New Directions in Asian American Jurisprudence

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PREFACE ........................................................................ 6
I. INTRODUCTION .................................................................. 7
An Explanation of Terms: Narratives and Stereotypes ............. 10
II. LOCATING ASIAN AMERICAN JURISPRUDENCE IN LEGAL SCHOLARSHIP ........................................ 11
A. Asian American Identity .................................................. 11
   1. Identification and Identity Projects ............................ 12
   2. Three Asian American Identity Projects .................... 14
B. Interrogation of Legal Materials ........................................ 17
   1. Three Asian American Historical Narratives .............. 17
      a. The Immigration Narrative .................................. 19
      b. The Citizenship Narrative .................................. 20
      c. The Racial Narrative ........................................ 24
C. Politics and Praxis in Legal Scholarship ............................ 26
   1. Against Invisibility .................................................... 27
      a. Identity Projects ................................................ 27
      b. Legal Interventions ............................................ 28
   2. Community Activism and Justice ................................. 31
III. RACIAL ANALYSIS ........................................................... 32
A. Beyond Black and White ................................................. 32
   1. The Black-White Narrative in American Law .............. 33
   2. Identity and Legal Invisibility .................................... 34
   3. Legal Scholarship and Invisibility .............................. 36
B. Asiatic Racialization: Three Categories and Three Stereotypes ........................................ 38
   1. The Chinese Racial Category and the Foreignness

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† Professor of Law Western State University College of Law. This work is a continuing cooperative and collective project with contributors over years—too many to name individually. Special thanks to the editors of the Asian American Law Journal (including its years as the Asian Law Journal) for continuing to encourage and support Asian American identity and the Asian American legal project. Thanks also to the community of scholars pursuing Asian American legal studies—especially CAPALF—the Conference of Asian Pacific American Law Faculty. CAPALF has been my intellectual and social home. And finally, thanks to the broader critical legal communities—Critical Legal Studies, Critical Race Theory, Lat-Crit and others—who continue to pursue social justice in the law.
PREFACE

I first taught a course on Japanese Americans and the Law at San Francisco State University in 1970. Since then, I have continued to investigate and write on race, law, and Asian Americans. With that personal history, I was of course pleased when the Asian American Law Journal invited me to deliver its inaugural lecture on Asian American Jurisprudence in 2008.

When I asked the Journal editors for their thoughts on possible themes, they suggested that I provide a summary and history of Asian American Jurisprudence. In my lecture, I focused on new directions in Asian American scholarship and planned to include a short literature review for the written article. However, the more I read, the more I found myself unable to find a theme or set of themes that could capture the diverse topics that constitute this fascinating and growing area of scholarship.

An approach came to me after a conversation with Professor Leti

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1. I was still in law school at the time and was later told that one reason I was invited was that I was the only activist associated with the San Francisco State Asian American Political Alliance who had a bachelor's degree. The others were all undergraduates.

2. Especially helpful in sorting the various themes was the work of Keith Aoki and Kevin Johnson in their comprehensive review of the intellectual product of the LatCrit Project. Keith Aoki & Kevin R. Johnson, An Assessment of LatCrit Theory Ten Years After, 83 IND. L.J. 1151 (2008). LatCrit has been a major gathering place, intellectual safe space, and venue for publication of an entire generation of work aimed at questions affecting Latinos and Latinas.
Volpp, Professor of Law at Berkeley Law. In our conversation, I mentioned to her the difficulties I encountered in finding a theoretical framework. She recalled Lisa Lowe’s suggestion that Asian American Studies was not a subject area, but rather a political space. In this piece, I follow Volpp’s suggestion and posit that Asian American Jurisprudence is not a discrete doctrine or theory, but a space and locale in legal studies for identity, interrogation, and praxis.

My goal in this Essay is to provide parameters for the intellectual and social venues of our work as well as provide methodological and substantive themes to be tested against continuing investigations of the legal materials. Above all, I hope to encourage political and intellectual activism.

I add here a personal note. In developing this Essay, I used my own writings, surveyed a range of materials on Asian Americans and the Law, and reviewed comparative analyses. As this Essay’s themes developed, I realized that while I focus only on a handful of exemplary articles and books in this Essay, there is a wealth of outstanding publications that form the body of Asian American Jurisprudence. A more comprehensive bibliographic essay may be a project for the future. But for this Essay, I chose a limited number of references and unfortunately omitted many scholars and friends.

I. INTRODUCTION

One difficulty in describing Asian American Jurisprudence is that there is a large body of significant intellectual material that seems to be connected, but defies simple theorizing. There is no single legal methodology or tradition that encompasses the interdisciplinary efforts of Asian American legal scholars writing about Asian Americans. This Essay is therefore divided into three sections. Part II pursues the theme of Asian American Jurisprudence as a locale for identity, interrogation, and praxis. I review each of these concepts as locales to see how authors have developed each area. Part III develops a racial analysis of Asian Americans in legal materials. Part IV provides a short review of five authors who have developed themes that represent new directions for Asian American Jurisprudence. I attempt to introduce the concepts in broad strokes below and provide greater detail in the body of the article.

In Part II, I discuss Asian American Jurisprudence as a locale for identity, interrogation, and praxis. The first location theme for Asian American Jurisprudence is identity. Identity, especially as developed in the

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3. Lisa Lowe is a professor of comparative literature and cultural studies at U.C. San Diego. Among her influential writings is IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS (1996). In Lowe’s words, “The grouping ‘Asian American’ is not a natural or static category; it is a socially constructed unity, a situationally specific position, assumed for political reasons.” Id. at 82.

4. See Aoki & Johnson, supra note 2.
work of Anthony Appiah,\textsuperscript{5} describes the implicit motivation behind much of these scholarly efforts. Further, Appiah’s distinction between collective and ascriptive identity corresponds to the traditional notions of ethnic identity and imposed racial profiles. This distinction provides a means of linking our efforts to describe Asian American ethnic communities in legal materials with our opposition to the racially subordinating imposition of stereotypes. As a methodology, assertions of identity continue to be at the heart of Asian American Jurisprudence.

The second location theme, interrogations, encompasses our reinterpretation of cases, statutes, and legal histories into three intertwined narratives: immigration, citizenship, and race. In many respects, this is the most familiar terrain of Asian American Jurisprudence. The immigration narrative is the legal history of Asian immigration to the United States. This story begins with Chinese immigration before Exclusion, and continues through the many peoples and communities who have come to America since. The immigration narrative is one of the most thorough and well-developed narratives in our scholarship.

The legal intricacies of the immigration story are closely linked to the citizenship narrative. The citizenship narrative begins where the immigration narrative leaves off. It is not only about coming to America, but facing discrimination and exclusion in America. Beginning with the statutory requirement that only “white persons” could become naturalized citizens, Asian immigrants have faced barriers to participation in the economic, social, and political life of America.

The third narrative is the racial narrative. Within a few years of arrival, Chinese immigrants began to face organized opposition to their presence. Those attacks were racial, but in a form different from existing racial subordinations. By the time the Chinese Exclusion Act was passed in 1882, the Chinese were characterized as a permanently foreign race that was incapable of becoming Americans. The stereotype of foreignness became a regular dimension to the racialization of Asian Americans. In the mid-1960s, an additional stereotype, the Model Minority, was imposed onto Asian Americans. Finally, after 9-11, the face of the enemy in the War on Terror became anyone who looked vaguely “Arab,” which included individuals from many regions of the world such as West Asia, South Asia, or the Middle East. After 9-11, the stereotype of someone who “looks like a terrorist” became firmly implanted as an additional dimension to the racialization of Asian Americans.

The third location theme, praxis, links Asian American Jurisprudence to its roots in social and student struggles. Asian American Jurisprudence is a literature of social struggle against racial subordination and is directly

\textsuperscript{5} K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE (1996).
related to Asian American Studies. The origins of modern Asian American Studies were in student strikes of the 1960s and 1970s. Many of the current courses on Asian Americans and the Law and Asian American Jurisprudence are the result of student activism. The substantive content of Asian American Jurisprudence includes three important politics that arise from these activist roots. First, on the terrain of legal studies, identity assertions are a challenge to social stereotypes. Second, identity is a challenge to the invisibility of Asian American ethnicities in legal materials. Third, the intellectual and theoretical claims of identity are grounded in community issues. This link is identified and articulated by Eric Yamamoto’s critical race praxis, which calls for “enhanced attention to theory translation and deeper engagement with frontline action.”

In Part III, I examine race and racialization more closely. After examining the locales for Asian American Jurisprudence, I next pursue a closer examination of how Asian Americans are racialized. I begin with an examination of the core racial narrative in American law—the Black-White narrative. I examine how the Black-White narrative has limited racial discussion and rendered other races invisible. I also suggest additional influences that create racial and ethnic invisibility. Finally, I suggest that the Black-White model is inadequate to describe the racialization of Asian Americans. To better capture the actual experience of race as encountered by Asian Americans, I examine how Asians have been categorized. I argue that three different Asian American racial categories have emerged that correspond to the three dominant stereotypes of Asian Americans: foreignness, Model Minority, and 9-11 terrorist.

I next articulate a three-part analytical framework for comparing and contrasting Asiatic racialization and Black-White racialization. The three elements I have discerned are i) body primitives, ii) racial categories, and iii) racial stereotypes. I conclude by suggesting how this three-part analysis improves our understanding of racial profiling and stereotypes.

In Part IV, I review five authors who bring new perspectives to Asian American Jurisprudence. They assert the new social categories of the diaspora and the Middle Easterner, extend our discussion to the Pacific Colonies, and bring gendered religious identity into our discussions. By way of conclusion, I make some suggestions for new directions for Asian American Jurisprudence. I also offer in an appendix, a methodology for investigation in Asian American Jurisprudence. This methodology is not a test for authenticity—rather, it raises questions to provoke additional thinking about the space and locale of Asian American Jurisprudence.

Finally, I note crucial omissions from this paper. Several colleagues, including Lisa Ikemoto, Sumi Cho, Adrienne Davis and Robert Chang have

noted the absence of discussions of Asian American women and Asian American sexuality. I decided after considerable thought that those analyses were beyond the scope of this presentation. I look forward to future scholarship on these questions.

*An Explanation of Terms: Narratives and Stereotypes*

In this paper, I refer to narratives and stereotypes. I use these terms as part of the methodology of this paper and my survey of Asian American Jurisprudence. I use the term “narrative” to suggest a narrative in the literary analysis and historical studies tradition. The narratives in Asian American Jurisprudence are not limited to what has been called “storytelling” in the Critical Race Theory tradition. The narratives of immigration, citizenship, and racialization that have emerged within Asian American Jurisprudence are legal history as well as historical narrative. They are a retelling of our coming to America through an interpretation of the legal materials. The narratives shape how we see ourselves and, by providing our own interpretations of cases, statutes, and legal history, help shape how we are seen in the legal system.

Consider the following example. In Part III, I describe the Asian American citizenship narrative as encompassing how Asian immigrants become part of America. I include within this narrative the Chinese Exclusion, the *Thind* case upholding the limitation of citizenship naturalization to “white persons,” the Japanese American incarceration in World War II, the false accusation of espionage against Wen Ho Lee, and the promulgation of the 9-11 terrorist as enemy in the War on Terror. I see these sometimes discrete historical episodes as part of a narrative of Asian immigrants seeking full participation in all aspects of American society. If one accepts even a portion of this narrative, then the citizenship narrative shapes how one views and treats Asian American ethnicities and communities.

The immigration and citizenship narratives also advance the often inchoate notion of an Asian American identity. The continuity of these narratives is by no means self-evident. They encompass a century and a half, include immigrants from countries in the farthest reaches of North, South and West Asia, and as an aspect of legal studies, sprawl across a wide range of statutes, decisions, legal doctrines and legal methodologies. As narratives, the stories have a plot (coming to America), personifications (the U.S. versus proto Asian Americans), protagonists (immigrants), antagonists (exclusionists and racists), a lengthy chronology, and even authors (Asian Americanists). If we craft a compelling narrative, we

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strenthen our ability to shape ourselves and our futures.\footnote{See, e.g., J. Hillis Miller, \textit{Narrative, in Critical Terms for Literary Study} 75 (Frank Lentricchia & Thomas McLaughlin eds., 1990).}

I use the term “stereotype” as meaning more than a simple misunderstanding. Analysis of stereotyping suggests that stereotypes function in several different ways. Stereotypes essentialize difference, fix the boundaries of understanding of the “other,” and operate where there are inequities of power directed at the subordinated or excluded.\footnote{Here I follow Stuart Hall’s analysis of stereotyping as a signifying practice. Hall references Richard Dyer’s article on stereotyping. \textit{Stuart Hall, Representation: Cultural Representations and Signifying Practices} 257 (1997).} Thus, the term “Model Minority” has become associated with Asian Americans, and goes far beyond a simple erroneous characterization. The term’s origins in 1965 inserted Asian Americans into the Civil Rights struggles as an intermediate group between Blacks and Whites. Today, the term continues to inject Asian Americans into the ongoing debate over race-conscious affirmative action practices. The term colors educators’ and other students’ expectations of Asian Americans.

These methodological comments are intended to suggest that Asian American Jurisprudence encompasses more than traditional legal studies. Our efforts seek legal reform—reforms that are not limited to traditional proposals for a new statute or the correct judicial interpretation. Our work is normative—we seek social justice—and is not constrained by a narrow understanding of law or legal studies.

II. LOCATING ASIAN AMERICAN JURISPRUDENCE IN LEGAL SCHOLARSHIP

I describe Asian American Jurisprudence as a space and locale for identity, interrogation, and praxis. I do this by identifying three implicit areas that define this substantive space in legal studies. Asian American identity is a rich area in which many authors adopt a community-based subject position and write from that viewpoint. The second area, interrogation, examines our multiple histories and creates larger narratives. I identify three significant historical narratives: immigration, citizenship, and racialization. The third area is praxis, our efforts to integrate activism and scholarship.

\textit{A. Asian American Identity}

In this Essay, I refer to “identity” to restate an important theme in Asian American Jurisprudence: identity matters.\footnote{See \\textit{Cornel West, Race Matters} (1994).} In legal studies, the examination of identity is summarily marginalized through the label “identity politics.” This term reduces identity to a special interest in a realm of political maneuverings. The continued intellectual production of
thoughtful and imaginative scholarship that goes well beyond a narrow politics challenges that dismissive reading of identity. Asian American Jurisprudence embraces and celebrates the examination of our multiple identities.

To better understand why this intellectual interest continues, I suggest that identity scholarship, including Asian American Jurisprudence, encompasses responses to two different forms of ethnic and racial subordination. Identity scholarship can be a reply to racial stereotyping. Racial stereotypes are often imposed upon ethnic communities and originate outside those communities. One direct response for law professors who are members of communities subjected to these stereotypes and racial profiles is to write articles in law reviews. Those responses identify the stereotypes and racial profiles and provide rebuttals to their harmful effects.

A second, less obvious, dimension to identity scholarship is a reaction to invisibility and erasure. Prior to the 1980s, there were very few law review articles written about Asian Americans. We had a marginal existence in the pages of law reviews. Even in the literature on race, discussions centered on Black and White, to the exclusion of other non-Whites. As a response to invisibility, identity articles about Asian Americans are an effort to establish a history and a presence in the legal literature.¹¹

Finally, identity jurisprudence is simply an area of intellectual interest and appropriate for scholarly inquiry. There is a substantial history, and a number of statutes and cases that affect Asians and Asian Americans that are deserving of research and study.

Viewed in this fashion, identity jurisprudence has multiple functions. To describe and analyze Asian American identity jurisprudence, I look to the work of Anthony Appiah.

1. Identification and Identity Projects

In recent years, some of the most careful examinations of race, identity, and consciousness have been by Anthony Appiah. Especially helpful is his 1996 essay, “Race, Culture and Identity.”¹² In it, he isolates three aspects of identity: identification, collective identities, and ascribed identities.

Consider first, Appiah’s notion of “identification”:

Once the racial label is applied to people, ideas about what it refers to, ideas that may be much less consensual than the application of the label, come to have their social effects. But they have not only social effects but psychological ones as well; and they shape the ways people conceive of

¹¹. I discuss invisibility further below, see infra Part II.C.1.
¹². APPIAH & GUTMANN, supra note 5.
themselves and their projects. In particular, the labels can operate to shape what I want to call “identification”: the process through which an individual intentionally shapes her projects—including her plans for her own life and her conception of the good—by reference to available labels, available identities.\(^\text{13}\)

Appiah’s notion of identification helps describe the identity projects of Asian American Jurisprudence. Many of the articles in this field have been the result of conscious choices by authors to assert their identity through scholarship and political activity. The production of these articles is a mode of resistance to racial subordination and the creation of the means—identities—to move forward that resistance.

As a complement to identification, Appiah offers the term “collective identities” to describe the “narratives that people can use in shaping their life plans and in telling their life stories.”\(^\text{14}\) Together, these terms describe the “internal” aspect of collective ethnic or community life as expressed in Asian American Jurisprudence. As part of our work is to write about and establish Asian American identities, we engage in an identification project and seek to develop collective identities.

The crucial oppositional dimensions of these collective identities are the imposed understandings from society. Appiah discusses this concept as “ascription of racial identity.”\(^\text{15}\) Examples of “ascribed racial identities” are racial stereotypes and racial profiles. Appiah’s analysis and terminology help to remind us that stereotypes and racial profiles are externally imposed understandings that are more than “misunderstandings” or “prejudices.” They cannot be remedied or dismissed through simple discussion or education.

I will use a modified version of Appiah’s terminology to match more closely our writings in Asian American Jurisprudence. Appiah uses:

<table>
<thead>
<tr>
<th>Identification</th>
<th>Collective Identity</th>
<th>Ascriptive Identity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identification Project/ Identification</td>
<td>Collective Ethnic Identity</td>
<td>Ascribed Racial Stereotype</td>
</tr>
</tbody>
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The shift in labels reflects my understanding that our identity projects are projects of resistance to the racial and ethnic subordinations of stereotyping and invisibility. I also choose “ethnic” as the term for the

\(^\text{13}\) Id. at 78 (emphasis added).

\(^\text{14}\) Id. at 97.

\(^\text{15}\) Id. at 76, 79-80.
assertion of our collective identity precisely because it is a concept largely absent from American law. The absence of ethnicity as a concept renders our collective communities invisible in much legal discourse. Traditional legal discourse reduces ethnicity to an element in the special interest bickering of "identity politics." The reading in Asian American Jurisprudence of ethnic identity as a collective identity places ethnicity into the center of our analysis.

2. Three Asian American Identity Projects

We can see the analytical categories of identification, ascribed racial identity, and collective ethnic identities in three early Asian American Jurisprudence articles: my 1985 book review, “Other Non-Whites” in American Legal History, Mari Matsuda’s 1987 article, “Looking to the Bottom,” and Robert Chang’s 1993 article, “Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space.” All of these articles are identity projects—projects that establish and use existing identities to shape life projects and conceptions of the good.

“Other Non-Whites” is a book review of Justice at War, Peter Irons’ scholarly treatment of his representation of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui in their writs of error coram nobis to overturn their World War II convictions. “Other Non-Whites” sought to reframe the discussion of the internment from a discussion of individual ethical, political, and judicial mistakes into an examination of a legal history of the racialized treatment of Asian Americans. It was the first of my own published writings on race, and I very much viewed the article as my personal identification project.

“Other Non-Whites” also described a collective Asian American identity in American law. The article sketched out a racial legal history by discussing cases and statutes that had not previously been discussed together as a single narrative. In “Other Non-Whites” I wove together California’s early racial classification case, People v. Hall, the Chinese Exclusion and citizenship cases, the Japanese Concentration Camp cases, and the Equal Protection alienage cases. In addition, I described

18. 4 Cal. 399 (1854).
19. United States v. Wong Kim Ark, 169 U.S. 649 (1898) (quoting Fong Yue Ting v. United States, 149 U.S. 698 (1893)).
the racial crossover between the Japanese American cases and *Brown v. Board of Education.* This narrative was an early effort to establish an Asian American collective identity that encompassed Chinese and Japanese citizens and aliens.

This article also discussed the ascriptive racial stereotype of foreignness. "Other Non-Whites" noted how the California Supreme Court had described the Chinese as "a distinct people, living in our community, recognizing no laws of this State... a race of people whom nature has marked as inferior... differing in language, opinion, color and physical conformation."23

The article further quoted language from *Fong Yue Ting v. United States:*

> [The Chinese are] of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country... incapable of assimilating with our people.24

The ascribed racial stereotype of foreignness remains a central consideration in Asian American Jurisprudence.25

Mari Matsuda’s 1987 article, “Looking to the Bottom: Critical Legal Studies and Reparations,” was a foundational article for both Critical Race Theory and Asian American Jurisprudence.26 “Looking to the Bottom” discussed two reparations claims—for the Japanese American internment and the annexation of Hawai‘i. Matsuda, a Japanese American activist who was born and raised in Hawai‘i, posited the two reparations claims as a part of her own identity project to describe and build a collective identity for Japanese Americans and Asian Americans, and a Hawaiian collective identity for Native Hawaiians. Matsuda’s work is not limited to the intellectual assertion of a collective identity. Her intervention explicitly supports the political projects of securing reparations as compensation for past injustices.27

Robert Chang’s article, “Towards an Asian American Legal Scholarship,” was an explicit work of Asian American identification.28 He began with a personal story and moved to the vigorous announcement of an “Asian American Moment... [a] Moment... marked by the increasing

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23. Gotanda, supra note 16.
24. Id. at 1190.
25. See infra Part II.B.1.
26. Matsuda, supra note 16.
27. See also MARI MATSUDA, WHERE IS YOUR BODY? (1997). Matsuda asserts her subject position as a Japanese American woman and includes thoughtful and engaged examinations of Asian American identity.
28. Chang, supra note 16.
presence of Asian Americans in the legal academy who are beginning to raise their voices to "speak new words and remake old legal doctrines." He then goes on to ask others to pursue this identification project: "This Moment brings new responsibilities for Asian American legal scholars. This Moment brings new challenges. This Moment also brings us hope." Chang's call for an Asian American Moment is not only the clear assertion of an Asian American collective identity. The article is also a call for an Asian American Jurisprudence defined by intellectual activism.

"Towards an Asian American Legal Scholarship" weaves together a narrative of a broad Asian American collective identity. Chang discusses anti-Asian violence with two contemporary examples—Vincent Chin, a Chinese American, and Navrozy Mody, an Asian Indian American. He then links Chin and Mody to an Asian American history—the murder of four Chinese people during the 1877 burning of the Chico, California Chinatown and the twenty eight Chinese individuals killed in the 1887 Rock Springs Wyoming Massacre. The experience of discrimination as well as exposure to violence and lynchings have been part of our common heritage. Chang places together these incidents from different eras to emphasize their common place in our history and therefore our identity.

Chang also engages the Model Minority trope—the second of the major ascriptive racial profiles assigned to Asian Americans. He notes that the Model Minority myth "renders the oppression of Asian Americans invisible." As part of his refutation of the Model Minority myth, he cites poverty and income data on the Chinese, Japanese, Laotians, Cambodians, Hmong, and Vietnamese to dispel the stereotype of economic success. Chang's vision for an Asian American collective identity is historically grounded and broadly inclusive.

In these early articles, we see the effort by writers in Asian American jurisprudence to describe and advocate for a collective Asian American identity, identify important imposed ascriptive racial stereotypes (foreignness and the Model Minority), and promote intellectual and community-based programs of political activism.

Appiah's analysis and separation of the operation of identity into identification, collective identity, and ascriptive racial identity provide a way to understand that much of Asian American Jurisprudence is inspired by our multiple identity projects. We seek to define and express our

29. Id. at 1245-46; 5-6.
30. Id.
31. Id. at 1252-53; 12-13.
32. Id. at 1254; 14.
33. Id. at 1261; 21.
collective identities in opposition to socially imposed, and fundamentally false, ascriptive racial identities. In the legal literature, our assertion of collective ethnic identities is an intervention against the invisibility of Asian American ethnicities.

In sum, identity matters. Asian American Jurisprudence is an important part of the tradition of the minority scholar: the tradition that reveals what had previously been invisible, names what had always been present yet not identified, and speaks openly what had previously been left unsaid.

B. Interrogation of Legal Materials

In this second locale discussion, I focus upon how Asian American scholars have closely examined the legal materials and constructed important historical narratives. Using statutes, cases, social histories, and national histories, authors have written or rewritten the story of Asians in the United States. I identify three intertwined narratives that describe major substantive themes in Asian American Jurisprudence: the immigration narrative, the citizenship narrative, and the racialization narrative.

I introduce these narratives as guidelines to sort through the multitude of issues and questions raised in writing a history of Asians in America. The questions of immigration, citizenship, and racialization, understood very broadly, are intertwined in the lived experience of Asian Americans. The three narratives should not be understood as a single narrative strand or story. They represent separate elements of special interest to legal scholars. Therefore, in this survey, I suggest the outlines of each narrative and present some examples of scholarly work that I believe illustrate the distinct aspects of each narrative strand.

1. Three Asian American Historical Narratives

The narratives are truly epic: they extend from the beginnings of Asian immigration and continue through the present. Scholars in Asian American Studies and Asian American Jurisprudence have brought to light materials that had been largely ignored. They tied together the histories, individual stories, political struggles, and community efforts along with statutes, legislative debates, and court decisions into a broad new dimension in American legal history. Important authors and works in the Asian American Studies tradition include Ronald Takaki’s *Strangers from a Different Shore: A History of Asian Americans*;\(^{35}\) Yuji Ichioka’s *The Issei: The World of the First Generation Japanese Immigrants, 1885-1924*;\(^{36}\) Sucheng Chan’s *Asian Americans: An Interpretive History*;\(^{37}\) Gary


Okihiro’s *Margins and Mainstreams: Asians in American History and Culture*; K. Scott Wong and Sucheng Chan’s *Claiming America: Constructing Chinese American Identities during the Exclusion Era*, and most recently, Mae Ngai’s *Impossible Subjects: Illegal Aliens and the Making of Modern American*. Today, this literature is a significant and mature body of scholarship.

Within Asian American Studies, scholars from disciplines other than history have also examined legal materials. Lisa Lowe is a professor of comparative literature and her influential study, *Immigrant Acts: On Asian American Cultural Politics*, is often classified within cultural studies. The main theme of her analysis, as suggested by her title, is the role that immigrants and immigration of Asians have played in America’s national culture and politics. She begins her first chapter, “Immigration, Citizenship, Racialization: Asian American Critique,” by linking citizens, citizenship, and national culture:

> Citizens inhabit the political space of the nation, a space that is, at once juridically legislated, territorially situated, and culturally embodied. Although the law is perhaps the discourse that most literally governs citizenship, U.S. national culture... powerfully shapes who the citizenry is, where they dwell, what they remember, and what they forget.

Lowe goes on to discuss the place of the immigrant:

> In the last century and a half, the American citizen has been defined over against the Asian immigrant, legally, economically, and culturally. These definitions have cast Asian immigrants both as persons and populations to be integrated into the national political sphere and as the contradictory, confusing, unintelligible elements to be marginalized and returned to their alien origins.

Lowe’s narrative does not treat the Asian immigrant history as a story of people coming to America, separate from the main currents of American culture. Nor is her story of assimilation a story of Asian immigrants losing their culture and joining a unified American culture. Rather, Lowe notes how U.S. citizenship has itself been defined “over and against” the immigrant.
a. The Immigration Narrative

In our own tradition of Asian American Jurisprudence, authors have pioneered studies in each of the three broad narratives I have outlined. The first is the immigration narrative. The story of leaving the homeland and arriving to a mixed welcome is connected to every person of Asian ancestry in the United States. Yet this was a largely invisible narrative prior to the 1960s. Immigration studies were dominated by sociological and historical accounts of European immigration. The Chinese Exclusion was treated as a minor aberration in the triumphal story of Ellis Island and the arrival of millions of immigrants from Europe.44

Instead of separate immigrations from different homelands throughout Asia, Asian American Studies and Asian American Jurisprudence have created an Asian American narrative of immigration, exclusion, discrimination, internment, and deportation. In refuting that view, Bill Ong Hing’s series of books, especially Making and Remaking Asian America Through Immigration Policy, 1850-1990 and Defining America Through Immigration Policy, present an important reinterpretation of the immigration narrative.45 Beginning with the truism and cliché, “we are a nation of immigrants,” Hing presents a more complex story.46 He argues:

There have always been two Americas . . . One America has embraced the notion of welcoming newcomers from different parts of the world . . . This America has understood that Americans are not necessarily of the same background or tongue. The other America has remained largely mired in a Eurocentric (originally western Eurocentric) vision of America that idealized the true American as white, Anglo-Saxon, English-speaking, and Christian. For the most part, this America has opposed more immigration, especially immigration from regions of the world that are not white or supportive of our brand of democracy.47

Hing’s alternative to existing narratives of immigration has been an important addition to immigration studies.

Another notable dimension to the immigration narrative has been the discriminatory treatment of immigrants, non-citizens, and illegal immigrants. Victor Romero’s book, Alienated: Immigrant Rights, The Constitution, and Equality in America, focuses upon unequal treatment of non-citizens.48 Romero explains:

46. See HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY, supra note 45, at 3.
47. Id.
Put simply, immigration law divides people into citizens of the United States and others, between those who can claim legal status as full members of this republic, and those who cannot. While the Constitution recognizes this distinction, it simultaneously aspires to provide due process and equal protection of the laws to all persons, regardless of citizenship. So here is the dilemma: to what extent should the Constitution protect noncitizens—immigrants, undocumented persons, tourists, foreign students—in the United States?

Romero reviews a number of specific contexts—the War on Terrorism after 9-11, search and seizure rights under the Fourth Amendment, college education, and sexual orientation. He presents a framework for analysis and suggestions for reform. There are, of course, many dimensions, including the historical, social, and political, to the immigration narrative. Closely interconnected to our stories of immigration and the treatment of immigrants is the story of how immigrants struggled to become citizens—full legal participants in American society.

b. The Citizenship Narrative

Intertwined with the immigration narrative is the citizenship narrative—the continuing effort for citizenship and full participation in American political and civil society. Within the broad outlines of this narrative, I place the stories of the barriers to citizenship, both as a specific legal status and the actual ability to live, work, vote, and enjoy one’s life and liberty. This narrative covers the enormous scope of the many forms of legally based discriminatory treatment of Asians in America. I will discuss only a few examples from our literature.

One of the earliest examples of a barrier to becoming a citizen was the 1790 limitation of naturalization to “free white persons.” Congress did not remove the racial barrier to naturalization until 1952. Earlier, in the 1920s, the 1789 statute was interpreted by three U.S. Supreme Court cases to uphold the barrier. One of the decisions, Ozawa v. United States, involved a petition by a culturally assimilated Japanese American who had attended high school and college in the United States. He met all the requirements for naturalization but race. The Court, using a mix of scientific and popular understandings of race, held that a person of the

49. Id. at 1.
50. Id. at 6-8.
52. Act of March 26, 1790, ch. 3, 1 Stat. 103.
Japanese race was not a “Caucasian” and therefore not White.\textsuperscript{55} The following year, the Court decided \textit{United States v. Thind}, where the plaintiff was a “high-caste Hindu of full Indian blood.”\textsuperscript{56} Rejecting the scientific approach to “Caucasian” in \textit{Ozawa}, the Court adopted “the understanding of the common man,” to interpret “white person” and found against Thind.\textsuperscript{57} Based on the statutes and cases interpreting this provision, Ian Haney López wrote an influential study, \textit{White by Law: The Legal Construction of Race}.\textsuperscript{58} It focused on racial construction with attention to Whiteness and White race consciousness, and has not exhausted study of these cases.

In contrast, both before and after \textit{Ozawa} and \textit{Thind}, some of the lower courts allowed naturalization for petitioners from the Middle East and Southeastern Europe.\textsuperscript{59} Because these cases involved different nationalities and ethnicities—Syrians, Armenians, Punjabis, Afghans and Arabians—they continue to attract scholarly attention. John Tehranian in \textit{Whitewashed: America’s Invisible Middle Eastern Minority} argues:

\begin{quote}
[T]he cases reveal that Middle Easterners found themselves at the heart of the legal struggle over whiteness. The era when these cases were litigated—the first half of the twentieth century—witnessed the crystallization of modern legal definitions through which Middle Easterners were generally deemed white by law—but just barely. Teetering on the precipice of whiteness, their racial status remained open to contestation.\textsuperscript{60}
\end{quote}

These cases, therefore, continue to be reinterpreted into different narratives about how a less familiar group of Asians, the Middle Eastern minority, have come to the United States.

Hiroshi Motomura has written extensively on immigration law. Most recently, Motomura has undertaken an ambitious rereading of American immigration and how our American understanding of immigrants has changed. The story of the efforts to gain full rights to participate in society is the defining theme of Motomura’s \textit{Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States}.\textsuperscript{61} Motomura’s lost story is that America once believed that immigration was a transition to citizenship. In a story centered on the evolution of racial restrictions on immigration, that transition to citizenship has been replaced, argues

\begin{footnotes}
57. \textit{Id.} at 210.
59. \textit{Id.} at 203-208.
60. \textit{JOHN TEHRANIAN, WHITEWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY} 63 (2009).
\end{footnotes}
Motomura, by immigration as contract (an agreement to work hard and avoid trouble) and immigration as affiliation (one’s ties to this country are measured by the strength of the ties established after arrival). Motomura writes against the broad panorama of immigration over the past one hundred fifty years. His synthetic history and reading of legal notions of social contract and affiliation provide significant insights into how our vision of immigrants has dramatically changed over time.

The citizenship narrative includes the long history of discrimination and exclusion in private as well as civic life. An early moment in this narrative is the 1854 California Supreme Court decision in People v. Hall. Hall had been convicted of murder in a case in which the victim and two witnesses had been Chinese. On appeal, Hall challenged the admissibility of the Chinese witnesses’ testimony. Like many states, California provided by statute that “no Black, or Mulatto person, or Indian shall be allowed to give evidence in favor of, or against a White man.” The court decided that the statute applied to the Chinese testimony and reversed the conviction.

People v. Hall, with its colorful descriptions of the Chinese and unusual racial interpretations, has attracted many commentaries. While the court’s language is easy to criticize, I have interpreted the court’s language as reflecting genuine difficulty in deciding how to classify the Chinese under the statute. The court used a mixture of linguistic and scientific discussion to expand “Indian” to include the Chinese and any other Asiatic, referring to the belief that Indians had crossed the Bering Strait. As an alternative basis for its decision, the court found Black to be a generic term, meaning any non-White, therefore including the Chinese. The court’s decision expanded a plainly discriminatory and exclusionary statute so that the Chinese were also excluded from full civic participation. On its face, the statute exemplifies an era of statutory racial exclusion in favor of Whites. The decision in People v. Hall is part of the narrative of how the Chinese joined Blacks and Indians as excluded and discriminated against in the California racial landscape.

Another example in the citizenship narrative is a set of commentaries on the well-known 1886 decision of Yick Wo v. Hopkins. Yick Wo involved a challenge by San Francisco Chinese laundrymen to a San Francisco ordinance requiring that laundries be located in brick or stone buildings unless they obtained a waiver from the board of supervisors. Yick

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62. Id. at 9-14.
63. 4 Cal. 399, 399 (discussed in Neil Gotanda, Exclusion and Inclusion: Immigration and American Orientalism, in ACROSS THE PACIFIC: ASIAN AMERICANS AND GLOBALIZATION 129, 134 (1999)).
64. 4 Cal. at 401.
66. 118 U.S. 356 (1886).
Wo’s appeal stated that over 200 petitions by Chinese applicants had been denied, while all but one of the petitions filed by non-Chinese were granted. The Supreme Court reversed his conviction, holding that the ordinance’s application by public authorities was so unequal and oppressive that it was a denial of equal protection of the laws. The underlying story of discrimination against Chinese laundrymen is clear. Within our constitutional civil rights history, the case has been cited and referenced often as an early example of a favorable anti-discrimination decision and therefore a precursor to such modern civil rights decisions as *Brown v. Board of Education*.

Against this tradition, Gabriel Chin, a prolific scholar who has made significant contributions to Asian American Jurisprudence, published in 2008 an article on *Yick Wo*, arguing that it has been misinterpreted as a case about race discrimination. Rather, argues Chin, the decision was about the constitutionally protected right to operate a laundry. Thomas Joo, another well-published scholar who had previously written about nineteenth century Chinese civil rights cases, published a response arguing that *Yick Wo* did involve race. According to Joo, the Court entangled economic rights with race involving “Nonblack Nonwhites,” laying the basis for a civil rights counter-revolution symbolized by *Lochner v. New York* and *Plessy v. Ferguson*.

I include this exchange of commentaries on *Yick Wo* to show that the study of even the best-known cases continues. The narrative of Chinese resistance to discrimination remains under discussion.

As a final example in the citizenship narrative, I mention the example of electoral politics. Final repeal of the racial barriers to citizenship was finally achieved in 1952. That would seem to have been the last formal barrier to Asian American involvement in electoral politics yet full participation in political and civic life remains subject to racial challenges. In 1996, a campaign finance scandal involving questionable donations to the Bill Clinton presidential campaign resulted in widespread caricatures of Asian donations and a particularly offensive National Review magazine

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67. Id. at 359.
68. Id. at 374.
cover with Al Gore, Hillary Clinton, and Bill Clinton in various kinds of Oriental garb. Asian Americans in politics still have an exotic flavor. Campaign finance scandals linked to Asia were a reminder that foreignness was still a powerful trope available for use against Asians.  

c. The Racial Narrative

The third narrative is the racial narrative. This aspect of our legal history is the story of our movement from immigrants to racial minorities. This is not a linear story, where one can locate on a timeline a position of the Chinese immigrant, followed by a position of the racialized Chinese-American minority, and then a place as an Asian American racial minority. But we can see a broad narrative with moments when Asian Americans are subject to racial discrimination. I present two examples of the Asian American racial narrative. The first is Frank Wu’s Yellow: Race In America Beyond Black and White.  

Frank Wu’s study of race for Asian Americans begins in the present. His manner of presentation is anecdotal and he offers a rich array of examples and very human situations to illustrate his arguments about race. His logical starting point is there is more to race in America than Black and White: “My premise is straightforward. Race is more than black and white, literally and figuratively. Yellow belongs. Gray predominates.” Wu then quickly moves to the political: “Being neither black nor white, Asian Americans do not automatically side with either blacks or whites.”

Using these as his racial premises, Wu divides his presentation of Asian American race into three parts. In the first, he discusses what I have already described as ascriptive racial stereotypes. Says Wu:

I begin by considering the model minority myth and the perpetual foreigner syndrome. The myth and the syndrome are defined by the remarks, respectively, “You Asians are all doing well,” and the question, “Where are you really from?”

Wu then continues in the second part of his book by discussing a series of what he calls problems: immigration, affirmative action, cultural diversity, and racial profiling. These are all, of course, related to race. Wu ends on a hopeful note on the possibilities of coalitions—both personal and political.

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74. Wu, supra note 34.
75. Id. at 18.
76. Id. at 19.
77. Id.
78. Id. at 301.
Wu’s racial narrative premises the existence of Asian Americans and looks to history for support and clarification. Wu’s understanding of the racial condition for Asian Americans points to a differentiation from Black and White. He sees this as an important part of the story of race for Asian Americans. Wu also points to stereotyping as a central part of the experience of race for Asian Americans. For Wu, race works through stereotypes.

I find Wu’s racial narrative not dissimilar from my own racial narrative. I use a historical presentation rather than anecdote, and I add a third major stereotype, the 9-11 terrorist. But Wu’s approach to stereotyping and racism closely tracks my own approach. I outline an Asian American racial narrative, complementary to the existing standard Black-White narrative discussed below. This racial narrative is structured around three Asian American ascriptive collective identities: foreignness, the Model Minority, and the 9-11 terrorist.

My version of the Asian American racial narrative begins in California just before the Civil War. In the 1854 case of People v. Hall, the California Supreme Court had difficulty deciding the proper racial categorization for the Chinese. By statute, and in criminal and civil cases, California excluded the testimony of Negroes, Indians, or Mulattoes against Whites. The court was clear that the Chinese were not White, but only with great difficulty concluded that “the name of Indian, from the time of Columbus to the present day, has been used to designate, not alone the North American Indian, but the whole of the Mongolian race.” At this early period of Chinese immigration, the California Supreme Court did not have a clear and easy understanding of the Chinese available. Without that framework, the court had difficulty explaining its decision on the appropriate racial category for the Chinese.

In subsequent years, as Chinese immigration grew in California and the West, anti-Chinese agitation became increasingly heated. Congress enacted the Chinese Exclusion Act in 1882. By 1889, Supreme Court in Chae Chan Ping v. United States (The Chinese Exclusion Case) was clear in its discussion of the Chinese. Without ambiguity or hesitation, the Court accepted California’s anti-Chinese rhetoric and found that the Chinese remained “strangers in the land” and that it was “impossible for them to assimilate with our people.” These were characteristics of the Chinese race, a category confirmed by statute as based upon descent. This sense of permanent inassimilability is a crucial part of the ascribed racial stereotype

79. *Id.* at 1-38.
80. *Hall,* 4 Cal. 399 at 402.
82. 130 U.S. 581 (1889).
83. *Id.* at 595-596.
84. *Id.*
of foreignness.

These cases and immigration statutes established a distinct form of racialization—Asiatic racialization. Under Asiatic racialization, immigrants from different nations in Asia were classified by national origin, understood through foreignness, and normalized into the American racial map. This process of Asiatic racialization, in which national or ethnic categories are linked to the trope of foreignness, was the dominant mode of racialization until the mid-1960s. In 1965, the “Model Minority” stereotype was introduced in a magazine article praising the Japanese American “success story.” The Model Minority stereotype was extended to other Asian groups and came to be attached to an Asian American category rather than limited to particular national or ethnic racial groups. These two ascribed racial stereotypes, while in some aspects inconsistent, coexist as available racial understandings of Asian Americans.

The new addition to the racial understanding of Asian Americans emerged with violence against many dark-skinned Asian Americans who “looked like” Arab terrorists after 9-11. In some respects, the 9-11 terrorist can be seen as a continuation of Japanese saboteurs or Chinese spies. However, its partial origins in cultural Orientalism and its continued power and prevalence as the “face” of the War on Terror, suggest that the trope of the 9-11 terrorist will continue to shape how Americans see and understand Asian Americans. I believe this will continue for the foreseeable future and we should accord special attention to the emergence of this dangerous stereotype.

These are two examples of an Asian American racial narrative. Both Frank Wu’s presentation and my own historically based narrative focus upon the role of stereotyping in describing and understanding how Asian Americans have been racialized.

These three narratives of immigration, citizenship, and racialization have shaped how we think about ourselves and also about how we seek to have America understand who we are and what we do. They are a central aspect of our assertions of community identity and form a necessary basis for our responses to stereotyping and ethnic invisibility.

C. Politics and Praxis in Legal Scholarship

Here, I observe that articles in Asian American Jurisprudence have consistently asserted programs for social change. Asian American Jurisprudence has always included an Asian American politics and praxis. The assertion of Asian American identities has been an effort to reveal the invisible and unnoticed in legal studies. By itself, it is an important intervention in legal studies. The politics of the assertion of an Asian

86. See infra Part III.B.3.
American identity and foregrounding of the particularized political and social interests of Asian Americans further describe the location of Asian American Jurisprudence.

Praxis is a way to describe and define Asian American Jurisprudence. I identify three main strands of praxis in the legal politics of Asian American Jurisprudence. The first grows out of Asian American Jurisprudence as an identification project in legal studies. The second is the effort to intervene in legal doctrines that affect Asian Americans. The third is explicit political activism advocated by various authors, and exemplified by the work of Eric Yamamoto.

1. Against Invisibility

Earlier, in discussing identity, I noted that identification and identity projects can be directed against racial stereotypes and invisibility. Here, I examine political actions against invisibility—the absence of ethnic communities from legal materials and legal analysis.

a. Identity Projects

Recall Appiah’s understanding of identification as projects to shape one’s “life and...conception of the good.” Asian American Jurisprudence is an intervention in the law and legal studies. As noted earlier, the starting point for ethnicity in the law is its absence. Ethnicities, collective community identities, are invisible. The assertion of a collective ethnic identity in a law review article should be seen as a challenge to this invisibility. If there is no examination or discussion in legal studies of a particular community’s unjust treatment, then assertion of a collective identity is a direct political intervention. When a particular ascribed racial identity embedded in the law is seen as harmful—foreignness, the Model Minority, and the 9-11 terrorist—then a law review article identifying these ascribed racial identities and locating them in the law is an appropriate legal response.

The outstanding response to invisibility in legal materials is the treatise Race, Rights and Reparation: Law and the Japanese American Internment, co-authored by Eric Yamamoto, Margaret Chon, Carol Izumi, Jerry Kang, and Frank Wu. The book is extraordinary in the depth of the research, the clear presentation in textbook form of complex materials, and the thoughtfulness of the analyses prepared for the volume. It is useful not only as a textbook, but also as a reference work.

Race, Rights and Reparations begins with a survey of the Asian American context through an introduction to race theory and an overview

87. APPIAH & GUTMANN, supra note 5, at 78.
of Asian American legal history. The first chapter on theory establishes a jurisprudential framework, pulling together the disparate strands of race theory, constitutional rights, and the campaign to obtain individual reparations for camp internees. The second chapter on legal history reviews immigration and citizenship narratives through World War II and incorporates “study modules” on the rights to work and to own property. The middle part of Race, Rights and Reparations addresses the internment. Through original documents and commentaries, the authors present one of the central experiences for Asian Americans of citizenship—the terms under which we participate in U.S. society. Their final section recounts the various redress movements, such as the varied fronts of political activity that converged around the coram nobis litigation to reverse the wartime convictions, as well as the efforts to obtain monetary damages through litigation and congressional legislation. These discussions illustrate the breadth and range of political activism around redress for the internment.

The final part of the redress section covers current issues and themes related to the internment and the Supreme Court decisions. Of special relevance to this article is the review of the Wen Ho Lee prosecution and the racial profiling of Arab Americans during and after the first Gulf War. To date, Race, Rights and Reparation remains the only Asian American legal textbook, serving as an outstanding contribution by making Asian Americans and their history a visible part of legal analysis.

b. Legal Interventions

Another potential response is to try to modify the application of particular legal doctrines to cases involving Asian American ethnic groups. An early example was the sharp exchange over the “cultural defense” in criminal law. Leti Volpp provided a careful and nuanced analysis of the cultural defense in her 1994 article “(Mis)identifying Culture: Asian Women and the ‘Cultural Defense’.” Volpp discussed two cases, one involving violence against a Chinese woman by a Chinese male defendant who raised a “cultural defense,” and a second relating to a Chinese woman who sought to admit cultural factors to explain her mental state in a parent-child suicide attempt. Her thorough examination of the various

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89. Id. at 3-30.
90. Id. at 31-92.
91. Id. at 95-274.
92. See id.
93. Id. at 277-443.
94. Id. at 445-76.
96. Id. at 64 (discussing People v. Dong Lu Chen, No. 87-7774 (N.Y. Sup. Ct., Dec. 2, 1988)).
97. Id. at 84 (discussing People v. Helen Wu, 286 Cal. Rptr. 868 (Cal. Ct. App. 1991)).
New Directions

Considerations took serious issue with the misuse of culture by the courts. Volpp criticized the perception that immigrants have a static, foreign culture, available for introduction by “expert” testimony into a value-free, culturally unbiased American justice system:

[A]ny testimony about a defendant’s cultural background must embody an accurate and personal portrayal of cultural factors used to explain an individual’s state of mind and should not be used to fit an individual’s behavior into perceptions about group behavior . . . 98

Volpp continues:

[T]he value of antisubordination should be used to mediate between a position that totally rejects the defense and a position that embraces a formalized “cultural defense” from the perspective of cultural relativism. I conclude that the formalization of a “cultural defense” should not be promoted, and that a commitment towards ending all forms of subordination should inform the decision of whether or not to support the informal use of cultural information on behalf of a defendant in a given case. 99

In her analysis, Volpp poses the possibility of an “accurate . . . portrayal of cultural factors” as an appropriate collective identity in opposition to an imposed ascriptive identity of “perceptions about group behavior” presented by “expert” testimony. 100

Two years later, Doriane Lambelet Coleman published a pointed condemnation of the cultural defense, including a criticism of Volpp’s article: 101

[P]ermitting the use of culture-conscious, discriminatory evidence as part of the defendant’s case-in-chief distorts the substantive criminal law and affords little or no protection to victims, whose assailants are left, as a result of this distortion, relatively free from broader societal strictures. 102

Coleman argued further:

[T]he use of cultural evidence risks a dangerous balkanization of the criminal law, where non-immigrant Americans are subject to one set of laws and immigrant Americans to another. This is a prospect that is inconsistent not only with one of the law’s most fundamental objectives, the protection of society and all of its members from harm, but also with

98. Id. at 58.
99. Id. at 59.
100. Id. at 85.
102. Id. at 1098.
the important human and civil rights doctrines embodied in the Equal Protection Clause.\textsuperscript{103}

In Coleman's view, recognition of any collective cultural identities in criminal law can only result in discrimination and balkanization of the law. Volpp provided an equally incisive response. First, Volpp locates Coleman's work politically as part of "backlash politics":

Backlash scholarship attempts to preempt debate on the difficult questions raised by such subjects as multiculturalism and race... [B]acklash scholarship denies that scholarship such as critical race theory exists [or]... asserts that such scholarship is invalid... critiquing [such] scholarship as "subjective."... Key imagery, terms, and tropes... are distorted and redeployed in the service of "color-blind meritocratic fundamentalism."\textsuperscript{104}

Volpp then specifies how Coleman has responded to efforts to recognize the multicultural dimensions of a criminal defense:

Coleman's article exemplifies two variants of backlash scholarship. One, in the name of "liberalism," laments that multiculturalism goes too far in threatening our "unified culture." The other yokes cultural feminism to victims' rights, and charges that multiculturalism threatens "women's progress."... Coleman's thesis relies on a regressive vision of immigrant communities, of multiculturalism, and of scholarship on these issues. As a result, her article fails to adequately address the complex questions raised by the emergence of "cultural defenses."\textsuperscript{105}

Volpp properly characterizes Coleman's position as throwing up one's hands and saying that multiculturalism is too complicated and threatens our "unified" American culture; thus, any recognition of cultural identities is a slippery slope toward disruption of American justice. Coleman distorts the efforts of Asian American Jurisprudence to assert collective community identities through doctrinal changes in criminal law, from a project to develop a nuanced sense of justice into a legal assault on American values. For Coleman, the preferred American norm is to maintain the invisibility of ethnic minorities.

Volpp's call for a nuanced cultural defense is an appropriate effort to challenge ethnic invisibility and to further the objective of a culturally sensitive judicial system. More broadly, assertions of community ethnic identity function as political challenges to invisibility and stereotyping operating within the law.

\textsuperscript{103} Id.
\textsuperscript{104} Leti Volpp, Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism, 96 COLUM. L. REV. 1573, 1574 (1996).
\textsuperscript{105} Id. at 1576.
2. Community Activism and Justice

A second theme in Asian American Jurisprudence is the explicit call for political activity. In the early work of Chang and Matsuda, cited previously, as well as in both Asian American law reviews, political activism is a primary objective. The welcome of the University of California, Berkeley, *Asian American Law Journal* includes the following call to action:

AALJ serves dual purposes for the Asian Pacific American and legal communities. First, the journal sets a scholarly foundation for exploring the unique concerns of Asia and Asian America. While AALJ’s focus is primarily on Asian Pacific American issues at home, the journal also addresses topics of international concern. Global developments can, and do, impact domestic interests. Second, AALJ seeks to put that scholarship in action and open the dialogue between those who study law and those who are affected by it. In pursuit of these goals, AALJ strives to provide a forum for the many voices and opinions of the Asian Pacific American community through annual symposia and the journal’s publication.106

The University of California, Los Angeles, *Asian Pacific American Law Journal* Statement of Purpose bears a similar provision:

The Asian Pacific American Law Journal (APALJ) focuses exclusively on the legal, social and political issues affecting Asian Pacific American communities. APALJ plays an important role by providing a forum for legal scholars, practitioners and students to communicate about emerging concerns and by disseminating these writings to the general population. We work hard to reach out to the community and initiate discourse on APA issues.107

Accordingly, both journals have published articles on all aspects of Asian American political activity.

In his article, “Representing Race: Critical Race Praxis, Race Theory and Political Lawyering Practice in Post-Civil Rights America,” Eric Yamamoto executed the most sustained exploration of political activism, developing his theme of praxis by linking intellectual activity and political activism.108 He expanded his analysis in *Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America*:

What is interracial justice? In brief, interracial justice entails hard acknowledgement of the historical and contemporary ways in which racial groups harm one another, along with affirmative efforts to redress justice grievances and rearticulate and restructure present-day relations . . . Its

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guiding principle for relationship building is reconciliation . . . Interracial justice embraces a praxis methodology, or . . . race praxis. Race praxis grounds justice at the juncture of progressive race theory and antisubordination practice . . . .

In the context of interracial conflicts intertwined with White subordination of racial minorities, Yamamoto focuses upon the need for justice as a principal focus, not just compensatory remedies. He emphasizes that simple ethnic self-interest may be insufficient to provide a just resolution. Where there are interracial conflicts beyond White racial subordination, the race praxis requires a search for justice that encompasses the full complexity of interracial dynamics. No sense of American justice can be complete without considerations of racial justice, and no effort to achieve interracial equity is possible without a full search for justice for all racial groups. Yamamoto’s efforts at the crucial juncture of theory and political activism provide an important example for future work in Asian American Jurisprudence.

III. RACIAL ANALYSIS

A. Beyond Black and White

Frank Wu subtitles his book Yellow, as Race in America Beyond Black and White. Perceiving a barrier to explorations of race in terms other than Black and White, Wu and other authors often assert the need to go beyond the “Black-White Paradigm.” How race is or is not limited to this binary is a substantial and complex question. Rather than adopt a reductive “paradigm,” each area of racial concerns—e.g., law, politics, education, history, sexuality—requires careful and distinct analysis.

I will limit this discussion to legal studies, and I will approach the question by looking at the kind of historical narrative that I have already discussed. First, I observe that legal discourse on race includes a historically based Black-White narrative. While this framework is not inherently restrictive, legal commentators, judges, and lawyers treat the Black-White paradigm as a closed story. The actions of these legal players reinforce these limits on the discussion of race, enabling the Black-White narrative to forge an unspoken framework for the study of race in America law. However, focusing upon the Black-White binary opens up the possibility of introducing alternative competing or complementary

109. YAMAMOTO, supra note 6, at 9-10.
111. Wu, supra note 34
112. See Aoki & Johnson, supra note 2.
narratives.\footnote{My discussion here is therefore severely limited as a commentary or critique of the Black-White paradigm. Many other interpretations of the Black-White Paradigm are possible and would suggest other forms of interventions.}

1. The Black-White Narrative in American Law

The Black-White narrative is easily accessible through constitutional law. In discussing race, most constitutional law textbooks and treatises present a standard set of Court decisions, including \textit{Dred Scott v. Sanford},\footnote{60 U.S. 393 (1851).} \textit{Plessy v. Ferguson},\footnote{163 U.S. 537 (1896).} \textit{Korematsu v. United States},\footnote{323 U.S. 214 (1944).} \textit{Brown v. Board of Education},\footnote{349 U.S. 294 (1954).} \textit{Loving v. Virginia},\footnote{388 U.S. 1 (1967).} \textit{City of Richmond v. J.A. Croson},\footnote{488 U.S. 469 (1989).} culminating in \textit{Grutter v. Bollinger}\footnote{539 U.S. 306 (2003).} and \textit{Gratz v. Bollinger}.\footnote{539 U.S. 244 (2003).} Constitutional law presents the story as a narrative of progress in race relations. Our nation struggled with slavery as revealed in the text of the Constitution’s three-fifths clause.\footnote{U.S. Const. art. 1, § 2, cl. 3.} We grappled with the complexities of racial subjugation through the antebellum years as seen in Chief Justice Taney’s flawed decision in \textit{Dred Scott}. Even after the triumph of emancipation, we continued our erroneous treatment of race by condoning racial segregation in \textit{Plessy v. Ferguson}. The nation began its constitutional redemption through the Supreme Court’s reversal on race, beginning with \textit{Brown v. Board of Education} and culminating in \textit{Loving v. Virginia}. Today, though we grapple with the legacy of slavery in the affirmative action cases, the time limitation suggested by Justice O’Conner in \textit{Grutter} and \textit{Gratz} suggests that the end of our long racial nightmare is in sight. The election of Barack Obama is the latest piece of evidence of the triumphant march of racial progress.

Even in this summary, it is important to note that the Black-White racial narrative is well-grounded in the narrative of American history. For our purposes, I do not seek to review this narrative as history. Rather, I seek to understand the manner in which this narrative has operated to limit racial discussions to two races. From the standard canon of Supreme Court race cases, I discern the following elements to the Black-White narrative: the short list of racial participants, a subordinate Black race and a superordinate White race, and epic and tragic racial opposition and struggle from the inception of the colonial era through the present. Moreover, each race has its own collective identity, and together, they define the racialized
population of the entire nation-state. Other non-White races are either not present on the racial map or peripheral to any real discussion of race.

Further, if we accept the forward progress of the racial narrative, then we are approaching the end of our great national struggles over race. Under these circumstances, there is no need for new or alternative approaches to race. The narrative of progress also supports the narrowness of the Supreme Court’s recent racial jurisprudence. The mode of analysis is the rigid strict scrutiny standard of judicial review. Since we are nearing the conclusion of our history of racial conflict, there are only a handful of racial contexts requiring Supreme Court equal protection review. We have had decisions on affirmative action in higher education and voting rights with little attention to other areas. For example, the movement of Asians to the United States since 1965, as well as the long history of war, conquest, and migration of non-White immigrants from Latin America, are outside of this Black-White racial narrative.

In this context, an important dimension to Asian American Jurisprudence has been to provide alternative racial narratives to counter the Black-White racial narrative. The Asian American narratives illustrate both that race has taken forms other than Black and White, and that racial subordination in its various forms continues in law as well as in society.

2. Identity and Legal Invisibility

While the Supreme Court’s racial canon reflects the main currents of American racial history, the invisibility of other “races” is apparent, even in *Korematsu v. United States*, the sole case not directly involving Black and White struggles. Although this case established the doctrine of strict scrutiny for racial classification, the Court did not apply the “most rigid scrutiny” standard to the examination of Japanese Americans. Instead, it is dicta on what the Court would have done if the case had involved race. The context for *Korematsu*, the Japanese American internment, is only background for strict scrutiny judicial review, and the history of Japanese Americans or Asian Americans does not enter the discussion.

The restrictive nature of the limited Black-White narrative also results in the absence of ethnicity or the ethnic as a topic of significant legal analysis. While popular and scholarly discussions about race frequently use the phrase “race and ethnicity,” constitutional law discussions almost never use the words “ethnic” or “ethnicity” because both the terms and the concept of ethnic categories remain unanalyzed or unthinkingly equated to race. In this Essay, I have used the term “collective ethnic identity” to describe the internal community dimensions of our identity projects. The

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123. 323 U.S. 214 (1944).
distinction between race and ethnicity allows us to distinguish racial stereotypes and racializations, which focus upon subordination, from our own efforts to examine ethnic community context and culture.

In legal analysis, the absence of the ethnic category means that an assertion of an ethnic community identity, such as Hmong, lacks a commonly understood approach, thereby requiring analogy to race or national origin. Since neither corresponds completely, ethnic collective identity and identification projects become unavailable for legal analysis.

Although most legal analysis has not employed an understanding of ethnic collective identities, immigration law has brought significant attention to nationality groups. Immigration, naturalization, and citizenship have been much more central to Asian American Jurisprudence than equal protection has been. Under current mainstream approaches to immigration law, primary categories of analysis are the nation-state and national origin. As a non-racial discussion, immigration, naturalization, and citizenship fall outside of the Black-White racial paradigm. In this sense, the important writings of Asian American Jurisprudence scholars such as Bill Ong Hing, Hiroshi Motomura, Gabriel Chin, and Victor Romero are efforts to make collective ethnic identities visible and available for analysis in immigration law.125

Our standard treatments of race in American law are necessarily limited to American legal jurisdiction, which differs in scope from our national boundaries. The border is an important legal and ideological marker.126 Our national boundaries have changed and shifted throughout our history of conquest, annexation, and manifest destiny. Through slavery and imperialism, we have captured and conquered sovereign and indigenous peoples with origins outside of our moving national border. We have acquired and lost colonies and continue to maintain colonies today. Still, our territories in the Pacific—Guam, American Samoa, and American Micronesia, including the Northern Marianas—are “outside” of the American nation-state as envisioned in the Black-White narrative. While the Black-White paradigm overlooks the collective identities of our conquered and colonized non-White peoples, Asian American Jurisprudence has recognized them. For example, Mari Matsuda has advocated for reparations to Native Hawaiians for the overthrow of the Hawaiian nation.127 Similarly, Eric Yamamoto and others continue to debate efforts to redress the loss of their kingdom through movements for

125. See, e.g., Hing, supra note 45; MOTOMURA, supra note 61; Chin, supra note 70; Romero, supra note 48.
126. As a complementary example, there is a rich and diverse literature in many disciplines on the border and borderlands in Latino/Chicano Studies and LatCrit theory. There is no comparable examination of “borderlands” in Asian American Jurisprudence. See, e.g., LEGAL BORDERLANDS (Mary Dudziak & Leti Volpp eds., 2006).
127. See Matsuda, supra note 27; see supra discussion in Part II.A.2.
Asian American Jurisprudence scholars have addressed the border as a subject of interpretation and challenge more generally. Robert Chang began his book *Disoriented* with a “Meditation on Borders” to introduce his extended discussion of the need for critical interpretations of the situation of immigrant Asian Americans. Similarly, Leti Volpp’s co-edited book, *Legal Borderlands*, divides the essays into “Law’s Borders,” “Borders of Identity,” “Borders of Territory,” and “Borders of Power.” Both Chang’s and Volpp’s works are examples of scholarship where the border does not limit our research and investigations.

The Black-White narrative as presented in the constitutional law canon has remained limited to our national borders. If we accept that constraint, we exclude from our discussions other peoples and ethnicities who are part of our American history. To continue these exclusions renders communities, peoples, and ethnicities invisible to examinations of race and ethnicity in American law.

3. Legal Scholarship and Invisibility

Through its publication culture, the legal academy has also resisted assertions of collective identities. Professional advancement for law professors occurs through publication in prestigious journals. Legal scholarship is, however, bound by the peculiar cultural form of the law review article, which typically discusses appellate opinions and concludes with a call for reform. Consider the following description:

The law review article characteristically begins by identifying an alleged error in a recent appellate court opinion. The outcome should have been different, according to the scholar. The argument that follows consists largely of a review of prior Supreme Court opinions to find the principle of reason that informs the decisions. The author then follows this analysis with a reform proposal: “The reforms offered by legal theorists may often be impractical, but the central assumption . . . is that reform is the appropriate end of scholarship.”

Under this standard law review article format, an author seeking to assert a collective ethnic identity against the invisibility of that identity in legal materials faces two significant difficulties. First, the appellate opinions which ground the standard critique provide little material in the text of the opinions. At best, information about identity is located in dicta, the non-doctrinal discussions that are secondary or extraneous to the logic

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128. YAMAMOTO, supra note 6, at 60.
131. Id. at 7.
of the doctrinal decision. To tease an interpretation out of dicta, an author may use literary interpretation, cultural studies, or historical context. All of these may render the article suspect in the eyes of law review editors since those methodologies are not part of standard law review analysis. Second, an identity-based article that seeks to make a collective identity visible does not seek law reform as its principal objective. The goal is to render visible the previously unseen or unacknowledged. Exposing a community in legal materials is not normally considered a law reform project.

For these reasons, an identity-based article, no matter how well-written or researched, may not find an appropriately prestigious home. Since that can work against a law professor’s career objective, there is a disincentive to writing identity-based articles. Again, it is important to observe that this kind of resistance to identity-based Asian American Jurisprudence is not inherent in the legal materials. The difficulties lie in the culture of law reviews and legal studies. Our efforts to address this form of resistance therefore must take a different form from interventions around the Black-White narrative.

4. Adding-On New Races—Is Chinese a Race?

To go beyond the Black-White narrative is therefore to seek to identify and make visible collective identities. Authors in early Asian American Jurisprudence have done so by writing about the Chinese, the Japanese, the Asian Indian, and the Hawaiians. In the context of the Black-White narrative, this effort against invisibility requires further theoretical discussion. We accept that Black and White are races. However, are the Chinese a race, in the same sense as Black and White, which are historically grounded social and legal constructions? This is not a simple question, since a significant part of our current racial discourse turns on the legacy of slavery. We know that the Chinese were neither enslaved, slave owners, nor the direct social beneficiaries of antebellum White supremacy.

How then should one expand the narrow Black-White racial narrative? One approach is to “add on” to the existing formal racial categories. Under the add-on method, we implicitly accept that Chinese is a racial classification and members of that identity can experience racial discrimination. This unproblematic analytical approach sufficiently addresses racial exclusion and discrimination by White America. To discuss a context for discrimination based upon disparate treatment, it is sufficient to recognize the group nature of the Chinese and that an individual Chinese person was treated differently.

The simple addition of new races, however, does not adequately capture the manner in which U.S. racial practices go beyond simple differential treatment. In the era of Chinese exclusion, the notion that Chinese people would lie under oath was considered common sense and did not require proof in court, so that a statute that excluded a Chinese
person's testimony against a White person would have needed only a
cursory justification. The addition of new formal racial classifications
does not adequately address this use of racial stereotyping in an otherwise
clear case of discrimination.

I suggest that a more productive approach to going beyond Black and
White is to review the process of racialization. Through that examination,
we will see that not only are there new racial categories in addition to
Black and White, but that distinct stereotypical meanings attach to these
classifications. As a first step in investigating these additional racial
groups, I assess the Chinese as a racial category.

B. Asiatic Racialization: Three Categories and Three Stereotypes

1. The Chinese Racial Category and the Foreignness Stereotype

I can trace the first period of the Asian American racial narrative
through the Chinese Exclusion line of statutes and cases. As noted above,
the racial category that develops in this period is not Asian or Oriental, but
is described in nationality terms as Chinese. This marks a significant
departure from the Black-White racial narrative that conflates national,
ethnic, or tribal origins into large, meta-racial groupings, such as Black and
White. For Chinese immigrants in the United States, the use of a national
category and the ascription of foreignness developed as an alternate mode
of racialization.

I begin with the observation that the term “Chinese” refers to more
than one social category. There are Chinese citizens (“subjects” in the
nineteenth century terminology), Chinese Americans (participants in the
Chinese ethnic collective identity), a racial category of Chinese (all persons
of Chinese ancestry or descent), and the category of diasporic Chinese (the
Chinese descendants who no longer live in China but have social and
emotional ties to the homeland).

Each of these analytically distinct meanings of “Chinese” has different
social and legal histories. During the late nineteenth century, the Supreme
Court and Congress interpreted the meaning of “Chinese” as used in the
Chinese Exclusion Act. Through its interpretations, the Court and Congress
created a new Chinese racial category. Further, in discussing the Chinese,
the Court articulated an understanding of inherent foreignness—culturally,
socially, politically, and economically—and a permanent inability to
assimilate to America.

I see the development of this new racial category through the
classification of the Chinese in the Chinese Exclusion Act. The initial

132. See Hall, 4 Cal. 399 at 401.
133. See generally Anupam Chander, Diaspora Bonds, 76 N.Y.U. L. REV. 1005 (2001); see also
infra discussion in Part V.
Chinese Exclusion Act of 1882 barred "Chinese laborers." The intent of Congress likely was to exclude Chinese workers, but not the Chinese generally. A Boston district court reviewing the status of a Hong Kong-born carpenter of Chinese ancestry who had jumped ship in Boston found that he was a British subject, and therefore not a Chinese laborer covered by the Chinese Exclusion Act. The Boston court, interpreting treaty and statute, had determined that "Chinese" in the 1882 Exclusion Act was a political term, covering the Chinese subjects. The Hong Kong-born carpenter was therefore not covered by the Exclusion Act.

In contrast, a California court adjudicating a case with similar facts found that the Chinese from Hong Kong were covered by the 1882 Chinese Exclusion Act. The California court applied a racial meaning of Chinese—any person of Chinese descent. The conflict was resolved by Congress, the Geary Act of 1892. The exclusionary language was changed from Chinese laborer to "Chinese persons or persons of Chinese descent." The term "Chinese" thus acquired a clear racial meaning as to its coverage: all persons of Chinese ancestry.

The understanding that "Chinese" referred to a Chinese racial category was used in subsequent Supreme Court opinions. But a careful examination of its oppositionality shows the Chinese racial category is both similar to, yet different from Black and White racial categories. The Black and White racial oppositionality grows out of slavery and post-Civil War segregation and racial discrimination. White and Black are in opposition to each other, with Whites in the superior position over subordinate Blacks. The ascribed racial identity for Blacks grows out of enslavement and includes themes of physical and cultural inferiority. In opposition is the implicit understanding of the superiority of Whites.

The Chinese racial category is also posed in opposition to a culturally superior White nation. But the direction of the rationale—foreignness—is directed less at inferiority than at expulsion. The Chinese are inassimilable and therefore to be excluded from the body politic if not physically deported from the nation. This new racial category is therefore not a simple "add-on" to White and Black. Although the Chinese racial category was based upon descent from original Chinese bodies (just as the Negro or

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137. Id.
139. Gotanda, supra note 136, at 1698.
Black racial category was based upon descent from original African bodies), the ascribed racial identities for Blacks differ sharply from the ascribed identities for the Chinese. The different racial profiles have very different qualities in relation to the American nation. Blacks are clearly part of the American nation, though in a subordinate relationship. The Chinese, by contrast, are only provisionally present on U.S. soil. Their foreignness makes them politically and socially suspect, and at best, tolerable economic participants as workers or traders. The Chinese are therefore ultimately excludable from the nation.

To appreciate the import of foreignness as a mode of socially excluding the Chinese, I chart the hostile ascriptive racial stereotype in opposition to domestic assimilated Americans. Here we look at the early construction of the Chinese in the era of Chinese Exclusion.140

<table>
<thead>
<tr>
<th>AMERICAN</th>
<th>CHINESE Foreignness</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assimilated to American culture</td>
<td>Foreign Chinese culture</td>
</tr>
<tr>
<td>Christian</td>
<td>Exotic religious beliefs and practices</td>
</tr>
<tr>
<td>Socially mobile</td>
<td>Choosing to live in Chinatowns</td>
</tr>
<tr>
<td>Loyal</td>
<td>Disloyal/Traitor</td>
</tr>
</tbody>
</table>

In the American legal context, the solution to foreignness is social and political exclusion or deportation. Again, contrast the oppositionality of Chinese and White with the oppositionality of Black and White. White subordination of Black Americans is within the national boundaries. The border has much greater meaning for Chinese Americans. The American national boundary is not the simple jurisdictional terrain within which racial subordination is played out. Instead, the political implication of foreignness is expulsion at all levels—social expulsion into Chinatowns, political exclusion from electoral politics,141 and finally deportation to the distant Chinese homeland.142

The use of nationality as marking a racial group was extended to other Asian nationalities and ethnicities. One example of how this took place is in the line of lower court and Supreme Court decisions reviewing the “free white person” requirement for naturalization. In those decisions, nationalities and ethnicities were the categorical basis for the discussion of

141. See Gotanda, supra note 73.
whether a person was "white." One of the two Supreme Court decisions in these cases, Ozawa v. United States, uses "Japanese" as a categorical basis for comparison with "white." Such categorical usage implements Japanese as a racial category rather than as a nationality.

2. The Asian American Racial Category and the Model Minority Stereotype

The development of the Asian American category has not been well studied. There is a brief comment in Race, Rights and Reparations that “Asian immigrants initially resisted the process of being consolidated into a racial category of ‘yellow,’ ‘Asiatic,’ ‘oriental’ or . . . ‘Asian American.” Yet the term “Asian American” is not found in the legal materials before the 1970s. The term gained currency during the student activism of strikes for ethnic studies at San Francisco State University, U.C. Berkeley, and U.C.L.A., and was adopted in the name of the new discipline—Asian American Studies. Whatever its origins, the term “Asian American” came into common use in the 1970s as a category to describe immigrants and descendants of immigrants from Asia.

It is during this same period that we see the origin and development of the Model Minority stereotype. Articles extolling the success of Asian Americans began in 1965 with a New York Times article about Japanese Americans. The article was published in the midst of the Civil Rights movement and followed by numerous other articles and books supporting the idea of Asian Americans as a Model Minority. The Model Minority stereotype has been extensively studied: the stereotype is described and criticized in Robert Chang’s 1993 essay, “Toward an Asian American Legal Scholarship,” and it was the first substantive chapter in Frank Wu’s...

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143. See, e.g., the compilation of the naturalization cases in LÓPEZ, supra note 58, at 203-208. These cases discuss Chinese, Japanese, Burmese, Syrians, Armenians, and others in determinations of whether the petitioner is "white" for purposes of naturalization. The discussions are clearly about each petitioner’s category as a racial categorization. While these cases are naturalization cases, the logic of racial categorization is carried forward in other cases as well.

144. 260 U.S. 178 (1922). The discussion in Ozawa and the other racial prerequisite cases use more than one rationale. I am not arguing that there is a clear statement that Japanese is a racial category. Rather, the Court's language is clearly categorical in character and does not refer to Japanese nationality as a citizenship category.

145. See YAMAMOTO, CHOI, IZUMI, KANG and WU, supra note 88, at 9.

146. My personal experience with the absence of "Asian American" came in teaching Asian Americans and Legal Ideology at UCLA Law School in 1993. I prepared materials chronologically beginning with People v. Hall and fully expected to see the evolution and consolidation of an Oriental or Asian American category in cases and statutes. I found myself in the middle of the term before I finally was forced to admit to myself that the category does not evolve in the materials. The term appears, seemingly fully developed, in the 1970s.


148. See Petersen, supra note 85. Petersen, in the book that followed, notes that he was approached by a New York Times editor to write the story and that he "started with no knowledge at all about the Japanese Americans.” WILLIAM PETERSEN, Preface to JAPANESE AMERICANS, at ix-x (1971).
If we view the Model Minority as linked to a new Asian American racial category, then we can examine its relation to White and Black categorizations.

The Model Minority involves a placement separate from, but linked to, both White and Black. Asian Americans are a "model" to those in need of a role model and therefore super-positioned above the Black racial category. The category is also "minority" and therefore subordinated to the majority White category. The Model Minority should thus be seen not as an independent description of the achievement of Asian Americans but rather as a description of racial stratification. Asian Americans are placed between "majority" Whites and as a model to Blacks stereotyped as subordinate to Asian Americans.

Chang, Wu, and many others have factually debunked the Model Minority concept and consistently speak of it as the Model Minority Myth, but the stereotype remains powerful.

The following chart considers the stereotype of the Asian American Model Minority and places it between common racial stereotypes for Black and White.

<table>
<thead>
<tr>
<th>BLACK</th>
<th>ASIAN AMERICAN Model Minority</th>
<th>WHITE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Poor Education</td>
<td>Overachievement in education</td>
<td>High achievement in education</td>
</tr>
<tr>
<td>Inner-city culture of low success</td>
<td>Assimilated to high educational and economic success</td>
<td>Model for high achievement</td>
</tr>
</tbody>
</table>

Here, instead of exclusion from the terrain of racial politics, the Model Minority is an insertion directly into Black and White politics. Whether this is considered as stratification or triangulation, the vector of racial politics is not directed towards expulsion through deportation. Rather, the positioning is part of a more complex racial politics, but still well within the existing framework of the Black-White paradigm.

As a racialization, the Model Minority began with Japanese Americans but came to be associated with Asian Americans generally. The underlying Model Minority racial category—Asian American—is therefore a racial category added to the Black-White racial narrative. It is not, however, a formal, neutral category. The Model Minority concept has a specific social and political place and context. The Model Minority arises

149. Chang, supra note 16; Wu, supra note 34.
in the midst of the Civil Rights Movement as a model to discipline both Asian Americans and Blacks and has a specific non-neutral place in our racial order. The Model Minority is a very specific stereotype or ascribed collective identity, crafted at a particularly historical moment in race relations.

3. The 9-11 Terrorist Category and Stereotype

This new categorization does not have the relatively well understood parameters of racialized nationalities and ethnicities or the Asian American category. Instead, we are offered a rather vague and confused set of images around which we have built a racial category.

Leti Volpp, in her article “The Citizen and the Terrorist” describes this new category:

September 11 facilitated the consolidation of a new identity category that groups together persons who appear “Middle Eastern, Arab or Muslim,” whereby members of the group are identified as terrorists and disidentified as citizens. While the stereotype of the “Arab terrorist” is not an unfamiliar one, the ferocity with which multiple communities have been interpellated into this identity category suggests that there are particular dimensions converging in this racialization.

Volpp goes on to note three dimensions to this convergence: “the legitimacy of racial profiling; the redeployment of Orientalist tropes; and the relationship between citizenship, nation, and identity.” Her study notes that there were over one thousand reported incidents of hate violence between September 11, 2001 and February 8, 2002. She adds that this number likely vastly understates the true number of incidents.

Volpp also notes how her description of this category appears to be inconsistent.

The category of those who appear “Middle Eastern, Arab, or Muslim,” is socially constructed like all racial categories, and heterogeneous. Persons of many different races and religions have been attacked as presumably appearing “Middle Eastern, Arab, or Muslim.” South Asians, in particular, along with Arabs and persons of Middle Eastern descent, have been subject to attack, although Latinos and African Americans have also been so identified. The category uses the religious identification, “Muslim,” as a racial signifier. Persons have been attacked since they “appear Muslim” which, of course, makes no sense, since Muslims can be of any race.

151. 49 UCLA L. Rev. 1575 (2002).
152. Id. at 1575.
153. Id.
154. Id. at 1575 n. 1.
155. Id. at 1576 n. 2.
Given these confusing parameters and the awkwardness of Volpp’s (accurate) description of the category, I have used a political description—9-11 terrorists—to describe this category. We continue to live with the invocation of the “9-11 terrorist” ascribed racial identity against a wide variety of individuals.\footnote{156. See \textit{Inside the Middle East}, \url{http://insidethemiddleeast.blogs.cnn.com/2009/01/03/muslim-family-booted-off-plane/}.}

Just as this category is difficult to describe, the nature of the stereotype is also composed of overlapping and sometimes contradictory impulses. To help describe the stereotype, consider the following chart of the 9-11 terrorist who “appears Middle Eastern, Arab or Muslim.”

<table>
<thead>
<tr>
<th>Loyal American</th>
<th>9-11 Terrorist Images</th>
</tr>
</thead>
<tbody>
<tr>
<td>White or Black</td>
<td>Middle Eastern or Arab</td>
</tr>
<tr>
<td>American</td>
<td>Foreign; Oriental</td>
</tr>
<tr>
<td>Christian</td>
<td>Muslim; Hindu; Sikh</td>
</tr>
<tr>
<td>American English accents</td>
<td>Indian English; Pakistani English; Oxford English</td>
</tr>
<tr>
<td>American name</td>
<td>Barack Hussein Obama</td>
</tr>
<tr>
<td>Standard male grooming</td>
<td>Sikh turban and beard</td>
</tr>
<tr>
<td>Standard female dress</td>
<td>Muslim woman’s head cover</td>
</tr>
</tbody>
</table>

A traveler reproducing one or more of these images is likely to be subject to unwelcome racial profiling at the airport or by law enforcement.

More difficult to describe is the full stereotype and the political context for the stereotype. The visual cues described in the chart are linked to a generalized set of fears and understandings of national identity. Leti Volpp and Sherene Razack have addressed the meanings associated with the 9-11 terrorist.

In the last section of her article, Volpp uses citizenship to analyze the 9-11 terrorist. Volpp describes citizenship as made of four distinct discourses: citizenship as formal legal status; citizenship as rights; citizenship as political activity; and citizenship as identity/solidarity.\footnote{157. \textit{Volpp}, \textit{supra} note 151, at 1592. Volpp notes that she is following Linda Bosniak’s analysis of the construct of citizenship beyond the nation-state.} In her analysis, she posits an identity dimension of citizenship as a process of interpellation whereby certain individuals are positioned as objects of exclusion through racial profiling.\footnote{158. \textit{Id.} at 1594.} Therefore, argues Volpp,
the boundaries of the nation continue to be constructed through excluding certain groups. The “imagined community” of the American nation, constituted by loyal citizens, is relying on difference from the “Middle Eastern terrorist” to fuse its identity at a moment of crisis.\footnote{Id. at 1595.}

The 9-11 terrorist becomes the repository of national insecurities generated by the horrific events of 9-11. These national fears are reified into a mythic terrorist, preparing to attack the United States, embodied in various vague forms, and inscribed onto the body of any person matching some aspect of the image of the 9-11 terrorist. In so doing, American identity is reinforced against the mythic terrorist.

More recently, in \textit{Casting Out: The Eviction of Muslims from Western Law and Politics}, Sherene Razack has written an extensive description of Western practices towards Muslims in the “War on Terror.”\footnote{Sherene H. Razack, \textit{Casting Out: The Eviction of Muslims from Western Law and Politics} (2008).} Razack summarizes her project:

I divide the book into two parts. Part one . . . focuses on the figure of the “dangerous” Muslim man and examines the camp as a place in which are incarcerated “terror suspects” and those marked as outside the political community. Part two . . . focuses on imperiled Muslim women, exploring in detail feminism’s connection to race thinking and the legal projects that regulate Muslim communities in the post-9/11 era. Given the two arguments I advance, that race thinking undergirds the making of empire, and that the world is increasingly governed by the logic of the exception, each chapter is an example of a camp—that is, a place where law is suspended (the force of law without law) and Muslims are evicted from the national community.\footnote{Id. at 19.}

Razack’s work is also clear on the distinction in treatment of men and women. While the Western project towards Muslim men has moved toward placing Muslim men into “camps” outside the law, Western actions towards Muslim women have been directed towards policing Muslim communities in the name of gender equality. These efforts are understood as “necessary . . . to forcibly ‘deculturalize’ feudal and hyper-patriarchal migrants to Europe who are Muslim.”\footnote{Id. at 20. Cf. Volpp’s critique of Doriane Lamelet Coleman, \textit{supra} note 95.}

Razack’s work complements Volpp’s analysis. Razack directs us to analyze how we have marked off Muslims and placed them into camps in the service of empire. While Volpp’s political placement of the 9-11 terrorist focuses upon our national insecurities, Razack extends our understandings to show how the 9-11 terrorist functions to support our military and economic ventures abroad. When faced with our national
insecurities after 9-11 and the imperatives of our military ventures abroad, we conclude that the 9-11 terrorist must be imprisoned. Only a camp where the dangerous terrorist can be held outside the law is sufficient to contain the terrorist.

This third dominant stereotype for Asian Americans—the 9-11 terrorist—continues to evolve. Even as currently understood, the stereotype is sufficiently well developed that it can be situated as part of the racialization of Asian Americans since 1850.

4. Multiple Racializations and Other Subordinations

The suggestion that we live within a racial regime of racialized stereotypes should not be taken to mean that all ethnic relations are only racial. In the context of Asian and Pacific peoples, the United States has an important set of colonial and imperial relationships. Part of the legacy of the Philippines as a former colony is the vibrant Filipino American ethnic community. That colonial legacy is woven into the domestic racialized treatment of Filipino Americans and those historical strands are important to distinguish in our studies of racialization and colonization. Similarly, Hawai‘i was conquered during our era of imperial and colonial conquest. The Hawaiian sovereignty movement and the peculiar logic of Rice v. Cayetano illustrate clearly that racial subordination in its paradigmatic Black-White form does not adequately describe the condition of the peoples of Hawai‘i.

Guam, the Northern Marianas, and American Samoa are U.S. colonies with “immigrant” communities established within the United States. Of importance to this discussion of Asian American jurisprudence is that these ethnic communities do not fit within the national boundaries of the Black-White narrative. Because the boundaries of the colonies and their collective identities fall outside of the territorial United States, it is much more difficult to expand Black-White racial categorization by adding on a new ethnic racial category. These colonized peoples have a distinct history from our standard national narrative of enslavement, segregation, and discrimination.

To carry forward both the analytic and political project of contesting racial subordination as well as distinguishing non-racial forms of social subordination requires a more careful examination than simply noting that there are multiple forms of American racialization. In the next section, I propose a more specific analytic model to further interrogate the social construction of race in America—a model for comparative racialization.

163. For a carefully researched history that combines and distinguishes these two strands, see DOROTHY B. FUJITA-RONY, AMERICAN WORKERS, COLONIAL POWER: PHILIPPINE SEATTLE AND THE TRANSPACIFIC WEST, 1919-1941 (2003). Seattle area Filipino cannery workers were part of the plaintiff class in the important Title VII decision, Wards Cove Packing v. Antonio, 490 U.S. 642 (1989).

C. Comparative Racialization: An Analytic Comparison

1. Three-Part Analytic Framework

In this section, I will develop a three-part analytic framework for comparative racialization: body primitive, racial category, and ascribed racial stereotype. I will also use these three elements to develop the following understanding of racialization: an ascribed racial stereotype linked to a racial category and inscribed on the body. I will use our discussion of Asian American racializations as the basis for this more abstract analytic framework.

The objective of an analytic framework for comparative racialization is to provide the tools to both compare and contrast multiple racializations. At the level of racial praxis—actual coalition building for interracial justice—Eric Yamamoto has provided important examples and guidelines for the pursuit of social justice. At the jurisprudential level, I seek here to describe a theoretical framework to discern how Black-White racializations are similar to and different from Asian American racializations. This is a theoretical analysis with practical implications. First, this analysis provides references for racial coalition. As explained by Yamamoto, theory can never replace concrete political work. Theory can, however, provide helpful guidelines for racial coalition. Second, there are legal situations in which a careful analysis of the elements of racial practices can help build an argument or analyze a result. Finally, by separating the racial category from the ascribed racial stereotype, I am more easily able to discuss stereotypes as having a communicative and expressive aspect. The racial discussion is thus no longer based upon the concept of racial discrimination and grounded in traditional disparate treatment.

Any effort to provide an analytical frame for racial analysis faces enormous difficulties. The literature on race is vast and theoretical examinations of race are themselves the subject of study. Thus, I will limit our discussion in two ways. First, this analysis is grounded in the previous discussions of Black-White and Asian American racialization. This framework was crafted to encompass Asian American racialization, and it may contribute to examining other racializations such as LatCrit Theory. Second, this is a legal analysis. The focus is the process of racialization as carried out through legal institutions and as examined in legal studies. The task is to create a sub-jurisprudence on race in American law that provides useful comparisons and contrasts of the processes of racialization.

The widely publicized case of Wen Ho Lee is a modern example of

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165. YAMAMOTO, supra note 6.
166. One well-known study lists seven major formulations of race as: designation, lineage, type, subspecies, status, class and social construct. MICHAEL BANTON, RACIAL THEORIES (2d ed. 1998).
the use of the ascribed racial stereotype of foreignness and Asiatic racialization. Wen Ho Lee was a Chinese American nuclear physicist who was falsely accused of spying for China. The charges against Lee were so thin that the final resolution of the case was a complete dismissal by a conservative federal court judge. In open court, the judge apologized to Lee for his treatment by the government and chastised the Department of Energy and U.S. attorney.\textsuperscript{167} The case as presented by Department of Energy officials and prosecuting attorneys relied largely on the racial profiling of Lee as naturally inclined to spy for China. The following chart illustrates how Wen Ho Lee was racialized and compares his treatment with two contemporary cases—John Deutch, the former head of the CIA who was charged with mishandling classified data on a home computer, and Amadou Diallo, an innocent African immigrant who was killed by police officers in the entryway to his New York apartment.\textsuperscript{168}

<table>
<thead>
<tr>
<th>Name</th>
<th>Racial Category</th>
<th>Racial Profile/Cultural Understanding</th>
<th>Social Context</th>
<th>Political Conclusion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wen Ho Lee</td>
<td>Chinese</td>
<td>Inassimilable, foreign, presumed disloyal</td>
<td>U.S.-China nuclear competition</td>
<td>Spy, espionage</td>
</tr>
<tr>
<td>John Deutch</td>
<td>White</td>
<td>Assimilated, presumed loyal</td>
<td>Director of CIA</td>
<td>Slap on the wrist</td>
</tr>
<tr>
<td>Amadou Diallo</td>
<td>Black</td>
<td>Criminal, violent, carrying a gun</td>
<td>Poverty, high crime rate, many racial minorities</td>
<td>Police may shoot first, ask questions later</td>
</tr>
</tbody>
</table>

This chart’s separation of the category and the racial profile allows a closer examination of how Wen Ho Lee was placed into the context of the long standing racial trope of foreignness. It also emphasizes that his racialized treatment was as a “Chinese spy,” not an Asian or Asian American spy. Our earlier analysis of the Chinese racial category has already noted that the categories associated with the foreignness trope are national-ethnic racial categories. All of the elements together make clear that this was a race case—not a misunderstanding or error in judgment of prosecutors.

From the elements of the chart, I can abstract out three distinct factors that are the three parts of this analytic framework: 1) body primitive; 2)
racial category; and 3) signified subordination/ascribed racial stereotype. In this next chart, I re-examine Wen Ho Lee’s racialization using our three-part framework.

<table>
<thead>
<tr>
<th>Body Primitive</th>
<th>Racial Category</th>
<th>Ascribed Racial Stereotype</th>
</tr>
</thead>
<tbody>
<tr>
<td>African</td>
<td>Black</td>
<td>Inferior and criminal</td>
</tr>
<tr>
<td>Caucasian</td>
<td>White</td>
<td>Superior</td>
</tr>
<tr>
<td>Asiatic</td>
<td>Chinese</td>
<td>Foreign spy</td>
</tr>
</tbody>
</table>

The unused stereotype:

<table>
<thead>
<tr>
<th>Asiatic</th>
<th>Asian American</th>
<th>Model Minority</th>
</tr>
</thead>
</table>

Wen Ho Lee’s background fits into the Model Minority stereotype, but the stereotype did not fit the political needs of federal prosecutors. Their interest was in developing a narrative of Chinese espionage. Since Wen Ho Lee had an Asiatic Body and ethnically identified as Chinese, the racial profile of the foreign spy was available for use in supporting the false charges.

I will next examine the three elements more closely. Each of the three parts to comparative racialization provide useful insights into racialization.

a. Body Primitive

The first category, the body primitive, reflects the long tradition that race is based upon a taxonomy or classificational scheme for bodies. I use the term “body primitive” rather than simply “body” in order to reference the underlying traditional, primitive notion of race. There is in our modern usage of the terms Black, Asian, White, Hispanic, an embedded assumption that these concepts refer to particular body types. They correspond to the intuitive and primitive color categories of race—Black, Yellow, White, Brown, or Red. While these primitive color categories have largely disappeared from judicial analysis and legal studies, they are important for understanding what makes racial categorization possible.

Our nation’s history is filled with many attempts to divide humanity into various “races” as racial schemas have been intensely examined for centuries. Authors in this tradition include well-known writers such as Carl Linnaeus, J.F. Blumenbach, Arthur de Gobineau, and the nineteenth century American school—Samuel George Morton and Louis Agassiz.169 It

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169. See BANTON, supra note 166, at 1-116 (discussing Carl Linnacus, J.F. Blumenbach, Arthur de Gobineau, Samuel George Morton, and Louis Agassiz); see also GOSSETT, THOMAS, RACE: THE
can clearly be seen that "primitive" forms of human body classification continue to be an implicit part of our racial jurisprudence. This influence continues despite the fact that explicit analysis of the body classifications themselves is now discredited as bad racial science. Yet body classifications are the foundation for racial categories. A person with an African body type who claims a White racial classification only invites further investigation. Such emphasis on body types in racial categories applies to all racial jurisprudence including equal protection and Title VII.

Since the study of body-primitives has fallen out of academic favor, the language of body primitives still echo old, archaic categories: African, Caucasian, and Asiatic. These older terms help us to see how the body-primitives have been conflated into racial categories. Such body-primitive terms allow us to analytically separate body racial-primitives from racial categories.

b. Racial Category

Racial categories have traditionally been enforced by the legal system, and that tradition continues. Racial categorization has a long and deep history in American law. In my early research on racial categorization in colonial Virginia, I argued that legal recognition of racial categories in the North American colonies is linked directly to the rise of African chattel slavery as a marker for enslavability.170 Under segregation, enforcement of separation was dependent upon an accurate legal determination of who was Negro and who was White.171 The use of these legal categories continues to the present today.172 In such areas as equal protection and civil rights anti-discrimination law, racial categories are the basis for claims of unequal treatment.

I turn next to the third part of this racial analytic framework, the ascribed racial stereotype.

c. Ascribed Racial Stereotype

Separating analysis of the racial category from the ascribed racial stereotype allows for an expanded legal analysis of the components of racialization. As I have discussed earlier in this Essay, the content of the racial stereotypes applied to Asian Americans. My point here is to emphasize that the stereotype is analytically distinguishable from its associated racial category. Further, in separating the racial category from the racial stereotype, we can observe that these two distinct concepts may

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be subject to different types of legal analysis. Scholars generally use very different legal doctrines to analyze racial stereotypes and racial profiles as opposed to their analysis of racial discrimination. This is because racial stereotypes and profiles are forms of expression and communication.

*d. Inscribed on the Body*

At the beginning of this section, I described the process of racialization as an ascriptive racial identity linked to a racial category and inscribed on the body. I examine here briefly the idea of “inscribed on the body.” For our purposes, I simply use the “common sense” knowledge that racial categories are linked to particular body types. I borrow this idea from the much more fully developed theoretical examinations in feminist theory. One example of an examination of the body reads:

> It is on and through the body that the discourse of sexuality is deployed. The discourse of sexuality operates both at the level of the individual body and the body politic . . . At the level of the individual body, power operates through the inscription of social-cultural norms on the body, resulting in a politicization of the body. The body politic and the politics of the body mirror one another, rendering both populations and individuals docile and useful. As we shall see, feminist analyses demonstrate how cultural norms of femininity are inscribed on individual women’s bodies. These norms are inscribed on the body politic as well, validating some bodies as useful for heavy lifting and manual labor and some bodies as useful in the service industry and as support staff. 173

This passage suggests that we should first realize that the discourse of race is carried out through the use of racialized bodies. In racial terms, when we describe someone as “Asian” we have invoked a body type as well as a racial category. If, after identifying someone as Asian, we immediately understand that person to be a foreign immigrant and likely to speak with an accent, then we have completed the process by which a political and cultural understanding have been imposed or inscribed onto the Asiatic body.

The final chart summarizes our three-part analysis within which stereotypes are inscribed on the body.

<table>
<thead>
<tr>
<th>BODY PRIMITIVE</th>
<th>RACIAL CATEGORY</th>
<th>RACIAL STEREOTYPE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inscribed on the body</td>
<td>Maintained by law</td>
<td>Ascribed racial stereotype</td>
</tr>
<tr>
<td>African</td>
<td>Black</td>
<td>Enslaveability</td>
</tr>
<tr>
<td>Caucasian</td>
<td>White</td>
<td>Biological superiority</td>
</tr>
</tbody>
</table>

2. What Does This Framework Do?

This three-part framework provides different suggestions for analysis and actions. First, by separating out each element, we can discern distinct histories for each of the parts. Such histories provide important suggestions for anti-subordination efforts. Second, the separation of the racial category from the racial profile allows for more emphasis on the various forms of anti-subordination struggle. Racial categories are maintained by legal doctrines. If the underlying legal categories are the object of a particular effort, then legal attacks would seem appropriate. If, however, the focus is on the racial profile—for example, whether display of a noose creates a hostile work environment—then the subject is cultural, but is still subject to legal treatment.

3. Racial Profiling and the Floating Body of Racial Knowledge

The separation of racial categories and racial profiles also provides a more accurate description of racial profiling. Racial profiling uses the “spaghetti-on-the-wall” technique.\(^{174}\) The profiler (whose race is often irrelevant) selects a target individual. Based upon the target person’s body and cultural configuration (dress, style, language), the profiler selects a racial profile from the Floating Body of Racial Knowledge—the stereotypes or tropes available in American culture. The profiler then broadcasts the profile at the body to see if it sticks. If the target or others recognize the profile and act in some way to support racial domination, then the profiling is complete. There has been an act of racial subordination.

I use the spaghetti metaphor to describe how the stereotypes or tropes operate to configure and make familiar the way in which we think about others.\(^{175}\) This version of racial profiling shows how racial profiles do exist

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<table>
<thead>
<tr>
<th>Asiatic</th>
<th>Chinese</th>
<th>Foreignness</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asiatic</td>
<td>Asial American</td>
<td>Model minority</td>
</tr>
<tr>
<td>Asiatic</td>
<td>“Looks like a terrorist”</td>
<td>9-11 terrorist</td>
</tr>
</tbody>
</table>

174. This refers to testing whether spaghetti is fully cooked by throwing it against the wall to see if it sticks.

175. DANIEL CHANDLER, *Rhetorical Tropes, in SEMIOTICS: THE BASICS* 124 (2002) (“[T]ropes can be seen as offering us a variety of ways of saying ‘this is (or is like) that.’ Tropes may be essential to understanding if we interpret this as a process of rendering the unfamiliar more familiar. . . . [F]igurative language is part of the reality maintenance system of a culture or sub-culture. . . . [We do not see] the way in which the culturally available stock of tropes acts as an anchor linking us to the dominant ways of thinking within our society.”) (citing GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980)). In most of this essay, I have used “racial stereotype” rather than “signified subordination” or “trope” to defer reference to these methodologies. See Daniel Chandler, *Semiotics for Beginners*, http://www.aber.ac.uk/media/Documents/S4B/sem07.html.
NEW DIRECTIONS

in our culture—within the Floating Body of Racial Knowledge. Racial profiles are created, reinforced, and reinvented in a multitude of ways, including from judicial opinions as well as from the actions of judges, attorneys, and other participants in our legal system. They exist in our “culture” yet do not reside in any particular location. Often, the profiles have deep historical roots. The diffuse nature of this form of racial knowledge means that efforts to modify racial knowledge will be difficult. I use the image of the Floating Body of Racial Knowledge—the racial tropes available in our culture—to refocus the nature of legal interventions. Unlike redress for racial discrimination, disruptive interventions into culture cannot be effectively implemented within the narrow framework of an individual charge of racial discrimination. Legal expertise in equal protection and anti-discrimination law are complemented by new questions of how one affects the culture at large.

This three-part racial analysis allows us to compare the treatment of Asian Americans and African Americans in multiple contexts. We can compare the distinct histories of the racial categorization to compare and contrast how the categories have developed. The use of body primitives refocuses attention on how these are truly racial practices and not simply cultural misunderstandings. Finally, recognition of distinct and different racial tropes for African Americans and Asian Americans illustrates the different ways that racialization affects individuals. The emphasis upon tropes allows a focus upon the ways that popular culture is one of the important repositories of racial practices. This focus upon culture also emphasizes that transformation and change will require different understandings of how race, law, and culture are intertwined.

This analysis by its own terms is largely retrospective. The three parts of the analysis focus upon racial practices as they have evolved over the history of Asian immigration to the United States. There remain many areas for further study.

V. NEW DIRECTIONS IN ASIAN AMERICAN JURISPRUDENCE

The articles in this section are both significant and relatively new identity-based studies in Asian American jurisprudence. Each examines a dimension of the Asian American population that has not been covered in earlier discussions. The first article, Anupam Chander’s “Diaspora Bonds,” and John Tehranian’s book, White Washed, propose new categories that they argue should be recognized in the law. Ediberto Román’s treatise

176. In the recent presidential election, efforts to assign racial profiles of “terrorist” and “Muslim”—traditional forms of foreignness—to Barack Obama were largely unsuccessful. These efforts followed my suggested form for profiling. Various news sources tried to invoke these profiles and make them “stick” to Obama’s body. Through his political skills and the fact that his body is recognizable of African descent, the efforts to make these racial profiles “stick” were unsuccessful.

177. Chander, supra note 133; Tehranian, supra note 60.
surveys past and current American colonies and provides a territorial
catalog of nationalities and ethnicities subject to American racialization yet
outside of our borders. Rose Cuizon Villazor’s article examines a
specific question of racialization—blood quantum—in a colonial
context. Together, Román’s treatise and Villazor’s article point to the
need to study and critique our continuing colonial presence in the Pacific.
Finally, Madhavi Sunder’s work illustrates the possibilities of transnational
organizing around gender and religious identities. We have only begun to
explore gendered religious identities.

A. Partial Immigration in an Era of Globalization

The oldest article in this group is “Diaspora Bonds,” by Anupam
Chander. The title is an intentional pun in his examination of
“Diasporas—groups who maintain ties to a homeland while living
abroad.” Chander examines diaspora in the context of international law
and studies the particular case of “Resurgent India Bonds,” a financial
device used by the Indian government to raise capital from the Indian
diaspora. To satisfy the requirements of the standard-form law review,
Chander makes specific hybrid proposals with regard to questions of
sovereignty and choice of law to resolve disputes involving these finance
bonds. But Chander’s concern and interest lie in the questions surrounding
a diasporic identity.

Chander notes that the legal literature largely ignores its political and
legal relevance—what I have earlier called “invisibility.” Further, he notes
that other disciplines, humanities and social sciences have recognized the
importance of studying diasporas:

A globalized world requires a new paradigm of the relationship of the
citizen to the state. In place of the . . . insistence on a singular state loyalty
or the cosmopolitan call for global citizenship, the diaspora model would
permit individuals to construct national and transnational communities of
their own choosing. According to the diaspora model, one’s loyalty can be
to the country in which one lives, the country or countries from which
one’s ancestors came, the diaspora to which one belongs, or all or none of
the above. The diaspora model finds in the hybridity and dual loyalty of
the diaspora the basis for reconceiving the citizen as able to live and

178. Ediberto Román, The Other American Colonies: An International and
Constitutional Law Examination of the United States’ Nineteenth and Twentieth
179. Rose Cuizon Villazor, Blood Quantum Land Laws and the Race Versus Political Identity
181. Chander, supra note 133.
182. Id.
183. Id. at 1008-09 and notes therein. See also Aiwha Ong, Flexible Citizenship: The
Cultural Logics of Transnationality (1999).
thrive with multiple and overlapping loyalties and sovereigns.184

Chander draws comparisons with studies of multiculturalism and examinations of the border and borderlands in LatCrit theory.185 He also notes the growing economic importance of diasporic communities, the role of technology in enabling diasporic movement and communication. Finally, he sees the recognition among scholars of a "deepening sense of an individual’s right to define one’s identity."186 Throughout this study, Chander is motivated not only by an intellectual curiosity, but a very personal sense of mission. He concludes:

The nation-state system imposes a physicality on individuals that does not correspond precisely to their emotional attachments. Whether by choice or not, we live in one country, even through our hearts might belong to two. In some sense, then this Article has been an effort to grapple with the existential question Salman Rushdie finds himself asking as a writer of the Indian diaspora: “How are we to live in this world?”187

B. Old Orientalism and a Proposed New Ethnic Category

John Tehranian offers an expansive discussion in a new book, White Washed: America’s Invisible Middle Eastern Minority.188 Tehranian begins his book with an identity narrative—a story about his own experiences in the academic job market and the vagaries of the racial categories used for affirmative action. Throughout, Tehranian clearly voices his concurrent roles as a participant, analyst, and advocate. He uses the history of the racial classification cases and discrimination against persons whose ancestry is based in the Middle East to create a narrative for his new identity category. Tehranian is acutely aware of the complexities of his proposal. He recounts a friend’s reaction to his book proposal:

[O]ne of my oldest childhood friends . . . responded with a degree of uneasy amusement and bemusement: “As a Persian-Armenian-Irish Catholic Quaker from Hawaii who lives in Utah and California . . . you are the perfect person to comment on the plight of Middle Eastern Muslims!”189

Tehranian continues in this vein, using stories from his own mixed, non-Arab, non-Muslim background to confront the realities of struggles
over hybridity and essentialism. The crucial analytical question posed by Tehranian centers on his advocacy of a new Middle Eastern category. The category is arguably a pan-ethnic grouping, rather than a racial category with deep and familiar roots in American history. The legal histories he reviews (the racial prerequisite to naturalization cases) and recent cases involving persons of Middle Eastern ancestry include two distinct strands. One is about the development of employment and various forms of civil discrimination. The other strand is on the history of foreignness and Orientalism, which has radically expanded into the trope of the 9-11 terrorist.

Tehranian’s category is an important addition to the efforts being made in developing an internal collective identity—an American pan-ethnic identity that includes distinct nationalities, ethnicities, and religions. Yen Le Espiritu’s book describes how different Asian nationalities and ethnicities were grouped together under the “pan-ethnic” label of Asian American. When the new Middle Eastern category is seen as a “benign” pan-ethnicity to counter the vicious ascribed racial identity of the 9-11 terrorist, Tehranian’s proposal is consistent with the past development of pan-ethnic identities. Tehranian’s proposal facilitates the development of a category to allow the documentation of civil rights forms of discrimination. This aspect of a Middle Eastern category follows the path of other ethnic and racial categorizations that have evolved through numerous permutations in census classifications and Title VII reporting requirements. Given the social and political implications of such a new category, the question now is whether a collective will exists to pursue this strategy.

C. Remnants of America’s Forgotten Colonial Empire

Ediberto Román’s treatise on America’s colonies is a comprehensive survey of America’s imperial expansion at the end of the nineteenth century. The largest parts of this empire were colonies ceded by Spain to the United States after the Spanish American War. Other territories were acquired from international mandates before and after World War II. Román reviews the history of these acquisitions and their treatment under U.S. law and Supreme Court decisions. Román focuses on the economic and political systems of domination and exploitation under American

190. Id. at 140.
191. See ESPRITU, supra note 147, at 9-14.
192. Id.
194. ROMÁN, supra note 178.
rule.195

Román describes the scope and breadth of America’s imperial domination of a sprawling array of nations, peoples and ethnicities. While our possessions include Puerto Rico and the U.S. Virgin Islands, my focus is upon our Pacific colonies.196 America’s Pacific colonies include Guam, American Samoa, Micronesia, the Marshall Islands and the Northern Marianas. These colonies are subject to American rule and American jurisdiction though their location is outside of the borders of the United States. The exact dimensions of the application of constitutional and jurisdictional principles remains a complex tangle of past Supreme Court decisions, various federal laws, and the specific histories of each colony or territory.

Román begins and ends his book with the deceptively simple observation that we have denied the peoples of these colonies the basic rights and privileges of democratic citizenship—the right to vote for their ultimately governing authority. Quite simply, we discriminate against our colonies and then expend significant effort to erase their existence from our political and social consciousness. The identity dimensions of the peoples of our colonies are little discussed in American race relations. In the context of Asian American Jurisprudence, an effort to assert the existence and presence of otherwise legally invisible communities is an important identity project.

D. American Indian Law in Our Pacific Colonies

Rose Villazor provides a comparative analysis of the body of law that continues to use blood quantum—fractions of ancestral descent.197 Blood quantum was formerly a crucial part of Negro-White racial classification. There was a significant body of statutory and case law on racial classification through the end of the segregation.198 Another body of case law upheld the use of blood quantum by American Indian law to determine tribal membership. In Morton v. Mancari, the Supreme Court case found use of blood quantum was justified to further the political self-governance by Indian tribes.199 The contrast between the Black-White racial treatment and the American Indian use of the political community treatment of blood quantum was confronted in the landmark decision of Rice v. Cayetano.200 In that widely commented decision, the Supreme Court rejected the

195. See id. at 87-120.
196. The literature on Puerto Rico is large, see, e.g., PEDRO MALAVET, AMERICA’S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO (2004).
197. Villazor, supra note 179.
198. Racial classification was a part of the Court’s discussion in Loving v. Virginia, 388 U.S. 1 (1967) (striking down Virginia’s ban on interracial marriage).
characterization of the legacy legislation of the annexation of the Hawaiian nation as legally similar to the politically negotiated status of Indian tribes. Instead, the Court applied Fifteenth Amendment Black-White voting discrimination standards to strike down the law protecting Native Hawaiians. 201

Villazor’s article then examines the use of blood-quantum in other jurisdictions—American Samoa and the Northern Marianas. In these cases, the jurisdictions are not a question of a nineteenth century legacy of imperial expansion but an active part of our dominion over sovereign territories. Villazor argues that the court erred in its basic approach and states:

[I]t is necessary to expand law’s understanding of political indigeneity . . . One way toward that goal is examining blood quantum land laws in the U.S. territories and how they have been framed in equal protection jurisprudence. Cases from the U.S. territories tend to be marginalized in “mainstream” jurisprudence. By placing these neglected cases within the ambit of normative equal protection doctrine, I contend that, at minimum, they provide an opening outside of the strict understanding of racial and political indigeneity. . . . 202

Villazor’s comparative exploration through blood quantum laws outlines the broad contours of other comparative explorations. The collective identities—Chamorro, Samoan, Hawaiian, American Indian tribes, Black and White—cover an extraordinary geographical, political, and social range. In Rice v. Cayetano the Supreme Court retreated to the narrowest form of voter discrimination review within the Black-White paradigm. 203 Villazor’s article points to a new direction for examination of these questions.

E. Organizing Gendered Religious Identities

Madhavi Sunder’s 2003 article, “Piercing the Veil,” is a nuanced discussion of women’s rights activism and the various legal, political, ideological, and social constraints on their work. 204 She raises a range of identity issues in her discussion. In her discussion of the human rights strategies of the transnational network Women Living Under Muslim Laws (“WLUML”), Sunder notes:

WLUML exemplifies an operational human rights strategy that provides

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201. 417 U.S. at 518-525. See also Chris Iijima, Race over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano, 53 RUTGERS L. REV. 91 (2000); comments by Leti Volpp, Eric Yamamoto, and others, cited by Villazor, supra note 179, at 804 n. 16.
202. Villazor, supra note 179, at 802.
203. 417 U.S. at 518.
204. Sunder, supra note 180, at 1399.
women the option of articulating and demanding freedom and equality within the context of a normative (i.e., religious and/or cultural) community. I identify a conceptually coherent theme in the work of both WLUML and [a theoretically and strategically similar human rights teaching manual called “Claiming our Rights”]. Both herald... the rumblings of a New Enlightenment... [A]ctivists on the front lines of the war against Muslim fundamentalism are challenging old Enlightenment views that would leave religion and culture as spheres of despotism, and are asserting instead rights to liberty and equality within the private, as well as public, spheres.

Madhavi further observes:

WLUML asserts that the most serious challenge to women’s rights in the Muslim world today is the imposition of identity by Muslim laws, particularly the imposition of a religious identity on women... [C]haracterizing laws and practices as religious is particularly challenging to the realization of women’s rights because the talismanic incantation of religion insulates the claims from critique.206

But rather than advocate purely secular strategies for equality in the public sphere without addressing growing inequality in the private (as the traditional human rights approach would suggest), WLUML employs strategies that contest fundamentalist depictions of identity. This approach entails both critiquing the fundamentalist claims about women’s religious identity and empowering women to reshape religious identity in more egalitarian terms.207

These short excerpts convey Madhavi’s strong political commitment to social justice as well as a sensitive appreciation of the complexities of identity politics. As religious identities have emerged as crucial in our current discussions of sexual identities, Madhavi’s analysis suggests that comparative analyses of ethnic and religious identities may be explored in far-reaching and distant terrains.

V. CONCLUSION

The themes of the authors discussed under New Directions suggest an important shift in the focus of Asian American Jurisprudence. All of the authors have significant Asian American identity elements in their work. Each author writes from an American subject position and critically examines aspects of American economic, political, and social life. Their discussions, however, are not limited by the earlier Asian American Jurisprudence narratives of immigration, citizenship, and racialization. In particular, the examinations of the diaspora category, the Marianas, and

205. Id. at 1433-1434.
206. Id. at 1435-36.
207. Id. at 1436.
organizing by international women are not readily encompassed by our three traditional narratives.

Within the racialization narrative and its tropes of foreignness, Model Minority, and 9-11 terrorist, these authors can be seen as offering alternative responses. In particular, since several of the authors are immigrants, their answer to the charge of foreignness might well be, “yes... and your point?” Since a large part of the Asian American population is foreign-born, the subordinating power of the foreignness stereotype is diluted. Over time, we can expect usage of the three stereotypes to change. Our narratives and stereotypes remain open for further analysis and critique.

We have begun explorations of international law, transnational law, the law of the American colonies, and our imperial presence in Asia. The open question is the value of identity-based examinations of these materials. Further, it is unclear whether their study will reveal ruptures or continuities with our developed historical narratives of immigration, citizenship, and racialization. A survey of our writings suggests areas for additional study. In the existing literature, the areas least addressed are gender and sexuality. There is little to analyze, so I only observe that such methodologies as intersectionality, queer theory, and the many dimensions of feminist thought remain available to examine Asian American legal materials.

Whatever the difficulties of the new directions for analysis, I am confident about the social dimensions. There will continue to be racial discrimination and subordinating discursive treatments of Asian Americans, and our political activism to address this racism will continue. As part of those efforts, we must continue to make building racial coalitions a central part of our political strategy. The complexities of building racial coalitions will continue. But even with those difficulties, we should never lose sight of the foundational nature of slavery, segregation, and the centrality of Black-White racialization in all of our struggles.

There is a certain element of closure in this examination. Immigration laws and policies will continue to change, but the part of our immigration and citizenship narratives prior to 1965 is passing from social analysis to historical review. Similarly, as we understand the nature of foreignness and Model Minority tropes and their role in racialization, we can turn our attentions to the new threats of the 9-11 terrorist stereotype. Observations of the speed and breadth of globalization are commonplace. Less frequent critical examination of these events is needed to pursue and advance social justice.
VI. APPENDIX

I offer here questions to pose in determining whether an article might be considered as part of Asian American Jurisprudence. These questions are meant to serve as a guide in locating an author and her analysis rather than as a normative examination where too many wrong answers leads the Asian American Jurisprudence community to immediately disregard an author’s work.

Remembering that Asian American Jurisprudence is not a discrete doctrine or theory, but a space and locale for identity and interrogation the following is a methodology for a critique of Asian American Jurisprudence.

1. Is there an implicit (or explicit) assertion of identity?
   a. What is the collective identity asserted?
   b. What is the oppositional ascriptive identity imposed from without?
   c. Is this an identitarian project?
      i. What are the project’s parameters?
      ii. Social definition?; political coalition?; economic development?
   d. Is this an anti-discrimination project?
      i. Does this affect an Asian American racial or ethnic category?

2. As an assertion of identity within the law, is there a legal genealogy?
   a. A doctrinal legal history?
   b. A legal developmental logic of the category?
   c. A socio-legal history?

3. Is this racial?
   a. Is this an ascriptive racial profile inscribed on an Asiatic body?
      i. Is there a body type?
      ii. A racial category?
      iii. An identifiable racial trope?

4. If this identity assertion is not fully racial, here are some other possible subordinations:
   a. Pan-Ethnic
   b. Diasporic Collective Identity
   c. Colonial/Post-colonial Collective identity
   d. Religious Collective Identity
   e. Post-9-11 Terrorist
   f. American Indian Dependent Nation

5. What are the politics of the Identity?
   a. Is there a move towards anti-subordination?
      i. Intellectual intervention?
      ii. Legal struggle—praxis?
   b. Is there an issue of interracial justice?