

Burning Shoes and the Spirit World: The Charade of Neutrality

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I. INTRODUCTION

Our contemporary discussions of discrimination are distorted by the common tendency to frame claims of inequality as attempts at special pleading rather than as demands for equal treatment.¹ This Article uses a case study, the criminal prosecution of a student of Chinese origin at a leading American university, and an allusion to the Jena Six controversy, to show how easy it is to misunderstand claims of this type—even sympathetically. These claims can and should be reframed. Once that has been accomplished, it becomes apparent that many conflicts arise not from novel assertions of multiculturalism, but from more conventional arguments in favor of similar treatment for those similarly situated. These problems are more amenable to resolution if the competing arguments are characterized more accurately, and even if they continue to be difficult, it is worthwhile for all of us to comprehend them clearly. They are not about difference but about sameness.

This Article is descriptive in a manner that is also prescriptive. A better picture of the world as it is will enable us to create the world as it should be. The case that is used is illustrative, and it is useful in that it is inconsequential. The crime was *malum prohibitum* rather than *malum in se*.² It was at worst the transgression of a practical regulation without great moral stakes;

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¹ See, e.g., SHELBY STEELE, *WHITE GUILT: HOW BLACKS AND WHITES TOGETHER DESTROYED THE PROMISE OF THE CIVIL RIGHTS ERA* (2006); PETER COLLIER & DAVID HOROWITZ, *THE RACE CARD: WHITE GUILT, BLACK RESENTMENT, AND THE ASSAULT ON TRUTH AND JUSTICE* (1997). For responses, see EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2006); MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2005); and THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* (2005). Walter Benn Michaels has offered a perceptive analysis. See WALTER BENN MICHAELS, *THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY* (2006).

² *Malum prohibitum* refers to “[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.” *BLACK’S LAW DICTIONARY* 978-79 (8th ed. 2004). *Malum in se* refers to “[a] crime or an act that is inherently immoral, such as murder, arson, or rape.” *Id.* at 978.

thus, the conversation may proceed without implicating fundamental principles. In early 2008 at the University of Michigan, Peng Song, an undergraduate student of Chinese heritage, was apprehended for setting a fire in the public space of a dormitory building. Song did not deny the offense; rather, he apologized for the commotion.³

Song explained that he had performed the deed in honor of his recently deceased grandfather, who had raised him.⁴ In keeping with Chinese funerary customs, he had burnt an offering. His parents had advised him that his late grandfather needed shoes in the afterlife. Thus inspired, he had made a pair of symbolic shoes from cardboard that would be delivered through the ritual.⁵ After trying to start the fire outside, where the blustery conditions thwarted his efforts, Song retreated indoors to a space he reckoned to be safe.⁶ The fire triggered an alarm and an evacuation of the building, but there were no physical injuries to any persons and no damage to any property.⁷ These basic facts are not disputed.⁸

Despite the goodwill of the police officer who initially came to the scene—one of four who ultimately responded⁹—and the reputation of the institution for promoting diversity,¹⁰ the Ann Arbor prosecutor pressed charges.¹¹ Song was indicted for violation of a misdemeanor civil infraction—namely, violating a University of Michigan Regental Ordinance prohibiting “set[ting] fire upon University property or University buildings except in approved stoves and grills or as otherwise permitted by University officials by a prior writing.”¹² Although there was an internal procedure for seeking approval of fires in advance,¹³ Song did not avail himself of this procedure. His omission is of little importance, since other students simi-

³ Telephone interview with Peng Song (Sept. 19, 2008) (on file with author) [hereinafter “Song interview”]. See also University of Michigan General Incident Report from Joseph Anderson (Jan. 20, 2008) (on file with author); Narrative/Supplement Report from Joseph Anderson (Jan. 20, 2008) (on file with author).

⁴ Song interview, *supra* note 3.

⁵ *Id.*; General Incident Report, *supra* note 3; Narrative/Supplement Report, *supra* note 3, at 1.

⁶ Song interview, *supra* note 3.

⁷ See Laura Berman, *Honor, Families, and a Rigid U.S. Judicial System*, DETROIT NEWS, Sept. 11, 2008, at B1.

⁸ General Incident Report, *supra* note 3; Narrative/Supplement Report, *supra* note 3 (not disputing these basic facts).

⁹ General Incident Report, *supra* note 3; Narrative/Supplement Report, *supra* note 3.

¹⁰ In litigation defending affirmative action, the University of Michigan presented an aggressive, empirical case for the importance of diversity in higher education. It succeeded in establishing that diversity could be a “compelling state interest.” See *Grutter v. Bollinger*, 539 U.S. 306, 307 (2002); *Gratz v. Bollinger*, 539 U.S. 244, 246 (2002); see also PATRICIA GURIN ET AL., *DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN* (2004).

¹¹ Complaint, *People v. Song*, No. 08-0286 (Mich. Dist. Ct. filed Mar. 27, 2008).

¹² BD. OF REGENTS, UNIV. OF MICH., REGENTS’ ORDINANCE art. XII, § 1(6) (2001), available at <http://www.regents.umich.edu/ordinance.html>.

¹³ *Id.*

larly failed to obtain approval in comparable cases described later in this Article.

The episode would have been nothing, but for the prosecutor's decision to use his ample discretion to pursue the case.¹⁴ The defendant had no advance interest in becoming the champion of a cause, but the case subsequently attracted mainstream media coverage.¹⁵

II. TWO MODELS OF EQUALITY: ASSIMILATION AND MULTICULTURALISM

The Peng Song case shows the failure of public discourse about diversity. Rather than being used as an opportunity to educate both Song and the community, it became an adversarial proceeding that advanced no meaningful societal goal. Public discourse about diversity, whether related to race, religion, culture, or other characteristics, often takes an identifiable adversarial form regardless of the merits: an aggrieved party brings an allegation of unfairness, which the accused party meets in turn with a denial supplemented by counter-allegations of hypersensitivity, political correctness, "playing the race card," and so on.¹⁶ The discussion degenerates into each side attaching conclusory labels to the other side, attacking their adversary for their intentions, decency, good faith, and overall character. It is an endeavor that is as all around futile as it is frustrating.

These struggles are set against a background, sometimes dubbed the sameness/difference debate, consisting of two schools of thought on equality: assimilation and multiculturalism.¹⁷ They are assumed to be mutually exclusive, both claiming to impart meaning to the Fourteenth Amendment guarantee of "the equal protection of the laws."¹⁸ In many actual disputes, these interpretations are more compatible than might be supposed. Their combination may better advance a progressive vision.

¹⁴ The ethical norms governing the bar prohibit discriminatory "bias or prejudice" on the part of attorneys only when the conduct is "knowing." See MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3; see also STANDARDS FOR CRIMINAL JUSTICE § 3-3.9 (1993) (discussing "Discretion in the Charging Decision").

¹⁵ Berman, *supra* note 7; see also Taryn Hartman, *Beyond Black and White: Former WSU Dean's Book Explores Asian American Racial Tensions and Stereotypes*, DETROIT LEGAL NEWS, Oct. 7, 2008, at 1.

¹⁶ Richard Thompson Ford has been a thoughtful critic of the means by which claims about racial prejudice may reinforce racial stereotypes. See, e.g., RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* (2008); RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* (2004). For additional analysis, see TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* (2001); LINDA WILLIAMS, *PLAYING THE RACE CARD: MELODRAMAS OF BLACK AND WHITE FROM UNCLE TOM TO O.J. SIMPSON* (2002).

¹⁷ An influential book by Martha Minow provides a comprehensive overview of the tension between these models. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1991). For additional examination of this subject, see *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES* (Richard A. Shweder et al., eds., 2004).

¹⁸ U.S. CONST. amend. XIV, § 1.

The first school of thought is based on assimilation.¹⁹ It has become the dominant model in jurisprudence. Its central proposition is that, subject to practical constraints, individuals who are the same in relevant respects should be held in the same regard, at a minimum by the government and other entities acting while clothed with official authority. Professors Jacobus tenBroek and Joseph Tussman introduced this logical analysis with an influential article on the Supreme Court internment cases.²⁰ They argued that a majority of the Justices made a mistake by approving of the wholesale incarceration of approximately 125,000 individuals during World War II, two-thirds of them United States citizens, without any due process—much less findings of guilt—because their Japanese ancestry was perceived to make them more predisposed to commit treason against their homeland, the United States.²¹ The Justices were wrong because, simply, they depicted these persons as different from other citizens even though they were the same as other citizens. The citizens of Japanese ancestry were indistinguishable from citizens of other lineage, except by virtue of that blood. Such a basis for classifying a group was susceptible to several problems: it is prone to irrational prejudice; it may be demonstrably false as to the aggregate even if plausible; and it may be false as to the individual even if it is true on average. The error with respect to the Japanese foreign nationals, who were barred from naturalization on the ground they were not “free white persons,”²² was to treat them differently than German and Italian foreign nationals (a relatively low number of whom were incarcerated).²³

Hence the lead opinion in *Korematsu*,²⁴ by extrapolating from generalizations about race or ethnicity to behavior or potential conduct, erred by being both over-inclusive and under-inclusive. It was over-inclusive by condemning many Japanese Americans concededly loyal to the United States. It was under-inclusive by failing to capture many non-Japanese Americans who genuinely posed a threat to the United States. Race and ethnicity were deployed as proxies for behavior and conduct, and the nexus was illusory. TenBroek and Tussman’s style of reasoning was as elegant as a geometric

¹⁹ The classic work on the subject is MILTON M. GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS* (1964). A more recent argument that assimilation is compulsory is presented in PETER D. SALINS, *ASSIMILATION, AMERICAN STYLE* (1997).

²⁰ Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

²¹ *Id.* at 356 (citing *Korematsu v. United States*, 323 U.S. 214 (1944)).

²² See *Ozawa v. United States*, 260 U.S. 178, 195 (1922); see also *United States v. Thind*, 261 U.S. 204, 214 (1923). An important analysis of these racial prerequisite cases is IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 49-78 (1997).

²³ See STEPHEN R. FOX, *UNCIVIL LIBERTIES: ITALIAN AMERICANS UNDER SIEGE DURING WORLD WAR II* 58-59 (2000). See generally STEPHEN R. FOX, *THE UNKNOWN INTERNMENT: AN ORAL HISTORY OF THE RELOCATION OF ITALIAN AMERICANS DURING WORLD WAR II* (1990). But see JEFFREY L. SAMMONS, *Were German Americans Interned During World War II? A Question Concerning Scholarly Standards and Integrity*, 71 GERMAN Q. 73, 73-77 (1998) (questioning data on German American internments).

²⁴ *Korematsu*, 323 U.S. at 214.

proof, and given that it was an abstract attack on the use of discriminatory classificatory schemes, it could be extended with minor modification to virtually all implementations of discrimination, as they are perforce dependent on some sort of a classificatory scheme as a foundation.²⁵

Although tenBroek and Tussman were arguing against the Supreme Court's three split opinions upholding official government policies,²⁶ they may be said to have triumphed ultimately. The three branches of the federal government have since spoken in unison: the Supreme Court has disapproved of its prior outcome in terms that are as explicit as possible without technically overruling the decisions,²⁷ Congress has enacted legislation to distribute monetary redress to those affected,²⁸ and Presidents of both political parties have apologized for the incarceration.²⁹ Public opinion by and large has settled against the precedent.³⁰

There are, undoubtedly, ongoing disagreements about what constitutes sameness or similarity of status, and, correspondingly, what constitutes sameness or similarity of policy. They play out, however, within the basic framework of "strict scrutiny" judicial review without threatening it.³¹ The consensus position within race jurisprudence is the theory of color-blindness.³²

The second school of thought is based on multiculturalism.³³ It is increasingly influential in academic discourse despite its marked lack of success in changing legal formalism.³⁴ Its central proposition is that, insofar as they do not infringe upon others, communities ought to be tolerated, perhaps respected, possibly even encouraged, for their meaningful differences from what the majority may take for granted as natural, proper, and the default. One might worry that this pluralism is merely a response to assimilation,

²⁵ Tussman & tenBroek, *supra* note 20, at 367.

²⁶ They were, in chronological order: *Hirabayashi v. United States*, 320 U.S. 81 (1943), *Yasui v. United States*, 320 U.S. 115 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944). In a fourth case, however, the Supreme Court appeared to indicate the incarceration of individuals innocent of wrongdoing in the internment camps was, and had always been, without constitutional authorization. *See Ex parte Endo*, 323 U.S. 283 (1944).

²⁷ *Adarand Constructors v. Peña*, 515 U.S. 200, 213-16, 236 (1995).

²⁸ 50 U.S.C. § 1989 (2000).

²⁹ Proclamation No. 4417, 41 Fed. Reg. 35 (1976).

³⁰ U.S. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* (1997).

³¹ For the continuing significance of "strict scrutiny," see *Adarand Constructors*, 515 U.S. at 202. *See also* *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-12, 18-20 (1972).

³² For a comprehensive critique of the "color blind" argument, see Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 2-7 (1991).

³³ *See* KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

³⁴ *See, e.g.*, WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1996); RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* (2008); CHARLES TAYLOR, *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (1994).

whether coercive or voluntary, but its history belies the notion that it is reactionary or defensive. Some of its content, it is true, derives from the critique of assimilation, including the skeptical observation that assimilation is inescapably oriented toward a model, and that model is patently culturally specific even though it is presented in sincerity as a universal ideal.³⁵ It requires a certain privilege to confuse the culturally specific for the universal ideal—to everyone else the oversight is plain.

Alongside the calls for assimilation, embraced by public and corporate Americanization and “melting pot” programs in the early twentieth century, there were exhortations no less enthusiastic, and in some sense more visceral, for preservation of discrete traditions for their own sake, because they were rich, sustaining, and unique.³⁶ Many writers, such as Horace Kallen, were concerned with responding to anti-Semitism and ensuring Judaism would be able to flourish without being overwhelmed by its surroundings.³⁷ Other advocates who espoused the same philosophy over time have included black nationalists, neo-Confederate partisans, and white ethnic Catholics,³⁸ usually without acknowledging the parallels among their perspectives.

Beyond race, religion, and culture, the dichotomy between these schools of thought emerges in feminism;³⁹ the lesbian, gay, bisexual, transgender (LGBT) rights movement;⁴⁰ and the disability rights movement.⁴¹ In its other guises, it is the argument between the conviction that women can become identical to men, and the resistance to the dictate that they resemble men,⁴² or the aspiration for same-sex couples to mimic male-female couples, and the celebration of a “queer” sensibility.⁴³ It is embodied by the disabled

³⁵ For discussions of the coercive aspects of assimilation, see generally YOSHINO, *supra* note 33. See also BARRY RUBIN, *ASSIMILATION AND ITS DISCONTENTS* (1995) (discussing Jewish assimilation); BEVERLY DANIEL TATUM, *ASSIMILATION BLUES: BLACK FAMILIES IN WHITE COMMUNITIES: WHO SUCCEEDS AND WHY* (2000) (discussing African American assimilation).

³⁶ See HORACE M. KALLEN, *CULTURE AND DEMOCRACY IN THE UNITED STATES: STUDIES IN THE GROUP PSYCHOLOGY OF THE AMERICAN PEOPLE* 67 (1924); RANDOLPH BOURNE, *THE RADICAL WILL: SELECTED WRITINGS, 1911-1918* at 11 (1977).

³⁷ See SARAH SCHMIDT, HORACE M. KALLEN: *PROPHET OF AMERICAN ZIONISM* xii (1995).

³⁸ See generally DAVID GOLDFIELD, *STILL FIGHTING THE CIVIL WAR: THE AMERICAN SOUTH AND SOUTHERN HISTORY* (2002) (discussing neo-Confederates); WILSON MOSES, *CLASSICAL BLACK NATIONALISM: FROM THE AMERICAN REVOLUTION TO MARCUS GARVEY* (1996) (discussing black nationalists); MICHAEL NOVAK, *UNMELTABLE ETHNICITY: POLITICS AND CULTURE IN AMERICAN LIFE* (2d ed. 1995) (discussing ethnic consciousness); DEAN E. ROBINSON, *BLACK NATIONALISM IN AMERICAN POLITICS AND THOUGHT* (2001) (discussing black nationalists); WILLIAM VAN DEBURG, *MODERN BLACK NATIONALISM: FROM MARCUS GARVEY TO LOUIS FARRAKHAN* (1996) (discussing black nationalists).

³⁹ See generally, CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1993); CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

⁴⁰ See generally, Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in *LESBIANS, GAY MEN, AND THE LAW* 401 (William B. Rubenstein ed., 1993).

⁴¹ See generally, Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 *ALA. L. REV.* 997 (2004); Michael Ashley Stein, *Disability Human Rights*, 95 *CAL. L. REV.* 75 (2007).

⁴² See SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* (1999).

⁴³ Compare ANDREW SULLIVAN, *VIRTUALLY NORMAL* (1996) (arguing for gay rights using an assimilationist model), with MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLIT-*

person who constantly strives to overcome her condition, versus the individual who insists she must be taken as is.⁴⁴ The multiculturalist position has been explicated repeatedly and persuasively, gaining respectability in popular culture and academic writing.⁴⁵ Still, this position has been rejected as a basis for legal doctrine more than it has been accepted, and is often dismissed as the so-called “cultural defense” which simply attempts to excuse criminal behavior on the basis of cultural difference.⁴⁶

The assimilationist versus multiculturalist dialogue is often cast as a dilemma for liberals who must choose between respecting the group and respecting the individual.⁴⁷ Honoring the group means acquiescing to the mistreatment of a member of the group; protecting that individual entails denigrating the group. The example that is frequently used is that of immigrant communities and domestic violence, where the male aggressor invokes an ostensibly traditional understanding of gender roles.

This problem is not what it appears to be. It is a false dilemma. The distinctions between assimilation and multiculturalism might become important in rare circumstances, but it facilitates our discussions to discern their illusory quality as applied in most contexts. The assimilationist model is thin; it has logical rigor. The multiculturalist model is thick; it has emotional appeal.⁴⁸

III. DEFINING EQUALITY FOR PENG SONG

The case of Peng Song is ideal for this exercise. Throughout, Song’s story was portrayed as demonstrating disrespect for difference.⁴⁹ Indeed, the very elements that made Song sympathetic made him stereotypic as well: he was definitely foreign and vaguely exotic, evidently beholden to ancestor-

ICS, AND THE ETHICS OF QUEER LIFE viii (1999) (arguing for gay rights using a “queer” model).

⁴⁴ Compare BONNIE TUCKER, *FEEL OF SILENCE* (1995) (memoir of deaf woman who assimilated), with JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* (2000) (disability advocate’s argument for a civil rights model, rather than a medical model, for understanding disability) and JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1994) (same).

⁴⁵ See, e.g., KYMLICKA, *supra* note 34; TAYLOR, *supra* note 34.

⁴⁶ See Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1321 (2006). Leti Volpp and Doriane Lambelet Coleman have also debated whether cultural evidence should be barred or solicited in criminal proceedings. See Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals’ Dilemma*, 96 COLUM. L. REV. 1093, 1097 (1996); Leti Volpp, *Talking “Culture”: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1612-13 (1996); see also Doriane Lambelet Coleman, *Culture, Cloaked in Mens Rea*, 100 S. ATLANTIC Q. 981 (2001); Leti Volpp, *Feminism and Multiculturalism*, 101 COLUM. L. REV. 1181, 1189 (2001); Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (2000); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the “Cultural Defense,”* 17 HARV. WOMEN’S L.J. 57, 57 (1994).

⁴⁷ See generally, Rhoda E. Howard, *Group Versus Individual Identity in the African Debate on Human Rights*, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES 159 (Abdullahi Ahmed An-Na’im & Francis M. Deng eds., 1990).

⁴⁸ See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 9-10 (1973).

⁴⁹ See Berman, *supra* note 15.

worshipping superstition. His earnest display of filial piety which would have been honored as highly virtuous in a traditional Chinese context is all the same antithetical to Western liberalism.⁵⁰ To rational minds, the very belief that burning goods in the real world would convey them to the spirit world, even metaphorically, seems absurd. The more reverential the act, the more easily is the actor mocked.

For those who would defend him, the implicit line of thought was as follows: Song acted as he did as a manifestation of his identity; his identity is rooted in race, religion, and culture; his race, religion, and culture all have a subordinate, minority status within the environment. If the dominant majority and subordinated minorities received equal treatment as defined by the multiculturalist model, decision-makers would either excuse Song's behavior or call it justified. The issue is joined, then: must/should everyone, including members of a subordinated minority group, conform their conduct to the decrees that have been promulgated by the dominant majority without invidious purpose, or is it proper to carve out an exception?

As a result, whether the practice is authentically a product of race, religion, and culture becomes a key empirical inquiry. Of course, race, religion, and culture correlate poorly and are legally distinct—Asian Americans, for example, are heavily represented among evangelical Christians⁵¹—but for present purposes it is sufficient to group them together as socially-constructed aspects of individual identity. After all, even those who would allow any dispensation here presumably would impose the prerequisite that the act at issue in fact be traceable to race, religion, and culture. It cannot be a pretense or sham. That test is satisfied in the Song case, and there has been no suggestion that it was not.

Among Chinese peoples in China, integral to their patterns of mourning, the living are to provide the dead with vital goods, whether money, household furnishings, clothing, or miscellaneous personal belongings. Ghosts need these items in the afterlife, and they will put them to good use.⁵²

⁵⁰ See ALAN CHAN, *FILIAL PIETY IN CHINESE THOUGHT AND HISTORY* 1 (2004) (discussing the primacy of filial piety in Chinese culture); CHARLOTTE IKELS, *FILIAL PIETY: PRACTICE AND DISCOURSE IN CONTEMPORARY EAST ASIA* 2-7, 10 (2004) (exploring filial piety in the context of modernization in Asia); Philip J. Ivanhoe, *Filial Piety as a Virtue*, in *WORKING VIRTUE* 297, 297-312 (Rebecca L. Walker & Philip J. Ivanhoe eds., 2007); see also NORMAN KUTCHER, *MOURNING IN LATE IMPERIAL CHINA: FILIAL PIETY AND THE STATE* (1999).

⁵¹ See ANTHONY W. ALUMKAL, *ASIAN AMERICAN EVANGELICAL CHURCHES: RACE, ETHNICITY, AND ASSIMILATION IN THE SECOND GENERATION* 32-44 (2003) (discussing the range of studies on Chinese American and Korean American Protestant churches); TONY CARNES & FENGGANG YANG, *ASIAN AMERICAN RELIGIONS: THE MAKING AND REMAKING OF BORDERS AND BOUNDARIES* (2004); ELAINE HOWARD ECKLUND, *KOREAN AMERICAN EVANGELICALS* (2006); RUSSELL JEUNG, *FAITHFUL GENERATIONS: RACE AND NEW ASIAN AMERICAN CHURCHES* (2004); REBECCA KIM, *GOD'S NEW WHIZ KIDS: KOREAN AMERICAN EVANGELICALS ON CAMPUS* (2006).

⁵² See generally JANET LEE SCOTT, *FOR GODS, GHOST AND ANCESTORS: THE CHINESE TRADITION OF PAPER OFFERINGS* (2007); see also SUE FAWN CHUNG & PRISCILLA WAGERS, *CHINESE AMERICAN DEATH RITUALS: RESPECTING THE ANCESTORS* (2005); NICHOLAS STANDAERT, *THE INTERWEAVING OF RITUALS: FUNERALS IN THE CULTURAL EXCHANGE BE-*

The objects take the shape of simulacra of varying degrees of detail and expense. They are commercially manufactured so as to be on hand for consumers, much as flowers would be. Money, for example, might become a gilded box resembling a gold bar. Everything is transmitted via fire.⁵³ The neglect of this obligation would reflect poorly on the living descendants and the dead ancestor. It would humiliate the spirits and leave them impoverished.⁵⁴ It is no trivial matter for believers.

There is, though, an alternative conception of the dilemma. It turned out, as Song prepared to defend himself, that there were various other students who had also set fires in the dormitories, but who were not prosecuted at all.⁵⁵ Their fires, like Song's, presented risks but did not ultimately cause physical injury or property damage. Their fires, like Song's, had not been authorized. Their motivations, like Song's, were stereotypical.

But what was crucial is that their motivations, quite unlike Song's, matched an image of the middle-class undergraduate that the majority would deem ordinary. The other students had celebrated birthdays with cakes decorated with lit candles; they had burned incense; they had smoked marijuana, which of course is in itself a criminal act.⁵⁶ Whatever else an observer might have had to say about these incidents, she would not remark that she was surprised in any event.

There is not enough information in the record to ascertain whether the other students who set fires happened to be, like Song, Asian in descent. Even if some of them were, the acts would not be attributed to their Asian-ness. It is improbable, albeit conceivable, that someone other than an Asian would make a funerary offering through fire. Any such individual would be aberrational and not representative.

Yet, markedly unlike Song, his peers had not been prosecuted for their deeds. They certainly could have been. The regulation that applied to Song applied to them by its own terms.⁵⁷ It is a strict liability provision, and it does not matter what *mens rea* any actor may have had.

If Song's identity cannot help him, neither should it harm him. Without race, religion, and culture, the fire of the funerary offering and the fires of the birthday candles, incense, and marijuana are all the same—a disaster could start from the flames of any of those sources. If Song should be prosecuted, others should be prosecuted too. It is difficult to imagine the prosecu-

TWEEN CHINA AND EUROPE (2008); JAMES L. WATSON & EVELYN RAWSKI, *DEATH RITUAL IN LATE IMPERIAL AND MODERN CHINA* (1988); Valerie Hansen, *The Law of the Spirits: Chinese Popular Beliefs*, in *FACING DEATH: WHERE CULTURE, RELIGION, AND MEDICINE MEET* 142 (Howard M. Spiro, Mary G. McCrea Curnen & Lee Palmer Wandel eds., 1996).

⁵³ See SCOTT, *supra* note 52, at 20-25.

⁵⁴ *Id.* at 103-12.

⁵⁵ Telephone interview with Kelly Flint, Counsel for Peng Song (Sept. 11, 2008) (on file with author) [*hereinafter* Flint interview]; see also First Amended Motion to Dismiss and Affidavit in Support, *People v. Song*, No. 08-0286 (Mich. Dist. Ct. Sept. 11, 2008).

⁵⁶ Flint interview, *supra* note 55.

⁵⁷ BD. OF REGENTS, UNIV. OF MICH., REGENTS' ORDINANCE art. XII, § 1(6) (2001), *available at* <http://www.regents.umich.edu/ordinance.html>.

tion of a college student who had enjoyed a birthday cake with lit candles, even if a mishap had ensued. The community reaction would be too negative. If a jury trial were held (not likely unless the most serious charges were brought), perhaps jury nullification would result.⁵⁸ Such an outcome would reflect a racialized cultural norm, but it would pass without notice, because the racialized cultural norm happens to be the majority norm. That is, a birthday cake with lit candles falls squarely within common practice, certainly in modern America.

In other words, a case that has all the features of a multiculturalist claim conceals within it an assimilationist claim.⁵⁹ It is only standing in isolation, as a single case, that a defendant such as Song must resort to the multiculturalist defense, invoking his identity. Otherwise, a person such as Song is protected by the assimilationist assumption that his identity is immaterial. Up until then, it follows that whether Song belonged to a subordinated minority group is insignificant. If the government provided equal treatment as defined by the assimilationist model, people who are similarly situated would have to be similarly treated, such that either all of the students who set fire should have been prosecuted or none of them.

Practical considerations may intervene, counseling against an absolute rule, but at least the approximate rule remains that racial considerations must not interfere with the choices about punishment. The contemporary consensus is that invidious racial motivations should not determine governmental decisions. Even those who are unsympathetic in general to allegations of racial discrimination presumably would agree.⁶⁰

The selection of multiculturalism over assimilation generates more than theoretical consequences. It may well be legally dispositive. The multiculturalist approach relies on case law that is developing; the assimilationist approach is well-established. The multiculturalist approach focuses on the accused party and her community; the assimilationist approach focuses on

⁵⁸ Jury nullification, wherein a jury chooses to disregard evidence or the law and “acquits an otherwise guilty defendant, because the jury objects to the law the defendant violated or the application of that law to the defendant,” has been a prominent topic of discussion since the O.J. Simpson acquittal. The leading article is Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995).

⁵⁹ Song’s dilemma could be likened to one of the great Greek dramas. In the story of Antigone, as told in Sophocles’s *Oedipus* trilogy, the heroine must choose between the law of the land (prohibiting her from burying her brother) and family obligation (requiring her to do so). See SOPHOCLES, *THE OEDIPUS CYCLE: OEDIPUS REX, OEDIPUS AT COLONUS, ANTIGONE* 186-252 (Dudley Fitts & Robert Fitzgerald trans., 1949).

⁶⁰ Under even the current black-letter doctrine, it would be unlawful for a prosecutor to pursue prosecutions that were explicitly premised on race; in such a hypothetical instance of open discrimination, the problems of proof that have impaired previous constitutional claims of discrimination would be overcome. See *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (holding that to establish discriminatory effect of prosecution based on race, defendants would need to demonstrate that members of other races could have been prosecuted for similar crimes but were not); see also ANGELA Y. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 186-93 (2007); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 311 (1998).

the state and its officials. There are also benefits to the multiculturalist approach. The facts may be easier to investigate and prove, and they are limited to the case at bar. There may be no quarrel that the actor was compelled by essential traits in her identity, and that her identity diverges from the majority culture. By contrast, with the assimilationist approach, it is necessary to refer to other cases to set the baseline and the very point is that those cases did not materialize. The problem of proof may be insurmountable.

In the multiculturalist debate, the assimilationist's contention is that there should not be recognition of exceptions, and her arguments may be taken at face value. In the assimilationist debate, the multiculturalist might once have openly defended disparate measures, but more likely now admits that disparities are wrong but denies that they exist. In either instance, if the challenge is to the subtle evils of structural disparities and unconscious prejudices, those who judge are embedded in the structure itself and subject to the same implicit bias.⁶¹

Most damning of all for multiculturalism, it is reversing cause and effect. The party that has been injured because of race, religion, or culture becomes the party that has broached the subject. It is not the initial act of racial discrimination that becomes the transgression, but its calling out. The attitude of *Plessy v. Ferguson*⁶² persists. In upholding *de jure* racial segregation between whites and blacks, the majority exemplified the maneuver of imputing racial subordination to the disadvantaged:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.⁶³

The rub is that the assimilationist and the multiculturalist approaches are not equal. The title of "defendant" highlights the obvious: these individuals find themselves in the position of defending themselves, typically involuntarily as they have not set out to make a point except in the rare test case. They may opt for the multiculturalist approach over the assimilationist approach not due to ideology, but because the former is tactically superior to the latter. Neither is very attractive under the case law, but a defendant must seize any modest improvement of her prospects. The abiding hope is that

⁶¹ See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 353 (2007). See generally Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063 (2006); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁶² 163 U.S. 537 (1896).

⁶³ *Id.* at 551.

people who would oppress others due to presumptions about differences will turn out to be more welcoming of others after they have struggled to make themselves the same.

The multiculturalist approach, at least the variation with a religious foundation, has garnered some support recently. After the Supreme Court decided *Employment Division v. Smith*,⁶⁴ which held that the government may enact laws of general applicability as long as the burden on religious practices does not run afoul of the Free Exercise Clause,⁶⁵ Congress passed the Religious Freedom Restoration Act (RFRA) of 1993, which prohibited the government from imposing a substantial burden on a person's religion unless it demonstrates that that is the least restrictive means of pursuing a compelling state interest.⁶⁶ Additional litigation has since curtailed the scope of RFRA, limiting its reach to the federal government.⁶⁷ Multiculturalism has not, however, been adopted beyond RFRA.

The assimilationist approach, meanwhile, is impaired by the requirement of intent to discriminate. The equal protection of the laws is guaranteed, but it cannot be enforced. In *Washington v. Davis*,⁶⁸ the Supreme Court held that laws with racially discriminatory effects can be constitutional if there is no discriminatory intent.⁶⁹ Using similar reasoning, the Supreme Court held in *United States v. Armstrong*⁷⁰ that selective prosecution claims will only prevail if the defendant can prove both discriminatory effect and discriminatory intent.⁷¹ Chief Justice William Rehnquist, writing for the majority, held that prosecutorial decisions would be presumed to be fair, and claims to the contrary would be evaluated by a higher standard.⁷²

Only in *Yick Wo v. Hopkins*,⁷³ when the Justices were moved by the egregious official conduct to create the "as applied" constitutional challenge, did the Court hold disparate treatment cognizable.⁷⁴ There, San Fran-

⁶⁴ 494 U.S. 872 (1990).

⁶⁵ *Id.* at 885. For a comprehensive discussion of the litigation and the legislation in this area, see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007), especially pages 257-76.

⁶⁶ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2006)).

⁶⁷ See *City of Boerne v. Flores*, 521 U.S. 507, 534-36 (1997).

⁶⁸ 426 U.S. 229, 239 (1976).

⁶⁹ *Id.*

⁷⁰ 517 U.S. 456 (1996).

⁷¹ *Id.* at 464-65.

⁷² *Id.*

⁷³ 118 U.S. 356 (1886).

⁷⁴ *Id.* at 373-74. The rationale for the Supreme Court's decision has been discussed at length. See David E. Bernstein, *Revisiting Yick Wo v. Hopkins*, 2008 U. ILL. L. REV. 1393 (2008); Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV. 1359 (2008); Thomas W. Joo, *Yick Wo Re-Visited: Nonblack Nonwhites and Fourteenth Amendment History*, 2008 U. ILL. L. REV. 1427 (2008). The symposium containing the foregoing articles continues a dialogue begun in earlier works. See David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999); David E. Bernstein, *The Supreme Court and "Civil Rights," 1886-1908*, 100 YALE L.J. 725, 743-44 (1990); Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nine-*

cisco used a facially neutral regulation of laundries to force the Chinese-owned stores out of business. Otherwise, as Justice Antonin Scalia has highlighted with erudition but no lamentation, successful claims of selective prosecution are “a *rara avis*” (a rare bird).⁷⁵

There are few precedents allowing selective prosecution claims to be considered. The Sixth Circuit Court of Appeals, which includes Michigan, permitted a case to proceed into the discovery phase in *United States v. Jones*,⁷⁶ on “a *prima facie* case of discriminatory intent.”⁷⁷ The court was willing to infer racial animus from the actions of the police officers in the case. During the arrest of the African American suspect, the officers wore t-shirts that bragged about their apprehension of him. While the suspect was awaiting trial, they mailed to him a postcard depicting a black woman wearing bananas on her head, and included a handwritten message about an officer’s vacation and made allusions to the defendant’s prospects of “going to jail for a long time.”⁷⁸ The officers did not do the same in other cases, and their explanations were dismissed as incredible.⁷⁹

The effects of selective prosecution are multiplied because of the symbolic functions of the criminal law.⁸⁰ Those intangible functions weigh even more heavily in cases such as Song’s, when there has been neither injury nor damage and there is little need for deterrence. The expressive value of the criminal prosecution is virtually all there is to it. The decision to pursue Song sends a message to everyone who views herself as similar to Song. It communicates who is in charge and who is not, who belongs and who does not, to whom the government belongs and to whom it does not. Hostility toward Song would exacerbate the situation, but its absence hardly gives solace. It is the converse of the hate crime that is not acknowledged as such.⁸¹

On the eve of trial, after the leading newspaper of the metropolitan area ran a column about the case,⁸² Song was offered a plea bargain. He took it and entered a plea of *nolo contendere*.⁸³

teenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence, 29 U.S.F. L. REV. 353 (1995).

⁷⁵ *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (Scalia, J., concurring).

⁷⁶ 159 F.3d 969 (6th Cir. 1998).

⁷⁷ *Id.* at 977.

⁷⁸ *Id.* at 975.

⁷⁹ *See id.* at 977.

⁸⁰ *See* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 163-67 (1999).

⁸¹ *Id.* at 167-69.

⁸² *See* Berman, *supra* note 15.

⁸³ *See* Register of Action at 2, *People v. Song*, No. 08-0286 (Mich. Dist. Ct. Mar. 27, 2008).

IV. CONCLUSION

Framing is critical. Volumes are written on the subject.⁸⁴ Much of the first year of law school, the training of novice advocates, is dedicated to the art of asking the right question, with the confidence that it leads to the best answer.⁸⁵ On the subjects of race, religion, and culture, the imperative becomes all the more pressing thanks to history, controversy, and self-interest.

Framing determines what is action and what is reaction, and from that, what is neutral and what is partial. The Song case shows how these frames operate. In the Jena Six controversy, the same framing problem recurs. It can be described as a case of special pleading or equal treatment. The African American students confront the same choice. They may emphasize their difference or their sameness. The chronological framing of the case is critical. If “the case” is defined as beginning with the history of white racism toward African Americans within the area, then it becomes apparent that it is whites, not African Americans, who have invoked race as an initial matter, and in an invidious manner. But if “the case” is defined as beginning with an assault on whites by African Americans, of course it then appears that African Americans, rather than whites, have acted on the basis of racial impulses.

There have been and will be cases in which an aggrieved party wishes to express that she is being subjected to an injustice due to her particular identity not being taken into account. Nevertheless, it is important to distinguish such scenario from the more regular occurrence of a party who falls back to such a claim only after judging that there will be scant sympathy for the claim that she deserves to be held to universal standards, a claim she would make if it stood any chance of success. The elision is understandable. The one claim is transformed into the other claim, even without notice. But

⁸⁴ George Lakoff has been the most influential public intellectual arguing that progressives must reframe political discourse. See GEORGE LAKOFF, THINKING POINTS: COMMUNICATING OUR AMERICAN VALUES AND VISION (2006); GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE (2004); GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK (2002); GEORGE LAKOFF, MORAL POLITICS: WHAT CONSERVATIVES KNOW THAT LIBERALS DON'T (1997); see also Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1126 (2006).

The argument presented in this essay is by no means limited to individuals who belong to racial minority groups. One of the celebrated cases encompassed by this argument is portrayed in the documentary *Brother's Keeper*. A poorly educated, unsophisticated, impoverished white farmer who lived in squalor with his siblings was accused of the murder of the eldest of his brothers. His neighbors rallied to his cause, against the more urban prosecutors and what they represented. The drama attracted national media attention, largely favoring the defendant. BROTHER'S KEEPER (American Playhouse 1992).

⁸⁵ See Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 33 (1998); Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409, 474-76 (1986).

it weakens both categories of claims and creates backlash. Our ideals of a diverse democracy require us to adopt a broader frame in addressing allegations of racial, religious, or cultural inequality.

