

## COVID-19 AND THE CONTINUING ASIAN AMERICAN MOMENT: NARRATIVES FROM THE MIDWEST

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The COVID-19 pandemic drastically affected the operations and daily routines of the university and college town that have been my home for the past twenty-two years. In mid-March 2020, the University of Missouri (“MU”),<sup>1</sup> in Columbia, Missouri, suspended all in-person classes for the remainder of the semester, with classes to be taught remotely,<sup>2</sup> and also prohibited employees from working on campus, with rare exceptions, for a three-week period,<sup>3</sup> later extended.<sup>4</sup> The City of Columbia issued a general stay at home order for a one-month period,<sup>5</sup> which was also extended.<sup>6</sup> Intercollegiate

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1. In the fall of 2015, the University of Missouri campus in Columbia was the site of racial tensions, which saw demonstrations, a student’s hunger strike, a boycott by the football team, and subsequent resignations of both the then university system president and campus chancellor. See John Eligon & Richard Pérez-Peña, *University of Missouri Protests Spur a Day of Change*, N.Y. TIMES (Nov. 12, 2015), <https://www.nytimes.com/2015/11/10/us/university-of-missouri-system-president-resigns.html>. For a discussion and analysis, by a faculty colleague, see Ben Trachtenberg, *The 2015 University of Missouri Protests and Their Lessons for Higher Education Policy and Administration*, 107 KY. L.J. 61 (2018–2019).

2. *UM System Universities Suspend In-person Classes for Spring Semester*, UNIV. MO. SYS. (Mar. 14, 2020), [https://www.umsystem.edu/ums/news/news\\_releases/202003145428990\\_news](https://www.umsystem.edu/ums/news/news_releases/202003145428990_news).

3. *Presidential Directive To Reduce In-person Work, Effective Mar. 23*, UNIV. MO. SYS. (Mar. 19, 2020), <https://www.umsystem.edu/president-blog/presidential-directive-reduce-person-work-effective-mar-23>.

4. *Work from Home Directive Continues*, UNIV. MO. (Apr. 28, 2020), <https://chancellor.missouri.edu/news/work-from-home-directive-continues/>.

5. DIR. OF PUB. HEALTH & HUM. SERVS., CITY OF COLUMBIA, ORDER NO. 2020-03, STAY AT HOME ORDER (2020), <https://www.como.gov/wp-content/uploads/COVID-Health-Director-Order-Stay-at-Home-3.24.2020-City-of-Columbia.pdf>.

6. DIR. OF PUB. HEALTH & HUM. SERVS., CITY OF COLUMBIA, ORDER NO. 2020-04, RENEWAL OF STAY AT HOME ORDER (2020), [https://www.como.gov/wp-content/uploads/covid\\_health\\_director\\_order\\_4\\_for\\_stay\\_home\\_final.pdf](https://www.como.gov/wp-content/uploads/covid_health_director_order_4_for_stay_home_final.pdf).

athletic contests of the Missouri Tigers were cancelled for the remainder of the academic year.<sup>7</sup> This appears to have been the norm for many universities across the country as a result of COVID-19.<sup>8</sup>

An event that occurred at MU that was not seen in all other institutions involved an action by the university's faculty council. The Missouri faculty council, similar to those of other universities, is "the elected representative organization of the [university] Faculty," which "develops policies that affect academic life."<sup>9</sup> During the council's meeting on April 9, 2020, it issued an "Open Letter Regarding the COVID-19 Pandemic and Racial Discrimination" ("Open Letter").<sup>10</sup> "[I]t is with sadness," the Open Letter states, "that we note that some members of the Chinese, Korean, and other Asian communities on our campus and in our community have experienced incidents of discomfort and discrimination in their dealings with others because of the pandemic."<sup>11</sup> The council urged the university community and elected officials to refer to the disease by its scientific name and "to reject and push back against any xenophobia triggered by racist descriptions of COVID-19."<sup>12</sup>

I imagine that different readers will have different reactions to the 362-word Open Letter, and I encourage those interested to voice their views. For me, the document prompts a discussion of various issues relating to the field of Asian American jurisprudence.

By way of necessary background, in 1993, Professor Robert S. Chang announced an "Asian American Moment," and with it called for an Asian American Legal Scholarship.<sup>13</sup> He noted that the new field was necessary because neither traditional civil rights methodology nor critical race theory adequately addressed the Asian

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7. The University of Missouri is a member of the Southeastern Conference, which announced the cancellation of all regular-season conference and non-conference competitions "for the remainder of the 2019–20 athletic year." *SEC Statement on Remaining 2020 Competition*, SE. CONF. (Mar. 17, 2020), <https://www.secsports.com/article/28917409/sec-statement-remaining-2020-competition>.

8. *See The Coronavirus Is Upending Higher Ed. Here Are the Latest Developments.*, CHRON. HIGHER EDUC. (Mar. 25, 2020), <https://www.chronicle.com/article/the-coronavirus-is-upending-higher-ed-here-are-the-latest-developments/>.

9. *About, MU Faculty Council on University Policy*, UNIV. MO., <https://facultycouncil.missouri.edu/about/> (last visited Nov. 16, 2020).

10. Open Letter Regarding the COVID-19 Pandemic and Racial Discrimination from the Univ. Mo. Fac. Council (Apr. 9, 2020) [hereinafter Open Letter], <https://missouri.app.box.com/s/0b6mt1hqfhmqv83s7qnrbvzvx7gipd1x/file/650896695685>.

11. *Id.*

12. *Id.*

13. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1245–46, 1314 (1993).

American experience.<sup>14</sup> In the twenty-seven years since Professor Chang's call to action, the movement has seen significant scholarship in the field<sup>15</sup> (including criticism from one author that the movement has failed, with Asian American law scholars writers to blame),<sup>16</sup> symposia exploring legal issues affecting Asian Americans,<sup>17</sup> and efforts to include Asian American jurisprudence in the law school curriculum.<sup>18</sup>

One characteristic of Asian American Legal Scholarship, as well as other forms of "outsider jurisprudence,"<sup>19</sup> is the personal narrative (or the less professorial label of "storytelling"), in which authors incorporate their personal experiences in their work. For example, in Professor Chang's opening text, he recounted the times he was refused service at a gas station,<sup>20</sup> stopped by the police for suspicion of possessing a stolen vehicle,<sup>21</sup> and mistaken for a copy boy by a faculty colleague at his law school.<sup>22</sup> Professor Margaret (H.R.) Chon recalled the experience of a nine-year-old boy chanting a fake Asian language at her and her two kids when she picked them up from

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14. *Id.* at 1247–48.

15. A partial list includes: ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* (1999); Neil Gotanda, *New Directions in Asian American Jurisprudence*, 17 *ASIAN AM. L.J.* 5 (2010); Frank H. Wu, *The Arrival of Asian Americans: An Agenda for Legal Scholarship*, 10 *ASIAN L.J.* 1 (2003). Other works are cited herein.

16. Elbert Lin, *Identifying Asian America*, 33 *SW. U. L. REV.* 217, 218, 256 (2004).

17. Symposium, *In Honor of Neil Gotanda*, 4 *ASIAN L.J.* 1 (1997); Symposium, *Reigniting Community: Strengthening the Asian Pacific American Identity*, 3 *U.C. IRVINE L. REV.* 801 (2013); Symposium, *The Long Shadow of Korematsu*, 40 *B.C. L. REV.* 1 (1998). The *Asian American Law Journal*, formerly, the *Asian Law Journal*, holds an annual spring symposium and lecture. *About This Journal*, *ASIAN AM. L.J.*, <https://www.law.berkeley.edu/library/ir/aalj/about.php> (last visited Nov. 16, 2020).

18. *E.g.*, John Hayakawa Torok, *Asian American Jurisprudence: On Curriculum*, 2005 *MICH. ST. L. REV.* 635, 636–37; Leti Volpp, *Rethinking Asian American Jurisprudence*, 10 *ASIAN L.J.* 51, 53–56 (2003). Teachers of a course devoted to the subject have shared their syllabi and reading lists. *E.g.*, Robert S. Chang, *Syllabus: Asian Americans and the Law*, 10 *ASIAN L.J.* 105 (2003); Gabriel J. Chin, *Syllabus: Asian Pacific Americans and the Law*, 10 *ASIAN L.J.* 115 (2003); Leti Volpp, *Syllabus: Asian Pacific Americans and the Law*, 10 *ASIAN L.J.* 97 (2003).

19. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 *MICH. L. REV.* 2320, 2323–26 (1989); Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 *CORNELL L. REV.* 43, 44–45 (1994).

20. Chang, *supra* note 13, at 1244.

21. *Id.* at 1244, 1299.

22. *Id.* at 1299.

school.<sup>23</sup> Professor Chris Iijima began his article: “My six-year-old half-Asian son has just had his first ‘Ching Chong Chinaman’ taunting in school. I was expecting it, but it threw me off-balance nevertheless.”<sup>24</sup>

There is considerable commentary on the use of the narrative in legal scholarship, indicating a polarized debate on the subject.<sup>25</sup> Criticisms against the narrative form range from the view that personal experiences are not relevant and do not contribute much to the development of law,<sup>26</sup> to the more dyspeptic statement that some who “forswear[] analysis in favor of storytelling . . . come across as labile and intellectually limited.”<sup>27</sup> Another observer has noted that in the “victim talk world” that we live in, some stories might sound of “testimonials of pain in a contest over who suffered more.”<sup>28</sup> For their part, Professors Daniel A. Farber and Suzanna Sherry conclude that stories *can* legitimately and significantly contribute to legal

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23. Margaret (H.R.) Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 UCLA ASIAN PAC. AM. L.J. 4, 21 (1995). “[T]he boy was on the same little league baseball team that my son had been on—and that my husband had coached.” *Id.*

24. Chris K. Iijima, *The Era of We-construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 47 (1997).

25. See, e.g., Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 808 (1993); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1745 (1989); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 251 (1992); see also *infra* note 29.

26. By way of one notable example, Professor Susan Estrich begins her article with the following narrative:

Eleven years ago, a man held an ice pick to my throat and said: “Push over, shut up, or I’ll kill you.” . . .

I ended up in the back seat of a police car. I told the two officers I had been raped by a man who came up to the car door as I was getting out in my own parking lot (and trying to balance two bags of groceries and kick the car door open). He took the car, too.

Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1087 (1986). In a law review colloquy entitled “Human Voice in Legal Discourse,” Professor Mark Yudof describes Estrich’s article as “an excellent and moving work on rape.” Mark G. Yudof, *Tea at the Palaz of Hoon’: The Human Voice in Legal Rules*, 66 TEX. L. REV. 589, 590 (1988). But regarding Estrich’s experience of being raped, he asks, “In what sense, if any, is her personal story relevant to her legal scholarship?” *Id.* at 598. Yudof concludes, “Estrich’s diverse uses of the human voice do not contribute much to her elaboration of what the law of rape should be.” *Id.* at 599.

27. Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40, 43 (reviewing DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997)).

28. Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1430 (1993).

scholarship and our understanding of the law, if they are accurate, typical, and legally relevant.<sup>29</sup>

It seems to me that the Open Letter was motivated by the same type of individual personal experiences seen in much of Asian American Legal Scholarship. Members of the faculty council learned of incidents where persons of Asian descent experienced racism on campus or in the surrounding area. These experiences were the basis for action that led to the drafting and approval of the letter. But here lurk Farber and Sherry's warnings on reliance of "stories from the bottom."<sup>30</sup> I hasten to add that Farber and Sherry's demand for truth and typicality was designed for legal scholarship, and not action by a university faculty council. Still, the faculty council at the University of Missouri "serves as a reflection of faculty thought. It is the public face of MU faculty members to university officials, stakeholders, and media."<sup>31</sup> Moreover, the actions of a body at a public university might evoke thoughts of "state action" and public accountability. Although the Open Letter does not have the force of law, the basis for the council's actions should be concrete and bona fide.

I think it is entirely fair for readers of the Open Letter to ask, civilly and constructively, elaborating questions about the referenced incidents. I prefer to think that my colleagues in academia, engaged and interested, wish to understand and be informed about the underlying setting. To this end, what were the "incidents of discomfort and discrimination" that members of this Missouri community experienced?<sup>32</sup> I would press for clarification on the reference to "discomfort and discrimination." Individual *discomfort* seems subjective and leaves open the possibility of a hypersensitive

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29. Farber & Sherry, *supra* note 25, at 808, 809, 830–31. In addition, they counsel that storytellers also need "to include an analytic dimension in their work." *Id.* at 809. The two authors further elaborated on their views, in Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994), and FARBER & SHERRY, *supra* note 27. Farber and Sherry's approach is not without critics. *E.g.*, Kathryn Abrams, *How to Have a Culture War*, 65 U. CHI. L. REV. 1091, 1092 (1998) (reviewing FARBER & SHERRY, *supra* note 27); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 256 (1994); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 667 (1993); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 609–10 (1994); Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1845 (1994); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 806 (1994).

30. Farber & Sherry, *supra* note 25, at 808, 819, 822, 824, 827, 838.

31. *About, MU Faculty Council on University Policy*, *supra* note 9.

32. For my part also, I was interested in the details, as a university employee, especially one who might be categorized as a member of the so-called "Chinese, Korean, and other Asian communities," and as a parent of a university student.

victim, perhaps one with an “eggshell psyche.”<sup>33</sup> In *discrimination*, was the council using the term in the lay or legal sense? As one court has noted, the term “has a specialized meaning in the law and in lay use the term has a distinctly less precise meaning.”<sup>34</sup>

Toward due diligence, I contacted a member of the MU faculty council to get more details.<sup>35</sup> My source on the council was not at liberty to discuss the particulars of the referenced incidents, but graciously responded to my queries. In sum: In the spring of 2020, approximately eight persons, mostly nationals of China or South Korea who are graduate students or pre-tenured faculty at the university, approached members of the council’s Inclusion, Diversity & Equity Committee. These persons related their experiences of discriminatory comments and actions directed at them, on campus and in the surrounding area, which made them feel unwelcome, unsafe, or threatened.<sup>36</sup>

One wonders if these stories would satisfy Farber and Sherry’s test for truth. As they explain,

We can distinguish three different statements about the perception of an event:

(1) “If you had been watching, this is what you would have seen”;

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33. *Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d 1282, 1285 (Me. 1987) (“We do not provide compensation for the hurt feelings of the supersensitive plaintiff—the eggshell psyche.”); *see also* Frank S. Ravitch, *Hostile Work Environment and the Objective Reasonableness Conundrum: Deriving a Workable Framework from Tort Law for Addressing Knowing Harassment of Hypersensitive Employees*, 36 B.C. L. REV. 257, 273–77 (1995) (discussing the “eggshell skull” rule in cases involving the harassment of hypersensitive employees in the workplace).

34. *Torres v. County of Oakland*, 758 F.2d 147, 151 (6th Cir. 1985).

35. I also tried to view the minutes of the faculty council meeting when the Open Letter was approved. Although minutes of most faculty council meetings are posted on the university’s internet site, minutes of the April 9, 2020 meeting are not, as of this writing. *See Meetings and Minutes 2019–2020*, UNIV. MO., <https://facultycouncil.missouri.edu/meetings-and-minutes/2019-2020/> (navigate to “April 9, 3:30 pm”) (last visited Nov. 16, 2020). I exchanged emails with a staff member in the provost’s office about gaining access to the meeting’s minutes and a recording of the meeting, but without success. A media report describing the meeting and the letter does not address the details that I sought. Laura Evans, *MU Faculty Council Puts out Letter About COVID-19 and Racism*, COLUMBIA MISSOURIAN (Apr. 10, 2020), [https://www.columbiainmissourian.com/news/covid19/mu-faculty-council-puts-out-letter-about-covid-19-and-racism/article\\_d3cca85a-7b4a-11ea-9d4f-43d29a10bb84.html](https://www.columbiainmissourian.com/news/covid19/mu-faculty-council-puts-out-letter-about-covid-19-and-racism/article_d3cca85a-7b4a-11ea-9d4f-43d29a10bb84.html).

36. Zoom Interview with Member, Univ. Mo. Fac. Council on Univ. Pol’y (July 28, 2020).

(2) “The situation might not have looked this way if you had been watching, but this is how it felt to me”; and

(3) “The situation didn’t feel this way to me at the time, but this is how it seems to me now.”<sup>37</sup>

To Farber and Sherry, only “[t]he first standard is the customary test for the truth of a description of events,” “the ordinary understanding of truth.”<sup>38</sup> Practically, other readers might react to stories of discrimination with skepticism and doubt. Professor Chang acknowledged this possibility in his own work:

I usually keep these stories to myself because when I tell them to people, I often hear doubt in their voices and their questions. How do you know it was racism? How do you know that the same thing would not have happened to anyone else? They question the details. . . . As the questions keep coming, I realize that people do not want to believe me. . . . From their perspective, since Asian Americans do not suffer from discrimination, I must be mistaken, deluded, or lying.<sup>39</sup>

If, assuming for purposes of discussion only, that the incidents referenced in the Open Letter did occur and any reasonable person would describe them as “incidents of discomfort or discrimination,” it is also a fair question to ask if they are merely isolated incidents,<sup>40</sup> which returns us to Farber and Sherry’s call for typicality. They explain that, in legal scholarship, “if the story is being used as the basis for recommending policy changes, it should be typical of the experiences of those affected by the policy.”<sup>41</sup> Readers can decide for themselves whether due to the COVID-19 pandemic, racially motivated acts against persons of Asian descent in America are isolated and atypical, or are instead, if not common, at least not uncommon, and of sufficient frequency to require some public action. The major American media outlets have reported a number of such

37. Farber & Sherry, *supra* note 25, at 833.

38. *Id.*

39. Chang, *supra* note 13, at 1274 (footnotes omitted).

40. *See id.* (“[E]ven if they believe my stories, they discount them as isolated incidents.”).

41. Farber & Sherry, *supra* note 25, at 838–39. They continue:

Studies by cognitive psychologists demonstrate that humans tend to overrely on atypical examples. Because individuals assume that dramatic or easily remembered events are typical, they often overestimate the likelihood of such events. Even when they correctly appraise a trait as typical, they overestimate its prevalence, assuming that more members of the group possess the trait than really do. In other words, people frequently engage in what we commonly call stereotyping. Finally, people are too quick to assume the presence of a pattern from a small number of cases.

*Id.* at 839 (footnotes omitted).

incidents of racial bias, including violence, in the several States.<sup>42</sup> In the early months of 2020, there were reports of Asian Americans being stabbed,<sup>43</sup> kicked,<sup>44</sup> punched,<sup>45</sup> spat on,<sup>46</sup> sprayed with an air freshener,<sup>47</sup> verbally assaulted.<sup>48</sup> One person was attacked allegedly for wearing a mask,<sup>49</sup> another, for not wearing one.<sup>50</sup> Importantly, a

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42. *E.g.*, Peter Aitken, *Asian Americans Reported Hundreds of Racist Acts in Last Week, Data Shows*, FOX NEWS (Mar. 27, 2020), <https://www.foxnews.com/us/asian-americans-racist-acts-coronavirus> (“Asian Americans reported more than 650 racist acts over the last week in the wake of coronavirus, according to new data.”); Alex Ellerbeck, *Over 30 Percent of Americans Have Witnessed COVID-19 Bias Against Asians, Poll Says*, NBC NEWS (Apr. 28, 2020), <https://www.nbcnews.com/news/asian-america/over-30-americans-have-witnessed-covid-19-bias-against-asians-n1193901> (“More than 30 percent of Americans have witnessed someone blaming Asian people for the coronavirus pandemic . . . . Sixty percent of Asian Americans, who made up about 6 percent of the survey’s respondents, told [the survey] they’ve seen the same behavior.”); Tiffany Hsu, *Anti-Asian Harassment Is Surging. Can Ads and Hashtags Help?*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/business/media/asian-american-harassment-ad-council.html> (“A coalition of civil rights groups recorded more than 2,100 incidents in 15 weeks . . .”).

43. Danielle Wallace, *Texas Man Accused of Stabbing Asian Family over Coronavirus Could Face FBI Hate Crime Charge*, FOX NEWS (Apr. 2, 2020), <https://www.foxnews.com/us/texas-man-stabbing-asian-family-coronavirus-fbi-hate-crime> (“A man who allegedly tried to kill an Asian family [including a 2- and 6-year-old] inside a Texas supermarket last month to prevent them from spreading the coronavirus could be charged by the FBI for a hate crime, according to reports.”).

44. Ewan Palmer, *New York Police Investigating Two Alleged Coronavirus-Inspired Hate Crimes Occurring on Same Day*, NEWSWEEK (Mar. 13, 2020), <https://www.newsweek.com/coronavirus-new-york-asians-hate-crime-chinese-1492216>.

45. *Id.*

46. Sabrina Tavernise & Richard A. Oppel Jr., *Spit on, Yelled at, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html>.

47. Kashmiri Gander, *Suspected New York Coronavirus Hate Crime Investigated After Man Sprays Air Freshener at Asian Passenger*, NEWSWEEK (Mar. 6, 2020), <https://www.newsweek.com/new-york-coronavirus-hate-crime-asian-passenger-chinese-virus-1490867>.

48. Tavernise & Oppel, *supra* note 46. Asian American health care workers have not been spared. Tracy Jan, *Asian American Doctors and Nurses Are Fighting Racism and the Coronavirus*, WASH. POST (May 19, 2020), <https://www.washingtonpost.com/business/2020/05/19/asian-american-discrimination/>.

49. Ewan Palmer, *Asian Woman Allegedly Attacked in New York Subway Station for Wearing Protective Mask*, NEWSWEEK (Feb. 5, 2020), <https://www.newsweek.com/new-york-subway-attack-coronavirus-woman-mask-1485842>.

50. Jacob Henry & Olivia Bensimon, *Victim of Possible Coronavirus Hate Crime in Queens Speaks Out*, N.Y. POST (Mar. 14, 2020),



*New York Times* report, whose title includes “Chinese-Americans Fear for Their Safety,” also notes that “[o]ther Asian-Americans—with families from Korea, Vietnam, the Philippines, Myanmar and other places—are facing threats, too, lumped together with Chinese-Americans by a bigotry that does not know the difference.”<sup>51</sup> That is, perpetrators are discriminating, but not that discriminating.<sup>52</sup>

A brutally simple syllogism appears to be at work here: The virus that led to a pandemic that caused death, illness, mass unemployment, and profound disruption of everyday life in America and many other countries originated in *China*. Therefore, blame, displeasure, assault, or violence against those stateside who appear Chinese (“enough”) is warranted. That would seem to qualify as nativistic racism, however defined.<sup>53</sup>

It was racism that the Missouri faculty council’s letter sought to address, hence the unambiguous title, “Open Letter Regarding the COVID-19 Pandemic and *Racial* Discrimination.”<sup>54</sup> Thus, the council emphatically urged all to reject “any xenophobia triggered by *racist* descriptions of COVID-19.”<sup>55</sup> In its capacity as “the elected representative organization of the MU Faculty” and “the public face of MU faculty members,”<sup>56</sup> the council took decisive action to issue the letter.

The Open Letter was well-intentioned. Yet I have questions, which relate to lessons and teachings of Asian American jurisprudence. Note the phrasing to identify the persons in the referenced group: “[S]ome members of the *Chinese, Korean, and other Asian communities* on our campus and in our community”; “our *Chinese, Korean or other Asian friends and colleagues*”; “our *Asian friends and colleagues*”; “the *Chinese, Korean, and other Asian friends and colleagues*.”<sup>57</sup> With the chosen phrasing, was the faculty council referring to (1) nationals of countries in Asia who are on campus or in the area as international students or visiting scholars (and their families), whose stay in the university community is temporary,

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<https://nypost.com/2020/03/14/victim-of-possible-coronavirus-hate-crime-in-queens-speaks-out/>; Palmer, *supra* note 44.

51. Tavernise & Oppel, *supra* note 46.

52. Perhaps perpetrators in Asia proper are more discriminating. See *List of Incidents of Xenophobia and Racism Related to the COVID-19 Pandemic*, WIKIPEDIA,

[https://en.wikipedia.org/wiki/List\\_of\\_incidents\\_of\\_xenophobia\\_and\\_racism\\_related\\_to\\_the\\_COVID-19\\_pandemic](https://en.wikipedia.org/wiki/List_of_incidents_of_xenophobia_and_racism_related_to_the_COVID-19_pandemic) (last visited Nov. 16, 2020) (reporting that natives of Wuhan, where the virus originated, were turned away from hotels in China, and establishments in Japan and Korea displayed signs saying, “No Chinese Allowed”).

53. See Chang, *supra* note 13, at 1288–1303 (discussing “formal expressions of nativistic racism” in U.S. immigration, naturalization, and voting rights laws).

54. Open Letter, *supra* note 10 (emphasis added).

55. *Id.* (emphasis added).

56. *About, MU Faculty Council on University Policy*, *supra* note 9.

57. Open Letter, *supra* note 10 (emphasis added).

inclusive of their terms of study; or (2) U.S. nationals—with permanent residence or citizenship—of Asian descent; or (3) both? Although persons in the first two subgroups are both of Asian descent, those in the first might see themselves as transients in America. Those in the second, for whom America is their domicile or permanent home, are persons whom I would approximate as comprising of “Asian Americans.”<sup>58</sup> Given the letter’s later reference to the university’s International Student and Scholar Services office, which is “available to help students and scholars navigate their responses and cope with such incidents,”<sup>59</sup> the focus of the council’s attention seemed to be on the first subgroup above, Asians temporarily in America. My contact on the faculty council confirmed to me that persons who reported the incidents were mostly nationals of China or South Korea.<sup>60</sup> But if this is the case, the letter would inexplicably fail to include Asian Americans.<sup>61</sup> Indeed, the “Asian American” description does not appear at all in the letter, nor “American citizens of Asian descent.” The media reports provide ample examples that regardless of their national origin, immigration status, or time stateside, persons who appear Asian are subject to incidents of bias and violence.<sup>62</sup> Moreover, in a letter whose purported goal was to reject racism, xenophobia, discrimination, and bias, it is puzzling to leave out U.S. nationals who are of Asian descent.

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58. Highlighting the distinction between the two subgroups is the presence at some university campuses of separate organizations for both (i) international students from an Asian country and (ii) American students of that national origin. For example, at The Ohio State University, contrast OSU KISO (Korean Int’l Student Organization / 한인학생회), FACEBOOK, <https://www.facebook.com/groups/osukiso/>, with Korean Student Association at The Ohio State University, FACEBOOK, <https://www.facebook.com/groups/OSUKSA/>.

59. Open Letter, *supra* note 10.

60. Zoom Interview, *supra* note 36. For a few of the persons, my contact did not know of their nationality or immigration status.

61. One wonders if the “Chinese, Korean, and other Asian communities on our campus and in our community” and “Chinese, Korean or other Asian friends and colleagues” phrasing would include the president of the university system and then interim chancellor of the campus, whose curriculum vitae notes his immigration from South Korea, United States citizenship, and top secret security clearance, *Mun Young Choi*, <https://www.umssystem.edu/media/president/mun-choi-curriculum-vitae.pdf> (last visited Nov. 16, 2020), or the campus provost, who one media report describes as “Indian-American,” *Indian-American Appointed Provost at University of Missouri*, NEWS INDIA (July 23, 2018), <https://www.newsindiatimes.com/indian-american-appointed-provost-at-university-of-missouri/>.

62. I would opine that perpetrators whose actions lead to what could accurately be described as “incidents of discomfort and discrimination” do not stop to first confirm distinctions between nationals of countries in Asia who are stateside and U.S. nationals of Asian descent.

The Open Letter reminds of *othering*. *Merriam-Webster* has explicitly raised the question of whether *other* is a verb.<sup>63</sup> The well-known dictionary source notes that although the word has served as an adjective, adverb, noun, and pronoun over the past few centuries, “[i]n recent decades, *other* has increased its part-of-speech portfolio to include verb use, having acquired the meaning ‘to treat or consider (a person or a group of people) as alien to oneself or one’s group (as because of different racial, sexual, or cultural characteristics).”<sup>64</sup> Thus, in mid-Missouri in the spring of 2020, those whose actions led to “the incidents of discomfort and discrimination” were othering, and those who were targeted were othered (or otherized). This is classic othering, when the otherers view the othered as aliens from *other* countries. Arguably, there was another form of othering, when U.S. nationals—permanent residents and citizens—also of Asian descent, some of whom were born stateside (and some in Boone County, Missouri, and lived all their lives there), were omitted.

The Open Letter re-invites a discussion of what it means to be “Asian American.”<sup>65</sup> The term includes persons from twenty different countries, and “[e]ach group has its own national identity with accompanying differences in language, culture, ethnicity, religious beliefs, and socioeconomic conditions. In addition to the vast diversity among Asian groups, there are numerous subgroups within each national group.”<sup>66</sup> There is also a history of tension and conflict between and among some Asian countries,<sup>67</sup> and sometimes within each country.<sup>68</sup> Despite these differences and the complexity of the

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63. *Other*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/other> (navigate to “Is *other* a verb?”) (last visited Nov. 16, 2020).

64. *Id.*

65. See Robert S. Chang, *Passion and the Asian American Legal Scholar*, 3 ASIAN L.J. 105, 107 (1996) (“Do ‘we’ exist only as an ‘imagined community?’”); Torok, *supra* note 18, at 649 (“Defining this category is not simple. But it is perhaps also not impossible. ‘Asian American’ self-definition involves racial, national, and geographic categories, as well as gender, sexual, migration, and class categories.”).

66. K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 31 (1992) (citing Harry H.L. Kitano, *Asian-Americans: The Chinese, Japanese, Koreans, Pilipinos, and Southeast Asians*, 454 ANNALS AM. ACAD. POL. & SOC. SCI. 125, 127, 137 (1981)).

67. See, e.g., Sofia Lotto Persio, *South Korea Angers Japan with “Unacceptable” Military Drills near Disputed Islands*, NEWSWEEK (Dec. 18, 2017, 8:05 AM), <https://www.newsweek.com/south-korea-angers-japan-drills-disputed-islets-761373> (reporting “a history of distrust” between Japan and South Korea).

68. See, e.g., Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (with Japan and the United States in Mind)*, 27 MICH. J. INT’L L. 1, 25–26 (2005) (discussing confrontation between social classes and conflict between the provincial regions, in South Korea).

collective, there appears to be an emergence of a pan-Asian identity among persons of Asian descent.<sup>69</sup>

In the Open Letter, the faculty council took the additional next step of calling on elected officials “to refer to [the disease] by its scientific name” and not “racist descriptions of COVID-19.”<sup>70</sup> This was likely in response to reports of various politicians’ use of “Chinese virus” or “Chinese flu”<sup>71</sup> for COVID-19. Just twelve days after the council issued its letter, the Attorney General of the State of Missouri filed a complaint in the United States district court in St. Louis against the People’s Republic of China and others, alleging that “defendants are responsible for the enormous death, suffering, and economic losses they inflicted on the world, including Missourians.”<sup>72</sup> The complaint avers that Chinese authorities engaged in a “sinister”<sup>73</sup> and “appalling campaign of deceit, concealment, misfeasance, and inaction”<sup>74</sup> that allowed the virus to spread,<sup>75</sup> and then a cover up.<sup>76</sup> The Show Me State was the first to commence such

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69. See Susan Taing, Comment, *Lost in the Shuffle: The Failure of the Pan-Asian Coalition To Advance the Interests of Southeast Asian Americans*, 16 BERKELEY LA RAZA L.J. 23, 31 (2005) (discussing pan-Asian unity, identity, and collective). Another part of the complexity is that of self-identification. As two commentators note,

Do individuals from different Asian groups view themselves as “Asian Americans”? . . . American-born Japanese and Chinese Americans are the most likely to think of themselves as Asian Americans, while recent immigrant groups greet pan-Asian movements with indifference or hostility. Recent Chinese immigrants tend not to see themselves as Asian Americans—or indeed, as Americans at all—but as Chinese.

Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 895 (1995).

70. Open Letter, *supra* note 10.

71. Chief among them was the President. See Barnini Chakraborty, *Trump Doubles Down on ‘China Virus,’ Demands To Know Who in White House Used Phrase ‘Kung Flu,’* FOX NEWS (Mar. 18, 2020), <https://www.foxnews.com/politics/trump-coronavirus-china-virus-white-house-kung-flu> (“President Trump on Wednesday continued to call COVID-19, the ‘China virus,’ and said he doesn’t think labeling the novel coronavirus is racist or puts Asian-Americans at risk.”); Tavernise & Oppel, *supra* note 46 (“Mr. Trump and his Republican allies are intent on calling the coronavirus ‘the Chinese virus,’ . . .”).

72. Complaint at 2, Missouri *ex rel.* Schmitt v. China, No. 1:20-cv-00099 (E.D. Mo. Apr. 21, 2020).

73. *Id.* at 3.

74. *Id.* at 2.

75. *Id.* at 17–18.

76. *Id.* at 18–29.

an action,<sup>77</sup> and perhaps there is substance to some of the charges.<sup>78</sup> Commentators have offered their opinions on whether the action can overcome the sovereign immunity defense.<sup>79</sup> Also of interest is what the Missouri lawsuit might say about local politics and what resonates with the electorate.<sup>80</sup> These appear to be times when anti-Chinese sentiment is high nationwide, such that those seeking re-

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77. Frank Morris, *Missouri Sues China, Communist Party over the Coronavirus Pandemic*, NPR (Apr. 21, 2020, 8:30 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/21/840550059/missouri-sues-china-communist-party-over-the-coronavirus-pandemic>.

78. With respect to the culpability of Chinese officials in the spreading of the pandemic and the global crisis, there appears to be a “more nuanced and complex finding of what Chinese officials did wrong in January [2020].” Edward Wong et al., *Local Officials in China Hid Coronavirus Dangers from Beijing, U.S. Agencies Find*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/08/19/world/asia/virus-china-trump.html>.

According to U.S. intelligence agencies:

Officials in Beijing were kept in the dark for weeks about the potential devastation of the virus by local officials in central China . . . .

. . . .

[A new U.S. intelligence report] does not contradict the Trump administration’s criticism of China, but adds perspective and context to actions – and inactions – that created the global crisis.

. . . .

. . . [The report] still supports the overall notion that Communist Party officials hid important information from the world, U.S. officials said. . . .

*Id.*

79. See John B. Bellinger III, Opinion, *Suing China over the Coronavirus Won’t Help. Here’s What Can Work.*, WASH. POST (Apr. 23, 2020, 7:51 PM), <https://www.washingtonpost.com/opinions/2020/04/23/suing-china-over-coronavirus-wont-help-heres-what-can-work/> (“These suits are likely to be dismissed because foreign governments enjoy immunity from suit in U.S. courts under the Foreign Sovereign Immunities Act.”); Morris, *supra* note 77 (“A sovereign is not supposed to sue a sovereign, and that’s what’s going on here,” says Lea Brilmayer, professor of international law at Yale Law School.”).

80. See Benjamin Fearnow, *Missouri Files Lawsuit Against China over Coronavirus, GOP Lawmakers Lead First State ‘Negligence’ Claims*, NEWSWEEK (Apr. 21, 2020, 4:56 PM), <https://www.newsweek.com/missouri-files-lawsuit-against-china-over-coronavirus-gop-lawmakers-lead-first-state-negligence-1499322> (referring to speculation that “the GOP-led move is an election year stunt”). Appointed as Missouri’s Attorney General to fill a vacancy in 2018, Eric Schmitt won election in his own right on November 3, 2020. Dori Olmos, *Republican Eric Schmitt Wins Missouri Attorney General Race*, KSDK-TV (Nov. 4, 2020, 6:32 AM), <https://www.ksdk.com/article/news/politics/elections/missouri-attorney-general-election-results-2020/63-113bc166-542a-4a59-a4f2-b4608dbff80c>. Schmitt defeated his Democratic opponent by over 20 percentage points, carrying all but four of the state’s 114 counties and one independent city. *2020 Missouri Attorney General Election Results*, SPRINGFIELD NEWS-LEADER (Nov. 7, 2020), <https://www.news-leader.com/elections/results/race/2020-11-03-other-MO-26798/>.

election in closely contested elections are employing an “attack China” message.<sup>81</sup>

Senator Josh Hawley of Missouri has argued that this message has “long resonated with voters at home.” He stated, “The typical, ordinary, normal everyday voter in my state at least, in Missouri—if you ask them what they think about China, they’d say they think they’re a threat, they’re an opponent. Working voters have been concerned for years about China cheating on trade, taking their jobs, and the military threat.”<sup>82</sup> I must hasten to add that I am not qualified to assess the merits of the criticisms against China for its actions in contemporary geopolitics. Rather, my question for the moment is whether policymakers should take into account the impact that anti-China rhetoric might have on the approximately 2.4 percent of the population of my home state, that is, Missourians of Asian descent.<sup>83</sup>

In all events, Senator Hawley’s reference to the view that China is cheating on trade and taking Missourians’ jobs should be a chilling reminder of the infamous case of Vincent Chin. A Chinese American, Chin was beaten to death with a baseball bat by two Detroit autoworkers, one of whom apparently believed that Chin was Japanese and was quoted as saying, “[I]t’s because of you little mother fuckers that we’re out of work.”<sup>84</sup> As one commentator noted,

Even if one presumes that [defendants Ronald Ebens and his stepson Michael Nitz’s] unemployment was caused by unjust trade practices of the Japanese government, when Ebens and Nitz brained Vincent Chin, they transferred blame not only from the Japanese government to the Japanese people, not only from the Japanese people to United States citizens of Japanese

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81. See Catie Edmonson, *Faced with Crisis and Re-election, Senate Republicans Blame China*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/06/13/us/politics/faced-with-crisis-and-re-election-senate-republicans-blame-china.html> (“Fighting for their political lives amid twin domestic crises—a pandemic that has battered the economy—vulnerable Republican senators running for re-election are working to divert voters’ gazes half a world away and make their races a referendum on China.”).

82. *Id.*

83. According to census estimates, persons identified as “Asian alone” comprise 2.2 percent of Missouri’s population, and “Native Hawaiian and Other Pacific Islander alone” comprise 0.2 percent. *Missouri*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/MO/PST045219> (last visited Nov. 16, 2020). If indeed the anti-Chinese message resonates with people in Missouri, then Missourians of Asian descent are on notice. The “incidents of discomfort and discrimination” that occurred in mid-Missouri fueled by COVID-19 may be only the beginning. In the years to come, continuing tension with China, or open conflict with North Korea, would make some Missourians more vulnerable to anti-Asian American actions.

84. *United States v. Ebens*, 800 F.2d 1422, 1427 (6th Cir. 1986).

descent, but finally from Japanese Americans to anyone *unlucky enough to bear Asian features*.<sup>85</sup>

As discussed above, the personal narrative is an element of Asian American Legal Scholarship, as well as other fields, albeit with some controversy. Perhaps I would be remiss in not offering some of my own personal experiences. I will share one.

For the first two and a half years of my life in the States, I lived in Iowa, when my father was a graduate student. Beginning from the spring of my third-grade year, to the end of fifth grade, after which I moved to the East Coast, I attended elementary school in the Hawkeye State. I remain in touch with a few of my Iowa classmates, my first friends in a new country, some fifty years later. One—incidentally, the only Black student in my elementary school classes in Iowa—related to me a conversation that he had had with one of our other classmates when they reached the eighth or ninth grade. In my friend’s conversation with John (not his real name), my friend mentioned that he was still in touch with me. John responded, “He was one of them rich Japs.”<sup>86</sup>

First, is the story, as I relate it, true? Per Farber and Sherry, would a disinterested third party have seen and heard what I have described had she been present?<sup>87</sup> That seems simple enough, as there is a binary character to my narrative. Either my friend told me what he told me with the quoted words, or he did not. Next, I acknowledge that my story sounds of hearsay, in that I am relating “something heard from another.”<sup>88</sup> More accurately, it is hearsay within hearsay,<sup>89</sup> because I am offering *that* my friend told me *what* John told him. For purposes of discussion, even if this Essay were considered a form of a “trial or hearing” under the formal rules of evidence,<sup>90</sup> I would argue that John’s statement to my friend is not hearsay, because although the declarant (John) is not making the statement here, it is not being offered “in evidence to prove the truth of the matter asserted in the statement,”<sup>91</sup> to wit, that I was a wealthy person of Japanese descent. Rather, as seen herein, I urge that the matter asserted was false. But that is not the end of the hearsay analysis, because the assertion from my friend that John said what he said *is* hearsay. To evidence experts, I ask if one of the exceptions

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85. Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1928 (1993) (emphasis added).

86. Over the years, my friend and I have discussed this story a few times. Most recently, I asked him to confirm the details.

87. See Farber & Sherry, *supra* note 25, at 833 (“(1) If you had been watching, this is what you would have seen . . . . The first standard is the customary test for the truth of a description of events.”).

88. *Hearsay*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (2002).

89. FED. R. EVID. 805.

90. *Id.* 801(c)(1).

91. *Id.* 801.

to the rule against hearsay<sup>92</sup> or the residual exception<sup>93</sup> might apply. To everyone, I ask for a little leeway.

My parents' tax returns from those two years of my life when John and I were classmates would confirm that my family was far from wealthy. During that time, my family lived in the temporary barracks that my father's university built after World War II, for married student housing.<sup>94</sup> Although both of my parents were graduates of the top university in South Korea<sup>95</sup> and began careers as elementary school teachers there, my father was the first in his family to attend college, and my mother worked minimum wage jobs in Iowa to support the family, before re-directing to a new professional career in computer programming. With respect to my national origin, John apparently did not know of my father's bitterly resentful recollections of growing up under Japanese colonial rule, a period of "forced assimilation," in which Koreans were to be made Japanese.<sup>96</sup>

Then why offer in this record a *false* statement, by an *adolescent*, from the *previous* millennium. Here, could I be accused of resorting to storytelling merely and unnecessarily for emotive appeal<sup>97</sup> or gratuitous "victim talk"?<sup>98</sup> I would argue that there is much in John's terse statement, the elements of which are seen in Asian American Legal Scholarship. Perhaps my classmate from that Iowa school many years ago saw me as a foreigner from Asia, specifically a Japanese person, or perhaps he described everyone of Asian descent that way ("them . . . Japs"). Perhaps he believed that persons of Asian descent stateside are all well-to-do ("rich"). Over the years, scholars in the field have elaborated on my classmate's simple statement and

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92. *Id.* 803.

93. *Id.* 807.

94. See David McCartney, *Temporary Housing: Not Much, But It's Home*, SPECTATOR (Jan. 2010), <https://spectator.uiowa.edu/2010/january/oldgold.html>.

95. Richard Halloran, *Seoul Students Clash with Police As Anti-Park Protests Mount*, N.Y. TIMES (Nov. 16, 1973), <https://www.nytimes.com/1973/11/16/archives/seoul-students-clash-with-police-as-antipark-protests-mount-classes.html>.

96. CARTER J. ECKERT ET AL., *KOREA OLD AND NEW: A HISTORY* 317 (1990); see ANDREW C. NAHM, *INTRODUCTION TO KOREAN HISTORY AND CULTURE* 177-78 (1993) (stating that during the Japanese occupation, Koreans were "put under a harsh, military rule" and "humiliated and mistreated"). Professor Chon related a part of her father's recollections of the experience:

[M]y father told me how his mother had been tortured by the equivalent of intelligence agents in Japan-occupied Korea in the early 1930's. My grandfather had been hiding from the Japanese authorities. One night, my father woke up to find his mother gone and a Japanese soldier looking down at him.

Chon, *supra* note 23, at 26 n.122.

97. Farber & Sherry, *supra* note 25, at 849 ("[T]he emotive force of the stories is seen as [the storytellers'] primary appeal. In our view, however, emotive appeal is not enough to qualify as good scholarship.")

98. Minow, *supra* note 28, at 1413.



emphasized the societal perception of Asian Americans as perpetual foreigners,<sup>99</sup> regardless of their citizenship, place of birth, or length of years stateside, who are othered<sup>100</sup> and will always be viewed, not as Americans, but as Asian Americans,<sup>101</sup> and who, as members of the “model minority,” do not suffer from discrimination.<sup>102</sup>

In 1993, the same year of Professor Chang’s landmark work, Professor Jerry Kang’s student note also examined racial violence against Asian Americans, and asserted that such violence “is not only brutalizing Asian American individuals, but also casting terroristic fear over their communities.”<sup>103</sup> Twenty-seven years later, the COVID-19 pandemic has shown that microaggressions to slights to verbal assaults to physical violence against this demographic of the U.S. population continue. Thus, Chang’s hope that Asian American Legal Scholarship would “speak our oppression into and out of existence”<sup>104</sup> has not yet been realized, in a country that is still struggling to resolve the most intractable problem of race.<sup>105</sup>

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99. *E.g.*, FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 79 (2002) (“[E]veryone with an Asian face who lives in America is afflicted by the perpetual foreigner syndrome.”); see Neil Gotanda, *Asian American Rights and the “Miss Saigon Syndrome,”* in *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* 1087, 1096 (Hyung-Chan Kim ed., 1992) (“[T]here is the . . . presumption that [Asian Americans] are foreigners; or, if they are U.S. citizens, then their racial identity includes a foreign component.”).

100. *E.g.*, Terri Yuh-lin Chen, Comment, *Hate Violence As Border Patrol: An Asian American Theory of Hate Violence*, 7 *ASIAN L.J.* 69, 82 (2000); Kelsey Inouye, Note, *Asian Americans: Identity and the Stance on Affirmative Action*, 23 *ASIAN AM. L.J.* 145, 165 (2016).

101. *E.g.*, Chang, *supra* note 13, at 1318 n.403 (“I know that my future children, and their children, will never be Americans. They will always be Asian Americans.”); Kevin Shawn Hsu, Note, *Empowerment, Discrimination, and the Façade of Leadership: Asian American Political Elites’ Failed Assimilationist Strategy*, 14 *ASIAN AM. L.J.* 85, 105 (2007) (referring to “the societal belief that Asian Americans are culturally alien and will never be ‘real Americans’”); see Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 *MICH. L. REV.* 1595, 1625 (2005) (reviewing MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004)) (discussing the suggestion that “Asian Americans, as defined as antithetical to American citizenship, can never be fully assimilated into the American nation”).

102. *E.g.*, Chang, *supra* note 13, at 1259 & n.78, 1275; Pat K. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 *WM. & MARY L. REV.* 1, 24, 55 (1994); Miranda Oshige McGowan & James Lindgren, *Testing the “Model Minority Myth,”* 100 *NW. U.L. REV.* 331, 359–60 (2006); Note, *supra* note 85, at 1931.

103. Note, *supra* note 85, at 1943.

104. Chang, *supra* note 13, at 1312.

105. See Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 *YALE L.J.* 923, 923 (1988) (reviewing DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987)) (describing race as America’s “oldest and most intractable problem”).

The work of Asian American Legal Scholarship must continue. Chiefly, if it is true that anti-Asian harassment is “surging” nationwide but with “little action from the federal government,”<sup>106</sup> then what policy or institutional changes could be implemented to address racial discrimination against Asian Americans?<sup>107</sup> Some scholars may choose to further explore the interplay between electoral politics, Asia-related measures, and their impact on Asian Americans.<sup>108</sup> The sudden increase in sales of firearms to Asian Americans<sup>109</sup> invites an ethnographic study on the support of the Second Amendment by this growing group of gun owners. Building on the previous commentary regarding Asian Americans’ place in the traditional Black-White approach to race,<sup>110</sup> the time is ripe for a fresh look at the question of what role Asian Americans play in the Black Lives Matter movement. Fully aware that others may disagree, I believe personal experiences, narratives, and stories (and open

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106. Hsu, *supra* note 42.

107. In the spring of 2020, both houses of Congress introduced a resolution “[c]ondemning all forms of anti-Asian sentiment as related to COVID-19.” S. Res. 580, 116th Cong. (2020); H.R. Res. 908, 116th Cong. (2020). As of this writing, the Senate resolution is pending in its Committee on the Judiciary. S. Res. 580, <https://www.congress.gov/bill/116th-congress/senate-resolution/580>. The House passed its resolution by a vote of 243 Yeas, 164 Nays, 1 Present, and 23 Not Voting. H.R. Res. 908, <https://clerk.house.gov/Votes/2020193>. The approved House resolution:

(1) calls on all public officials to condemn and denounce any and all anti-Asian sentiment in any form;

....

(3) condemns all manifestations of expressions of racism, xenophobia, discrimination, anti-Asian sentiment, scapegoating, and ethnic or religious intolerance;

(4) calls on Federal law enforcement officials, working with State and local officials –

(A) to expeditiously investigate and document all credible reports of hate crimes and incidents and threats against the Asian-American community in the United States;

....

(C) to hold the perpetrators of those crimes, incidents, or threats accountable and bring such perpetrators to justice . . . .

H.R. Res. 908, <https://www.congress.gov/116/bills/hres908/BILLS-116hres908eh.pdf>. The Senate version of the resolution is virtually identical to that of the House. S. Res. 580, <https://www.congress.gov/116/bills/sres580/BILLS-116sres580is.pdf>.

108. See *supra* text accompanying notes 72–83.

109. See Tavernise & Oppel, *supra* note 46.

110. See, e.g., Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 HASTINGS WOMEN’S L.J. 165, 170–71 (1995); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 229 (1995); Janine Young Kim, Note, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2385–86 (1999).

letters too) are relevant in this scholarship, toward an understanding of the tenets of Asian American jurisprudence.

After some twenty years in academia, I have settled into my principal fields of (i) dispute resolution, with a special interest in the impact of culture on the dispute resolution process and (ii) law and society in East Asia, with a focus on Korea. It is my license to note that the field of Asian American jurisprudence lies smartly in between. Within the boundaries of the East Asia discipline is the subject of the societal diaspora. Relocation stateside has given rise to legal issues affecting Asian immigrants, for the first and subsequent generations, resulting in disputes and opportunities for settlement. Culture is the common denominator in all three fields. For Asian American jurisprudence, culture appears on both sides of the U.S. dynamic. On one is the societal and legal culture that allows for, among others, the exclusion of immigrants from a particular country;<sup>111</sup> the internment of American citizens based on their national ancestry,<sup>112</sup> while drafting some of them for U.S. military service;<sup>113</sup> the Vincent Chin case, whose defendants did not serve time as part of their sentence.<sup>114</sup> On the other is an emerging culture of a demographic group comprising approximately 6 percent of the national population,<sup>115</sup> which includes persons of diverse national

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111. See Chang, *supra* note 13, at 1296–98 (discussing the Chinese Exclusion Acts); Recent Case, Chae Chan Ping v. United States, 130 U.S. 581 (1889), 3 HARV. L. REV. 136, 136 (1889) (discussing the Supreme Court’s decision upholding the constitutionality of the Exclusion Act of 1888); see also Recent Case, United States v. Ju Toy, 198 U.S. 253 (1905), 19 HARV. L. REV. 60, 60-61 (1905) (discussing the Court’s holding in *Ju Toy* that under the Chinese Exclusion Act of 1894, as amended, the executive branch’s decision denying admission to “a Chinaman who alleged that he was a native-born citizen of the United States returning after a temporary absence” was not reviewable by the federal courts).

112. See, e.g., ERIC L. MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II (2007).

113. See, e.g., ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II (2001).

114. Both defendants, Ebens and Nitz, pled guilty to manslaughter, and the trial judge sentenced each to three years’ probation, a \$3,000 fine, and court costs. The Asian American community expressed outrage. Federal charges were brought against the two. Nitz was acquitted; Ebens was convicted and sentenced to twenty-five years in prison. See Denny Chin & Kathy Hirata Chin, *Asian Americans and the Law*, 11 JUD. NOTICE 6, 18 (2016). On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed and remanded. *United States v. Ebens*, 800 F.2d 1422, 1442 (6th Cir. 1986). The case was moved from Detroit to Cincinnati for retrial. “In voir dire, the vast majority of the prospective jurors answered that they had never met an Asian American person. This time, Ebens was acquitted, as the jury was not persuaded that race was a motivating factor.” Chin & Chin, *supra*, at 18.

115. See *United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Nov. 16, 2020) (indicating population estimates of persons identified as “Asian alone”

origins, seeking acceptance by the mainstream. I readily concede that the notion of an “Asian American culture”—somewhat diffusive, amorphous—is contested.<sup>116</sup> Yet somewhere between Eric Liu’s description of Asian American culture as “anything that Asian Americans are doing”<sup>117</sup> and his wry observation that “[w]hat’s missing from Asian American culture is culture”<sup>118</sup> lies the foundations for the work of a continuing Asian American Legal Scholarship. At a minimum, this scholarship must continue to *join the issue*, of the comparative presence and role of Asian Americans, under law.

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at 5.9 percent of the U.S. total population, and “Native Hawaiian and Other Pacific Islander alone” at 0.2 percent).

116. Neil Gotanda, *Chen the Chosen: Reflections on Unloving*, 81 IOWA L. REV. 1585, 1592 (1996) (stating that “Asian American culture may defy definition”); Hsu, *supra* note 101, at 94 (stating that the Asian American community in the late 1960s to the early 1980s “lacked the racial and ethnic cohesion of a homogenous ‘Asian American culture’ necessary to successfully execute a cultural nationalist project”).

117. ERIC LIU, *THE ACCIDENTAL ASIAN: NOTES OF A NATIVE SPEAKER* 79 (1998) (quoting an unnamed Asian American activist).

118. *Id.*