

ON PRECEDENT AND PROGENY: A RESPONSE TO PROFESSOR GABRIEL J. CHIN'S "DOUBTS ABOUT *YICK WO*"

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Those that cannot prove their worth and strength by the test of experience are sacrificed.¹

INTRODUCTION

I am no stranger to the joys of reproduction. My brothers have each fathered two children, providing me two amazing nieces and two incredible nephews. I have two adult godchildren: one, a lovely young woman with a child of her own; the other, a fine young man (with two younger brothers who are engaging in their own right). I have formally mentored two teen girls; sixteen years later, one continues to rely upon my support and guidance. Friends, colleagues, and acquaintances have introduced me to their children, grandchildren, and great-grandchildren. I hope our time together brightened their lives as it has mine.

I am a woman, yet I am not a mother.² I did not conceive, carry, or birth any of these children. Technically, they are not mine, and I am not theirs. Given the "ethos of maternity"³ and rubric of motherhood, both of which command that the most natural state for a woman—a whole, real woman—is to be a mother,⁴ I may as well not exist.⁵ Nevertheless,

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1. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 22 (1921).

2. *Black's Law Dictionary* defines mother as "[a] woman who has borne a child. A female parent." *BLACK'S LAW DICTIONARY* 1013 (6th ed. 1990).

3. Note, *Neonaticide and the "Ethos of Maternity": Traditional Criminal Law Defenses and the Novel Syndrome*, 5 *CARDOZO WOMEN'S L.J.* 175, 224 (1998).

4. "Motherhood is 'absolute dedication' by woman to her role." Paula Abrams, *The Tradition of Reproduction*, 37 *ARIZ. L. REV.* 453, 477 (1995) (chronicling religious, philosophical, and cultural roles regarding, *inter alia*, society's elevation of woman as mother).

5. "Our society does not think it is just fine for people to remain single and childless deliberately or for married people to remain childless deliberately. Infertility is constructed as a nearly un-

many would cite my presence as incredibly important and, at times, both crucial and determinative in their development. Some would be accurate; others would be generous; a few, alas, would likely be in error.

In certain circles, under certain circumstances, women who have not borne children can become mothers through “othermothering.”⁶ Othermothering occurs when women assist biological mothers by sharing mothering responsibilities or “simply” mother children not their own.⁷ Othermothers can be, but need not be, confined to blood relatives or “supportive fictive kin.”⁸ Women unrelated or even strangers to the birth mother can othermother, as can men.

Nevertheless, childlessness, i.e., “failure” to (re)produce, is regarded by some as a curse.⁹ In certain circles, childlessness is also regarded as an effrontery to humanity.¹⁰ Due to the importance placed on reproduction by religious mandates and customs going back to time immemorial, barren women historically have been regarded as unnatural.¹¹ Under these tenets, women have an obligation to procreate; those who fail embody suffering, deserve pity, and evidence disfavor.¹²

bearable tragedy; deliberate childlessness is constructed as nearly unimaginable selfishness.” Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 KY. L.J. 1197, 1225 (1995–1996).

6. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 119 (1990). “Baby Boom,” a movie starring Diane Keaton, was one of the first modern mainstream introductions to the concept of othermothering. There, Keaton portrays a high-powered businesswoman who “inherits” an infant upon the death of a distant relative and chooses to raise the infant as her own. See *BABY BOOM* (MGM Studios 1987).

7. See Adrien Katherine Wing & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. GENDER RACE & JUST. 257, 262 (1999) (citing Patricia Hill Collins’s coinage of the term and its suggestion “that persons other than biological mothers can mother”). So, for example, my othermothering of others’ offspring has involved—nay, required—significant quantities of money, time, energy, emotion, physical space, actual presence, and emotional availability.

8. Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 18 (2005) (discussing the notions of community caretaking of children by women as a political strategy and empowered living).

9. See, e.g., Mary Rodgers Bundren, *The Influence of Catholicism, Islam and Judaism on the Assisted Reproductive Technologies (“ART”) Bioethical and Legal Debate: A Comparative Survey of ART in Italy, Egypt and Israel*, 84 U. DET. MERCY L. REV. 715, 739–40 (2007); Ellen Waldman, *Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel*, 16 HEALTH MATRIX 65, 70 (2006) (“The curse of the barren woman unites several of the biblical matriarchs’ narratives, reminding the reader that the quest for children reaches back to time immemorial.”).

10. See, e.g., Michelle Goldberg, *To Breed or Not to Breed*, in *MAYBE BABY* 3, 5 (ed. Lori Leibovich, 2006) (characterizing the author’s fear that her childlessness is an “effrontery in defying the whole history of the human race”). Barren desolation is one way to characterize the emotional reaction of those who take the affront. *Id.*

11. See Wing & Weselmann, *supra* note 7, at 257 (noting that “[i]n Western culture, being a mother is presented as the natural destiny of all women”).

12. See ADRIENNE RICH, *OF WOMEN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 19 (10th ed. 1986) (noting that in some regions in the Middle East, “God is believed to strike a woman barren as punishment for some impiety”); Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL’Y 61, 64–65 (1995) (noting modern “[c]elebration of women’s highest calling being mothering” and that “Biblical stories proclaim that motherhood is a special blessing bestowed upon those women who have obeyed God; those who are disobedient may be made barren”) (citations omitted).

Moreover, there is an obligation to procreate properly. Having the right type of child(ren) may be second only to the requirement of (pro)creation. Unfortunately, progeny are not always what parents want or need them to be. They have a healthy splash of parental genes; nearly everything else—emotions, experiences, and behaviors—are their own. The rest is largely and quite often completely out of parental hands. Even were one to prove an impeccable parent, there is no guarantee of commensurate results. Children can disappoint. They have an irritating way of being ungrateful, disrespectful, venal, and irresponsible. It is said that the apple does not fall far from the tree; however, each of us likely knows of at least one example where one might counter that truism with evidence that some apples have not only the capacity to roll but launch.

Nevertheless, parents are often (rightly) regarded as culpable regarding the quality of their progeny. Some parents are appallingly imperfect. These parents (or even fabulous ones, albeit less pathologically) model convenient amnesia, favoritism, inconsistency, and even criminality. Lack of clarity or consistency can create confusion in those expected to follow the parent's lead, should the parent choose to lead. Parents can procreate and keep children in chaos.

I hesitate to criticize either parents or their posterity. Given the chicken/egg nature of what is seen from the outside and after the fact (which, upon further examination, reveals more than one version), laying blame can be difficult. Just as parents do not always get the children they want and children rarely get to choose their parents, progeny does not always flow prettily from precedent, and progeny does not always perpetuate precedent, particularly because other influences can exercise great power, affecting much by way of outcome.

I. ONE IS THE LONELIEST NUMBER

Given what Professor Chin has now exposed regarding *Yick Wo* and its progeny, I shall exercise a similar restraint. *Yick Wo* did not hold that it violated the Equal Protection Clause of the Fourteenth Amendment to prosecute an individual because of his race.¹³ *Yick Wo* did not turn on race, but property (and arbitrary governmental deprivation thereof).¹⁴ The rationale, Professor Chin asserts, was treaty-based; no state could properly interfere with the federal government's right to manage foreign affairs, even when those affairs were domestic and even when "foreigners" were Americans.¹⁵ Given the exceedingly racialized

13. Gabriel J. Chin, *Unexplained on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV. 1359, 1362.

14. *See id.* at 1363.

15. "[F]oreignness is a crucial dimension of the American racialization of persons of Asian ancestry. It is at the heart of the racial profile of Chinese and other Asian Americans." Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1694 (2000).

times, such oxymorons were common.¹⁶ Accordingly, it is unsurprising that the Court decided *Yick Wo* as it did, given the Justices' incubation in an immature country that had, for centuries, especially eschewed and outlawed racial equality.¹⁷

Through a twenty-first-century lens, *Yick Wo*'s holding seems pregnant with possibility. I suspect that such a reading is both blessed and cursed with the passage of time, as well as softened race-based laws.¹⁸ At the time, and given the tenor of its race-based jurisprudence, *Yick Wo*—the “small miracle” of equal protection—most certainly was not what the Court sought.¹⁹

Nor was *Yick Wo* what it now appears regarding race-based, discriminatory prosecutions. Instead, *Yick Wo* was the first of its kind; it may also be the last. For the reasons outlined by Professor Chin, *Yick Wo* now is constitutionally—both doctrinally and theoretically—incapable of attaining the loftier legacy of making racial discrimination unconstitutional in criminal prosecutions.²⁰ Thus, as precedent, *Yick Wo* may be regarded as an effrontery, given our justice system's reverence for *stare decisis* and precedent.²¹ Accordingly, without progeny, *Yick Wo* may as well never have been decided.²²

II. FRUIT OF THE POISONOUS WOMB

Professor Chin, however, does not appear to mourn *Yick Wo*'s existence. Instead, he seems to mourn the failure of *Yick Wo*'s progeny to elevate properly (versus erroneously and after the fact) *Yick Wo* as precedent. But Professor Chin certainly cannot lament the lack of little *Yick Wos*, i.e., cases that are—according to his analysis²³—mundane,²⁴

16. See Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 ASIAN L.J. 1, 12 (2001) (“Asian Americans have been “raced” as foreign, and from there as presumptively disloyal . . .”). See generally Mari J. Matsuda, *We Will Not Be Used*, 1 ASIAN PAC. AM. L.J. 79 (1993); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

17. See, e.g., Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1411 (1988) (citing ways in which legal race-based discrimination was explicit and blatant prior to Reconstruction).

18. See, e.g., Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 663–64 (characterizing twenty-first-century social structure as one that “includ[es] legal proscriptions, disparages outward racial antagonism” and where “racial biases are submerged to the level of unconsciousness”).

19. See Chin, *supra* note 13, at 1360; see also Hutchinson, *supra* note 18, at 663 (noting Post-Reconstruction and Civil Rights Movement “overt, outward racial hostility” via “outward and violent defiance” against formal, legal equality by governments and private parties).

20. See Chin, *supra* note 13, at 1361 n.9 (noting that case law subsequent to *Yick Wo* held that race-based criminal prosecutions violate the Equal Protection Clause of the Fourteenth Amendment).

21. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (noting that, under U.S. law, “respect for precedent is . . . indispensable”).

22. Cf. Goldberg, *supra* note 10, at 5 (characterizing failure to reproduce as “an effrontery in defying the whole history of the human race”).

23. See Chin, *supra* note 13, at 1361.

“classic token[s]”²⁵ that enable attribution error. “Bad precedents, when tolerated and condoned, tend to be repeated.”²⁶

Professor Chin notes that the Court seems to have untold opportunities to apply *Yick Wo* against race-based prosecutions, but either failed or refused. Professor Chin is most correct when he highlights the Court’s complicity in bringing about this state of being and, essentially, the substantive desuetude of *Yick Wo*’s holding. It is not as if *Yick Wo* can, *sua sponte* and singularly, create progeny.²⁷ Legal norms, typically via *stare decisis*, may perpetuate and reinforce cultural norms. However, *stare decisis* is not an “inexorable command.”²⁸ There is an understanding, but no obligation, for the Court to cite any (prior) decision.²⁹ Moreover, how the Court chooses to “read” its own precedent is viral. A holding will not be taken seriously if the Court fails to take it seriously.³⁰

Additionally, the Court remains maddeningly deferential to law enforcement’s stealthy³¹ and even overt³² use of race or apparent ethnicity

24. *Id.* at 1364.

25. *Id.*

26. Andreas J. Jacovides, *Cyprus: The International Law Dimension*, 10 AM. U. J. INT’L L. & POL’Y 1221, 1222 (1995).

27. If one is barren, might it matter if the barrenness is by choice or force (e.g., biological)? For example:

The construction of the woman who chooses not to have children is contrasted with the woman who desires to, but is unable to bear children. The tragedy of her predicament reinforces the marginality of the woman who is childless by choice. Interestingly enough, in a context in which nature has visited a cruel deprivation on the “barren woman,” the woman who chooses not to reproduce is positioned as having made a choice that violates some natural instinct, order, or destiny.

Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 185 n.15 (2001).

28. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992); cf. Wing & Weselmann, *supra* note 7, at 260 (identifying mothering as a role that a woman may take on, but “not an inherent activity for all women”).

29. See *Casey*, 505 U.S. at 854.

30. See Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 387 (2001) (noting the Court’s landmark presidential decision “expressly denied the case had any precedential value”).

31. See generally Lenese Herbert, *Othello Error: Facial Profiling, Privacy, and the Suppression of Dissent*, 5 OHIO ST. J. CRIM. L. 79 (2007) (challenging U.S. Transportation Safety Administration’s post-September 11, 2001, use of a facial observation as a screening technique at American airports that purports to detect “high-risk” travelers, i.e., those “contemplating a terrorist or criminal act”). “According to TSA, face—not race or color—matters.” *Id.* at 84. However, as Professor Herbert notes:

After September 11, 2001, and in the context of American airports and national security, ethnicity may matter as much as race. Since the start of the “War on Terror,” profiling claims have been leveled against law enforcement by Arabs, Muslims, and those perceived as members of those populations. These individuals now complain that they are also disproportionately singled out by police for traffic stops, harassment, discrimination, and airport searches, simply because police correlate terrorist acts and national security threats with these groups.

Id. at 86 (citations omitted).

32. Hutchinson, *supra* note 18, at 678 (citing the Court’s upholding law enforcement’s use of race as “indicative of criminal propensity”). In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Court held that “even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation. . . . [W]e think it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved.” *Id.* at 563–64 (citations committed).

to burden subordinated classes.³³ Via so-called objective tests³⁴ and insistence upon neutrality (and demurring to other amendments when racial animus and complaint cannot be avoided), the Court can purport plausible deniability regarding racial discrimination by the executive, deferring to law enforcement needs.

Focusing so heavily on *Yick Wo* and its progeny risks ignoring the importance of the true brokers of constitutional protections or minimizing them as an afterthought. For example, prosecutors are considered by many to be the most powerful public officials in the American criminal justice system,³⁵ given the breadth of and deference to obvious and “hidden”³⁶ prosecutorial discretion.³⁷ As prosecutors are sworn to do justice,³⁸ individual facts and circumstances must be considered, as not all criminal defendants, victims, witnesses, and societal harm are the same, even when the identifying charged crime is.³⁹ Accordingly, prosecutorial discretion is necessary to the smooth operation of the criminal justice system; with it, prosecutors are presumptively free⁴⁰ to decide (ideally) who and what should be charged in order to mete out individualized

33. “Because the Court has decided to take a *deferential* approach with respect to discrimination that oppressed classes endure, it is reluctant or unwilling to view stark patterns of discrimination against them as probative of discriminatory intent.” Hutchinson, *supra* note 18, at 653, 678 (stating that “[r]acial discrimination in the context of law enforcement is a longstanding source of racial disharmony and subjugation”) (citation omitted).

34. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968) (basing assessment of reasonable seizures and searches during street encounters via the objectively reasonable officer).

35. See ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 23–24 (2007). Professor Davis notes that even the decision to charge an individual with a crime is an exercise in prosecutorial discretion, given that there is no absolute law that requires a prosecutor to charge. Accordingly, the decision to charge is “the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion.” *Id.*

36. See Lenese C. Herbert, *When Prosecutorial Discretion Meets Disaster Capitalism*, in RACE TO INJUSTICE: LESSONS LEARNED FROM THE DUKE UNIVERSITY LACROSSE PLAYERS’ RAPE CASE (Michael L. Seigel ed., forthcoming 2008) (characterizing the defendant’s ability to find out when and how discretion is exercised as “often an impossible task” given the rare “consistent, standardized methodology, explanation, or record” of how such discretion is and was exercised).

37. See DAVIS, *supra* note 35, at 127 (characterizing evidence to support a claim of prosecutorial discretion as “nearly impossible”).

38. See Brady v. Maryland, 373 U.S. 83, 87 n.2 (1963) (quoting former solicitor general and Judge Simon E. Sobeloff, who noted that “the Government wins its point when justice is done in its courts”); see also Berger v. United States, 295 U.S. 78, 88 (1935) (opining on the “peculiar and very definite” status of prosecutors as servants of the law); Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice,”* 76 FORDHAM L. REV. 1337, 1366 (2007) (quoting North Carolina’s Dough Bocker, lead prosecutor in the infamous North Carolina Michael Nifong [Duke Lacrosse Case] disbarment proceedings, who argued role of the prosecutor is that of “a minister of justice . . . whose most important duty and responsibility is to seek justice, not merely to convict”).

39. See DAVIS, *supra* note 35, at 13–14 (noting that factual differences in cases should be considered in prosecutorial decision making to affect justice for a diverse group of criminal defendants).

40. Judicial review of prosecutorial discretion shall be “extremely limited” and assessed under the “harmless error” standard, i.e., that courts should not set aside convictions if the error was harmless beyond a reasonable doubt. See *id.* at 127 (citing Rose v. Clark, 478 U.S. 570, 582 (1986)); see also, e.g., United States v. Hasting, 461 U.S. 499, 506 (1983) (limiting judicial review of judicial oversight even when, *inter alia*, prosecutorial misconduct leads to a finding of harmless error); United States v. Russell, 411 U.S. 423, 435 (1973).

treatment and, therefore, justice, based upon social, evidentiary, economic, and political considerations, when and where necessary.

Prosecutorial discretion receives presumptive and powerful deference, as interference with prosecutorial duties will almost certainly interfere with criminal law enforcement:⁴¹

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. . . . Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry and may undermine prosecutorial effectiveness . . .⁴²

Discerning how a prosecutor's various decisions were made is often an impossible task. Seldom does there exist a consistent, standardized methodology, explanation, or record upon which an abusive prosecutor can be measured or held accountable. Accordingly, concern regarding abuse of prosecutorial discretion stems from the lack of useful standards, meaningful guidelines, effective penalties, and official accountability for prosecutors when this discretion morphs into prosecutorial abuse that prejudices the criminally accused and constitutionally protected defendant (although other abuses can be quite significant, e.g., of family and friends or victims and witnesses).

When one takes into consideration that "the competitive enterprise of ferreting out criminality" of not only policing, but also criminal trial work, as well as the likelihood of successfully obscuring exploited and abused discretion by intentional actors, the task of checking that discretion is more daunting still. If even well-meaning prosecutors exercise their discretion in ways that produce unfair results, one can only imagine what ill-intentioned prosecutors are able to do, particularly because misconduct and abuse are never acknowledged and rarely punished.⁴³

41. One commentator has characterized the standards for obtaining discovery of evidence that may prove prosecutorial misconduct as "nearly impossible." Moreover, even when such a standard is met and evidence is discovered, judicial review of the prosecutorial conduct shall be "extremely limited" and assessed under the "harmless error" standard, i.e., that courts should not set aside convictions if the error was harmless beyond a reasonable doubt. See DAVIS, *supra* note 35, at 127 (citing *Rose v. Clark*, 478 U.S.570, 582 (1986)).

42. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

43. See DAVIS, *supra* note 35, at 17 (identifying the problems of prosecutorial discretion even when prosecutors attempt only to "do . . . justice"); see also *id.* at 140–41 (criticizing prosecutorial career advancements and rewards as improper and positive reinforcements for "arbitrary, hasty, and impulsive" decisions that may lead to high conviction rates, but are derived without accountability, or supervisory input).

III. OTHERMOTHERING AND *YICK WO*

Yick Wo was not one of the Court's great constitutional decisions outlawing racial inequality, but a pretender to that throne.⁴⁴ Let us assume, then, that *Yick Wo* is bad precedent that spawned unsound, illegitimate progeny that both obscure and expose *Yick Wo*'s clay feet as hardly "venerable precedent."⁴⁵ Professor Chin notes that it is a failure of unclear origins that *Yick Wo* has not been applied "to invalidate hundreds or thousands of discriminatory prosecutions."⁴⁶ Notwithstanding those failed opportunities, *Yick Wo* is hardly without progeny; rather, it is widely cited.⁴⁷ *Yick Wo* has become a bit of a meme, thanks to not only accurate, but inaccurate attributions. Accordingly, *Yick Wo* may have othermothered cases and causes into existence.

Professor Chin notes *Yick Wo*'s role in a number of cases⁴⁸ and that, notwithstanding its problematic progeny, inapplicability, or use as dicta, *Yick Wo* remains directly and indirectly⁴⁹ responsible for advancing a judicial and cultural understanding that, at the outset, eschews "systematic or intentional discrimination"⁵⁰ and provides a defense against "any such proceeding that is actually prosecuted on the ground of unconstitutional discrimination,"⁵¹ race-based prosecutions. Decisions such as *Oyler v. Boyles*⁵² and *Murguia v. Municipal Court*⁵³ are inextricably wound with *Yick Wo*, if for no other reason than that *Yick Wo*'s failings as precedent tested the waters for these cases' more determinative language and applicability. Essentially, what *Yick Wo* could not achieve on its own and in its time, subsequent cases were able to achieve, aided by *Yick Wo*'s

44. Cf. *Genesis* 9:18–27 (recounting Noah's sons' different reactions to his drunken nakedness). In these scriptures, it seems that Noah once grew drunk and fell unconscious. Noah's son, Ham, happened upon his drunken, unconscious, and naked father. Ham told his brothers, Shem and Japheth, who sought to cover Noah without seeing what Ham had. Shem and Japheth took a coat, walked backwards, and laid it upon Noah, never seeing what Ham had. Upon regaining consciousness, Noah cursed Ham and his descendants while blessing Shem and Japheth.

45. See Grant H. Morris, *The Evil That Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199, 1229 (lauding *Yick Wo*).

46. Chin, *supra* note 13, at 1363.

47. A quick June 13, 2008, search of several Lexis database libraries revealed *Yick Wo* merits a respectable number of "hits" as a search term:

Database	Number of Hits
United States Supreme Court Briefs	381
Federal Court Cases Within Two Years	58
Law Reviews and Journals	1,829
State Court Cases, Combined	1,672
Administrative Law	608

48. See Chin, *supra* note 13, at 1366–69.

49. See *id.* at 1368–69 (noting supportive, but not determinative or leading, post-*Brown v. Board of Education* civil equal protection case citation of *Yick Wo*).

50. *Edelman v. California*, 344 U.S. 357, 359 (1953).

51. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 588–89 (1961).

52. 368 U.S. 448 (1962).

53. 540 P.2d 44 (Cal. 1975).

presence and precedence. Perhaps these cases said what and when *Yick Wo*, legal scholarship (such as that contained herein), and substantive political discourse could not. In other words: reports of *Yick Wo*'s barrenness have been greatly exaggerated. Despite *Yick Wo* being incorrectly cited,⁵⁴ its precedential value may well have reached the ranks of the *sine qua nons*, as *Yick Wo* provides shoulders upon which modern race-based discrimination case law may produce *Yick Wo* 2.0, i.e., proper progeny that achieve that which *Yick Wo* argued, but was thwarted from achieving standing alone.⁵⁵

CONCLUSION

Each of us has our own idea of value. *Stare decisis* and precedent constructs one: a case matters if it is cited as authority. Seemingly, there is no other. Moreover, such a limited, fixed understanding of value reduces, if not ignores, the complexity of such an assessment. Particularly in the context of Fourth Amendment case law, imperfect precedent can lead to troubled (and troublesome) progeny. One scholar puts it this way:

The criminal defendant is a kind of private attorney general. But the worst kind. He is self-selected and self-serving. He is often unrepresentative of the larger class of law-abiding citizens, and his interests regularly conflict with theirs. Indeed, he is often despised by the public, the class he implicitly is supposed to represent. He will litigate on the worst set of facts, heedless that the result will be a bad precedent for the Fourth Amendment generally. He cares only

54. See Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 132 (1993) (characterizing othermothering as a practice that can "overcome[] some of the burdens of motherhood and reduce the potential for the collective transformative action of mothers").

55. Originally, "Web 2.0" was an Internet-specific term that suggested a new version of the World Wide Web, albeit without changes or updates in technical specifications; rather, the changes would occur in the ways in which both software developers and end-users would use the World Wide Web. Web 2.0 and then "2.0" likely entered popular parlance in 2004, signifying enhancement or improvement, often significant and dramatic, upon an original version. See Tim O'Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, Sept. 30, 2005, <http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-2.0.html> (identifying O'Reilly as one of the progenitors of the term "Web 2.0" and noting its defining characteristics to include, among many others, "continuous improvement"). Today "2.0" as a meme and modifier refers to the more modern and, often, superior version of any item, individual, or idea. See *id.*; see also Laura Kurtzman, *Some in Silicon Valley Still Dream of Al Gore 2.0 for President*, S.F. GATE, May 20, 2007, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/05/20/politics/p102014D78.DTL&type=politics> (noting appeal of former 2000 Democratic presidential candidate, Al Gore, as a 2008 presidential candidate, given, inter alia, Gore's post-2000 improvements, including "becom[ing] an environmental crusader and technology insider"); Posting of ReyBango to Ext JS, <http://extjs.com/blog/2007/12/04/ext-20-final-released/> (Dec. 4, 2007, 12:28) (characterizing 2.0 version as a "dramatic step forward from all previous versions"); The State of Minnesota, *Sustainable Building Guidelines (MSBG) Version 2.0*, Jan. 9, 2008, available at <http://www.msbg.umn.edu/> (last visited June 14, 2008) (announcing 2.0 provides "new features to make documentation easier"); StockFetcher.com, *Stock Screening*, <http://help.stockfetcher.com/sfhelp/?topicid=100328> (last visited July 14, 2008) (characterizing 2.0 as a brand-new take on the popular StockFetcher screening and charting interface that "provides much richer stock screening and charts, directly to your browser").

about the case at hand—his case—and has no long view. He is not a sophisticated repeat player. He rarely hires the best lawyer. He cares only about exclusion—and can get only exclusion—even if other remedies (damages or injunctions) would better prevent future violations. . . . He is, in short, an awkward champion of the Fourth Amendment.⁵⁶

Perhaps *Yick Wo* should have become one of the greatest constitutional law cases in modern American history. Perhaps the decision should have transformed American constitutional law and the way in which we regard or handle race-based prosecutions at the highest levels of government. Might progeny have made *Yick Wo* a better Supreme Court decision than it is without progeny? Perhaps, but that is not guaranteed. Demanding reasons as to why a tree did not bear fruit may, at times, require discounting that fruit which may have escaped our view or understanding. Additionally, the fault may lie with an unfair judiciary,⁵⁷ exacerbated by seemingly intractable, sometimes indiscernible prosecutorial discretion.

Maybe 128 years are not sufficient for the language or gist of *Yick Wo* to gain traction. By way of comparison, Robert Kennedy, Jr. indicated in 1968 that the United States would be ready for an African American president forty years hence. In 2008, that time has drawn nigh. Similarly, in 2008, the Supreme Court upheld a worker's claim against employer retaliation in a race-based bias case. The Court did so by invoking section 1 of the Civil Rights Act of 1866, a Civil War era provision.⁵⁸ Thus, perhaps *Yick Wo*'s time has not yet come.

But even if it has come and gone, make no mistake that its presence, its mere occurrence, can still be seen as sufficient. Perhaps *Yick Wo* should not have to redeem itself by producing little *Yick Wos*; it stands on its own merits; it is worth something for its own sake. Failure to reproduce does not doom the case to the depths of Hades. Perhaps *Yick Wo* is an end unto itself. *Yick Wo*, sans progeny, suffices. Its story, placed in the context of and alongside many other similar stories, makes a significant story of impact. On its own, it may have failed to transform the face of race-based discrimination claims and jurisprudence. But transforming the face of race-based discrimination and discrimination claims is a job for several cases, not merely a single one. Transformation is a task that spans time and even eras. Transformation, then, requires not just one case decision in American history, but several. Accordingly,

56. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 796 (1994).

57. See Chin, *supra* note 13, at 1361 (asserting that “a fair judiciary should have applied *Yick Wo* to invalidate hundreds or thousands of discriminatory prosecutions”).

58. In *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008), the Court exhumed 42 U.S.C. § 1981(a)— “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens”—to affirm the Seventh Circuit’s decision that the provision encompasses retaliation claims “against a person who has complained about a violation of another person’s contract-related ‘right.’” *Id.* at 1954, 1962.

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when properly assessing *Yick Wo*'s precedential value, disregarding its progeny—ill-conceived, questionable, and imperfect—seems to be a mistake.

