Reparation as Narrative Resistance: Displacing Orientalism and Recoding Harm for Chinese Women of the Exclusion Era

Sandra Ka Hon Chu

This article examines the issue of harm within the historical context of Canadian immigration legislation that was directed towards Chinese migrants from 1885 to 1947. During this period, the Canadian government restricted Chinese immigration in the form of a head tax imposed upon all Chinese entering Canada and subsequently through the outright exclusion of Chinese immigration. The prohibitive head tax barred the majority of Chinese women from immigrating to Canada and resulted in the forced separation of Chinese women from their partners in Canada, a period characterized by extreme hardship arising from the civil war and accompanying famine in China. Those who paid the head tax ultimately challenged the exclusionary immigration legislation in a class action in which women were noticeably absent—an absence that exemplified the way in which law embodies particular experiences over others. Since law has been
constructed to accommodate the needs of seemingly autonomous individuals, separation was not seen as harm—a fact that was made more acceptable in the case of Chinese women because separation was imposed upon Orientalized Others. The historical tropes that were constructed to dehumanize and "de-legalize" Chinese women justified and rendered invisible any harms perpetrated. This article considers the injuries suffered by Chinese women of the exclusion era and canvasses feminist legal theory and the narrative possibilities of reparative litigation to explore the transformative possibilities in legal redress.

If you have a daughter, don’t marry her to a baker
Or she will not get half a year’s sleep out of three.
If you have a daughter, don’t marry her to a farmer
Or her legs will be covered in cow dung and her hair
Will be full of dust.
If you have a daughter, you should marry her to a Gold Mountain guest.
Whenever his boat turns around, she will have dollars by the hundreds.

(Yuen-fong Woon, *The Excluded Wife*)

On 29 February 1860, Mrs. Kwong Lee became the first Chinese woman to set foot in Canada.¹ Travelling from San Francisco with her two children, Mrs. Kwong Lee joined her husband in British Columbia at a time when Chinese migrants were yet to be legally restricted from entering Canada. Despite her husband’s prominence as an influential leader in the Chinese community in Victoria and the historical significance of her arrival, little is known of Mrs. Kwong Lee.² What can be ascribed is that she was one of few Chinese women to live in Canada during a period of severe Chinese exclusion. Over 100 years later in 1983, Dak Leon Mark approached the office of Member of Parliament Margaret Mitchell, requesting her assistance in obtaining a refund of the $500 head tax he had paid upon his entry to Canada in 1922. At the time, head tax compensation had yet to surface in the popular consciousness. While lobbying for Japanese-Canadian redress was already underway, Prime Minister Brian Mulroney only formally

---


I would like to thank Sonia Lawrence for her valuable critical insight while I researched the thesis that was the foundation for this article and Samer Muscati, my closest and most cherished reader for his enthusiasm, support, and patience.
acknowledged the wrongs done by the Canadian government to survivors of wartime internment with the provision of redress in 1988. Despite the eventual success of the Japanese-Canadian redress campaign, Mark’s solicitation was followed by years of community organizing, largely focused on obtaining an apology and a symbolic sum of compensation for the payment of the head tax. In 2000, the redress campaign culminated in a class action by head tax payers calling for a return of the amount paid to the Canadian government during the period of the head tax.

While the effects of the head tax on Chinese male migrants were extensively documented during the redress campaign, fewer efforts were made to highlight the experiences of Chinese women in the same period, despite the fact that discriminatory legislation and administrative policy presented more serious restrictions to Chinese women coming to Canada as permanent settlers from the 1880s until 1950. Not surprisingly, women’s claims in the head tax payers’ class action were necessarily attached to, and dependent upon, those of their male partners. The experiences of Chinese women during the period of exclusion have also been largely ignored by mainstream scholarly literature. The few texts that allude to Chinese-Canadian history primarily describe the male migrant experience—their infamous exploitation by the Canadian Pacific Railway or the bachelor society of early Chinatown. When Chinese women are referred to, such references are “either confined to presentations of the relevant statistical evidence or, alternatively, the significance of these women’s presence is bounded within a patriarchal discourse of family life.”

3. The term “Chinese” is used in this article to describe a socially constructed race of people (wherein “race” is defined as less a biological and apolitical condition than a conceptual mechanism by which power and privilege are allocated) since discrimination against the Chinese was based on purely physical racial grounds. As such, naturalized Chinese Canadians were subjected to the same anti-Chinese legislative bills as alien Chinese. For example, the legal definition of “Chinamen” was as follows: “Chinamen means any native of the Chinese Republic or its dependents not born of British parents, and shall include any person of the Chinese race, naturalized or not. An Act Respecting Elections of Members of the Legislative Assembly S.B.C. 1920, c. 27, s. 2(1).

While discrimination against naturalized Chinese was in direct conflict with the Dominion Naturalization Act, 1914, R.S.C. 1927, c. 138, with regard to the rights of naturalized subjects, the majority of anti-Chinese bills in British Columbia were not legally challenged. See B. Singh Bolaria and Peter Li, Racial Oppression in Canada (Toronto: Garamond, 1985) at 109.


5. Bolaria and Li, supra note 3 at 11.

Though Chinese women were obviously subject to both direct and indirect forms of legislated discrimination, few scholars or legal insiders have addressed the reasons for the absence of a claim by Chinese women for legal redress.

Given the dearth of literature in this area, this article shall consider the unexamined particularities of Chinese women's historical confrontation with Canadian immigration policy. In light of their invisibility within reparation claims, what can be said about the "Gold Mountain" wives and the harms they suffered? Where are their voices in a community that has become increasingly comfortable with articulating its historical experiences with oppression? Whereas both Chinese women and men experienced emotional injury as a result of discriminatory immigration legislation, such harms were characterized as subsidiary in relation to monetary loss in the head tax payers' class action. Notwithstanding the potential to explore this particular experience of injury, pursuit of a successful legal remedy in the head tax payers' class action entailed the subordination of stories of separation in favour of experiences involving conventional conceptions of loss. Since redress was largely predicated upon payment of the head tax, the claims of Chinese women, most of who had not been directly financially harmed by discriminatory legislation, were contingent on the head tax paid by their spouses. Correspondingly, the pursuit of redress through litigation implied that all of the harms perpetuated against the Chinese-Canadian community during the exclusion era were already being claimed. In the absence of a legally cognizable harm, Chinese women of the exclusion era could only support their spouses' claims for head tax compensation, concurrently limiting their own prospects for redress litigation. While strategic choices must necessarily be made in litigation, Vanaja Dhruvarajan suggests that, in their struggle against racism, racialized women are often exhorted "to maintain solidarity with their ethnic group... at the expense of their personal interests."

Since a collective of Chinese women obviously encompasses individuals with immensely varied experiences, a central issue is who among them are able to claim redress for the injuries they have suffered. Given the scope of this matter, this article shall be confined to a theoretical exploration of the impact of exclusionary Canadian immigration legislation on Chinese women who experienced a period of forced separation from their partners before entering Canada. The investigation of legislated forced separation does not prelude same-sex relationships between Chinese women of the exclusion era, despite the omission of lesbian women from the historical literature and the oral histories considered. While the historical record treats them all as heterosexual, Chinese women of the exclusion era who engaged in same-sex relationships could have been similarly subject to forced separation as a result of

discriminatory Canadian immigration legislation. Even if their experiences have been rendered invisible, the forced separation of individuals within same-sex relationships constitutes harm just as the forced separation of heterosexual partners does. Although this article shall primarily discuss the heterosexual relationships for which there are historical records, the argument for legal redress is equally applicable to the forced separation of same-sex couples.

Presumably, Chinese women who both did and did not experience forced separation but were nevertheless barred from entering Canada also experienced a particular form of harm. Since these women never entered Canada, they were robbed of the moral status to claim redress as a cognizable community before Canadian courts today. Arguably, the harm perpetuated against those who never came is greater than those who eventually did, especially in view of the cases of women who died awaiting remittances from, and reunification with, their spouses. This issue, while extremely important, involves an investigation of Canadian immigration admission policy and the distinct concern of whether individuals can claim redress for discriminatory immigration legislation, even absent the experience of forced separation. Since the focus of this article shall be on Chinese women who ultimately immigrated to Canada after a period of forced separation, the issue of separation as a form of legally cognizable harm shall be explored.

Some systematic attention to the experiences of Chinese women during the exclusion era is called for, and the first part of this article provides a historical backdrop of the struggles of the Chinese community, and particularly Chinese women, in Canada before and during the period of exclusion. Issues such as how the physical separation of Chinese migrant families arose and whether the Canadian government sanctioned Chinese families' separation shall be considered to better understand the framework of Chinese migration during the exclusion era. This section also describes the recent efforts of Chinese head tax payers to obtain redress through the courts.

The second part of the article describes the emotional harms experienced by the Chinese migrant community as a result of discriminatory immigration legislation. If Chinese migrants and their partners experienced emotional injury arising from their physical separation, is this a legally cognizable harm? If not, is there support in feminist legal theory for an expanded notion of harm? What are some of the difficulties associated with recognizing emotional injury as harm? While the notion of forced separation as harm inevitably links

8. While it would have been preferable to solicit the oral histories of Chinese women of the exclusion era, time constraints have limited the overview in the first part of this article to primarily historical references to Chinese women in the literature. There are obvious limitations to reliance on such literature, particularly with respect to the strategies for redress. The project of "hearing the subaltern community speak" is a vital one because it prioritizes the subjectivities of individuals within the community without unduly emphasizing the narratives of scholars, however sympathetic. As such, soliciting oral histories from Chinese women of the exclusion era certainly warrants future academic investment.
Chinese women's claims to their relationships with another, it also potentially allows women (and men) to claim redress independent of monetary loss. Seemingly, a more expansive version of harm would place many legal actors, such as Chinese women of the exclusion era, within the ambit of redress. Nevertheless, even if redress is feasible, its employment may unwittingly demand the strategical production of narratives of victimhood at the expense of reconstructed narratives of agency. The third part of this article thus reviews the narrative possibilities of reparative litigation, including the displacement of reductive tropes with transformative narratives. Can a redress strategy be located that constitutes repairation claimants as agents while acknowledging the particular harms they suffered and continue to suffer? Can transformative reparation allow harmed claimants to reclaim their histories and identities through a retelling of dynamic and multiple subjectivities? How can reparation be a mode for displacing destructive tropes? Rather than delineate a litigation strategy for a claim within Canadian law, this article shall critically highlight tensions existing within the legal system that continue to restrict particular claims for redress today. This article shall also consider how legal redress can be a potentially emancipatory engagement. The ultimate objective of this project is thus to explore the possibilities of a cultural shift in how we perceive harm, and correspondingly legal redress, in the context of a transformative reparation claim.

**Historical Background**

From the late 1840s throughout the 1850s, poor economic conditions, an unstable political climate, and the threat of Western colonization in China drove numerous Chinese men, mostly from the southeastern coastal provinces of Guangdong and Fujian, into the western United States in search of gold. After Chinese merchants in California heard rumours of the discovery of gold in the Fraser Valley, a scout was sent to British Columbia to ascertain the truth. As David Lai describes, the return of the scout and his assurances of the “marvellous richness of the gold mines of that region” propelled the first major wave of Chinese migration from California to British Columbia in 1858. According to Peter Li, the available statistics reveal the Chinese population in British Columbia grew slowly in the first two decades following their arrival and more rapidly thereafter. Reported estimates of the Chinese population in British Columbia in the 1860s range from 1,700 to

With the exception of a small number of merchants, the majority of Chinese emigrants came from the Chinese working class. As Xiaojian Zhao maintains, Chinese immigration was a network-driven process operated by clan or kin ties, and migration was traditionally viewed as an economic investment for the clans as well as for the families concerned. In order to finance their trips, many Chinese borrowed from relatives and repaid their loans when they had the opportunity to work and save up in Canada.

From the beginning, immigration from China was essentially a male activity. In America, sexist immigration policy was legislatively sanctioned by the federal Page Act of 1875, which restricted the immigration of Chinese women into the United States in order to prevent the formation of Chinese families and to alleviate the threat of Chinese women’s presumptive prostitution on American morality. In Canada, the preference for cheap male labour meant that there were better chances for Chinese men, relative to Chinese women, to locate work. Moreover, because the presence of unemployed spouses and children of Chinese labourers would have forced Chinese migrants to press for higher wages, the racial economy preferred a “bachelor society” of single Chinese men, who represented a source of cheap, vulnerable labour. Since Chinese labourers generally accepted a lower wage than White labourers, Chinese migrants were also accused of engaging in unfair competition, and they served as a convenient scapegoat for the socio-economic dislocations of an industrializing society.

According to Sheila Burney, from 1885 to 1924, only 1,100 Chinese women landed in Canada, compared with more than 40,000 Chinese men. While female labourers could have theoretically aided both husbands and the joint family by pursuing economic opportunities abroad, the costs associated with migration and extreme social hostility from settled Canadians deterred many Chinese men from bringing their families to Canada when it was still

16. Li, supra note 9 at 23.
19. Li, supra note 9 at 75–6.
legally possible to do so. As Anthony Chan contends, anti-Chinese hatred compelled most Chinese families to remain in China while husbands remained essential bachelors in Canada. Correspondingly, the same economic factors that forced many to leave China in the first place also prevented migrants from paying for the passage of family members. As a result, Lai reports that among 4,154 Chinese residing in British Columbia in 1879, only forty-four were women. The majority of women with spouses in Canada remained in China, where they cared for children and, often, extended family. In some instances, entire villages were economically supported by the remittances sent by family wage earners in Canada.

While White prostitution largely outnumbered Chinese prostitution during the exclusion era, the few Chinese women who did come to Canada were often labelled as prostitutes. Nevertheless, their limited numbers were initially welcome by the larger Canadian population as an outlet for Chinese men’s sexuality. Although the politics of racial purity already made it difficult for Chinese men to enter into familial relations with White women, Chinese women were seen as lessening the threat of miscegenation that single Chinese men posed to the dominant White society. As Tania Das Gupta maintains, Chinese men were thought to lust after White women, “seeking to assuage their perilous hunger by luring these women behind the partitions of their laundries or restaurants into their private lairs, then seducing them with wine and opium so that they could have sexual relations with them.” The mixing of the races was taboo unless it involved White men and Chinese women. According to Chan, this sentiment was echoed by Emily Murphy, the first female judge in the British Empire, who said in 1922 that sexual relations between White women and Chinese men were “the ultimate in human degradation.” At the same time, the

---

22. Li, supra note 9 at 64.
24. Li, supra note 9 at 64.
27. Li, supra note 9 at 76.
29. Chan, supra note 23 at 80.
30. Sugiman, ed., supra note 1 at 19.
31. According to J. Brian Dawson, Alberta Supreme Court Justice Nicholas Beck stated in 1913 that if some Chinese led immoral lives in Canada, “the Dominion Parliament [was] to be held responsible [as it had imposed] the poll tax on Chinese women of $500” so that few Chinese could “afford to pay this sum for a prospective wife or go home to get married.” Calgary Albertan, 27 November 1913, as reported in Dawson. supra note 15 at 123.
32. Das Gupta, supra note 26 at 153.
33. Ibid. at 160.
34. Chan, supra note 23 at 80.
35. Ibid. at 80.
concern for racial purity that was the cornerstone of British-Canadian nation building and immigration policy meant that it was not desirable that women from the perceived "lower races" reproduce.\textsuperscript{36} This concern eventually gave rise to a fear of Chinese women because of their potential to increase the Chinese population.\textsuperscript{37} In addition to their capacity as biological reproducers, Chinese women, as cultural reproducers, represented a different form of participation in the nation-building process, through their parenting and community participation.\textsuperscript{38} As such, Chinese women experienced a paradoxical relationship with White settlers. While their presence mitigated the "vice" of Chinese male sexuality, it also enabled Chinese reproductive life. The latter fear guaranteed eventual restrictions on their entry into Canada and reinforced their marginal presence within society. By contrast, throughout the late nineteenth and early twentieth century, White British women were actively encouraged to immigrate to Canada,\textsuperscript{39} where they could fulfil their future or potential roles as wives and mothers of the Canadian nation and, thus, as nation builders and civilizers.\textsuperscript{40}

When the Canadian Pacific Railway was constructed between 1881 and 1885, Chinese men were recruited directly from China to assist in building the railway.\textsuperscript{41} Although Chinese labour was crucial to the development of western Canada, Chinese migrants were depicted as unassimilable, alien, dirty, and not worthy of having full citizenship rights.\textsuperscript{42} The labouring classes also blamed the Chinese for depressing wages, since they were generally paid less than White workers and occasionally used as scabs in labour disputes.\textsuperscript{43} Since the Chinese population of British Columbia was overwhelmingly male, images of Chinese immorality were perpetuated as a result of ongoing concerns


\textsuperscript{38} Sedef Arat-Koc, "Gender and Race in 'Non-discriminatory'Immigration Policies in Canada," in E. Dua and A. Robertson, eds., \textit{Scratching the Surface: Canadian Anti-Racist Feminist Thought} (Toronto: Women's Press, 1999), 207 at 207.

\textsuperscript{39} Abu-Laban and Gabriel, supra note 36 at 38.

\textsuperscript{40} Sedef Arat-Koc, "From ‘Mothers of the Nation’ to Migrant Workers," in A. Bakan and D. Stasiulis, eds., \textit{Not One of the Family, Foreign Domestic Workers in Canada} (Toronto: University of Toronto Press, 1997), 53 at 54.

\textsuperscript{41} Submission to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance by the Chinese Canadian National Council and the Metro Toronto Chinese and Southeast Asian Legal Clinic. 25 September 2003, <www.ccnc.ca/entryContent/edbl2d36658aa53.doc> [Contemporary Forms of Racism].

\textsuperscript{42} Li, supra note 9 at 30. See also Paul Yee, \textit{Struggle and Hope: The Story of Chinese Canadians} (Toronto: Umbrella Press, 1996) at 24; Patricia Roy, \textit{A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants 1858-1914} (Vancouver: UBC Press, 1989) at 9; and Dawson, supra note 15 at 119, for a discussion of the general attitudes of White settlers towards Chinese migrants during the exclusion era.

\textsuperscript{43} Li, supra note 9 at 24.
about the protection of White women, the illegal drug traffic, and gambling. Nevertheless, Chinese males were attractive to many employers because their labour cost was less than that of White workers in British Columbia. As Kay Anderson reports, in order to override the objections of the British Columbia government and allow contractors to procure Chinese labour to build the railway, Prime Minister John A. Macdonald assured anti-immigration campaigners that the recruitment of Chinese labourers would not bring "a permanent degradation of the country by a mongrel race." While viewing the Chinese as socially inferior, White employers relied on a racialized labour force for capital accumulation at a time when the shortage of White workers rendered industrial expansion difficult. Correspondingly, the low ratio of women to men was seen by anti-Chinese agitators as an indication that few Chinese immigrants intended to settle in Canada—a view that was espoused by both federal and provincial governments to justify systematic discrimination and policies that would force the Chinese to return to China, as soon as the demand for their labour slackened. According to Chan, this notion was reinforced by Prime Minister Macdonald in 1882, when he stated that the Chinese were unlikely to stay because they brought neither wives nor children. The resultant belief that Chinese men were merely "sojourners" in British Columbia thus temporarily alleviated the concerns of a Chinese menace.

As the economic situation in British Columbia began to deteriorate, Chinese labourers were believed to be driving down wages and appropriating White jobs. Consequently, White workers in each industry began demanding the exclusion of Chinese migrants. A perceived increase in the number of women in the Chinese migrant community also signalled the possibility that some Chinese were not temporary migrants but, rather, immigrants who planned to stay permanently. Inevitably, agitation against the Chinese began to grow. As early as 1875, renewed anti-Asian sentiment arising from the economic depression in British Columbia culminated in the passage of a bill disenfranchising the Chinese in provincial and municipal elections.

45. Li, *supra* note 9 at 29.
47. Li, *supra* note 9 at 17.
49. Ibid. at 127.
51. Li, *supra* note 9 at 27.
52. Ibid. at 30.
54. Li, *supra* note 9 at 32.
According to Lai, the passage of an act in Queensland, Australia, in 1877 imposing a £10 head tax on Chinese immigrants also prompted the British Columbia government to pass a bill in September 1878 known as the "Chinese Tax Act," by which every Chinese person over twelve years of age would be required to pay $10 every three months to obtain a licence to reside in British Columbia. The provincial law was strongly opposed by both Chinese labourers and White employers because it made hiring Chinese more difficult. While the British Columbia Supreme Court ultimately declared the act unconstitutional, the British Columbia legislature nevertheless proceeded to establish a committee to consider how to halt Chinese immigration.

Although the panic with respect to the expanding Chinese family was largely exaggerated, a royal commission was eventually established in 1884 to report on Chinese residents and what could be done to curtail future immigration. Given the abundant supply of both White and Chinese labour at the time, there was no longer a need to maintain a large flow of Chinese men into the country. Rather, the combination of the seeming necessity for inexpensive Chinese labour to complete the Canadian Pacific Railway and the extreme anger directed by White workers against the perceived Asian competition meant that legislative control of the Chinese was inevitable as soon as major projects of development were completed in British Columbia and Chinese labour became dispensable. Upon the completion of the national railway, the government of Canada moved to restrict the immigration of Chinese to Canada with the passage of the "Chinese Immigration Act," which imposed a head tax of $50 upon every person of Chinese origin entering the country. The same act also stipulated that vessels destined for Canada could not carry more than one Chinese person for every fifty tonnes of tonnage. Those individuals who paid the head tax were given a certificate

56. Li, supra note 9 at 32.
58. Lai, supra note 10 at 31. See also McLaren, supra note 57 at 237, for a discussion of exclusion era judicial decision making that clearly ran against the grain of the province by voicing disapproval of at least some aspects of the racist policies embodied in the legislation.
59. In 1884, among the 10,492 Chinese in British Columbia, only eighty-eight were married women and girls and seventy were identified as prostitutes. See Li, supra note 9 at 63.
60. Ibid. at 40.
61. Bolaria and Li, supra note 3 at 86.
of entry, which had to be returned in exchange for a certificate of leave when they left Canada, even temporarily, or they would risk being barred from re-entry. Individuals who paid the head tax could register to leave the country for up to twelve months—remaining outside the country for longer required repayment of the head tax. The only exceptions to a payment of the head tax were Chinese clergymen, Chinese merchants, and non-Chinese migrants and their spouses. Thus, married Chinese women's migration to Canada depended significantly on their husband's race, financial status, and occupational classification. Wealthy merchants, whose businesses were favoured by the government, were allowed to migrate to Canada with their wives and children exempt of the head tax, while poor labourers paid a heavy tax that deprived them from bringing most of their families. Chinese immigrants were the only group singled out by racial origin to have a fee passed against their entry. In Li's view, the tax resolved a basic dilemma: on the one hand, the desire to maintain the convenience of Chinese labour, while, on the other, an unwillingness to recognize the rights of Chinese as Canadians. As Li argues, the head tax "was a means of ensuring that the supply of Chinese labour would not be completely severed, while at the same time officially endorsing the second-class entrance status of the Chinese." Although not explicitly forbidding women to enter, the new tax made any further immigration extremely difficult. According to Tamara Adilman, the head tax was the most important constraint on Chinese women's entry to Canada. Effectively, the fee predetermined that the majority of the Chinese-Canadian population would continue to be male since women were viewed as expensive economic liabilities and not productive workers who would be able to repay the head tax. Of the Chinese women who migrated after the imposition of the head tax, most were merchants' wives, and the

63. Li, supra note 9 at 34. In order to leave Canada for any duration, Chinese migrants living in Canada were required to "register to leave." Upon registration, Chinese migrants would be provided with a return card permitting their return within a specified period of time.
64. Ibid. at 34.
65. Adilman, supra note 4 at 56.
67. Li, supra note 9 at 40.
68. Sugiman, ed., supra note 1 at 18.
69. Adilman, supra note 4 at 55.
70. Ibid. at 55. As Margaret Conran, Alvin Finkel, and Cornelius Jaenen argue, men and women performed distinct tasks in the Canadian colonial economy. While men were expected to perform the physical labour associated with industrial expansion, women were generally relegated to household labour, a division that presumably also applied to Chinese migrants. See Margaret Conran, Alvin Finkel, and Cornelius Jaenen, History of the Canadian Peoples: Beginnings to 1867 (Toronto: Copp Clark Pitman, 1993) at 493.
71. Sugiman, ed., supra note 1 at 18. According to Adilman, some women were refused admission into Canada because their stated "married" status was deemed false and the controller of immigration had the discretion to decide which women could enter. As a result, a number of Chinese women had to prove that they were bona fide "housewives" rather than
remainder were single women who had contracted to work in British Columbia, mostly as home sewers and paid domestic workers. Since Chinese men continued to labour at low wages in Canada, the costs of family maintenance were externalized. In addition to the benefits of immediate cheap labour, recruitment from outside the country meant that the state did not have to pay the costs of reproducing labour. As Li contends, White employers exercised selectivity in favour of single males since payment of a family wage could be avoided and reproduction costs would be borne by the homeland villages, which maintained the plentiful supply of cheap male labour. Correspondingly, the absence of a developing Chinese-Canadian population reinforced the community's marginalization. While federal policy brought female domestic workers from Europe to boost White birth rates, it deliberately prevented Chinese-Canadian families from forming.

With the realization that $50 was inadequate to meet the objective of curtailing Chinese immigration, the government of Canada increased the head tax to $100 in 1900 and again in 1903 to $500, an amount that was equivalent to approximately two years' wages for a Chinese labourer working in Canada at the time. While the Chinese continued to immigrate to Canada, increasingly, men who paid the inflated head tax could not afford additional payments for their families, and prospective female migrants doubtless found it even more difficult to pay the $500 fee. As a result, the head tax further reinforced the sex imbalance within the Chinese-Canadian population.

labourers, a move that relegated Chinese female migrants to the home and its functions. See Adilman, supra note 4 at 61.

72. Adilman, supra note 4 at 56–7. Adilman also describes a number of Chinese women who worked in Canada as seasonal farmworkers, clerks in vegetable and fruit businesses, and general labourers in laundries and restaurants.

73. According to Li, "the reproduction of labour involves the cost of replenishing the labour power of workers; aside from the basic costs of food and shelter, it means financing the infrastructure for maintaining a work force. Such infrastructures may include the worker's family, which provides emotional and other support in addition to reproducing another generation of workers, and other institutions such as schools and hospitals for the proper upkeep of a healthy labour force. If workers recruited from outside the country left their families behind, the cost of labour reproduction would obviously be lower. The state would not be responsible for maintaining those families; that cost would be borne by the workers themselves through the remittances they sent home." See Li, supra note 9 at 76.


76. Chinese Immigration Act, S.C. 1900, c. 32.


78. Chan, supra note 23 at 67.

According to Li, among a random sample of 4,564 Chinese entering Canada between 1885 and 1903, only fifty were women, thirty of whom identified themselves as "wives."\textsuperscript{80} Li also reports that in 1911 there were 26,813 Chinese men and only 961 Chinese women in Canada, a ratio of almost twenty-eight to one. By contrast, the corresponding ratio for all of Canada was 113 men to 100 women.\textsuperscript{81} As Mariana Valverde maintains, the Chinese-Canadian community's sex imbalance generated a fear of miscegenation so great that it prompted a number of moral reformers to timidly protest against the exclusionary policy on the basis that the disproportion of Chinese males in Canada encouraged immorality.\textsuperscript{82} Although basically opposed to Chinese immigration, one wing of the missionary movement took the position that family life was better than all-male immigration, "in the interest of justice and morality."\textsuperscript{83}

Despite the imposition of the head tax, White unemployment and agitation against Asians continued to go hand in hand.\textsuperscript{84} As soldiers returning from the First World War swelled the labour market and war industries shut down, Canada experienced a general economic slump and unemployment soared.\textsuperscript{85} Xenophobic British Columbians continued to associate the Chinese with enemy aliens.\textsuperscript{86} As Patricia Roy reports, in one instance the Victoria Trades and Labour Council accused employers of Chinese migrants of being "decidedly unpatriotic," while its Vancouver counterpart asked members not to patronize bars, restaurants, or hotels that employed Chinese workers and urged that such businesses be denied liquor licenses.\textsuperscript{87} Women's organizations are also reported to have complained that the Chinese competed for jobs with White women.\textsuperscript{88} While Chinese migrants continued to lose jobs, the Canadian government made a sizeable profit from the imposition of the head tax on

80. General Register of Chinese Immigration, 1885–1903, vols. 694–703, as reported in Li, supra note 9 at 23.
81. Census of Canada 1911, vol. 2 (Ottawa: King's Printer, 1913) at 369, as reported in Li, supra note 9 at 65.
82. Resolution at May 26, 1911, meeting of the General Society of the Presbyterian Women's Missionary Society, as referenced in Mariana Valverde, The Age of Light, Soup, and Water: Moral Reform in English Canada, 1885–1925 (Toronto: McClelland and Stewart, 1991) at 117. Sec, for example, the testimony of James Young in the Report of the Royal Commission on Chinese Immigration 1885 (New York: Arno Press, 1978), who stated: "[W]herever I have known any considerable number of men deprived of female society for any length of time, the inevitable result has been that they become coarser. The intellect is depraved, the whole moral tone is lowered, and men rush into a greater depth of wickedness and vice than would otherwise have been possible" (at 89), as reported in Constance Backhouse, "The White Women's Labor Laws: Anti-Chinese Racism in Early Twentieth-Century Canada" (1996) 14 Law and History Review 315 at 341.
83. Valverde, supra note 82 at 117.
84. Roy, supra note 44 at 18.
85. Ibid. at 55.
86. Ibid. at 17.
87. Ibid.
88. Ibid.
Chinese immigrants. According to Li, between 1886 and 1923, the total reported revenue collected from the Chinese through the head tax amounted to $23 million.\footnote{Dominion Bureau of Statistics, \textit{Canada Year Book} (Ottawa: King’s Printer, 1931) at 185 and \textit{Canada Year Book} (1941) at 123; and Department of Mines and Resources, \textit{Annual Report of the Department of Mines and Resources, Immigration Branch, 1939-44} (Ottawa: King’s Printer, 1947) as reported in Li, \textit{supra} note 9 at 41-2.} Regardless, by the early 1920s, provincial politicians were convinced that the head tax was not achieving its goal of deterring immigration from China.

Between 1920 and 1923, government bodies became increasingly concerned with the presence of Chinese women in British Columbia.\footnote{Adilman, \textit{supra} note 4 at 63.} By 1921, the overall Chinese male-to-female ratio in Canada had declined to approximately sixteen to one.\footnote{Census of Canada 1921, vol. 1 (Ottawa: King’s Printer, 1924) at 358.} In Belinda Huang’s view, the improved ratio between Chinese men and women could be attributed both to the departure and death of male migrants and to the birth of a small number of children.\footnote{Belinda Huang, “Gender, Race and Power: The Chinese in Canada, 1920–1950” (MA thesis, McGill University, Montreal, 1998) at 10. See also Con et al. \textit{supra} note 1 at 149.} Despite the enduring sex imbalance, a major anxiety of the White population was that “if Chinese were allowed, without restriction, to bring their wives to Canada, they would reproduce at an alarming rate and [might] eventually outnumber whites.”\footnote{Adilman, \textit{supra} note 4 at 64.} This fear ultimately culminated in the passing of the \textit{Chinese Immigration Act} in 1923.\footnote{\textit{Chinese Immigration Act}, S.C. 1923, c. 38.} Referred to as the “Exclusion Act” by Chinese Canadians, the new act prohibited virtually all Chinese immigration except for consular officials, children born in Canada, students, and merchants. Chinese women were not likely to fall within these categories. According to Adilman, Mackenzie King deemed the act a necessary solution to the problem of labour competition.\footnote{Debates of the House of Commons, 1923, Vol. 3 at 2312-13. as reported in Adilman, \textit{supra} note 4 at 63.} However, as Adilman contends, the general debate really revolved around racist attitudes, which were probably intensified by the economic difficulties in British Columbia.\footnote{Ibid. at 63.} By implicitly excluding all Chinese women from Canada, the \textit{Exclusion Act} was clearly intended to control the reproductive life of the Chinese population.\footnote{Ibid. at 65. According to Li, although miscegenation was a possibility, inter-ethnic marriages were rare even in the absence of a miscegenation law, because of social hostility by settled Canadians, frequently highlighted by public statements by politicians and judges regarding marriages between Chinese men and White women. See Li, \textit{supra} note 9 at 70. As Patricia Roy reports, Prime Minister Mackenzie King believed Asians and “Occidentals” could not “intermingle physically on any wholesale or unlimited scale without mutual misfortune.” See Roy, \textit{supra} note 44 at 26 and 32-3.} As long as Chinese women could not come as permanent settlers to Canada, Chinese men would return to China, thereby
solving the Chinese-Canadian problem. The law went into effect on 1 July 1923 and was known for years afterwards by Chinese Canadians as "Humiliation Day." To mark Humiliation Day in 1924, Chinatown merchants in Vancouver closed their stores, refused to fly the Union Jack, and boycotted the annual parade.

The effects of the Exclusion Act were dramatic. According to Lai, between 1923 and 1947, only twelve Chinese were admitted to Canada as immigrants. Those who already resided in Canada were required to register with the Canadian government and to obtain a certificate of registration. Failure to register could result in a fine of up to $500 or imprisonment for up to twelve months, or both. As Kevin Griffin reports, the Chinese-Canadian community decreased to 34,000 within a decade after peaking at 47,000 in 1931. As a result of the restrictions, the Chinese-Canadian family as an intact unit did not exist, except in very limited cases, prior to the repeal of the act in 1947. The separation of families meant that most Chinese males in Canada lived a "married bachelor" existence. Li reports that in 1941, of the 29,033 Chinese men living in Canada, 20,141 had wives outside the country. Furthermore, the ratio of Chinese males to females significantly increased, reinforcing the overwhelming bachelor society in Chinese-Canadian communities while exposing the few Chinese women who immigrated to Canada to a harsh environment of sexual and reproductive pressure.

The period of exclusion was a turbulent time in China that was marked by famine, invasion, civil war, and political persecution. Many married Chinese men in Canada lost contact with their families during the Second World War. While their partners were abroad, women in China struggled to raise their children, often with the assistance of their

---

98. Adilman, supra note 4 at 67.
100. Lai, supra note 10 at 58.
101. Li, supra note 9 at 35.
102. Ibid. at 35.
103. Griffin, supra note 99 at 39.
105. Census of Canada 1941, vol. 1 (Ottawa: Dominion Bureau of Statistics) at 298-9, as reported in Li, supra note 9 at 72. I have not identified any records regarding the separation of Chinese women in Canada from their female partners in China. Given the number of Chinese women in Canada, their figures are probably limited.
107. Li, supra note 9 at 68.
extended families. As their oral histories suggest, many women experienced extreme economic hardship and starvation when remittances were cut off during wartime. Women who did not receive remittances from their spouses survived by their ability to find outside paid employment and successfully farm whatever land they had. Many worked as farm hands, wood cutters, and manual labourers—jobs that were traditionally associated with men. Some women in this situation survived by living with other men. The civil war in China and the subsequent Cold War between communist China and the West meant that some Chinese families were never reunited. Even those more fortunate did not reunite with their families until years after the initial marriage. According to Li, family reunification rates remained low, evidenced by the fact that the post-war census reveals the gender imbalance within the Chinese-Canadian community remained extremely high.

The Exclusion Act effectively deprived Chinese migrants of family support, delayed the formation of a viable Chinese-Canadian community, and, given the absence of a sizeable native-born population, inhibited the political influence of the Chinese-Canadian community. Although the Chinese were

108. Ibid. at 69. See also Yee, supra note 42 at 45, in which Gim-may Wong describes her separation from her husband Yuen: “I was fifteen years old when I was married in 1930... I couldn’t go to Canada with him, so I took care of the land in the village. Yuen sent money home all the time. We had several fields. I did the work and hired helpers.” See also Sugiman, ed., supra note 1 at 102, in which May Chow describes her experiences in China during the exclusion era when remittances from her father in Canada had temporarily halted: “[F]or eight years we never got any money. My mother had to sell clothes and things from the house. Life was difficult in the 1930s.”

109. Ibid. at 69 and 73. In some cases, the absence of men facilitated the breakdown of traditional gender boundaries and hierarchies. According to Huang, women from wealthier families became effective household heads during their husbands’ absence and had complete control over their families’ finances, land acquisition decisions, and workers. Women also played an increasingly active role in community fairs, forming all-female organizations that dealt with problems of gambling and opium in the villages. See Huang, supra note 92 at 42. In other cases, women with partners in Canada felt that their control over their family finance and marriage decreased and lamented that they could “only wait” at home and “hope that their husbands remitted money to sustain them and their family.” See Huang, supra note 92 at 72.

110. Overseas Chinese Affairs Committee in Guangdong in the People’s Republic of China, The Labouring People Who Love Their Fatherland (Guangdong Sheng, 1952), as reported in Huang, supra note 92 at 42.

111. According to Huang, the fear that migrants’ wives would be unfaithful or neglectful of their family obligations during their husbands’ absence led to increased vigilance about their behaviour. As she reports, the print media often described how villagers intervened and punished unfaithful wives on behalf of their absent husbands. See the Ta Han Kung Pao, the longest running Chinese language newspaper in Canada, available at the National Library in Ottawa, 2 July 1931 and 13 January 1930, as reported in Huang, supra note 92 at 72.

112. Li, supra note 9 at 68.

113. Ibid. at 68.

114. Ibid. at 70.

115. According to Li, as late as 1991, 73 per cent of all Chinese and 85 per cent of all Chinese over the age of fifteen in Canada had been born abroad. See Li, supra note 9 at 72-3.

116. Ibid. at 73.
not legally barred from becoming naturalized citizens of Canada, naturalization was difficult after 1923. Since the 1914 *Naturalization Act* also stated that wives assumed the status of their husbands, a Chinese woman with Canadian citizenship automatically became an alien by marrying an alien Chinese. While the *Exclusion Act* was repealed in 1947, racist restrictions on the immigration of Chinese persons continued until the early 1960s. This legislative activity reflected a wider pattern of anti-Asian public policy in Canada. In addition to the head tax and the *Exclusion Act* legislation, Chinese immigrants were subject to more legislative control than any other migrant group in Canada. These included laws disenfranchising Chinese Canadians, taxes levied on rice and laundries, prohibitions against the employment of White women in Chinese restaurants, prohibitions against Chinese ownership of Crown land, segregation of schools, and prohibitions against entry to various occupations and professions. The effects of such discriminatory treatment undoubtedly contributed to the Chinese community's continuing marginalization in Canada decades after the *Exclusion Act* was repealed.

From 1950 to 1955, Li reports that an average of 2,000 Chinese immigrated annually to Canada. According to Momoye Sugiman, among these individuals were young women in their late teens or early twenties who had immigrated to join their new husbands. Due to the shortage of Chinese women in Canada and anti-miscegenation sentiment among the White settler population, Chinese bachelors in Canada who had postponed marriage because of the financial and legal difficulties involved in sending for a bride from China married young women from China twenty to thirty years younger than them in order to have children. This huge gap created another social phenomenon within the Chinese-Canadian community—young widows with children to raise. The gender imbalance created by the restrictions that the act imposed was so significant that even following the repeal of the *Exclusion Act* in 1947 and the repeal of other immigration restrictions in

117. Ibid. at 35.
118. *Naturalization Act*, S.C. 1914, c. 44. Conversely, Chinese men with Canadian citizenship did not similarly become "aliens" upon marrying alien Chinese women.
119. Contemporary Forms of Racism, supra note 41 at 3.
120. Li, supra note 9 at 31.
121. Ibid. at 32. See, for example, *An Act Relating to an Act to Make Better Provision for the Qualification and Registration of Voters*, S.B.C. 1875, no. 2; *An Act Respecting the Qualification and Registration of Voters*, S.B.C. 1895, c. 20; *An Act Respecting Elections of Members of the Legislative Assembly*, S.B.C. 1920, c. 27; *British Columbia Municipal Elections Act*, S.B.C. 1896, c. 38; *An Act for the Protection of Women and Girls in Certain Cases*, S.B.C. 1923, c. 76; *Saskatchewan Elections Act*, S.S. 1908, c. 2; *An Act to Prevent the Employment of Female Labour in Certain Capacities*, S.S. 1912, c. 17; and *Act to Amend Factory, Shop and Office Building Act*, S.O. 1914, c. 40.
122. Li, supra note 9 at 96.
123. Sugiman, ed., supra note 1 at 21.
124. Ibid. at 21. See also Burney, supra note 21 at 27.
125. Sugiman, ed., supra note 1 at 22.
1962, the gender balance in the Chinese-Canadian community did not begin to equalize until 1981.\textsuperscript{126} Such extreme gender imbalance contributed to the isolation that Chinese women experienced in Canada and reinforced their dependency on their spouses. As a result of the gender imbalance, there was also a significant delay in the formation of a second generation of Chinese Canadians. As Li reports, as late as 1991, over 70 per cent of the Chinese community in Canada was not born in Canada.\textsuperscript{127}

\section*{Class Action}

The year of Dak Leon Mark's request roughly coincided with the adoption of the \textit{Canadian Charter of Rights and Freedoms}.\textsuperscript{128} As more generous notions of racial equality developed, which were reflected in law, the harm that Mark experienced as a result of the head tax could finally be articulated. By 1983, the muting of culturally conditioned ideas about Chinese inferiority, coupled with the entrenchment of individual rights in Canadian law, established the backdrop to Mark's initial pursuit for redress. According to Griffin, Mark had conveyed to Margaret Mitchell the importance of compensation in light of the \textit{Charter} and his newly entrenched human rights.\textsuperscript{129} Notwithstanding the absence of \textit{Charter} jurisprudence regarding reparation, Mark invoked the language and authority of its equality rights provisions as the basis for his claim for compensation. At Mark's request, Mitchell wrote to Prime Minister Pierre Trudeau requesting an apology and compensation. When her request was rebuffed, Mitchell voiced her concerns in the House of Commons the following year. Within days, a Chinese radio station in Vancouver encouraged individuals who had paid the head tax to come to its East Pender Street office. The appeal did not fall on deaf ears. On the first weekend, 400 elderly Canadians brought in their receipts. The Chinese-Canadian National Council, a Toronto-based umbrella group, eventually registered 4,000 head tax payers and their descendants.\textsuperscript{130} Predictably, women were largely absent among the head tax claimants.

While the head tax campaign initially focused on lobbying federal politicians, holding rallies, sponsoring conferences, and distributing postcards on the head tax and redress campaign, head tax payers ultimately invoked the "official" language of the law in December 2000 when Shang Jack Mack, Quan Ying Lee, and Yew Lee filed a class action law suit with the Ontario Superior Court of Justice, seeking the return of the amounts of the head

\textsuperscript{126} Li, \textit{supra} note 9 at 98.
\textsuperscript{127} Ibid. at 73.
\textsuperscript{129} Griffin, \textit{supra} note 99 at 42.
\textsuperscript{130} Contemporary Forms of Racism, \textit{supra} note 41.
tax paid by them, their spouses, or their direct descendants, plus interest, to the government of Canada. In addition, the plaintiffs sought damages for pain and suffering, injury to dignity and lost opportunity, a public apology, and the establishment of a foundation dedicated to the eradication of racism.\textsuperscript{131} Of the three plaintiffs, only Shang Jack Mack had personally paid the head tax. Quan Ying Lee was the widow of a head tax payer who had immigrated to Canada in 1949, after the repeal of the \textit{Exclusion Act}. Yew Lee was the third of Quan Ying Lee's children. Born in China, Yew Lee immigrated to Canada in 1949 with his mother.

Three main arguments were forwarded by the plaintiffs. First, the plaintiffs argued that the government's refusal to provide redress to head tax payers was discriminatory in light of the provision of reparation to Japanese wartime internees. The exclusion of benefits to head tax payers and the provision of benefits to similarly situated Japanese Canadians thus constituted a violation of their constitutional equality rights. The plaintiff's second argument was based upon international law. In short, the various \textit{Exclusion Acts} were invalid upon their enactment because they violated customary international law. Unjust enrichment was the third argument put forward. Since the head tax violated customary international law, the plaintiffs argued that its collection constituted unjust enrichment, which the state has a common law duty to repair. Despite the focus of the legal arguments on compensation for the head tax, the plaintiffs highlighted the “hardship, emotional distress, family separation, loss of companionship of spouse, child and parent, loss of opportunity and injury to dignity” suffered as a result of the discriminatory legislation.\textsuperscript{132} According to the plaintiffs' memorandum of argument, “the single most devastating consequence of the various forms of the \textit{Act} was the separation of families and the resulting impediment to the growth of the Chinese Canadian community”\textsuperscript{133} —a harm that would have been shared by Chinese men and women of the exclusion era alike. Nevertheless, while damages for pain and suffering, injury to dignity, and lost opportunity were claimed, the plaintiffs framed the case primarily in terms of head tax compensation—a harm that most Chinese women could only claim as surviving spouses of head tax payers.\textsuperscript{134}

On 9 July 2001, Justice Peter Cumming of the Ontario Superior Court of Justice dismissed the case. While acknowledging that the legislation that was imposed upon Chinese immigrants was “patently discriminatory against persons of Chinese origin” and therefore both “repugnant and reprehensible” by contemporary Canadian morals and values, Cumming nevertheless found it “plain and obvious” that the plaintiffs' claim could

\textsuperscript{131} Statement of Claim, \textit{supra} note 79 at para. 1.
\textsuperscript{132} \textit{Mack v. Canada (Attorney General)} 55 O.R. (3d) 113 at para. 10.
\textsuperscript{133} Memorandum of Argument, \textit{supra} note 104 at para. 7.
\textsuperscript{134} Statement of Claim, \textit{supra} note 79 at para. 1.
not succeed.\textsuperscript{135} Cumming J., however, suggested in his judgment that Parliament should "consider providing redress for Chinese Canadians who paid the Head Tax or were adversely affected by the various Chinese Immigration Acts."\textsuperscript{136}

Mack, Lee, and Lee appealed the order of the Ontario Superior Court of Justice to the Ontario Court of Appeal. The appeal was heard on 10–11 June 2002. During the hearing, Appellate Court Justice James MacPherson was reported to have suggested that the head tax had been willingly paid by individuals who chose freely to come to Canada and that funds from the tax had helped to meet important public purposes. MacPherson J.A. was further reported to have commented that paying the head tax must seem worthwhile to the head tax payer who could now witness his "granddaughter playing first-string cello for the Toronto Symphony Orchestra."\textsuperscript{137}

By teleologizing a narrative of destiny that portrayed an inexorable progression towards liberation and the place of the head tax payer within it, MacPherson J.A. stifled the head tax plaintiffs' narratives with his own.\textsuperscript{138} According to this schema, the head tax was a mere stepping stone to eventual acceptance in Canada. In response, the plaintiffs launched an official complaint with the Canadian Judicial Council, arguing that the hostile tone and stereotypical content of MacPherson J.A.'s comments indicated racism and bias against the plaintiffs.\textsuperscript{139} The Canadian Judicial Council dismissed the complaint, stating that the plaintiffs' failure to appreciate the importance of adversarial questioning by appellate judges made the complaint "both

\begin{itemize}
  \item \textsuperscript{135} According to Justice Cumming, the Charter could not be applied retroactively or retrospectively since the offending law was repealed in 1947, and there could be "no contemporary application of a repealed law." Furthermore, the fact that the government gave redress to one group of Canadians did "not in itself provide a legal basis for another, unrelated group in respect of their claim of discrimination." With respect to the international law argument, Justice Cumming contended that international treaties and conventions do not form part of Canadian law unless they have been expressly implemented by statute. While the international documents and treaties cited by the head tax plaintiffs evince a norm prohibiting racial discrimination, the fundamental documents and conventions relied upon by the plaintiffs did not come into existence until after 1947, and many of the documents were not ratified by Canada until after 1970. Finally, in reference to the unjust enrichment claim, Justice Cumming acknowledged that the first two requirements of unjust enrichment had been met, but the Chinese Immigration Acts constituted a juristic reason for the enrichment. See \textit{Mack v. Canada (Attorney General)} (2001), 55 O.R. (3d) 113 (Mack).
  \item \textsuperscript{136} \textit{Mack, supra} note 135 at para. 54.
  \item \textsuperscript{139} Formal complaint against Justice MacPherson, \textit{supra} note 137.
\end{itemize}
unjustified and unfair." The eventual decision of the Ontario Court of Appeal, dismissing the applicants' appeal, was released on 13 September 2002. While the court ultimately dismissed the appeal, it conceded that the legislation targeting Chinese Canadians was "one of the more notable stains on our minority rights tapestry." The plaintiffs sought leave to appeal to the Supreme Court of Canada. On 24 April 2003, the Supreme Court of Canada dismissed the plaintiffs' leave application without reasons. The redress campaign thus returned to the political arena where lobbying by head tax claimants culminated in 2006 with an official apology by Prime Minister Stephen Harper and symbolic redress payments of $20,000 to surviving head tax payers and persons who had been in conjugal relationships with now deceased head tax payers.

**Law's Spurned Persons: Lotus Blossoms and Fallen Women**

As the Chinese head tax payers' class action demonstrated, reliance on an evidently conventional notion of monetary loss does not necessarily result in legal success. Chinese head tax payers were denied redress at every judicial level, despite the courts' acknowledgment that the head tax and exclusion era legislation were patently unjust. Nevertheless, litigation highlighted to a largely uninformed public the injustices of the exclusion era and contested the historical stereotypes of Chinese Canadians as perpetually foreign. Had the class action not proceeded, the head tax payers' broader political campaign for redress would have likely deteriorated. Hence, the lawsuit succeeded, to some extent, in reconstructing particular versions of Chinese-Canadian history and identity. At the same time, certain other versions of Chinese-Canadian history and identity remained hidden—stories that are less legally viable but that tell of losses no less valid from the perspective of those harmed. While both

143. Prior to the 2006 apology and the "symbolic payment" by the Conservative government, the outgoing Liberal government had tabled a bill in November 2005 to fund a $2.5 million non-profit foundation to educate Canadians about anti-Chinese discrimination, a decision that met with opposition by the broader Chinese-Canadian community because it had been negotiated without the participation of the most active groups on this issue, including the Chinese Canadian National Council, and did not include individual compensation for head tax claimants. For further discussion on this issue and a transcript of the apology, see "Chinese Head Tax and Historical Recognition Initiatives," Department of Canadian Heritage, <http://www.pch.gc.ca/progs/multi/redress-redressement/index_e.cfm> and "Chinese Head Tax FAQs," CBC News, <http://www.cbc.ca/news/background/immigration/theadtax.html>.
Chinese men and women experienced such loss, Chinese women rarely also experienced the direct economic loss that ostensibly counts in the courtroom. In view of the gendered nature of the Chinese head tax payers' class action, this section shall explore why particular harms are privileged over others. What relationship does this have with the identity of potential claimants? How can seemingly novel conceptions of harm gain legal recognition?

A central theme of feminist jurisprudence holds that law embodies a masculine perspective in emphasizing autonomy and the individual over interdependency and the community. Thus, law’s preferred person is able-bodied, autonomous, rational, educated, monied, competitive, and essentially self-interested. Conversely, law’s preferred women “nurture the human side of the abstract man, care for his children and make him fit to go out into the hostile, public world where he must maintain the appearance of a free, independent and self-sufficient agent of his own (and his family’s) interests.” Within this framework, law is primarily concerned with the protection and advancement of the rights of individual citizens, not with regulating and forging social connections between individuals, a factor that works to the disadvantage of women who have historically occupied the position of Other in relation to the male self. Given the dominance of such tropes, harms perpetrated against individuals who do not conform to law’s preferred persons have been largely overlooked by historical and legal insiders.

In the context of Canadian immigration policy, model citizens have been historically “White, particularly British-origin, Protestants.” Whereas state practices actively excluded Chinese women from entering Canada, the migration of women from “preferred groups” was encouraged for the purposes of White nation building. Correspondingly, the migration of Chinese male migrants was tolerated, given their perceived capacity for hard physical labour. Though neither the prospective Chinese male migrant nor the prospective Chinese female migrant of the exclusion era conformed to law’s model citizens, men have found it easier to articulate their discrimination in terms of racial subordination. The specific form that anti-Chinese policy (namely, the head tax) took enabled the possibility of litigation and a means of seeking compensation not necessarily available to other targets of discriminatory Canadian immigration policy. In particular, the deliberate, but oblique, prevention of Chinese women’s migration to Canada by virtue of systemic practices in China and socio-economic factors in Canada

146. Ibid, at 105.
147. Abu-Laban and Gabriel, supra note 36 at 38.
148. Ibid, at 38.
constitutes a harm that is not yet legally cognizable in courts. In short, Chinese women could not be directly discriminated against in terms of the head tax because they did not even have the capacity to pay it.

In Nitya Duclos's view, the dominant-group model upon which each type of discrimination doctrine is based is "someone who diverges from the norm in only one respect—a white woman in a sex discrimination case, a racial minority man in a race discrimination case." Since harm is defined from the perspective of those who do not tend to experience it, a select group of people who differ from the dominant group in only one respect are compensated for their harms. Chinese male migrants of the exclusion era, who were valued in controlled numbers for their labour capacity, are thus able to claim racial discrimination when confronted with immigration legislation that appears on its face to be exclusively motivated by racism. In contrast, racialized women have been historically required to establish that the harms they have experienced are just like White women's or just like racialized men's, in order to successfully claim discrimination. Without interrogating the implicitly sexist and classist nature of exclusion era immigration legislation, Chinese women of the exclusion era are required to prove racism in the form of the head tax—a loss that most cannot claim. Not surprisingly, the singular reparation claim to date involving racialized women (and, correlatively, gender-based harm) is the case initiated by former "comfort women" against the Japanese government for the systematic rape perpetrated at Japanese military brothels ("comfort stations") during the Second World War.

Given the dearth of reparation claims involving intersectional harms, Chinese women of the exclusion era, who depart from the dominant group norm with their experiences of class, race, and gender oppression, have naturally experienced greater difficulty articulating their harms through dominant discourses of discrimination. As critical race feminists have stressed, feminists and critical race scholars often fail to address the oppression of both race and gender when these issues intersect. Consequently, the interaction between Chinese women's racial and gender constructs, so intimately embedded within the narratives associated with Chinese women

150. Ibid. at 42.
151. Ibid. at 44.
152. Tong Yu, "Recent Developments: Reparations for Former Comfort Women of World War II" (1995) 36 Harvard International Law Journal 528 at 528. Recent programs unveiled by the Japanese government include raising a compensation fund for former comfort women through private sector donations, initiating academic exchanges with other Asian countries, and financing vocational education for women in other Asian countries.
during the exclusion era, have largely been ignored at great theoretical cost. According to Daiva Stasiulus, "the interaction of race, gender, and class produces a distinct result not captured by analyzing race, gender, and class separately."\textsuperscript{154} Rather than treating race, gender, and class as discrete categories, critical race feminists implore an analysis of how material structures, discourses, and experiences of gender are racialized, how race is gendered, and how class overlaps with the logics of race and gender.\textsuperscript{155}

Reconsidering Chinese women's oppression during the exclusion era within an intersectional framework highlights the severe race, class, and sex discrimination that they were subjected to as a result of their positioning as racialized women. As with other Chinese applying for admission into the country, Chinese women were judged by intersecting notions of race and class. As Chinese, they were assumed to be excludable rather than admissible.\textsuperscript{156} However, while Chinese men posed a threat primarily in terms of labour competition, Chinese women threatened both the moral framework and racial "purity" of the nation, as evidenced by references to Chinese women exclusively in the context of prostitution, polygamous relationships, or population control.\textsuperscript{157} Though Chinese merchants' wives might have been able to deflect suspicions by emphasizing their class status, all Chinese women were subject to gendered provisions in the exclusion laws that classified and judged them primarily as being dependent of males.\textsuperscript{158} Chinese women were thus perceived either as sexual servants with little or no agency in the bachelor society or as the domesticated appendages of labouring Chinese men. As such, Chinese women "assumed at least a double subaltern identity, as they occupied a subordinated position within a subordinated group."\textsuperscript{159}

Despite the harms that Chinese women suffered as a result of discriminatory immigration policy, their experiences have been largely conflated with those of Chinese men in current dialogue about the head tax. Although this is due in part to the difficulty of transcending the dominant-group perspective described by Duclos, their silence can also be attributed to the paucity of narrative tropes available to describe Chinese women's confrontation with discriminatory state policy. As Linda Carty suggests, Third World women find themselves cast to the periphery of liberal feminist theory.


\textsuperscript{155} Ibid. at 355.

\textsuperscript{156} Adilman, \textit{supra} note 4 at 61. See also Erika Lee, \textit{At America's Gates: Chinese Immigration during the Exclusion Era, 1882-1943} (Chapel Hill: University of North Carolina Press, 2003) at 93, for a discussion of the restrictions on Chinese women's admission into America and the ideological impact this has had on Chinese migrant women's identity.

\textsuperscript{157} Adilman, \textit{supra} note 4 at 63.

\textsuperscript{158} Ibid. at 61.

where they are positioned as monolithic, pitied as being passive, and dismissed as tradition bound. Since they are "rarely seen or looked at," they are "seen through, analyzed not as citizens, or even people, but as a problem to be solved or confined or... taken over." Chinese women are thus reduced to passive objects, only to be known by cognitively privileged Western subjects. This was evident in the case of Ah Fong Moy, a Chinese woman who was first presented as a "Chinese lady" in Barnum's American Museum in 1834, robed in silks and seated against Chinese furnishings in front of a backdrop of various dioramas. Moy was but a visual experience, to be contemplated but not heard, her subjectivity denied. As Edward Said notes,

latent Orientalism . . . encouraged a peculiarly (not to say invidiously) male conception of the world. . . . The Oriental male was considered in isolation from the total community in which he lived and which many Orientalists. . . . have viewed with contempt and fear. . . . The male conception of the world, in its effect upon the practicing Orientalist, tends to be static, frozen, fixed eternally. The very possibility of development, transformation, human movement—in the deepest sense of the word—is denied the Orient and the Oriental.

The construction of the Oriental male as perpetually isolated reinforces the assumption that the legislated separation of Chinese families was voluntary and natural to Oriental Others. As the following narratives illustrate, the particularities of Chinese women during the exclusion era assured their caricaturization as contrasting tropes justifying their oppression: the enabling, domestic, silent wife ("lotus blossoms") and the victimized whore ("fallen women"). These constructions have allowed the Orientalist gaze to work in varying degrees to strip Chinese women of agency, marking their bodies in the eyes of the Chinese-Canadian community and the dominant culture.

Lotus Blossoms

Between 1884 and 1894, a mere thirty-four Chinese women are reported to have entered Canada in the company of men listed as their husbands.

162. Ibid. at 3.
164. Said, supra note 161 at 207–8.
165. Sugiman, ed., supra note 1 at 18.
Most migrants' wives remained in China, where they raised their children with the assistance of various family networks.\textsuperscript{166} Despite the obvious material structures hindering migration, however, one frequently proffered explanation for the apparent reluctance of Chinese women to emigrate with their husbands during this period is the prevalence of Confucian values in Chinese culture, which stress the importance of family.\textsuperscript{167} According to Lucie Cheng, the Chinese patriarchal family system discouraged "decent" women from travelling abroad.\textsuperscript{168} Rather, a married woman's first obligation was to her parents-in-law, in whose home she assumed specific, prescribed responsibilities.\textsuperscript{169} At home, Chinese women were able to perform the labour of child-bearing and child-rearing at no cost to the Canadian state, and this was crucial to the development of a reserve of cheap Chinese labour. As some scholars contend, Confucianism remained pure in theory and application among migrants in Canada, and Confucian ideas and values exerted a strong influence on the Chinese patriarchal family.\textsuperscript{170} In Sucheng Chan's view, "given the central importance of filial piety in traditional Chinese culture, the moral duty of wives to remain in China to wait on their parents-in-law was greater than their obligation to accompany their husbands abroad."\textsuperscript{171} Similarly, Judy Yung argues that "men ruled the country while women stayed home to manage the household."\textsuperscript{172} Dutiful wives were thus left home to tend to the family while their husbands went overseas in search of fortune.\textsuperscript{173} Arguably, such accounts of Chinese subjectivity emphasize the patriarchal nature of Chinese "Others" while rendering the patriarchal nature of the dominant culture invisible. Nevertheless, Chinese women were stereotypically described as \textit{Nei-jen}, or "inside people," a notion that emanated from centuries of Confucian prescriptive literature defining women's place in the domestic sphere.\textsuperscript{174}

The notion of Chinese women as obedient wives was summarized by Commissioner John Gray of the Royal Commission on Chinese Immigration, who maintained that "the married women is subject to the will of her husband,

\begin{itemize}
\item \textsuperscript{166} Li, supra note 9 at 73-4.
\item \textsuperscript{167} Sugiman, ed., supra note 1 at 17. See also Judy Yung, \textit{Chinese Women of America: A Pictoral History} (Seattle: University of Washington Press, 1986) at 10.
\item \textsuperscript{169} George Peffer, \textit{If They Don't Bring Their Women Here: Chinese Female Immigration before Exclusion} (Urbana: University of Illinois Press, 1999) at 5.
\item \textsuperscript{170} Li, supra note 9 at 61. See also Chan, supra note 23; and Peffer, supra note 169 at 5.
\item \textsuperscript{172} Yung, supra note 167 at 10.
\item \textsuperscript{173} Ibid. at 11.
\item \textsuperscript{174} Adilman, supra note 4 at 54.
\end{itemize}
and sometimes to the control of her husband's mother. The faithfulness of married women in China to their husband's will compares favorably with the practice of the same virtue by the women of Europe and America.\(^{175}\) In this version of the stereotype, Chinese women are, for the most part, passive figures who exist to serve men. Robbed of subjectivity, Chinese women are only deemed to have the superimposed will of their spouses. Unlike the disembodied individual, endowed with legal rights shielding him from community scrutiny and permitting him to pursue his self-interest with no thought of responsibility to others, Commissioner Gray's solipsistic representation of Chinese women removed all notions of liberty and conscripted their bodies in the service of maternity.\(^{176}\) Within this paradigm, Chinese women who did not migrate to Canada remained in China out of deference to their husbands and not because of the severely racist, sexist, and classist immigration legislation directed towards their community.

While there is no question that patriarchal cultural values, a sojourning mentality, and differentials in the cost of living all worked in tandem to limit the number of Chinese female immigrants during the early decades of the Chinese influx, the assumption that cultural restraints were solely responsible for the skewed sex ratio of the Chinese immigrant community should be challenged.\(^{177}\) According to Li, "there is a profound difference between the ideals of traditional familism, as incorporated in the ethical precepts of neo-Confucianism, and the form of the Chinese family as an empirical reality...economic necessity compelled both the husband and the wife to participate actively and jointly in agricultural production."\(^{178}\) Given the poor economic conditions at home, George Peffer suggests that there were sufficient economic incentives for tolerating, and even encouraging, female emigration from China rather than prohibiting it,\(^{179}\) particularly among rural Chinese where most women needed to work to support the immediate and extended family. In Peffer's view, Confucian traditions exerted much less influence over the families from which most prospective migrants came.\(^{180}\) In particular, Adilman reports how studies of women from southern China, where most migrants came from, conclude that in addition to their work in the home women laboured in other spheres, such as agriculture and manufacturing.\(^ {181}\)

Correspondingly, Li maintains that a more important reason for the gross disproportion between males and females in Chinese

---

175. Report of the Royal Commission, supra note 82 at 269.
177. Zhao, supra note 15 at 9.
178. Li, supra note 9 at 62.
179. Peffer, supra note 169 at 6.
180. Ibid. at 14.
181. Adilman, supra note 4 at 54.
immigrant communities was anti-Chinese sentiment among the White public.\(^{182}\) Coupled with the animosity directed towards Chinese women in particular, the severe marginalization of the Chinese in Canada had an equal, if not more profound, impact on discouraging the migration of women as “family-oriented” Confucian values.\(^{183}\) Thus, Confucianism and the sojourner mentality alone fall short of explaining the years of profound gender imbalance during the pre-exclusion era. Though it is impossible to locate a single, definitive account of why Chinese women did not migrate during the exclusion era, the formalization of social hostility in the form of anti-Chinese legislation, especially targeting migrant women, undoubtedly undermined the confidence of Chinese women to safely work and reside in Canada.

Although the influence of Confucianism appears to have been overstated, a conception of Chinese women as lotus blossoms was compatible with existing (Western) narratives describing women’s place within the private sphere. According to Commissioner Gray, Chinese women yielded, without dissent, to their husbands’ wills. Therefore, the matter of consent was never interrogated. As Teemu Ruskola argues, one prominent justification for America’s Chinese exclusion laws was the putative inability for Chinese to comprehend the notion of individual rights and thus qualify for a Western “Republican form of Government.”\(^{184}\) By establishing the difference between the intellectual, social, and historical West and the immature East—so immature and radically “un-legal”—the Chinese could be justifiably denied formal equality.\(^{185}\) Similarly, the understanding that Chinese women were Nei-jen rendered their absence in Canada natural, given the Orientalist construction of Other women. Such intersecting race and gender discourse justified Canadian control over Chinese immigration. As a result, the impact of discriminatory laws in Canada has been left unexamined and the phenomenon of transnational households in the Chinese-Canadian community could be attributed to Orientalist notions of the disembodied Chinese male and the domesticated Chinese female. While Chinese women’s agency should not be conceived in terms of free-standing individual

182. Li, supra note 9 at 61. In Canada, the hostile treatment of Chinese migrants is evidenced in the 1902 Royal Commission Report on Chinese and Japanese Immigration, where a Chinese merchant from Vancouver testified that “a large proportion of [Chinese men in Canada] would bring their families here, were it not for the unfriendly reception they got here during recent years.” See Report of the Royal Commission on Chinese and Japanese Immigration (Ottawa: King’s Printer, 1902) at 263. See also Lindsay Ferguson, “Constructing and Containing the Chinese Male: Quong Wing v. The King and the Saskatchewan Act to Prevent the Employment of Female Labour” (2002) 65 Saskatchewan Law Review 549 at 555; and Huping Ling, Surviving on the Gold Mountain (Albany: State University of New York Press, 1998) at 26.

183. Li, supra note 9 at 61.


185. Ibid. at 217.
autonomy or straight-jacketed structural determinism, the capacity of Chinese women of the exclusion era to choose is both facilitated and constrained by socio-political circumstances. Yet, like their Western counterparts, Chinese women were perceived as being unable to choose, thus authorizing others to define their needs and experiences. As such, Chinese wives were deemed to enable their partners, from afar, "to spring forth into the public sphere, fully nurtured, full-grown, emotionally nourished, and unencumbered by children." Given the ideological framework confining maternalized Chinese women to the home, and the endurance of such narratives, it is no wonder that any harm arising from forced separation has yet to be considered.

Fallen Women

Since Chinese merchants "quickly realized that profits could be made from the sexual needs of Chinese workers and the curiosity of white pleasure seekers," numerous Chinese women were recruited to Canada for the purposes of prostitution. According to Karen Van Dieren, due in part to the shortage of Chinese women in British Columbia, young women were purchased in China, then brought to British Columbia where they were resold for as much as $1,500 to Chinese men. Often, this was a remunerative solution for relieving families in China of its female members, since their sale or part of their earnings could help support the family. As Van Dieren reports, Chinese women were customarily forced to sign a contract stating that they agreed to prostitute themselves for a specified length of time, after which they were free. Such indentured servitude led some White settlers to perceive Chinese prostitutes as morally and spiritually bereft slaves—a notion that made them favourite subjects for White missionaries' rescue crusades, as well as for nativist politicians seeking to justify restricting and excluding Chinese immigration. According to Sumi Cho, sensational newspaper headlines in America reflected the widespread characterization of Chinese women as the abused chattel of brutal Chinese proprietors. Correlatively, Peter Ward reports how Canadian newspapers popularized images of Chinese women as syphilis-infected prostitutes luring young White men into corruption.

187. Naffine, supra note 145 at 104.
188. Adilman, supra note 4 at 57.
189. Van Dieren, supra note 37 at 80.
190. Cheng, supra note 168 at 403.
191. Van Dieren, supra note 37 at 80.
192. Ibid. at 81.
193. Cho, supra note 159 at 184.
In Cho's view, "such characterizations effectively combined the racialized narrative of a harsh, heathen and unassimilable Chinese culture with a gendered dimension that reflected images of sexual slavery."¹⁹⁵

The visibility of Chinese prostitutes in British Columbia and popular racist sentiment against the Chinese ensured that almost all Chinese women were deemed prostitutes, while many were believed to seduce young White boys and transmit venereal disease.¹⁹⁶ As Eithne Luibhéid suggests, sex with Chinese prostitutes was the seeming vector through which White supremacy and the perpetuity of the White race was directly threatened.¹⁹⁷ Chinese prostitutes, and, by extension, Chinese women, were believed to pose a serious threat to Canadian society because they undermined the morals and health of the White community.¹⁹⁸ According to Erika Lee, Chinese prostitutes represented a "sexualized danger with the power to subvert both the domestic ideal (based on the notion of women as the moral centre of a chaste social order) and the existing relations between White heterosexual men and women. Their mere presence made possible the crossing of racial and class lines and renewed fears of 'moral and racial pollution.'"¹⁹⁹ In short, Chinese prostitutes were seen as potent instruments for the debasement of White manhood, health, morality, and family life.²⁰⁰

Yet, while Chinese prostitutes were denigrated, they also serviced Chinese (and sometimes White) men's sexual needs with a minimal possibility of reproductive family life, thus aiding the state's objective of maintaining cheap Chinese labour in Canada without threatening the construction of the White British-Canadian state.²⁰¹ By satisfying Chinese males' immediate sexual needs, Chinese prostitutes facilitated bachelor society immigration, leaving capital free of the cost of families for its workers.²⁰² Meanwhile, Chinese women also alleviated the paternalistic fear of vulnerable and innocent White women being subject to the "primitive" sexuality of men of colour. Workplace laws such as An Act for the Protection of Women and Girls in Certain Cases of 1923 in the Statutes of British Columbia embodied such stereotypes and sought to prohibit the employment of White women and girls in Chinese businesses, which were defined as places "where morals might be in question."²⁰³ Despite the fact that Chinese prostitutes enabled Chinese

²⁰⁵ Cho, supra note 159 at 184.
²⁰⁶ Van Dieren, supra note 37 at 80.
²⁰⁷ Eithne Luibhéid, Entry Denied: Controlling Sexuality at the Border (Minneapolis: University of Minneapolis Press, 2002) at 37.
²⁰⁸ Van Dieren, supra note 37 at 80.
²⁰⁹ Lee, supra note 156 at 26.
²¹⁰ Chan, supra note 171 at 138.
²¹¹ Stasiulis, supra note 154 at 364.
²¹² Cheng, supra note 168 at 405.
²¹³ Act for the Protection of Women and Girls, supra note 121; and Li, supra note 9 at 33. Saskatchewan, Ontario, and Manitoba had passed similar legislation making it illegal for Chinese restaurants to hire non-Chinese waitresses. As Roy argues, this legislation
workers to labour at low wages in Canada without compromising the racial purity of the country or White women, they were also characterized as disease-ridden seductresses and sexual deviants.

The primary instance in which Chinese women are addressed in the Report of the Royal Commission on Chinese Immigration 1885 relates to prostitution. According to John Meares, a physician testifying before the commission, “all Chinese women are looked upon as prostitutes; as a rule, they are. There are a few women here, but it would be a great blessing if there were a great many more for the use of the Chinamen.” As a number of similar statements in the report reinforce, a phallocentric understanding of Chinese subjectivity drove ideological perceptions of Chinese women. The manner in which the discourse was informed by the juxtaposition of two patriarchal cultures served not only to alienate women from their powers of self-definition but also to erase all notions of women’s self-perception. In the process, Chinese women’s agency was expunged from debate. In the service of men, Chinese women were merely passive recipients of harm.

This distorted view was shared by the Women’s Missionary Society of the Methodist Church, which felt the need to “rescue” Chinese women by establishing a Chinese Rescue Home in 1886 to provide a safe refuge for prostitutes. Designed as a surrogate family, the home was used to teach Chinese prostitutes the “Christian” meaning of womanhood and White middle-class behaviour and values. Those residing in the home were prepared for marriage with ongoing lessons in fancy work, housekeeping, sewing, and manners. Saving the souls of Chinese prostitutes thus became the White women’s burden, and a discourse of rescue and salvation was deployed to justify missionary women’s participation in speaking on Chinese women’s behalf. Chinese prostitutes were thus positioned in the contradictory space of infantilized and hypersexualized. In either characterization, Chinese women were presumed to be unable to act in their own best interests. Not surprisingly, attempts to convert Chinese prostitutes into paradoxically harmed White women more than it did Chinese restauranteurs. White women who were dismissed from their employment at Chinese restaurants protested that their employers had treated them well and that they had no other jobs. See Roy, supra note 44 at 206-7. See also Backhouse, supra note 82 at 315, Con et al., supra note 1 at 120; Roy, supra note 44 at 43-4; and Burney, supra note 21 at 8, for commentary on this legislation.

204 Report of the Royal Commission, supra note 82 at 201.
205 Chalykoff, supra note 6 at 165.
206 Ibid. at 165.
207 Sugiman, ed., supra note 1 at 19.
208 Van Dieren, supra note 37 at 82.
209 Ibid. at 80.
210 Chan, supra note 171 at 83.
211 Sally E. McWilliams, “From a Distance of One Hundred and Twenty Years: Theorizing Diasporic Chinese Female Subjectivities in Geling Yan’s The Lost Daughter of Happiness” (2005) 6(1) Meridians: Feminism, Race, Transnationalism 133 at 140.
marriageable Christian women were not always successful. As Van Dieren reports, the Women's Missionary Society's annual reports repeatedly deplore the unwillingness of prostitutes to stay in the home:

A Chinese woman sought refuge with us. We made her welcome and tried to induce her to stay, but after three days, she preferred to return to the dark life which had already claimed six years of her existence. We had charge of a Chinese woman for nearly three weeks but she is unimproved in her life, as she is an inveterate gambler and prostitute.212

In contrast to law's preferred women (White, Christian, middle-class, and married), Chinese prostitutes led "dark lives" that did not conform to the celebrated model of maternity and degraded lifestyles, whereby any notion of agency was erased. "Rescued" prostitutes seemingly traded one form of subjugation (as "sexual slaves") for another (as "marriageable Christian women"). Their questionable moral character, as well as the severe race, sex, and class oppression of the exclusion era, took fallen women outside the boundaries of the law. While Chinese prostitutes working in Canada did not necessarily experience forced separation from their partners, their construction as victims and, correlatively, as lacking in agency helped reinforce the sentiment that discriminatory immigration legislation was not responsible for harms perpetuated against Chinese women as a whole. To the Orientalist gaze, the distinctions between Chinese women are collapsed. In either instance of the narrative trope, lotus blossoms and fallen women are primarily male-centred. Whereas "bad" Chinese women are sexually degraded and "good" Chinese women are submissive, silent, and domesticated, both women's existence in Canada has been constructed in the presence of men, whether she is serving him, seducing him, or simply part of the context in which he acts. Since Chinese women have been marked as passive recipients of harm, any harm they experienced was justified by virtue of their own inherent subordination. Inevitably, these bifurcated representations of Chinese women's identities have had an ongoing relationship to the legal and extralegal violence directed against Chinese women in Canada.

The Relational Self

Don't marry your daughter to a Gold Mountain boy. He will not be in bed one full year out of ten.

212. WMS, Annual Reports, 1898-99, at 83, and 1901-02, at 34, as referenced in Van Dieren, supra note 37 at 84.
Spiders spin webs on top of her bed,  
While dust covers fully one side

Zhao, Chinese folk rhyme

While the available literature reveals a diversity of experiences arising from the separation of Chinese women from their spouses abroad, little is known of the emotional harm women ostensibly suffered as a result of such separation. For some women, particularly those from wealthy families, their spouses' absence enabled them to become effective household heads with control over their families' finances, land acquisition decisions, and workers. Other women felt spousal separation lessened their control over their family finances and marriage and lamented that they could "only wait" at home and "hope that their husbands remitted money to sustain them and their family." Many other women experienced extreme economic hardship and starvation when remittances were cut off during wartime. Though it may be more difficult to claim emotional suffering in the former cases, gains in status and autonomy do not necessarily preclude women from experiencing emotional harm as a result of their spouses' absence. Despite Chinese migrants' own significantly elevated economic and social status in their home villages, the head tax payers' class action alleged "hardship, emotional distress, family separation, loss of companionship of spouse, child and parent, loss of opportunity and injury to dignity" suffered as a result of the discriminatory legislation.

Given the possibility that Chinese women of the exclusion era experienced harms just as, or more, severe as those experienced by Chinese male migrants, law has not, thus far, embodied the particularities of their experience. The intersectionality of their oppression, coupled with convenient stigmatic tropes diminishing any harm experienced, seemingly pose too many obstacles for legal redress within a traditional legal framework. Since the confinement of Chinese women to the maternal and sexual spheres erased all notions of agency, any emotional injuries they suffered were disregarded. Nevertheless, the harms that Chinese women suffered as a consequence of forced separation are no less authentic than those suffered by law's preferred persons. In order for Chinese male migrants to have been separate and autonomous, they required "secondary, interconnected selves that had less property

213. Yung, supra note 167 at 80.  
214. Huang, supra note 92 at 42 and 83-4.  
215. Ibid. at 72.  
216. Li, supra note 9 at 69 and 73.  
217. As Huang contends, many Chinese migrants saw themselves as providers for their nation and villages and believed that their remittances contributed significantly to both the local and national economies. In many cases, Chinese migrants' financial power increased their control over family members and public institutions. Huang, supra note 92 at 74 and 91.  
218. Mack, supra note 135 at para. 10.
and less power."\textsuperscript{219} In order for head tax payers to claim the harm of separation, they needed to be separated from an Other.

An alternative version of law that has been promoted by cultural feminists is one premised upon interdependency, connection, responsibility, and caring. "Different voice" theorists view women’s differences as potentially valuable resources that might serve as a better model of social organization and law than existing "male" characteristics and values.\textsuperscript{220} Cultural and relational feminists believe that persons should be viewed in the context of relationships and not as separate, autonomous individuals.\textsuperscript{221} The interpretive constructs of cultural feminist jurisprudence originated in the insights of moral psychology and object relations, in particular, in the work of Carol Gilligan. According to Gilligan, masculinity is defined through separation, while femininity is defined through attachment, such that male gender identity is threatened by intimacy while female gender identity is threatened by separation.\textsuperscript{222}

Given the differences in women’s conceptions of self and morality, women bring to the life cycle a different point of view and order human experiences in terms of different priorities that give rise to an ethic of care.\textsuperscript{223} Citing Gilligan’s ethic of care, Robin West contends that women’s concept of harm revolves "not around a fear of annihilation by the other but a fear of separation and isolation from the human community on which she depends, and which is dependent on her."\textsuperscript{224} Women’s potential for material and psychic connection with the Other defines women’s subjective, phenomenological, and existential state, “just as surely as the inevitability of material separation from the other defines men’s existential state.”\textsuperscript{225} However, the values that flow from women’s material potential for physical connection are not recognized as values by the rule of law. Rather, rights are identified “as rights to individuate and distance or sever ourselves from, rather than rights to safely connect or relate to, our families, intimates, communities, or co-citizens.”\textsuperscript{226} As a result, separation of the individual from her family, community, or children is not understood to be harm, and one is not protected against it.\textsuperscript{227}

\begin{thebibliography}{99}
\bibitem{221} McClain, supra note 144 at 1174.
\bibitem{222} Carol Gilligan, \textit{In a Different Voice: Psychological Theory and Women's Development} (Cambridge: Harvard University Press, 1983) at 8.
\bibitem{223} Ibid. at 22.
\bibitem{225} Ibid. at 14.
\bibitem{227} Ibid. at 80.
\end{thebibliography}
In order to reconstitute law in a manner that embraces women's different voices, West suggests a project of reconstructive jurisprudence, in which rights and harm are rearticulated in a way that reveals, rather than conceals, their origin in women's "distinctive existential and material state of being." This entails a reassessment of the traditional notions of harm. As Lucinda Finley argues, "if the law has been defined largely by men, and if its definitions, which are presumed to be objective and neutral, shape societal judgements as to whether a problem exists or whether a harm has occurred, then can the law comprehend and adequately redress women's experiences of harm?" Since women suffer in ways that men do not, the gender-specific suffering that women endure is "routinely ignored or trivialized in the larger (male) legal culture." While the dismissal of women's gender-specific suffering comes in various forms, the outcome is always the same: women's suffering for one reason or another is outside the scope of legal redress.

By emphasizing the way in which law recognizes and remedies some harms while, at the same time, overlooking or marginalizing others, cultural feminists challenge traditional assumptions about what constitutes harm while highlighting its gendered content. In their view, the reconstruction of law in a way that places greater emphasis on individuals' dependence on, and involvement with, others rather than giving prominence to their separate and individual status would address, rather than ignore or diminish, those harms that pervade the biographies of women.

Applying West's thesis to Chinese women of the exclusion era would potentially enable an acknowledgment of the emotional suffering they experienced as a result of forced separation. Yet a troubling implication of West's thesis is that connection is common to all, or virtually all, women and foreign to men. As Joan Tronto notes, the equation of care with women is questionable because the evidence to support the link between gender difference and different moral perspectives is inadequate. Moreover, a number of feminist theorists have contended that cultural feminists' essentializing of women may actually limit this challenge by imposing binary structures between men and women and repressing difference. When women are constructed as oppositional to men, discourses of power are potentially

228. West, supra note 224 at 61.
231. Ibid. at 116.
recreated and sustained, and the assertion of gender difference inevitably implies the inferiority of the distinctly female. If connection is treated as inherently gendered, it will also be treated as a secondary and irrelevant form of moral thinking. As Linda Kerber underscores, "by emphasizing the biological basis of distinctive behaviour, Gilligan permits her readers to conclude that women's alleged affinity for 'relationships of care' is both biologically natural and a good thing." This may, in turn, be used to oppress women, limit their freedom, and force them to conform to theoretical models of "feminine" personality and behaviour. Therefore, embracing values of care could lead to a revival of the "cult of womanhood" and unwittingly serve as a justification for limiting women's social roles. In attempting to speak for women, Gilligan presupposes that she knows what women truly are—a position some feminists have described as politically reactionary and ontologically mistaken.

Critical race feminists have also stressed how gender essentialism posits a monolithic female experience that does not capture the sundry nature of women's oppression. By "thinking as women," cultural feminists engage in what Adrienne Rich calls "white solipsism," privileging the experience of White, middle-class, heterosexual women as Women. Thus, gender essentialism produces a theory that effaces the differences between women. At the same time, Gilligan's work suggests that men, as oppositional subjects with respect to women, do not value relationships and connection as women do—an approach that would meaninglessly preclude Chinese men from claiming the emotional harm of forced separation while their female partners could. Not surprisingly, Gilligan's work has been critiqued for taking inadequate account of the impact of race, class, and cultural context upon the construction of gender.

Since there is virtually no consideration of the complex interaction of race, sex, and the various other grounds of oppression that are so much a part of the lived experience, some feminists have also argued that the "different voice" is actually the result of women's subordination and socialization. Therefore, there is no means of truly "knowing" women's voice and potential until subordination by and to men ends. By valorizing care, nurturance, and

236. McClain, supra note 144 at 1197.
238. Angela Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stanford Law Review 585 at 588.
239. McClain, supra note 144 at 1197.
240. Ibid. at 1186.
responsibility, the "difference" approach may reinforce, rather than question, the additional burdens women bear. This is evident in some scholarly inductions of Chinese women as "dutiful wives" who stayed at home to care for the family, a seemingly natural endeavour for Nei-jen that rendered invisible and uncontested the specific conditions of their confinement. As Judith Baer argues, "the fact of women's caregiving in a society which disparages care cannot prove that the ethic is natural to women rather than forced upon them... far from being benign, the distinctive moral voice may be an unhealthy adaptation to subjection." Moreover, women who embrace the identity of a marginalized group may be forced by the political process to accept this identity as their exclusive definition—a move that cannot be liberative. In Susan Hekman's view, "if the goal of political activity is to seek legal redress for the group's marginalisation, the law will further serve to fix that identity," a statement that would particularly apply to Chinese women who claim a monopoly on emotional suffering for forced separation. Rather, women should be challenging rather than affirming the identities and differences of the polity since the identities that women have embraced are not of their own choosing. Despite the appeal of Gilligan's meta-narrative, a legal claim positioning Chinese women as the sole sufferers of emotional harm would perpetuate reductive ideological claims regarding their fixed identities (sexual, racial, gender, national) and a theoretically infeasible emancipatory project. A more nuanced approach would circumvent an essentialized identity with a progressive populism that emphasizes common economic and quality-of-life concerns shared across social groups and economic strata. Politics thus remain provisional, and emphasis is placed on situational and local responses and necessarily shifting solidarities.

**Reconstructing Harm**

Seemingly, cultural feminists' embrace of an alternative legal framework comprehends the harm of forced separation experienced by Chinese women of

---

242 *ibid.* at 46.
244 *ibid.* at 11.
245 *ibid.*
247 *ibid.* at 818.
248 *ibid.*
the exclusion era. While head tax payers strategically predicated their class action on monetary loss, their partners were silenced in the absence of a more conventional form of harm with which the harm of separation could be coupled. Given the possibilities for redress in borrowing from different voice theory, can adoption of the notion of separation as harm be reconciled with critiques of cultural feminism? What are the dangers of conceptualizing Chinese women of the exclusion era as a collective? If race and gender are simply social constructs, the need and even the possibility of a feminist politics become immediately problematic. Given this prospect, how can redress be demanded in the name of Chinese women if the category is merely a fiction?

One response to the critique of gender essentialization is to reconceptualize legal harm without reconceptualizing it as being inherently female. Accordingly, "feminists must distinguish between valorizing the work women have had to do and valorizing it as female."

Care, nurturance, and connection should be seen as socially valuable features of human society, despite its depreciation of these values. An ethic of care builds and nurtures connection and community, which are so crucial to the functioning and development of a citizenry. As Linda McClain suggests, "rather than regarding connection with others as something effortlessly attained by women, either by virtue of their biological or social experience...connection and community require effort and determination to expand one's own perspective by recognizing the perspective of others." For theorists such as Jennifer Nedelsky, a full conception of humanness requires attention to embodiment, to difference, to emotion, and to our essentially relational nature. Within this framework, men who experience the harm of forced separation are also able to claim redress since care and connection are not just attributes of women. Accordingly, Chinese migrants, male or female, would no longer need to base claims of harm on obvious material loss such as payment of the head tax.

While a legal system based on sexual equality may reject a female ethic of care, it must also take into account the fact that care remains women's province. As Baer argues, "even if caregiving is not good for the caregivers, even if they do it because they have to, the law must not only stop punishing them but start rewarding them." For Chinese women of the exclusion era, the need to physically care for the extended family and children was very much a gendered reality, a fact made more difficult by legislated separation from their spouses or partners in Canada. Although many Chinese men

249. Baer, supra note 235 at 94.
250. McClain, supra note 144 at 1188.
252. Baer, supra note 235 at 54.
253. Ibid. at 54.
working in Canada also experienced the harm of forced separation (and may claim redress accordingly), the particular harm that Chinese women experienced arose from the intersecting race, class, and sex structures in place during the exclusion era. As Chinese women in relationships with Chinese labourers working in Canada, they were subject both to discriminatory immigration legislation, leaving them with few or no economic options to migrate with their partners, and to "Confucian" patriarchy demarcating their duties to physically care for the extended family in China. The circumstances of their separation were thus distinct from those involving Chinese male migrants. In view of this situation, one reason to conceptualize Chinese women of the exclusion era as a collective is to articulate a concept of subjectivity, based on a particular historicized experience, without pinning it down for all time. In Iris Marion Young's view, "the exclusions, oppressions, and disadvantages that women often suffer can hardly be thought of at all without a structural conception of women as a collective social position.

In order to access the voice of power, the embrace of a particular identity within a specific historical context may be strategically employed. As Annie Bunting suggests, "essentialism from a dominant perspective can perpetuate oppression while, as a means of challenging dominant ideologies, it can be necessary and persuasive." Similarly, Gayatri Spivak contends that strategic essentialism may be deployed to mobilize people to do political work, without attributing any essence to womanhood in a real or ontological sense. Thus, collectivizing "harmed" Chinese women of the exclusion era maintains a point of view outside of liberal individualism, which denies the reality of groups and, as a result, obscures oppression. Even critics of identity politics concede that excluded identities must be embraced to contest hegemony. As Nancy Hirschmann notes, if voices of connection and care are not gendered voices, but rather voices of power and powerlessness, the powerless need to access the voice of power. Therefore, an anti-essentialist position cannot be oversimplified to disempower marginalized groups from articulating their claims for redress. If employed self-consciously, with constant critical deconstruction of categories and identity, strategic

257. Young, *supra* note 254 at 17.
essentialism is a potentially powerful tool for a transformative reparation project.\textsuperscript{260}

Applied to harmed Chinese women of the exclusion era, a strategic essentialism suggests that it is possible to utilize specific signifiers of racialized or gendered identity, such as “Chinese women,” for the purpose of contesting and disrupting the discourses that exclude them. One way to engage in persistent critique and to avoid confining women within an exclusive identity is to apply Young’s concept of seriality, in which identity is claimed not as a set of essential attributes but, rather, as a social collective whose members are passively unified by the relations their actions have to material objects.\textsuperscript{261} Similarly, Alcoff conceptualizes “women” as being defined not by a particular set of attributes but, rather, by a particular position, so that the internal characteristics of the person thus identified are not denoted so much as the external context within which this person is situated.\textsuperscript{262} Within this framework, Chinese women of the exclusion era are passively united by their confrontation with discriminatory Canadian immigration legislation, the historical situation within China during a particular socio-economic and cultural period, their relationships with Chinese migrants, and their experiences of forced separation, and not by the essentializing narratives of lotus blossoms or fallen women. Chinese women’s needs do not emanate from the authenticity of racial or gendered experience but from a socially specific context.

In this manner, the ontology for reparation is not predicated upon Chinese women’s victimization but, instead, upon the behaviour and circumstances that caused the injury—a shift that avoids fixing Chinese women into a stable identity and recognizes the invariably complex conditions that result in harm. Whereas the essentialist definition of woman describes her identity as independent of the external situation (since her relational traits are ontologically autonomous of her relationships to others or to the external historical and social conditions), a strategically essentialist definition describes her identity as relative to a constantly shifting context and to a situation that includes a network of elements involving others. The emphasis is thus on pragmatic goals, practical politics, and attaining concrete objectives rather than expressing essential or ontological meanings.\textsuperscript{263}

Recognition of the complexity and variety in women’s experience can produce a theoretical shift away from a focus on gender \textit{per se}, towards a preoccupation with the material structures that inform particular experiences. In this way, the connection thesis broadens the ways in which the

\textsuperscript{260} Bunting, \textit{supra} note 255 at 12.

\textsuperscript{261} Iris Marion Young, “Gender as Seriality: Thinking about Women as a Social Collective” (1994) 19(3) Signs 713.

\textsuperscript{262} Alcoff, \textit{supra} note 237 at 349.

\textsuperscript{263} Hekman, \textit{supra} note 243 at 16.
legal subject is contextualized by bringing in a wider array of social relationships and emotional experiences as relevant evidence contemplated by legal rules. By expanding the context in which legal disputes can be framed, law is made more accessible and sensitive to multiple subject positions. As Martha Minow argues, "seemingly stable categories for sorting through experiences become subject to questions in light of feminist work... when brought to bear on law, feminist questions concern not merely the treatment of women compared to men in various settings, but they also address more profound questions such as what should count as harm for the purposes of tort law? Why does the harm have to entail physical injury or harm that a white adult man could experience? Why does the cause relevant to plaintiff recovery have to be traceable to another person as opposed to a social pattern or practice?" By introducing alternative frameworks for sorting out perceptions of the world, feminist analysis challenges the very reference points that in the past have defined what is central and what is marginal while embracing critical race feminists' summons for multiple consciousness. Adopting a relational approach to law also allows one to "inquire into the institutional practices that determine a norm against which some people seem different, or deviant." Once stated, norms based on the male experience become a subject for contest. Alternative norms can be articulated and defended. Within this framework, harm can be redefined to encompass the emotional injury of forced separation.

Thus, feminist jurists must claim as a crucial task the rewriting of laws that put individuals at a disadvantage because of family responsibilities or ignore the emotional needs that rise from caregiving. A reformulation of law through relationally oriented feminist thinking may entail the recognition of forced separation as harm. Still, because the law defines injuries and measures compensation primarily in relation to what keeps people out of work and what their work is worth, non-economic damages, such as pain and suffering or compensation for emotional injuries, are deemed suspect and expendable. While a "justice-geared" perspective and a "care-based" perspective are both important in resolving tort disputes, Leslie Bender argues that the care perspective is practically absent in tort law. Rather, "the law of torts values physical security and property more highly than emotional security and

264 Martha Minow, "Beyond Universality" (1988) University of Chicago Legal Forum 115 at 125.
265 Ibid. at 126.
267 Ibid. at 218.
268 Baer, supra note 235 at 54.
269 Finley, supra note 229 at 898.
human relationships."^{271} As a result, tort law's definition of responsibility is primarily financial, and harm is generally understood to arise out of observable and discrete acts of individuals.^{272} Since law so often fails to compensate women for harms for which there is no precise masculine analogue,^{273} tort law marginalizes women's injuries by taking them out of the realm of compensable physical harms.^{274} For Bender, a richer construct of justice would include "compassion, caring, and responses to particularized injured victims' needs, and would grow out of principles of substantive equality before the law."^{275} Relationally oriented justice would entail, at minimum, an acknowledgment of emotional injuries that Chinese women of the exclusion era experienced as a result of forced separation. Yet in its search for objective, neutral, abstract, and universal formulas for imposing responsibility, tort law became fixated on money damages.^{276} For Chinese women who did not pay the head tax, their injuries were but emotional and thus subordinate.

Nevertheless, feminists continue to apply different voice theory to justify legal reform that promotes recognition of alternative conceptions of harm. For example, Robin West advocates for recognition of the harm of separation in the context of parent-child relationships.^{277} In her view, the emotional pain of separating from older children in order to work in the paid labour market and the severing of teen and pre-adolescent friendships upon marriage are harms that could potentially find legal acknowledgment.^{278} Similarly, Chinese women of the exclusion era could argue that state-enforced, involuntary separation had a profound, negative impact on their emotional and physical well-being—harm that has been under-acknowledged in the head tax redress campaign. Although the possibility for legal redress remains slim, the protection of relational interests is not unprecedented. An area in which relational losses have traditionally been compensated is consortium actions for loss of a "spouse's society, companionship, affection and sexual relations."^{279} Such actions are anchored on the emotional loss suffered by a spouse, and spouses have been compensated for their experiences of material harm.^{280} While loss of spousal consortium was historically gender-differentiated (men were remedied for their material loss while women were denied a remedy on the basis of mere

272. Bender, supra note 270 at 861.
275. Bender, supra note 270 at 861.
276. Ibid. at 904.
278. Ibid. at 130.
280. Levit, supra note 279 at 146.
"emotional" loss), a number of cases have awarded compensation to women who have suffered loss of spousal consortium. Moreover, a number of jurisdictions, including Canada, recognize the right of migrants to family reunification.

Adrian Howe proposes a shift from the conventional tort idea of individualized, privatized injury to a concept of social injury for women. Her "social injury strategy" aims to demonstrate that social injury is part of a gender-ordered legal system. As Howe contends, "the social injury framework provides a strategic response to the problem of the privatized nature of women's pain." For Bender, "there is nothing natural or necessary about legal responsibility meaning solely financial responsibility, since we have other meanings of responsibility in our vocabulary of personal relations, and we have been able to integrate those meanings into our social system without problem. We can figure out how to implement them in our legal system too." Whatever the route taken, formal acknowledgment of the harm of separation is predicated upon an ethic that demands respect for emotional harm. According to West, the failure to compensate emotional injuries "has real consequences, the most obvious of which is that in the absence of regulation by the state, women's emotional well-being is hostage to the whimsical desires of men." Should an ethic of responsibility and care predicated upon interconnected and mutually dependent human beings find legal acknowledgment, justice may finally embody redress for Chinese women's experience of emotional harm arising from spousal separation in the exclusion era.

**Contesting Narrative Orientalism**

words are better than tears/so I spill them.  
Janice Mirikitani, "Breaking Silence"
Almost sixty years after the repeal of the *Chinese Exclusion Act*, significant borders remain to be negotiated. For Chinese women of the exclusion era, Canadian immigration policy served an important function in maintaining race, sex, and class hierarchies and contributed to reductive tropes of Chinese women. As Ibrahim Gassama, Robert Cheng, and Keith Aoki note, "the immigrant may find that the border has not been left behind, that the border is not just a phenomenon of geographic margin or territorial periphery... her body is marked by the border. Indeed, she carries the border with her." The constitutive role of law in creating such borders is readily apparent in the context of Canadian immigration policy. For Chinese women of the exclusion era, law was rarely an instrument for defending rights and dispensing justice. Rather, the discourse of law and its categories, arguments, reasoning modes, rhetorical tropes, and procedural rituals fit into a complex of discursive practices that together have structured how people perceive, and therefore act, to reproduce the ideological inferiority of Chinese women. Marked as lotus blossoms or fallen women, Chinese women of the exclusion era were fixed as monolithic, passive recipients of harm.

According to Sally Engle Merry, "the power of law to transform sociocultural systems is two-sided: it depends both on the direct imposition of sanctions and on the production of cultural meanings in an authoritative arena." While the sanctions of the exclusion era have long been lifted, withdrawals from sites of cultural occupation present more complex issues. Cultural meanings generated from law may exist long after their legislative repeal. The historical conditions of the exclusion era enabled the production of particular myths that continue to colour the collective memory of the community. In particular, stereotypes of Chinese women of the exclusion era remain intact in contemporary formulations of Chinese-Canadian women's identity by virtue of their incredible fluidity. As Aoki describes, tropes such as lotus blossom and fallen woman have bifurcated into closely related "good" and "bad" iterations, which perpetuate sexually and racially charged representations of "Suzie Wong, China Girl, Miss Saigon, Madame Butterfly... bound feet, submission, dominance, eroticism, servitude, and..."

---

treachery," all of which "cluster and collide on the site of the female Asian body." Ideology, in the form of narrative tropes available for representing the experiences of harmed Chinese women, was a factor of social power to the extent that Chinese women's inability to be heard outside the rhetorical structures within which cultural power had been organized hampered their ability to achieve recognition. As a result, the traditional account of Chinese women and Canadian immigration law tells a repetitive story about individuals who have been degraded and systematically marginalized and managed, in part through deep structural inscriptions of race, class, sex, and "foreign-ness." When Chinese-Canadian women, after years of cultural stereotyping, internalize these externally generated Orientalist expectations and behaviour patterns, such images are incorporated into their self-imaginings and the tropes crystallize.

Most importantly, the earlier-mentioned evocations of narrative Orientalism and its interactions with the legal system de-emphasize an important element: the idea of agency. Devoid of agency, Chinese women are merely passive recipients of law, unable to comprehend harm, much less "talk back" to dominant discourses confining them to one-dimensional narratives. Thus, not only have the head tax and twenty-four years of legislated exclusion subjected Chinese women to the emotional injury of forced separation, but they have also reinforced the message that Chinese women are limited to narratives characterized by subordination. One aspect of relational repair requires what Glenn Loury calls the "common baseline of historical memory"—an agreed upon public narrative about a historical injustice and a commitment on the part of the public to take responsibility for contemporary situations affecting harmed communities. Chinese women of the exclusion era have much to displace and resist, having been reduced to passive "race-sex" objects against which Canadian subjects define themselves. Given the depth and breadth of this Orientalist appropriation of Chinese women's identities, how is the power of narrative Orientalism to be contested? How can the courtroom provide an arena to evoke a resistant subjectivity?

295 Ibid. at 45.
297 Aoki, supra note 18 at 43.
A Transformative Model of Reparation

As a quest for reparation empowers the sounding of narratives as anti-hegemonic analytical devices, reparation campaigns have the potential to decisively create substantive, long-lasting social change for harmed communities. As Mari Matsuda argues, “reparation is at its heart transformative. It recognizes the crimes of the powerful against the powerless. It condemns exploitation and adopts a vision of a more just world.”

For Chinese women of the exclusion era, a transformative model of reparation maintains that a simultaneous agenda of deconstructing Orientalist narratives, emotional and relational healing, and community building can create the conditions necessary for a successful, subversive political movement. Thus, one aspect of a transformative campaign should ensure that a legal suit does not strive to achieve success by drafting narrow claims within the traditional legal paradigm. While a tight fit with traditional notions of harm may be considered a legal prerequisite to success in the context of judicially imposed redress, a tight fit is not a legal or moral prerequisite for litigation storytelling. Given the unlikelihood that specific demands for reparation would be heard if articulated in other terms, law can be beneficial when the subordinated participate in the extra-legal benefits of litigation. By using the very logic of the law against it, reparation advocates may be able to highlight the contradictions between the dominant ideology and their reality—namely, the fact that formal equality has not resulted in justice for the community.

For Chinese women of the exclusion era, claiming forced separation and the accompanying emotional injury as legal harm is one means of highlighting the state-sanctioned harm they experienced. Within a courtroom, claimants are able to point to other instances in which such harms have been legally legitimated (that is, family reunification cases and “loss of consortium” cases) in order to demonstrate the exclusions within law that continue to operate to deny their claims. Claimants may also expose the Orientalist representations that denied their agency and their suffering during the exclusion era. As Shelley Gavigan notes, “even in conditions of subordination, women and men are active moral agents who participate in the construction and change of both their experiences and the world.” By emphasizing the fact that

Chinese women of the exclusion era were not straitjacketed to structural constraints within China and, thus, were purely subordinated Nei-jin, the claimants shall not resort to narratives characterized solely by victimization, even if this compromises a litigation strategy. By resisting narratives invoking their silence, Chinese women protest the authority of Others to speak on their behalf. If reparation for the emotional injuries sustained by Chinese women of the exclusion era is not truly a litigation strategy, but rather a rhetorical device for displacing Orientalist tropes and “talking back” to dominant discourses regarding harm, then the traditional measures of success in determining the outcome of a lawsuit should not apply.303

While critics of reparation may point to the fragmenting effect of redress on class interests as the chief medium of political mobilization, such that “cultural recognition displaces socioeconomic redistribution as the remedy for injustice and the goal of political struggle,”304 Matt James notes how head tax redress claimants, though ultimately unsuccessful in their class action, were able to publicize present-day injustices such as the current exploitation of immigrants, refugees, and domestic workers.305 Similarly, recipients of Japanese-Canadian and Japanese-American redress continue to campaign on behalf of other communities’ reparation efforts, including those of Native Canadians and African Americans.306 Accordingly, a transformative reparation effort should not limit itself to isolated claims for redress. Those seeking reparation need to draw on the moral force of their claims and join with others to lobby for bureaucratic, legal, and attitudinal restructuring so that their efforts extend beyond their own reparation claims to securing reparation for others. In this way, reparation efforts promote collaborative undertakings and political coalition building, such that the commonalities of wrongs can be used to coalesce and form formidable political partnerships.

Reparation litigation, in tandem with a political campaign, has enormous potential to highlight the chasm between social justice and legal justice. For Chinese women of the exclusion era, the harms they suffered may be linked to other political efforts predicated upon resisting Orientalist narratives or state-sanctioned discrimination in immigration policy, although these alliances are obviously not exhaustive.

Thus, a transformative model of reparation must be sustained by a legal claim that is broadly drafted to encompass all critical concerns. This may

305 James, supra note 106.
entail, as Eric Yamamoto believes, the government restructuring of institutions and relationships that gave rise to the "underlying justice grievance" in order to address "root problems of misuse of power, particularly in the maintenance of oppressive systemic structures." For Chinese women of the exclusion era, recoding dominant narratives that limit legal harm to monetary loss and sediment Chinese women as perpetually passive could be an emancipatory undertaking. Although such a legal suit may be vulnerable to dismissal for failing to state a legally cognizable claim, current and past legal cases (such as the head tax payers' class action) that sought to fit within the traditional legal paradigm have met with similar fates. Inexorably, narrow legal framing of reparation claims allows opponents to hide their underlying social and political objections. Since the primary goal of the legal attack is to generate dialogue and build political coalitions, critically drafted claims may be one route to forward-looking, transformative reparation.

**Conclusion**

By pursuing reparation in the language of law, reparation claimants reconstitute legal cultures that formerly legitimized their oppression by displacing and replacing dominant historical discourses. Accordingly, Chinese-Canadian women's participation in a reparation movement may enable the reclamation of law through their own narratives and experiences. Chinese women of the exclusion era could use the courtroom as an arena for anti-hegemonic performance by rejecting images of docility that have been invoked by others to dismiss their claims and by rejuvenating the notion of Chinese women as more than passive objects of oppression. Their testimonies can also serve as a space for the complex process of subject formation. As David Engel and Frank Munger observe, an awareness of law could contribute to a transformation of self-perception. Obstacles formerly faced may be identified as the product of discrimination or illegality.

309. Admittedly, there has been no testing of the assertion of the value of litigation in terms of its benefits for the claimants or the broader community, so there is no evidence as to the value of loss in a prospective claim. However, there have been previous incidences of "catalytic losses" in Canadian jurisprudence, including the seminal case of *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, in which the dissent ultimately became the majority opinion in *Pettikus v. Becker*, [1980] 2 S.C.R. 834. See Mitchell McInnes, "The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution" (1999) 37 Alberta Law Review 1 at 14, for a discussion of the events following the public outcry after *Murdoch*. See also Claire L'Heureux-Dubé, "The Dissenting Opinion: Voice of the Future?" (2000) 38 Osgoode Hall Law Journal 495 at 505, for a discussion of the value of dissenting judicial opinions, with particular reference to the *Murdoch* decision.
310. Engel and Munger, *supra* note 300 at 95.
rather than personal shortcoming. By resignifying themselves, individuals are empowered to claim injustice, attribute responsibility to powerful others, and imagine alternatives unhampered by the "routinization" of historic inequities. An awareness of the restrictive nature of Chinese women's narratives may enable Chinese-Canadian women to transcend the arrested development of such scripts. By actively engaging in the reconstruction of law, Chinese-Canadian women free themselves of the representational grids that have historically bound them.

The transformation of self-perception through redress may have a correspondingly profound impact upon the collective identity of the larger community. For Chinese women of the exclusion era, a reparation movement has the potential to yield discourse regarding redress for the emotional injury of separation. By pursuing redress, Chinese-Canadian women collectively participate in the process of reconstructing legality as well as the identity of the larger community reflected in the legal process. Litigating a particular experience of harm, which may be subjectively experienced by all, deconstructs accepted notions of what constitutes suffering and, correlative, what constitutes legal harm. As the Japanese-Canadian reparation campaign illustrated, redress became an issue that affirmed Japanese Canadians' identity and legitimacy, by actualizing a national legal consciousness that regards the wartime internment as a significant part of Canadian history. Correspondingly, a reparation claim predicated upon the emotional injury associated with separation may underscore the particular conditions of Chinese women's historical struggles and, in turn, affirm this experience of harm for the larger community. The notion of harm is recoded or at least destabilized. By articulating the silence in harmed individuals' lives, reparation enables resistance through communal re-identification.

While the head tax and Exclusion Act era concluded years ago, the legacy of these laws remains with us even after their repeal. As André Van der Walt explains, such a "historical hangover" occurs when legal forms and practices become embedded in "relatively autonomous" structures that form part of the collective consciousness. For Chinese-Canadian women, the ideological damage waged by exclusion era legislation lingers, while recognition of its destructive impact is engulfed by demands to "move on" given the existence of formal equality today. By responding with narratives recalling the inequities and injustice of the exclusion era, reparation claimants resist forgetting and highlight the ongoing impact of exclusion era legislation today. Even if

311. Ibid. at 95.
314. Van der Walt, supra note 291 at 261.
ultimately unsuccessful, reparation campaigns can affect identities by contributing to paradigmatic shifts in everyday thoughts, speeches, and actions. Despite its failure in the courts, the head tax redress movement generated narratives, meaning systems, and dialogue previously muffled by years of exclusion. As Engel and Munger provide, "cultural and discursive shifts...affect the interactional and intersubjective dimension of identity."315 With each claimant's act of storytelling, the history of Chinese women's exclusion from, and marginalization in, Canada is recoded and the notion of emotional injury as harm is bolstered. At the same time, new cultural images of Chinese-Canadian women with irreducibly complex personhoods could be produced to counteract the ideological legacy of exclusion era legislation.

Reconstructed narratives forge a communal truth of the country's shrouded past, allowing citizens to recover their shared history and demonstrate how it differs from the myths we hold in our collective conscience. This new history, if heard, could lead to a remaking of society. By reconstructing identities and legality in a manner that permits the building of new truths, a transformative reparation movement may enable the reclamation and reconstitution of relationships that are central to the larger community's mobilization. Chinese women of the exclusion era may finally move forward, empowered by their disruption of historical narratives and conventional notions of what suffering is. The resistance to forgetting may awaken, and politicize, the community even in the shadow of laws that do not heed them. For Chinese women of the exclusion era, complicating the traditional legal paradigm is not one of several options for reform, but rather a critical way not to disappear.316

315. Engel and Munger, supra note 300 at 95.
316. Duclos, supra note 149 at 51.