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If you know your history
Then you would know where you coming from,
Then you wouldn't ask me
Who the 'eck do I think I am.
—Bob Marley, "Buffalo Soldier"

Courts and judges make mistakes. Sometimes, those mistakes are founded on invidious racial stereotypes and a denial of equal protection under the law. Hong Yen Chang's denial of admission to the California Bar is an example of both types of legal error. Chang was an exceptional lawyer, a great statesman, and a paragon of the Chinese American community in the late nineteenth and early twentieth century. In 1890, Chang brought a motion before the California Supreme Court to seek admission to the California Bar. In denying Chang's application, the California Supreme Court ruled in part "a certificate of naturalization issued to a Chinaman is void."[1]

About one hundred and twenty-five years later, Chang's descendants and the Asian Pacific American Law Students Association at the University of California, Davis School of Law brought a motion before the Supreme Court of California to posthumously admit Hong Yen Chang to the California Bar.[2] On March 16, 2015, a unanimous seven-member panel of the California Supreme Court granted the motion posthumously admitting Chang as an attorney and counselor in California.[3]

† LL.M., University of California, Berkeley, School of Law, 2015; LL.B., Osgoode Hall Law School, 1990; B.Sc., cum laude, Western Michigan University, 1984. My sincerest gratitude to all the remarkable men and women at the *Asian American Law Journal* including but not limited to the Editors-in-Chief, Eugene Chao and Nina Gupta, Mona Fang, Francis Choi, Cindy Dinh, Truc Doan and Stephen Chang. The above-noted persons are simply first among equals.

1. In re Hong Yen Chang, 84 Cal. 163 (1890) [hereinafter *Chang I*].

2. UC DAVIS APALSA, HONG YEN CHANG, http://students.law.ucdavis.edu/apalsa/hongyenchang.html (last visited May 28, 2015).

3. In re Hong Yen Chang on Admission, S223736 (Cal. March 16, 2015), *available at* http://www.courts.ca.gov/opinions/documents/S223736.PDF [hereinafter *Chang II*].

This case comment analyzes the California Supreme Court's decision and consists of three parts. Part I explores Chang's extraordinary upbringing and outlines the underlying historical and legal backdrop of his legal education. Part I also includes a description and analysis of the 1890 rejection by the California Supreme Court, hereafter known as *Chang I*. Part II analyzes the posthumous admission by the California Supreme Court in 2015, i.e. *Chang II*. Part III sets out the legal framework for the Court's decision and what guidance the decision provides going forward.

I. CHANG'S BACKGROUND

A. Chang's Education and Voyage to the United States

Hong Yen Chang was born in 1860 in Xiangshan, Guangdong Province, China. His father, Chang Shing Tung, died when Hong was ten. His mother, Yee Shee, raised Chang.[4] During this time, China was suffering from a devastating internal civil war in the Taiping Rebellion as well as numerous military defeats at the hands of Western imperial powers, notably, the Second Opium War. The military losses to the Western imperial powers resulted in a loss of territorial autonomy, sovereign wealth and national dignity.[5] In 1871, reformers in the Qing dynasty initiated the Christian Educational Movement ("C.E.M."), an early initiative of the Self Strengthening Movement that lasted from 1861–1895. China's leaders acknowledged reform was a *sine qua non* for legal and political survival. The earlier military defeats resulted in: (1) Chinese recognition of Western technical and military superiority; (2) acceptance of the Western method of conducting international relations; and (3) the establishing of schools devoted to the study of Western languages and technical skills in order to reduce dependence on foreign experts.[6]

Shortly after the reform initiative, Chang travelled by ship to America as part of the C.E.M. All of the 120 boys selected for overseas study were of Han ethnicity; many were orphans. Most of the selected students were from the southeastern part of China.[7] Upon arriving in America, Chang enrolled at Phillips Andover Academy in 1878. Initially, all the boys were required to wear traditional long gowns of Chinese scholars and keep their hair in waist-length, braided queues. However, the boys' attire was perceived as feminine, which led to bullying and school fights, and eventually a change to American style coats and pants.[8] Despite the

4. LANI AH TYE FARKAS, BURY MY BONES IN AMERICA 87–93 *(*1996).

5. EDWARD J.M. RHOADS, STEPPING FORTH INTO THE WORLD: THE CHINESE EDUCATIONAL MISSION TO THE UNITED STATES 1872–81 1–3 (2011).

6. *Id*.

7. *Id*. at 30. Hong Yen Chang is also known as Zhang Kangren. *Id.* at 15. Ninety-one percent of the students were from either Guangdong or Jiangsu province. *Id.* at 18.

8. FARKAS, *supra* note 4, at 88.

bullying, Chang thrived at the academy and became one of the keynote speakers on his graduation in 1879. He provided an English oration entitled "The Influence of Greece Beyond Greece."[9]

After graduation from Phillips Andover Academy, Chang began his studies at Yale College. However, the Chinese government recalled all the C.E.M. students, including Chang, back to China. One of the underlying reasons for the recall was growing anti-Chinese sentiment in Washington, D.C. and the United States State Department. Even previously qualified C.E.M. students were arbitrarily denied admission to the Naval Academy and West Point.[10]

Chang left China in 1882 and travelled to Honolulu, Hawaii. In Honolulu, he studied law for one year in A.S. Hartwell's chambers and was offered a $1,200 salary to remain and continue his legal studies in Hawaii. However, Chang wanted to expand his legal horizon and entered Columbia Law School.[11]

B. Chang's Denial of Bar Admission

Chang enrolled in a class of 108 students at Columbia Law School and received his degree in 1886.[12] However, the recent law graduate faced a significant statutory obstacle; American citizenship was a necessary precondition for admission to the New York Bar in 1886. The Chinese Exclusion Act of 1882 banned the entry of Chinese laborers into the United States for ten years and prohibited any state or federal court from admitting "Chinese to citizenship." It was the first federal law to ever exclude a group on the basis of race.[13] As a result of the Chinese Exclusion Act, it appeared as though Chang would not be called to the New York Bar. Interestingly, a prominent judge assisted Chang in having the New York legislature pass a bill removing the prohibition.[14] A bill in support of the motion granting Chang citizenship passed the New York legislature and was signed by Governor David Hill in April 1887. Chang had informally lobbied his own case before the Governor.[15]

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9. *Id.*

10. *Id.* at 89.

11. *Id.* at 90.

12. *Id.* A newspaper article reported that Chang was the first Chinese lawyer in America, that he "was taller than the majority of his race" and "unusually intelligent in his looks", and his "abilities in legal investigation" were among the finest in the class and he had excelled in special branches of the law. *Id.*

13. Act of May 6, 1882, Ch. 126, 22 Stat. 58 (1882). *See also* Richard P. Cole & Gabriel J. Chin, *Emerging From the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 LAW & HIST. REV. 325–26 (1999).

14. FARKAS, *supra* note 4, at 90.

15. An Act for the Relief of Hong Yen Chang, Laws of New York, Chapter 249 (1887). Section 1 states, "The General Term of the first department of the Supreme Court of this State is hereby authorized to waive alienage of Hong Yen Chang, a native of China, but now a resident of the city, county and State of New York, and to regularly admit and license him to the practice as an attorney and counselor at law in all courts of this State, on his passing in a satisfactory manner the usual examination

On November 11, 1887, Judge Van Hossen of the New York Court of Common Pleas naturalized Chang as an American citizen. Chang was subsequently admitted to the New York Bar on May 17, 1888 and obtained a certificate of passport authenticating his American citizenship on June 12, 1889. The certificate was signed by then Secretary of State, James G. Blaine.[16]

After the tortuous and difficult call to the New York Bar, Chang travelled to California and hoped to serve the large Chinese diaspora there.[17] In 1890, Chang brought a motion before the California Supreme Court seeking admission to the California Bar. The only two prerequisites under section 279 of the California Code of Civil Practice were that: 1) the applicant present a license to practice law from the highest court of a sister state; and 2) the person was either a US citizen or was eligible and intended to become a US citizen.[18]

On behalf of a unanimous four panel Court, Judge Fox ruled that the certificate of naturalization issued in New York was void *ab initio* because only Congress had jurisdiction over naturalization laws. Moreover, the Chinese Exclusion Act specifically prohibited granting certificates of naturalization to any Chinese native.[19] Relying on two federal court decisions, *In re Ah Yup* and *In re Look Tins Sing*, the Court also found that "persons of the Mongolian race are not entitled to be admitted as citizens of the United States."[20]

> In closing, the Court ruled "the certificate of naturalization presented in th[e] case was issued without authority of law, and is void . . . the holder of it is a person of Mongolian nativity . . . [as] the applicant is not a citizen of the United States and is not eligible under the law to become such, the motion must be denied.[21]

In *Chang I*, the California Supreme Court relied on *In re Look Tin Sing* for the proposition that persons of the "Mongolian" race were not entitled to U.S. citizenship. The purpose of referencing the *Sing* decision is twofold. First, it sets out how the California Supreme Court in 1890 misapplied the law. Secondly, the *Sing* decision sets out the flavor and nature of the animus towards Chinese American citizens. A basic reading of the *ratio decidendi (*legal principle upon which a decision is founded*)* in

for the admission of attorneys and counselors." *Id. See also*, FARKAS, *supra* note 4, at 90.

16. FARKAS, *supra* note 4, at 90.

17. *Id*. *See* Cole & Chin, *supra*, note 13, at 626-27, (recounting that in 1882, there were 135,000 people in California of Chinese descent; the newly arrived were part of the larger mass migration of two and a half million immigrants from China between 1840 to 1940).

18. *See Chang I*, *supra* note 1.

19. *Id*.

20. *Id*.

21. *Id.*, *In re Look Tin Sing*, 21 Fed. Rep. 905 (1884).

Sing suggests the *Chang I* court misread the decision and misapplied the law.[22]

The facts in *Sing* were as follows. Look Tin Sing was born in Mendocino, California in 1870. Sing travelled to China in 1879 and returned to San Francisco, California five years later—Sing's father always intended that his son return to the United States. Upon arriving in San Francisco, Sing was detained because the authorities argued he was required to have permission to enter the United States notwithstanding his status as an American-born citizen. Congress had passed restrictive immigration laws concerning Chinese nationals in 1882 and 1884.[23]

The fourteen-year-old boy brought a habeas corpus application to the Circuit Court for his release and an order that he be allowed entry in the United States as a US citizen. The District Attorney argued that the restrictive congressional immigration laws prevented Sing's re-entry into the United States regardless of where the boy was born and that the young boy return to China since his parents were Chinese and the boy was coming from China. The court summarily dismissed the prosecution's argument by holding that the law could not have intended that Sing, a U.S. citizen, look to any foreign country to enter the United States, and, that no U.S. citizen could be excluded from the United States except as part of a criminal sanction. If anything, the rationale of the decision, namely that a child born to Chinese parents domiciled in the United States becomes, at birth, a citizen of the United States under the first clause of the Fourteenth Amendment leads to the opposite conclusion. Moreover, there is nothing in the *Sing* decision that mentions the "Mongolian" race. The court fundamentally misinterpreted both the federal court decision and the Fourteenth Amendment, and simply erred in law.[24]

Thankfully, in recent years, there has been a renewed positive interest in the Chinese Educational Mission. In 2003, a five-part documentary called *Youtong* (Boy Students) was shown multiple times on China Central Television. In the same year, historical exhibitions on the subject of Chinese foreign students were held at the National Museum of China in Beijing and the Hong Kong Museum of History. Male C.E.M. students were portrayed as pioneers, a prominent theme in both exhibits. [25]

The California Senate also showed renewed interested in Chang's denial. Such legislative awareness found expression on May 15, 2014, when the California Senate passed Senate Resolution No. 46. The Resolution recommended Chang's posthumous admission to "remedy the injustice he suffered and to send a powerful message about the legal

22. *In re Look Tin Sing*, 21 Fed. Rep. 905.
23. *Id*. at 905–06. *See also Chang I, supra* note 1, at 164.
24. *Id.* at 905, 911.
25. FARKAS, *supra*, note 4, at 96.

profession's commitment to justice, diversity and inclusion." The Senate Resolution symbolized the California Senate's desire to remedy the prejudice Chang suffered and send a powerful message about the legal profession's commitment to justice, social inclusiveness and fairness.

II. CALIFORNIA SUPREME COURT GRANTS POSTHUMOUS

On March 16, 2015, the Supreme Court of California issued a nine-page judgment posthumously admitting Hong Yen Chang to the California Bar (*Chang II*). The decision can be broken down into four issues. The introductory portion sets out Chang's personal antecedents and the 1890 denial by the California Supreme Court.[26]

In the second part, the Court then proceeds to analyze the impact of Chang's denial through both an historical prism and an exercise in consciousness awareness. Specifically, the Court noted, "Understanding the significance of our two page decision denying Chang admission to the bar requires a candid reckoning with a sordid chapter of our state and national history."[27]

In *Chang II*, the California Supreme Court recounts in great historical detail the primeval racism and extensive discrimination the Asian American community encountered from 1848 to 1943. The general framework is set out in *Chae Chan Ping v. United States* (1889), a decision of the U.S. Supreme Court that upheld the Chinese Exclusion Act. In *Chae Chan Ping,* the Court noted:

> The discovery of gold in California in 1848 as is well known and followed by a large immigration thither form all parts of the world . . . . The news of the discovery penetrated China, and laborers came from there in great numbers . . . by far the greater number under contract with employers for whose benefit they worked. These laborers readily secured employment, and, as domestic servants, and in various kind of outdoor work, proved to be exceedingly useful. . . . They were generally industrious and frugal. Not being accompanied by families, except in rare circumstances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in may cases, by open conflicts, to the great disturbance of the public peace.[28]

In *Chae Chan Ping*, the United States Supreme Court observed the following social dynamic:

26. *Chang II*, *supra* note 2, at 1–2.
27. *Id.* at 3.
28. *Id.* at 4 (quoting Chae Chan Ping v. United States, 130 U.S. 581, 594–95 (1889)).

The differences of race added greatly to the difficulties of the situation.. [T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration. The people there accordingly petitioned earnestly for protective legislation.[29]

After the United States Supreme Court, upheld the Chinese Exclusion Act, in 1880, the California Legislature enacted a series of "Sinophobic" laws restricting economic and social mobility. These laws included:

1. Commercial fishing bans for "aliens incapable of becoming electors of state;
2. Imposing Criminal Liability on corporations that hired Chinese workers
3. A "Chinese Police Tax" to protect "free white labor against competition with Chinese Coolie labor;
4. A license tax on each foreigner who was ineligible to become a citizen.[30]

In 1879, the California electorate denied the right to vote to any "native of China" along with any "idiot, insane person, or person convicted" of crimes. In 1880, the most "Sinophobic" legislature in Californian history passed laws that prohibited towns, counties and municipalities in the state from issuing licenses to transact any business of occupation to "aliens not eligible to become electors of the State of California. This was the historic climate under which Chang was denied admittance in 1890.[31]

The third issue the *Chang II* Court analyzed relates to values and norms. The state Supreme Court addresses how a number of the normative foundations of unequal treatment have been discarded. The 2015 California Supreme Court recognized that a number of the premises surrounding the legal and policy rationales of the "Sinophobic" laws have been

29. *Id*.

30. *Chang II*, *supra* note 3, at 4 (citing past discriminatory laws).

31. *Id.* at 5–6. (In the *Ping* decision, the United States Supreme Court noted that California lobbied Congress to pass the Chinese Exclusion Act because "their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; that they retained habits and customs of their own country, and in fact constituted a Chinese settlement within the state." *Id.*).

significantly condemned. Congress repealed the Chinese Exclusion Act in 1943. Both houses of Congress expressed remorse for both the Chinese Exclusion Act and other discriminatory pieces of legislation targeting Chinese Americans. The California Constitution repealed all anti-Chinese provisions in 1952. In 2014, the California legislature adopted a resolution admitting the prejudicial history against the Chinese American community.[32]

The fourth issue in *Chang II* involves the relationship between the legal requirements for the practice of law and ethnicity or citizenship. On the issue of noncitizens practicing law, the Court recognized and adopted the precedent of *Raffaelli v. Committee of Bar Examiners* (1972).[33] In *Rafaelli*, the California Supreme Court held that it was "constitutionally indefensible" to bar noncitizens from practicing law.[34] The United States Supreme Court upheld the *Rafaelli* decision in 1973 (see *In re Griffiths*, 413 U.S. 717 (1973)).[35]

In 2013, the California state legislature passed legislation that permitted undocumented immigrants to be eligible for admission to the California State Bar. In the case of *In re Garcia*,[36] the California Supreme Court granted admission to an undocumented immigrant who had met the necessary preconditions by concluding "that an undocumented immigrant is present in the United States without lawful authorization does not involve moral turpitude or demonstrate unfitness so as to justify exclusion from the California State Bar, or prevent the individual from taking an oath promising faithfully to discharge the duty to support the Constitution and the laws of the United States and California."[37]

In summary, the 2015 California Supreme Court examined the offensive legal and xenophobic sociological climate relating to the 1890 decision and concluded it was a denial of "equal protection of the laws." Separate from a strict analysis of the law, the Court restated the general abhorrence of the underlying values behind the discriminatory law. Finally, the Court also analyzed the relationship between the legal requirements for the practice of law and how that relates to one's ethnicity or citizenship.

III. CRITIQUE AND MOVING FORWARD

In granting the posthumous application in 2015, the Court recognized its own institutional limitations by noting:

32. *Id*. at 8. The Court noted California's role in the Chinese Exclusion Act which "set the precedent for racist and foreign and national policy that led to broader exclusion laws" and fostered racism. *Id.*

33. *Id*. at 7.

34. Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 291 (1972).

35. *Chang II*, *supra* note 3, at 7.

36. In re Garcia, 58 Cal. 4th 440, 466 (2014).

37. *Chang II*, *supra*, note 3, at 7.

> Even if we cannot undo history, we can acknowledge it, and, in so doing, accord a full measure of recognition to Chang's path breaking efforts to became the first lawyer of Chinese descent in the United States. . . . In granting Hong Yen Chang posthumous admission to the California Bar, we affirm his rightful place among the ranks of persons deemed qualified to serve as an attorney and counselor at law in the courts of California.[38]

What is highly commendable is the way in which the Court analyzed the wrong done to both Chang and the larger Asian American community. The Court notes that denying Chang was not simply an individual injustice but denied the larger Chinese American community access to a great lawyer.[39]

The 1890 decision did not just infringe Chang's individual interests; it also affected broader community interests. Sir Thomas Lund, former president of the International Bar Association, recognized this legal reality by noting:

> [I]t is only natural for a member of the public to secure legal advice and representation from . . . a fellow national who speaks the same language and is accustomed to giving advice to his own nationals. An advocate who shares the same ethnic background may help bridge the cultural and linguistic barriers newly arrived immigrants face.[40]

By 1890, there was a large Chinese diaspora in California. By denying Chang admission to the Bar, the Court not only denied him the right to practice law but denied the Chinese American community access to a great legal mind.

A second part of the 2015 decision that requires some amplification is the reference to the *Hall* decision. In *People v. Hall*, the California Supreme Court barred the testimony of Chinese witnesses in a murder trial.[41] In the case, a white defendant had been convicted, in part, on the basis of testimony provided by members of the Chinese community in California. In overturning the conviction, the Court equated Chinese residents with American Indians and relied on the Criminal Act of 1850. The act barred any persons of color including American Indians, African Americans and "Mulattoo" persons from testifying against whites.[42] Speaking on behalf of the Court, Justice Murray held that "[t]he same rule which would admit them to testify would admit them to all rights of

38. *Id*. at 8.
39. *Id*.
40. Kiyoko Kamio Knapp, *Disdain of Alien Lawyers*, 7 SETON HALL CONST. L.J. 103, 130–31.
41. *See People v. Hall*, 4 Cal 399 (1854); *Chang II*, *supra* note 3, at 5.
42. *Id*.

citizenship and might soon see them in the pools, in the jury box, upon the bench and in our legislative halls."[43]

The evidentiary proscription regarding Chinese witnesses resulted in a wave of lawlessness. Crimes involving attacks against Chinese residents were committed without any accountability—one can only imagine how severely the law operated. Indeed, a victim who happened to be Chinese could not testify in court. Conversely, if someone of Chinese background was charged with a crime, he could not testify on his own behalf thus eradicating any opportunity to make a full answer and defense to a criminal charge. The *Hall* ruling essentially created a legal and factual class of Chinese residents who were *persona non grata*.[44]

The *Chang I* decision in 1890 was in some ways a continuation of the *Hall* decision as it represented a significant curtailment of access to justice for the Chinese American community. The third postscript requires completing Chang's life story after 1890. After the California Supreme Court denial in 1890, Chang had a very prominent career in diplomacy and banking. He worked for the Chinese Consulate in San Francisco from 1888 to 1895. From 1900 to 1907, Chang worked at the Yokohama Species Bank of Japan. From 1907 to 1909, he was the Accountant-General to the Shanghai branch treasury. In 1909, Chang became a Professor of International Law and Banking at Nanking University. From 1910 to 1913, he was the Chinese consul to Canada and was posted in Vancouver, British Columbia. [45] From 1912 to 1913, Chang was First Secretary and Charge d'Affairs of the Chinese Legation to the United States. From 1916 to 1917, he was director of Chinese naval students at the University of California at Berkeley. After a long and fruitful life, Chang passed away in 1926.[46]

The California Supreme Court also provided a legal framework for further cases involving communities that have been legally and socially marginalized. One can draw three inferences from *Chang II*.

First, the Court's analysis on the relationship or lack of relationship between ethnicity, citizenship and the fitness requirements to practice law creates an almost axiomatic statement of law. The California Supreme Court's reference to the *Rafaelli* and *In re Garcia* decisions establish a fundamental principle that a banning a person because of their citizenship status is a "lingering vestige of a xenophobic attitude that 'should be allowed to join those anachronistic classifications among the crumbled

43. *Id.*; Cole & Chin, *supra* note 13. *See also* Connie Young Yu, *Who are the Chinese Americans?*, *in* REFERENCE LIBRARY OF ASIAN AMERICA: ANOTHER CONTRIBUTION TO DIVERSITY 41–50 (S. Gall & I. Natividad eds., 1995).

44. *See* Yu, *supra* note 44, at 44. Reference is made to attacks on both city streets and in mining districts where people were often beaten and murdered. The annotation refers to a newspaper clipping that noted hundreds of Chinese being "slaughtered in cold blood and daily murders of 'Chinamen' with only two or three instances of the perpetrators" facing any criminal process. *Id.*

45. FARKAS, *supra* note 4, 91–92.

46. *Id.* at 92–93.

pedestals of history.'"[47]

Second, the Court's approach was purposive, broad and expansive. The interdisciplinary approach involved looking at the case through an objectively historical, broad sociological and subjectively individualistic prism to arrive at the correct decision. By way of example, the Court could have narrowly granted the application without delving into all the types of prejudice Chinese Americans encountered in the late nineteenth and early twentieth century. Using a narrow method, it would have not been necessary to consider how denying Chang a place at the bar affected the broader Chinese American diaspora. As a precedent, the reasons hold great value for any similar types of applications in the future.

Finally, while the Court did not set a requirement that future applicants provide some evidence of objective and subjective harm, future applicants ought to be address those issues on two grounds. First, any applicant who can show some objective and subjective harm strengthens her case. Secondly, with a more complete evidentiary foundation, a court is better able to provide detailed, compelling reasons using a more expansive analysis. Future cases ought to address the subjective aspect of a past wrong. There also ought to be some objectively verifiable history that corroborates the subjective harm. Finally, any future application ought to make reference to the Court's analysis regarding ethnicity, race and its relationship to the practice of law. The 2015 California Supreme Court decision granting Chang posthumous admission underscores that although justice can be significantly delayed, it need not be denied.

47. *Chang II*, *supra* note 3, at 7.