

2022

## Anti-Asian American Racism, COVID-19, Racism Contested, Humor, and Empathy

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Online ISSN: 2643-7759

### Recommended Citation

Peter H. Huang, *Anti-Asian American Racism, COVID-19, Racism Contested, Humor, and Empathy*, 16 FIU L. Rev. 669 (2022).

DOI: <https://dx.doi.org/10.25148/lawrev.16.3.8>

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# ANTI-ASIAN AMERICAN RACISM, COVID-19, RACISM CONTESTED, HUMOR, AND EMPATHY

Peter H. Huang\*

## ABSTRACT

*This Article analyzes the history of anti-Asian American racism. This Article considers how anger, fear, and hatred over COVID-19 fueled the increase of anti-Asian American racism. This Article introduces the phrase, racism contested, to describe an incident where some people view racism as clearly involved, while some people do not. This Article critiques respectability politics for being an ineffective response to racism. This Article proposes how to utilize humor to engage non-violent racism. This Article studies how to achieve DEI (Diversity, Equity, and Inclusion) by Empathy Through Personal Perspective Pivoting (ETPPP).*

**Keywords:** anti-Asian American racism, COVID-19, racism contested, respectability politics, humor, DEI, empathy through personal perspective pivoting (ETPPP)

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## I. INTRODUCTION

Anti-Asian American racism increased in 2020,<sup>1</sup> fueled by anger, fear, and hatred over the COVID-19 pandemic due to a novel coronavirus named SARS-CoV-2,<sup>2</sup> first detected in Wuhan, China.<sup>3</sup> This anti-Asian American racism led to child bullying, coughing, adult verbal harassment, shunning, spitting, civil rights violations, discrimination, and hate violence towards Asian Americans.<sup>4</sup> The Asian Pacific Planning and Policy Council (A3PCON), Chinese for Affirmative Action (CAA), and the Asian American Studies Department of San Francisco State University launched the Stop AAPI Hate reporting center<sup>5</sup> and website *Stop AAPI Hate*<sup>6</sup> to track anti-Asian American harassment.<sup>7</sup>

<sup>1</sup> Lily Bailey, *A Significant Rise in Racism Toward Asian People During COVID*, PSYCH. TODAY (Oct. 7, 2020), <https://www.psychologytoday.com/us/blog/because-we-are-bad/202010/significant-rise-in-racism-toward-asian-people-during-covid>; Adrian De Leon, *The Long History of US Racism Against Asian Americans from 'Yellow Peril' to 'Model Minority' to the 'Chinese Virus'*, THE CONVERSATION (Apr. 8, 2020, 8:12 AM), <https://theconversation.com/the-long-history-of-us-racism-against-asian-americans-from-yellow-peril-to-model-minority-to-the-chinese-virus-135793>; Ali Rogin & Anna Nawaz, *'We Have Been Through This Before.'* *Why Anti-Asian Hate Crimes Are Rising Amid Coronavirus*, PBS NEWSHOUR (June 25, 2020, 6:44 PM), <https://www.pbs.org/newshour/nation/we-have-been-through-this-before-why-anti-asian-hate-crimes-are-rising-amid-coronavirus>; Qian Julie Wang, *Anti-Asian Racism Isn't New*, N.Y. TIMES (Feb. 18, 2021), <https://www.nytimes.com/2021/02/18/opinion/asian-americans-racism.html>; David Yi, *Jeannie Mai Grew Up Too Aware of Asian Racism, and Is Standing Up to Hate in America Now*, BAZAAR (Apr. 21, 2020), <https://www.harpersbazaar.com/culture/politics/a32189463/asian-american-racism/>; Nancy Wang Yuen, *Anti-Asian Racism Is Taking a Mental and Emotional Toll on Me*, SELF (May 26, 2020), <https://www.self.com/story/anti-asian-racism-coronavirus>.

<sup>2</sup> See generally RAUL RABADAN, UNDERSTANDING CORONAVIRUS (2020).

<sup>3</sup> *Novel Coronavirus – China*, WORLD HEALTH ORG. (Jan. 12, 2020), <https://www.who.int/emergencies/disease-outbreak-news/item/2020-DON233>; see also 76 DAYS (MTV Documentary Films 2020), <https://www.76daysfilm.com/>.

<sup>4</sup> AAPI EQUITY ALLIANCE, <http://www.asianpacificpolicyandplanningcouncil.org/asian-american-pacific-islander-aapi-civil-rights-organizations-establishes-stop-aapi-hate-reporting-center/> (last visited Jan. 27, 2022).

<sup>5</sup> *About Stop AAPI Hate*, STOP AAPI HATE, <https://stopaapihate.org/about/> (last visited Jan. 27, 2022).

<sup>6</sup> STOP AAPI HATE, <https://stopaapihate.org/> (last visited Jan. 27, 2022).

<sup>7</sup> Steve Mullis & Heidi Glenn, *New Site Collects Reports of Racism Against Asian Americans Amid Coronavirus Pandemic*, NPR (Mar. 27, 2020, 9:23 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/27/822187627/new-site-collects-reports-of-anti-asian-american-sentiment-amid-coronavirus-pand>.

Over 2,100 reports of anti-Asian American hate incidents occurred in the three months from March to June of 2020.<sup>8</sup> From March 19, 2020 to December 31, 2020, there were 2,808 first-hand reports of such incidents.<sup>9</sup> Breaking down this total, 382, meaning approximately 13.6% of incidents targeted youth under twenty years old; 240, or about 7.3% of the total incidents, involved physical assaults;<sup>10</sup> and 126, or 4.5% of all reported incidents, were directed at Asian Americans who were 60 years old.<sup>11</sup> Asian American women were attacked almost two and a half times more than Asian American men.<sup>12</sup> The most ethnically targeted Asian Americans were Chinese, at 40.7% of reported incidents.<sup>13</sup> From March 19, 2020 to February 28, 2021, the Stop AAPI Hate reporting center received 3,795 reports of anti-Asian hate incidents nationally.<sup>14</sup> The AAPI (Asian American and Pacific Islander) Emergency Response Network receiving over 3,000 reports “since it started tracking Covid-specific hate incidents”<sup>15</sup> in 2020. The Anti-Defamation League compiled a list of cases that chronicles “surging reports of xenophobic and racist incidents.”<sup>16</sup>

Attacks of some Asian Americans were captured on videos that went viral. For example, disturbing surveillance video footage caught a vicious unprovoked attack,<sup>17</sup> in which a man violently kicks an Asian woman, in her stomach and to the ground, shouting “(Expletive) you. You don’t

<sup>8</sup> Erin Donaghue, *2,120 Hate Incidents Against Asian Americans Reported During Coronavirus Pandemic*, CBS NEWS (July 2, 2020, 1:57 PM), <https://www.cbsnews.com/news/anti-asian-american-hate-incidents-up-racism/>. See also Erin Donaghue, *Surging Anti-Asian Hate Crimes Being Tracked During Coronavirus Pandemic: “Things Are Getting Very Physical,”* CBS NEWS (Mar. 26, 2020, 11:27 AM), <https://www.cbsnews.com/news/coronavirus-pandemic-anti-asian-hate-crimes-tracking/>.

<sup>9</sup> *Stop AAPI Hate: New Data on Anti-Asian Incidents Against Elderly and Total National Incidents in 2020*, RAFU SHIMPO (Feb. 11, 2021), <https://www.rafu.com/2021/02/stop-aapi-hate-new-data-on-anti-asian-incidents-against-elderly-and-total-national-incidents-in-2020/>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Russell Jeung et al., *Stop AAPI Hate National Report*, STOP AAPI HATE, <https://actupny.com/wp-content/uploads/2021/03/210312-Stop-AAPI-Hate-National-Report.pdf> (last visited Mar. 10, 2022).

<sup>15</sup> Anne Anlin Cheng, *What This Wave of Anti-Asian Violence Reveals About America*, N.Y. TIMES (Feb. 21, 2021), <https://www.nytimes.com/2021/02/21/opinion/anti-asian-violence.html>; Christine Hauser, *Asian-Americans Were Targeted in Nearly 3,800 Hate Incidents in the Past Year*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/03/17/us/hate-crimes-against-asian-americans-community.html>.

<sup>16</sup> *Reports of Anti-Asian Assaults, Harassment and Hate Crimes Rise as Coronavirus Spreads*, ANTI-DEFAMATION LEAGUE (June 18, 2020), <https://www.adl.org/blog/reports-of-anti-asian-assaults-harassment-and-hate-crimes-rise-as-coronavirus-spreads>.

<sup>17</sup> New York City Police Department (@NYPDNEWS), TWITTER (Mar. 30, 2021, 8:00 AM), <https://twitter.com/NYPDnews/status/1376867018792652802>.

belong here.”<sup>18</sup> He stomps on her head and upper body three more times,<sup>19</sup> as she lay defenseless in front of a building at 360 West 43rd Street in Manhattan at around 11:40 a.m. on March 29, 2021.<sup>20</sup> The woman was hospitalized with “a fractured pelvis and contusion to the head,”<sup>21</sup> while the man casually walked away.<sup>22</sup> A man chased the attacker, who pulled out a knife to escape.<sup>23</sup> The sixty-five-year old attacked woman, Vilma Kari, immigrated from the Philippines to America decades ago.<sup>24</sup> In a reversal of roles, many Asians sought to protect their parents from hate.<sup>25</sup> The police apprehended the thirty-eight-year old attacker early Wednesday, March 31, 2021 and charged him with felony assault as a hate crime.<sup>26</sup> Decades-long debates remain over the rationales and effectiveness of hate crime laws in responding to violent bigotry.<sup>27</sup>

Tiffany Yip, a developmental psychologist and chairperson of the psychology department at Fordham University,<sup>28</sup> observed while “Black

<sup>18</sup> Michael R. Sisak & Karen Matthews, *Video Shows Vicious Attack of Asian American Woman in NYC*, AP NEWS (Mar. 30, 2021), <https://apnews.com/article/65-year-old-asian-woman-assaulted-nyc-street-692b82db37efae29d12e7fa638eb2e1d>.

<sup>19</sup> Rachel Treisman, *Attack on Asian Woman in Manhattan, as Bystanders Watched, To Be Probed as Hate Crime*, NPR (Mar. 30, 2021, 1:40 PM), <https://www.npr.org/2021/03/30/982745950/attack-on-asian-woman-in-manhattan-as-bystanders-watched-to-be-probed-as-hate-cr>.

<sup>20</sup> Neil Vigdor, *Attack on Asian Woman in Midtown Prompts Another Hate Crime Investigation*, N.Y. TIMES (Mar. 31, 2021), <https://www.nytimes.com/2021/03/30/nyregion/attack-asian-woman-midtown.html>.

<sup>21</sup> *Search Continues in Brutal Manhattan Attack on Asian Woman Heading to Church*, ABC7NY (Mar. 30, 2021), <https://abc7ny.com/search-continues-in-brutal-nyc-attack-on-asian-woman-heading-to-church/10459000/>; Ryan W. Miller, *‘Absolutely Disgusting and Outrageous’: Elderly Asian American Woman Released from New York Hospital After Brutal Attack; Suspect Sought*, USA TODAY (Mar. 30, 2021), <https://www.usatoday.com/story/news/nation/2021/03/30/nypd-asian-american-woman-assaulted/7057944002/>.

<sup>22</sup> New York City Police Department, *supra* note 17.

<sup>23</sup> *Id.*

<sup>24</sup> Nicole Hong et al., *Brutal Attack on Filipino Woman Sparks Outrage: ‘Everybody Is on Edge’*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/03/30/nyregion/asian-attack-nyc.html>.

<sup>25</sup> Vanessa Hua, *In a Role Reversal, Asian-Americans Aim to Protect Their Parents from Hate*, N.Y. TIMES (Mar. 29, 2021), <https://www.nytimes.com/2021/03/26/well/family/asian-american-hate-racism.html>.

<sup>26</sup> *Id.*

<sup>27</sup> Claudia Card, *Is Penalty Enhancement a Sound Idea?*, 20 LAW & PHIL. 195 (2001); Jane Coaston, *What’s Wrong with Our Hate Crime Laws?*, N.Y. TIMES (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/opinion/hate-crime-laws.html>; Heidi M. Hurd, *Why Liberals Should Hate “Hate Crime Legislation,”* 20 LAW & PHIL. 215 (2001).

<sup>28</sup> *Tiffany Yip*, FORDHAM UNIV., [https://www.fordham.edu/info/21660/psychology\\_faculty\\_and\\_staff/5443/tiffany\\_yip](https://www.fordham.edu/info/21660/psychology_faculty_and_staff/5443/tiffany_yip) (last visited Jan 27, 2022).

families always have the racial talk,' . . . 'I'm not sure Asian-American families can avoid "the talk" any longer.'"<sup>29</sup> There is guidance based on research and practice for parents about how to discuss with teenagers Asian American discrimination in the COVID-19 era.<sup>30</sup> There are also additional resources to help facilitate discussions with younger children about race and racism.<sup>31</sup>

While this Article focuses on anti-Asian American racism, much of the Article's analysis also applies to discrimination, prejudice, and stereotyping based on race, ethnicity, gender, sexual orientation, disability, weight, and many other intersecting axes of privilege, domination, and oppression.<sup>32</sup> This commonality does not deny the unique experiences, forms, and histories of prejudice, stereotyping, discrimination, domination, and oppression different ethnic groups, races, women, disabled, religions, cultures, and sexual orientations have faced. The commonality suggests that while different, all people are similar and may have privilege in some dimensions of their identities, while simultaneously be disadvantaged by some other dimensions of their identities. John Cho, a well-known Korean American actor, observed COVID-19 reminds Asian Americans of the conditional nature of their belonging in America.<sup>33</sup> Cho wrote cogently,

If the coronavirus has taught us anything, it's that the solution to a widespread problem cannot be patchwork.

<sup>29</sup> Heidi Shin, *I'm Helping My Korean-American Daughter Embrace Her Identity to Counter Racism*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2021/03/19/well/family/Talking-to-children-anti-Asian-bias.html>.

<sup>30</sup> *Guide for Parents of Asian/Asian American Adolescents*, MGH CENT. FOR CROSS-CULTURAL STUDENT EMOTIONAL WELLNESS, <https://www.mghstudentwellness.org/resources-1/guide-for-parents-of-asianasian-american-adolescents> (last visited Jan. 27, 2022); MGH Student Wellness, *Talking to Teens About Anti-Asian Discrimination in the Era of COVID-19: Guidance from Research and Practice*, VIMEO (Mar. 5, 2021), <https://vimeo.com/520018357>. See also *Asian American Racism & Mental Health Resources*, MGH CENT. FOR CROSS-CULTURAL STUDENT EMOTIONAL WELLNESS, <https://www.mghstudentwellness.org/racism> (last visited Jan. 27, 2022).

<sup>31</sup> EMBRACE RACE, <https://www.embracerace.org/> (last visited Jan. 27, 2022); *Talking to Young Children About Race and Racism*, PBS, <https://www.pbs.org/parents/talking-about-racism> (last visited Jan. 27, 2022).

<sup>32</sup> Charlene Wong, *Fancy Terminology*, JUDGE-ME-NOT: BY MY CIRCUMSTANCES, <https://judge-me-not.weebly.com/fancy-terminology.html> (last visited Jan. 27, 2022); Natalya Dell, *Intersecting Axes of Privilege, Domination, And Oppression*, NATALYAD (Feb. 10, 2014), <https://sites.google.com/site/natalyadell/home/intersectionality>; Kathryn Pauly Morgan et al., *Describing the Emperor's New Clothes: Three Myths of Educational (In-)Equality*, THE GENDER QUESTION IN EDUCATION: THEORY, PEDAGOGY & POLITICS 1, 105 (1996).

<sup>33</sup> John Cho, *Coronavirus Reminds Asian Americans Like Me That Our Belonging Is Conditional*, L.A. TIMES (Apr. 22, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-04-22/asian-american-discrimination-john-cho-coronavirus>.

Never has our interconnectedness and our reliance on each other been plainer.

You can't stand up for some and not for others. And like the virus, unchecked aggression has the potential to spread wildly.<sup>34</sup>

The introduction section of this Article starts off by recounting some relevant personal anecdotes about non-violent, verbal racism. The introduction analyzes the normalization of stereotypes and the related economic information-based theory of statistical discrimination. The introduction adopts a definition of racism from Critical Race Theory. The introduction also proposes the phrase, racism uncertainty, to describe the impact of animus-based racism whereby many encounter with strangers may be noisy enough to be unclear as to whether there is underlying racial profiling involved. Finally, the introduction introduces the phrase, racism contested, to describe an incident where some people view racism as being clearly involved, yet some people do not. In other words, even whether there was racism in an incident itself is contested among people.

#### A. Personal Anecdotes

Before COVID-19, I used to enjoy frequently eating at so-called AYCE (All-You-Can-Eat) buffets, especially vegan Chinese ones. AYCE is a curious phrase because it suggests a contest about how much can one physically eat. Buffets exemplify in many ways the best and worst aspects of modern American neoliberal life:<sup>35</sup> eating out relatively inexpensively, being able to help yourself, huge quantities of variable quality food, and a vast number of choices in an abundant array of colors, cuisines, flavors, shapes, sizes, smells, and textures. Buffets are a one-stop culinary destination for the masses, with something it seemed for every individual and every taste. Buffets empower people to exercise something financial economists call real options,<sup>36</sup> to enjoy individual autonomy, freedom of choice, fulfillment of desires, gratification of preferences, satisfaction of impulses, and pursuit of the good old-fashioned virtue of value with the vices of decadence, excess, gluttony, unlimited appetites, and waste.

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<sup>34</sup> *Id.*

<sup>35</sup> Brian Bartels, *The History of the Buffet, an American Institution*, VINEPAIR (May 23, 2017), <https://vinepair.com/articles/the-buffet-a-cultural-history-of-an-american-institution/>.

<sup>36</sup> See, e.g., Peter H. Huang, *A New Options Theory for Risk Multipliers of Attorneys' Fees in Federal Civil Rights Litigation*, 73 N.Y.U. L. REV. 1943, 1946–47 n.12 (1998) (explaining the meaning of the phrase “real options”).

This Article's author highly recommends its readers pause to watch an amazing, almost hypnotic four-minute and forty-one-second video.<sup>37</sup> This astonishing production was filmed to be shown to investors and for internal training purposes in 1991 at a Sizzler<sup>38</sup> restaurant in San Diego, California. This promotional commercial portrays dining at a Sizzler's buffet court to be a joyful, almost magical, transcendent experience at a bold, wholesome, and unique all-American institution. Also worth viewing is this CNN *Parts Unknown* program segment,<sup>39</sup> featuring Korean American fine artist David Choe,<sup>40</sup> treating the late American celebrity chef Anthony Bourdain<sup>41</sup> to a meal at a Sizzler in the Koreatown section of Los Angeles, California. Bourdain observed how the Sizzler buffet was "a judgment-free zone where there are no mistakes, a world to explore incongruous combinations, without shame or guilt, free of criticism."<sup>42</sup> Bourdain understood how to Choe Sizzler was "a wonderland ... and a happy place."<sup>43</sup> Another sense in which buffets are quintessentially American is they offer the tantalizing promise of culinary exemplars from diverse nationalities (typically, American, Chinese, French, Italian, Japanese, and Mexican). And just like the promise of the American dream, a buffet usually does not live up to what it could be, and instead usually only delivers a reality of stereotypes and inaccurate representations. Relatedly, a comedian once joked after eating at Denny's: an old man said to the cashier, "my compliments to your menu's photographer."

One weekend afternoon before COVID-19, I hurriedly parked in a lot in front of a buffet I had never dined at in southern New Jersey. Upon opening my car door, it hit the passenger door of a pick-up truck parked in the next spot. The Caucasian driver of that car yelled "why don't you learn how to drive and go back to the country you were born in?" I replied, "short trip, I'm already there." Her Caucasian passenger tried to calm her down and told her there was no damage or dent in his door. I thought about, though decided against, asking her to learn to speak more precisely by pointing out she presumably meant learn how to open a car door carefully as opposed to learn how to drive because opening car doors is probably and technically not part of a driving course. Parents teach kids to open

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37 Rachel Redhouse, *Sizzler Promotional Commercial 1991*, YOUTUBE (Sept. 4, 2012), <https://youtu.be/E3YGtQ40Qvs>.

38 *The Sizzler Story*, SIZZLER, <https://www.sizzler.com/about-us> (last visited Jan. 27, 2022).

39 Jesus Frankenstein, *Parts Unknown – Los Angeles – Sizzler*, YOUTUBE (Jan. 12, 2014), <https://youtu.be/yIKr3KQVyp8>.

40 DAVID CHOE, <https://davidchoe.com/> (last visited Jan. 27, 2022).

41 Brian Stelter, *CNN's Anthony Bourdain Dead at 61*, CNN (June 8, 2018), <https://www.cnn.com/2018/06/08/us/anthony-bourdain-obit/index.html>.

42 Jesus Frankenstein, *supra* note 39.

43 *Id.*



passenger car doors carefully before children can learn to drive legally. During dinner, my partner was concerned my car might get keyed. So, we finished our meal quickly to ensure there was not any vandalism of the car's doors or tires. Fortunately, there was no harm, other than our hurried, shortened, stressful, and worrisome meal.

Although this incident was non-violent, it nonetheless imposed five types of costs or taxes.<sup>44</sup> First, a behavioral tax in the sense of our changing our behavior by ending dinner early. Second, a cognitive tax in the sense it dominated our dinner conversation and occupied our thoughts during dinner. Third, an emotional tax in the sense of general feelings of anxiety and unease during our dinner. Fourth, a mental health or psychological tax in terms of anger, discomfort, and stress. Fifth, there is a physical health tax or harm from chronic exposure to racial animus. This example also shows how the deadweight loss or social burden of racially motivated animus will often fall not only on targets of prejudice, their friends and family, but also those who espouse or practice ethnic/racial hatred. A mistaken belief a non-Caucasian must be an immigrant is unfortunately still a recurrent one in America.

Ethnic/racial epithets/slurs<sup>45</sup> are also another everyday unfortunate part of American life. I remember being called a chink and china boy in Public School P.S. 183 elementary school<sup>46</sup> and Horace Mann school<sup>47</sup> by some classmates and more strangers on the streets and subway trains and stations of New York City. My parents taught me to ignore such incidents by repeating the well-known adage and children's rhyme about the irreversible binomial,<sup>48</sup> "sticks and stones." I also remember several University of Iowa undergraduates telling me they were relieved at the start of the first class of industrial organization and the first class of public finance a professor whose last name is Huang could actually speak English without a foreign accent. In August 2020, the University of Colorado (CU) law school annual faculty retreat included reflection on CU law school

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<sup>44</sup> See generally Dhruv Khullar, *How Prejudice Can Harm Your Health*, N.Y. TIMES (June 8, 2017), <https://www.nytimes.com/2017/06/08/upshot/how-prejudice-can-harm-your-health.html> (surveying studies finding harmful impacts on health of individuals who face actual or even potential chronic discrimination based on ethnicity, race, class, or sexual orientation).

<sup>45</sup> *Understanding the Meaning of Racial Epithet with Examples*, OPINIONFRONT, <https://opinionfront.com/understanding-meaning-of-racial-epithet-with-examples> (last visited Jan. 19, 2022).

<sup>46</sup> P.S. 183, <https://ps183.org/> (last visited Jan. 19, 2022).

<sup>47</sup> HORACE MANN SCH., <https://www.horacemann.org/> (last visited Jan. 19, 2022).

<sup>48</sup> Yakov Malkiel, *Studies in Irreversible Binomials*, 8 LINGUA 113 (1959).

dean S. James Anaya's<sup>49</sup> anti-racism and representation initiative.<sup>50</sup> During a breakout room discussion, a colleague shared how after conversing with that colleague during an informal orientation reception, an entering CU law student expressed relief that colleague spoke English so well in light of that colleague's surname. Upon hearing of this conversation, a male Caucasian CU colleague expressed what seemed to be incredulity, shock, and surprise. His reaction reminded me of these lyrics in *Colors of the Wind*,<sup>51</sup> the theme song from the animated film, *Pocahontas*:<sup>52</sup>

You think the only people who are people  
 Are the people who look and think like you  
 But if you walk the footsteps of a stranger  
 You'll learn things you never knew you never knew.

...

And we are all connected to each other,  
 In a circle, in a hoop that never ends.

...

For whether we are white or copper-skinned  
 We need to sing with all the voices of the mountain  
 Need to paint with all the colors of the wind  
 You can own the earth and still  
 All you'll own is earth until  
 You can paint with all the colors of the wind.

My father earned a Ph.D. in metallurgy from the University of California, Berkeley and my mother earned her Ph.D. in biophysics from the University of Pittsburgh in three years (while giving birth to two of her three sons). Yet because their native language was Chinese (they grew up speaking Cantonese and Mandarin, respectively), they faced life-long racism because they spoke English with obvious foreign accents.<sup>53</sup> They

<sup>49</sup> S. James Anaya, COLO. L., <https://lawweb.colorado.edu/profiles/profile.jsp?id=729> (last visited Jan. 19, 2022) (Dean and University Distinguished Professor).

<sup>50</sup> S. James Anaya, *From Dean Anaya: My Commitment to Confront Racism and Advance Representation in the Legal Profession*, COLO. L., (July 21, 2020), <https://www.colorado.edu/law/2020/07/21/dean-anaya-my-commitment-confront-racism-and-advance-representation-legal-profession>; *Anti-Racism and Representation Initiative*, COLO. L. (June 28, 2021), <https://www.colorado.edu/law/anti-racism-and-representation-initiative>.

<sup>51</sup> JUDY KUHN, *Colors of the Wind*, on *POCAHONTAS: AN ORIGINAL WALT DISNEY RECORDS SOUNDTRACK* (Walt Disney Records 1995). See also VANESSA WILLIAMS, *Colors of the Wind*, on *POCAHONTAS: AN ORIGINAL WALT DISNEY RECORDS SOUNDTRACK* (Walt Disney Records 1995).

<sup>52</sup> *POCAHONTAS* (Walt Disney Pictures 1995).

<sup>53</sup> Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329, 1330 (1991) (discussing accent bias).

often told my brothers and me of their encounters with anti-Chinese racism in their professional careers and everyday lives.

Similar to many American immigrants, my parents reminded their children that although governments can, and often do, seize any physical and financial capital in the form of land and wealth people own, states cannot take away people's human capital in the form of their education and learned skills. Also like many immigrants from cultures without a civic tradition of democratic participation and political activism, my parents constantly reminded us as Americans, we have a duty to exercise our privilege to vote. My parents also instilled in us the feeling of being very fortunate to live in a nation with the rule of law. My parents lived through a number of horrible wars, including the Second Sino-Japanese War, Chinese Civil War, and World War II. My parents escaped Communist Party rule on mainland China (by fleeing to Hong Kong and Taiwan). These formative personal experiences led my parents to also teach their children to never take peaceful times for granted and to view racism as an issue of human rights.

### *B. Normalization of Stereotypes*

Verbal ethnic/racial slights were commonplace, familiar, and normalized in my life. I came to become unsurprised at such ethnic/racial stereotyping. I also did not even consider such encounters and experiences with strangers to be racist because they did not involve any physical violence. I was untroubled when people made such inaccurate pre-judgments based on so little information as an individual's ethnic/racial appearance or surname. I viewed such encounters as what economists call statistical discrimination,<sup>54</sup> due to hopeful naïveté and studying in graduate school about information-based economic theories of discrimination,<sup>55</sup> several of those theories being pioneered by male Caucasian economics

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<sup>54</sup> Hanming Fang & Andrea Moro, *Theories of Statistical Discrimination and Affirmative Action: A Survey*, in HANDBOOK OF SOCIAL ECONOMICS 1A, 133, 133–62 (Jess Benhabib et al. eds., 2011).

<sup>55</sup> See, e.g., Kenneth J. Arrow, *Some Mathematical Models of Race Discrimination in the Labor Market*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 187 (Anthony H. Pascal ed., 1972); Kenneth J. Arrow, *The Theory of Discrimination*, in DISCRIMINATION IN LABOR MARKETS 3 (Orley Aschenfelter & Albert Rees eds., 1973); Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972); Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355, 368–74 (1973); Joseph E. Stiglitz, *Approaches to the Economics of Discrimination*, 63 AM. ECON. REV. 287 (1973).

Nobel laureates,<sup>56</sup> including my Ph.D. thesis advisor, the polymath economic theorist extraordinaire Ken Arrow.<sup>57</sup>

Economic statistical discrimination theory is able to explain how racial profiling and gender discrimination can exist and persist if people use

observable characteristics . . . , such as . . . gender or race, as a proxy for otherwise unobservable outcome relevant characteristics. So in the absence of direct information about an individual's productivity, qualifications, . . . a decision-maker may substitute group averages (either real or imagined) or stereotypes to fill the information void.<sup>58</sup>

Statistical discrimination is further exacerbated by risk aversion.<sup>59</sup> Statistical discrimination was developed as, and is viewed by many economists as, being an alternative way<sup>60</sup> to explain racism than animus-based discrimination,<sup>61</sup> another economic theory of racism due to another male Caucasian economics Nobel laureate.<sup>62</sup>

While statistical discrimination was developed to be a model of information-based, instead of animus-based, discrimination, not all economists agree. One such economist is among the most respected Black

<sup>56</sup> Kenneth J. Arrow was a 1972 economics Nobel laureate. See *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1972*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/1972/summary/> (last visited Jan. 19, 2022). Edmund S. Phelps is a 2006 economics Nobel laureate. See *Edmund S. Phelps, Facts*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/2006/phelps/facts/> (last visited Jan. 19, 2022). Michael Spence is a 2001 economics Nobel laureate. See *A. Michael Spence, Facts*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/2001/spence/facts/> (last visited Jan. 19, 2022). Joseph E. Stiglitz is also a 2001 economics Nobel laureate. See *Joseph E. Stiglitz, Facts*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/2001/stiglitz/facts/> (last visited Jan. 19, 2022).

<sup>57</sup> Michael M. Weinstein, *Kenneth Arrow, Nobel-Winning Economist Whose Influence Spanned Decades, Dies at 95*, N.Y. TIMES (Feb. 21, 2017), <https://www.nytimes.com/2017/02/21/business/economy/kenneth-arrow-dead-nobel-laureate-in-economics.html>.

<sup>58</sup> Mike Moffat, *The Economics of Discrimination: An Examination of the Economic Theory of Statistical Discrimination*, THOUGHTCO. (Apr. 10, 2019), <https://www.thoughtco.com/the-economics-of-discrimination-1147202>.

<sup>59</sup> *Id.*

<sup>60</sup> Dan Kopf, *What Is Statistical Discrimination?*, QUARTZ (July 28, 2020), <https://qz.com/1870193/what-is-statistical-discrimination/>.

<sup>61</sup> See generally GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971) (formalizing the notion of racial preferences as an aversion to cross-racial interactions).

<sup>62</sup> Gary S. Becker was a 1992 economics Nobel laureate. See *Gary Becker, Facts*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/1992/becker/facts/> (last visited Mar. 22, 2022), .

economists in America,<sup>63</sup> Howard University economics professor William Spriggs,<sup>64</sup> who President Barack Obama appointed as assistant secretary for the Office of Policy at the U.S. Department of Labor from 2009 to 2012.<sup>65</sup> Spriggs is the Chief Economist to the AFL-CIO<sup>66</sup> (American Federation of Labor and Congress of Industrial Organizations) which is the largest federation of unions in the U.S. and consists of fifty-five national and international unions representing more than twelve million active and retired workers.<sup>67</sup> By appointment of the AFL-CIO, Spriggs joined the board of the National Bureau of Economic Research.<sup>68</sup> Spriggs is also a member of the advisory board<sup>69</sup> of the Opportunity & Inclusive Growth Institute,<sup>70</sup> which is a part of the Minneapolis Federal Reserve. Fifteen days after George Floyd was killed on May 25, 2020, by a Minneapolis police officer about four miles from the Opportunity & Inclusive Growth Institute, the Federal Reserve Bank of Minneapolis published an open letter to his fellow economists<sup>71</sup> by Spriggs.<sup>72</sup> In his letter, Spriggs cogently states:

Another strain of economists are the “polite” economists who use “statistical discrimination” as a way to resolve what they perceive as an agency problem in how racism can affect economic outcomes. To Black economists, “statistical discrimination” is a constant micro-aggression. It is a model that makes no sense. How does

<sup>63</sup> Isheka N. Harrison, *7 Things to Know About Howard University Economist William Spriggs*, MOGULDOM NATION (Oct. 12, 2020), <https://moguldom.com/310025/7-things-to-know-about-howard-university-economist-william-spriggs/>.

<sup>64</sup> *William Edwards Spriggs*, HOWARD UNIV., <https://profiles.howard.edu/profile/35381/william-edward-spriggs> (last visited Mar. 22, 2022).

<sup>65</sup> Harrison, *supra* note 63.

<sup>66</sup> AFL-CIO, <https://aflcio.org/> (last visited Mar. 22, 2022).

<sup>67</sup> Ann Brown, *Howard Prof. Bill Spriggs to Economists: Deficiencies Are with Systemic U.S. Policies, Not Black America*, MOGULDOM NATION (June 26, 2020), <https://moguldom.com/288238/howard-prof-bill-spriggs-to-economists-deficiencies-are-with-systemic-u-s-policies-not-black-america/>.

<sup>68</sup> *Leadership & Governance*, NAT’L BUREAU OF ECON. RSCH., <https://www.nber.org/about-nber/leadership-governance> (last visited Mar. 22, 2022).

<sup>69</sup> *Advisory Board*, FED. RSRV. BANK OF MINNEAPOLIS, <https://www.minneapolisfed.org/institute/about/advisory-board> (last visited Mar. 22, 2022).

<sup>70</sup> *About Us*, FED. RSRV. BANK OF MINNEAPOLIS, <https://www.minneapolisfed.org/institute/about> (last visited Mar. 22, 2022).

<sup>71</sup> William Spriggs, *A teachable moment? Will George Floyd’s death spur change in economics?*, FED. RSRV. BANK OF MINNEAPOLIS (June 9, 2020), <https://www.minneapolisfed.org/article/2020/a-teachable-moment-will-george-floyds-death-spur-change-in-economics>.

<sup>72</sup> *William Spriggs*, FED. RSRV. BANK OF MINNEAPOLIS, <https://www.minneapolisfed.org/people/william-spriggs> (last visited Mar. 22, 2022).

a model assume that an entire set of actors, observing the infinite diversity of human beings, all settle on “race” as a meaningful marker independent of history, laws, and social norms? And, miraculously, those same “rational” actors use “statistical” methods to find only negative attributes highly correlated with “race.” The fact that far too many economists blindly agree that negative attributes correlate to being African American and cannot see that relationship to police officers assuming all Black men are criminals is stupefying. The fact that a discipline that prides itself on being objective and looking for data to test hypotheses fails to see how negative attributes do not correlate with being African American is a constant irritant for Black economists.<sup>73</sup>

Statistical discrimination is a form of prejudice in the sense of prejudgment about an individual based on stereotypes.<sup>74</sup> Notice not all discrimination is considered illegal. For example, car insurance rates depend on such legally permissible demographic variables as the driver’s age and marital status to reflect different risk profiles based on the different average car accident risks of those observable groups.<sup>75</sup> California, Hawaii, Massachusetts, Montana, North Carolina, Pennsylvania, and parts of Michigan prohibit car insurance companies from using gender in setting rates, while other states vary widely.<sup>76</sup> Most states allow car insurance companies to use credit-based insurance scores<sup>77</sup> in underwriting and rating decisions, except for California, Hawaii, Maryland, Massachusetts, Michigan, Oregon, and Utah.<sup>78</sup>

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<sup>73</sup> William Spriggs, *A Teachable Moment? Will George Floyd’s Death Spur Change in Economics?*, FED. RSRV. BANK OF MINNEAPOLIS (June 9, 2020), <https://www.minneapolisfed.org/article/2020/a-teachable-moment-will-george-floyds-death-spur-change-in-economics>.

<sup>74</sup> Nadra Kareem Nittle, *What Is a Stereotype?*, THOUGHTCO. (Feb. 4, 2021), <https://www.thoughtco.com/what-is-the-meaning-of-stereotype-2834956>.

<sup>75</sup> Lacie Glover, *5 Surprising Factors That Inflate Your Car Insurance Rate*, NERDWALLET (Jan. 8, 2018), <https://www.nerdwallet.com/article/insurance/auto/5-surprising-factors-inflate-car-insurance-rate>; Ben Luthi, *How Much Does Car Insurance Cost?*, EXPERIAN (Aug. 28, 2021), <https://www.experian.com/blogs/ask-experian/how-much-does-car-insurance-cost/>.

<sup>76</sup> Lisa Green, *What You Can Do About Gender-Based Rate Hikes for Car Insurance*, NERDWALLET (Mar. 18, 2019), <https://www.nerdwallet.com/blog/insurance/auto/is-gender-raising-your-car-insurance-rates-how-to-fight-it/>.

<sup>77</sup> John Ulzheimer, *What Is the Difference Between Credit-Based Insurance Scores and Credit Scores?*, EXPERIAN (June 29, 2020), <https://www.experian.com/blogs/ask-experian/what-is-the-difference-between-credit-based-insurance-scores-and-credit-scores/>.

<sup>78</sup> Louis DeNicola, *Which States Restrict the Use of Credit Scores in Determining Insurance Rates?*, EXPERIAN (Sept. 23, 2020), <https://www.experian.com/blogs/ask-experian/which-states-prohibit-or-restrict-the-use-of-credit-based-insurance-scores/>.

Not all discrimination sounds invidious. Some discrimination even sounds flattering. Strangers often believe and some even say being Chinese explains my achieving these five atypical milestones.<sup>79</sup> First, at age thirteen, in between eighth and ninth grades, sit in on pre-calculus and calculus 1 concurrently in the first six-week session of New York University (N.Y.U.) summer school, with both professors writing letters stating I would have earned a grade of A had I taken the course for credit. Second, in the same summer earn a grade of A in calculus 2 in the second six-week session of N.Y.U. summer school. Third, enroll in Princeton University at age fourteen. Fourth, graduate in three years from Princeton University as a university scholar<sup>80</sup> in mathematics and economics. Fifth, start at age 17 a Ph.D. in applied mathematics at Harvard University.

I used to not challenge such attributions of such accomplishments to being a member of the so-called “model minority” despite understanding such (mis)attributions were not compliments.<sup>81</sup> Instead, attributing academic success or mathematical expertise to being Asian implies such achievements are due to gifts of nature or luck in a genetic lottery, as opposed to the result of repeated hard work, growth mindsets,<sup>82</sup> grit,<sup>83</sup> perseverance, and persistence. Like many Asians and Asian Americans, I was raised to be humble, modest, and self-deprecating, to a fault. I was taught from early childhood on to not look for trouble and instead to be quiet and blend into the background. To brag or bring attention to myself was considered unseemly. My upbringing, learned self-deprecating nature, and feeling sometimes like an imposter<sup>84</sup> led me to accept or at least not contest model minority attributions for being a child prodigy.

<sup>79</sup> See generally Peter H. Huang, *Tiger Cub Strikes Back: Memoirs of an Ex-Child Prodigy About Legal Education and Parenting*, 1 BRIT. J. AM. LEGAL STUD. 297 (2012); Peter H. Huang, *Adventures in Higher Education, Happiness, and Mindfulness*, 7 BRIT. J. AM. LEGAL STUD. 425, (2018).

<sup>80</sup> *University Scholar Program*, PRINCETON UNIV., <https://odoc.princeton.edu/curriculum/special-academic-programs/university-scholar-program> (last visited Mar. 22, 2022) (explaining how the “University Scholar Program is designed for students with exceptional talent in an academic or creative area that cannot be pursued within the regular curriculum”).

<sup>81</sup> Jenna Ryu, *This Is America: Stop Gaslighting Me with the Asian ‘Model Minority’ Myth*, USA TODAY (Dec. 18, 2020, 2:35 AM), <https://www.usatoday.com/story/news/2020/12/17/covid-19-era-shows-normalization-racism-against-asians/6515353002/> (discussing the adverse consequences of the model minority myth).

<sup>82</sup> See generally CAROL S. DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* (2007).

<sup>83</sup> Angela Lee Duckworth, *Grit: The Power of Passion and Perseverance*, YOUTUBE (May 9, 2013), <https://youtu.be/H14bBuluwB8>; ANGELA DUCKWORTH, *GRIT: THE POWER OF PASSION AND PERSEVERANCE* (2018).

<sup>84</sup> See, e.g., Pauline Rose Clance & Suzanne Ament Imes, *The Imposter Phenomenon in High Achieving Women: Dynamics and Therapeutic Intervention*, 15 PSYCHOTHERAPY: THEORY, RSCH. & PRAC. 241, 241 (1978) (coining the term imposter phenomenon (IP) while studying high-achieving

Not all experiences with racism are the overt, outwardly threatening experiences many people of color have faced. Njeri Mathis Rutledge is a professor of law at South Texas College of Law Houston, an associate municipal court judge and magistrate, a former prosecuting attorney, and graduate of Spelman College and Harvard Law School.<sup>85</sup> She recently realized her success as a Black woman in America comes from her ability to dismiss and normalize the racism she faces on a daily basis.<sup>86</sup> She had this realization when a white colleague asked her during the summer of 2020 if she had ever personally experienced racism.<sup>87</sup> She instinctively and reflexively said no because she had not been a victim of police abuse or some other life-threatening racial incident.<sup>88</sup> In doing so, she realized she had equated the lack of violent racism with the lack of all of the racist slights directed at her.<sup>89</sup> She had indeed personally experienced racism.<sup>90</sup> “Every. Single. Day.”<sup>91</sup> She is<sup>92</sup>

soul-achingly tired. Tired of denying, minimizing, and dealing with racism. Tired of waking my daughter up from nightmares where she’s asking me if the police are going to kill us. . . . a lifetime of conversations about racism, service on diversity committees, and participation in anti-racism workshops. . . . being terrified every time my gentle, educated Black husband leaves our house, he will be the victim of police violence.<sup>93</sup>

The normalization of racial insults, stereotypes, and slurs “props up a powerful façade of acceptability, even to its victims. Minimizing the daily abusive reality of people of color is in many ways more corrosive to

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female college students and professionals); Queena Hoang, *The Impostor Phenomenon: Overcoming Internalized Barriers and Recognizing Achievements*, 34 VT. CONNECTION 42, 42 (2013).

<sup>85</sup> Njeri Mathis Rutledge, S. TEX. COLL. OF L. HOUS., <http://www.stcl.edu/about-us/faculty/njeri-i-mathis-rutledge/> (last visited Mar. 22, 2022); Njeri Mathis Rutledge, *Curriculum Vitae*, [http://www.stcl.edu/wp-content/uploads/2016/08/Rutledge.cv\\_.2016.pdf](http://www.stcl.edu/wp-content/uploads/2016/08/Rutledge.cv_.2016.pdf) (last visited Mar. 22, 2022).

<sup>86</sup> Njeri Rutledge, *I thought I Never Personally Experienced Racism. Then I Realized I Just Normalized It*, USA TODAY (Sept. 15, 2020, 8:23 AM),

<https://www.usatoday.com/story/opinion/voices/2020/09/15/racism-every-day-black-women-column/5793258002/>.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*



the ideals of equality, and harder to eliminate, than the violent extremes.”<sup>94</sup> Professor Rutledge concludes, “I can no longer normalize the unacceptable. None of us should. If Americans want to build a society truly reflecting our nation’s ‘self-evident’ truths in our Declaration of Independence, we must all identify racism for what it is, working together to ensure a new normal.”<sup>95</sup>

### C. *Defining Racism*

Caucasians often and routinely perceive non-Caucasians as foreigners. This question often-asked of non-Caucasians: “why don’t you go back to the country you were born in?” is a more hostile and presumptive variation of two questions Professor Jennifer Ho is tired of hearing: “where are you from?”<sup>96</sup> and “what’s your nationality?”<sup>97</sup> Ho is a CU ethnic studies professor,<sup>98</sup> and the director of the Center for Humanities & the Arts.<sup>99</sup> Ho is “the daughter of a refugee father from communist China and a mother born in Kingston, Jamaica, to immigrant parents from Hong Kong.”<sup>100</sup> Ho is also the President, from 2020 to 2022, of the Association for Asian American Studies (AAAS).<sup>101</sup> The AAAS was founded in 1979 and “has emerged as a primary research and teaching hub for Asian American Studies, an interdisciplinary field born out of the 1960s movements for racial justice and student activism.”<sup>102</sup>

The AAAS released in early March 2020 a statement about anti-Asian harassment and COVID-19 to:

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Interview by Audicy Kao with Jennifer Ho, Dir., Ctr. for Humans. & the Arts Univ. Colo. Boulder (June 2020), <https://journalofethics.ama-assn.org/videocast/ethics-talk-spread-anti-asian-racism-and-xenophobia-during-covid-19-pandemic>.

<sup>97</sup> Kelsey Simpkins, *Anti-Asian Discrimination Amid Pandemic Spurs Jennifer Ho to Action*, CU BOULDER TODAY (Apr. 17, 2020), <https://www.colorado.edu/today/2020/04/17/anti-asian-discrimination-amid-pandemic-spurs-jennifer-ho-action>.

<sup>98</sup> *Jennifer Ho*, UNIV. OF COLO. BOULDER, <https://www.colorado.edu/ethnicstudies/people/core-faculty/jennifer-ho>.

<sup>99</sup> Jennifer Ho, *Director’s Letter*, UNIV. OF COLO. BOULDER, <https://www.colorado.edu/cha/about/directors-letter>.

<sup>100</sup> Jennifer Ho, *Claiming Dixie?*, OXFORD AM., Spring 2019, at 12, <https://www.oxfordamerican.org/magazine/item/1691-claiming-dixie>.

<sup>101</sup> *Leadership: Board of Directors*, ASS’N OF ASIAN AM. STUD., <https://aaastudies.org/about/leadership/> (last visited Jan. 27, 2022).

<sup>102</sup> *About Us*, ASS’N OF ASIAN AM. STUD., <https://aaastudies.org/about/> (last visited Jan. 27, 2022).

acknowledge the rise of anti-Asian (especially anti-Chinese) harassment<sup>103</sup> that many Asian Americans (particularly those who look East Asian) are experiencing. As an organization dedicated to the study of Asian Americans, we want to be very clear that xenophobia has no place in our communities or workplaces and that harassment of Asians due to fears of the coronavirus are not only unwarranted but sadly part of a longer history of stereotypes associating Asians, especially Chinese, with disease.<sup>104</sup> We stand firm in rejecting anti-Asian bigotry in the guise of people expressing fear of Novel Coronavirus/COVID-19. We also urge people to find resources that will educate them about how to manage their health<sup>105</sup> as well as why their prejudices/biases in assuming all Asians have the virus are rooted in a history of Yellow Peril rhetoric,<sup>106</sup> xenophobia, ableism, and anti-Asian racism. Please encourage your colleagues and friends to explore this open-source syllabus<sup>107</sup> that addresses anti-Asian bias associated with the coronavirus. And please remember: frequent handwashing, not anti-Asian stereotypes/harassment, is your best means of preventing the spread of coronavirus.<sup>108</sup>

In the midst of COVID-19, Ho developed a wonderful set of online resources adapted from a downloadable slide deck she created “to help educate people about anti-Asian racism that has emerged in the wake of

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<sup>103</sup> Holly Yan, Natasha Chen, & Dushyant Naresh, *What’s Spreading Faster than Coronavirus in the US? Racist Assaults and Ignorant Attacks Against Asians*, CNN (Feb. 21, 2020), <https://www.cnn.com/2020/02/20/us/coronavirus-racist-attacks-against-asian-americans/index.html>.

<sup>104</sup> John Pomfret, *The Coronavirus Reawakens Old Racist Tropes Against Chinese People*, WASH. POST (Feb. 5, 2020), <https://www.washingtonpost.com/opinions/2020/02/05/coronavirus-reawakens-old-racist-tropes-against-chinese-people/>.

<sup>105</sup> *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last updated Nov. 29, 2020).

<sup>106</sup> Christopher Woolf, *Long Before Anxiety About Muslims, Americans Feared the ‘Yellow Peril’ of Chinese Immigration*, WORLD (Dec. 9, 2015, 4:00 PM), <https://www.pri.org/stories/2015-12-09/long-anxiety-about-muslims-americans-feared-yellow-peril-chinese-immigration>.

<sup>107</sup> Jason Oliver Chang, *Treating Yellow Peril: Resources to Address Coronavirus Racism*, [https://docs.google.com/document/d/1-DLnAY5r-f4DRLZgndR\\_Bu47nqHVtAOKem5QRmbz7bg/edit](https://docs.google.com/document/d/1-DLnAY5r-f4DRLZgndR_Bu47nqHVtAOKem5QRmbz7bg/edit) (last visited Jan. 27, 2022).

<sup>108</sup> *AAAS Statement on Anti-Asian Harassment and the Novel Coronavirus/COVID-19*, ASS’N OF ASIAN AM. STUD. (Mar. 5, 2020), <https://aaastudies.org/aaas-statement-on-anti-asian-harassment-and-the-novel-coronavirus-covid-19/>.

the COVID-19 global pandemic.”<sup>109</sup> This Article adopts Ho’s definition of racism to be “a system where one racial group dominates/has power over others.”<sup>110</sup> Ho notes that racism “is institutional – it is power plus prejudice.”<sup>111</sup>

Ho cites a definition of racism grounded in Critical Race Theory (CRT): “racism = race prejudice + social and institutional power.”<sup>112</sup> Power in the sense of institutional and social power includes the ability to define reality for yourself and others, the ability to define reality, the ability to influence others, access to decision-makers to accomplish desired goals, and access to resources.<sup>113</sup> Prejudice is an

attitude based on limited information, often on stereotypes. Prejudice is usually, but not always, negative. Positive and negative prejudices alike, especially when directed toward oppressed people, are damaging because they deny the individuality of the person. . . . No one is free of prejudice. Examples: . . . Asians are good at math.<sup>114</sup>

It is important to understand that racism differs from racial discrimination, hatred, or prejudice because racism entails “one group . . . [having] the power to carry out systematic discrimination through the institutional policies and practices of the society [and by] shaping the cultural beliefs and values that support those racist policies and practices.”<sup>115</sup>

Ho provides these five historical examples of racism in America:<sup>116</sup> First, dispossession and colonization of Native Americans.<sup>117</sup> Second, enslaving and trans-Atlantic slave trading of African people.<sup>118</sup> Third, incarceration of Japanese Americans in World War II.<sup>119</sup> Fourth, horrifying detention of Latinx immigrants at southwestern U.S.

<sup>109</sup> Jennifer Ho, *Anti-Asian Racism and COVID-19*, CO. ARTS & SCI. MAG. (July 16, 2020), <https://www.colorado.edu/asmagazine/2020/04/08/anti-asian-racism-and-covid-19>.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Racism Defined*, DRWORKSBOOK, <https://www.dismantlingracism.org/racism-defined.html> (last updated May 2021).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Ho, *supra* note 109.

<sup>117</sup> Claudio Saunt, *The Invasion of America*, AEON (Jan. 7, 2015), <https://aeon.co/essays/how-were-1-5-billion-acres-of-land-so-rapidly-stolen>.

<sup>118</sup> SLAVE VOYAGES, <https://www.slavevoyages.org/> (last visited Jan. 27, 2022).

<sup>119</sup> *Preserving Japanese American Stories of the Past for the Generations of Tomorrow*, DENSHŌ, <https://densho.org/> (last visited Jan. 27, 2022).

borders.<sup>120</sup> Fifth, ongoing redlining,<sup>121</sup> banning of interracial marriages,<sup>122</sup> and educational racial discrimination.<sup>123</sup> A former law school faculty colleague at first did not believe and then was amazed to learn the onset of COVID-19 fueled hate crimes against Asians,<sup>124</sup> and understandable anxiety about being targets of hate crimes against Asian Americans.<sup>125</sup>

#### D. Racism Uncertainty

In addition to animus-based racism in an interaction, any encounter with strangers may be noisy enough to be unclear as to whether there is underlying racial profiling involved. Let us call this impact of racism by the phrase “racism uncertainty.” Racism uncertainty itself a social cost in the form of an emotional tax because social psychologists have demonstrated that people adapt emotionally to events after they attend, react, and explain those events.<sup>126</sup> Such racism uncertainty can lead to misunderstanding, miscommunication, and misattribution of people’s unobservable motives and rationales for their observable behavior. Such misinformation can lead to wrong inferences, ranging from whether a professor can speak English without a foreign accent to much more serious mistakes, such as whether a professor is a thief. The following example illustrates this possibility.

<sup>120</sup> Adam Serwer, *A Crime by Any Name*, ATLANTIC (July 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/border-facilities/593239/>.

<sup>121</sup> Bruce Mitchell & Juan Franco, *HOLC “Redlining” Maps: The Persistent Structure of Segregation and Economic Inequality*, NAT’L. CMTY. REINVESTMENT COAL. (Mar. 20, 2018), <https://nrcr.org/holc/>.

<sup>122</sup> Marisa Peñaloza, ‘*Illicit Cohabitation*’: Listen To 6 Stunning Moments from *Loving v. Virginia*, NPR (June 12, 2017, 5:00 AM), <https://www.npr.org/2017/06/12/532123349/illicit-cohabitation-listen-to-6-stunning-moments-from-loving-v-virginia>.

<sup>123</sup> *History – Brown v. Board of Education Re-Enactment*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/history-brown-v-board-education-re-enactment> (last visited Jan. 27, 2022).

<sup>124</sup> Angela R. Gover et al., *Anti-Asian Hate Crime During the COVID-19 Pandemic: Exploring the Reproduction of Inequality*, 45 AM. J. CRIM. JUST. 647 (2020).

<sup>125</sup> Hannah Tessler et al., *The Anxiety of Being Asian American: Hate Crimes and Negative Biases During the COVID-19 Pandemic*, 45 AM. J. CRIM. JUST. 636 (2020); Sabrina Tavernise & Richard A. Opiel Jr., *Spit On, Yelled At, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html>.

<sup>126</sup> Timothy D. Wilson & Daniel T. Gilbert, *Explaining Away: A Model of Affective Adaptation*, 3 PERSPS. ON PSYCH. SCI. 370 (2008) (presenting their model “represented by the acronym AREA, holds that people attend to self-relevant, unexplained events, react emotionally to these events, explain or reach an understanding of the events, and thereby adapt to the events (i.e., they attend less and have weaker emotional reactions to them.)”).

It was a weekend night during autumn 1985 on the Southern Methodist University (SMU) campus, about five miles north of downtown Dallas, Texas. Like many other weekend nights, many SMU students were driving in their (or their parents') BMW and Mercedes-Benz convertibles around town, while many SMU faculty were driving in their Honda and Toyota family sedans. SMU is in University Park, one of America's most affluent cities, in terms of its high median household income, high per capita income, and low poverty rate. In nearby Snider Plaza, there were many charming, laidback, picturesque cafes, eateries, sandwich shops, fashion boutiques, and other fancy, posh stores that catered to wealthy SMU students. The demographics of SMU and University Park were mainly Caucasian. Before becoming a visiting assistant professor in economics at SMU, the only fact I knew about SMU was that it was the alma mater of the fictional and mischievous supporting character, *Lucy Ewing*, from the once popular prime time soap opera television series, *Dallas*.<sup>127</sup>

I was leaving after midnight from the SMU economics department with some books. A Caucasian male SMU police officer stopped his patrol car, shone a flashlight, asked me to stop, and requested identification. After complying with his request, he asked what I was doing so late and if the books in my hands were mine. He was not convinced someone would be working this late on a weekend to prepare for teaching a graduate mathematical economics class next week.<sup>128</sup> After much further questioning and seeing a worn copy of a journal article about something called proper equilibria,<sup>129</sup> did he finally let me go, advising me to not work that late, especially on weekends. Was this encounter a case of due diligence by a campus police officer or was it invidious racial profiling? We will never know the answer. The point is that even such a question exists. This incident illustrates how racism uncertainty itself imposes

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<sup>127</sup> *Lucy Ewing, Occupation*, WIKIMILLI, [https://wikimili.com/en/Lucy\\_Ewing](https://wikimili.com/en/Lucy_Ewing) (last updated Feb. 17, 2022).

<sup>128</sup> I was going to cover the differential topological properties of sequential equilibria, a refinement of a game theory solution concept known as the Nash equilibrium. See David M. Kreps & Robert Wilson, *Sequential Equilibria*, 50 *ECONOMETRICA* 863, 863, 887–93 (1982); John F. Nash Jr., *Equilibrium Points in N-Person Games*, 36 *PROCS. NAT'L ACAD. SCI.* 48, 49 (1950). John Nash was a 1994 economics Nobel laureate and Robert Wilson is a 2020 economics Nobel laureate. See *John F. Nash Jr., Facts*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/1994/nash/facts/> (last visited Jan. 27, 2022); *Robert B. Wilson, Facts*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/2020/wilson/facts/> (last visited Jan. 27, 2022).

<sup>129</sup> Proper equilibria are another refinement of Nash equilibria. See Roger B. Myerson, *Refinements of the Nash Equilibrium Concept*, 7 *INT'L J. GAME THEORY* 73 (1978). Roger Myerson is a 2007 economics Nobel laureate. See *Roger B. Myerson, Biographical*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/2007/myerson/biographical/> (last visited Jan. 27, 2022).

psychological costs in terms of lack of emotional resolution about encounters with strangers where they may have been racism. Only that police officer knows if he would have behaved similarly were I Caucasian. I cannot help but wonder whether events would have unfolded differently today were I an African American or Hispanic American. While we will never know if this was a case of racism, it is clearly a case of racism uncertainty.

### *E. Racism Contested: Atlanta Area Spa Shootings*

Related to racism uncertainty is the phenomenon this article terms racism contested to describe an incident where some people view the situation as clearly involving racism and some people see that same incident as not involving racism. Racism contested happens when the question of who gets to define what racism is becomes itself contested.<sup>130</sup> An example of anti-Asian American racism contested is the March 16, 2021 incident for which “a white man, was charged with fatally shooting eight people, including six women of Asian descent, at spas in the Atlanta area.”<sup>131</sup> Much of the news media referred to the six Asian American as women of Asian descent, even after it was clear many of them were not recent immigrants, thus perpetuating the “perpetual foreigner” stereotype.<sup>132</sup> Investigators did not rule out a racial motive for the killings, despite the suspect’s claim that he was not driven by racial bigotry and instead motivated to eliminate temptations to his sexual addiction.<sup>133</sup> Skepticism about whether this particular crime should be charged as a hate crime is an example of racism contested.<sup>134</sup>

<sup>130</sup> Marc Ramirez, *Who Gets to Decide What is Racism, Hate? Atlanta Shootings Renew Debate over White Violence, Privilege*, USA TODAY (Mar. 18, 2021), <https://www.usatoday.com/story/news/2021/03/18/atlanta-victims-were-killed-white-violence-racism-many-insist/4751240001/>.

<sup>131</sup> Nicole Hong & Jonah E. Bromwich, *Asian-Americans Are Being Attacked. Why Are Hate Crime Charges So Rare?*, N.Y. TIMES (Oct. 26, 2021), <https://www.nytimes.com/2021/03/18/nyregion/asian-hate-crimes.html>.

<sup>132</sup> Angie Chuang, *Two Stereotypes that Diminish the Humanity of the Atlanta Shooting Victims – and All Asian Americans*, CONVERSATION (Mar. 26, 2021, 11:46 AM), <https://theconversation.com/two-stereotypes-that-diminish-the-humanity-of-the-atlanta-shooting-victims-and-all-asian-americans-157762>.

<sup>133</sup> Richard Fausset et al., *Suspect in Atlanta Spa Attacks Is Charged with 8 Counts of Murder*, N.Y. TIMES (July 27, 2021), <https://www.nytimes.com/2021/03/17/us/atlanta-shooting-spa.html>.

<sup>134</sup> Asian Pacific American Law Students Association, *Hate Crimes and Anti-Asian Violence: A Conversation About Critical Race Theory and Feminist Perspectives on Legal Strategies*, COLO. L. (Apr. 6, 2021), [https://www.colorado.edu/law/academics/areas-study/immigration-and-citizenship-law/immigration-and-citizenship-law-speakers-and-\(under-Spring-2021\)-\(flyer-on-file-with-author\)](https://www.colorado.edu/law/academics/areas-study/immigration-and-citizenship-law/immigration-and-citizenship-law-speakers-and-(under-Spring-2021)-(flyer-on-file-with-author)).

On March 17, 2021, Captain Jay Baker, the Cherokee County, Georgia Sheriff's Office spokesperson, stated as part of a press conference held in the Atlanta Police Department headquarters, the suspect "was pretty much fed up and kind of at the end of his rope, and yesterday was a really bad day for him, and this is what he did."<sup>135</sup> After making these insensitive comments, screenshots appeared online of a April 2, 2020 Facebook post from Baker promoting anti-Chinese t-shirts: "Get yours while they last" above the photograph of t-shirts that read, "Covid 19 IMPORTED VIRUS FROM CHY-NA."<sup>136</sup>

Many people, including Chinese American Georgia state senator Michelle Au, believe "racism and misogyny are intertwined, especially when it comes to perceptions of Asian women."<sup>137</sup> Like many individuals, Au observed how crimes are often racially motivated and motivated by gender.<sup>138</sup> The motivations of gender bias and racial animus are not mutually exclusive, and indeed are sometimes unfortunately entangled together.

The names and ages of those who were killed in the shootings are:<sup>139</sup> Hyun Jung Grant, 51; Xiaojie Tan, 49; Soon Chung Park, 74; Suncha Kim, 69; Yong Ae Yue, 63; Daoyou Feng, 44; Ashley Yaun Gonzalez, 33; and Paul Andre Michaels, 54. Xiaojie Tan was Chinese, killed just one day before she was to celebrate her fiftieth birthday with her daughter, and owned Young's Asian Massage.<sup>140</sup> Hyun Jung Grant was Korean and

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<sup>135</sup> Meghan Roos, *Sheriff's Comments That Atlanta Shooter Had 'Really Bad Day' Sparks Backlash*, NEWSWEEK (Mar. 17, 2021, 3:05 PM), <https://www.newsweek.com/sheriffs-comments-that-atlanta-shooter-had-really-bad-day-sparks-backlash-1576936>.

<sup>136</sup> Stephanie K. Baer, *The Cop Who Said the Spa Shooter Had a "Bad Day" Previously Posted a Racist Shirt Blaming China for the Pandemic*, BUZZFEED NEWS (Mar. 17, 2021, 6:13 PM), <https://www.buzzfeednews.com/article/skbaer/spa-shooter-bad-day-racist-facebook> (showing the Facebook post photo).

<sup>137</sup> Nancy Guan, *'We Need Protection': Georgia State Sen. Michelle Au Warned of Anti-Asian Violence Before Atlanta Shootings*, USA TODAY (Mar. 20, 2021, 4:10 PM), <https://www.usatoday.com/story/news/nation/2021/03/20/atlanta-shooting-state-sen-michelle-au-condemns-anti-asian-violence/4781935001/>.

<sup>138</sup> *Id.*

<sup>139</sup> Melissa Chan & Madeleine Carlisle, *A Single Mom. A Newlywed. A Veteran. These Are the Victims of the Atlanta Shootings*, TIME (Mar. 22, 2021, 11:55 AM), <https://time.com/5948259/atlanta-shooting-victims/>.

<sup>140</sup> Trevor Hughes et al., *Xiaojie Tan Dreamed of Traveling the World and Celebrating Her 50th Birthday with Her Daughter. Then the Atlanta Shooter Ended Her Life*, USA TODAY (Mar. 23, 2021, 1:12 PM), <https://www.usatoday.com/story/news/nation/2021/03/18/stop-asian-hate-atlanta-shooting-victim-mother-business-owner/4754151001/>.

worked at Young's Asian Massage.<sup>141</sup> Soon Chung Park, a Korean mother and Suncha Kim, a Korean grandmother, both worked at the Gold Spa in Atlanta.<sup>142</sup> Yong Ae Yue was a Korean mother of two and a licensed massage therapist who worked at the Aromatherapy Spa, across the street from the Gold Spa.<sup>143</sup> Daoyou Feng was Chinese and worked at Young's Asian Massage.<sup>144</sup> Ashley Yaun Gonzalez or Delaina Ashley Yaun was a newlywed mother of two on a date with her husband at Young's Asian Massage for the first time.<sup>145</sup> Paul Michels was a U.S. Army veteran working on the security system at Young's Asian Massage.<sup>146</sup> A Hispanic man, Elcias Hernandez-Ortiz, thirty, was also shot and non-fatally injured when he was on his way to send money back home to his family in San Marcos, Guatemala.<sup>147</sup>

The Atlanta area shootings increased the already heightened by COVID-19 fear among many Asian Americans.<sup>148</sup> The killings also sparked outrage<sup>149</sup> and cries for solidarity and unity among minority groups in America,<sup>150</sup> particularly Asian Americans,<sup>151</sup> who are themselves quite diverse in class, education, and income.<sup>152</sup> Some Asian Americans are urging for better tracking of hate crimes, greater political involvement, increased multilingual support for mental health, legal and

<sup>141</sup> Ryan W. Miller et al., *Hard Workers, Dedicated Mothers, Striving Immigrants: These are the 8 People Killed in the Atlanta Area Spa Shootings*, USA TODAY (Mar. 22, 2021, 12:10 PM), <https://www.usatoday.com/story/news/nation/2021/03/19/who-are-atlanta-shooting-spa-victims/4762802001/>.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Chan & Carlisle, *supra* note 139.

<sup>146</sup> *Id.*

<sup>147</sup> Miller et al., *supra* note 141.

<sup>148</sup> New York Times Editorial Board, *Asian-Americans Are Scared for a Reason*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/03/18/opinion/anti-asian-american-violence.html>.

<sup>149</sup> Kara Swisher, *An Asian American Poet on Refusing to Take Up 'Apologetic Space'*, N.Y. TIMES (Apr. 1, 2021), <https://www.nytimes.com/2021/04/01/opinion/sway-kara-swisher-cathy-park-hong.html> (interviewing Cathy Park Hong).

<sup>150</sup> Marc Ramirez, *Stop Asian Hate, Stop Black Hate, Stop All Hate: Many Americans Call for Unity Against Racism*, USA TODAY (Mar. 22, 2021, 4:16 PM), <https://www.usatoday.com/story/news/nation/2021/03/20/atlanta-shootings-see-asian-black-americans-take-white-supremacy/4769268001/>.

<sup>151</sup> Marc Ramirez & Trevor Hughes, *'Stand Up, Fight Back': Atlanta Rally Decries Anti-Asian Violence, Mourns Spa Shooting Victims*, USA TODAY (Mar. 21, 2021, 12:09 PM), <https://www.usatoday.com/story/news/nation/2021/03/20/atlanta-shooting-surveillance-video-aaron-long-march-victims/4780302001/>.

<sup>152</sup> Brian X. Chen, *There Is No Rung on the Ladder That Protects You from Hate*, N.Y. TIMES (Mar. 24, 2021), <https://www.nytimes.com/2021/03/20/technology/personaltech/asian-american-wealth-gap.html>.



employment services, more political representation, and public education about Asian Americans' contributions to U.S. history.<sup>153</sup>

On March 18, 2021, The United States House of Representatives Judiciary Committee held a live streamed, three-hour and eight-minute hearing titled *Discrimination and Violence Against Asian Americans*.<sup>154</sup> It was the first congressional hearing about anti-Asian discrimination and violence in over thirty years.<sup>155</sup> United States Representative from Texas Chip Roy chose the hearing to make “a lengthy condemnation of the Chinese government’s handling of the coronavirus and asserted that objections to what he categorized as nothing more than hawkish rhetoric about China amounted to ‘policing’ of free speech.”<sup>156</sup> United States Representative from California, Thomas Miller McClintock II, decided to cite two statistics to as he put it, “add perspective to this issue.”<sup>157</sup> First, Asian Americans are only fourth (4.4%) on the list of hate crime victims after blacks, whites, and Hispanics.<sup>158</sup> Second, Asian Americans have the highest median income among of any ethnic group of Americans.<sup>159</sup> He then asks, “if America were such a hate-filled, discriminatory, racist society filled with animus against Asian Americans, how do you explain the remarkable success of Asian Americans?”<sup>160</sup>

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<sup>153</sup> Marc Ramirez, *Asian American Activists Are Demanding Equal Civil Rights, Better Education in Schools After Asian Hate Attacks*, USA TODAY (Mar. 27, 2021, 2:32 AM), <https://www.usatoday.com/story/news/nation/2021/03/26/stop-asian-hate-asian-americans-across-us-demand-reforms/6990150002/>.

<sup>154</sup> House Committee on the Judiciary, *Discrimination and Violence Against Asian Americans*, YOUTUBE (Mar. 18, 2021), [https://youtu.be/547JYf-VA\\_Q](https://youtu.be/547JYf-VA_Q); see also *Discrimination and Violence Against Asian Americans: Hearing Before the H. Subcomm. on the Const., Civ. Rts., and Civ. Liberties of the H. Comm. on the Judiciary*, 117th Cong. (Mar. 18, 2021), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4449> (providing supporting documents).

<sup>155</sup> Catie Edmondson, *Asian-American Lawmakers Call Out Racist Language: ‘I Am Not a Virus,’* N.Y. TIMES (May 5, 2021), <https://www.nytimes.com/2021/03/18/us/politics/asian-politicians-racism.html>.

<sup>156</sup> Catie Edmondson, *House Democrats Hold a Rare Congressional Hearing on Anti-Asian Discrimination.*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/03/18/us/congress-hearing-asian-american-discrimination.html> (containing video of the hearing).

<sup>157</sup> House Committee on the Judiciary, *supra* note 154, at 2:57:14–2:58:14.

<sup>158</sup> House Committee on the Judiciary, *supra* note 154; see also *2019 Hate Crime Statistics*, FBI: UNIF. CRIME REPORTING PROGRAM (2020), <https://ucr.fbi.gov/hate-crime/2019/topic-pages/incidents-and-offenses> (reporting 4.3 percent of 2019 hate crimes resulted from anti-Asian bias).

<sup>159</sup> House Committee on the Judiciary, *supra* note 154; see also *Asian Women and Men Earned More Than Their White, Black, and Hispanic Counterparts in 2017*, U.S. BUREAU OF LAB. STAT. (Aug. 29, 2018), <https://www.bls.gov/opub/ted/2018/asian-women-and-men-earned-more-than-their-white-black-and-hispanic-counterparts-in-2017.htm> (reporting median incomes).

<sup>160</sup> House Committee on the Judiciary, *supra* note 154.

America's President Joe Biden and Vice President Kamala Harris condemned violence against Asian Americans.<sup>161</sup> Biden signed an executive order directing the U.S. federal "government to work toward stopping 'anti-Asian bias, xenophobia and harassment.'"<sup>162</sup> Biden pressed Congress to pass the COVID-19 Hate Crimes Act,<sup>163</sup> which Biden believed would "expedite the federal government's response to the rise of hate crimes exacerbated during the pandemic."<sup>164</sup> The COVID-19 Hate Crimes Act, sponsored by Asian American U.S. Senator from Hawaii Mazie Hirono and U.S. Representative from New York Grace Meng, directs federal officials to review current federal, state and local hate crime laws, and establishes online threat-reporting systems to facilitate reporting pandemic related hate crimes.<sup>165</sup> The related No Hate Act,<sup>166</sup> proposed by U.S. Senator from Connecticut Richard Blumenthal, offers grants to states to improve hate crime reporting and permits courts to mandate those convicted under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act<sup>167</sup> to engage in community service and participate in educational programs as conditions for supervised release.

While such legislation is laudable, the underlying root causes of race-based hatred and violence are fear, ignorance, and lack of empathy. Educating all Americans to learn about how all Americans, including Asian Americans, African Americans, Hispanic Americans, and Native Americans contributed to America's history and economic prosperity through confiscated real property; creative scientific and technological innovation; hard, often cheap or free, forced, and involuntary labor; and voluntary military service should help all Americans appreciate and understand how all Americans have played important roles in the sustenance of America's democracy and political experiment.

A multiple award-winning example of an educational and entertaining documentary film about Asian American history is the seventy-six-minute *Far East, Deep South*.<sup>168</sup> As depicted in its two-minute

<sup>161</sup> Michael D. Shear, *Confronting Violence Against Asians, Biden Says That 'We Cannot Be Complicit,'* N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2021/03/19/us/politics/biden-harris-atlanta.html>.

<sup>162</sup> *Id.*

<sup>163</sup> S. 937, 117th Cong. (2021); H.R. 6721, 116th Cong. (2020).

<sup>164</sup> S. 937, 117th Cong. (2021); H.R. 6721, 116th Cong. (2020).

<sup>165</sup> S. 937, 117th Cong. (2021); H.R. 6721, 116th Cong. (2020).

<sup>166</sup> S. 2043, 116th Cong. (2019).

<sup>167</sup> National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190.

<sup>168</sup> FAR EAST DEEP SOUTH, <https://fareastdeepsouth.com/> (last visited Jan. 27, 2022); *see also Resources*, FAR EAST DEEP SOUTH, <https://fareastdeepsouth.com/resources/> (last visited Jan. 27, 2022) (providing additional educational resources for additional research).

and seventeen-second official trailer,<sup>169</sup> the movie features an emotional, poignant journey of a Chinese American man from California to Mississippi to visit his father's grave.<sup>170</sup> His personal voyage reveals "the racially complex history of the early Chinese in the segregated South."<sup>171</sup> The film discusses how Chinese American grocery stores sold goods to freed blacks at lower prices than the inflated prices plantation commissaries charged to keep former slaves in debt.<sup>172</sup> The film also reveals that Chinese American grocery shops offered short-term loans to their African American customers as they had no access to credit markets.<sup>173</sup>

This Article addresses racism directed towards Asians and Asian Americans. Part I demonstrates how Asians and Asian Americans, just like other ethnic and racial groups, have faced prejudice, stereotyping, discrimination, and racism throughout American history. Part II critiques respectability politics in response to racism. Part III examines how to utilize the power of humor to engage and reject non-violent anti-Asian American racism. An appendix considers how to achieve DEI (Diversity, Equity, and Inclusion) by empathy through personal perspective pivoting. A related, companion article analyzes challenging AAPI hate and resisting explicit, and so possibly violent, racism.<sup>174</sup>

## II. FROM "COOLIES" TO MODEL MINORITIES TO "KUNG FU"

While the dominant American race relations narrative is a black and white binary dichotomy,<sup>175</sup> American history is unfortunately replete with instances of anger, fear, hatred, scapegoating, and suspicion towards many non-Anglo peoples, including African Americans, Asian Americans, Hispanic Americans Jewish Americans, Native Americans, and Irish Americans.<sup>176</sup> This part of the Article offers a very brief history of anti-

<sup>169</sup> Only Won, *Far East Deep South (Trailer)*, YOUTUBE (Mar. 25, 2020), <https://youtu.be/4ABGDr5k2HY>.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Roseann Liu, commentary, *Dismantling the Barrier Between Asians and African-Americans*, PHILA. INQUIRER (June 8, 2018), <https://www.inquirer.com/philly/opinion/stop-and-go-asian-african-americans-20180608.html>.

<sup>173</sup> JOHN JUNG, *CHOPSTICKS IN THE LAND OF COTTON: LIVES OF MISSISSIPPI DELTA CHINESE GROCERS* 89, 108 (illustrated ed. 2011).

<sup>174</sup> See generally Peter H. Huang, *Resistance Is Not Futile: Challenging AAPI Hate*, 28 WM. & MARY J. RACE, GENDER, & SOC. JUST. 261 (2022).

<sup>175</sup> See generally FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2002).

<sup>176</sup> See generally RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL*

Asian American racism.<sup>177</sup> Even this condensed historical summary conclusively shows that Asian Americans, as with all other ethnic and racial groups, have faced prejudice, stereotyping, discrimination, and racism throughout American history.

#### A. “Coolies” and the “Yellow Peril”

Ever since the initial wave of Chinese immigration to America, there has been anti-Chinese prejudice. Chinese men immigrated to America in 1849 to work as miners during the California gold rush.<sup>178</sup> Such early Chinese workers were called “coolies,” a word that Europeans used to describe low-status, low-wage, unskilled laborers in their Asian colonies. Chinese men also worked as laborers for wealthy robber barons to help build the western portions of the first transcontinental railroads,<sup>179</sup> such as the Central Pacific Railroad incorporated in 1861 by businessmen including Leland Stanford, Charles Crocker, and Mark Hopkins.<sup>180</sup> Crocker recruited Chinese men in California and the Canton province: 12,000 by 1868, constituting 90% of the work force.<sup>181</sup>

After the gold rush and as jobs grew scarce, Caucasian working-class men became worried about competition from Chinese immigrants.<sup>182</sup> These fears led to the passage of the Chinese Exclusion Act on May 6, 1882,<sup>183</sup> America’s first, and thus far only, federal law to prohibit all members of a specific ethnic or national group from immigrating to America. The Chinese Exclusion Act built on the Page Act of 1875,<sup>184</sup> named after its sponsor, Representative Horace F. Page, a Republican who introduced it to “end the danger of cheap Chinese labor and immoral

AMERICA (rev. ed. 2008).

<sup>177</sup> See generally *The History of Violence Against Asians and Asian Americans*, WHY (Mar. 24, 2021), <https://why.org/episodes/the-history-of-violence-against-asians-and-asian-americans/> (providing another unpacking of the history of racism and violence against Asians and Asian Americans).

<sup>178</sup> Kelly Simpson, *Chinese-Americans: Remembering a Golden Legacy*, KCET (Jan. 24, 2012), <https://www.kcet.org/history-society/chinese-americans-remembering-a-golden-legacy>.

<sup>179</sup> Chinese Railroad Workers in North America Project at Stanford University, *Geography of Chinese Workers Building the Transcontinental Railroad*, <https://web.stanford.edu/group/chineserailroad/cgi-bin/website/virtual/>.

<sup>180</sup> George Kraus, *Chinese Laborers and the Construction of the Central Pacific*, 37 UTAH HIST. Q. 41, 42 (1969).

<sup>181</sup> *Id.* at 42, 49.

<sup>182</sup> William Wei, *The Chinese-American Experience: An Introduction*, HARPWEEK, <https://immigrants.harpweek.com/ChineseAmericans/1Introduction/BillWeiIntro.htm> (last visited Jan. 27, 2022).

<sup>183</sup> Chinese Exclusion Act, Pub. L. No. 47-126, ch. 126, 22 Stat. 58 (1882).

<sup>184</sup> Page Act, Pub. L. No. 43-141, ch. 141, 18 Stat. 477 (1875).

Chinese women.”<sup>185</sup> Princeton University history professor Beth Lew-Williams<sup>186</sup> shows how anti-Chinese immigration laws incited anti-Chinese violence and vigilantism.<sup>187</sup>

Chinese men were demonized with the use of “images of barbaric hordes of heathen Chinaman wanting to rape white women, which filled the English-language print culture.”<sup>188</sup> A September 3, 1865 *New York Times* editorial said,

with Oriental thoughts will necessarily come Oriental social habits. . . . We have four millions of degraded negroes in the South . . . and if, in addition . . . there were to be a flood-tide of Chinese population—a population befouled with all the social vices . . . with heathenish souls and heathenish propensities, whose character, and habits, and modes of thought are firmly fixed by the consolidating influence of ages upon ages -- we should be prepared to bid farewell to republicanism and democracy.<sup>189</sup>

An earlier *New York Daily Tribune* editorial warned that the U.S. federal government must stop the influx of Chinese, who were “uncivilized, unclean, filthy beyond all conception, without any of the higher domestic or social relations; lustful and sensual in their dispositions.”<sup>190</sup> Such racist depictions, editorials, and images incited vigilantes to burn down Chinatowns and kill the Chinese people who were living in them.<sup>191</sup> In Los Angeles, on October 23, 1871, an angry mob of over 500 brutally and savagely massacred and hung 20 Chinese men and boys,<sup>192</sup> “mutilating

<sup>185</sup> George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875-1882*, 6 J. AM. ETHNIC HIST. 28, 28 (1986).

<sup>186</sup> Beth Lew-Williams, PRINCETON UNIV. DEP’T OF HIST., <https://history.princeton.edu/people/beth-lew-williams> (last visited Jan. 27, 2022).

<sup>187</sup> See generally BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* (2018).

<sup>188</sup> Steven Heller, *The Artistic History of American Anti-Asian Racism*, ATLANTIC (Feb. 20, 2014), <https://www.theatlantic.com/entertainment/archive/2014/02/the-artistic-history-of-american-anti-asian-racism/283962/> (reviewing YELLOW PERIL! AN ARCHIVE OF ANTI-ASIAN FEAR (John Kuo Wei Tchen & Dylan Yeats eds., 2014)).

<sup>189</sup> Gregory B. Lee, *Dirty, Diseased and Demented: The Irish, the Chinese, and Racist Representation*, 12 J. GLOB. CULTURAL STUD. 1, 5 (2017) (citing *The Growth of the United States through Emigration—The Chinese*, N.Y. TIMES (Sept. 3, 1865)).

<sup>190</sup> *Id.* at 4 (citing N.Y. DAILY TRIB. (Sept. 29, 1854)).

<sup>191</sup> Jeff Yang, *A New Virus Stirs Up Ancient Hatred*, CNN (Jan. 30, 2020, 6:25 PM), <https://www.cnn.com/2020/01/30/opinions/wuhan-coronavirus-is-fueling-racism-xenophobia-yang/index.html>.

<sup>192</sup> Kelly Wallace, *Forgotten Los Angeles History: The Chinese Massacre of 1871*, L.A. PUB. LIBR. BLOG (May 19, 2017), <https://www.lapl.org/collections-resources/blogs/lapl/chinese-massacre->

their corpses in the deadliest known single lynching incident in US history.”<sup>193</sup> From 1882 on, Chinese (and other Asian) Americans faced “large scale violence, including massacres in Rock Springs, Wyoming (1885), Hells Canyon, Oregon (1971), and Los Angeles (1971).”<sup>194</sup>

Anti-Chinese prejudice became anti-Asian racism when the manifold varied ethnic individual differences of Chinese people in America were conflated into a single racial category, that of so-called Oriental in the past and Asian in the present. The seminal experiment in the psychology of judgment and decision making (JDM) starts with this instruction: “Imagine that the United States is preparing for an outbreak of an unusual Asian disease.”<sup>195</sup> This foundational experiment demonstrated how changing mathematically equivalent alternative frames (about lives saved versus lives lost) can change people’s perspectives and their decisions.<sup>196</sup> Psychologist Daniel Kahneman went on to be a 2002 economics Nobel laureate “for having integrated insights from psychological research into economic science, especially concerning human judgment and decision-making under uncertainty.”<sup>197</sup> Kahneman’s co-author of this famous article,<sup>198</sup> Amos Tversky, passed away in 1996,<sup>199</sup> and was thus ineligible for a 2002 Nobel Prize because after “1974, the Statutes of the Nobel Foundation stipulate that a Prize cannot be awarded posthumously, unless death has occurred after the announcement of the Nobel Prize.”<sup>200</sup> In an informative article about America’s half-hearted easing of restrictions on businesses during COVID-19, University of Pennsylvania law school professor of law and psychology Tess Wilkinson-Ryan<sup>201</sup> recently wryly

1871.

<sup>193</sup> Yang, *supra* note 191.

<sup>194</sup> Crystal Tang, *Unpacking the Model Minority Myth*, BENEFICIAL STATE FOUND. (June 4, 2019), <https://beneficialstate.org/perspectives/unpacking-the-model-minority-myth/>.

<sup>195</sup> Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 453 (1981).

<sup>196</sup> *Id.*; see also Jeremy Nicholson, *How a Change of Perspective Can Improve Your Decisions*, PSYCH. TODAY (Dec. 31, 2018), <https://www.psychologytoday.com/us/blog/persuasion-bias-and-choice/201812/how-change-perspective-can-improve-your-decisions>.

<sup>197</sup> Daniel Kahneman, *Facts, THE NOBEL PRIZE*, <https://www.nobelprize.org/prizes/economic-sciences/2002/kahneman/facts/> (last visited Jan. 27, 2022).

<sup>198</sup> Tversky & Kahneman, *supra* note 195.

<sup>199</sup> Karen Freeman, *Amos Tversky, Expert on Decision Making, Is Dead at 59*, N.Y. TIMES (June 6, 1996), <https://www.nytimes.com/1996/06/06/us/amos-tversky-expert-on-decision-making-is-dead-at-59.html>.

<sup>200</sup> *Nobel Prize Facts*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/facts/nobel-prize-facts/> (last visited Jan. 27, 2022).

<sup>201</sup> Tess Wilkinson-Ryan, UNIV. OF PA. CAREY L. SCH., <https://www.law.upenn.edu/cf/faculty/twilkins/> (last visited Jan. 27, 2022).

stated, “The glibly xenophobic use of ‘Asian’ as a shortcut to inducing fear and confusion is a subject for another article.”<sup>202</sup>

The “yellow peril” narrative was due to German Emperor Wilhelm II who after dreaming in 1895 of Buddha riding a dragon and storming Europe, commissioned artist Hermann Knackfuss to depict it.<sup>203</sup> The resulting lithograph titled “*The Yellow Peril*” had the caption, “*Peoples of Europe, Defend Your Holiest Possessions,*” and illustrates an archangel attempting to persuade some European nations to unify in defense of women from so-called attacking yellow forces of Asia.<sup>204</sup> Versions of this image appeared in the January 22, 1898 issue of the Harper’s Weekly magazine,<sup>205</sup> with a readership of hundreds of thousands in America.<sup>206</sup> Asians and Asian Americans were seen as perennial foreigners to be treated with fear, scorn, and suspicion.

### B. Transition to the Model Minority Myth

When World War II and the Cold War started, America feared that excluding Chinese immigrants might alienate its ally China against Japan. This fear led to a narrative and perspective shift. The Chinese Exclusion Act was repealed on December 17, 1943 by the Magnuson Act.<sup>207</sup> The Citizens Committee to Repeal Chinese Exclusion “strategically recast Chinese in its promotional materials as ‘law-abiding, peace-loving, courteous people living quietly among us’” instead of the “‘yellow peril’ coolie hordes.”<sup>208</sup> The origins of the model minority myth and stereotype are tied up with geopolitical anxieties,<sup>209</sup> the Cold War,<sup>210</sup> and the civil rights movement.<sup>211</sup> Part of the lauding of Asian Americans was motivated

<sup>202</sup> Tess Wilkinson-Ryan, *Our Minds Aren’t Equipped for This Kind of Reopening*, ATLANTIC (July 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/reopening-psychological-morass/613858/>.

<sup>203</sup> Kat Chow, *If We Called Ourselves Yellow*, NPR: CODE SWITCH (Sept. 27, 2018, 6:25 AM), <https://www.npr.org/sections/codeswitch/2018/09/27/647989652/if-we-called-ourselves-yellow>.

<sup>204</sup> Peter C. Perdue & Ellen Sebring, *The Boxer Uprising — I*, MIT VISUALIZING CULTURES, [https://visualizingcultures.mit.edu/boxer\\_uprising/bx\\_essay02.html](https://visualizingcultures.mit.edu/boxer_uprising/bx_essay02.html) (last visited Mar. 11, 2022).

<sup>205</sup> *Id.*

<sup>206</sup> Chow, *supra* note 203.

<sup>207</sup> Magnuson Act, Pub. L. No. 78-199, 57 Stat. 600 (1943).

<sup>208</sup> Ellen D. Wu, *Asian Americans and the ‘Model Minority’ Myth*, L.A. TIMES (Jan. 23, 2014, 12:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-0123-wu-chua-model-minority-chinese-20140123-story.html>.

<sup>209</sup> *Id.*

<sup>210</sup> See generally Robert G. Lee, *The Cold War Origins of the Model Minority Myth*, in ASIAN AMERICAN STUDIES NOW: A CRITICAL READER 256 (Jean Yu-wen Shen Wu & Thomas C. Chen eds., 2010).

<sup>211</sup> See generally ELLEN D. WU, THE COLOR OF SUCCESS: ASIAN AMERICANS AND THE

by international politics (i.e., to make China an ally against Russia). In other words, Asian Americans were being used for political and/or economic gain. This was neither the first nor last time that would be the case.

The narrative that some minorities are model ones implies that other minorities are less than and not model minorities. To pigeonhole Asians and Asian Americans as model minorities is to also bestow the label of not model minorities on non-Asian and non-Asian American minorities. Historically, the model minority myth was used to compare, contrast, and pit Asians and Asian Americans against African Americans.<sup>212</sup> Skeptics of the notion that structural inequalities continue to exist in American society<sup>213</sup> deploy the political narrative of some Asians and Asian Americans as model minorities to downplay the role that racism plays in enduring, persistent struggles that racial/ethnic groups, particularly African Americans, face.<sup>214</sup> The model minority trope divides the many non-Caucasians, all who have been targets of discrimination, prejudice, and stereotyping throughout America's history, in many different ways, degrees, and forms.

The model minority myth also places undue pressures and mental health strain on Asian Americans to excel academically.<sup>215</sup> University of California, Irvine Chancellor's fellow and sociology professor Jennifer Lee<sup>216</sup> and University of California, Los Angeles Walter and Shirley Wang Endowed Chair in U.S.-China Relations and Communications and sociology and Asian American studies professor Min Zhou<sup>217</sup> draw on psychology and sociology to analyze how immigration laws, institutions, and culture combined to encourage high academic and economic

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ORIGINS OF THE MODEL MINORITY (2015). See also Jeff Guo, *The Real Reasons the U.S. Became Less Racist Toward Asian Americans*, WASH. POST (Nov. 29, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/29/the-real-reason-americans-stopped-spitting-on-asian-americans-and-started-praising-them/> (interviewing Indiana University Asian-American studies professor Ellen Wu).

<sup>212</sup> William Petersen, *Success Story, Japanese-American Style*, N.Y. TIMES, Jan. 9, 1966, at 180.

<sup>213</sup> See, e.g., Andrew Sullivan, *Why Do Democrats Feel Sorry for Hillary Clinton?*, N.Y. MAG. (Apr. 14, 2017), <https://nymag.com/intelligencer/2017/04/why-do-democrats-feel-sorry-for-hillary-clinton.html>.

<sup>214</sup> Chow, *supra* note 203.

<sup>215</sup> Chris Fuchs, *Behind the 'Model Minority' Myth: Why the 'Studious Asian' Stereotype Hurts*, NBC NEWS (Aug. 22, 2017, 12:15 PM), <https://www.nbcnews.com/news/asian-america/behind-model-minority-myth-why-studious-asian-stereotype-hurts-n792926>.

<sup>216</sup> Jennifer Lee, THE UNIV. OF CAL. IRVINE, [https://www.faculty.uci.edu/profile.cfm?faculty\\_id=4667](https://www.faculty.uci.edu/profile.cfm?faculty_id=4667) (last visited Mar. 11, 2022).

<sup>217</sup> MIN ZHOU, PH.D., <https://mzhou177.wixsite.com/mysite/> (last visited Mar. 11, 2022).



achievement among certain Asian American groups.<sup>218</sup> Social psychologist and Princeton University Eugene Higgins Professor Susan T. Fiske<sup>219</sup> researches discrimination, prejudice, and stereotyping. Racism entails all three of these social biases: stereotyping (cognition), prejudice (emotion), and discrimination (behavior).<sup>220</sup> Fiske finds that some Americans feel scorn towards immigrants and envy towards Asians.<sup>221</sup> Viet Nguyen, who is a 2016 Pulitzer Prize winning novelist<sup>222</sup> and University Professor at the University of Southern California,<sup>223</sup> aptly summarizes how instead of “the Asian invasion, we were, instead, the model minority: the desirable classmate, the favored neighbor, the nonthreatening kind of person of color. Or were we? . . . Racism is not just the physical assault.”<sup>224</sup>

Despite assuming the dubious distinction and status of model minority in America, violent anti-Asian racism persisted. Notably, in Detroit, on June 19, 1982, two unemployed Caucasian men brutally killed Chinese American engineer Vincent Chin after Chin’s bachelor party by bludgeoning Chin with a baseball bat until cracking Chin’s head open.<sup>225</sup> Chin’s attackers did not deny their actions, framing them as just a bar brawl gone bad, got a plea agreement from second-degree murder down to manslaughter, and received sentences of three years of probation and \$3,000 in fines.<sup>226</sup> This horrific event unified Asian Americans and spurred many into political activism.<sup>227</sup> Frank Wu, who is the president of Queens College, the City University of New York (CUNY), since July 2020,<sup>228</sup>

218 JENNIFER LEE & MIN ZHOU, *THE ASIAN AMERICAN ACHIEVEMENT PARADOX* (2015).

219 Susan T. Fiske, *Department of Psychology*, PRINCETON UNIV., <https://psych.princeton.edu/person/susan-fiske> (last visited Mar. 11, 2022).

220 SUSAN T. FISKE, *SOCIAL BEINGS: CORE MOTIVES IN SOCIAL PSYCHOLOGY* 347 (4th ed. 2018) (defining stereotyping, prejudice, and discrimination); *see also* Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in *HANDBOOK OF SOCIAL PSYCHOLOGY* 357 (Daniel T. Gilbert et al. eds., 1998).

221 Susan T. Fiske, *Envy Up, Scorn Down: How Comparison Divides Us*, 65 *AM. PSYCH.* 698, 702 (2010); SUSAN T. FISKE, *ENVY UP, SCORN DOWN: HOW STATUS DIVIDES US* 22–23, 49, 54, 72, 89, 124, 131, 136–37, 150, 163 (2011).

222 VIET NGUYEN, <https://vietnguyen.info/> (last visited Mar. 11, 2022).

223 Viet Nguyen, UNIV. OF S. CAL., <https://dornsife.usc.edu/cf/faculty-and-staff/faculty.cfm?pid=1003574> (last visited Mar. 11, 2022).

224 Viet Thanh Nguyen, *Asian Americans Are Still Caught in the Trap of the ‘Model Minority’ Stereotype. And It Creates Inequality for All*, *TIME* (June 25, 2020, 6:37 AM), <https://time.com/5859206/anti-asian-racism-america/>.

225 Frank H. Wu, *Why Vincent Chin Matters*, *N.Y. TIMES* (June 22, 2012), <https://www.nytimes.com/2012/06/23/opinion/why-vincent-chin-matters.html>.

226 *Id.*

227 *Id.*

228 *President Frank Wu*, QUEENS COLL., <https://www.qc.cuny.edu/about/administration/president/Pages/Welcome.aspx>.

observes that notwithstanding “decades of debunking by social scientists and historians, the model minority myth — Asian-Americans as overachieving nerds — persists.”<sup>229</sup> And yet, Wu warns that, “history also teaches us that before Asian-Americans were seen as model minorities, we were also perpetual foreigners. Taken together, these perceptions can lead to resentment. And resentment can lead to hate.”<sup>230</sup> COVID-19 showed the prudence of Wu’s cautionary warning.<sup>231</sup>

### C. Impact of COVID-19

In the film, *Star Wars: Episode I - The Phantom Menace*,<sup>232</sup> the sage, Jedi Yoda, famously states, “Fear is the path to the dark side. . . . fear leads to anger . . . anger leads to hate . . . hate leads to suffering.”<sup>233</sup> Whether Yoda’s advice to Anakin Skywalker when they first meet is psychologically sound is unclear.<sup>234</sup> On the other hand, it is clear that COVID-19 has fueled fear about, anger towards, and hate crimes against, Asian Americans and Asians.<sup>235</sup> A Pew Research Center study found approximately 40% of adults reported “it has become more common for

<sup>229</sup> Wu, *supra* note 225.

<sup>230</sup> *Id.*

<sup>231</sup> Matthew Lee, *Coronavirus Fears Show How ‘Model Minority’ Asian Americans Become the ‘Yellow Peril,’* NBC (Mar. 9, 2020, 11:22 AM), <https://www.nbcnews.com/think/opinion/coronavirus-fears-show-how-model-minority-asian-americans-become-yellow-nca1151671>.

<sup>232</sup> STAR WARS: EPISODE I - THE PHANTOM MENACE (Lucasfilm 1999).

<sup>233</sup> Gabriel Frimodig, *Fear Leads to Anger, Anger Leads to Hate, Hate ... to Suffering*, YOUTUBE (Jul. 15, 2020), <https://www.youtube.com/watch?v=kFnFr-DOPf8>.

<sup>234</sup> Kyle Hill, *Was Yoda’s Advice Any Good Psychologically?* DISCOVER (May 6, 2014, 11:00 AM), <https://www.discovermagazine.com/the-sciences/was-yodas-advice-any-good-psychologically> (interviewing Marquette University psychology professor Dr. Nakia Gordon about Yoda’s advice).

<sup>235</sup> Anti-Defamation League, *Reports of Anti-Asian Assaults, Harassment and Hate Crimes Rise as Coronavirus Spreads*, ADL BLOG (July 18, 2020), <https://www.adl.org/blog/reports-of-anti-asian-assaults-harassment-and-hate-crimes-rise-as-coronavirus-spreads>; Evan Gerstmann, *Irony: Hate Crimes Surge Against Asian Americans While They Are on the Front Lines Fighting COVID-19*, FORBES (Apr. 4, 2020, 7:13 PM),

<https://www.forbes.com/sites/evangerstmann/2020/04/04/irony-hate-crimes-surge-against-asian-americans-while-they-are-on-the-front-lines-fighting-covid-19/#7963c8a03b70>; Cathy Park Hong, *The Slur I Never Expected to Hear in 2020*, N.Y. TIMES (Apr. 12, 2020), <https://www.nytimes.com/2020/04/12/magazine/asian-american-discrimination-coronavirus.html>; Sheng Peng, *Smashed Windows and Racist Graffiti: Vandals Target Asian Americans Amid Coronavirus*, NBC NEWS (Apr. 10, 2020), <https://www.nbcnews.com/news/asian-america/smashed-windows-racist-graffiti-vandals-target-asian-americans-amid-coronavirus-n1180556>; COVID-19 Webinar Series, *Let’s Talk! Supporting Asian and Asian American Students Through COVID-19*, MASS. GEN. HOSP. CTR. FOR CROSS-CULTURAL STUDENT EMOTIONAL WELLNESS, <https://www.mghihp.edu/Asian-American-Webinar-Series>; Melody Zhang, *Don’t Overlook the Virulence of Racism Toward Asian Americans*, SOJOURNERS (Mar. 26, 2020), <https://sojo.net/articles/don-t-overlook-virulence-racism-toward-asian-americans>.

people to express racist views toward Asians since the pandemic began.”<sup>236</sup> Viral videos posted on Twitter show a southern California Caucasian woman shouting profanity-laced anti-Asian slurs at a young Asian woman<sup>237</sup> and separately at an Asian man.<sup>238</sup> New York state attorney general Letitia James released a statement<sup>239</sup> and launched a hotline at 1-800-771-7755 to report COVID-19 related hate crimes and xenophobic rhetoric.<sup>240</sup>

Matthew Baum, Marvin Kalb Professor of Global Communications and Professor of Public Policy at the John F. Kennedy School of Government and Department of Government at Harvard University,<sup>241</sup> demonstrated that during crises, Americans with strong partisan identities, regardless of party, are less likely to rally around the president.<sup>242</sup> This occurs because of three reasons. First, Americans who are partisan are likely to follow more news and thus already have strong opinions. Second, as partisanship increases, party affiliation may crowd out national affiliation to become the dominant group identity. Third, in times of strong polarization, the other party being in charge sparks threatening emotions that might be as powerful as those a crisis triggers. Thus, Baum shows that presidents need to rally Americans to them during crises.

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<sup>236</sup> Neil G. Ruiz et al., *Many Black and Asian Americans Say They Have Experienced Discrimination Amid the COVID-19 Outbreak*, PEW RESEARCH CENTER (July 1, 2020), <https://www.pewresearch.org/social-trends/2020/07/01/many-black-and-asian-americans-say-they-have-experienced-discrimination-amid-the-covid-19-outbreak/>.

<sup>237</sup> Rachel Tennell (@rmtennell), TWITTER (June 10, 2020, 4:56 PM), <https://twitter.com/rmtennell/status/1270822121174859785>.

<sup>238</sup> Anthony C. Walker (@anthonywalker), TWITTER (June 11, 2020, 8:34 PM), <https://twitter.com/anthonywalker/status/1271239471485378566>.

<sup>239</sup> *AG James Launches Hotline to Combat Coronavirus Hate Crimes and Xenophobic Rhetoric*, N.Y. STATE OFF. OF THE ATT’Y GEN. (Mar. 23, 2020), <https://ag.ny.gov/press-release/2020/ag-james-launches-hotline-combat-coronavirus-hate-crimes-and-xenophobic-rhetoric>.

<sup>240</sup> Morgan Gstalter, *New York AG Launches Hotline to Report Coronavirus Hate Crimes, Xenophobia Against Asian Americans*, HILL (Mar. 25, 2020, 1:18 PM), <https://thehill.com/homenews/state-watch/489474-new-york-attorney-general-launches-hotline-to-report-coronavirus-hate>.

<sup>241</sup> *Matthew Baum*, JOHN F. KENNEDY SCH. OF GOV’T, HARV. UNIV., <https://www.hks.harvard.edu/faculty/matthew-baum>.

<sup>242</sup> Matthew A. Baum, *The Constituent Foundations of the Rally-Round-the-Flag Phenomenon*, 46 INT’L STUD. Q. 263 (2002).

Today, Asian Americans are being used for political gain again.<sup>243</sup> To mobilize his voter base, Trump needed to use the “hate and fear” tactic.<sup>244</sup> Peggy Wallace Kennedy, the daughter of George C. Wallace, the former Alabama governor and career segregationist,<sup>245</sup> recently stated that America’s current “president understood, as her father did, that ‘the two greatest motivators for disaffected voters’ are ‘hate and fear.’”<sup>246</sup> As COVID-19 raged, Trump used “kung flu” and similarly inflammatory rhetoric to racial and ethnic anger, frustration, and hatred towards Asian Americans and Asian immigrants. This was all the more ironic because 17% “of doctors, 9% of physician assistants and nearly 10% of nurses in the United States are of Asian descent. Asians and Asian Americans are also as the forefront of America’s efforts to find a vaccine.”<sup>247</sup>

These “hate and fear” political tactics of the “Chinese virus” and “Kung Flu” rhetoric resulted in videos of racist rants against Asian Americans on Twitter and other anti-Asian discrimination,<sup>248</sup>

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<sup>243</sup> Kurt Bardella, *‘China Virus’ Redux: For Trump and Republicans, It’s Open Season on Asian Americans Like Me*, USA TODAY (Mar. 17, 2021, 9:21 PM), <https://www.usatoday.com/story/opinion/2021/03/04/covid-racism-asian-americans-trump-provocations-column/6904348002/>; Stacy Torres, *Violence and Hate Against Asian Americans is a Health and Safety Crisis for Everyone*, USA TODAY (Mar. 18, 2021, 9:16 AM), <https://www.freep.com/story/opinion/2021/03/17/anti-asian-violence-covid-safety-crisis-hurts-everyone-column/4736733001/>.

<sup>244</sup> See, e.g., Justin Baragona, *Trump Addresses ‘Kung-Flu’ Remark, Says Asian-Americans Agree ‘100 Percent’ With Him Using ‘Chinese Virus,’* DAILY BEAST (Mar. 18, 2020, 1:48 PM), <https://www.thedailybeast.com/trump-addresses-kung-flu-remark-says-asian-americans-agree-100-with-him-using-chinese-virus>; Max Cohen, *Kellyanne Conway Reacts to Trump’s Use of ‘Kung Flu,’ Months After Calling Term ‘Highly Offensive,’* POLITICO (June 24, 2020, 1:43 PM), <https://www.politico.com/news/2020/06/24/kellyanne-conway-trump-kung-flu-coronavirus-337682>; Andrew Restuccia, *White House Defends Trump Comments on ‘Kung Flu,’ Coronavirus Testing*, WALL ST. J. (June 22, 2020, 8:04 PM), <https://www.wsj.com/articles/white-house-defends-trump-comments-on-kung-flu-coronavirus-testing-11592867688>.

<sup>245</sup> Howell Raines, *George Wallace, Segregation Symbol, Dies at 79*, N.Y. TIMES (Sept. 14, 1998), <https://www.nytimes.com/1998/09/14/us/george-wallace-segregation-symbol-dies-at-79.html>.

<sup>246</sup> Peter Baker, *A Half-Century After Wallace, Trump Echoes the Politics of Division*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/us/politics/trump-wallace.html>.

<sup>247</sup> Gerstmann, *supra* note 235.

<sup>248</sup> Ed Park, *Confronting Asian Americans Discrimination During the Coronavirus Crisis*, NEW YORKER (Mar. 17, 2020), <https://www.newyorker.com/culture/culture-desk/confronting-anti-asian-discrimination-during-the-coronavirus-crisis>.

harassment,<sup>249</sup> hate crimes,<sup>250</sup> and scapegoating.<sup>251</sup> World Health Organization (WHO) officials warned Trump to not use the phrase “Chinese Virus,”<sup>252</sup> and instead follow WHO best practices for naming infectious diseases<sup>253</sup> because misnaming a virus by its point of origin can lead to racial profiling “when there is no blame in this.”<sup>254</sup> It literally requires no (or at most, extremely minimal) effort to refer to COVID-19 by its correct, officially designated name.<sup>255</sup>

A study analyzing 1,273,141 hashtags from March 9 to 23, 2021, which corresponds to the weeks before and after Trump’s tweet with the phrase, “Chinese Virus,” found that approximately one-fifth (19.7%) of the 495,289 hashtags with #covid19 expressed anti-Asian sentiment, as compared to about half (50.4%) of the 777,852 hashtags with #chinesevirus.<sup>256</sup> This empirical evidence supports the WHO officials who

<sup>249</sup> Caitlin Yoshiko Kandil, *Asian Americans Report Over 650 Racist Acts Over Last Week, New Data Says*, NBC NEWS (Mar. 26, 2020, 4:41 PM), <https://www.nbcnews.com/news/asian-america/asian-americans-report-nearly-500-racist-acts-over-last-week-n1169821>.

<sup>250</sup> *Hate Crimes Against Asian Americans Are at an ‘Alarming Level’, UN Says*, NEXTSHARK (Oct. 20, 2020), <https://nextshark.com/un-experts-trump-attacks-against-asian-americans/>; Josh Margolin, *FBI Warns of Potential Surge in Hate Crimes Against Asian Americans Amid Coronavirus*, ABC NEWS (Mar. 27, 2020, 9:28 AM), <https://abcnews.go.com/US/fbi-warns-potential-surge-hate-crimes-asian-americans/story?id=69831920>; Kristine Phillips, *‘We Just Want to be Safe:’ Hate Crimes, Harassment of Asian Americans Rise Amid Coronavirus Pandemic*, USA TODAY (May 21, 2020, 6:00 AM), <https://www.usatoday.com/story/news/politics/2020/05/20/coronavirus-hate-crimes-against-asian-americans-continue-rise/5212123002/>.

<sup>251</sup> Kristine Phillips, *‘They Look at Me and Think I’m Some Kind of Virus:’ What It’s Like to be Asian During the Coronavirus Pandemic*, USA TODAY (Mar. 28, 2020, 11:09 AM), <https://www.usatoday.com/story/news/nation/2020/03/28/coronavirus-racism-asian-americans-report-fear-harassment-violence/2903745001/>.

<sup>252</sup> Dawn Kopecki, *WHO Officials Warn US President Trump Against Calling Coronavirus ‘the Chinese Virus,’* CNBC (Mar. 18, 2020), <https://www.cnbc.com/2020/03/18/who-officials-warn-us-president-trump-against-calling-coronavirus-the-chinese-virus.html>.

<sup>253</sup> *WHO Issues Best Practices for Naming New Human Infectious Diseases*, WORLD HEALTH ORG. (May 8, 2015), <https://www.who.int/news/item/08-05-2015-who-issues-best-practices-for-naming-new-human-infectious-diseases>; Kai Kupferschmidt, *Discovered a Disease? WHO Has New Rules for Avoiding Offensive Names*, SCI. INSIDER (May 11, 2015), <https://www.sciencemag.org/news/2015/05/discovered-disease-who-has-new-rules-avoiding-offensive-names>.

<sup>254</sup> Morgan Gstalter, *WHO Official Warns Against Calling It ‘Chinese Virus,’ Says ‘There’s No Blame in This’*, HILL (Mar. 19, 2020, 2:19 PM), <https://thehill.com/homenews/administration/488479-who-official-warns-against-calling-it-chinese-virus-says-there-is-no>.

<sup>255</sup> Charlotte Gibson, *UCLA’s Natalie Chou Won’t Stand for Anti-Asian Racism Related to Coronavirus*, ESPN (Mar. 26, 2020), [https://www.espn.com/espnw/voices/story/\\_/id/28955666/ucla-natalie-chou-stand-anti-asian-racism-related-coronavirus](https://www.espn.com/espnw/voices/story/_/id/28955666/ucla-natalie-chou-stand-anti-asian-racism-related-coronavirus) (reporting about Chinese UCLA basketball women’s player Natalie Chou speaking out against racist names for COVID-19 in her tweet); Natalie Chou (@NatalieChou1), TWITTER (Mar. 21, 2020, 5:34 PM), <https://twitter.com/NatalieChou1/status/1241478192176738304>.

<sup>256</sup> Yulin Hswen et al., *Association of “#covid19” Versus “#chinesevirus” with Anti-Asian*

warned Trump against using the stigmatizing phrase Chinese virus instead of the neutral, proper name COVID-19. Additional supporting evidence comes from a study of the rise of anti-Chinese sentiment and behavior on the internet during the outbreak of COVID-19.<sup>257</sup>

Social psychological research shows that humans evolved so that infectious disease threat leads towards “disgust prejudice against individuals whose morphological appearance or behavior deviates from normative standards.”<sup>258</sup> Stefanie Johnson,<sup>259</sup> University of Colorado Leeds School of Business professor of organizational leadership and information analytics,<sup>260</sup> discusses psychological research studies demonstrating that the threat of infectious disease can fuel racism.<sup>261</sup> Even for people who do not contract an infectious disease, the threat of doing so correlates with ethnocentrism and xenophobia,<sup>262</sup> resulting in more violence directed at out-group individuals.<sup>263</sup> Americans living in regions having larger infectious disease rates displayed higher implicit and explicit racial biases, with more germ averse white people exhibiting stronger explicit, though not implicit, anti-black/pro-white racial bias.<sup>264</sup> Infectious disease threat fuels anti-immigration attitudes.<sup>265</sup> Humans evolved to behave as if they have a behavioral immune system in the sense that higher

*Sentiments on Twitter: March 9–23, 2020*, AM. J. PUB. HEALTH (2021); see also Elizabeth Weise, *Anti-Asian Hashtags Soared After Donald Trump First Tied COVID-19 to China on Twitter*, *Study Shows*, USA TODAY (Mar. 18, 2021, 4:00 PM), <https://www.usatoday.com/story/news/nation/2021/03/18/anti-asian-hashtags-donald-trump-covid-19-tweet-study/4728444001/> (reporting on study).

<sup>257</sup> Fatemeh Tahmasbi et al., “Go eat a bat, Chang!”: *On the Emergence of Sinophobic Behavior on Web Communities in the Face of COVID-19* (Mar. 3, 2021), <https://arxiv.org/abs/2004.04046>; see also Craig Timberg & Allyson Chiu, *As the Coronavirus Spreads, So Does Online Racism Targeting Asians*, *New Research Shows*, WASH. POST (Apr. 8, 2020), <https://www.washingtonpost.com/technology/2020/04/08/coronavirus-spreads-so-does-online-racism-targeting-asians-new-research-shows/> (reporting on study).

<sup>258</sup> Mark Schaller & Steven L. Neuberg, *Danger, Disease, and the Nature of Prejudice(s)*, 46 ADV. EXPERIMENTAL SOC. PSYCHOL. 1, 2 (2012).

<sup>259</sup> DR. STEFANIE K. JOHNSON, <https://drstefjohnson.com/author/> (last visited Mar. 13, 2022).

<sup>260</sup> Stefanie K. Johnson, UNIV. OF COLO. BOULDER, <https://www.colorado.edu/business/leeds-directory/faculty/stefanie-johnson> (last visited Mar. 13, 2022).

<sup>261</sup> Stefanie K. Johnson, *Is COVID-19 Increasing Racially Motivated Crimes?*, PSYCHOL. TODAY (May 22, 2020), <https://www.psychologytoday.com/us/blog/stand-out-and-fit-in/202005/is-covid-19-increasing-racially-motivated-crimes>.

<sup>262</sup> Schaller, *supra* note 258, at 35–36.

<sup>263</sup> Kenneth Letendre et al., *Does Infectious Disease Cause Global Variation in the Frequency of Intrastate Armed Conflict and Civil War?*, 85 BIO. REV. 669 (2010).

<sup>264</sup> Brian A. O’Shea et al., *Infectious Disease Prevalence, Not Race Exposure, Predicts Implicit and Explicit Racial Prejudice Across the United States*, 11 SOC. PSYCHOL. & PERSONALITY SCI. 345 (2020).

<sup>265</sup> Jason Faulkner et al., *Evolved Disease-Avoidance Mechanisms and Contemporary Xenophobic Attitudes*, 7 GRP. PROCESS INTERGROUP RELS. 333 (2004).

infectious disease threat increases disgust feelings towards novel foods and people who look as if they might be contagious,<sup>266</sup> such as those who are disabled,<sup>267</sup> obese,<sup>268</sup> elderly,<sup>269</sup> and disfigured.<sup>270</sup>

#### D. Stephen Bainbridge's Tweets

Stephen Bainbridge is the William D. Warren Distinguished Professor of Law at the UCLA School of Law.<sup>271</sup> Bainbridge teaches various business law courses,<sup>272</sup> including *Business Associations*, which “is a basic foundational requirement in the Business Law Specialization.”<sup>273</sup> On February 25, 2020, Bainbridge posted this now deleted tweet, “If we all ask nicely, do you think we could get China to ban eating bats, civets, and other wild animals that serve as viral hosts?”<sup>274</sup> It is somewhat ironic for Bainbridge to have asked this question because Bainbridge organized a group of law professors to go eat out at someplace that served meat,<sup>275</sup> also known as dead animals, on October 15, 1999, during a *Teaching Corporate Law Symposium* held at the University of Georgia School of Law as the organizer of the conference had chosen to have only vegan options available. I was very happy to eat vegan as I’m

<sup>266</sup> Sara B. Weinstein et al., *A Landscape of Disgust*, 359 SCI. 1213 (2018).

<sup>267</sup> Justin H. Park et al., *Evolved Disease-Avoidance Processes and Contemporary Anti-Social Behavior: Prejudicial Attitudes and Avoidance of People with Physical Disabilities*, 27 J. NONVERBAL BEHAV. 65 (2003); Schaller, *supra* note 258, at 33–35.

<sup>268</sup> Justin H. Park et al., *Pathogen-Avoidance Mechanisms and the Stigmatization of Obese People*, 28 EVOLUTION & HUM. BEHAV. 410 (2007); Schaller, *supra* note 258, at 34.

<sup>269</sup> Lesley A. Duncan & Mark Schaller, *Prejudicial Attitudes Toward Older Adults May Be Exaggerated When People Feel Vulnerable to Infectious Disease: Evidence and Implications*, 9 ANALYSIS SOC. ISSUES & PUB. POL’Y 97 (2009); Schaller, *supra* note 258, at 33.

<sup>270</sup> Joshua M. Ackerman et al., *A Pox on the Mind: Disjunction of Attention and Memory in the Processing of Physical Disfigurement*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 478 (2009); Schaller, *supra* note 258, at 33.

<sup>271</sup> Stephen Bainbridge, UCLA Law School faculty profile, UCLA POL. SCI., <https://www.law.ucla.edu/faculty/faculty-profiles/stephen-m-bainbridge>.

<sup>272</sup> *Id.*

<sup>273</sup> *Law 230: Business Associations*, UCLA LAW, <https://www.law.ucla.edu/academics/curriculum/business-associations> (last visited Mar. 13, 2022).

<sup>274</sup> Stephen Bainbridge (@ProfBainbridge), TWITTER (Feb. 25, 2020, 3:45 PM), <https://perma.cc/GL4F-AMMZ>.

<sup>275</sup> Mary Ann Case, *Pets or Meat*, 80 CHI.-KENT L. REV. 1129 (2005) (taking its title from the scene in the Michael Moore film, *ROGER AND ME* (Dog Eat Dog Films 1989), depicting the sale of rabbits. Moore sees a crudely handwritten sign offering, “Rabbits or Bunnies, Pets or Meat for Sale.”). See also Grace Clement, *Pets or Meat? Ethics and Domestic Animals*, 1 J. ANIMAL ETHICS 46 (2011); *PETS OR MEAT: THE RETURN TO FLINT* (PBS 1992).

vegetarian and remember the date from presenting *The Value of Options Thinking in Corporate Law*.<sup>276</sup>

On April 6, 2020, Bainbridge posted these now deleted tweets:

1/ The Economist reports that an antibody test for the novel coronavirus will soon be available. I would be most curious to take one. As some of you know, I had a horrific cold/flu in late January/early February that I assumed was a bad case of bronchitis.

2/ But I have a number of Chinese students in my class this semester and I wonder if one of them might have brought the virus back from China. I assume not because I know of nobody else at the (law school) who got sick, but still... One wonders.<sup>277</sup>

Bainbridge's tweets unsurprisingly garnered negative social media attention.<sup>278</sup> UCLA's Asian/Pacific Islander Law Students (APILSA) sent an open letter, stating:

Stephen Bainbridge's April 6 Tweets caused material harm to the API community at UCLA Law. Dozens of students reached out to APILSA after screenshots of the Tweets were circulated on social media. These students had already been anxious about the growing number of API individuals who have become victims of hate crimes in the wake of COVID-19; several of these individuals had already faced discriminatory episodes at the law school themselves.

...

We strongly condemn Stephen Bainbridge's egregious Tweets posted on April 6, which irresponsibly perpetuate xenophobic stereotypes. This is a blatant violation of the spirit of the UCLA Faculty Code of Conduct, which states that faculty at UCLA must not discriminate against students on the basis of race or national origin.<sup>279</sup>

<sup>276</sup> Peter H. Huang, *Teaching Corporate Law from An Options Perspective*, 34 U. GA. L. REV. 571 (2000), excerpted and reprinted as *Corporate Finance: An Option Perspective* in 2(10) DERIVATIVES FIN. PROD. REPT 17 (2001).

<sup>277</sup> Saumya Gupta, *Professor's Tweets Regarding COVID-19 Elicit Student Concerns of Xenophobic Tone*, DAILY BRUIN (Apr. 27, 2020), <https://dailybruin.com/2020/04/27/professors-tweets-regarding-covid-19-elicite-student-concerns-of-xenophobic-tone>.

<sup>278</sup> *Id.*

<sup>279</sup> APILSA Letter Regarding Stephen Bainbridge, <https://docs.google.com/document/d/1tKETaMjlbwnwbGmXJTK7-jOeRR8eg2ejLtW-cN2xn3s/edit> (last visited Mar. 13 2022); see *Faculty Code of Conduct*, UCLA General Catalog 2019-2020.



On April 10, 2020, UCLA first-year law student Alton Wang tweeted: “This is a @UCLA\_Law professor, who gets to teach at an institution that will rather support racist professors than the students, particularly students of color. And we wonder why law school isn’t an inclusive environment and why institutional barriers remain for many POC.”<sup>280</sup>

Bainbridge had this exchange with Wang:

A Twitter interaction with a racist UCLA Law professor @ProfBainbridge, in parts:

- 1: He claims that he got sick, possibly of COVID, because of a Chinese student in his class
- 2: He employs racist stereotypes about Chinese food and culture
- 3: I tweet back at him
- 4: He blocks me<sup>281</sup>

Bainbridge tweeted a public apology about his tweets before deleting his Twitter account.<sup>282</sup> Bainbridge also sent apology emails to APILSA co-chairs Brendan Pratt and Constance Chan, in addition to issuing this apology on his blog:<sup>283</sup>

I very much regret having given offense and contributed—albeit unintentionally and inadvertently—to a challenging time. There are unquestionably far too many strains of xenophobia in this country right now, especially taking the form of anti-Asian and anti-Asian American sentiment. In this context, my tweets were thoughtless and unfortunate. Put bluntly, they were stupid and insensitive.<sup>284</sup>

On April 14, 2020, UCLA School of Law Dean Jennifer L. Mnookin<sup>285</sup> issued a statement<sup>286</sup> to the UCLA law school community stating:

<sup>280</sup> Alton Wang, (@altonwang), TWITTER (Apr. 10, 2020, 10:35 AM), <https://twitter.com/altonwang/status/1248620581462802433>.

<sup>281</sup> Alton Wang, (@altonwang), TWITTER (Apr. 10, 2020, 1:22 PM) <https://twitter.com/altonwang/status/1248662619604398080>.

<sup>282</sup> Gupta, *supra* note 277.

<sup>283</sup> *An Apology*, PROFESSOR BAINBRIDGE, <https://www.professorbainbridge.com/professorbainbridgecom/2020/04/an-apology.html> (last visited Mar. 13, 2022).

<sup>284</sup> *Id.*

<sup>285</sup> Jennifer Mnookin, UCLA LAW, <https://law.ucla.edu/faculty/faculty-profiles/jennifer-l-mnookin> (last visited Mar. 13, 2022).

<sup>286</sup> April 14 Note on Diversity and Inclusion at UCLA Law, UCLA LAW (Apr. 14, 2020),

Unfortunately, last week, a UCLA Law faculty member tweeted out remarks that mirrored xenophobic speculation that has been directed at Asian and Asian-American communities. The faculty member, Stephen Bainbridge, stated that he had been ill recently, and wondered if one of the Chinese students in his class might have brought coronavirus to campus. These tweets were offensive and harmful, particularly given the widespread hostility that has been directed at Asian and Asian-American communities as a result of this pandemic. I recognize that these tweets harmed and deeply pained many members of our community and most particularly our Chinese LL.M. students, a number of whom are in his class this semester and who could well have felt singled out and unwelcome because of his tweet. As members of the Asian Pacific Islander Law Students Association pointed out in their thoughtful letter addressed to me and others, “Language has a viral quality—it can pollute, infect, and distort our perception of the world and each other.” Additionally, I appreciate that our students issued their letter with an eye towards community healing, closure, and engagement.”

...

I appreciate his apology, and I am deeply sorry for the harm caused by his tweets.

...

We can – and must – do better. In the coming days and weeks, I look forward to working with APILSA, BLSA, and others in our community to continue to listen, learn, and address these issues in meaningful and concrete ways. I have started that process already: earlier this year, I asked the UCLA Law Committee on Equity, Diversity and Inclusion, which includes both faculty and students, to make concrete proposals for improving our climate, and to develop curriculum, teaching tools, and programming to make our learning environment more inclusive and more effective. They have been hard at work – even during this pandemic – to develop some proposals for our community. I also well know that they – and I – certainly do not have all the answers, and that as the letter from APILSA also recognizes, there will be

challenges. As part of that process, we will actively seek your input and ideas.

Today, I mainly wanted to send a message to all of you to reaffirm my and this institution's core commitments and values, including creating a supportive learning environment for everyone. I am wholly committed to fostering an environment where students and faculty, regardless of background, race, nationality, religion, gender identity, political perspective, or any other dimensions of our lived identities, feel heard, welcomed and fully and deeply included. And I promise you that our school's response to these incidents will not end with this email.<sup>287</sup>

On that same day of April 14, 2020, UCLA APILSA issued a public statement,<sup>288</sup> acknowledging the UCLA School of Law Dean's statement and Professor Bainbridge's apology:

As noted in his blog post, he also deleted his Twitter. To Professor Bainbridge and others, we must emphasize that this is not what we were seeking at all: we want to continue the conversation, not end it. Though we represent the API community at the law school and prioritize the material well-being of students over the emotional tranquility of professors who denigrate them, we are not beyond compassion for all members of the law school. We are sincere in our commitment to come together and use this as an opportunity to heal.

To our community members impacted by Professor Bainbridge's statements, we invite you to read the full text of his apology on his blog and evaluate for yourself whether this constitutes sufficient redress for the harm that you experienced as an individual. We anticipate that many will still be angry and hurt by the comments. We are, too. But we also believe that we must work together to progress as a community, especially during these turbulent times. As an institution, we at APILSA understand that an apology is but one part of a complete journey to restitution for a community.

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<sup>287</sup> *Id.*

<sup>288</sup> UCLA APILSA, *APILSA Public Statement Regarding Stephen Bainbridge* (Apr. 14, 2020), [https://docs.google.com/document/d/1dMtHYMFHNWV\\_Om9-2Ob0MqBH13Ca8kWI-K7tbxGxca0/edit](https://docs.google.com/document/d/1dMtHYMFHNWV_Om9-2Ob0MqBH13Ca8kWI-K7tbxGxca0/edit).

We thank Dean Mnookin and the law school for their candor. We look forward to working with the administration and faculty to create better, formalized standards so that all marginalized students in the future can reap material benefits from the events of this week. Our work to address xenophobia and racism is far from over. There is work to be done to ensure that our stories are heard, that xenophobic remarks made by faculty members are not tolerated moving forward, and that we grow stronger as a community. There is a marked difference between an apology from an individual professor, however well-articulated and well-taken it might be, and the creation of standards for cultural competency and professionalism. As members of the legal community, we hoped to set a precedent. Through the swell of community support, we were able to do that. But we would lose an opportunity for positive change if that precedent stopped at one-off apologies. We need to create a new standard of cultural competency and tolerance and we need accountability for when those in positions of power violate those standards.<sup>289</sup>

Since then, a number of meetings among UCLA School of Law students, Dean Mnookin, administrators, and faculty have occurred to advance the conversation.<sup>290</sup>

In an ironic and unfortunate coincidence, a co-author of Professor Bainbridge's casebook, *Business Associations*,<sup>291</sup> J. Mark Ramseyer, Harvard Law School Mitsubishi Professor of Japanese Legal Studies,<sup>292</sup> recently caused his own Asian-related international controversy.<sup>293</sup>

<sup>289</sup> *Id.*

<sup>290</sup> Gupta, *supra* note 277.

<sup>291</sup> WILLIAM A. KLEIN, J. MARK RAMSEYER, & STEPHEN BAINBRIDGE, *BUSINESS ASSOCIATIONS, CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, LLCs, AND CORPORATIONS* (10th ed. 2018).

<sup>292</sup> J. Mark Ramseyer, HARV. L. SCH., <https://hls.harvard.edu/faculty/directory/10697/Ramseyer> (last visited Mar. 13, 2022).

<sup>293</sup> Leah Asmelash, *A Harvard Professor Argued that Korean Women Forced into Sex Slavery in WWII Did So Voluntarily. Now He's Facing a Backlash*, CNN (Mar. 10, 2021), <https://www.cnn.com/2021/03/10/us/comfort-women-ramseyer-article-trnd/index.html>; Stephany Bai et al., *Ramseyer's Academic Malpractice: Legitimizing Denialism*, HARV. CRIMSON (Mar. 12, 2021), <https://www.thecrimson.com/article/2021/3/12/ramseyer-academic-malpractice/>; Crimson Editorial Board, *Ramseyer's Lies on Comfort Women Signal Deeper Rot*, HARV. CRIMSON (Mar. 8, 2021), <https://www.thecrimson.com/article/2021/3/8/ramseyer-comfort-women-paper/>; Ariel H. Kim & Y Simon J. Levien, *Harvard Professor's Paper Claiming 'Comfort Women' in Imperial Japan Were Voluntarily Employed Stokes International Controversy*, HARV. CRIMSON (Feb. 7, 2021),

Ramseyer claims “wartime brothels called comfort stations . . . contractual dynamics . . . reflected the straightforward logic of the credible commitments so basic to elementary game theory.”<sup>294</sup> Ramseyer claims that Korean women, including girls as young as ten, knowingly chose to enter into voluntary contracts as prostitutes to provide sex for Japanese soldiers!<sup>295</sup>

Jeannie Suk Gersen,<sup>296</sup> John H. Watson, Jr., Professor of Law at Harvard Law School,<sup>297</sup> who is the first and only ethnic Korean and also the first Asian American woman to achieve tenure at Harvard Law School,<sup>298</sup> criticized the lack of any factual evidence to support Ramseyer’s claims.<sup>299</sup> Michael Chwe,<sup>300</sup> Professor and Chair Ladder Faculty in political science at UCLA,<sup>301</sup> who is an applied game theorist,<sup>302</sup> drafted a public letter,<sup>303</sup> rejecting Ramseyer’s claims about how economics and game theory justify his assertions. As of February 2021, the letter has

3000 signatories, including over 1100 professors of economics, over 350 professors who work in game theory, over 100 professors who are legal scholars, over 100 professors who work in Law and Economics, over 100 professors of history, over 330 professors who are

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<https://www.thecrimson.com/article/2021/2/7/hls-paper-international-controversy/>; Youmi Kim & Mike Ives, *A Harvard Professor Called Wartime Sex Slaves ‘Prostitutes.’ One Pushed Back*, N.Y. TIMES (Feb. 26, 2021), <https://www.nytimes.com/2021/02/26/world/asia/harvard-professor-comfort-women.html>.

<sup>294</sup> J. Mark Ramseyer, *Contracting for Sex in the Pacific War*, 65 INT’L. REV. L. & ECON. (2021).

<sup>295</sup> *Id.* at 4.

<sup>296</sup> JEANNIE SUK GERSEN, <https://jeanniesukgersen.com/> (last visited Jan. 24, 2022).

<sup>297</sup> Jeannie Suk Gersen, Harvard Law School faculty page, HARV. L. SCH., <https://hls.harvard.edu/faculty/directory/10869/Gersen> (last visited Jan. 24, 2022).

<sup>298</sup> Jeannie Suk Gersen, *Seeking the True Story of the Comfort Women*, NEW YORKER (Feb. 25, 2021), <https://www.newyorker.com/culture/annals-of-inquiry/seeking-the-true-story-of-the-comfort-women-j-mark-ramseyer>.

<sup>299</sup> *Id.*; Jeannie Suk Gersen, *The Story of the Comfort Women, in Korean and Japanese*, NEW YORKER (Mar. 13, 2021), <https://www.newyorker.com/news/news-desk/the-story-of-the-comfort-women-in-korean-and-japanese>.

<sup>300</sup> MICHAEL CHWE, <http://chwe.net/michael/> (last visited Jan. 24, 2022).

<sup>301</sup> Michael Chwe, UCLA Political Science Department faculty page, UCLA POL. SCI., <https://polisci.ucla.edu/person/Michael-chwe/> (last visited Jan. 24, 2022).

<sup>302</sup> *Id.*; see also MICHAEL SUK-YOUNG CHWE, JANE AUSTEN, GAME THEORIST (updated ed., Princeton Univ. Press 2014).

<sup>303</sup> Michael Chwe, *Letter by Concerned Economists Regarding “Contracting for Sex in the Pacific War” in the International Review of Law and Economics*, <http://chwe.net/irle/letter/> (last updated May 11, 2021).

scholars of Asia, and over 240 professors who are present or former editors or co-editors of scholarly journals.<sup>304</sup>

Chwe provided a helpful, non-technical discussion of economics and game theory concepts and ideas related to this controversy.<sup>305</sup> Chwe also created a webpage of related additional resources.<sup>306</sup>

Finally, in the interests of complete disclosure and on a more personal note, I once sat next to Ramseyer during an American Law and Economics Association luncheon session, and reminded him I was a student in his civil procedure II at the University of Chicago.<sup>307</sup> Ramseyer's article certainly lies in the University of Chicago law school cultural tradition of being controversial, rather than correct or first in publishing research.<sup>308</sup>

### III. ASIAN AMERICAN RESPECTABILITY POLITICS

Respectability politics is “when minority and/or marginalized groups are told (or teach themselves) that in order to receive better treatment from

<sup>304</sup> Resources on “Contracting for Sex in the Pacific War” in the *International Review of Law and Economics*, MICHAEL CHWE (Feb. 2021), <https://chwe.net/irle/2021/02/24/letter-by-concerned-economists-regarding-contracting-for-sex-in-the-pacific-war-in-the-international-review-of-law-and-economics/>.

<sup>305</sup> Michael Chwe, *Frequently Asked Questions About Our Letter by Concerned Economists Regarding “Contracting for Sex in the Pacific War” (CSPW) in the International Review of Economics*, [https://docs.google.com/document/d/1UMg\\_XLMoS6J999LTghDhAwh3DZuFaB5KC0SkFGSITWc/edit](https://docs.google.com/document/d/1UMg_XLMoS6J999LTghDhAwh3DZuFaB5KC0SkFGSITWc/edit) (last visited Jan 24, 2022).

<sup>306</sup> Resources on “Contracting for Sex in the Pacific War” in the *International Review of Law and Economics*, MICHAEL CHWE, <https://chwe.net/irle/> (last visited Jan. 24, 2022).

<sup>307</sup> I received a grade of 78 in the University of Chicago law school 1994-95 “Grading scale A: 80 and above, B: 74-79, C: 68-73, D: 60-67, and F:55-59” with the “Distribution of honors in a typical graduating class Highest Honors (82 average and above) under 1%, High Honors (80 average and above) 4%, Honors (78 average and above) 29%.” 1L Transcript (on file with author). By comparison, I received a grade of 85 in Cass Sunstein’s *Elements of Law* and Sunstein wrote a note stating, “As will be public tomorrow, you got a fantastic grade in *Elements*, by some margin the best in the class! No one has gotten a higher grade in many years, and in fact I’ve never given a higher one in any course. Congratulations on a brilliant exam. On another matter: I meant to ask you whether you might want to do some research work for me this summer. I am going to be doing some work right up your alley, on various theories of rationality. ... I know you may have other and better things to do, but this job—between 15 and 35 hours a week, I would guess, as you would prefer—is yours if you want it.” Memo, Jan. 5, 1995 (on file with author). I had to decline because of having already committed to be a visiting assistant professor in the economics department of the University of Southern California during the summer of 1995 teaching law and economics.

<sup>308</sup> Peter H. Huang, *Emotional Reactions to Law and Economics, Market Metaphors, and Rationality Rhetoric*, in *THEORETICAL FOUNDATIONS OF L. & ECON.* 163, 171 (Mark D. White ed., 2009) (recounting a conversation when then dean of the University of Chicago law school expressed his belief that publishing controversial research is more important than being first or correct in publishing research).

the group in power, they must behave better.”<sup>309</sup> Evelyn Brooks Higginbotham, Harvard University Victor S. Thomas Professor of History and of African American Studies,<sup>310</sup> introduced the phrase “*politics of respectability*” in her book, *Righteous Discontent: The Women’s Movement in the Black Baptist Church, 1880-1920*.<sup>311</sup> Respectability politics is based upon the belief that being respectable will somehow magically solve the problems of bigotry, oppression, and racism. Sadly, this belief is a demonstrably and empirically false assumption.<sup>312</sup> Behaving respectably does not guarantee minorities any permanent safety from even low-level, nonviolent racism, let alone violent forms of racism such as beating, lynching, and murder. Any safety is at best contingent and only temporary. Many Asian (American) minorities who behaved respectably during COVID-19, including Asian American physicians and nurses on the front lines responding to COVID-19, have been racially harassed verbally and physically.<sup>313</sup>

#### A. Andrew Yang’s Op-Ed

In response to anti-Asian American sentiment, former Democratic Presidential candidate Andrew Yang wrote an op-ed, which advised Asian Americans to demonstrate, embrace, and showcase their American-ness by performing acts of patriotism and civic duty.<sup>314</sup> Yang was effectively advocating responding to racism by engaging in Asian American respectability politics, which is a type of racial stereotyping—albeit a self-inflicted one—that is based on the rhetoric of the model minority myth. Related to the adoption of the model minority rhetoric by some Asians and primarily non-Asians is how illegal anti-Asian bias and/or discrimination against Asians is, often intentionally conflated with legal race-conscious

<sup>309</sup> Damon Young, *The Definition, Danger and Disease of Respectability Politics, Explained*, THE ROOT (Mar. 21, 2016, 4:44 PM), <https://www.theroot.com/the-definition-danger-and-disease-of-respectability-po-1790854699>.

<sup>310</sup> Evelyn Brooks Higginbotham, *Victor S. Thomas Professor of History and of African and African American Studies*, HARV. UNIV. DEP’T. OF HIST., <https://history.fas.harvard.edu/people/evelyn-brooks-higginbotham>. (last visited Jan. 24, 2022).

<sup>311</sup> EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT: THE WOMEN’S MOVEMENT IN THE BLACK BAPTIST CHURCH 1880-1920*, 185–87 (Harvard Univ. Press 1993).

<sup>312</sup> Sarah Molano, *The Problem with Respectability Politics*, PIPE DREAM (Apr. 23, 2018), <https://www.bupipedream.com/opinions/94369/the-problem-with-respectability-politics/>.

<sup>313</sup> Tracy Jan, *Asian American Doctors and Nurses Are Fighting Racism and the Coronavirus*, WASH. POST (May 19, 2020), <https://www.washingtonpost.com/business/2020/05/19/asian-american-discrimination/>.

<sup>314</sup> Andrew Yang, *Andrew Yang: We Asian Americans Are Not the Virus, but We Can Be Part of the Cure*, WASH. POST, (Apr. 1, 2020), <https://www.washingtonpost.com/opinions/2020/04/01/andrew-yang-coronavirus-discrimination/>.

affirmative action for legal strategy, public relations, media coverage, or political purposes.<sup>315</sup>

*B. Responses by George Takei, Steven Yuen, and Simu Liu*

An unsurprising storm of over 6,000 critical tweets erupted.<sup>316</sup> Asian Americans predominantly disagreed very strongly with Yang.<sup>317</sup> Three famous actors reviled Yang in tweets. *Star Trek, The Original Series*<sup>318</sup> Starship Enterprise helmsmen, Mr. Sulu, and star George Takei, tweeted, “Yang is way off the mark here. During WWII, Japanese Americans often felt we had to prove our loyalty because of others’ racism. Japanese American soldiers fought bravely and died in huge numbers for our nation. We don’t have anything we need to prove.”<sup>319</sup> *The Walking Dead*<sup>320</sup> character Glenn Rhee and star Steven Yuen tweeted “don’t perform nationalism out of fear. enact collectivism as human beings going through a crisis together. rise above, educate, remain steadfast in knowing that an asian american is part of the fabric of this nation. so help each other as you would anyhow because you’re american.”<sup>321</sup> Simu Liu, a Chinese-Canadian actor who starred in Marvel Studio’s superhero movie *Shang-Chi and the Legend of the Ten Rings* as its titular character,<sup>322</sup> tweeted, “At a time where Asian diaspora from around the world are experiencing massive racism and discrimination, @AndrewYang basically just told us to suck it up, eat a cheeseburger and buy an American flag.”<sup>323</sup>

<sup>315</sup> See, e.g., Jeannie Suk Gersen, *Anti-Asian Bias, Not Affirmative Action, Is on Trial in the Harvard Case*, NEW YORKER (Oct. 11, 2018), <https://www.newyorker.com/news/our-columnists/anti-asian-bias-not-affirmative-action-is-on-trial-in-the-harvard-case>.

<sup>316</sup> Wendy Lu, *Andrew Yang Says Asians Need To ‘Show Our American-ness’ in Order To Avoid Racism*, HUFFPOST (Apr. 2, 2020, 9:17 PM), [https://www.huffpost.com/entry/andrew-yang-asian-americans-racism-column\\_n\\_5e86549dc5b63e06281b4660](https://www.huffpost.com/entry/andrew-yang-asian-americans-racism-column_n_5e86549dc5b63e06281b4660).

<sup>317</sup> Khanh Nguyen, *Showing ‘Americanness’ Is Not the Answer to COVID-Fueled Racism*, HONOLULU CIV. BEAT (May 1, 2020), <https://www.civilbeat.org/2020/05/showing-americaanness-is-not-the-answer-to-covid-fueled-racism/>; Li Zhou, *Andrew Yang told Asian Americans to prove their Americanness. Here’s why that’s wrong*, VOX (Apr. 3, 2020, 4:50 PM), <https://www.vox.com/2020/4/3/21206760/andrew-yang-washington-post-asian-americans-opinion>.

<sup>318</sup> *Star Trek* (NBC 1966–1969).

<sup>319</sup> George Takei (@GeorgeTakei), TWITTER (Apr. 7, 2020, 5:06 PM), <https://twitter.com/GeorgeTakei/status/1246139544115777542>.

<sup>320</sup> *The Walking Dead* (AMC 2010–present).

<sup>321</sup> Steven Yeun (@steveyeun), TWITTER (Apr. 3, 2020, 5:24 PM), <https://twitter.com/steveyeun/status/1246186737455357952>.

<sup>322</sup> SHANG-CHI AND THE LEGEND OF THE TEN RINGS (Walt Disney Pictures & Marvel Studios 2021); Borys Kit & Mia Galuppo, *Marvel Finds Its Shang-Chi in Chinese-Canadian Actor Simu Liu*, HOLLYWOOD REP. (July 20, 2019, 5:55 PM), <https://www.hollywoodreporter.com/heat-vision/marvels-shang-chi-sets-simu-liu-star-at-comic-con-1225856>.

<sup>323</sup> Simi Liu (@SimuLiu), TWITTER (Apr. 2, 2020, 9:31 PM),



### C. Critiquing Respectability Politics

Opponents of respectability politics believe it to be a dangerous fallacy on these three levels: logically, emotionally, and spiritually.<sup>324</sup> All these three levels are discussed by Jenn Fang, an Asian American feminist blogger and vascular developmental biologist,<sup>325</sup> in her blog post,<sup>326</sup> responding to Andrew Yang. First, respectability politics is an ineffective idea because it does not work. Second, respectability politics offers its believers only a false sense of security and protection. Third, respectability politics is a misguided notion because it perversely shifts blame and responsibility from oppressors to the very people who are being oppressed.

Jenn Fang cogently blogged this about Andrew Yang's clarion call for Asian Americans to engage in respectability politics:

Respectability politics argues that we don't deserve the right to be protected from racism; instead, that we must earn protection from racism through good behavior.

Asian American history (and indeed the history of all non-white people) teaches the error of this faulty logic time-and-time again: being suitably respectable, culturally assimilated, or intellectually gifted is no protection from racism. Fred Korematsu was still jailed. Wen Ho Lee was still imprisoned. Vincent Chin was still murdered. Asian American history abounds with more examples than I can possibly list here.

And yet, Yang fails to understand how racism works; or perhaps, more specifically, he fails to see racism as a systemic problem. Yang suggests we work individually to prove ourselves loyal and friendly to the racists who would attack us. This does not challenge racism, at best, it might only temporarily deflect or delay it. It doesn't say "Racism is wrong"; only, "Don't hurt me — I'm one of the 'Good Ones'. Hurt them." This is model minority reasoning, miniaturized. It operates only by casting some Asian Americans as acceptably patriotic and exceptionally talented, while castigating others as

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<https://twitter.com/SimuLiu/status/1245886734337859584>.

<sup>324</sup> Young, *supra* note 309; Molano, *supra* note 312.

<sup>325</sup> *Angry Reader of the Week: Jenn Fang*, ANGRY ASIAN MAN (May 16, 2014), <http://blog.angryasianman.com/2014/05/angry-reader-of-week-jenn-fang.html>.

<sup>326</sup> *Andrew Yang Is Wrong: Respectability Politics Won't Save Asian Americans from Racist Violence*, REAPPROPRIATE (Apr. 2, 2020), <http://reappropriate.co/2020/04/andrew-yang-is-wrong-respectability-politics-wont-save-asian-americans-from-racist-violence/>.

disloyal and insufficiently American — and therefore more deserving of scorn, skepticism, and attack.<sup>327</sup>

The above quote discusses how racism works and explains why respectability politics does not work in response to eradicate or even mitigate racism. As Fang points out, systemic racism is an institutional and structural problem requiring societal education and global changes instead of just attempted solutions at the level of individual minority members locally changing their behavior to appease or not incite racists. Respectability politics is akin to model minority rhetoric in several ways. First, respectability politics also pits one proper subset of minorities against other proper subsets of minorities. Second, respectability politics sets up a very high bar of respectable minority behavior (similar to model minority behavior) to achieve in order to avoid being targeted by racist attacks. Third, respectability politics ignores the reality that racism is expressed in cultural, institutional, and personal ways.<sup>328</sup>

#### IV. ENGAGING NON-VIOLENT RACISM THROUGH HUMOR

Other than Andrew Yang's respectability politics, and tweets in reaction to Yang, there have been several responses to anti-Asian racism, including the production and release of public service announcement (PSA) videos, such as this one-minute and fifteen-second one by the non-profit Advertising Council titled, *Fight the Virus. Fight the Bias. Love Has No Labels*.<sup>329</sup> The video features “testimonials from a firefighter, a nurse, a driver, an artist, the celebrity chef Melissa King and others, who describe being told to ‘go back to China’ or having people spit in their direction.”<sup>330</sup> Emmy-winning writer Alan Yang, known for such popular shows as “Parks and Recreation” and “Master of None” stated that Anti-Asian racism “hit[s] very close to home” and “wasn’t an abstract idea to me, something theoretical” because “I knew people this was happening to.”<sup>331</sup> As U.S. federal leaders largely ignored the surge of Anti-Asian racism accompanying the outbreak of COVID-19, “the fight against pandemic-

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<sup>327</sup> *Id.*

<sup>328</sup> DRWORKSBOOK, *supra* note 112.

<sup>329</sup> Ad Council, *Fight the Virus. Fight the Bias. Love Has No Labels*, YOUTUBE (July 21, 2020), [https://youtu.be/SocfEGYD\\_Xw](https://youtu.be/SocfEGYD_Xw).

<sup>330</sup> Tiffany Hsu, *Anti-Asian Harassment Is Surging. Can Ads and Hashtags Help?* N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/business/media/asian-american-harassment-ad-council.html>.

<sup>331</sup> Tiffany Hsu, *A New P.S.A. Hopes to Put a Focus on Pandemic-Related Racism*. N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/business/a-new-psa-hopes-to-put-a-focus-on-pandemic-related-racism.html>.

related harassment of Asian-Americans has largely fallen to civil rights groups, marketing agencies, social media accounts and nonprofit organizations, which have promoted hashtags like #IAmNotCovid19, #RacismIsAVirus, #HealthNotHate and #MakeNoiseToday.”<sup>332</sup>

In an informative seven-minute and fifteen second PSA video, the National Committee on U.S.-China Relations released, CU Professor Jennifer Ho, and Queen’s College CUNY President Frank H. Wu discuss the origins and history of the model minority stereotype, deconstruct this myth that persists to this day, and assess its damaging repercussions in light of Asian American activism and solidarity among all minority groups.<sup>333</sup> Model minority rhetoric is a form of white washing, false flattery that rather unsubtly criticizes every other ethnic/racial minority group in America. Ho points out that, to call someone a model minority “is actually inaccurate, it’s very damaging, and it’s definitely divisive.”<sup>334</sup> Wu compares and contrasts East Asian cultures as exemplified by the Japanese proverb, “the nail that sticks out gets pounded down” and the Chinese saying (which he first says in Mandarin) of “don’t go looking for trouble” and the American tradition of civil society, civic engagement, and political voice,<sup>335</sup> exemplified by the American adage of “the squeaky wheel gets the grease” to urge Asians and Asian Americans “to stand up and speak out by bridge building in coalition with others that share their ideals.”<sup>336</sup>

Responding effectively to racism requires an understanding of what essentially motivates and fundamentally underlies racism. Because this Article adopts the definition of racism as power plus prejudice, it is helpful to understand two things. First, a particular, endogenously chosen history in America of institutionalized violence, conquest, laws, and policies have led to one group having power over other groups. Overcoming racism requires changing that power imbalance. Second, fear and ignorance can lead to prejudice. Overcoming racism thus also requires reducing fear and ignorance.

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<sup>332</sup> *Id.*

<sup>333</sup> National Committee on U.S.-China Relations, *The “Model Minority” Myth: Jennifer Ho and Frank H. Wu*, YOUTUBE (Aug. 6, 2020), <https://youtu.be/zHFvEvPo5z0>.

<sup>334</sup> *Id.* at 6:00–6:05.

<sup>335</sup> See generally ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (Harv. Univ. Press 1970) (contrasting exit and voice as competing methods to express dissatisfaction in businesses, organizations, and countries).

<sup>336</sup> National Committee on U.S.-China Relations, *supra* note 333, at 6:20–6:36.

### A. Fear, Ignorance, and Prejudice

Jane Elliott famously demonstrated how easily children can learn prejudice<sup>337</sup> in her “blue eyes, brown eyes” experiential learning exercise, where she taught third-graders one day that kids

with blue eyes were better, smarter and superior to those with brown eyes . . . and therefore they were entitled to perks, like more recess time and access to the water fountain. . . . The next day, she reversed the roles. Now the brown-eyed students were superior and had perks.<sup>338</sup>

In a PBS documentary about her exercise,<sup>339</sup> Elliot recalls that she “watched wonderful, thoughtful children turn into nasty, vicious, discriminating little third graders.”

During a guest appearance on the late-night *Tonight Show Starring Jimmy Fallon*, Elliott wore a sweatshirt stating: “God created one race / THE HUMAN RACE.”<sup>340</sup> Part of overcoming prejudice is recognition of our common, shared heritage.<sup>341</sup> Elliott said: “Racism is ignorance based on being miseducated. Racism is a result of being indoctrinated instead of educated.”<sup>342</sup> Dr. Nathan Rutstein, a former University of Massachusetts Amherst School of Education lecturer,<sup>343</sup> also described prejudice as “an emotional commitment to ignorance.”<sup>344</sup> Part of the ignorance Elliott and Rutstein refer to “is the ignorance of how it feels to be discriminated against based on your race.”<sup>345</sup> Fear plus ignorance plus low self-esteem

<sup>337</sup> Alisha Haridasani Gupta, *A Teacher Held a Famous Racism Exercise in 1968. She’s Still at It*, N.Y. TIMES (July 15, 2020), <https://www.nytimes.com/2020/07/04/us/jane-elliott-anti-racism-blue-eyes-brown-eyes.html>.

<sup>338</sup> JANE ELLIOTT, A COLLAR IN MY POCKET: BLUE EYES/BROWN EYES EXERCISE (2016).

<sup>339</sup> Frontline PBS, *A Class Divided* (full film), YOUTUBE (Jan. 18, 2019), [https://youtu.be/1mcCLm\\_LwpE](https://youtu.be/1mcCLm_LwpE).

<sup>340</sup> The Tonight Show Starring Jimmy Fallon, *Jane Elliott on Her “Blue Eyes/Brown Eyes Exercise” and Fighting Racism*, YOUTUBE (June 2, 2020), <https://youtu.be/f2z-ahJ4uws>.

<sup>341</sup> Sam McFarland, *Identification with All Humanity: The Antithesis of Prejudice, and More*, in CAMBRIDGE HANDBOOK OF THE PSYCHOLOGY OF PREJUDICE 632, 652–54 (Chris G. Sibley & Fiona Kate Barlow eds., 2017) (presenting Identification with All Humanity Scale).

<sup>342</sup> Brianna Holt, *The Return of Jane Elliott*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/15/style/jane-elliott-anti-racism.html>.

<sup>343</sup> News & Media Relations, *Obituary: Nathan Rutstein, Former Education lecturer*, UNIV. OF MASS. AMHERST (June 6, 2006), <https://www.umass.edu/archivenewsoffice/article/obituary-nathan-rutstein-former-education-lecturer>.

<sup>344</sup> NATHAN RUTSTEIN, HEALING RACISM IN AMERICA: A PRESCRIPTION FOR THE DISEASE 99 (1993).

<sup>345</sup> Daniel McGann-Bartleman, *If You’re a Bystander, You’re a Racist*, BREEZE (Oct. 13, 2016), [https://www.breezejmu.org/opinion/if-youre-a-bystander-youre-a-racist/article\\_d7d83444-90cc-11e6-870c-4b9e8554a534.html](https://www.breezejmu.org/opinion/if-youre-a-bystander-youre-a-racist/article_d7d83444-90cc-11e6-870c-4b9e8554a534.html).

can equal bias, bigotry, discrimination, hatred, and prejudice. Whereas fear is a biological, evolutionary reaction, ignorance and self-esteem can endogenously change. While people can be educated, people can also refuse to learn any information they want to avoid or do not want to learn. People can and will manipulate their personal beliefs through selective information avoidance to avoid cognitive dissonance.<sup>346</sup> Some people's (self-) identities and even their self-worth are inextricably tied to cherished misinformation, dearly held wrong beliefs, and partisan world views. The *raison d'être* of some cults, institutions, organizations, pandemics, panics, and religions is that some people are committed to and emotionally invested in not learning about reality. Ignorance precipitates fear, which motivates ignorance, ad infinitum.

### B. Utilizing Humor to Engage Non-Violent Racism

Jenny Yang,<sup>347</sup> a former labor organizer who is now an actor, a stand-up comedian, and writer, and who is not related to former Democratic Presidential candidate Andrew Yang, took his tweet literally and to heart when she created a brilliant and hilarious two-minute and twenty-second video parody of his advice for Asian Americans to proudly display their American-ness.<sup>348</sup> In her video, Jenny Yang is on Highland Park, Los Angeles crosswalks and streets wearing a red top, blue jeans, white socks, white sneakers, a blue scarf, a yellow medical face mask, and white latex gloves. Jenny Yang introduces her video by saying, "the coronavirus has a lot of Americans scared of Asians. So Andrew Yang says we can't make them be less racist. We just have to be more American. Let's see if that works. Come on!"<sup>349</sup> Jenny Yang holds up a home-made "Honk if you won't hate-crime me" sign, offers random passersby free Clorox wipes, and hands out her nice all-American résumé with a black six-foot pole. Jenny Yang also posted on Twitter pictures of the actual 2-page tongue-in-cheek American resume that she wrote.<sup>350</sup> Jenny Yang shouts, "God bless the U.S.A.!" She repeatedly chants "U-S-A!" (for a total of almost fourteen times). She sings, "you're a grand old flag, you're a high-flying flag" and "glory hallelujah." She reassures people that she is very

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<sup>346</sup> Tracy Jan, *As They Fight Virus, Asian American Battle Racism*, WASH. POST, May 22, 2020.

<sup>347</sup> *Jenny Yang Comedian. Writer. Actor. Host*, JENNY YANG, <http://jennyyang.tv/> (last visited Mar. 9, 2022).

<sup>348</sup> Jenny Yang (@jennyyangtv), TWITTER (Apr. 3, 2020, 1:48 PM), <https://twitter.com/jennyyangtv/status/1246132396191178752>.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

American, volunteering that she is really good at saying WOOT and likes to ask for ranch dressing wherever she goes.

In the remaining one minute and thirteen seconds of footage in her video, also posted on Twitter, Jenny Yang captions in turquoise that Asian Americans should study Asian American studies books and classes to learn our histories and how they are interconnected with African American, Hispanic American, Native American, and all Americans' histories. Jenny Yang counsels other Asian Americans to remember this moment when the time comes for us to demonstrate our solidarity with and support for other people when they suffer from bigotry, discrimination, prejudice, racism, and oppression. Jenny Yang reminds viewers that everyone is able to fight for and achieve civil liberties due to the battles and labor of African American social movements. Jenny Yang concludes by stating that we do not and should not have to demonstrate that we are so-called "good Americans" in order for us to "deserve to be treated with decency and dignity."<sup>351</sup>

Jenny Yang complimented Andrew Yang for being very honest and vulnerable when he described himself as feeling for the first time in a long time, racially tinged, self-consciousness, and even somewhat ashamed when he saw the accusatory eyes of a frowning middle-aged man outside a grocery store watching Andrew Yang leaving the store.<sup>352</sup> Nonetheless, Jenny Yang was disappointed that Andrew Yang did not address the problem of being ashamed when he was confronted with negative anti-Asian perceptions.<sup>353</sup> Instead, Andrew Yang chose to double down by rejecting his Asian identity.<sup>354</sup> In doing so, Andrew Yang implied that being American and being Asian are antithetical, as well as that Asian Americans were somehow not already doing their best at helping out others.<sup>355</sup>

Jenny Yang responded to Andrew Yang's advising Asian Americans to practice respectability politics with a more sensible alternative by very eloquently saying:

[W]hen someone is seeing your face and all they're feeling is racist anger toward you as a representative of China because they think China is the one that caused the

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<sup>351</sup> *Id.*

<sup>352</sup> Rebecca Sun, *Comedian Jenny Yang Rebuts Andrew Yang Op-Ed with Satirical Video: "Honk If You Won't Hate-Crime Me!"*, THE HOLLYWOOD REP. (Apr. 5, 2020, 3:29 PM), <https://www.hollywoodreporter.com/news/comedian-jenny-yang-rebuts-andrew-yang-op-ed-satirical-video-1288623>.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

virus, what are you going to do? Are you going to pull out your SAT score? Are you going to go, “Look at my report card. I was a 4.5 student. Don’t beat me up with your bat?” Other than the basic necessities of not trying to harm people in general, there’s really nothing much we should do other than exist as humans in order to deserve and be afforded any measure of common decency and dignity. The term that people like to use is respectability politics: the idea that if we just do certain things that would please the majority culture, it will keep us immune from the negative effects of racism. And that’s just wrong. It’s not wrong because my politics say it’s wrong, it’s wrong based on the fact that it doesn’t work.

Just because someone has an Asian face doesn’t mean they’re responsible for the global pandemic that has disrupted everyone’s lives. If I were to rewrite Andrew Yang’s messaging, it would say: “It is a scary time right now, and everyone has a lot of reasons to be scared. One of the things that we shouldn’t do is lash out against those of us who are associated culturally with the disease, because Asians overall are not responsible for the pandemic. And for all of us to truly be better Americans — including Asian Americans, who might be facing increased anti-Asian harassment right now — we should lead by exercising a deeper level of compassion and support for each other.” That’s it. That’s all you needed to say.<sup>356</sup>

To his credit, Andrew Yang conceded many of the points that Jenny Yang, Jenn Fang, and other critics of his op-ed made when he said in an interview, “I realize that the Op-Ed fell short.”<sup>357</sup> Andrew Yang said that he is pro-people and was not saying that he is more pro-White than pro-Asian.

The anger and frustration that many Asian Americans felt about Andrew Yang’s op-ed in the context of their fears about hatred towards Asians and Asian Americans are themselves interesting reminders of the power of emotions and emotional contagion. Asians and Asian Americans have a complicated and manifold set of experiences.<sup>358</sup> Even the phrases

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<sup>356</sup> *Id.*

<sup>357</sup> Benny Luo, *Andrew Yang Responds to Backlash on Washington Post Op-Ed*, NEXTSHARK (Apr. 7, 2020), <https://nextshark.com/andrew-yang-responds-washington-post-op-ed/>.

<sup>358</sup> See generally ERIKA LEE, *THE MAKING OF ASIAN AMERICA: A HISTORY* (2015).

Asian and Asian American are incongruous because many of the diverse sets of people in those categories do not self-identify by those phrases.<sup>359</sup>

Economics Nobel Laureate George Akerlof<sup>360</sup> and Duke University James B. Duke Professor of Economics Rachel Kranton<sup>361</sup> co-authored a pioneering article, *Economics and Identity*,<sup>362</sup> analyzing “how, a person’s sense of self, affects economic outcomes.”<sup>363</sup> They develop economic analysis where people have identity-based payoffs, benefits they seek and costs they avoid, that can depend on their own choices, as well as other individuals’ choices.<sup>364</sup> They also demonstrate third parties can cause persistent changes in people’s identity payoffs.<sup>365</sup> Finally, they show that although some people can choose their own identity, other individuals may not be able to do so.<sup>366</sup> Professor Claire Hill advocates extending the law and economics of identity from payoffs to perceptual lens.<sup>367</sup>

All people have multiple identities that can be more or less activated or salient. For example, social psychological research shows that Chinese Americans “selected individualistic (i.e., unique and non-cooperative) options to a greater extent when the American, as opposed to Chinese, identity was evoked.”<sup>368</sup> People select which of their multiple identities they identify with in any given moment and set of circumstances. For example, I customarily self-identify as a law and economics professor and meditator. Only if and when asked about race and ethnicity (or species), I would primarily self-identify as Taiwanese American, secondarily as an Asian American, and tertiarily as a carbon-based life form.<sup>369</sup> Society as

<sup>359</sup> Frank H. Wu, *Asian Americans Recognizing Ourselves at a Crossroads*, CUNY FORUM 8: CORONA CONVERSATIONS EAST & WEST (July/Aug. 2020), <https://aaari.info/cuny-forum-8-wu/>; Frank Wu, *There Are No Asians in Asia, Are There?*, HUFFPOST (May 26, 2014, 8:44 PM), [https://www.huffpost.com/entry/there-are-no-asians-in-as\\_b\\_5392390](https://www.huffpost.com/entry/there-are-no-asians-in-as_b_5392390).

<sup>360</sup> *George A. Akerlof: Facts*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/2001/akerlof/facts/> (last visited Mar. 10, 2022).

<sup>361</sup> Faculty page of Rachel Kranton a James B. Duke Professor of Economics, DUKE UNIV., <https://sites.duke.edu/rachelkranton/> (last visited Mar. 10, 2022).

<sup>362</sup> George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715, 715 (2000); see also GEORGE A. AKERLOF & RACHEL E. KRANTON, *IDENTITY ECONOMICS: HOW OUR IDENTITIES SHAPE OUR WORK, WAGES, AND WELL-BEING* (2010).

<sup>363</sup> Akerlof & Kranton, *supra* note 362.

<sup>364</sup> *Id.* at 717.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> Claire A. Hill, *The Law and Economics of Identity*, 32 QUEEN’S L.J. 389, 389 (2007).

<sup>368</sup> Robyn A. LeBouef et al., *The Conflicting Choices of Alternating Selves*, 111 ORG. BEHAV. & HUM. DECISION PROCESSES 48, 52 tbl.2 (2010).

<sup>369</sup> Akash Peshin, *Why Is Life on Earth Carbon-Based?*, SCI. ABC, <https://www.scienceabc.com/humans/why-is-life-on-earth-carbon-based.html> (last visited Mar. 3, 2022).



a whole and particular members of society choose which of my multiple identities they identify me with in any given moment and set of circumstances. Someone angry about COVID-19 may decide to identify me as a target of their animus, disgust, and violence. Thus, we all have internal identities we choose to identify with and external identities society and members of society choose to identify us with. In researching this Article, the author has learned more about Asian American history and has become more likely to identify as an Asian American<sup>370</sup> and less likely as Chinese American.<sup>371</sup>

As with many other contested issues, racism and elimination of racism evoke strong emotions.<sup>372</sup> Emotions can and should be ephemeral and fleeting. Nonetheless, they can have long-lasting and possibly irreversible consequences. There are and can be no enforceable laws against emotions, even ones of animus. There are and can be laws against emotionally motivated violent acts to harm people. Such laws as hate crimes are difficult and costly to enforce, with no guarantee of success. Even if successful, prosecution does not bring the dead back to life. Societies cannot legislate away people's emotions or thoughts. Law, and other institutions, can help to change people's behavior and in so doing, help to change accepted yet morally wrong social norms and attitudes. Martin Luther King, who won the 1964 Nobel Peace Prize,<sup>373</sup> said: "while the law may not change the hearts of men, it can and it does change the habits of men. And when you begin to change the habits of men, pretty soon the attitudes will be changed; pretty soon the hearts will be changed."<sup>374</sup>

Racism can be violent or non-violent. Society can and should respond to violent racism, such as hate crimes, by legislation and vigorous enforcement of laws that prohibit violent racism. While society can also respond to non-violent racism, such as ethnic slurs, by legislation and enforcement, such a legalistic response draws upon scarce legislative, judicial, prosecutorial, and enforcement resources and diverts them away from responding to violent racism. This Article suggests that humor offers a decentralized, non-legalistic, and self-help response to non-violent

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<sup>370</sup> Michelle Lyu, *Becoming Asian in America*, PLAN A MAG. (Feb. 2021), <https://planamag.com/becoming-asian-in-america/>.

<sup>371</sup> Emily Dong, *I Want to Be Chinese*, ORG. FOR POSITIVE PEACE (July 2020), <https://forpositivepeace.org/2020/01/01/i-want-to-be-chinese/>.

<sup>372</sup> Eduardo Bonilla-Silva, *Feeling Race: Theorizing the Racial Economy of Emotions*, 84 AM. SOCIO. REV. 1, 2 (2019).

<sup>373</sup> *Martin Luther King Jr.: Facts*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/peace/1964/king/facts/> (last visited Mar. 10, 2022).

<sup>374</sup> Dr. Martin Luther King, Jr., *The Other America* (Apr. 14, 1967) (transcript available at <https://www.crmvet.org/docs/otheram.htm>).

racism that complements a centralized, legalistic, and societal response to violent racism. Both violent racism and non-violent racism are harmful to individuals and societies. How much of racism is violent racism and how much of racism is non-violent racism changes over time and location. Importantly, the proportion of racism that is violent racism tends to grow over time and across locations if and when the occurrence of non-violent racism becomes more accepted and normalized as the baseline in society.

Humor, parody, and satire can engage, challenge, and change people's hearts, attitudes, and behavior. This pathway is the reverse of how law can change behavior, attitudes, and hearts. In this way, humor and law are not just complements in overcoming racism, they also are doing this utilizing complementary, inverse pathways. Decomposing racism into its components of violent racism and non-violent racism helps clarify how law is better suited to engage and mitigate violent racism, and humor is better suited to engage and mitigate non-violent racism.

Additionally, non-violent racism, left unchecked can, and often does, grow into violent racism. This growth can occur because those who practice non-violent racism develop habits of mind and behavior that can escalate to violent racism. Non-violent racism is the start on a slippery slope to violent racism. Engaging and mitigating non-violent racism can thus also engage and reduce violent racism. To be clear, there are certainly limits in the power of humor to respond directly to violent racism. The way that humor can be an effective response to violent racism is indirectly by engaging and reducing non-violent racism before it grows into violent racism.

Humor provides a non-adversarial, non-confrontational, and non-threatening way to engage and reject non-violent racism. Morgan Spurlock, the director of *Super Size Me*,<sup>375</sup> observes that: "We have a mantra at our company, which is, 'If you can make someone laugh, you can make someone listen.'"<sup>376</sup> People's brains are hardwired to respond positively to humor and laughter.<sup>377</sup> Behavioral research finds humor can

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<sup>375</sup> SUPER SIZE ME (Kathbur Pictures 2004).

<sup>376</sup> Michele Corriston, *Why Super Size Me Director Morgan Spurlock Uses Humor in His Documentaries*, PEOPLE (Nov. 20, 2014, 4:10 PM), <https://people.com/movies/why-super-size-me-director-morgan-spurlock-uses-humor-in-his-documentaries/>.

<sup>377</sup> JongEun Yim, *Therapeutic Benefits of Laughter in Mental Health: A Theoretical Review*, 293 TOHUKU J. EXPERIMENTAL MED. 243, 243 (2016) (reviewing how laughter secrets endorphins, can alter dopamine and serotonin activity, and "decreases serum levels of cortisol, epinephrine, growth hormone, and 3,4-dihydrophenylacetic acid (a major dopamine catabolite), indicating a reversal of the stress response.").

raise perceptions of status,<sup>378</sup> and hasten meaningful connections.<sup>379</sup> Honest conversations about racism can be difficult.<sup>380</sup> Humor, while not a cure to violent racism, can be a great start to starting a conversation about race and non-violent racism. Overcoming non-violent and violent racism require communication, compassion, empathy, kindness, and mindfulness. Humor facilitates communication and connection.<sup>381</sup>

Personality psychologist Gordon Allport noted prejudice is a learned hostile attitude or feeling which is resistant to facts, ignores honesty and truth, and leads to avoidance, discrimination or legalized (institutionalized) racism, violence, and eventually genocide.<sup>382</sup> This leads some individuals to have, and indefinitely maintain, incorrect beliefs about other groups with whom they will not voluntarily interact due to their prejudice. Humor can engage and counteract prejudice by enabling education instead of ignorance, relationships instead of avoidance, and peaceful coexistence instead of violent conflict.<sup>383</sup>

Prejudice is to prejudge someone unfamiliar by forming a positive or negative valence judgment based on some observable attribute(s) before truly comprehending, knowing, and understanding that person. Discrimination is to decide based upon prejudice without taking the time and effort required for a more nuanced and informed decision. Hence the importance of humor at making information more palatable and user-friendly.<sup>384</sup>

Jennifer Aaker, the General Atlantic Professor at the Stanford Graduate School of Business,<sup>385</sup> and Naomi Bagdonas, a Lecturer at the

<sup>378</sup> See, e.g., T. Brafford Bitterly et al., *Risky Business: When Humor Increases and Decreases Status*, 112 J. PERSONALITY & SOC. PSYCHOL. 431, 431 (2017) (presenting eight experiments demonstrating that humor can influence status).

<sup>379</sup> See, e.g., Terri R. Kurtzberg et al., *Humor as a Relationship-Building Tool in Online Negotiations*, 20 INT'L J. CONFLICT MGMT. 377, 377 (2009); Karen O'Quin & Joel Aronoff, *Humor as a Technique of Social Influence*, 44 SOC. PSYCHOL. Q. 349, 349 (1981).

<sup>380</sup> IJEOMA OLUO, *SO YOU WANT TO TALK ABOUT RACE* 4–5 (2018).

<sup>381</sup> Kurtzberg et al., *supra* note 379; O'Quin & Aronoff, *supra* note 379.

<sup>382</sup> See generally GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (25th Anniversary ed. 1979).

<sup>383</sup> Kurtzberg et al., *supra* note 379; O'Quin & Aronoff, *supra* note 379.

<sup>384</sup> See, e.g., Thomas E. Ford et al., *More Than "Just a Joke": The Prejudice-Releasing Function of Sexist Humor*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 159, 159 (2008) (presenting two experiments finding "that, for sexist men, exposure to sexist humor can promote the behavioral release of prejudice against women"); Nicholas Kristof, *To Beat Trump, Mock Him*, N.Y. TIMES (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/opinion/sunday/trump-politics-humor.html>; Robyn K. Mallet et al., *What Did He Mean By That? Humor Decreases Attributions of Sexism and Confrontation of Sexist Jokes*, 75 SEX ROLES 272, 272 (2016) (providing experimental evidence that "delivering a sexist remark as a joke, compared to a serious statement, tempered perceptions that the speaker was sexist which, in turn, made women less likely to confront.").

<sup>385</sup> Jennifer Aaker, STANFORD GRADUATE SCHOOL OF BUSINESS,

Stanford Graduate School of Business,<sup>386</sup> and an executive coach, recently wrote the book, *Humor, Seriously: Why Humor Is a Secret Weapon in Business and Life (And how anyone can harness it. Even you.)*<sup>387</sup> Their book is based on, and related to, a course they have co-taught at Stanford Graduate School of Business to hundreds of executives and MBAs.<sup>388</sup> Their delightful and funny book analyzes, discusses, summarizes, applies, and illustrates empirical and experimental research from biology, brain chemistry, neuroscience, physiology, psychology, leadership, management sciences, communication studies, sociology, and behavioral science about how humor can affect human decision-making, emotions, and motivation.<sup>389</sup> Chapter two of their book analyzes how human brains “are hardwired to respond to humor and laughter,<sup>390</sup> and how humor has been proven in the behavioral research to (among other things) increase perceptions of status,<sup>391</sup> quicken the path to meaningful connection,<sup>392</sup> unlock creativity,<sup>393</sup> and boost resilience.”<sup>394</sup> Chapter five of their book is

<https://jaaker.people.stanford.edu/> (last visited Mar. 11, 2022).

<sup>386</sup> Naomi Bagdonas, STANFORD GRADUATE SCH. OF BUS., <https://www.gsb.stanford.edu/faculty-research/faculty/naomi-joanne-bagdonas> (last visited Mar. 11, 2022).

<sup>387</sup> See generally JENNIFER AAKER & NAOMI BAGDONAS, *HUMOR, SERIOUSLY: WHY HUMOR IS A SECRET WEAPON IN BUSINESS AND LIFE (AND HOW ANYONE CAN HARNESS IT. EVEN YOU.)* (2021). Aaker and Bagdonas released a TED talk, *Why Great Leaders Take Humor Seriously*, in July 2021, with over 900,000 views as of Feb. 8, 2022: Jennifer Aaker & Naomi Bagdonas, *Why Great Leaders Take Humor Seriously*, TED (July 2021), [https://www.ted.com/talks/jennifer\\_aaker\\_and\\_naomi\\_bagdonas\\_why\\_great\\_leaders\\_take\\_humor\\_seriously?utm\\_source=Humor%2C+Seriously&utm\\_campaign=de8bad5681-EMAIL\\_CAMPAIGN\\_2022\\_02\\_08\\_09\\_39&utm\\_medium=email&utm\\_term=0\\_67227f8185-de8bad5681-447001003&mc\\_cid=de8bad5681&mc\\_eid=4d3cce5. .](https://www.ted.com/talks/jennifer_aaker_and_naomi_bagdonas_why_great_leaders_take_humor_seriously?utm_source=Humor%2C+Seriously&utm_campaign=de8bad5681-EMAIL_CAMPAIGN_2022_02_08_09_39&utm_medium=email&utm_term=0_67227f8185-de8bad5681-447001003&mc_cid=de8bad5681&mc_eid=4d3cce5.)

<sup>388</sup> See AAKER & BAGDONAS, *supra* note 387, at 12.

<sup>389</sup> *Id.* at 11.

<sup>390</sup> JongEun Yim, *Therapeutic Benefits of Laughter in Mental Health: A Theoretical Review*, 293 TOHOKU J. EXPERIMENTAL MED. 243 (2016) (reviewing how laughter secrets endorphins, can alter dopamine and serotonin activity, and “decreases serum levels of cortisol, epinephrine, growth hormone, and 3,4-dihydrophenylacetic acid [a major dopamine catabolite], indicating a reversal of the stress response.”).

<sup>391</sup> See, e.g., T. Brafford Bitterly et al., *Risky Business: When Humor Increases and Decreases Status*, 112 J. PERSONALITY & SOC. PSYCH. 431 (2017) (presenting eight experiments demonstrating that humor can influence status).

<sup>392</sup> See, e.g., Terri R. Kurtzberg et al., *Humor as a Relationship-Building Tool in Online Negotiations*, 20 INT’L J. CONFLICT MGMT. 377 (2009); see also Karen O’Quin & Joel Aronoff, *Humor as a Technique of Social Influence*, 44 SOC. PSYCH. Q. 349 (1981).

<sup>393</sup> See generally Ori Amir & Irving Bierderman, *The Neural Correlates of Humor Creativity*, 10 FRONTIERS HUM. NEUROSCIENCE 597 (2016); see also Alice M. Isen et al., *Positive Affect Facilitates Creative Problem Solving*, 52 J. PERSONALITY & SOC. PSYCH. 1122 (1987).

<sup>394</sup> AAKER & BAGDONAS, *supra* note 387, at 15.

about humor's power to garner trust.<sup>395</sup> Humor has been experimentally shown to facilitate learning<sup>396</sup> and leadership.<sup>397</sup>

An intriguing recent model of information acquisition and avoidance is based on the observation that information can positively and negatively change people's action, affect, and cognition.<sup>398</sup> This article suggests naming this model: Information Revises Action, Affect, and Cognition, abbreviated IRAAC. This acronym is proposed in honor of, and similar to, the well-known acronym of IRAC, which stands for Issue, Rule, Analysis/Application, and Conclusion.<sup>399</sup> The IRAC method of legal analysis, or some variation of it with some permutation of the letters in the acronym, is familiar to law students from their legal writing course in the first year of law school.<sup>400</sup>

The IRAAC model of information preferences proposes that individuals evaluate information based on three dimensions of value. First, the decision-making, instrumental, or usefulness value of information. Second, the affective, emotional, or hedonic value of information. Third, the cognitive, mental model, or sense-making value of information. People then combine these component valuations of information by creating a weighted sum of the three individual valuations and, depending on the sign of that weighted sum, decide whether to acquire (positive weighted sum), avoid (negative weighted sum), or be indifferent to (zero weighted sum) information.<sup>401</sup> Individuals can differ in the personal weights they attach to each dimension of information value depending on how much each type of information value matters to them.

In the context of information about people of a different ethnicity/race, some individuals place large weights on emotionally negative, and/or cognitively negative, identity-threatening aspects of information value and much less weight on the decision-making behavior

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<sup>395</sup> *Id.* at 16.

<sup>396</sup> See, e.g., Dana Bilsky Asher, *The Surprising Link Between Laughter and Learning*, FAST CO. (May 10, 2016), <https://www.fastcompany.com/3059651/the-surprising-link-between-laughter-and-learning>; see also Terri Avner Ziv, *Teaching and Learning with Humor: Experiment and Replication*, 57 J. EXPERIMENTAL EDUC. 5 (1988).

<sup>397</sup> See, e.g., Colette Hopton et al., *It's Not You, It's Me: Transformational Leadership and Self-Deprecating Humor*, 34 LEADERSHIP & ORG. DEV. J. 4 (2013); see also Nale Lehmann-Willenbrock & Joseph A. Allen, *How Fun Are Your Meetings? Investigating the Relationship Between Humor Patterns in Team Interactions and Team Performance*, 99 J. APPLIED PSYCH. 1278 (2014).

<sup>398</sup> Tali Sharot & Cass R. Sunstein, *How People Decide What They Want to Know*, 4 NATURE HUM. BEHAV. 14 (2020).

<sup>399</sup> Tracy Turner, *Flexible IRAC: A Best Practices Guide*, 20 LEGAL WRITING J. 233 (2015).

<sup>400</sup> Cf. Tracy Turner, *Finding Consensus in Legal Writing Discourse Regarding Organizational Structure: A Review and Analysis of the Use of IRAC and Its Progenies*, 9 LEGAL COMMUN & RHETORIC: JALWD 351 (2012).

<sup>401</sup> Sharot & Sunstein, *supra* note 398, at 14.

change aspect of information value. Such an individual may then choose to avoid information about, and contact with, people with a different ethnicity/race. A change in such an individual's information preferences about people of a different ethnicity/race can be accomplished by humor causing the affective value of information to switch from negative to positive and/or humor changing the cognitive aspect of information value from negative, identity-threatening to neutral or positive. In doing so, humor could lead such an individual then to choose to switch from avoiding to acquiring or being receptive to information about, and contact with, people with a different ethnicity/race. The IRRAC model of information preferences thus can explain how humor offers a non-adversarial, non-confrontational, and non-threatening way to engage and reject racism.

In this way, humor, while not the end-all-be-all cure to racism, can serve as means to open dialogues, discussions, and conversations about race and racism. Humor can make it easier to form connections for people who are unwilling to open themselves up to those against whom they feel prejudice and facilitate a realization of commonalities rather than differences. Because a form of willing ignorance underlies prejudice/discrimination, humor can counter racism by enabling education.

Psychologists Jose Chin Yong, Norman P. Li, and Satoshi Kanazawa recently provided evidence for humans being not so much rational as rationalizing, and evolved to be coherence-seeking and fiction-making animals.<sup>402</sup> They offer evidence that rationalizing is a uniquely human trait among animals.<sup>403</sup> They also argue “that rationalization processes (e.g., cognitive dissonance reduction, post hoc justification of choices, confabulation of reasons for moral positions) are aimed at creating the fictions we prefer to believe and maintaining the impression that we are psychologically coherent and rational.”<sup>404</sup> They observe that coherence “appears to be prioritized at the expense of veridicality, suggesting that distorted perceptions and appraisals can be adaptive for humans—under certain circumstances, we are better off understanding ourselves and reality not so accurately.”<sup>405</sup> Their novel perspective on humanity explains how and why humans like to tell stories and narratives that fit together more than being necessarily accurate. This view of humanity also means

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402 See generally Jose C. Yong, Norman P. Li & Satoshi Kanazawa, *Not So Much Rational but Rationalizing: Humans Evolved as Coherence-Seeking, Fiction-Making Animals*, 76 AM. PSYCH. 781 (2021), <https://doi.org/10.1037/amp0000674>.

403 See *id.* at 5.

404 *Id.* at 1.

405 *Id.*

that shared beliefs, ideologies, and norms about ethnicity/race can be fundamentally wrong yet persist if those beliefs, ideologies, and norms are coherent. Humor has the power to show that racist beliefs, ideologies, and norms are incoherent. Humor also can facilitate the dissemination and adoption of alternative coherent beliefs, ideologies, and norms that are not racist.

A final example of utilizing humor to discuss and combat racism is a satiric December 15, 1984, *Saturday Night Live* skit: *White Like Me*.<sup>406</sup> The name of this skit plays on the title of a book by Caucasian journalist John Howard Griffin, who took medication to darken his skin and wrote about his experiences while traveling in 1950's deep southern United States.<sup>407</sup> In the laugh-out-loud skit, comedian Eddie Murphy experiences America as a white man by hiring the best makeup artists to apply white makeup to his face and hands, watching lots of the television show *Dynasty*,<sup>408</sup> and reading a whole bunch of Hallmark cards. He then becomes Mr. White and gets a free newspaper from a white shopkeeper, free drinks during a musical party after the last black man gets off a Manhattan bus, and—without any credit, collateral, identification, or loan application—is given free money by a white banker. It is not just Eddie Murphy's skin color that has changed from black to white. The skit envisions and portrays the whole universe that Murphy perceives, and is perceived by, that has changed.<sup>409</sup>

## V. CONCLUSIONS

Despite the dominant, popular narrative about Asians and Asian Americans being the so-called model minority (for example, studious, hard-working, and excelling at mathematics), there is a long history of anti-Asian and anti-Asian American racism in the United States.<sup>410</sup> Even before COVID-19, many Asian Americans felt that American media portrayed them, and other Americans saw them, as perpetual foreigners.<sup>411</sup>

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<sup>406</sup> See *Saturday Night Live*, *White Like Me*, NBC (Dec. 15, 1984), <https://www.nbc.com/saturday-night-live/video/white-like-me/n9308> [https://perma.cc/VTF7-WBQD].

<sup>407</sup> See generally JOHN HOWARD GRIFFIN, *BLACK LIKE ME* (Penguin Books 2010) (1961).

<sup>408</sup> *Dynasty* (ABC television series, 1981–89).

<sup>409</sup> This Article's appendix considers how to achieve DEI by empathy through personal perspective pivoting.

<sup>410</sup> Adrain De Leon, *The Long History of Racism Against Asian Americans in the U.S.*, PBS NEWS HOUR (Apr. 9, 2020, 11:36 AM), <https://www.pbs.org/newshour/nation/the-long-history-of-racism-against-asian-americans-in-the-u-s>.

<sup>411</sup> Christopher Hoffman, *Perpetual Foreigners: A Reflection on Asian Americans in the American Media*, HUFFPOST (Nov. 1, 2016, 6:49 AM), <https://www.huffpost.com/entry/perpetual->

Although racism towards Asians and Asian Americans was already a fact of life before the current pandemic, COVID-19 exacerbated such racism and the current American political climate increased public displays of such racism.

After the police use of excessive lethal force in the inhumane, unjustified killing of George Floyd on May 25, 2020, world-wide protests erupted in support of the Black Lives Matter movement.<sup>412</sup> The killing of George Floyd, Ahmaud Arbery, Breonna Taylor, Tony McDade, Elijah McClain, Tamir Rice, and many other African-Americans by white law enforcement officers or white vigilantes are only the most recent examples of a centuries-long history of lethal violence against black people in America. As University of California, Irvine professor of political science and Asian American studies Claire Jean Kim observes, “Asians have faced various forms of discrimination, but never the systematic dehumanization that black people have faced during slavery and continue to face today.”<sup>413</sup> Kim acknowledged and stressed the differences between experiences of Asian Americans (e.g., citizenship hurdles, immigration bans, and internment camps) versus African-Americans (e.g., lynching, segregation, and police brutality).<sup>414</sup>

Educator Jane Kim wrote an impassioned essay about how Asian Americans can “embark on the lifelong journey to being anti-racist and fighting racism, especially when it comes to anti-Blackness.”<sup>415</sup> Instead of letting ourselves be pitted against each other by such rhetorical devices as the model minority myth, all minorities should unite to combat structural, systemic racism, and also sexism because of the intersectionalities among race, gender, sexual orientations, class, disabilities, and physical appearance.<sup>416</sup> America’s two fastest-growing immigrant minority communities—Asian Americans and Hispanic Americans—have a shared literary aesthetic portraying the Cold War as it exploded across Asia and

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foreigners-a-reflection-on-asian-americans\_b\_5810b616e4b0f14bd28bd19a.

<sup>412</sup> BLACK LIVES MATTER, <https://blacklivesmatter.com/> (last visited Mar. 12, 2022).

<sup>413</sup> Kat Chow, ‘Model Minority’ Myth Again Used As A Racial Wedge Between Asians and Blacks, NPR: CODE SW!TCH (Apr. 19, 2017, 8:32 AM), <https://www.npr.org/sections/codeswitch/2017/04/19/524571669/model-minority-myth-again-used-as-a-racial-wedge-between-asians-and-blacks>.

<sup>414</sup> *Id.*

<sup>415</sup> Jane Kim, *An Asian American Guide to Dismantling Anti-Blackness*, ASIAN AM. CHRISTIAN COLLABORATIVE (May 30, 2020), <https://www.asianamericanchristiancollaborative.com/article/asian-american-guide-anti-blackness>.

<sup>416</sup> See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 166.



Latin America, uneven economic opportunities of the post-civil rights era, and similar roles in supplying labor to power global capitalism.<sup>417</sup>

Many individuals throughout history have noted that human beings share much more in common than we have in differences. For example, recently U.S. Senator from New Jersey Cory Booker eloquently said, “The lines that divide us are nowhere near as strong as the ties that bind us.”<sup>418</sup> Yet, some individuals and leaders emphasize individuals’ differences to engage in blaming of others, conflicts, and scapegoating. The tribal-like rivalries that so many college alumni and professional sports team fans fervently engage in annually aptly illustrate how easily such zealous allegiances are formed and passed on to future generations. People are so often too easy to divide, almost for seemingly minor, arbitrary differences. Many political leaders thrive on corporate interests and profit from such divisive rhetoric, conquer and divide strategies, and emphasis about how people differ instead of are similar.

Racism is a form of willing ignorance about people who differ in their skin pigmentation. Racism is deeply ingrained into American culture, history, society, and economy.<sup>419</sup> Overcoming racism requires cultural, economic, institutional, social, and organizational changes. In reflecting about what she learned from almost fifty years of conducting that exercise at corporations, educational institutions, and other organizations,<sup>420</sup> Jane Elliott logically noted: “Love is not the answer to the problems of the — isms in our society; the answer is justice.”<sup>421</sup> Overcoming racism also requires changing people’s hearts and minds. University of San Francisco law professor Rhonda V. Magee<sup>422</sup> offers a compassionate, embodied

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417 LONG LE-KHAC, *GIVING FORM TO AN ASIAN AND LATINX AMERICA* (2020).

418 The Late Show with Stephen Colbert, *Sen. Cory Booker’s Live Reaction to Trump’s Frightening Message to White Supremacists*, YOUTUBE (Sept. 30, 2020), [https://www.youtube.com/watch?v=o\\_ls5xpXX1s](https://www.youtube.com/watch?v=o_ls5xpXX1s) (featuring U.S. Sen. Booker speaking at 8:32 to 8:37).

419 See Birungi Ives, *The Solution to Racism, Sexism, Homophobia, Underlying Prejudice, and Overt Hate*, MEDIUM (July 12, 2017), <https://medium.com/thrive-global/the-solution-to-racism-sexism-homophobia-underlying-prejudice-and-overt-hate-5318f282cde> (stating, “Racism has no bounds and is both overtly and subversively indoctrinated into the lives, minds and words of people, regardless of education, socioeconomic status and location.”).

420 See generally Jane Elliott, *It’s All About Ignorance: Reflections from the Blue-eyed/Brown-eyed Exercise*, in *CAMBRIDGE HANDBOOK OF THE PSYCH. OF PREJUDICE* 655 (Chris G. Sibley & Fiona Kate Barlow eds., 2017) (presenting Identification with All Humanity Scale).

421 *Id.* at 665.

422 *Rhonda V. Magee*, UNIV. OF S.F. SCH. OF L., <https://www.usfca.edu/law/faculty/rhondamagee> (last visited Mar. 12, 2022); see also *About Rhonda V. Magee, M.A., J.D.*, RHONDA V. MAGEE, <https://www.rhondavmagee.com/about-mindfulness-trainer/> (last visited Mar. 12, 2022, 5:05 PM).

mindfulness-based, and pragmatic approach to confronting systemic racial injustice and proceeding to healing.<sup>423</sup>

Lee Wong is a sixty-nine-year-old Asian American, who as chairman of the board of trustees meeting of West Chester township, Ohio revealed in a public meeting of the board, his chest scars from serving in the United States army.<sup>424</sup> Mr. Wong movingly stated, “prejudice is hate. We need to be kinder, gentler to one another because we are all the same. We are one human being on this earth.”<sup>425</sup> To overcome systemic racism, all of us must be willing to learn to be more caring, compassionate, empathetic, and mindful.<sup>426</sup> With the introduction of COVID-19 vaccines, a new President, and the first Asian American, African-American, and woman vice President, there is reason to hope that Americans will be more caring, compassionate, empathetic, and mindful. This Article concludes with a hopeful, optimistic quote from Moises Velasquez-Manoff, a science journalist and the author of the book, *An Epidemic of Absence: A New Way of Understanding Allergies and Autoimmune Diseases*:<sup>427</sup>

If we could begin to grasp the limits of the planet we live on, if we could understand that the earth itself is an island and that we are all dependent on one another for survival, perhaps we would see each other differently, too — and have less use for the very idea of race.<sup>428</sup>

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<sup>423</sup> RHONDA V. MAGEE, *THE INNER WORK OF RACIAL JUSTICE: HEALING OURSELVES AND TRANSFORMING OUR COMMUNITIES THROUGH MINDFULNESS* (TarcherPerigee 2019); *My Book*, RHONDA V. MAGEE, <https://www.rhondavmagee.com/my-book/>.

<sup>424</sup> West Chester Township, Board of Trustees Regular Meeting, VIMEO (Mar. 23, 2021), <https://vimeo.com/528295543>.

<sup>425</sup> Neil Vidgor, ‘*Is This Patriot Enough?*’: Asian-American Man Reveals Battle Scars as He Calls Out Bias, N.Y. TIMES (Mar. 28, 2021), <https://www.nytimes.com/2021/03/28/us/lee-wong-soldier-asian-american.html>.

<sup>426</sup> See generally Peter H. Huang, *Boost: Improving Mindfulness, Thinking, and Diversity*, 10 WM. & MARY BUS. L. REV. 139 (2018).

<sup>427</sup> MOISES VELASQUEZ-MANOFF, *AN EPIDEMIC OF ABSENCE: A NEW WAY OF UNDERSTANDING ALLERGIES AND AUTOIMMUNE DISEASES* (paperback ed., 2013).

<sup>428</sup> Moises Velasquez-Manoff, *Want to Be Less Racist? Move to Hawaii*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/opinion/sunday/racism-hawaii.html>.

## APPENDIX: EMPATHY THROUGH PERSONAL PERSPECTIVE PIVOTING

This appendix introduces a conceptual analysis about racism and how to achieve DEI (Diversity, Equity, and Inclusion) by a paradigm-shift of Empathy Through Personal Perspective Pivoting (ETPPP).<sup>429</sup> This appendix is partially inspired by applied mathematician Eugenia Cheng's recent, popular book advocating rethinking the notion of gender itself, based on Cheng's area of research specialty, category theory.<sup>430</sup> In two video talks, Cheng explains how category theory can be helpful in life,<sup>431</sup> and to understand the world.<sup>432</sup> In both talks, Cheng abstracts from the prime factorization of a composite number to illustrate the concepts of privilege,<sup>433</sup> from gender, race, and sexual orientation.

Category theory is a general mathematical theory of structures and of systems of structure. In 1945, two mathematicians, Samuel Eilenberg and Saunders MacLane introduced the concept of categories.<sup>434</sup> Category theory has evolved to have a central position in modern mathematics, theoretical computer science, and quantum physics. Category theory offers a powerful language, or conceptual framework, to visualize universal

<sup>429</sup> See also Peter H. Huang, *Addressing Emotions from COVID-19, Racial Inequity, and Civil Unrest: Chronic Stress, Leadership, and Loneliness*, Am. Bar Ass'n, Section Disp. Resol., (June 18, 2020), [https://americanbar.zoom.us/rec/play/vZQkfr-h-j03G1Gc5QSDUaloW47sLK6sh3IY-JenU\\_mAXUBMAGGuNuHN7ZEtYee96BjLEGdsTzliQGx?continueMode=true&\\_x\\_zm\\_rtaid=hXTgo0EbQn-CGy82j2sl7w.1596139200498.1f541f05f0dbd197ef93356410099b06&\\_x\\_zm\\_rhtaid=601](https://americanbar.zoom.us/rec/play/vZQkfr-h-j03G1Gc5QSDUaloW47sLK6sh3IY-JenU_mAXUBMAGGuNuHN7ZEtYee96BjLEGdsTzliQGx?continueMode=true&_x_zm_rtaid=hXTgo0EbQn-CGy82j2sl7w.1596139200498.1f541f05f0dbd197ef93356410099b06&_x_zm_rhtaid=601).

<sup>430</sup> See generally EUGENIA CHENG, *X + Y: A MATHEMATICIAN'S MANIFESTO FOR RETHINKING GENDER* (Basic Books 2020); see also Eugenia Cheng, *How to Undo Gender Stereotypes in Math—With Math!*, WIRED (Aug. 25, 2020), <https://www.wired.com/story/how-to-undo-gender-stereotypes-in-math-with-math/>; Katy Guest, *x + y by Eugenia Cheng Review – An End to the Gender Wars?*, GUARDIAN (July 22, 2020), <https://www.theguardian.com/books/2020/jul/22/x-y-by-eugenia-cheng-review-an-end-to-the-gender-wars>; Cathy O'Neil, *Want a Better Way to Think About Gender? Use Math*, N.Y. TIMES (Sept. 4, 2020), <https://www.nytimes.com/2020/09/04/books/review/x-y-mathematicians-manifesto-gender-eugenia-cheng.html>; *To the Mathematician Eugenia Cheng, There's No Gap Between Art and Science*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/08/13/books/review/eugenia-cheng-by-the-book-interview.html>.

<sup>431</sup> Lambda World, *Eugenia Cheng, Category Theory in Life*, YOUTUBE (Nov. 3, 2017), <https://youtu.be/ho7oagHeqNc>.

<sup>432</sup> TEDx Talks, *How Abstract Mathematics Can Help Us Understand the World | Dr. Eugenia Cheng | TEDxLondon*, YOUTUBE (July 19, 2018), [https://youtu.be/pUN\\_DPlpQtE](https://youtu.be/pUN_DPlpQtE).

<sup>433</sup> See Natalya Dell, *Intersecting Axes of Privilege, Domination, and Oppression*, NATALYAD (Feb. 10, 2014), <https://sites.google.com/site/natalyadell/home/intersectionality>; see also Charlene Wong, *Fancy Terminology*, JUDGE-ME-NOT: BY MY CIRCUMSTANCES, <https://judge-me-not.weebly.com/fancy-terminology.html>; Kathryn Pauly Morgan, *Describing the Emperor's New Clothes: Three Myths of Education (In)Equality*, in *THE GENDER QUESTION IN EDUCATION: THEORY, PEDAGOGY, & POLITICS* 105 (Ann Diller et al., eds. 1996).

<sup>434</sup> Samuel Eilenberg & Saunders MacLane, *General Theory of Natural Equivalences*, 58 TRANS. AM. MATH. SOC'y 231, 237 (1945).

components of a family of structures of a particular kind, and how structures of different kinds are interrelated. Category theory is potentially a powerful formal tool for analyzing such concepts as truth, system, and space. Category theory also provides a different theoretical conception of sets and, as such, a possible alternative to standard set-theoretical foundations for mathematics. In doing so, category theory raises issues about ontology and epistemology.

Cheng advocates moving away from a set-theoretic way of thinking and examining intrinsic traits (for example, what do all men or all women have in common, to say nothing of nonbinary or gender-fluid people) and toward a category-theoretic approach of thinking about relationships (for example, how do certain character traits group humans together—these may have cultural association or statistically observed frequency in a proper subset of humanity, and are not exclusive to a particular proper subset of humanity). This appendix takes Cheng's advice and applies her suggestion to reconceptualize the very notion of race itself.

Any individual can be thought of as having particular values in many dimensions, e.g., weight, height, age, education, and physical location on the planet. Those values can and do change over time. If the units or scales in which those dimensions are measured change, then that same individual now would be described by different numerical values on those dimensions. One can also change basis vectors in which coordinates are expressed without changing scales or units of measurement along any single dimension and every individual changes their coordinate values. An example is going from rectangular coordinates in a two-dimensional plane to polar coordinates,<sup>435</sup> or from rectangular coordinates in a three-dimensional space to spherical coordinates.<sup>436</sup>

The idea of ETPPP is analogous to a mathematical notion in linear algebra, namely that of changing a vector's coordinates (or more precisely the basis vectors in which, and with respect to, coordinates are expressed as linear combinations of the basis vectors).<sup>437</sup> A more familiar example of an ETPPP is when one exercises by playing a video game, such as Wii Sports. In our usual three-dimensional space, one's physical movements would appear to an outside observer as being merely seemingly incongruous motions in space. To oneself and any observer who sees the

<sup>435</sup> Christopher Stover & Eric W. Weisstein, *Polar Coordinates*, WOLFRAM MATH WORLD, <https://mathworld.wolfram.com/PolarCoordinates.html>.

<sup>436</sup> *Rectangular, Cylindrical, and Spherical Coordinates*, HARTLEY MATH, <http://hartleymath.com/calculus3/cylindrical-spherical-coordinates>.

<sup>437</sup> 3Blue1Brown, *Change of Basis | Chapter 13, Essence of Linear Algebra*, YOUTUBE (Sept. 11, 2016), <https://youtu.be/P2LTAUO1TdA> (suggesting “a mathematical sort of empathy” results from a change in basis in linear algebra, at 12:00-12:21).

television screen, one is playing a game of tennis, baseball, bowling, or golf. The video game projects one's physical actions into an alternate virtual reality, where the same physical actions have a different representation and meaning.

The fictional holodeck technology featured significantly in *The Big Goodbye*,<sup>438</sup> the eleventh episode of the television series, *Star Trek: The Next Generation*, is an example of a sophisticated virtual-reality simulation. This example also suggests that one possible way to educate people about how racism feels is through people assuming the roles of avatars from another race.<sup>439</sup> For an application to a nonhuman species, think of the movie, *Avatar*.<sup>440</sup>

*I See You*<sup>441</sup> is the main theme song,<sup>442</sup> sung over the film *Avatar*'s end credits. In the language of the fictional indigenous Na'vi species in *Avatar*, *I See You* is a phrase with two versions: 1) Oel ngati kame, a neutral greeting, and 2) Oel ngati kameie, expressing a positive feeling towards meeting someone. Also, the Na'vi utilize two versions of the verb see: 1) tse'a, referring to vision in the physical sense, and 2) kame, conveying vision in a spiritual sense, which is more analogous to comprehension or understanding.<sup>443</sup> A cornerstone of Na'vi philosophy is "to see" in the sense of opening one's heart and mind to the present.<sup>444</sup>

Senator from California, Kamala Harris, stated in her speech accepting the Democratic Party vice presidential nomination, "This virus, it has no eyes, and yet it knows exactly how we see each other — and how we treat each other. And let's be clear — there is no vaccine for racism. ... We've gotta do the work to fulfill that promise of equal justice under law."<sup>445</sup> Dr. Martin Luther King said in a speech at Cornell College, Mount

<sup>438</sup> *Star Trek: The Next Generation: The Big Goodbye* (Paramount Domestic Television Jan. 11, 1988).

<sup>439</sup> See, e.g., Nick Yee & Jeremy Bailenson, *The Proteus Effect: The Effect of Transformed Self-Representation on Behavior*, 33 HUM. COMMUN. RSCH. 271 (2007) (presenting experimental evidence that people's behavior conforms to their digital self-representation independent of how others perceive them—a process called the Proteus Effect.); Nick Yee et al., *The Proteus Effect: Implications of Transformed Digital Self-Representation on Online and Offline Behavior*, 36 COMMUN. RSCH. 285 (2009) (presenting experimental evidence that "virtual bodies can change how we interact with others in actual avatar-based online communities as well as in subsequent face-to-face interactions.").

<sup>440</sup> AVATAR (20th Century Fox 2009).

<sup>441</sup> LEONA LEWIS, *I See You (Theme from Avatar)*, on AVATAR: MUSIC FROM THE MOTION PICTURE (Atl. Records 2009).

<sup>442</sup> Avatar Wiki, *I See You*, FANDOM,

[https://james-camerons-avatar.fandom.com/wiki/I\\_See\\_You#Avatar\\_Theme\\_Song](https://james-camerons-avatar.fandom.com/wiki/I_See_You#Avatar_Theme_Song).

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

<sup>445</sup> Matt Stevens, *Kamala Harris Accepts Vice-Presidential Nomination: Full Transcript*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/us/politics/kamala-harris-dnc->

Vernon, Iowa, on Oct. 15, 1962, “I’m convinced that men hate each other because they fear each other. They fear each other because they don’t know each other, and they don’t know each other because they don’t communicate with each other, and they don’t communicate with each other because they are separated from each other.”<sup>446</sup> Separation, lack of communication, and lack of knowledge among people occur when people do not see other people as individuals and instead see others as merely representing composite groups.

It is important to realize the idea of race itself can be understood as an artificial, historically contingent, and man-made political and social construction. Race is not a naturally, objectively, and scientifically based genetic or biological concept.<sup>447</sup> From the social constructivist perspective, “to which most (but not all) academics and judges say they subscribe,”<sup>448</sup> race “cannot refer to an attribute, a genetically produced trait, or a signifier—level of melanin in skin, phenotype, distinctive names or speech—that people just have and thereby obviously belong to a designated racial group.”<sup>449</sup> Instead, race “references a complexly constituted social fact, whereby material and dignitary opportunities are organized such that certain physical and cultural signifiers become the salient markers of consequential cultural categories, and those categories are constituted by a constellation of social relations and meanings with a definite content and organization.”<sup>450</sup>

The social constructivist view of race suggests race is not an exogenously fixed attribute or dimension of an individual. As Professor Kohler-Hausmann notes about Eddie Murphy’s Mr. White character, the very notion of “‘white’ is essentially a metonym for a constellation of social meanings produced through a complex history of slavery, immigration, and countless other forces, not a melanin deficit (or white face makeup in his case).”<sup>451</sup> So, we should perceive and model race as, in English, a constellation, or in financial parlance, a “portfolio,” or in mathematical terms, a “vector” of component attributes. The point is then as people’s personal perspectives change, then so do the “coordinates” of

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speech.html.

<sup>446</sup> Martin Luther King, Jr., Address at Cornell College, Mount Vernon, Iowa (Oct. 15, 1962), available at <https://news.cornellcollege.edu/dr-martin-luther-kings-visit-to-cornell-college/>.

<sup>447</sup> Michael Yudel et al., *Taking Race Out of Human Genetics*, 351 SCI. 564 (2016).

<sup>448</sup> Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, 113 NW. U. L. REV. 1163, 1168 n.12 (noting that “if one is not a constructivist about race, then I don’t see any way one can recognize discrimination as a wrong distinctive from, say, general distributive injustice or inefficiency.”).

<sup>449</sup> *Id.* at 1170 (summarizing very briefly the social constructivist theory of race).

<sup>450</sup> *Id.* at 1170.

<sup>451</sup> *Id.* at 1214.

their and others' races change. In other words, changing one's perspective changes how one sees the world and the world sees one.

DEI can be facilitated if people learn to regularly engage in ETPPP. So, how can people be encouraged to do so? One way already mentioned earlier is to embed ETPPPs into engaging, fun video games. Another is through practicing mindfulness<sup>452</sup> and Loving-Kindness Meditation (LKM).<sup>453</sup> ETPPP is effectively a form of empathy to see the world and be seen by the world from another's perspective. Memorable, emotionally moving, and resonant literature, movies, and songs all have the potential of causing ETPPPs in their audiences of listeners, viewers, and readers, respectively.<sup>454</sup> For example, when the Lassie, "a fictional female Collie that is arguably the most recognizable and famous dog character of all times,"<sup>455</sup> passed away on a television episode, millions of viewers cried.<sup>456</sup>

Science fiction is a particularly apt medium to engage racial and other socially charged issues in a non-threatening manner because of its fictional nature set in unfamiliar, yet somewhat recognizable, surroundings. A memorable example is *Let That Be Your Last Battlefield*,<sup>457</sup> the fifteenth episode from the third season of the iconic television show, *Star Trek, The Original Series*. In this episode, Belle has been pursuing Lokai for 50,000 Earth years. Both are from a planet, where Lokai and his people have skin which is ink-black on the left side and chalk-white on the right side. Belle and his people have skin which is ink-black on the right sides and chalk-white on the left side. That is the source of their conflict. In other words, their peoples are literally mirror image reflections of each other. Actors Frank Gorshin and Lou Antonio played Belle and Lokai, the black/white

<sup>452</sup> Adam Lueke & Bryan Gibson, *Mindfulness Meditation Reduces Implicit Age and Race Bias: The Role of Reduced Automaticity of Responding*, 6 SOC. PSYCH. & PERSONALITY SCI. 284 (2015); Adam Lueke & Bryan Gibson, *Brief Mindfulness Meditation Reduces Discrimination*, 3 PSYCH. CONSCIOUSNESS: THEORY, RSCH. & PRAC. 34, 39 (2016).

<sup>453</sup> See, e.g., Peter H. Huang & Kelly J. Poore, *Can You Hear Me Later and Believe Me Now? Behavioral Law and Economics of Chronic Repeated Ambient Acoustic Pollution Causing Noise-Induced (Hidden) Hearing Loss*, 29 S. CA. REV. L. & SOC. JUST. 193, 263-65 (2020) (discussing the practice of LKM to mitigate bias).

<sup>454</sup> Marina Bianchi, *The Magic of Storytelling: How Curiosity and Aesthetic Preferences Work*, 8 ECON. E-J. 1 (2014), [www.economics-ejournal.org/economics/journalarticles/2014-44](http://www.economics-ejournal.org/economics/journalarticles/2014-44); Leigh Caldwell, *Cognitive Goods, Normal Goods and the Market for Information* (Jan. 2019) (unpublished presentation) (available at <https://www.aeaweb.org/conference/2019/preliminary/548>).

<sup>455</sup> *What Type of Collie was Lassie?*, Old-Time Farm Shepherd, <https://www.oldtimefarm shepherd.org/breed-information/type-collie-lassie/> (last visited Mar. 13, 2022).

<sup>456</sup> THOMAS C. SCHELLING, *The Mind as a Consuming Organ*, in CHOICE AND CONSEQUENCE: PERSPECTIVES OF AN ERRANT ECONOMIST 328, 328 (1984).

<sup>457</sup> *Star Trek: Let That Be Your Last Battlefield* (NBC television broadcast Jan. 10, 1969).

and white/black aliens. This Article advocates humor as another possible language and form of communication to start honest dialogues and ongoing conversations about race and racism in America. Humor, like science fiction, can provide a medium in which topics difficult for discussion become more approachable and less contentious than in a solemn and somber setting.