

## Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case

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On December 14, 1992, 19-year-old Wayne Lo stormed the campus of Simon's Rock College of Bard, an elite private institution for gifted students, and began a twenty-minute shooting spree that left two people dead and four wounded. In the past seven years, I have followed the news coverage of the Wayne Lo case with increasing interest, not only because Wayne and I are both Chinese American, born in the same year, and raised under similar circumstances, but because the degrees of separation have unwittingly decreased between us. My husband Dan was Wayne's childhood friend, one who slept over at his house and shared adolescent confessions about girls, sex, and religion. Wayne's mother and father are longtime friends of my in-laws and serve as Dan's godparents. Our families have exchanged letters and photographs over the years and managed to pretend that while we graduated from college, married, and landed our first jobs, a young man in a Massachusetts prison did not exist.

Early in law school, I began to think about Wayne more frequently. I prodded Dan for details about the young killer, hoping to discover any clues to Wayne's perplexing identity. Slowly, I arrived at a theory, not about why he killed that chilly day in December, but about how his race may have influenced his conviction and the denial of his appeal.

In this paper, I will examine the racial imagery surrounding Wayne Lo's trial as an example of how stereotypes of Asians and Asian Americans influence the criminal justice system. In Part I, I offer two prevailing categories of stereotypes, the "model minority" and "yellow peril," and highlight their criticisms. In Part II, I discuss how these stereotypes potentially influence legal actors in cases involving both Asian American victims and defendants. Finally, in Part III, I return to the Wayne Lo case and propose an explanation of how racial stereotyping may have colored

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† J.D. 1999, Georgetown University Law Center. Jones, Foster, Johnston & Stubbs, P.A. (Florida), June 1999 to present. I am greatly interested in the legal issues affecting Asian Americans and hope to research and teach in that area one day. Special thanks to Daniel Yen, Stephen and Priscilla Hsia, and Shelly Chen for their continual encouragement. I dedicate this Article to Wayne Lo and his family.

## I. THE MODEL MINORITY AND YELLOW PERIL STEREOTYPES

Like all other racial and ethnic minorities, Asian Americans are subjected to a variety of stereotypes. The following subsections examine two broad categories, which have been loosely labeled as the "model minority" and "yellow peril" stereotypes. A brief description, history, and contemporary criticisms of each stereotype follow.

### A. *Asian Americans as the Model Minority*

Asian Americans are perhaps most commonly viewed today as a "model minority." Although definitions vary, a model minority can be described as a non-white group that has achieved economic success and societal acceptance through hard work and conservative values. In particular, Asian Americans have received applause for their academic achievements, high family incomes, industriousness, low levels of criminal behavior, and stable family structures. Asian Americans may be perceived as blending neatly into corporate and community structures because of their cultural values of non-aggression and preservation of the status quo.

Beginning in the mid-1960s, educators, the media, politicians, and even the White House bestowed upon Asian Americans such titles as "America's Super Minority" and "America's Greatest Success Story."<sup>1</sup> President Reagan proudly declared in 1984 that Asian Americans "preserve [the American Dream] by living up to the bedrock values" of America—"the sacred worth of human life, religious faith, community spirit and the responsibility of parents and schools to be teachers of tolerance, hard work, fiscal responsibility, cooperation, and love."<sup>2</sup>

Underlying some of this praise was the vaguely implied notion that Asian American success flowed from the inherent superiority of the Asian race. In particular, some feared that Asians were naturally endowed with greater intelligence and enterprise; conversely, the failure of other minorities to succeed could be attributed to their lack of these qualities. However, the development of the model minority stereotype can be more accurately explained by a variety of social and political factors, specifically, by immigration policies and the social climate of the 1960s and 1970s.

#### 1. *Historical Factors in Creating the Model Minority Stereotype*

The model minority stereotype may be linked to the Immigration Act of 1965, which allowed large numbers of Asians to enter the United States. Although the Act rejected ethnic quotas and relaxed prior restrictions on Asian immigration, it provided mass entry to only certain classes of Asians. The post-1965 Asian immigrants were largely drawn from the wealthiest

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1. *America's Super Minority*, FORTUNE, Nov. 26, 1986; David A. Bell, *The Triumph of Asian Americans: America's Greatest Success Story*, NEW REPUBLIC, July 15 and 22, 1985, at 24-31. See also RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 474 (1989) (offering various headlines characterizing Asian Americans as a model minority).

2. TAKAKI, *supra* note 1, at 474-75.

and most educated groups in their native countries.<sup>3</sup> For example, the number of Chinese immigrants from mainland China, Taiwan, Singapore, and Hong Kong who identify themselves as professionals or executives has more than doubled since 1965.<sup>4</sup> Many Asians were recruited, no longer as fillers for hard labor positions as their predecessors prior to 1965, but as desired graduate students, professionals, and technicians under the preference of “skilled workers.” In particular, policymakers sought to attract Asians for scientific and technical positions that American students had not successfully filled. Thus, immigration policy controlled the quality of Asian immigrants in ways that they did not for other minorities.

The influx of post-1965 immigrants changed the character of the Asian American community by bringing in wealth, status, and expertise to a minority group once largely comprised of poor, uneducated laundry and restaurant owners. In addition, second-generation Asian Americans began moving out of ethnic enclaves and into urban centers to live and work among white Americans.<sup>5</sup> Consequently, the characteristics of Asians with whom white Americans regularly interacted differed vastly from the older immigrants in the Chinatowns, Koreatowns, and Little Saigons that they viewed from a distance. As exposure to this minority group increased, white Americans may have formed their ideas of Asian Americans from the limited number of wealthy, educated Asians who lived and worked among them.

The social atmosphere of the civil rights era also perpetuated the model minority stereotype. The activism of the 1960s resulted in endowing important legal rights to Asian Americans. Several court decisions and legislative acts extended the protection of due process and equal protection to Asian Americans,<sup>6</sup> which may have helped increase the visibility of Asians as valuable participants in American society. However, the social climate of the late 1960s and early 1970s may have also produced conditions ripe for the exaggeration of Asian American successes.

In particular, the recognition of Asian American achievements occurred in a period when the social problems of other minorities, namely the increased poverty and crime rates among African Americans and Latino Americans, began to attract widespread concern.<sup>7</sup> In the aftermath of the civil rights movement, white Americans needed affirmation that their society was not experiencing upheaval, that traditional American ideals were still valid, and that minorities did not threaten the status quo.<sup>8</sup> Given these social pressures, white Americans embraced the idea of Asian

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3. See LAN CAO AND HIMILCE NOVAS, *EVERYTHING YOU NEED TO KNOW ABOUT ASIAN AMERICAN HISTORY* 51 (1996).

4. See BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990*, 85 (1993).

5. *Id.* at 84.

6. See, e.g., [*Brown v. Board of Education*], 347 U.S. 483 (1954) (holding the “separate but unequal” doctrine to be unconstitutional); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §1422 (1988)) (granting Asians the right to become naturalized U.S. citizens).

7. See TAKAKI, *supra* note 1, at 478.

8. *Id.*

Americans as a model minority, as proof that traditional values and structures were still legitimate.<sup>9</sup> If Asian Americans were able to achieve the American dream within the confines of the current system, the argument followed that other minorities could be expected to take responsibility for the problems plaguing their communities. Thus, the model minority stereotype effectively diverted needed attention from structural problems in the economy and social institutions that affected African and Latino Americans differently from Asians.<sup>10</sup> Reliance upon the model minority stereotype allowed white Americans to disavow responsibility for creating or perpetuating conditions that fostered such problems.

## 2. *Criticisms of the Model Minority Stereotype*

Although the model minority stereotype is cloaked in praise, it ultimately injures Asian American communities. First, large numbers of Asian Americans do not conform to "model minority" characteristics. The stereotype fails to consider the poverty among the unemployed Hmong, Chinatown residents, elderly Japanese, Vietnamese refugees, and Filipino farm laborers.<sup>11</sup> The model minority stereotype presumes Asian Americans to be a monolithic group composed of fungible members; in reality, however, significant differences exist between and within separate Asian ethnic groups.

Moreover, sociological research fails to include key demographic data that would undermine the model minority label for nearly all Asians.<sup>12</sup> Most family income studies fail to include data showing that Asian American families tend to have greater numbers of workers per household.<sup>13</sup> Additionally, Asian Americans have generally congregated in cities that also have the highest nationwide costs of living.<sup>14</sup> Asian American men tend to be overeducated and work longer hours in the same positions held by white Americans.<sup>15</sup> The culture of corporate America preserves a "glass ceiling" in job advancement for Asian Americans such that few reach senior executive levels.<sup>16</sup> Finally, Asian Americans have yet

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9. *Id.*

10. *Id.*

11. *Id.*; See, e.g., *Affirmative Action Facts and Myths*, RECRUITMENT AND RETENTION PROJECT, U.S. STUDENT ASSOCIATION I (1996) (reporting that particular Asian American groups have poverty rates three times greater than white Americans); HERBERT R. BARRINGER ET AL., *ASIANS AND PACIFIC ISLANDERS IN THE UNITED STATES* (1993) (presenting case studies on Asian ethnic groups which tend to show the inaccuracy of the model minority stereotype).

12. See TAKAKI, *supra* note 1, at 475; BARRINGER ET AL., *supra* note 11, at 45, 91 (offering statistical evidence that demographic data such as average age, gender ratio, number of years in the United States, and place of residency, are better indicators of economic success than race alone); Pat K. Chew, *Asian Americans: The "Reluctant" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 24-33 (1994) (presenting evidence which undermines monolithic nature of the model minority stereotype).

13. See TAKAKI, *supra* note 1, at 475.

14. *Id.*

15. *Id.*

16. See, e.g., ELLIS COSE, *COLOR-BLIND: SEEING BEYOND RACE IN A RACE-OBSSESSED WORLD* 159 (1997).

to gain widespread acceptance in political leadership.<sup>17</sup>

Policymakers who assume that the model minority stereotype is accurate tend to categorically overlook low-income Asian Americans on social agendas.<sup>18</sup> By perpetuating the faulty assumption that Asian Americans have largely succeeded, the model minority stereotype effectively denies deserving Asian Americans from inclusion in programs designed to help minorities.

The model minority stereotype also intensifies competition and racial animosity towards Asian Americans. The stereotype is commonly used to blame other minority groups, namely African Americans and Hispanic Americans, for not having achieved the same levels of economic and social success.<sup>19</sup> Asian Americans are artificially aligned with the existing white power structures and pitted against other minorities. The 1992 riots of Asian-owned stores by African Americans in Los Angeles in response to the beating of Rodney King illustrate the increasingly accepted view of white-Asian solidarity. Although King suffered brutality at the hands of white police officers, the African American backlash and protest against the beating was directed against Korean-owned grocery stores.

In addition, the perception of Asian American success also exacerbates tensions with white Americans, who fear that their jobs are jeopardized by the presence of Asian workers.<sup>20</sup> Several publicized cases involving race-motivated killings of random Asian Americans by white Americans illustrate the existence of white-Asian conflicts.<sup>21</sup> The model minority stereotype thus elevates racial tensions and creates conditions for

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17. See, e.g., James Sterngold, *Asian Americans Learning Tough Lessons About Politics*, N.Y. TIMES, Nov. 3, 1996; Jane A. Morse, *Post 1992 Election Analysis: More Asian Americans Vying for a Place in U.S. Politics* (Nov. 4, 1992) <<http://www.usis-israel.org.il/publish/elections/wfasians.htm>>.

18. See, e.g., TAKAKI, *supra* note 1, at 478 (discussing denials of funding for government programs which would help Asian Americans learn English, find employment, and obtain educational assistance); *Welfare Reform Bill Barring Critical Aid to Legal Immigrants Passes Congress*, ORGANIZATION OF CHINESE AMERICANS 1 (1996) (examining denial of social services and funding for Asian immigrants, as embodied in the 1996 welfare reform legislation); HING, *supra* note 4, at 12 (arguing that policymakers and Asian Americans themselves have failed to prioritize Asian Americans in immigration reform efforts).

19. See, e.g., Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U. L. REV. 811, 814 (1996) (“[The model minority myth] is used to ask African Americans, rhetorically, ‘Well, the Asian Americans have succeeded; why can’t you?’ As the original *New York Times* article introducing the image put it, Asian Americans stand in contrast to ‘problem minorities.’”); HING, *supra* note 4, at 9-11 (discussing political rhetoric which situates whites and Asians together as successful members of society against blacks and Hispanics as unproductive immigrants); Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 76 (1995) (arguing that non-white minorities view Asian Americans as representatives of the white power system).

20. See, e.g., HING, *supra* note 4, at 7-11 (“[The model minority image] raises a fear in the general population of unfair competition from these ‘superbeings’ that is reminiscent of what led to the desire to control them historically.”); Rachel F. Moran, *Policy, Politics & Praxis: What if Latinos Really Mattered in the Public Policy Debate?*, 85 CAL. L. REV. 1315, 1317 (1997) (arguing that white Americans increasingly believe that they are “under siege” by racial minorities and that the model minority stereotype exacerbates fears that “real” Americans are being displaced by “foreigners”).

21. See, e.g., Dan Lovely & Richard Vega, *A Death in Coral Springs: ‘We Came Here for Freedom . . . We Live in Hell,’* USA WEEKEND, Jan. 10, 1993 (citing cases of anti-Asian violence and discussing the effect of the model minority stereotype on racial conflict).

anti-Asian violence by both whites and non-whites.<sup>22</sup>

Finally, the model minority image strips Asian Americans of the power to define themselves as individuals. This form of disenfranchisement leads to a variety of psychosocial concerns. As Daya Sandhu, Professor of Educational and Counseling Psychology, explains:

Several mental health concerns and psychological afflictions, such as threats to cultural identity, powerlessness, feelings of marginality, loneliness, hostility and perceived alienation and discrimination remain unredressed and hidden under the veneer of the model minority myth. Both social and psychological forces to conform to the model minority stereotype place an inordinate amount of pressure on Asian Americans.<sup>23</sup>

### B. *The Threat of the Yellow Peril*

Although Asian Americans have been celebrated for their conformity with traditional American values and norms, they are also subject to another contradictory stereotype: for nearly two centuries, Asians and Asian Americans have been perceived as the “yellow peril.” Although the term perhaps carried stronger, malicious connotations when it was first coined in the 1800s,<sup>24</sup> it is used in this paper as an umbrella term for a variety of stereotypes. The yellow peril stereotype refers to a view of Asian Americans as foreigners who have different (generally inferior) cultural practices, as well as lower moral and ethical standards from white Americans, and who therefore constitute a threat to American stability. Even for Asian Americans who are second-plus generation, they are often presumed to be outsiders with alien practices and behaviors.

#### 1. *Historical Roots of the Yellow Peril Stereotype: The Chinese Experience*

The early history of Asian immigrants in America reveals that the general public regarded them as uneducated, intellectually inferior, dangerous, and morally deficient.<sup>25</sup> The experience of the Chinese in the United States is instructive. Historian Stuart Creighton Miller observed that when they first arrived, Chinese immigrants were “considered by most persons. . . as very contemptible. . . cunning and corrupt, treacherous and vindictive, [given] to lechery, dishonesty, xenophobia, cruelty, despotism,

22. See, e.g., TAKAKI, *supra* note 1, at 481-84 (discussing the murder of Vincent Chin in 1982); UNITED STATES COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S 22-48 (documenting increased racially-motivated violence against Asian Americans); PHILADELPHIA COMMISSION ON HUMAN RELATIONS, STATE OF INTERGROUP HARMONY 53-55 (1988) (citing statistics showing that Asian Americans are more likely to become victims of hate crimes than all other racial and ethnic minorities on a per capita basis).

23. Mary Morrissey, *The Invisible Minority: Counseling Asian Americans*, COUNSELING TODAY (Oct. 1997).

24. In 1905, the *San Francisco Chronicle* published a series of articles warning of the threat of Japanese immigration to America. The articles called the Japanese a “yellow peril” and claimed that Japanese immigrants were spies, massive hordes who plotted to take away white property, and criminals who preyed on white women. See, e.g., CAO AND NOVAS, *supra* note 3, at 95.

25. See, e.g., STUART CREIGHTON MILLER, THE UNWELCOME IMMIGRANT: THE AMERICAN IMAGE OF THE CHINESE, 1785-1882, 20-26 (1965); TAKAKI, *supra* note 1, at 296-328 (reporting on images of Filipino Americans as sexually immoral and morally inferior).

filth and intellectual inferiority.”<sup>26</sup> Chinese immigrants were also reported in the print media of the early 1800s as eating vermin, murdering young girls to drink certain bodily fluids, and acting generally as less than human beings.<sup>27</sup> One journalist described Chinese immigrants as “utter heathens, treacherous, sensual, cowardly and cruel.”<sup>28</sup> By the late 1870s, the numbers of Chinese immigrants who entered California as railroad and agricultural laborers burgeoned. Despite their increased presence on the West Coast, white Americans viewed the Chinese as strange and exotic beings. Circus manager P.T. Barnum capitalized on these notions and placed Chinese men on display as a sideshow in his famed carnivals.<sup>29</sup>

Although white Americans at best viewed the Chinese with a sense of curiosity, sentiments darkened when Chinese laborers began moving off white-owned plantations and opened their own businesses in urban areas. Anti-Chinese sentiment reached a climax when members of a militant labor organization murdered several Chinese men and burned their homes and stores in 1877.<sup>30</sup> In response, numerous business and labor organizations in San Francisco joined together to petition Congress to prohibit Chinese immigration.<sup>31</sup> The California Senate responded by publishing a formal report claiming that Chinese immigrants had failed to adopt American values and instead had polluted California with rampant prostitution and other criminal activity.<sup>32</sup>

By 1882, Congress passed the Chinese Exclusion Act of 1882, prohibiting all Chinese persons, “lunatics”, and “idiots” from entering the United States for ten years. The ban on Chinese immigration was extended in 1888, 1892, and 1902. The legislation was not repealed until 1943, when Congress allowed Chinese Americans to become eligible for naturalization and established a paltry quota of 105 Chinese immigrants per year.

## 2. *Contemporary Images of the Yellow Peril*

Although the term “yellow peril” as it was originally used has virtually disappeared from mainstream vocabulary, contemporary images

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26. MILLER, *supra* note 25, at 76-77.

27. *Id.* at 76-87.

28. Henry George, *The Chinese in California*, N.Y. TRIB., May 1, 1869, at 1-2.

29. See CAO AND NOVAS, *supra* note 3, at 24.

30. See ELLIS COSE, *A NATION OF STRANGERS* 49 (1992).

31. *Id.* For example, the Workingmen’s Party issued a manifesto announcing their contempt for the Chinese: “Before [California] and the world we declare that the Chinaman must leave our shores. We declare that white men, and women, and boys, and girls, cannot live as the people of this great republic should and compete with the single Chinese coolie on the labor market . . . . To an American, death is preferable to life on a par with the Chinaman.”

32. CAO AND NOVAS, *supra* note 3, at 25 (quoting the CALIFORNIA SENATE, ADDRESS TO THE PEOPLE OF THE UNITED STATES UPON THE EVILS OF CHINESE IMMIGRATION (1877): “During their entire settlement in California, [the Chinese] have never adapted themselves to our habits . . . never discovered the difference between right and wrong, never ceased the worship of their idol gods, or advanced a step beyond the traditions of their native hive. Impregnable to all the influences of our Anglo-Saxon life, they remain the same stolid Asiatics that have floated on the rivers and slaved in the fields of China for thirty centuries of time . . . . It is safe to say that where no Chinese soul has been saved [by Christianity] . . . a hundred white have been contaminated by their presence.”).

of Asian Americans retain subtle notions of Asians as strange and foreign.<sup>33</sup> Asian men are still portrayed in the media as bumbling, squinty-eyed tourists, shrieking martial artists, or opium-sniffing underworld lords. Despite notable strides that Asian American men have made in the past few decades as professionals, politicians, artists, musicians, and other positions, Hollywood still offers few alternatives to Asian and Asian American actors outside of the traditional martial artist roles occupied by actors such as Jackie Chan and Chow Yun-Fat.

Asian women are still depicted as dragon ladies and modern-day geishas. For example, in the highly acclaimed "Ally McBeal" television series, the Asian American character, Ling, fulfills a number of historical stereotypes despite her modernized wardrobe and perfect English. Ling is a litigious and often icy woman who spouts nonsensical sayings in Mandarin before juries; takes her co-workers to a noisy Chinese restaurant where she orders a colleague's pet frog to be fried up as an entrée; and performs exotic sexual acts for her lover, a white male who also happens to be her superior. Ling has few true friends among her white co-workers, and in one recent episode, takes on the dragon lady stereotype literally, by spouting fire at the show's lead character.

These images reinforce ideas that Asians can be defined by characteristics uniquely different from those of mainstream America. The foreignness component of the yellow peril stereotype is particularly enduring. No matter how many generations of American-born ancestors they have in their family, Asian Americans are continually presumed to be foreign-born immigrants with thick accents.<sup>34</sup> Moreover, the emergence of Asian gangs has led to a resurrection of the notion of inherent criminality among Asians.<sup>35</sup> Paradoxically, in the same year that President Reagan praised Asian Americans for their successes, the President's Commission on Organized Crime held its first hearing on Asian organized crime. By the late 1980s, Chinese syndicates rivaled the size and sophistication of the Italian Mafia and controlled 60% of heroin smuggling across the United States.<sup>36</sup> The spread of Asian gangs likely will reinforce the historical images of Asian Americans as being morally deviant.

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33. See, e.g., HING, *supra* note 4, at 8 (examining political rhetoric surrounding the 1990 Immigration Act suggesting that Asians, who have traditionally congregated in ethnic enclaves and failed to assimilate into mainstream society, should be subject to tightened restrictions); TAKAKI, *supra* note 1, at 480-81 (discussing contemporary Asian stereotypes in Hollywood and community violence against Asian Americans).

34. See, e.g., Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 295-97 (1997) (observing that Asian Americans are daily confronted in conversation with the "purportedly neutral 'Where are you from?' or the intended-to-be-complimentary 'You speak such good English,'" questions which maintain the presumption that Asian Americans are not real Americans); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 429-30 (1996).

35. See KATHERYN K. RUSSELL, *THE COLOR OF CRIME XIII* (1998); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1708 n.460 (1985).

36. See WILLIAM KLEINKNECHT, *THE NEW ETHNIC MOBS* 19 (1996).



### C. Conclusion

Although the model minority and yellow peril stereotypes appear to be diametrically opposed, they may instead be closely interrelated.<sup>37</sup> For example, a post-modern deconstruction of the term “model minority” demonstrates the inherent relationship between the two stereotypes. Asian Americans are “model” insofar as they conform to white values and norms. Asian men are model as long as they are productive members of society and reinforce the status quo. However, the term “minority” emphasizes their continual “other”-status in society. During difficult economic times, the industrious Asian becomes scapegoated as a foreign enemy who threatens the jobs of “real” Americans.<sup>38</sup> In conclusion, both the yellow peril and model minority stereotypes reinforce inaccurate and negative ideas about Asian Americans. Whether Asian Americans are characterized as success stories or peculiar outsiders, these stereotypes deny our individuality and the inherent right to construct our definitions of what it means to be an Asian American.

## II. THE EFFECTS OF RACIAL STEREOTYPING ON CRIMINAL JUSTICE

From the foundations of American society, a promise has been touted by the law: specifically, that the eyes of the law shall remain blind from prejudices. It is dubious that the law has kept its promise of neutrality and objectivity, particularly since all law requires human interpretation and enforcement. For centuries, imperfect humans, who undoubtedly nurture biases, have shaped the law into its current meaning. Racial stereotyping has certainly played some role, then, in the development and administration of the criminal law in the United States.<sup>39</sup>

The American jury system, which entrusts to the people significant discretion in finding guilt, appears to be particularly vulnerable to racial stereotyping. If the eyes of the law are purportedly color-blind, the very existence of the jury system poses a direct challenge. Given the unavoidable existence of subtle or overt prejudice, it is unlikely that a jury made up of any number of people will unfailingly deliver the promise of impartiality in the law.

Sociological research has begun to unearth the pervasive influence of racial prejudice against African Americans on the criminal justice system. For example, studies have concluded that racial stereotyping of African American defendants by prosecutors can significantly influence jurors’

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37. See, e.g., Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness in the Construction of Asian American Legal Identity*, 4 *ASIAN L.J.* 71, 72 (1997) (discussing the circularity of the “model minority” and “yellow peril” stereotypes); Frank H. Wu, *From Black to White and Back Again*, 3 *ASIAN L.J.* 185, 212 (1996) (arguing that Asian American success is often attributed to their foreignness).

38. Chew, *supra* note 12, at 36 (describing the scapegoating of Asian Americans for economic problems); see also Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 *CAL. L. REV.* 1053, 1071-72 (1994).

39. See generally DAVID COLE, *NO EQUAL JUSTICE* (1999).

perceptions of guilt.<sup>40</sup> Few studies, however, have analyzed the influence of stereotyping of other racial minorities in the criminal law. Expanded research on bias against various other racial and ethnic groups is essential to eradicate the vestiges of racial discrimination in the United States, given the fact that minorities as a whole tend to be disproportionately over-represented in the criminal justice system.<sup>41</sup>

This section proposes several ways in which Asian American stereotypes may influence jurors, judges, and law enforcement officials. Subsection A discusses the effects of stereotyping on cases involving Asian American victims, Subsection B examines the influence of stereotyping on cases involving Asian defendants, and Subsection C discusses the "cultural defense" as a development in the criminal law that has been largely initiated by the yellow peril stereotype. In offering hypotheses on how the model minority and yellow peril stereotypes affect cases involving Asian Americans, I hope to generate awareness and stimulate discourse on the existence of racial injustice in the criminal justice system.

### *A. Racial Stereotyping and Its Effect on Asian Victims*

The model minority stereotype may lead to an increased likelihood of criminal acquittals in cases involving Asian American victims. In particular, the model minority stereotype tends to "whiten" Asians and undermine the existence of anti-Asian sentiment.<sup>42</sup> Jurors who accept the model minority stereotype therefore may not recognize or appreciate the racial motivation of crimes.<sup>43</sup>

#### *1. Effects of the Model Minority Stereotype*

The murder of Vincent Chin in 1982 provides an example of the general acceptance of the model minority stereotype. Chin, a 27-year old Chinese American engineer preparing for his upcoming wedding, was beaten to death by two white, unemployed auto workers, Roger Ebens and Michael Nitz.<sup>44</sup> Ebens had earlier mistaken Chin for a Japanese American at a local bar and accused him of contributing to unemployment in the auto industry. After engaging in a brawl, the three men were asked to leave the bar. Ebens and Nitz found Chin later that evening at a fast food restaurant

40. See, e.g., Steven DeBrotta, *Arguments Appealing to Racial Prejudice: Uncertainty, Impartiality, and the Harmless Error Doctrine*, 64 IND. L.J. 375, 385-86 (1989) (arguing that use of racial stereotypes influences jurors to assign culpability based upon anti-minority sentiment and frustrates the defendant's right to an impartial jury); Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L.J. 1739, 1744-50 (1993) (discussing racial imagery used against minority defendants in various stages of a criminal trial).

42. See, e.g., MULTICULTURAL PERSPECTIVES IN CRIMINAL JUSTICE AND CRIMINOLOGY 160 (James E. Hendricks & Bryan Byers eds., 1994).

42. See Gordon Allport, Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1931 (1993).

43. Chiu, *supra* note 38, at 1093 (discussing the difficulties for jurors in the Vincent Chin case to appreciate anti-Asian racism and the consequent acquittal).

44. For a description of the Vincent Chin murder, see ROGER DANIELS, *ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850*, 341-42 (1988); See also Vidcotape: Who Killed Vincent Chin? (Christine Choy & Renee Tajima 1988).

and waited for him to leave. Once outside, Nitz held Chin while Ebens beat him with a baseball bat and shouted: “‘It’s because of you little mother f—ers that we’re out of work.’”<sup>45</sup>

Neither Ebens nor Nitz were charged under a hate crime statute, and Ebens was subsequently acquitted of manslaughter.<sup>46</sup> Wayne County Circuit Judge, Charles S. Kaufman sentenced the men to three years probation and fined each of them \$3,000 plus \$780 in fees after hearing arguments only from the defense attorneys and not from the prosecuting attorney. Both defendants were permitted to “repay their debt” to society in monthly payments of \$125. One Asian American activist remarked of the sentencing: “Three thousand dollars can’t even buy a good used car these days. And this was the price of a life.”<sup>47</sup>

The media expressed doubt that Asian Americans could be targeted for racial discrimination, given their successful assimilation into American society, and questioned whether the incident was racially motivated.<sup>48</sup> Ebens himself testified: “I’m no racist. I’ve never been a racist.”<sup>49</sup> Judge Kaufman apparently believed Ebens’ version of events that characterized the killing as merely a drunken brawl between two men, one of whom happened to be Asian.

In justifying his leniency, Judge Kaufman explained:

These [aren’t] the kind of men you send to jail. We’re talking here about a man who’s held down a responsible job with the same company for seventeen or eighteen years and his son who is employed and is a part-time student. . . . These men are not going to go out and harm somebody else. I just [don’t] think that putting them in prison [will] do any good for them or for society. . . . You don’t make the punishment fit the crime; you make the punishment fit the criminal.<sup>50</sup>

In response, Vincent’s mother, Lily Chin demanded: “What kind of law is this? What kind of justice? This happened because my son is Chinese. If two Chinese killed a white person, they must go to jail, maybe for their whole lives. . . . Something is wrong with this country.”<sup>51</sup>

Although Judge Kaufman’s decision went largely unnoticed by white Americans, it sparked unprecedented activism within Asian American communities across the country. Asian Americans in Detroit promptly organized the American Citizens for Justice and demanded the United States Department of Justice to investigate whether Ebens and Nitz had violated Chin’s federal civil rights.<sup>52</sup> In November 1983, a federal grand

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

46. *See generally* *United States v. Ebens*, 485 U.S. 681 (1988).

47. Choy and Tajima, *supra* note 44.

48. *See* Chiu, *supra* note 38, at 1093. For a general discussion on the difficulty of prosecutors to convince a jury that a crime is racially motivated, see James Morsch, Comment, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659, 664-69 (1991).

49. Choy and Tajima, *supra* note 44.

50. *Id.*

51. *Id.*

53. *Id.*

jury indicted Ebens and Nitz on two counts.<sup>53</sup> One year later, a U.S. district court jury convicted Ebens of violating Chin's civil rights but acquitted him of conspiracy, and acquitted Nitz of both charges.<sup>54</sup> Ebens was sentenced to twenty-five years but was freed after posting a \$20,000 bond.<sup>55</sup>

In September 1986, a federal appeals court overturned Ebens' civil rights conviction on a technicality.<sup>56</sup> The Department of Justice ordered a retrial in Cincinnati, a city whose inhabitants had little exposure to Asian Americans and who were unfamiliar with the anti-Japanese sentiment among Detroit auto workers. Not surprisingly, the Cincinnati jury acquitted Ebens of all charges. Neither Ebens nor Nitz ever served a day of jail time for Chin's murder.<sup>57</sup> Outraged by the final outcome, Lily Chin left the country whose legal system had failed to secure justice for her family and returned to China.

Chin's murder illustrates the alarming effect of the model minority stereotype in undermining anti-Asian sentiment. Convictions under hate crime statutes for violent acts against Asian Americans are highly difficult to secure. Law enforcement officers also believe, consistent with the model minority stereotype, that Asian Americans are unlikely targets for racially-motivated crimes. Accordingly, acts committed against Asian Americans are considered crimes that merely happen to involve minority victims. Few district prosecutors charge suspects with violations of hate crime statutes.<sup>58</sup> For example, Oregon police failed to properly investigate the anti-Asian nature of a serial rape case in 1992.<sup>59</sup> Although the rapist, a white male, had a history of sexually assaulting Japanese women, he was charged only with kidnapping and rape.<sup>60</sup> In another case, North Carolina police failed to investigate the possibility that a rape and lynch murder of an eight-year old Chinese girl in 1985 was racially motivated.<sup>61</sup> The gruesome killing occurred shortly after the publication of pornographic photos in *Penthouse* magazine that depicted Asian women being tortured, bound, and hung from trees.<sup>62</sup> Despite the similarities in the photos and the details of the murder, police failed to consider the anti-Asian nature of the crime.<sup>63</sup> The model minority stereotype, which creates the erroneous assumption that Asians cannot be victims of racial discrimination, produces potentially devastating consequences on the enforcement of crimes against

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54. *Id.*

55. *Id.*

56. *Id.*

56. *Id.* An attorney for the Americans Citizens for Justice was alleged to have "improperly coached" several of the prosecution's witnesses.

58. *Id.*

58. See, e.g., Michael Chugani, *Hate and Fear Stalk the Streets*, H.K. STANDARD, May 18, 1998 (page unavailable) (stating that anti-Asian hate crimes are widely under-reported by local officials because of apathy and a claimed lack of funding).

59. See Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 ASIAN L.J. 151, 179 n.170 (1996) (discussing cases of violence involving Asian American female victims).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

Asian Americans.<sup>64</sup>

The model minority stereotype constructs Asian Americans as easier victims of crime. Criminals tend to engage in rational targeting and assume that Asian Americans carry more cash than their white counterparts, are physically weaker, are more culturally averse to striking back at criminals, and are less likely to report crimes.<sup>65</sup> Asian American women, viewed as submissive, may be particularly vulnerable to domestic abuse and rape.<sup>66</sup> Even the decision of whether to commit a crime may be influenced by racial stereotypes of Asian Americans.

## 2. *Effects of the Yellow Peril Stereotype*

The yellow peril stereotype tends to increase the likelihood of acquittal in cases involving Asian American victims. For example, the image of Asian men as dangerous foreigners or martial artists has influenced jurors' views of "reasonableness" in self-defense contexts. The 1992 killing of Yoshihiro Hattori, a 16-year-old Japanese foreign exchange student, illustrates the persistence of the yellow peril stereotype.

Hattori and a white friend, Webb Haymaker, were on their way to a Halloween party. The boys mistook the Peairs' house, which was decorated for Halloween and located in the same neighborhood, for their friend's house.<sup>67</sup> The boys rang the doorbell, and after nobody answered, proceeded around the corner of the house where they heard noises. Bonnie Peairs then opened the carport door. As Haymaker attempted to explain that they were looking for a friend's house, she slammed the door and screamed for her husband to locate their gun. Mrs. Peairs' testimony about her impressions of Hattori that night revealed race-based fears: "I guess he appeared Oriental. He could have been Mexican or whatever."<sup>68</sup> Her husband later testified that he had never seen her so terrified. The boys

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64. On the other hand, the model minority stereotype may compel jurors to be more sympathetic to Asian American victims. Similarly, Asian lives may be valued more highly because of their perceived economic and social contributions to society. For example, in a case where a 22-year old white defendant brutally tortured and murdered a 24-year old Georgetown honor student, jurors suggested that they were influenced by the victim's educational accomplishments and future potential in awarding the death penalty. See Greg Hernandez, *O.C. Jury Votes Death for Hate Crime Murder: Verdict Against White Supremacist Who Knifed Asian Honor Student Hailed as Message on Racial Violence*, L.A. TIMES, Oct. 10, 1997, at A1 ("The juror said the fact that the defendant and the victim were about the same age and had chosen such different paths in life was not lost on the emotional panel. 'It was almost like good versus evil,' the juror said. 'The victim's mom and dad wanted the very best for their family and the defendant chose another path at an early age for whatever reason' . . . . Human Relations Commissioner Ken Inouye, who had met with the victim's family on several occasions, said the killing was particularly tragic in light of the victim's accomplishments as a student and his promising future. 'It's very ironic that such a fine man should be taken from us in such a heinous manner,' Inouye said.").

65. See Allport, *supra* note 42, at 1929-30 (discussing rational calculations made by potential criminals which are related to the model minority stereotype).

66. See generally Wang, *supra* note 59.

67. See Hattori v. Peairs, 662 So. 2d 509, 511-12 (La. Ct. App. 1995).

68. Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 437 (1996).

For a discussion of the prejudicial effect of racial descriptives in witness testimony, see Johnson, *supra* note 35, at 1746 ("Unavoidable racial content may be stressed by the words chosen to describe [a] fact ('He looked Oriental, definitely foreign . . .')").

then turned around to leave the Peairs' property. Hattori and Haymaker were already ten yards away when Rodney Peairs stepped outside, carrying a large handgun. Hattori turned around and began walking toward him in an effort to explain why they were at the house. Smiling apologetically, Hattori explained in accented English, "We're here for the party!"<sup>69</sup> Peairs pointed his gun at Hattori and shouted "Freeze!"<sup>70</sup> When Hattori, who did not understand the English term, "freeze," continued to approach him, Peairs immediately shot him in the chest.

Peairs was acquitted of manslaughter; the jurors apparently agreed that Peairs reasonably believed that he was in danger of death or imminent bodily harm as a result of his encounter with Hattori.<sup>71</sup> Peairs testified at trial that he did not see any weapons on Hattori and that the boy appeared to be of a small build. However, Peairs insisted that the boy was "scary" and "frightening."<sup>72</sup> The jury accepted Peairs' impression of Hattori as one which an ordinary member of the community would make and found that the killing was justifiably made in self-defense. Peairs' attorney successfully played on white fears of Asians as foreign menaces, by describing Hattori to jurors as "a stranger invading someone's home turf."<sup>73</sup> Such rhetoric resonates with the historical and contemporary views of Japanese Americans as enemies to American stability and economic progress.<sup>74</sup>

Peairs' shooting of Hattori was undoubtedly racially-motivated. An unarmed white teenager who approached Peairs' house on Halloween night, an occasion when people typically roam neighborhoods, would not have posed a reasonable threat of death or imminent harm. Although both Haymaker and Hattori approached the Peairs' house, Peairs only targeted Hattori. The very fact that Hattori had Asian features provided a reasonable basis to fear him. Such use of racial imagery by Peairs' counsel is far from unique. Racially suggestive language is too often uttered by lawyers during trials and unfortunately is effective in subtly influencing jurors.<sup>75</sup> In Hattori's case, allusions to the yellow peril stereotype went unchallenged.

In a similar case, an elderly homeowner, Anthony Simon, was acquitted of aggravated assault when he shot his Chinese neighbor, Steffen Wong, who was entering his own home.<sup>76</sup> During the trial, a clinical psychologist testified that Simon suffered from anxiety neurosis. However, Simon insisted that because Wong was an "Oriental," he was an expert in

69. *Hattori*, 662 So. 2d at 512 n.77.

70. *Id.*

71. However, Hattori's parents successfully brought a wrongful death action against Peairs. *Id.*

72. *Defense Depicts Boy as "Scary,"* N.Y. TIMES, May 21, 1993, at A10.

73. See, e.g., Lee, *supra* note 68, at 433.

74. *Id.* ("Historically, Japanese nationals and Japanese Americans have been viewed as the enemy. In more recent times, the Japanese have also been viewed as the enemy—the economic yellow peril responsible for the loss of American jobs . . . . The notion of foreignness embedded in this 'invasion of home turf' language was so subtle that this indirect reference to national origin went unnoticed by the prosecution.")

75. See Johnson, *supra* note 35, at 1678.

76. See *Kansas v. Simon*, 646 P.2d 1119, 1121 (Kan. 1982).

martial arts. Simon further noted that he was afraid of Wong because of prior disagreements between them and that he feared more Orientals would move into the neighborhood. The jury accepted Simon's testimony and concluded that Simon had reasonably believed that Wong posed an imminent threat of serious bodily harm.<sup>77</sup>

Both the Hattori and Wong cases illustrate the impact of the yellow peril stereotype on jurors in deciding what is reasonable in self-defense contexts. As long as Asians are perceived as threatening foreigners or martial artists, jurors can acquit defendants for acts that would not be considered self-defense if the victims were not Asians. Courts can continue to validate the racist fears of defendants simply if they believe that most persons would have reacted to the victim with the same fears and prejudices.<sup>78</sup>

### 3. *Other Effects of the Yellow Peril Stereotype*

In addition to influencing the concept of reasonableness, the yellow peril stereotype devalues Asian lives. When Asian Americans are perceived to be foreign or otherwise outside the American community, prosecutors face significant hurdles in convincing a non-Asian jury to identify with the Asian victim. One author elaborates on the dehumanizing effect of both the model minority and yellow peril images of Asian Americans:

Racial stereotypes about Asians as foreigners, economic rivals, 'gooks' we fought in Vietnam, 'Japs' responsible for Pearl Harbor, 'chinks' who take our jobs, not only deindividualize, they also dehumanize Asian Americans . . . . Racial representations might also influence legal decisionmakers to accept more readily claims of self-defense by defendants who kill Asian Americans, not necessarily because Asian Americans are thought to be more violent or more dangerous than others (although this may occur under the Asian-as-martial artist stereotype), but because Asian and Asian American lives, seen as foreign or outside the American community, are not valued to the same extent as other lives.<sup>79</sup>

Juries may view Asian victims as somehow less deserving of a true victim status.<sup>80</sup> In line with this reasoning, sociolegal research indicates that the race of a homicide victim is often more dispositive in a jury's finding of guilt and the severity of the subsequent sentencing than the race

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78. *Id.*

78. See Viet D. Dinh, *Randall Kennedy, Race, Crime, and the Law: Races, Crime, and the Law*, 111 HARV. L. REV. 1289, 1302 (1998) ("A decision that the belief was reasonable must rest on the tenuous determination that most people would make the same ignorant, wrong, or racist calculation and would react similarly, and on the objectionable judgment that such racially motivated reactions are proper in our society. In making such a judgment, the court would be actively validating the defendant's racism.")

79. Lee, *supra* note 68, at 440.

80. See generally Reginald Leamon Robinson, *The Other Against Itself: Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15, 86 (1993) (suggesting that non-whites do not qualify as true victims); Allport, *supra* note 42, at 1936-39 (discussing dehumanization of Asian Americans flowing from the foreignness component of the yellow peril stereotype, which constructs Asians as easier victims for violence).

of the defendant.<sup>81</sup> Although Vincent Chin's skull was fractured in several places, Judge Kaufman explained Ebens' acquittal on the ground that the murder was not sufficiently brutal. Chin's life was likely devalued because of his perceived status as a foreigner, especially because only 19 of the 200 prospective jurors stated that they had ever encountered an Asian American and all of them were quickly dismissed.<sup>82</sup> For a jury that did not include any Asians and that had no real-life experiences with Asian Americans, Chin's race arguably hindered jurors from identifying with him.

In addition, Asian Americans and other non-white victims tend to receive less attention from law enforcement officers at all stages of the criminal arrest, investigation, and pre-trial processes.<sup>83</sup> Police often assume that Asian and Asian American victims are unable to speak coherent English and instead speak to white witnesses. Asian victims also may distrust police and fail to assert their grievances.<sup>84</sup> As a result, police likely make fewer arrests for Asian and Asian American victims as compared to white victims.

In cases involving battered immigrant wives, police tend to accept events recited by their American husbands and thus fail to make proper arrests.<sup>85</sup> The devaluation of Asian lives flowing from the yellow peril stereotype also causes police to de-prioritize cases involving Asian victims. Homicides involving Asian and Asian American victims are less likely to be tried as felonies compared to similar killings involving white victims.<sup>86</sup>

The Asian Law Caucus charged the police handling of the 1997 killing of Kuan Chung Kao as grossly inadequate.<sup>87</sup> In the early morning hours of April 29, 1997, two Ronherth Park police responded to calls of an intoxicated man crying for help. The officers arrived at Kao's home to find him drunk and disgruntled after being harassed with racial slurs at a bar.<sup>88</sup> Although Kao was spotted twirling with a large wooden stick and appeared drunk, the officers aggressively confronted and shot him within thirty

81. See DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 185 (1990) (arguing that killers of white victims are more likely to be sentenced to death than killers of non-white victims); Kimberle Crenshaw, *Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law*, 43 STAN. L. REV. 1241, 1251 (1991) (citing statistics indicating that cases involving white victims of rape are more likely to end in convictions than those involving non-white victims).

82. See Alethea Yip, *Remembering Vincent Chin*, ASIAN WEEK, June 19, 1997, at 12.

83. See, e.g., Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women*, 2 AM. U. J. GENDER & L. 63, 70 (1994) (discussing lack of enforcement in hate crimes against minorities); See Peter Finn, *Bias Crime: Difficult to Define, Difficult to Prosecute; New Laws and Techniques that are Putting Violent Bigots Behind Bars*, 3 CRIM. JUST. 19, 20 (1988).

84. See Wang, *supra* note 59, at 172.

85. See *id.* at 164-65.

86. See, e.g., Samuel R. Gross and Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 44 (1984) (citing study indicating that police tend to upgrade descriptions of homicides involving white victims compared to those involving non-white victims).

87. See Peter Blumberg, *Cover-Up Charged in Kao Shooting*, PRESS DEMOCRAT (SANTA ROSA, CAL.), Aug. 1, 1997, at B1. For a description of the killing, see also *Police Murder of Kuanchung Kao, REVOLUTIONARY WORKER* (Sept. 28, 1997) <<http://www.mcs.net/~rwor/a/v19/920-29/925/kao.htm>>.

88. See *Sonoma County Police Tactics Debated*, SAN FRANCISCO CHRONICLE, Feb. 21, 1998, at A19.



seconds of their arrival.

Mr. Kao was untrained in martial arts, but Officer Shields cited fear of Kao as a martial arts expert as a reason for shooting him.<sup>89</sup> On June 19, 1997, District Attorney Mike Mullins cleared Lynch and Shields of any criminal wrongdoing after a cursory investigation was completed; the police failed to conduct interviews with a dozen eyewitnesses and entirely ignored the possibility that Shields used excessive force in a confrontation with a man who was obviously inebriated.<sup>90</sup> Despite the fact that a grand jury of Sonoma County concluded in an independent investigation that the protocol for investigating police misconduct was flawed and inadequate, an administrative claim filed on behalf of the family against the city by the ALC was summarily rejected by the Rohnert Park city council. This example of police discrimination can be attributed to the foreignness component of the yellow peril stereotype. In Kao's case, local, state, and federal authorities accepted Shields' assumption that Kao was a dangerous martial artist and failed to consider the possibility of racism by Shields.<sup>91</sup>

### B. *Racial Stereotyping and Its Effect on Asian Defendants*

In general, sociolegal research indicates that the effects of racial stereotyping of Asian defendants on guilt attribution are not as pronounced or widespread as compared to African Americans and other minority defendants.<sup>92</sup> However, racial biases affect Asian defendants in the following ways.

#### 1. *Effects of the Model Minority Stereotype*

First, the model minority stereotype artificially aligns Asians with whites and therefore obscures the need for Asians to be included on a jury. A defense lawyer remarked that the absence of Asians on the jury was not a strong basis for appeal in a recent case in Nevada involving a group of Asian Americans who were convicted of conspiracy, money laundering, and fraud.<sup>93</sup> Similarly, despite the substantial presence of Asian Americans in Orange County, a California judge ruled that the absence of Asian jurors was insignificant.<sup>94</sup>

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89. See Aurelio Rojas, *Wrongful Death Claim Against Rohnert Park*, SAN FRANCISCO CHRONICLE, Oct. 2, 1997, at A18.

90. See Blumberg, *supra* note 87.

91. *Id.*

92. See Johnson, *supra* note 35, at 1697 (comparing effects of racial stereotyping of Asian Americans on juries with that of other minorities).

93. See Glenn Puit, *Seven Found Guilty in Baccarat Scam That Hit Three Casinos*, LAS VEGAS REV.-J., Nov. 27, 1996, at 6B. However, one defense attorney remarked: "I don't think [my client] has a grasp of what the concept of conspiracy is, considering the fact that he doesn't know any of the other defendants . . . I would have liked to have seen more jurors with an Asian background. I certainly don't believe this was a jury of his peers."

94. See Jeffrey Miller, *Judge Rejects Discrimination Claim from Asian American Defendants*, ORANGE COUNTY (CAL.) REG., Jan. 27, 1994, at B01 (quoting Judge Ted Millard as concluding that the disparity between Asian Americans in Orange County and their participation as grand jurors is "constitutionally insignificant"); Rene Lynch, *Judge Rejects Claim That Juries Bar Asians in Courts: He Says Motion by Defense Attorneys in the Stuart Tay Murder Trial and Other High-Profile Cases 'Borders on Being Frivolous'*, L.A. TIMES, Jan. 27, 1994, at 1.

Second, the model minority stereotype, in promoting fears about Asian competition, creates hostility against Asian defendants. Such anti-Asian sentiment increases the likelihood of guilt attribution, particularly in crimes that involve an element of deliberation.<sup>95</sup> Asians are assumed to be capable of masterminding crimes and outsmarting white Americans, when in fact their crimes lacked clear design. For example, even though some of the defendants had never met one another, two businessmen from Hong Kong and four Asian Americans were convicted of conspiring to defraud several casinos in a recent Nevada case.<sup>96</sup> During the investigation, casino managers reportedly described that the casino had previously been hit by “a strikingly similar group of Asian sharp guys.”<sup>97</sup> These depictions suggest that the defendants were viewed as fungible, regardless of their actual, individual participation in the fraud.

## 2. *Effects of the Yellow Peril Stereotype*

The yellow peril stereotype influences the way in which law enforcement officers handle crimes committed by Asian Americans both before and after arrest. In cities where Asian gangs are widely feared, police rely on “facebook” (compilations of photographs of suspects) to arrest Asian Americans. However, some Asian facebook include photographs of Asian Americans who have no criminal records.<sup>98</sup> Law enforcement officers who rely on the facebook practice likely view Asians as fungible: every young Asian male who fits the physical profile is a potential Chinatown gangster. Such stereotyping is particularly disturbing in light of the fact that white Americans commonly make errors in identifying Asian faces.<sup>99</sup>

Not surprisingly, several incidents in California illustrate the disastrous consequences of relying on the facebook practice. During the summer of 1992, police rounded up eight Asian teenagers in Laguna Park, California, to be photographed after an earlier, unrelated incident involving another group of Asians in the park.<sup>100</sup> In January 1993, police officers raided a Japanese American family in Fountain Valley, California, after

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95. On the other hand, the model minority stereotype may also influence juries as well as police officers to view Asian Americans as generally law-abiding. Other minority offenders who are perceived as greater threats to society are therefore punished more severely than Asians. Consistent with this view, less than half of Asian juveniles who were arrested for violent offenses were charged, a statistic that is lower than other racial groups.

To date, few studies have compared the arrest and sentencing of Asian Americans with African Americans and other minorities. The annual *Crime in the United States* reports released by the United States Department of Justice and the Federal Bureau of Investigation continues to use a “White-Black-Other” categorization for most of its statistics.

96. See Puit, *supra* note 93.

97. John L. Smith, *Mini-Baccarat Bust Expected to Be Major Coup for Security*, LAS VEGAS REV.-J., Aug. 21, 1996, at 1B.

98. Wang, *supra* note 59, at 172.

99. See Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 940 (1994) (citing a study in which whites identified Asian faces with only 52% accuracy).

100. See *AWARE Fact Sheet: Police Mug Files on People of Color* <<http://sun3.lib.uci.edu/~dtsang/awarefs.htm>>.

misidentifying the son, Mark Kanshige, as an attempted murder suspect from a photo dossier.<sup>101</sup> The officers forced the entire family outdoors and handcuffed the family members, while they ransacked the house in search of evidence that did not exist. Mark spent six months in jail and was subsequently found innocent by a jury. Also, police officers in Garden Grove, California, illegally detained and photographed three Southeast Asian teenagers, two of whom were honor students, in July 1993.<sup>102</sup> The officers accused the girls of being gang members, although police could not offer any reason for the suspicion other than the fact that the girls were wearing baggy pants and appeared to be loitering by a pay phone.

In addition, police officers who view Asians as morally inferior may apply tactics of harassment or brutality to dominate Asian suspects. A New York court recently convicted N.Y.P.D. Officer Rolando Baquandano of attempted assault of Korean storeowner, Son Tae Kim. Baquandano became enraged when Kim resisted the officer's accusation that Kim had given counterfeit bills to customers. Baquandano charged Kim and his brother with resisting arrest and disorderly conduct, and then proceeded to beat the two men. During the beating, which left Kim and his brother hospitalized, Baquandano called Kim and his brother "f—ing Orientals" and "animals."<sup>103</sup>

The yellow peril image increases suspicion against Asian Americans and affects law enforcement initiatives even before the arrest stage. During the summer of 1997, White House security guards denied entry to several Asian Americans with pre-approved security clearances.<sup>104</sup> Although the visitors were U.S. citizens and one was a member of the U.S. Civil Rights Commission, a security guard insisted that their surnames appeared "foreign, you know, Asian, Chinese."<sup>105</sup> On one occasion, a Secret Service guard changed a visitor's citizenship status from "United States" to "foreign" based solely upon the person's surname.<sup>106</sup>

The incidents occurred during the height of a campaign finance scandal, in which the Clinton administration and Democratic party officials were alleged to have given many foreign nationals, including a number of Asians, liberal access to the White House. Although the White House and Secret Service hastily admitted their mistake and reiterated their stance against racial discrimination, a coalition of civil rights groups charged public officials with having "engaged in a pattern of bias based on race and national origin" against Asian Americans in a lengthy report; the complaint stated that the campaign finance investigation, by unfairly targeting Asians, stigmatized Asian Americans, "both inside and outside the Government."<sup>107</sup>

Police who assume that all Asian Americans are foreigners may

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101. *Id.*

102. *Id.*

103. *Id.*

104. See Lena H. Sun, *Asian Names Scrutinized at White House; Guards Stopped Citizens Who Looked 'Foreign,'* WASH. POST, Sept. 11, 1997, at A01.

105. *Id.*

107. *Id.*

107. *Id.*

attempt to take advantage of Asian suspects by failing to comply with criminal procedures. In 1996, the New York Police Department agreed to a \$35,000 settlement with Nancy Tong, after subjecting the Oscar-nominated Asian American film producer to an unlawful strip search.<sup>108</sup> Lieutenant Walter Peyton stopped Tong after she stepped out of her car during a traffic jam.<sup>109</sup> Peyton ordered her to return to her car, and Tong questioned him but followed his order.<sup>110</sup> Peyton then arrested her, charged her with two non-moving traffic violations (which were later dropped by police), and brought her to the precinct to undergo a strip search.<sup>111</sup> Elizabeth Ou Yang, Tong's attorney, maintains that Peyton's actions were based upon racial discrimination.<sup>112</sup>

### C. The Cultural Defense

The remnants of the yellow peril stereotype form the basis for the "cultural defense" in criminal law.<sup>113</sup> The defense exculpates (or provides mitigation to) minority defendants for acts that are criminal in the United States but may be commonly practiced in their native cultures. To prevail under the cultural defense, the defendant must usually show that his acts were committed under a reasonable, good-faith belief in their propriety.<sup>114</sup> The defendant can introduce evidence of cultural norms that support the reasonableness of the acts. In general, the defense negates the requisite *mens rea* of the crime. By emphasizing the "foreignness" of Asian Americans, the yellow peril stereotype reduces the likelihood that jurors will attribute culpability to Asian American defendants when a cultural defense is raised.

Asian defendants have increasingly sought to use the defense in spousal abuse cases. For example, Dong Lu Chen successfully applied the cultural defense to mitigate his sentence for the murder of his wife after he discovered her infidelity. Chen argued that Chinese men, given their traditional cultural values about adultery and the particular shame placed on wronged husbands, justifiably react violently to discoveries of unfaithfulness. Divorce is viewed in certain Asian cultures as the ultimate demonstration of personal failure and remarriage is often impossible. In

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108. See Tomio Geron, *N.Y.P.D. Settles APA Complaints: Brutality Charges Pile up in New York*, ASIAN WEEK, Mar. 1, 1996, at 13.

110. *Id.*

111. *Id.*

112. *Id.*

112. *Id.* ("The law is very clear: you cannot subject someone to a strip search for a non-moving violation. And [Tong] posed no danger to the officer. Subjecting her to a strip search was to humiliate her and show her who has control. They think they can take advantage of Asian Americans because they don't know their rights, because they don't speak English . . . [Tong] was devastated. It was violating and humiliating.")

113. See Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 66 (1994) ("[T]he perspective that [Asians] living in the United States are not 'American' is the very basis for the assertion of the 'cultural defense,' on the grounds that someone from a distinctly 'non-American' culture should not be judged by 'American' standards."); see also Chiu, *supra* note 38, at 1109-10.

114. See John Lyman, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 88 (1986).

addition, adultery carries deep shameful connotations for a wronged husband, whose masculinity and respect in the community is destroyed by the suggestion that he could not satisfy his wife. Given these cultural pressures, a wronged spouse may be able to show that he or she was unable to form the requisite intent to be legally responsible for a spouse's killing or that a sentence should be reduced.

In filicide<sup>115</sup> cases, Asian parents have introduced evidence that filicide was either not regarded as a serious crime in their native countries or appeared to the defendant as the only culturally-mandated option in troubled family situations. Joint parent-child suicide ("oyako-shinju") is not considered to be a serious offense in Japan, particularly in cases where the parent has recently discovered marital infidelity. Thus, Japanese parents may view filicide as an appropriate and justified means to purge the shame of adultery and prevent their ignoble ostracization from the community. Accordingly, Japanese defendants may raise the cultural defense to reduce their charges from murder to manslaughter in parent-child suicide cases.<sup>116</sup>

Although the cultural defense appears to protect the rights of Asian and Asian American defendants and curbs ethnocentrism of criminal concepts such as the "reasonable person" standard, the defense ultimately perpetuates harmful stereotypes of Asians as uncivilized and morally inferior beings.<sup>117</sup> Although the defense provides relief to specific Asian defendants, it is premised upon the accuracy of the yellow peril stereotype. Although white cultures are viewed as continually advancing, Asian cultures are instead perceived as incapable of moving beyond their backward practices and ideas. The defense also fails to appreciate the diversity of beliefs and practices within Asian communities. Thus, the cultural defense allows a civilized Western government to account for its uncivilized minorities. The defense potentially perpetuates the subordination and marginalization of Asian Americans.

Second, the defense fails to hold Asian Americans accountable for acts for which they can and should accept responsibility. By providing refuge in their native cultures, the defense fosters the underlying notion that Asians have a diminished capacity for appreciating and owning up to their acts. The cultural defense allowed Chinese men to be portrayed "in terms of the primitive, elemental Oriental."<sup>118</sup> In fact, several Chinese American activists protested the use of the cultural defense in the Chen murder case

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116. WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 531 (1993) (defining "filicide" as the killing of one's son or daughter.).

116. See Chiu, *supra* note 38 (discussing *California v. Kimura*, No. A-091133 (Santa Monica Sup. Ct., Nov. 21, 1985)).

117. See *id.* (discussing Asian American arguments against the cultural defense); see also Volpp, *supra* note 113, at 71-72 ("When a dominant group essentializes a subordinated group by focusing on selected traits to describe the group as a whole, the dominant group defines its own characteristics in contrast to the subordinated group . . . . The resulting image erased the prevalence of gendered violence in the United States and distanced the United States-based spectator from [Asian American defendants] in a way that rendered them unrecognizable and inhuman.").

118. Valerie L. Sacks, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523, 540 (1996).

by declaring that spousal abuse is not acceptable in Chinese culture and that Chen would not have been so readily excused in his native country.<sup>119</sup>

Third, the defense does not fulfill its purported goal of recognizing differences between white and non-white cultures. Rather, a jury assesses evidence about Asian norms only to the extent that it can relate to that culture and understand it. Thus, the cultural defense relies on jurors' abilities to find common ground with the defendant. A defendant is successful only if jurors can recognize cultural sameness, rather than cultural difference.<sup>120</sup> The cultural defense successfully exculpated Kong Moua in 1985, in a case where Moua, according to a pre-wedding ritual, took his fiancée to his family home and had sexual intercourse over her protests.<sup>121</sup> Moua presented evidence that in his native Hmong culture, forced marital sex (ostensibly including sex with one's fiancée) is generally not considered rape. The court's decision to drop kidnapping and rape charges against Moua may have been empty exercise in cultural difference, given that marital rape has enjoyed a longstanding exemption from criminal prosecution in Western societies.<sup>122</sup> The defense was successful only insofar as white jurors related Hmong patriarchal values to their own traditions of gender subordination.

Fourth, the cultural defense claims that culture--rather than structural forces such as racism, sexism, and economics--explains social problems within Asian American communities.<sup>123</sup> In spousal abuse cases, the defense effectively diverts attention from important issues such as the sexist attitudes which persist within immigrant Asian families.<sup>124</sup> While domestic violence in white communities attracts concern, the same problem in immigrant communities is viewed as a cultural practice.

### III. REPRIS: PORTRAIT OF A MURDERER

The influence of racial stereotyping of Asian Americans on the criminal justice system illustrates the unavoidable fact that law is not detached from social perceptions. Both jurors and law enforcement

119. See *id.* (providing examples of Chinese American opinions: "Our culture does not give a man permission to kill his wife regardless of what the situation was at home." Chen "is either crazy or he's enraged . . . It has nothing to do with his being Chinese or having a Chinese background . . . It is not acceptable conduct." Chen, they say, "would have been dealt with much more harshly by a Chinese court." A man who accuses his wife of adultery . . . "has no right to kill his wife. It is absolutely not part of Chinese culture . . . This kind of thinking . . . reinforces patriarchal and racial stereotyping . . .").

120. See Chiu, *supra* note 38, at 1114.

121. See *California v. Moua*, No. 315972 (Sup. Ct. Fresno County 1985).

122. See Chiu, *supra* note 38, at 1115.

123. See Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1585 (1996) ("[The cultural defense] is dehumanizing because it distances Asian Americans from the understandings of human behavior developed using the Western notions of individualism and psychoanalysis. It is also depoliticizing because it uses culture, and not structural forces such as racism or economic oppression, to explain the existence of problems in Asian American communities."); see also Sacks, *supra* note 118, at 536 ("A too-simplistic use of the cultural defense erases crucial distinctions between the perspectives of those who are differently situated and likens disparate phenomena.").

124. See, e.g., Volpp, *supra* note 113, at 94-95.

officers are affected by the model minority and yellow peril stereotypes in cases involving Asian Americans. Although the eyes of the law promise symbolically to be blind, they are in reality clouded by the misunderstandings and biases of the human actors who carry out the law.

In returning to Wayne Lo's case, I offer that the model minority and yellow peril stereotypes may have influenced the jury's perception of Wayne's blameworthiness. In doing so, I do not mean in any way to excuse the wrongfulness of Wayne's actions or to depreciate the suffering of his victims' families. However, I do argue that racial bias may have caused jurors to fail to accord proper weight to the reasonableness of an insanity defense.

News accounts about Wayne depicted him as the epitome of a model minority, one who distinctly did not fit the expected profile for a murderer. Often juxtaposed with the descriptions of his mystifying actions on the day of the murders and during his trial were anecdotes about his model upbringing. Many journalists focused on the success of his immigrant parents in building an award-winning Chinese restaurant from the ground up, on Wayne's incredible musical talent and stellar grades which landed him into a prestigious college for young prodigies, and on the thoughtfully written essay that he had penned only hours before the killings.<sup>125</sup> Journalists reported Wayne as being a "very bright student and a talented musician" with "exceedingly good manners and gentlemanly upbringing."<sup>126</sup> Wayne was also labeled as a "quiet violinist" and "dutiful son."<sup>127</sup> Another journalist wrote: "From the moment [Wayne] arrived in America he showed great promise."<sup>128</sup>

Several journalists devoted attention to the successes of Wayne's parents. Wayne's father had been an officer in Taiwan's Air Force and his mother a music teacher in Taipei.<sup>129</sup> The journalists also included a statement from a family friend commending Wayne's parents as "very, very good. They are model parents."<sup>130</sup> Some reporters included a statement from Wayne's father boasting of the success of his two sons: "[Wayne] used to be the best in my country. My family is a very straight family. I want them to have straight A's. If they practice music, they have to be perfect. That is why they are so good."<sup>131</sup> A journalist at the *Boston Globe* reported on Wayne's "exceptional intelligence" that propelled him far beyond the confines of a traditional high school curriculum.<sup>132</sup> Others noted that Wayne's musical virtuosity was discovered by a renowned

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125. See, e.g., Kathryn Marchocki and Ralph Ranalli, *Shooting Suspect Leaves Contrasting Impressions*, BOSTON HERALD, Dec. 20, 1992, at 6.

126. *Id.*

127. See Lynda Gorov, *Wayne Lo Showed His World Two Personalities*, BOSTON GLOBE, Dec. 16, 1992, at 38.

128. Maxine Bernstein et al., *From Concertos To a Lethal Rampage: The Night Wayne Lo Began Shooting*, HARTFORD COURANT, Dec. 20, 1992, at A1.

129. *See id.*

130. *Id.*

131. See Marchocki and Ranalli, *supra* note 125.

132. See Brian McGrory et al., *Shooting at College Kills Two, Injures Four*, BOSTON GLOBE, Dec. 16, 1992, at 1.

conductor when he was only seven years old, and he soon became the youngest person to play with a local youth orchestra.<sup>133</sup>

Wayne so epitomized the model minority stereotype that the media characterized him as completely assimilated to the white American community. This had at least two effects on Wayne's trial. First, little effort was made to ensure that the jury, chosen from a predominantly white, rural population, would be racially balanced. Although Judge Daniel A. Ford moved Wayne's trial from Berkshire County into Hampden Superior Court in Springfield, Massachusetts, Ford was more concerned that Berkshire residents had already been inundated with the media frenzy surrounding the killings than with the possibility of racial prejudice. Not surprisingly, none of the jurors chosen were of Asian descent. Similarly, on Wayne's appeal, his defense lawyers focused more on the potential bias of a gay psychologist on the allegedly homophobic defendant than on racial prejudice by any of the legal actors in the trial. Wayne's race became a non-issue in both the trial and appeal. As an ideal candidate for the model minority stereotype, Wayne was treated just as if he had been white.

Second, the model minority stereotype may have influenced jurors in rejecting Wayne's insanity defense. In order to prove legal insanity, Wayne was required to show that he suffered from a mental disease or defect that impaired his ability to know right from wrong or to control his unlawful conduct.<sup>134</sup> However, if an Asian American is depicted as a model citizen, jurors would be hard-pressed to conclude that at the same time, he could be mentally impaired. After all, mental illness is not often associated with individuals from hardworking and decent families who prove themselves to be scholarly, talented, and successful. Accordingly, while experts for Wayne's defense testified that he suffered from schizophrenia, the prosecution sought to show that he instead suffered from a "narcissistic personality disorder" that gave him an "overinflated image of his own importance."<sup>135</sup> Such a characterization belies the fear of Asian superiority inherent in the model minority stereotype. Essentially, the prosecution sought to show that because Wayne had excelled beyond most people of his age, he must have harbored the belief that he was better than his white victims.

Thus, the model minority stereotype may have colored jurors' view of Wayne as being more emotionally stable than he actually was. Several facts that suggest Wayne was internally unbalanced may have, in fact, gone unnoticed by jurors. Although Wayne initially told his father that he had been instructed by God to purge the campus of evil and described the contemplated crime with apparent clarity, on a different occasion, he appeared confused and told jail officials that he thought he was on a vacation and would be flying home to Montana soon. Although the prosecution argued that Wayne believed God had commanded him to

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133. See Bernstein et al., *supra* note 128.

134. See *Massachusetts v. Brennan*, 504 N.E.2d 612, 615 (Mass. 1987).

135. See *Experts Testify Wayne Lo Knew Attack was Wrong*, PATRIOT LEDGER (QUINCY MASS.), at 05.



cleansing the campus of sin, Wayne was apparently also influenced by a secular punk band, Sick of it All, whose t-shirt he brazenly wore at his arraignment. Moreover, Wayne evidently failed to understand the message of Sick of It All's music, which presumably denounces racism and violence.<sup>136</sup> Similarly, none of the news accounts of the shootings discussed the unsettling inconsistency between the fact that Wayne held neo-Nazi views and that he himself was not white.

Third, the yellow peril stereotype may also have made it more difficult for the jury to relate to Wayne. Although potential jurors were questioned about their attitudes towards Asians, the dearth of Asians and Asian Americans in Springfield, Massachusetts suggests that few had real-life experience on which to form their opinions. Thus, Wayne may have appeared more threatening to white jurors whose prestigious college had been invaded by a foreigner. In addition, jurors may have been influenced by the prosecution's characterization of Wayne as a madman bent on murder, allowing their fears and prejudices about Asian criminality to weigh against the defense's evidence of insanity.

In particular, despite the fact that there was no evidence to show that the shootings were not random, jurors apparently believed the prosecution's characterization that Wayne was a crazed and dangerous bigot who intended to cleanse the campus of African Americans, homosexuals, and drug addicts. For example, there was evidence that Wayne espoused racist, sexist, anti-Semitic, homophobic, and neo-Nazi sentiments on campus.<sup>137</sup> The media also offered anecdotal evidence that Wayne had allegedly threatened an interracial couple,<sup>138</sup> argued in an academic paper for secretly deporting and exterminating individuals with AIDS,<sup>139</sup> written obscene graffiti in the snow which demeaned handicapped persons,<sup>140</sup> shaved his head,<sup>141</sup> listened to punk rock music,<sup>142</sup> dressed in an extreme fashion,<sup>143</sup> and followed Rush Limbaugh's radio program.<sup>144</sup> One journalist described Wayne as a withdrawn and angry skinhead and quoted classmates as stating that he was an "extreme bigot," "scary," and "anti-everything."<sup>145</sup>

However, there was no mention that, despite Wayne's alleged hatred against blacks, Jews, and homosexuals, none of Wayne's victims fit any of these descriptions. Moreover, contrary evidence showing Wayne's lack of

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136. See Karla Peterson, *When All Goes Wrong, Blame Rock n' Roll*, SAN DIEGO UNION & TRIB., Mar. 11, 1993, at 4. On the album released before the shootings, the band included songs about the evils of racism ("Just Look Around") and violence ("What's Going On"). Lyrics for the latter title include: "Beatings of five to one wasn't enough/Now we're using everything from chains to knives and guns/How much more of this do we have to take/Before we realize it's such a senseless waste."

137. See McGrory et al., *supra* note 132.

138. See Marchock and Ranalli, *supra* note 125.

139. See McGrory et al., *supra* note 132.

140. See *id.*

141. See Gorov, *supra* note 127.

142. See *Questions Abound in College Shootings*, ST. PETERSBURG TIMES, Jan. 4, 1993, at 1A ("When his music changed, Wayne Lo changed . . .").

143. See Bernstein et al., *supra* note 128.

144. *Id.*

145. Gorov, *supra* note 127.

bigotry may have been overlooked. An African American student said that Wayne never directed any racist remarks to her, and a Jewish teacher who knew Wayne personally admitted that he had in fact been polite to her.<sup>146</sup> The fact that Wayne had a gay friend at the college never came out at the trial. Other classmates conceded that although Wayne's views were unpleasant, he was regarded as having superficially adopted the "breakfast-cereal fascism" views of his friends and was merely "another tough guy who was all talk."<sup>147</sup> In addition, Wayne himself, who entered Simon's Rock on a W.E.B. Dubois scholarship for minority students, wrote an essay during his freshman year discussing his feelings of isolation as a minority in rural Montana, where he was the only Asian American among 340 students in his high school.<sup>148</sup> At Simon's Rock, Wayne was only one of two students of Asian descent.<sup>149</sup> At the trial and in the media, Wayne's race was not only ignored such that he was equated with being a white, neo-Nazi, but he was simultaneously characterized as being a despicable outsider to be feared.

Facts showing Wayne's internal inconsistencies would have challenged the prosecution's characterization of the killings as a premeditated racist/homophobic murder spree, making the alternative view that Wayne was in fact insane more credible. The media and prosecution instead presented a carefully constructed portrait of Wayne as a brilliant and deliberative killer. Accordingly, prosecutors argued that Wayne intentionally used Biblical imagery after the killings to lead people to believe he was crazy.<sup>150</sup> The district attorney claimed that Wayne deliberately warned a professor of his murderous intentions by including on his final exam paraphrased verses from the biblical Book of Revelation: "'Anyone adding to this book, God will add to him the plagues mentioned here. Anyone taking away from this book, God will take away his tree of life. Amen. God be with you.'"<sup>151</sup> The prosecution sought to admit illegally seized evidence from Wayne's dormitory room suggesting that Wayne had carefully planned the shootings.<sup>152</sup> The barred evidence included a drawing of a man firing an assault rifle and a note with the word "redrum" written repeatedly.<sup>153</sup> Journalists also reported that Wayne, who rarely smiled at anyone, sat grinning to himself in the cafeteria on the evening of the shootings.<sup>154</sup> Although the journalists suggested that Wayne's apparently positive mood revealed his murderous intentions, they failed to offer any equally credible explanations. Wayne may have simply

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146. See Marchocki and Ranalli, *supra* note 125.

147. McGrory et al., *supra* note 132.

148. *Id.*; See Bernstein et al., *supra* note 128.

149. See generally GREGORY GIBSON, GONEBOY: A WALKABOUT 200 (1999).

150. *Id.*

151. See *Professor Testifies Lo Ended Test with Threat*, BOSTON GLOBE, Jan. 12, 1994, at 21. The scriptural reference is Revelation 22:18-21.

152. See Gibson, *supra* note 149, at 130.

153. See *Student on Trial in Fatal Rampage*, TULSA WORLD (OKLA.), Jan. 6, 1994, at C7. "Redrum" is the word "murder" spelled backwards. It was uttered by a child as a foreshadowing of violence in the film, *The Shining*.

154. See Bernstein et al., *supra* note 128.

felt excited to have finished his final exams and to be returning home for Christmas vacation.

On the other hand, the findings of clinical psychologists who examined Wayne strongly suggested that Wayne, in fact, suffered from a classic case of paranoid schizophrenia. Wayne had told David Smith, a psychologist from the Berkshire County House of Correction, that he had received commands related to the Book of Revelation.<sup>155</sup> Another psychologist who examined Wayne testified that Wayne believed that because the Book of Revelation had been written to the churches of Asia and he was an Asian, the book had been written especially to him.<sup>156</sup> Furthermore, Wayne had perceived “voices” instructing him to purchase a gun and perform the rampage.<sup>157</sup> The voices told him to keep his mission secret and on the evening of the shootings, pronounced: ““It is time.””<sup>158</sup> Based on the numerical data, Wayne’s psychological tests all pointed to insanity.<sup>159</sup> In addition, various witnesses testified to Wayne’s history of emotional instability, namely, bouts of suicidal depression.<sup>160</sup> Wayne had also suffered physical beatings by his father and had apparently developed a warped belief that the beatings somehow purified him of his transgressions.<sup>161</sup>

Moreover, there was sufficient evidence to show that Wayne did not appreciate the consequences of his actions. On the day before the shootings, Wayne had spoken with his best friend from Montana and appeared jovial, making plans together for the upcoming Christmas vacation.<sup>162</sup> His testimony demonstrated that Wayne did not appreciate the criminality or potential consequences of his actions. In addition, clinical psychologist Eric Plakun, who spent eight hours examining Wayne, testified that Wayne had not understood the wrongfulness of the shootings.<sup>163</sup> Rather, Wayne told Dr. Plakun that he had been excited to have fulfilled his spiritual mission and that it had been ““quite a night. It was a climax.””<sup>164</sup>

None of this evidence swayed the appellate court, which concluded that Wayne did not meet the legal definition of insanity. Despite abundant evidence to support Wayne’s insanity defense, the jury and appellate judge instead agreed with the prosecution’s characterization of Wayne as a deliberative killer who outsmarted his teachers and fellow students by pretending to be insane.

However, I know that I am not alone in believing that Wayne was, in fact, insane. After careful and honest consideration of the available

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155. See Gibson, *supra* note 149, at 202.

156. *Id.* at 210.

157. *Id.* at 202-210.

158. *Id.* at 208.

159. *Id.* at 203.

160. *Id.* at 205-6.

161. *Id.* at 208.

162. *Id.* at 204.

163. *Id.* at 208.

164. *Id.*

evidence, the father of one of Wayne's victims has since concluded that Wayne was insane at the time of the shootings.<sup>165</sup> But I also know that given the fact that Wayne has run out of legal avenues to pursue, my speculations regarding his case will likely never bear a stamp of approval by any legal authority. I am continually aware that my conviction that Wayne and other Asians and Asian Americans are still affected by racial prejudices in the criminal justice system is, more often than not, poorly received. Most of my colleagues, both Asian and non-Asian, to whom I have mentioned this article have expressed doubt that Asian Americans are affected by racial biases anymore, particularly in the legal system. But as Wayne serves out a life sentence he probably would not have received had he been white, I can only hope that we will consider the possibility in this new century that racial stereotyping against Asian Americans remains an ever-present force in the criminal justice system.

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165. *Id.* at 243.