


7-6-2017

# A Never Ending State of Emergency: The Danger of National Security in Emboldening the Color Line in America

Celeste McCaw

Follow this and additional works at: <http://repository.law.miami.edu/umrsjlr>

 Part of the [Law and Race Commons](#), and the [National Security Law Commons](#)

---

## Recommended Citation

Celeste McCaw, *A Never Ending State of Emergency: The Danger of National Security in Emboldening the Color Line in America*, 7 U. Miami Race & Soc. Just. L. Rev. 107 (2017)  
Available at: <http://repository.law.miami.edu/umrsjlr/vol7/iss1/7>

This Note is brought to you for free and open access by University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Race & Social Justice Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# A Never Ending State of Emergency: The Danger of National Security in Emboldening the Color Line in America

Celeste McCaw\*

I. INTRODUCTION .....	108
II. “FACTS DO NOT CEASE TO EXIST BECAUSE THEY ARE IGNORED.” .....	109
III. “ALL LEGAL RESTRICTIONS WHICH CURTAIL THE CIVIL RIGHTS OF A SINGLE RACIAL GROUP ARE IMMEDIATELY SUSPECT.” .....	112
IV. KOREMATSU IN CONTEXT: THE SHAPING OF LAW AND PUBLIC POLICY BY SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS .....	114
V. KOREMATSU SETS THE STAGE FOR THE AMERICAN CRIMINAL JUSTICE SYSTEM’S INTRA-NATIONAL WAR ON TERROR .....	119
VI. RACE RELATIONS AND NATIONAL SECURITY TODAY: THE LEGAL MURDER OF YOUNG BLACK MEN AND THE IMPLICATION OF FERGUSON .....	124

---

\* Celeste N. McCaw, Esq. University of Miami School of Law, J.D. 2016; University of Miami School of Law, LL.M. 2016; St. John’s University, B.A. 2013. I would first like to thank the Race & Social Justice Law Review staff and the University of Miami School of Law faculty, especially Professor Donald Jones, whose course in Constitutional Law inspired the content of this article. The argument that I make in this Note unapologetically confronts the current state of intra-national affairs in the United States by tackling the issue of national security and race relations in this country. As a woman of color, I am a member of the communities that this argument directly impacts. Because of this, the advocacy in this article is one written with profound purpose and passion. I want to thank my parents, Teresa and Jeffery McCaw, Sr. It is through their guidance and support of my inquisition into all things I do not understand, that I arrived at this particular place, asking uncomfortable questions with the hope that someone who reads this will be inspired to work with me toward finding the answers.

## I. INTRODUCTION

“The policemen or soldiers are only a gun in the establishment’s hand. They make the racist secure in his racism. The gun . . . makes the establishment secure in its exploitation. The first problem it seems is to remove the gun . . . .”<sup>1</sup> Arguably, this statement made by Huey Newton, an African American political activist of the 1960s, sets the fifty-year-old stage for the argument that my paper intends to make today—America is at war with itself and the Constitution is a gun in its arsenal. Like a virus, the strain of race relations in this country has lodged within this nation such an aggressive attack to our cellular makeup—equal protection, due process—that a threat to America’s “national security” has become an everyday reality. U.S. judicial precedence, with *Korematsu* as one of the cases at its contemporary helm, creates not only a basis of using race as the motivation for antagonistic governmental action, but also sets the framework for expanding the war powers of Article II to suit the political conveniences of the newest “present emergency.”

I argue that as long as race or ethnicity functions as the means by which the color line is demarcated in America, the United States will forever be in a state of crisis. It will forever be shackled with a pressing public necessity—a necessity warning of the danger to the country’s public health and safety when the American legal system tells us that the lives of some citizens matter more than the lives of others. Thus, the government is always anticipating its next move, like a chess player never losing sight of his need to entrap his opponent’s king, and its citizens seem to always be a few moves behind.

The Constitution is the government’s gun, and national security is one of its bullets. It is the Constitution—eloquently crafted, seemingly indestructible—that is premised on the objective of protecting liberty and unity. But the Constitution, like any manmade creation, is not without flaw. Thus, “We the People,” the individuals that establish and sustain this Constitution, are neither free nor unified. For if the rights of just one person residing under the protection of this contractual document to which he or she is assigned, are curbed, inhibited, restrained, or infringed, then the nation is no longer liberated, no longer united, and no longer secure. For it is the individual, “We the People,” by which and for which the U.S. Constitution was established and to which the U.S. Constitution must protect.

---

<sup>1</sup> “HUEY NEWTON TALKS TO THE MOVEMENT ABOUT THE BLACK PANTHER PARTY, CULTURAL NATIONALISM, SNCC, LIBERALS AND WHITE REVOLUTIONARIES,” *THE BLACK PANTHERS SPEAK* 54 (Philip Sheldon Foner ed., Da Capo Press, 2nd ed. 2002). (emphasis added)

In this paper, I argue that the expansion of the government's war powers, the current state of U.S. affairs, and the historical jurisprudence of the Supreme Court will continue to create a foundation by which "national security" will justify the use of race or ethnicity as the primary factor in arresting, detaining, or imprisoning members of a racial or ethnic group. In Part I, I provide the particular facts of *Korematsu* and the factual backdrop in which the case was decided. In Part II, I provide a framing of the issues that *Korematsu* raises and the applicable level of scrutiny that is used to decide similarly situated cases. In Part III, I analyze how the government's interest in national security has found its footing in the history of our judicial system prior to the *Korematsu* decision and how the *Korematsu* Court should have decided. In Part IV, I discuss the contemporary issues that often arise by the current state of the criminal justice system by reflecting on the history of American policing. Finally, in Part V, I conclude with a discussion on the theoretical impact of the *Korematsu* decision on the state of U.S. affairs in regards to race relations and national security today.

## II. "FACTS DO NOT CEASE TO EXIST BECAUSE THEY ARE IGNORED."<sup>2</sup>

September 1, 1939 marked the start of World War II (WWII).<sup>3</sup> Some of the most notable causes of WWII consisted of Germany's resentment for signing the Treaty of Versailles, the devastation to the global economy by the Great Depression, and the growing number of dictatorships in European countries.<sup>4</sup> But the infamy of WWII, the infamy reigns in the event of the Holocaust—an event that led to the genocide of a single racial group (the Jews) by an Aryan regime (the Nazis). Although many governments—America included—may not have agreed with such an overt persecution of the Jews, it can be argued that the Nazis' white nationalist mentality was one that was globally shared.

The U.S. joined the war two years later, following two attacks on Pearl Harbor by Japanese fighter planes.<sup>5</sup> In December 1941, Congress declared war on Japan following the December 8<sup>th</sup> attack on Pearl Harbor.<sup>6</sup> Being fired from their government jobs and having their

---

<sup>2</sup> ALDOUS HUXLEY, *PROPER STUDIES* 247 (1927).

<sup>3</sup> World War II Fast Facts, CNN LIBRARY, <http://www.cnn.com/2013/07/09/world/world-war-ii-fast-facts/> (last updated July 31, 2015).

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

<sup>5</sup> Library of Congress, EXECUTIVE ORDER 9066: EVACUATION AND SEGREGATION, <http://www.loc.gov/teachers/classroommaterials/connections/manzanar/history2.html>.

<sup>6</sup> *Id.*

cameras and short-wave radios confiscated were some of the repercussions that Japanese Americans had felt in the weeks following Congress' declaration.<sup>7</sup> From Japanese Americans in Hawaii being accused by U.S. Supreme Court Justice Owen J. Roberts of helping the Japanese to attack Pearl Harbor to newspapers reporting of Japanese-American sabotage,<sup>8</sup> America did not hide its resentment and distrust of its Japanese citizens.

"At the time of the Pearl Harbor attacks, more than 100,000 persons of Japanese ancestry were living in California, Arizona, and the coastal areas of Oregon and Washington."<sup>9</sup> Most Japanese persons had come to the U.S. as immigrants to work the mines, to help develop the railroad system, and to be fishermen, farmers, and migrant agricultural laborers.<sup>10</sup> While Japanese immigrants were initially accepted into the U.S. as a means of cheap labor, Americans began to resent, mistrust, and discriminate against Japanese immigrants over the years.<sup>11</sup> With the rising increase of Japanese immigration and the heightened stereotype of the yellow peril, "the writings of various authors, newspaper editors, columnists, and movies in which Asians were portrayed as sinister villains engaged in activities of vengeance and treachery" became the mirror by which Americans viewed those of Japanese ancestry.<sup>12</sup>

On February 19, 1942, before any Act of Congress was promulgated, Executive Order No. 9066 authorized:

[T]he Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such actions necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commanders may determine, from which any or all persons may be excluded, and with such respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the

---

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Jay M. Brown, When Military Necessity Overrides Constitutional Guarantees: The Treatment of Japanese Americans During World War II, YALE-NEW HAVEN TEACHERS INSTITUTE (1982), <http://www.yale.edu/ynhti/curriculum/units/1982/3/82.03.01.x.html>.

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

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

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

Secretary of War or the appropriate Military Commander may impose in his discretion.<sup>13</sup>

On March 21, 1942, Congress took action in support of President Roosevelt's Executive Order No. 9066 and promulgated legislation that provided that:

[W]hoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense.<sup>14</sup>

A curfew order promulgated pursuant to Executive Order No. 9066, was attacked as unconstitutional in *Hirabayashi v. United States*, 320 U.S. 81 (1943). The curfew order “subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m.”<sup>15</sup> The appellant in *Hirabayashi* contended that Congress's 1942 Act was beyond the war powers of Congress and that its application against only Japanese citizens amounted to racial discrimination, which is constitutionally impermissible.<sup>16</sup> Despite these contentions, the Supreme Court “upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.”<sup>17</sup>

In May 1942, under the authority of Executive Order No. 9066 and the 1942 Act, an exclusion order—Civilian Exclusion Order No. 34—was promulgated by the Commanding General of the Western Defense

---

<sup>13</sup> Authorizing the Secretary of War to Prescribe Military Areas, 7 Fed. Reg. 1407 (Feb. 25, 1942) (Executive Order No. 9066); see also Library of Congress, *supra* note 5.

<sup>14</sup> Act of Congress of March 21, 1942, 56 Stat. 173; *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

<sup>15</sup> *Id.* at 217.

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

<sup>17</sup> *Id.*

Command.<sup>18</sup> The order directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from a described West Coast military area.<sup>19</sup> San Leandro, California, residence of Fred Korematsu, was one of the military areas designated in the exclusion order.<sup>20</sup> Korematsu was born on American soil. Thus, the Constitution makes him a citizen of the United States “by nativity and a citizen of California by residence.”<sup>21</sup>

Learning of the exclusion order, Korematsu chose to challenge it by remaining in San Leandro and continuing his life as an American citizen.<sup>22</sup> At the advisement of his then Italian American girlfriend, Korematsu underwent plastic surgery—altering his eyes in an attempt to look less Japanese—and changed his name to Clyde Sarah.<sup>23</sup> Despite these alterations, Korematsu was recognized for being of Japanese ancestry and was arrested on May 30, 1942 for violating the exclusion order; and on September 8, 1942, he was convicted in a federal district court.<sup>24</sup> “No issue was raised as to Korematsu’s loyalty to the United States.”<sup>25</sup>

### III. “ALL LEGAL RESTRICTIONS WHICH CURTAIL THE CIVIL RIGHTS OF A SINGLE RACIAL GROUP ARE IMMEDIATELY SUSPECT.”<sup>26</sup>

“I don’t want any of them [persons of Japanese ancestry] here. They are a dangerous element. There is no way to determine their loyalty . . . The danger of the Japanese was, and is now—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty . . . But we must worry about the Japanese all the time until he is wiped off the map.”<sup>27</sup>

---

<sup>18</sup> *Id.*

<sup>19</sup> *Korematsu*, 323 U.S. at 216.

<sup>20</sup> *Id.* at 215-16.

<sup>21</sup> *Id.* at 242-43 (Jackson, J., dissenting).

<sup>22</sup> OF CIVIL WRONGS AND RIGHTS: THE FRED KOREMATSU STORY, PBS (2001).

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

<sup>24</sup> *Korematsu*, 323 U.S. at 216.

<sup>25</sup> *Id.*

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

<sup>27</sup> *Id.* at 236. Evidence of the Commanding General’s attitude toward individuals of Japanese ancestry is revealed in his voluntary testimony on April 3, 1943, in San Francisco before the House Naval Affairs Subcommittee to Investigate Congested Areas, Part 3, pp. 739-40 (78th Cong., 1st Sess.). (emphasis added)

The material issue raised by *Korematsu*, was whether or not the internment, in and of itself, was constitutional<sup>28</sup>—whether the forced arrest, detainment, and imprisonment of a single racial group could withstand constitutional scrutiny. However, the *Korematsu* Court chose to frame the issue as whether it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time that they did.<sup>29</sup> But a more brooding issue dealing with race relations and national security is implicated by *Korematsu*—“What does it mean to be an American?” In 1903, W.E.B. Du Bois, an African American sociologist, introduced the concept of double consciousness.<sup>30</sup> Du Bois described double consciousness as the division of one’s self and how that division prevents an individual from truly forming a unified identity.<sup>31</sup> Although Du Bois spoke of double consciousness in the context of the Black American’s identity, it can be argued that a double consciousness exists within any repressed and devalued group in America. Accordingly, *Korematsu* illustrates the double consciousness that manifested within the Japanese American during WWII—the double consciousness of being both alien and citizen.

“When a fundamental right is limited by the government, courts typically apply the highest level of scrutiny.”<sup>32</sup> A law can only surpass strict scrutiny if three prongs are satisfied. The first prong requires that there must be a compelling state interest.<sup>33</sup> The second prong requires that narrowly tailored means be used to achieve the compelling state interest.<sup>34</sup> The third and final prong requires that “the government must use the least restrictive means in limiting the people’s rights.”<sup>35</sup>

Laws classifying citizens by race are immediately suspect and are subject to strict scrutiny. Nevertheless, not all suspect legislation is unconstitutional.<sup>36</sup> Thus, because a suspect law classifying persons by

---

<sup>28</sup> OF CIVIL WRONGS AND RIGHTS: THE FRED KOREMATSU STORY, *supra* note 22.

<sup>29</sup> *Korematsu*, 323 U.S. at 217-18.

<sup>30</sup> W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (Brent Hayes Edwards ed., 2007) (1903).

<sup>31</sup> *Id.*

<sup>32</sup> AMANDA DI PAOLO, ZONES OF TWILIGHT: WARTIME PRESIDENTIAL POWERS AND FEDERAL COURT DECISION MAKING 3 (2010).

<sup>33</sup> See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest.’”); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1964) (“Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a ‘governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’”).

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

<sup>35</sup> *Id.*

<sup>36</sup> *Korematsu*, 323 U.S. at 216.



race was at issue in *Korematsu*, strict scrutiny was the applicable level of review in analyzing the constitutional validity of the legislation.

#### IV. KOREMATSU IN CONTEXT: THE SHAPING OF LAW AND PUBLIC POLICY BY SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS

In 1896, at a time when America was endemic with racial prejudice and discrimination, the highest court in the land set the legal precedent of “separate but equal”—a precedent on which *Korematsu* would be decided almost fifty years later. In *Plessy v. Ferguson*,<sup>37</sup> the Supreme Court upheld as constitutional a Louisiana statute that criminalized railroad passengers for using facilities that were intended for a different race. The majority reasoned that the statute was not unreasonable and that the social badge of inferiority worn by the colored race is not one which the Constitution can remove.<sup>38</sup> In his dissent, Justice Harlan calls for a colorblind constitution; one in which the interests of the two races require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of the law. Despite Justice Harlan’s position, the constitutionality of “separate but equal” remained the legal framework upon which *Korematsu* was decided in 1944.

Notwithstanding the racial animus in America, upholding the exclusion order in *Korematsu* can also be attributed to the Judiciary’s expansive interpretation of the war powers in times of military necessity. The Supreme Court has historically interpreted Presidential power in a manner that generally expands it, not limits it.<sup>39</sup> The case of *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827), was the first case in which the Supreme Court specifically described and defined the power of the President as Commander-in-Chief.<sup>40</sup> The Constitution, the Court reasoned, invests the President with the exclusive power to determine when the forces of the United States are to be activated during times of invasion and civil rebellion.<sup>41</sup> The Court held that Congress vests in the President exclusive and sole discretion in making determinations of emergencies and situations justifying the activation of the military.<sup>42</sup>

---

<sup>37</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>38</sup> *Plessy*, 163 U.S. at 551.

<sup>39</sup> ARTHUR H. GARRISON, SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS, TERRORISM, AND WAR: A HISTORICAL PERSPECTIVE 41 (2011).

<sup>40</sup> *Id.*

<sup>41</sup> *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827); see GARRISON, *supra* note 39 at 42.

<sup>42</sup> *Martin*, 25 U.S. (12 Wheat.) at 31; see GARRISON, *supra* note 39 at 43.

Safeguarding national security is most often synonymous with a war on terror—a war that is often waged against a particular racial group. I make the contention that a war on terror does not only have to be a war between the U.S. and foreign nations; it can also be a war between the U.S. and its own peoples. Arguably, the Mott Court supports my contention with its endorsement of Executive emergency determinations being made during times of international threat (invasion) as well as during times of intra-national threat (civil rebellion). Under this rationale and with the perception that citizenship ceases to matter for the “enemy aliens” of nonwhite America, the U.S. is now and will always be in a time of intra-national threat.

In regards to the development of pre-Korematsu public policy, America’s intra-national war on terror can be traced throughout U.S. history. In the 1880s, it was against Chinese immigrants when the “yellow terror”—the belief that low-paid Chinese workers were taking jobs away from whites—coincided with the Chinese Exclusion Act of 1882.<sup>43</sup> In the 1890s, it was against American Indians when the Dawes Act attempted to erode tribal integrity and decertify Indian tribes, thus making it easier for whites to acquire Indian land.<sup>44</sup> In the 1920s, it was against southern and eastern European immigrants when Congress— Influenced by the premises of eugenics—passed the Immigration Act of 1924 in an attempt to control the number of “unfit” individuals entering the country and to strengthen the laws prohibiting race mixing.<sup>45</sup> During

---

<sup>43</sup> See ANTI-CHINESE LAWS AND THE SPANISH AMERICAN WAR (American Anthropological Association 2007) [http://www.understandingrace.org/history/gov/antichin\\_law\\_spanam\\_war.html](http://www.understandingrace.org/history/gov/antichin_law_spanam_war.html). “When President Rutherford B. Hayes signed the Chinese Exclusion Treaty in 1880, he effectively reversed the open-door policy set in 1868, and placed strict limits on the number of Chinese immigrants allowed into the U.S. as well as on the number allowed to become naturalized citizens. Congress then enacted the Chinese Exclusion Act in 1882, prohibiting for ten years both immigration from China and the naturalization of Chinese immigrants already in the U.S.”

<sup>44</sup> See Am. Anthropological Ass’n, U.S. CONTROL OF AMERICAN INDIANS (2007), [http://www.understandingrace.org/history/gov/us\\_control.html](http://www.understandingrace.org/history/gov/us_control.html) (date when last visited needed here). “In 1887, Congress passed the Dawes Severalty Act, which imposed a system of private land ownership on Native American tribes for whom communal land ownership had been a way of life. Individual Indians became eligible to receive land allotments of up to 160 acres, together with U.S. citizenship. When the allotment system finally ended, Indian landholdings were reduced from 138 million acres in 1887 to only 48 million acres by 1934.”

<sup>45</sup> See Am. Anthropological Ass’n, EUROPEAN IMMIGRATION AND DEFINING WHITENESS (2007) [http://www.understandingrace.org/history/gov/eastern\\_southern\\_immigration.html](http://www.understandingrace.org/history/gov/eastern_southern_immigration.html) (date when last visited needed here). “Madison Grant and Charles Davenport, among other eugenicists, were called in as expert advisers on the threat of “inferior stock” from eastern and southern Europe, playing a critical role as Congress debated the Immigration

the New Deal Era, it was against largely Blacks and Latinos when the promulgation of legislation such as, the GI Bill of Rights and the Social Security Act, created and maintained the wealth gap between whites and non-whites, which is reflected in rates of home ownership, assets, savings and investment even today.<sup>46</sup>

In regards to the development of pre-Korematsu legal policy following Mott and specifically during the emergence of the Red Scare in 1917,<sup>47</sup> the Supreme Court continued to develop its jurisprudence of deference to the government in times of national crises. The Red Scare resulted in the Supreme Court establishing Constitutional boundaries of the government's power to regulate civil liberties, specifically those involving political speech and dissent in times of war.<sup>48</sup> In 1917, Congress passed the Espionage Act, which made it unlawful to gather, copy or otherwise secure military information for the purpose of providing it to the enemy or otherwise using such information to the detriment of the United States or the military.<sup>49</sup>

The Act was passed during a heightened time of national fear of disloyalty, and its purpose was to gain support for America's involvement in World War I (WWI).<sup>50</sup> The constitutionality of the

---

Act of 1924. The act attempted to control the number of 'unfit' individuals entering the country by lowering the number of immigrants allowed in to fifteen percent of what it had been previously."

<sup>46</sup> See Am. Anthropological Ass'n, THE GREAT DEPRESSION AND WORLD WAR II (2007) [http://www.understandingrace.org/history/gov/great\\_depression\\_ww2.html](http://www.understandingrace.org/history/gov/great_depression_ww2.html) (date when last visited needed here)."The New Deal programs of the 1930s helped revive the U.S. economy after the Great Depression. In 1935, the Social Security Act provided retirement benefits for U.S. workers, but domestics and farm workers were initially excluded from eligibility, a policy that largely affected blacks and Latinos. The GI Bill of Rights or the Servicemen's Readjustment Act of 1944, which provided for college and vocational education for returning World War II veterans as well as one-year of unemployment compensation, resulted in an expansion of the middle class. The GI bill also provided loans for returning veterans to buy homes and start businesses, but non-whites were widely discriminated against in these programs."

<sup>47</sup> See PBS, PEOPLE & EVENTS: PRELUDE TO THE RED SCARE: THE ESPIONAGE AND SEDITION ACTS. (2004), [http://www.pbs.org/wgbh/amex/goldman/peopleevents/e\\_redscare.html](http://www.pbs.org/wgbh/amex/goldman/peopleevents/e_redscare.html). "America's first Red Scare, an era of hostility toward perceived "disloyalty"—and relentless government repression of radicals and others—began in April 1919. The Red Scare's roots extended deep into the preceding years, almost to the day America entered World War I; History.com, RED SCARE, A&E NETWORKS (2010), <http://www.history.com/topics/cold-war/red-scare>. As the Cold War between the Soviet Union and the United States intensified in the late 1940s and early 1950s, hysteria over the perceived threat posed by Communists in the U.S. became known as the Red Scare. (Communists were often referred to as "Reds" for their allegiance to the red Soviet flag.)"

<sup>48</sup> GARRISON, *supra* note 39, at 91.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 93.

Espionage Act of 1917, specifically section 3,<sup>51</sup> was highly contested within the Supreme Court by cases such as *Shaffer*<sup>52</sup> (holding that, under the Espionage Act, a conviction for the mailing of a book containing several “treasonable, disloyal, and seditious utterances” was valid), *Schenck*<sup>53</sup> (holding that an anti-conscription circular with the intent to obstruct the recruiting and enlistment service violated the Espionage Act), and *Debs*<sup>54</sup> (holding that a Socialist Party speech with the purpose, incidental or not, of opposing the war was not constitutionally protected).

Thus, this First Amendment jurisprudence continued to advance the concept that when civil liberties are limited during national emergencies, the Judiciary, more often than not, will defer to the political branches of government when they are working together.<sup>55</sup> Cases concerning war powers become questions of procedure rather than substance.<sup>56</sup> This approach to wartime judicial decision-making offers less protection to individuals because the approach allows the Court to neglect the constitutional question presented before it.<sup>57</sup> With the emergence of WWII, the Supreme Court officially cemented the legal authority to legitimize the subjugation of individual rights by government action with its decision in *Korematsu v. United States*.<sup>58</sup>

---

<sup>51</sup> The Espionage Act (1917), c. 30, tit. 1, § 3, 40 Stat. 217, 219; see also Digital History, THE ESPIONAGE ACT OF 1917, Digital History ID 1904 (2014) [http://www.digitalhistory.uh.edu/disp\\_textbook.cfm?smtID=3&psid=3904](http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=3904). “The Espionage Act of 1917, § 3, provides that: ‘Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.’”

<sup>52</sup> *Shaffer v. United States*, 255 F. 886 (9th Cir. 1919).

<sup>53</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>54</sup> *Debs v. United States*, 249 U.S. 211 (1919).

<sup>55</sup> DiPAOLO, *supra* note 32, at 2.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 4.

<sup>58</sup> GARRISON, *supra* note 39, at 201. “The other two internment cases—*Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944)—addressed two issues arising before and after the exclusion order challenged in *Korematsu*. In *Hirabayashi*, a curfew order was at issue and in *Endo*, a retention/detention order was at issue. In both *Hirabayashi* and *Korematsu*, the Court held that the President had the power to authorize a policy of curfew and exclusion followed by detention in time of war. However, the Court held in *Endo* that the internment of loyal Japanese Americans could not be supported by the fact that proposed relocation communities refused to accept the released Japanese Americans.” *Id.*

The anti-civil liberties ruling made in *Korematsu* not only sheds light on the power of the “Jim Crow” era in which the Justices of the Supreme Court sat, but also on the danger to individual rights caused by national security interests. In light of the racial antagonism implications and the national security interests surrounding *Korematsu*, the Supreme Court failed to apply the proper judicial standard.<sup>59</sup> Although the Supreme Court purported to apply strict scrutiny, the Court instead applied the minimal standard of rational basis review—whereby a law is upheld if it is rationally related to a legitimate state interest.<sup>60</sup> Accordingly, if the Supreme Court had properly applied strict scrutiny, then it should have found Executive Order No. 9066 and the 1942 Act to be unconstitutional.

As aforementioned in Part II, for a law to pass under strict scrutiny, the government must be advancing a compelling state interest, and the means by which the interest is to be achieved must be narrowly tailored and least restrictive in limiting individual rights.<sup>61</sup> In *Korematsu*, national security was determined to be a necessary and crucial government objective, and thus the “compelling interest” prong was met. Justice Black, former member of the Ku Klux Klan,<sup>62</sup> reasoned that the military authorities’ apprehension of grave, imminent danger to the public safety justified a compelling interest.<sup>63</sup> Arguably, Justice Black fails to address the “narrowly tailored” and “least restrictive” prongs of the strict scrutiny analysis. However, some may reason that Justice Black’s remark that “the exclusion order had a definite and close relationship to the prevention of espionage and sabotage”<sup>64</sup> was his attempt at meeting the “narrowly tailored” and “least restrictive” prongs of the test. I disagree.

In order to meet the “narrowly tailored” and “least restrictive” prongs under strict scrutiny, (1) the law should not be under/over-inclusive and (2) there cannot be a less restrictive alternative to achieve the same interest.<sup>65</sup> The exclusion order was neither “narrowly tailored”

---

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

<sup>60</sup> *Id.* at 202.

<sup>61</sup> DiPAOLO, *supra* note 32, at 3.

<sup>62</sup> CIVIL LIBERTIES V. NATIONAL SECURITY IN A POST-9/11 WORLD 150 (M. KATHERINE B. DARMER ET. AL., eds.2004).

<sup>63</sup> *Korematsu*, 323 U.S. at 218.

<sup>64</sup> *Id.* (emphasis added)

<sup>65</sup> See *Griswold*, 381 U.S. at 485 (“Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a ‘governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’”); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (“[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.”).

(in that it was over-inclusive in reaching more people, non-citizens and citizens of Japanese ancestry, than was necessary) nor “least restrictive” (in that a less restrictive means of individual determination of disloyalty was available to achieve the government’s interest). By upholding the enforcement of the exclusion order merely on the reasoning of *Hirabayashi*, the Court abandons its duty to apply strict scrutiny.<sup>66</sup> It is evident that the wholesale removal of a single racial group is overly broad and thus unconstitutional.<sup>67</sup> Therefore, the true error of the Court was in failing American citizens at an important time and at an important juncture by applying a weak judicial standard in the protection of Constitutional rights.<sup>68</sup>

Since the Supreme Court’s ruling, *Korematsu* has been widely and severely criticized on the premise that it dodges a more serious, underlying, constitutional question in its upholding of a race-specific statute disadvantaging a racial minority.<sup>69</sup> In 1984, a federal district court overturned *Korematsu*’s conviction on the ground that the government had “knowingly withheld information from the courts when they were considering the critical question of military necessity.”<sup>70</sup> Four years later, Congress enacted legislation acknowledging the “fundamental injustice” of the evacuation and providing restitution to individuals that were forced to leave their homes.<sup>71</sup> Although the *Korematsu* decision has not been overruled, it is not remembered for its holding but arguably for setting the precedence that statutes that are facially discriminate against racial minorities are constitutionally troubling and must be challenged.<sup>72</sup>

## V. KOREMATSU SETS THE STAGE FOR THE AMERICAN CRIMINAL JUSTICE SYSTEM’S INTRA-NATIONAL WAR ON TERROR

The structure of the American criminal justice system has always been in controversy. One particular issue with the system is the government’s use of preventive detention. Thus, an issue that may be framed is whether it is beyond the government’s power to use preventive techniques to maintain social control and to ensure the security of its citizens. But a more brooding issue dealing with the criminal justice system and how it allocates criminal liability to its citizens is whether some of us are born a suspect? It was President Johnson who called for a

---

<sup>66</sup> GARRISON, *supra* note 39, at 218.

<sup>67</sup> *Id.* at 202.

<sup>68</sup> *Id.* at 220.

<sup>69</sup> GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW*. 531 (5th ed. 2005).

<sup>70</sup> *Id.*; *See Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

<sup>71</sup> *See*, Pub. L. No. 100-383, 102 Stat. 903 (1988).

<sup>72</sup> *Id.*

“War on Crime,” who saw the urban policeman as the “frontline soldier.” Despite the unconstitutionality of ordinances that criminalize status instead of conduct, revamped and revitalized laws take their places . . . hoping that this time they will be able to withstand judicial scrutiny. Fifty years later, and the crime is still the same . . . most often, it is to be black . . . to be black with other blacks . . . to be black and wear the same colors . . . to be black in a designated area. The crime is one of status . . . of identity . . . it is to be a mere member of a people . . . it is to be born a suspect.

“Contemporary detention jurisprudence has developed across several contexts including pretrial detention, commitment of the mentally ill, and detention of sexual predators, undesirable aliens, and unlawful combatants.”<sup>73</sup> Instead of being seen as a form of punishment, contemporary detention is seen as regulatory. When we call a crime by another name does it make it less egregious? What about the laws that are in place that defend these status crimes? What is required of a statute in order for it to “punish” or “regulate” the action or inaction of a citizen? How does the government use national security to maintain the use of a constitutionally bankrupt system?

The use of preventive detention puts the traditional guarantees of criminal justice at risk. Where the concern is with prevention and not punishment, the important assessment consists in an inquiry into an individual’s personality rather than into the criminal act. The less relevant the criminal act is for the judicial decision, the less effective the traditional safeguards.<sup>74</sup> Thus, it appears that preventive detention passes judicial review and most importantly constitutional muster because it falls under the guise of regulation rather than punishment. It can be argued that “a statute is in excess of the power vested in the Legislature [when] it makes a mere intention, unexecuted, and not connected with any overt act, a crime.”<sup>75</sup> For a law to subject individuals to just punishment it must be for some past voluntary wrongful or potentially harmful conduct specified in advance by statute.<sup>76</sup>

Although the purposes of criminal punishment are the subject of controversy, there is the consensus that desert is a necessary condition for punishment.<sup>77</sup> If punishment is premised on “the requirement of an

---

<sup>73</sup> Michael L. Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. REV. 77, 85 (2005); accord MICHAEL L. CORRADO, PRESUMED DANGEROUS: PUNISHMENT, RESPONSIBILITY, AND PREVENTIVE DETENTION IN AMERICAN JURISPRUDENCE(2013).

<sup>74</sup> *Id.*

<sup>75</sup> *Proctor v. State*, 176 P. 771, 772 (Okla. Crim. App. 1918).

<sup>76</sup> See JOHN KAPLAN, ET AL., CRIMINAL LAW: CASES AND MATERIALS (7th ed. 2012).

<sup>77</sup> See *id.* at 115.

act,” then people cannot be punished for falling into some demographic category that is statistically likely to commit crime or for exhibiting some condition which tends to be a predictor of future crime.<sup>78</sup> Therefore, individuals cannot and should not be punished for their status. And yet, so many slain black and brown bodies litter the streets of this country. What is their crime? The crime often tends to be who they are and not what they did.

When the assessment consists of an inquiry into an individual’s personality rather than into the criminal act, the assessment seems to dictate the occurrence of a status crime. An individual’s personality expounds on one’s characteristics, thought patterns, and ideals. To assess someone’s personality in determining whether or not they will be “detained” and whether or not their constitutional rights will be diminished is to punish someone for their status. For example, *Kansas v. Hendricks*, 521 U.S. 346 (1997), analyzes the “double track” system in which the offender is subjected first to a period of retributive detention, or punishment, and then to a period of preventive detention.<sup>79</sup> In *Hendricks*, Justice Thomas reasoned that the “liberty interest is not absolute” and that the Kansas statutory requirements limited indefinite confinement to those with “volitional impairment[s],” making it “difficult, if not impossible, for the person to control his dangerous behavior.”<sup>80</sup> The Supreme Court upheld the Kansas “double track” sexual predator statute as constitutional.

In the United States, punishment is only punishment if it is retributive, and while many crimes are intended to be both punitive and preventive, there are clear cases in which the intent (at least the explicit intent) is preventive and not punitive.<sup>81</sup> Detention becomes a reaction to what a person is (i.e., status) rather than what he or she actually did (i.e., conduct).<sup>82</sup> The problem is that detention, whatever its aim, is always an impediment on the individual’s right to liberty and due process of the law.

In addition to the affect that preventive detention has on certain members of society (specifically, minorities), criminal law reform is also a subject that is addressed. One particular subset of criminal law reform is the reforming of police practices. When searching for effective alternatives to the way that police practices are implemented currently, it is crucial that the history of these practices is explored in order to guide

---

<sup>78</sup> *Id.* at 116.

<sup>79</sup> Corrado, *supra* note 73.

<sup>80</sup> *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997); accord Corrado, *supra* note 78 at 61.

<sup>81</sup> See Corrado, *supra* note 73, at xxxi.

<sup>82</sup> *Id.*



the community in effectively brainstorming new strategies. The most heavily discussed issue deals with America's policing of low-income communities and communities of people of color. What has led to so many young black and brown children being gunned down by the same law enforcement officers who have pledged to serve and protect them?

The development of police practices in the United States began with the use of slave patrols and Night Watches, which later became the model by which modern police departments have functioned.<sup>83</sup> The slave patrols and the Night Watches were designed to control the behaviors of minorities.<sup>84</sup> Even before the first formal slave patrol was created in the Carolina Colonies in 1704, the South continuously used the practices of patrols and Night Watches to capture runaway slaves and return them to their slave masters.<sup>85</sup> After the Civil War, state law enforcement officers would work with vigilante groups, such as the Ku Klux Klan—"which notoriously assaulted and lynched Black men for transgressions that would not be considered crimes at all, had a White man committed them"—to run and manage the slave patrols.<sup>86</sup>

In the late nineteenth century, the rise of the new working class and the frequent occurrence of major strikes and riots in American cities like Chicago resulted in municipalities hiring armed men to impose order.<sup>87</sup> In each of the major strikes and riots, the police attacked strikers with extreme violence.<sup>88</sup> This ideology of order that developed in the late nineteenth century echoes down to today—except that today, poor black and Latino people are the main threat, rather than immigrant workers.<sup>89</sup> What, if anything, has changed since the eighteenth century development of the slave patrols from the current police practices today? And how has it impacted the way America deals with its national security, especially with intra-national threats?

There is arguably no change from the way America was policed over three centuries ago to the way that it is policed today. In present day, the most marginalized of society, especially black and brown people, have been targeted by police officers through strategies, such as stop-and-frisk

---

<sup>83</sup> See Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, EKU ONLINE POLICE STUDIES (Jan. 7, 2014), <http://plsonline.eku.edu/insideloook/brief-history-slavery-and-origins-american-policing>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Sam Mitrani, Stop Kidding Yourself: The Police Were Created to Control Working Class and Poor People, LAWCHA (Dec. 29, 2014), <http://lawcha.org/wordpress/2014/12/29/stop-kidding-police-created-control-working-class-poor-people/>.

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

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

tactics, racial profiling, selective enforcement policing, and abuse of searches and seizures. The way this ideology of American policing has developed through history can be viewed most dramatically in the militarization of law enforcement officers. The use of military-style equipment—weapons and tactics designed for the battlefield—to conduct ordinary law enforcement activities—are used by the police routinely, across the United States, to force their way into people’s homes, disrupting lives and destroying communities.<sup>90</sup> In a study conducted by the American Civil Liberties Union (“ACLU”), the ACLU found that the use of paramilitary weapons and tactics primarily impacted people of color. For instance, when paramilitary tactics were used in drug searches, the primary targets were people of color, whereas when paramilitary tactics were used in hostage or barricade scenarios, the primary targets were white.<sup>91</sup>

When looking at the way history has shaped present day police practices, it is crucial to look at the issue of national security and American policing of people of color in a critical and analytical context. It is more than the growing number of young black bodies sprawled across the American streets. Bodies bloodied, bruised, and breathless. In the wake of their death, the community must recognize the issues that their passing brings to light. It is recognizing that these young lives have been stunted by the criminal justice system . . . by a creature of government that should be held accountable for failing the communities it serves. It is recognizing that issues such as digital illiteracy, unequal access to educational resources, and inability to receive optimal healthcare, have been deliberately redlined, redistricted, or rescreened to create clear lines of non-access to low-income communities (often predominantly communities of people of color). Taking this particular

---

<sup>90</sup> War Comes Home: The Excessive Militarization of American Policing, ACLU FOUNDATION 21 (2014), [https://www.aclu.org/sites/default/files/field\\_document/jus14-warcomeshome-text-rell.pdf](https://www.aclu.org/sites/default/files/field_document/jus14-warcomeshome-text-rell.pdf).

<sup>91</sup> *Id.* at 35. “Where race was known, deployments that impacted people of color (the majority being Black) constituted 28 percent of the total, whereas deployments that impacted white people constituted 31 percent of the total. A small percentage (6 percent) impacted a mix of white people and people of color. Breaking this down further into actual numbers of people impacted by SWAT deployments shows that of all the incidents studied where the number and race of the people impacted were known, 39 percent were Black, 11 percent were Latino, 20 were white, and race was unknown for the rest of the people impacted. This means that even though there were more deployments that impacted only white people or a mix of white people and minorities, many more people of color were impacted. This may relate to the fact that white people were more likely to be impacted by deployments involving hostage, barricade, or active shooter scenarios, which most often involve domestic disputes impacting small numbers of people, whereas people of color were more likely to be impacted by deployments involving drug investigations, which often impact large groups of people and families.” *Id.*

viewpoint on the broad issue of national security is crucial to the future development of America's safekeeping.

## VI. RACE RELATIONS AND NATIONAL SECURITY TODAY: THE LEGAL MURDER OF YOUNG BLACK MEN AND THE IMPLICATION OF FERGUSON

Marcus Tullius Cicero, a Roman philosopher and political theorist, is often quoted for his statement *inter arma silent leges*: in war, the law is silent.<sup>92</sup> Public policy in post-Korematsu America did not see much positive change in the realm of national security and race relations. America's intra-national war on terror raged on, and is arguably still raging.

In the 1950s, it was against Mexicans when "Operation Wetback, a project of the U.S. Immigration and Naturalization Service, deported hundreds of thousands of illegal immigrants from the Southwest."<sup>93</sup> In the 1960s and 1970s, it was against non-whites, with the most substantial impact on Blacks, when affirmative action became synonymous with "reverse discrimination" as whites began to resent opportunities afforded nonwhites and U.S. courts began to strike down affirmative action programs.<sup>94</sup> In the 1990s and early 2000s (post-9/11), it was against

<sup>92</sup> DiPAOLO, *supra* note 32, at 3.

<sup>93</sup> See GOVERNMENT: 1950s-1960s CIVIL RIGHTS ERA AND THE VIETNAM WAR, THE RACE PROJECT (2007), [http://www.understandingrace.org/history/gov/civil\\_rights\\_vietnam.html](http://www.understandingrace.org/history/gov/civil_rights_vietnam.html). "In 1954, Operation Wetback, a project of the U.S. Immigration and Naturalization Service deported hundreds of thousands of illegal immigrants from the Southwest, in particular Mexican nationals. Mexican citizens residing in the U.S. were called wetbacks, a derogatory term for Mexican or Central American immigrants that referred to their entry into the U.S. by crossing the Rio Grande River, which separates the two countries. The project included police sweeps of Mexican-American neighborhoods and random stops and ID checks of people in a region populated by many Native Americans and native Latinos."

<sup>94</sup> See GOVERNMENT: 1960s- THE BEGINNING AND THE END OF AFFIRMATIVE ACTION, THE RACE PROJECT (2007), [http://www.understandingrace.org/history/gov/civil\\_rights\\_vietnam.html](http://www.understandingrace.org/history/gov/civil_rights_vietnam.html). "In the late 1970s, the courts began to strike down affirmative action programs that were designed to give minorities an opportunity to compete for federal contracts, by challenging programs that utilized "quotas." The change in the way affirmative action came to be viewed took a different tone in the courts. In discrimination lawsuits filed in the 1970s, racist intent was almost always denied by defendants. But the courts often relied on statistical patterns as evidence of discrimination. However, the standard for proving discrimination subsequently changed so that intent became the basis for determining discrimination. By the 1980s, the courts had so narrowly defined discrimination that the onus was on the victims of racial bias to prove the intent of employers and institutions that had exhibited racism in their policies and practices."

“foreigners”—undocumented immigrants, illegal residents, and Muslims—when legislation such as, the North American Free Trade Agreement (NAFTA), the 1996 Welfare Reform bill, and the Patriot Act, were designed to thwart terrorism and the social advancement of immigrants.<sup>95</sup>

But what about today? Which group in the U.S. is now the government’s most evident opponent in its war on terror? Today, the war, a war that has been waged for over four hundred years, is against America’s Black males—Emmett Till, Medgar Evers, Amadou Diallo, Trayvon Martin, Jordan Davis, Michael Brown—when their advancement in society is thwarted by an institutional racism that is often dismissed by the U.S. legal system. “The practice of demonizing African Americans dates back to the period of the slave trade and has endured despite the reelection of America’s first African American president.”<sup>96</sup> The not guilty verdict rendered in the George Zimmerman trial<sup>97</sup> and the St. Louis County grand jury’s decision not to indict Darren Wilson<sup>98</sup> are the latest in a long line of reminders that far too many whites believe that blacks, in general, and black males, in particular, are dangerous, thus making young black men the faces of crime in contemporary America.<sup>99</sup>

Because the Black body is viewed as a site of “pathology,” specifically criminal pathology, Black male bodies are ontologically truncated and stymied through racist gazes as if they are “guilty of

---

<sup>95</sup> See GOVERNMENT: 1990s-2000s, NAFTA, THE PATRIOT ACT, AND THE NEW IMMIGRATION BACKLASH, THE RACE PROJECT (2007), <http://www.understandingrace.org/history/gov/nafta.html>. “In 1992, Congress passed the North American Free Trade Agreement (NAFTA) intended to create a free-trade bloc among the U.S., Canada and Mexico. However, the agreement raised concerns in the U.S. about immigration from south of the border. The 1996 Welfare Reform bill included anti-immigrant and other measures that eliminated many social services for undocumented immigrants. In 2001, the U.S. government initiated a series of immigration policies under the Patriot Act that were designed to thwart terrorism after the 9/11 attacks.”

<sup>96</sup> Owen Brown, Jr., *The Legal Murder of Trayvon Martin and New York City Stop-and-Frisk Law: America’s War Against Black Males Rages On*, 37 WESTERN J. OF BLACK STUDIES 258, 258 (2013).

<sup>97</sup> See *id.* at 260. “On February 26, 2012, George Zimmerman a white male of Hispanic descent, shot and killed a teenage black male named Trayvon Martin. Zimmerman was acting in the capacity of a neighborhood Watch Captain for a gated community in Sanford, Florida. On July 13, 2013, a jury consisting of six women acquitted Zimmerman of the charge of second degree murder or the lesser charge of manslaughter.” *Id.*

<sup>98</sup> A St. Louis County grand jury—consisting of nine whites and three blacks—decided not to indict local police officer, Darren Wilson, for the fatal shooting of unarmed black teen, Michael Brown in August of 2014. See Storyline: Michael Brown Shooting, NBC NEWS (2014), <http://www.nbcnews.com/storyline/michael-brown-shooting>.

<sup>99</sup> Brown, Jr., *supra* note 96, at 260.

something—some previous crime or sin or moral slippage.”<sup>100</sup> America’s young black males—the Trayvon Martins and the Michael Browns that reside within and outside of the inner cities—are not the problem. “Rather the problem is that Blackness is pre-marked and pre-nominated as a site of ‘deviance’ vis-à-vis white racist epistemic and axiological frames of reference.”<sup>101</sup> State or state-sanctioned violence on the Black body is “the failure to see Black Americans as unique individuals with promise, talents, resources, or even genius that one day might improve the republic.”<sup>102</sup>

Thus, America’s war against black males rages on,<sup>103</sup> and the Black American’s defeats—such as, the de-emasculatation of Black males during slavery, the persistent police brutality against people of color coinciding with the over- and under-policing of lower income communities, and the growing wealth gap between whites and nonwhites that is continually solidified by striking down affirmative action programs—outweigh its victories—such as, the Brown<sup>104</sup> decision, the 1964 Civil Rights Act,<sup>105</sup> and the Voting Rights Act of 1965.<sup>106</sup> The contemporary reality of the relationship between Black Americans and the criminal (in)justice system<sup>107</sup> is evidence of my claim that national security has justified the use of race or ethnicity as the primary factor in arresting, detaining, or imprisoning members of a racial or ethnic group in America.

Even though Blacks only make up thirteen percent of the nation’s population, they comprise forty percent of its prison inmates.<sup>108</sup> “Sadly, members of law enforcement, judges, and jurors find it difficult to empathize with Black defendants and usually believe that members of this group ‘get what they deserve.’”<sup>109</sup> The New York City Stop-and-Frisk program can be used as one of the most recent examples to further expound on the tenuous relationship between Black Americans and the criminal justice system. Championed by Mayor Michael Bloomberg and Police Commissioner Raymond Kelly, the rules governing the program

---

<sup>100</sup> George Yancy et al., *Interpretative Profiles on Charles Johnson’s Reflections on Trayvon Martin: A Dialogue between George Yancy, E. Ethelbert Miller, and Charles Johnson*, 38 WESTERN J. OF BLACK STUDIES. 1, 2 (2014).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 3.

<sup>103</sup> Brown, Jr., *supra* note 96.

<sup>104</sup> Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

<sup>105</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

<sup>106</sup> Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

<sup>107</sup> Cassandra Chaney & Ray V. Robertson, Can We All Get Along? Blacks’ Historical and Contemporary (In)Justice With Law Enforcement, 38 WESTERN JOURNAL OF BLACK STUDIES 108 (2014).

<sup>108</sup> *Id.* at 111.

<sup>109</sup> *Id.*

are delineated in New York State Criminal Procedure Law § 140.50, which are based on the Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968).<sup>110</sup> "Opponents of stop-and-frisk argue that it creates antagonism between law enforcement and the people in the communities they are charged with policing."<sup>111</sup> Not only are Blacks and Hispanics disproportionately targeted by the program,<sup>112</sup> but empirical findings of the NYCLU, the Center on Constitutional Rights reveal that blacks are policed, arrested, prosecuted, and sentenced more harshly than whites in the American criminal justice system.<sup>113</sup>

In the wake of this ongoing intra-national war on Black males (arguably in the name of "national security"), America is left with the visual imageries of state sanctioned violence—of a brutally disfigured Black face, one beyond his mother's recognition, lying motionless in a casket; of Black blood splattered across "Jim Crow Must Go" t-shirts in the driveway of a man's home; of a night being riddled with 41 gun shots from a policeman's firearm, followed by the streets enveloping yet another black body; of little Black boys adorned in hooded sweatshirts being racially profiled in gated communities; of a car bursting with the melodies of hip hop and brown faces being barreled with bullet holes; and of police officers donned in full-fledge riot gear juxtaposed to the faces of mostly Black women, men, and children. In order to put an end to these historical wars on terror and to the never-ending state of emergency which is this nation's reality, we must remove the gun—we must put the civil rights and the civil liberties of American citizens, and even of those who reside on U.S. soil, over the American government's continuous expansion of power during times of pressing public necessity.

---

<sup>110</sup> Brown, Jr., *supra* note 96, at 258. The *Terry* Court held that: "Under some circumstances, a suspect can be briefly stopped and, if need be, frisked based on less than probable cause. Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken." See also *Terry v. Ohio*, 392 U.S. 1 (1968).

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

<sup>112</sup> Chaney & Robertson, *supra* note 107, at 111.

<sup>113</sup> Brown, Jr., *supra* note 96, at 267.