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ESSAY: (RACIAL) PROFILES IN COURAGE, OR CAN WE BE HEROES TOO?

Robert S. Chang*

INTRODUCTION

Racial profiling usually conjures up images of police officers acting on negative stereotypes concerning the criminality of people of color and subjecting them to greater surveillance and state.¹ This type of negative affirmative action is practiced by police, prosecutors, judges, and juries alike.² Before 9/11, an emerging

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¹ See, e.g., Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 744 (2000) (discussing how African Americans were “disproportionately targeted” by New Jersey state troopers for traffic enforcement); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 680–716 (2000) (analyzing the targeting of racial minorities for investigation in both criminal law enforcement and immigration law enforcement); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1115–19 (2000) (asserting that the broad discretionary authority of police officers and prosecutorial officials to freely—if not lawfully—engage in racial profiling undermines the legitimacy of the legal system); Victor C. Romero, *Racial Profiling: “Driving While Mexican” and Affirmative Action*, 6 MICH. J. RACE & L. 195, 197–99 (2000) (recognizing that the most common example of racial profiling is the implementation of race-based stops by law enforcement to identify illegal immigrants).

² See, e.g., Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115, 1116 (1996) (arguing that racial profiling—a negative form of affirmative action—occurs as a result of “selective enforcement, selective prosecution, and selective sentencing”). Arguably, the benefits to racial communities of positive affirmative action are far outweighed by the harm to those communities from negative affirmative action by the criminal justice system. Consequently, the article suggests abandoning positive affirmative action policies for racial minorities in the context of education, employment, and contracting if negative affirmative action policies in the criminal

bipartisan consensus denounced this practice.³ As the arguments condemning racial profiling were gaining strength, the events of 9/11 diluted such support as terror became racially embodied in the faces of the nineteen who were accused of hijacking the planes on that fateful day.⁴ Many who were hostile towards the practice before 9/11—including those from communities most often subject to racial profiling by the criminal justice system—began to say that some degree of racial profiling was perhaps necessary.⁵

While this type of negative racial profiling is problematic, it is also important to focus on positive racial profiling.⁶ Following 9/11,

justice system were eliminated. *See id.*; *see also* Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 880–82 (1997) (proposing that one way to end racial discrimination in the criminal justice system is to provide African American defendants with African American majority juries).

³ See 147 CONG. REC. S5891, 5896–97 (daily ed. June 6, 2001) (statement of Sen. Clinton) (acknowledging the efforts of a Republican Representative who “worked to obtain the support of both Democrats and Republicans alike” and declaring that “we are all . . . on the same side, citizens, officers of the law, Republicans and Democrats—to say that racial profiling is wrong and must end”); *see also* Tom Brune, *Profiling Proposal Attacked, Senate Bill Called “Wrong Approach,”* NEWSDAY (N.Y.), Aug. 2, 2001, at A16 (proclaiming that despite strong bipartisan support to end racial profiling, there was disagreement over the best approach to the problem, as evidenced by Republican Senators Orrin Hatch’s and Strom Thurmond’s disparagement of the first Senate bill that actually banned the practice), available at 2001 WL 9243716.

⁴ See Jason L. Riley, *‘Racial Profiling’ and Terrorism*, WALL ST. J., Oct. 24, 2001, at A22 (noting that “[n]ot ‘some’ of them, or a ‘disproportionate number’ of them,” but rather all nineteen hijackers were Arabic and practitioners of Islam), available at 2001 WL-WSJ 2879648; *see also* Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1194–95 (2002) (noting that following 9/11 the attitude of federal and local law enforcement agencies shifted from employing strategies to end racial profiling to using strategies of racial profiling to combat future terrorism); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576–81 (2002) (indicating that since 9/11 views toward racial profiling have shifted among citizens, airlines, law enforcement, and the Department of Justice—all of which have exhibited racial, ethnic, and religious profiling to some degree).

⁵ See Riley, *supra* note 4, at A22.

Two respected pollsters have reported that blacks, the frequent targets of profiling, are now more likely than other racial groups to favor it. Seventy-one percent of black respondents to a Gallup poll, and 54% in a Zogby poll, said they want Arab-looking travelers singled out for extra scrutiny at airports. And when the Detroit News, whose readership includes one of the nation’s largest Arab-American enclaves, conducted its own survey last month, it found that even Arabs want look-alikes checked out more closely; 61% said “extra questioning or inspections are justified.”

Id.

⁶ This essay—exploring positive racial profiling—is related to the work done by scholars examining the operation of racial privilege. Privilege can be achieved by positive racial profiling, which simultaneously reinforces the racial privileges in society. *See, e.g.*, STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 17–23 (1996) (discussing the sources of privilege inherent to society and the difficulty in combating discrimination it reinforces); *see also* Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, in POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22–23 (Leslie Bender & Daan Braveman eds., 1995) (asserting that the privileged race and gender often

several newspapers published photographs of firefighters who died when the World Trade Center Towers came crashing down.⁷ Notably, newspapers recounted stories of their heroism.⁸ As profiles in courage, these heroes also had a race and gender—they were almost exclusively white men.⁹ The race and gender profile of the heroes was not an accident; rather, it was produced by the hiring practices of the Fire Department of New York (FDNY).¹⁰ The criticism of the hiring practices of the FDNY should not be taken as a criticism of the bravery and integrity of the firefighters with regard to their service as firefighters. It is important, though, to ask—with regard to negative and positive racial profiling—why are our criminals people of color and why are our heroes white? This essay explores how negative and positive racial profiling is part of

admit that others are disadvantaged, but they are less likely to admit that they are privileged); Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 94–95 (2000) (advancing the argument that men should challenge the societal norms that make them the privileged gender in order to embrace feminism); Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969, 972–73 (1993) (suggesting that whites are the privileged race because they can enjoy the current status of their position in society); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 5, 34–39 (1990) (examining the cultural significance and power of the ideas of the "rhetorically created myth[s]" of "white innocence" and "black abstraction").

⁷ See Dean E. Murphy, *Honoring the Rescuers*, N.Y. TIMES, Sept. 23, 2001, at B8 (displaying the photographs of the firefighters who had died or who were reported missing on 9/11 at the World Trade Center); see also *The Faces of the Bravest*, N.Y. DAILY NEWS, Sept. 23, 2001, at 25 (remembering pictorially the firefighters lost in the 9/11 attacks).

⁸ See Editorial, *Heroes Amid the Horror*, N.Y. TIMES, Sept. 15, 2001, at A22 (noting that the total number of firefighters lost in the 9/11 attacks was thirty times more than the department has ever lost in any other single event); see also Drew Jubera, *'Bravest' Is Just the Start: Firefighters' Superhero Status Glows After the Assault: New York*, ATLANTA CONST., Sept. 19, 2001, at A12 (dubbing New York City firefighters the "working man's rock stars"), available at 2001 WL 3691152.

⁹ See John Leo, *Color Me Confounded*, U.S. NEWS & WORLD REPORT, Jan. 28, 2002, at 31 (reporting that an estimated 319 of the 343 firefighters who died at the World Trade Center were non-Hispanic whites); see also Dru Sefton, *Female Firefighters Lost in the Glow of Brotherhood*, STAR-LEDGER (Newark, N.J.), Dec. 11, 2001, at 7 (commenting that "by an accident of fate, not one woman firefighter" died at the World Trade Center), available at 2001 WL 31289012.

¹⁰ See Jane Latour, *Looking for a Fire Department That Looks Like New York*, GOTHAMGAZETTE.COM (Dec. 3, 2001), at <http://www.gothamgazette.com/iotw/firedepartment/doc1.shtml> (last visited Jan. 31, 2003) (noting that at a fire department swearing-in ceremony, the FDNY Fire Commissioner, Thomas Von Essen, admitted that the fire department is "94 percent white male, and it's one of the issues that [the FDNY is] constantly being criticized for"); see also *infra* notes 109–15 and accompanying text (discussing the statistical make up of the New York City Fire Department and their hiring practices). But see *Profile: Race and the New York City Fire Department* (National Public Radio Broadcast, Feb. 16, 2002) (claiming that although the employment or recruiting test is only given every four years, among the minorities who registered for the last test given in 1999, many of them failed to show up to take the test), available at 2002 WL 7823816.

the larger project of constituting this nation.¹¹ Part I examines a project referred to as *differential Americanization* as it operates during times of war or crisis. Part II analyzes the controversy over racial profiles with regard to a proposed monument to honor the fallen firefighters.

I. DIFFERENTIAL AMERICANIZATION DURING WARTIME

War, perhaps more than anything else, forces a nation's subjects to renegotiate their relationship with the nation. When the United States engages in war, it also engages in a process of deepening the Americanization of its citizens. It does this by calling upon its citizens to collectively band together to do their patriotic duty against a common enemy. By performing patriotic gestures, its citizens feel a comradeship that consolidates this imagined community that is America. It is this feeling of comradeship that has made millions of people willingly die for their nation.¹²

When the United States engages in war, its marginal citizens often find themselves in an awkward position. As a victim of state-sponsored neglect, discrimination, and terror, how do you respond when that very state calls upon you to do your duty?

In African American communities, serving in the armed forces has been debated in every war. During the Civil War, Frederick Douglass urged Blacks to enlist in the army, saying, "[H]e who fights the battles of America may claim America as his country—and have that claim respected."¹³ This theme has been echoed in many other writings and speeches. During World War I, W. E. B.

¹¹ For excellent accounts of the construction of an American national identity, see WALTER BENN MICHAELS, *OUR AMERICA: NATIVISM, MODERNISM, AND PLURALISM* (1995) (utilizing various works of literature to demonstrate that the concept of *American* is rooted in historical contexts and political events); PRISCILLA WALD, *CONSTITUTING AMERICANS: CULTURAL ANXIETY AND NARRATIVE FORM* (1995) (exploring the works of famous writers in an effort to gain a perspective on the changing cultural influences reflected in their writings—the “untold stories” that gradually became part of the national identity as the United States built a nation and rose to become a world power).

¹² BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 7 (rev. ed. 1991) (defining “nation” as being imagined as a limited, sovereign, political community “conceived as a deep, horizontal comradeship” which compels citizens to die for it).

¹³ Frederick Douglass, *Why Should a Colored Man Enlist?*, 5 *DOUGLASS' MONTHLY* (Rochester, N.Y.), Apr. 1863, at 818, 819 *reprinted in* FREDERICK DOUGLASS, *SELECTED SPEECHES AND WRITINGS* 528, 530 (Philip S. Foner ed., 1999) [hereinafter *DOUGLASS*] (blending the view that enlisting would be self-serving with the view that that it would also serve a larger, national goal by taking the stance that patriotic duty does not have to be undermined by personal needs but in fact can serve both purposes).

Du Bois said:

We of the colored race have no ordinary interest in the outcome. That which the German power represents today spells death to the aspirations of Negroes and all darker races for equality, freedom and democracy. Let us not hesitate. Let us, while this war lasts, forget our special grievances and close our ranks shoulder to shoulder with our own white fellow citizens . . . that are fighting for democracy. We make no ordinary sacrifice, but we make it gladly and willingly with our eyes lifted to the hills.¹⁴

He repeated this same sentiment during World War II.¹⁵ There were of course those who were incensed and opposed Du Bois' views.¹⁶ But the fact that two of the most vocal critics of racism in the United States would urge Blacks to join in the U.S. war effort speaks volumes. They viewed participation in war as a pathway to eventual racial uplift.¹⁷ War, because of the opportunity it presented, was a time to put aside grievances.

For marginal citizens and subjects, war has often been thought to offer a pathway to becoming a more secure American. Whether it has proven successful for African Americans probably remains an open question in light of the persistence of racial inequality.¹⁸ Nevertheless, not all groups are offered the same opportunities.

World War II presented a unique dilemma for Japanese Americans. After the bombing of Pearl Harbor, Japanese Americans were declared "unacceptable for service in the armed forces, and they were exempted from the draft."¹⁹ Most of the 6,000

¹⁴ W. E. B. Du Bois, Editorial, *Close Ranks*, 16 THE CRISIS: A RECORD OF THE DARKER RACES 111, 111 (New York, N.Y.) (July 1918), reprinted in W. E. B. DU BOIS: A READER 697 (David Levering Lewis ed., 1995) [hereinafter W. E. B. DU BOIS: A READER] (issuing a plea to African American men to join the armed forces during World War I and to place democracy above their immediate needs for racial equality).

¹⁵ See W. E. B. Du Bois, *Closing Ranks Again*, AMSTERDAM NEWS, Feb. 14, 1942, reprinted in W. E. B. DU BOIS: A READER, *supra* note 14, at 739-40 (stating that "[Negroes] stand ready to fight shoulder to shoulder for democracy with soldiers of any race or color and for a democracy of all men.").

¹⁶ See W. E. B. DU BOIS: A READER, *supra* note 14, at 695 (indicating that numerous influential African Americans—including William Monroe Trotter, Archibald Grimké, and A. Philip Randolph—were outraged by Du Bois' support of the war effort).

¹⁷ See *id.* (summarizing that Du Bois' views on most subjects were based upon what he perceived as "the civil rights advantage his people could derive from a given position"); see also DOUGLASS, *supra* note 13, at 529 (urging that a failure to take up arms and aid the North would justify the past contempt of the government towards African Americans).

¹⁸ See generally, e.g., ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992) (examining discrepancies between black and white Americans concerning inequality with regard to families, income, employment, education, and schooling).

¹⁹ ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE

Japanese Americans already in the U.S. armed services were “immediately dismissed.”²⁰ Apart from the military misfortunes suffered by Japanese Americans, many who were located on the west coast region were forced into internment camps.²¹ Those placed in the camps included Japanese immigrants who were ineligible—due to their ethnicity—to become citizens along with their American-born citizen children.²²

After dismissing its Japanese American soldiers, the U.S. government almost immediately realized they had a need for “Japanese speakers for interpreters, scouts and surveillance.”²³ In addition, the Japanese American Citizens League (JACL) lobbied to allow American-born males of Japanese ancestry to serve in the U.S. military.²⁴ The group’s efforts included testifying before Congress²⁵ and participating in “negotiations among Colonel

AMERICAN INTERNMENT 214 (2001) (describing the backlash against Japanese Americans in the immediate aftermath of Pearl Harbor).

²⁰ See *id.* (discussing the treatment of Japanese Americans during World War II in relation to military service).

²¹ See *id.* at 100–01 (discussing how Executive Order 9066—which “grant[ed] the military the power to exclude persons from specified areas”—led to the internment of approximately 120,000 people of Japanese descent, despite the fact that the Order never made specific reference to the Japanese race).

²² See SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 122 (1991) (explaining that approximately 40,000 immigrants from Japan along with 70,000 of their American-born children were forcibly relocated). Japanese immigrants were held to be racially ineligible to become naturalized citizens in *Ozawa v. United States* because they were not “free white persons” or of African nativity or descent—as specified in the statute. 260 U.S. 178, 195 (1922). Their American-born children, however, were U.S. citizens based on the Fourteenth Amendment of the United States Constitution. See *United States v. Wong Kim Ark*, 169 U.S. 649, 693–94 (1898) (holding that the clear meaning of the Fourteenth Amendment confers citizenship upon all persons born in the United States regardless of the citizenship of the parents).

²³ YAMAMOTO, *supra* note 19, at 214.

²⁴ See *id.* (explaining that the JACL expressed strong support for “the right of Nisei to serve in the military”). American-born males of Japanese descent were called “Nisei,” while their parents and grandparents were “Issei.” See MICHIE WEGLYN, *YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA’S CONCENTRATION CAMPS* 35 (1976). This second generation demonstrated “a pathetic eagerness to be American[.]” *Id.* at 41. The Nisei were constantly attempting to prove their loyalty and integrity; this was exemplified by their proposal of a volunteer suicide battalion. See *id.* at 38. Nisei leader Mike Masaoka was behind the suggestion that was originally rejected by the War Department. See *id.* Masaoka served as the national secretary and field executive of the JACL during World War II, and advocated fervently for “full and complete cooperation with the U.S. Government.” See *Introduction to and Explanation of the Resolution to the U.S. Department of Interior*, JAPANESE AMERICAN VOICE: MAKING OUR VOICES HEARD, at <http://www.javoice.com/intro.html> (last visited Jan. 5, 2003). The JACL was the Japanese Americans Citizens League, in existence in the early 1940s, which sought to address the problems of their minority status in the United States. See WEGLYN, *supra*, at 24. Masaoka’s proposal would later be implemented by the United States military. See *id.* at 38.

²⁵ See *Testimony of Mike Masaoka before the House Select Committee Investigating*

William Scobey [and] Assistant Secretary of War John J. McCloy . . . to let Japanese Americans volunteer to fight in Europe.”²⁶

Japanese American males of draft age were then asked to fill out a Selective Service Questionnaire that included the following two questions:

No. 27. Are you willing to serve in the armed forces of the United States on combat duty wherever ordered?

No. 28. Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, to any other foreign government, power or organization?²⁷

The difficulty of responding to the questions was enhanced by the emotional toll of their confinement to the internment camps at the time they were given the questionnaires. Some Japanese Americans were angered by the first question.²⁸ What would it mean to agree to serve in the U.S. armed forces when your family would remain behind barbed wire? Some thought the second question was a trap.²⁹ What would it mean to forswear allegiance to the Japanese emperor when you had never sworn allegiance in the first place? Thus, an affirmative answer to this question might have been seen as a confession to an allegiance that never existed.³⁰ Debates raged in the camps about how to respond to the questions.³¹

The different responses to these questions were guided by what

National Defense Migration Feb. 23, 1942, JAPANESE AMERICAN VOICE: MAKING OUR VOICES HEARD (testifying before the House Committee about the loyalty of Japanese Americans), at <http://www.javoice.com/masaoka.html> (last visited Jan. 5, 2003). Additionally, The Japanese American Creed was read before the U.S. Senate in May, 1941 by Masaoka—extolling the values of Japanese Americans. *See id.*

²⁶ LESLIE T. HATAMIYA, RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988 22 (1993) (noting that the negotiations preceded the decision by the War Department which allowed Japanese Americans to volunteer).

²⁷ WEGLYN, *supra* note 24, at 136.

²⁸ *See id.* at 138 (indicating that the Nisei felt great abhorrence at the idea of combating against their own relatives in Japan).

²⁹ *See id.* at 136–38 (fearing that an answer of *yes* would be interpreted as a sign of allegiance to Japan, while answering *no* would be indicative of disloyalty to America, leaving no option for the Nisei to declare their American loyalty after their citizenship rights were re-established).

³⁰ *See* CHAN, *supra* note 22, at 130 (indicating that many Nisei felt no attachment to Japan and that they refused to allow any allegiance to be impaired).

³¹ *See* WEGLYN, *supra* note 24, at 136–43 (revealing the view that answering *yes* to both questions was effectively volunteering for the army, while answering *no* would be punished by deportation or segregation).

they thought it meant to be an American and how they should show their loyalty. Those who answered *no* to both questions were sent primarily to the Tule Lake, California camp, which was designated as a segregation center for both “disloyals” and for those who were cooperative.³² Some responded *no* to the first question and *yes* to the second.³³ Others believed that the patriotic thing to do was answer *yes* to both questions.³⁴ Still, some went further and volunteered outright for the armed services to show their loyalty to America.³⁵

Many of these volunteers ended up in segregated fighting units. The 100th Infantry Battalion was made up of over 1,400 Nisei—second-generation Japanese Americans—from Hawaii.³⁶ They quickly earned the nickname “Purple Heart Battalion” because of the severe number casualties they suffered.³⁷ Then, the 442nd all-Nisei Regimental Combat Team was formed.³⁸ Eventually the 100th and the 442nd were combined,³⁹ and emerged from World War II as the most highly decorated unit in the history of the U.S. armed forces for its size and length of service.⁴⁰

The combined unit offered their blood to achieve “Americanness” for themselves, for their families, and for future generations. That is the bargain that is sometimes offered to disfavored minorities trying to gain acceptance from the American majority.

After 9/11, Middle Eastern and South Asian communities in the

³² See CHAN, *supra* note 22, at 132 (listing five categories of people placed at Tule Lake, including “disloyals”—those answering *no* to both questions—and American citizens who wished to renounce their citizenship and who requested expatriation to Japan).

³³ See WEGLYN, *supra* note 24, at 138 (conceding that negative responses to the first question were common).

³⁴ See *id.* at 136, 143 (suggesting that a *yes* response to both questions was proof of loyalty to America).

³⁵ See *id.* at 144 (noting that in Hawaii nearly 10,000 Nisei eagerly volunteered for the 1,500 positions available for the all-Nisei combat team).

³⁶ See YAMAMOTO, *supra* note 19, at 214–15 (emphasizing the recommendation of a Hawaiian Commander Lieutenant to the Hawaiian Nisei to form a Nisei Battalion to prove their loyalty to America).

³⁷ See *id.* at 215 (calculating that during the first month and a half 78 men were killed and 239 were wounded).

³⁸ See *id.* (adding that this team consisted of volunteers from Hawaii and the mainland).

³⁹ See *100th Battalion, 442nd Infantry*, GLOBALSECURITY.ORG (recognizing that before the merger, the 442nd Infantry was a source of replacements for the 100th Battalion), at <http://www.globalsecurity.org/military/agency/army/100-442in.htm> (last modified Apr. 7, 2002).

⁴⁰ See *id.* (receiving 9,486 Purple Hearts, along with the thousands of other recognitions). The heroics of 100th/442nd unit are still being recognized today. In June 2000, twenty-two soldiers of the 100th/442nd, or their surviving family members, were awarded the nation’s highest decoration for valor—the Medal of Honor. *Id.*

United States have become the most recent victims of racial backlash. What bargain is being offered to them? For many, their only recourse is to drape their homes, cars, places of business, and bodies with the American flag, in hopes that this positive claiming of American identity is sufficient to ward off legal and extralegal violence. In the months following 9/11, over 1,000 incidents of hate violence were reported.⁴¹ In addition to these macroaggressions, microaggressions⁴² directed against Middle Eastern and South Asian persons and communities are also thwarting their pathway to belonging in America.

Since 9/11 over twelve hundred noncitizens have been detained by federal authorities, the overwhelming majority of them appear to be of Middle Eastern and South Asian ancestry.⁴³ The precise number is unknown because the federal government has refused to release updated figures since November 2001.⁴⁴ Further, an unknown number remain in custody and have little or no access to legal counsel.⁴⁵ Over 5,000 males of Middle Eastern and South Asian descent between the ages of 18 and 33, who held visas from countries having Al Qaeda operations, were targeted for questioning by both local and federal authorities.⁴⁶

⁴¹ See also Volpp, *supra* note 4, at 1575 n.1 (adding that 1,717 cases of "Anti-Muslim incidents" were reported before February 8, 2002); see also Muneer Ahmad, *Homeland Insecurities: Racial Profiling the Day After 9/11*, SOCIAL TEXT (forthcoming 2002) (on file with author).

⁴² Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989) (discussing the "incessant and cumulative" assaults on black self-esteem" that stem from interactions between whites and blacks (quoting Pierce, *Psychiatric Problems of the Black Minority*, in AMERICAN HANDBOOK OF PSYCHIATRY 512, 514 (S. Arieti ed. 1974))). Microaggressions are a subtler form of offensive behavior directed towards a particular race and are often automatic, responses stemming from an assumed attitude of supremacy. *Id.* at 1566.

⁴³ See Volpp, *supra* note 4, at 1577-78 (stating that "[t]he purported basis [for the detention] is to investigate and prevent terrorist attacks, yet none of the persons arrested and detained have been identified as engaged in terrorist activity").

⁴⁴ See *id.* at 1577 n.6 (explaining that the Bush administration defended this nondisclosure policy, relying on concern for the privacy rights of the detainees).

⁴⁵ See Ashar, *supra* note 4, at 1197 (indicating that the lack of contact with legal counsel is attributed to the "secretive manner" of their arrest and detention); see also Neil A. Lewis, *Judge Orders U.S. to Release Names of 9/11 Detainees*, N.Y. TIMES, Aug. 3, 2002, at A1 (noting that the public lacked knowledge concerning who the detainees were, where they were, or whether or not they were represented by counsel); cf. Philip Shenon, *Judge Delays Order to Identify Detainees Until Appeals Ruling*, N.Y. TIMES, Aug. 16, 2002, at A14 (explaining that the United States Justice Department was disinclined to reveal the number of individuals that had been detained following 9/11).

⁴⁶ See Steven Brill, *The FBI Gets Religion*, NEWSWEEK, Jan. 28, 2002, at 32, 33 (noting that this was "racial profiling at its worst" because of the manner and breadth of such questioning); see also Jodi Wilgoren, *Prosecutors Begin Effort to Interview 5,000, But Basic Questions Remain*, N.Y. TIMES, Nov. 15, 2001, at B7 (reporting that many Arabs and Muslims considered the government questioning to be founded on their ethnicity rather than their

Arab Americans, who voluntarily submitted to the FBI interviews, still felt the sting of racial profiling. One interviewee commented that “[the federal agents] were very polite, but you still feel violated by having someone from the FBI knock on your door You submit, because you figure they’ll be watching you if you don’t, but it was not pleasant.”⁴⁷ Responding to the interviewee’s statement, the reporting journalist discounted this experience by stating that “[p]eople being blown to bits in office towers isn’t pleasant either. And this doesn’t seem too high a price for the FBI . . . to have established contacts” in Arab American communities.⁴⁸ It is easy, though, for the journalist to pass judgment that the price is not too high. When the price is being paid by someone else, it is very easy to ignore.

Thus far, the focus has been on the comparable burdens suffered by Japanese Americans after the attack on Pearl Harbor and by Middle Eastern and South Asian Americans after 9/11. Each represents the most disfavored outgroups in their respective periods. It should be remembered, however, that they are not the only marginal citizens or subjects in America. What happens to other outgroups? The following is a discussion concerning the idea of differential Americanization during war.

Extreme exclusion directed against one outgroup sometimes creates opportunities for other outgroups to become incorporated as more fully American. In order for this to occur, there seems to be at least two related pathways: the ability to distance oneself from the most disfavored outgroup; and participation in, or at least the appearance of a perceived willingness to participate, in patriotic gestures. Such gestures, however, might include discrimination against the most disfavored group. These two related pathways may lead the ingroup to accept or recognize members of an outgroup as Americans, even if it is in a limited way.

The differential Americanization of Chinese Americans and Japanese Americans during World War II provides an example of this theory. While Japanese Americans were struggling to become American in the face of state-sponsored discrimination, Chinese

behavior or their connection with the terrorist attacks).

⁴⁷ Brill, *supra* note 46, at 33 (discussing how the FBI’s approach to questioning changed as the goal of questioning moved from “grilling” alleged suspects to retrieving information in response to the Arab American communities’ cooperation).

⁴⁸ See *id.* (responding that in light of the terrorist attacks of 9/11, peaceable information gathering is reliant on cooperation and sensitivity by both the authorities and the Arab American communities).

Americans were, to a certain extent, embraced.⁴⁹ Prior to World War II, the mainstream American public largely lumped Chinese and Japanese persons together as undesirable Asians.⁵⁰ Both groups were deemed to be racially ineligible to become naturalized citizens.⁵¹ They had also been the targets of racially discriminatory immigration laws along with other kinds of state-sponsored discrimination.⁵² Both groups were subject to anti-miscegenation laws that prevented their intermarriage with whites.⁵³ But some of these things changed with the war.

Militarily, China was an ally of the United States during World War II. Strategically, Japan tried to use the race card to unite Asian countries against the United States by proclaiming that Americans had embarked on a "campaign of venomous vilification" against the character of the Chinese people and that America deliberately excluded them from American citizenship.⁵⁴ In a fashion similar to the way foreign policy concerns drove domestic

⁴⁹ But see YAMAMOTO, *supra* note 19, at 9 (noting that "[o]vertly racist views about Japanese Americans during World War II must be linked to a powerful social process in which Americans from Asia were . . . regarded as not part of the national body").

⁵⁰ See ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 78–79 (1999) (explaining that despite efforts by Japanese immigrants to distinguish themselves from the earlier Chinese immigrants, "they were treated by white Americans as merely different strains of the same 'Yellow Peril' first embodied by the Chinese").

⁵¹ See *United States v. Thind*, 261 U.S. 204, 213–14 (1923) (claiming that a high-caste Hindu from Punjab, India did not constitute a white person under the naturalization statute, and therefore, was not eligible for naturalization); *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (stating that Japanese persons were not Caucasian, and therefore, were barred from naturalization); *In re Ah Yup*, 1 F. Cas. 223, 224 (C.C.D. Cal. 1878) (No. 104) (holding that Chinese people were not "white persons" within the meaning of the naturalization statute, and therefore were excluded from naturalization).

⁵² See CHANG, *supra* note 50, at 82–84 (citing examples such as the Geary Act of 1892—requiring "all Chinese legitimately residing in the United States [to] obtain . . . a certificate affirming their right to be in this country"—and the discriminatory, animal-like treatment of the Chinese detainees at Angel Island).

⁵³ See Megumi Dick Osumi, *Asians and California's Anti-Miscegenation Laws*, in *ASIAN AND PACIFIC AMERICAN EXPERIENCES: WOMEN'S PERSPECTIVES* 1 (Nobuya Tsuchida ed., 1982) (highlighting the prevalence of miscegenation laws among the states and their effect of subordinating and separating Asians from white society). In the initial statute, issuance of a marriage license to a white person and a Mongolian was forbidden. See *id.* at 2 (citing 1880 Cal. Stat. 3). In 1905, this was extended to make "marriages between whites and Mongolians 'illegal and void.'" *Id.* (citing 1905 Cal. Stat. 554).

⁵⁴ See Neil Gotanda, *Towards Repeal of Asian Exclusion: The Magnuson Act of 1943, the Act of July 2, 1946, the Presidential Proclamation of July 4, 1946, the Act of August 9, 1946, and the Act of August 1, 1950*, in *ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY* 309, 311–13 (Hyung-Chan Kim ed., 1996) (illustrating Japan's propagandist methods by noting a Tokyo broadcast that included an accusation of hypocrisy on the part of the United States indicating that instead of waging war to liberate oppressed people, it was doing so to entrench a policy of imperialism against Asian societies).

civil rights reform—as discussed by authors Derrick A. Bell, Jr.⁵⁵ and Mary L. Dudziak⁵⁶—the need to stay on good terms with China led the United States Congress to pass a law that permitted Chinese persons to become naturalized citizens.⁵⁷ The law additionally repealed the Chinese Exclusion laws—setting a quota that permitted the immigration of 105 persons of Chinese ancestry each year.⁵⁸ That the inclusion of Chinese Americans was driven by war imperatives can be seen in the failure of a similar bill with regard to Koreans. Korea, at the time, was a protectorate of Japan.⁵⁹ The United States did not have to stay on good terms with Korea. Hence, the bill that would have permitted Koreans to naturalize failed.⁶⁰

The media also became involved in the wartime project of differential Americanization. Both *Time* and *Life* magazines published feature articles that explained to their readers how to tell the friendly Chinese from the Japanese enemy.⁶¹ These articles discussed the differing racial profiles, physical features, and behavior.⁶² The articles also exhibited detailed photos of Chinese and Japanese faces, and the articles indicated how to make distinctions regarding their physical attributes.⁶³ While both magazines included pictures of Chinese and Japanese faces, *Life* included annotations showing the purported differences:

⁵⁵ See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (contending that the decision in *Brown* not only helped Americans cope with the immorality of racial inequality but also provided credibility in America's struggle with communism for the loyalty of third world countries).

⁵⁶ See, e.g., MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 14–17 (2000) (illustrating how racial problems in America undermined our international prestige and our fight against communism during the Cold War).

⁵⁷ See John Hayakawa Torok, “Interest Convergence” and the Liberalization of Discriminatory Immigration and Naturalization Laws Affecting Asians, 1943–1965, in *CHINESE AMERICA: HISTORY AND PERSPECTIVES* 1, 3–4 (1995) (discussing an overall shift in American law away from racism towards Asians—specifically the Chinese—through passage of the Chinese Exclusion Act).

⁵⁸ See *id.* at 8–9 (theorizing that the repeal of the Chinese exclusion laws was “more symbolic than substantive” since any immigrant who was at least “half” Chinese was still considered in the national-origins quota—thus, continuing the regulation of immigration on a racial basis).

⁵⁹ See *id.* at 9 (noting that Korea and India, unlike China, were not sovereign states).

⁶⁰ *Id.*

⁶¹ See *How to Tell Japs From the Chinese*, LIFE, Dec. 22, 1941, at 81 [hereinafter *Japs From the Chinese*]; *How to Tell Your Friends from the Japs*, TIME, Dec. 22, 1941, at 33 [hereinafter *Friends from the Japs*].

⁶² See *Japs From the Chinese*, *supra* note 61, at 81–82; *Friends from the Japs*, *supra* note 61, at 33.

⁶³ See *Japs From the Chinese*, *supra* note 61, 81–82; *Friends from the Japs*, *supra* note 61, at 33.

Chinese face	Japanese face
parchment yellow complexion	earthy yellow complexion
more frequent epicanthic fold	less frequent epicanthic fold
higher bridge [on nose]	flatter nose
never has rosy cheeks	sometimes rosy cheeks
scant beard	heavy beard
longer, narrower face	broad, shorter face
lighter facial bones	massive cheek and jawbone

Table 1: Comparison of Chinese and Japanese facial features⁶⁴

Time focused on offering characterizations of the two groups, nonsensically commenting that “the Chinese expression is likely to be more placid, kindly, open; the Japanese more positive, dogmatic, arrogant,” and that Chinese persons had an “easy gait [and] sometimes shuffle[d]” whereas the enemy Japanese walked “stiffly erect.”⁶⁵

In the midst of racial confusion, some Chinese Americans, fearful of being the target of misdirected hate, sought to distinguish themselves from Japanese Americans.⁶⁶ While the impulse to distance oneself from a targeted group is understandable, it also contributes to maintaining the status quo of racial discrimination. By isolating oneself from a disfavored group, one sacrifices the opportunity to challenge the racial terms upon which American identity is implicitly and explicitly articulated.

This is the challenge that marginal citizens and subjects who are not members of the current most disfavored group face. Do we accept inclusion that comes at the cost of the most disfavored group?

Aaron McGruder, in his *Boondocks* comic strip, *plays* with the impact that the heightened racial profiling of Arab Americans has had on African Americans. One of the characters in his comic strip

⁶⁴ *Japs From the Chinese*, *supra* note 61, at 81.

⁶⁵ *Friends from the Japs*, *supra* note 61, at 33.

⁶⁶ Some persons of Chinese ancestry wore badges identifying themselves as Chinese. See Volpp, *supra* note 4, at 1590–91 (comparing the badges worn by the Chinese distinguishing themselves from the Japanese to Sikh men and South Asian American responses of religious misrecognition—saying they are not Muslim, after 9/11); see also *Japs From the Chinese*, *supra* note 61, at 81 (outlining the efforts of the Chinese consulates to distinguish Chinese Americans from Japanese Americans by “tag[ging] their nationals with identification buttons”). There were also other measures taken by the Chinese to make a distinction between themselves and the Japanese during this time period. See Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, 17 CRIM. JUST. 52, 53 (2002) (demonstrating that Chinese Americans posted signs that said “I hate the Japs more than you do” in an effort to evade blanket discrimination).

celebrates a news bulletin that states that recent polling has revealed that African Americans are now the "Third Most Hated Ethnic Group" in the United States.⁶⁷ Depending on one's perspective, African Americans have moved either up or down from being the most hated ethnic group in the United States. Despite McGruder's irony, this is no cause to celebrate for African Americans.

This message is reminiscent of the attitude taken by many black leaders in response to racism directed against Chinese immigrants in the late 1800s and early 1900s. On one hand, some black leaders were fearful that the immigration of Chinese workers who were willing to work for subsistence wages would lead to a displacement of black workers.⁶⁸ "Despite . . . [these] feelings, [however,] most blacks believed nonetheless that no matter how bad the habits of the Chinese were, 'these vices do not justify the whites in oppressing them.'"⁶⁹ Further, black leaders understood that even though the immediate targets of the discriminatory immigration legislation were persons of Asian ancestry, such legislation ultimately reinforced the system of racial stratification and discrimination under which African Americans continue to suffer.⁷⁰ None are free until all are free.

McGruder's comic implicitly asks how those not directly burdened by the new racial profiling are supposed to respond. This question is more complex for members of an outgroup that is indirectly benefiting because a new outgroup has taken their place. An African American student recently echoed this sentiment. She expressed her frustration and anger after 9/11 because suddenly, people were no longer regarding her with suspicion in stores, on the street, or on campus. Instead, they were smiling at her. She did not know how to handle this newfound acceptance. She was uncertain how long it would continue. She suspected, though, that it would not last.

In her article, Leti Volpp examines the way that the current crisis can lead to a reconfiguration of who can claim to be part of the "we"

⁶⁷ Aaron McGruder, *The Boondocks*, L.A. TIMES, Nov. 7, 2001, at E5.

⁶⁸ See Arnold Shankman, *Black on Yellow: Afro-Americans View Chinese-Americans, 1850-1935*, 39 PHYLON 1, 4 (1978) (contradicting the initial belief that there was sufficient work for both the blacks and the Chinese).

⁶⁹ *Id.*

⁷⁰ See *id.* (explaining that the blacks opposed the taxation of laundry services since—although originally aimed at the Chinese—it would also affect black women).

in “We the People.”⁷¹ With racial profiling targeting persons of apparent Middle Eastern and South Asian ancestry, a new privileged position—*loyal American*—is emerging, and “[o]ther people of color have become ‘American’ through the process of endorsing racial profiling.”⁷²

This does not just mean acquiescence to racial profiling—“we” have all been deputized. As one commentator noted that “Bush and the Office of Homeland Security urged citizens to become “citizen-sentinels” and create a national neighborhood watch.”⁷³ The Bush administration went further and proposed a plan referred to as Operation Tips—Terrorism Information and Prevention System⁷⁴—which would have asked workers in “unique positions” with access to people’s home—such as utility workers, postal workers, and cable television workers—to report suspicious behavior to a special hotline.⁷⁵ Public outcry led to this portion of Operation TIPS being “scaled back.”⁷⁶

But what constitutes suspicious behavior? Against whom are we to be vigilant? What happens when vigilance—once authorized—turns into vigilantism? As previously mentioned, there were over 1,000 reported incidents of bias crimes in the weeks following 9/11.⁷⁷

Professor Muneer Ahmad—in an article forthcoming in *Social*

⁷¹ See Volpp, *supra* note 4, at 1576, 1592–99 (asking “[w]ho is the ‘us’ in the U.S.?”).

⁷² *Id.* at 1584.

⁷³ See Editorial, *Closing the Safety Gap*, CHRISTIAN SCI. MONITOR, Oct. 11, 2001, at 8, available at 2001 WL 3738329.

⁷⁴ See Dan Eggen, *Under Fire, Justice Shrinks TIPS Program*, WASH. POST, Aug. 10, 2002, at A1 (remarking that the program was not “designed to infringe on privacy concerns”), available at 2002 WL 2827007.

⁷⁵ See Eric Lichtblau, *Terrorism Tip Network Scaled Back Surveillance: Workers With Access to Homes Won’t Use New Hotline, Justice Department Says*, L.A. TIMES, Aug. 10, 2002, at A1 (indicating, however, that the proposed network was not intended to report “anything other than publicly observable activities”), available at 2002 WL 2495625.

⁷⁶ See *id.* (reporting that civil rights advocates believed that the proposed hotline had excessively infringed upon civil rights in an effort to evade terrorism); see also Eggen, *supra* note 74, at A1 (commenting that the revised plan would not include any workers who had access to private property and would only include those laborers who worked in locations or worked at events that were clearly public).

⁷⁷ See Volpp, *supra* note 4, at 1575, 1580. For some examples of these crimes, see Robert E. Pierre, *Victims of Hate, Now Feeling Forgotten; Family of Man Killed After 9/11 Finds Little Charity, But Much Hardship*, WASH. POST, Sept. 14, 2002, at A1 (explaining that the shooter’s motive for killing an Indian immigrant in a gas station was to “retaliate on local Arab Americans”), available at 2002 WL 100081894; see also Richard A. Serrano, *Deluge of Hate Crimes After 9/11 Pours Through System Courts: Officials Have Three Times the Cases Involving Arab-looking Victims as at This Time a Year Ago*, L.A. TIMES, July 6, 2002, at A8 (reporting that the perpetrator admitted his actions were “in response to the attacks of Sept. 11, 2001” when he set flame to a restaurant owned by a non-Muslim Pakistani), available at 2002 WL 2487985.

Text—describes the problem of unchecked patriotic fervor:

In the first days after the terrorist attacks, our patriotism helped many to grieve collectively But very soon after that, and predictably so, this coping mechanism gave way to an unreflective national fervor and a caustic nativism which was then expressed in violence. When the killer of Balbir Singh Sodhi, the Sikh gas station owner in Mesa, Arizona, was arrested, he stated, "I'm a patriot. I'm a damn American all the way." A man who tried to run over a Pakistani woman with his car yelled that she was "destroying my country."⁷⁸

Hate crimes become redeployed as patriotic gestures, when belongingness is exercised through the negation or abjection of those people marked as truly different. These patriotic gestures are not limited to the United States borders. A discussion of our patriotic excesses that have taken place overseas, however, are not developed in this essay.

PART II: (RACIAL) PROFILES IN COURAGE

September 11 and its aftermath are marked by moments of inclusion and exclusion. One illustration of this dichotomy involves a now famous photograph of three white male firefighters and the controversy over a proposed, but now scuttled memorial.⁷⁹ For the most part, the race of the fallen firefighters had not been an issue until a controversy erupted over a proposed monument that would recognize the firefighters who perished when the World Trade Center Towers came crashing down.⁸⁰ On 9/11, during the search for survivors, three firemen were photographed raising a flag over the site.⁸¹ This image became etched in people's minds.⁸² It

⁷⁸ Ahmad, *supra* note 41 (on file with author).

⁷⁹ See Tom Franklin, *The After-Life of a Photo That Touched a Nation*, COLUM. JOURNALISM REV., Mar.-Apr. 2002, at 64, 65 (expressing "disappoint[ment] that [his] photograph . . . became the subject of such division," and explaining that although he supports a memorial representing diversity, he believes his photograph "captures an important moment" and should not be changed), available at www.cjr.org/year/02/2/franklin.asp (last visited Jan. 31, 2003).

⁸⁰ See Rod Dreher, *The Bravest Speak: Firemen on the Flag-raising Statue That's Raising Racial Ire*, NAT'L REV. ONLINE, Jan. 16, 2002 (quoting a fireman in a New York firehouse who blamed the FDNY leadership for making "a race issue out of it"), at www.nationalreview.com/dreher/dreher011602.html (last visited Jan. 31, 2003).

⁸¹ See Franklin, *supra* note 79, at 64 (recounting the circumstances giving rise to his opportunity to photograph the firemen raising the flag on 9/11).

⁸² See Leonard Pitts, *Politically Correct Version of Sept. 11 Insults Firefighters*, 24 L.A.

appeared everywhere and became an important symbol of American courage in the face of darkness.⁸³ There was an attack by a foreign enemy. Yet, at the site of attack, the flag was raised from the rubble, symbolically proclaiming that America had not been beaten. Instead of being seen in the rocket's red glare as in our national anthem professes, the flag rose above the dust and smoke as a testament of America's resilience.

The photograph was the inspiration for a proposed monument that was to be erected at the New York City Fire Department's Brooklyn headquarters.⁸⁴ While the men in the photograph are white, the monument was to depict one white, one black, and one Hispanic firefighter.⁸⁵ This decision caused an immediate controversy.⁸⁶

But before exploring the controversy, it is important to examine another image that the picture and monument invoke and sharply resemble: the raising of the American flag at Iwo Jima during World War II.⁸⁷ This earlier example has much to teach us about what is

BUS. J. 47, Jan. 28, 2002 (characterizing Franklin's photograph as being "among the most famous photographs that awful day produced"), available at 2002 WL 11231831; see also Elizabeth Llorente, *A Reunion of Heroes: Firemen in Powerful New Image*, NORTH JERSEY NEWS, Sept. 2, 2002 (describing the photograph as capturing a "show of determination and patriotism [which] touched people around the world, and established the image . . . as an icon"), available at <http://www.northjersey.com/cgi-bin/page.pl?id=4841868> (last visited Jan. 31, 2003).

⁸³ See Franklin, *supra* note 79, at 64–65 (discussing the thousands of letters, e-mails, and phone calls that he received and noting the hope it gave to many who "called it a symbol of strength and courage, a reminder that Americans were united and strong"); see also Llorente, *supra* note 82 (noting that the photograph had been reproduced in various contexts including magazine and newspaper covers, t-shirts, coffee mugs, parade floats, and postage stamps).

⁸⁴ See Leo, *supra* note 9, at 31 (noting that the famous photograph was supposed to be memorialized as a nineteen-foot bronze statue—sponsored by the company that manages Brooklyn's fire department headquarters).

⁸⁵ See Franklin, *supra* note 79, at 65 (discussing the role that his photograph was to play in the memoriam).

⁸⁶ See generally Dreher, *supra* note 80 (reporting that many firemen resented the fact that officials wanted to falsify history and change an actual picture of what happened out of political correctness); Franklin, *supra* note 79, at 65 (stating his view—as the photographer—that changing the subjects of the photograph "diminishes the credibility of photojournalists as chroniclers of history"); Leo, *supra* note 9, at 31 (warning that by doctoring images and removing or adding people for political purposes, reality in society becomes unimportant); Pitts, *supra* note 82 (taking offense to the idea that the image must be distorted to represent people "with brown skin or Spanish surnames" when the truth is, it already does).

⁸⁷ Many articles discussing the Franklin photograph and the proposed monument compare the image to the flag-raising at Iwo Jima. See, e.g., Dreher, *supra* note 80 (using the example of changing the faces of the Marines in the Iwo Jima memorial to emphasize the absurdity of changing the photograph of the firemen); Franklin, *supra* note 79, at 64 (commenting that both the image of the firemen and the image of the flag-raising at Iwo Jima have been engrained in the public consciousness as symbolic of strength and courage); Leo, *supra* note 9, at 31 (posing the question—"would anyone tolerate political revisionism of the Iwo Jima

at stake in the way images are deployed to construct history and cultural memory that help to constitute our nation.⁸⁸

Interestingly, the flag that was immortalized in the famous Iwo Jima photograph was not the first American flag on this site.⁸⁹ In fact, another flag had been placed there earlier that day.⁹⁰ A photograph exists of American soldiers standing around—a few holding the flag pole—and one soldier holding a “carbine in the foreground.”⁹¹ Yet, this preceding photograph never emerged as an iconic symbol.⁹² It was the raising of the second, larger flag that immediately became an important and significant symbol of the American will.⁹³

One of the six men raising the flag in the photograph was Marine Private Ira Hayes, a Pima Indian.⁹⁴ Private Hayes and the other two surviving members of the six soldiers depicted in the photograph were pulled from active duty and were sent around the country to help sell war bonds.⁹⁵ During the bond tour, he was celebrated as an American hero.⁹⁶ Private Hayes, however, found it difficult to accept this status which was at odds with what really took place that day—one American flag had already been secured on the hill.⁹⁷ It was happenstance that the decision was made to

statue to get more diversity”); Pitts, *supra* note 82 (indicating that for many people the flag-raising at the World Trade Center is an “eerie” reminder of the flag-raising at Iwo Jima, and further, that both represent the best of America).

⁸⁸ Cf. PETER BURKE, EYEWITNESSING: THE USES OF IMAGES AS HISTORICAL EVIDENCE 13 (2001) (suggesting that the “use[] of images cannot and should not be limited to ‘evidence’ . . . and room should be left for . . . ‘the impact of the image on the historical imagination’”).

⁸⁹ See KARAL ANN MARLING & JOHN WETENHALL, IWO JIMA: MONUMENTS, MEMORIES, AND THE AMERICAN HERO 5–6 (1991) (noting that the famous photograph—taken by Joe Rosenthal—on which the World War II monument was based was actually taken several hours following the first flag-raising on Iwo Jima).

⁹⁰ See *id.* at 3 (recounting the story of the first flag-raising).

⁹¹ See *id.* at 5, 50 (indicating that the photograph of the first flag-raising was taken by Lou Lowrey and that it was not nearly as dramatic).

⁹² See *id.* at 61 (revealing that the Marine magazine, *Leatherneck*, withheld Mr. Lowrey’s photographs and did not publish them “so as not to compete with the accepted picture of what had suddenly become the official, bona fide Iwo Jima flag-raising”).

⁹³ See *id.* at 67 (explaining that the Marines lowered the first flag and raised the second so one flag would constantly be kept flying over the island).

⁹⁴ See *id.* at 3, 102–03, 111 (discussing how Private Hayes was the soldier pulling the guide rope in the famous photograph).

⁹⁵ See *id.* at 102–03 (noting the other surviving soldiers—Marine Private Rene Gagnon and Pharmacist’s Mate Second Class John Bradley).

⁹⁶ See *id.* at 113 (explaining that while on the bond tour the soldiers led parades, accepted ceremonial keys to cities, participated in interviews, and posed for photographs).

⁹⁷ See *id.* at 111, 116–21 (indicating that Private Hayes expressed concern that one of the soldiers—Henry Hansen—had been misidentified and that the soldier raising the flagpole was actually his friend, Harlon Block). Further, since both men were deceased, Private Hayes

replace the first flag with a larger flag. It was happenstance that he was among the six who participated in the second flag-raising. Despite Private Hayes's participation in the battle at Iwo Jima, he did not consider himself to be a hero.⁹⁸ This feeling of ambivalence contributed to his public drunkenness during the bond tour—eventually leading to his removal from the tour and his return to combat duty.⁹⁹

Yet, despite how the men present at Iwo Jima viewed the raising of the second flag, the popular image of what occurred transcended reality. The photograph of the event was widely disseminated and was used by the Treasury Department to promote the war effort.¹⁰⁰ As a visual tool, the photograph played an important role in the construction of an allegory of the American nation.

Various elements of the photograph contribute to its efficacy. In this case, the locale is Iwo Jima—foreign soil and an *American* flag is being raised. The young men in the scene are easily identified as American by their uniforms and the flag that they are carrying. A Native American—through his participation in a heroic struggle and his inclusion in the second flag-raising—is being incorporated into the allegory of American ideal of equality. According to this image, citizenship and participation in the military creates a horizontal plane upon which equal national identity is unified and upon which the tremendous inequalities that exist in society as well as America's history of conquest and genocide are forgotten.¹⁰¹

The Native American—by standing beside his brothers in defense of America and helping to raise the flag—illustrates an American dream—a dream in which an individual is able to forget the past

was advised to remain silent while on the bond tour. *See id.* at 111.

⁹⁸ *See id.* at 120–21 (referring to his days on the bond tour as awful, Hayes explained that “[p]eople shoved drinks in our hands and said we were heroes”).

⁹⁹ *See id.* at 116, 120–21 (explaining Hayes's “abrupt departure” was often clarified by labeling Hayes as “the brave Indian lad who had begged to go back to war”).

¹⁰⁰ *See id.* at 107 (noting that more than one-million business owners agreed to put war bond posters featuring a reproduction of the photograph in their front windows).

¹⁰¹ *See* ANDERSON, *supra* note 12, at 7 (utilizing the notion of the “horizontal plane” to discuss a nation). This attitude can be seen in the initial reaction when one of the flag-raisers was mistakenly identified as Louis C. Charlo—“grandson of the great Chief Charlo of Nez Perce war fame.” *See* MARLING & WETENHALL, *supra* note 89, at 85. Marling and Wetenhall comment that:

Charlo's Native American heritage endowed the Iwo Jima photo with echoes of American history and American ethnic diversity: he authenticated a democratic ethos that found room for Indian boys from Montana. The figure of Charlo allowed [Congressman] Mansfield to conflate the proud past of the Indian with the proud tradition of the United States Marines.

Id.

and look to the future. With America embracing him as one of its own, it is also able to forget its own past, to believe that it has been forgiven of its sins.

One speculates about the cost to Private Hayes in his decision to leave the reservation—a place that he had rarely ventured from before joining the Marine Corps.¹⁰² Upon returning to the United States, Private Hayes tried to regain his old life, but found himself haunted by memories, guilt, and pain.¹⁰³ Hailed as a hero, Hayes remembered receiving hundreds of letters at his home on the reservation, and those visitors who would “drive through the reservation, walk up to [him] and ask, ‘Are you the Indian who raised the flag on Iwo Jima.’”¹⁰⁴ Plagued with thoughts of his “good buddies” lost in battle, Hayes shielded himself away from the attention. In his mind, those men—rather than himself—deserved the title of “hero.”¹⁰⁵

Reluctantly, Ira Hayes attended the inaugural ceremony held in Washington, D.C., for the monument based on the photograph of the Marine Corp. raising the flag at Iwo Jima.¹⁰⁶ In a close inspection of the photograph—and now permanently sculpted in bronze—a raised hand from the back of the group of Marines can be seen reaching for the flag pole. That hand belongs to Ira Hayes, and remains frozen, perhaps, fittingly, forever reaching for but never quite grasping that symbol of American freedom.¹⁰⁷

Following a night of drinking, Ira Hayes died at the age of thirty-two. “As Ira drank his last bottle of whiskey he was crying and mumbling about his ‘good buddies’ who did not return from the War.”¹⁰⁸

Focusing now on the 9/11 memorial, the question is—what is at

¹⁰² See Iwo Jima, Inc., *The Flag Raisers* (recounting Private Hayes's difficulties of coping with his public exposure after returning from the War), at <http://www.iwojima.com/raising/raisingc.htm> (last visited Jan. 31, 2003).

¹⁰³ See MARLING & WETENHALL, *supra* note 89, at 143 (discussing Hayes' “downhill spiral” that included heavy drinking and numerous citations for public drunkenness as a direct result of his experience in World War II).

¹⁰⁴ See Iwo Jima, Inc., *The Flag Raisers* (reflecting on Private Hayes' mental anguish from the time he returned home until his death), at <http://www.iwojima.com/raising/raisingc.htm> (last visited Jan. 31, 2003).

¹⁰⁵ See *id.* (quoting Private Hayes as stating “I guess I was about to crack up thinking about all my good buddies. They were better men than me and they're not coming back”).

¹⁰⁶ See MARLING & WETENHALL, *supra* note 89, at 1–3 (describing Ira Hayes at the ceremony as “alone, sullen, [and] uncomfortable”).

¹⁰⁷ See MARLING & WETENHALL, *supra* note 89, at 3.

¹⁰⁸ See Iwo Jima, Inc., *The Flag Raisers* (contributing Hayes's alcohol problem to his attempt to escape from his “Conflict of Honor”), at <http://www.iwojima.com/raising/raisingc.htm> (last visited Jan. 6, 2003).

stake. The monument was intended not to honor the individual men who happened to raise the flag—rather, it was meant to honor all the slain firefighters. It seems that the racial depiction of the individuals is immaterial once the decision is made that the monument will not characterize and be modeled after specific men. If the three firemen have any claim, it is not that their racial composition has been altered but that their individual features have been erased.

This monument may be understood to be an inclusionary gesture. What would it mean, however, if blacks and Hispanics accepted this symbol? Who gets excluded by this inclusionary gesture? The organization of three *racialized* bodies encircling the symbol of America represents a vision of the American people. Portraying one white, one black, and one Hispanic fireman in no way comports with reality. Of the 343 firefighters who died there, an estimated 319 were non-Hispanic whites.¹⁰⁹ This 93% white statistic is actually quite close to the demographic background of the New York City Fire Department—in which black firefighters constitute 2.7% and Hispanic firefighters constitute 3.2% of the force.¹¹⁰ It is, however, nowhere near the actual demographic composition of the general population in New York City in 2000, which consisted of 35% white, 24.5% black, 27% Hispanic, 9.8% Asian American, and .2% Native American.¹¹¹

Depicting one white, one black, and one Hispanic fireman might closely resemble the demographic makeup of the general population, but it represents a lie to the largely failed efforts to desegregate the fire department. In a 1973 lawsuit, black and Hispanic plaintiffs won a Section 1983 civil rights claim against the New York City Fire Department that was based on a violation of the Equal Protection Clause of the Fourteenth Amendment, whereby the department was court ordered to change its application procedures

¹⁰⁹ See Leo, *supra* note 9, at 31 (criticizing the decision not to place a memorial for fallen New York City firefighters because of the inability to reach a decision over whether to include a politically correct version or an historically accurate depiction).

¹¹⁰ See Pitt, *supra* note 82, at 47 (stating that blacks and Hispanics should be just as insulted because of the lack of blacks and Hispanics on the New York City Fire Department as the white firefighters are by the decision to replace them with a politically correct version).

¹¹¹ See NEW YORK CITY DEPT OF CITY PLANNING, POPULATION BY MUTUALLY EXCLUSIVE RACE & HISPANIC ORIGIN, NEW YORK CITY & BOROUGH, 1990 & 2000 (showing that the population of whites decreased from 1990 to 2000, while the population of blacks, Hispanics, and Asian Americans increased substantially and that the Native American population had a slight reduction), at <http://www.ci.nyc.us/html/dcp/html/census/popdiv.html> (last visited Jan. 31, 2003).

and examinations.¹¹² At the time of the lawsuit, racial minorities constituted 5% of the fire department and 32% of the general population.¹¹³ Almost thirty years later, the racial minority composition of the fire department is now between 6 and 7% in a city that has become even more racially diverse.¹¹⁴

The debate over the monument has generated very little discussion about how the racial composition of the fire department was achieved and maintained. The struggle over the racial composition of the men to be depicted in the monument echoes the struggle over the racial composition of the New York City Fire Department. The New York City Fire Department currently appears the way it does because race has continued to be a factor in terms of hiring, promotion, and work environment.¹¹⁵

CONCLUSION

This struggle over the racial composition of the monument and of the fire department is a microcosm for the struggle over Americanness. It is part of the overall struggle over the differential Americanization that takes place during times of war or crisis. Who gets to belong? Who gets to be heroes? For marginal citizens and subjects, becoming firefighters may offer a pathway to becoming more securely American. I am not suggesting, nor am I urging—as Douglass and Du Bois did in the context of the military—that racial

¹¹² See *Vulcan Soc'y of N.Y. City Fire Dep't, Inc. v. Civil Serv. Comm'n of the City of N.Y.*, 490 F.2d 387, 397–98 (2d Cir. 1973) (finding that “in combination with the defects in . . . [the written exam] . . . the use of a merely qualifying physical examination rendered the Fire Department’s selection procedures insufficiently job-related to withstand constitutional attack”).

¹¹³ See *Vulcan Soc'y of N.Y. City Fire Dep't, Inc. v. Civil Serv. Comm'n of the City of N.Y.*, 360 F. Supp. 1265, 1269 (S.D.N.Y. 1973) (commenting that this disparity is included as a “factor to be considered where the job opportunity . . . does not require specialized educational training, but is one open to the general public”).

¹¹⁴ See Pitts, *supra* note 82 (comparing the racial composition of New York City—26.6% black and 27% Hispanic—to the racial composition of the FDNY—2.7% black and 3.2% Hispanic).

¹¹⁵ See Sheryl McCarthy, *There Are Ways to Fight FDNY's Racism*, *NEWSDAY* (N.Y.), Jan. 31, 2002, at A34 (discussing a variety of factors that contribute to the small percentage of minorities in the FDNY, including—the low turnover rate, the low number of minority applicants, the minorities lower scores on the written exam, and the minorities perception that they are being kept out—and concluding that both the department and the black community need to work to increase the percentage of minorities), *available at* 2002 WL 2725755; see also Les Payne, *FDNY Puts Out No Welcome Mat for Blacks*, *NEWSDAY* (N.Y.), Jan. 27, 2002, at B6 (remarking on the historical exclusion of blacks from many professions and placing the proposed monument in the following context: “The lily-white statue renders the apartheid department the way it is. The mixed-race statue projects the way the fire department ought to be.”), *available at* 2002 WL 2724940.

minorities join fire departments as a way to further racial uplift.¹¹⁶ Racial minorities should not have to prove their belongingness in this manner. But what about the meaning of exclusion—what does it mean if this avenue is foreclosed?

The monument, with its effort to achieve racial diversity, presents one vision of who is included as a symbolic American fireman. It might be thought of as presenting profiles in courage that were racially inclusive. The proposed monument generated a tremendous amount of controversy and resistance that led to its cancellation.¹¹⁷ We might regard this as a failure of the integrationist vision. But I find myself concerned about this inclusionary gesture because this integrationist depiction would have been a lie. The more important struggle will be won when all racial groups and women are welcomed as actual American firefighters. And, the even larger struggle will be won when differential Americanization along racial lines no longer exists. Instead of the current state of affairs, in which we profile people on the basis of their race in negative ways that place undeserved burdens on racial minorities and in positive ways that give undeserved or under-deserved privileges to white people, we might finally achieve the society dreamed of by Dr. King.¹¹⁸

¹¹⁶ See *supra* notes 13–17 and accompanying text (discussing the beliefs and advice of these black leaders of their time).

¹¹⁷ See Leo, *supra* note 9, at 31 (elucidating the conflict between those who would portray the historical reality of a predominantly white fire department and those who would falsify that reality to promote the image of diversity, which ultimately led to the demise of the project).

¹¹⁸ See Dr. Martin Luther King, Jr., *I Have a Dream*, Address at the Lincoln Memorial in Washington, D.C. (Aug. 28, 1963) (“I have a dream that my four children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”).

PANEL II: IMMIGRATION POLICY

