Michigan Journal of Race and Law

Volume 1

1996

The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of *Vincent Chin*

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THE SOCIAL CONSTRUCTION OF IDENTITY IN CRIMINAL CASES: CINEMA VERITÉ AND THE PEDAGOGY OF *VINCENT CHIN*

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This article is dedicated to the memory of Vincent Chin. It also is dedicated to Cindy (Ngok Lan) Chin (who was not related to Vincent). Cindy Chin and I were partners for seven years. In 1989, while I was pursuing an LL.M. at Georgetown, we watched the original PBS broadcast of *Who Killed Vincent Chin?* We immediately were struck by the power and poignancy of the film and discussed its effectiveness in presenting the commonalities and distinctions between the struggles of people of color. Cindy had dedicated her life to such struggles and coalition-building against racism, violence against women, and homophobia. Without knowing precisely how, we decided then that there must be a place for *Vincent Chin* in law school teaching. As discussed in the article, I have used the film on numerous occasions since I began law teaching. Cindy died in 1993, before this article was completed. It is dedicated to her memory, to all who loved her, to all who supported us, and to all who share the vision for dignity and justice for all people.

I also wish to thank my students from Syracuse University College of Law, Northern Illinois University School of Law, and Dickinson School of Law, whose participation and candor made this article possible. Many thanks also to my research assistants Heather Weinstein (Syracuse), Marie Nuguid (Syracuse), Frances Chua (Syracuse), and Mary Obrzut (NIU). Special thanks also to my colleagues Margaret Chon (Syracuse) and Peter Alexander (Pittsburgh) for their valuable comments on earlier drafts, and to Lisa Ikemoto (Loyola, L.A.), Angela Harris (UC-Berkeley), Michael Chang (California Western), and Keith Aoki (Oregon) for their valuable insights and assistance. Also, thank you to Delores M. Walters for her continued support and understanding. Finally, my thanks go out to the members of the *Michigan Journal of Race & Law* for their hard work in producing this issue.

[P]eople can aspire not simply to minimal participation in American society, but to equal dignity and maximum service.[1]

—Harold Hongju Koh

INTRODUCTION

The long legacy of racial inequality endures in United States society and institutions. While the existence of racism adversely affects the entire society, African Americans, Native Americans, Asian Americans, and Latina/o Americans bear the brunt of direct and indirect assaults of racism. Members of these groups often share similar experiences of racism based, as they are, on theories and practices of dehumanization, devaluation and exclusion. However, examining the impact of race in the United States requires viewing these experiences through the lenses of the particular communities of people of color. As Robert Blauner writes:

> Each third world people has undergone distinctive, indeed cataclysmic, experiences on the American continent that separate its history from the others, as well as from whites.

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1. Harold Hongju Koh, *Foreword*, *in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY, at i, xi (Hyung-Chan Kim ed., 1992).

> Only Native Americans waged a 300-year war against white encroachment; only they were subject to genocide and removal. Only Chicanos were severed from an ongoing modern nation; only they remained concentrated in the area of their original land base, close to Mexico. Only blacks went through a 250-year period of slavery. The Chinese were the first people whose presence was interdicted by exclusion acts. The Japanese were the one group declared an internal enemy and rounded up in concentration camps. Though the notion of colonized minorities points to a similarity of situation, it should not imply that black, red, yellow, and brown America are all in the same bag. Colonization has taken different forms in the histories of the individual groups. Each people is strikingly heterogeneous, and the variables of time, place, and manner have affected the forms of colonialism, the character of racial domination, and the responses of the group.[2]

Thus, examination of constructions of "otherness" and the role of law in American society requires investigation into the distinct and shared experiences of racial disparity. Such an expanded scope is necessary to better understand and analyze the phenomenon of racism itself by identifying its various guises and manifestations.[3] This understanding is necessary between White Americans and peoples of color, as well as between communities of peoples of color.[4] As the demographics of society and law schools become

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2. Robert Blauner, *Colonized and Immigrant Minorities*, *in* FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 149, 158 (Ronald Takaki ed., 2d ed. 1994). As Professor Ronald Takaki also states, "[W]ho we are and how we are perceived and treated in terms of race and ethnicity are conditioned by where we came from originally." Ronald Takaki, *Introduction: Different Shores*, *in* FROM DIFFERENT SHORES, *supra*, at 3, 8.

3. *See, e.g.*, David Theo Goldberg, *Introduction*, to THE ANATOMY OF RACISM at xiii (David Theo Goldberg ed., 1990) ("[T]he presumption of a single monolithic racism is being displaced by a mapping of the multifarious historical formulations of *racisms*.").

4. Increasingly, racial conflicts are occurring between different groups of people of color, as well as between Whites and people of color, as recent incidents of African American and Asian American clashes in California, New York, and Massachusetts reveal. See *infra* notes 209-20.

The patterns of inter-racial bias crimes vary. In Miami, Florida, for instance, tensions are greatest between Latino and African American residents. *See* Daniel Goleman, *As Bias Crime Seems to Rise, Scientists Study the Roots of Racism*, N.Y. TIMES, May 29, 1990, at C1, C5. In a recent article, Professor Pat Chew recalled the racial taunting that she experienced during childhood in El Paso, Texas, in which she was greeted with "Chinita, Chinita" by Mexican American children; and later, as an adult in El Paso, being called "Chi-na Chi-na," followed by kissing and hissing sounds. Pat

increasingly diverse, it is important that all law students analyze these issues throughout legal curricula.[5]

However, despite its importance, engaging in multifaceted, multicultural discourse in law school curricula often is approached with great reticence by educators and students. The reasons for such reticence are complex and varied; much of it may stem from the general difficulty that our society has in addressing matters of diversity. As Audre Lorde explained:

K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 18 (1994).

While these examples are not meant to suggest that any group or groups of people of color are more inclined to commit racially assaultive acts against any other group of people of color, they do indicate a need for greater knowledge about the impact of racist assaults by the "other" against the "other," whomever the "other" may be. *See id.* at 18 n.62; *see also* Reginald L. Robinson, *"The Other Against Itself": Deconstructing the* Violent Discourse *Between Korean and African Americans*, 67 S. CAL. L. REV. 15, 19-35 (1993) (discussing the "violent discourse" between African and Korean Americans as represented actually and symbolically by People v. Superior Court (Soon Ja Du), 7 Cal. Rptr. 2d 177 (Ct. App. 1992)). In this case, Korean American store owner Soon Ja Du shot and killed Latasha Harlins, an African American woman, who allegedly was taking a bottle of orange juice from the store. *See id.* at 51 n.146; *see also* Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581 (1993) (analyzing the 1992 Los Angeles uprising in the context of "our society's system of white-over-colored supremacy").

5. Seeking to determine law students' knowledge about their own and others' cultures, Professors Richard Vance and Robert Prichard administered a "cultural literacy" test for professional students that was adapted from E.D. Hirsch's controversial cultural literacy project. *See* Richard P. Vance & Robert W. Prichard, *Measuring Cultural Knowledge of Law Students*, 42 J. LEGAL EDUC. 233 (1992) (citing E.D. HIRSCH, CULTURAL LITERACY (1987); Charles King, *Cultural Literacy of Fourth-Year Medical Students*, 63 J. MED. EDUC. 919 (1988); and E.D. Hirsch, *Cultural Literacy*, 52 AM. SCHOLAR 159 (1983)). The study group comprised the 1989 entering class at Wake Forest University School of Law (as well as the Graduate School of Management and the School of Medicine at Wake Forest University, and the School of Medicine at the University of Kansas). Criticisms of Hirsch notwithstanding, the vast majority of students across gender, racial and class lines were unable to identify significant cultural events or individuals related to their own or others' identities. The law students answered roughly 25% of questions correctly. There were no significant differences among students taking the exam based on age, sex, race, country of birth, religious affiliation, type of college attended, class rank or grade point average, plans for specializing, previous doctoral degree, number or type of extracurricular activities, or the number or type of books read in the previous year. *Id.* at 233-39.

The results of the study prompted the authors to conclude that "continual exposure to interdisciplinary perspectives [in law school] appears to be more crucial than ever, given the apparent lack of such exposure in students' earlier experience." *Id.* at 239. They further identified the need for law students' cultural literacy for their continued independent learning; for their ability to "fit cases into the historical and social context that created an atmosphere for changes in the law"; and because "[the students] will practice in a pluralistic environment in which clients and co-workers from varied cultural backgrounds will create challenges to effective communication." *Id.* at 237-38.

> [W]e have *all* been programmed to respond to the human differences between us with fear and loathing and to handle that difference in one of three ways: ignore it, and if that is not possible, copy it if we think it is dominant, or destroy it if we think it is subordinate. But we have no patterns for relating across our human differences as equals. As a result, those differences have been misnamed and misused in the service of separation and confusion.[6]

Overcoming silence or frustration or confusion, then, suggests the need to recognize the importance of the undertaking and to develop creative pedagogical methods in order to foster necessary discussion and debate. Professor Dorothy Roberts describes the importance of this project within the area of criminal law, asserting that

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6. AUDRE LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, *in* SISTER OUTSIDER: ESSAYS AND SPEECHES BY AUDRE LORDE 114, 115 (1983).

More recently, another explanation has gained increasing currency as espoused by Dinesh D'Souza. D'Souza challenges a number of premises about racism, in a rhetorical dialogue with himself:

> *Are you saying that racial discrimination no longer exists?* On the contrary. Evidence for the old discrimination has declined, but there are many indications that black cultural pathology has contributed to a new form of discrimination: *rational discrimination*. High crime rates of young black males, for example, make taxi drivers more reluctant to pick them up, storekeepers more likely to follow them in stores, and employers less willing to hire them. Rational discrimination is based on accurate group generalizations that may nevertheless be unfair to particular members of a group.
>
> *If racism is not the main problem for blacks, what is?* Liberal antiracism. By asserting the equality of all cultures, cultural relativism prevents liberals from dealing with the nation's contemporary crisis—a civilizational breakdown that affects all groups, but is especially concentrated among the black underclass. Many liberals continue to blame African American pathologies on white racism and oppose all measures that impose civilizational standards on the grounds that they are nothing more than "blaming the victim." Meanwhile, the pathologies persist unchecked.

DINESH D'SOUZA, THE END OF RACISM 24 (1995) (emphasis added).

Thus, introducing a new term, "rational discrimination," D'Souza legitimizes a host of individual and societal decisions which, while often conscious, are based on gross generalizations and deeply imbedded racial stereotypes. *See, e.g.*, Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994). This sort of legitimization is compounded by the very "Moynihanesque" insistence upon describing the condition of the African American underclass as "pathological," rather than institutionally inspired.

While these assertions refer to the African American experience, they also would seem to apply to other peoples of color whenever the claim is made that disparities in treatment result from institutionalized racial and/or class biases. While not discounting the importance of individual responsibility, this author finds that institutional policies and barriers, more than individual choices, are the loci of much despair in communities of color, as discussed further in this article.

"[n]ot only is race used to identify criminals, it is embedded in the very foundation of our criminal law. Race helps to determine who the criminals are, what conduct constitutes a crime, and which crimes society treats most seriously."[7] In this vein, *Who Killed Vincent Chin?*, the documentary film from which this article derives its title, provides a valuable opportunity to explore the ways in which the doctrine and application of law, particularly criminal law, are informed by social constructions of identity which often influence the administration and outcomes of criminal cases.

Who Killed Vincent Chin?[8] examines the homicide of a Chinese American man, Vincent Chin, by unemployed White auto workers, Ronald Ebens and Michael Nitz. The killing occurred in Detroit, Michigan, in 1982, during the height of the domestic auto industry's decline, worker layoffs and the importation of Japanese automobiles to the United States. The auto workers initially received minimal sentences after the killing.[9] The Detroit-area Asian American communities' outrage at the leniency of the sentences extended nationally and internationally.[10] A galvanized community response demanded reexamination of the case, which resulted in subsequent federal civil rights charges.[11] After conviction, then appeal by the defendants, another federal civil rights trial was held approximately four years after the killing, in Cleveland, Ohio.[12] Defendants Ebens and Nitz were acquitted in the final trial stemming from the events of Vincent Chin's death.[13] The film, produced by Asian American women filmmakers, Christine Choy and Renee Tajima, explores the human, factual, legal, and societal dimensions surrounding Vincent Chin's death.

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7. Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1945 (1993). As Professor Frances Ansley states, "If the history of the United States Constitution and the American legal system teaches us anything, surely one of its core messages is that race has played a key role at many critical and formative junctures of our development." Frances L. Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1515 (1991). *See generally Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988) (examining the constitutional problem of race discrimination in criminal justice institutions).

8. WHO KILLED VINCENT CHIN? (Filmmakers Library 1988).

9. United States v. Ebens, 800 F.2d 1422, 1425 (6th Cir. 1986). *See infra* notes 236-37 and accompanying text.

10. Ebens, 800 F.2d at 1425, 1438-39 (noting the extensive national and international coverage of the case, and the almost universal condemnation of the defendants).

11. *See* Mary Thornton, *U.S. Probes Beating Death in Detroit: Two Men Sentenced to Probation in Killing of Chinese American*, WASH. POST, Aug. 5, 1983, at 1. These charges were brought under 18 U.S.C. § 245(b)(2)(F) (1988).

12. *Ebens*, 800 F.2d at 1422, 1425.

13. *See* Penelope McMillan, *Killing that Galvanized Asian-Americans Remembered*, L.A. TIMES, June 23, 1992, at B3; *see also infra* Part II.B (scenes from *Vincent Chin*).

This article will discuss the use of the film, *Who Killed Vincent Chin?*, as a method: (1) to analyze the relationship of social constructions of identity, particularly race, on the rules and discretionary application of criminal jurisprudence; (2) to provide an interactive pedagogical tool for law teachers, especially criminal law teachers, to examine the social contexts of criminal jurisprudence from multiple perspectives; and (3) to examine the ability of criminal law doctrine to address issues of race.

Part I of the article provides an overview of the major theories of racial identity. This section also examines the historical and contemporary social constructions of Asian Americans in the United States.[14] Part II examines the events surrounding Vincent Chin's

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14. Although I frequently use the term "Asian American" throughout this article, it is important to state that this is not meant to suggest a homogeneous group with an essentialist identity. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). Indeed, there is great diversity between and within Asian American communities, including diversity in language, religion, immigration history, social norms and other cultural practices. *See* Chew, *supra* note 4, at 25 (discussing diversity of Asian American communities). The 1990 U.S. Census records report that the Asian and Pacific Islander population totals 7,226,986. The Asian American group totals 6,876,394; the Pacific Islander American group totals 350,592. *See id.* at 25 & n.106. The 1990 Census lists the Asian American population as primarily comprising Chinese (24%), Filipino (21%), Japanese (13%), Asian Indian (13%), Korean (12%), Vietnamese (9%), Cambodian (2%), Laotian (2%), Hmong (1%), Thai (1%), and other groups that are not separately identified but categorized under "Other Asian" (4%). The Census lists Pacific Islander Americans as Polynesian, Micronesian, and Melanesian. *See id.*

Yet, as Professor Robert Chang notes, "Regardless of its origins . . . 'Asian American' can serve as a unifying identity based on the common experiences of Asian Americans because of the inability of most non-Asian Americans to distinguish between different Asian groups." Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1245 n.7 (1993) [hereinafter Chang, *Asian American Legal Scholarship*]. Thus because of the dynamics of socially constructed Asian American identity and chosen Asian identity, my use of "Asian American" only partly relies on official census categories and also includes persons of Asian descent who live in the United States regardless of citizenship status. *See id.* at 1245. Writer and filmmaker Richard Fung expounds on this point, stating that:

> "Asian" consciousness only begins to eclipse national consciousness in the context of white racism, and particularly as experienced here in the diaspora. It is premised on a shared sense of visibility, and less on any common cultural, aesthetic, or religious roots. . . . [A]t the same time, we draw strength from using our socially constructed identities . . . as a lever for organizing and challenging racism. . . . It's in this way that I choose to work within a "yellow" experience of race. This I call "Asian," but with the full recognition that Asian is not only this experience.

Richard Fung, *Seeing Yellow: Asian Identities in Film and Video*, *in* THE STATE OF ASIAN AMERICA: NATIVISM AND RESISTANCE IN THE 1990S, at 161, 162 (Karin Aguilar-San Juan ed., 1994). For a discussion of how "race" in the context of Asian Americans

death and provides a contextualized analysis of the events and of criminal law doctrine and decision making. This section also explores the pedagogical value of the film as a medium through which to gain awareness and analysis of the impact of race in the criminal law. It compares the production of knowledge in a documentary film with the production of knowledge in law school or during criminal proceedings. In urging the serious consideration of pedagogical scholarship, it insists upon the imperative to value non-textual information. Part III critiques whether bias crime legislation can effectively address the prevalence of such harms as resulted in Vincent Chin's death. The efficacy of any schemes which attempt to criminalize harms motivated by racial animus will necessitate an appreciation from a multiracial viewpoint, which largely has remained lacking throughout criminal law theory and implementation. Part IV concludes that identifying, deterring, and punishing hate crimes is required throughout the criminal justice system, not simply through the narrow class of offenses that are designated as "hate crimes." Moreover, the effectiveness of existing criminal jurisprudence and hate crime schemes depends upon the rejection of social constructions that identify Asian Americans as less visible and less valuable "others" within American society.

Thus this article argues for a multidimensional approach to legal analysis and pedagogy and approaches racial identification and racial construction from a multiracial, rather than a commonly applied biracial, viewpoint. In ultimately calling for a "multidimensional approach" to these concerns, the above-mentioned priorities, methodologies and lessons must embody the commitment throughout the legal profession to secure the equal dignity of all citizens in law and society.[15]

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disrupts concepts of nationality, see Robert Chang, *A Meditation on Borders*, *in* THE NEW NATIVISM (Juan Perea ed., forthcoming 1996) [hereinafter Chang, *Meditation*].

Also, with respect to terminology, I want to note that I refer to the "Vincent Chin" case throughout this article, although ordinarily one would refer to a criminal case by the name of the defendant rather that the victim. In this instance, however, it seems more appropriate to regard this as the "Vincent Chin" case because his lived and constructed Asian identity is central to understanding the fatal attack against him. This does not imply that only Asian Americans (and other peoples of color) should be concerned with the dynamics of racism; instead it is hoped that, by focusing on a perspective that is rarely highlighted—Vincent Chin's—and Ronald Ebens' racist response to him, the totality of racist violence can be understood. *See, e.g.*, Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571 (1993) (discussing the "Rodney King Case" for similar reasons).

15. The embrace of "multidimensional approaches" in the critiques of hidden, biased and/or ignored assumptions in legal doctrine, legal education and legal institutions, goes beyond the mere call for "inclusiveness," which suggests an unproblematic co-existence of diverse peoples and perspectives. Rather, as Professor Angela Harris has captured this sentiment:

I. THE ENIGMA OF RACE

> *In this country as elsewhere, the importance of race as a social marker derives from the meanings all of us assign to race. With only a small exaggeration, we can say that race "is" the sum of its representations. Among the myriad forms of expression that shape the meanings of race, none have been more influential than the messages communicated by politics, government, and law.*[16]
>
> —Kenneth Karst

A. *Theories of Racial Identity*

1. Biological Race

For centuries, theorists have propounded genetic determinism as the justification for ranking people on the basis of class, race, ethnicity, and gender, and for providing differential access to societal resources. Rather than biologically predetermined, however, such structural arrangements are socially determined by a given society.[17] Eighteenth and nineteenth century biological definitions of race subdivided people into three basic classifications: Negroid (Black), Caucasian (White), and Mongoloid (Yellow).[18] Membership in each

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> [T]he task should not be to try to somehow resolve the philosophical tension between modernism and postmodernism, but rather consciously to inhabit that very tension. This work requires both a commitment to modernism and a willingness to acknowledge its limits. *At its best, it inspires a jurisprudence of reconstruction—the attempt to reconstruct political modernism itself in light of the difference "race" makes.*

Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 760 (1994) (emphasis added) (footnote omitted). To Professor Harris' articulation, I would add the imperative to inhabit these tensions inherent within the goals to eliminate oppression and to celebrate difference by gaining fuller insight into the difference that different differences make. This article seeks to contribute to this forward movement. Exemplified by the multi-layered Latina/o experience, Professor Berta Hernández Truyol describes this goal as movement towards a "true universalist" approach, defined as a multiple perspective approach that asks many questions, rather than perpetuate the reductionism and anomalies produced by single-issue, single-trait inquiries in law and society. Berta E. Hernández Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 375 & n.16 (1994).

16. KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION 67-68 (1993) (quotation marks added).

17. *See* Leith Mullings, *Notes on Women, Work and Society*, *in* ANTHROPOLOGY FOR THE NINETIES 312, 312-13 (Johnetta B. Cole ed., 1988).

18. ASHLEY MONTAGU, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE 4-5 (5th ed. 1974); *see also* D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 479-87 (1993) (and sources cited) (noting that Bernier, as

biological classification was based on such hereditarily shared physical characteristics as skin color, hair texture, facial structure, and other morphological features.[19] The postulate of biological determinism equated racial differences with innate inferiority. Consequently, the biological system of ranking the races institutionalized the bases upon which societal benefits and burdens were to be distributed.[20]

The absurdity of relying upon physical characteristics as the sole determinant of "racial identity" was most apparent in antebellum America. For example, in 1806, three generations of enslaved women sued for freedom in Virginia asserting that they descended from a free maternal ancestor.[21] Under Virginia law, which dictated that Blacks were presumably slaves, and Whites and Native Americans were presumably free, slaves bore the burden of proving a free ancestor.[22] The court applied a racial test to determine the plaintiffs' (Wright's) presumptive slave or free status, stating:

> Nature has stampt upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour either disappears or becomes doubtful; a flat nose and wooly head of hair. The latter of these disappears the last of all: and so strong an ingredient in the African constitution is this latter character, that it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or Indians. . . . So pointed is this distinction between the natives of Africa and the aborigines of America, that a man might as easily mistake the glossy, jetty clothing of an American bear for the wool of a black sheep, as the hair of an American Indian for that of an African, or the

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early as 1684, and Linnaeus, more definitively in 1758, divided humans into hierarchical categories of "man," thereby forming the foundation for later adoption of racial hierarchies by scholars in various scientific and pseudo-scientific fields).

19. MONTAGU, *supra* note 18, at 4-5.

20. As biologist and historian Stephen Jay Gould recognized: "Biological determinism is, in its essence, a *theory of limits*. It takes the current status of groups as a measure of where they should and must be (even while it allows some rare individuals to rise as a consequence of their fortunate biology)." STEPHEN JAY GOULD, THE MISMEASURE OF MAN 28 (1981).

21. *See* Ian Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 1 & nn.1-4 (1994) (discussing Hudgins v. Wright, 11 Va. (1 Hen. & M.) 133 (1806)).

22. Hudgins v. Wright, 11 Va. (1 Hen. & M.) at 134.

> descendant of an African. Upon these distinctions as connected with our laws, the burden of proof depends.[23]

Thus, as Professor Lopez notes, the women's fate hinged upon "the complexion of their face, the texture of their hair, and the width of their nose."[24] In finding for freedom, the court ruled that "the witnesses concur in assigning to the hair of Hannah . . . the long, straight, black hair of the native aborigines of this country."[25]

Similarly, Professor Cheryl Harris' work has been illuminating on the concept of "whiteness" as a proprietary interest from which societal status and benefits flow. As her work indicates, the combination of physical appearance and lineage dictated one's legal status:

> In adjudicating who was "white," courts sometimes noted that, by physical characteristics, the individual whose racial identity was at issue appeared to be white and, in fact, had been regarded as white in the community. Yet if an individual's blood was tainted, she could not claim to be "white" as the law understood, regardless of the fact that phenotypically she may have been completely indistinguishable from a white person, may have lived as a white person, and have descended from a family that lived as whites. Although socially accepted as white, she could not *legally* be white.[26]

Since the 1970s, most physical anthropologists have agreed that race in general is not a valid taxonomic device.[27] In fact, there is no subgroup that is sufficiently isolated genetically to remain distinct.[28] Because of the intermixing of humanity's genetic inheritances and

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23. *Id.* at 139.

24. López, *supra* note 21, at 2.

25. *Hudgins*, 11 Va. (1 Hen. & M.) at 139-40.

26. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1739 (1993); *see also* Plessy v. Ferguson, 163 U.S. 537 (1896) (instituting "separate but equal" doctrine and applying to person of mixed descent who was phenotypically indistinguishable from a White person); *infra* notes 110-12 and accompanying text (discussing Ozawa v. United States, 260 U.S. 178 (1922), and United States v. Thind, 261 U.S. 204 (1923)).

27. *See* Alice Littlefield et al., *Redefining Race: The Potential Demise of a Concept in Physical Anthropology*, 23 CURRENT ANTHROPOLOGY 641 (1982) (citing a 1978 survey conducted by anthropologist Leonard Lieberman, which revealed that approximately 70% of cultural anthropologists and half of physical anthropologists reject race as a biological category); *see also* Sharon Begley, *"Three Is Not Enough": Surprising New Lessons from the Controversial Science of Race*, NEWSWEEK, Feb. 13, 1995, at 67-68 (discussing the work of biologist Jared Diamond and the variety of traits upon which "racial" classifications can be based).

28. Ashley Montagu, *The Concept of Race*, *in* THE CONCEPT OF RACE 12, 16-17 (Ashley Montagu ed., 1964).

the resulting overlap of physical traits among groups, attempts at racial classification are considered to be entirely futile.[29]

2. Socially Constructed Race

As a basis for social rank, race is always a *socially* defined phenomenon which, at most, only very imperfectly corresponds to genetically transmitted traits and then, as Professor Gerald Berreman notes, relating only to phenotypes rather than genotypes.[30] Professor Berreman, an anthropologist, states:

> Systems of "racial" stratification are social phenomena based on social rather than biological facts. To be sure certain conspicuous characteristics which are genetically determined or influenced (skin color, hair form, facial conformation, stature, etc.) are widely used as convenient indicators by which ancestry and hence "racial" identity is recognized.[31]

Thus, what are perceived as distinct "races" are not objective, biological differences, but socially constructed differences. As the loci for contesting social power, such socially prescribed "racial" differences can serve a number of purposes, including devaluation of a group by relegating members to a cheap source of labor, entrenchment of existing power and class arrangements, and elevation of the cultures of racial oppressors.[32] These generalizations affect how people from different "races" are regarded by the society. Since social distinctions based on race are learned, it follows that like race itself, racism also is a social concept; racist ideology becomes reified in social and institutional structures. According to Professor Berreman, "A society is socially stratified when its members are divided into categories which are differently powerful, esteemed, and rewarded."[33] Among societal institutions, the law may be the most pervasive in constructing and legitimizing social hierarchies, as race-based thinking permeates our law, policy, and politics.[34]

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29. *See* MONTAGU, *supra* note 18, at 4-5.

30. Gerald Berreman, *Race, Caste, and Other Invidious Distinctions in Social Stratification*, *in* ANTHROPOLOGY FOR THE NINETIES, *supra* note 17, at 485, 491-92.

31. *Id.* at 492-93.

32. Michael J. Lynch & E. Britt Patterson, *Introduction* to RACE AND CRIMINAL JUSTICE 5-6 (Michael J. Lynch & E. Britt Patterson eds., 1991) (citing A. SYMANSKI & T.G. GOERTZEL, SOCIOLOGY 268-69 (1979)).

33. Berreman, *supra* note 30, at 485.

34. *See generally* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (arguing that a "color-blind interpretation of the Constitution

However, even as informed judgment leads to the conclusion that biological race is devoid of scientific support, it is premature to dismiss all notions of "race" as merely superficial classifications of physical traits. Professor Anthony Appiah, for example, argues that all notions of race should be abandoned, including those based on biology. He suggests that notions of culture should be substituted for concepts of race.[35] Complex though it may be, however, race consciousness does exist, largely in symbiotic relationships between inherited traits, recognizable physical characteristics, shared history, and embraced and/or imposed identity.[36] As Michael Omi and Howard Winant have indicated, for example, theories that reduce racial identities to ethnic ones fail to account for the centrality of race in the histories of oppressed groups. Such theories also underestimate the degree to which traditional notions of race have shaped, and continue to shape, the societies in which we live.[37] Binary definitions of race as biologically based or as falsely based generalizations, stereotypes, and myths, then, do not acknowledge the complex dynamics of racial identities and constructions. As scholar Jayne Chong-Soon Lee states, "[R]ace is defined not by its inherent content, but by the social relations that construct it."[38]

B. *Constructions of Asian Americans*

1. Historical Constructions of Asian Identities

Vincent Chin's death in 1982 was pivotal in reawakening awareness within Asian American communities and the rest of American society about dissonance in the social perceptions of

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legitimates, and therefore maintains, the . . . advantages that whites hold over other Americans")..

35. *See* Anthony Appiah, *The Uncompleted Argument: DuBois and the Illusion of Race*, *in* "RACE," WRITING, AND DIFFERENCE 21 (Henry Louis Gates, Jr., ed., 1986).

36. Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 765 (1994) (reviewing KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE (1992)).

37. *Id.* at 771 & n.128 (citing MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S, at 10, 21-24 (1986)).

38. *Id.* at 772; *see also* López, *supra* note 21, at 46 (stating that "[c]ontext superimposed on chance largely shapes races in the United States" (footnote omitted)); Richard Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 586 (1977) (stating that "[r]ace is . . . one of the dominant characteristics that affects both the way the individual looks at the world and the way the world looks at the individual"). *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S, at 3-4 (1986) (discussing the political nature of racial classification).

citizens of Asian descent in the United States.[39] Racially motivated violence against Asian Americans has much historical precedence, however.[40] The particular experiences of Asian Americans provide important perspectives regarding the role of race in American society and institutions, including in the law. This section reviews the foundations underlying the social construction and stereotyping of Asian Americans, particularly Chinese and Japanese immigrants.

One scholar has noted that "Asians . . . at certain times and places in the past, have been a pariah group at the very bottom of the ethnic escalation of American society."[41] United States immigration laws have been particularly instrumental in depicting Asian Americans as non-citizens and thereby rationalizing their deprivation of the rights thereof.[42] Beginning with the First Congress' enactment of the 1790 Naturalization Law that restricted naturaliza-

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39. Asian Americans across ethnic, generational, economic and gender lines responded to the nationwide effort by American Citizens for Justice and Mrs. Lily Chin, Vincent Chin's mother, to publicize Vincent Chin's killing. Attorney Alan Yee, a member of a Bay Area support group, recalled the Vincent Chin case as a turning point for Asian Americans:

> People started to work together for the first time. Anti-Asian violence and the scapegoating of Asians had been building up but no one had spoken up against it. The Chin case made people see that racism cut across economic barriers. Asians who would have never touched politics became active around this issue. And that awareness and support has continued. People are more active now. The feel they have a social responsibility to fight racism.

Serena Chen, *Vincent Chin Lives on in Documentary of His Murder*, S.F. EXAMINER, Mar. 18, 1988, at D8 (quoting Alan Yee); *see also* Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory out of Coalition*, 43 STAN. L. REV. 1183, 1189-90 (1991) (discussing *Who Killed Vincent Chin?* in terms of intersectional consciousness-raising within the Asian American community); McMillan, *supra* note 13, at B3.

40. *See* Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in 19th-Century America: The Unusual Case of* Baldwin v. Franks, 3 LAW & HIST. REV. 349, 352 & nn.17-21 (1985); *see also* GARY Y. OKIHIRO, *Perils of the Body and Mind*, *in* MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE 118-47 (Gary Y. Okihiro ed., 1994) (discussing the origins and continuing vitality of "yellow perilism" as a basis for the repression of Asian peoples in ancient and newer worlds).

41. ROGER DANIELS, ASIAN AMERICAN: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850, at 4 (1988).

42. *See* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850-1990 (1993). For excellent overviews and analyses of laws discriminating against Asian Americans, see generally ASIAN AMERICANS AND THE SUPREME COURT, *supra* note 1; SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY (1991); Margaret Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 ASIAN PAC. AM. L.J. (forthcoming 1996) (manuscript at 7-8, on file with author) (discussing the historic panoply of anti-Asian laws promulgated by state and national legislatures, including laws governing immigration, naturalization, employment, property ownership, marriage partnership, education, housing, national service and loyalty).

tion to "free white persons,"[43] race remained a criterion for citizenship well into the twentieth century.[44] With respect to immigration, Asians were the only groups to be totally excluded, beginning with the Chinese in 1882, until 1965.[45] Also, from a legal and legislative

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43. Naturalization Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (granting naturalized citizenship to alien Whites).

44. *See* GARY Y. OKIHIRO, *When and Where I Enter*, *in* MARGINS AND MAINSTREAMS, *supra* note 40, at 6-7 (noting that despite the fact that the 1790 Act was modified to include persons of African descent in 1870 and Chinese nationals in 1943, race was not eliminated as completely as a criterion for citizenship until 1952); *see also* DANIELS, *supra* note 41, at 67. Similarly, a complete ban on Japanese immigration was instituted years later in 1924. *See infra* note 45. Citizenship was conferred upon Mexican-Americans largely as a result of the Treaty of Guadalupe Hidalgo, which ratified American annexations after the Mexican-American War. Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* *in* ASIAN AMERICANS AND THE SUPREME COURT, *supra* note 1, at 1087, 1093 & n.18.

The 1790 Naturalization Law also excluded Native Americans from citizenship after the conversion of their homeland. Although they were born in the United States, they were regarded as members of tribes, or as domestic subjects or nationals. As "foreigners," they could not seek naturalized citizenship because they were not "white." Even the Fourteenth Amendment, which defined federal citizenship, did not initially apply to Native Americans. *See* U.S. CONST. amend. XIV. While Native Americans could become U.S. citizens through treaties with specific tribes or through allotment programs such as the Dawes Act of 1887 (also known as the Indian Allotment Act), general citizenship for Native Americans was not granted until 1924. DANIELS, *supra* note 41, at 29 & n.16.

Early determinations of Latina citizenship was derived from the annexation of formerly Mexican territory after the Mexican-American War, which officially ended with the Treaty of Guadalupe Hidalgo. Treaty of Peace with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922. Upon extending U.S. borders to encompass land that later became the states of California, Arizona, New Mexico, and Colorado, the 75,000 Mexican inhabitants of those areas were given the choice to remain and automatically become U.S. citizens, or move south to Mexico. Hernández Truyol, *supra* note 15, at 387 & nn.67-70. For discussion of other Latina migrations to the United States, see *id.* at 389-93.

The Chinese were the first Asian immigrants to arrive in the United States, arriving in the 19th century to work on the railroads and in the mines. *See* HYUNG-CHAN KIM, A LEGAL HISTORY OF ASIAN AMERICANS, 1790-1990, at 45-47 (1994). Japanese immigration began early in the 20th century. *See* HING, *supra* note 42, at 54, 61. Most Koreans, Vietnamese, Cambodians, Hmong, and Laotians have immigrated since 1965. *See id.* at 124-32.

45. Act of May 6, 1882, ch. 126, 22 Stat. 58. In 1965, the Immigration and Nationality Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C. (1994)), was signed into law. The new immigration law amended the McCarran-Walter Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1994)). Section 2 of the 1965 Act provided: "No person shall receive any preference or priority or be discriminated against in the issuance of an immigration visa because of his race, sex, nationality, place of birth, or place of residence." This section removed the Asiatic Pacific Triangle proviso of the 1952 law, which had discriminated against natives of Asian countries since 1924. *See* KIM, *supra* note 44, at 162.

The Immigration Act of 1924 was officially known as "[a]n Act to limit the immigration of aliens into the United States, and for other purposes"; however it was

standpoint, Asian Americans shared a status as "aliens ineligible for citizenship."[46] Yet, as Professor Charles McClain states, "the at-best obscure niche which the Chinese occupy in the historical consciousness of the average educated American," points to the larger phenomenon of lack of knowledge about the history of Chinese immigration to the United States.[47]

a. *Constructions of Early Chinese Immigrants*

Chinese immigrants began to arrive in America during the nineteenth century.[48] Many sought sanctuary from the British Opium Wars, others fled peasant rebellions and land ownership disputes, while others sought relief from harsh economic conditions.[49] By 1870, there were 63,000 Chinese in the United States, located largely in California where they constituted nine percent of the population.[50]

Chinese immigrants participated in the 1849 California Gold Rush. Seven hundred fifteen Chinese arrived in the United States in 1849 after the discovery of gold in California.[51] During the 1860s,

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unofficially known as the "Quota Immigration Law," the "Nationality Origins Act," or the "Japanese Exclusion Act." The 1924 Act restricted the immigration of Asians on two primary bases. First, "Congress adopted the 1890 census data as the basis for determining the number of aliens to be admitted," which of course included very few Asians. Second, the Act effectively stated that "no alien ineligible to citizenship shall be admitted to the United States." This excluded Japanese nationals since the Supreme Court had ruled in 1922 that Japanese could not become eligible for citizenship, thereby precluding their admission as immigrants. *See* KIM, *supra* note 44, at 114.

46. For first-hand narratives, see JOANN FAUNG JEAN LEE, ASIAN AMERICAN EXPERIENCES IN THE UNITED STATES: ORAL HISTORIES OF FIRST TO FOURTH GENERATION AMERICANS FROM CHINA, THE PHILIPPINES, JAPAN, INDIA, THE PACIFIC ISLANDS, VIETNAM, AND CAMBODIA (1991).

47. Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 531 (1984).

48. The precise arrival of Asian Americans to America is uncertain, although archaeologists have recently suggested that Chinese may have come to America in the fifth century. However, there is scant evidence of the presence of Asians in America prior to the discovery of gold in California. *See* Hyung-Chan Kim, *An Overview*, *in* ASIAN AMERICANS AND THE SUPREME COURT, *supra* note 1; *see also* GARY Y. OKIHIRO, *Family Album History*, *in* MARGINS AND MAINSTREAMS, *supra* note 40, at 93.

49. RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 192 (1993); *see also* KIM, *supra* note 44, at 44-46 (discussing the causes of Chinese immigration, including the rapid expansion of industrial and commercial capitalism in Europe and America which created great demands for cheap labor and a world market for the sale of Western-manufactured goods).

50. *See* TAKAKI, *supra* note 49, at 194. Although most Chinese migrants lived in California, they also lived elsewhere in the West, as well as in the Southwest, New England, and the South. In the West, Chinese migrants constituted sizable populations in other areas: 29% in Idaho, 10% in Montana. *See id.*

51. *See* KIM, *supra* note 44, at 47.

24,000 Chinese, two-thirds of the Chinese population in the United States, were working in California mines. Most were independent prospectors and many organized into small groups and formed their own companies.[52] However, because of discriminatory miners' taxes and anti-Asian violence, many Chinese were forced from mining.[53] Furthermore, as mining profits began to decrease, thousands of Chinese miners joined other Chinese migrants to work on the railroad. However, unlike White ethnic immigrants such as Italians, Poles, and Irish, the Chinese were a politically proscribed labor force. Consigned to the permanent foreigner status of migrant workers, they were located in a racially segmented labor market.[54] While industrialists enlisted low-wage Chinese labor to build railroads,[55] operate factories,[56] and develop agriculture,[57] Chinese workers were

52. *See* TAKAKI, *supra* note 49, at 195.

53. *See* KIM, *supra* note 44, at 47. Labeled as "unfair competitors," Chinese miners were subjected to mob violence by White miners. The riot in Tuolumne County, California, was the first of many anti-Chinese riots in California. In addition, the California legislature enacted a series of tax measures that discriminated against Chinese miners. First, a Foreign Miners' Tax in 1850 required all foreign miners ineligible for U.S. citizenship to pay a monthly tax of $20; however, because of its devastating economic effects, it was later repealed in 1851. In 1852, the legislature passed the Foreign Miners' License Tax, which required foreigners who were not U.S. citizens to obtain a license for $3.00 a month. Another Foreign Miners' Tax was passed in 1853, raising the tax to $4.00 and adding $2.00 per month for each year after 1855. In 1862, the California legislature enacted, "The California Police Tax," that was a head tax levied on all Chinese who were 18 years or older, requiring that they pay $2.50 per month if they were not engaged in the production of rice, sugar, tea, or coffee, or if they had not paid the California Foreign Miners' Tax. In 1863, this law was found to violate the state's constitution in Lin Sing v. Washburn, 20 Cal. 534 (1862). *See* KIM, *supra* note 44, at 47-49. For further discussion of the various discriminatory tax laws, the federal responses, and the perceived social realities, see *infra* notes 88-96 and accompanying text.

54. *See* DANIELS, *supra* note 41, at 67.

55. The Central Pacific Railroad, for example, depended heavily on Chinese labor. In February 1865, 50 Chinese workers were hired by the Central Pacific Railroad. Within two years, with 12,000 Chinese workers, Central Pacific had a work force that was 90% Chinese. They completed the physical labor required to lay the tracks and technical labor such as operating power drills and handling explosives for boring tunnels. *See id.*; TAKAKI, *supra* note 49, at 196-97.

56. Chinese workers were extensively involved in manufacturing, constituting 50% of the San Francisco work force in four key industries: boots and shoes, woolens, cigar and tobacco, and sewing. TAKAKI, *supra* note 49, at 198.

57. In 1880, the Chinese represented 86% of the agricultural work force in Sacramento City, 85% in Yuba, and 67% in Solano. *See id.* at 198-200. Southern plantation owners imported Chinese laborers to replace emancipated African American slave laborers. See Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 230-31 & nn.9-10.

"urged to return to their homeland" upon completing their service, "while others came to replace them."[58]

The employment of Chinese laborers provided White business owners with a weapon against White workers as a means to break their labor strikes. Factory owners in the American West and in the East imported Chinese laborers for the purpose of breaking strikes. When Congress passed the Chinese Exclusion Act in 1882, it was in reaction to fears about Asian workers exacerbating the conflict between White labor and capital. Legislators claimed that White workers had been "forced to the wall" by corporations employing the Chinese. In the aftermath of the violent Railroad Strike of 1877, Congress insisted that "the gate must be closed."[59]

Racist underpinnings ensured the passage of the Chinese Exclusion Act, not simply fear of continued violence from labor disputes. This is clear from the strong support for the Act in the West, Northeast, Mid-Atlantic, Midwest, and South—often, "in states where there were no Chinese and where competition between White workers and Chinese laborers did not exist."[60] As Professor

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58. Ronald Takaki, *Reflections on Racial Patterns in America*, *in* FROM DIFFERENT SHORES, *supra* note 2, at 24, 26. For example, Charles Crocker, an employer for the Central Pacific Railroad, told a legislative committee: "I do not believe [the Chinese] are going to remain here long enough to become good citizens, and I would not admit them to citizenship." *Id.* at 28 & n.14 (citing Charles Crocker's testimony in a report of the Joint Special Committee to Investigate Chinese Immigration, S. Rep. No. 689, 44th Cong., 2d Sess., 667, 679, 680 (1876-77)); *see also* STUART CREIGHTON MILLER, THE UNWELCOME IMMIGRANT: THE AMERICAN IMAGE OF THE CHINESE, 1785-1882 (1969).

59. Ronald Takaki, *Class*, *in* FROM DIFFERENT SHORES, *supra* note 58, at 103, 107-08. Initially, the Exclusion Act prohibited the entry of Chinese laborers into the United States and denied naturalized citizenship to the Chinese already here; however, six years later, the prohibition was broadened to include "all persons of the Chinese race." Exemptions were provided for Chinese officials, teachers, tourists and merchants. After renewal in 1892, the Chinese Exclusion Act was extended indefinitely in 1902. TAKAKI, *supra* note 49, at 207 & n.43 (citing CHENG-TSU WU, "CHINK!": A DOCUMENTARY HISTORY OF ANTI-CHINESE PREJUDICE IN AMERICA 82-83 (1972)).

In 1943, after almost 100 years, Congress repealed the Chinese Exclusion Laws and allowed a quota for Chinese immigration. This new policy permitted only 105 Chinese immigrants annually. The law also extended the rights of naturalized citizenship to Chinese immigrants; however, immigrants were required to present evidence of legal entry and to pass tests in English composition, American history and U.S. Constitution. Between 1944 and 1952, only 1428 Chinese were naturalized. *See* TAKAKI, *supra* note 49, at 387; *see also* C. Hays, *Archive Yields Rich Details of Era when Chinese Were Barred*, N.Y. TIMES, July 17, 1994, at 25. *See generally* E. SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (1939); A. SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (1971).

60. Takaki, *supra* note 59, at 105. In *The Unwelcome Immigrant: The American Image of the Chinese, 1785-1882*, for example, author Stuart Miller repudiated the conventional belief that anti-Chinese animus was confined to California. *See* MILLER, *supra* note 58. Instead, Miller found that anti-Chinese sentiments existed in New England and in other parts of the country based on the extensive negative portrayals of, and

Takaki observes, this fact suggests that the Act "may have been . . . a response to the increasing and violent class conflicts developing within White society. To prohibit Chinese immigration would be to eliminate an issue the labor movement was using to organize White workers."[61] Thus, the situation highlights the complex conjunctions of race and class.

In the context of American racialism, the Chinese were initially defined in terms of Black and White. As Professor Okihiro states, the ambiguous situation of the Chinese was reflected in the Louisiana census:

> In 1860, Chinese were classified as whites; in 1870, they were listed as Chinese; in 1880, children of Chinese men and non-Chinese women were classed as Chinese; but in 1900, all of those children were reclassified as blacks or whites and only those born in China or with two Chinese parents were listed as Chinese.[62]

More pervasively, however, the Chinese were assigned racial inferiority status within American society much like Native Americans and African Americans before them. Thus, while lauding the work of Chinese laborers,[63] the new industrialists simultaneously

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prejudices against, the Chinese. *See* KIM, *supra* note 44, at 2-3, 41-42 (comparing MILLER, *supra* note 58, with other theses asserting that anti-Chinese sentiment was localized to California).

61. Takaki, *supra* note 59, at 105-06.

62. GARY Y. OKIHIRO, *Is Yellow Black or White?*, *in* MARGINS AND MAINSTREAMS, *supra* note 40, at 53 & n.56 (citing LUCY M. COHEN, CHINESE IN THE POST-CIVIL WAR SOUTH: A PEOPLE WITHOUT A HISTORY 167-68 (1984)).

63. The plantation owners of the West and South and the industrialists of the North and East almost uniformly lavished praise upon the Chinese laborers for their industriousness. The praise was steeped in biological and social constructions of race. Ironically, as Professor Ronald Takaki states, "Chinese were persecuted, not for their vices, but for their virtues." RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1989), *cited in* Wu, *supra* note 57, at 230-31 n.12. More malevolently, however, the praise for Chinese workers was devised to drive wedges between newly freed workers of African descent and European ethnic immigrants, as reflected in the following accounts.

Comparing Chinese laborers to former slave laborers, one plantation owner wrote that "[t]hey work much more steady, without the loss of half-Saturday; and second, they do not run over their work, what they do is done well." Wu, *supra* note 57, at 230-31 n.12 (citing COHEN, *supra* note 62, at 109).

A Baton Rouge, Louisiana, newspaper stated, "[Chinese] are more obedient and industrious than the negro, work as well without as with an overseer, and at the same time are more clearly in their habits and persons than the freedmen." *Id.* at 231 n.13 (citing COHEN, *supra* note 62, at 124).

In the North, Chinese factory workers were praised in comparison to Irish immigrants. *See* MILLER, *supra* note 58, at 186-87. The *New York Times* wrote, " 'John Chinaman' was a better addition to [American] society than was 'Paddy.' " *Id.* at 186.

developed a caste/class ideology which located Asians beneath Whites. Chinese migrants were described as "heathen, morally inferior, savage, childlike, and lustful." Concerns about threats to racial purity also prompted anti-miscegenation laws directed at the Chinese.[64] Likened to Native Americans, the Chinese were accused of impeding civilization and it was suggested that they be removed to reservations. Defined as "aliens ineligible to citizenship," Chinese and other Asian immigrants were also denied, by state legislation, the right to own property in many states.[65] In 1879, President Rutherford B. Hayes warned that the "present Chinese invasion was pernicious and should be discouraged. Our experience in dealing with the weaker races—the Negroes and Indians . . .—is not encouraging. . . . I would consider with favor any suitable measures to discourage the Chinese from coming to our shores."[66] Of course, three years later Congress responded by prohibiting Chinese immigration.

Early legal constructions of Chinese Americans as less than full citizens were epitomized by immigration statutes, discriminatory tax laws, and testimonial limitation laws. The influence of arrant testimonial incapacity laws was reflected in two criminal cases involving the killings of Chinese Americans. In what Chinese American legal historian Charles McClain called "a disgraceful decision,"[67] *People v. Hall* parallels the *Vincent Chin* case for the degree of ignominy and outrage that it evoked in the Chinese American community. In October 1853, George W. Hall and two co-defendants were tried for the murder of Ling Sing. During the trial, three Chinese and one Caucasian witness testified on behalf of the State.[68] Hall, a White defendant, was sentenced to be hanged upon the jury's verdict of guilty.[69] Appealing the verdict, counsel for the defendant argued,

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The newspaper further commented that the Chinese men did not drink whiskey, stab one another, or beat their wives. *See id.* at 186-87.

64. In 1880, for example, California prohibited marriage between a White person and a "Negro, mulatto, or Mongolian." CAL. CIV. CODE § 60 (Deering Supp. 1905); *see also* Megumi Dick Osumi, *Asians and California's Anti-Miscegenation Laws*, *in* ASIAN AND PACIFIC AMERICAN EXPERIENCES: WOMEN'S PERSPECTIVES 1, 6 (Nobuya Tsuchida ed., 1982); OKIHIRO, *supra* note 62, at 51-52.

65. State legislation in California, Washington, Arizona, Oregon, Idaho, Nebraska, Texas, Kansas, Louisiana, Montana, New Mexico, Minnesota, Missouri, Washington, Utah, Wyoming, and Arkansas prohibited Asian property ownership. *See* Takaki, *supra* note 58, at 26; *see also* Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7, 7-8 (1947).

66. TAKAKI, *supra* note 49, at 206 n.40 (citing MILLER, *supra* note 58, at 190); *see also* People v. Hall, 4 Cal. 399 (1854).

67. McClain, *supra* note 47, at 548 (referring to *Hall*, 4 Cal. 399).

68. *See id.* at 549 & nn.109-10 (citing Indictment at 1, *Hall*, 4 Cal. 399; Trial Transcript at 1, *Hall*, 4 Cal. 399).

69. *See id.*

inter alia, that the Chinese witnesses did not have testimonial capacity upon which the jury's verdict of guilt could be based. This was the first time that the issue of testimonial capacity of Chinese immigrants was presented for adjudication by the highest court in California.[70]

Chief Justice Hugh C. Murray reversed the conviction and held that the Chinese immigrants' testimony had been improperly admitted.[71] The decision was based on three grounds, described by Professor McClain as: "canons of statutory construction, as the court purported to understand them; an amateur foray into history and ethnography; and on what the court called public policy considerations."[72] Each strand of the court's rationale was odious in its own right; however, the combined effect of the opinion was to legally inculcate the gross devaluation of Asian American lives. First, was the court's exercise of statutory interpretation, construing a California criminal statute which provided, "No black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any White person."[73] The court proceeded along the path of tortured legal-historical analysis to find that from Columbus' fundamental mistaken belief that he had found an island in the Chinese Sea near India, he had thereupon named the inhabitants "Indians," and that "the American Indians and the Mongolian, or Asiatic, were regarded as the same type of the human species."[74] Although acknowledging that scientists no longer believed that North America had originally been populated by Asian immigrants, the court felt constrained to construe the statute based on the early scientific and legislative assumptions of the period that regarded North American Indians and Chinese as being one race.[75] More pointedly, the court reasoned that even if Asians were not the same as Indians, the word "black" in the statute required a generic understanding that all races other than Caucasians were excluded.[76] The public policy rationale was spurred by Chief Justice Murray's belief in the "proverbial mendacity" of the Chinese; a race whom "nature has marked as inferior, and—

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70. *See id.*

71. *See id.*

72. McClain, *supra* note 47, at 549.

73. *Id.* at 549 & n.113; *see also* GUNTHER BARTH, BITTER STRENGTH: A HISTORY OF THE CHINESE IN THE UNITED STATES, 1850-1870 (1964); MILLER, *supra* note 58.

74. McClain, *supra* note 47, at 549 (citing People v. Hall, 4 Cal. at 400); *see also* KIM, *supra* note 44, at 48; *cf.* OKIHIRO, *supra* note 44, at 16-20 (providing an in-depth discussion of Columbus' travels and mistaken conclusions and stating that his reports and others like it helped to justify a "Christian imperialism" and control over the "new world").

75. McClain, *supra* note 47, at 549-50 (citing *Hall*, 4 Cal. at 402).

76. *See id.* at 550 (citing *Hall*, 4 Cal. at 404).

incapable of progress or intellectual development beyond a certain point . . . ."[77]

The same California court decided *People v. Brady*[78] on similar grounds. In this case, the California Supreme Court ruled that forbidding Chinese witnesses to testify for or against Whites did not violate the Fourteenth Amendment of the U.S. Constitution.[79]

As Professor Neil Gotanda notes, the Chinese protested the *Hall* decision,[80] yet one of the Chinese community's most prominent advocates further advanced the racist underpinnings at the heart of the *Hall* opinion in objecting to the court's decision to bar Chinese testimony by equating them with Blacks and Native Americans.[81] Prominent Chinese merchant Lai Chun-Chuen objected to *Hall*, stating: "[Coming] to the conclusion that we Chinese are the same as Indians and Negroes, and your courts will not allow us to bear witness. And yet these Indians know nothing about the relations of society; they know no mutual respect; they wear neither clothes nor shoes; they live in wild places and [in] caves."[82]

Two cases involving Chinese American citizens' testimonial capacity reached conflicting results after *Hall* and *Brady* were decided in 1854. In *People v. Awa*,[83] the appellant's manslaughter conviction was reversed because the testimony of his Chinese witness had been improperly excluded under the 1863 statute banning Chinese testimony against White persons. Strictly construing the statute, the California Supreme Court reasoned that the statute prohibited a Chinese person from testifying against a "white person." Since the opposing party, the State, was not a "white person" within the meaning of the statute, the court reversed and remanded for a new trial.[84]

The court's stricter statutory construction of the prohibition on Chinese testimony in *Awa* seemed to signal an improvement in the legal and social status of Chinese citizens. However, in *People v.*

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77. *Id.* (citing *Hall*, 4 Cal. at 404-05).

78. 4 Cal. 198 (1854).

79. Kim, *supra* note 48, at 7. The California legislature, apparently embarrassed by the outrageous *Hall* and *Brady* decisions, repealed the laws forbidding the Chinese from testifying against Whites. Act of Apr. 16, 1850, ch. 99, § 14, 1850 Cal. Stat. 229, 230, *repealed by* CAL. CIV. PROC. CODE § 18 (1872); *see also* KIM, *supra* note 44, at 49.

80. Gotanda, *supra* note 44, at 1092 (noting that Asian Americans resisted discriminatory measures from their earliest days in the United States).

81. McClain, *supra* note 47, at 550-51 & nn.122-25.

82. *Id.* at 550 & n.122 (citing LAI CHUN-CHEUN, REMARKS OF THE CHINESE MERCHANTS OF SAN FRANCISCO UPON GOVERNOR BIGLER'S MESSAGE 5 (W. Speer trans., 1855) (available in Bancroft Library, University of California Library, University of California, Berkeley)).

83. 27 Cal. 638 (1865).

84. *Id.* at 638. For a discussion of this case, see McClain, *supra* note 47, at 560.

Washington,[85] this improvement in status flagged. The defendant in *Washington* was indicted solely on the testimony of Chinese witnesses. The defendant, a "mulatto," successfully moved to set aside the indictment. On appeal, the California Supreme Court upheld the set-aside based on the recent Civil Rights Act of 1866,[86] under which all U.S.-born citizens were entitled to equal treatment under the law. Accordingly, the court reasoned, Black citizens who were born in the United States could exclude Chinese testimony if White citizens enjoyed this privilege under California law.[87]

Next to testimonial incapacity laws, discriminating tax laws especially undermined Chinese immigrants' access to full citizenship. Rejecting the 1862 recommendations of a joint select committee to remove discriminatory anti-Chinese tax laws from the California law books, the California legislature and Governor Leland Stanford instead enacted more anti-Chinese legislation.[88] This legislation, entitled "An Act to protect Free White Labor against competition with Chinese Coolie Labor, and to Discourage the Immigration of the Chinese into the State of California,"[89] imposed a capitation tax of $2.50 per month on all Chinese residents, except those who operated businesses, had licenses to work in the mines, or were engaged in the production or manufacture of sugar, rice, coffee, or tea.[90]

The "Chinese Police Tax," as the legislation was known, was immediately challenged. In *Ling Sing v. Washburn*,[91] a Chinese resident who was not a member of the exempt categories challenged the tax assessment. The state law was invalidated on the ground that it violated the U.S. Constitution. The case underscored the need for federal protection for Chinese residents' civil rights. Thus, deliberations on the 1868 Burlingame Treaty[92] to encourage trade between China and the United States involved Chinese American merchants' insistence on federal protection of Chinese lives and property. The resultant Treaty recognized the "free migration and emigration" of the Chinese to the United States as visitors, traders, or "permanent residents," and the rights of Chinese in the United States to "enjoy the same privileges, immunities, or exemptions in respect

85. 36 Cal. 658 (1869), *overruled by* People v. Brady, 40 Cal. 198 (1870).

86. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

87. *Washington*, 36 Cal. at 666-67; *see also* McClain, *supra* note 47, at 560.

88. *See* McClain, *supra* note 47, at 554-55.

89. Act of Apr. 26, 1862, ch. 339, 1862 Cal. Stat. 462 (repealed by Act of May 16, 1939, ch. 154, 1939 Cal. Stat. 1274, 1376), *cited in* McClain, *supra* note 47, at 555 & n.152.

90. McClain, *supra* note 47, at 555 & n.154; *see also* KIM, *supra* note 44, at 49.

91. 20 Cal. 534 (1862).

92. Additional Articles to the Treaty Between the United States and China of June 18, 1858, July 28, 1868, U.S.-China, 16 Stat. 739.

to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation."[93]

Building on the success of the Burlingame Treaty, Chinese merchants sought federal legislation to abolish discriminatory state laws. They successfully lobbied Congress to include protections for them in the 1870 Civil Rights Act, which declared that "all persons within the jurisdiction of the United States . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens." Furthermore, "[n]o tax" shall be levied "by any State upon any person emigrating thereto from a foreign country which is not equally imposed and enforced upon every person emigrating to such State from any other foreign country, and any law of any State in conflict with this is hereby declared null and void."[94]

Despite guarantees of equal protection by treaty and federal law, such measures had little effect on what actually happened in society. The Chinese continued to be vulnerable and were victims of racial violence, particularly in the California mining districts.[95]

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93. *Id.* at 740, *cited in* McClain, *supra* note 47, at 563.

94. S. 365, 41st Cong., 2d Sess., CONG. GLOBE 323, 1536 (1869-70), *cited in* McClain, *supra* note 47, at 564-67. In addition to the successful challenge of the "Chinese Police Tax," two other significant but largely unknown cases challenging anti-Chinese taxes were successful. *Ex parte* Ah Pong, 19 Cal. 106 (1861), and Ah Hee v. Crippen, 19 Cal. 491 (1861), grudgingly held for the Chinese plaintiffs in actions against the foreign Miners' License Tax. Ah Pong brought a habeas corpus action after his imprisonment for refusing to pay the tax. In ordering his release, the court held that the mere fact that he was Chinese and living in the mining district did not subject him to the foreign miners' tax. *Ah Pong*, 19 Cal. at 107 (discussed in McClain, *supra* note 47, at 558).

In *Ah Hee*, a Chinese miner brought a replevin action to recover a horse that had been attached by the county tax collector for failure to pay the tax. The plaintiff argued on equal protection grounds that foreigners who were bona fide residents had the same rights of possession and enjoyment of property as U.S. citizens; if native-born citizens had the right to mine lands for gold without paying a license fee or tax, foreigners who were bona fide residents had the same rights. Second, he argued that the legislation only applied to mining on federal or state owned public lands, not mining on privately owned property. The district court ruled in favor of the plaintiff based on the constitutional argument; however, the supreme court affirmed the lower court's ruling on statutory interpretation grounds, that is, that the legislature had intended the tax to apply only to public lands. The court avoided the constitutional issues. *Ah Hee*, 19 Cal. at 491-98 (reviewed by McClain, *supra* note 47, at 558-59).

95. *See* Teresa L. Amott & Julie A. Matthaei, *Climbing Gold Mountain: Asian American Women*, *in* RACE, GENDER, AND WORK: A MULTICULTURAL HISTORY OF WOMEN IN THE UNITED STATES 193, 203 & n.49 (Teresa L. Amott & Julie A. Matthaei eds., 1991) ("Political and labor leaders incited violence against Chinese immigrants. White mobs attacked Chinese in San Francisco, Los Angeles, Denver, Rock Springs, Tacoma, and Seattle. In 1871, a mob attacked the residents of the Los Angeles Chinatown, lynching 19 and stealing $40,000 in cash.").

Blamed as "the source of the troubles" of White working men, Chinese accounts during the period recalled being taunted and physically assaulted: "We were simply terrified; we kept indoors after dark for fear of being shot in the back. Children spit on us as we passed by and called us rats."[96]

b. *Constructions of Early Japanese Immigrants*

Like the Chinese and other immigrant groups, the Japanese emigrated to America seeking relief from external forces. During the 1880s, farmers in Japan bore heavy tax burdens for that country's industrialization and militarization. Many were forced to sell their property due to their inability to pay their taxes and hunger prevailed in much of the country. Between 1885 and 1924, 200,000 Japanese left for Hawaii and 180,000 for the United States mainland.[97] Initially, most of the migrants from Japan were men; however, a significant number of women became part of the Japanese migration. By 1920, women represented forty-six percent of the Japanese population in Hawaii and thirty-five percent in California.[98]

Hawaiian planters developed a profitable sugar export economy. Between 1875 and 1910, cultivated plantation lands multiplied nearly eighteen times, from 12,000 to 214,000 acres. This success was based on an ethnically diverse imported labor force, composed of Hawaiians, Filipinos, Puerto Ricans, Chinese, Japanese, Portuguese, and Koreans. Employers purposely sought laborers from diverse nationalities as a way to ensure against concerted strike actions. In 1903, planters began importing Korean workers in order to pit them against the Japanese. Aware of the antagonism between the two groups, planters believed that the Koreans would not combine with the Japanese in strike actions. However, the Korean labor supply was cut off in 1905 after the Korean government prohibited further emigration to Hawaii due to reports of abuses on the plantations.[99] In 1909, again seeking to supplant the Japanese work force, the planters

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96. TAKAKI, *supra* note 49, at 208 & n.47 (reciting the account of Huie Kin).

97. *Id.* at 246-47.

98. This is in stark contrast to the earlier Chinese migration in 1900 when, 50 years after the beginning of Chinese immigration, only 5% were women and only 1% were American born; while in 1930, 52% of the Japanese population had been born in America. While the 1882 Chinese Exclusion Act prohibited the entry of Chinese male and female laborers, Japan negotiated the 1908 Gentlemen's Agreement which prohibited the entry of Japanese "laborers," although it allowed Japanese women to emigrate to the United States as family members. This opening in immigration policy resulted in over 60,000 women coming to America, many as "picture brides." *See* TAKAKI, *supra* note 49, at 247-48.

99. *See id.* at 252-53.

brought laborers from the Philippines, a territory acquired after the Spanish-American War.

To strengthen their authority over their ethnically diverse work force, planters stratified occupations according to race: Whites occupied the skilled and supervisory positions, while Asian immigrants were the unskilled laborers. In 1904, the Hawaiian Sugar Planters' Association passed a resolution that restricted skilled positions to "American citizens, or those eligible for citizenship."[100] Asian immigrants were excluded, as they were not White and were therefore ineligible to become naturalized citizens according to federal law. Working mostly as field hands and mill laborers, workers were grouped by ethnicity and gender. They labored under a differential wage system based on ethnicity, which paid Portuguese workers more than the Japanese, who constituted seventy percent of the work force. The planters saw Japanese Americans as a colonized labor force. They sought to restrict access to education beyond the sixth or eighth grade, and sought to limit education to vocational training for successive generations of Japanese plantation laborers.

A large White working class did not exist in Hawaii. In fact, most of the people in the islands were Asian, and by 1920, the Japanese alone represented about forty percent of the population. As workers, they were generally confined to the wage-earning plantation labor force. Aware of their extremely limited opportunities for individual advancement and economic independence, the Japanese in Hawaii tended to emphasize a class strategy of unionization.[101]

On the United States mainland, however, the Japanese faced a markedly different situation. They were a racial minority, constituting only two percent of the population in 1920. They felt scorned by White society and had become the target of hostile and violent White workers.[102] Initially, the Japanese were employed in agriculture, railroad construction, and the canneries. As migratory farm laborers, they constantly moved from field to field. Similarly, railroad workers were shuttled from one construction site to another. Cannery workers were shipped from the West Coast to Alaska and then back after the fishing season. Denied access to employment in the

100. *Id.*; *see also* GARY Y. OKIHIRO, CANE FIRES: THE ANTI-JAPANESE MOVEMENT IN HAWAII, 1865-1945 (1991).

101. TAKAKI, *supra* note 49, at 266-67.

102. *See* OKIHIRO, *supra* note 100; Report on the Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 32 (GPO, 1982), *cited in* Lorraine K. Bannai & Dale Minami, *Internment during World War II and Litigations, in* ASIAN AMERICANS AND THE SUPREME COURT, *supra* note 1, at 755, 756 & n.14.

industrial labor market, many Japanese entered entrepreneurial activity, becoming farmers and shopkeepers.[103]

The Japanese were able to become farmers so rapidly because of their timely entry into agriculture. Beginning in the late nineteenth century, industrialization and urbanization led to increased demands for fresh produce in the cities. The development of irrigation in California at this time opened the way for intensive agriculture and a shift from grain to fruit and vegetable production: between 1879 and 1909, the value of crops representing intensive agriculture skyrocketed from just four percent to fifty percent of all crops grown in California. This tremendous expansion occurred under a market stimulus created by two extremely important technological achievements—the completion of the national railroad lines and the invention of the refrigerated car. Now these farmers were able to ship their perishable fruits and vegetables to almost anywhere in the United States.[104]

However, wealth did not immunize the Japanese farmers from racism. The first generation of Japanese immigrants, the Issei, hoped that their children, the second generation Nisei, who were born and acculturated in the United States, would secure acceptance in the larger society.[105] However, even the American born Nisei were subjected to racist assaults. Nisei were also often perceived as foreigners[106] and were discriminated against in employment.[107] One of the wealthiest and most prominent Japanese farmers, Kinji

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103. TAKAKI, *supra* note 49, at 267; *see also* YUJI ICHIOKA, THE ISSEI: THE WORLD OF THE FIRST GENERATION JAPANESE IMMIGRANTS, 1885-1924 (1988).

104. TAKAKI, *supra* note 49, at 268-69 & n.61.

105. Japanese Americans' presence and experiences in the United States are typically identified according to generational delineations, e.g., the Issei (first generation), Nisei (second generation), Sansei (third generation), and Yonsei (fourth generation). For an excellent discussion of generational comparisons and contrasts among Japanese Americans' experiences, see EVELYN NAKANO GLENN, ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE 3-41 (1986).

106. *See* TAKAKI, *supra* note 49, at 274 & n.75; *see also* DENNIS M. OGAWA, FROM JAPS TO JAPANESE: THE EVOLUTION OF JAPANESE-AMERICAN STEREOTYPES (1971). As discussed *infra* Part I.B.2.a, the construction of foreignness has been a persistent theme in the lives of Asian Americans. *See, e.g.*, Keith Aoki, *Foreign-ness & Asian American Identities: Yellowface, Propaganda and Bifurcated Racial Stereotypes*, 3 UCLA ASIAN PAC. L.J. (forthcoming 1996); Gotanda, *supra* note 44, at 1087-1103.

107. A study of 161 Nisei who graduated from the University of California between 1925 and 1935 found that only 25% were employed in professional vocations for which they had been trained. Twenty-five percent worked in family businesses or trade that did not require a college education, and 40% had "blind alley" jobs. TAKAKI, *supra* note 49, at 275.

Ushijima (George Shima),[108] upon purchasing a house close to the university in Berkeley, was told by protesters led by a classics professor to move to the "Oriental" neighborhood. The local newspapers announced: "Jap Invades Fashionable Quarters" and "Yellow Peril in College Town." Shima refused to move.[109]

Farming had been the path for many European immigrants to enter into American society. Many Japanese immigrants believed that their success, especially in agriculture, would help them become accepted into American society. But this strategy of acceptance through agriculture failed to recognize the depth of racial exclusionism. Their very success provoked a backlash. In 1908, the federal government pressured Japan to prohibit the emigration of laborers to the United States. Shortly afterward, California and many other states enacted legislation to exclude Japanese immigrants from owning and leasing land. These restrictive alien land laws were based on the ineligibility of the Japanese for naturalized citizenship.[110]

In 1922, the United States Supreme Court affirmed that Takao Ozawa, a Japanese immigrant, was not entitled to naturalized citizenship because he "clearly" was not "Caucasian."[111] In denying citizenship, the Supreme Court noted, among other things, that Takao Ozawa had graduated from Berkeley, California High School, had studied at the University of California for three years, attended American churches, and spoke English at home; therefore, he clearly met the character and education requirements for citizenship.[112] The Court, however, was not persuaded by Ozawa's argument that persons of Japanese ancestry were constructively "white persons" for purposes of the immigration laws which expressly excluded Chinese immigrants.[113]

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108. Ushijima had been dubbed the "potato king" by the press and had controlled 85% of the California potato crop, valued at over $18 million in 1920. GARY Y. OKIHIRO, *Margin as Mainstream*, *in* MARGINS AND MAINSTREAMS, *supra* note 40, at 153.

109. TAKAKI, *supra* note 49, at 270-71.

110. *Cf.* Naturalization Law of 1790, 1 Stat. 103 (providing that only White persons could become citizens).

111. Ozawa v. United States, 260 U.S. 178, 198 (1922).

112. *Id.* at 189.

113. *Id.* at 181. Ozawa argued that, unlike Chinese immigrants who were specifically excluded from citizenship under the Exclusion Law, Japanese immigrants were not expressly excluded under the naturalization laws, and that therefore he should be considered a "free white person" according to the prevailing racial theories. OKIHIRO, *supra* note 62, at 61. Professor Pat Chew notes that various state and federal courts had agreed with Ozawa's constructive whiteness argument, where at least 14 cases of the naturalization of Japanese immigrants had been reported at the time of *Ozawa*. Chew, *supra* note 4, at 15 n.46; *see also Ozawa*, 260 U.S. at 183 (arguing for Petitioner that no uniform rule could be drawn from decisions since 1875). For a discussion of *Ozawa*, see Kim, *supra* note 48, at 35-37.

In 1923, the Supreme Court again affirmed anti-Asian immigration laws in *United States v. Thind*.[114] Bhagat Singh Thind claimed Aryan ancestry as the basis for claiming Caucasian racial identity.[115] Thus, the Court was forced to mediate the inconsistency between its holding in *Ozawa* that the test for citizenship was being Caucasian and Thind's claim of Caucasian racial ancestry. In apparent contradiction, Justice Sutherland reasoned that "[i]t may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today."[116] The Court then found that the original drafters of the 1790 naturalization law intended that American citizenship would only be extended to direct descendants of immigrants from the British Isles and Northwestern Europe.[117] Despite its obvious racial bias, the Court denied any discriminatory underpinnings in its ruling: "It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation."[118]

In 1924, Congress enacted an immigration law that included a provision prohibiting the entry of "aliens ineligible to citizenship," which was couched in the language of general applicability, while being unequivocally directed at the Japanese.[119] However, the nadir of anti-Asian, anti-Japanese bias in twentieth-century America was

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The *Ozawa* case and United States v. Thind, 261 U.S. 204 (1923), illustrate a point discussed by Professor Robert Chang regarding Asian immigrants arriving after the Chinese. These later immigrants often sought to distinguish themselves from Chinese Americans by a variety of means, including adopting more "westernized" dress and abandoning other cultural practices, thereby attempting to escape anti-Chinese animus. Chang, *Asian American Legal Scholarship*, *supra* note 14, at 1290.

114. 261 U.S. 204 (1923).

115. *Id.* at 210. Professor Chang notes that Asian Indians were distinguished from other Asians by European and North American scholars who identified Asian Indians as descendants of the Aryan (White) race. Chang, *Asian American Legal Scholarship*, *supra* note 14, at 1290 n.236 (citing Sucheta Mazumdar, *Race and Racism: South Asians in the United States*, *in* FRONTIERS OF ASIAN AMERICAN STUDIES 25, 26-30 (Gail M. Nomura et al. eds., 1989)).

116. *Thind*, 261 U.S. at 209.

117. *Id.* at 213; *see also* Chew, *supra* note 4, at 17. For a discussion of *Thind*, see Kim, *supra* note 48, at 37-38 (noting that Justice Sutherland had devised a "zone theory" of racial inclusion and exclusion, upon eschewing rigid racial categories of what constituted a "white person" for purposes of the immigration and naturalization statutes. In this regard, Justice Sutherland adopted a theory of common usage for "whiteness," that is, what the popular concept of what a White person meant).

118. *Thind*, 261 U.S. at 215. For a discussion, see Chew, *supra* note 4, at 17.

119. Act of May 24, 1924, 43 Stat. 153; *see also* TAKAKI, *supra* note 49, at 273.

the internment of Japanese Americans during World War II. In February 1942, President Franklin D. Roosevelt signed Executive Order 9066,[120] which gave the Secretary of War the power "to exclude, remove and then detain U.S. citizens of Japanese descent and their alien parents."[121] Most of the relocation camps were located in desolate desert areas in Utah, Arizona, Colorado, Arkansas, Idaho, California and Wyoming. Families were assigned twenty-by-twenty feet barracks with rudimentary furnishings resembling a military prison.[122] Of the 120,000 internees, 70,000 were United States citizens by birth, members of the Nisei generation. In the relocation camps, draft-age Nisei men[123] were required to sign a loyalty questionnaire entitled "Statement of United States Citizenship of Japanese Ancestry."[124]

The exclusion order was upheld based on presidential war powers in four major cases challenging the constitutionality of the Executive Order: *Hirabayashi v. United States*,[125] *Yasui v. United States*,[126] *Korematsu v. United States*,[127] and *Ex parte Mitsuye Endo*.[128]

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120. Exec. Order No. 9066, 3 C.F.R. § 1092 (1938-1943), *reprinted in* 56 Stat. 173 (1942).

121. Although race clearly was the impetus for the internment order, the U.S. military and political officials "incredibly . . . denie[d] any connection between the exclusion and race," Bannai & Minami, *supra* note 102, at 774, by reasoning that "Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we were at war with the Japanese Empire." Wu, *supra* note 57, at 255 & n.148 (quoting Korematsu v. United States, 323 U.S. 214, 223 (1944)).

122. *See* TAKAKI, *supra* note 49, at 382-83 (discussing the conditions in the internment camps). Unlike Americans of German or Italian descent, Japanese Americans were considered inherently disloyal. Even more illogically, the U.S. government did not deem it necessary to intern Japanese American citizens in Hawaii, who were more numerous than their West Coast counterparts. One hundred ten thousand West Coast Japanese Americans were interned, while of the 150,000 Japanese American citizens in Hawaii, only 1444 were similarly treated. The War Department justified this disparity by finding Japanese labor "absolutely essential" for rebuilding the defenses destroyed at Pearl Harbor. *Id.* at 308.

123. Second-generation Americans of Japanese descent who were born in the United States.

124. TAKAKI, *supra* note 49, at 29-30 & n.20 (discussing the "Statement of United States Citizenship of Japanese Ancestry" as quoted in MICHI WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS 155 (1976)). Despite their country's suspicions, over 33,000 Japanese Americans served in World War II, as did other Asian Americans. *See id.*

125. 320 U.S. 81 (1943).

126. 320 U.S. 115 (1943).

127. 323 U.S. 214 (1944), *reh'g denied*, 324 U.S. 885 (1945). *Korematsu* was decided by a 6-3 vote. The opinion, written by Justice Black, gave great deference to the combined war powers of the President and Congress. Justice Murphy's dissent described the situation regarding the Japanese American internment as "one of the most sweeping and complete deprivations of constitutional rights in the history of this

Although the Japanese American parties in each case asserted slightly different grounds to challenge the Executive Order, in each case, the Supreme Court upheld the President's War Powers authority and Congress' enabling legislation upon the belief that the inherent disloyalty of Japanese American citizens justified the exercise of such plenary authority.[129] As stated by attorneys Dale Minami and Lorraine Bannai, the government withheld relevant information about the decision to remove Japanese Americans during World War II, and the Court rendered its decisions based on scant evidence suggesting disloyalty and on the dubious assertion of "judicial notice" establishing Japanese Americans' predisposition to espionage and sabotage.[130]

The campaign for internment generally was supported by government, business, and media institutions. A *Los Angeles Times* opinion epitomized the prevailing sentiment: "A viper is nonetheless a viper wherever the egg is hatched—so a Japanese American, born of Japanese parents—grows up to be Japanese, not American."[131]

c. *Chinese and Japanese American Women: Early Experiences, Early Constructions*

In a chapter entitled, *Recentering Women*, Professor Gary Okihiro states, "Asian American history is replete with the deeds of men. Women constitute a forgotten factor in Asian American history. They have 'no name.' "[132] There were substantial differences in the

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nation." While the majority opinion agreed with the dissent as to the general unconstitutionality of imposing burdens, the Justices felt that the needs of the nation, as perceived at the start of the war, justified these measures. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 622-23 (4th ed. 1991).

Korematsu is generally better known than the other cases, primarily because it is recognized as the start of a "revolution in constitutional analysis of equal protection issues." *Id.* at 622. *Korematsu* established a heightened level of judicial scrutiny of government action when racial or national origin classifications were at issue: first, such classifications were "suspect" because they were likely to be based on an impermissible purpose; second, such classifications were to be subject to independent judicial review—"rigid scrutiny"; third, such classifications would be invalid if based on racial antagonism and upheld only if they were based on "public necessity." *Korematsu*, 323 U.S. at 216. The Court failed to apply its pronounced scheme of equal protection analysis in the case itself, however.

128. 323 U.S. 283 (1944).

129. *See* Bannai & Minami, *supra* note 102, at 755, 758-67; Kim, *supra* note 48, at 47-53; *see also* PETER IRONS, JUSTICE AT WAR (1983).

130. Bannai & Minami, *supra* note 102, at 768-72; *see also* Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

131. TAKAKI, *supra* note 49, at 380 & n.7.

132. GARY Y. OKIHIRO, *Recentering Women*, *in* MARGINS AND MAINSTREAMS, *supra* note 40, at 64. Professor Okihiro's reference to "no name" women is invoked from Maxine Hong Kingston's *The Woman Warrior: Memoirs of a Girlhood Among Ghosts*, in

immigration experiences of Asian American men and women. As Professor Okihiro further states:

> Chinese women, for instance, comprised only 7.2 percent of the Chinese in America in 1890; Japanese women constituted 4 percent of the Japanese population of the U.S. mainland in 1900 and 12.6 percent in 1910; of all the Filipinos admitted into California between 1920 and 1929, only 6.7 percent were women; Korean women comprised 25 percent of the Koreans on the mainland in 1920 and 34 percent in 1930; and of the 474 Asian Indians in America in 1909, none were women.[133]

Chinese women emigrated to the United States in substantially fewer numbers than Chinese men. In 1852, there were only seven women among the 11,794 Chinese in California.[134] In 1870, the ratio of Chinese men to women in the United States was 14 to 1, and in 1900, of the 89,863 Chinese in the continental United States, 4522, or five percent, were women.[135] Several dynamics appear to account for this. A combination of Chinese tradition and culture limited women's migration to the United States.[136] The hierarchical system of Confucianism largely defined women's subordinated status in the Chinese social structure.[137] According to its tenets:

> [T]hroughout her life, the ideal woman was subject to her father as a child, her husband when married, and her sons

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which she relates the story of her aunt who committed suicide after giving birth to a daughter who was fathered by a man other than her husband. The aunt, this "no name woman," was expunged from the family record, "as if she had never been born," and even her name was erased from memory, like all the countless other "no name women," who fail to appear in the pages of history books "as if they had never been born." OKIHIRO, *supra*, at 64-65, (citing MAXINE HONG KINGSTON, THE WOMAN WARRIOR: MEMOIRS OF A GIRLHOOD AMONG GHOSTS (1975)).

133. YAMATO ICHIHASHI, JAPANESE IN THE UNITED STATES 72 (1932); TAKAKI, *supra* note 63, at 273; Kay Leonard, *Marriage and Family Life Among Early Asian India Immigrants*, *in* FROM INDIA TO AMERICA: A BRIEF HISTORY OF IMMIGRATION, PROBLEMS OF DISCRIMINATION, ADMISSION AND ASSIMILATION 67 (S. Chandrasekhar ed., 1982); OKIHIRO, *supra* note 132, at 67 (citing Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, *in* ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943, at 94 (Sucheng Chan ed., 1991)); STATE OF CAL., DEP'T OF INDUS. RELATIONS, SPECIAL BULLETIN NO. 3, FACTS ABOUT FILIPINO IMMIGRATION INTO CALIFORNIA 32 (1930).

134. TAKAKI, *supra* note 49, at 209.

135. *Id.*

136. *Id.*

137. The patriarchal family system in China limited women's mobility in order to ensure that the men's wages were sent home. In addition, it was considered indecent for women to travel abroad. *See* Amott & Matthaei, *supra* note 95, at 199; *see also* TAKAKI, *supra* note 49, at 209.

> when widowed, and she was taught the four "virtues": first, a woman should know her place in the universe and behave in compliance with the natural order of things; second, she should guard her words and not chatter too much or bore others; third, she must be clear and adorn herself to please men; and fourth, she should not shirk from her household duties.[138]

In addition to cultural factors, conditions in the United States weighed against Chinese women's emigration. Clearly significant factors were the economic demands of White employers who sought single male workers. As a result, most men arrived as sojourners who planned to return to China after realizing their fortunes.[139] Racism, harsh living conditions, and a general lack of welcome dissuaded Chinese women's emigration to the United States.

During the early decades of Chinese immigration, a number of Chinese women arrived as an act of resistance, many to escape gender oppression and to lead independent lives.[140] Frequently, however, women's immigration was a product of men's exploitation and often they were forced into prostitution.[141] For example, Ah Toy, who came to San Francisco in 1849 to better her condition, "worked as a prostitute, and then became the madam of a brothel of Chinese women."[142] *Tongs* (gangs) soon monopolized the prostitution trade in 1854. Young girls from Canton and Hong Kong were recruited into prostitution. Men purchased girls from poor families as slaves or put them under contract for roughly five years; in other cases, girls were kidnapped or lured onto ships with promises of gold, marriage, jobs, or education.[143] Once in California, Chinese girls were sold to wealthy Chinese men as concubines, to brothels reserved for Chinese

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138. OKIHIRO, *supra* note 132, at 69 & n.9 (citing ELISABETH CROLL, FEMINISM AND SOCIALISM IN CHINA 13, 14, 19 (1978)).

139. *See* Amott & Matthaei, *supra* note 95, at 195; *see also* TAKAKI, *supra* note 49, at 210.

140. *See* OKIHIRO, *supra* note 132, at 75-79.

141. *See* Lucie Cheng, *Free, Indentured, Enslaved: Chinese Prostitutes in Nineteenth Century America*, *in* LABOR IMMIGRATION UNDER CAPITALISM 402-34 (Lucie Cheng & Edna Bonacich eds., 1984). Also, as Professor Okihiro reminds us, the economic dimension of prostitution should not obscure the fact that the exploitation of Asian women in America was an extension of preexisting exploitative social relations in Asia, where patriarchy controlled women's lives. OKIHIRO, *supra* note 132, at 77.

142. Amott & Matthaei, *supra* note 95, at 201 & n.36.

143. *Id.* The narratives of Chinese women who were forced into prostitution are included in Ronald Takaki's work. They include Lilac Chen, who tells of being sold by her father at the age of six, and was later brought to San Francisco. *See* TAKAKI, *supra* note 49, at 211. Wong Ah So tells of being wooed by kindness and tales of gold in America, only later to become a virtual slave and forced to work as a prostitute in San Francisco. *See id.* at 212 & n.57.

men, or to lower-class brothels serving Whites as well as Asians. Others were shipped to mining camps, where treatment often was particularly harsh. The women endured degradation and abuse. As Professor Takaki states, "[D]isease was a constant threat: syphilis and gonorrhea were widespread. Life was dangerous and sometimes short. Occasionally, prostitutes were beaten to death by their customers or owners, and others committed suicide by taking an overdose of drugs or drowning themselves in the San Francisco Bay."[144]

In 1870 there were at least 159 brothels in San Francisco alone, and almost two-thirds of the Chinese women in the city worked as prostitutes.[145] Chinese women were cast as synonymous with prostitution. In an 1856 editorial reflecting the attitude of much of White society, the *New York Tribune* wrote: "The Chinese are lustful and sensual in their dispositions; every female is a prostitute of the basest order."[146] In 1870, California passed a law to prohibit the importation of Asian women for the purpose of prostitution.[147] In 1875, Congress followed suit and passed the Page Law to prohibit the entry of prostitutes; however, it was interpreted so broadly that it also precluded the entry of Chinese wives.[148]

As a result of the Chinese Exclusion Act in 1882, its renewal in 1892, and passage of the 1924 Immigration Act that denied Asian immigrants, including Asian women, the right to be permanent resident aliens, the Chinese population diminished from 124,000 in 1890 to 85,000 in 1920; it expanded very gradually to 106,000 in 1940.[149] The Exclusion Act prevented single Chinese women and the wives of U.S. residents other than merchants from immigrating.[150] Increasingly, Chinese women immigrants worked as wage laborers in laundries, garment or cigar factories, and as agricultural workers, servants, cooks, and on the railroads. After the Chinese Exclusion

144. TAKAKI, *supra* note 49, at 213 & n.60.

145. Amott & Matthaei, *supra* note 95, at 202.

146. *Id.* at 202 & n.43.

147. Act of Mar. 3, 1870, ch. 230, 1870 Cal. Stat. 330.

148. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477; *see also* TAKAKI, *supra* note 49, at 210.

149. Amott & Matthaei, *supra* note 95, at 204.

150. Professor Pat Chew discusses the impact of anti-Asian immigration laws on her grandparents, who experienced long periods of separation because her grandmother was prohibited from immigrating to the United States. *See* Chew, *supra* note 4, at 26 n.108; *see also* Daina Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1066 & n.89 (1994) (noting that although the Chinese Exclusion Act did not specifically exclude Chinese women, the federal appellate court decision in Case of the Chinese Wife, 21 F. 785, 788 (C.C.D. Cal. 1884), ruled that Chinese women assumed the same status as their husbands and therefore were treated identically for exclusion purposes).

Act prohibited further Chinese immigration in 1882, employers sought cheap labor from Japanese immigrants.

There were profound differences in Chinese and Japanese immigration experiences. One major difference was the greater number of Japanese women immigrants than the Chinese women immigrants of an earlier period. Japanese immigration to the United States and Hawaii began on a large scale after 1880. In 1900, the ratio of men to women was twenty-five to one in the Japanese immigrant community.[151] By 1910, there were over 72,000 Japanese in the continental United States.[152] Men initially predominated in the Japanese immigration in the nineteenth century. In 1920, however, women comprised forty-six percent of the Japanese population in Hawaii and thirty-five percent in California.[153]

In 1907, federal legislation limited Japanese immigration, with the signing of the "Gentlemen's Agreement."[154] Under the Agreement, unskilled Japanese men were prohibited entry into the United States. Thus, between 1910 and 1920, the number of Japanese men in the United States declined. However, because the Agreement did not prohibit the entry of wives and relatives (as had the Chinese Exclusion Act), the ratio of men to women was reduced. Over half of the

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151. Amott & Matthaei, *supra* note 95, at 219.

152. *Id.* at 218.

153. In contrast, in 1900, 50 years after the beginning of Chinese immigration, only five percent of the Chinese population in America were women. *See* TAKAKI, *supra* note 49, at 247.

154. The so-called "Gentlemen's Agreement" was reached during the turmoil of public school segregation and efforts to limit Japanese immigration to America. Concerned that there would be a total exclusion of Japanese immigration like the earlier Chinese exclusion acts, the Japanese government agreed with the U.S. government to prevent Japanese citizens carrying passports for Hawaii, Canada, or Mexico from entering the continental United States. The Immigration Act of 1907 included an agreement between the two countries that prevented immigration of aliens who were excluded from admission to the United States. *See* Kim, *supra* note 48, at 39-40. The series of correspondences between the U.S. Ambassador to Japan and the Japanese Foreign Minister came to be called the "Gentlemen's Agreement" of 1908. As Professor Hyung-Chan Kim states, the complete text of the agreement has never been made public; however, the following report in the annual immigration report of 1908 reveals the provisions:

> This understanding contemplates that the Japanese government shall issue passports to the continental United States only to such of its subjects as are non-laborers . . . who, in coming to the continent, seek to resume a formerly acquired domicile, to join a parent, wife, or children residing there, or to assume active control of an already possessed interest in a farming enterprise in this country; so that the three classes of laborers entitled to receive passports have come to be designated as "relatives," "former residents," and "settled agriculturalists."

Id. at 40 (citing FRANK F. CHUMAN, THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS 35 (1976)).

Japanese women who arrived between 1909 and 1923 were "picture brides"; roughly 23,000 picture brides came to the United States during that period.[155]

Like the Chinese, the combination of unbalanced sex ratio and low wages for female plantation workers contributed to a growing prostitution business among Japanese immigrants.[156] Similarly, many Japanese women who emigrated to America were abducted or tricked into prostitution.[157] Once they arrived in the United States, the women were often held in bondage by *amegoro* (pimps). While some prostitutes worked as barmaids, most worked in brothels. Prostitution was race-segregated, with separate brothels serving Whites, Chinese, and Japanese.

Despite high literacy levels, Japanese women were discriminated against in the labor market. Almost ninety percent of employed Japanese women in the United States and Hawaii in 1900 worked in agriculture or as domestic servants.[158] Japanese women worked arduously. As described by Japanese American sociologist Evelyn Nakano Glenn:

> Some went to remote labor camps that were built for railroad workers in the Mountain states, coal miners in Wyoming, sugar beet field hands in Utah and Idaho, laborers in lumbering camps and sawmills in Washington, and fish cannery workers in Alaska. Others, particularly those who stayed in California, went into the fields where their husbands tilled soil as tenant farmers. In addition to working alongside their husbands, women in labor camps and farms often drew their own water, gathered wood to cook and heat the house, and fought to keep dirt out of houses that were little more than shacks. . . . [W]omen whose husbands resided in urban areas were more fortunate. They too worked long hours and kept house in

155. Amott & Matthaei, *supra* note 95, at 221 & n.108; *see also* TAKAKI, *supra* note 49, at 248 (discussing picture bride practice as an extension of the arranged marriage custom); Sucheta Mazumdar, *General Introduction: A Woman-Centered Perspective on Asian American History*, *in* MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 1, 6-7 (Asian Women United of California ed., 1989).

156. Mazumdar, *supra* note 155, at 1-2.

157. *See* Amott & Matthaei, *supra* note 95, at 219; *see also* OKIHIRO, *supra* note 132, at 78; Yuji Ichioka, *Ameyuki-san: Japanese Prostitutes in Nineteenth-Century America*, 4 AMERASIA J. 1 (1977).

158. Amott & Matthaei, *supra* note 95, at 219-20 & tbl.7-2.

> crowded quarters, conditions were less primitive, and the presence of an ethnic community eased their adjustment.[159]

In 1900, nearly one-half of employed Japanese women worked in agriculture, and by 1930 approximately one-fourth worked in agriculture.[160] Between 1900 and 1930, many Japanese women worked in domestic service, while others entered sales, manufacturing, clerical, professional, and managerial jobs.[161] In 1940, just before the onset of World War II, thirty-eight percent of Japanese American women were employed in agriculture, ten percent in domestic service, and twenty percent in other service work. As authors Teresa Amott and Julie Matthaei note, "Their jobs shared certain common characteristics: they tended to be extensions of women's work in the home, they were labor intensive and paid low wages, they demanded long hours, and many of them were located in family-owned or other Japanese enterprises."[162]

The internment of Japanese citizens following anti-Japanese hysteria during World War II exacted severe hardships on Japanese families. As described by Valerie Matsumoto:

> Family unity deteriorated in the crude communal facilities and cramped housing. Overcrowding and lack of privacy drove many away from the one-room barrack "apartments," and family members gradually began to eat separately in the large mess halls: mothers with small children, fathers with other men, and older children with their friends. All family members spent more time than ever before in the company of their peers.[163]

Executive Order 9066, authorizing the internment of 120,000 Japanese American citizens and their American-born children who were residing in the western half of the Pacific Coastal States and southern third of Arizona, included 50,000 women.[164] There were important transformations in women's roles within the general difficulty of camp life. For example, wages, while extremely low, were equal for men and women, and women gained new variety in job

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159. GLENN, *supra* note 105, at 47-48.

160. *See generally* Gail M. Nomura, *Issei Working Women in Hawaii*, *in* MAKING WAVES, *supra* note 155, at 135-48 (discussing the history of Japanese women immigrants' work and diversification from agricultural into urban occupations).

161. Amott and Matthaei, *supra* note 95, at 220 & tbl.7-2, 224.

162. *Id.* at 227 & n.132.

163. Valerie Matsumoto, *Nisei Women and Resettlement During World War II*, *in* MAKING WAVES, *supra* note 155, at 116, 116-26.

164. *Id.* at 116.

assignments.[165] Also, women who had previously lived under fairly isolated rural conditions were in community with other women from urban and rural backgrounds.

When the War Relocation Authority slowly began to close the internment camps in 1942, Japanese Americans returned to areas on the West Coast. Upon returning to their previous neighborhoods, they were greeted with signs by new White inhabitants stating, "No Japanese Welcome."[166] Japanese Americans lost an estimated $400 million in property and other incalculable losses. Although many Japanese Americans remained on the West Coast, many others relocated to other regions in the United States.[167]

Following the 1965 amendments to the U.S. immigration laws, most of the vestiges of the Asian exclusion laws were removed. As a result of unlimited visas for certain relatives and a fixed/increased number of visas for others, about eighty percent of all legal immigration to the United States each year is from Asia, the Pacific Islands, and Latin America.[168] In addition, a sizable number of Southeast Asian refugees have come to the United States since 1975.[169]

While concepts of race often change over time,[170] historical perspective is important because so many of the practices and attitudes that surface in society and in law have deep roots in the past. For example, Chinese Americans are continually and contradictorily held to be perpetual foreigners and model Americans. Similarly,

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165. *Id.* at 117.

166. Amott & Matthaei, *supra* note 95, at 230.

167. In 1988, Congress enacted H.R. 442, known as the Civil Liberties Act of 1988, which authorized $20,000 reparations for each survivor of the internment camps and established a trust fund to support educational efforts toward the prevention of similar acts in the future. Matsumoto, *supra* note 163, at 125 & n.39. The U.S. Justice Department's Office of Redress Administration reportedly has paid more than $1.59 billion dollars to 79,656 recipients and is still searching for over 4000 eligible recipients. *U.S. Seeking 4,000 Japanese-American Redress Recipients,* Japan Economic Newswire Plus, June 9, 1995, *available in* DIALOG.

168. HING, *supra* note 42, at 38-41.

169. *Id.* at 125-28. William R. Tamayo, managing attorney of the Asian Law Caucus, argues that the disparate immigration policies of the early eras of Asian immigration are continuing under the recent immigration laws. According to Tamayo, the 1990 Immigration Act produced modest improvements in Asian immigrants' situations; however, "[t]he family reunification system received little increase and in fact the first preference [immediate family of U.S. citizens] was reduced in half." William R. Tamayo, *Asian Americans and Present U.S. Immigration Policies: A Legacy of Asian Exclusion, in* ASIAN AMERICANS AND THE SUPREME COURT, *supra* note 1, at 1105, 1123.

170. *See, e.g.*, Jones, *supra* note 18, at 449 and sources cited therein (noting the history of over-inclusive and under-inclusive conceptions of race: e.g., race as synonymous with nationality during the Civil War, and race as representing different species or subgroups of the same species under the earlier Linnaean theory).

Japanese Americans are perceived as enemy aliens and heroic Americans. Asian American women were incongruously constructed as socially passive and sexually submissive, and as exotic and sexually promiscuous. These indelible perceptions were forged in the legal precedents of the Exclusion Laws; constitutionally-affirmed, race-based detention; and other legal provisions directed against citizens of Asian descent. Thus, the imperative to understand the context in which race influences the contemporary socio-legal landscape demands comprehension of their historical origins. This is discussed in the next section.

2. Contemporary Constructions of Asian Identities

Due to racially exclusionist developments in American history, racial inequality has come to exist in a structural form, sanctioned and often created by law. Social constructions about Asian Americans are firmly rooted in legislative enactments and judicial rulings originating from the early period of Asian migration to America. The imprimatur of legal authority continues to have a profound effect on contemporary perceptions of Asian Americans in American society. Public attitudes and perceptions frequently follow statutory enactments, and the legal-political subversion that made Asian Americans less than full citizens served to reinforce what had formerly suggested their subhuman qualities. Bolstered by historical legal constructions, many racial stereotypes continue to inform societal views of Asian Americans. These social constructions define Asian Americans as docile and subservient, perpetual foreigners, presumptively poor communicators where English-language proficiency is limited, unfair economic competitors, "model minorities," inscrutable, and homogeneous.

a. *Forever Foreign*

The result of express discriminatory immigration and naturalization laws against generations of Asian American immigrants and their descendants has generated the pervasive construction of Asian Americans as "foreigner."[171] Many Asian American commentators have identified this as a defining characteristic of American "Orientalism."[172] Professor Neil Gotanda expresses the manner in

171. *See* U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S, at 14-15 (1992).

172. Professor and literary critic Edward Said has stated that the European conception of Asia and Asians as "the Other" was a European invention, which connoted

which the social categories "foreign" and "citizen" parallel the legal categories "alien" and "citizen," stating that:

> [F]or African Americans and Whites in twentieth century America, there is presumed a close correlation between U.S. citizenship and social status as an American. Similarly, for African Americans and whites, if such a person is not a citizen, then that person is probably not "socially" regarded as American but as "foreign." Thus, within the United States, if a person is racially identified as African American or white, that person is presumed to be legally a U.S. citizen and socially an American. . . . [T]hese presumptions are *not* present for Asian Americans, Latinos, Arab Americans, and other non-Black racial minorities. Rather, there is the opposite presumption that these people are foreigners; or, if they are U.S. citizens, then their racial identity includes a foreign component. These are the racial groups who, collectively, I have called "Other non-Whites."[173]

The "perpetual foreigner" constructions of Asian Americans are attributable to racist and nativist ideologies. Indeed, Professor Robert Chang has more aptly named the phenomenon as "nativistic racism."[174] As we have seen in the previous section, nativistic racism spawned discriminatory immigration laws, as well as statutes prohibiting land ownership by Asian Americans, among other anti-Asian legislative measures. More recently, nativistic racism has been reflected by official English language movements[175] and fear of a

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a place of "romance, exotic beings, haunting memories and landscapes, remarkable experiences." OKIHIRO, *supra* note 44, at 10 (quoting EDWARD SAID, ORIENTALISM 1 (1978)). According to Professor Said, "Orientalism" was an ideology that justified the further "feminization of Asia, colonization, characterizations of Asians as innately inferior." *Id.* at 10 & nn.19-21 (citing SAID, *supra*, at 1, 59, 62, 72, 74, 86, 207-08, 211, 222).

173. Gotanda, *supra* note 44, at 1095-96 & n.30 (citing T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9 (1990)).

174. Chang, *Asian American Legal Scholarship*, *supra* note 14, at 1256-57 n.61.

175. *See* Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293 (1989); Kathryn K. Imahara, *Language Rights Issues to the Year 2020 and Beyond: Language Rights Policy*, *in* THE STATE OF ASIAN PACIFIC AMERICA: A PUBLIC POLICY REPORT: POLICY ISSUES TO THE YEAR 2020 (LEAP Asian Pac. Am. Pub. Policy Inst. & UCLA Asian Am. Studies Ctr. eds., 1993); Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992). As Daina Chiu states, English-only movements are designed to force assimilation upon non-English-speaking Asian and Latina immigrants. As of 1992, 19 states had adopted measures making English the official language. Chiu, *supra* note 150, at 1078-79 & n.176 (citing *Update on Legal Official Recognition of English in*

Japanese-controlled United States economy.[176] As evidenced by the killing of Vincent Chin, foreignness continues to explain the manner in which racism is directed at Asian Americans.[177] While this reaction often is particularly strong toward those who retain the language, culture, and customs of their ethnic heritage, "even Asian Americans who exhibit no obvious cultural or linguistic signs of recent immigration are presumed to be foreign."[178]

Professor Mari Matsuda has extensively analyzed race, national origin, and class-based discrimination in the work place, finding that Asian Americans with discernible accents frequently face employment discrimination.[179] Professor Matsuda notes with respect to the social and historical forces in her native multilingual Hawaii:

Missouri, Louisiana, U.S. Newswire, Mar. 6, 1992, *available in* LEXIS, Nexis Library, USNWR File).

176. *See, e.g.*, Steve Garbarino, *Fear in a Climate of Japan Bashing*, NEWSDAY, Feb. 6, 1992, at 67 (discussing fear of Japanese takeover of Rockefeller Centre when Mitsubishi Corporation purchased 51% of shares); Mark Potts, *Japan and Mariners: Quandary for Game*, WASH. POST, Feb. 28, 1992, at F1; Mark Potts, *Japanese Cleared for Seattle Baseball Deal*, WASH. POST, June 10, 1992, at A1 (discussing controversy over Nintendo Corporation's purchase of shares in the Seattle Mariners baseball team). For a discussion, see Chang, *Asian American Legal Scholarship*, *supra* note 14, at 1257 (noting that the fears of "the Japanese 'taking over' " are conceptually flawed by confusing and/or equating private corporations to the Japanese people or the nation of Japan, and noting moreover that "Japanese investors owned less than 2% of United States commercial property").

177. *See infra* Part II.B.

178. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 171, at 20. Consider the frustrations of Representative Mineta: "[A]lthough my family has been in this country for more than 85 years, people still tell me with genuine surprise that I speak English remarkably well and without a trace of accent." *Anti-Asian Violence: Oversight Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong. 10 (1987) (statement of Representative Mineta) [hereinafter *Hearings on Anti-Asian Violence*]; *see also* Jerry Kang, Note, *Racial Violence against Asian Americans*, 106 HARV. L. REV. 1926, 1931 & n.41 (1993).

179. *See* Matsuda, *supra* note 175. Professor Matsuda analyzes societal prejudices and employment discrimination against people with different, less acceptable accents, proposing the use of Title VII to combat accent discrimination in the workplace. *See id.* at 1332. Professor Matsuda provides extensive analysis of Fragante v. City of Honolulu, 888 F.2d 591 (9th Cir. 1989), in which a Filipino-Hawaiian man took the civil service examination for a Division of Motor Vehicles position. *See* Matsuda, *supra* note 175, at 1333. Despite ranking first on the list of eligibles, he was turned down for the job of clerk based on a supervisor's low rating of his speech. In rejecting the applicant, the employer-interviewer's comments cited: "Difficult manner of pronunciation," and a "Pronounced" and "Heavy Filipino" accent. *See id.* at 1337 & nn.22-26. In addition, Professor Matsuda discusses Kahakua v. Hallgren, No. CV-86-0434-MDC (D. Haw. 1987), *aff'd sub nom.*, Kahakua v. Friday, 876 F.2d 896 (9th Cir. 1989), in which a native Hawaiian applicant with extensive experience in meteorology was denied a promotion after a speech consultant rated his speech unacceptable for weather broadcasts. A White applicant with no college degree and minimal experience in meteorology was selected for the position based on his "excellent" broadcasting voice. The judge discounted the testimony of the plaintiff's linguist who stated that Hawaiian Creole pronunciation is not incorrect, but is rather

> Native Hawaiians were encouraged to adopt English and abandon Hawaiian. There are some adults in Hawaii today who recall being punished for speaking Hawaiian. . . . Because the Creole arose among plantation workers, it was never the language of American whites who lived in Hawaii. A combination of racism, class bias, and linguistic intolerance meant that Creole speakers were segregated both residentially and in school.[180]

One aspect of the construction of Asian Americans as permanent foreigners is the perception of Asian Americans as unfair economic competitors. Since the earliest era of Asian immigration, politicians, business leaders, workers, and the media have characterized Asian Americans as unfair competitors in business, industry and employment.[181] Asian Americans in the United States are accused of taking jobs from "real" Americans.[182] The belief that Asian immigrants deprive Whites of jobs and business opportunities has recently been exemplified by the tensions between Vietnamese and White fishers in the Galveston Bay area in the Texas Gulf coast. When newly arrived Vietnamese immigrants began their independent shrimping operations in Kemah-Seabrook, the White American fishers decided that "there are just too many Vietnamese people in Kemah-Seabrook and therefore [the fishers would] be satisfied only when some of the Vietnamese le[ft] the area."[183]

In order to disrupt or destroy the Vietnamese immigrants' shrimping businesses, White fishers, with Ku Klux Klan assistance, threatened the Vietnamese community with cross-burnings, a "boat ride" while wearing Ku Klux Klan robes and shooting canons, burning Vietnamese-owned or operated shrimp boats, and pointing pistols at the Vietnamese fishers and their families.[184] The Vietnamese fishers filed a civil rights suit against their tormentors, and the federal district court enjoined the local fishers' campaign of violence

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one of the many varieties of pronunciation of standard English. *See* Matsuda, *supra* note 175, at 1341, 1345-46 & nn.58-62.

180. Matsuda, *supra* note 175, at 1343.

181. *See* Aoki, *supra* note 106, at 22-25 (noting the simultaneous and paradoxical characterization of Asian immigrants as superior and inferior to Whites, fueling conceptions of Asian immigrants as unfair economic competitors either because they had superior talent or because they worked for subpar wages).

182. See *Hearings on Anti-Asian Violence*, *supra* note 178, at 35.

183. Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1002 (S.D. Tex. 1981) (summarizing testimony of Seabrook Chief of Police R.W. Kerber).

184. *Id.* at 1001, 1003 n.3, 1004; *see also* Chew, *supra* note 4, at 61 (offering a discussion of the *Vietnamese Fishermen's* case).

and intimidation, so that the Vietnamese could "pursue their chosen occupation free of racial animus."[185]

The international dimension of the perception of Asian Americans as unfair competitors finds its source in the linkage of Asian Americans with the economic policies of Asian nations. The synergy between the domestic and international dynamics, which constructs Asian Americans as foreign, is central to understanding the context of Vincent Chin's death.[186]

b. *Model Minorities*

Perhaps the most prevalent contemporary social construction of Asian Americans is the "model minority" characterization, which conspires with the constructions of perpetual foreignness and unfair economic competitors.[187] Constructed as the model minority, Asian Americans have been located beneath Whites in the social hierarchy, but above other people of color. The media was key in the development and dissemination of this image. A few months after the 1965 Watts riots, the *New York Times* published an article by sociologist William Petersen entitled, *Success Story: Japanese American Style*.[188] A bevy of media enterprises followed suit by presenting a steady stream of such representations.[189] Professor Neil Gotanda exposes the way in which Asian Americans are situated within U.S. racial stratification:

> The image of Asians as model minority is a distinctly racial conceptualization. The perception of economic gains of Asian American small businesses (especially the image of the "Korean grocer"), the dramatic presence of Asians at U.S. colleges and universities, and Japanese automobile sales are blended together in a confusing mix. These various images of the successful Asian have only the Asian racial image in common. For example, economic ties between small businesses and Nissan Motors are nonexistent. Small Asian American businesses and giant Asian corporations share no political allegiances. Similarly, ties of

185. 518 F. Supp. at 1016-17.

186. *See infra* Part II.

187. The concept of Asian Americans as an exemplary racial group originates in the Reconstruction Era of the 19th century. *See* Wu, *supra* note 57, at 230-31.

188. William Petersen, *Success Story: Japanese American Style*, N.Y. TIMES MAG., Jan. 9, 1966, at 20.

189. For a sampling of media exegeses on Asian Americans' model minority status, see TAKAKI, *supra* note 49; Wu, *supra* note 57, at 236-37 & n.53.

> cultural tradition are irrelevant to the business enterprise. The common linkages are solely in the mainstream perception of racial similarity.[190]

Perpetuation of the model minority label to describe Asian Americans permits the perpetration of the twin tropes of American ideology: the notions that simply through hard work and determination, and individual effort, *anyone* can succeed in American society. While success is hardly possible without these attributes, it is misleading to assert them as the sole basis for societal advancement. The consequence of Asian Americans' portrayal as "model minorities" reinforces the racial and ethnic hierarchies of White supremacy and does not disrupt the popular image of America as a fair and just society, rather than one that is steeped in structural racism and other inequalities. Thus, despite its widespread acceptance, the model minority designation is misleading and pernicious for several reasons. As Professor Pat Chew states:

> The model minority label . . . suggests that Asian Americans, through their achievements, have been accepted as equals by others in American society. As models, the inference is that they have risen above historic subordination and societal perceptions of inferiority.
>
> Recent and extensive studies of what Americans think of Asian Americans, however, suggest that these positive inferences from the model minority label may be more aspirational than real.[191]

Significantly, while Whites perceive Asian Americans more positively than they do other people of color, they perceive Asian Americans less positively than themselves.[192] Compared to themselves, Whites perceived Asian Americans as less intelligent, more violence-prone, lazier, and more likely to prefer living off welfare.[193] Although some Asian Americans have subscribed to the model minority designation,[194] for many others the myth inscribes a false

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190. Gotanda, *supra* note 44, at 1089.

191. Chew, *supra* note 4, at 32.

192. *See id.* at 32-33 (citing Tom W. Smith, *Ethnic Images*, GEN. SOC. SURV. TOPICAL REP. No. 19 (1990); Lawrence Bobo & James R. Kluegel, Modern American Prejudice: Stereotypes, Social Distance, and Perceptions of Discrimination Toward Blacks, Hispanics, and Asians (Aug. 1991) (unpublished paper presented at the Annual Meetings of the American Sociological Association)).

193. *Id.* at 32.

194. Chang, *Asian American Legal Scholarship*, *supra* note 14, at 1260 n.79 (noting that former Senator S.I. Hayakawa was a proponent of the model minority myth); *see also* Wu, *supra* note 57, at 236 n.53 (noting that one official of the Japanese American

image of Asian Americans as leading problem-free existences. As Professor Robert Chang observes, "The successful inculcation of the model minority myth has created an audience unsympathetic to the problems of Asian Americans. Thus, when we try to make our problems known, our complaints of discrimination or call for remedial action are seen as unwarranted and inappropriate."[195] As expressed by a student in Professor Mitsuye Yamada's Ethnic American Literature class, the model minority myth can engender resentment against those Asian Americans who defy the construction of contentment: "It made me angry. *Their* anger made *me* angry, because I didn't even know the Asian Americans felt oppressed. I didn't expect their anger."[196]

Adherence to the myth produces real harms, then, when Asian Americans, particularly more recent immigrants of lesser means, including Laotians, Hmong, Cambodians, and Vietnamese, do not receive needed attention or assistance in response to their social and economic needs.[197] Even among more economically successful Asian

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Citizens League testified before the U.S. Civil Rights Commission in 1966 that "I am representing the most angelic of minorities in this community"), *quoted in* DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850, at 320 (1988). *But see* Reed Ueda, *False Modesty*, NEW REPUBLIC, July 3, 1989, at 16 (urging that Asians embrace model minority status).

195. Chang, *Asian American Legal Scholarship*, *supra* note 14, at 1260. A *Wall Street Journal* and NBC poll found that "most American voters thought that Asian Americans did not suffer discrimination," but instead received too many "special advantages." Murray Polner, *Asian Americans Say They Are Treated like Foreigners*, N.Y. TIMES, Mar. 7, 1993, at B1.

196. Mitsuye Yamada, *Invisibility Is an Unnatural Disaster: Reflections of an Asian American Woman*, *in* THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR, 35, 35 (Cherríe Moraga & Gloria Anzaldúa eds., 1981), *quoted in* Chang, *Asian American Legal Scholarship*, *supra* note 14, at 1261.

Related to the myth of model minority status is the social construction defining Asian Americans as docile and submissive. As one author posits:

> In part, this stereotype arises from average physiological differences in weight and height between Asian Americans and members of other racial groups. In part it stems from Western interpretations of certain Asian cultural and aesthetic values. In addition, Asian immigrants' desires to avoid calling attention to themselves, to survive silently, and to remain invisible further encourage the perception of submissiveness.

Kang, *supra* note 178, at 1931 (noting the particular potency of this image as applied to Asian American women); *see also Hearings on Anti-Asian Violence*, *supra* note 178, at 68; *see also supra* Part I.B.2.

197. Overlapping with the construction of Asian Americans as foreign and compliant is the perception of Asian Americans as interchangeable and indistinguishable. "[B]ecause many Asian Americans share similar gross physical characteristics, visually distinguishing one Asian American from another may be difficult, especially for non-Asian Americans." Kang, *supra* note 178, at 1932.

Thus, for many reasons, Asian Americans are viewed as monolithic. In reality, however, a large percentage of the Southeast Asian community live below the

Americans, income disparities persist. On average, more members contribute to family income among Asian Americans than among Whites, and earnings for Asian Americans are generally less than for Whites.[198] Information purporting to confirm the greater economic status of Asian Americans often cite Japanese and Chinese Americans as having incomes well above the national average.[199] Upon closer scrutiny, despite apparently surpassing economic parity, Asian Americans' success in this regard is achieved by acquiring more education and working longer hours than Whites in comparable employment positions and ages.[200]

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poverty level and often have much lower education rates and higher unemployment rates than the national average. The poverty rates of newer groups of Asian immigrants are listed at 67.2% (Laotians), 65.5% (Hmong), 46.9% (Cambodians), and 33.5% (Vietnamese). U.S. COMM'N ON CIVIL RIGHTS, *supra* note 171, at 17; *see also* Chew, *supra* note 4, at 28-30 & sources cited therein (discussing the poor socioeconomic status of Southeast Asian immigrants and refugees, as well as severe physical and psychological health problems for many in these communities). In Vietnamese, Cambodian, Hmong, and Laotian families, incomes range from $1600 to $5200 per year, which is far below the average. U.S. GEN. ACCOUNTING OFFICE, ASIAN AMERICANS: A STATUS REPORT 22, tbl.1.1 (1990).

198. Diane Crispell, *People Patterns: Family Ties Are a Boon for Asian Americans*, WALL ST. J., Sept. 28, 1992, at B1 (noting that 63% of Asian and Pacific Islander households have two or more earners, compared with 60% of White families; and that 19% have three or more earners, compared with 14% of White families); *see also* Arthur Brice, *Census Report: Asian Americans Earn Less Despite More Education*, ATLANTA J. & CONST., Sept. 18, 1992, at C5 (noting that Asian Americans with high school education who were working full-time earned an average of $2760 less than comparable Whites, and that Asian Americans with four or more years of college earned $1660 less than comparable Whites). Scholar Frank Wu also notes that belief in above-average Asian American incomes ignores geographic differences due to the concentration of Asian Americans in high-income, high-cost states such as New York, California, and Hawaii. Wu, *supra* note 57, at 245 n.104. According to the U.S. General Accounting Office, the average Asian American income is $6900, compared to $7400 for the average White American. U.S. GEN. ACCOUNTING OFFICE, *supra* note 197, at 22. The higher average annual household incomes of Asian Americans ($23,700) as compared to the rest of the U.S. population ($20,300) is partly explained by the larger size of Asian American households. *Id.* at 2.

199. *See, e.g.*, Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1157 (revised text of speech delivered on January 4, 1991, at Association of American Law Schools convention, where Posner cited Japanese Americans' incomes as being over 32% above the national average, and Chinese Americans' incomes as being over 10% above the national average), *cited in* Chang, *Asian American Legal Scholarship*, *supra* note 14, at 1261 & n.84.

200. Professor Takaki's research from the 1980s reveals that Japanese American men in California achieved comparable incomes to White men only upon acquiring 17.7 years of education compared to 16.8 years for White men 25 to 44 years old, and by working 2160 hours compared to 2120 hours for White men in the same age categories. TAKAKI, *supra* note 63, at 475.

For men in other Asian American groups, the income disparities are starker. According to Professor Takaki, in California, Korean men earned 82% of the income of White men, Chinese men earned 68%, and Filipino men earned 62%. In New York, Korean men earned 88% of the income of White men, Filipino men earned 76%, and Chinese men earned 52%. *Id.*

For Asian American women, race and gender dynamics combine to form a complex picture of employment and income disparities. In 1980, thirty-two percent of Asian American women were in the lowest-wage and lowest-status occupations of machine operator, farmworker, or service worker, as opposed to twenty-six percent of Whites.[201] Although a higher percentage of Chinese, Japanese, and Filipina women (thirty percent, twenty percent, and forty-one percent, respectively) have college or advanced degrees than do White women, the high proportion of Asian American educational success also obscures structural race- and gender-based disparities. Moreover, the evidence of Asian American women's stronger educational and economic advancement is conflicting. According to one researcher, "Controlling for educational and occupational status when compared to white women, Asian Pacific Islander women do as well if not slightly better, in terms of earned median income."[202] However, Professor Sucheng Chan concludes, "[D]espite their high educational level, [Asian American women] receive lower returns to their education than do white women."[203]

Professor Deborah Woo details the competing and contradictory realities of the model minority myth as it applies to Asian American women:

> Much academic research on Asian Americans tends to underscore their success, a success which is attributed almost always to a cultural emphasis on education, hard work, and thrift . . . . While the story of Asian American women workers is only beginning to be pieced together, the success theme is already being sung. The image prevails that despite cultural and racial oppression, they are somehow rapidly assimilating into the mainstream . . . . Moreover, they have acquired a reputation for not only being conscientious and industrious but docile, compliant, and uncomplaining as well.[204]

The geographical concentration of Asian Americans in areas where both income and cost of living are very high may further

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Familiar disparities are apparent from the 1990 census data on individual and aggregate family earnings. *See, e.g.*, Crispell, *supra* note 198, at B1; Brice, *supra* note 198; *see also* Chiu, *supra* note 150, at 1089-93 (discussing glass ceiling and occupational segregation experiences of Asian Americans).

201. Amott & Matthaei, *supra* note 95, at 250.

202. Henry Der, *Asian Pacific Islanders and the "Glass Ceiling"—New Era of Civil Rights Activism? Affirmative Action Policy*, *in* THE STATE OF ASIAN PACIFIC AMERICA, *supra* note 175, at 215, 220.

203. CHAN, *supra* note 42, at 169.

204. Deborah Woo, *The Gap Between Striving and Achieving: The Case of Asian American Women*, *in* MAKING WAVES, *supra* note 155, at 185-86.

mislead in assertions of Asian American men's and women's higher earnings. As Professor Woo explains:

> National income averages which compare the income of Asian American women with that of the more broadly dispersed Anglo women systematically distort the picture. Indeed, if we compare women within the same area, Asian American women are frequently less well-off than Anglo American females . . . . When we consider the large immigrant Asian population and the language barriers that restrict women to menial or entry-level jobs, we are talking about a group that not only earns minimum wage or less, but one whose purchasing power is substantially undermined by living in metropolitan areas of states where the cost of living is unusually high."[205]

For Asian American women in the professional classes, employment and earning inequities are no less striking. Professor Woo's research further reveals that "[i]n general, Asian American women with a college education are concentrated in narrow and select, usually less prestigious, rungs of the 'professional-managerial' class."[206] Moreover, census data suggesting confirmation of unqualified Asian American success emphasize significant Asian American representation in "professional-managerial" or "executive, administrative, managerial" categories. However, as managers, usually male, Asian Americans are concentrated in certain occupations: "They tend to be self-employed in small-scale wholesale and retail trade and manufacturing. They are rarely buyers, sales managers, administrators, or salaried managers in large-scale retail trade, communications, or public utilities. Among foreign-born Asian women, executive-managerial status is limited primarily to auditors and accountants."[207] Thus, idealizing Asian American men and women as model minorities without further interrogation of the realities underlying the myths obscures important facts about the discrepancies between individual and/or group achievement and institutional barriers which maintain racial, gender, economic, and social hierarchies.

Especially pernicious, too, is the message of the model minority myth to other groups of people of color. Express and implied, the message is that if Asian Americans could overcome the historic barriers of racial discrimination, they could also. Thus, while Asian

205. *Id.* at 188.
206. *Id.* at 190.
207. *Id.*

Americans are exalted in the mainstream media and American mindset as formidable profiles of work ethic success, the deprecation of African Americans, Native Americans, Latina/o Americans, and poor Whites has been magnified. The clamor for other groups of people of color to remake themselves in the image of the Asian American "model" has been sounded not only by the dominant culture but within communities of color as well. For example, William Raspberry, an African American columnist for the *Washington Post*, urged African Americans to get "beyond racism" and follow the model provided by "West Coast Asian Americans, who if they had waited for the end of anti-Oriental prejudice, might still be living in poverty, rather than outstripping white Americans in education and income, as they in fact are."[208] As the previous discussion has revealed, uncritical acceptance of the model minority characterization ignores centuries of history of Asian Americans and other peoples of color who have been reduced in the socio-economic structure by similar and vastly dissimilar experiences of inequality.

In the cauldron of discontent and devaluation within communities of color, interethnic tensions have increasingly erupted into violence. The tragic consequences that can result are exemplified by the killing of African American teenager Latasha Harlins, an accused shoplifter, by Korean American store owner Soon Ja Du, in March 1991.[209] Professor Reginald Robinson eloquently describes the interethnic dynamics underscoring the encounter:

> Rage and violence filled the exchange between Soon Ja and Latasha. Rage over a $1.79 bottle of juice seems overly dramatic—too emotional for the moment. A fifty-one year old woman, who Judge Karlins adjudged nonthreatening to the public, verbally and physically battered an African American child. "Bitch" and "What orange juice?" warrant less violence. Perhaps Soon Ja's rage came from hundreds of would-be Latashas, and perhaps Latasha's rage reflected the anger that had been corked up within the African American community. Seen in this light, the exchange of rage took place symbolically between envoys of warring communities who failed to understand that each side was required to decode the other's "bitch" and "what orange juice?" Instead, both envoys lost their patience; diplomacy aside, each wanted for a moment to speak honestly. Soon Ja, like Latasha, could probably predict war, but not at that

208. William Raspberry, *Beyond Racism*, WASH. POST, Nov. 19, 1984, at A23.
209. People v. Superior Court (Soon Ja Du), 7 Cal. Rptr. 2d 177 (Ct. App. 1992).

> moment. While tragic, the rage must be seen contextually, in its larger, socially important meaning.[210]

Professor Robinson further explains the sources of the interethnic discord:

> [A]part from individual violence between African and Korean Americans . . . , the *violent discourse* is a function of structural inequities, such as racial injustice and economic inequality . . . . This [inevitable socioeconomic pressure] follows from social difficulty and racial hardship that appear to be beyond a single individual's control. This absence of control is placed under erasure by the socialized other because this instability insists on exposing the source of other's disempowerment. This insistence can produce violent "talk," and the resulting violence between African and Korean Americans represents a form of talk—a means of communicating. Its message is riveting; it punctuates decades of rage and penetrates mere rhetoric. In the end, violence underscores the dissonance between words and meaning; it shouts, and it gets your attention. I call this form of "talk" "*violent discourse.*". . .
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> However, if *violent discourse* proceeds from the premise that Korean merchants have *caused* the present despair in black communities, African Americans' violent "talk" appears misguided. Racial injustice and economic inequality permeated black life before Asian merchants operated in African American communities.[211]

Interethnic conflicts have many origins and hence occur in many directions. The tensions running in both directions between the Korean and African American communities have received much attention. In addition to the Soon Ja Du/Latasha Harlins encounter, there have been other deaths and economic reprisals. Three months after Latasha Harlins was killed, store owner Tae Sam Park shot and killed Arthur Lee Mitchell during a struggle to thwart a theft.[212] The killing, and the decision by the Los Angeles County Prosecutor to

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210. Robinson, *supra* note 4, at 93 (footnotes omitted); *see also* Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901, 909-15 (1995); Jones, *supra* note 18, at 504 n.276 (discussing the sentencing judge's projection of fears of continuing hostility of African Americans in South Central Los Angeles through a racial lens, which resulted in a mere six-month sentence for Du).

211. Robinson, *supra* note 4, at 22, 24-25 (footnotes omitted).

212. *See* Hing, *supra* note 210, at 912-13 & n.56.

not press charges against Park triggered a lengthy boycott of Park's store.[213] In Hawthorne, California, store owner Wha Young Choi allegedly beat a twelve-year-old African American girl suspected of shoplifting.[214]

In October 1991, two African American burglars shot Kwang Yul Chun to death.[215] This followed the September 1991 shootings of two Korean shop workers by African American armed robbers; and in December, two African American robbery suspects shot Yong Tae Park to death at his store.[216] The Korean American community also expressed outrage at the killing of a nine-year old Korean girl by an African American during a hold-up of her parents' store.[217]

Similar incidents occurred on the East Coast. In January 1990, an altercation between a Korean American store owner and a Haitian American woman shopper who was suspected of shoplifting resulted in boycotts of Korean American-owned stores in Brooklyn, New York.[218] In August 1988, another altercation occurred between Korean and African Americans stemming from an accusation of shoplifting and a refusal to permit the Korean store owners to search the African American women's bags.[219] A fatal shooting by Korean grocer Chang Yung Soo resulted in the death of Kevin Coohill, an African American customer, after an argument in a Brooklyn grocery.[220]

Antagonisms run between other communities of color, as well. It has been noted, for instance, that "Koreans still resent their country's historical oppression by Japan. And Japanese and Chinese cultures and militaries have often clashed."[221] It is against this background that Richard Fung states, "[W]hile the Chinese, the Japanese, the Koreans, the Filipinos, and the Vietnamese had fought each other in their old countries, and sometimes continued to do battle in the new, they had one thing in common. Here, they were all branded with the mark 'oriental.' "[222] In another instance, in *Johnson v.*

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213. *See id.* at 913 & nn.57-60.

214. *See id.* at 914 & n.64.

215. *See id.* at 914 & n.65.

216. *Id.* at 914 & nn.68-69.

217. *Id.* at 914 & n.70.

218. *Id.* at 942-43.

219. *Id.* at 943.

220. *Id.* at 943 & n.229 (citing Michel P. McQueen, *Clashes with Koreans Spark B'klyn March*, NEWSDAY, Jan. 28, 1990, at 19); *see also* Robinson, *supra* note 4, at 50-51 (discussing incidents of interracial violence between African and Asian Americans in Washington, D.C., Brooklyn, and Manhattan).

221. Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 963 (1995).

222. Fung, *supra* note 14, at 162.

DeGrandy,[223] Latino and African American plaintiffs independently alleged that the Florida legislature's redistricting plan violated the Voting Rights Act of 1965 by diluting the strength of African Americans and Latinos in the Dade County area.[224]

Professor Charles Lawrence explains that the rising voices of interethnic tensions speak the language of White supremacy:

> When a Vietnamese family is driven out of its home in a project by African American youth, that is white supremacy. When a Korean store owner shoots an African American teenager in the back of the head, that is white supremacy. When 33 percent of Latinos agree with the statement, "Even if given a chance, [African Americans] aren't capable of getting ahead," that is white supremacy. When over 40 percent of African American voters in California support proposition 187, the antiimmigrant initiative, that too is white supremacy.[225]

Although White supremacist ideology cannot excuse the individual exercise of agency that is involved interethnic conflicts, it provides a persuasive explanation for the origins of much "violent discourse" between communities of color. It is here that the model minority moniker is revealed as an instrument in the service of maintaining racial and social hierarchy. As stated by Professor Lawrence:

> Those of us who are assigned a higher status on this ladder find that our belief in another group's inferiority gives us an investment in white privilege. We are rewarded for our racism and are less likely to experience the full force of our own subordination. Those of us who are assigned a lower status resent the relative privilege of those who are a rung above us on the ladder. We scapegoat the groups who are forced by their own subordination to live or work in proximity to us or take the menial jobs that would otherwise be ours. We express our anger and resentment in white racist terms, seizing on the stereotypes and symbols used by whites to label the targets of our anger inferior.[226]

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223. 114 S. Ct. 2647 (1994).

224. *Id.* at 2651-52; *see also* Ramirez, *supra* note 221, at 969.

225. Charles R. Lawrence, III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 829 (1995) (citations omitted).

226. *Id.* at 831 and sources cited therein (footnotes omitted).

Hostile racial stereotypes against Asian Americans, misconceptions about the universal affluence of Asian Americans, and beliefs that Asian Americans are responsible for a variety of social and economic ills, have contributed to racially motivated violence and discrimination against Asian Americans. In 1992, the U.S. Commission on Civil Rights documented that violence against Asian Americans had doubled since 1980.[227] Understanding the causal evolution of racist violence requires examining the social contexts in which it manifests itself.

What must be undertaken, then, is the more complex conversation about the varieties in which racial subordination and other sanctioned forms of inequality are manifested between and within communities of White Americans and communities of Americans of color. Reaching the deepest levels of this discussion will entail an interrogation of the role of law in perpetuating subordination and constructions of "otherness" throughout society and legal systems. Without this understanding, it will be impossible to effectively channel social activism and legal acumen to dismantle all structures of societal inequity. Understanding the contextualized experiences of racism operating within the criminal justice system is addressed in the next sections.

II. ANALYSIS OF *VINCENT CHIN*

> *[T]he history of Asian Americans and the Supreme Court . . . [i]s a story of a people who have largely been objects, not shapers, of a legal system they do not fully understand, a language they do not fluently speak, a melting pot into which they have not been allowed to assimilate. . . . [T]he sadness multiplies when one realizes that for each Asian American whose name and narrative appears here—Fong Yue Ting, Yick Wo, Korematsu, Hirabayashi, Gong Lum—thousands of others like them suffered in silence: faceless and voiceless casualties of an alien, hostile legal system.*[228]
>
> —Harold Hongju Koh

In contemporary times, particularly during the early 1980s, anti-Asian sentiment in the United States was heightened. This sentiment was particularly acute in Detroit, Michigan, where the heart of the American auto industry was economically depressed and Japanese

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227. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 171; *see also infra* Part III (discussing racially motivated crimes against Asian Americans).

228. Koh, *supra* note 1, at ix.

auto imports gained in sales and popularity in this country. It was within this social climate and other social contexts that the killing of Vincent Chin occurred, bringing national and international attention to the issue of racially motivated violence against Asian Americans in the United States.[229]

Ostensibly, the facts surrounding Vincent Chin's death are not in dispute. On June 19, 1982, Vincent Chin, a twenty-seven-year-old naturalized American citizen, went to the Fancy Pants Lounge in Highland Park, Michigan, with three friends to celebrate his upcoming marriage. Highland Park is a suburb of Detroit; it is also the headquarters of the Chrysler Corporation. Ronald Ebens, a general foreman at Chrysler, and his stepson, Michael Nitz, a Chrysler worker, were also at the Fancy Pants, a nude dancing club. Ronald Ebens and Michael Nitz sat across the elevated dancing runway from Vincent Chin and his friends, Jimmy Choi, Gary Koivu, and Robert Sirosky.[230]

As two female dancers, one White and one Black, performed a striptease on an elevated runway, Ebens reacted after watching Chin give a generous tip to the White dancer. "Hey, you little m—!" he shouted at Chin, telling the Black dancer, "Don't pay any attention to those little f—, they wouldn't know a good dancer if they'd seen one." Vincent Chin got up from his seat and started toward Ebens.[231]

"Little f—, big f—, we're all the same," Ebens said to Chin. Vincent Chin took umbrage at the remark and struck Ronald Ebens. A fight ensued. Ebens began making racial and obscene remarks toward Chin calling him a "Chink" and "Nip" and making remarks about foreign car imports. The dancers heard Ebens say that "it's because of little mother f— that we're out of work."[232] Ebens lifted a chair to strike Chin and struck his stepson's head instead. The doorman and parking lot attendant broke it up and ejected everyone. The verbal jousting continued in the parking lot. Chin called Ebens a "chicken s—" and challenged him to continue the fight in the parking lot. Ebens went to Nitz's car and removed a baseball bat. Seeing Ronald Ebens with the bat, Vincent Chin and his friends ran down the street. Ebens and Nitz pursued Chin, and upon meeting Jimmy Perry, Nitz offered Perry twenty dollars to help them go find the "Chinese guy." According to Perry's testimony, Ebens and Nitz

229. *See, e.g.*, Andersen, *Vincent Chin Case Gets National Audience*, ASIAN WK., July 14, 1989, at 1, 12.

230. United States v. Ebens, 800 F.2d 1422, 1427 (6th Cir. 1986); *see also* Michael Moore, *The Wages of Death*, DET. FREE PRESS, Aug. 30, 1987, at 15.

231. *See Ebens*, 800 F.2d at 1427; *see also* Moore, *supra* note 230.

232. *Ebens*, 800 F.2d at 1427.

talked during the ride about catching a "Chinese guy" and "busting his head" when they caught him.[233]

The ultimate confrontation occurred in the lot of a supermarket next to a McDonald's restaurant. After searching the area, Ebens and Nitz spotted Chin sitting outside the McDonald's. Nitz pulled into the lot, and Ebens jumped out. He ran toward Chin, bat in hand. Upon seeing Ebens coming, Chin ran out into the street. Nitz joined the chase and within seconds caught and held Chin while Ebens swung the bat into Chin's legs. Chin screamed and fell to the ground. Ebens continued to swing, breaking a number of Chin's ribs. While Vincent Chin was crumpled and bleeding on the pavement, Ebens struck him again, directly on the skull. Vincent Chin did not move. Two off-duty Highland Park police officers were among the two dozen or so people in or near the McDonald's who watched the entire scene as Ebens continued to bash the unconscious Chin. The officers ran out and ordered Ebens to drop his bat.[234]

Vincent Chin was taken to Henry Ford Hospital, losing consciousness several times en route. He suffered lacerations on the back left side of his head and abrasions on his shoulder, chest and neck. He lapsed into a severe coma, and after emergency surgery, his brain ceased functioning entirely. On June 23, 1982 at 9:50 p.m., the ventilator was removed and Vincent Chin was pronounced dead.[235]

Wayne County, Michigan, prosecutors originally charged Ronald Ebens, 43, and Michael Nitz, 23, with second-degree murder.[236] Ebens pleaded guilty to manslaughter prior to trial. Wayne County Circuit Judge Charles Kaufman sentenced each man in March 1983 to three years probation and fined them $3780.[237]

Chinese American citizens formed American Citizens for Justice, an advocacy group to protest the perceived leniency in the sentences and to raise awareness about the killing. After Judge Kaufman rejected the group's request to change the sentence, the committee appealed to the U.S. Department of Justice to investigate the case for civil rights violations. Ebens and Nitz were indicted in November 1983 on federal civil rights charges.[238] After a trial by jury,

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233. *Id.* at 1427-28.

234. *Id.* at 1428.

235. *Id.*

236. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 171, at 25.

237. *Id.* In Michigan, conviction of second-degree murder carries a maximum penalty of life in prison, and manslaughter carries a maximum sentence of 15 years in prison. MICH. COMP. LAWS ANN. §§ 750.317, 750.321 (West 1991); *see also infra* Part III (discussing Legal Formalism and Contextualized Reading of Criminal Law).

238. *Ebens*, 800 F.2d at 1425-26; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 171, at 25. There were two counts on the indictment. The first count alleged violation of 18

Michael Nitz was acquitted and Ronald Ebens was found guilty and sentenced to twenty-five years in prison.[239] Ronald Ebens appealed. The U.S. Court of Appeals for the Sixth Circuit ruled that Ebens was denied a fair trial and reversed his conviction on the basis of errors in rulings made by the district court.[240] The case was remanded for retrial, and Ebens' motion for change of venue to the Southern District of Ohio was granted.[241] When the case was retried in Cincinnati, Ohio, in 1987, the jury found that the assault was not racially motivated. Ronald Ebens was acquitted.[242]

U.S.C. § 241 (1988), charging conspiracy to deprive Vincent Chin of his civil rights. The second count alleged violation of 18 U.S.C. § 245(b)(2)(F) (1988), which provides:

> (b) "Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with . . .
>
> (2) any person because of his race, color, religion or national origin and because he is or has been . . .
>
> (F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; shall be fined under this title, or imprisoned not more than one year, or both; and if bodily injury results . . . shall be fined under this title, or imprisoned not more than ten years, or both; and if death results . . . shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

239. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 171, at 25.

240. One of the major reasons for the reversal involved the existence of tape recordings that Ebens' lawyers subpoenaed from the American Citizens for Justice (ACJ) which seemed to indicate that the group sought to influence the witnesses to tell a consistent story on the stand. According to the court of appeals, on the tapes, the attorney for ACJ, Lisa Chan, could be heard apparently trying to coax Choi, Koivu and Sirosky to corroborate each other's statements. *Ebens*, 800 F.2d at 1430-31, 1442-45 (discussion of transcripts and tapes).

241. United States v. Ebens, 654 F. Supp. 144 (E.D. Mich. 1987).

242. In addition to marked demographic differences between Detroit and Cincinnati, Cincinnati citizens were not aware of the degree of antipathy toward Asian Americans and particularly toward Japanese auto imports in the Detroit area in the early 1980s. These factors, possibly compounded by confusion about the elements for conviction under 18 U.S.C. § 245(b) (1988), may have accounted for the acquittal. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 171, at 26; CHAN, *supra* note 42, at 176-78; *see also* M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases*, 67 TUL. L. REV. 1855 (1993) (discussing choice of venue decisions within the context of racially charged cases, such
as the Rodney King case, and proposing that federal and state legislatures enact

Although the outlined facts in the Vincent Chin case were not in dispute,[243] central questions remain concerning the motivation for the killing and the operation of the criminal justice system under which Ronald Ebens and Michael Nitz pled guilty to lesser charges and ultimately evaded substantial penalties for the killing of Vincent Chin. The next section examines these issues as they are presented in *Who Killed Vincent Chin?* The pedagogical value of the film also is explored as an interactive medium to examine criminal law homicide doctrine in a contextualized discourse based on the events culminating in Vincent Chin's death.

A. *Pedagogical Perspectives*

Legal educational methods have come under sharp criticism for various reasons. Many of the criticisms focus on adherence to the reformulation of American legal education in 1870 by Christopher Columbus Langdell, the dean of the Harvard Law School. Langdell declared the study of law to be a science that was to be taught from old English cases, in chronological order, primarily in Socratic dialogue.[244] Langdell's most far-reaching reform was the introduction of the case method for teaching law. According to the method, the teacher became a Socratic guide to the excavation of concepts and principles buried within the cases.[245] Although the Langdell school dominated legal education in the first half of the twentieth century,[246] there were early criticisms of the method as being unsuitable for developing good lawyers. For some critics, the Langdellian method severed the connections between the study of law and American political, social, and economic policies. In short,

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statutes which require consideration of demographic similarities of the alternative site in choice of venue decisions, beyond the traditional factors of cost, convenience, and the degree of publicity).

243. In claiming that there was insufficient evidence to convict based on 18 U.S.C. § 245 (1988) in the subsequent civil rights trial, Ronald Ebens essentially admitted the physical facts of the assault; however, he denied that there were any racial motivations attending his conduct. *See Ebens*, 800 F.2d at 1428.

244. John Henry Schlegel, *Searching for Archimedes—Legal Education, Legal Scholarship, and Liberal Ideology*, 34 J. LEGAL EDUC. 103, 104-05 (1984) (citing ROBERT B. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983)). After Harvard's adoption of the Langdellian method, early converts were Northwestern, Columbia, Western Reserve, Cornell, Stanford, and the University of Chicago. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 612-15 (1985).

245. FRIEDMAN, *supra* note 244, at 612-13. Professor Friedman also notes that Langdell was not the first to teach through cases. John Norton Pomeroy used a case method at New York University Law School in the 1860s. However, Pomeroy did not "shape the whole program of a leading school" with this technique. *See id.* at 513, n.20 (quoting J. WILLARD HURST, THE GROWTH OF AMERICAN LAW 261 (1950)).

246. FRIEDMAN, *supra* note 244, at 593.

the legacy of Langdell is that law became divorced from society and life.[247]

These and other criticisms led to a search for alternatives to the Langdellian method. One significant alternative was the Legal Realism movement. Legal realists rejected the work of nineteenth century judges and scholars, with their emphasis on legal logic and purity of concepts. Instead, the legal realists were concerned with the actual value and use of legal rules. Under this approach, law had to be a working tool; it also had to be regarded as such.[248] Oliver Wendell Holmes' oft-quoted edict that "[t]he life of the law has not

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247. The Langdellian method continues to predominate in legal education and maintains many proponents. Considering criticisms of the Langdellian method, one can also acknowledge that "appellate opinions can serve as an especially useful vehicle for the education of sentiment as well as to teach the importance of approaching abstract principles skeptically." *See* Terrance Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163 (1984). As Dean Sandalow argues:

> Appellate opinions . . . report only carefully selected facts, and even those are often stated in highly abstract fashion; they are, for that reason, implausible vehicles for conveying a sense of the variousness and complexity of life. But though it is true that the opinions are written in that way, it does not follow that they must be read in the same way. A skillful teacher will lead students to read opinions imaginatively, with attention to the human possibilities that lie beneath their abstract language. The exploration of these possibilities, conjoined with consideration of their implications for judgment, offers opportunity for developing that fusion of feeling and intellect we call sensibility.

Id. at 172. In this regard, Dean Sandalow emphasizes two points:

> First, legal education can dull sensibility as well as enlarge it. A failure to devote class time to probing beneath the abstract language that judicial opinions typically—and statutes invariably—employ conveys to students the lesson that emotion and the complexities of life are irrelevant to law. And by leading students during a formative intellectual period to think only in abstract categories, legal education can dull both feeling and their sensitivity to complexity. But a second point needs also to be recognized. The appropriate objective is not the release of feeling, but its education. This . . . requires bringing feeling into contact with the full range of life's possibilities, but it also requires that it be brought into contact with those general ideas we call knowledge.

Id.; *see also* Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517 (1991) (suggesting modifications to Langdell's case method of teaching that would synthesize both practical lawyering skills and intellectual abstraction).

248. The works of Karl Llewellyn, Jerome Frank, and Arthur Corbin epitomize legal realist scholarship. FRIEDMAN, *supra* note 244, at 591-93. Judicial adherents include Chief Justice Earl Warren, during whose Supreme Court tenure, as Professor Friedman states, "overruling became positively epidemic." *Id.* at 592. For representative works, see, e.g., Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947); Karl N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935).

been logic; it has been experience," best captures the realists' philosophy.[249] As Professor Elizabeth Mensch states:

> The realists urged judges to eschew the rigid, abstract formalism of constitutionally protected property and contract rights in favor of increasing deference to the legislative adjustment of competing claims, enacted in the service of a larger "public interest." Meanwhile, in private law, enlightened, progressive judges should be willing to sacrifice rigid adherence to the logic of doctrine for the sake of doing a more commonsense and overtly policy-oriented "justice within the particular context of each case."[250]

Other responses to legal educators' dissatisfaction with the case method have included a variety of methods designed to incorporate realism into the study of law.[251] Most notably, clinical education, simulation, and problem methods emerged to meet these goals.

Although the earliest legal education followed a clinical education model, that is, an apprenticeship in which the clerking attorney worked under the direction of a more experienced attorney, clinical education has remained controversial since its resurgence in the 1960s.[252] Professor Robert Dinerstein states that:

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249. OLIVER W. HOLMES, JR., THE COMMON LAW 1 (1881).

250. Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 13, 21 (David Kairys ed., 1990).

251. With respect to this effort, Professor Melvyn Zarr observes:

> Students rightly sense that the meaning of legal concepts is intimately tied to the workings of the legal process and that whatever the appellate court decides has real meaning only if understood in the context of the entire case. The students rightly sense that a great deal has happened in the case before the appellate stage, and that, if a retrial is ordered, more is yet to come. . . . There is demonstrable need for delving more deeply into the process and rationale of trial and appeal. But this is subordinated to the need for "coverage." . . . The professor will try to fill in the blanks. . . . But for the students, never having been exposed to a whole case, it is an uphill struggle.

Melvyn Zarr, *Learning Criminal Law Through the Whole Case Method*, 34 J. LEGAL EDUC. 697 (1984).

252. William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 465-66 & nn.7-10 (1995). For a brief history of clinical legal education, see *id.* at 465-71. Although it would seem that few would dispute the obvious benefits of students learning through clinical legal education methodology, since the case method gained primacy in legal education, "hands-on" methodologies became intellectually suspect in many quarters. Many writers have explicated the falseness of such dichotomous valuations of legal learning and knowledge—skills versus analysis—and have explained that these forms of learning and pedagogy form a continuum of complementary opportunities for legal education. *See, e.g.*, David Barnhizer, *The University Ideal and Clinical Legal Education*, 35 N.Y.L. SCH. L. REV. 87 (1990); Richard A. Boswell, *Keeping the Practice in*

> To many people, the relationship between clinical programs and the justice mission of American law schools is so clear as to be self-evident . . . . Indeed, for many law students, the law clinic may be the *only* place in which concerns about justice are discussed and, at least sometimes, acted upon.[253]

For all of its attributes, however, clinical legal education cannot meet all of the demands to provide authentic lawyering experiences,[254] particularly when many clinical educators and programs remain marginalized within their institutions.[255] Thus, time constraints and student-teacher ratios often limit the extent of clinical offerings in an institution. These factors, compounded by ever-present fiscal concerns, call for expanded opportunities for students to obtain experiential learning.

The problem method of instruction is frequently used in law schools, particularly in advanced courses. As described by proponents, the problem method is a "major alternative to case method teaching."[256] Professor Gregory Ogden defines the method by what is required of the student: "The student is expected 'to focus his study on a problem or problems posed in advance of the class. His task is to wrestle with each problem drawing on whatever material may have been assigned to be studied in connection with it.' "[257] There are disadvantages associated with the problem method, however. As Professor Ogden observes, the problem method is time-consuming

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Clinical Education and Scholarship, 43 HASTINGS L.J. 1187 (1992); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991); Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749 (1992); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577 (1987).

253. Robert D. Dinerstein, *Clinical Scholarship and the Justice Mission*, 40 CLEV. ST. L. REV. 469, 469 (1992).

254. *See* James M. Brown, *Simulation Teaching: A Twenty-Second Semester Report*, 34 J. LEGAL EDUC. 638, 639 (1984) (discussing selected benefits of simulation in comparison to clinical programs).

255. Boswell, *supra* note 252, at 1192-93; *see also* Donald Schon, *Educating the Reflective Legal Practitioner*, CLINICAL L. REV. 231 (1995) (discussing the historical status of clinical legal educators); *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 512 (1992) (describing the variety of clinical educational offerings and the consensus amongst programs on the nine primary goals of clinical education).

256. Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654, 654 (1984); *see also* Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992); Stephen Nathanson, *The Role of Problem Solving in Legal Education*, 39 J. LEGAL EDUC. 167 (1989); Charles R. Calleros, *Variations on the Problem Method in First-Year and Upper Division Classes*, 20 U.S.F. L. REV. 455 (1986).

257. Ogden, *supra* note 256, at 654-55 (footnote omitted).

for instructors and students; like the clinical programs, small classes work best for this pedagogy, but that is an expensive proposition, and preparing problems requires specialized skill. Furthermore, this method raises questions of potential compromises in course coverage and is less real than simulation or clinical courses.[258]

The use of simulation exercises has been widely adopted in clinical courses;[259] increasingly they are being incorporated into traditional classroom settings.[260] However, several difficulties arise with the simulation model. As noted by Professor Andrew Taslitz:

> Specifically, it has been suggested that: (1) the time required to draft a good simulation is not worth its benefits; (2) some faculty members are uncomfortable teaching particular skills at which they may have had little practice; (3) simulation is a time-consuming exercise which may cut into time necessary to achieve other course goals; and (4) simulations are difficult to conduct in a large class.[261]

More recently, however, critics have identified more pervasive problems throughout legal education. The traditional guise of value-neutral principles which permeates legal education has been disclosed by legal educators and scholars who call for more critical and contextualized analyses of law and its operation in society. As Professor Peter Shane states: "The values and practices of most academic communities in this country still predominantly reflect a set of experiences and expectations most associated in our culture with white, mainstream, Protestant, heterosexual, elite men. These

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258. *Id.* at 664-66.

259. *See* Stacy Caplow, *Autopsy of a Murder: Using Simulation to Teach First Year Criminal Law*, 19 N.M. L. REV. 137 (1989) (describing the reliance on simulation exercises in clinical programs to accomplish several goals, including teaching legal process and specific skills to universalize the students' experiences, to emphasize critical decision making, and to raise professional responsibility and values concerns).

260. *See, e.g.*, Brown, *supra* note 254, at 638; Caplow, *supra* note 259 (describing the development of an elaborate simulation exercise for first year students in a criminal law course).

261. Andrew E. Taslitz, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 HASTINGS L.J. 143, 168-69 & nn.109-13, (citing THOMAS E. GUERNSEY, PROBLEMS AND SIMULATIONS IN EVIDENCE: INSTRUCTOR'S MANUAL at iii-iv (1991) (referring to Thomas Guernsey's approach to resolving these issues)). Professor Stacy Caplow expressed similar reservations: "I am not wholly convinced that the project added to the depth and breadth of the students' knowledge of substantive criminal law to justify the extra time and effort required of all the participants." Caplow, *supra* note 259, at 138.

experiences and expectations are, indeed, so predominant that they are often claimed falsely to embody neutrality."[262]

Critical legal scholars[263] begin from the premise that identity, perspective, and context matter. Across disciplines, critical legal scholars challenge the claims of objectivity, and claims of knowledge and power as universal. Identifying the bias(es) in purportedly neutral principles requires intellectual vigilance. It means, among other concerns, ferreting out implications based on gender,[264] class,[265]

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262. Peter M. Shane, *Why Are So Many People So Unhappy? Habits of Thought and Resistance to Diversity in Legal Education*, 75 IOWA L. REV. 1033, 1034 (1990).

263. By "critical legal scholars," I do not mean to refer exclusively to the "Critical Legal Studies" (CLS) movement in legal education. As described by Professor David Trubek, the goals of the CLS movement are to "expose the assumptions that underlie judicial and scholarly resolution of such issues, to question the presuppositions about law and society of those whose intellectual product is being analyzed, and to examine the subtle effects these products have in shaping legal and social consciousness." David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 588-89 (1984).

However, despite its value in critiquing the underlying assumptions in the law, CLS has been criticized for its own theoretical shortsightedness in failing to observe intersectional analyses, such as issues of race and gender. *See, e.g.*, Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1868 (1990); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1369 (1988); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61 (1988); Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. J. 103 (1987).

Furthermore, CLS has been duly criticized for paying scant attention to substantial areas of legal doctrine, particularly criminal law. As Professor Kathryn Russell notes:

> Given the apparent charge and worth of a critical legal critique, it is surprising that critical legal scholars have focused so little of their attention upon criminal law. . . . [T]he relative omission of criminal law from the critical legal scholars' scrutiny is particularly glaring given the seminal role criminal law plays in the American legal system.

Katheryn K. Russell, *A Critical View from the Inside: An Application of Critical Legal Studies to Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 222, 223-24 (1994). In accord with the purposes of this article, Professor Russell argues that "[i]t is precisely the importance of criminal law to the social order which necessitates its close scrutiny." *Id.* at 226.

264. *See, e.g.*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Patricia Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1990); Mary I. Coombs, *Non-Sexist Teaching Techniques in Substantive Law Courses*, 14 S. ILL. U. L.J. 507 (1990); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Ann E. Freedman, *Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School*, 4 GA. L. REV. 849 (1990); Goldfarb, *supra* note 252; Harris, *supra* note 14; Menkel-Meadow,

sexuality,[266] ableism,[267] and of course, race in ostensibly neutral principles and practices of law. In feminist legal theory, for example, the *sine qua non* is consciousness-raising and questioning express and implied male norms in legal reasoning and practices.[268]

Critical race scholarship, then, is equally distinctive by its challenge to purportedly normative values underpinning legal doctrine. Like other forms of critical legal theory, critical race theory advances the contexts, perspectives, and entrenched hierarchies within the law. Articulating the need for a critical race analysis, Professor Kimberlé Crenshaw argues:

> Racism is a central ideological underpinning of American society. Critical scholars who focus on legal consciousness

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supra note 263; Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

265. *See* Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988); Regina Austin & Sharon Dietrich, *Employer Abuse of Low-Status Workers: The Possibility of Uncommon Relief from the Common Law*, *in* THE POLITICS OF LAW, *supra* note 250, at 350; Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW, *supra* note 250, at 38; Karl E. Klare, *Critical Theory and Labor Relations Law*, *in* THE POLITICS OF LAW, *supra* note 250, at 61.

266. *See* Elvia R. Arriola, *Gendered Inequality: Lesbians Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103 (1994); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); Paula L. Ettelbrick, *Who Is a Parent? The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513 (1993); Leigh Megan Leonard, *A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption*, 12 WOMEN'S RTS. L. REP. 39 (1990); RUTHANN ROBSON, LESBIAN (OUT) LAW: SURVIVAL UNDER THE RULE OF LAW (1992); Sharon E. Rush, *Sexual Orientation: A Plea for Inclusion*, 10 BERKELEY WOMEN'S L.J. 69 (1995); Jeffrey G. Sherman, *Speaking Its Name: Sexual Orientation and the Pursuit of Academic Diversity*, 39 WAYNE L. REV. 121 (1992); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

267. *See* Nasa Begum, *Disabled Women and the Feminist Agenda*, 40 FEMINIST REV. 70 (1992); Keri K. Gould, *And Equal Protection for All . . . The Americans with Disabilities Act in the Courtroom*, 8 J.L. & HEALTH 123 (1993-94); Deirdre M. Smith, Comment, *Confronting Silence: The Constitution, Deaf Criminal Defendants, and the Right to Interpretation during Trial*, 46 ME. L. REV. 87 (1994); Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans with Disabilities*, 43 EMORY L.J. 245 (1994) (reviewing JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993)); Barbara Faye Waxman, *Hatred: The Unacknowledged Dimension in Violence against Disabled People*, 9 SEXUALITY & DISABILITY 185 (1991).

268. By asking what Professor Katharine Bartlett calls "the woman question," male-based normative assumptions are investigated for the inclusion (or exclusion) of women's perspectives, life experiences, and other factors which lend context to analysis and understanding. The authority of lived experiences becomes a measure of the authenticity of the law. Katharine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837-49 (1990); *see also* Goldfarb, *supra* note 252, at 1626; Menkel-Meadow, *supra* note 264.

> alone thus fail to address one of the most crucial ideological components of the dominant order. The CLS practice of delegitimating false and constraining ideas must include race consciousness if the accepted object is to transcend oppressive belief systems. [269]

Critical race scholars have identified several defining elements of the genre: (1) "recogniz[ing] that racism is endemic to American life"; (2) "[expressing] skepticism toward dominant legal claims of neutrality, objectivity, color blindness, and meritocracy"; (3) "challenging ahistoricism and insisting on a contextual/historical analysis of the law"; (4) "insisting on recognition of the experiential knowledge of people of color and our communities of origin in analyzing law and society"; (5) "[borrowing] from several traditions, including liberalism, law and society, feminism, Marxism, poststructuralism, critical legal theory, pragmatism, and nationalism"; and (6) "[working] toward the end of eliminating racial oppression as part of the broader goal of ending all forms of oppression . . . [as] experienced by many in tandem with oppression on grounds of gender, class, or sexual orientation."[270]

Yet, in fulfilling the mission to "ask the race question,"[271] critical race scholars and scholarship have increasingly been criticized for bipolar approaches to racial dilemmas embedded in law. Professor Robert Chang asserts that "[c]ritical race theory . . . claims that race matters but . . . has not yet shown how different races matter differently."[272] To the extent that Professor Chang's observation reflects a

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269. Crenshaw, *supra* note 263, at 1336 (footnote omitted); *see also* John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990).

270. CHARLES R. LAWRENCE, III, ET AL., *Introduction* to WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 1, 6-7 (1993).

271. *See* Bartlett, *supra* note 268, at 837 (explaining "the woman question"). In analogous fashion, critical race theorists ask "the race question."

272. Chang, *Asian American Legal Scholarship*, *supra* note 14, at 1248 & n.13 (extending a challenge to critical race scholars to explore more fully the different experiences of racism, particularly pertaining to Asian Americans). Professor Deborah Ramirez observes that demographic changes from 1960 to 1990 reveal the steady increase in Americans who identify as people of color. According to Professor Ramirez, between 1980 and 1990, the Asian American population grew by 107.8%, and the Latino population by 53%, while the number of non-Latino Whites increased by only 6%. Ramirez, *supra* note 221, at 960. In 1960, Blacks comprised 96% of the population of people of color. Increases in the Asian and Latino communities have changed the demographics such that Blacks are currently about 50% of the population of people of color. *Id.* at 962. With further projections that Latinos will be the majority group of people of color in the United States in the 21st century, Professor Ramirez concludes that " '[m]inority' [i]s [n]o [l]onger a [s]ynonym for 'African-

less inclusive exploration of racial and ethnic experiences within critical analyses of law and society, it presents a challenge and an opportunity to engage in a multifaceted critical discourse. This call for expanded subjectivity on the issue of race in law must be heeded throughout the range of legal affairs involving doctrinal development, legal education, and law practice. Because the academy maintains gatekeeper status on future involvement in most aspects of legal affairs, multiple perspectives, pedagogical techniques, and interactive learning experiences must become integral to the educational scheme. Thus, even without total rejection of the Langdellian method and other pedagogical schools, it is clear that legal theory and legal education must include more of the contexts in which law shapes our lives, *all of our lives*.[273]

American.' " *Id.* at 960 & nn.12-16, 962 & nn.25-28; *see also* Hernández Truyol, *supra* note 15, at 373-74 & n.14 (stating that "[within the wealth of 'outsider jurisprudence'] there appears to be a void: a critique or analysis of the law from the particular perspective of Latinas'/os' experience").

As scholar Frank Wu proclaims, "The time has come to consider groups that are neither black nor white in the jurisprudence on race." Wu, *supra* note 57, at 225. He then proceeds to assert the following:

> [B]ipolarity is an organizational scheme both imposed by and reflected in the law. Bipolarity has been associated with essentialism in the conception of race. Race is conceptualized as breaking down into two all-encompassing and mutually exclusive categories, black and white. Race is further conceptualized as biological fact, relatively immutable, always visible in skin color, and a defining facet of a person. These trends toward bipolarity and essentialism manifest themselves as white against black, majority against minority, or American against foreign. Racial groups are conceived of as white, black, honorary whites, or constructive blacks.

Id. at 248-49 (footnotes omitted).

Asian American legal scholars have been among the leading voices to raise concerns regarding essentialist and bipolar racial analyses. *See, e.g.*, OMI & WINANT, *supra* note 38; Aoki, *supra* note 106; Chang, *Asian American Legal Scholarship*, *supra* note 14; Chang, *Meditation*, *supra* note 14; Chon, *supra* note 42; Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of* Justice at War, 85 COLUM. L. REV. 1186 (1985) (reviewing IRONS, *supra* note 129); Gotanda, *supra* note 34; Gotanda, *supra* note 44, at 1087; Sharon K. Hom, *Engendering Chinese Legal Studies: Gatekeeping, Master Discourses, and Other Challenges*, 19 SIGNS 1020 (1994); Ikemoto, *supra* note 4; Lee, *supra* note 36; Matsuda, *supra* note 175; Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989).

273. In this regard, we would do well to embrace the words of activist educator Angela Davis:

> It is our responsibility to examine the rich histories of all of our sisters. In deciding to define ourselves as "women of color" we assent to a unity which, in turn, urges us to inform ourselves about those with whom we unite. We rightfully claim that we have been relegated to the margins of history and have been denied the opportunity . . . to acquire knowledge about ourselves. By and large, the knowledge accessible to us has been determined in accordance with race, gender, and class biases. Having challenged institutions of

In criminal law, for instance, topics often seem facially neutral; however, when viewed from the perspective of real-life experience, the manner in which these topics are taught often expose them as racially and culturally biased.[274] As Dean Gregory Williams observes: "The purpose of endorsing the 'objective view' is to attempt to create an illusion that we have a relatively smoothly functioning criminal justice system where judges, police, prosecutors and defense counsel all reason in a similar manner and all share a common set of beliefs and normative values."[275] Furthermore, Socratic and other approaches to legal education that profess neutrality of legal principles often alienate students of color and give an unrealistic worldview to non-minority students.[276] The consequences of such an allegiance to "neutral" principles of law can be extensive, affecting students' perspectives and their chances of academic and professional success. The reliance on hidden or overt stereotypes in law school examinations, for example, may seriously affect a student's psyche, as well as his or her grade.[277] In this way, harmful potential

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learning for having relegated us to a state of invisibility, let us not replicate this process among ourselves.

Angela Y. Davis, *Keynote Address: Third National Conference on Women of Color and the Law*, 43 STAN. L. REV. 1175, 1176 (1991).

274. *See* Gregory Howard Williams, *Teaching Criminal Law: "Objectivity" in Black and White*, 9 HARV. BLACKLETTER J. 27 (1992).

275. *Id.* at 29.

276. Other students who experience having "outsider" perspectives in the law school environment also describe feelings of alienation from the material and methods of legal education. In a study of women law students at Yale, for instance, the women attributed their silence in the classroom to "alienation from self, community, the classroom, and the content of legal education." Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 206 & n.83 (1991) (citing Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988)). The participants in the Yale study criticized the content of legal education and complained that legal education was "too theoretical" and indifferent to real-world issues, yet "not theoretical enough" and lacking in adequate "inquiry into the social, historical, political, or economic underpinnings of the cases." *Id.* at 206 & nn.88-89 (quoting Weiss & Melling, *supra*, at 1347). Professor Taunya Banks' work has also been instrumental in identifying the loci of the disaffection experienced by women law students and students of color. *See* Taunya Lovell Banks, *Gender Bias in the Classroom*, 14 S. ILL. U. L.J. 527 (1990).

277. Professor Patricia Williams discusses the phenomenon of gratuitous references to race, gender, and sexual orientation in law school examinations, finding that when such human dilemmas and dimensions are not the subject of the problem, they are reduced to the same racist, sexist, classist, homophobic, and ableist generalizations and stereotypes. Moreover, she recognizes, such uses place "an enormous burden on black [and other marginalized] students . . . who must assume, for the sake of answering these questions, these things about themselves." PATRICIA J. WILLIAMS, *Crimes Without Passion*, *in* THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 82 (1991). Illustrating her point, Professor Williams states:

> [I]n the Othello problem, the exam is put in a frame where to contest those subtly generalized "truths" (blacks are sexually dangerous, blacks are milita-

> ristic—would the Capulets or the Montagues ever be characterized as "militaristic"?) is not only irrelevant but costs the student points: it is, according to the model answer, *necessary* to argue that "a rough untutored Moor might understandably be deceived by the wiles of a more sophisticated European." In other words, a student who refuses to or cannot think like a racist—most people of color, I would guess—will receive a lower grade. My further guess is that everyone, including perhaps the students of color, will rationalize this result away as an inability to "think like a lawyer."

Id.

From her survey of exams, Professor Williams concluded that the problems drew their justifications from the "preference for the impersonal above the personal, the 'objective' above the 'subjective.' Most of these problems require blacks, women who have been raped, gays and lesbians, to not just re-experience their oppression, but to write *against* their personal knowledge." *Id.* at 87. Upon compiling exams on a variety of subjects, given at law schools around the country, Professor Williams found:

> • a tax exam that asks students to calculate the tax implications for Kunta Kinte's master when the slavecatchers cut off his foot;
>
> • a securities-regulation exam in which the professor muses about whether white-collar defendants should go to jail, since "unlike ghetto kids" they are not equipped to fare in that environment;
>
> • a constitutional law exam in which students are given the lengthy text of a hate-filled polemic entitled "How to Be a Jew-Nigger" and then told to use the first amendment to defend it;
>
> • a description of the "typical criminal" as a "young black male with an I.Q. of 87 who is one of eight children and has always lived on welfare and who spends his time hanging out in pool halls with his best friend Slick";
>
> • numerous criminal law exams whose questions feature exclusively black or Hispanic or Asian criminals and exclusively white victims;
>
> • many questions depicting gay men as the exclusive spreaders of AIDS, asking students to find the elements of murder;
>
> • many, many questions in which women are beaten, raped, and killed in descriptions pornographically detailed (in contrast to streamlined questions, by the same professors, that do not involve female victims).

Id. at 84-85.

The phenomenon that Professor Williams has discussed may be more widespread than previously imagined. Law school can be a particularly anger-producing and painful experience for students who find negative characterizations of themselves as inculcated into exams, as well as in classroom experiences. *See* Paula C. Johnson, *The Role of Minority Faculty in the Recruitment and Retention of Students of Color*, 12 N. ILL. U. L. REV. 1075 (1992). Also, as Professor Leslie Espinoza has demonstrated, testing biases occur prior to law school attendance, and indeed, may greatly affect such entry. Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121, 134 (1993) ("The [LSAT] can keep you out of law school, it can determine which law school you attend, and it can greatly affect the way you feel about yourself and your potential for success while in law school . . . . For many students, the LSAT is their first official contact with the study of law and the construction of legal professionalism. The questions within the test often present a social world view that excludes outsider test takers. . . .").

occasioned by the gratuitous use of race, class, gender and sexuality into the curriculum also must be recognized. As Professor Patricia Williams instructs, "[W]hat we write into exams, as much as what we teach, conveys stereotypes, delimits the acceptable, and formulates ideals."[278]

Of course, race and its constructions have always been more complex than the Black-White paradigm.[279] Because of this historical truth and present demographic reality regarding racial and ethnic diversity, it is more important than ever to increase knowledge and dialog about the effects of social and legal constructions of all people of color in American society. As an African American woman law professor, I find it necessary to pursue such theoretical understanding and pedagogical efforts as part of my responsibility and commitment to increase my own and my students' knowledge about distinctive ways in which law, particularly criminal law, denotes the relative value of citizens' lives through constructions of identity.[280]

This article undertakes these challenges through its deconstruction of the Vincent Chin case for analytical and pedagogical purposes. Hence, my discussion of *Who Killed Vincent Chin?* springs from a commitment to multidimensional discourse, and entails analysis of the doctrine and application of criminal law when Asian American identity is implicated. The multidimensional approach, as I view it, must incorporate more inclusiveness of "other" perspectives and greater attention toward methodologies that can effectuate increased awareness of the interactions between legal institutions and those whose subjectivity long has been ignored throughout legal discourses. As Professor Berta Hernández Truyol demonstrates in her discussion of the "multidimensionality" of Latinas'/os' lives, the commitment to the multidimensional approach is essential, not simply desirable, in order to improve the lives of all peoples:

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278. WILLIAMS, *supra* note 277, at 85.

279. Frank Wu notes that:

> Even on its own terms, race has never been a black and white matter. There have always been as many shades of black and brown as there have been individuals who identified themselves, or were identified by others, by that concept. There have always been Native Americans, Chicanos, and Asian immigrants.

Wu, *supra* note 57, at 251 (footnote omitted); *see also* Ramirez, *supra* note 221, at 964-69 (discussing the implications of increasing numbers of Americans who claim multiracial identities on legal programs "which rely on simplistic racial classifications").

280. *See* Judy Scales-Trent, *Using Literature in Law School: The Importance of Reading and Telling Stories*, 7 BERKELEY WOMEN'S L.J. 91 (1992) (discussing the development of a seminar focusing on the experiences of women of color in the law and asking, "Were the issues for all women of color similar to each other? Different? Finding and exploring these issues was the aim of this course.").

> The problems and misunderstandings that result from analysis of complex conduct and peoples through a simplistic single-lens perspective can be solved . . . if we trade in the monocle for a prism that allows a multidimensional perspective that will result in an analytical framework that can accommodate the complexities of our society. . . . Rarely can we find the best answer . . . by asking only one obvious question, such as "What is the effect of a practice on an ethnic group?" Rather we will reach the better resolution by asking many questions, including questions that address the conflation of traits.[281]

My analysis of the socio-legal circumstances surrounding Vincent Chin's death embraces the insights of critical legal studies disciplines, including, but not limited to, critical race theory and feminist legal theory. It is an interdisciplinary analysis that deliberately "looks for the coercive and hidden assumptions embedded in law, and values the multiple consciousness of the disempowered."[282] In agreement with Paulo Freire that "[e]ducation of a liberating character is a process by which the educator invites learners to recognize and unveil reality critically,"[283] the use of the film *Who Killed Vincent Chin?* appealed to me as ideal for pursuing the goal of examining criminal law doctrine in a context that would reveal, among other critical perspectives, the racial implications of law from the standpoint of Asian Americans. In addition, the film provided the opportunity to gain a macro and micro perspective on the connections among legal doctrine, factual analysis, legal analysis, and legal processes. In this regard, it is also important that students appreciate the connections between each stage of the criminal process, and not simply the appellate stage, in order to foster their recognition that earlier stages of criminal process are often more critical than the appellate stage with which law students become accustomed.

Finally, for pedagogical purposes, Professor Paul Baier's appeal also resonates. As he states: "Cases alone are not enough. . . . Yet as I cover the terrain of teaching materials . . . I see mainly cases, cases, and more cases. . . . The tapes add a vital advocacy component to our learning [and] also teach the usual analytical skills, and in a manner far superior to the printed page."[284]

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281. Hernández Truyol, *supra* note 15, at 382, 431.

282. Matsuda, *supra* note 175, at 1330.

283. PAULO FREIRE, THE POLITICS OF EDUCATION 100-02 (Donald Macedo trans., 1985).

284. Paul R. Baier, *What Is the Use of a Law Book Without Pictures or Conversations?*, 34 J. LEGAL EDUC. 619, 621, 632 (1984). Indeed, there is a burgeoning interest in the creative use of film in legal education. While film and film technology have long

B. *Scenes from* Who Killed Vincent Chin?[285]

WOMAN'S VOICE: *The jukebox was sitting here . . . back here. You can see the mirrors and the lockers where they would get ready for their dance. Then one of the girls would perform three dances: the first one in their outfits and the last two had to be topless.*

RONALD EBENS (Defendant): *I'm no racist. I've never been a racist.*

LILY CHIN (Mother of Vincent Chin): *I got off the boat during the first month of the lunar calendar of 1948. We lived and worked in a basement laundry. Highland Park was high class back then but when the neighbors' kids saw us in the basement they made ugly faces. They stuck out their tongues and made as if to slit our throats. When I first came here I didn't know much of anything! So my husband like to take me to new places. We went*

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been used in clinical education programs, there is a growing recognition of the value of film in other areas of the curriculum. As Professor Rennard Strickland notes, "There is a long history of law in film." Rennard Strickland, Using Popular Culture to Raise Social Justice Issues, Remarks at the Meeting of the Association of American Law Schools (Jan. 1994) (tape of conference available at AALS; handouts on file with the author). Professor Strickland's slide presentation of movies having legal themes included: *Inherit the Wind*; *To Kill a Mockingbird*; *Twelve Angry Men*; *A Man for All Seasons*; *The Man Who Shot Liberty Valance*; *The Verdict*; *Career Woman*; *Adam's Rib*; and a number of other titles. Professor Strickland also discussed his slide collection entitled, *Depictions of Native Americans in Film.*

On the same panel, Professor Michelle Jacobs also discussed her use of popular television shows, such as *Cops*, *Law and Order*, *20/20*, *48 Hours*, and *Day One*, to explore topics in criminal procedure, evidence and ethics. Michelle Jacobs, Teaching Law Through Pop Culture, Remarks at the Meeting of the Association of American Law Schools (Jan. 6, 1994) (tape of conference available at AALS; handouts on file with the author); *see generally* Christine Alice Corcos, *Columbo Goes to Law School: Or, Some Thoughts on the Uses of Television in the Teaching of Law*, 13 LOY. L.A. ENT. L.J. 499 (1993).

285. I want to thank director Christine Choy for providing a transcript of *Who Killed Vincent Chin?*, which is on file with the author, and for giving generous time for an interview during the preparation of this article.

Who Killed Vincent Chin? has received numerous awards and recognition—including an Academy Award nomination, 1989; Best Film, Global Village Documentary Festival, 1988; Best Documentary, Hawaii International Film Festival, 1988—and has been shown to worldwide audiences, including those at the San Francisco Film Festival, the Montreal World Film Festival; Sundance Film Festival; and the United States Film Festival. The film runs 82 minutes, and is available from Filmmakers Library, 124 East 40th Street, New York, NY 10016. It originally aired for general audiences in the United States on PBS television stations in June 1989; the PBS broadcast featured an interview with director Christine Choy and producer Renee Tajima following the film.

to see a baseball game but when people saw Chinese sitting there they kicked us and cursed at us. I never went back.

FRANK EAMAN (Defense Attorney): *Ron Ebens is guilty of having too much to drink, being a macho man who wouldn't back down from a fight and wanted to avenge his stepson. And he's guilty of letting himself go too far and killing somebody with a baseball bat. A serious crime no doubt. . . . He is not guilty of doing this because of racial animus or racial feelings or racial bias or racial prejudice. It so happens the person he was involved with was Chinese.*

JUDGE CHARLES KAUFMAN (Wayne County Circuit Court): *The victim lingered for four days, which again, based upon everything was indicative to me that they attempted to administer a punishment. They did this too severely, in careless disregard of human life, which is what manslaughter is. And that's what they were found guilty of and that's what I predicated my sentence on. Had it been a brutal murder of course these fellas would be in jail now.*

HELEN ZIA (American Citizens for Justice): *The one thing that has pulled together through sheer concern all Asian Americans in this country and brought press and so forth from overseas and . . . concern from overseas, is the belief that Vincent Chin would be alive today if he were not Asian. And there is no question about that in any of our minds.*

STARLENE (Fancy Pants Dancer): *Yeah, we all were surprised that they didn't come to us and ask us what happened. You know, all the dancers were like shocked.*

OFFICER MORRIS COTTON: *When you have two police officers as eyewitnesses to any type of, I believe both officers should have been notified for court. Both officers should have [gone] to court and both officers should have been notified of any plea bargaining. In this matter we were, I would have to say, maybe the last to know.*

HELEN ZIA: *They didn't even know that the sentencing was going to take place. One friend, one family friend was able to find out that day and was present at the sentencing. And he was totally shocked by the outcome of the sentencing. When it happened he says he stood there and . . . is this it? You know. Isn't anybody else going to be allowed to say anything?*

MIDDLE-AGED ASIAN AMERICAN MAN: *I got involved because actually in looking at it, here are two complete strangers who . . . they can do something like that and get away with it on*

probation when just the other day a man on a negligent homicide or manslaughter got 15 years. Being able to see the possible manifestations with my own children I thought we ought to do something to send a message out.

RACINE (Fancy Pants Dancer): *I turned around and I heard . . . Mr. Ebens say something about the little motherfucker and Vincent said I'm not a little motherfucker. And he [Ebens] said I don't know if you're a big one or a little one. Then he said something about well because of ya'll motherfuckers we're out of work.*

CNN DETROIT REPORTER: *Ebens and Nitz now face arraignment in Federal District Court and will stand trial on charges they conspired to violate the civil rights of Vincent Chin. If convicted both face life terms in prison.*

RON EBENS: *In the first place when you hear them say your name versus the United States of America . . . it's kind of a heavy feeling, you know. Especially when you served in the army, know. You had your feelings of loyalty to the country and it's like they're saying, you know, we're against you. That's hard to take. Especially when you know that the charges are fabricated.*

HELEN ZIA: *All ACJ (American Citizens for Justice) and the many people who supported us in this case ever wanted was to have this case looked at in a court of law the way it should've been the first time.*

OFFICER MICHAEL GARDENHIRE: *I couldn't say if it was premeditated. It could have been. I would say that the instance that the problem started, which was down at the Fancy Pants, and I don't know what happened down there. There was enough time for them to cool off. Whatever it was. But I think that Mr. Ebens and Mr. Nitz stalked Jimmy Choi and Vincent Chin.*

JUROR (Federal Civil Rights Trial): *The problem with his [Ronald Ebens'] testimony was that his memory was very selective. He had a lot to drink the night of the killing and he testified that he didn't remember many details of the evening. But when asked about various racial remarks that other witnesses said they had heard he said he was sure that he didn't say these things. And that was received very skeptically by the jury. We felt his memory was too selective.*

FRANK EAMAN: *When they read through the verdict it was not guilty, not guilty, not guilty, guilty. When they got through three not guilties, boy, we thought, "God we did it." Did we do this and then when they said the fourth guilty it was sort of like*

the anvil fell that we were always waiting for . . . it was gonna fall.

We're absolutely going to appeal it. The case is not over yet.

REPORTER: *Outrage. That is the cry coming from the metro Detroit's Chinese American community this evening. A federal appeals court has ordered a new trial for Ronald Ebens. He's the man convicted of beating Vincent Chin to death with a baseball bat four years ago. Eyewitness news reporter Al Alan says the new trial was ordered because of trial errors.*

LILY CHIN: *I ask you, how would you feel as a mom?*

Please, I want everybody . . . appeal the government do not drop this case. I want justice for Vincent. I want justice for my son.

Documentary filmmakers Christine Choy[286] and Renee Tajima[287] became aware of the Vincent Chin case in 1984, having learned

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286. Christine Choy is chairperson of the New York University Film School, at the Tisch School for the Arts. She was born Chai Ming Huei, to a Korean father and a Chinese mother. Her documentary films explore the relationships between women and people of color and American society. Her films include *Sa-I-Gu*, which recorded the perspectives of four Korean women after the Los Angeles rebellion following the first "Rodney King" trial. *Mississippi Triangle* focuses on Chinese laborers who were brought to the Delta from the West after the Civil War to replace emancipated slaves. *See* Martin Johnson, *A Mississippi Triangle: Chinese, Blacks and Mr. Charlie*, NEW AMSTERDAM NEWS, June 16, 1984, at 22. *Bittersweet Survival* focuses on the migration of Southeast Asian (primarily Vietnamese) refugees to the United States, the difficulties of their transition to a culture with new customs, language, and laws, and the exploitation faced by refugee workers. *To Love, Honor, and Obey* addresses violence against women. *Sisters on the Inside* examines women inmates' experiences in New York, North Carolina, and Illinois prison institutions. *Homes Apart: Two Koreas* examines the lives of Korean Americans, who are generally represented on film less than Chinese and Japanese Americans. *From Spikes to Spindles* focuses on life in New York City's Chinatown and larger issues in Chinese Americans' experiences.

287. Renee Tajima is a third-generation Japanese American. She was born in Chicago and raised in Southern California. She studied filmmaking at the Massachusetts Institute of Technology and was a film critic for *The Village Voice*. In discussing the motivation for her work, Renee Tajima states that she had been told by producers that "the political documentary [was] dead." According to her, however, "for Asian Americans it [was] just beginning." James Minor, *Oscar Nomination for Vincent Chin Film*, ASIAN WK., Feb. 24, 1989, at 1, 10. Further impetus for her involvement in the "Vincent Chin" film stemmed from her family's history. During World War II, her mother was interned at Heart Mountain, Wyoming, and her father served in the U.S. armed forces. Shortly before the Vincent Chin incident her own brother was killed in a racial riot in California. Kay Bourne, *Boston Producer Explores Racism in Documentary Film*, BAY ST. BANNER (Boston), July 20, 1989, at 14.

Her collaboration with Christine Choy on *Vincent Chin* "started out to be a 15-minute piece that would raise awareness about anti-Asian feelings." *Id.* "After we got to Detroit and talked to some of the people," Tajima recalled, "we realized there was much more to the story than two whites killing a Chinese guy. It was more than an

about the predominantly Asian American organization Americans Citizens for Justice from a *New York Times* news clipping.[288] According to director Christine Choy, "We wanted to present the story in its whole context—how it was interwoven into American culture, point out the contradictions within society, how different races are viewed and who becomes the scapegoat. We wanted to make a good film that would tell the story and become a part of American history."[289] Moreover, the filmmakers endeavored "to dispel the image of the Asian as either a noble victim or noble savage."[290]

The effectiveness of the documentary film form lies in its ability to make viewers literally "see" issues in need of attention. Documentaries provoke and encourage response, shape and challenge attitudes and assumptions. As one film scholar has stated, "[W]hen documentaries are at their best, a sense of urgency is created. . . . Such films have a powerful, pervasive impact."[291] Pioneering documentary filmmaker Paul Rotha regards the medium "as a powerful, if not the most powerful, instrument for social influence today. . . ."[292] Hence, the nonfiction film has been best described as "the creative interpretation of actuality."[293]

Who Killed Vincent Chin? is in the documentary film genre of cinema verité, and more particularly, it is in the mode of interactive documentary filmmaking.[294] Regarding *Who Killed Vincent Chin?*, director Christine Choy opines:

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isolated incident." Serena Chen, *Vincent Chin Lives on in Documentary of His Murder*, S.F. EXAMINER, Mar. 16, 1988, at D8.

288. Chen, *supra* note 287.

289. *Id.*

290. David A. Kaplan, *Film About a Fatal Beating Examines a Community*, N.Y. TIMES, July 16, 1989, at H27, H32 (quoting Christine Choy).

291. BILL NICHOLS, REPRESENTING REALITY: ISSUES AND CONCEPTS IN DOCUMENTARY at ix-x (1991); *see also* Annette B. Weiner, *Epistemology and Ethnographic Reality: A Trobriand Island Case Study*, 80 AM. ANTHROPOLOGIST 752, 757 (1978).

292. PAUL ROTHA, DOCUMENTARY FILM: THE USE OF THE FILM MEDIUM TO INTERPRET CREATIVELY AND IN SOCIAL TERMS THE LIFE OF THE PEOPLE AS IT EXISTS IN REALITY 25 (1952).

293. NONFICTION FILM THEORY AND CRITICISM 15 (Richard M. Barsam ed., 1976) (quoting John Grierson).

294. Professor Bill Nichols provides an excellent history and discussion of documentary filmmaking. Four modes of representation are recognized as the primary methodologies of documentary film: expository (classic "voice-of-God" commentaries, for example), observational (minimizing the filmmaker's presence), interactive (where the filmmaker and social actors expressly acknowledge one another in conversation, participatory actions, or interviews), and reflexive (where the filmmaker draws the viewer's attention to the form of the work itself). NICHOLS, *supra* note 291, at xiv, 32. Some commentators regard observational documentaries interchangeably as "direct cinema," or "cinema verité." Other commentators regard them as distinct forms, although some assign the label "direct cinema" to the more observational mode while others would assign the label "cinema verité" to the same mode. Nichols eschews these controversies in terminology, preferring the more descriptive appella-

> [I]f the film is successful, it is because it was told by the people who are directly involved in the situation rather than told by me as the filmmaker. Of course, that does not mean I do not have a point of view, obviously I do have a point of view. But I did give equal time, as much as possible, to both the victims as well as the defendants. I designed the film in the genre of minimalism. The issues get repeated, but every time you repeat, it reviews new information. So, at the end, the audience becomes a judge. So, I designed the film like a visual courtroom; I've

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tions, *observational* and *interactive* modes of documentary representation. *Id.* at 38. Eric Barnouw, for example, distinguishes direct cinema from one recognized form of cinema verité as follows:

> The direct cinema documentarist took his camera to a situation of tension and waited hopefully for a crisis; [the Rouch version of] cinema verité tried to precipitate one. The direct cinema artist aspired to invisibility; the Rouch cinema verité artist was often an avowed participant. The direct cinema artist played the role of uninvolved bystander; the cinema verité artist espoused that of provocateur.

Id. (citing ERIC BARNOUW, DOCUMENTARY: A HISTORY OF THE NON-FICTION FILM 254 (1974)); *see also* Brian Wilson, *The Documentary Form as Scientific Inscription*, *in* THEORIZING DOCUMENTARY 37 (Michael Renov ed., 1993).

In either conceptualism, it is the filmmaker that espouses the depiction of realism, particularly in the observational and interactive modes of filmmaking, i.e., "direct cinema" or "cinema verité." Yet, the filmmaker's presence is absence as "observational cinema . . . conveys the sense of unmediated and unfettered access to the world." NICHOLS, *supra* note 291, at 43. However, some filmmakers and film theorists assert that the "cinema verité" appellation remains appropriate even where there is, albeit minimal, filmmaker presence. In this regard, interactive documentary stresses images of testimony or verbal exchange and images of demonstration. This mode often revolves around the form known as the interview. *Id.* at 56.

But compare Trinh T. Minh-ha, who posits: "There is no such thing as documentary—whether the term designates a category of material, a genre, an approach, or a set of techniques." Trinh T. Minh-ha, *The Totalizing Quest of Meaning*, *in* THEORIZING DOCUMENTARY, *supra*, at 90. In the final analysis, because *Who Killed Vincent Chin?* defies rigid categorization, I conclude with Lindsay Anderson:

> It isn't a question of technique, it is a question of the material. If the material is actual, then it is documentary. . . . If you get so muddled up in your use of the term, stop using it. Just talk about films. Anyway, very often when we use these terms, they only give us an opportunity to avoid really discussing the film.

Id. at 92 (quoting Lindsay Anderson) [italicization omitted].

Finally, filmmaker Jean Rouch offers this definition:

> [Cinema verité:] it would be better to call it cinema-sincerity. . . . That is, that you ask the audience to have confidence in the evidence, to say to the audience, This is what I saw. I didn't fake it, this is what happened. . . . I look at what happened with my subjective eye and this is what I believe took place . . . It's a question of honesty.

Id. at 95 & n.9 (quoting Jean Rouch).

> involved the audience from the first frame to the last frame. . . . Towards the end, I disappear . . . . The audience becomes the one you who makes the decision.[295]

Indeed, the ethics and dialectics of the documentary film have many parallels in legal activism. Documentary communication, much like lawyering, "seeks to initiate a process which culminates in public action by presenting information, and to complete the process by making this presentation persuasive. Documentary seeks to inform but, above all, it seeks to influence."[296] Like the advocate, the filmmaker creates the manner and sequence within which subjects and images will be revealed. As described by Paul Rotha, the director's role, then, bears striking resemblance to the lawyer's role, particularly relating to the development of case theory, legal advocacy, strategy, and policy making:

> At one and the same time he considers his themes and his actors, his special approach and his innumerable angles of vision, his lighting and his changing shapes of composition; he imagines his sounds and the speed of his movements, visualizes the assembling and contemplates the eventual effect on the screen. All these distinct but closely related ideas and materials are arranged, developed, suspended, dispersed and brought together again—gradually becoming fused into a unified film under the will of the director and . . . producer. And in the successful film, these elements are closely interwoven, so that the unity achieved by their fusion is of greater value than simply their sum.[297]

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295. MICH. DAILY WEEKEND MAG., Nov. 11, 1988, at 10, 11 (quoting Christine Choy).

296. A. William Bluem, *The Documentary Idea: A Frame of Reference*, *in* NONFICTION FILM THEORY AND CRITICISM, *supra* note 293, at 75, 76-77. Also, as Professor Bernard Hibbitts discusses, American legal discourse long has embraced figurative language evocative of sensory experiences, particularly favoring visual metaphors. Professor Hibbitts then posits that there is a metaphoric paradigm shift occurring within legal discourse such that visual metaphors are being supplanted by aural metaphors ("different voices," "speaking," "singing," "hearing," "silence," and "listening"). While Professor Hibbitts regards the move towards metaphoric aurality as a significant reconfiguration of American legal discourse, its power will ultimately be derived from a synergistic application with other sensory capacities. In other words, applying all available senses will be necessary for understanding legal (con)texts. Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 229-32, 356 (1994).

297. ROTHA, *supra* note 292, at 31.

Cinema Professor Bill Nichols draws a direct comparison between the two fields, upon stating that "[i]nteractive documentary stresses images of testimony or verbal exchange and images of demonstration (images that demonstrate validity, or possibly, the doubtfulness, of what witnesses state)."[298] Unexpected juxtapositions, unusual framing, incongruous or contradictory statements about the same issue prompt the viewer to reassess initial statements in light of subsequent, discrepant assertions. As recognized by Professor Nichols:

> These possibilities pose distinct ethical issues for practitioners. How far can participation go? How are limits beyond which a filmmaker cannot go negotiated? What tactics does "prosecution" outside of a formal legal system allow? The word "prosecution" refers to the process of social or historical inquiry in which the filmmaker engages in dialogue with witnesses to carry forward an argument. Actually, the relation to witnesses may be closer to that of public defender that prosecutor; it is not commonly an adversarial relationship but one in which the filmmaker represents his or her witnesses, particularly when differing motives, priorities, or needs are at work.[299]

In interactive documentaries, generally, the actual words and gestures of interviewees take precedence, and their comments and responses provide a core part of the film's perspectives or contentions. In *Who Killed Vincent Chin?* the filmmakers present nearly all of the individuals at the center and on the periphery of the incident. The strength of the film is derived from the multiple and conflicting perspectives that are presented. The juxtapositions of identity, place, and present and historical context are essential for understanding the conflicting accounts and, importantly, the event of Vincent Chin's death. These contradictions elucidate rather than confuse.

The presentation of events is not linear; rather, it interweaves the facts and social circumstances of the killing in a slow-moving montage of music, evidence, interviews, perspectives, media coverage surrounding the killing, automobile advertising campaigns, social events, and cultural and economic conflict. Of course, the title of the film, *Who Killed Vincent Chin?*, is ironic and rhetorical, since it is known from the start that Ronald Ebens, with assistance from Michael Nitz, killed Vincent Chin. Clearly, then, something larger is at issue. Thus, it is through the multidimensional

298. NICHOLS, *supra* note 291, at 44.
299. *Id.* at 45.

presentation of central characters' lives, and the complex unraveling of events and perspectives, that the specific and larger implications of text, subtext and context contained in *Who Killed Vincent Chin?* unfold to provide meaning.

Vincent Chin was adopted by David and Lily Chin and became a naturalized American citizen in 1961.[300] The viewers' knowledge of Vincent Chin is revealed through others. Through family photos and the descriptions of family and friends, he appears to be thoroughly enamored with life in his new homeland, fully assimilating into American society. As described by his childhood friend Gary Koivu:

> *I think Vincent fit in very well. He learned the ways of America and he didn't seem handicapped by the fact that he was a Chinese. He made a lot of friends, had a lot of girlfriends. People accepted him pretty readily. He had a very good sense of humor. He was always laughing. I was always the quiet one. You know, the friends I have are very close but he was making friends all the time. He could walk into a place and get to know people real well and he was always the life of the party. . . . Vincent used to work with his father on Sundays at the restaurant. Vincent wanted to get married and have an American job. And he accomplished that goal by working at the engineering place. . . .*[301]

He is seen as a cherubic boy who arrives to America for the first time at the age of six. Later, he is seen to engage in typical youthful behavior: cars are a passion, he enjoys parties with his friends, and dates intra- and inter-racially. An engineer, Vincent Chin planned to find employment as an automotive engineer in Detroit. Much later, unsparing autopsy photos of his battered skull bear stark contrast to the images of Vincent's seeming contentment and acceptance in American society.

Viewers observe Ronald Ebens, who expresses his continuing longing for the Wisconsin farm life of his youth, as he describes his reluctant adjustment to life in urban Detroit in order to advance as an auto industry worker. Ronald Ebens shares with viewers that:

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300. Vincent Chin was born in the People's Republic of China on May 18, 1955. He was adopted by Hing (David) and Lily Chin when he was three years old. His adoption became finalized when he was six years old, at which time he became a U.S. citizen. *See* American Citizens for Justice, Confidential Report on the Vincent Chin Case to the U.S. Dep't of Justice, Civil Rights Division 14 (June 28, 1983) (copy on file with author) [hereinafter ACJ Report on the Vincent Chin Case]; *see also* United States v. Ebens, 800 F.2d 1422, 1427 (6th Cir. 1986); Ronald Takaki, *Who Really Killed Vincent Chin?*, S.F. EXAMINER, Sept. 21, 1983, at B3.

301. Gary Koivu, *quoted* in Film Transcript to WHO KILLED VINCENT CHIN? (Filmmakers Library 1988), at 9 (transcript on file with author) [hereinafter Film Transcript].

> *I was raised on a farm. I spent my first 17 years on a farm with five kids and I guess that part of my life I really miss. I enjoyed the farm more than anything I've ever done. If I had to pick a place to live that's where I'd live again.*[302]

Ebens admits to killing Vincent Chin, while declaring that it had nothing to do with race. "It just so happened that the guy was Chinese," he says.[303] In contrast, two dancers at the Fancy Pants, Racine Colwell and Angela ("Starlene") Rudolph, state that they heard Ebens say, "It's because of you m— f— that we're out of work."

Ronald Ebens is never presented as villainous in the film. Instead, he presents himself with an earnestness which resounds with the ordinariness of his attitudes. He describes his brutal beating of Vincent Chin as "preordained."[304] He also states that while he knows few "Asians," the ones he knows are "really nice people."[305] According to director Christine Choy, "When we met Ebens, he was the one who thought he was the victim because he thought he was going to jail. . . ."[306]

Lily Chin, the mother of slain Vincent, provides another perspective on the killing of her son. Speaking in her native Toisanese dialect and uncertain English, she is at the center of the moral, legal, and cultural intersections identified in the film. Lily Chin arrived from Canton, China, to Detroit in 1948 after her marriage to Hing (David) Chin, a Chinese American serviceman who served in the Army during World War II. She and her husband settled in Highland Park, just outside Detroit. They established a successful Chinese restaurant after their laundry business declined. They hoped to blend into the "melting pot" and obtain their share of the American Dream.[307]

Lily Chin defied gender and cultural stereotypes by engaging in a five-year struggle for justice after the killing of her son. Her image conflicts with that proliferated by mainstream movie/media portrayals:

> Pearl of the Orient. Whore. Geisha. Concubine. Whore. Hostess. Bar Girl. Mama-san. Whore. China Doll. Tokyo Rose. Whore. Butterfly. Whore. Miss Saigon. Whore. Dragon Lady. Lotus Blossom. Gook. Whore. Yellow Peril.

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302. *Id.* at 4.
303. *Id.* at 3, 24.
304. *Id.* at 8.
305. *Id.* at 16; *see also* Moore, *supra* note 230, at 20.
306. WOMEN'S WEAR DAILY, July 17, 1989, at 3 (quoting Christine Choy).
307. *See* Moore, *supra* note 230, at 20.

> Whore. Bangkok Bombshell. Whore. Hospitality Girl. Whore. Comfort Woman. Whore. Savage. Whore. Sultry. Whore. Faceless. Whore. Porcelain. Whore. Demure. Whore. Virgin. Whore. Mute. Whore. Model Minority. Whore. Victim. Whore. Woman Warrior. Whore. Mail-Order Bride. Whore. Mother. Wife. Lover. Daughter. Sister.[308]

Through the autobiography of Lily Chin, the film provides a feminist interpretation through which viewers witness the raising of Lily Chin's consciousness as she raises the consciousness of others,

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308. Jessica Hagedorn, *Asian Women in Film: No Joy, No Luck*, MS., Jan./Feb. 1994, at 74. Further criticizing the portrayals of Asian women in film, Filipina writer Jessica Hagedorn states:

> In Hollywood vehicles, we are objects of desire or derision; we exist to provide sex, color, and texture in what is essentially a white man's world. . . . Movies are still the most seductive and powerful combination of sound and image. In many ways, as females and Asians, as audiences or performers, we have learned to settle for less—to accept the fact that we are either decorative, invisible, or one-dimensional.

Id. at 78-79. Furthermore, Renee Tajima asserts:

> Asian women in American cinema are interchangeable in appearance and name, and are joined together by the common language of non-language—that is, uninterpretable chattering, pidgin English, giggling, or silence. They may be specifically identified by nationality—particularly in war films—but that's where screen accuracy ends. The dozens of populations of Asian and Pacific Island groups are lumped into one homogeneous mass of Mama Sans.

Renee E. Tajima, *Lotus Blossoms Don't Bleed: Images of Asian Women*, *in* MAKING WAVES, *supra* note 155, at 308-09.

In April 1991, Asian American activists, in coalition with others, protested the Broadway production of *Miss Saigon*, an updated version of the Puccini opera *Madame Butterfly*. *Miss Saigon* is the story of a Vietnamese prostitute, Kim, who falls in love with a White American soldier, Chris. The soldier leaves during the fall of Saigon, to return three years later with Ellen, his White U.S. wife. In the intervening years, the Vietnamese woman has cared for the Eurasian child whom she conceived with the soldier. After loathsome entreaties by a Vietnamese government official, Kim flees to Bangkok, where she reunites with Chris, subsequently dying in his arms in an act of self-immolation so that he and his wife will take the child to America. *See* Steven DeCastro, *Identity in Action: A Filipino American's Perspective*, *in* THE STATE OF ASIAN AMERICA, *supra* note 14, at 302. The bases of the *Miss Saigon* protest were located in the multiple sites of gender, racial and political stereotypes and subordination. As stated by activist Yoko Yoshikawa, "[W]e saw *Miss Saigon* as the latest in a long line of Western misrepresentations of Asians, perpetuating a damaging fantasy of submissive 'Orientals,' self-erasing women, and asexual, contemptible men." Yoko Yoshikawa, *The Heat Is on Miss Saigon Coalition: Organizing across Race and Sexuality*, *in* THE STATE OF ASIAN AMERICA, *supra* note 14, at 275-76. Politically, the storyline evokes not only the stereotyped images of Asian women and men, but also the colonialist mentality of the West toward Asian nations, specifically sanitizing the Vietnam War as a subplot to Asians' imagined love affair with America.

including that of the viewers.[309] This is a painful and complex transformation as she simultaneously embodies one gender role stereotype—that of the long-suffering mother who is literally paralyzed by grief—and eschews another—that of the docile, uncomplaining Asian American woman demanding justice for her son for five years. In the film, Lily Chin discusses her early life in Detroit, when Chinese immigrants were relegated to service industries such as laundries and restaurants, but could not work in the auto plants.[310] Lily Chin's experiences, counterpoised against the perspectives of Ronald Ebens, reveal the interlocking race, gender, and class dynamics in American society.

Visual metaphors enhance the film's powerful portrayals. The city of Detroit, once a mecca for industrial innovation and manufacturing, particularly for automobile production, displays a more tarnished image during the auto industry's decline. Blue-collar Detroit is observed through a contemporary grey miasma. While the automobile industry once characterized Detroit as an urban "Gold Mountain" of sorts, its other distinguishing industry—music, epitomized by the presence of Motown Records—relocated to California in a move that has been described as "part of what broke Detroit's spirit."[311] Furthermore, the influence of media images in the development of mainstream attitudes and values can be seen through film and advertising clips in the film. For example, an early Chevrolet commercial showing Dinah Shore singing exuberantly about her American car is juxtaposed with a cartoon depicting menacing hordes of Japanese cars overwhelming the United States.

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309. Film writer Julia Lesage has written that "[f]eminist documentaries represent a use of, yet a shift in, the aesthetics of cinema verité due to the filmmakers' close identification with their subjects, participation in the women's movement, and sense of the films' intended effect. . . . Either the stance of the people filmed or the stance of the film as a whole reflects a commitment to changing the public sphere as well; and for this reason, these filmmakers have used an accessible documentary form." Julia Lesage, *The Political Aesthetics of the Feminist Documentary Film*, Q. REV. FILM STUD. 507, 521 (1978). The work of male cinéma vérité documentarists, on the other hand, often has been characterized "precisely by the film's ironic distance from the subject and the filmmaker's presentation of his vision of the subject as his 'creation.' " *Id.* at 522 n.7. These observations are consonant with the ethos of *Who Killed Vincent Chin?* Having grown up in Shanghai, then having moved to Korea at age nine, and later to Japan before being transplanted to the United States, director Christine Choy found resonance in Lily Chin's immigrant experience with her own and also identified with her as a woman of color. In addition, her experiences with the gender, race, and class dynamics in Asia and in the United States influenced her filmmaking philosophy and approaches. Interview with Christine Choy, filmmaker, in New York, N.Y. (July 15, 1994) (on file with author).

310. *See* Moore, *supra* note 230, at 20.

311. Bourne, *supra* note 287, at 15 (quoting documentary producer Juanita Anderson).

However, the most salient and riveting metaphor is the recurring image of baseball. In many minds, baseball transcends mere sport and is integral to the American identity. Consider, for example, the following sentiment:

> To many of us, baseball is more than just a game—it's a magical, spellbinding, almost religious experience, a wondrous force that takes over our lives when we're young, and stays with us for life. . . . [I]t's not possible to imagine what North America would be like without baseball, for as our society evolved and grew, baseball evolved and grew right along with it, and became woven into the very fabric of our culture.[312]

In *Who Killed Vincent Chin?*, this quintessential conception of Americanism materialized itself in perverse, interrelated proportions. First, Vincent Chin is killed by Ronald Ebens' use of a baseball bat; this metaphorical and literal image of an Asian American man being beaten to death by such a fundamental symbol of American life is eerily profound and prophetic. Second, Ronald Ebens is playing baseball when he cannot be reached to learn that Vincent Chin has died after lingering in a coma for four days. Third, Lily Chin provides a searing counter-narrative to baseball-as-apple-pie, based on her early experiences in Highland Park. One of her most vivid memories is of her first trip to a major league baseball game to see the Detroit Tigers. She and her husband decided to participate in the American pastime. She recalls the crude encounters with other stadium-goers, whom she says mocked their ethnic features and their language and mimicked as if to slit their throats. They never went back.[313] Once again, the baseball images and the manner of her son's

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312. RON MCCULLOCH, HOW BASEBALL BEGAN: THE LONG OVERLOOKED TRUTH ABOUT THE BIRTH OF BASEBALL 1 (1995). Documentary filmmaker Ken Burns' 1994 "nine inning" series on baseball on PBS expressed similar views in its effort to place baseball within a larger socio-historical framework.

313. Lily Chin's less-than-sanguine remembrance of baseball is, of course, replete with historical reference. Assigned the emblematic status of American society and values, baseball also long has mirrored the chasms in society at large. While the sport spans over 150 years in existence, it was not until 1946 that the baseball color line ended when Jackie Robinson became the first African American to play in the minor or major leagues in the 20th century. TOM GILBERT, BASEBALL AND THE COLOR LINE 9 (1995). Prior to the integration of major league baseball, the various Negro Leagues provided opportunities for African Americans to play competitive-level baseball. However, as Bruce Chadwick writes, "[B]lack baseball was avoided by the mainstream press, shunned by record keepers, and ignored by the white major leagues." BRUCE CHADWICK, WHEN THE GAME WAS BLACK AND WHITE: THE ILLUSTRATED HISTORY OF BASEBALL'S NEGRO LEAGUES 9 (1992). The color line in baseball shifted slightly and arbitrarily with the inclusion of Cuban players Armando Marsans and Rafael Almeida in 1911. However, darker-skinned Cubans, like African Americans,

death suggest an uncanny coincidence. Lastly, Detroit-area auto workers take turns destroying Japanese-model cars with baseball bats and sledgehammers. These acts powerfully conjure images of the actual beating death of Vincent Chin.

The significance of these clashing images and perspectives and the manner in which they inform the doctrine and decision making in the criminal justice system are discussed in the next section.

C. *Contextualizing Criminal Law Doctrine and Discretion*

The legal formalism ideal would advance a theory of neutrality with respect to the development of doctrine and the exercise of discretion in the criminal law, and in application to cases such as *Vincent Chin*. However, reexamining this case from a critical standpoint suggests that issues of race permeate the entire incident, from the facts to the subsequent criminal justice system's handling of the *Vincent Chin* case. How, then, can the facts of *Vincent Chin* be analyzed within a context that acknowledges formalistic criminal law doctrine and also asks the critical "race question" in order to understand the extant socio-legal dynamics in the case? This closer analysis requires recognizing the role of law, particularly of the criminal law, in ascribing value to the harms experienced through systems of law enforcement, penal laws, and punishment schemes. As the most serious offense within the scope of criminal law, homicide can be singled out for imparting such messages and value judgments.

As a matter of legal formalism regarding criminal law doctrine, Michigan is primarily a common law state. That is, its criminal homicide statute contains two basic categories of criminal homicide, murder and manslaughter, as well as a third category of negligent homicide.[314] Within these categories, murder is divided into first degree and second degree.[315]

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remained excluded from the major leagues. GILBERT, *supra*, at 107-08; CHADWICK, *supra*, at 29. For a discussion of women's history in amateur and professional baseball, see BARBARA GREGORICH, WOMEN AT PLAY: THE STORY OF WOMEN IN BASEBALL (1993) (noting that "[i]n 1943, the first and so far, only women's professional baseball league was born: the All-American Girls Baseball League," which lasted until 1954).

314. *See generally* DOUGLAS B. SHAPIRO & JACK VAN COEVERING, CRIMINAL LAW (1991); *see also* Timothy A. Baughman, *Michigan's "Uncommon Law" of Homicide*, 7 COOLEY L. REV. 1, 18 (1990) (stating that the common law definition of murder in Michigan is the statutory definition).

315. MICH. COMP. LAWS ANN. § 750.316-.317 (West 1991 & Supp. 1996). The common law distinctions between first and second degree murder apply. The Michigan Penal Code defines first degree murder in part as "[m]urder perpetrated by means of . . . willful, deliberate, and premeditated killing." § 750.316; *see, e.g.*, People v. Dykhouse, 345 N.W.2d 150 (Mich. 1984); People v. Taylor, 350 N.W.2d 318 (Mich. Ct. App. 1984); People v. Thomas, 337 N.W.2d 598 (Mich. Ct. App. 1983); People v.

Although Michigan has not statutorily defined manslaughter, it recognizes the common law distinction between voluntary and involuntary manslaughter.[316] Thus, voluntary manslaughter occurs when a person acts "out of a temporary excitement induced by an adequate provocation and not from the deliberation and reflection that marks the crime of murder."[317] Involuntary manslaughter generally applies to the defendant who did not intend to cause death or serious bodily injury but who engaged in nonfelonious criminal activity or performed a lawful act in a criminally negligent manner.[318]

Of course, where a defendant is charged with a greater degree of homicide, he or she is entitled to have the trier-of-fact (jury or judge) consider conviction on lesser homicide charges that are consistent with defense theories and which meet evidentiary sufficiency.[319] To some degree, this concern was obviated in the *Vincent Chin* case since Ronald Ebens pleaded guilty to manslaughter; however, it remains relevant in evaluating the possible and appropriate charging levels, and the basis for the offer and acceptance of

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Doyle, 342 N.W.2d 560 (Mich. Ct. App. 1983). Also, a death which occurs during the course of enumerated felonies will constitute first-degree murder. § 750.316; *see also* People v. Aaron, 299 N.W.2d 304 (Mich. 1980). Finally, the requisite intent to establish first degree murder can be shown by a specific intent to kill, or "[an] intent . . . to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of [defendant's] behavior is to cause death or great bodily harm." *Id.* at 329.

Second degree murder involves the defendant's conscious creation of a high risk of death. *See* People v. Clayton, 296 N.W.2d 177, 199 (Mich. Ct. App. 1980). In addition, second degree murder can be established by either an intent to kill, an intent to cause great bodily harm, or an act committed in wanton and willful disregard of the probability that the act will cause death or great bodily harm. *See, e.g.*, People v. Mackey, 423 N.W.2d 604, 606 (Mich. Ct. App. 1988) ("Malice or the intent to kill may be inferred from the acts of the defendant where the defendant actually intended to inflict great bodily harm."); People v. Klave, 343 N.W.2d 565 (Mich. Ct. App. 1984) (inferring malice from defendant's repeated beating of two-year-old daughter; the inference of malice arises when defendant willfully engages in activity likely to result in serious injury or possibly death).

316. *See* MICH. COMP. LAWS ANN. § 750.321 (West 1991 & Supp. 1996); People v. Richardson, 293 N.W.2d 332, 335 n.8 (Mich. 1980).

317. People v. Townes, 218 N.W.2d 136, 141 (Mich. 1974).

318. *Id.*

319. *See, e.g.*, *Richardson*, 293 N.W.2d 332. The Michigan Supreme Court reversed a jury conviction of first degree murder where the trial court instructed the jury on first and second degree murder and voluntary manslaughter, but denied defense requests to instruct on involuntary manslaughter and reckless use of firearms resulting in death. The court reversed because the jury was deprived of its "option to convict consistently with the defendant's testimony, evidence and theory." *Id.* at 338; *see also* People v. Martin, 344 N.W.2d 17, 18 (Mich. Ct. App. 1983) ("[the trial court's] failure to instruct on involuntary manslaughter, consistent with the defense theory of accident, required reversal even where the jury convicted defendant of first-degree murder.").

Ebens' plea to a lesser charge.[320] Thus, the formalistic definitions of criminal homicide, examined in the *Vincent Chin* case through *Who Killed Vincent Chin?*, evoke numerous questions regarding the determination of blameworthiness deemed sufficient for murder conviction, the difference between first and second degree murder, the conditions that can reduce murder to voluntary manslaughter, and the bases for line drawing between reckless killings which constitute murder and those which constitute involuntary manslaughter.

Consideration of these issues involves recognition of the substantial discretion which inheres in law enforcement and judicial entities and also prompts recognition of the potential for abuse and discrimination. As a matter of legal formalism, for example, discretionary decisions by law enforcement and the courts regarding investigation, arrest, prosecution, and sentencing initially must be based on considerations of probable cause to believe that a crime has been committed and that a particular person has committed an offense. However, the decision to investigate, arrest, prosecute, and sentence often are influenced by the race, gender and/or economic status of the victim and of the alleged perpetrator of crime.[321] When the contextual dimensions are fully considered, more depth is added to the analysis of this case and to the criminal justice system as a whole.

1. Doctrine

As revealed in *Who Killed Vincent Chin?*, there are fundamental conflicts between the interested parties' theories of the case. These

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320. *See* FED. R. CRIM. P. 11(f); *see also* North Carolina v. Alford, 400 U.S. 25 (1970). In *Alford*, the defendant was indicted for first degree murder, pleaded guilty to second degree murder, but maintained his innocence upon taking the stand. On the stand, he testified that he was pleading guilty only to avoid the possibility of receiving the death penalty. Despite Alford's claim of innocence, the Supreme Court upheld the trial court's acceptance of the plea; indeed, it held that the "strong factual basis for the plea removed the taint of constitutional error from the trial court's decision to accept Alford's plea." *Alford*, 400 U.S. at 38. After the Court's ruling in *Alford*, many states have required a judicial determination of the factual basis or accuracy of the plea. The Court's failure to provide further guidance to determine what constitutes a "strong factual basis" leaves the integrity of the plea bargaining process in question. For further discussion of plea bargaining in connection with the Vincent Chin case, see *infra* Part II.C.2.

321. *See* RONALD BARRI FLOWERS, MINORITIES AND CRIMINALITY 149-62 (1988) (discussing differential enforcement of law in communities of color by law enforcement agencies and the courts) (1990); CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR 115-219 (1993); *Developments in the Law—Race and the Criminal Process*, *supra* note 7.

conflicts are starkly drawn in the subsequent federal civil rights trial;[322] however, they are no less pronounced at the state criminal proceedings level, which is the focus of this article.[323] These disparate views can be evidenced dualistically by the defense's insistence at all levels and proceedings that nothing more serious than a barroom brawl resulted in Vincent Chin's death, contrasted by the State's and Asian communities' contention that a far more serious criminal offense had occurred. The defense argued that the killing was not the result of racial animosity, as stated by defense attorney Frank Eaman:

> *Ron Ebens is guilty of having too much to drink, being a macho man who wouldn't back down from a fight and wanted to avenge his stepson. And he's guilty of letting himself go too far and killing somebody with a baseball bat. A serious crime no doubt. . . . He is not guilty of doing this because of racial animus or racial feelings or racial bias or racial prejudice. It so happens the person he was involved with was Chinese.*[324]

In contrast, members of American Citizens for Justice (ACJ), argued that race was *the* precipitous factor of Vincent Chin's death. As stated by Helen Zia:

> *I think anybody who takes the time to go over the facts of this case and to read what people who were witnesses there, who had no motivation, no self interest in coming forward and saying they heard certain things . . . racial things. Anybody who takes the time to look at that, I think can only conclude that there was racial motivation in this killing.*[325]

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322. *See supra* Part II.B.

323. The primary focus of this article regards the state criminal proceedings; however, it is the subsequent federal civil rights proceedings that illuminate the criminal action. In large part, this is due to the lack of a record or reported case in the state proceedings. The state record is absent in this case because the prosecutorial decision is not subject to hearing on the record, and because a plea bargain was reached. Thus, in addition to the accounts provided in the film and in other sources, the federal court provides a source of written record and a recitation of the underlying facts. However, as discussed *infra* Part II.D, the important analytical and pedagogical purposes extend beyond the criminal law. In discussing my use of *Vincent Chin* with colleagues Professors Paulette Caldwell, at New York University; Taunya Banks, at the University of Maryland, and Angela P. Harris, at the University of California, at Berkeley, they expressed interest in the film for use in civil rights and procedural law courses, in addition to criminal law.

324. Film Transcript, *supra* note 301, at 21-22.

325. *Id.* at 2.

In the film, witnesses who were present at the Fancy Pants provide accounts of the events triggering the fight between Ronald Ebens and Vincent Chin:

> Starlene: *I was on the stage dancing and Chin and his friends were at the other end of the stage. And so they had encouraged me to come down to their . . . to their end of the stage to dance for them. You know, cause they were having a party. And so you know, being in a new club I felt a little leery but it was alright so I went down to dance for 'em. And he [Chin] wanted to give me a tip which was cool with me you know, I wanted to accept the tip. But when I went to accept the tip he didn't want to give it to me the way I wanted to receive it you know. I had just started here and I was very uncomfortable so I kind of refused and told him that's alright. You know, keep the tip and I . . . went to the other end of the stage and then Ebens comes in.*
>
> . . . .
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> *I remember seeing him [Ebens] walk through the door all the way down to the stage, cause he sat right in front of me, you know. Obviously he came in a couple of days before . . . and saw me dancing. He liked me, we must've talked and got along. Cause he was you know, boosting me up and encouraging me and it made me feel good you know. Cause he was making me . . . yeah it's Starlene you know, what's been happening you know. Party down or whatever.*[326]
>
> Ebens: *I think her name was Starlene. That's all I remember. And I wouldn't have known that if she hadn't been at the [federal civil rights] trial.*[327]
>
> Starlene: *And so I felt better. Then Chin and his friends . . . well maybe not his friends but someone in the corner. . . . They got upset . . . "ah she's nowhere you know. You don't know what you're talking about." And Ebens . . . is at the other end of the stage going "what, man you don't know a good thing when you see one, you know. And Chin . . . goes "I'm not a boy."*[328]
>
> Gary Koivu: *I was talking to Jimmy [Choi] on my left. Vincent was on my right when I heard Vincent say "don't call me a f—. I'm not a f—." And that's when I turned and saw who Vincent was talking to. And I put my hand on Vincent's arm and I calmed him down.*

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326. *Id.* at 20.
327. *Id.* at 21.
328. *Id.*

. . . I was looking at Ronald Ebens when he said, "I'm just not sure if you're a big f— or a little f—." And then with that Vincent stood up and walked around me and Jimmy and approached Ronald Ebens. Ebens stood up and Vincent shoved him in the chest and Ebens shoved back and they both started punching.[329]

Racine Colwell: *I came around the bar and all I saw was Mr. Ebens was yelling at Vincent Chin. And the next thing you know Vincent got up and walked around and hit Mr. Ebens.*[330]

Ronald Ebens: *And he came around and sucker punched me. And that was . . . that was the start of it all right there. I never even got a chance to stand up. Never seen it coming. That's the way the whole thing started.*[331]

Racine Colwell: *I was close enough to hear Mr. Ebens say to Mr. Chin, "It's because of you m—f—s that we're out of work." Mr. Chin replied "I'm not a little m—f—."*

. . . .

[M]r. Nitz jumped into the fight to help Mr. Ebens. And Mr. Ebens raised a chair and Vincent raised a chair to deflect and somehow Mr. Ebens' son . . . stepson Mr. Nitz got hit with the chair. And after that they were broken up by the parking lot attendant.[332]

Starlene: *I didn't see anybody throw blows but I saw Chin standing in a position as to where he had just got through throwing a few blows and Ebens was on the floor you know. Ebens was on the floor and his stepson . . . I think he was on the floor too on the otherside somewhere, but he was thrown off you know and Chin was the only one standing. Like you know the survivor of whatever he had done right there. He was the one who had, you know, won. Cause, he, hey, they were kinda busted up you know. He kinda busted them up by himself. His friends didn't help him cause he was handling it by himself.*[333]

Ronald Ebens: *Well Racine Colwell testified [at the civil rights trial] that she had heard me say "It's because of you little so and so's that we're out of work." I guess if you want to construe that*

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329. *Id.* at 8.
330. *Id.* at 9.
331. *Id.*
332. *Id.* at 21.
333. *Id.* at 22.

> *as a racial slur. I don't, I don't know how you could do that but I never said that period.*[334]

Scholar Jayne Lee cautions against a knee-jerk characterization and interpretation of the events and conflicting accounts surrounding Vincent Chin's death. In moving beyond a visceral reaction to events that are quickly labeled "racist," a more discerning analysis is needed in order to understand the milieu of social construction and the social contexts in which such events occur. As Jayne Lee states:

> Because we cannot determine the "racism" of a practice from its content alone, we can never predict whether a practice will be racist or antiracist. Instead, we must examine the practice's social situation and effects. This indeterminacy does not mean we need abandon all prediction . . . . What this indeterminacy does mean is that we often cannot ascertain whether a practice is racist apart from its social context and its effects.[335]

What, then, to make of Ronald Ebens' actions and anti-Asian epithets within the social and historical context and within the application of formalistic criminal law doctrine and discretion? Professor Marvin Jones provides a clue, though speaking in another context, when he says that:

> In [this] case, there is a clear intersection between the plane of interpretation and adjudication, and the plane of historical narrative. . . . They are, like the racial myths they reflect, reducible to certain constituent components, as if they were expressions of deep structures within our social and legal culture, rather than random or peculiar events.[336]

Thus, when Ronald Ebens, in the midst of the events that began at the Fancy Pants, rails at Vincent Chin that "it's because of you m— f—s that we're out of work," this provides greater insight into his state of mind than he is willing to or is capable of admitting. It also has historical resonance. Through a narrow lense, what happened at the Fancy Pants was nothing more than a barroom brawl, as the defense contended. Viewing events through the narrow purview of formalistic legal analysis propagates the myth of objectivity; race and other contextual factors need not be considered, and indeed, would sully the colorless palette of neutral, albeit rational,

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334. *Id.*

335. Lee, *supra* note 36, at 758.

336. Jones, *supra* note 18, at 505.

determinations. However, when viewing the events through the wider lense of multiple perspectives, including race, ethnicity, gender, and class, a more pernicious picture emerges. Opening the lense in order to absorb and cast light onto the significant historical, contextual, and identity dimensions would inform the criminal doctrine and process.

There are several such intersections in this case. On one level, at least, it would seem that Ronald Ebens and Vincent Chin enjoyed a male bond of sorts, as both affirmed their gender identities by participating in women's objectification at the Fancy Pants Lounge as regular entertainment in the time-honored tradition of the bachelor party. As Rich Wagner, a friend of Ronald Ebens, describes:

> *We used to go to other topless bars like the Fancy Pants, places like this. It would just be a place to go and a bunch, group of guys. It was just a way to relieve yourself. And you'd have girls up dancing that would dance you know topless and people would you know sometimes yell at the girls. Sometimes just sit there and drink or whatever—but it was a place for the group of people from the plants to go and meet. You know and most of them were married and very family orientated people, but it was a night out. It was a night out for the guys.*[337]

In the end, Ronald Ebens disavowed any racist inclinations, and also disavowed any affinity for the women strippers.[338] Furthermore, Ebens and Chin seem to find commonality in another ritual display of male aggressiveness—fighting. There appears to be no doubt, in fact, that Vincent Chin threw the first punch.[339] In addition to

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337. Film Transcript, *supra* note 301, at 7.

338. The African American dancer Starlene asserted that Ronald Ebens boosted her confidence after she had been offended by Vincent Chin. *Id.* at 20. Ebens, however, denies having any special knowledge of Starlene, stating, "*I think her name was Starlene. That's all I remember. And I wouldn't have known that if she hadn't been at the trial.*" *Id.* at 21.

The women dancers were variously devalued and discredited in the legal proceedings as well. In the initial stages, they were never interviewed regarding their observations. In the subsequent civil rights trial, government attorneys attempted character assassination of Starlene, which was found to be trial error on appeal. United States v. Ebens, 800 F.2d 1422, 1442 (6th Cir. 1986) (prosecutor suggesting sexual liaison between Ebens and Starlene).

Another sentient witness, Racine Colwell, also was dismissed as unrealistic, although she was found to be more credible than Starlene by the federal civil rights jury. Film Transcript, *supra* note 301, at 22. Ronald Ebens stated, "*Well Racine Colwell testified that she had heard me say 'It's because of you little so and so's that we're out of work.' I guess if you want to construe that as a racial slur. I don't, I don't know how you could do that but I never said that period.*" *Id.* at 22.

339. *Ebens*, 800 F.2d at 1427-28; *see also* Film Transcript, *supra* note 301, at 8-9 (comments of Gary Koivu, Racine Colwell, and Ronald Ebens).

recognizing the dynamic of male braggadocio and the devaluation of women which Ebens and Chin apparently shared, it is necessary to comprehend where they diverge in their shared male identities in order to deconstruct the meaning of Ronald Ebens' racial animus.

Toward this end, it is important to recognize the obvious and subtle nature of Ebens' racial behavior. First, there is the most obvious form—name calling. Ebens began to make obscene remarks toward Vincent Chin, calling him a "Chink" and a "Nip."[340] However, it is the more subtle demonstration of racism that is telling in this case. When Ebens comments further that "it's because of you little m— f—s that we're out of work," an expression of nativistic racism[341] directed at Vincent Chin specifically and Asian Americans generally is revealed. The racial animus contained in this statement is not made clear by the accompanying anti-Asian epithets; rather, it is clear from the social context surrounding those utterances.

The growing national recession became depression in Detroit in 1982. As one news reporter states in the film, officially Detroit's unemployment rate was at seventeen percent. Half of the people in the city were on some sort of government assistance, and the mayor had declared a hunger emergency in the city.[342] Government officials located the source of the United States' economic woes in Japan. In one news broadcast, the late Speaker of the House Thomas P. ("Tip") O'Neill urges, "*[I]f I were President of the United States for two months I said I'd fix the Japanese like they've never been fixed. I said I would put a moratorium on automobile. . . .* "[343] The invective expressed by public officials, the frequent public gatherings to bash Japanese auto imports with sledgehammers, and Ronald Ebens' and Michael Nitz's identities as laid-off U.S. auto workers provide a clear referent for "we." In this respect, the Japanese are not distinguished from Japanese nationals, Japanese Americans, Chinese Americans, or any ethnic Asian person for that matter, and they are the clear referent for "you."

The next sequence of events stemming from the Fancy Pants altercation reveals how the racial animus found its fatal expression. The fight continued outside the Fancy Pants, with Vincent Chin challenging Ebens to finish the fight. Ronald Ebens then removed a baseball bat from Michael Nitz's hatchback. Upon seeing the baseball bat, Vincent Chin ran and was pursued by Ebens and Nitz. Vincent Chin was found by one of his friends, Jimmy Choi, and the two of them ran for several blocks until they stopped at a

340. *Ebens*, 800 F.2d at 1427.

341. *See* Chang, *Asian American Legal Scholarship*, *supra* note 14, at 1252-53.

342. Film transcript, *supra* note 301, at 11.

343. *Id.* at 12.

McDonald's restaurant hoping to find refuge in the crowd.[344] Ebens and Nitz continued to look for Chin. They happened upon an African American man named Jimmy Perry during their search; they offered Perry twenty dollars to help them find and catch a "Chinese guy."[345] Perry testified at the civil rights trial that Ebens and Nitz talked during the ride about catching a "Chinese guy" and "busting his head" when they caught him.[346]

The ultimate confrontation took place in the parking lot of the supermarket next to McDonald's. According to the court of appeals:

> Ebens and Nitz approached Chin and Choi using a parked car for cover. Ebens was still carrying the baseball bat. Chin saw them coming and yelled "Scram." Choi escaped but Nitz grabbed Chin in a bear hug from behind. Chin broke loose and ran onto Woodward Avenue. Ebens struck Chin several times with the bat on the back and head causing Chin to fall to the ground. . . . [I]t is undisputed that Ebens was the aggressor. Meanwhile, the Highland Park police officers who were working as security guards at McDonald's came up, drew their guns and ordered Ebens to drop his bat.
>
> Chin was taken to Henry Ford Hospital, losing consciousness several times en route. He suffered two lacerations on the back left side of his head and abrasions on his shoulder, chest and neck and lapsed into a severe coma. After the performance of emergency surgery, his brain ceased functioning entirely. At 9:50 p.m., June 23, 1982, a ventilator which had been employed to keep him breathing was removed and he was pronounced dead.[347]

Normatively, Ronald Ebens' killing of Vincent Chin can be analyzed according to the common law paradigms for homicide, with little or no explicit reference to race. In this regard, the analysis would begin with second degree murder, the presumption for express-malice intentional killings, and implied malice killing where there is an intent to cause grievous bodily injury that results in death, and/or where the defendant acts with extreme recklessness (or "depraved heart").

Thus, the basic facts would support a second degree theory on express or implied malice theories. As a matter of express malice,

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344. *Ebens*, 800 F.2d at 1428.
345. *Id.*
346. *Id.*
347. *Id.*

Ebens' intent to kill Vincent Chin can be argued based on the "natural-and-ordinary-consequences" rule.[348] After the initial fight at the Fancy Pants, Ebens took the confrontation to a more dangerous level by retrieving the baseball bat from Nitz's car, chasing Chin with it, then driving around in pursuit for twenty to thirty minutes to "catch a Chinese guy" and "bust his head."[349] The ensuing vicious beating with the bat to Chin's head, back, chest, neck and shoulders would evince an intent to kill in that the probable outcome of such a beating would be death. In the absence of evidence that Ebens was not an "ordinary" person, a trier of fact could infer that he intended the natural and probable consequences of his conduct, that is, Vincent Chin's death. Off-duty Highland Park Police Officers Michael Gardenhire and Morris Cotton reported observing numerous double-handed swings to Vincent Chin's body and four fatal blows to his head.[350] The use of the baseball bat, as a deadly weapon, strengthens this argument.[351]

Under implied-malice murder theories, a second degree charge can be supported by the severe beating by Ebens based on the interrelated doctrines of intent to inflict grievous bodily harm and "depraved heart" killings. In this regard, culpability exists where the actor who unjustifiably and inexcusably intends to cause such serious injuries is guilty of murder when the victim dies as a result of the assault.[352] The depraved heart murder results from the creation of an extremely high degree of risk of death or serious bodily injury. Whether defendant's conduct will fall within the high degree of risk creation which suffices for negligence/recklessness manslaughter or that which qualifies as murder is a subjective determination to be made by the prosecutor at the charging juncture, and by the trier of fact at the close of evidence. Thus, the difference between risk creation which is murder and that which is manslaughter is a matter of

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348. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 471 (1987).

349. *Ebens*, 800 F.2d at 1428.

350. ACJ Report on the Vincent Chin Case, *supra* note 300, at 4.

351. The "deadly weapon rule" permits the inference that one who uses a deadly weapon, or who intentionally uses a deadly weapon directed at a vital part of the human body, intends to kill. DRESSLER, *supra* note 348, at 471; WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 613-14 (2d ed. 1986) (noting those items that have been considered deadly weapons, not by virtue of intrinsic qualities, but by virtue of the circumstances of their use: e.g., loaded guns, daggers, swords, axes, iron bars, baseball bats, bricks, rocks, ice picks, automobiles, and pistols used as bludgeons). In both instances of the natural and probable consequences theory a permissible inference as to intent can be drawn; constitutionally, however, this cannot be a presumption on a material element of the offense. *See* Sandstrom v. Montana, 442 U.S. 510, 524 (1979).

352. *See* DRESSLER, *supra* note 348, at 476; *see also* People v. Mackey, 423 N.W.2d 604 (Mich. Ct. App. 1988).

degree. It is a profoundly elastic measure of fault and seriousness of the offense which permits flexibility, but also invites abuse where the determination is based on biased considerations of race, gender, and the like.

Although the putative starting point for express or implied malice killings is second degree murder, the facts and circumstances of the *Vincent Chin* case also warrant analysis under the first degree paradigm. Beyond intention, first degree murder doctrine requires premeditation and deliberation. There is no presumption of first degree murder; there must be a showing that the defendant actually premeditated and deliberated.[353] This involves a quantitative and qualitative analysis. Quantitatively, when first degree murder is alleged, the element of premeditation is interpreted to require an appreciable time to contemplate the killing beyond the time in which an intent to kill can be formed. However, the terms "premeditation" and "deliberation" defy precise definition. According to LaFave and Scott, "perhaps the best that can be said of 'deliberation' is that it requires a cool mind that is capable of reflection, and of 'premeditation' that it requires that the one with the cool mind did in fact reflect, at least for a short period of time before [committing the] act of killing."[354] Qualitatively, the inquiry focuses on the actor's capacity to premeditate and deliberate. In such instances, the defendant's subjective capacity to reflect on the intention to kill may be found to be impaired by intense emotion, intoxication, or limited mental capacity.[355]

Both quantitative and qualitative inquiries are relevant in the *Vincent Chin* case. Evidence of premeditated desire to kill often is based on three categories of evidence: (1) planning activity, (2) motive, and (3) manner of killing.[356] Certainly, what Ebens considered to be the affront of Vincent Chin's presence at the Fancy Pants and of his defeat at Chin's hands, indicate motive. And that the killing is accomplished by Ebens' striking directly at Vincent Chin's vital body parts, particularly his head, evinces a mien and manner calculated to result in Vincent Chin's ultimate demise.

As stated, however, this inquiry must also resolve the issue of capacity to premeditate. In this case, Ebens' apparent rage, compounded by some degree of intoxication, would render a finding of subjective premeditation somewhat problematic. This is particularly so where other institutional players in the criminal justice system are

353. LAFAVE & SCOTT, *supra* note 351, at 644.

354. *Id.* at 643.

355. *Id.* at 644.

356. DRESSLER, *supra* note 348, at 475.

inclined to sympathize with the actor's condition and conduct.[357] Where present, intoxication must be considered a salient factor in connection with the theories of criminal homicide liability. Both Ronald Ebens and Vincent Chin were drinking at the Fancy Pants. The state of Ebens' sobriety is primarily at issue for the determination of his culpability, however. As such, the state of his sobriety has significant implications on the charging level and potential outcome of the case, upward from voluntary manslaughter.

With respect to a first degree charge, for example, even voluntary intoxication may vitiate the requisite finding of premeditation and deliberation if the actor is unable to form this subjective specific intent to kill. With respect to heat-of-passion manslaughter, voluntary intoxication is not available to the actor who is more apt to anger or slower to cool down than a reasonable or ordinary person.[358] Under the depraved heart theory, voluntary intoxication offers no defense for creating an extreme risk of death or harm.[359] The net result, then, would suggest second degree murder as an appropriate charging level—downward from first degree; though upward from voluntary manslaughter.

Again, as a normative matter, one of the most plausible theories against the second degree charge would be a defense in mitigation, or voluntary manslaughter.[360] Prevailing on a provocation defense requires that the killing be committed (1) in the heat of passion, (2) during passion resulting from adequate provocation, (3) before a reasonable opportunity to cool off had elapsed, and (4) the provocation was the impetus for the killing.[361] At common law, adequate provocation could be based on circumstances of aggravated assault or battery, or mutual combat. Both possibilities exist under the *Chin* facts.

Time-framing is crucial in analyzing a provocation defense, as necessitated by the "cooling off" inquiry. In this case, two critical time periods are at issue: the initial altercation at the Fancy Pants, and Ebens' and Nitz's pursuit of Vincent Chin after this initial confrontation. As to the first time period, Ebens could argue that Chin's "first blow" ignited his anger to retaliate, under the first paradigm case of aggravated assault or battery. Complicating this provocation

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357. *See, e.g.*, LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 280-82 (1993) (discussing how prosecutors, jurors, and judges empathized with middle-class drunk drivers on the basis of class—and likely gender and race—and accorded more lenient treatment until widespread movements emerged to condemn drinking and driving).

358. LAFAVE & SCOTT, *supra* note 351, at 393.

359. *Id.* at 652-53; *see also* MODEL PENAL CODE § 2.08 (1985).

360. *See* MICH. COMP. LAWS ANN. § 750.321 (West 1991 & Supp. 1996).

361. *See* LAFAVE & SCOTT, *supra* note 351, at 653-63.

claim is whether there would be any recognition that Ebens' racist name-calling constitute a provocation claim availed to Vincent Chin, as his passions clearly were aroused by Ebens' racial slurs.[362]

Under the second paradigm case, mutual combat, the defense would argue that Vincent Chin's death resulted from the mutual combat between himself and Ronald Ebens. Again, time-framing is important. These arguments are much stronger for the events which occur at the Fancy Pants, where the fight originated. For purposes of voluntary manslaughter analysis, mutual combat is defined as "a fight or struggle which both parties enter willingly or in which two persons, upon a sudden quarrel, and in hot blood, mutually fight upon equal terms and death results from the combat."[363] The mutual combat theory is a paean to male violence. It suggests what Professor Susan Estrich has discussed in terms of the force-resistance requirement in rape law.[364] In addition to countenancing an unrealistic standard with respect to male violence in women's lives, recognizing mutual combat also perpetuates the homophobic notion that "real men fight," or alternatively, that "real men fight back."[365] It is in this vein that Professor Mari Matsuda asserts that "patriarchy killed Vincent Chin."[366]

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362. *See* Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND, *supra* note 270, at 66-69 (positing that racist speech is the equivalent of "fighting words," which is likely to produce physical symptoms in victims and to provoke victims' violent response, and is therefore undeserving of First Amendment protection).

363. People v. Neal, 446 N.E.2d 270 (Ill. App. Ct. 1983).

364. Professor Estrich states: "[M]ost of the time, a criminal law that reflects male views and male standards imposes its judgment on men who have injured other men. It is 'boys' rules' applied to a boys' fight." Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986) (footnote omitted).

365. Professor Estrich explains the "sandlot" dynamic, with its homophobic overtones thusly:

> The first [view of force in human relations] understands force as most schoolboys do on the playground: force is when he hits me; resistance is when I hit back. That is the definition of force traditionally enforced in rape cases. . . .
>
> . . . .
>
> [I]t is not at all difficult to understand that a woman who had been repeatedly beaten, who had been a passive victim of both violence and sex during the "consensual" relationship . . . would not fight. She wouldn't fight; she might cry. Hers is the reaction of "sissies" in playground fights. . . .

Id. at 1105, 1111.

366. Professor Matsuda states:

> Most people think that racism killed Vincent Chin. When white men with baseball bats, hurling racist hate speech, beat a man to death, it is obvious that racism is a cause. It is only slightly less obvious, however, when you walk down the aisles of Toys R Us, that little boys grow up in this culture

Courts have vacillated in defining the principles for this form of manslaughter; typically, however, one or two things must be proven: (1) that defendant's conduct, under the circumstances known to the actor, must involve a high degree of risk of death or serious bodily injury, in addition to the unreasonable risk required for ordinary negligence; and/or (2) whatever the level of risk required, the actor must be aware of the fact that their conduct creates the risk.[367]

Undergirding both theories is a requirement for reasonableness and/or proportionality. Therefore, Ebens' actions, after the initial confrontation, would appear to militate against success on the defense. His use of the baseball bat (a deadly weapon), along with the aid of Nitz, takes his response out of the realm of a "fair fight." Moreover, the thin line that exists between self-defense and provocation theories is erased where, after the initial confrontation, Ronald Ebens responds to repel the nondeadly force of Vincent Chin's battery with the deadly force of the vicious beating.[368] In the space where self-defense converts into provocation, Ebens, it can be argued, acts with the intention to cause grievous bodily harm to Chin as revealed by his retrieving the bat, driving around in pursuit, and expressing the desire to "bust the Chinese guy's head." At issue is whether or not the time between the initial altercation at the Fancy

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> with toys that teach dominance and aggression, while little girls grow up with toys that teach about being pretty, baking, and changing a diaper. And the little boy who is interested in learning how to nurture and play house is called a "sissy." When he is older he is called a "f-g." He learns that acceptance for men in this society is premised on rejecting the girl culture and taking on the boy culture, and I believe that this, as much as racism, killed Vincent Chin.

Matsuda, *supra* note 39, at 1189-90.

367. *See* LAFAVE & SCOTT, *supra* note 351, at 653-55. The standard for criminal negligence manslaughter has alternately been articulated in terms of negligence or recklessness standards. The distinction lies in the requirement of the defendant's awareness regarding the creation of risk of death and/or that defendant is aware that his or her conduct creates the heightened degree of risk. The former standard suggests negligence, while the latter, singly or combined with the former, suggests recklessness. Many states have followed the lead of the Model Penal Code on this matter, thereby requiring consciousness of risk, or recklessness. *See* LAFAVE & SCOTT, *supra* note 351, at 669-71; MODEL PENAL CODE §§ 2.02(c), 210.3 (1985). However, some states condemn risk creation irrespective of the actor's realization of the risk.

368. In this respect, the subtle line between provocation and self-defense becomes apparent. As Professor Dressler explains: "If V unjustifiably strikes D with the intent to kill her, D is justified in killing V in self-defense, assuming that she reasonably believes that the attack will continue and that deadly force is necessary. If V commences a *non*deadly attack on D, D may justifiably use *non*deadly force to protect herself, and if an accidental death ensues she will not be guilty of any homicide offense. If V starts a *non*deadly assault and D, enraged, *intentionally* kills V, her disproportionate response impairs her claim of self-defense, but the provocation defense comes into play." DRESSLER, *supra* note 348, at 491.

Pants and Ebens' and Nitz's subsequent half-hour search for Chin throughout the neighborhood evinces Ebens' continuing state of "hot blood," and whether a reasonable or ordinary person would have cooled off within this period. Paradigmatically, the resolution of these issues could support a reduction from second degree murder to voluntary manslaughter; yet Ronald Ebens' disproportionate response would not seem to support this result.

Involuntary manslaughter must also be considered under the *Chin* facts. In this instance, where a defendant acted with criminal negligence or recklessness, or engaged in non-felonious criminal activity and did not intend to cause death or serious bodily injury, but engaged in non-felonious criminal activity in which death resulted, he may be culpable for involuntary manslaughter. Addressing the two possibilities, in Ebens' defense claim, the nonfelonious criminal activity presumably is the retaliatory battery against Vincent Chin. However, this claim would seem to be unavailing where Ebens struck Chin with severe blows intended to cause severe harm; not as is often recognized, where a defendant intends a minor blow but actually causes greater harm than was anticipated. Similarly, Ebens' retaliatory actions suggest a conscious awareness of the risk of harm to Vincent Chin and that Ebens' conduct created a grave degree of risk. Nevertheless, a trial judge would have a duty to instruct on involuntary manslaughter if the evidence could support such a theory.[369]

Analysis of the *Vincent Chin* case according to formalistic criminal law principles, while clearly possible, does not render a fuller understanding of the dynamics in the case and their relationship to these principles. Simple application of formalistic analysis would mean adoption of the defense's theory that race was only an incidental aspect of the case, and that the subtle and overt anti-Asian slurs by Ronald Ebens were inconsequential. Minimization of the importance of racist speech and their connection to racist acts is common.[370] Professor Patricia Williams states that "the attempt to split bias from violence has been this society's most endearing rationalization."[371] In this vein, Professor Mari Matsuda includes the following examples

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369. *See, e.g.*, People v. Heard, 103 Mich. App. 571 (Ct. App. 1981) (noting a duty to instruct on the cognate offense of involuntary manslaughter "if supported by the evidence"); People v. Ora Jones, 395 Mich. 379 (1975) (noting that where the trial judge instructs on manslaughter without a request from the parties, it is reversible error to give only an instruction on voluntary manslaughter, where the defense's theory was based on accident).

370. *See generally* LAWRENCE, ET AL., WORDS THAT WOUND, *supra* note 270; Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989).

371. Patricia Willliams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 139 (1987).

in a list of "just kidding" stories which minimize the harms of racism:

> An African American worker found himself repeatedly subjected to racist speech when he came to work. A noose was hanging one day in his work area; a dead animal and other threatening objects were placed in his locker. "KKK" references were directed at him, as well as other racist slurs and death threats. His employer discouraged him from calling the police, attributing the incidents to "horseplay."
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> In San Francisco, a swastika was placed near the desks of Asian-American and African-American inspectors in the newly integrated fire department. The official explanation for the presence of the swastika at the fire department was that it was presented several years earlier as a "joke" gift to the battalion chief, and that it was unclear why or how it ended up at the work stations of the minority employees.
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> An African-American FBI agent was subject to a campaign of racist taunts by white coworkers. A picture of an ape was pasted over his child's photograph, and racial slurs were used. Such incidents were called "healthy" by his supervisor.
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> In Seattle, a middle-management Japanese-American was disturbed by his employer's new anti-Japanese campaign. As the employer's use of slurs and racist slogans in the workplace increased, so did the employee's discomfort. His objections were viewed as overly sensitive and uncooperative. He finally quit his job, and he was denied unemployment insurance because his departure was "without cause."
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> [A] Hmong family in Eureka, California, was twice victimized by four-foot high crosses burning on their lawn. Local police dismissed this as "a prank."[372]

Therefore, giving full weight to the significance of Ebens' reference to Vincent Chin as a "Chink" and "Nip" and to his accusation that "because of you we're out of work" reveals something more than an accidental killing, as the defense suggests. Instead, more appropriate homicide charges would recognize intentionality by Ronald Ebens based on theories of express and implied malice. The

372. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* WORDS THAT WOUND, *supra* note 270, at 20-21.

racial bias that fueled Ronald Ebens' criminal intent can be located in the conscious and subconscious mind. The defense argued that Ebens' racial epithets were meaningless to the analysis of this case. On some level this is an understandable position given the widespread acceptance of racist discourse in U.S. society. Thus, Ronald Ebens describes his encounter with Vincent Chin as "preordained,"[373] not as a deliberate racist act. According to Professor Charles Lawrence:

> Much racist conduct is considered unrelated to race or regarded as neutral because racist conduct maintains the status quo, the status quo of the world as we have known it. . . . [T]his is particularly true when the message and meaning of the epithet resonates with beliefs widely held in society. . . . [E]ach individual message gains its power because of the messages that are conveyed in a society where racism is ubiquitous.[374]

Research reveals that bias-motivated violence is particularly vicious.[375] This helps to explain the virulence of the attack on Vincent Chin. One witness at the McDonald's described the manner of Ebens' attack on Vincent Chin as "as though he were swinging for a home run."[376]

Thus, consciously, Ronald Ebens was aware of Vincent Chin as an Asian American within the socio-economic climate of Detroit's industrial decline, which was largely attributed to persons of Asian descent, particularly the Japanese. That such violence should occur during such difficult economic times also typifies bias-related assaults. Many researchers noted the rise in racially motivated crimes during the recession of the late 1970s to the early 1980s.[377] According

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373. In an interview in the film, Ronald Ebens states: "*What if we'd had an accident prior to it. What if we'd went to the ball game. There're 10,000 what ifs I can ask myself. It's just like this was preordained to be I guess. It just happened.*" Film Transcript, *supra* note 301, at 8.

374. Charles R. Lawrence, III, *Regulating Racist Speech*, 1990 DUKE L.J. 443, 453 & n.90.

375. In a study conducted by Dr. Jack McDevitt, it was found that while the national average for injury to assault victims is 29%, 74% of victims of bias-related assaults were injured. McDevitt concluded from his research that bias-related attacks are far more lethal than other kinds of attacks, resulting in hospitalization of their victims four times more often than for other assaults. Goleman, *supra* note 4, at 1 (discussing the McDevitt study).

376. *See* WHO KILLED VINCENT CHIN ? (Filmmakers Library 1988) (remarks of Officer Gardenhire).

377. Precise figures from that period are not available, however, since systematic tracking of bias crimes began only in the mid-1980s. Goleman, *supra* note 4, at 1; *see also infra* note 457.

to UCLA sociologist Dr. Ivan Light, "The roots of intergroup conflict are as much in economic competition as it is in negative stereotypes."[378] Dr. Steven Salmony, a psychologist at the University of North Carolina who has studied Klan violence, adds, "Economics and political uncertainties lead to personal insecurities. For the most vulnerable people, it's a short step to ethnic violence."[379]

In addition to the obvious nativistic racist impulse, a subtler degree of racial animus was involved in the case. Although more elusive, the social construction of Asian Americans as meek surely was inculcated into Ebens' psyche from popular representations. Again, Professor Charles Lawrence is instructive, stating that "for the most part, we do not recognize the myriad ways in which the racism pervading our history and culture influences our beliefs. In other words, most of our racism is unconscious."[380] More specifically, Renee Tajima writes:

> [S]everal generations of Asian women have been raised with racist and sexist celluloid images. The models for passivity and servility in these films and television programs fit neatly into the myths imposed on us, and contrasts sharply with the more liberating ideals of independence and activism. Generations of other Americans have also grown up with these images. And their acceptance of the dehumanization implicit in the stereotypes of expendability and invisibility is frightening.[381]

Thus the clash in the constructed image of Asian Americans with the reality of Vincent Chin's single-handed defeat of Ebens and Nitz at the Fancy Pants ignited a fury that led the men to avenge the racial affront against *them*. Ebens, it should be noted, was "a very large, well-built man," compared to Vincent Chin, who was of small build.[382] Ronald Ebens also had a reputation for violence. According to Ebens' friend Rich Wagner:

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378. Goleman, *supra* note 4, at 1 (quoting Dr. Ivan Light).

379. *Id.* (quoting Dr. Steven Salmony).

380. Lawrence, *supra* note 374, at 469.

381. Renee Tajima, *supra* note 308, at 317.

382. Interview with Christine Choy, *supra* note 309. Christine Choy estimated that Ronald Ebens was six feet, two inches tall and weighed about 200 pounds, Michael Nitz was six feet, three inches tall and weighed about 200 pounds, while Vincent Chin was five feet, six inches tall and weighed about 155 pounds. Generalizations about Asian Americans account for their being targeted for economic street crime; viewed as physically weak and culturally averse to defending themselves, Asian Americans are considered low direct risks in any physical confrontation. *See* Calvin Sims, *Seeking Cash and Silent Victims, New York Thieves Prey on Asians*, N.Y. TIMES,

> *Yes, I was surprised and the one thing is I know that Ron in a lot of cases would be a little bit an extrovert. He would talk, he talked to anybody. That's the kind of person he was but every little while he would get into arguments with people. You know, not into fights and stuff like that but he'd get into arguments. He's been in some scrapes in, in, in a bar. You know one or two before. And he really . . . Ron just, he did have a knack at times where he would rub somebody the wrong way. But normally it would end up in a discussion and you know it would end there.*[383]

To the extent that the widespread use of racial epithets is considered ordinary parlance, it distances the speaker/actor from the responsibility of claiming their actions as conscious or intentional. For this reason, legal analysis of intentionality must be reconceptualized to consider acts that are deliberate, though on some level unconscious.[384] In this case, the manifestation of Ronald Ebens' conscious and unconscious racism, as evidenced by the severity of the attack, was the intention to cause lethal harm to Vincent Chin and/or to avenge the loss of position of White superiority at having been beaten by Vincent Chin in the Fancy Pants brawl. Beyond the formalistic application of criminal law principles, then, the racist underpinnings of Ebens' actions explain not only that such criminal intentions were formed, but, more significantly, why. Furthermore, a more searching analysis, from the victim's point of view, is instructive toward understanding how conscious or unconscious bias can determine whether a given harm is considered more or less serious depending on the identities and constructions of the victims and defendants, and of those with discretionary decision-making authority, including police officers,[385] prosecuting attorneys,[386] judges,[387] and

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Oct. 7, 1990, at A1 (citing hundreds of subway attacks on Asian Americans); *see also* Kang, *supra* note 178, at 1930.

383. Film Transcript, *supra* note 301, at 7.

384. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); *see also* Davis, *supra* note 370 (discussing the term defined by Black mental health professionals as "incessant, often gratuitous and subtle offenses" which stem from social constructions of Black identity which assume White superiority and Black inferiority and subordination. The microaggressive acts that characterize interracial encounters are carried out in "automatic, preconscious, or conscious fashion" and "stem from the mental attitude of presumed superiority" (footnote omitted)).

385. *See* Geoffrey P. Alpert et al., *Law Enforcement: Implications of the Rodney King Beating*, 28 CRIM. L. BULL. 469, 469 (1992); Douglas A. Smith et al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234 (1984); Gregory Howard Williams, *Police Discretion—Who's In Charge*, 68 IOWA L. REV. 431 (1983).

386. *See* Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC'Y REV. 587 (1985); Helen Zia, *Asians Are America's Forgotten Victims*, L.A. DAILY J., Sept. 17, 1991, at 6.

also jurors.[388] It is not a matter of finding racism throughout the criminal justice system if one looks hard enough for it; it is a matter of looking hard enough for it in order to find the presence of racial bias that so many citizens of color experience in various ways. Applying formalistic principles without consideration of context permits a false sense of equal justice within the criminal law.

2. Discretion—Law Enforcement

The problems of race that resulted in Vincent Chin's killing were replicated during the adjudication of the case. It is unlikely that the state prosecutor considered the full racial underpinnings of the Vincent Chin case; rather, it is more likely that the case was handled in a faceless, formalistic manner. Although Ronald Ebens was originally charged with second degree murder, it appears that law enforcement regarded the case with only perfunctory attention.

The prosecutor's investigation into the offense did not include interviews with the women dancers at the Fancy Pants who observed the fight and heard the critical exchanges between Ronald Ebens and Vincent Chin. Similarly, the Chin family and the two African American police officers who were on the scene during the beating at McDonald's and who forced Ronald Ebens to stop, were not notified about the plea bargained agreement, nor was a representative from the prosecutor's office present in the court when sentence was pronounced.[389] Perhaps this, too, can be interpreted as normative practices and results stemming from an overtaxed law enforcement agency; however, the racial, gender, and class dynamics would suggest something more that was amiss.

The influence of race on law enforcement efforts has been well documented.[390] In one study that examined the degree to which race

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387. *See Developments in the Law—Race and the Criminal Process*, *supra* note 7, at 1626-37 (discussing race-based sentencing disparities under indeterminate sentencing schemes).

388. *See generally id.* at 1557-87 (discussing racial disparities and the criminal jury); *see also* FLOWERS, *supra* note 321, at 155 (citing studies of juror discrimination, in which the disparity in finding defendants of color guilty more often than Whites increases for serious crimes and crimes against White victims); Sheri L. Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1749, 1792 (1993) (discussing lack of protections for defendants of color against racial imagery used to enhance the likelihood of their convictions, and jurors' use of explicit or implicit racial arguments in the course of deliberations).

389. United States v. Ebens, 800 F.2d 1422, 1425 (6th Cir. 1986) (discussing the criticisms of the local Wayne County Prosecutor's investigation and general handling of the case); *see also* John Holusha, *Two Fined in Detroit Slaying Are Indicted by Federal Jury*, N.Y. TIMES, Nov. 3, 1983, at A26.

390. *See generally Developments in the Law—Race and the Criminal Process*, *supra* note 7, at 1500-20.

influenced police arrest decisions, the researchers found that police were more responsive to White victims of crime. The authors concluded that "[t]he results of [their] study show that differential responsiveness to victims may be greater in magnitude than suspect-directed bias, thus representing a greater challenge to equitable administration of justice."[391] The authors attributed the crime victim response differential to the likely degree of social distance between majority White police departments and people of color, citing earlier research which indicated that police view non-Whites as hostile and resentful toward them, and that police generally harbor an unsympathetic attitude toward people of color.[392] Indeed, most studies reveal that "police use race as an independently significant, if not determinative, factor in deciding whom to follow, search, or arrest."[393]

As noted earlier, there is great latitude in the prosecutor's decision-making authority. Three arguments are generally advanced for this far-reaching discretion—the separation of powers doctrine,[394] the expertise of the prosecutor's office, and the impracticability of subjecting prosecutorial decisions to potentially lengthy judicial review.[395] However, as persuasive as these arguments may be, research indicates that race often improperly influences the prosecutor's decision making in regard to investigation, severity of charges, and level of requested penalties.

Studies of prosecutorial decision making at the initial screening stage, for example,[396] reveal that the race of the victim is the most

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391. Smith et al., *supra* note 385, at 249.

392. *Id.* at 248.

393. *Id.* at 249; *see also Developments in the Law—Race and the Criminal Process*, *supra* note 7, at 1494-96 & nn.9-12, 1497-1520 (discussing critiques of racially discriminatory police conduct).

394. U.S. CONST. art. II, § 3. Also, many state constitutions have a corollary to the separation of powers doctrine found in the federal Constitution.

395. *See Developments in the Law—Race and the Criminal Process*, *supra* note 7, at 1522-23; *see also* Dwight Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 760-73 (1991) (discussing feeble efforts by federal courts in limiting prosecutorial discretion where judicial intervention may not be constrained by constitutional proscriptions).

396. As Professor Greene notes:

> Theoretically, there are several checks available to limit abuses in prosecutorial discretion. First, decisions to prosecute are subject to judicial oversight. Second, prosecutorial discretion may be legislatively controlled by pruning criminal statutes, setting priorities for prosecutorial budgets, providing less vague standards and creating or requiring the creation of written guidelines, policies and procedures. Finally, prosecutors are accountable to the electorate, directly or indirectly.

salient factor in determining whether full prosecution would be pursued, the chances for which increase when the victim is White. One such study, by looking at prosecutors' decisions to fully prosecute rather than to reject a case, or to try a case rather than to plea bargain, found that the probability of full prosecution increased when victims were White and other factors were controlled.[397]

Radelet and Pierce studied the influence of race in the assessment of homicide offenses. The study examined 1017 homicide defendants in Florida and compared the initial police assessment of the severity of each homicide with the initial prosecutorial assessment, and then determined whether the prosecutor upgraded or downgraded the police assessment of severity. The authors concluded that crimes involving White victims and Black offenders were much more likely to be upgraded by the prosecutor in severity assessment, while crimes involving Black victims and White offenders were more likely to be downgraded. These (re)assessments in turn led to more serious charges, more vigorous prosecution, and higher sentences for crimes involving White victims.[398]

A similar study conducted by Bowers and Pierce examined persons indicted for first degree murder in several Florida counties over a five year period (1972 to 1977). Bowers and Pierce concluded that homicide cases characterized by the police as involving no felony circumstances or only suspected felony circumstances were most likely to be upgraded by the prosecutor to felony murder if the defendant was Black and the victim was White. The authors further concluded that the prosecutor's selective upgrading and downgrading for crimes involving Black victims or White defendants, was the primary reason for the high proportion on death row of Blacks who had killed White victims.[399]

Greene, *supra* note 395, at 760 & n.90 (noting that over 44 states hold elections for the office of prosecutor, including Michigan). *See* MICH. COMP. LAWS ANN. § 168.191 (West 1991 & Supp. 1996); *see also* Greene, *supra* note 395, at 760 & n.91 (stating that elections are also held with respect to federal prosecutors, who are accountable to the U.S. Attorney General and, through that officer, to the President. Congress can exercise control through its advise and consent function. U.S. CONST. art. II, § 2, cl. 2; *see* Morrison v. Olson, 487 U.S. 654 (1988). Congress may also initiate impeachment proceedings. U.S. CONST. art I, § 2, cl. 5; *see* Chandler v. Judicial Council, 398 U.S. 74 (1970)).

397. Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439, 441-47 (1979).

398. Radelet & Pierce, *supra* note 386, at 615-19, *discussed in Developments in the Law—Race and the Criminal Process*, *supra* note 7, at 1526 & n.21.

399. William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Fuhrman Capital Statutes*, 26 CRIME & DELINQ. 563, 614-16 (1980), *reprinted in* W. BOWERS, G. PIERCE & J. MCDEVITT, LEGAL HOMICIDE 199, 244-46 (1984). Of course, the premise of this article is that bipolar analysis such as applied in the aforementioned studies, while valuable, may not reflect the particular dynamics attendant to differently constructed racial and ethnic groups. In this way, these findings may or may

The complexity of the prosecutor's role as a discretionary decision maker involves consideration of the strength of evidence, public opinion, legislative and/or public policy, expenditure of finite resources, and conjecture about the trier of fact's response (judge or jury). Of course, the prosecutor is ethically bound to bring only those cases that are supported by probable cause;[400] however, race may influence the decision to proceed beyond a basic finding of probable cause where the prosecutor and the jury may believe the victim or defendant of color not to be as valuable as other members of society. As stated by Professor Dwight Greene:

> [W]hile the prosecutorial function takes into account many intangible factors including administration, resource allocation, case evaluation and assessment, equity, fairness, and justice, which make judicial review difficult, these legitimate bases for granting prosecutors some discretion also reveal the potential for abuse. Prosecutors could readily rely upon, albeit perhaps unconsciously, improper considerations, including racist, sexist or classist stereotypes or other forms of pluralistic ignorance.[401]

As previously examined, typically there is a range of charges which potentially could be brought against a defendant.[402] The prosecutor has the discretion to decide what, if any, charges to bring. At every stage where there is prosecutorial discretion there may be discrimination and abuse of discretion. As the *Vincent Chin* case indicates, this includes the decision to devise plea bargained

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not reflect the precise circumstances within interactions between Whites and other people of color and Asians in the victim-defendant, or defendant-victim identities. This cannot be extrapolated with confidence. What is clear, however, is that the response of law enforcement agencies places a premium on the value of White citizens' lives, as defendants and particularly as victims of crime. *See* Harris, *supra* note 26 (stating that "[A]merican law has recognized a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated").

400. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1980) (stating that a finding of probable cause requires a determination both that the law can be applied to the facts and that there is sufficient evidence the defendant probably committed the crime).

401. Greene, *supra* note 395, at 759 n.89. Research released in January 1991 by the National Opinion Research Center at the University of Chicago and sponsored by the National Science Foundation, found that White Americans still believe, often unconsciously, in very racist stereotypes about Blacks and Hispanics with respect to laziness, tendency to commit acts of violence, intelligence and national loyalty. *See id.* (citing Smith, *supra* note 192, at 5). As Professor Greene opines: "There is no reason to believe that prosecutors as a group are free from such thinking. Indeed, given the skewed populations to which they are exposed, prosecutors may be more prone to such stereotyping." *Id.*

402. *See supra* Part II.C (discussion of formalist and contextual homicide law).

dispositions, where the opportunity to misapply prosecutorial discretion also can occur. Plea bargaining is the most common form of criminal case disposition. In the plea bargaining process, the defendant waives certain constitutional protections attendant to the right to a trial in exchange for a reduction in charge and/or sentence.[403] As was asserted in *Who Killed Vincent Chin?*, the prevalence of plea bargaining practices is in response to the demands of high case loads.[404] Also frequently cited are the risks associated with the uncertainties of trial from the prosecutor's point of view.[405]

In 1971, the Supreme Court placed its imprimatur on plea bargaining, thereby expanding prosecutorial discretion, in *Santobello v. New York*.[406] In *Santobello*, Chief Justice Burger called plea bargaining "an essential component of the administration of justice."[407] Nevertheless, plea bargaining has its proponents and detractors.[408] Proponents of plea bargaining contend that it prevents logjams in the criminal courts; it permits sentences to be tailored to individual defendants; it efficiently allocates criminal justice system resources; and prosecutors can obtain higher conviction rates without risking the expense and uncertainty of trial.[409]

Opponents of the process have argued that plea bargaining undermines the deterrent value of punishment by permitting evasion of legal sanctions; that plea bargaining is coercive, i.e., defendants plead guilty because they are led to believe that they will receive longer sentences if they insist on going to trial and are subsequently

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403. Criminal defendants give up several constitutional rights under plea bargained dispositions, including the right to remain silent, to confront witnesses, to be proven guilty beyond a reasonable doubt, and to a trial by jury. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 13 L. & SOC'Y REV. 211 (1979); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1059 n.1, 1136-37 (1976).

Charge reduction bargaining involves prosecutorial waiver of certain charges or counts in a multiple charge or count case, thereby reducing the maximum potential sentence length. See FRIEDMAN, *supra* note 357, at 390 (tracing plea bargaining back to the 19th century).

404. NAT'L MINORITY ADVISORY COUNCIL ON CRIMINAL JUSTICE, THE INEQUALITY OF JUSTICE—U.S. JUSTICE DEPARTMENT 211 (1980).

405. *See* HAROLD J. VETTER & IRA J. SILVERMAN, CRIMINOLOGY AND CRIME 500 (1986); MILTON HEUMANN, PLEA BARGAINING: EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 109-12 (1978).

406. 404 U.S. 257 (1971); *see also* Brady v. United States, 397 U.S. 742 (1970); Bordenkircher v. Hayes, 284 U.S. 357 (1978).

407. *Santobello*, 404 U.S. at 260.

408. *See generally* Malvina Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1 (1982).

409. *See* Douglas A. Smith, *The Plea Bargaining Controversy*, 77 J. CRIM. L. & CRIMINOLOGY 949, 950 (1986), and sources cited therein.

found guilty; and that defendants with a strong case may be encouraged to plead by his or her attorney simply because the attorney does not have the time or energy to prepare for trial.[410] Lastly, it is argued that plea bargaining detracts from the legitimacy of the legal system because defendants regularly plead to lesser crimes than those actually committed.[411]

For all of its asserted benefits, however, plea bargaining remains a controversial practice in which questions are raised regarding the purported societal interests being served. And, for all of its controversies, among the least explored areas is the impact of plea bargaining on under-served and/or devalued communities that are victims of crime.[412] In this respect, the decision to plea bargain a case, rather than to vigorously investigate and prosecute, can reflect a determination based less on the underlying facts than the identities, real and constructed, of those involved. Where prosecutorial discretion is (mis)applied in this fashion, society and members of underserved communities suffer because plea bargaining often leads to pleas which stray from the actual offense, and results in sentences that do not correspond to the crimes committed. Consequently, the defendant is undercharged, inadequately punished, and members of communities of color are underprotected and undervalued.[413] As revealed by the *Vincent Chin* case, the adverse impact of plea bargaining in this way becomes especially apparent in the sentencing decision, which is discussed below.

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410. *Id.* at 949.

411. Ursula Odiaga, Note, *The Ethics of Judicial Discretion in Plea Bargaining*, 2 GEO. J. LEGAL ETHICS 695 (1989).

412. There has been considerable research on the discriminatory impact of plea bargaining practices on defendants of color. *See, e.g.*, MANN, *supra* note 321, at 182-84; Kevin C. McManigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989). However, little attention has been paid to the practice when people of color are victims of crime. For a notable exception, see Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420 (1988); *see also* Randall Kennedy, *Changing Images of the State: The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994) (calling for harsher treatment of defendants of color regarding drug penalty schemes).

413. Indeed, according to the American Citizens for Justice report to the Civil Rights Division of the U.S. Department of Justice, the preliminary hearing judge, Thomas C. Bayles, remarked at length that Ebens and Nitz had been "undercharged" with second degree murder, whereas Ebens had obtained the baseball bat from Nitz's car and the two defendants had searched for Vincent Chin for 20 to 30 minutes before Ebens beat him to death. ACJ Report on the Vincent Chin Case, *supra* note 300, at 3-5.

3. Discretion—Judging and Sentencing

It would be fantasy to assume that the pervasive influences of race discussed earlier in this paper did not also influence the perceptions of judges.[414] The deeply embedded racial stereotypes in U.S. society renders this outcome implausible. Members of the bench are unlikely to be any less impacted than are other Americans by racial and ethnic stereotypes. In this vein, Professor Kenneth Karst asks that we:

> Think again about all the ways awareness, thought, and feeling are affected by acculturation. Consider, too, how each type of socially defined difference produces its own specialized barriers to understanding. Even the most conscientious judge will have difficulty in imagining the thoughts and feelings of people who have grown up in groups that his culture has trained him to see as outsiders. . . .[415]

Upon accepting their pleas of guilty to manslaughter, Wayne County Circuit Judge Charles Kaufman sentenced Ronald Ebens and Michael Nitz to three years probation and $3780 fines.[416] Judge Kaufman was heavily criticized for the light sentence, which sparked public outrage, particularly in the Asian American community.[417]

Despite the application of formalistic considerations in sentencing dispositions, numerous studies of disparate treatment in criminal sentencing indicate that White defendants receive less

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414. Canon 3 of the Code of Judicial Conduct states that, "A judge should perform the duties of his office impartially and diligently." CODE OF JUDICIAL CONDUCT Canon 3 (1980).

415. Kenneth L. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1965 (1987).

416. Ronald Ebens pleaded guilty, and Michael Nitz pleaded nolo contendere. Changes in sentencing schemes have restricted the role of judges in this area. Many states have followed the federal sentencing guidelines in this regard. Therefore, while a federal judge has no discretion to participate in plea bargaining under FED. R. CRIM. P. 11(e), he or she has total discretion as to sentencing following a plea bargain under FED. R. CRIM. P. 11(e)(3)&(4), which state that the court may accept or reject a plea agreement. The federal sentencing guidelines give somewhat limited judicial discretion in this area, by stipulating sentencing ranges for offense levels. Sentencing Reform Act of 1984, Title II of the Comprehensive Crime Control Act of 1984, 18 U.S.C. §§ 991-99 (1984).However, the judge maintains some sentencing discretion because departures from the guidelines are provided for when "the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into account by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." Sentencing Reform Act, 18 U.S.C. § 3553(b) (1984).

417. *See* United States v. Ebens, 800 F.2d 1422, 1425 (6th Cir. 1986); CHAN, *supra* note 203, at 177; *see also supra* notes 10-11 and accompanying text.

severe sentences than their counterparts of color.[418] In these instances, the race of the victim is the salient determinant in the defendant's sentence—the perpetrators of offenses against White victims receive harsher sentences.[419] The impetus for disparate sentencing may be conscious and unconscious bias, and has not abated as a result of the increase in determinate, rather than indeterminate, sentencing schemes.[420] In a study of three states (Michigan, California, and Texas), which was controlled for relevant variables influential in sentencing, criminal justice researcher Joan Petersilia found that White felony offenders were more likely to receive probation or shorter sentences that defendants of color.[421]

According to Professor Coramae Richey Mann, "In addition to different backgrounds, potential racial prejudices, and cultural stereotyping, administrative pressures can play an integral role in judges' decisions."[422] Addressing the latter circumstance, Judge Kaufman pointed to an overwhelming docket in response to an interviewer's question about the sentence:

> *I am the presiding judge in the Criminal Division of the Wayne County Circuit Court. I have approximately 50 sentences every week. With 50 sentences a week, you're talking about 200 sentences a month. You're talking about 2000 sentences per year.*[423]

As to the former concerns, however, Judge Kaufman provides further detail upon which Ebens' and Nitz's sentences were based, stating:

> *The victim lingered for four days, which again, based upon everything was indicative to me that they attempted to administer a punishment. They did this too severely, in careless disregard of human life which is what manslaughter is. And that's what they were found guilty of and that's what I predicated my sentence on.*

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418. *See, e.g.*, Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981).

419. *See* David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); RONALD BARRI FLOWERS, RACE AND THE CRIMINAL JUSTICE SYSTEM 157 (citing studies by W. Bowers and G. Pierce, and G. LaFree).

420. *See* MANN, *supra* note 321, at 198-200; Paula C. Johnson, *Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & LAW 1, 37-41 (1995); *see also Developments in the Law—Race and the Criminal Process*, *supra* note 7, at 1626-41 (discussing indeterminate and determinate sentencing schemes).

421. JOAN PETERSILIA, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 20-28 (1983), *cited in* MANN, *supra* note 321, at 188.

422. MANN, *supra* note 321, at 189.

423. Film Transcript, *supra* note 301, at 14.

> *Had it been a brutal murder of course these fellas would be in jail by now.*[424]

Judge Kaufman's sentence is considered more curious in light of his departure from the pre-sentence report, which recommended incarceration for Ebens and Nitz. In *Who Killed Vincent Chin?*, Helen Zia of ACJ states:

> *The only thing that really bugs me is that the response especially from people in the legal community has been that these things happen all the time. Sure, police detectives don't even bother to ask people at the scene of the crime . . . anything. I did have an opportunity to read the presentence report, the psychiatric evaluation and so forth. And one thing I don't understand about that was that words like . . . Ronald Ebens is a bigot, an extremely hostile person. He has a long history of alcoholism and alcohol related problems and it recommended in addition to incarceration that he receive detoxification and counseling for his alcoholism.*[425]

Judge Kaufman's explanation inevitably prompts the questions: what constitutes a "brutal murder" and what is the appropriate level of punishment where the underlying facts suggest such brutality, even upon acceptance of defendant's plea of guilty. Responses to these questions, as seen previously, are informed by social context as well as social construction. Why, for example, when descriptions of the attack on Vincent Chin suggest a normative concept of brutality,[426] was the killing of Vincent Chin not deemed to be such? At the time of the sentencing, Judge Kaufman reasoned that Vincent Chin had thrown the first punch, that the defendants were employed and had no criminal records, and that Ebens and Nitz "weren't the kind of people you send to jail."[427] Thus, it is probable that Judge Kaufman lacked the "empathetic understanding"[428] necessary to

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424. *Id.* at 13.

425. *Id.* at 14; *see also* PETERSILIA, *supra* note 421, at ix (presenting previous finding that judges followed the pre-sentence report's recommendation in 80% of cases studied); ACJ Report on the Vincent Chin Case, *supra* note 300, at 5-6.

426. The two off-duty police officers who witnessed the attack at the McDonald's "observed numerous double-handed swings to Vincent Chin's body, and then four fatal blows to his head." ACJ Report on the Vincent Chin Case, *supra* note 300, at 3-4.

427. Thornton, *supra* note 11, at A4 (quoting Judge Charles Kaufman); *see also* Stephen Franklin, *A Victim's Relatives Hope for Justice on Third Try*, CHI. TRIB., Apr. 19, 1987, at 5.

428. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

Professor Lynne Henderson also speaks to the value of empathy in legal decision making, stating that:

view the attack on Vincent Chin from a different perspective, one that would not rely on a social construction of Ebens and Nitz as "noncriminal" and Vincent Chin as less valuable. Were it so, the brutality of Ebens' act unmistakably would be revealed.

Along these lines, in a study to measure the perceptions of appropriate punishments for offenders convicted of various felonies, researchers found that the relationship between the criminal perpetrator and the victim, and between the offender's social status and the victim's social status, influenced attitudes of appropriate sanctions.[429] Further, the study concluded that socio-demographic characteristics such as race, gender, and education, influenced respondents' judgments about what constitutes suitable criminal sanctions. In other words, the researchers determined that perspectivity and context determined the perception of fairness in sentencing: "We quite clearly see that thoughts of justice are filtered through the social context in which behavior occurs. Our research implies that perceptions of justice, inferred from evaluations of felony sanctions, reflect discretionary judgments and considerations of structural aspects of society."[430] The researchers underscore their conclusions by quoting Roscoe Pound on the administration of justice:

> [I]n no legal system, however minute and detailed its body of rules, is justice administered wholly by rule and without any recourse to the will of the judge and his personal sense of what should be done to achieve a just result in the case

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> [E]mpathy is a form of understanding, a phenomenon that encompasses affect as well as cognition in determining meanings; it is a rich source of knowledge and approaches to legal problems—which are, ultimately, *human* problems. Properly understood, empathy is not a "weird" or "mystical" phenomenon, nor is it "intuition." Rather, it is a way of knowing that can explode received knowledge of legal problems and structures, that reveals moral problems previously sublimated by pretensions to reductionist rationality, and that provides a bridge to normatively better legal outcomes.

Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1576 (1987) (footnote omitted). Having stated the importance of empathy, it is important to understand its fullest expression, which is not further self-absorption. Rather, as Professor Kenneth Karst states, "[m]ore than an intellectual predisposition, or belief, it is a readiness to be engaged in the experiences of others." Karst, *supra* note 415, at 1966. The empathy ideal, then, is firmly rooted in recognition and respect for the lived experiences and perspectives of others.

429. Joann L. Miller et al., *Felony Punishments: A Factorial Survey of Perceived Justice in Criminal Sentencing*, 82 J. CRIM. L. & CRIMINOLOGY 396 (1991).

430. *Id.* at 414.

> before him. Both elements are to be found in all administration of justice.[431]

Judge Kaufman's sentencing decision and his proffered rationales raise additional questions about the expectations of judges. On this point, Professor Judith Resnik observes, "[T]he heretofore male law of judges has made impossible demands. Impartiality and disengagement can never be achieved, hence all judgment is (sub rosa) suspect, hence we are always living in a second best world in which we cover our tracks with doctrines of insulation. . . ."[432] Professor Lynne Henderson adds, "[E]mpathy aids both processes of discovery—the procedure by which a judge or other legal decision maker reaches a conclusion—and processes of justification—the procedure used by a judge or other decision maker to justify the conclusion—in a way that disembodied reason simply cannot."[433] However, while supporting the move away from Cartesian duality—that is, "to cease to be in order to hear another's claims, or to be, and then to be impermissibly interested"[434]—Professor Patricia Cain correctly observes that "'bias' . . . can be both good and bad."[435] In this regard, the *Vincent Chin* case did not evince a complete lack of empathy; instead, under the rubric of individualized sentencing, Judge Kaufman apparently empathized with Ronald Ebens and Michael Nitz rather than with Vincent and Lily Chin.

"Looking from the bottom,"[436] Judge Kaufman could have considered the context in which Ronald Ebens killed Vincent Chin: the derision of Asian Americans during the Detroit area's economic decline and the incitement of violence against Asian Americans

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431. 2 ROSCOE POUND, JURISPRUDENCE 355 (1959), *quoted in* Miller et al., *supra* note 429, at 415.

432. Judith Resnik, *On the Bias: Feminist Reconsideration of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1943 (1988).

433. Henderson, *supra* note 428, at 1576 (footnote omitted). *But see* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099 (1989) (expressing doubts and hopes about the "call to context," which is complex and often contradictory); *see also* WILLIAMS, *supra* note 277, at 146-65 (recognizing that formal legal rules and procedures often provide more protection to subordinated groups in a society built upon racial hierarchy).

434. Resnik, *supra* note 432, at 1944 (interpreting the views of Judge Learned Hand on the role of judges, and citing LEARNED HAND, THE SPIRIT OF LIBERTY 309-10 (Irving Dillard ed., 1958).

435. Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1946 (1988); *see also* Massaro, *supra* note 433, at 2110 ("The significant modern questions . . . are not whether judges and "law" should "empathize," or whether stories are exceptional windows to experience, but with whom should we empathize—why, when, and according to what procedures?").

436. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

through public displays and political rhetoric,[437] which, according to Ebens' admissions, fueled his anger toward Vincent Chin.[438] He also would have been knowledgeable about the historical nativistic racist scapegoating of Asian Americans for economic woes in the United States. Considering these contextual aspects of the killing, Judge Kaufman may have been more informed, and thus more inclined, to see the brutality of the killing as something beyond routinized violence. Equipped with this knowledge, he could have understood the significance of Vincent Chin's throwing the first punch upon being called a "Chink" and "Nip" and the grave disproportion of Ebens' response. This would not have required abandonment of normative concepts justifying punishment; rather, these concepts would have reached their full potential.[439] Instead, his ruling applied a "blame the victim" rationale which was disconnected from the reality, events and motivations generated by the era. Rendered ahistorically, the ruling ignored the past and present contexts in which "[c]ountless [Asian Americans] have been brutalized by vicious physical assaults by whites who resent their presence, competition, real or imagined, and their accomplishments."[440]

The difficulties, then, involve distinguishing good bias from bad, and maintaining the good bias (good connection) in the process of judging.[441] Professor Cain asks, "If we are willing to admit that our judges naturally bring a point of view with them into the courtroom, then what sort of language should we use to talk about judicial bias?"[442] She offers this valuable prescription:

> When you listen as a judge, you must transcend your sense of self, so that you can really listen. Listen to the story that is being told. Do not prejudge it. Do not say this is not part of my experience. But listen in such a way as to make it part of your experience. Find some small part of your own

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437. *See, e.g., supra* text accompanying note 343 (statements by former Congressman Tip O'Neill); *supra* p. 437 (noting the frequent car bashings of Japanese imports with sledgehammers).

438. *See supra* text accompanying note 341 (statements by Ronald Ebens while fighting with Vincent Chin).

439. As Professor Phyllis Goldfarb states, "[C]ontextual reasoning merely suggests that decision makers view the scope of legal relevance quite broadly and remain open to persuasion about the relevance of novel facts and the insights they can spawn. Decision makers need not ignore the prevailing rules potentially applicable to the case." Goldfarb, *supra* note 252, at 1640 (footnote omitted).

440. JAMES E. BLACKWELL, THE BLACK COMMUNITY: DIVERSITY AND UNITY 66-67 (1991), *quoted in* Robinson, *supra* note 4, at 85 (discussing the stereotypes that often belie the manufactured stereotypes of Asian Americans).

441. Cain, *supra* note 435, at 1946.

442. *Id.* at 1948.

> self that is like the Other's story. Identify with the Other. Do not contrast. Only when you have really listened, and only then, should you judge.[443]

Following Professor Cain's prescription would have resulted in less polarized perceptions as to whether Judge Kaufman's sentencing of Ronald Ebens and Michael Nitz constituted just punishment or impunity.

D. *Student Responses to* Who Killed Vincent Chin?

In the foregoing sections I have endeavored to disclose the ways in which ahistorical and noncontextual allegiance to formalistic legal principles can render reprehensible results in criminal proceedings. Understanding how societal structures, individual and group identity, and social constructions influence legal doctrine and processes requires critical appraisal of various intersections between race, gender, class, sexual orientation, and physical capabilities, in American society. Upon focusing on the experiences of Asian Americans, I have applied critical analysis of these dynamics in explaining my alternative views on the *Vincent Chin* case. As I have sought to demonstrate, even a professedly formalistic approach could have produced a different, more commensurate result in this case, although it would seem more unlikely to do so.

At this point, it is important to add that in discussing the film and its subjects with students, my views are not the only ones to be heard. Indeed, as a teaching tool, the purpose of watching the film is to encourage students to articulate their own views and analyses of the same events, while simultaneously encouraging them to enlarge their worldview by "pivoting the center."[444] As historian Elsa Barkley Brown states the objective, speaking in terms of African American women's experiences:

> [T]he most important and most difficult questions in African-American women's history ask how to center the experiences of African-American women and how to foster in our students the ability to center those experiences. How do our students overcome years of notions of what is

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443. *Id.* at 1955 (providing an alternative feminist interpretation of Judge Learned Hand's conception of judging).

444. In the words of historian Bettina Aptheker, this phrase entails the ability to center in another's experience. BETTINA APTHEKER, TAPESTRIES OF LIFE: WOMEN'S WORK, WOMEN'S CONSCIOUSNESS AND THE MEANING OF DAILY LIFE (1989), *cited in* Elsa Barkley Brown, *African-American Women's Quilting: A Framework for Conceptualizing and Teaching African-American Women's History*, *in* 14 SIGNS 921, 921 n.1 (1989).

> normative? While trying to think about these issues in my teaching, I have come to understand that this is not merely an intellectual process. It is not merely a question of whether people are able to intellectualize about a variety of experiences. It is also about coming to believe in the possibility of a variety of experiences, a variety of ways of understanding the world, a variety of frameworks of operation, without imposing consciously or unconsciously a notion of the norm. . . .[445]

In each setting where I have used the film,[446] students have shown great interest and have brought impressive insights to the exercise. In the substantive courses, students generally welcomed the opportunity to get out of the casebook and to relate those principles to issues having social significance;[447] and in the clinical courses, the students eagerly and more readily identified the competing interests, demands of professionalism, and the operation of the criminal justice system.[448]

Several student exercises help to facilitate class discussion of the film. Used alternately and not mutually exclusively, these exercises have included questionnaires and reaction papers about the film. In questionnaires or reaction papers, students are given broad areas in which to discuss the issues they believe to be important to the case and the film. For example, they are asked whether the film adds any value to their understanding of criminal law doctrine and/or the

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445. Brown, *supra* note 444, at 921; *see also* Matsuda, *supra* note 272, at 9 ("The multiple consciousness I urge lawyers to attain is not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed.").

446. I have shown *Who Killed Vincent Chin?* in several of my substantive criminal law and clinical education courses at Northern Illinois University College of Law and Syracuse University College of Law. I also conducted a class with first year criminal law students at Dickinson Law School at the invitation of Professors Peter Alexander and Jane Rigler. I want to thank the students at all of these institutions for their participation and insights.

447. In my substantive criminal law classes, I have typically shown the film after completion of the homicide materials in the casebook. I believed that in this way students would have the necessary analytical foundations to discuss the distinctions between categories and degrees of criminal homicide. I am grateful to Professor Marina Angel, however, for suggesting that I show the film prior to "filling their heads with all of that" to see whether and how the students might independently devise distinctions within criminal law homicide doctrine. I can now express satisfaction with showing the film either before or after the introduction of classical criminal homicide doctrine; in both instances, the students have been astute and insightful. Society of American Law Teachers Teaching Conference/Criminal Law Section Update, July 22, 1993, at 5 (on file with author).

448. In the clinical courses, I typically show the film early because of the important insights regarding case theory, fact investigation, and counseling to be gained.

operation of the criminal justice system; what factors they believe impacted the proceedings and outcome of the case and at what stages; whether the issues raised in the film are appropriately addressed in the law school curriculum; and whether the film will have any value for them during their coursework, clinical work, and beyond law school.

In role-playing assignments, we concentrate on the local criminal case and proceed as though no plea bargain had been reached. Also, to examine whether the analyses or outcomes would differ across doctrinal variations, students are assigned to use common law and the Model Penal Code[449] as the applicable criminal law. Students assume the roles of prosecuting attorney, defense attorney, judge, eyewitnesses, ACJ activists, Vincent Chin, Lily Chin, and friends of Ebens and Nitz.[450] While students are free to enter into

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449. MODEL PENAL CODE (1985).

450. Several issues of ethics and professionalism frequently arise and are particularly highlighted during the role-playing exercises. For example, students question the exercise of prosecutorial discretion in "overcharging" and "undercharging" for various reasons, including race-based influences, and trial ethics, including locating the line between witness preparation and improper witness coaching, as was alleged against an ACJ attorney and witnesses favorable to the government. *See* United States v. Ebens, 800 F.2d 1422, 1430-32 & app. A (6th Cir. 1986). Another issue relates to the duty to provide legal representation, with regard to the expressed reluctance to represent Ronald Ebens. For an excellent treatment of this subject, see Abbe Smith, *When Ideology and Duty Conflict, in* CRIMINAL JUSTICE SECTION, AMERICAN BAR ASS'N, ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER, 18-29 (Rodney J. Uphoff ed., 1995); *see also id.* ("A lawyer is under no obligation to act as advisor for advocate to every person who may wish to become his client . . .") (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26); *id.* ("A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant.") (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2, Comment); *id.* ("A lawyer should represent a client zealously within the bounds of the law.") (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7); ABA CANONS OF PROFESSIONAL ETHICS 15 (1908) (The lawyer has an obligation to give "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertions of [the lawyer's] utmost learning and ability.").

In addition to the issues of empathy, race and gender, exploring the role of Lily Chin permits greater understanding of the role of the victim or surviving family and friends in criminal cases. In an adversary legal system such as that of the United States, victims typically have no formally recognized role in the trial of their offenders and no mechanism for expressing their concerns about the offender, the crime, and its impact on them. As one researcher notes, adherence to the public prosecution system means that "victims have no power to compel prosecutions nor 'standing' to contest decisions to dismiss or reduce charges, to plea bargain . . . or to challenge the sentence imposed on their offenders." *See* Edna Erez & Ewa Bienkowska, *Victim Participation in Proceedings and Satisfaction with Justice in the Continental Systems: The Case of Poland*, 21 J. CRIM. JUST. 47, 48-49 (1993). In contrast, crime victims in many European or continental criminal justice systems have more extensive rights to involvement in the process. Poland provides such an example:

plea negotiations, they must explain any decisions in this regard as well as any departures from events or decisions depicted in the film or recorded in the appellate case in their "revised" handling of the case. In this way, everyone must articulate sound and persuasive reasons for their respective positions and decisions to other members of the class, who in turn question them about their positions and decisions. This requires critical thinking and participation by all members of the class.

Irrespective of the particular assignment, however, students invariably raise the following topics as relevant for discussion: race, gender roles, and class distinctions; the role of police, prosecutors, judges, witnesses and jurors; ethical and professional responsibility of attorneys and judges; the impact of criminal litigation on crime victims, defendants, and their families and friends; perspectivity; economics; sentencing policies; political empowerment; media influence; justifications for punishment; intoxication; the connection between fact investigation, material facts, doctrinal law and case theory; double jeopardy; and the relationship between state and federal criminal proceedings. Thus, because the students view these

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> Victims have the right to become a supporting or subsidiary prosecutor in public prosecutions and thus suggest witnesses or evidence or present questions to witnesses. They also have a right to be represented by a lawyer in the criminal proceedings against their offenders. If the public prosecutor refuses to file charges and initiate criminal proceedings, victims have the right to become private prosecutors and pursue the case on their own. Victims in Poland also can file adhesive suits (become civil plaintiffs in the criminal trial) and thus recover their costs resulting from the crime during the criminal proceedings, while leaving the burden and costs of prosecution to the public prosecutor. As private prosecutors or as subsidiary prosecutors, they have the right to make statements concerning the offender or propose a sentence. Victims also have the right in every stage of the Polish criminal justice process to be informed by the relevant agency about their privileges or obligations concerning the proceedings.

Id. at 48; *see also* Joachim Herrmann, *The German Prosecutor, in* DISCRETIONARY JUSTICE IN AMERICA 16 (Kenneth Culp Davis ed., 1976) (discussing limited discretion of German prosecutors and right of victims to compel prosecution). In the United States, the "victim's rights movement" has gained speed, although it remains controversial within the adversary system, particularly in capital sentencing cases. For discussion of the issues, see, for example, Lynne Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985) (arguing that laws passed in the crime victim's name may have worsened conditions for victims where the victim's experience remains largely ignored, mischaracterized and misappropriated). In the capital sentencing context, discussing the Supreme Court's decision in *Payne v. Tennessee*, which upheld the use of victim impact statements in capital jury sentencing proceedings, see Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After* Payne v. Tennessee, 45 STAN. L. REV. 1027 (1993); Jose Felipe Anderson, *Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing* (unpublished manuscript) (on file with author).

issues as germane and interrelated, our treatment of the case and the movie plumbs greater depths than solely an elemental analysis of homicide law. Below are samples of students' expressions about *Who Killed Vincent Chin?*[451]

The majority of students are unnerved by the apparent lack of remorse demonstrated by Ronald Ebens:

> *The film has enhanced my appreciation of the retribution function of punishment and especially the rehabilitation aspect since the two attackers have not expressed the slightest remorse over the death.*
>
> * * *
>
> *He [Ron Ebens] continued to work and play on his company baseball team. In fact, he played baseball on the day of Vincent Chin's death, just four days after the initial incident.*
>
> * * *
>
> *I was especially surprised at the complete lack of remorse Mr. Ebens displayed. He seemed very indignant and defensive. Not once did he ever mention feeling regretful towards his actions. This disturbed me. I understand his feeling that he did not intend to kill Mr. Chin, but no recognition of his actions seemed strange to me.*
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> * * *
>
> *Most disturbing was Mr. Ebens' lack of remorse. When asked to explain what happened, Mr. Ebens claims he does not know what happened. When asked if his conduct was wrong, he claimed he did nothing on purpose. He seems to think his act is not analogous to pointing a gun at Mr. Chin and shooting him. No, he did not point a loaded gun, but Mr. Ebens was loaded with anger and bigotry. . . . At the very least, Mr. Ebens should feel some sense of shame, embarrassment or sadness for his part in the death of Mr. Chin.*
>
> * * *
>
> *Not once did [the Ebenses] attempt to empathize with Vincent or his family. She [Nita Ebens, Ronald Ebens' wife] just assumed that these things happened and the whole event was being proliferated through a myriad of television and media sensationalism.*

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451. These are excerpts from student reaction papers and responses to questionnaires about the film (on file with the author). In order to encourage complete candor, students had the option of identifying themselves on their papers.

The fact that all she did was make reference to how her and her husband's life had been very tumultuous during Ronald's five year trial period indicated to me that she felt the death of Vincent was simply a burden.

* * *

Ebens still feels the incident was just "preordained" to happen. He feels no remorse for what he did. Nothing illustrates this more clearly than the manner in which he spoke about being in jail for Fathers' Day. He truly seemed more upset about that than anything he had done to Vincent Chin. He said he did not want to be away from his children on that day. At least he got to see his children again. Mrs. Chin is not so fortunate.

Upon discussing whether or not to explicitly address issues of race, ethnicity, gender, and other issues of diversity and context in the law school curriculum, some students found their idealism diminished, others had their cynicism confirmed, while others' faith in color-blind justice remained unshaken:

I don't think first year is the time for a film like this. However, I may be wrong. In the first year, students are concentrating on the basics, and they may consider issues like this collateral and not as important.

* * *

[W]e need to understand that these principles [of law] do not operate in isolation. . . . We can forget that the realities of class, bias, race, politics, and an overwhelmed court system operate to form a different reality. Hearing that from a professor or reading it on the page does not have the same impact as a visual medium.

* * *

There are valid concerns and fears on both sides of the race/ethnicity question which are at the boiling point and if not dealt with will infect and cause some great racial conflict (i.e., violence).

* * *

I found it beneficial because I realize that I had an idealistic view about the system, or maybe my standards are higher. It was interesting to see how a group of people were able to get the federal court to look into the issues of the case. . . . Realistically, these issues should affect every attorney.

* * *

As a former newspaper reporter who spent many years covering the courts, I was not surprised by the Vincent Chin film. It points to many of the areas of the criminal justice system that are ripe for abuse, most notably in the areas of plea bargaining, and judicial and prosecutorial discretion.

* * *

[L]aw students have already formed their values about these issues. So, please. Just teach us the law, and let us graduate, leave this rat hole, and pursue our careers. . . . Call me naive, but I truly believe that justice is blind.

* * *

Discussion about diversity in the law school curriculum is necessary but often falls on deaf ears. Every year some issue regarding race surfaces [at this institution]. And every year, those individuals who need to be a part of the discourse so that a better understanding between all students can be achieved, do not participate. The frustration is felt by all, at both the faculty and student levels. I do not think that the issue should be eliminated, in fact I think the issue should be discussed more often and openly. When that happens, maybe [we] may become a little more receptive to other points of view.

Students offered the following opinions about the factors that impacted the Chin case. Few believed that the case would have been handled the same or that the outcome would have been the same had the roles and identities of Ronald Ebens and Vincent Chin been reversed:

If the Asian community had not organized, the Chin case would have quietly disappeared. The publicity was certainly responsible for the Federal indictment. . . . The media also played a crucial role in the Chin case. When you have witnesses talking on the evening news or cops saying this was wrong the pressure builds.

* * *

This case does demonstrate the power of the people, for it was only after marching in the streets did a second trial come about. . . . The Asian American community was not the only one to find no peace in the sentence Mr. Ebens received, his sentence did violence to what we have come to define as justice.

* * *

I don't think necessarily that the killing was the result of race, insofar as the men appeared to be just as likely to kill another white in the same situation. I think that the economy and the geography played a more substantial role. Major cities to some extent have become immune to the violence and in many instances so have the citizens. I think the race implications were taken by the media and blown out of proportion.

* * *

I believe that race, ethnicity, and the media were influential to all stages of the incident starting at the topless bar. We must remember that this event took place in Detroit, "The Motor City." Having been from there, I am very aware of the tension which exists between the American auto industry workers and the Asian population in general. My best friend from home is Korean and happens to drive a Toyota. She lived out in Ypsilanti where one of the auto factories is located and one which was a target factory for closure two years ago. My friend applied for a teaching position at an elementary school located near the factory. She was terrified to go to her interview at the school, and subsequently when offered the job, declined acceptance because of her race and the fact that she drove a Japanese car. The fear in Asians is real. This is no different than any of the fears experienced by other people of color.

* * *

The larger issue here is not whether Ebens was a racist in the murder of Vincent Chin, but whether the criminal justice system was. The answer is a resounding "yes." The criminal justice system turned this murder into a racially motivated crime by not affording it the proper due diligence to begin with—no matter what the docket looks like or the case load!

* * *

A psychiatrist's professional evaluation concluded that Mr. Ebens ought to be incarcerated, and was in need of reform. Friends admitted that he was argumentative, violent, had a drinking problem, and that behind closed doors, he was a bigot. The preferential treatment given to Mr. Ebens was no doubt due to the fact that he was an upstanding citizen, not because he obeyed the law per se, but because his profile; white, from a small town, a father and family man, fit the preferred societal norm. It would seem that the trial judge did not want to punish Mr.

Ebens based on his profile, rather than the justification for punishment.

* * *

In many respects this case was not about one man taking someone else's life. This case was about the hate and racism that persists in this country. If Mr. Chin had not been Asian-American would Mr. Ebens still have felt the need to chase him down? . . . Mr. Ebens mistakenly believes that this whole thing started with a sucker punch. No, it started when white Americans assumed they were the superior race. It started when Mr. Ebens did not teach his stepson to respect diversity.

* * *

Media influences and shapes our images, thoughts and beliefs. Some say the media in this case orchestrated a racially charged case, while others say the media fulfilled its role to uncover untruths. Mr. Ebens' trial received media coverage, surely society is not so uncompassionate that the beating of a man to death, apparently motivated by hatred, goes unnoticed. Yes, people cared about what happened to Mr. Chin. He died not because of anything he did, but because of who he was.

* * *

This film helped to further my understanding that the system works different ways for different people. If Ebens had been a person of color, there would be little doubt of his guilt. However, caught up in legal definitions and defining what Ebens did, there was a loss of justice for the victim that the system was supposed to protect.

While most students found value in the film's depiction of the comprehensive nature and interests in criminal proceedings, for others the non-linear approach was viewed as disjointed and confusing. Other students found that the film did not effectively impart lessons about criminal law doctrine and procedure. And for some, the filmmakers' biases were disturbing, noting, for example, that all voices were not heard, particularly state and federal prosecutors, appellate judges, and jurors:

The film Who Killed Vincent Chin? *enhanced my knowledge of substantive criminal law because it reinforced what we've learned this semester. This film helped show the importance of the definitions of crimes and the need for the proscribed punishment to concur with the offense. It further demonstrated the need for the correct form and degree of punishment in order for the aim or*

goals of criminal law to be met. Moreover, this film was helpful in showing how the morality of society and the morality of the judges plays a part in the criminal law system.

* * *

The plea bargain was fair. It would probably have been difficult to prove that the defendants intentionally or purposefully killed Vincent Chin; however, their actions were certainly done with reckless disregard to human life. . . . Manslaughter was a fair charge both to society and to the defendants. Society, or more appropriately the Asian American community did not seem to find fault with the level of crime that was pled to. The defendants realized that their actions were criminal, pled guilty and expected to be punished by going to jail.

* * *

This was a great example of the risks of plea bargains. It was good to see the complexity of provocation, self-defense, and premeditation in a real world situation. Seeing the process and its manipulation on all sides was enlightening.

* * *

In terms of being an effective means to understand substantive criminal law, the film was generally ineffective. The facts given seemed inadequate and were presented in a confusing manner, both of which prevented a thorough substantive analysis. My understanding of criminal law would be more greatly enhanced by a detailed problem or hypothetical.

* * *

I liked the completeness of this film. They were, in my mind, very successful in providing a comprehensive view of the legal process. The fact finding and question section that took up the majority of the first half and intermittently throughout the entire film, was a tremendous benefit. It brought together personal questions related to how one goes about the discovery process. Not only did they extensively question Mr. Ebens and his wife, Mr. Nitz and Mrs. Chin, but they questioned Mr. Chin's friends, the factory workers, police, and the dancers at the club, and witnesses on the street.

* * *

Growing up in a small, blue-collar town myself, I am all too aware of the racial discrimination which still exists towards minority groups. One aspect of the film which did disturb me,

however, was the fact that the producers of this documentary were Asian. Their point of view was clearly in favor of Chin (and rightfully so). Their bias, although understandable, may have slanted their editing process against the defendants. . . . For example, at one point during the film jurors of the first Detroit federal trial were interviewed. These jurors were convinced that the attack was racially motivated. However, on retrial a second jury found no underlying racism in the attack. The producers failed to interview jurors from the second trial, and instead place blame on the result on the change of venue [from Detroit to Cincinnati]. . . . Overall, I do not think this valuable message was greatly tarnished by potential bias.

* * *

[N]othing indicates that the media, race, or the location of the trial influenced the outcome of the case. First, the media did not likely influence the outcome of the [federal civil rights] case. Indeed, notwithstanding their sensationalist portrayal of the crime, the jury acquitted the defendant. Second, race did not apparently influence the outcome of the case. Although someone noted that there were no Chinese jurors, nothing indicates that the chosen jurors were prejudiced. Third, the location of the civil rights trial did not likely influence the outcome of the case: A reporter stated that he expected the jury to acquit the defendant, because the trial was held in a "conservative city." There are two problems with this comment, however: (a) it implies that the jury was conservative (nothing indicates that it was), and more disturbingly, (b) it implies that conservatives are insensitive to racial issues (which is emphatically untrue).

* * *

I must question if Ebens is really as awful as he appeared in the film because it is very likely that only those images portraying him in the worst light were included. Particularly persuasive was the film's contrasting the various lifestyles of the two groups: the autoworkers were always presented in the worst possible light (i.e., closed-minded and immoral), while the Asian culture was seen as emphasizing strong family values and all the traditional American dreams.

Responding to whether or not the issues raised in the film would impact them beyond law school, students offered the following views:

In terms of criminal law, considering issues of diversity is essential. . . . In terms of my own career as an attorney, I try to treat

people consistently and fairly, regardless of their diversity. When dealing with others, I prefer not to address people differently because they may be of a different race or ethnicity than me. Continuously addressing issues of diversity may only serve the purpose of emphasizing differences, and promoting disparate treatment of those who are different, instead of encouraging people to respect others for those differences.

* * *

This film was excellent because it served so many different purposes. It highlighted the fact that many different things influence the criminal justice system such as the political and economical viewpoints of the judges. In addition, it prompted me to reflect upon today's criminal justice system and to highlight some of the current problems. It also prompted me to think about what my role will be in this process once I become a practicing attorney.

* * *

Change will only happen if people do not lose touch with their value judgments in determining what is right and what is wrong. As law students, we must keep in mind that we are not here to serve some theoretical, abstract idea of the law, rather we are here to serve human kind. How then, can we keep at least a portion of our idealism intact?

We will picture Ebens beating Vincent Chin with a baseball bat as if swinging for a home run.

The students' own comments convinced me of the pedagogic value of *Who Killed Vincent Chin?* The variety of their opinions and debates regarding content, form and perspective in the case and the film, reinforced the value of presenting challenging situations to students so that they can grapple with the complexity and inconsistency of criminal law doctrine and its applications. *Who Killed Vincent Chin?* required students to "pivot the center" of Asian Americans' lives, and to consider the violent expressions of their historical and contemporary devaluation in the United States. The students were able to do so with impressive results. The accompanying exercises provided opportunities for students' personal reflections, as well as opportunities for experiential learning in which they worked collaboratively to advocate a variety of positions, with consideration for law, context, and socially constructed identity.[452]

452. For a nonexhaustive list of descriptions of similar pedagogical efforts by other law professors, see, for example, Beverly Balos, *Learning to Teach Gender, Race,*

III. THE SEQUEL: THE EMERGENCE OF "HATE CRIME" LEGISLATION

The Vincent Chin litigation has been called a "landmark for Asian Americans."[453] The case is invariably cited as epitomizing anti-Asian violence in American society.[454] His death occurred in 1982, a century after the Chinese Exclusion Act of 1882, accompanied by the unchanged violent rhetoric from a century ago—the seemingly indelible construction of Asian Americans as alien, economic enemies. In June 1992, memorials marking the tenth anniversary of Vincent Chin's death were held in several U.S. cities.[455] According to Ronald Wakabayashi, former national director of the Japanese American Citizens League, the ongoing litigation and subsequent community action were in response to the perception amongst many Asian Americans that "their lives [were] not worth much."[456]

In the decade since Vincent Chin's death there has been a resurgence in bias-motivated violence.[457] Asian Americans are among the most frequent victims of bias-motivated offenses; the U.S.

Class, and Heterosexism: Challenge in the Classroom and Clinic, 3 HASTINGS L.J. 161 (1992); Caplow, *supra* note 259; Christine Alice Corcos, *supra* note 284; Jay M. Feinman et al., *Symposium, Five Approaches to Legal Reasoning Within the Classroom: Contrasting Perspectives on* O'Brien v. Cunard S.S. Co., 57 MO. L. REV. 347 (1992) (discussing the teaching of a torts case from the perspectives of critical legal studies, feminist jurisprudence, law and economics, critical race theory, and traditional legal education); Phyllis Goldfarb et al., *Symposium: Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992); Jane Schukoske, *Teaching Law Reform in the 1990s*, 3 HASTINGS WOMEN'S L.J. 177 (1992).

453. Franklin, *supra* note 427, at 5 (quoting Ronald Wakabayashi, former national director of the Japanese American Citizens League).

454. A WESTLAW search revealed that Vincent Chin's death had been mentioned in thirty-one law review articles, as evidence of anti-Asian violence in America.

455. *See Vincent Chin's Grim Anniversary—Racial Killing in '82 Spurs Seattle Rally*, SEATTLE TIMES, June 24, 1992, at B2; McMillan, *supra* note 13, at B3.

456. Franklin, *supra* note 427, at 5 (quoting Ronald Wakabayashi).

457. In 1991, the FBI's first national report on bias crimes found that 4558 hate crime incidents were reported n 1991. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS (1993) [hereinafter FBI REPORT]. The report was compiled pursuant to the Hate Crimes Statistics Act, Pub. L. No. 101-275, 1990 U.S.C.C.A.N. (104 Stat.) 140, and the general crime statistics provisions of 28 U.S.C. § 534 (1988). Racial bias was the reported motivation in six out of ten offenses, religious bias accounted for two out of ten, and ethnic and sexual-orientation bias accounted for one out of ten reported offenses. Thirty-two states participated in the study. Although only 3000 of the 16,000 law enforcement agencies chose to participate in the FBI's data collection, the report confirmed what several researchers surmised to be "a steady increase in hate crimes in the last year or two." Goleman, *supra* note 4, at C1 (quoting Howard Ehrlich); *see also* Stephen Labaton, *Poor Cooperation Deflates F.B.I. Report on Hate Crime*, N.Y. TIMES, Jan. 6, 1993, at A10. The FBI reported a record number of cases handled by its civil rights division in 1989, the year before the report. *See* Goleman, *supra* note 4, at C1.

Commission on Civil Rights reported that violence against Asian Americans had doubled since 1980.[458]

In Dr. Jack McDevitt's study on hate crime, most of the perpetrators of racist incidents were young White men, just under two-thirds, while one-third of the perpetrators were Black. Dr. McDevitt further noted that while most of the crimes by Blacks were against Whites, he found that "whites attack everybody: Blacks, Hispanics, gays, Asians." In Boston, the study revealed, bias crimes committed by Asian Americans and Latinos were rare, although Vietnamese immigrants were the third most frequently victimized group.[459]

One of the most significant developments in the criminal law since Vincent Chin's death has been the emergence of "hate crime" legislation. Such legislation has been controversial and has been severely criticized for potential infringements on constitutionally protected speech and expressive conduct,[460] as well as for the efficacy of its treatment within criminal law doctrine.[461] The effectiveness of

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458. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 171. According to Professor Jack McDevitt, sociologist at Northeastern University, typical bias offenses involve "turf" battles such as that experienced by an Asian family that moved into an all-White neighborhood in Boston. On the first night someone broke several windows with rocks, and on the second night someone spray-painted the walls with racist slurs. On the third night the family moved back to its old neighborhood, leaving an older son to guard their possessions. A mob of 20 youths taunted the son until he came out, then beat him. *See* Goleman, *supra* note 4, at C1 (discussing McDevitt's research).

459. Goleman, *supra* note 4; *see also* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 171; ORGANIZATION FOR CHINESE AMERICANS IN PURSUIT OF JUSTICE 2 (1992) ("Today, Asians rank fourth on the list of victims of hate crimes, behind African Americans, people of the Jewish faith, and homosexual men."); Amici Curiae Brief of the National Asian Pacific American Legal Consortium at 3, Wisconsin v. Mitchell, 508 U.S. 476 (1993), *cited in* Kang, *supra* note 178, at 1926 n.3 ("Incidents of violence against Asians have risen at a rate faster than for any other ethnic group.").

460. *See, e.g.*, Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 33 (1991).

461. The primary objection of traditional criminal law theory to hate crimes is use of the actor's "motive" in defining the offense or the penalty enhancement. This is based on the belief that motive ought not be relevant to criminal liability. Therefore, hate crimes violate this rule by taking account of the actor's motive—his or her anti-race, anti-religion, anti-sexual orientation, or other anti-group motive.

However, there is recognition that motive may be consistent with traditional criminal law theory. As Professor Paul Robinson observes: "[M]otive—the cause of an action—frequently is an element of liability and grading, and no apparent reason exists why it should not be that way. It should alter liability if and only if it alters an actor's blameworthiness for the prohibited act." Paul H. Robinson, *Hate Crimes: Crimes of Motive, Character, or Group Terror?*, 1992/1993 ANN. SURV. AM. L. 605, 608; *see also* Douglas N. Husak, *Motive and Criminal Liability*, CRIM. JUST. ETHICS, Winter/Spring 1989, at 3; Jonathan David Selbin, Note, *Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After* R.A.V., 72 OR. L. REV. 157, 192 (1993) (noting that "[c]oncepts of motive, purpose and intent are intertwined, and the rele-

hate crimes legislation to address hate-motivated offenses against Asian Americans is questionable, however, absent a deeper commitment to condemn such practices throughout criminal justice system jurisdictions.

As previously discussed, hate-motivated violence has been a long-standing aspect of social, political, and legal control in the lives of many racially identified groups in the United States.[462] In modern times, in response to increased evidence and perceptions that hate crimes were increasing, the federal government and many states deemed the problem sufficiently serious to warrant statutory regulation.[463] Currently, forty-seven states have enacted legislation to address bias motivated crime.[464] Bias-motivated statutes generally take three forms: penalty enhancement statutes, when existing criminal conduct (e.g., assault) is motivated by the victim's status; "ethnic intimidation" or "interference with enjoyment" laws; and harassment and intimidation laws that make it a separate and distinct crime to harass or intimidate any person because of the victim's status. Penalty enhancement statutes are the most common manner of addressing bias-motivated crimes, and this category can be further divided into four groupings of penalty enhancement legislation.

First are what have been called "pure" penalty enhancers, which provide for extra punishment if the defendant commits any

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vancy of motive in substantive law turns on how broadly or narrowly it is defined") (citing LAFAVE & SCOTT, *supra* note 351, at 227). *But see* Abby Mueller, *Can Motive Matter? A Constitutional and Criminal Law Analysis of Motive in Hate Crime Legislation*, 61 UMKC L. REV. 619, 626-27 (1993) (noting the important distinctions between the related concepts of "motive," "purpose," and "intent").

462. *See supra* Part I.B.2.b. Early legal efforts to address the unique harms of hate crimes originated during the Reconstruction era. Following the emancipation of formerly enslaved persons of African descent, rampant violence permeated their lives due to unrelenting Ku Klux Klan terrorism. *See* Wayne R. Allen, Note, *Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment*, 25 GA. L. REV. 819 (1991); Edward F. Malone, Comment, *Legacy of the Reconstruction: The Vagueness of the Criminal Civil Rights Statutes*, 38 UCLA L. REV. 163 (1990). The federal government was prompted to enact legislation designed to stem the onslaught of racially motivated violence against Blacks in the South. The 1870 statute, also known as the Ku Klux Klan Act, criminalized interference with the enjoyment of federally protected rights. The act was originally entitled "an Act to enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes." Enforcement Act of 1870, ch. 114, 16 Stat. 140. The Act is now codified at 18 U.S.C. § 241 (1988).

463. The federal statute requires the Attorney General to report on the incidence of crimes motivated by bias based on race, religion, ethnicity and sexual orientation. The FBI's Uniform Crime Reports Division has the responsibility for gathering such data. *See* Hate Crimes Statistics Act, 28 U.S.C. § 534 (1988); *see also* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME DATA COLLECTION GUIDELINES 1 (1993).

464. *See* Project, *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y 29, 37 & app. A (1995) (survey of federal and state legislation).

crime in whole or in part because the victim belongs to an enumerated group. Pure penalty enhancement schemes can further be classified according to those that require or permit incarceration or monetary fines to be added to the penalty for the underlying offenses,[465] and those that provide for the degree of the underlying offense to be increased in severity.[466]

The second class of penalty enhancement statutes are triggered by fewer underlying offenses. That is, these statutes provide the same stiffer penalties or increases in degree of the underlying offense as "pure" enhancers, but they are not triggered by all crimes, but are often limited to any one or more of the offenses of assault, battery, or damage to real or personal property.[467]

The third class of statutes are characterized by prosecutorial discretion.[468] Lastly, there are statutes that list bias against certain groups as an aggravating factor to be considered in sentencing.[469] Within this category, penalty enhancement occurs by pushing a sentence toward the upper statutory limit, rather than by enhancing punishment by adding to the penalty authorized by statute.

Michigan has joined the vast majority of states that have enacted hate crimes legislation. Its legislation is within the category of penalty enhancement statutes, which provide stiffer penalties for

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465. *See, e.g.*, N.H. REV. STAT. ANN. § 651:6 (1992); VT. STAT. ANN. tit. 13, § 1455 (1992); WIS. STAT. ANN. § 939.645 (West 1982 & Supp. 1993).

466. *See, e.g.*, FLA. STAT. ANN. § 755.085 (West 1992).

467. *See, e.g.*, MASS. ANN. LAWS ch. 265, § 39 (Law. Co-op. 1993); CAL. PENAL CODE §§ 422.7, 422.75 (West 1988 & Supp. 1993); D.C. CODE ANN. §§ 22-4001, 22-4003 (1992); MD. CODE ANN., CRIM. LAW § 470A (1992); MINN. STAT. § 609.2231 (1992); MO. REV. STAT. §§ 574.090, 574.093 (1991); OHIO REV. CODE ANN. § 2927.12 (Banks-Baldwin 1990); 18 PA. CONS. STAT. § 2710 (1993). New Jersey enhances the penalty only for simple assault if it is committed based on bias. N.J. REV. STAT. § 2C:12-1 (1992).

468. Under the Connecticut statute, for example, the state may charge a defendant with intimidation based on bigotry or bias if "with specific intent to intimidate or harass another person because of such other person's race, religion, ethnicity or sexual orientation . . . [he] [c]auses physical contact with such other person." CONN. GEN. STAT. § 53a-181b (1992); *see also* COLO. REV. STAT. § 18-9-121 (1993); IDAHO CODE § 18-7902 (1993); 720 ILL. COMP. STAT. 5/12-7.1 (West 1993), *as amended by* 1993 Ill. Laws 259; IOWA CODE § 729.5 (1992); MICH. COMP. LAWS ANN. § 750.147b (West 1991 & Supp. 1996); MONT. CODE ANN. § 45-5-221 (1992); N.Y. PENAL LAW § 240.30 (Consol. 1993); N.C. GEN. STAT. § 14-401.14 (1992); N.D. CENT. CODE § 12.1-14-04 (1991); OKLA. STAT. tit. 21, § 850 (1992); OR. REV. STAT. §§ 166.155, 166.165 (1991), *as amended by* 1993 Or. Laws Adv. Sh. Nos. 18, 332; WASH. REV. CODE § 9A.36.080 (1991). While the offense of intimidation, a felony, requires only physical *contact*, assault in the third degree, a misdemeanor, requires physical *injury*. CONN. GEN. STAT. § 53a-61 (1992).

469. *See, e.g.*, ALASKA STAT. § 12.55.155 (Michie 1993); CAL. PENAL CODE § 1170.75 (West 1988 & Supp. 1993); 730 ILL. COMP. STAT. 5/5-5-3.2 (West 1993), *as amended by* 1993 Ill. Laws 215; N.C. GEN. STAT. § 15A-1340.4 (1992); W. VA. CODE § 61-6-6-21 (1992).

crimes motivated in whole or in part by the victim's race, religion, national origin, or sexual orientation.[470] It is unlikely that the Michigan hate crime legislation will face a successful constitutional challenge in view of the Supreme Court's decision in *Wisconsin v. Mitchell*.[471]

In view of the increases in hate-motivated crime in recent years, the need for specific legislation appears to be clear. Although early anti-bias statutes originated on the federal level, modern offenses often fall outside the purview of such enactments. The federal "Enforcement Statutes" of 1870 and 1871, for example, were directed against organized hate-motivated violence. However, the incidence of hate-motivated offenses is not necessarily characterized by organized group conduct; it is more pervasive and diffuse than that, as Vincent Chin's killing illustrates.

Even as crime has become a national issue politically, the states remain primarily responsible for most matters of crime and punishment.[472] Thus, where existing federal legislation is perceived to be inadequate to address the pervasive and often spontaneous nature of hate crime, it is imperative that states take the initiative to enact legislation that responds to the particular harms of hate-motivated offenses, as many have done. While federal statutes can operate as a backup for state failures to address such harms, a more effective approach would be for states to enforce the laws on the state level.[473] State governments have an important interest in penalizing bias-motivated violence. Severe injury often results from

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470. MICH. COMP. LAWS ANN. § 750.62 (West 1991) ("Crimes Motivated by Prejudice or Bias; Race, Ethnic Origin, Religion, Gender, or Sexual Orientation"); MICH. COMP. LAWS ANN. § 750.147b (West 1991) ("Ethnic Intimidation"); MICH. COMP. LAWS ANN. § 752.525 (West 1991) ("Religious Meetings, Disturbance, Carrying on Certain Businesses Within Two Miles"); MICH. COMP. LAWS ANN. § 750.169 (West 1991) ("Disturbance of Religious Meetings"); MICH. COMP. LAWS ANN. § 750.396 (West 1991) ("Wearing Masks or Face Coverings in Public"); MICH. COMP. LAWS ANN. § 750.528a (West 1991) ("Training in Weapons").

In 1992, Michigan reported 165 bias-motivated offenses; in 1993, 239 such incidents were reported, revealing an increase of 74 hate-motivated offenses between 1992 and 1993. *See* Project, *Crimes Motivated by Hatred*, *supra* note 464, at 76.

471. 508 U.S. 476 (1993) (holding that the Wisconsin statute was not unconstitutionally overbroad, nor violative of the First Amendment. Affirmed the sentence enhancement aspect of the statute for "criminal conduct [that is] more heavily punished if the victim is selected because of [the victim's] protected status than if no such motive obtains.").

472. *See* FRIEDMAN, *supra* note 357, at 262 (noting that most of the basic crimes—murder, armed robbery, theft, rape, larceny, arson—are exclusively state crimes).

473. *See* Comment, *Racially Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies*, 75 J. CRIM. L. & CRIMINOLOGY 103, 116 (1984).

bias crimes;[474] victims reporting hate crimes experience numerous related attacks, while a significant number also report isolated incidents. Furthermore, the impact of hate crimes transcends the physical harm to the individual. Other members of the Asian American community perceived their lives to be equally endangered and devalued after Vincent Chin's death, for example.[475] In addition, the harm to the individual and to her or his family or friends can have lasting traumatic effects.[476]

However, even as the need for state-level hate crime legislation is recognized, there are two principal problems that must be acknowledged with respect to any existing or proposed statutory schemes. First is the conflicting message of such legislation, which suggests that there is something extraordinary about hate-motivated crime simply because it is characterized as such, rather than recognizing the pervasive impact of bias in the commission of offense against people of color and others who are injured by bias crimes throughout American society. Second, even where specific hate crime legislation exists, discretionary decision making—particularly in the form of prosecutorial discretion—may render its effectiveness meaningless.

As examined earlier, the experiences of Asian Americans frequently are omitted from the discourse on racism. This oversight occurs, according to Professor Rita Chaudhry Sethi, because "Whites . . . deny us our right to speak out against prejudice, partially because it tarnishes their image of Asians as 'model' minorities; [and] other people of color . . . deny us the same because of monopolistic sentiments that they alone endure real racism."[477] A Wall Street Journal/NBC News poll revealed that most American voters thought that Asian Americans did not suffer discrimination "but rather received too many 'special advantages.' "[478]

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474. *See, e.g.*, NAT'L INST. AGAINST PREJUDICE AND VIOLENCE, *The Ethnoviolence Project Pilot Study*, INST. REP. No. 1, at 5 (1986).

475. As one Asian American man states in *Who Killed Vincent Chin?*:

> *I got involved because actually in looking at it, here are two complete strangers who . . . they can do something like that and get away with it on probation when just the other day . . . a man on a negligent homicide or manslaughter got 15 years. Being able to see the possible manifestations with my own children I thought we ought to do something to send a message out.*

Film Transcript, *supra* note 301, at 15.

476. *See* Selbin, *supra* note 461, at 178-81, and sources cited therein.

477. Rita Chaudhry Sethi, *Smells like Racism: A Plan for Mobilizing Against Anti-Asian Bias*, *in* THE STATE OF ASIAN AMERICA, *supra* note 14, at 235, 236.

478. Polner, *supra* note 195, at B1.

The second point is that because of enduring social constructions of Asian Americans—simultaneously raced and un-raced[479]—crimes motivated by anti-Asian animus are routinely diminished or not recognized at all. In the years since Vincent Chin was killed, several incidents illustrate this point. In what the author calls a "macabre collage of violence" against Asian Americans, the following incidents reveal the pervasiveness of such occurrences:

> [A] police detective brutalized Long Guang Huang while falsely arresting him in May 1985; youths fractured the skull and legs of Sing Vang, a Vietnamese refugee, in September 1985; a gang called the "Dotbusters" beat to death Navroze Mody, an Asian Indian American, in September 1987.[480] In 1989, Jim Loo, a Chinese American, was murdered in a pool room fight in which he was called "gook," "chink," and blamed for the death of American soldiers in Vietnam. The same year, a gunman motivated by racial hatred strafed a schoolyard with an automatic weapon, killing five children of Southeast Asian descent. In 1990, Hung Truong, a fifteen-year-old Vietnamese youth, was killed by two men, said to be skinheads, shouting "white power."[481] While screaming "Karate! Karate!," skinheads in Denver forced six Japanese students to stand in a line and beat them with baseball bats.[482] In the summer of 1992, some of the rioters in Los Angeles deliberately targeted Asian American businesses.[483] A nineteen-year-old Vietnamese American, Luyen Phan Nguyen, was beaten to death at a party while onlookers yelled "Viet Cong."[484]

When crimes were committed against Asians in housing projects in San Francisco, the Housing Authority was reluctant to call the crimes racially motivated. This reluctance was in spite of rampant racial slurs, such as "Go home, Chinaman," and "accent harassment."[485] The Deputy Director of the Oakland Housing Authority

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479. Kendall Thomas, Comments at Frontiers of Legal Thought, Duke Law School (Jan. 26, 1990), *quoted in* Lawrence, *supra* note 362, at 61 (proposing the use of "race" as a verb).

480. Kang, *supra* note 178, at 1927 n.11 (citing *Anti-Asian Violence*, *supra* note 178, at 10).

481. *Id.* (citing U.S. COMM'N ON CIVIL RIGHTS, *supra* note 171, at 26-31).

482. *Id.* (citing Johnny Ng, *Skinheads Accused of Attacking Japanese in Denver*, ASIAN WK., Nov. 30, 1990, at 18).

483. *Id.* (citing U.S. COMM'N ON CIVIL RIGHTS, *supra* note 171, at 47).

484. *Id.* (citing Mike Clary, *Rising Toll of Hate Crimes Cited in Student's Slaying*, L.A. TIMES, Oct. 10, 1992, at A1) (citations omitted from quote).

485. Sethi, *supra* note 477, at 236 & n.5.

minimized the existence of racial bias aimed at the Asian tenants by responding: "There may be some issues of race in it, but it's largely an issue of people who don't speak English feeling very isolated and not having a support structure to deal with what's happening to them."[486] A bipolar vision of racism also may have contributed to the reluctance to characterize the events as racist, as the perpetrators were African Americans.[487]

The community of Asian Indians living in Jersey City, New Jersey, were victimized by racist violence in 1986. Their homes and businesses were "vandalized, and graffitied with racial slurs, women had their saris pulled, Indians on the street were harassed and assaulted, and a 28-year old man was beaten into a coma."[488] A group calling themselves "the Dotbusters" published a letter in the *Jersey Journal*, stating that "We will go to any extreme to get Indians to move out. . . . If I'm walking down the street and I see a Hindu and the setting is right, I will just hit him or her. We plan some of our more extreme attacks . . . . We use the phone book and look up the name Patel."[489] The writers threatened all Asian Indians in Jersey City, and promised to drive them out of Jersey City. Teenagers in Dickinson High School were found with Dotbuster IDs.[490] In spite of the explicit threat to the safety of the Asian Indian community, the police failed to respond, telling the Asian Indian community that they should not be concerned.[491]

Later in the same month that the Dotbusters' letter was published in the *Jersey Journal*, the horrific bludgeoning to death of Navroze Mody occurred. Navroze was beaten to death with bricks by a group of eleven young Latinos. Even after he had lost consciousness, his assailants repeatedly propped him up and continued to beat him. His White companion was not attacked.[492] Four of Mody's attackers were indicted for manslaughter; two of the indicted were also accused of assaulting two Indian students two weeks before killing Navroze.[493]

Despite the obvious brutality involved, there was scant public outrage surrounding Mody's killing. Moreover, the Hudson County Prosecutor refused to pursue criminal charges for racial bias, even

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486. Steven A. Chin, *Asians Terrorized in Housing Projects*, S.F. EXAMINER, Jan. 17, 1993, at B1; *see also* Sethi, *supra* note 477, at 236-37.

487. *See supra* Part I.A.2.

488. Sethi, *supra* note 477, at 244-45.

489. TAKAKI, *supra* note 63, at 481; *see also* Sethi, *supra* note 477, at 245.

490. "Dotbusters" refers to the cosmetic dot, called *bindi*, that is worn by many Indian Asian women to symbolize marital fidelity.

491. *See* Sethi, *supra* note 477, at 245.

492. *See id.*; *see also* Chang, *Asian American Legal Scholarship*, *supra* note 14, at 1254.

493. *See* Sethi, *supra* note 477, at 245.

though the prosecuting attorney stated that "[t]here was no apparent motive for the assault other than the fact that the victim was an Asian American."[494] Of the eleven attackers in the Mody case, three were convicted of aggravated assault, and one of simple assault. As Professor Sethi opines, "[P]erhaps it was because Asian Indians did not know how to employ the political system that the verdicts returned did not fit the crimes committed. Perhaps it was because the attackers were also minorities. But the main reason why justice was not served was because the racism that Indians were enduring did not fit the neat, American paradigm for racial violence."[495]

In 1989, Patrick Edward Purdy fired an AK-47 assault rifle in the schoolyard at Cleveland Elementary School in Stockton, California, killing five Indochinese children and wounding thirty others.[496] This tragedy was belatedly recognized for the presence of racial motivation in the killings. According to California Attorney General John Van de Kamp: "It appears highly probable that Purdy deliberately chose Cleveland Elementary School as the location for his murderous assault in substantial part because it was heavily populated by Southeast Asian children. His frequent resentful comments about Southeast Asians indicate a particular animosity against them."[497]

As Professor Pat Chew discusses, the killing of Yoshihiro Hattori, a sixteen-year-old Japanese exchange student in Louisiana, is also illustrative.[498] Hattori and his American host Webb Haymaker mistook Rodney and Bonnie Peairs' house as the location of a Halloween Party. When Bonnie Peairs answered the door, Haymaker said, "We're looking for the party."[499] Hattori was quickly approaching the door.[500] Frightened, Mrs. Peairs called for her husband to get

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494. Statement by Hudson County Prosecutor Paul DePascale, *quoted in* Sethi, *supra* note 477, at 245 (citing Raul Vicente, Jr., *Cops Arrest Two as Dotbusters*, GOLD COAST, Mar. 24-31, 1988, at 4); *see* Vivienne Walt, *A New Racism Gets Violent in New Jersey*, NEWSDAY, Apr. 6, 1988, at 5.

495. Sethi, *supra* note 477, at 247.

496. *See* Chang, *Asian American Legal Scholarship*, *supra* note 14, at 1314 n.377.

497. NELSON KEMPSKY, CHIEF DEPUTY ATTORNEY GENERAL, STATE OF CALIFORNIA, A REPORT TO ATTORNEY GENERAL JOHN K. VAN DE KAMP ON PATRICK EDWARD PURDY AND THE CLEVELAND SCHOOL KILLINGS 12 (Oct. 1989), *quoted in* U.S. COMM'N ON CIVIL, *supra* note 171, at 31; *see also* Chang, *Asian American Legal Scholarship*, *supra* note 14, at 1314 & n.377.

498. *See* Chew, *supra* note 4, at 58 (citing *Acquittal in Doorstep Killing of Japanese Student*, N.Y. TIMES, May 24, 1993, at A1 [hereinafter *Doorstep Killing*]; David E. Sanger, *After Gunman's Acquittal, Japan Struggles to Understand America*, N.Y. TIMES, May 25, 1993, at A1).

499. *Id.* (citing *Doorstep Killing*, *supra* note 498).

500. *Id.*

his gun.[501] Rodney Peairs immediately retrieved his .44 caliber pistol.[502] Coming to the door, Mr. Peairs pointed the gun and shouted, "Freeze!"[503] Apparently not understanding the order, Hattori continued toward the door and was fatally shot.[504]

"Three days of testimony made it clear that the teenager had been killed almost by reflex. Little more than a minute passed between the time Mr. Hattori rang the Peairs' doorbell and the time Mr. Peairs shot him."[505] Taking just over three hours to deliberate, the jury acquitted Mr. Peairs of manslaughter, concluding that he acted reasonably as a frightened homeowner using permissible "deadly force to protect himself from an intruder."[506]

Hattori's killing did not initially receive widespread coverage in the American press. "Only after the incident became highly publicized in the Japanese press as an example of the harm caused by the lack of gun control in the United States," Professor Chew explains, "did the American press begin to report it."[507] Moreover, as Professor Chew notes, "[N]either the American journalists nor the lawyers, including those for the prosecution, explored the role that race might have played in the incident or in the jury's decision.[508] For instance, the Peairs agreed that Mrs. Peairs' fear precipitated the shooting, but neither would explain what caused that fear."[509] Furthermore, the Peairses could not explain why they shouted to a neighbor to "go away" when the neighbor wanted to help the dying Mr. Hattori lying in the Peairs' carport.[510]

The answer to Mrs. Peairs' inexplicable fear very likely lies within the social construction of Asian "otherness" which dictated her reaction and her husband's violent response to Hattori, and not to Haymaker. With only an instant to form the judgment of reasonable conduct, the salient questions are these: "Why did Peairs not

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501. *Id.*

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.*

506. *Id.* at 58-59 (citing Sanger, *supra* note 498).

507. *Id.* at 59 (citing interview with Hiroko Otani, Visiting Teacher from Tokyo, Japan, at the Carnegie Mellon Child Care Center in Pittsburgh, Pa. (Nov. 15, 1992)).

508. *Id.* at 59. "In contrast," Professor Chew notes, "the Japanese press did suggest that race conflict was a cause of the shooting." *Id.* at 59 n.260. One major Japanese newspaper, the Mainichi Shimbun, described Louisiana's "shoot the burglar law" as a "manifestation of the discrimination that exists in the community where burglary charges are made predominantly against blacks." *Id.* (citing Sanger, *supra* note 498, at A7).

509. Chew, *supra* note 4, at 59 (citing *Doorstep Killing*, *supra* note 498, at A11).

510. *Id.*

shoot at Haymaker? In other words, was it more likely that Hattori was shot and Peairs was acquitted because Hattori was Asian?"[511]

The American public's reaction to the killing and Peairs' subsequent acquittal was very revealing. Instead of expressing outrage, the public and press were "intrigued by how the American and Japanese 'cultures' viewed the gun control issues differently."[512] "Rather than condemnation or even critical scrutiny of the Peairs' conduct," Professor Chew concludes, "there was apparent community support."[513]

As Professor Bill Ong Hing states, "Hate crimes statutes are intended not only to protect potential victims, but also to change the way society thinks about race relations."[514] This article does not question the need for hate crime legislation. Yet, the examination of the *Vincent Chin* case and the *Hattori* case reveals the shortcomings of such an approach. These cases indicate how the embedded stereotypes about Asian Americans operate to disadvantage Asian Americans in criminal justice schemes where overt indicia of racial animus may (*Vincent Chin*) or may not (*Hattori*) be present, particularly where law enforcement and the public do not view such incidents against Asian Americans as being motivated by hate.[515]

Within the discipline of antidiscrimination law, Professor Alan Freeman provides a useful explanation as to how traditional antidiscrimination law deliberately approaches racial discrimination from the "perpetrator" rather than from the "victim" perspective:

> The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors. It is a world where, but for the conduct of misguided ones, the system of equality of opportunity would work to provide a distribution of the good things in life without racial disparities and where deprivations that did correlate with race would be

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511. *Id.*; *see also id.* at 59 n.263 (considering the possibility that bipolar analysis contributed to the lack of attention to the racial dimensions in the Hattori killing).

512. Chew, *supra* note 4, at 60 (citing Sanger, *supra* note 498, at A17).

513. *Id.* (citing Peter Applebome, *Verdict in Death of Student Reverberates across Nation*, N.Y. TIMES, May 26, 1993, at A14; *Doorstep Killing*, *supra* note 498, at A11).

514. Hing, *supra* note 210, at 950.

515. *See* Tanya Kateri Hernández, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence,"* 99 YALE L.J. 845, 850-55 (1990) ("Existing state statutes are deficient because they do not address the real problem with bias statutes—the lack of enforcement.").

> "deserved" by those deprived on grounds of insufficient "merit." It is a world where such things as "vested rights," "objective selection programs," and "adventitious decisions" (all of which serve to prevent victims from experiencing any change in conditions) are matters of fate, having nothing to do with the problem of racial discrimination.[516]

Thus, while hate crime legislation fills a necessary gap in the strategies against bias-motivated offenses, limiting the treatment of cases such as *Vincent Chin* to the domain of criminal civil rights or hate crime legislation permits the legal system and the rest of society to ignore the institutionalized nature of racial bias. As such, while certain offenses that are perpetrated against persons of color will be deemed to warrant "hate crime" status, the remaining myriad of instances in which crimes are perpetrated against persons of color will continue to be minimized in grade of offense and degree of punishment for perpetrators. For those who would examine this situation critically, it would suggest an otherwise fairly operating system.[517] Hate-motivated offenses share with other anti-discrimination laws the premise that by punishing the individual wrongdoer, the harm has been addressed and redressed. However, the basic flaw in this reasoning is that the individual wrongdoer rarely acts out of the context of a preexisting norm—a preexisting racist norm—which is socially constructed and societally embedded. This is an untenable state of affairs even for criminal law doctrine, where individual

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516. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978) (footnotes omitted).

517. *See* Selbin, *supra* note 461, at 160 (discussing the practical implications of determining whether a particular crime or class of crimes qualifies as a hate crime). Important to this consideration is that despite evidence that most violent crime is intraracial, in a study of 1031 incidents involving Asian homicide victims and offenders of a known race over the 1976-1984 period, of the Asian victims killed by non-Asians, about two-thirds (66.5%) were killed by Whites, and about one-third (31.4%) were killed by Blacks. Sung Joon Jang et al., *Predictors of Interracial Homicide Victimization for Asian Americans: A Macrostructural Opportunity Perspective*, 34 SOC. PERSP. 1, 11 (1991). Thus, the authors conclude that the research reveals that "[A]sian Americans are at least three times more likely to have been killed by a member of another race than are whites, and about five times more than blacks. This indicates that although the overall risk of homicide victimization is relatively low for Asians, this type of victimization is more distinctly interracial when it does occur than is the case for the majority population and the larger minority population." *Id.* at 14-15. Significantly, the researchers found the victim's gender to be a significant predictor of whether a victim was killed by a White or by an Asian. In the study's subsample, Asian women were found to be significantly less likely than men to be killed by a White than by an Asian. *Id.* at 14.

blameworthiness establishes the culpability that justifies state punishment.

A far more powerful legal message for law and society would be for the lives of crime victims of color to be considered as valuable as other members of society in every facet of criminal law doctrine, decision making, and adjudication. As Professor Stephen Carter reminds us, "[M]illions of tiny, racialist decisions are made each day, and are justified, in the minds of most decision makers, not on the ground that they oppress, but on the ground that they are rational."[518] Articulating this message does not suggest a "color-blind" approach to criminal adjudications, however.[519] To the contrary, it calls for taking into account the particular ways in which racial animus fuels criminal reactions against persons of color and to treat such offenses as serious crimes because of these constructions and contexts. As the *Vincent Chin* proceedings illustrate, this often does not occur, thereby compounding the injury or loss, and perpetuating the structure of racial superiority by devaluing the lives of victims of color within ostensibly neutral principles of law and legal administration.

CONCLUSION—CHALLENGES FOR CRIMINAL LAW, LEGAL EDUCATION, AND SOCIETY

When those who have the power to name and to socially construct reality choose not to see you or hear you, whether you are dark-skinned, old, disabled, female, or speak with a different accent or dialect than theirs, when someone with the authority of a teacher, say, describes the world and you are not in it, there is

518. Carter, *supra* note 412, at 434.

519. As Professor Charles Lawrence states:

> Faith in the colorblind cure contains an implicit acceptance of significant cost. The admitted injury imposed by the still virulent and demeaning social construction of race continues while we wait for the "just-don't-say-it" approach to work. But this cost includes more than what can be measured by a reckoning of those cases where racial discrimination is real in fact but not in law. The narrow doctrinal view of what counts as racism helps spread the epidemic of denial. . . .

Lawrence, *supra* note 225, at 837.

> *a moment of psychic disequilibrium, as if you looked into a mirror and saw nothing.*[520]
>
> —Adrienne Rich

Because of the harmfulness of racist discourse and conduct, which often results in great psychic and physical injury, the moral weight of the criminal justice system must activate to publicly sanction such wrongdoing against society.[521] Hate crime legislation is an important effort toward the public approbation of bias-motivated injuries, provided the necessary willingness by law enforcement agencies is forthcoming. However, any law enforcement efforts toward addressing bias-motivated offenses will be ineffective unless those entities imbued with discretionary power begin to view members of the diverse communities within this country as having equal worth.

In this regard, perhaps the most telling conclusion of the FBI bias crimes survey identifies the need for local law enforcement agencies to develop greater sensitivity toward bias offenses.[522] Professor Kenneth Culp Davis recognized that "[t]he strongest need and the greatest promise for improving the quality of justice to individual parties in the entire legal and governmental system are in the areas where decisions necessarily depend more upon discretion than upon rules and principles and where formal hearings and judicial review are mostly irrelevant."[523] This means that police, prosecutors, and judges must recognize structural and personal biases which may lead them to use their discretion in ways that devalue the lives of people of color. Laxity in homicide investigations, plea bargained agreements, and sentencing dispositions are behaviors which indicate indifference, at best, or racism, at worst, toward diverse

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520. FRANCES A. MAHER & MARY KAY THOMPSON TETREAULT, THE FEMINIST CLASSROOM: AN INSIDE LOOK AT HOW PROFESSORS AND STUDENTS ARE TRANSFORMING HIGHER EDUCATION FOR A DIVERSE SOCIETY 1 (1994) (quoting Adrienne Rich). For example, over the last decade, the number of Asian American law students has grown from 1.7% to 5.5%, and continues to grow; the majority of these students are Chinese, Korean or Japanese Americans. L. Ling-Chi Wang, *Trends in Admissions for Asian Americans in Colleges and Universities: Higher Education Policy*, *in* THE STATE OF ASIAN PACIFIC AMERICA, *supra* note 175, at 49, 55.

521. On the particular harms of hate crimes, see *supra* Part III; *see also Hate Crimes Statistics Act of 1988: Hearings on S. 702, S. 797, S. 2000 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong. 240 (1988) (statement by Leonard D. Goodstein, Ph.D., Chief Executive Officer, American Psychological Association); Goleman, *supra* note 4, at C1.

522. FBI REPORT, *supra* note 457; *see also Hatred Turns Out Not to Be Color-Blind*, TIME, Jan. 18, 1993, at 22.

523. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA 3 (1976).

communities. The commitment to end such glib practices must be prioritized. Moreover, it is clear that legal and social constructions of identity operate symbiotically to create climates where racial hostility will result in racial violence. There is an imperative, then, to address the broader problems of stereotyping which infect the operative views throughout the criminal justice system and throughout society.

Legal education has an important role to play toward rectifying this situation and achieving these goals because of the unique roles that lawyers play in developing legal doctrine and social policy.[524] If we acknowledge the centrality of race in the development and interpretation of legal doctrine, we must equip our students to understand the contexts and manifestations of racism(s) in our society, legal rules, and legal systems. Moreover, as Professor Patricia Williams reminds us:

> We, as law teachers, create miniworlds of reality, by the faith that students put in our tutelage of the rules of reality. We define the boundaries of the legitimate and the illegitimate, in a more ultimately powerful way than almost anyone else in the world. It is enormously important therefore to consider the process by which we include, as well as the process by which we exclude.[525]

Similarly, Bell Hooks states that:

> If the effort to respect and honor the social reality and experiences of groups in this society who are nonwhite is to be reflected in a pedagogical process, then as teachers—on all levels, from elementary to university settings—we must acknowledge that our styles of teaching must change. . . Most of us were taught in classrooms where styles of teachings reflected the notion of a single norm of thought and experience, which we were encouraged to believe was universal. This has been just as true for nonwhite teachers as for white teachers. . . . As a consequence, many teachers are disturbed by the political implications of a multicultural education because they fear losing control in a

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524. *See* Hing, *supra* note 210, at 930-31 (noting that lawyers have central roles in the resolution of cases involving race relations, and that lawyers have heightened access to the power structure, including the power to shape both policy and law). In this regard, it is significant to note that in 1987, American Citizens for Justice, established two $500 Vincent Chin scholarships for Asian Pacific American students who are entering law school. The scholarships were established from a trust fund for Mrs. Lily Chin. N.Y. NICHIBEI, Dec. 14, 1989.

525. WILLIAMS, *supra* note 277, at 88.

> classroom where there is no one way to approach a subject—only multiple ways and multiple references.[526]

This article represents an effort toward the recognition of this responsibility, as well as a suggested creative approach to this imperative. We can overcome the apparent reticence to address such issues in the curriculum by seeking and sharing creative teaching ideas that will break the silence on issues of race and diversity in legal education.[527] When difference and diversity are genuinely regarded as national strengths, we will journey toward the kind of pluralistic democracy so often imagined, though as yet unrealized. Traveling along this path, we must commit ourselves to teach "laws with flaws."[528] Accepting this challenge, "[O]ur goal in legal educa-

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526. BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM 35-36 (1994).

527. It also should be acknowledged that the commitment to engaging in multiple perspective pedagogy is not necessarily without some pain and discomfort to the instructor and the students. Bell Hooks speaks honestly about this dynamic:

> When I first entered the multicultural, multiethnic classroom setting I was unprepared. I did not know how to cope effectively with so much "difference." Despite progressive politics, and my deep engagement with the feminist movement, I had never before been compelled to work within a truly diverse setting and lacked the necessary skills. . . . Just as it may be difficult for professors to shift their paradigms, it is equally difficult for students. I have always believed that students should enjoy learning. Yet I found that there was much more tension in the diverse classroom setting where the philosophy of teaching is rooted in critical pedagogy and (in my case) in feminist critical pedagogy. The presence of tension—and at times even conflict—often meant that students did not enjoy my classes or love me, their professor, as I secretly wanted them to do. Teaching in a traditional discipline from the perspective of critical pedagogy means that I often encounter students who make complaints like, "I thought this was supposed to be an English class, why are we talking so much about feminism?" (Or, they might add, race or class.) . . . And I saw for the first time that there can be, and usually is, some degree of pain involved in giving up old ways of thinking and knowing and learning new approaches. I respect that pain. And I include recognition of it now when I teach, that is to say, I teach about shifting paradigms and talk about the discomfort it can cause.

Id. at 41-43; *see also* Beverly Daniel Tatum, *Talking About Race, Learning About Racism: The Application of Racial Identity Development Theory in the Classroom*, 62 HARV. EDUC. REV. 1, 5 (1992) (identifying three primary areas of student resistance to talking and learning about race and racism: (1) race is considered a taboo topic for discussion, especially in racially mixed settings; (2) many students, regardless of racial-group membership, have been socialized to think of the United States as a just society; (3) many students, particularly White students, initially deny any personal prejudice, recognizing the impact of racism on other people's lives, but failing to acknowledge its impact on their own).

528. *See* Taunya Lovell Banks, *Teaching Law with Flaws: Adopting a Pluralistic Approach to Torts*, 57 MO. L. REV. 443, 454 (1992); *see also* Burnele V. Powell, *Somewhere*

tion should be to learn from these past mistakes and teach our students how to make laws work for all segments of society."[529] *This* is the lesson of *Who Killed Vincent Chin?* Vincent Chin's legacy deserves no less.

Farther Down the Line: MacCrate on Multiculturalism and the Information Age, 69 WASH. L. REV. 637 (1994).

529. *See* Banks, *supra* note 528, at 454.