Profiling Principle The Prosecution of Wen Ho Lee and the Defense of Asian Americans

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Questions are more important than answers. This Foreword is only an introduction. It is an attempt to present the questions for further discussion.

We should avoid the common question of whether wrongful racial profiling occurred in the Wen Ho Lee case, because the simplicity of the inquiry conceals the subtle error of its implication. Like the designation of “Chinese spy” which can refer to either a spy for China or a spy who is of Chinese descent, the question of whether wrongful racial profiling occurred in the Wen Ho Lee case confuses two distinct questions. There is the question of whether racial profiling occurred, and then there is the question of whether any such racial profiling was wrongful. One is a descriptive question, and the other is a normative question.

The confusion of the factual inquiry with the moral judgment, however, is hidden in the heart of the controversy over racial profiling. As a consequence of this confusion, the debate over the Lee case has the two sides arguing different issues. When the prosecution states, “there was no wrongful racial profiling,” they have in mind the crucial word “wrongful.” When the defense states, “there was wrongful racial profiling,” they take for granted that any racial profiling must be deemed wrongful.

The proponents of the prosecution have had little choice but to concede that the investigation of Lee in some manner may have relied on race – there has been too much testimony from insiders to deny at least the strong possibility – and they have presented a sophisticated version of the argument for rational discrimination. They have insisted that because mainland China targets potential sources of secret information from individuals of Chinese ancestry, it makes sense for the counterintelligence operation as a defensive measure to do so as well. The opponents of the prosecution have concentrated their efforts on arguing that Lee was a victim of a selective inquiry and double standards. They have had greater difficulty not in showing that race may have been involved in focusing on Lee, but instead, in explaining why the use of that factor would be wrong if it is logical. (One side is concerned about issues of national security, and the other side is concerned about due process; that is another debate altogether, albeit related to racial profiling.)

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The prosecution has the easier case than the defense in this respect: The prosecution can prevail if it either demonstrates that Lee was not treated any differently than a white counterpart would have been, or that any such difference in treatment was appropriate. After all, not even the greatest idealists have ever argued that every individual must be accorded identical treatment by a democratic government under any conceivable circumstance; distinctions can and must be made. The defense faces a significant burden: It must not only establish that there was some use of race, but it must also then plead that even a use of race under circumstances that seem as compelling as any government would ever be able to demonstrate nonetheless remains improper.

In the actual debate, each side has made an unwarranted assumption. The prosecution advocates have assumed that a utilitarian calculus should be used to achieve justice: They appear content to show the rationality of the use of race, under the assumption that what is rational is by definition right. The defense advocates have assumed that absolute civil rights are necessary to ensure justice: They seem willing to show that the use of race by itself is enough to warrant condemnation of the practice.

The prosecution argument can be refuted by several means. Most obviously, its cost-benefit methodology can be accepted but its particular analysis rejected. It is especially utilitarians who would be appalled at the poor use of their technique. The Lee investigation failed to achieve its own stated objectives. While Lee may have been guilty of minor offenses, the government itself was forced to concede that he was not the so-called “Chinese spy” and never transferred secrets to any foreign power. As is typical of instances of racial profiling and abuse of prosecutorial power, Lee was investigated for something altogether different from that which he was indicted; it was not simply a lesser charge but an unrelated one. The charges had nothing to do with an intentional transfer of information to China. The Lee investigation also produced unanticipated externalities: Potential Asian immigrant and Asian American employees avoided the labs, and current employees reconsidered whether they wished to stay there, both of which are detrimental to the government in recruiting talented employees.

In addition, utilitarianism is subject to all the usual attacks. In this particular context, utilitarianism is vulnerable to the familiar argument that civil rights by their nature, and any rights, cannot be trumped by the results of mere accounting. Rights are incommensurable in the marketplace. They cannot be readily quantified, and they defy comparison. If an anti-discrimination principle has any meaning at all, it must be at its most effective when it is least attractive. Otherwise, the right is not even a privilege.

There also is a peculiar problem in the Lee case. The perpetual foreigner syndrome that afflicts Asian Americans in general affects Lee in particular. The perpetual foreigner assumption – that Asians are sojourners, visitors, and/or guests who cannot overcome an inherent alien status – makes it easy to deprive Asian Americans of civil rights. Asian Americans are not integrated into a paradigm of civil rights because the poor treatment accorded Asian Americans is based not on their race but on their alienage, and therefore is acceptable.

A consensus has developed that discrimination on the basis of race is improper. A consensus remains, however, that discrimination on the basis of citizenship is proper. Citizens may enter the country; foreigners must seek permission. Indeed, serious theorists contend that the sovereignty of the nation and the meaning of
citizenship status — ideas that undoubtedly have real consequence as matters of law and culture — cannot exist without a distinction between citizens and aliens that favors the former and literally disenfranchises the latter. Of course, the crux of the perpetual foreigner syndrome is race and not alienage. Race has been equated with alienage either by definition or as a proxy. Asian racial background is correlated to foreign status — the Chinese Exclusion Act, the Asiatic Barred Zone, and the racial prerequisite to naturalization enforced in the Ozawa1 and Thind2 cases were the de jure version of this phenomenon. “Where are you really from?”, “How do you like it in our country?”, “When are you going home?”, and “If you don’t like it here, you can go back to where you came from,” are the de facto version of it.

Here, the perpetual foreigner syndrome expresses itself in an especially acute manner. Structurally, the “Chinese look for spies among Chinese Americans” argument as a justification for selecting Lee is identical to that presented for the Japanese American Internment. It is the proposition that the United States government can deprive its citizens of their civil rights because a hostile power has taken certain actions. It also can be interpreted as allowing a foreign government such as China or Japan to divest United States citizens of their rights. Described from this perspective, it appears more absurd, especially because it is unlikely that most Americans would accept a similar forfeiture of their own rights based on the activities of another country. Yet the Lee case was rarely viewed from this angle, perhaps because Lee himself was treated rhetorically as if he were a foreigner rather than a citizen.

However, the defense argument suffers because Lee’s supporters responded in turn with their own utilitarian arguments and, in some instances, were offended by the more robust case they could have presented. The conventional argument for Lee was premised on the irrationality of pursuing him. The reasoning proceeded along the following lines: There is no reason to suppose that Lee would be a spy for China because of his race. This approach suffers from major flaws. Inevitably, if the approach is to be more than an assertion taken on faith, it degenerates into an empirical debate, namely whether it is rational or irrational to believe that there is some slightly higher likelihood that a person of Chinese heritage would betray the United States to China, than a person who is basically the same save for his or her heritage. Because a significant amount of the information used to consider the question is classified and because of the usual problems of imperfect knowledge, this contest turns out to proceed in the abstract and with assumptions. Moreover, to argue that it is irrational to single out Lee suggests that if it is rational, it is permissible.

In other words, the defense advances an argument only for instrumental behavior. It is a plea that the government remain rational about conduct, not a demand that the government respect civil rights. An argument for rationality is ineffective if there is a fundamental disagreement about what is rational, which is bound to occur if there is even modest pluralism. People can and are likely to agree to behave rationally, but even a sincerely shared preference for rationality does not necessarily produce the same sense of rationality and, to some extent, excludes the possibility of multiple options within a reasonable range.

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1. Ozawa v. United States, 260 U.S. 178 (1922) (holding that a Japanese immigrant was not a “free white person” eligible to naturalize as a citizen).
2. United States v. Thind, 261 U.S. 204 (1923) (holding that an Indian immigrant was not a “free white person” eligible to naturalize as a citizen).
The better approach is more critical of the government, not less critical. The better approach, however, requires a concession for the sake of argument. Although some are not willing to make this concession, such an inability to make concessions reflects a commitment to ideology that is not strategic. The concession is that it is reasonable (or, to present it in a milder form, it is not absurd) to believe that there is some slightly higher likelihood that a person of Chinese heritage would betray the United States to China, rather than a person who is basically the same save for his or her heritage. Or consider the mildest means of expressing a similar line of reasoning. It is not absurd to believe that there is some slightly higher likelihood that a person of Chinese heritage can speak a Chinese dialect than a person who is basically the same save for his or her heritage. Or to use an example with statistical support beyond doubt, a majority of Asians in the United States are foreign-born, not merely that a higher percentage of Asians than whites are foreign-born; thus, any effort by the government to sort out who is foreign-born could rely on Asian background with better than fifty percent accuracy.

The case that incorporates any of these concessions is stronger than the case that does not. It is stronger because it renders irrelevant the opposing side’s empirical argument. It also is stronger because it makes significant the notion of rights. Once this concession has been made, the genuine issues have been joined. The real debate can be conducted. That debate is whether in those rare instances where racial discrimination is, in fact, rational discrimination – there are examples from which we can infer probabilities with a degree of certainty as Bayesian statistical analysis would suggest – it is a course of action we as a society wish to sanction. There are other interesting questions, but they are empirical questions: Do the premises obtain? Do people engage in preference falsification? Do they behave in bad faith? Are there countervailing costs? Are there opportunity costs in the failure to act? Even after irrational discrimination has been defeated, the possibility of rational discrimination can be threatening.

In legal terms, this debate concerns the difference between “rationality” review and “strict scrutiny” review. The levels of judicial intervention in majoritarian processes may differ only as procedural devices, allocating the burden of proof to the citizen in “rationality” review and the government in “strict scrutiny” review, recognizing in each instance certain presumptions and fictions. Or they may differ as substantive standards, so that the evidence that would satisfy the less demanding “rationality” review would not pass the more rigorous “strict scrutiny” review. In such a regime, an application of a Bayesian formula would be sufficient for “rationality” review. By itself, it would fail “strict scrutiny” review because of the requirements of “compelling state interest” and “least restrictive means” (“narrow tailoring”). If “rationality” review and “strict scrutiny” review are to be distinguished, with the latter made more than a burden-shifting procedure, racial profiling cannot pass muster solely by its rationality (the naming of “rationality” review as such is not accidental).

The Lee case also should prompt Asian Americans to realize a number of features of contemporary racial dynamics. These may be new to Asian Americans (and, for that matter, non-academics), but they are established insights applied to new contexts.

The inquiry as to whether Lee had committed a crime on the one hand, and the inquiry as to whether he was able to assert his civil rights and whether he was given due process on the other hand, are different inquiries, but the former must be
considered subordinate to the latter. The guilt-innocence inquiry cannot be pursued with justice unless and until the civil rights-due process inquiry has been resolved. A reversal of priorities, with the civil rights-due process matter deferred, ensures that a guilty judgment will dominate the discourse even if it is likely to be faulty. It sets the inordinately high threshold of requiring an absolutely pure party as the challenger to systemic problems.

The persecution of Lee can occur without any intentional wrongdoers but can become racial, thanks to a volatile combination of factors ranging from partisan politics and the institutional goals of media outlets, to official indifference and the stereotypical images of popular culture. The United States Attorney ultimately responsible for the Lee case was Chinese American. The Secretary of Energy who initially approved the choices in the Lee case was the highest-ranking Latino in the federal government. The Clinton administration was liberal, and it had even promoted progressive rules against racial profiling. It boasted more Asian Americans among its ranks than any other executive branch, by an order of magnitude. Other than perhaps one individual, Notra Trulock, as to whom press reports suggested a pattern of previous bias, none of the persons involved could be accused with much foundation of being a “racist.”

The Lee case also requires Asian Americans to consider again the value of multiracial coalitions and to redouble their efforts toward such coalitions. Asian Americans were moderately successful in maintaining pan-Asian coalitions, even though Japanese Americans with memories of the internment identified with Chinese Americans much more visibly than with other Asian ethnicities. Asian Americans were largely unsuccessful in connecting Wen Ho Lee to “driving while black.” Some actively tried to distinguish Lee, as an unassuming scientist, from drug dealers, preferring an image of middle-class conformity while avoiding association with stereotypes of people of color. Some Asian American commentary implied that racial profiling of Asian Americans was altogether different from that applied to African Americans. Ironically, Asian Americans appeared largely unaware of the possibility that their selective concern would confirm the accusation that Asian Americans were acting out of ethnic solidarity.

The lawyers who represented Lee, however, deserve the utmost respect. They won for a client and a cause when virtually all observers, however sympathetic, would have dismissed their prospects while wishing them well. They vindicated Lee, charged with theft of the nation’s nuclear “crown jewels,” and equated him to the Rosenbergs, who were sentenced to death during the Cold War era — making him a martyr and shaming his tormentors. The greatest testament to their practical victory would be principled policies.

If legal academics have any practical contribution to make to public discourse, it is in pointing out the hard questions. This Foreword has highlighted the hard questions. The attempts to answer follow.