management to select their state over other states in which to incorporate. *Id.* According to the theory, in order to compete with other states, the legislators draft laws that allow management maximum discretion, including the exploitation of shareholders' and other corporate constituencies' interests, on the theory that managers will find these laws the most attractive. *Id.* The states "race" with each other to produce the laws that are most attractive to management but are increasingly offensive and lack protection (toward the "bottom") for shareholders and other constitu-

practical or political purposes of one group, but at the same time risks compromising broader societal interests and cohesiveness. Informed comparisons between the groups can be used best to shape strategies and set priorities for working together collaboratively on increasing minority diversity on university faculties and in other occupations.

The prior sobering analysis reveals that although there are exceptional occupations where one of the minority groups is proportionately represented, minority Americans generally are under-represented in the managerial and professional occupations.<sup>385</sup> Determining which minority group is the most under-represented is like determining the worst of the worst case scenarios. Rather than arguing about who is at fault for each others' problems and polarizing opposing positions, it is more productive for all groups to focus on mutually agreed upon common goals and on how to balance divergent but equally cherished interests.<sup>386</sup>

## 2. *The Purposes*

Whether Asian Americans or any other minority group are included in an affirmative action program should depend upon a thorough and informed analysis of whether their inclusion promotes the well-reasoned objectives and purposes of the affirmative action policy. Universities and other employers may articulate general objectives.<sup>387</sup> Relying on unquestioned rationales, such as those discussed above, and a lack of information, they may neglect to consider systematically how the inclusion or exclusion of Asian Americans and other minority groups promotes or hinders those objectives.

The following discussion exemplifies some oft cited objectives of affirmative action programs. The discussion also suggests some more specific inquiries that universities and other employ-

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encies. *Id.*

385. See text accompanying *supra* note 217.

386. See, e.g., Tim Fong, *While Asians and Hispanics Learn to Work Together*, L.A. DAILY J., Apr. 14, 1987, at 4.

387. See Nenno, *supra* note 382 (illustrating the ineffectiveness of a generally stated affirmative action policy whose implications and implementation have not been thoroughly considered).

ers do not typically make in determining who will participate. These types of inquiries can assist the architects of affirmative action policies to think more reflectively about their objectives, while addressing the many complicated issues that the process implicates.

Thus, if an objective of the affirmative action policy is to *remedy past discrimination*, these inquiries are relevant:

- Are some types of past discrimination more extreme and hence more worthy of remedy than others? For instance, should one compare the slavery of African Americans to the deprivation of the property and lives of the Native American tribes to the riots, lynching, and internment of Asian Americans? And if so, how?
- At what point should preferential treatment on the basis of past discrimination cease? Have Asian Americans and Jewish Americans, but not other minority groups reached that point?
- Should everyone in a particular minority group be included or should an individual have to show a more direct link to past discrimination? For instance, should an individual have to trace his or her relationship to a Japanese American World War II internee or to a Chinese American "coolie" who was lynched?

If *proportionate representation* is a goal, these inquiries are appropriate:

- For which minority groups is representation sought? Does the community or university priorities or history dictate that some groups should have proportionate representation but others should not? Should subgroups of minority groups be distinguished because of differing economic or immigration status? For example, should Southeast Asian American groups be represented but not Asian Indian American groups; or should only Asian Americans with an economically deprived background, regardless of ethnic origin, be represented?
- How should the appropriate percentage for representation be determined? Should it reflect the percentage of the minority group in the national, state, or regional population; or the percentage in the student enrollment at the university or in the

particular department? In the alternative, should the percentage be based on those in the available market pool? If only certain Asian American subgroups, such as Southeast Asian Americans, are to be represented, should the percentage of representation be based on all Asian Americans or just that subgroup?

- How should an organization determine if the proper percentage has been met? If the university decides that it wishes to have a 2.9% representation of Asian Americans, is that goal met if there are 2.9% Asian Americans in the university as a whole, or must there be that percentage in each department or at each professorial level?

If *equal opportunity* is another objective, consider these questions:

- If the goal is to assure that discrimination does not occur today, how is "equal opportunity" defined? Should a school be allowed to consider "over-representation" of Asian Americans in its admission policies? Do special efforts to inform minorities of the opportunities satisfy the goal, or should there also be particular obligations to include minority candidates in the interviewing and hiring processes?
- So long as the standards for admission and employment stay the same, how does one accommodate some inherent bias in the system? For instance, if a university has preferences of legacies and athletes, and Asian Americans are less likely to be either, does that satisfy equal opportunity? If the reputed requirements for law school teaching are attendance at ivy league schools and prestigious judicial clerkships, but minorities are less likely to be admitted to either, does the continuing use of those standards conflict with the equal opportunity goal?
- How should the university acknowledge, if at all, that some white men feel that affirmative action for minorities deprives them of "equal opportunity?" If white men become the numerical minority, should their claim of discriminatory treatment be considered more legitimate?

If *equality of outcomes* is the purpose, the following issues

become important:

- "Equality in opportunities" would mean that each similarly-situated minority group receive the same treatment in recruitment and hiring. In "equality of outcomes," by contrast, the objective is for individuals from each minority group to be comparably successful in obtaining and succeeding in their faculty positions. The most effective strategy should be tailored for each minority group, quite possibly resulting in different programs and policies for each group.<sup>388</sup>
- If the goal is for each minority group to have comparably positive outcomes, how is "comparably positive outcomes" defined? Is it a proportionate representation of each minority group at the tenured faculty level rather than just representation in the whole faculty?
- If a minority professor is more likely to achieve tenure if the working environment is structured in a certain way regarding teaching, research, mentoring, and pacing of professional progress, should the university structure the environment accordingly? If these accommodations for individual preferences result in the university treating faculty from different minority groups and whites differently, does this conflict with the goals of equal opportunity?<sup>389</sup>
- In the alternative, should "comparable positive outcomes" be achieved in part by the reevaluation and possible modification of the existing standards for achievement?

If *diversity* is the objective, consider these inquires:

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388. See, e.g., Liang Tien, *Determinants of Equality and Equity for Special Populations Served by Public Mental Health Systems*, 43 HOSP. & COMMUNITY PSYCHIATRY 1104 (1992) (describing a system that assumes that special populations have different rates of mental illness and different treatment needs; funds are allocated and programs are designed in recognition of these differences); Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice—Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. 993 (1991) (suggesting that society can incorporate differences and should be able to accommodate pluralistic notions of justice).

389. See, e.g., Stanley Sue, *Ethnic Minority Issues in Psychology: A Reexamination*, 38 AM. PSYCHOLOGIST 583, 584-85 (1983) (discussing the conflict between these two types of equality).

- What kinds of diversity are desired? If the minority status of an individual, for instance an African American, is a sufficient indicator of diversity, should it also be for other minority groups? Is diversity in culture and in the thinking process the goal? If so, is race or ethnicity just one factor? Are there "degrees of differentness?" How does one ascertain the potential for contributions to diversity?
- If a goal is to provide role models, for whom is the role model provided? Is it for all students, for minority students as a group, or for a particular minority group? If it is for all students or minority students as a group, does it matter which minority group the faculty member is from?<sup>390</sup>
- If multiculturalism requires that the existing system accommodate the values and interests of all different minority groups, how does that accommodation cope with conflicts in values between groups and the probable infringement on the values and interests of whites?

These inquiries call into question the current rationales for inclusion and exclusion. If Asian Americans or other minority groups are not included, that determination should be based on accurate information and well-reasoned rationales that are relevant to the affirmative action policy's objectives.

### CONCLUSION

As with my reaction to Derrick Bell's resignation as Dean of the University of Oregon Law School and its aftermath,<sup>391</sup> I have written this article with ambivalence and reticence. I do not want to be presumptuous about the problems and solutions, yet I believe a significant step toward a more multicultural and open society lies in questioning fundamental but possibly falla-

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390. *But see, e.g.,* Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222 (1991) (arguing that minorities functioning as role models may be confining and disempowering); Linda S. Greene, *Tokens, Role Models, and Pedagogical Politics: Lamentations of an African American Female Law Professor*, 6 BERKELEY WOMEN'S L.J. 81 (1990-91) (arguing same).

391. *See supra* narrative accompanying note 1.

cious beliefs about each other. Hopefully, through more knowledge comes more understanding and acceptance.

My intention is not to assign fault because I know that the status of Asian Americans is attributable to a combination of complex societal, cultural, economic, historical, legal, psychological, and political factors.<sup>392</sup> I do not want to speak too loudly or offensively, yet I want to tell a story that I believe is worth telling but is largely untold. Noting the irony that Asian Americans are reticent themselves and are the minority group about which other Americans are reticent, I was motivated to overcome my own reticence.

The process of writing and researching this Article reaffirmed that as an Asian American woman, I live many paradoxes. This Article also is my attempt to better understand and reconcile some of these paradoxes and to urge other Asian Americans to do the same. It explores the ways in which my immigrant grandparents' and parents' hopes for achieving the American dream were unfulfilled and the ways in which my children's hopes for the American dream might be jeopardized. It begins to sort out some of the truths from some of the illusions that in many ways I, like other Americans, have long believed.

*[My mother's memories of a conversation between her, when she was a young child, and her father, on the eve of his sailing from a Guangdong Province village in southern China to San Francisco, California in 1916.]*

*"Tell me Papa, why do you have to go away, why do you have to leave me?"*

*"Because, child, America is the land of golden mountains, where opportunity and prosperity is for everyone. I must go—so that you will have a future."*

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392. See Sue, *supra* note 389.