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The Profiling of Threat Versus the Threat of Profiling

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THE PROFILING OF THREAT VERSUS THE THREAT OF PROFILING

*Frank H. Wu**

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You know I suppose it's only because I'm a law professor that I take joy in coming back to this room where thirteen years ago as a first year law student I sat where you now sit in the afternoons for my course on Public Law. I'm glad to be back and I am very happy to be here to talk to you about some very important issues that I think affect all of us and affect our legal system, whether or not we're Asian American, whether or not we're racial minorities.

Law professors, as you know, always like to make three points when they talk. So I am going to make three points this afternoon in discussing the Wen Ho Lee case. First, I would like to give you a very brief summary of this spectacularly failed federal criminal prosecution. Second, I would like to talk about the racial profiling that was used in this case. Third, and finally, I would like to talk about the possibilities for Asian Americans and other racial minorities to engage in principled activism to overcome these unfortunate trends.

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I. THE WEN HO LEE CASE

Let me begin though by summarizing a little bit of this case. You may recall that for more than a year there were spectacular allegations that Wen Ho Lee, a 60-year-old physicist, who had been forced to retire from the Los Alamos National Labs, where research and development work is conducted on our nuclear arsenal, was the so-called “Chinese spy.”¹ This individual, working in the top secret Division X of the Los Alamos Labs, supposedly had downloaded hundreds of pages of top secret data, weapons design information and surreptitiously and illegally passed it on to the communist Chinese government.² For more than a year he sat in solitary confinement, allowed very few visitors, shackled at the hands and feet with a light bulb burning overhead at all hours, and under constant surveillance. He was said to have given away the “crown jewels” of our nuclear arsenal.³

This was supposed to have been the worst breach of national security since the Rosenberg case some fifty years ago.⁴ Yet, as quickly as the case against Wen Ho Lee had developed, it then evaporated. The federal government eventually agreed to a plea bargain where Wen Ho Lee was found to be guilty of one count that had nothing to do with espionage but that had to do merely with negligently mishandling data. He was sentenced to time already served.⁵

Now this case was spectacular, not only because of its collapse, but also because of the reasons for its collapse. When the U.S. District Court Judge Parker, a Republican appointee, not a radical on matters of race, approved of the plea bargain, he said from the bench that this case, he thought, shamed the nation;⁶ that the government’s prosecutorial conduct here represented overreaching;⁷ that it was overly zealous⁸ and he raised questions about whether or not Wen Ho Lee had been the victim of selective prosecution and double standards.⁹

1. See, e.g., James Risen, *Inquires Why Suspect At Atom Lab Kept Access*, N.Y. TIMES, Apr. 23, 1999, at A7.

2. See Matthew Purdy, *The Making of a Suspect: The Case of Wen Ho Lee*, N.Y. TIMES, Feb. 4, 2001, at A1; Matthew Purdy and James Sterngold, *The Prosecution Unravels: The Case of Wen Ho Lee*, Feb. 5, 2001, N.Y. TIMES, at A1.

3. *Id.*

4. *Id.*

5. See, e.g., James Sterngold, *U.S. to Reduce Case Against Scientist to a Single Charge*, N.Y. TIMES, Sept. 11, 2000, at A1.

6. See Robert Scheer, *No Defense: How the New York Times Convicted Wen Ho Lee*, NATION, Oct. 23, 2000, at 11, 12.

7. See *id.*

8. See *id.*; Purdy, *supra* note 2.

9. Scheer, *supra* note 6, at 12.

Now if you look a little deeper at the case, if you look beyond the surface allegations, you find the sort of smoking gun evidence that you always wish for in trying to prove discrimination cases like this but which is hard to find. For example, Robert Vrooman, a former CIA agent who was the head of counter-intelligence at the Los Alamos Labs, said in public statements and in a sworn affidavit that there was no doubt in his mind that Wen Ho Lee was selected for investigation, in part because of his racial and ethnic background.¹⁰ This statement, a brave statement to be made by a law enforcement official, is the equivalent of a sheriff or the head of some police department coming forward and admitting to racial profiling and stopping African American motorists on the highway. This was a statement that came from one of the people in charge of the investigation itself, who said that his colleagues, in pursuing this individual, targeted the individual, despite hundreds if not thousands of other leads that were not followed up despite numerous studies that showed that the Department of Energy in its labs had faulty security procedures.¹¹ Despite the fact that Wen Ho Lee's own wife worked as an FBI informant, they picked this single person to investigate because they feared that nuclear warhead plans had been lost to China; a claim which some have found not to be credible.¹²

Independent studies, including one by a congressionally appointed oversight committee, chaired by former Senator Warren Rudman, concluded that the evidence was speculative at best and that there had not even been any breach of our nuclear weapons data and loss of that data.¹³ Nonetheless, Vrooman's stepping forward to say that the target of investigation was targeted because of race is an extraordinary statement, for here you have an admission of selective prosecution by someone working for the prosecution team.

Not only that, there is a clear case of double standards in this case, which is so difficult to prove in most cases. At roughly the same time that Wen Ho Lee was incarcerated, was being deprived of his civil rights, the former Director of the CIA, John Deutch, admitted that he had committed similar transgressions—downloading highly sensitive data onto a laptop computer that was not secured, taking that computer home with him and accessing the World Wide Web and going to various websites, and signing on and downloading data and rendering the data on his laptop—jeopardizing the most highly, confidential, classified information

10. See, e.g., James Risen, *Officials Disagree on How Lab Scientist Became Spy Suspect*, N.Y. TIMES, Oct. 4, 2000, at A1, 24; Scheer, *supra* note 6, at 18.

11. See Purdy, *supra* note 2.

12. See *id.*; Vernon Leob & Walter Pincus, *Guilty Plea, Release Leave Unresolved Questions in Lee Case*, WASH. POST, Sept. 17, 2000, at A12.

13. See David A. Vise, *Justice Study Faults FBI in Spy Case; Wen Ho Lee Probe too Slow and Sloppy, Report Says*, WASH. POST, May 19, 2000, at A1.

that the government has, vulnerable to a breach of security.¹⁴ The same problem with mishandling top-secret data is present as in the allegations against Wen Ho Lee. The difference: Deutch, who also was foreign-born, was not prosecuted. Instead, a cover-up was engaged in by some of his cronies at the CIA—something which was then later revealed, and at the very moment when he otherwise would have pled guilty also to a single count he was pardoned by President Clinton in the final round of pardons before Clinton left the White House.¹⁵

What's interesting, then, about this case is that while a low level researcher who is a racial minority, who is the only person of Asian descent working in his division at Los Alamos Labs, faces the possibility not just of life imprisonment but of the death penalty,¹⁶ a White male who is at the top of the establishment, who has committed the same breach, is let off with a slap on his wrist.

We also found out, through the testimony of various people involved with the prosecution of this case as the judge looked into these claims, that there had been this targeting on the basis of race, that the FBI in administering polygraph tests had lied not just to Wen Ho Lee but to the American public. They had said that this individual failed polygraph tests when in fact he had passed them. They had reminded him of the fate of the Rosenbergs, who were sent to their deaths, and tried to coerce out of him a confession, despite his efforts to help them before he realized that he was the target of their scrutiny.¹⁷ So this was truly an unusual case and it offers a rare glimpse into the activities of law enforcement when it is investigating sensitive matters with racial overtones.

II. RACIAL PROFILING

Let me now turn to the second part of my talk: racial profiling. I approach this topic as someone who believes quite strongly and fervently that Wen Ho Lee was done a wrong, a grievous wrong, by his own gov-

14. See, e.g., *Deutch Faces New Security Inquiry, Documents Show*, L.A. TIMES, Sept. 16, 2000, at A1.

15. See *id.*; *Deutch Seeks Plea Deal in Security Case*, L.A. TIMES, Jan. 19, 2001, at A12; *Secrets Weren't Compromised in Deutch Case, Pentagon Finds*, L.A. TIMES, Feb. 2, 2001, at A20.

16. See 18 U.S.C. § 2381 (2001). The statute reads:

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office in the United States.

Id.

17. See Purdy, *supra* note 2; Scheer, *supra* note 6, at 20.

ernment, and that his lawyers worked a miracle in persuading the prosecution to accept the plea bargain and then the judge, that this wrong had been done. Let me say, though, this: That the responses in explaining what was wrong in the government's conduct have been seriously flawed. So while I agree that the government's conduct was wrong, I'd like to suggest that most of the discussion of this issue has entirely missed the point. That is, those individuals who have tried to criticize the government or defend Wen Ho Lee have misunderstood the nature of the problem.

The nature of the problem is this: Racial profiling—that is the use of race by the government in its law enforcement—can be rational but wrong. It's important to understand that distinction between whether an act is rational and whether it is wrong. How an action can be both rational yet at the same time wrong, illegal or unconstitutional.

In talking about racial profiling let me make three subpoints. The first subpoint is this: We all do it. The second subpoint is in some instances racial profiling is rational or at least plausible; it passes a common sense test. The third subpoint is rationality is no defense.

A. We All Do It

Let me first talk about all of us engaging in racial profiling. Let me give you some simple examples of the ways in which we engage in racial profiling. We do this, if, for example, we're at the airport and we need to find someone who speaks a foreign language. I'm often traveling and I'm often at airports where there are a large number of Asians. Not Asian Americans but Asian Asians, people not whose ancestors but who themselves are from Asia. Tourists, business people, traveling here in the United States with limited English proficiency and quite often, as is true with tourists or business people from anywhere else, they're lost. They need help. They need to know how to use the telephone or where the bathroom is or how to find their rental car or their friends. Not everyday and not every time I fly, but often enough—two, three, five times a year—some Asian stranger will pick me out of the crowd as I'm walking through an airport and come up to me and start talking to me in Chinese or Japanese or Korean or some other Asian language. They will pick me, in particular, ignoring all the other individuals who walk by who are White or African American.

This is a simple form of racial profiling. They believe that it is much more likely that I, as someone who looks Asian, will have some sort of linguistic understanding; will be able to speak the language or at least muddle through; that I am a better bet for them than someone who is Caucasian or African American, despite the fact that my Mandarin Chinese is that of about a five year old and there are plenty of people who are White or who are African American who can speak Asian languages fluently. Nonetheless, if you had to pick, if you looked at the people

sitting in this audience and asked “Who is most likely to be able to speak Chinese or Japanese or Korean?”; if you had only one person you could pick to help you out, you would have to be willful or obstinate not to pick someone with an Asian face. I make this point because I think it’s important to understand the ways in which it’s easy to make inferences; the ways in which we rely on race. We rely on generalizations all the time and not all of those are invidious. They can be, but not all of them are.

The point is simply this: That now, in addition to the old fashioned form of racial discrimination, a form of bias which simply seeks to subjugate people, there is another form of so-called rational discrimination and there are people who actually argue in favor of this. You can read the work of Nobel laureate Gary Becker;¹⁸ you can read Richard Posner’s work;¹⁹ you can look at the work of Richard Epstein in *Forbidden Grounds*²⁰ or that of Clint Bolick,²¹ an advocate against affirmative action, or that of Dinesh DeSouza,²² all of who argue that irrational discrimination is wrong and should be avoided because it’s inefficient. That is, when people make assumptions that turn out to be wrong for the most part, that’s bad. But when people make assumptions that turn out to be right, for the most part, or right more often than not, then it’s acceptable. Indeed, it’s something we should praise and encourage and avoiding it would be inefficient behavior. We would cease to be rational actors.

This process of making assumptions based on race is the dilemma of the cabbie, who driving through a major city late at night looks at the fare standing at the street corner in the rain and sees that it’s an African American male between eighteen and forty-five and passes that person up to pick up the White passenger a block further down the street. It’s that sort of behavior which these writers not only condone, but encourage. Because this sort of behavior, they believe, is not intended to subjugate a people. Rather, it is using one trait, that of race, as a proxy for another trait, that of likely status as a felon or a criminal or likely conduct that is a propensity to engage in violent behavior. So they argue this is different than discriminating against a group without a “rational” reason.

B. Rationality of Racial Profiling

Now, in explaining why racial profiling is still wrong, I think it’s important for us to understand that sometimes the pro-profiling arguments

18. See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1971).

19. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 615–26 (1986).

20. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS*, 59–78 (1992).

21. See CLINT BOLICK, *THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION?* (1996).

22. See DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTICULTURAL SOCIETY* 245–87, 297, 539 (1995).

at least have a certain surface rationality. That takes me to my second sub-point: The rationality of racial discrimination in some instances. It is not easy to dismiss some of these arguments. For example, though I think that the internment of Japanese Americans during World War II was a tremendous wrong in violation of the Equal Protection Clause, I think it's also difficult to deny that at least it is plausible that Japanese Americans in the time of war might have some slightly greater propensity to be loyal to Japan than the United States, at least as compared to citizens of other racial backgrounds. Now don't misunderstand me here. I am strongly against the internment, against the prosecution of Wen Ho Lee, and against racial profiling of African American motorists as could possibly be—as I hope to explain and as I hope you'll see in a moment. But I'm against it not on the grounds of irrationality and I think that to argue this sort of conduct is irrational and utterly absurd and lacks any factual foundation is to make the wrong argument, because then what happens when you make that argument is you implicitly concede that when there is a rational basis the conduct is justified. You are then vulnerable whenever someone at least has a factual foundation, a plausible basis for a credible argument. They will have trapped you. You failed to have a fallback argument if all you say is this conduct is irrational. Because then you are attacking the very rationality of what someone has to say and engaged in what I would regard as an unwinnable argument about what the facts are rather than a legal argument or a moral argument or an argument over what the principles should be. That takes me to my third sub-point: What is wrong with the prosecution of Wen Ho Lee? What is wrong with racial profiling?

C. What Is Wrong With Racial Profiling?

I would like to give you six arguments as to what is wrong with racial profiling.

1. Attack the Premises

First, there is the easy argument, which is the premises don't obtain—the premises aren't true. In other words, you could accept that where behavior is rational, you should engage in that behavior. But then argue these premises aren't true. It isn't factually true that Japanese Americans are more likely to be loyal to Japan than the United States. Or it isn't true that there is a greater likelihood of that among Japanese Americans than among Whites. Or you could argue there is no reason to suspect that Wen Ho Lee would be more disloyal to the United States as a naturalized citizen from Taiwan than someone similarly situated who is White and native born.

You could contest the premises and that is an important argument to have. You should have that argument. But sometimes that argument is vulnerable. The Wen Ho Lee prosecution is vulnerable because there is at least some evidence that the government of China targeted, in its recruitment of potential spies and potential informants and sources of information, people of Chinese ancestry. So that allows the government to say "Well we're merely being defensive. We don't want to stereotype. We don't want to be racially biased. We don't want to be prejudiced, but after all, if the Chinese government is doing this we're only playing defense. We're only responding to what someone else is doing." This is the argument that was made by a former army intelligence officer who I debated on CNN, for example. He argued that if the Chinese government does this it makes perfect sense for the U.S. government to respond in turn.²³ So sometimes you can't contest the premise as strongly or as strenuously as you would like because there is a factual problem for you there.

Nonetheless, there are five other reasons that I think are quite compelling for rejecting racial profiling even when it is rational. So understand that this is a more robust argument. It allows you to make a strategic concession. You can say "I admit that there is at least a plausible basis for you to suspect this person rather than that person." For example, you find sometimes the same argument is made with reference to African Americans and the overall statistics of people who are incarcerated. People look at the incarceration rates and argue that African American men are incarcerated at much higher rates than White men. Of course they disregard the causes, disregard possible prejudice within the criminal justice system. They say, nonetheless, "We at least know that there are higher rates of incarceration."

You see this same problem, for example, with respect to alienage. Asian Americans are often offended by the assumption that we're foreigners. It creates this notion of being a perpetual foreigner. When people ask "Where are you from?" they don't accept your answer [S]ometimes when I say I was born in Cleveland and grew up near Ann Arbor, used to live in San Francisco and now live in Washington, D.C., people shake their heads and say "No, I mean where are you 'really' from?" That addition of the word really, a question that they ask only of people who look to them foreign, is selective, but in some ways has a rational basis. For after all, two-thirds of all Asians in the United States are foreign born.²⁴ So

23 *Talk Back Live: Wen Ho Lee: Did the Government Mishandle the Case?* (CNN television broadcast, Sept. 27, 2000), transcript available at <http://www.cnn.com/TRANSCRIPTS/0009/27/tl.00.html>; see also Stuart A. Harrington, *Is Wen Ho Lee a Tarnished Martyr?*, SAN DIEGO UNION-TRIBUNE, Oct. 6, 2000, at B7.

24. See LISA LLOCK, THE FOREIGN BORN POPULATION IN THE UNITED STATES: MARCH 2000, U.S. CENSUS BUREAU CURRENT POPULATION REP. NO. P20-534 (2000); U.S. CENSUS

it is not just that there are higher rates of foreign birth among the Asian Americans than among White Americans. An absolute majority of people who are Asian American are in fact foreign born.

So, what then makes that question still offensive? What makes it offensive to say to me "How do you like it in our country?" or "When are you going home?" or "My, you speak English so well." What is it about those statements that despite their rationality troubles us? Let me suggest that there are a variety of things that properly do trouble us.

2. Racial Profiling is Not Objective

The second reason that racial profiling is wrong is that you have to accept on good faith that the person who is engaged in what they claim to be rational discrimination, in fact, is objective. You must assume that the person engaged in racial profiling has done an analysis and is using statistics or is using some real evidence rather than just acting out of prejudice. Unfortunately, all too often, you find out that their analysis of the facts turns out to coincide neatly with their prejudice. In other words, they went in with one view and came out with that same view. So sometimes though their sincerity may not be doubted, nonetheless, the good faith of their conclusions may be suspect.

3. Racial Profiling Frustrates the Value of Being Color-Blind

Third, racial profiling is emphatically not color-blind and does not treat us as individuals. Note that you cannot be at the same time a rational discriminator and a proponent of color-blindness. It is impossible. You must choose. So for those individuals who claim that they would like to follow the words of the late Reverend Martin Luther King, Jr. when he said that he had a dream that we not be judged by the color of our skin but by the content of our character, those individuals who profess their faith in those inspirational words cannot then turn around and say "But I make an exception and engage in rational discrimination when it suits me."

So, rational discrimination and color-blindness as an ideal are contradictory. For what rational discrimination does is it lumps us together and says we will treat individuals as members of groups and use aggregate statistics and deduce based on generalizations what is true about this person or that person. Not because we know anything about this person or that person, but rather because we know about their membership within a racial group.

4. Racial Profiling is Often Based on Bad Information

Fourth, rational discrimination is wrong because it's often based on just bad estimates. All of us are bad with statistics. Social scientists who study this will tell you that people can't distinguish between the proposition most X are Y and most Y are X. So that when you tell them one, they easily confuse it with the other. They can't distinguish between the notion that one group has a greater propensity for a particular action than another group and the notion that an absolute majority of the former group has propensity to that action. We're just simply bad at making statistical inferences on a day to day basis. We tend to overestimate some risks and grossly underestimate other risks.

5. The Vicious Cycle of Racial Profiling

Fifth, rational discrimination or racial profiling creates a vicious cycle. It is a self fulfilling prophecy. It proves itself to be true. Let me give you a simple demonstration using the numbers I have on this chalkboard.

	Year 1	Year 2	Year 1 + Year 2
Total No. of Residents	10,000	10,000	10,000
No. of Black Residents	1,000	1,000	1,000
% of Police Resources Devoted to Blacks	25%	75%	—
No. of Blacks Arrested; % of Blacks Arrested; % of Blacks without Arrest Record	25; 2.5%; 97.5%	75; 7.5%; 92.5%	100; 10%; 90%
No. of Non-Blacks Arrested; % of Non-Blacks Arrested	75; .83%	25; .28%	100; 1.1%
No. of Times a Black Resident is More Likely than a Non-Black Resident to Have an Arrest Record	3 (2.5% ÷ .83%)	27 (7.5% ÷ .28%)	9 (10% ÷ 1.1%)

This is a demonstration, which if you know anything about statistics, should appall you and it is meant to appall you. It is meant to show a gross simplification and abuse of statistical analysis, but one that accords with our common sense. What I propose to do is demonstrate how if you, in good faith, as someone who is avowedly not a racist, decide to engage in rational discrimination for the purposes of controlling crime, how you will end up with a law enforcement policy which is hardly colorblind

and certainly will have effects which cause the subjugation of a racial minority group.

Let us envision a regime in which we have a town and in this town there are ten thousand residents. Of these ten thousand residents a thousand are Black. Now, I'm just using arbitrary numbers. I'm using nice, neat numbers so you can see how this works. But this isn't too far off the mark. So I'm envisioning a town where 10% of the population is African American and we'll imagine that the rest, the remaining nine thousand, are White, although it really doesn't matter for our purposes whether they're White or whether it's more racially mixed. Just that nine thousand are non-Black.

Let's say you're the police chief in this town and let's say that you decide based on analysis, based on facts and figures, based on having looked at the Federal Bureau of Prisons statistics about who is incarcerated—not based on prejudice at all. Let's say you decide that you want to target your law enforcement in a manner that is appropriate to the problem and you say "Well, where is the problem?" And let's say by looking at the numbers you see that there are, in fact, more African American men who are incarcerated as a proportion of the prison population than there are as a proportion of the general population. The likelihood that an African American man has a criminal record is much higher than the likelihood of a similar White man, all other factors being equal. So let's say our hypothetical is based on these statistics, and these numbers that I'm giving you are true. I don't have the exact figures. But each of the statements that I have given you as a premise is actually true.

So let's say you decide to allocate your resources based on these numbers and let's say each percentage of your resource that you allocate results in the arrest of one person. Okay, now these are the sorts of assumptions that people make in this sort of statistical analysis all the time. So I'm not doing anything fancy and I'm not doing anything that would deviate from the way you would do this if you were a proponent of these methods.

All right, so you have 100% of your resources to allocate. Let's say that you decide to allocate 25% of your resources toward African Americans. That is, that you're going to allocate that many more patrol cars and officers on the beat to African American neighborhoods, to checking out African American bars, or places where you know larger numbers of African Americans congregate, etc. Twenty-five percent of your effort is going to be targeted at African Americans, 75% targeted at Whites. You're still going to target the majority at Whites, but you're going to overemphasize slightly African Americans.

What will happen at the end of the first year? What will happen at the end of the first year, if each percentage of this effort correlates to one arrest, is you will have arrested seventy-five Whites and twenty-five African Americans. Now what that means is the twenty-five African

Americans out of the one thousand African Americans in the population constitute 2.5%; 97.5% of African Americans will still be good, decent, law abiding people. No arrest record whatsoever. Ninety-seven point five. That's the overwhelming majority.

Nonetheless, because African Americans are a minority in this community, because they're so significantly outnumbered and make up only 10% of the population, what will happen if you have 25% of your pool of people who have been arrested out of those one hundred people who were arrested, twenty-five are African American. Let's say this town was just founded and no one else has any arrest record previously, etc. Two point five times more of your pool of people with arrest records will be African American than of the general population. Two and a half times. Not only that, your typical African American, just your average African American, your random African American. If you just pick someone who is African American based just on their race, they are three times more likely to have an arrest record than someone who is White, who is randomly picked. Three times more likely, and that's if you just allocated 25% of your law enforcement efforts toward African Americans, and you can do all the numbers to double check my figures if you want.

So now let's say in year two. You look at these numbers that you get at the end of year one and you say "Wow, there really is more of a problem than I thought there was." Because look at this: African Americans are three times as likely as Whites to have criminal records. Three times as likely. You might then say, "Well, I'm going to adjust my law enforcement strategy accordingly. I'm going to focus three quarters of my law enforcement resources toward African Americans and one quarter toward Whites." Why? Because, after all, African Americans are three times more likely than Whites to have criminal records. Now again, this is an utter and total abuse of these numbers, but I will leave it to you as clever law students to figure out exactly why because this is doing what rational discrimination asks us to do. That is, to look at the numbers. You'll see exactly how pernicious the results turn out to be.

In year two, at the end of year two, you will have arrested a total of one hundred African Americans and one hundred Whites. You will have arrested those totals because you'll arrest another twenty-five Whites added to the original seventy-five year one arrests. Seventy-five African Americans added to your original twenty-five African Americans for one hundred from each group. (We'll ignore people who get picked up more than once, which is also the sort of thing that you can do for ease of use with an abstract model like this.)

What then happens is 90% of African Americans in this fictional town are still law abiding people. Still the overwhelming majority, 90%, okay, because one hundred have been arrested out of a thousand. Nine hundred have not been. Yet, despite that, African Americans are now over-represented within this pool at five times their rate in the general

population. The general population of African Americans is 10%. In this pool they are 50%; overrepresentation is by five fold. That's significant overrepresentation. Not only that, it is nine times more likely that any random African American who you pick up has a criminal record than it is of Whites. Nine times more likely. Almost an order of magnitude more likely.

What this means is that in year three this rational discriminator, the police chief, behaving rationally, might decide to allocate 90% of law enforcement resources to African Americans. Well, it doesn't take long for you to understand that the more extreme racial profiling is, the more it justifies itself. If you devote 100% of your law enforcement efforts targeted toward African Americans—unless people who are not African American bizarrely just decide to turn themselves in for committing a crime—you will have a pool of people who is arrested, prosecuted, and incarcerated that is or approaches 100% African American. In other words, if you have perfect racial profiling it will appear to have entirely justified itself.

Now, the reason I've walked you through this exercise using these numbers is to show you how easily this escalates; how easy it is to create the illusion that a policy is rational when it's applied to a racial minority group. That is what we have going on in the Wen Ho Lee case where you initially make the assumption that there is some greater likelihood that someone who is of Chinese background will commit espionage for China, so you investigate people of Chinese background.

Well, it doesn't take a rocket scientist to figure out that if the only people you investigate are Chinese American, if those are your only suspects, then the people you prosecute and ultimately find guilty are also likely to be Chinese American, regardless of whether or not they were actually guilty.

6. Racial Profiling Creates Negative Incentives

The sixth and final reason racial profiling is problematic is because of the incentives it creates for society as a whole. Racial profiling has a corrosive effect as Randall Kennedy has noted.²⁵ Let me make this as concrete as possible: let us say that we adopt the same mode of analysis that rational discrimination asks us to adopt. Let's say each of us behaves as the perfect rational actor, okay, and our morality is judged merely by cost benefit analysis, by what's utilitarian from our perspectives and we do what will result in the greatest benefit and the least cost to us. We maximize our own happiness, for that is what the rational discriminator does.

25. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997); Randall Kennedy, *Racial Profiling Usually Isn't Racist. It Can Help Stop Crime. And it Should Be Abolished*, *NEW REPUBLIC*, Sept. 13, 1999, at 30.

He says, "Well, it's rational for me to discriminate, therefore I'm going to do so." It's a racial tragedy of the commons.

What happens now if everyone who is African American and male behaves rationally in this regime? If they face rational discrimination, what is rational behavior? Well, rational behavior for the African American male is to be a criminal. It's rational behavior because if they are not a criminal, of course they don't get any of the benefits of being a criminal. They don't get the loot that they might steal. They don't get the cachet that accompanies being bad. They don't get all the other good things that you get from a life of crime. Yet, what do they suffer? They suffer all the costs. They suffer the stigma associated with criminality. They suffer being picked up by police, not being able to apply for jobs, not having cabbies pick you up.

Not having a cabbie pick you up, well, that by itself doesn't seem like anything unless you understand that that's just one incident, one small sign of a larger pattern.

So, if you are African American and male and you face this prejudice, the smartest thing for you to do, if all you're doing is behaving rationally, is to conform to the stereotype.

Likewise, in the Wen Ho Lee case, the most rational behavior for an Asian American who works for the federal government, who is believed to be engaged in espionage, is in fact to engage in espionage. After all, if you're going to be suspected of it and bear the burden why be innocent of it?

All right, I make this point which I hope is a little provocative to point out that mere rationality by itself is not a sufficient basis to provide a principle by which an individual can live, much less a principle by which a government would act.

So, for all of these reasons, the rational discrimination or racial profiling—call it what you will—that the government engaged in the Wen Ho Lee case is something we should condemn.

III. ASIAN AMERICAN ACTIVISM

Now, let me turn to my third point—Asian Americans and activism in this case—because here too I think Asian Americans made a mistake. I say this as someone who is Asian American, who is an activist, who has worked with the individuals who are active on this case. The mistake they made is this: if you look at some of the quotes from Asian American leaders, or if you listen to the discussion within Asian American communities about the Wen Ho Lee case, especially within the Chinese American community, what you hear people saying is something like this: "Dr. Lee is not like drug dealers. He is not like people who are accused of those

sorts of crimes.”²⁶ I’m paraphrasing but that’s roughly what one leader told the *New York Times*.

What’s troubling about that is that it suggests that Dr. Lee is the good racial minority, not the bad racial minority. What’s implicit in this is the notion that he was presumed guilty until proven innocent. What was wrong with the selective prosecution and the double standard here was its application against a respectable elderly Ph.D. holder who did research, who was Asian, and implicit in the comparison with drug dealers is the notion that he is not like African American males—young men, thugs, more dangerous felons. That’s what’s horrible about this, is the notion that he was treated the way that African Americans are treated on a daily basis. That’s what’s troubling about this activism; the failure to recognize that this is the same problem as driving while Black but with a different face put on it. Not only did Asian American activists not recognize but they actively sought to disassociate themselves from these other issues rather than build bridges and form coalitions so that groups together could condemn racial profiling.

Moreover, what else was interesting here is that as we talked about this case as a society, people made the following defense of the government: that none of the people involved were racist; they weren’t bigots. It’s not as if they were members of the KKK, although there were suspicions that one of the individuals who pursued Dr. Lee was someone who did have some problems with race based on a pattern of prior conduct. This person, who was White and male, had been involved in at least one lawsuit where an African American working with him as a colleague had sued, alleging that he had created a hostile work environment, and settled the case for several tens of thousands of dollars. There was some other evidence suggesting that this one individual may have had some racial animus toward Dr. Lee, that he had made some statements suggesting that no person of Chinese descent could be trusted.²⁷

Nonetheless, for the most part, I think we can agree that the prosecutors who were involved—that the Department of Energy, that the Secretary of Energy, Bill Richardson, himself the highest ranking Hispanic in the federal government and someone who has spoken movingly about his own Hispanic background and having faced racial bias, and the U.S. attorney, who ultimately had responsibility for this case and who himself was Asian American—that these are people of good faith.

It’s important to understand, though, that just as rationality doesn’t excuse anything, neither does good faith. It is possible to engage in rational discrimination while sincerely believing that you are not a racist; while sincerely believing that all you’re doing is relying on rational processes and

26. See James Sterngold, *Coalition Fears an Asian Bias in Nuclear Case*, N.Y. TIMES, Dec. 13, 1999, at A1.

27. See Sterngold, *supra* note 5.

facts. That's what's especially troubling about this form of racial bias: it's a form of racial bias that we don't recognize because we're prone to say "Well, it's true." We accept the defense of truth without asking why it is that something true of an abstract group should also be extended to cover individuals simply on the basis of race. We accept, all too easily, the notion that mere rationality is sufficient.

IV. CONCLUSION

So let me close then finally on this thought: that in order to understand the *Wen Ho Lee* case, in order to understand racial profiling, we must look at what we learned in constitutional law that every first year law student knows: the strict scrutiny test. Strict scrutiny means that it is not enough to accept only rationality, that we must, when race is involved, give strict scrutiny to the actions of the government. When we give the actions of the government strict scrutiny, if that standard is to mean anything at all, if it is to mean more than rationality review, than what it must mean is that rationality by itself does not suffice. There must be something more compelling as the ends. There must be narrow tailoring of the means. Strict scrutiny ensures that we will look closely and carefully and examine to make sure that our supposed rationality isn't just a mask and a cover for preexisting racial bias. Only when we learn how to do this, only when we reject merely utilitarian calculus for a moral understanding of the obligation and guarantee of the Fourteenth Amendment, will we be able to prevent other examples of rational discrimination or racial profiling.

Thank you.

APPLAUSE

V. AUDIENCE QUESTIONS

FRANK WU: I'm happy to take questions. It's rare that you have the opportunity to ask a law professor questions and get a straight answer, as I'm sure you all know.

QUESTION: I have a question. You mentioned that racial profiling provides negative, but rational, incentives for persons being profiled. For instance, an African American being profiled as a criminal might as well receive the benefits of criminal behavior if they are going to be accused anyway. How does this translate to Asian Americans that we often describe as "model minorities?"

FRANK WU: Sure, one of the images of Asian Americans is "Oh, you're so polite" you know, and that sounds like a compliment but all racial stereotypes, even the ones that are complimentary are, I think, suspect, because what is it to be polite? Well, to be polite is to be submissive, deferential, weak, not assertive. You know the last thing you want in your

lawyer, for example, is someone who is polite. You know if you need to hire someone to sue someone, you don't want to hire the most polite person you can find. So sometimes even these positive images can have their negative component just as the images of, for example, African Americans as natural athletes sounds on its face like a compliment but you don't have to go too far beneath the surface to find images of bestiality. The notion that, well, it's just brute strength, it's not individual merit. Or that African Americans are good in certain positions in sports but not as the quarterback or as the coach because that requires much more intelligence.

So, some of these positive stereotypes have negative components. This particular stereotype of Asian Americans as being polite, I think, is also linked to the notion of Asian Americans as perpetual foreigners.

You know what's interesting about the Wen Ho Lee case? Think for a moment about this argument: China tries to recruit spies from among people of Chinese descent, therefore, the U.S. government is entitled to investigate Chinese Americans or people of Chinese descent, selectively. What does that really say? Well, structurally that says a foreign government, through its unilateral actions, can deprive U.S. citizens of their civil liberties. Well, that's absurd. Other than the Japanese American internment, there is no other example that I am aware of, where any court, where any decision maker, has accepted the notion that the actions of a foreign government, with which I have nothing to do, can deprive me, a U.S. citizen, of my constitutional rights.

Yet, with Asians that logic seems to apply because Asians are regarded as somehow foreign, not belonging, not assimilating. You can see this, for example, if you look at all sorts of cases, constitutional cases. If you look at the cases in which the plenary power doctrine is created, where the court approved of the Chinese Exclusion Act, the court is very forthright in cases that remain good law, that haven't been overruled in saying "Here we're dealing with an obnoxious race—one that does not assimilate." I think it's captured very well by a phrase that Asian Americans sometimes hear, especially if they aren't polite and do dissent and are activists. The comment, which is sort of the flip side of the "When are you going home?," is the "If you don't like it here you can go back to where you came from."

Well, I came from the Midwest. You know, well, I came from Cleveland, so I'm not quite sure what that is meant to say, but I think it's meant to say that you're disenfranchised. You don't have a right to articulate your disagreement and if you articulate your disagreement, if you are not willing to accept the terms that are given to you because you are, after all, a guest who is here enjoying privileges and benefits not rights, well then you can just get lost. I often, if I have the privilege to debate something in a more public form, whether it's on a college campus, a t.v. show or a radio show, get fan mail, or more properly hate mail, with that message.

You know: "Go back to where you came from," or asking "Well, what do they do in China?" as if that has anything to do with what I'm talking about.

QUESTION: You mentioned one commentator that tried to distinguish between an Asian American who had a doctorate and the average "driving while Black" victim. I want to be careful not to screw up and make that same separation because I think they're very linked. But as a practical matter as a movement against racial profiling, the "driving while Black" and other racial profiling of Blacks and Latinos seems to cover a wider variety of people on a daily basis, and I'm just wondering as a movement how that movement can include Asian Americans and African Americans.

FRANK WU: Sure, you know if anything, Asian Americans who are outraged at the Wen Ho Lee case are proving to some extent the government's case because their outrage is selective. Right? They're showing ethnic sympathies. And the last thing: one of the points I make to Asian American audiences is, you know, if you claim to be principled and claim to care about civil rights, where are you when there is a protest about "driving while Black?" You can't just suddenly discover the wonderful nature of due process and talk about all these different issues and how you're against police practices when it's someone who looks like you, because it's patently obvious to everyone that you only care, in this moment, for this particular case. And, I think you're right. If anything, it should be exactly the other way around. We should be much more concerned about the stereotyping of African Americans than Asian Americans, at least in this context, because law enforcement is only relatively, rarely targeted at Asian Americans and only when there is a national security issue or only when this image of foreignness comes into play. It's much more often targeted against African Americans, Hispanics, and other people of color. But the way to make people understand, the way to make them sympathetic, is not to attack them. I try not to do that. I try to say "Look, now that you're outraged about Wen Ho Lee, now that there's been a good result there, how about you come out to this rally next week about 'driving while Black'? Because if you help other groups when the issue has their face on it, they will then help you. But if you're not going to help them, they're not going to help you and you're never going to be able to show that this is about anything other than raw self-interest."

In order to prevail, I think especially for racial minorities to prevail, the only way is through principle, not self interest. You can't just stand up and say "I care about Wen Ho Lee because of these lofty ideals" if you don't stand for those lofty ideals elsewhere. Because then people realize the real reason you care about Wen Ho Lee is because he is Asian like you and that's the worst message to send. That just confirms this view of racial minorities: sticking up for their own and only their own.

QUESTION: You mentioned that rational racial profiling and the idea of colorblindness are mutually exclusive. This sounds a lot like affirmative action opponents who are frustrated by a race conscious remedy being used to compensate for past racial discrimination. In the affirmative action context, how do you square this conflict between colorblindness and the need for race conscious pragmatism?

FRANK WU: Right. That is a very good point and that's a very difficult argument to make. Let me attempt to make the argument three different ways.

First, there's a difference between the original wrongdoing and the remedy to the wrongdoing. That is to say, that affirmative action is not the equivalent of chattel slavery. It is not the equivalent of Jim Crow. But, if you believe people who make the argument you're trying to respond to, they would wipe out all distinctions. In fact, that's what the court did in *Adarand*.²⁸ It said that there is no such thing as invidious racial classifications or benign classifications. There are only racial classifications. So if you take that reasoning at face value, if you accept that as saying exactly what its authors say it says and what you intend it to say, then what you're really saying is slavery and affirmative action are the same. You can't distinguish between them.

I think that while that sounds appealing in the abstract, it's just empirically wrong and morally reprehensible—that of course you can distinguish. I don't mean to put words into people's mouths. Take a look at the white papers written by the Regan era Justice Department where they make explicitly this argument.²⁹ They argue you can't distinguish between affirmative action and apartheid, and they argue you can't distinguish between affirmative action in Nazi Germany laws that classify people on the basis of whether they are Jewish or not, and you can't distinguish between affirmative action and Jim Crow.³⁰ So, my first response is: of course you can. In the abstract you can't if all you ask is the question "Is race involved?" Then I concede to you. You are right. Race is involved in the one case. Race is involved in the other case, but that's abstracting it to such a level that of course it's impossible to distinguish. That's like saying that the master and the slave are in the same position because each is in a relationship where race is involved. So, in the abstract, logically, yes, it is indistinguishable but historically and factually, I think, you can distinguish between a wrong and a remedy. So that's the first argument.

The second argument is that there is a difference, it seems to me, between inferring a person's conduct over which they have some control,

28. See *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200 (1995).

29. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REP. TO THE ATTORNEY GENERAL, REDEFINING DISCRIMINATION: DISPARATE IMPACT AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION 16 (1987).

30. *Id.*

and as to which we should treat everyone as individuals, and a person's status which they occupy as a result, not of their own free will, but just as a result of societal features. I'll explain what I mean. In the Wen Ho Lee case, the inference the government is making is one about conduct. They're inferring that because he is of Chinese descent, therefore he's more likely to betray the United States to China. It is not an inference about what is his status. It's an inference about what his conduct is likely to be. What will he do if offered the opportunity to sell secrets to China?

With affirmative action, it is not an inference about the conduct of Whites or African Americans or anyone else, it is rather an inference about the relative status of these groups and that, if you care about Kantian or these loftier notions of when it's proper to impose consequences on people. The answer is in a Kantian view. You can pose consequences when people out of their own free will have made choices. Otherwise, you can't attach moral consequences to things that people don't have control over. So, I think that distinguishes, if you want to talk in the most abstract philosophical way about these things, distinguishes between affirmative action on the one hand and invidious racial profiling on the other hand.

The third argument is this—and let me be absolutely clear about this—I support affirmative action. I testified in the Law School case on behalf of the student interveners on the defense side for the school.³¹ I have written in favor of affirmative action, testified in favor of it, and done all sorts of things in favor of affirmative action.³²

I get called sometimes to debate affirmative action on television or go to a college campus to debate it. Whenever that call comes, I try to say no. I try to say no as a supporter of affirmative action. I would like to explain why I try to say no. I try to say no because to have a debate suggests that this is all figuratively black and white. That there is a pro and a con and that there are sound bites and slogans and it's an entertainment. You know you go and you watch and you see how clever and witty the one speaker is compared to the other speaker and you have a winner and a loser. And that seems to me entirely misguided. What we need is not a debate. We need dialogue and then, more importantly than that, we need action. This isn't the sort of thing that you just sit in a classroom and talk about. It's something where you roll up your sleeves and get out there and do something.

But more importantly than that, to debate affirmative action is to make a tremendous strategic mistake. The mistake is this: it is to start with the remedy. If you start with the remedy of course everyone can play on flaws to the remedy and then you're left talking about well, "Should we

31. See *Grutter v. Bollinger*, 137 F.Supp.2d 821 (E.D. Mich. 2001).

32. See Gabriel Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 129, 159 (1996).

abolish this program? Should we amend that program?" The right place to start is with racial discrimination and to have a dialogue about racial discrimination. And then to take action about racial discrimination and to ask not "Should we abolish this program or that program?" but to ask instead "What will we do collectively and individually to address, not just statistical discrimination, not just historic discrimination, not just stuff you read about in books but contemporary day to day racial discrimination that we still see in the gross disparities in life expectancy or infant mortality or employment opportunities or educational outcomes?" How should we address disparities in every aspect of life that we still see in hate crimes such as those committed in L.A., Chicago, and Pittsburgh in the past two years in which gunmen have targeted people who are racial and ethnic minorities; shot at, wounded, and killed many of them for no reason other than the color of their skin?³³

The way to frame this, the way to talk about this, is to change the question, to have a new paradigm where we ask "What will we do?" And when we ask that, then it becomes apparent that affirmative action is just a means to an ends and affirmative action, I think that all supporters would agree, isn't perfect. It is not the best way to solve these problems. Ideally, there would be some other way to solve these problems. But it may be as the Bowen and Bok study showed of affirmative action with respect to colleges.³⁴ It may be the only way. If you don't take race into account, you just can't address racial problems. So that's what's different.

With affirmative action if you say, "Let's not take race into account" that's all affirmative action is: taking race into account in high stakes choices and decision making about who gets into this law school, for example. Then what you're doing is eliminating the very fact the problem is based on but not the problem itself. To do that would be like saying the way to cure cancer is we're just going to become cancer-blind. You know, that would be the equivalent of being color-blind; we're just going to deny that there is cancer and that will take care of the problem. Well, that, I think, is simply absurd and most people would agree. So there is a pragmatic argument.

So, I've given you a very concrete, factual one, an abstract theoretical one and now a pragmatic one that combines both of these which is, maybe, you're right. Maybe it is hard to distinguish, maybe it's almost impossible to distinguish between these cases, but if you don't allow the use of race for affirmative action, you simply end up with, for example, with University of California, Boalt Hall Law School, where you have one

33. See, e.g., Lorraine Forte, *Suit Alleges Hale Ordered Shootings*, CHI. SUN-TIMES, Mar. 15, 2000, at 26; Cindi Lash & Gene Collier, *Returning to the Scenes of the Crimes*, PITTSBURGH POST-GAZETTE, Apr. 30, 2000, at A19; Jeff Jacoby, *Laws Send the Wrong Message*, BOSTON GLOBE, June 22, 2000, at A25.

34. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998).

African American in the entire entering class and that's someone who deferred from the year before.³⁵

QUESTION: In situations like the information leak here, can't the government always use national security as a compelling justification for racial profiling? With this in mind, what has the Wen Ho Lee case really changed?

FRANK WU: Right, right. National security is the great magical wand that the federal government gets to wave. When it says "national security" the courts cower in fear and say "Oh well, if it's national security you get to do anything." You know, look at Chief Justice William Rehnquist's book *All the Laws But One*,³⁶ a book published just two years ago, where he argues basically that the internment of Japanese Americans was—he doesn't say it's right but he says that that's just the way that it would have to have been done, and that he doubts that it would be done any differently today. So, I think to some extent you're right, that maybe the government would do these things anyway. You know there's an irony of course to the Wen Ho Lee case, and that is if there was a Chinese spy no one has caught him. You know, they pursued the wrong man, they wasted all these resources, so they didn't even advance the interests of national security. If you look at what the government's case was—by the time it was filed and it had indicted Wen Ho Lee, its case had nothing to do with nuclear warheads with weapons, with design systems.³⁷ It only had to do with mishandling data, and government witnesses testified that their case had nothing to do, no connection whatsoever, with the original investigation that was undertaken. It's sort of like Whitewater. You know, transforming into something else completely. So Wen Ho Lee was pursued for something unrelated to what he was initially investigated for.

So, as far as national security goes, I'm in favor of national security just like everyone else. I'm a loyal American. I don't want to see the country overrun or China bombing the U.S. or Washington, D.C., but the problem here is national security is just invoked and no relationship is shown between national security—this wonderful goal that we all agree with—and prosecuting and pursuing this particular person on the other hand.

Let me just make a quick point about words and then I'll answer your question. There is something very interesting in the designation of Wen Ho Lee as the Chinese spy. You know that's an ambiguous phrase that was used in headlines all the time because Chinese spy doesn't make it clear: Is it someone who is spying for China or is it someone who is ethnically

35. See Jerome Karabel, Commentary, *Affirmative Action Had Real Merit; Education: Minority Students Accepted Under the Programs Did As Well As Their Regularly Admitted Counterparts*, L.A. TIMES, July 10, 2000, at B7.

36. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* (1998).

37. See, e.g., Purdy, *supra* note 2.

Chinese.³⁸ You know you could be a Chinese spy that is working for the Chinese government and not be of Chinese background at all. In fact, the recent revelations about the worst spy scandal in U.S. history that we've been reading about for the past couple of weeks involved someone, who, it's not clear what he was motivated by, but he wasn't motivated by ethnic ties.³⁹ You know it's not as if it was just ethnicity that drove him to spy and perhaps as that case unfolds we'll learn more about it.

Now to answer your question "What will this case do?" I think this case has done two things. First, it has at least galvanized Asian Americans. It has at least made Asian Americans aware of these issues and second, it's made people realize they can win one sometimes. You know it's really remarkable. A year ago everyone figured Wen Ho Lee was this evil, terrible person, you know, who deserved, if not death, at least life in prison, and the only people speaking up on his behalf were cranks, lunatics—people like me. Or people who were thought of as, "Well of course their speaking up for him, they're also Asian like him." And what happened? The government case completely collapsed. A sitting federal judge admonished the Justice Department and said that the case shamed the nation. That rarely happens. So Wen Ho Lee's lawyers did a tremendous job and it shows that if you're persistent, if the facts are on your side, if you can prove a case the way that they were able to prove it, that you can win. And this is not just speculation, it's not just people sitting around and saying it looks like racial profiling. They got the director of counterintelligence who investigated Wen Ho Lee to come forward and say this was racial profiling. You know when that happens justice will be done.

So I think that we can be at least somewhat optimistic. It's a huge mistake for the case to have been brought but at least it resolved itself with an outcome that was right.

So with that I guess we're done and I'm happy to stay and chitchat.

APPLAUSE

38. See Marilyn Rauber, *Feds Finally Slap Cuffs on China Nuke-Spy Suspect*, N.Y. POST, Dec. 11, 1999, at 3; John Solomon, *FBI Shifted China Spy Probe in '98*, PITTSBURGH POST-GAZETTE, Dec. 12, 1999, at A24; *Chinese Spy Investigation Shifts to Defense*, ASSOCIATED PRESS STATE & LOCAL WIRE, Oct. 19, 2000.

39. See Philip Shenon, *From Dour 'Mortician' of F.B.I. To Suspected Russian Superspy*, N.Y. TIMES, Feb. 21, 2001, at A1.