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Discrimination in the Wen Ho Lee Case:
Reinterpreting the Intent Requirement in
Constitutional and Statutory Race
Discrimination Cases

Miriam Kim†

In 1999, U.S. government scientist Wen Ho Lee was terminated from his
job at Los Alamos National Laboratory and charged with espionage. The
U.S. government suspected Dr. Lee of stealing top secret nuclear weapons
information for the Chinese government. What ensued was one of the
most highly publicized cases of racial profiling in Asian American history.
The author contends that the investigation of Wen Ho Lee was tainted
with stereotypes of perpetual foreignness, and that Lee was selectively
targeted and treated differently because of his race. Although a plea
bargain between Lee and the government officially ended the legal battle,
the author hypothesizes how Lee would have fared had he been able to
pursue a claim of racial discrimination either through selective
prosecution under the Equal Protection Clause, or an employment
discrimination claim under Title VII. The author shows how the current
“intent requirement,” in both types of claims, fails to adequately address
subtle forms of discrimination such as those that may have been at play in
the Lee affair. The author proposes that a uniform interpretation of intent
based on causation would solve this problem by expanding the scope of
inferences the fact finder would be allowed to draw in order to account
for such forms of discrimination.


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Harvard University. I give special thanks to Dr. Wen Ho Lee for serving as an inspiration to Asian
Americans everywhere; I apologize for any inaccurate statements I have made about your experience. I
also thank Linda Krieger, the Employment Discrimination Seminar, and the Asian Law Journal for their
support and insightful comments. I thank my fiancé, Henry Kim, and my parents for their undying
support. Lastly, I thank God for showing me true justice in Jesus. This Comment was written in the
Spring of 2001 and won the Asian Law Journal National Student Writing Competition.
INTRODUCTION

In March 1999, U.S. government scientist Wen Ho Lee was terminated from his employment at Los Alamos National Laboratory. In December of that year, he was indicted on fifty-nine counts of mishandling classified information. The indictment alleged that Lee had transferred classified files onto a declassified part of the computer system and downloaded them onto portable tapes. The prosecution characterized Lee as “a national security threat” who had stolen the “crown jewels” of the nation’s nuclear weapons secrets. Persuaded by the prosecution, the court decided to hold Lee without bail pending trial. But after Lee had spent nine months in solitary confinement, the prosecution agreed to dismiss the case if Lee would plead guilty to a single count of mishandling classified information.

On September 13, 2000, Judge James A. Parker of the United States District Court for the District of New Mexico accepted the plea and freed Lee. In a rare public apology to a criminal defendant, Judge Parker told

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2. *Id.*
Lee: Although, as I indicated, I have no authority to speak on behalf of the Executive Branch, the President, the Vice-President, the Attorney General, or the Secretary of the Department of Energy... I sincerely apologize to you, Dr. Lee, for the unfair manner you were held in custody by the Executive Branch.

Judge Parker's unusual apology to Lee and his deferential tone towards the Executive Branch suggest that something went very wrong in the Wen Ho Lee case. The judge indicated that there might have been suspicious misconduct on the part of the Department of Justice, the U.S. Attorneys' Office, and the Federal Bureau of Investigation. In releasing Lee, Judge Parker went on to tell him:

What I believe remains unanswered is the question: What was the government's motive in insisting on your being jailed pretrial under extraordinarily onerous conditions of confinement until today, when the executive branch agrees that you may be set free essentially unrestricted? This makes no sense to me.

Wen Ho Lee's supporters and civil rights proponents would answer Judge Parker's question by characterizing the government's motive as discriminatory. They would argue that Lee was selectively prosecuted and unjustly terminated from his employment because of his race.

In fact, Wen Ho Lee's attorneys brought a successful discovery motion leading to an initial order for in camera review of documents relating to racial selective prosecution. However, the parties reached a plea agreement just two days before the discovery was due. And while Lee has not filed a Title VII claim, his hypothetical case illustrates some of the problems plaintiffs face in proving employment discrimination.

5. Id. at 58.
6. Id. at 55.
7. Id. at 50.
10. See Transcript at 25-26, Lee (D.N.M. Sept. 13, 2000) (No. 99-1417-JC). Asian American civil rights activists continue to pressure the Department of Justice to seek release of these documents and to launch an independent inquiry into the handling of the Wen Ho Lee case. As part of that effort, Asian American civil rights groups have requested that an independent commission be awarded access to the type of documents that would have been produced in response to the selective prosecution discovery motion had the plea agreement not been reached. See Press Release, Asian Pacific American Civil Rights Groups Call for Independent Commission to Investigate Case (Sept. 27, 2000).
11. Under the terms of his plea agreement with the United States government, Lee waived his right to bring a collateral challenge to his sentence. See Transcript at 44, Lee (D.N.M. Sept. 13, 2000) (No. 99-1417-JC). Nevertheless, his hypothetical employment discrimination case provides a good illustration of the inadequacies of the intent requirement in individual disparate treatment cases. This Comment examines how the Wen Ho Lee case would be analyzed (but not necessarily how it would be
Accordingly, this Comment analyzes the Wen Ho Lee affair from two angles: (1) as a racial selective prosecution claim under the Equal Protection Clause; and (2) as an individual disparate treatment race discrimination claim under Title VII. There exist important parallels between the prosecutorial and employment contexts, particularly where the basis of termination is alleged criminal misconduct (as in Wen Ho Lee’s case). In such cases, an employment decision is not that different from a decision to prosecute. To prove discrimination in both contexts, the plaintiff must show the existence of intent to discriminate.

This is a high standard to meet. The Wen Ho Lee affair illustrates the difficulties of proving intent in constitutional and statutory claims. The existing definition of intent in race discrimination cases is motivational: a plaintiff must prove that the discrimination was purposeful. However, a prosecutor or employer unintentionally may make an adverse action driven by unconscious racial bias. The victim of such action has no remedy under existing law. This understanding of intent is insufficient to redress subtler forms of discrimination, thereby placing a virtually insurmountable burden on a claimant like Wen Ho Lee.

Numerous scholars have criticized the existing interpretation of the intent requirement and proposed reforms in constitutional and statutory contexts. But these studies tend to focus on either constitutional or

12. This Comment does not analyze the Wen Ho Lee case under other anti-discrimination statutes, other theories of liability (e.g., systemic disparate treatment, disparate impact, etc.), or other possible bases of discrimination (e.g., national origin, age, etc.).


statutory claims with little discussion about the similarities between the two areas. This Comment proposes a uniform interpretation of intent that would expand the scope of inferences the factfinder would be allowed to draw in both contexts in order to account for subtle forms of discrimination that may exist in a racial profiling case like Wen Ho Lee's.

The Comment is structured as follows: Part I provides a brief outline of the Wen Ho Lee affair from early FBI investigations to Lee's indictment, and ultimately, his release. To place the affair into a proper context, this Part begins with a brief history of discrimination against Asian Americans. Part II describes the existing interpretation of the intent requirement and uses social cognition theory to demonstrate how this interpretation often fails to account for subtler forms of discrimination. Part III describes the subtle forms of discrimination and bias that may have been at work at key stages of the decision-making processes in the Wen Ho Lee affair, and illustrates how the existing proof frameworks for selective prosecution and employment discrimination cases make it especially difficult for a claimant like Wen Ho Lee to satisfy the intent requirement. Part IV suggests that a causation-based interpretation of intent more adequately accounts for subtle forms of discrimination, and outlines a uniform standard that can be applied in constitutional and statutory contexts.

I. THE ASIAN AMERICAN STEREOTYPE OF FOREIGNNESS AND THE WEN HO LEE CASE

A. Asian American History: A History of Presumed Foreignness

From the first media leak in March 1999 through his release in September 2000, Wen Ho Lee was portrayed as a disloyal, inscrutable foreigner. This type of stereotyping and bias against Asian Americans like Lee is not new. Indeed, a notion of “foreignness” has been attributed to Asian Americans for over a century, not only in popular media but also in legal discourse.}

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17. One exception is Selmi, supra note 14.
18. The term Asian American is used in this Comment to refer to persons of Asian descent in America having origins in East Asia, Southeast Asia, and the Indian subcontinent.
22. A particularly notable illustration of this racial prejudice is Justice Harlan’s dissenting statement in Plessy v. Ferguson: “There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States . . . I allude to the Chinese race . . . .” Plessy v.
Neil Gotanda introduced the notion of "foreignness" as a basis for understanding the history of anti-Asian sentiment. Central to the stereotype is a perception of "other-ness," inassimilability, and disloyalty. Frank Wu, in a recent article on the Wen Ho Lee case, referred to the stereotype as the "perpetual foreigner assumption - that Asians are sojourners, visitors, and/or guests who cannot overcome an inherent alien status." In other words, there is a prevailing stereotype that Asian Americans are so different that they cannot fully assimilate into American society. Conversely, there is an assumption that Asian Americans possess perpetual loyalty to their ancestors' country of origin—even if they are United States citizens.

The history of restrictive immigration and naturalization policies demonstrates the deep-rooted perception of Asian Americans as foreign. Originally, Asian immigrants came to the United States in the mid-1800s to meet labor demand. But as their numbers increased, they were perceived as a threat and the government began restricting their entry. In response, Congress passed the Chinese Exclusion Act in 1882, suspending Chinese immigration for ten years. The Geary Act of 1892 extended the ban for an additional ten years; in 1904, the ban was extended indefinitely.

Even when Asian immigrants were able to gain entry into the United States, the government denied them the right to become citizens. For many years, Asian immigrants were the only racial group barred from naturalization. Filipinos and Asian Indians became eligible for naturalization in 1946, but it was not until the passage of the McCarran Walter Act of 1952 that the ban on Asian immigration was lifted and

Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).
25. See, e.g., People v. Hall, 4 Cal. 399, 404-05 (1854) (stating that "[The Chinese] have remained among us a separate people, retaining their original peculiarities of dress, manners, habits, and modes of living, which are as marked as their complexion and language . . . They do not and will not assimilate with our people . . . ."), quoted in Gotanda, supra note 23, at 1188-89.
26. See Turnbull, supra note 20, at 75 (describing the stereotype that "Asian Americans not only possess divided loyalties, which prevent them from being 'real' Americans, but also possess a malignant streak of foreignness, which inevitably renders them suspect").
30. Ch. 60, 27 Stat. 25 (1892).
immigrants of all races were granted naturalization rights. Asian Americans, regardless of their citizenship status, have been especially treated as foreigners and distrusted in time of war. Because Asian Americans are presumed to have a race-based affinity towards their ancestors’ country of origin, the government has viewed them as a threat to the United States - regardless of their citizenship status or individual loyalties. Several historical examples of this phenomenon include World War II, the Korean War, and the Vietnam War.

The most blatant example of distrust of Asian Americans was the Japanese internment during World War II. The government ordered that “all persons of Japanese ancestry, both alien and non-alien” be displaced into internment camps without being charged or placed on trial, fearing that they would endanger the war effort against Japan. The government displaced and interned 120,000 Japanese Americans (two-thirds of whom were American citizens) without regard to their individual loyalty to the United States. Japanese citizens challenged the internment, but the Supreme Court held that it was constitutional on grounds of military necessity.

During the Korean and Vietnam Wars, Asian Americans who participated in the United States’ military effort were distrusted like their Japanese American predecessors in World War II. The irony was that Asians were both allies and enemies in these wars. The United States fought alongside South Koreans against North Korea, and supported the Vietnamese people against the Communist Vietnamese. Nonetheless, “all [Asian] people came to be seen as the enemy by many American soldiers.”

In more recent years, the notion of foreignness has prompted a growing anti-Asian sentiment even during peacetime. For example, a campaign finance scandal raged after the 1996 presidential campaign,

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32. See U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990s 2 (Feb. 1992). Despite the lifting of the immigration ban, Congress retained the national origins system established by the Immigration Act of 1924, effectively continuing discrimination against Asian Americans until the national origins system was banned in 1965. Id. at 5. The Chinese Exclusion Act had previously been repealed in 1943, but Congress set an annual quota of 105 Chinese immigrants. Id. at 4. See also Gotanda, supra note 21, at 1697.
33. See Saito, supra note 21, at 81-85.
37. See Saito, supra note 21, at 84.
38. See id.
alleging that Chinese Americans had made illegal campaign contributions to the Democratic Party. In the wake of the scandal, the Wall Street Journal described Asian Americans as “people with tenuous connections to this country,” and Republican politicians warned of “foreigners buying the White House.”

B. The Wen Ho Lee Affair: Key Prosecutorial and Employment Decisions

This Part outlines a brief background of the Wen Ho Lee affair, focusing on the prosecutorial and employment decision-making processes, to demonstrate how unlawful discrimination, both overt and subtle, may have been at work. This Comment contends that the investigation of Wen Ho Lee was tainted with stereotypes of perpetual foreignness, and that Lee was selectively targeted and differentially treated because of his race.

Wen Ho Lee came to the United States from Taiwan in 1963 for graduate school and was naturalized as an American citizen in 1974. In 1978, he began working at the Los Alamos National Laboratory (LANL), a laboratory managed by the University of California under a contract with the Department of Energy (DOE). In 1980, Lee joined LANL’s X Division, the bomb-design unit, as a code developer working on computer simulation programs for nuclear weapons.

Fourteen years after Lee started at LANL, on September 25, 1992, China tested a new nuclear bomb, representing a breakthrough in China’s nuclear weapons technology. American intelligence experts were not alarmed initially, as other countries had previously mastered the technology. Further, the United States had been developing an open and cooperative relationship with China since the end of the Cold War. As part of this effort, American and Chinese nuclear scientists began making visits, exchanging ideas, and sharing research. During his tenure at LANL, Lee participated in these exchanges and traveled to countries throughout the world, including China, to attend meetings and present papers.

The DOE began investigating China’s nuclear activities in early 1995. There were allegations that the Chinese had reduced the size of their weapons so dramatically that they must have used stolen American

42. A detailed account of Lee’s experience is not necessary for the purpose of examining the intent requirement in race discrimination cases. However, readers are highly encouraged to read My Country Versus Me, a first-hand account of Lee’s experience before, during, and after imprisonment. See WEN HO LEE & HELEN ZIA, MY COUNTRY VERSUS ME (2001).
45. Id.
46. Id.
47. Id.
secrets. John L. Richter, a renowned bomb designer, concluded that China “might” have significant information about the W-88 Trident D-5 warhead, a nuclear weapon with a nine-inch casing thirty times more powerful than the Hiroshima bomb.

Suspecting espionage, Notra Trulock, then head of intelligence of the DOE, gathered a group of experts to review the evidence that China had stolen American secrets. The experts grew most concerned about a “walk-in document,” a Chinese classified document voluntarily turned over to the CIA by a double agent in 1995 and purportedly containing information on the W-88. Trulock’s experts disagreed as to the significance of the “walk-in document.” Even if China had design information, China could have made the advances on its own or with the benefit of official exchange visits with foreign scientists.

1. The Decision to Investigate and Prosecute Lee

Without any evidence of espionage, the DOE authorized Trulock to broaden his inquiry. In 1996, Trulock and the DOE launched an administrative inquiry (AI) called “Kindred Spirit” to investigate the purported loss of W-88 information. The AI utilized a “matrix analysis” which applied ostensibly neutral criteria including: (1) access to the design information of the W-88; (2) travels to China between 1984 and 1988; and (3) contact with visiting Chinese delegations between 1984 and 1988. DOE officials developed a list of seventy potential suspects. This list was narrowed to twelve “investigative leads” (half with Chinese surnames) to be followed up by the FBI. In the end, the top suspect was Wen Ho Lee.


49. Purdy, supra note 44. But see Case Review, supra note 48 (statement of Notra Trulock, III) (stating that Richter believed that “in fact it was the W-88 evidence that had been compromised”).


51. See Case Review, supra note 48 (statement of Notra Trulock, III) (stating that the debate was initially contentious and that “there were conflicting views as to whether the Chinese had benefited or the extent to which they had benefited from acquisition of the information”). The document was clearly not a blueprint for the W-88, but the experts disagreed as to what, if any, information China had about the W-88. Richter noted that the document confirmed that China knew “the periphery” of the W-88, but not its design. Purdy, supra note 44.

52. Purdy, supra note 44.

53. Id. The name of the AI, “Kindred Spirit,” reflected Trulock’s belief that a single spy had given the Chinese design information for the W-88.

54. Klein, supra note 43, at 150. See also *DEPARTMENT OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL’S REVIEW TEAM ON THE HANDLING OF THE LOS ALAMOS NATIONAL LABORATORY INVESTIGATION* 386 (Mar. 2000) (hereinafter *BELLWS REPORT*) (indicating that records of potential suspects were collected “based upon those with access to W-88 information, those who traveled to the PRC and those who hosted PRC visitors”). Trulock denies the existence of a matrix. But Trulock himself stated that the leads on potential suspects shared common elements: “travel to China or interactions with Chinese nuclear officials; access to nuclear weapons design information; and anomalies or incidents reported in their security files.” Case Review, supra note 48 (statement of Notra Trulock, III).

55. Purdy, supra note 44. Wen Ho Lee’s wife, Sylvia Lee, was also listed as a top suspect with
The evidence against Wen Ho Lee was insubstantial. Lee's access to W-88 information was listed as "moderate."\textsuperscript{57} Lee had traveled to China twice during the period in question — in 1986 and 1988 — both times with DOE approval.\textsuperscript{58} Lee also had contact with visiting Chinese scientists, as did many LANL scientists.\textsuperscript{59} Based on this meager evidence, the DOE issued a final report in May 1996 that Wen Ho Lee had "the opportunity, means and motivation to have compromised the W-88 information."\textsuperscript{60}

Upon receipt of the DOE report, the Federal Bureau of Investigation (FBI) launched a full investigation into Wen Ho Lee.\textsuperscript{61} The investigation was half-hearted and relied heavily on the DOE final report, a departure from the FBI's normal practice.\textsuperscript{62} The FBI accepted the DOE claim that Wen Ho Lee was "the only individual identified...who had the opportunity, motivation and legitimate access" to compromise W-88 secrets.\textsuperscript{63} For more than one year, FBI agents in Albuquerque ignored an order to open inquiries on suspects other than the Wen Ho Lee.\textsuperscript{64} The government also failed to look at the "hundreds, if not thousands, of people at military installations and missile contractors"\textsuperscript{65} to whom W-88 information had been distributed.\textsuperscript{66} The FBI assured the DOE that it would follow up on other potential leak sites but never did.\textsuperscript{67}

At this point, the FBI investigation languished because officials found no evidence of espionage. However, political pressure to identify the perpetrator of the purported leak grew with the rise of a fierce partisan struggle. Republicans accused the Democrats of accepting illegal contributions from China during the 1996 presidential campaign and of giving China access to American technology secrets.\textsuperscript{68} Against this backdrop, the House formed a committee to investigate possible compromises of sensitive technology to China. The Committee reported in

\begin{itemize}
\item 57. Id.
\item 58. Klein, supra note 43, at 146.
\item 59. Purdy, supra note 44.
\item 61. Klein, supra note 43, at 155; Case Update, supra note 60 (statement of Louis J. Freeh).
\item 62. Spy Hunters, supra note 1.
\item 63. BELLOWS REPORT, supra note 55, at 341 (emphasis added).
\item 64. Id. at n.499.
\item 65. Purdy, supra note 44.
\item 66. Case Review, supra note 48 (statement of Notra Trulock, III).
\item 67. Id.
\item 68. See, e.g., 144 CONG. REC. H4248 (1998) (statement of Rep. Ballenger) (implying that the Chinese gave campaign contributions to Clinton and the Democratic party in exchange for technological secrets); 144 CONG. REC. H2338 (1998) (statement of Burton) (alleging that the Democrats received illegal campaign contributions from the Chinese and then obstructed the Congressional investigation into the scandal).
\end{itemize}
late 1998 that China had stolen nuclear secrets.\textsuperscript{69} The Committee’s findings lacked sufficient support\textsuperscript{70} but produced enough political pressure to re-initiate the FBI investigation of Lee.\textsuperscript{71}

As political pressure grew, the FBI’s suspicions of Lee waned. In December 1998, after finally reading the 1996 DOE report, the head of the Albuquerque office concluded that it was a “piece of junk” and noted that there could easily be three hundred suspects.\textsuperscript{72} The FBI’s Albuquerque office wanted to close the two-year-old investigation.\textsuperscript{73}

In the midst of this political backdrop, the new energy secretary, Bill Richardson, apparently bolstering himself to be the Democratic vice presidential candidate, decided that Lee’s continued employment in the X Division was “an unacceptable risk.”\textsuperscript{74} On December 23, 1998, the DOE subjected Lee to a polygraph test, which he passed.\textsuperscript{75} But less than three hours after the polygraph, Lee had his access to the X Division suspended.\textsuperscript{76} Based upon the polygraph results, the FBI’s Albuquerque office “absolutely thought that Lee was not the right man” and prepared to close the case.\textsuperscript{77} But just as the case was about to close, on February 2, 1999, the FBI reviewed the DOE polygraph test and concluded that the results were “at best inconclusive.”\textsuperscript{78} As a result, on February 10, the FBI gave Lee its own polygraph examination, which reported him as being deceptive.\textsuperscript{79}

Meanwhile, the media had learned of the purported W-88 leak.\textsuperscript{80} Despite the FBI’s discouragement, the New York Times published a front-page story on March 6, 1999 that implied that an unnamed Chinese American scientist at LANL had helped China steal nuclear secrets.\textsuperscript{81}

Under public pressure, the FBI subjected Lee to a final interrogation the following day. The FBI agents threatened him with job loss, prison

\textsuperscript{69} A three-volume, declassified, redacted version of the Cox Committee Report, issued in January 1999, is available at <www.house.gov/coxreport>. While the Committee acknowledged that “much [was] unknown about the impact of the thefts,”\textsuperscript{id} it reported that the stolen secrets “gave China design information ‘on a par with our own.’” Chuck McCutcheon, \textit{With Cox Report’s Release, Struggle for Consensus Begins}, CQ WEEKLY, May 29, 1999.

\textsuperscript{70} See Purdy, supra note 44. John M. Spratt Jr., a Democratic representative on the committee, said that the panel “lacked the time and witnesses with sufficient technical background to fully examine the issue.” See also Michael May, ed., \textit{The Cox Committee Report: An Assessment}, Dec. 1999, <http://cisac.stanford.edu> (“Stanford Report”), concluding that “there is no credible evidence presented or instances described of actual theft of U.S. missile technology.” \textit{Id.} at 97. The Stanford Report also concluded that the codes allegedly mishandled by Lee were already available worldwide and of very limited utility to a foreign nation. \textit{Id.} at 55-56.

\textsuperscript{71} Purdy, supra note 44.

\textsuperscript{72} \textit{BELLOWS REPORT, supra note 55}, at 376 n.550 (internal quotations omitted).

\textsuperscript{73} Purdy, supra note 44.

\textsuperscript{74} \textit{Id}.

\textsuperscript{75} \textit{Id}.

\textsuperscript{76} Klein, supra note 43, at 155.


\textsuperscript{78} \textit{Case Update, supra note 60} (statement of Louis J. Freeh).

\textsuperscript{79} See \textit{LEE & ZIA, supra note 42}, at 52.

\textsuperscript{80} Purdy, supra note 44.

detention, and even electrocution – treatment reminiscent of the infamous Rosenberg case – if he did not confess to his dealings with China.82

On March 8, just two days after the publication of the Times story, LANL terminated Lee from his employment.83 Shortly thereafter, the government accused Lee of downloading classified nuclear data information onto an unsecured computer and of transferring those files onto portable tapes.84 On the advice of counsel, Lee refused to tell the government what he had done with those tapes, although he stated that he had properly destroyed them prior to his termination. In a “60 Minutes” interview in August 1999, Lee explained why he had downloaded and copied the files – simply to have backup files of his work.85

2. **The Decision to Prosecute and Deny Bail**

On December 4, 1999, top government officials met at the White House to discuss the potential prosecution of Lee.86 Six days later, Lee was indicted on fifty-nine felony counts87 in violation of the Espionage Act88 and the Atomic Energy Act.89 Thirty-nine of those charges carried a potential sentence of life imprisonment.90 Not a single count related to espionage.91 Instead, Lee was charged “with the intent to injure the United

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83. His termination came within 48 hours of the New York Times article, alleging that LANL was the source of the nuclear information supposedly released to China. A special statement issued by Senators Fred Thompson and Joseph Lieberman noted that “Energy Secretary Richardson has said that it was ‘strictly a coincidence’ that [the firing of Lee] occurred within 48 hours of the first press accounts,” referring to the March 6 article. See Department of Energy, FBI, and Department of Justice Handling of the Espionage Investigation into the Compromise of Design Information on the W-88 Warhead Statement Before the Senate Comm. on Governmental Affairs, 105th Cong. (Aug. 5, 1999) (statement of Fred Thompson, Comm. Chairman, and Joseph Lieberman, Ranking Minority Member), available at <http://www.senate.gov/%7Egov-affairs/080599_china_espionage_statement.html#N_1> (citing William Richardson, CNN Crossfire (Mar. 16, 1999)).

84. Spy Hunters, supra note 1.

85. Purdy, supra note 44. Scientists have testified that making backup copies is a common practice in the national laboratories. For a detailed explanation by Lee as to why he made the tapes, see LEE & ZIA, supra note 42, at 323-27.

86. See Transcript of Proceedings, United States v. Lee (D.N.M. Aug. 15, 2000) (No. 99-1417-JC), as quoted in Transcript at 51, Lee (D.N.M. Sept. 13, 2000) (No. 99-1417-JC). Those present included Attorney General Janet Reno, Secretary of Energy Bill Richardson, FBI Director Louis Freeh, National Security Advisor Samuel Berger, and Assistant U.S. Attorney John Kelly. Lee’s supporters argue that the fact that the meeting was held at the White House rather than the Department of Justice was unusual, and suggested that the prosecutorial decision was political. Id. But see Wen Ho Lee Espionage Case Update Before the Senate Select Comm. on Intelligence and the Senate Judiciary Comm., 106th Cong. (Sept. 26, 2000) [hereinafter Case Update] (statement of Janet Reno, Attorney General) (stating that the purpose of the meeting was not the issue of prosecution but “was to determine whether there would be national security exposure”).


89. 42 U.S.C. §§ 2275, 2276.

90. No civilian has ever been charged under the relevant sections of the Espionage Act, and no individual has been prosecuted under the relevant sections of the Atomic Energy Act. CARES, Understanding the Legal Charges Against Dr. Wen Ho Lee, at <http://www.asianlawcaucus.org/Cares/Charges.htm>.

91. See id.
States, and with the intent to secure an advantage to a foreign nation."  

Lee voluntarily cooperated with the FBI and the DOE throughout their investigations, but was nonetheless treated like a dangerous spy. In his first bail hearing, on December 13, 1999, a magistrate denied Lee bail based on testimony that Lee represented "the gravest possible security risk...to the supreme national interest" and that the downloaded data could "change the global strategic balance."  

Lee appealed the decision. During his second bail hearing on December 27, 1999, before Judge James Parker, prosecutors argued that "there was no combination of conditions of release that would reasonably assure the safety of any other person and the community or the nation."  

Judge Parker decided to deny Lee bail, and the Tenth Circuit affirmed. As a result, Lee was held in solitary confinement under stringent conditions pending trial.  

As pre-trial proceedings continued, Lee's defense attorneys waged and won several significant attacks in July and August 2000. The first triumph involved a challenge to the allegation that Lee intended to aid foreign nations. The defense formally asked which nations the prosecution believed Lee had intended to aid. Upon court order, the prosecution named China, as well as Australia, France, Germany, Hong Kong, Singapore, Switzerland and Taiwan—countries that did not seem to pose any nuclear threat to the United States.  

The defense also attacked the charge that Lee had stolen the "crown jewels" of the nation's nuclear secrets by seeking disclosure at trial of the actual classified files Lee was accused of downloading. Judge Parker agreed with the defense that the introduction of the classified materials at trial was essential for proving that most of the material was already available to the public.

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92. Indictment, supra note 87. The indictment did not indicate what foreign nation(s) Lee intended to assist. See also infra text accompanying note 98.  


95. Id.  

96. See United States v. Lee, 208 F.3d 228 (10th Cir. 2000) (unpublished table decision).  

97. There was a blue light shining in Lee's cell 24 hours a day, and he was only released from his cell one hour each day for exercise. He was allowed to see his family for only one hour each week, and they were required to speak English so that FBI agents could understand them. And he was shackled whenever he was released from his cell—even when he met his family and lawyers. Matthew Purdy, The Prosecution Unravels: The Case of Wen Ho Lee, N.Y. TIMES, Feb. 5, 2001, at A1. But see Case Update, supra note 86 (statement of Janet Reno). The government later recognized that the restrictive measures were unreasonable and loosened them. They removed Lee's shackles during exercise, and provided a Mandarin-speaking agent in case he wanted to speak Mandarin with his family. Id.  

98. Purdy, supra note 97. The prosecution apparently developed this list from job search letters found in Lee's home. Case Update, supra note 86 (statement of Janet Reno). In his decision releasing Lee, Judge Parker wrote, "Enhancing one's resume is less sinister than the treacherous motive the government, at least by implication, ascribed to Dr. Lee at the end of last year," as quoted in Purdy, supra note 97.  

99. Purdy, supra note 97.
3. The Decision to Release Lee

In August 2000, the defense won yet another significant attack when Judge Parker held a new bail hearing. Former LANL scientists testified that Lee’s “offenses” were not “serious infractions” but were commonly committed by LANL scientists. Further, John Richter testified that “99 percent of [the downloaded information] was unclassified in the open literature.”

Lee’s lawyers also exposed false testimony that Robert Messemmer, the lead FBI agent on the Lee investigation, had provided during the first bail hearing before Judge Parker in December 1999. During that hearing, Messemmer testified that Lee had lied to a colleague by asking to borrow his computer to download a “resume” when in fact he was downloading nuclear secrets. Defense lawyers subsequently discovered that Lee had told his colleague that he was downloading files and not his resume. When defense lawyers exposed Messemmer’s prior false testimony, Messemmer told Judge Parker that he had made an “honest error” and never meant “to mislead [him].”

As a result of this bail hearing, Judge Parker issued an order releasing Lee under strict conditions. The prosecution appealed to the Tenth Circuit, postponing Lee’s release. While the appeal was pending, the prosecution reached a plea agreement with the defense. Under the “walking plea,” Lee would plead guilty to one of the fifty-nine felony counts, receive a sentence of time served (278 days), and submit to sixty hours of government debriefing.

Upon Lee’s release, Judge Parker delivered an emotional apology for the “unfair manner” in which he was held in pre-trial custody. He told Lee that he felt he “was led astray” by “the Executive Branch” during the December 1999 bail hearing and that in retrospect, he felt that Lee’s pre-trial confinement was not necessary. He apologized for the handling and “unnecessarily long” resolution of the case, and scolded “the Executive Branch” which, he stated, has “embarrassed our entire nation and each of us who is a citizen of it.”

101. Purdy, supra note 97.
102. Id.
103. LEE & ZIA, supra note 42, at 305.
105. Purdy, supra note 97.
106. Id.
108. See Transcript at 10-17, Lee (D.N.M. Sept. 13, 2000) (No. 99-1417-JC). It should be noted that Lee did not admit to intending to harm the United States or to aid a foreign country. See id. at 16.
109. Id. at 58. Critics of the government’s case wonder at the prosecution’s sudden willingness to release Lee. One day, the prosecution was arguing that he stole the “crown jewels” of the nation’s nuclear secrets; the next day, they allowed him to walk out of court a free man. Zimring, supra note 107. During the release hearing, the chief prosecutor stated that the plea agreement prevented...
C. Allegations of Racial Profiling

The Wen Ho Lee affair demonstrates the entrenched stereotyping of Asian Americans as inscrutable, perpetual foreigners. The media depicted Lee as a Chinese spy even though he is from Taiwan, not China, and was never charged with espionage. Asian Pacific American leaders accused the government of engaging in illegal racial profiling — “equating race with criminality and using it in the absence of and in lieu of probable cause” — by terminating the employment of and selectively prosecuting Wen Ho Lee because of his ethnicity.

Robert Vrooman, former chief of counter-intelligence at LANL, testified before a Senate subcommittee that Lee was targeted because of his race. Vrooman testified that “every time Lee’s motive was discussed it came down to his ethnicity” and that no other motive was ever suggested. In a sworn declaration submitted in Lee’s defense, Vrooman said that dozens of other individuals who fit the “Kindred Spirit” matrix were not targeted. According to Vrooman, “the failure to look at the rest of the population [was] because Lee is ethnic Chinese.”


The significance is that Taiwan and China are two different sovereignties that have been at odds for the past half a century. At the end of World War II in 1945, Taiwan, which had been occupied by the Japanese, was restored to Chinese rule. But civil war raged in China for the next four years. Chiang Kai-Shek, the leader of the Kuomintang (KMT), was elected president in 1948, but the Communists began to win important victories, resulting in Chiang’s resignation and exile to Taiwan in 1949. Mao Zedong, the leader of the Communist Party, established the People’s Republic of China on the mainland, while Chiang Kai-Shek also called Taiwan the Republic of China. See History, at <http:Iwww.regit.comregitourltaiwanlabouthistory.htm>. To this day, China does not formally recognize Taiwan’s sovereignty, claiming that there is only “one China” and seeking Taiwan’s reunification with the mainland. China replaced Taiwan in the United Nations in 1971, and the United States changed its diplomatic relations from Taiwan to China in 1979. Under the U.S.-PRC Joint Communiqué, the United States recognized China as the sole legal government of China, and to this day does not have formal diplomatic relations with Taiwan. See Department of State, Bureau of East Asian and Pacific Affairs, Background Note: Taiwan, Oct. 2000, at <http:Iwww.state.govadorCpa>. Therefore, it seems odd that Wen Ho Lee, a Taiwanese American, was depicted as a spy for China.

See, e.g., Gerth, supra note 81.


Case Review, supra note 60 (statement of Robert S. Vrooman).

Id.


Id.
his belief that “investigators had a subtle bias that the perpetrator had to be ethnic Chinese.” He testified of comments by officials “noting something nefarious about the number of Chinese restaurants in Los Alamos, the number of Chinese-postdoctoral employees and suggesting that the DOE should not allow ethnic Chinese to work on classified programs.”

Some have alleged that Notra Trulock’s actions were motivated by his “racist views towards minority groups.” Vrooman alleged that Trulock had stated, “No ethnic Chinese should be allowed to work on U.S. nuclear weapons programs.” According to Siegfried S. Hecker, director of LANL from 1986 to 1997, Trulock also implied in several discussions that the laboratory “was infiltrated by Chinese agents.” Hecker also said that Trulock once suggested that “just the fact that there are five Chinese restaurants here meant that the Chinese government had an interest.”

Trulock has denied the remarks.

Outside of court, Wen Ho Lee’s supporters also pointed to the dissimilar treatment accorded to John M. Deutch, a white male and former director of the CIA, as evidence of race discrimination. As a top Defense official since 1993, Deutch’s carelessness was arguably more dangerous than Lee’s. Deutch used unsecured computers in his home to store “enormously sensitive material... at the highest levels of classification.” Technicians inadvertently discovered thirty-one secret files copied onto Deutch’s unsecured home computer after his retirement while he was serving as a consultant to the CIA. But Deutch escaped criminal prosecution and merely lost his security clearance, barring him from serving as a consultant to the CIA.

Deutch also kept a daily journal containing sensitive information on disks that he carried in his shirt pocket. The government initially could not find those disks, and Deutch declined to tell the government where they were. He also tried to delete the classified files he had copied once he learned he was being investigated. Unlike Lee, Deutch has refused to be questioned by CIA investigators. When questioned about the dissimilar

120. Id.
121. Id. But see Case Review, supra note 48 (statement of Notra Trulock, III) (stating that he received awards for his efforts to improve career opportunities for women and minorities during his management tenure at the DOE).
122. But see Case Review, supra note 48 (statement of Notra Trulock, III) (denying statement as “categorically false”).
123. Purdy, supra note 44 (internal quotation marks omitted).
124. Id.
125. Case Review, supra note 48 (statement of Notra Trulock, III). Because of the allegations regarding his role in the Wen Ho Lee affair, Trulock filed a defamation lawsuit against Wen Ho Lee, Charles Washington, and Robert Vrooman. A federal judge dismissed the lawsuit one week short of trial after attorneys warned that national security secrets could be compromised if the case proceeded to trial. Upon the dismissal, Trulock’s lawyers stated their intention to appeal. See Lee defamation case dismissed, SANTA FE NEW MEXICAN, Feb. 15, 2002, at A1.
126. Jacobs, supra note 77 (quoting CIA Director George Tenet).
128. Jacobs, supra note 77.
treatment of Deutch, the government responded that Deutch’s intentions were harmless, whereas Lee’s intent was to harm the United States.129 While the Department of Justice eventually initiated an investigation into Deutch’s activities, Deutch was pardoned by Bill Clinton on his final day as president.130

The government has denied all accusations of racial profiling. In response to allegations, DOE Secretary Bill Richardson created a Task Force Against Racial Profiling in the summer of 1999.131 The Task Force was chartered with making recommendations “to ensure that managers and employees neither commit nor tolerate racial profiling . . . and to prevent adverse discriminatory actions against all employees.”132 Based on visits to nine DOE sites, the Task Force reported the following perceptions generally held by DOE employees: (1) the existence of an “atmosphere of distrust and suspicion”; (2) a “glass ceiling effect”; (3) disparate application of security measures and resulting “brain drain”;133 (4) ineffective communications and inconsistent policy-implementation; and (5) most significantly for Lee’s case, a perception that counterintelligence efforts target employees of Chinese ethnicity.134

According to a classified Justice Department review of the Wen Ho Lee case completed in March 2000 (the “Bellows Report”), there was no evidence that Lee was singled out for his race.135 Further, the Bellows Report indicates that the initial DOE inquiry “[was] based upon a flawed predicate and it [made] a premature selection of Wen Ho Lee as the sole suspect.”136 But despite numerous problems with the investigation, the report concludes that “[r]acism was not among them.”137

The Bellows Report concedes, however, that there is some support for the claim of racial profiling.138 The DOE “Kindred Spirit” investigative plan indicated: “An initial consideration will be to identify those US

129. Gotanda, supra note 21, at 1694.
132. Id. at 4.
133. “Brain drain” refers to the “negative impact on the Department’s ability to recruit and retain highly qualified employees from all ethnic groups.” Id. at 6.
134. Id. at 5-6. National Asian Pacific American leaders also made visits to six laboratories. The group reported the following observations of employees’ perceptions: adverse impact of recent security changes; inadequate communications regarding recent security and workplace changes; a hostile work environment including “an increase in insensitive jokes and comments, perceived disparate treatment, and overall sense of isolation leading to distrust and suspicion”; impaired scientific reputation and leadership including the perceived “brain drain” syndrome; and a perception of a glass ceiling and employment barriers, particularly of a perceived absence or disproportionate representation of minorities in management. See REPORT OF OBSERVATIONS AND RECOMMENDED ACTIONS TO THE DEPARTMENT OF ENERGY TASK FORCE AGAINST RACIAL PROFILING (Nov. 18, 1999), in FINAL REPORT, supra note 131 (Appendix C).
135. See BELLOWS REPORT, supra note 55, at 381-82. The report remained classified while the Wen Ho Lee case was pending. It was not until August 13, 2001, almost one year after Lee’s release, that the Justice Department released the report in declassified form.
136. Id. at 381.
137. Id. at 382.
138. Id. at 385.
citizens, of Chinese heritage, who worked directly or peripherally with the design development.” \(^\text{139}\) The DOE plan noted that the initial targeting of ethnic Chinese was “a logical starting point,” because the counterintelligence community accepts the view that China primarily seeks ethnic Chinese for espionage. \(^\text{140}\) A former FBI espionage analyst explained that China targets ethnic Chinese “by appealing to a ‘perceived obligation to help China.’” \(^\text{141}\)

While this view may seem rational, it reflects the stereotype of Asian Americans as foreigners and the subtle bias that the alleged “Kindred Spirit” perpetrator was ethnic Chinese. Vrooman stated that the contention that China targets ethnic Chinese for espionage was not supported by the experience at LANL. \(^\text{142}\) According to Vrooman, “Chinese intelligence officials contacted everyone from the laboratories with a nuclear weapons background who visited China for information, regardless of their ethnicity.” \(^\text{143}\)

II. THE INADEQUACIES OF THE PREVAILING INTERPRETATION OF INTENT

Just before releasing Lee, Judge Parker told him:

> It is only the top decision makers in the Executive Branch . . . who have caused embarrassment by the way this case began and was handled. They did not embarrass me alone. They have embarrassed our entire nation and each of us who is a citizen of it. I might say that I am also sad and troubled because I do not know the real reasons why the Executive Branch has done all of this. \(^\text{144}\)

While Judge Parker was uncertain as to the “real reasons” behind the Executive Branch’s actions, Wen Ho Lee’s supporters have asserted that the Executive Branch targeted Lee because of his race. \(^\text{145}\) They contend that the government engaged in illegal racial profiling when it investigated, prosecuted, and terminated the employment of Wen Ho Lee. \(^\text{146}\)

We may never know the “real reasons” behind the Justice Department’s decision to handle the case as it did. However, this Comment will show that the Wen Ho Lee affair demonstrates that the existing interpretation of the intent requirement may be inadequate to deal with situations where the decision maker’s actions raise an inference of invidious race discrimination. This Part briefly introduces the existing intent requirement and argues that intent must be reinterpreted in both the constitutional and statutory contexts to provide any hope for a claimant like Wen Ho Lee.

\[^{139}\] Id.
\[^{140}\] Id.
\[^{141}\] Purdy, supra, note 44.
\[^{142}\] Vrooman, supra note 117.
\[^{143}\] Id.
\[^{145}\] See sources cited supra note 114.
\[^{146}\] See Gotanda, supra note 21.
A. The Intent Requirement in Selective Prosecution Cases

Criminal defendants may raise selective prosecution claims under the Equal Protection Clause of the Fifth Amendment.\(^\text{147}\) Central to the notion of equal protection is the "prevention of official conduct discriminating on the basis of race."\(^\text{148}\) One of the earliest discrimination cases under the equal protection clause was *Yick Wo v. Hopkins*,\(^\text{149}\) in which a claimant of Chinese descent challenged two San Francisco ordinances requiring a city permit to establish and maintain a laundry housed in a wooden building. While the ordinances seemed fair and neutral on their face, they disproportionately affected Chinese immigrants who owned nearly all of these laundries. Of approximately 320 laundries in San Francisco at the time, about 240 were owned and operated by Chinese immigrants.\(^\text{150}\) While the city granted permits to non-Asians, the city refused to issue permits to Asians.\(^\text{151}\) The Supreme Court held that the application of the ordinances was "so unequal and oppressive" that they discriminated illegally against Chinese laundrymen.\(^\text{152}\)

The selective prosecution doctrine arose from *Yick Wo* and its equal protection progeny. In the realm of criminal prosecution, the equal protection clause serves as a constitutional constraint on prosecutorial discretion.\(^\text{153}\) Specifically, the equal protection clause prohibits prosecutorial decisions based on one's race, religion, or other arbitrary classification.\(^\text{154}\)

In *Wayte v. United States*, the Supreme Court established the proof framework for a selective prosecution claim under the equal protection clause.\(^\text{155}\) The defendant in *Wayte* claimed that he had been selectively prosecuted because of letters he had written to the President and other government officials expressing his refusal to register for the draft.\(^\text{156}\) To prevail on such a selective prosecution claim, the Court held that the defendant must demonstrate that the prosecutorial decision: (1) had a "discriminatory effect" and (2) was "motivated by a discriminatory purpose."\(^\text{157}\)

The intent requirement in selective prosecution claims is encompassed in the discriminatory purpose prong. To prove discriminatory purpose, the

\(^{147}\) See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (releasing from prison Chinese petitioners who were singled out for enforcement of a facially neutral public health law in violation of the Equal Protection Clause). Criminal defendants may also raise the issue of selective prosecution by filing a separate federal civil rights claim under 42 U.S.C. § 1983. See *Developments in the Law*, supra note 15, at 1532.


\(^{149}\) 118 U.S. 356 (1886).

\(^{150}\) Id. at 356-57.

\(^{151}\) *Selmi*, supra note 14, at 296.

\(^{152}\) *Yick Wo*, 118 U.S. at 373.


\(^{156}\) Id. at 601, 604.

\(^{157}\) Id. at 608.
defendant must make out a prima facie case, or presumption, of purposeful discrimination. The burden then shifts to the prosecution to show the use of “permissible racially neutral selection criteria and procedures.” If the prosecution fails to give an adequate explanation, dismissal may be warranted.

B. The Intent Requirement in Title VII Cases

If Wen Ho Lee were to bring an employment discrimination claim, he would likely file a disparate treatment claim under Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Disparate treatment cases are divided into three general categories: (1) individual versus pattern and practice cases or class actions; (2) direct versus indirect methods of proof; and (3) single versus mixed-motive cases.

In most disparate treatment cases, it is difficult for the plaintiff to produce direct evidence of the employer’s intent to discriminate. It is questionable whether there is direct evidence of discrimination in Lee’s case. For instance, the statements about race and ethnicity to which Vrooman and Hecker testified may suffice as direct evidence of intent to discriminate against Lee and Chinese scientists more generally. But because Trulock and other government officials deny making these remarks, the case would be examined as an indirect evidence case.

In the absence of direct evidence of employment discrimination, the allocation of burdens and order of presentation of proof in disparate treatment cases is a three-step process, as set out in McDonnell Douglas v. Green. The plaintiff-employee has the initial burden of establishing a prima facie case of discrimination. The burden of production then shifts to the defendant-employer to rebut the prima facie case with a legitimate, non-discriminatory reason for the adverse employment action. If the defendant is successful, the presumption of discrimination drops and the burden of production shifts back to the plaintiff to establish that the

160. United States v. Jones, 159 F.3d 969, 979 n.8 (6th Cir. 1998); Haggerty, 528 F. Supp. at 1295, cited in ACLU Brief, supra note 159.
162. McKinley, supra note 15, at 448.
163. See id.
164. See supra text accompanying notes 121-124.
165. Depending on the nature of these statements, mixed motive analysis may be appropriate. For the purpose of this Comment, however, Wen Ho Lee’s potential employment discrimination claim will be analyzed as a circumstantial evidence or “pretext” case.
167. Id. at 802.
defendant's proffered explanation is pretextual.  

Throughout, the plaintiff-employee retains the ultimate burden of establishing intentional discrimination by a preponderance of the evidence.  

The Supreme Court recently reiterated the intent requirement, stating that “[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.” That is, even if a plaintiff was treated differently, she must prove that the differential treatment was caused by intentional discrimination.

C. The Prevailing Interpretation of Intent: Conscious Intent

The prevailing understanding of intent has been that it must be motivational in origin. In a recent employment discrimination case, the Court held a claimant must show that “the protected trait actually motivated the employer’s decision.” Under this framework, an inquiry of intent becomes an inquiry into the subjective mind of the decision maker. As part of a motivational understanding of intent, some scholars have equated intent with malice, hostile animus, ill will, or prejudice. But others have noted that the intent requirement does not require the decision maker to act on such malign bases. In fact, the Court has found intentional discrimination to exist even where decisions are based on benign and benevolent actions.

Similarly, conscious awareness of harm is insufficient to satisfy the intent requirement. In Personnel Administrator v. Feeney, an equal protection discrimination suit challenged a civil service preference for veterans. The Court in Feeney held that conscious awareness may be an

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170. Burdine, 450 U.S. at 253; Hicks, 509 U.S. at 507.


173. See id. at 1166-77. See also Wayte v. United States, 470 U.S. 598, 608 (1985) (selective prosecution claimants required to prove that the prosecutorial decisions "had a discriminatory effect and that it was motivated by a discriminatory purpose"); Warren v. Halstead Indus., Inc., 802 F.2d 746, 751-52 (4th Cir. 1986) ("Discriminatory intent means actual motive and is not a legal presumption to be drawn from a factual showing of something less than actual motive.").


175. See, e.g., Krieger, supra note 172, at 1177 ("Discrimination – at least in race and national origin contexts – is construed as resulting from hostile animus towards and accompanying negative beliefs about an individual because of his or her membership in a particular group."); Oppenheimer, supra note 16, at 923 (defining intent as "a conscious discriminatory motive"); cited in Selmi, supra note 14, at 288.

176. See Selmi, supra note 14, at 288.

177. Affirmative action jurisprudence, where the Court has invalidated conscious benign treatment in favor of women and minorities as discriminatory, provides the best example of this. See, e.g., City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) (invalidating city-sponsored use of minority set-asides in sub-contracting program); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (invalidating public medical school's race-based affirmative action admissions program).

element of intent, but standing alone, is insufficient to prove unlawful
discrimination. The Court found that the veteran preference’s disparate
impact on women was insufficient to prove discriminatory purpose. The
Court stated that discriminatory purpose “implies more than intent as
volition or intent as awareness of consequences.” A plaintiff must show
that the decision maker “selected or reaffirmed a particular course of action
at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects
upon an identifiable group.”

The “because of” language in Feeney suggests that the correct
understanding of the Court’s definition of intent is causation-based and not
motivational. Scholars have long argued that intent is best understood as
a causation concept, where one asks whether “an individual or group
was treated differently because of race.” Instead of inquiring into the
subjective mind of the decision maker, the causation approach asks whether
the plaintiff’s protected status was a motivating factor with a determinative
effect on the decision.

The Court’s interpretation of the intent requirement continues to
require a demonstration that conscious intent motivated the decision
maker. A motivational intent interpretation is flawed because it: (1)
requires one to inquire into people’s motivations resulting in numerous
problems; (2) rests on the myth that intent is necessarily conscious; and (3)
fails to account for cognitive bias and subtle forms of discrimination.

1. Difficulties of a Motivational Inquiry

A motivational intent interpretation is flawed because of the problems
posed by the requisite inquiry into the subjective mental state of the
decision maker. Social cognition theory demonstrates that individuals
often are not consciously aware of what motivates them to act. In the
late 1970s, psychologists Richard Nisbett and Timothy Wilson conducted a
study showing that people are poor at identifying the causal efficacy of
stimuli on their evaluations, choices, and decisions.

Bhagwat, supra note 178, at 152.
180. Feeney, 442 U.S. at 279.
181. Id. (citations omitted).
182. See Linda H. Krieger & Rebecca H. White, Whose Motive Matters?: Discrimination in Multi-
Actor Employment Decision Making, 61 LA. L. REV. 495, 502-03 (2001); Lee & Bhagwat, supra note
178, at 153 n.32.
183. See, e.g., Krieger, supra note 172, at 1242-43 (advocating a causation-based approach and
arguing that it could be implemented without amending Title VII); Lee & Bhagwat, supra note 178;
McGinley, supra note 15; Selmi, supra note 14.
184. Selmi, supra note 14, at 289.
185. Id.
187. See Krieger, supra note 172, at 1213-16.
188. Timothy DeCamp Wilson & Richard E. Nisbett, The Accuracy of Verbal Reports About the
Effects of Stimuli on Evaluations and Behavior, 41 SOC. PSYCHOL. 118, 119 (1978); Richard E. Nisbett
& Timothy DeCamp Wilson, Telling More Than We Can Know: Verbal Reports on Mental Processes,
manipulated components of complex stimulus situations such that the effect of certain stimuli on subjects' choices could be measured. If the stimulus had a significant causal effect, subjects usually said it did not influence their choices. If the stimulus had no significant effect on their choices, subjects reported it as determinative.\textsuperscript{189} It is false to assume that decision makers are always conscious of their decisions and the rationale behind those decisions.\textsuperscript{190}

Even if individuals are aware of the biases that may motivate them to discriminate, they probably are unwilling to admit to these biases and potentially expose themselves to liability. Without candor, conscious intent presents a nearly insurmountable burden of proof.\textsuperscript{191} This problem is exacerbated when the decision maker is not one individual but a group of individuals. The subjective mental state of a group becomes nearly impossible to probe let alone prove.\textsuperscript{192} An inquiry into motivation is further complicated by the requirement that discriminatory intent exist at the "moment of decision."\textsuperscript{193} Stereotypes and bias can corrupt the decision-making process long before the moment of decision, particularly where decisions are made by a group of individuals.\textsuperscript{194}

2. The Myth of Consciousness

A motivational understanding of intent is also flawed, because it "represents an outdated view of human behavior" that discriminatory intent is necessarily conscious.\textsuperscript{195} Mainstream America disapproves of overt race discrimination, but discrimination still exists today—often in unconscious or subtler forms than in the past.\textsuperscript{196} Charles Lawrence argued that much discriminatory treatment in modern society is attributable to unconscious motivations. He reasoned that discrimination is unconscious in that racism is largely a product of historical, cultural heritage that unconsciously influences one's beliefs and actions toward blacks.\textsuperscript{197}

The equal protection and Title VII proof frameworks falsely assume that absent discrimination, decision makers will act on a rational basis. In the prosecutorial context, the Court has acknowledged the "presumption of regularity" that supports prosecutorial decisions and, in the absence of clear evidence to the contrary, presumes "[prosecutors] have properly discharged their official duties."\textsuperscript{198} In the employment context, the Court has similarly

\textsuperscript{189} Krieger, supra note 172, at 1215.
\textsuperscript{190} Id. at 1185 (criticizing assumption that decision makers possess "transparency of mind").
\textsuperscript{191} Lee & Bhagwat, supra note 178, at 154.
\textsuperscript{192} Id. at 155. See also Eddie Genna, The Misplaced Reliance on Intent in Antidiscrimination Law: A Kantian Explanation (2001) (unpublished manuscript, on file with the author) (using Kantian principles to examine problems arising from the existence of multiple decision makers in Title VII tenure cases).
\textsuperscript{193} Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (stating that the critical inquiry is "whether gender was a factor in the employment decision at the moment it was made") (emphasis added).
\textsuperscript{194} Krieger, supra note 172, at 1213.
\textsuperscript{195} McGinley, supra note 15, at 418-19.
\textsuperscript{196} See Lawrence, supra note 16, at 322.
\textsuperscript{197} Id.
\textsuperscript{198} United States v. Chemical Found., Inc., 272 U.S. 1, 14-15 (1926), cited in United States v.
assumed that employers act rationally absent discrimination.\textsuperscript{199}

In “The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity,” Professor Linda Krieger exposed the falsity of the assumption that decision makers act rationally absent discrimination.\textsuperscript{200} On the contrary, Krieger argued, discrimination is not a result of motive or intent, but rather an automatic, “unwelcome byproduct” of otherwise normal cognitive processes.\textsuperscript{201} If discrimination is “automatic” as Krieger suggests, decisions may be tainted with discrimination even when conscious intent is lacking. Krieger’s elucidation of some major concepts of social cognition theory provides an essential basis for understanding the subtle forms of discrimination that may have been at work in the prosecutorial and employment decision-making processes in the Wen Ho Lee affair.\textsuperscript{202} The following section outlines some of those concepts.

3. Cognitive Bias and Subtle Discrimination

Courts define stereotypes differently from social cognitive psychologists. Under existing disparate treatment case law, courts view stereotypes as determining the roles deemed appropriate for members of particular groups. In other words, one’s group status acts as a “proxy” for a stereotypical trait – at the moment of the decision, independently of cognitive processes.\textsuperscript{203} In contrast, social cognitive psychologists view stereotypes as cognitive structures that “cause discrimination by biasing how we process information about other people.”\textsuperscript{204}

\textit{a. Stereotypes as Schemas}

According to social cognition theory, stereotypes are schemas that represent “a person’s accumulated knowledge, beliefs, experiences (both direct and vicarious), and expectancies regarding the schematized construct.”\textsuperscript{205} These “social schemas” cause us to classify individuals and objects into different categories – black and white, small and big, female and male – and to create a mental prototype of a “typical” category.

\begin{footnotes}
\item[200] Krieger, \textit{supra} note 172, at 1181.
\item[201] \textit{Id.} at 1216.
\item[202] While Krieger’s work focuses on the employment context, her use of social cognitive theory can be applied to decisionmaking in the prosecutorial context to show that the “presumption of regularity” is also misplaced.
\item[203] Krieger, \textit{supra} note 172, at 1173 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (citing decision maker’s comments that female plaintiff should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”); Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993) (“The employer cannot rely on age as a proxy for an employee’s remaining characteristics, such as productivity, but must instead focus on those factors directly.”); Dothard v. Rawlinson, 433 U.S. 321, 332 (1977) (prohibiting use of gender as a proxy for strength, regardless of its accuracy); Craig v. Boren, 429 U.S. 190, 197-98 (1976) (holding that use of gender as a proxy for other, more germane bases of classification violates the Equal Protection Clause)).
\item[204] Krieger, \textit{supra} note 172, at 1199.
\item[205] \textit{Id.}
\end{footnotes}
While schemas may be useful in organizing information, they act as implicit biases on information processing which may result in discrimination, both unintentional and unconscious. Once a given stereotype or “schema” is triggered, it “activates” the traits with which it is categorized. The schema then influences the processing of incoming information and the drawing of inferences about the action or event at issue. In the Wen Ho Lee affair, for example, the stereotype of “perpetual foreigner” may have been triggered when DOE officials began their investigation of Lee. Once the foreigner stereotype was triggered, various traits related to that stereotype, e.g., inscrutability, disloyalty, and distrust, may have influenced the processing of subsequent information about Lee.

b. Interpretation of Ambiguous Events

A significant way in which schemas affect information processing is the interpretation of ambiguous events. In one study, subjects were shown a silent videotape of a verbal exchange between two males, one white and one black. A buzzer rang intermittently, and subjects were asked to rate the intensity of the exchange. At one point, one participant (protagonist) shoved the other (victim). The buzzer rang, and subjects rated the exchange differently depending on the race of the protagonist. If the protagonist was white, subjects rated his behavior as “playing around” or “dramatizing.” But if the protagonist was black, subjects viewed the same behavior as “aggressive” or “violent.” This and other studies show that once behavior (e.g., shoving) is interpreted and encoded as a trait (e.g., “playing around” or “aggressive”), its meaning is “fixed” and affects subsequent judgments concerning the individual. Specifically, the trait then “supports and validates the preexisting stereotypic expectancy.”

In the Wen Ho Lee affair, Lee’s interactions with Chinese scientists and officials may have activated the relevant schema of “suspicious” or “disloyal” traits. In 1994, for example, Wen Ho Lee appeared at a LANL briefing and was warmly greeted by one of China’s top nuclear scientists who was leading a visiting delegation of Chinese weapons officials. Lee’s exchange with the scientist surprised a LANL official, prompting a reporting of the incident to the FBI. For the LANL official, Lee’s

206. Id.
207. Id. at 1188-90.
208. Id. at 1190.
209. Id.
211. Duncan, supra note 210, at 595, cited in Krieger, supra note 172, at 1203.  
212. Krieger, supra note 172, at 1203.  
213. Id.  
214. Purdy, supra note 44. A translator informed a laboratory official that the Chinese scientist was thanking Wen Ho Lee that the hydrodynamics computer software and calculations (all unclassified, public information) he provided them had been quite helpful. Id.  
215. Id. One wonders whether the Chinese scientist would openly greet Wen Ho Lee if he were really a spy for the Chinese government.
actions may have triggered the assumption that Asians are perpetual foreigners who remain loyal to Asian countries.\textsuperscript{216} In contrast, a similar greeting by a white employee may have been viewed as "friendly" or "cordial." Once the greeting was interpreted and encoded as a trait (e.g., "suspicious"), its meaning was "fixed" and may have affected subsequent judgments concerning Lee’s other activities, namely the downloading and copying of files. Lee’s future travels to China may have also been viewed as suspect, whereas other individuals’ trips to China may have been considered purely personal.\textsuperscript{217}

c. \textit{Simulation Heuristic}

The simulation heuristic is also useful in understanding the inferential processes that may have corrupted key decisions in the Wen Ho Lee affair. The simulation heuristic is based on the assumption that people construct images of various scenarios in determining the probability of a given event or situation.\textsuperscript{218} According to the theory, the more vividly a single plausible scenario can be constructed, the more plausible the specified event will seem.\textsuperscript{219} Amos Tversky and Daniel Kahneman, two noted theorists who labeled the heuristic, explain: "The use of scenarios to assess probability is associated with a bias in favor of events for which one plausible scenario can be found, with a corresponding bias against events that can be produced in a multitude of unlikely ways."\textsuperscript{220} In short, a specified event or situation is considered to be more probable if a single plausible scenario can be simulated in vivid detail.

For instance, an investigator (e.g., Notra Trulock) with a list of potential suspects would view a particular person (e.g., Wen Ho Lee) as more suspicious if he could construct and vividly imagine a single plausible scenario of espionage involving that person. Once investigators place a target under suspicion, they would find suspicious activity relating to the target in the most unsuspecting places. They would begin to see evidence differently so that unexplained inconsistencies and omissions become suspicious, making additional scenarios even easier to generate.

d. \textit{Causal Attribution}

Cognitive biases may also corrupt causal attribution, the way in which people try to understand the causes of an action or behavior.\textsuperscript{221} Once a stereotype is triggered, studies show that individuals usually attribute

\begin{itemize}
  \item \textsuperscript{216} See supra Part I.A.
  \item \textsuperscript{217} During the "Kindred Spirit" investigation, the DOE identified seventy potential suspects with travels to China during the mid-1980s. The travels of more than one third on the list were characterized as having "nothing to do with the scientific work of the laboratory." Purdy, supra note 44.
  \item \textsuperscript{218} Amos Tversky & Daniel Kahneman, The Simulation Heuristic, in \textit{JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES} 201, 206 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).
  \item \textsuperscript{219} See id. at 207 (explaining that "an assessment of the 'goodness' of scenarios can serve as a heuristic to judge the probability of events).
  \item \textsuperscript{220} Id.
  \item \textsuperscript{221} See Fritz Heider, The Psychology of Interpersonal Relations (1958), cited in Krieger, supra note 172, at 1204.
\end{itemize}
stereotype-consistent behavior to recurring, internal dispositional or stereotypic traits without attempting to search for other potentially relevant information.222 In contrast, people tend to attribute stereotype-inconsistent behavior to transient, external factors about the actor's situation or environment.223 Because people usually believe that stereotype-consistent behavior (or misbehavior) is caused by recurring factors and therefore more likely to recur, they consider such behavior worthy of more severe punishment than stereotype-inconsistent behavior.224

Attribution bias may distort the "similarly situated" analysis in discrimination cases.225 "Similarly situated" analysis, in the prosecutorial context, consists of determining whether individuals similarly situated to the claimant could have been prosecuted but were not. In the employment context, the analysis is used to help determine whether an employee was treated differently from similarly situated individuals because of his group status. Cognitive biases may cause decision makers and fact finders to attribute different causes to certain types of action and behavior depending on the actor. As a result, decision makers may not consider seemingly similarly situated individuals to be similarly situated at all.

For example, in the case of Wen Ho Lee, the causal attribution phenomenon could have distorted the way in which decision makers viewed Lee and interpreted his actions.226 For instance, decision makers may have viewed his downloading and copying of files as stereotype-consistent behavior attributable to dispositional factors of inscrutability and disloyalty. Decision makers may have believed that Lee would continue to download files if his access were not revoked. This may explain why DOE authorities suspended Lee's X Division clearance even after he had passed a polygraph test, and why they eventually terminated his employment. In contrast, decision makers may have viewed John Deutch's downloading of files as stereotype-inconsistent behavior or perhaps behavior involving no stereotype at all. In that case, causal attribution theory suggests that decision makers would attribute such behavior to external factors or circumstances. This would help explain (but not justify) why Deutch received a significantly milder punishment than Lee.

223. Id. at 1205.
224. Id. at 1206. In a 1985 study conducted by Galen Bodenhausen and Robert Wyer, subjects were asked to read case files of misbehavior by a target individual, predict whether the behavior in question was likely to recur, and to recommend a punishment. When the behavior was stereotype of the target's ethnicity, it was perceived as more likely to recur and deemed worthy of a more severe punishment. When the case file involved stereotype-inconsistent behavior or no stereotype at all, participants remembered more relevant external or situational information, were more likely to attribute the misbehavior to external, situational causes, and recommended a less severe punishment. Galen V. Bodenhausen & Robert S. Wyer, J., Effects of Stereotypes on Decision Making and Information-Processing Strategies, 48 J. PERSONALITY & SOC. PSYCHOL. 267, 268, 279 (1985), cited in Krieger, supra note 172, at 1205-06.
226. Id., at 1204-05 (stating that "causal attribution is subject to systematic biases that distort personal perception (how we see others) and interpersonal judgment (how we interpret their actions)").
III. THE INADEQUACIES OF THE EXISTING PROOF FRAMEWORKS:
PROVING DISCRIMINATORY INTENT IN THE WEN HO LEE AFFAIR

A claimant like Wen Ho Lee would have difficulties proving intentional discrimination under the prevailing motivational interpretation of intent. While courts may recognize that discrimination has become subtler and more difficult to prove, they have been unable to provide relief for subtle discrimination because of the artificial proof constructs designed to determine whether discriminatory intent, presently understood as motivational, exists. This Part illustrates some of the evidentiary problems that Wen Ho Lee would have to overcome to prove intent within the existing proof frameworks for selective prosecution and employment discrimination, respectively.

A. Selective Prosecution: Proving Intent in Constitutional Cases

Under the existing framework for proving intent in constitutional cases, Wen Ho Lee would have difficulty proving that the government had discriminatory intent to prosecute him. To prevail on his selective prosecution claim, Wen Ho Lee would have to satisfy the Wayte two-prong test, requiring a criminal defendant to show that the prosecutorial decision (1) was motivated by discriminatory purpose, and (2) had a discriminatory effect. This Comment is concerned with the discriminatory purpose prong, which examines the intent of the decision maker.

The proof framework for the discriminatory purpose prong is a burden-shifting one. The plaintiff must first establish a prima facie case, by demonstrating that the "totality of the relevant facts gives rise to an inference of discriminatory purpose." Once the plaintiff successfully establishes a prima facie case, the burden shifts to the defense to rebut the case, by showing that the prosecutorial decision was a result of "permissible racially neutral selection criteria and procedures." If the prosecution fails to give an adequate explanation, a dismissal may be warranted.

In United States v. Armstrong, the Court set out the same two-prong test to be applied when a criminal defendant seeks discovery regarding selective prosecution (as did Wen Ho Lee). Under this test, the defendant must produce "some evidence tending to show the existence of" discriminatory purpose and effect. Since Judge Parker granted Wen Ho

230. Id. at 468 (quoting Berrios, 501 F.2d at 1211).
Lee’s discovery request regarding racial selective prosecution, the court indeed found “some evidence tending to show the existence of” a discriminatory purpose. Wen Ho Lee was not able to pursue his claim on the merits, however. The judge’s discovery order was dropped when the parties reached a plea agreement just two days before the government was supposed to disclose thousands of pages of documents that may have shed light on possible selective prosecution.\(^{234}\)

Despite his successful discovery motion, Wen Ho Lee would have difficulty proving the discriminatory purpose prong under the existing, burden-shifting proof framework. Although Lee probably would be able to establish a prima facie case of discriminatory purpose, the government would likely give an adequate justification for its prosecution of Lee.

Since the judge found sufficient evidence of selective prosecution to grant Lee’s motion for discovery related to selective prosecution, Lee likely would have been able to establish a prima facie case of discriminatory purpose. Had Lee been able to pursue his selective prosecution claim on the merits, he would have had to show that the facts surrounding the FBI investigation and resulting prosecutorial decisions give rise to an inference of discriminatory intent. The court may have taken into consideration the documents it ordered the government to disclose for *in camera* review including: (1) records of statements by Trulock stating that the investigation should concentrate on ethnic Chinese; (2) list of suspects in the Kindred Spirit investigation; (3) classified transcripts of any Congressional testimony by government officials relating to the Wen Ho Lee affair; and (4) reports of all DOE administrative inquiries (1987 to present) of LANL employees regarding mishandling of classified data.\(^{235}\)

Though what information these documents would have revealed is uncertain, the mere fact that the court ordered their disclosure suggests that Lee probably would have been able to establish a prima facie case of discriminatory purpose.

But even assuming that Wen Ho Lee would successfully establish a prima facie case, the government would likely be able to rebut the case by proving that the prosecutorial decision was a result of “permissible racially neutral selection criteria and procedures.”\(^{236}\) The government would contend that it relied on legitimate, non-discriminatory factors to prosecute Lee. Specifically, the government would argue that it relied on the

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\(^{234}\) James Sterngold, *Asian-Americans Demand Bias Inquiry in Scientist’s Case*, N.Y. TIMES, Sept. 18, 2000, at A12. In releasing Lee, Judge Parker informed him that it was possible that the government’s disclosure of the ordered discovery and any additional discovery ordered “would lead to a dismissal of all the charges against [him].” Transcript at 26, Lee (D.N.M. Sept. 13, 2000) (No. 99-1417-JC). Six Asian Pacific American civil rights organizations also called on President Clinton after Lee’s release to establish an independent, bi-partisan commission to conduct an investigation of the handling of the Wen Ho Lee case to ensure the American public confidence in the government’s ability to conduct fair and impartial investigations. Among the specific requests was that the commission examine the use of racial profiling in investigations. Press Release, Asian Pacific American Civil Rights Groups Call for Independent Commission to Investigate Case (Sept. 27, 2000).


"matrix" analysis based on access to the W-88 information and prior trips to China. The government would also argue that the initial DOE inquiry was based on the counterintelligence community's legitimate, race-neutral view that China targets ethnic Chinese for espionage.

Lee could counter argue that the notion that China targets ethnic Chinese is not race-neutral but rather a result of subtle racial bias against Asian Americans. In support of this argument, Lee could offer testimony from Vrooman that the matrix was not the real basis for Lee's prosecution but that "the failure to look at the rest of the population [was] because Lee is ethnic Chinese." More generally, Wen Ho Lee could present expert testimony stating that prosecutorial decisions may be affected by unconscious racism at various stages of the decision-making process. For instance, he could argue that, in determining whether or not to prosecute and/or what particular charge(s) to file, the prosecutor's assessment of numerous non-racial factors (e.g., the seriousness of the offense, the defendant's prior record, the likelihood of a conviction, and public opinion) may be unconsciously affected by the race of the defendant and victim. However, unless the factfinder is allowed to draw inferences of unconscious or subtle discrimination, Lee would have difficulty satisfying the discriminatory purpose prong.

Wen Ho Lee may have a better chance of demonstrating discriminatory effect, but a showing of discriminatory effect would still be insufficient to satisfy the discriminatory purpose prong. To prove discriminatory effect, Lee would have to demonstrate that similarly situated employees who had committed comparable violations were not prosecuted. The effect prong is difficult to prove since the claimant must present evidence about prosecutions that never took place.

For his case, Lee could present Vrooman's statement that "[d]ozens of individuals" who fit Trulock's matrix "were not chosen for investigation." He could also point to the Bellows Report, which states that "Wen Ho Lee should not have been the only suspect" in the "Kindred Spirit" investigation. If the court disclosed the initial list of "Kindred Spirit" suspects, Lee could see if non-Asian American employees had committed similar infractions and determine why they had not been prosecuted. He could present evidence that the other "investigative leads" identified by the DOE on the initial list of potential suspects were not investigated further, suggesting that he was a victim of selective targeting. Moreover, Lee could present evidence that the FBI had failed to investigate other facilities that may have been the source of the W-88 leak. Lee could also present evidence that even though John Deutch committed similar if not more severe violations, he merely had his security clearance denied.

237. Vrooman, supra note 117.
238. See Davis, supra note 16, at 18 ("One reason [the intentional discrimination] standard is so difficult to meet is that much of the discriminatory treatment of defendants and victims may be based on unconscious racism and institutional bias rather than on discriminatory intent.").
239. Id. at 34-35; Developments in the Law, supra note 15, at 1523.
240. Vrooman, supra note 117.
241. BELLOWS REPORT, supra note 55, at 376.
This all suggests that Lee was a victim of selective targeting.

But even if Lee could show that the government's prosecutorial decisions had a discriminatory effect on Chinese Americans or Asian Americans generally, this showing of disproportionate impact would be insufficient to prove discriminatory purpose. Under Wayte, a selective prosecution claimant must prove discriminatory purpose independently of discriminatory effect. Evidence of disparate impact may indicate discriminatory effect, but it is insufficient to create an inference of discriminatory purpose. This places a difficult burden of proof on criminal defendants to prove racially selective prosecution.

The Court's decision in McCleskey v. Kemp, confirms the near impossibility of proving intentional discrimination in the constitutional context. McCleskey, an African American male, used a sophisticated statistical study to challenge the imposition of the death penalty against him for the murder of a white police officer in Georgia. The study, known as the Baldus study, provided extensive statistical evidence indicating that the race of a victim had a statistically significant correlation with the imposition of the death penalty in Georgia. After examining thousands of murder cases over a seven-year period and using thirty-nine nonracial variables that might affect sentencing, Baldus found that defendants who killed white victims were 4.3 times more likely to receive the death penalty than defendants who killed blacks. While the Baldus study was acclaimed as one of the most thorough studies on sentencing, the Court nevertheless held that it did not prove that McCleskey himself had been intentionally discriminated against because of his race.

The existing framework inadequately accounts for subtle forms of discrimination by limiting the scope of inferences that the factfinder can draw. A claimant like Wen Ho Lee could offer indirect or even seemingly direct evidence of discriminatory purpose, including statistical evidence as in McCleskey. For example, Lee could offer statistics showing that Asian American scientists who download classified files are more likely to be prosecuted than white scientists who download such files (if such statistics existed). But even when a claimant offers such evidence, the erroneous emphasis on a motivational and even conscious intent often prevents the factfinder from inferring discriminatory purpose from these subtler forms of discrimination.

242. Wayte v. United States, 470 U.S. 598, 608-10 (1985). See also Washington v. Davis, 426 U.S. 229, 244-46 (1976) (holding that evidence of disproportionate impact submitted by two blacks to show that the administration of a civil service exam was racially discriminatory was insufficient to prove intentional discrimination).


245. Id. at 286-89.

246. Id.


B. Employment Discrimination: Proving Intent in Statutory Cases

The Wen Ho Lee affair also demonstrates the inadequacies of the intent requirement in the statutory context. Because discrimination often exists in subtler forms today, an employee that seems to have been mistreated as clearly as Wen Ho Lee may not be able to satisfy his burden of proving discriminatory intent.

Under the McDonnell Douglas three-part proof framework applied in individual disparate treatment cases, Wen Ho Lee would first have to establish a prima facie case of discrimination. The burden of production would then shift to the defendant-employer to provide a rebuttal with a legitimate, non-discriminatory reason for his differential treatment and termination. If the defendant were successful, the presumption of discrimination would disappear and the plaintiff would have to show that the defendant’s proffered explanation was pretextual.

Wen Ho Lee could probably satisfy his initial burden of establishing a prima facie case. In order to establish a prima facie case in a termination case like Wen Ho Lee’s, a plaintiff must show that (1) he is a member of a protected class; (2) he performed to the minimal satisfaction of the employer; (3) he was terminated (adverse employment action); and (4) his position remained open or was subsequently filled by someone of similar qualifications. Lee could show that (1) he is Asian American (a protected class based on race); (2) he performed satisfactorily during his twenty-year tenure at LANL; and (3) he was dismissed from his job on March 8, 1999. Assuming that his position remained open or someone of similar qualifications replaced him, Lee would be able to satisfy the prima facie case requirement.

This prima facie showing would shift the burden of production to the employer to articulate a legitimate, non-discriminatory reason for his dismissal. LANL would have no trouble articulating such reasons, especially in light of Lee’s indictment. The employer would offer the testimony of officials like Trulock, stating that Lee violated security regulations and repeatedly attempted to enter secure areas after his access had been suspended. The employer would also offer evidence suggesting that Lee failed the December 1998 polygraph examination and failed to report travels abroad and contacts with foreign scientists. The DOE specifically stated that the reasons for Lee’s dismissal were “failing to properly inform the laboratory and [the DOE] about contacts with people from a sensitive country; specific instances of failing to properly safeguard classified material; and, apparently, attempting to deceive [the] laboratory

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253. There may be some dispute as to whether Lee’s performance met minimal performance requirements of the employer, primarily because of his alleged misconduct. However, because courts tend to see the performance requirement as a low, threshold burden that is not difficult to satisfy, the court would probably find that he was minimally qualified.
254. Hicks, 509 U.S. at 506-07; Burdine, 450 U.S. at 254; McDonnell, 411 U.S. at 802.
about security related issues. These reasons would suffice as legitimate, non-discriminatory reasons, especially considering the FBI investigation regarding his alleged misconduct and his indictment in December 1999.

Therefore the burden of production would shift back to Lee to demonstrate that the employer’s articulated reasons are pretextual. Lee could meet this burden by showing either: (1) that the employer’s proffered reason was false (“falsity”), or (2) if true, that it was not the real reason for his termination but that another reason more likely motivated the employer (“pretext”). This burden merges with the plaintiff’s ultimate burden of persuasion to prove that it was intent to discriminate, and not some other reason, that motivated the employment decision. This is a difficult burden to surmount.

Disparate treatment case law demonstrates the difficulty of satisfying the pretext requirement. After the three-part burden-shifting framework was established in *McDonnell Douglas*, lower courts disagreed as to whether a plaintiff who proves the falsity of the employer’s proffered reasons is entitled to a judgment as a matter of law. There were three approaches in the lower courts: (1) pretext only, where such a plaintiff was entitled to judgment as a matter of law; (2) permissive pretext, where the factfinder could find for the plaintiff but was not required to; and (3) pretext plus, where disproving the proffered reasons was insufficient to sustain a judgment for the plaintiff as a matter of law.

In *St. Mary’s Honor Center v. Hicks*, the Supreme Court attempted to resolve the circuit split by rejecting the pretext only approach and holding that the permissive pretext approach was the correct one. Hicks, a black man, was employed at St. Mary’s as a correctional officer and later promoted as a shift commander. He had a satisfactory employment record, but then was subjected to repeated, severe disciplinary action. He was suspended for five days for violations committed by his subordinates, given a letter of reprimand for allegedly failing to investigate an inmate brawl, demoted for his failure to ensure that his subordinates logged their use of a St. Mary’s vehicle, and was finally dismissed for threatening his immediate supervisor during a heated verbal confrontation. He alleged race discrimination, and at trial proved that the employer’s proffered

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256. See *Hicks*, 509 U.S. at 515-16; *Burdine*, 450 U.S. at 254-56; *McDonnell*, 411 U.S. at 804.
257. McGinley, supra note 15, at 450.
258. Davis, supra note 227, at 714-16.
259. The Court also rejected the pretext plus approach, but the Fifth Circuit continued to follow the rule after *Hicks*. See, e.g., Rhodes v. Guiberson Oil Tools, 39 F.3d 537, 542 (5th Cir. 1994) (interpreting Hicks’ adoption of permissive pretext as dictum); Boddie v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993) (stating that disproving defendant’s proffered reasons is insufficient and that plaintiff must prove “that the employer’s reasons were not the true reason for the employment decision and that unlawful discrimination was”), cited in Davis, supra note 227, at 734. The Court later clarified *Hicks* and held that the Fifth Circuit’s interpretation of *Hicks* was wrong. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).
260. *Hicks*, 509 U.S. at 504.
261. *Id.* at 505.
reasons were “not the real reasons for [Hick’s] demotion and discharge.”\(^{262}\) The Court nonetheless held that Hicks had failed to prove that his dismissal was racially motivated.\(^{263}\) In other words, the Court held that rejection of the employer’s proffered reasons (pretext only) is not sufficient to mandate a finding for the plaintiff. Instead, the Court held that while rejection of the employer’s proffered reason may permit the factfinder to infer intentional discrimination (permissive pretext), the ultimate question is “whether plaintiff has proven ‘that the defendant intentionally discriminated against [him]’ because of his race.”\(^{264}\)

Wen Ho Lee could try to show that the DOE’s proffered reasons for his discipline and dismissal were false. For instance, he could argue that he did not commit the violations; however, the LANL would probably have strong evidence to the contrary, in light of his guilty plea. He could also present declarations from other scientists, showing the objective falsity of LANL’s position regarding the classified nature of the information. Specifically, he could and did offer testimony from a former LANL director and other experts, arguing that much of the data he downloaded was available to the general public through the Internet and other sources, was of little or no use to most countries, and was not deemed classified until after his employment had been terminated.\(^{265}\) But even if Lee proved the falsity of the employer’s proffered reasons, Hicks suggests that such proof would still not guarantee a judgment in Lee’s favor. Under the existing proof framework, Lee would still have to prove intentional discrimination.

Instead of proving the falsity of his employer’s reasons, Lee could argue that the proffered reasons were a pretext for a discriminatory one. He could present comparator evidence, showing that similarly situated, non-Asian American employees committed similar violations but were not dismissed. He could present testimony from Charles E. Washington, former acting director of counter-intelligence at the DOE, that security infractions are common and generally do not result in termination, let alone criminal prosecution and solitary confinement.\(^{266}\) But LANL would argue that these employees were not similarly situated in that their infractions were not as serious as those allegedly committed by Wen Ho Lee. Even if Lee could prove that he was treated differently, the court might find that the security rules were not unreasonable, and that Lee’s dismissal was justified.

\(^{262}\) The district court found that Hicks had been treated differently from similarly situated supervisors and co-workers, and that his supervisor fabricated the alleged verbal confrontation to provoke him into threatening him. \(Id.\) at 508.

\(^{263}\) \(Id.\) (citing St. Mary’s Honor Ctr. v. Hicks, 756 F. Supp. 1244, 1250-51 (E.D.Mo. 1991) (concluding that “although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated”)).

\(^{264}\) Hicks, 509 U.S. at 511.


\(^{266}\) Washington, supra note 100 (stating in affidavit that other employees mishandled classified information but never “underwent this type of extreme scrutiny and criminal prosecution”).
Lee might also argue that the "Kindred Spirit" matrix and the contention that China targets ethnic Chinese for espionage were merely pretexts for racial bias. He could offer testimony from counterintelligence experts that Chinese Americans are not more likely to commit espionage than other Americans, and that it is even less likely that American citizens born in Taiwan, like Lee, would commit espionage on behalf of the People's Republic of China, a country from which Taiwan declared independence after years of civil war.\footnote{267} He could also offer statements by Vrooman, Hecker, and Washington that key decision makers, including Trulock, possessed racial animus towards minorities. Washington said of Trulock: "Based upon my personal experience with Mr. Trulock, I strongly believe that he acts vindictively and opportunistically; that he improperly uses security issues to punish and discredit others; and that he has racist views towards minority groups."\footnote{268} Despite all this evidence regarding pretext, the LANL decision makers would certainly challenge the veracity of the witness' testimony. Because of Lee's indictment, the court may be skeptical towards Lee's charge that the government's proffered reason for his dismissal was pretextual.

Lee would also face difficulty proving pretext because of the honest belief rule. Under this rule, adopted by the First, Eighth, Seventh, and Tenth Circuits, a plaintiff seeking to prove pretext must show that the employer did not honestly believe the proffered reason for the employment action in question.\footnote{269} If the employer honestly believed its proffered reasons for its actions, a plaintiff has not proven pretext, "even if the reasons are foolish or trivial or even baseless."\footnote{270} Some courts have gone as far as suggesting that the plaintiff must show that the employer's proffered reasons were "lie[s] ... or had no basis in fact"; proving that the reasons were "mistaken, ill-considered, or foolish" would be insufficient if the employer honestly believed them.\footnote{271}

Because LANL falls under the jurisdiction of the Tenth Circuit, the honest belief rule would apply in Lee's hypothetical employment discrimination case. Accordingly, the employer would argue that it

\footnote{267}{Id. See supra note 111 and accompanying text.}
\footnote{268}{Washington, supra note 100.}
\footnote{269}{See, e.g., Ezele v. United Parcel Service, Inc., 181 F.3d 898, 900 (8th Cir. 1999) (declining to find pretext where there was no evidence that the proffered reasons were "created to disguise an illegal discriminatory motive"); Ruiz v. Posadas de San Juan Assoc's., 124 F.3d 243, 248 (1st Cir. 1998) (holding that the critical question is "whether the employer believed its proffered reason was credible"); Jackson v. E.J. Branch Corp., 176 F.3d 971, 983 (7th Cir. 1998) (holding that pretext is not proven if the decision maker "honestly believed in the non-discriminatory reasons it offered... even if the reasons are foolish or trivial or even baseless").}
\footnote{270}{Jackson, 176 F.3d at 983.}
\footnote{271}{Crim v. Bd. of Educ., 147 F.3d 535, 541 (7th Cir. 1998). See also Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1289 (D.C. Cir. 1998) (avoiding the use of the term "pretext" and instead referring to "evidence that the employer's explanation is false, that it is a lie ... "); Tincher v. Wal-Mart Stores, 118 F.3d 1125, 1129 (7th Cir. 1997) (stating that "pretext means a lie, specifically a phoney reason for some action"); Pumpkin-Wilson v. Sheets, 1996 U.S. App. LEXIS 33263 (stating that the pretext requires a showing that the proffered reason was "not the genuine motivating reason, but rather was a disingenuous or sham reason") (citing Reynolds v. School Dist. No. 1, 69 F.3d 1523, 1535 (10th Cir. 1995)).}
honestly believed that Lee had committed the wrongdoings at issue because of the results of the DOE polygraph test and the discovery of a notebook with a list of classified files he had improperly downloaded. Lee could try to explain his actions or argue that the employer misinterpreted his actions, but showing that the employer’s proffered reasons were doubtful or mistaken would be insufficient. Lee would have to show that the employer did not honestly believe he had committed these wrongs or perhaps that the employer had lied about the alleged violations.

Lee could try to argue that the perception of his misconduct as serious enough to warrant termination may have resulted from negative racial stereotypes. Specifically, he would argue that Trulock and the FBI might have unconsciously decided to investigate Lee’s wrongdoings because of negative stereotypes of Asian Americans as perpetual foreigners, disloyal aliens, and inscrutable spies— even though they may have had a good faith, honest belief about these stereotypes. He could also try to present experts to argue that concepts of social cognition theory, including the simulation heuristic and causal attribution bias, demonstrate that he may have been selectively targeted based on race-based stereotypes.

The existing intent requirement and statutory proof framework do not give the plaintiff a means or opportunity to make such showings of subtle discrimination. Even if Lee had a sense that discrimination was the real cause for his dismissal, the honest belief doctrine and the intent requirement in general would prevent him from showing that his race was more likely the motivating factor for the challenged decision.

Even if Lee were successful in showing that the government’s proffered reason was false, or if true, was pretextual, he would nevertheless be required to satisfy his burden of persuasion that it was intent to discriminate, and not some other reason, that was the motivating factor in his dismissal. If the court does not recognize the allegations by Vrooman, Washington, and Hecker of an ad hoc policy of racial profiling, Trulock’s personal racial bias as direct evidence of discriminatory intent, or the “Kindred Spirit” matrix as indirect evidence of subtle racial bias, Lee probably would not be able to satisfy this burden. The government probably would successfully argue that it was his misconduct, and not any type of intent to discriminate, that was the reason for his termination. By inadequately taking into account subtle forms of discrimination, the existing intent requirement overlooks cognitive biases that may affect purportedly non-discriminatory, legitimate reasons for adverse employment actions.

The difficulty of proving intent in both the selective prosecution and employment contexts for someone like Lee, who seems to have been treated so unfairly, suggests that something is necessarily wrong with the intent requirement, as it has been interpreted in the constitutional and statutory contexts. Specifically, it tells us that the motivational interpretation of intent, which fails to account for subtle forms of

272. *Case Update, supra* note 60 (statement of Louis J. Freeh).
discrimination, is potentially inadequate to cover something as troubling as racial profiling.

IV. TOWARDS A UNIFORM INTERPRETATION OF CAUSATION-BASED INTENT

If intent is going to cover subtle forms of discrimination like racial profiling in the Wen Ho Lee case, there must be a different interpretation of intent than the existing one. Various scholars have proposed changes to the intent requirement in the constitutional and statutory contexts. The decision-making process in these two contexts is parallel in such a way that intent should be reinterpreted and uniformly applied as causation in both contexts to account adequately for subtle forms of discrimination that are so rampant today.

The existing proof frameworks in both the constitutional and statutory contexts require that the claimant establish a prima facie case of discrimination. In a selective prosecution case, the specific elements of a prima facie case are discriminatory purpose and discriminatory effect. The elements vary under Title VII, depending on the nature of the adverse employment action, but the plaintiff is required to raise an inference of discrimination. In both contexts, the burden of proof then shifts to the opponent to provide a "legitimate, non-discriminatory reason" for the employment decision or, similarly, "permissible racially neutral explanation criteria and procedures" for the prosecutorial decision. Ultimately, the burden lies with the claimant to prove intentional discrimination.

While courts can technically take into account subtle and even unconscious discrimination under the existing frameworks, they have been unwilling to apply the frameworks in such a way as to accomplish that. The courts must acknowledge and embrace the potential to identify and remedy subtle forms of discrimination and bias if they are going to cover cases as seemingly obvious as Wen Ho Lee's. Intent as causation provides the most coherent way to accomplish this.

A. Reinterpreting Intent as Causation

Many scholars have argued that causation is the appropriate way to understand the concept of intent, where one asks whether "an individual or group was treated differently because of race." Under the causation

274. See sources cited supra note 16.
279. See Selmi, supra note 14, at 289.
280. McGinley, supra note 15 (arguing that the Title VII proof constructs, as originally designed, were meant to separate discriminatory conduct, both conscious and unconscious, from non-discriminatory conduct).
281. See sources cited supra note 183.
282. Selmi, supra note 14, at 289.
approach, discrimination is "because of" the protected characteristic (e.g., race, sex, age, etc.) "when the protected characteristic caused, in whole or in part, the decision to occur." 283

The statutory language used in employment discrimination statutes, including Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), supports a causation understanding of intent. 284 Under each statute, a plaintiff establishes a prima facie case of discrimination by showing that the employer took the employment action "because of" her protected status. 285 Title VII prohibits employers from discriminating against an individual "because of such individual's race, color, religion, sex, or national origin." 286 The ADA prohibits discrimination against a qualified individual "because of" her disability. 287 Similarly, the ADEA prohibits discrimination against an individual "because of" her age. 288

The Court's decisions also support a causation-based understanding of intent. The "because of" language in Feeney suggests that the proper inquiry of intent under the Equal Protection Clause is not the subjective mental state of the decision maker. Instead, the proper inquiry is whether the plaintiff's protected status was a motivating factor with a determinative effect. 289 The plurality in Price Waterhouse v. Hopkins held that a plaintiff is entitled to liability when she can show that her protected status was a "motivating factor" in the employment decision, unless the employer can show that it would have made the same decision absent that factor. This essentially makes the protected characteristic a "but for" cause. 290

In response to Price Waterhouse, Congress enacted the Civil Rights Act of 1991, effectively amending Title VII and establishing a "motivating factor" test instead of the "but for" test suggested by the plurality in Price Waterhouse. 291 Section 703(m) of the Act provides that

[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice. 292

The "motivating factor" analysis, set up in Price Waterhouse and codified in the Civil Rights Act of 1991, suggests that causation is the proper way to understand intent.

Causation addresses the flaws of the motivational understanding of intent. First, a causation-based concept recognizes the difficulties of a

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283. Krieger & White, supra note 182, at 503.
284. Id.
285. Id.
289. See Lee & Bhagwat, supra note 178, at n.32-33; Selmi, supra note 14, at 289.
290. Krieger & White, supra note 182, at 504 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989)).
motivational inquiry, particularly where the issue involves a group decision. Instead of inquiring into the subjective motivations of the decision maker, a causation-based approach focuses on the determinative effects of decisions. Second, intent as causation recognizes that discrimination is not necessarily conscious, but rather that it may be subtle or even unconscious. Under this approach, the focus is placed on the plaintiff's harm and taken from the decision maker's self-awareness that he was motivated by the protected characteristic. Specifically, the inquiry is whether the protected characteristic had a determinative effect on the decision — regardless of whether the discrimination was unconscious, subtle, or conscious. By simply looking to see whether one's protected status was a motivating factor, the proposed standard would look at the harm experienced by members of a protected class rather than determining whether the actor intended to cause the harm per se. This standard would acknowledge that unconscious racism exists and is no less harmful, if not more harmful, than intentional discrimination.

B. Proving Causation: A Uniform Framework

Because of the difficulties of proving intentional discrimination through the formalism of the existing proof frameworks, courts should adopt a new, uniform framework that utilizes the causation-based concept of intent in both the constitutional and statutory contexts.

In the statutory context, Michael Zimmer has argued that the Civil Rights Act of 1991 established a uniform structure that replaced the “but for” test with the “motivating factor” test in all individual disparate treatment employment cases. Under the “motivating factor” test, the Act establishes a two-step process of proof:

[P]laintiff establishes liability by showing that the protected characteristic was “a motivating factor” for the decision plaintiff challenges. Defendant then may limit full remedies by proving it would have made the same decision even if it had not relied on the protected characteristic.

By basing liability on a showing that the status was a “motivating factor” and by presuming that remedies should be awarded unless the employer can establish the “same decision” defense, this two-step liability-relief system acknowledges that discrimination is rarely overt, and that prejudicial bias may enter into the decision-making process in subtle and even unconscious ways.

There is debate as to whether the “motivating factor” test applies in both direct and circumstantial evidence cases. Zimmer explains that the Act clearly applies to cases with direct evidence, but he argues that it should apply to cases with circumstantial evidence as well, such that all

293. Krieger & White, supra note 182, at 510 (citing D. Don Welch, Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent, 60 S. CAL. L. REV. 733, 778 (1987)).
294. See supra Part III.
296. Id. at 625.
evidence, whether direct or circumstantial, is weighed by the factfinder.  

Some courts disagree, insisting that the "motivating factor" test under Section 703(m) applies only in cases with direct evidence, and that plaintiffs must still establish "but for" causation in circumstantial evidence cases.  

Zimmer bases his conclusion on a variety of considerations. For instance, he argues that the plain meaning of the Act, and specifically the text of Section 703(m), does not differentiate among different types of intentional discrimination nor distinguish between direct or circumstantial evidence cases. Zimmer also argues that the alternative to a uniform approach—e.g., introducing different types of evidence and using different standards—would be unworkable in the context of jury trials. Moreover, Zimmer argues that a uniform structure advances the purpose of the amendments—to "liberalize" anti-discrimination laws as a legislative response to narrowing Supreme Court decisions. By replacing the "but for" test traditionally applied under the McDonnell Douglas approach with the "motivating factor" test, the Act reduces the plaintiff's burden in proving discriminatory intent. While Zimmer discussed the "motivating factor" test only in relation to the employment discrimination context, the causation-based approach is the most coherent approach for understanding discriminatory intent in general and should be applied to constitutional cases as well. It is proposed that the "motivating factor" test set forth in the Civil Rights Act of 1991 can be applied, not only to the statutory Title VII context but also to the constitutional selective prosecution context. A uniform standard in these contexts is appropriate, because the decision to prosecute is not dissimilar from an employment decision, particularly where the basis of termination is alleged misconduct, as in the case of Wen Ho Lee.  

A standard based on the Civil Rights Act of 1991 would change the nature of the review of anti-discrimination cases. Specifically, a uniform standard of intent as causation would expand the inferences that juries are allowed to draw in reviewing evidence of discriminatory intent. Courts would use the same evidentiary structures to detect subtle forms of discrimination, but they would be able to expand the inferences that could be drawn from such evidence. Useful evidence in determining whether a protected characteristic was a motivating factor includes the evidence underlying the plaintiff's prima facie case and the defendant's rebuttal,
evidence of differential treatment from those similarly situated to the plaintiff, past treatment of the plaintiff, and statements of bias or discrimination by the decision maker. The nature of the evidence may remain the same as in the motivational approach, but the jury would be allowed to draw a broader range of inferences from that evidence, recognizing that discriminatory intent may be subtler than traditionally understood.

If the Act's two-step liability-relief process were applied to the prosecutorial context, a criminal defendant would establish liability for selective prosecution where he showed that his protected status was a motivating factor in the prosecutorial decision. This would eliminate the discriminatory purpose and discriminatory effect prongs, and thereby lessen the burden on the defendant. Instead, a criminal defendant like Wen Ho Lee could show that his protected status (race) played a role in the prosecutorial decision and had a determinative effect.

This would not necessarily be an easy burden to satisfy, but Wen Ho Lee would have a much better chance of establishing liability under this scheme. To prove his selective prosecution claim, he could show that his race (Asian American) had a motivating role in the DOE's initial decision to target him as a prime suspect during the "Kindred Spirit" investigation. Even though there may have been other reasons why he was named a suspect, such as his travels to China and contacts with Chinese scientists, Lee could show that his race was a motivating factor. He could also present comparator evidence that similarly situated individuals who were not of his race could have been prosecuted but were not. He could point to individuals, not only implicated in the "Kindred Spirit" investigation, but who committed similar infractions in other contexts but were not prosecuted, namely John Deutch. Lee probably would present the same type of evidence under the traditional three-part McDonnell Douglas test. However, under the motivating factor test, the jury would be allowed to draw inferences of discrimination from such evidence that may have been prohibited otherwise. The government would be presumed liable once Lee established that his race was a motivating factor.

Under the two-step liability-relief system, the government could limit full relief by proving that it would have made the same decision even if it had not relied on Lee's race. The government probably would have trouble proving the counterfactual case, particularly considering declarations by individuals like Vrooman and Washington, as well as examples of similarly situated individuals like John Deutch, who were not prosecuted. While the existing framework places the burden on the claimant to show that similarly situated individuals were not prosecuted, the proposed framework would place that burden on the employer to show that the claimant would have been terminated from his employment and prosecuted even if it had not considered his protected characteristic.

305. See Krieger & White, supra note 182, at 511.
C. Preventing Causal Use of Subtle Discrimination

While the proposed two-tier scheme would help account for subtle forms of discrimination, it is only a partial solution. Even if society acknowledges that subtle discrimination is real, social cognition theory shows that it is impossible to prevent people from acting on cognitive biases of which they are not aware. In order to help decision makers become cognizant of their own biases, the government can and should establish some guidelines to help decision makers monitor and correct their own behavior.

In the selective prosecution context, Angela Davis has proposed a system of procedural protections that would make prosecutorial discretion less susceptible to abuse. Specifically, she proposed the use of racial impact studies, collecting and publishing data regarding the race of the defendant and victim in each case for each category of offense, along with the action taken at each stage of the prosecutorial process. The data would be analyzed to determine whether there was a statistically significant effect of race on prosecutorial decision making. Once the impact of race is determined, prosecutors could decide whether and how to change the existing prosecutorial decision-making process.

One procedural measure that has been proposed to improve the process is the implementation of charging guidelines - to help prosecutors make informed decisions at all stages of prosecution. Charging guidelines would provide prosecutors with specific instructions for prosecutorial decisions, and help prevent cognitive bias and subtle discrimination from infecting the prosecutorial process. The Attorney General has published the United States Attorneys' Manual as a handbook of instructions for federal prosecutors. Currently, the Manual is simply an internal Department of Justice guidance; "[i]t is not intended to, does not, and may not be relied upon to create any rights...enforceable at law."

Some scholars have proposed that deviations from charging guidelines, or other stated policies, "would be sufficient to show prima facie discriminatory prosecution and shift the burden of proof onto the government to explain its actions." Under the motivating factor test, deviations from the guidelines should be admissible to help a selective prosecution claimant establish that her protected status was a motivating factor.

The proposed creation of charging guidelines can be expanded to the employment context. Such guidelines would help employers and prosecutors make more informed decisions. In essence, they would have

306. See discussion supra Part II.C.3.
307. See Davis, supra note 16.
308. Id. at 19.
311. Id. (citing Vorenberg, Decent Restraint of Prosecutorial Power, 94 HARV. L. REV. 1521, 1564 (1981)).
some stated policies, as dictated by a governing agency like the Department of Justice or the Equal Employment Opportunity Commission, that would serve as a formal check on decisions and the motives underlying them—regardless of whether those motivations are conscious or unconscious. The use of preventative guidelines would only be a partial solution. However, when implemented in conjunction with the motivating factor proof framework, guidelines may serve as an effective means of preventing discriminatory decision making in two contexts that greatly impact the lives and liberties of individuals—criminal prosecution and employment.

After Wen Ho Lee’s dismissal, the DOE responded to allegations of racial profiling by enacting more explicit anti-discrimination policies. Bill Richardson, then Director of the DOE, issued a no-tolerance rule against racial profiling and created a task force against racial profiling.312 Had the DOE issued such policies and created the task force prior to Lee’s dismissal, the investigation into his alleged wrongdoings may have been more thorough. Ultimately, he may not have been subjected to the same treatment by investigators, prosecutors, and his employer. Some type of guideline would help decision makers regulate their own behavior. If a violation of these guidelines served as a showing of a prima facie case, as proposed by some scholars, or alternatively, helped the plaintiff to establish liability under the motivating factor test, decision makers would be more likely to assess deliberately whether their decisions are being affected by subtle forms of discrimination before such discrimination has a determinative effect.

Of course, there is some uncertainty as to the efficacy of preventive guidelines. Linda Krieger has argued that it is possible to prevent otherwise automatic cognitive biases,313 but “only through subsequent, deliberate ‘mental correction’ that takes group status squarely into account.”314 It is uncertain whether preventive guidelines would create the deliberate mental correction necessary to prevent otherwise automatic biases. Susan Bisom-Rapp has similarly questioned the efficacy of preventive measures and anti-discrimination training programs in particular.315 Bisom-Rapp noted the dearth of empirical research on the efficacy of training programs,316 and demonstrated that they may even have negative effects and lull managers into a false sense of security.317

312. See supra text accompanying notes 131-134.
313. Krieger, supra note 172, at 1216-17.
Despite the uncertainty of the efficacy of preventive measures, the use of racial impact studies and guidelines in the prosecutorial and employment contexts would primarily serve an expressive function, at least until Congress or the appropriate administrative agency could reassess their value. The creation of preventive measures would serve as a symbolic expression of the government’s acknowledgment of subtle forms of discrimination. The existence of such measures would also raise awareness among decision makers of the importance of eradicating such discrimination. Krieger is correct that decision makers need both awareness and will to change their behavior. Nonetheless, behavioral change must begin somewhere, and preventive guidelines may help to at least create public awareness and consciousness. Hopefully, the will to change will follow.

CONCLUSION

Wen Ho Lee is out of prison. Upon his release, he went home and attended a welcome-home party thrown by his neighbors. Back home with his family and friends, Lee no longer has to sit shackled in solitary confinement. But the fight for Lee continues.

Cecilia Chang, founder of a non-profit group in support of Lee, stated: "We accomplished one of our two goals – freedom for Lee – and now we’re going to work on getting justice for him." As part of that effort, Lee’s supporters have been seeking a presidential apology and pardon for Lee’s one felony conviction. Civil rights groups have also demanded a bipartisan, independent investigation into the prosecution of Lee to determine if he was singled out because of his race and to ensure that future prosecutions are conducted in a fair manner. And Lee himself is suing the federal government for violating his privacy by leaking information about him to the media.

Since his release from prison, Lee has written a book entitled My Country Versus Me, which gives a first-hand account of his experience before, during, and after imprisonment. In the final chapter, Lee writes:

[A's a scientist it is clear to me that unless the fundamentals change, it is highly possible that what happened to me will happen again . . . This is a country of many races of people – white, black, brown, red, yellow. If the

PREVENTION OF SEXUAL HARASSMENT, IN SEXUAL HARASSMENT THEORY, RESEARCH AND TREATMENT 175, 182 (William O'Donohue ed., 1997)).
320. See LEE & ZIA, supra note 42, at 331. During his last hours in office, President William Clinton issued a pardon for John Deutch but not for Lee. Lee’s supporters are continuing to seek a presidential pardon for Lee from the Bush administration.
323. See id.
Constitution is right, we should all be treated equally. But we are not, and we all must try to solve this problem. If we do not, the next generation will also face getting locked up the way I was.\(^3\)\(^2\)\(^4\)

The existing interpretation of the intent requirement is potentially inadequate to deal with cases like Wen Ho Lee's where something went wrong because of the individual's race. The implementation of the uniform standard proposed in this Comment would interpret intent as causation, more readily acknowledge the existence of subtle forms of discrimination, and help ensure that the intent requirement more adequately covers cases for claimants like Wen Ho Lee whether in the constitutional or statutory context. More importantly, the proposed reform will help ensure that what happened to Wen Ho Lee will not happen again.

\(^{324}\) Id. at 330.