

THE BOTTOM RUNG OF AMERICA'S RACE LADDER:  
AFTER THE SEPTEMBER 11 CATASTROPHE ARE  
AMERICAN MUSLIMS BECOMING AMERICA'S NEW  
N . . . . S?

*Jonathan K. Stubbs*<sup>†</sup>

On September 11, 2001, did American Muslims become America's newest race?<sup>1</sup> This essay offers preliminary observations regarding that

---

<sup>†</sup> Professor of Law, University of Richmond. B.A. Haverford College, B.A. University of Oxford (Eng.), M.T.S. Harvard University, J.D. Yale Law School, LL.M. Harvard Law School. All Rights Reserved. 2004. Innumerable people deserve thanks for their encouragement and support of this paper. I thank all who helped in any way, and apologize in advance for any omissions. Among those to whom special thanks are due, I wish to recognize my colleagues and friends, J.P. Jones, Azizah al-Hibri, Okianer Christian Dark, David Brennen, Carl Tobias, Marie Failinger and John Douglass. Thanks are due also to my mentors and friends Oliver W. Hill, Esq. and A.L. Williams, Jr., Esq., for their insight and wisdom as well as to my Soul Mate, friend and companion, Pamela Hamilton-Stubbs, M.D. For fine research assistance, thanks are due to Christopher Todd Warman. This article is dedicated to those who continue to protect human rights especially for the least of these in our society. While many have helped, the views and limitations reflected in this work are ultimately the author's.

1. For a compelling analysis of evidence that Muslims and Arabs were being treated as a subordinate race *before* the September 11 catastrophe see Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 Asian L.J. 1, 12-29 (2001). For incisive critiques encompassing (among other things) the racial profiling of Arabs, Muslims and those thought to be Arabs and Muslims, see Leti Volpp, *Critical Race Studies: The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575 (2002) (pointing out that over one thousand anti-Muslim hate crimes had been reported in the wake of September 11, 2001, and noting among other things, the inconsistency of governmental rhetoric that condemns racial profiling and government practices that implement racial profiling); Susan M. Akram & Kevin R. Johnson, "Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy": *Race, Civil Rights and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. Ann. Surv. L. 295 (2002) (available at <[http://www.nyu.edu/pubs/annualsurvey/articles/58%20N.Y.U.%20Ann.%20Surv.%20Am.%20L.%20295%20\(2002\).pdf](http://www.nyu.edu/pubs/annualsurvey/articles/58%20N.Y.U.%20Ann.%20Surv.%20Am.%20L.%20295%20(2002).pdf)>) (accessed Jan. 24, 2004) (describing draconian governmental responses to the September 11, 2001 attacks which effectively disregarded the civil rights of many individuals who were detained simply because of their identities rather than anything that they had done); and Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 Colum. Hum. Rts. L. Rev. 1, 32-46 (Fall 2002) (arguing that persons perceived as "Oriental" are presumed disloyal Americans and that similar presumptions are now being applied to Muslims, Arabs and other individuals thought to be Muslim or Arab). See *Civil Rights Concerns in the Metropolitan Washington, D.C. Area in the Aftermath of the September 11, 2001 Tragedies*, D.C., Md. & Va. Advisory Committees to the U.S. Commn. on Civil Rights (June 2003) [hereinafter *Civil Rights Concerns*] (available at <<http://www.usccr.gov/pubs/sac/dc0603/main.htm>>) (accessed Mar. 1, 2004) (evaluating the treatment of Arabs, Muslims, South

question.

### I.

Using the word “race” in America is like waving a red flag before a bull. You are likely to get a spirited response. In the context of a national calamity like the September 11, 2001 tragedy, discussing race becomes an even more delicate venture. Accordingly, to reduce prospects of confusion later, this essay begins by briefly addressing some initial concerns about even using the term “race.” The essay acknowledges that race is a complex, multilayered phenomenon. In these circumstances, do not expect these comments to provide definitive insights into the nature of “race.” Rather, because racial worldviews are so pervasive, the essay limits itself to merely attempting to give a sense of how the term “race” is used here.<sup>2</sup>

After briefly dealing with some concerns about race, the essay outlines evidence that, based on what at best can be called racial stereotypes, American Muslims have been singled out for particularly egregious treatment following the September 11 tragedy. For illustrative purposes, the essay draws comparisons between the response of public officials to the September 11 and Oklahoma City bombing catastrophes. The essay then puts these matters in a slightly broader historical perspective by considering several cases which the United States Supreme Court decided in the 1930s and 1940s before and after another calamitous day in American history: December 7, 1941, when the Japanese Empire attacked Pearl Harbor. To round out the historical outline, two contrasting cases involving the jurisdiction of military commissions to try American civilians are briefly evaluated.

Most of the background cases I will discuss affected members of oppressed racial minorities during America’s apartheid period. The

---

Asians and others following September 11).

2. Regarding what constitutes a worldview, see Audrey Smedley, *Race in North America: Origins and Evolution of a Worldview* 19 (2<sup>d</sup> ed. 1999) (describing a worldview as “[A] culturally structured, systematic way of looking at, perceiving, and interpreting various world realities, a society’s ‘weltanschauung,’ to use a word made popular in sociological studies.”). Smedley contends: “Once established and conventionalized, worldviews become enthroned in individuals as mind-sets. They may even achieve the state of involuntary cognitive processes, actively if not consciously molding the behavior of their bearers.” *Id.* In addition, see Thomas Luckmann’s description of a worldview as embracing an “encompassing system of meaning in which socially relevant categories of time, space, causality and purpose are superordinated to more specific interpretive schemes in which reality is segmented.” Thomas Luckmann, *The Invisible Religion: The Problem of Religion in Modern Society* 52-54, 61 (Macmillan 1967), quoted in Mechal Sobel, *The World They Made Together: Black and White Values in Eighteenth Century Virginia* 8 (Princeton U. Press 1987).

cases provide provocative food for thought in light of several recent cases involving American Muslims accused of terrorist activities.

In sum, the essay argues, first, that evidence exists that Muslims (more specifically, those perceived as “looking” Muslim) are being subjected to the same type of treatment in America that has been historically reserved for people of darker colors like Blacks, Latino/as, Asians, and Native Americans. Second, in light of the preliminary historical review, the essay contends that how the courts respond to the strait-jacketing of civil liberties of American Muslims will signal, like the proverbial miner’s canary,<sup>3</sup> whether individual freedoms for all Americans are likely to survive the societal backlash following the September 11 tragedy.

## II.

Before discussing whether American Muslims are becoming or have become America’s newest race, the essay briefly addresses how the term “race” is being used. We begin with a few salient concerns about the uses of the language of “race.”

Many natural scientists object that “race” itself lacks a sufficient scientific foundation to serve any constructive purpose. Specifically, scientists involved with the Human Genome Project have discovered recently that at the cellular level, humans are ninety-nine and nine tenths percent (99.9%) the same.<sup>4</sup> Dr. Craig Venter, chief researcher for one of the scientific teams, was quoted as stating: “No serious scholar in this field now considers race to be a scientific concept . . . . It doesn’t matter what the genetic trait is, there are very few if any of them that are related to what society calls race or ethnicity.”<sup>5</sup>

---

3. Lani Guinier & Gerald Torres, *The Miner’s Canary* 11-16 (Harv. U. Press 2002) (discussing among other things how oppressed “racialized communities” reflect larger societal maladies).

4. See Eric S. Lander et al., *Linkage Disequilibrium in the Human Genome*, 411 *Nature* 199 (2001); Lisa M. Krieger, *Genetic Code Doesn’t Reveal Distinctions in Race*, *San Jose Mercury News* (Feb. 21, 2001); Mark Henderson, *Colour Irrelevant, Say Genome Researchers*, *The Times* (London) 5 (Feb. 12, 2001) (copy on file with author); Rick Weiss, *Life’s Blueprint in Less Than an Inch; Research: Little of Genome Makes a Human*, *Wash. Post A1* (Feb. 11, 2001); *Human Genome: Analysis of Genetic Map Yields Surprises*, *Am. Health Line* (Feb. 12, 2001); and Jack Kemp, *Genome Shows Race is Non-Existent*, *Seattle Post-Intelligencer B5* (Feb. 21, 2001).

5. Henderson, *supra* n. 4, at 5. Data derived from the Human Genome project strongly suggests that all human beings originated in Africa, and that about twenty-five thousand years ago, a relatively small number of these humans immigrated to Europe and established the earliest European societies. See Lander, *supra* n. 4; David L. Chandler, *Heredity Study Eyes European Origins*, *The Boston Globe A22* (May 10, 2001); Emma Ross, *Europeans Traced to Tiny Group of Africans*, *The Record A1* (Apr. 21, 2001); and *Europeans Descended From Africans—Study a Few Hundred Just 25,000 Years Ago All It Took, Research Finds*, *Charleston Gazette A2* (Apr.

In a similar vein, Professor Jonathan Marks summarized matters as follows:

Races are not objective or biological categories. Populations are different from one another, but races are supposed to be large chunks of humanity, and apparently our species doesn't come biologically packaged that way, despite the fact that generations of Euro-Americans have assumed so. At best it comes in lots of small bio-packages.

The categories we acknowledge as races are marked by any number of differences, but the biological differences between them are minimal, reinforced by social and cultural differences.<sup>6</sup>

In short, from a genetic standpoint, we "all look alike."<sup>7</sup>

---

21, 2001). One recent study suggests that, on more than one occasion, humans migrated from Africa and colonized other parts of the world. See Alan Templeton, *Out of Africa Again and Again*, 416 *Nature* 45 (2002). A related study demonstrates a strong probability that Africans also colonized East Asia approximately thirty to ninety thousand years ago. Li Jin et al., *African Origins of Modern Humans in East Asia: A Tale of 12,000 Y Chromosomes*, 292 *Sci.* 1151 (2001). Persuasive scientific evidence shows that if one traces human history back far enough, we are all one human family. Stated differently, as humans we all grew up in the same geographical home or if you prefer, "Garden of Eden." See Gen 2:10-14. (noting that the Biblical Garden of Eden included parts of North and East Africa as well as Southwest Asia). Notwithstanding the numerous superficial changes in human anatomy that have occurred over centuries, many natural scientists have recognized humanity's common genetic and geographic origins.

6. Jonathan Marks, *Human Biodiversity: Genes, Race and History* 274-275 (Aldine De Gruyter 1995).

7. In a speech to the U.S. Conference of Mayors, former President Clinton elaborated upon the theme of common human identity that he had spotlighted the previous day during his last State of the Union message:

I got the Congress to laughing last night when I referred to what Dr. Ladner [sic], the distinguished geneticist from Harvard, said about . . . all people being genetically 99.9 percent the same. I just want to give you one more thing to think about, because we've got a pretty diverse group here. Ladner [sic] said that not only are we 99.9 percent the same, but that if you . . . were to take a hundred people each in four different race groups . . . a hundred African Americans, a hundred Hispanics, a hundred Irish, a hundred Jewish Americans—the genetic differences among individuals within the group are greater than the genetic differences between the groups as a whole.

[I]t's really quite stunning. The different skin color, the different characteristics that we've all developed over many thousands of years for all kinds of reasons are literally contained in one-tenth of 1 percent of our genetic makeup. And that's a statistic that I put out there on purpose, because [many members of Congress] . . . thought there was a Republican gene and a Democratic gene—(laughter, applause)—and whichever party they were in, they were glad they'd got the right chip . . . . (Laughter.)

And so I hope . . . you can make a lot of jokes out of this, and you can have a lot of fun with it. And the more you laugh, the more you get it.

President William Clinton, *Common Human Identity* (U.S. Conf. Mayors Jan. 28, 2000) (copy of transcript on file with *Fed. News Serv.* 7 (Jan. 28, 2000)).

The CBS News program, *Sixty Minutes*, furnished a recent dramatic affirmation of the former President's comments regarding genetic similarity among groups who may look very different. The Lemba people of southern Africa look physically like the people of that region (dark skin, tightly curled hair, broad noses . . .) and have asserted for centuries that they are Jewish.

While the empirical basis for race is somewhat rickety, many individuals still believe and act as though race exists; or as, is sometimes claimed, “perception is reality.” For many of us, race exists because we “see it.” In this context, Professor Audrey Smedley has incisively pointed out that in North America

“*race*” *does indeed exist* and should be viewed not as something biologically tangible and existing in the outside world that has to be discovered, described, and defined but as a cultural creation, a product of human invention like fairies, leprechauns, banshees, ghosts, and werewolves.<sup>8</sup>

In other words, in contemporary America, race is largely a cultural invention—a flexible human device for organizing individual as well as group behavior. We have invented race as an instrument for identifying and interacting with people based on superficial standards, like one’s looks. In fact, Justice Stewart’s famous comment about obscenity is for many Americans equally applicable to race: “we know it when we see it.”<sup>9</sup>

The implications of humans inventing race are vast, and fall outside the scope of this essay. Nevertheless one attribute of Americans’ racial worldview is the perception that humans are separated into groups arranged in a social pecking order, and as Professor Smedley points out, the groups are perceived as having “profound and unbridgeable differences.”<sup>10</sup> For the purposes of this essay, race is used to denote a flexible mental device which humans create and use to classify other human beings based usually, though not invariably, on a

---

Recently, through DNA testing, it was demonstrated that roughly ten percent of the Lemba are descended from the same male as other Jewish priests. See *Sixty Minutes* (CBS Apr. 23, 2000) (TV broadcast). As Professor Michael Hammer of the University of Arizona who helped conduct the genetic tests said:

You never know who you’re going to be related to when you think of people in this new genetic context. You may be black, you may be white, but you may share genetic lineages. And I think this is a more realistic view of the human species. We’ve been sharing lineages for thousands and thousands of years, and yet we look different.

*Sixty Minutes*, “The Lemba; Claims by African Black Tribe to be Jewish and Descendants [sic] of Abraham, Isaac and Jacob put to Scientific Test” 5 (CBS Apr. 23, 2000) (tv broadcast, transcript available from author).

8. Smedley, *supra* n. 2, at 6.

9. Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring) (footnotes omitted, emphasis added):

I have reached the conclusion . . . that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that.

10. Smedley, *supra* n. 2, at 22.

person's looks, national origins, language, cultural practices and belief systems.<sup>11</sup> While excruciatingly frustrating, this somewhat ambiguous description is consistent with the reality of the ever-changing understanding of the nature of "race." With these preliminary observations, we now turn to the September 11 tragedy, and evidence of what could turn out to be its more tragic aftermath.

### III.

On September 11, 2001, several planes were hijacked, and two of them were crashed into the World Trade Center's Twin Towers. The hijackers died, as did many innocent civilians including people in the buildings, rescuers and others on the ground. Many of the hijackers were Arabs as well as Muslims, and innocent civilians killed on the ground included a number of Muslims. The World Trade Center calamity generated a number of responses from the general public and political leaders. Well-documented reports abound of individual acts of courage, compassion and courtesy as people who hardly knew each other or who were complete strangers reached out from the deep wells of the human soul, saw other humans in need and provided a helping hand, comfort, protection and whatever else seemed necessary. Indeed, dedicated and brave rescuers died attempting to save victims of the Trade Center disaster.<sup>12</sup>

While many reactions to the September 11 catastrophe were noble, others were not. Some troubled individuals in our midst struck back swiftly, severely and savagely at persons they believed were involved in causing the national trauma. Because many people involved in the hijackings were Muslims and Arab, a small, but maniacal number of individuals in the United States reacted by threatening, attacking and even killing innocent Muslims and Arabs as well as other persons who looked to the attackers to be "Arab or Muslim." Non-Muslim South Asians (especially Sikhs), Latinos and African Americans suffered

---

11 For perceptive insights regarding the artificial nature of "race," see *Akram & Johnson, supra* n. 1, at 301-303; and *Joo, supra* n. 1, at 2-4. For a more in-depth treatment of racial worldviews and their implications for humans in the new millennium see Jonathan K. Stubbs, *Implications of An Uniracial Worldview: Race and Rights in a New Era*, 5 *Barry L. Rev.* (forthcoming Fall 2004).

12. See *Der Spiegel Magazine, Inside 9-11: What Really Happened* 63-153 (Paul De Angelis & Elizabeth Kaestner trans., St. Martin's Press 2002) (outlining in detail individual stories of survivors of the 9/11 tragedy); and Joel Achenbach & Brooke A. Masters, "'They're Jumping Out of Building One'; Newly Released Trade Center Transcripts Provide Real-Time Narrative to Sept. 11 Attacks," *Wash. Post* A1 (Aug. 29, 2003) (describing among other things the heroism of rescuers and victims as revealed in transcripts of, in some cases, their last words).

Deleted:

physical and verbal abuse because they were thought to be Arab or Muslim.<sup>13</sup> During the first week following the disaster, reliable reports indicate that at least a half dozen Arab Americans, Muslims and Sikhs were murdered in response to the attack.<sup>14</sup> Moreover, in the year following the disaster, other Americans (citizens and non-citizens) apparently committed over eight hundred violent crimes against Middle Easterners, Arabs and Sikhs.<sup>15</sup> In its 2001 annual report on hate crimes, the F.B.I. identified a more than one thousand six hundred percent (1600%) increase in hate crimes perpetrated upon persons in these groups.<sup>16</sup> Victims of these hate crimes not only had nothing to do with the Trade Center disaster but had also themselves been devastated by it.

In addition to Muslims who were victims of physical assaults, Muslim places of worship were desecrated, and private homes as well as businesses vandalized. For example, not long ago, a cross was burned outside a mosque and religious school in Maryland.<sup>17</sup> Persons who supposedly "looked Arab" or had Muslim names were singled out for particularly abusive treatment as they attempted to travel using airplanes. Consequently, many people in Arab and Muslim communities expressed serious concerns at the prospect of "flying while Arab."<sup>18</sup>

In response to the surge in hate crimes, the Department of Justice has investigated approximately five hundred of the incidents and brought criminal indictments against eighteen individuals. Each of the

---

13. See *Civil Rights Concerns*, *supra* n. 1, at 34, (testimony of Gautam Dutta, Vice Pres., S. Asian Bar Assn.); Volpp, *supra* n. 1, at 1584; Akram & Johnson, *supra* n. 1, at 296; Joo, *supra* n. 1, at 33-34; and Council on American-Islamic Relations Research Center, *The Status of Muslim Civil Rights in the United States 2002*, at 9 (2002) [hereinafter CAIR] (available at <<http://www.cair-net.org/civilrights2002/civilrights2002.pdf>>) (accessed Mar. 1, 2004) (annual report providing a comprehensive summary of discriminatory and sometimes violent treatment of American Muslims).

14. *Civil Rights Concerns*, *supra* n. 1, at 34; and CAIR, *supra* n. 13, at 10. See Jim Walsh, *Valley Sikhs Want Justice, Tolerance*, Ariz. Republic A1 (June 29, 2003) (discussing the impending trial of the alleged murderer of a Sikh killed in the aftermath of 9/11 as well as the more recent murder of the victim's brother in what some believe to be another race hate crime).

15. *Civil Rights Concerns*, *supra* n. 1, at 27. Some estimates suggest that in the year following September 11, over seventeen hundred incidents of bias were committed. See CAIR, *supra* n. 13, at 9.

16. Federal Bureau of Investigation, Uniform Crime Reporting Program, Hate Crime Statistics 2001 (foreword) (2002) (available at <<http://www.fbi.gov/ucr/01hate.pdf>>) (accessed Mar. 1, 2004).

17. Jamie Stockwell, *Two Teens Charged With Burning Cross Near Mosque*, Wash. Post B5 (Aug. 2, 2003).

18. *Civil Rights Concerns*, *supra* n. 1, at 31 (testimony of Kareem W. Shora, Legal Advisor, Am.-Arab Anti-Discrimination Comm.) (see above); Volpp, *supra* n. 1, at 1580; and CAIR, *supra* n. 13, at 4, 5, 12-13.

defendants has been convicted.<sup>19</sup>

In the legislative arena, the United States Congress lost no time in passing sweeping legislation that (among other things) is supposed to insulate the United States against the possibility of terrorist attack. Specifically, the United States Patriot Act<sup>20</sup> was passed without either public hearings or substantial debate in Congress about individual provisions of the legislation. In practice, Muslims have been targeted for particularly onerous treatment including arrest, searches, seizures, and physical detention without access to legal assistance.<sup>21</sup> Immigration and Naturalization Service administrative regulations have been enforced stringently against Muslim non-citizens.<sup>22</sup> Indeed, for a time the Canadian government had issued a travel advisory to its Muslim citizens warning them of the pitfalls of venturing into the United States because of immigration regulations that profiled individuals who were born in countries with large Muslim populations.<sup>23</sup>

In both the September 11 and Oklahoma City calamities, large buildings symbolizing American economic and legal activities were destroyed without warning, killing innocent unsuspecting individuals engaged in constructive human activities. In each case, the loss of life was devastating, the blow to the mental and emotional well being of millions was and is enduring, and the individual and collective sense of helplessness and rage are intense. Nevertheless, in contrast to the

---

19. U.S. Dept. of Justice, *Fact Sheet: Civil Rights Accomplishments* 5, 6 (July 23, 2003) (available at <[http://www.usdoj.gov/opa/pr/2003/July/03\\_crt\\_414.htm](http://www.usdoj.gov/opa/pr/2003/July/03_crt_414.htm)>) (accessed Feb. 1, 2004).

20. USA-PATRIOT Act, Pub. L. 107-156, 115 Stat. 272 (Oct. 26, 2001).

21. For media accounts of well publicized searches and seizures of American Muslim property by federal agents (during "Operation Green Quest") following 9/11, see Judith Miller, *A Nation Challenged: The Money Trail: Raids Seek Evidence of Money Laundering*, N.Y. Times A19 (Mar. 21, 2002); and Tom Jackman, *Raids Held in Terror Probe; N. Va. Sites Searched for Information About Funding*, Wash. Post B1 (Mar. 21, 2002). For critical responses of members of the American Muslim community to the raids, see Mary Jacoby, *Fighting Terror: Muslims Hit Raids Linked to Al-Arian*, St. Petersburg Times 1A (Mar. 22, 2002); and Kevin Murphy, *Federal Raids on Charities Anger U.S. Muslim Leaders*, Knight Ridder (Mar. 22, 2002). See CAIR, *supra* n. 13, at 7-8. For a perceptive analysis of the First and Fourth Amendment implications of the well publicized dragnet type searches and seizures, see John G. Douglass, *Raiding Islam: Searches that Target Religious Institutions*, 19 J. L. & Relig. 137 (2003-2004).

22. *Civil Rights Concerns*, *supra* n. 1, at 21-22 (testimony of Malea Kiblan, Esq. Immigr. Atty.); and Akram & Johnson, *supra* n. 1, at 317-336; and CAIR, *supra* n. 13, at 5-6.

23. William Douglas, *Powell Seeks Thaw In Canada*, Newsday A30 (Nov. 15, 2002); and Gill Donovan, *Avoid Travel to U.S. Islamic Congress Urges*, 39 Natl. Catholic Rptr. 10 (Nov. 29, 2002). For news reports of the recent imprisonment and deportation of two Canadian Muslim clerics who came to Florida to participate in religious activities, see *Muslims Denied Entry to U.S. Threaten Suit*, Deseret News E03 (Sept. 20, 2003); and *Two Muslim Clerics Feel Canada Let Them Down*, The Record H7 (Sept. 20, 2003) [hereinafter *Two Muslim Clerics*]. According to published reports, the two clerics, Ahmad Kutty and Abdool Hamid are Islamic scholars who were en route to Orlando, Florida to help lead prayer services.

September 11 tragedy, following the 1995 bombing of the Murrah Federal Building in Oklahoma, governmental law enforcement personnel did not create a racial profile of individuals like Timothy McVeigh, and engage in widespread arrests of disgruntled white males who perceived themselves to have axes to grind with the American government. Professor Leti Volpp described the situation well:

The Timothy McVeigh analogy helps clarify the strangeness of the present moment. Under the logic of profiling all people who look like terrorists under the "Middle Eastern" stereotype, all whites should have been subjected to stops, detentions, and searches after the Oklahoma City bombing and the identification of McVeigh as the prime suspect. This did not happen because Timothy McVeigh did not produce a discourse about good whites and bad whites, because we think of him as an individual deviant, a bad actor. We do not think of his actions as representative of an entire racial group. This is part and parcel of how racial subordination functions, to understand nonwhites as directed by group-based determinism but whites as individuals. Racial profiling also did not happen because, as a white man, Timothy McVeigh was seen by many as one of "us"—as the New York Times editorialized at that time, there was "sickening evidence that the enemy was not some foreign power, but one within ourselves."<sup>24</sup>

In fact, during the period between the Oklahoma City and 9/11 tragedies, the continuing activities of white supremacists erupted into further outbreaks of violence. For example, a white gunman walked into a Jewish community center and gunned down five persons, four of whom were children.<sup>25</sup> Contemporaneous with this shooting, James Byrd, an African American man in Jasper, Texas, was shackled to the back of a pick-up truck by three white men and dragged at high speed along the highway until his head and one of his arms were ripped from his body.<sup>26</sup> Similar racist murders include the beheading and burning of

---

24. Volpp, *supra* n. 1, at 1584-1585 (footnotes omitted). For an in-depth biographical profile of McVeigh, see Richard A. Serrano, *One of Ours: Timothy McVeigh and the Oklahoma City Bombing, passim* (W.W. Norton & Co., Inc. 1998). In addition, a provocative analysis of terrorist activities in America over the past fifty years, the societal context of the incidents, and responses to them is provided in Christopher Hewitt, *Understanding Terrorism in America: From the Klan to al-Qaeda* (Routledge 2003).

25. Rene Sanchez & Cassandra Stern, *Gunman Wounds 5 at Summer Camp; Police Identify Suspect; 3 Children Shot*, Wash. Post A1 (Aug. 11, 1999); Teresa Mask, *Memorial Service a Call to Action: Asian Americans Vow to Battle Against Hatred*, Chi. Daily Herald 8 (July 16, 1999); and Edward Walsh, *Gunman Fires at Minorities in Illinois; Black Ex-Coach Dies, Six Orthodox Jews are Wounded in Spree*, Wash. Post A1 (July 4, 1999). Material in this section is part of a larger (soon to be published) work on race and human rights. See Stubbs, *supra* n. 11, *passim*.

26. Thomas Fields-Meyer et al., *One Deadly Night: Deep in the Woods of East Texas, James*

another African-American man by two of his European-American associates in Virginia,<sup>27</sup> the cold-blooded murder of an African man by an European-American skinhead at a bus stop in Colorado,<sup>28</sup> and the vicious butchering of an Asian-American in California.<sup>29</sup> These atrocities occurred contemporaneously with the burning of scores of isolated, rural houses of worship, and a persistent drum-beat of white supremacist propaganda by all-white militias preparing for the inevitable "race war." Along these lines, the Federal Bureau of Investigation ("F.B.I.") reported that in 1999, in the United States, there were nine thousand eight hundred and two (9,802) victims of hate crimes. The F.B.I. defined hate crimes as criminal activities "motivated in whole or in part, by the offender's bias against a race, religion, disability, sexual orientation, or ethnicity/national origin."<sup>30</sup> Blacks constituted the largest

---

*Byrd Died a Terrible Death, Leaving a Town and a Nation in Shock*, People 49 (June 29, 1998); and Michael Dorman, *Road to Hate, Raw Racism, Chance Lead to Brutal Crime in Texas*, Newsday A7 (June 29, 1998).

27. Diane Struzzi, *Judge Oks Psychologist to Evaluate Man Charged in Burning, Beheading, National Attention has Focused on the Possible Racial Angle*, Roanoke Times & World News C4 (Dec. 13, 1997); Arlene Levinson, *Was Murder a Lynching? Racial Overtones to Heinous Killing*, Newsday A8 (Aug. 15, 1997); and Diane Struzzi, *Slaying Puts Rural County in National Spotlight: Killing has Drawn the Attention of Big-City Newspapers, the FBI and Civil Rights Groups*, Roanoke Times & World News 1A (Aug. 5, 1997). In July 1997, Garnett "G.P." Johnson (an African-American man) spent part of a night celebrating the birthday of a mutual acquaintance with several of Johnson's European-American associates, two of whom later took him outside into the yard of the house, doused him with gasoline, set him on fire and chopped off his head. Both of Garnett's killers were subsequently convicted of the murders. See Sylvia Moreno, *Jury Convicts Man in Virginia Beheading Case; Defendant Found Guilty of First Degree Murder in Slaying of Black Handyman*, Wash. Post B1 (Nov. 6, 1998).

28. Fred Brown, *Clinton: Don't Tolerate Hate! President Meets Officer's Widow on Denver Visit*, Denver Post A1 (Nov. 23, 1997) (discussing, in part, the slaying at a bus stop of Oumar Dia, a West African refugee by self-styled white supremacist skinheads). Dia was murdered in November 1997.

29. Scott Shepard, *Clinton to Target Hate Crimes*, Atlanta J. & Const. A14 (Nov. 9, 1997). The victim of the attack, Thien Nih Ly, was attacked and murdered while skating on a tennis court in Tustin, California in January 1996.

30. Federal Bureau of Investigation, U.S. Dept. of Justice, *Crime in the United States 1999: Uniform Crime Reports*, 58 (2000) [hereinafter *F.B.I. 1999*] (available at <[http://www.fbi.gov/ucr/Cius\\_99/99crime/99cius.pdf](http://www.fbi.gov/ucr/Cius_99/99crime/99cius.pdf)> (accessed Mar. 1, 2004). In the FBI's report, hate crime "victims" were defined as including "a person, business, institution or society as a whole." *Id.* at 59, n. 1. In a similar vein, in 1996, the California Attorney General's report regarding hate crimes in California also suggested that, second to African Americans, white people were the most likely group to suffer racist crimes. Cal. Atty. Gen., *Hate Crime in California, 1996*, Table 1 (available at <<http://caag.state.ca.us/cisc/publications/hatecrimes/hatecrim.htm>>) (accessed Mar. 6, 2004). Indeed, in 1992, following a decision by a jury that four European American male police officers were not guilty of criminal activity when they beat and almost killed an unarmed African American civilian (Rodney King), massive civil unrest broke out in Los Angeles, resulting, according to published reports, in at least 53 deaths and almost a billion dollars in property damage. *Reynolds Holding, Mistrial is Declared on Final Assault Charge: Acquittal Ends Beating Trial*, S.F. Chron. A1 (Oct. 21, 1993); and *Jury Denies Verdict in Trucker Beating Based on Riot Fears*, Toronto Star A26 (Oct. 26, 1993). At the height of the violence, one unsuspecting

societal group experiencing hate crimes,<sup>31</sup> and whites comprised the second largest victim group.

The F.B.I.'s report also pointed out that a shocking number of anti-Jewish hate crimes were committed: there were one thousand two hundred and eighty-nine (1,289) victims of anti-Jewish bigots.<sup>32</sup> The F.B.I. chose to categorize these crimes as religion based hate crimes; however, the classification is controversial for many reasons, not the least of which is that while many Jewish people do not perceive themselves as constituting a race, many racists do.<sup>33</sup>

---

white truck driver, Reginald Denny, was yanked from his vehicle, kicked, punched and nearly murdered by a small group of African American men. Denny was a scapegoat and his atrocious beating (which was captured on videotape) prompted an outpouring of anger, shame, and horror at the seeming unending cycle of violence. *See e.g.* Reynolds Holding, *Mistrial is Declared on Final Assault Charge*, San Francisco Chronicle A1 (Oct. 21, 1993); and *Jury Denies Verdict in Trucker Beating Based on Riot Fears*, Toronto Star A26 (Oct. 26, 1993).

31. *See F.B.I. 1999, supra* n. 30, at 59. Similarly, according to one report, in 1996 racist militias spent an estimated \$100,000,000 on explosives, weapons, and survival gear. Earl O. Hutchinson, *Wave of Hate Crimes Hit U.S.: Other States Should Follow Sheriff's, L.A.P.D.'s Lead in Responding to Racially Motivated Violence*, Daily News L.A. V3 (Nov. 9, 1997). Hutchinson's report stated that these organizations conducted "'preparedness expos' in six cities that drew thousands of participants, visitors and dozens of exhibitors." This Los Angeles Daily News article also noted:

At last count, these groups had at least 250 web sites, chat rooms and mailing lists. They are jammed with the standard racist articles, slogans, messages and letters.

In a six month period from July 1996, the Imperial Klan, one of several splinter Klux Klan factions, received more than 70,000 hits on their Web sites.

*Id.* *See* Shepard, *supra* n. 29, discussing in part the activities of white supremacists like skinheads and members of the militia movements, some of whom see themselves as "the front line troops in the coming racial apocalypse" (quoting Professor Arthur Gipson of Miami University in Ohio). *Id.* at A14.

The Internet is proving a fertile ground for the recruitment of young people into neo-Nazi, Ku Klux Klan, and similar white supremacist organizations. According to the Southern Poverty Law Center, in the last few years the number of race-hate-oriented websites has increased from one to over one hundred sixty. *Reevaluating the Net: A Growing Consensus of Experts Finds that Discussion Groups, not Websites are where Cyber-extremism Really Flourishes*, Intelligence Report No. 102 (S. Poverty L. Ctr. Summer 2001) [hereinafter *Reevaluating the Net*] (available at <<http://www.splcenter.org/intel/intelreport/article.jsp?aid=200>>) (accessed Mar. 6, 2004); Robert Marquand, *Hate Groups Market to the Mainstream*, Christian Sci. Monitor 4 (Mar. 6, 1998); and Kevin Sack, *Hate Groups in U.S. Are Growing, Report Says*, N.Y. Times A10 (Mar. 3, 1998). For better or worse, the worldwide web is now serving as a pathway for the worldwide dissemination of words of peace and destruction. For instance, indications exist that some individuals involved in the neo-Nazi movement are shifting attention from websites to chat rooms and other more personal venues. *Reevaluating the Net, supra*.

32. *See F.B.I. 1999, supra* n. 30, at 59.

33. A number of challenging issues arise: Should the crime be categorized according to the perceptions, intent, and behavior of the offender? Should the victim have the final say on how she identifies herself? How does one classify a heinous act that exceeds the usual parameters of flexible but relatively rational categories (like "religion"), and ventures into the realm of race? In-depth consideration of these matters, intriguing as they are, falls outside the scope of this exploratory article.

Today, in the United States, neo-Nazis continue soliciting and training “race warriors.”<sup>34</sup> In the aftermath of September 11, the United States government essentially resorted to racial and linguistic profiling to exclude many Muslims from immigrating to this country;<sup>35</sup> the government has not however, taken any discernible steps to end foreign reinforcements to neo-Nazi ranks by racially or linguistically profiling immigrants from countries with growing neo-Nazi organizations like the United Kingdom, Canada, Germany, Russia and the Czech Republic. This lack of governmental response is striking given the metastasis of a global racist movement manifesting itself in violence against people of darker colors in these countries. For instance, in the spring and summer of 2001, a series of riots rocked the United Kingdom. Pitched battles between British citizens of English descent and Britishers of South Asian ancestry erupted in the cities of Bradford, Oldham, Leeds and Burnley.<sup>36</sup> The riots left many persons (including law enforcement personnel) injured, many others were arrested, and hundreds of businesses and residences were damaged.<sup>37</sup> Commentators have suggested various reasons for the calamities including politicians’ inflammatory statements disparaging immigrants,<sup>38</sup> conflict among working class whites and people of color for decreasing numbers of

---

34. See e.g. Mark Potok, *In Sheep’s Clothing: Around the Country, Radical Right Groups are Staging ‘European’ Festivals in a Bid to Draw Ethnic Whites into the Movement*, Intelligence Rpt. No. 110 (S. Poverty L. Ctr. 2003) (available at <<http://www.splcenter.org/intel/intelreport/article.jsp?aid=54>>) (accessed Mar. 1, 2004) (discussing multifaceted attempts by the American white supremacist movement to recruit whites who celebrate European culture); and Hewitt, *supra* n. 24, at 126-128 (suggesting that some racist attacks are designed to ignite a “racial holy war”).

35. See *supra* nn. 22-23 & accompanying text.

36. Vikram Dodd, *Pre-riot Report Admits Bradford Plagued by Race Divisions*, *The Guardian* 1 (July 10, 2001); John Mahoney, *Crisis Talks to Halt New Riots; Race Thugs Burn Burnley*, *Daily Star* 8-9 (June 26, 2001); Alfred Lee, *Asian Youths Riot on Eve of British Polls*, *The Straits Times* 3 (June 7, 2001); Melanie Phillips, *Race Riots Grow Out of the Balkanisation of Britain*, *Sun. Times* (June 3, 2001); and Sarah Lyell, *Riots Break Out in Second English City*, *Intl. Herald Trib.* 7 (June 7, 2001).

37. Paul Peachey, *Minister Offers to Help Fund Recovery*, *The Indep.* 6 (June 26, 2001) (reporting that British Home Office minister pledged governmental assistance to help four hundred businesses damaged in Oldham riots); Sheila Jones, *Police Maintain Zero Tolerance as Tension Remains High, Oldham Riots, 21 Arrests Made but Serious Outbreaks of Violence Contained*, *Fin. Times* 2 (May 30, 2001); Jan Disley & Stephen White, *It Started as a Fist Fight . . . and Became One of the Worst Race Riots We’ve Ever Known; Cops Battle Mobs with Firebombs*, *The Mirror* 12-13 (May 28, 2001); Paul Stokes, *White Extremists Blamed for Race Riots—Police Chiefs Promise ‘Zero Tolerance’ as far-Right Groups Stand Accused of Exploiting Ethnic Tensions in Oldham*, *The Daily Telegraph* 10 (May 29, 2001); and Pauline Hawkins, *Appeal for Calm after Riots*, *U.K. Newsquest Regl. Press* (June 27, 2001).

38. Harry Blaney, III, *Europe’s Threat form Within*, *The Moscow Times* (June 8, 2001); Sarah Lyall, *Why are You Here? Britain’s Problem*, *N.Y. Times* § 4, 1 (June 4, 2001); and Lee, *supra* n. 36.

jobs,<sup>39</sup> poor police/community relations,<sup>40</sup> deliberate provocations of racist right wing instigators,<sup>41</sup> and the rise of neo-Nazi political parties in the United Kingdom and continental Europe.<sup>42</sup> The riots in the United Kingdom were not totally unexpected in the sense that over the past several years a series of well-publicized incidents seem to have created an atmosphere ripe for societal chaos.<sup>43</sup> While progress has

39. See David Jones, *Apartheid Britain*, Daily Mail 12 (June 23, 2001); Blaney, *supra* n. 38; Ken Livingstone, *The Media have Helped Stoke the Flames in Oldham: "The BNP was able to Gain a Foothold because its Message was given Legitimacy,"* The Indep. 5 (May 30, 2001); Phillips, *supra* n. 36; Alice Miles, *The Ferocity was a Surprise, but the Riot Itself was Not*, The Times (May 28, 2001); and Maurice Weaver, *Race Fears on Streets of Oldham-Police seek to Prevent a White Backlash after Attack on Pensioner in 'No-go' Area Raises Tension*, The Daily Telegraph 14 (Apr. 25, 2001).

40. See Phillips, *supra* n. 36; Livingstone, *supra* n. 39; and *Asians in Running Street Battles*, The Herald 2 (June 6, 2001).

41. See T.R. Reid, *Party Stokes Racial Ire in Britain; Presence of Fringe White-Power Organization Triggers Riots in Multi-Ethnic Areas*, Wash. Post A12 (July 10, 2001); Paul Harris, *Far Right Plot to Provoke Race Riots*, The Observer 5 (June 3, 2001); Melanie Phillips, *They weren't Looking for Trouble*, Sun. Times (June 3, 2001); and David Ward, *Oldham Riots: "This has been building up for years": Residents and Businesses Count the Cost of Night when Long-term Anger Flared Up*, The Guardian 3 (May 28, 2001).

42. Blaney, *supra* n. 38; Livingstone, *supra* n. 39; Miles, *supra* n. 39; and Jones, *supra* n. 39.

43. For instance, some observers believe that the widely publicized beating of Walter Chamberlain, a seventy-six-year-old white World War II veteran, helped precipitate the recent British riots. Four teenagers of Pakistani descent were charged with the offense. Adam Powell, *Town Prays for Peace: Bishop Speaks Out After Race Demo Thwarted*, Daily Mail 24 (May 7, 2001). In response to significant media coverage of the assault, avowedly racist organizations targeted Oldham and later other northern English cities with large Asian-British populations for demonstrations—and some say to provoke violence. See Harris, *supra* n. 41; Livingstone, *supra* n. 39; and Jones, *supra* n. 39.

Moreover in the period leading up to the most recent outbreaks of violence in the United Kingdom, other notorious incidents of violence along the color line had already stressed that country's social infrastructure. For instance, in London, in January 1998, Muhammed Rafique Khan, an Asian shopkeeper, was attacked and brutally murdered by a young white man in a section of the city which has "one of the highest rates of racial attacks in Britain," and in which several people of color had been killed in recent years. Justin Davenport & Julia Hartley-Brewer, *Shopkeeper Dies After "Race Attack" Stabbing*, Evening Stand. 5 (Jan. 8, 1998).

Khan's slaying occurred not too far from the site of a well-publicized murder of a black teenager, Stephen Lawrence, whose case continues to draw attention not only because of the brutality of the attack of a gang of hooligans, but also because of the documented failure of the local police to competently prosecute Lawrence's killers. *Id.*; and Bryan Cathcart, *The Mental Ghetto that Hides Racist Killings*, Guardian 17 (Dec. 17, 1997) (discussing the Home Secretary's publication of a report of the Police Complaints Authority investigation involving Stephen Lawrence's murder. The report of the Home Secretary identified a number of flaws in the investigation that resulted in an inability of the authorities to appropriately prosecute the killers.). See Alan Travis, *Fatal Flaws in Murder Inquiry*, Guardian 1 (Dec. 16, 1997). Without admitting negligence, the London Metropolitan Police recently settled the case with Lawrence's parents, Nick Hopkins & Vikram Dodd, *Lawrence Family Accepts Pounds 320,000 Payout from Met*, Guardian 2 (Dec. 20, 2000).

Similarly, a recent public inquest was held into the killing of a black musician who allegedly was burned to death by four white assailants in London. The inquest jury concluded that the death constituted homicide but that police failure to properly conduct the investigation made

been made, significant obstacles remain to creating a more equitable British society, including (as in the United States) issues involving racial and religious profiling.<sup>44</sup>

On the European continent, the social fabric in a number of countries also seems distressingly threadbare, as reflected, for instance, in recent reports of escalating violence against Jews, Muslims, gays and Roma individuals.<sup>45</sup> One particularly egregious example took place not long ago in Austria where an amateur photographer videotaped paramedics and a police officer taking turns standing and jumping (literally bouncing) upon the back of Cheibana Wague, an African immigrant, who had been taken into police custody after quarreling with his employer. According to published reports, as the paramedics and the police officer jumped on Wague's back the video shows a physician standing nearby observing "with his hands in his pockets." Wague died not long afterwards.<sup>46</sup>

---

the likelihood of successful prosecution remote. Maggie O'Riordan & Terri Judd, *Met Faces New Race Row Over Killing of Black Pop Star*, Daily Mail 9 (Sept. 17, 1998); and Nigel Rosser & Emily Sheffield, *Police Face Fury Over Blaze Killing*, Evening Stand. 1 (Sept. 16, 1998). Although the victim told an officer the identity of one of the assailants who had set him ablaze, the police allegedly failed to write down the name of the attacker. Further, the police secured the scene many hours after the incident occurred, thereby making it more likely that evidence would be corrupted. O'Riordan & Judd, *supra* n. 43.

44. Jason Bennetto, *We are Still Racist, Police Chief Admits*, The Indep. (Apr. 22, 2003) (discussing progress and challenges of the Metropolitan Police in London in the aftermath of widespread criticism of some of their policing attitudes and tactics following a number of cases including that of Stephen Lawrence); and Vikram Dodd & Nick Hopkins, *Momentum in Fight Against Racism "waners": Ten Years on from the Lawrence Case, Many Argue the Lesson has not yet been Learned*, The Guardian 9 (Apr. 19, 2003) (outlining some of the areas of progress and continuing tensions along color and religious lines in the United Kingdom).

45. See Amanda Ripley, *Seven Days of Hatred: Anti-Semitic Attacks Have Been Making Headlines, But Strikes Against any Minority—Jews, Muslims, Roma, gays—are all too Common in Europe*, Time 38 (Dec. 4, 2003).

46. Katinka Mezei, *Austria Shocked by Video Showing Mistreatment of Dead African Immigrant*, Agence France Presse (July 22, 2003); and Issa Mansaray, *Austria/Africa: Police Brutality Caught on Camera: A 33 year-old Mauritanian, Cheibana Wague, was Brutalised to Death By the Austrian Police, All of Which Was Videotaped*, New African 31 (Oct. 1, 2003). Other outrages include the July 27, 2000 neo-Nazi bombing in Duesseldorf, Germany which injured ten people, six of whom were Jewish. The Duesseldorf bombing followed, by less than two months, the brutal murder of Alberto Adriano, a German resident originally from Mozambique. Three neo-Nazis kicked Adriano to death. Peter Finn, *German Gets Life Term for Racial Killing; Two Sixteen Year Old Skinheads also Sentenced for Murder of African Immigrant*, Wash. Post A24 (Aug. 31, 2000). A memorial erected to honor Adriano's memory was subsequently defaced as well as memorials to the victims of the Holocaust. *Opposition Calls for Debate on Jewish Life in Germany*, Deutsche Presse-Agentur (Oct. 10, 2000). In response to such outrages, many individuals and groups have launched protests. *Over 200,000 Germans March against Neo-Nazi Violence*, Deutsche Presse-Agentur (Nov. 9, 2000).

More recently legislation has been proposed to curb the rising wave of racist and anti-Semitic violence. *Id.*; *German MPs Back Action Against Right-wing Extremists*, Deutsche Presse-Agentur (Mar. 30, 2001); and Roger Cohen, *German Official Pessimistic About Far-Right*

The rise of racist attacks in the United States, the United Kingdom, Germany, the Czech Republic, and other western nations has not confined itself to violence between people of different hues (inter-color conflict). Some devastating and deadly attacks have involved persons of the same "color" but different nationalities. Two of the most recent well-known outrages involve the nearly successful genocide of Albanians in Kosovo by the Yugoslav government and militia (and the all-too-predictable Albanian retaliatory atrocities following the conflict),<sup>47</sup> as well as ethnic cleansing in Bosnia-Herzegovina.

---

*Violence*, N.Y. Times A6 (Aug. 26, 2000). Terror tactics have been widely condemned. *The March of Defiance: Brummie Nazi Attack Victim Leads Protest*, Sun. Mercury (June 17, 2001) (describing a demonstration in Berlin led by a black Briton who was partially paralyzed when neo-Nazis hurled a paving stone at his automobile causing him to have an accident); *German MPs Back Action Against Right-wing Extremists*, *supra*; and *Over 200,000 Germans March Against Neo-Nazi Violence*, *supra*.

Unfortunately, the extremists may be attracting more followers in part because of the notoriety that their activities have attained. See Peter Finn, *Bad Publicity is a Boon for German Party; Leader of Far-Right Group Says Threat of Ban has Increased Interest*, Wash. Post A16 (Aug. 20, 2000).

Not too far removed from these events (temporally and geographically), in November 1997, a Sudanese student, Hassian Elamin Abdelradi, was stabbed to death by members of a neo-Nazi skinhead group in the Czech Republic. See A.G.B., *Investigation into the Murder of Sudanese Almost Complete*, C.T.K. Natl. News Wire (Dec. 9, 1997). These atrocities underline the persistent attempts of militant multiracialists to destroy individual persons perceived as being outside of their group. Ian Traynor, *Neo-Nazis Set Up "No Go" Zones*, Guardian 13 (Dec. 11, 1997). In addition, the German government commissioner for foreign persons has asserted in an annual report that Neo-Nazis have set up "liberated zones" in more than twenty-five towns and cities throughout the country. Foreigners, most of whom are people of color, are forbidden to enter the liberated zones. Such zones include cafes, discos, clubs, and "even whole streets." *Id.* The commissioner for foreigners concluded that this was an "alarming, comparatively widespread and growing phenomenon." *Id.*

47. For example, recently riots broke out in Kosovo in which Serbs were the victims of Albanian attacks. See Nicholas Wood, *Kosovo Smolders After Mob Violence*, N.Y. Times A10 (Mar. 24, 2004). It has been alleged that approximately ninety thousand Roma people living in the Kosovo region have been compelled to leave their homes by the returning Albanians. *German Study Says 90,000 Gypsies Forced to Flee Kosovo*, Duetsche Presse-Agentur (Sept. 7, 1999). The Roma, who are also sometimes referred to as Romany and others times (somewhat pejoratively) as "gypsies," present a difficult classification case for persons accustomed to thinking in multi-racial categories. The Roma lived in India approximately one thousand years ago, migrated to central Europe, and reside in a number of Central European countries. H.R. Subcomm. on Intl. Sec. Intl. Org. & Human Rights of the For. Affairs Comm., *Human Rights Abuses of the Roma (Gypsies)* 19, 103<sup>rd</sup> Cong. (Apr. 14, 1994) (Testim. of Tom Lantos, Subcomm. Chair). While they have many physical features associated with "whiteness" (facial architecture, hair texture, and frequently skin complexion), in many European countries, the Roma are viewed, referred to and treated as blacks. See V.V., *Skinheads Sent to Prison for Attacking Romanies*, CTK Natl. News Wire (Mar. 14, 2001) (Czech court sentenced six skinheads to between twelve and sixteen months in prison for stoning and throwing beer bottles at Roma persons in a restaurant while shouting "Gypsies to the Gas Chambers, the White Race, the Black Bastards, and Nothing but Nation.>").

Other recent examples of skinheads assaulting and killing Roma people include two neo-Nazis brutally beating Helena Bihariova (a mother of six), and, as she lost consciousness, forcing her into a frigid river where she drowned. See R.J.C., *Law is Disgrace to Romanies Murdered by*

The new European Nazis and their American counterparts (for instance, former Klan leader, David Duke) continue to meet periodically to support each other financially and programmatically.<sup>48</sup> Despite the documented rise of the racist and anti-Semitic movement in western societies, no one seems to have suggested that ethnically profiling prospective white male immigrants from such countries would be an appropriate response. By contrast, as part of America's current immigration policy, profiling of "Arab looking" persons with Islamic names has occurred.<sup>49</sup> Why the apparent discrepancy?

We face the specter of Muslims in America being rounded up and detained with little more than vague criminal charges which seem more associated with their looks, names or ideas than proven malicious behavior.<sup>50</sup> Simultaneously, disaffected white supremacists continue to train unimpeded with live ammunition in America's backwoods for an all-out American style racial holy war (jihad?). These circumstances should cause us to pause.

In this context, we revisit a few cases decided when American courts addressed human rights concerns of people at the bottom of the race totem pole before World War II and during the period when the nation was fighting against the Axis Powers (Germany, Japan and Italy) for its survival. These cases (along with two cases involving the trial of American civilians by military commissions) illuminate in a different way the current controversy involving American Muslims' ability to exercise their human rights. Afterwards, we consider *Padilla v. Bush*<sup>51</sup>

---

*White Racists*, CTK Natl. News Wire (Oct. 7, 1998). The assailants in Bihariova's case received sentences totaling fifteen years, in part because (according to published reports), the prosecutor asserted that the victim was killed by the icy River Elbe, rather than by the men who kicked, punched and forced her into the water. This rationale caused one commentator to conclude that "For judges in the Czech Republic [to hold that a racial hate crime existed] the only substantial proof is if the attacker had shouted 'You black bastard, I'm going to kill you because of your black skin' or suchlike before committing the crime." *Id.* See R.J.C., *Romanies Say Skinhead Attacks are Now Part of Everyday Life*, CTK Natl. News Wire (Nov. 19, 1997) (discussing similar attacks against Roma people living in Slovakia, including a murder in 1997, and three other homicides in 1996).

The United Nations Committee Against Torture has recently expressed concern about racism and xenophobia in Czech society. See V.V., *Czechs Criticized for Discrimination against Minorities*, CTK Natl. News Wire (May 15, 2001).

48. See Harris, *supra* n. 41; and Martin A. Lee, *The Wandering Jew-Hater: Neo-Nazi David Duke Found Many New Friends—and Even More Buyers of His Books—During His Recent Years in Europe*, Intelligence Rpt. No. 109 (S. Poverty L. Ctr. 2003) (available at <<http://www.splcenter.org/intel/intelreport/article.jsp?sid=21&printable=1>>) (accessed Mar. 1, 2004) (describing David Duke's international networking with other white supremacists while living abroad).

49. See *Two Muslim Clerics*, *supra* n. 23.

50. *Civil Rights Concerns*, *supra* n. 1, at 34; and Akram & Johnson, *supra* n. 1, at 352-355.

51. 233 F. Supp.2d 564 (S.D.N.Y. 2002), *adhered to upon reconsideration*, 243 F. Supp.2d 42 (S.D.N.Y. 2003), *aff'd in part and rev'd in part*, 352 F.3d 695 (2<sup>d</sup> Cir. 2003), *cert. granted*, 124

and *Hamdi v. Rumsfeld*,<sup>52</sup> which were decided following the September 11 tragedy, which deal with the rights of American Muslim citizens declared to be enemy combatants.

#### IV.

In *Powell v. Alabama*,<sup>53</sup> the United States Supreme Court held unconstitutional the rape convictions of seven poor, illiterate, African American teenage boys. The teens had been convicted of raping two young white women in broad daylight on an open gondola car of a freight train traveling through the Alabama countryside in March of 1931.<sup>54</sup> The Supreme Court held that the Alabama trial court failed to allow the defendants a genuine opportunity to hire legal counsel, and this failure violated constitutional due process.<sup>55</sup> Even if the defendants had been given the opportunity to procure counsel and they could not have obtained legal assistance, the Supreme Court stated that the Constitution required the trial court to appoint counsel. The Court said:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case . . . . In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.<sup>56</sup>

The *Powell* Court pointed out that to hold otherwise would have been to essentially sanction the judicial murder of persons who were,

---

S.Ct. 1353 (2004).

52. Brought in the Eastern District of Virginia, this case has generated an opinion by the trial court, three Fourth Circuit panel opinions, and upon denial of a motion to rehear the case *en banc*, several opinions by members of the *en banc* court. See *Hamdi v. Rumsfeld* 243 F. Supp.2d 527 (E.D. Va. 2002); 294 F.3d 598 (4th Cir. 2002) (*Hamdi I*); 296 F.3d 278 (4th Cir. 2002) (*Hamdi II*); 316 F.3d 450 (4th Cir. 2003) (*Hamdi III*); and 337 F.3d 335 (4th Cir. 2003), respectively. Recently, the Supreme Court granted *certiorari* from *Hamdi III*, see *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (2004).

53. 287 U.S. 45 (1932).

54. *Id.* at 49-51. For a first-hand account of the Scottsboro case as experienced by one of the defendants, see Kwando Mbiassi Kinshasa, *The Man from Scottsboro: Clarence Norris and the Infamous 1931 Alabama Rape Trial, in his Own Words* 107 (McFarland 1997) (recounting the lower court's discussion of the prosecution's incredible evidence of rape).

55. 287 U.S. at 71.

56. *Id.* at 71-72.

regarding the exercise of their legal rights, not only poor and illiterate, but also effectively deaf, dumb, and feeble-minded.<sup>57</sup> The *Powell* case ushered in a remarkable line of Supreme Court right to counsel decisions that gave substantive meaning to the protection of the individual freedoms of poor, unpopular and unlearned criminal defendants when their lives and liberty were at stake.<sup>58</sup>

In a similar vein, in *Chambers v. Florida*,<sup>59</sup> four, young, African American tenant farmers with little formal education were questioned by law enforcement officers “almost continually during the whole week.”<sup>60</sup> Finally, on Sunday, in the wee morning hours, after an all-night interrogation, the defendants finally “broke.” Law enforcement officials awakened the prosecutor to have him accept the alleged confessions, but he indignantly rejected the admissions as being worthless.<sup>61</sup> The prosecutor told the police officers to call him when they obtained “something worth while.”<sup>62</sup> The interrogation resumed, and finally, a few hours later, after being subjected to constant questioning without sleep, the defendants confessed to the murder of an elderly white man: and the prosecutor agreed that the evidence sufficed.<sup>63</sup> The confessions constituted the basis upon which the defendants were convicted of murder and sentenced to death.

The Supreme Court of Florida upheld the convictions but the United States Supreme Court unanimously reversed, holding the confessions to be unconstitutional. Writing for the Court, Justice Black stated:

The determination to preserve an accused’s right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust

---

57. *Id.* at 72.

58. See *Gideon v. Wainwright*, 372 U.S. 335, 343-345 (1963) (Constitution requires appointment of counsel for indigent defendants in state felony cases); *Argersinger v. Hamlin*, 407 U.S. 25, 37-40 (1972) (holding that judge may not sentence indigent misdemeanor defendant to incarceration unless, at beginning of trial, judge had appointed counsel to represent defendant); and *Scott v. Ill.*, 440 U.S. 367, 373-374 (1979) (refusing to extend right to court appointed counsel to indigent defendants convicted of a misdemeanor but not imprisoned).

59. 309 U.S. 227 (1940).

60. *Id.* at 230.

61. *Id.* at 231-233.

62. *Id.* at 232.

63. *Id.* at 235.

sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.<sup>64</sup>

The Court pointed out that the position of the Florida law enforcement officials was tantamount to arguing that lawless means justified the ends.<sup>65</sup> The Court rejected the "ends justifies the means" argument in words which seem particularly relevant to many individuals in twenty-first century America suspected or accused of terrorist activities:

Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.<sup>66</sup>

In contrast to *Powell* and *Chambers*, the Court's decisions in *Hirabayashi v. United States*<sup>67</sup> and *Korematsu v. United States*<sup>68</sup> suggest that the Court may be a relatively undependable shelter for individual liberties when the hurricane force winds of war, fear and bigotry buffet the civil liberties of the "helpless, weak, outnumbered, or . . . non-conforming victims of prejudice and public excitement."<sup>69</sup>

Less than two years after *Chambers'* clarion call to protect civil liberties, in *Hirabayashi*, the Court upheld the conviction of a Japanese American citizen who was found guilty of violating a military curfew order that applied to Japanese Americans citizens but not to citizens of

---

64. *Id.* at 237-238.

65. *Id.* at 240-241.

66. *Id.* at 241.

67. 320 U.S. 81 (1943).

68. 323 U.S. 214 (1944).

69. *Chambers*, 309 U.S. at 241.

non Japanese ancestry.<sup>70</sup> Pursuant to an Executive Order and congressional statute, the curfew was imposed because influential military and civilian authorities feared possible disloyalty of Japanese Americans in the western part of the United States.<sup>71</sup>

Validating the statute, the Court noted that for various reasons, Japanese Americans had not assimilated “as an integral part of the white population,”<sup>72</sup> and that many Japanese Americans had dual citizenship.<sup>73</sup> The Court said:

Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.<sup>74</sup>

Similarly, in *Korematsu*, the Court affirmed the conviction of a Japanese American citizen who failed to comply with military orders that all persons of Japanese ancestry in designated areas in the western United States report to centers so that federal authorities could relocate them to detention camps further inland. The Court recognized the “hardship” entailed by the forced removal and detention of American citizens,<sup>75</sup> and pointed out that ordinarily:

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.<sup>76</sup>

Nevertheless, the Court ruled the exclusion order constitutional.

Writing for a six-person majority, Justice Black reasoned as follows:

---

70. 320 U.S. at 83.  
71. *Id.* at 90-91, 94-95.  
72. *Id.* at 96.  
73. *Id.* at 97-98.  
74. *Id.* at 99.  
75. 323 U.S. at 219.  
76. *Id.* at 216.

Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.<sup>77</sup>

In *Chambers*, Justice Black had eloquently argued that the courts must stand as “havens” against the winds of legal oppression; in *Korematsu*, the havens seemed little more than empty judicial pup tents.

Before turning to more recent cases, a few words seem appropriate regarding two contrasting United States Supreme Court decisions involving the trial of American citizens by military commissions. In *Ex Parte Milligan*,<sup>78</sup> pursuant to the order of the commander of the Indiana military district, a military commission arrested, tried, convicted and sentenced to death by hanging an American citizen who had never been in the military or participated in the Civil War.<sup>79</sup> The two-judge Circuit Court divided on whether the commission had jurisdiction to adjudicate the case and certified that issue (along with several related issues) to the United States Supreme Court.<sup>80</sup> The Court concluded that it had jurisdiction to hear the case,<sup>81</sup> and addressing the issue of the commission’s authority, said:

[T]here are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substituted [sic] for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule [sic], so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.<sup>82</sup>

---

77. *Id.* at 219-220.

78. 71 U.S. 2 (1866).

79. *Id.* at 107-108.

80. *Id.* at 108.

81. *Id.* at 109-118.

82. *Id.* at 127.

The Court stated that the defendant was entitled to be discharged from custody.<sup>83</sup>

In contrast to this opinion, the Supreme Court's World War II era decision, *Ex parte Quirin*,<sup>84</sup> involved the trial of eight would-be saboteurs who were arrested in the United States after they were brought by German submarines to the East Coast. The defendants landed upon American shores in military uniform, then subsequently hid their military gear and posed as members of the civilian population.<sup>85</sup> After the F.B.I. apprehended the suspects, President Roosevelt appointed a military commission to try the captives as well as military lawyers to defend them. Among the prisoners was one individual (Herbert Hans Haupt) who claimed American citizenship.<sup>86</sup> The federal district court dismissed defendants' habeas petitions that requested, among other things, a jury trial.<sup>87</sup>

Haupt and his fellow collaborators appealed asserting (among other arguments) that in the absence of a state of martial law, the President lacked authority to create the military commissions to try them. In its opinion, the Supreme Court stated that Haupt had stressed "that the law of war 'can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.'"<sup>88</sup>

Sitting during a special term, the United States Supreme Court, heard oral argument for two days, and on the third day issued a *per curiam* opinion affirming the district court.<sup>89</sup> The Court said that it would issue a full opinion later. Less than two weeks after the Court's *per curiam* opinion six of the eight defendants were electrocuted.<sup>90</sup>

When the Court published its full opinion nearly three months later, Chief Justice Stone addressed the jurisdiction of military commissions as follows:

---

83. *Id.* at 131.

84. 317 U.S. 1 (1942).

85. *Id.* at 21.

86. *Id.* at 20. Subsequent scholarship confirms that Haupt was very probably an American citizen. See Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law*, 15 (U. Press Kan. 2003).

87. 317 U.S. at 24.

88. *Id.* at 45 (quoting *Ex Parte Milligan* 71 U.S. 2 at 121).

89. *Id.* at 42.

90. Fisher, *supra* n. 86, at 68-69, 77-80. See Francis Biddle, *In Brief Authority* 339 (Doubleday & Co., Inc. 1962) (giving an eyewitness account of the cases from the perspective of the Attorney General of the United States who personally tried them). The Court published its full opinion nearly three months after the imposition of the death penalty.

We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.<sup>91</sup>

The Court confined its opinion narrowly: it applied to situations in which persons were arrested on American soil having the intent to destroy “war materials and utilities.”<sup>92</sup> The Court also pointed out that Haupt was being tried as an “enemy belligerent” and therefore fell within the military commission’s jurisdiction.<sup>93</sup> Specifically, the Court said:

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.<sup>94</sup>

The *Quirin* Court limited *Milligan* (regarding its discussion of enemy belligerents) to *Milligan’s* particular facts.<sup>95</sup>

Briefly assessing some of the relevant pre 9/11 case law, *Powell* and *Chambers* affirm a strong tradition of American values protective of the human rights and dignity of individuals no matter how degraded their political or social status. Among other things, these cases heralded the recognition of basic due process protections for all criminal defendants, particularly those who were indigent, lacking in formal education, and social outcasts.<sup>96</sup> Such concern for “the least of these”<sup>97</sup>

---

91. *Quirin*, 317 U.S. at 46.

92. *Id.*

93. *Id.* at 37-38.

94. *Id.* (citations omitted).

95. *Id.* at 45.

96. *See supra* nn. 53-56 & accompanying text.

97. Matt 25:40.

is consistent with the greater overarching national commitment to protect justice for all. Perceptively acknowledging the foresight of the Framers, the *Milligan* Court observed:

Those great and good men foresaw that troublous times would arise, when rules and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrevocable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.<sup>98</sup>

In contrast, *Hirabayashi* and *Korematsu* are part of a parallel American tradition that values national survival over individual liberty, especially during times of national crises.<sup>99</sup> *Quirin* too fits comfortably into that stream of American jurisprudence that swirls with particular vigor during times of great fear.<sup>100</sup>

We now turn to two recent federal cases decided in the wake of the September 11 catastrophe.

## V.

*Padilla v. Bush*<sup>101</sup> and *Hamdi v. Rumsfeld*,<sup>102</sup> illuminate the contemporary tension between protecting individual liberty (particularly for individuals within subordinate groups) and national security concerns. In *Padilla*, Jose Padilla, an American Muslim citizen, was

---

98. 71 U.S. at 120-121.

99. For a comprehensive and thoughtful treatment of military tribunals and the Executive Branch's encroachment upon courts' jurisdiction, see Carl Tobias, *Detentions, Military Commissions, Terrorism and Domestic Case Precedent*, *passim* 76 S. Cal. L. Rev. 1371 (Sept. 2003).

100. In a similar vein see *U.S. v. Schenck*, 249 U.S. 47 (1919) (free speech protections are limited by circumstances in which the speech is uttered); and *U.S. v. Dennis*, 341 U.S. 494 (1951) (upholding convictions of members of the Communist Party for conspiring to form a party which would, among other things, advocate the future violent overthrow of the American government).

101. 233 F. Supp.2d 564 (S.D.N.Y. 2002), *adhered to upon reconsideration*, 243 F. Supp.2d 42 (S.D.N.Y. 2003), *aff'd in part and rev'd in part*, 352 F.3d 695 (2<sup>d</sup> Cir. 2003), *cert. granted*, 124 S.Ct. 1353 (2004).

102. Brought in the Eastern District of Virginia, this case has generated an opinion by the trial court, three Fourth Circuit panel opinions, and upon denial of a motion to rehear the case *en banc*, several opinions by members of the *en banc* court. See 243 F. Supp.2d 527 (E.D. Va. 2002); 294 F.3d 598 (4th Cir. 2002) (*Hamdi I*); 296 F.3d 278 (4th Cir. 2002) (*Hamdi II*); 316 F.3d 450 (4th Cir. 2003) (*Hamdi III*); and 337 F.3d 335 (4th Cir. 2003), respectively. Hamdi appealed to the Supreme Court and the Court granted *certiorari*, see *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (2004).

arrested in Chicago on a material witness warrant commanding him to testify before a federal grand jury. The government transferred Padilla to New York where the court appointed counsel to represent him. The government subsequently designated Padilla as an enemy combatant, and moved him from New York to a naval brig in Charleston, South Carolina.

Padilla's lawyer filed a *habeas corpus* petition seeking his release and requesting that she be allowed to see and consult with her client. The trial court ruled that the President had lawful authority to designate Padilla as an unlawful enemy combatant based on a Joint Resolution that Congress passed after the September 11 calamity in addition to existing case law.<sup>103</sup>

The court also ruled, however, that under the relevant federal *habeas* statutes, Padilla had a right to present evidence challenging the President's decision that Padilla was an unlawful enemy combatant. The court said:

Quite plainly, Congress intended that a § 2241 [habeas corpus] petitioner would be able to place facts, and issues of fact, before the reviewing court, and it would frustrate the purpose of the remedy to prevent him from doing so.<sup>104</sup>

The *Padilla* court discussed the distinction between prisoners of war and unlawful combatants as follows:

Four criteria generally determine the conditions an armed force and its members must meet in order to be considered lawful combatants:

- (1) To be commanded by a person responsible for his subordinates;
- (2) To have a fixed distinctive emblem recognizable at a distance;
- (3) To carry arms openly; and
- (4) To conduct their operations in accordance with the laws and customs of War.

. . . Those who do not meet those criteria, including saboteurs and guerrillas, may not claim prisoner of war status.<sup>105</sup>

---

103. 233 F. Supp. 2d at 596. Specifically, the court stated: "Here, the basis for the President's authority to order the detention of an unlawful combatant arises both from the terms of the Joint Resolution, and from his constitutional authority as Commander in Chief as set forth in *The Prize Cases* and other authority discussed above." *Id.*

104. *Id.* at 600.

105. *Id.* at 592 (citations omitted).

*Padilla* pointed out that in cases involving (alleged) unlawful combatants, the Geneva Conventions providing protections for prisoners of war do not apply, and accordingly, *Padilla* falls into the category of combatant who can be tried, convicted and punished by a secret military commission. The court stated:

The point of the protracted discussion immediately above is simply to support what should be an obvious conclusion: when the President designated *Padilla* an “enemy combatant,” he necessarily meant that *Padilla* was an unlawful combatant, acting as an associate of a terrorist organization whose operations do not meet the four criteria necessary to confer lawful combatant status on its members and adherents.<sup>106</sup>

In contrast to possible punitive measures which may be used against unlawful enemy combatants, a prisoner of war could be released after hostilities end.

In addition, the court addressed the standard that it would apply in evaluating the validity of the President’s determination that *Padilla* was an unlawful enemy combatant. The court described the scope of its inquiry as follows:

The commission of a judge . . . does not run to deciding de novo whether *Padilla* is associated with al Qaeda and whether he should therefore be detained as an unlawful combatant. It runs only to deciding two things: (i) whether the controlling political authority—in this case, the President—was in fact exercising a power vouchsafed to him by the Constitution and the laws; that determination in turn, is to be made only by examining whether there is some evidence to support his conclusion that *Padilla* was, like the German saboteurs in *Quirin*, engaged in a mission against the United States on behalf of an enemy with whom the United States is at war, and (ii) whether that evidence has not been entirely mooted by subsequent events. The first determination—that there is some evidence of *Padilla*’s hostile status—would support the President’s assertion in the June 9 Order that he was exercising the power referred to above. That is the “some evidence” test suggested in the government’s papers (Respondents’ Resp. to and Mot. to Dismiss Am. Pet. at 17), and it will be applied once *Padilla* presents any facts he may wish to present to the court.<sup>107</sup>

---

106. *Id.* at 593.

107. *Id.* at 608.

*Padilla's* “some evidence” standard is extremely deferential to the federal executive authorities in that the President need only submit some undefined amount of information that an American citizen is an unlawful enemy combatant. Once the Executive Branch meets the amorphous “some evidence” rule, governmental officials could detain an American citizen indefinitely. Furthermore, even though the government has asserted that it does not intend to try *Padilla* before a military tribunal,<sup>108</sup> the trial court’s opinion clearly suggests that the government can ultimately try, convict and execute individuals like *Padilla* by a secret military tribunal. Specifically, the trial court noted:

[T]he Court touched directly on the subject at issue in this case when it said that “unlawful combatants are likewise subject to capture and detention,”[citing *Quirin*]. Although the issue of detention alone was not before the Court in *Quirin*, I read the quoted sentence to mean that as between detention alone, and trial by a military tribunal with exposure to the penalty actually meted out to petitioners in *Quirin*—death—or, at the least, exposure to a sentence of imprisonment intended to punish and deter, the Court regarded detention alone, with the sole aim of preventing the detainee from rejoining hostile forces—a consequence visited upon captured lawful combatants—as certainly the lesser of the consequences an unlawful combatant could face. If, as seems obvious, the Court in fact regarded detention alone as a lesser consequence than the one it was considering—trial by military tribunal—and it approved even that greater consequence, then our case is a fortiori from *Quirin* as regards the lawfulness of detention under the law of war.<sup>109</sup>

Absent effective judicial review, the chances increase significantly that the Executive Branch may make an erroneous determination regarding enemy combatant status. Innocent American citizens could face death after *secret proceedings* in which their fates would have been decided without independent review by neutral tribunals.

Moreover, even if the Executive Branch is correct and an American citizen is an unlawful enemy combatant, how could one ensure that the accused’s treatment before a secret military tribunal at least met minimal human rights standards? After all, the person is still human, an American, and as *Padilla* noted, subject to the death penalty.<sup>110</sup>

---

108. *Padilla Allowed Access to Lawyer*, U.S. Dept. Def. News Release, Feb. 11, 2004, [hereinafter *Padilla Allowed Access*] (available at <<http://www.defenselink.mil/releases/2004/nr20040211-0341.html>>) (accessed Apr. 12, 2004).

109. *Padilla*, 233 F. Supp. 2d at 595.

110. *Id.*

The trial court ordered that Padilla be allowed to meet with his lawyer; and the government appealed citing, among other reasons, alleged fears that communications between Padilla and his attorney will invariably compromise national security.<sup>111</sup>

On appeal, the Second Circuit affirmed the trial court's decision to allow Padilla to meet with counsel, but on different grounds. Unlike the trial court, the appellate court concluded:

Padilla's detention was not authorized by Congress, and absent such authorization, the President does not have the power under *Article II of the Constitution* to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat.<sup>112</sup>

The appeals court stated that under section 4001(a) of the Non Detention Act<sup>113</sup> Congress intended to prohibit all detentions of American citizens, and that "that precise and specific language authorizing the detention of American citizens is required to override its prohibition."<sup>114</sup> The majority held that Congress had not expressly granted the President authority to detain American citizens, and that the President's independent executive powers as Commander-in-Chief "do not encompass the detention of a United States citizen as an enemy combatant taken into custody on United States soil outside a zone of combat."<sup>115</sup>

After painstaking analysis of the constitutional text and relevant precedent, the Second Circuit summarized matters as follows:

The Constitution's explicit grant of the powers authorized in the Offenses Clause, the Suspension Clause, and the *Third Amendment*, to Congress is a powerful indication that, absent express congressional authorization, the President's Commander-in-Chief powers do not support Padilla's confinement. [W]hile Congress—otherwise acting consistently with the Constitution—may have the power to authorize the detention of United States citizens under the circumstances of Padilla's case, the President, acting alone, does not.<sup>116</sup>

The Second Circuit ordered the trial court to issue a writ of habeas corpus directing Padilla's release, and pointing out that the military authorities

---

111. *Padilla v. Bush*, 243 F. Supp. 2d 42, 46 (S.D.N.Y. 2003).

112. *Padilla v. Bush*, 352 F. 3d 695, 698 (2<sup>d</sup> Cir. 2003) (emphasis in the original).

113. 18 U.S.C. § 4001 (2000).

114. *Padilla*, 352 F. 3d at 720.

115. *Id.* at 715, n. 24.

116. *Id.* at 715 (citation omitted).

could transfer Padilla to appropriate civil authorities who could initiate criminal charges against him.<sup>117</sup>

In contrast, the dissent argued that the President has inherent Article II authority to “thwart acts of belligerency on U.S. soil” and accordingly could designate an American citizen taken into custody on American soil outside of a zone of combat as an unlawful enemy combatant.<sup>118</sup> Furthermore, the dissent asserted that under its Joint Resolution<sup>119</sup> passed in the aftermath of the 9/11 calamity, Congress had authorized the President to detain such American citizens.<sup>120</sup>

The United States Supreme Court has recently granted *certiorari*.<sup>121</sup> As this article goes to press, the government has accorded Padilla limited access to his lawyer, claiming that in doing so the government is merely exercising its discretion. The government contends that he has no legal right to see a lawyer.<sup>122</sup>

*Hamdi v. Rumsfeld*<sup>123</sup> likewise involved an American Muslim citizen (born in Louisiana) who allegedly was an enemy combatant. According to the government’s assertions, Hamdi was taken into custody in Afghanistan while fighting with the Taliban forces against military units allied with the American government in an area of active combat operations.<sup>124</sup> Federal military authorities relocated Hamdi to Guantanamo Bay Naval Base and then to the Norfolk naval brig in Norfolk, Virginia.<sup>125</sup>

The authorities deemed Hamdi an enemy combatant.<sup>126</sup> While Hamdi was incarcerated in Norfolk, the federal public defender filed a *habeas corpus* petition on behalf of Hamdi.<sup>127</sup> The trial court granted the petition; however, on appeal, the Fourth Circuit Court of Appeals reversed. The appeals court held that the public defender lacked a substantial preexisting relationship with Hamdi and therefore could not appear as Hamdi’s next friend.

---

117. *Id.* at 724.

118. *Id.* at 727.

119. Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-140, 115 Stat. 224 (2001).

120. 352 F. 3d at 727.

121. *Rumsfeld v. Padilla*, 124 S. Ct. 1353 (2004).

122. *Padilla Allowed Access*, *supra* n. 108. For an informative biographical sketch of Padilla see Deborah Sontag, *Secret Justice: Terror Suspect's Path From Streets to Brig*, N.Y. Times, Apr. 25, 2004, § 1, at 1.

123. 294 F.3d 598 (*Hamdi I*).

124. *Hamdi*, 243 F. Supp. 2d 529.

125. *Id.*

126. *Id.*

127. *Id.*

On remand, the trial court granted the petition of Hamdi's father to appear as Hamdi's next friend.<sup>128</sup> In addition, the trial court appointed the public defender as counsel and ordered the government to grant Hamdi unmonitored access to his lawyer.

Once again the government appealed, and once again the Fourth Circuit reversed. This time, the appeals court stated that the trial court failed to give sufficient weight to the Executive Branch's concerns regarding national security.<sup>129</sup> Specifically, the appellate court stated:

There is little indication in the order (or elsewhere in the record for that matter) that the court gave proper weight to national security concerns. The peremptory nature of the proceedings stands in contrast to the significance of the issues before the court. The June 11 order does not consider what effect petitioner's unmonitored access to counsel might have upon the government's ongoing gathering of intelligence. The order does not ask to what extent federal courts are permitted to review military judgments of combatant status. Indeed, the order does not mention the term enemy combatant at all.<sup>130</sup>

On further remand, the Executive Branch filed a Declaration signed by Michael Mobbs, a "Special Advisor" in the Department of Defense. The Mobbs Declaration set forth the asserted facts supporting Hamdi's "enemy combatant" status and the government authorities requested that Hamdi not be granted access to a lawyer because of national security concerns.<sup>131</sup>

In response, the trial court said:

The declaration does not answer under whose authority and by what procedures Mr. Mobbs engaged in such a review. Nor does it explain whether Mr. Mobbs is responsible for supervising the classification decisions of others. These are important considerations for any meaningful judicial review because the Court must be able to determine whether the person(s) making the classification decision did so with the authority of the Executive and pursuant to the statutes, rules, and regulations pertaining to such matters.

The declaration is insufficient to determine whether the screening criteria used by the government in classifying Hamdi and in making the decision to transfer Hamdi to the Norfolk Naval Brig

---

128. *Hamdi II*, 296 F.3d at 279, 280.

129. *Id.* at 282.

130. *Id.*

131. *Hamdi*, 243 F. Supp. 2d at 533.

violated his Fifth Amendment rights to the due process of law or violated the law or regulations of the Country.<sup>132</sup>

The trial court ordered that the Executive Branch produce documentary evidence for the court to review in chambers so that it could carry out its constitutional duty of judicial review and determine whether the government violated an American citizen's due process rights. The court expressed its concerns as follows:

Without access to the screening criteria and Hamdi's statements, it is impossible to evaluate whether Mr. Mobbs is correct in his assertion that Hamdi's classification as an enemy combatant is justified. The Mobbs Declaration is little more than the government's "say-so" regarding the validity of Hamdi's classification as an enemy combatant. If the Court were to accept the Mobbs Declaration as sufficient justification for detaining Hamdi in the present circumstances, then it would in effect be abdicating any semblance of the most minimal level of judicial review. In effect, this Court would be acting as little more than a rubber-stamp. While the Respondents may very well be correct that Hamdi is appropriately classified as an enemy combatant, the Court is unwilling on the sparse facts before it to find so at this time.<sup>133</sup>

On appeal, the Fourth Circuit once more reversed, holding that the Executive Branch had produced sufficient evidence to support its claims that Hamdi was an enemy combatant. The appellate court stated:

[W]e hold that, despite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts presented in the Mobbs declaration. Where, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in an [sic] zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth *factual assertions* which would establish a legally valid basis for the petitioner's detention. Because these circumstances are present here, Hamdi is not entitled to habeas relief on this basis.<sup>134</sup>

The appeals court limited its ruling to the "specific context" before it: namely, "the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces."<sup>135</sup> The court dismissed

---

132. *Id.* at 533-534.

133. *Id.* at 535.

134. *Hamdi III*, 316 F.3d at 476 (emphasis added).

135. *Id.* at 465.

the case.<sup>136</sup>

Hamdi sought rehearing *en banc* and by a divided vote, the Fourth Circuit denied Hamdi's rehearing motion.<sup>137</sup> Judges Wilkinson and Traxler were authors of the court's panel opinion, and concurred in the decision not to rehear the case. Among other reasons, they argued that Hamdi had been taken into custody on foreign soil in an area of active combat operations, that fact was undisputed and sufficed to support the government's decision that he was an enemy combatant.<sup>138</sup>

In a vigorous dissent, Judge Motz argued that the court had abdicated its judicial duty of protecting Americans' individual civil liberties by failing to require that citizens at least be able to present factual evidence that the government had erroneously labeled them as enemy combatants. Judge Motz argued:

[D]eference to the political branches does not compel the Judiciary to abdicate its own duty to protect the individual liberties guaranteed all citizens. My disagreement with the panel decision is that Hamdi has not received the meaningful judicial review to which the panel acknowledges he is entitled. Such review is possible only if the Executive is required to substantiate its contentions that Hamdi is an enemy combatant with more than a declaration that the panel concedes is hearsay, inconsistent and incomplete. Even in the darkest days of World War II, after the devastating attack on Pearl Harbor, the Supreme Court recognized a greater role for the courts in safeguarding individual liberties than the panel now provides Hamdi. *See e.g., Quirin, 317 U.S. at 46.* After all, "implicit in the term 'national defense' is the notion of defending those values and ideals which set the Nation apart." *Robel, 389 U.S. at 264.* I regret that in the name of deference to the political branches' preeminence in matters of war, the panel permits the subversion of the very liberties that make defense of this Country worthwhile.<sup>139</sup>

In short, Hamdi, an American citizen, on American soil with courts freely functioning, had no access to a lawyer or opportunity to show that the federal government made a mistake that is costing him his liberty; and might under existing precedents, ultimately cost him his life.<sup>140</sup> Precluding an American citizen from defending herself merely because a

---

136. *Id.* at 477.

137. *Hamdi*, 337 F.3d at 341.

138. *Id.* at 342 (Wilkinson, J., concurring in dismissal); and *id.* at 345-347 (Traxler, J., concurring in dismissal).

139. *Id.* at 376, n. 9.

140. *Ex parte Quirin*, 317 U.S. at 37-38.

government official has made “factual assertions”—*not facts, just assertions*—illuminates a painful American dilemma: fear of terrorist attacks is causing the courts and general public to trade civil liberties for vague Executive Branch claims involving national security.

According to the government, Hamdi has no legal right to see a lawyer. Instead the Executive Branch has asserted that as a matter essentially of sufferance, it will allow Hamdi access to a lawyer on a limited basis.<sup>141</sup>

Like the would-be saboteurs in *Quirin*, Hamdi stands in jeopardy of trial, conviction and punishment, even execution, in secret. He is an American citizen almost completely excluded from federal courts based on *assertions* about facts that the courts have judicially barred him from challenging.

Comparing *Hamdi* with the *Powell* defendants who appeared before the Alabama trial court over seventy years ago, one finds that like the *Powell* defendants, Hamdi is economically indigent as well as in some respects, legally deaf and dumb. How so? His legal “hearing” is compromised because the courts have failed to mandate access to an advocate who can hear what is transpiring in the federal court and explain it to him. Rather than recognition of and respect for his legal right to see a lawyer, Hamdi’s access to an advocate is tenuous and unpredictable. The Executive Branch claims unfettered authority to regulate Hamdi’s access to counsel. Practically that means that if it chose to do so, the government could decide to terminate Hamdi’s access just when he needs it most. Even more ominously, the Executive Branch could change its current approach of detaining Hamdi and assert, under an expansive interpretation of *Quirin*, that it has the authority to try, convict and execute Hamdi in secret.

For similar reasons, Hamdi is perilously close to being legally dumb because he has no assurance that he will have a champion to communicate his wishes to neutral, independent tribunals. To make matters worse, unlike the *Powell* defendants, Hamdi is legally blind (no pun intended). The *Powell* defendants at least could see that they were being tried in state court and their fate was being decided (legal railroading!). No evidence exists that Hamdi knew before the eve of the Supreme Court’s decision to review his case that federal courts were determining his fate without meaningful input from him. As with

---

141. *DOD Announces Detainee Allowed Access to Lawyer*, U.S. Dept. Def. No. 908-03 (Dec. 2, 2003) (available at <http://www.defenselink.mil/releases/2003/nr20031202-0717.html>) (accessed Apr. 2, 2004).

Padilla, the Supreme Court has recently granted *certiorari*.<sup>142</sup>

While the existing case law alone is by no means conclusive, the pattern and practice of Executive Branch designation of American Muslims as unlawful enemy combatants may be emerging. If the courts sanction the practice of such individuals being held in military detention without an opportunity to prove before independent tribunals that the government has made a mistake, such persons will be marked with yet another badge of racial oppression. Like America's antebellum slaves, they will have been disqualified from presenting evidence in court to exonerate themselves.<sup>143</sup>

Briefly summarizing to this point, evidence exists that a discrete and insular minority group<sup>144</sup> in America's diverse population, American Muslims, has been smeared with the brush of disloyalty. In addition, the traitor stereotype stamped upon them has provoked some insecure fellow citizens to declare open season upon the lives and liberty of people whom the self appointed avengers believe are Muslims or Arab Americans or whatever you want to call them. Finally, some courts have been relatively tentative, indeed one is tempted to say timid, in their protection of the individual rights of American Muslim citizens accused of being unlawful enemy combatants. On the other hand, other courts have emphasized the continuing necessity of judicial review and respect for separation of powers even (especially?!) in unsettled times.

## VI.

We stand at a historical crossroads. At least two paths confront us. One path leads us to practices and laws that create and (literally) confine a new nebulous racial category consisting of Arabs, Muslims, and "Arab looking people." People in this category are being treated as though they have no rights that those who "look American" or have "American names" are bound to respect.<sup>145</sup> Indeed, American Muslims are being branded with what Theodore Allen describes as a "hallmark of racial oppression," namely "all members of the oppressed group [are reduced] to one undifferentiated social status, a status beneath that of any

---

142. *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (2004).

143. See e.g. *Strauder v. W. Va.*, 100 U.S. 303 (1879) (African Americans cannot be excluded from grand or petit juries on the basis of race); and 42 U.S.C. § 1981 (mandating among other things that all persons in the United States have a right to give evidence in court).

144. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 (1938).

145. See Volpp, *supra* n. 1; Akram & Johnson, *supra* n. 1; and *Civil Rights Concerns*, *supra* n. 1 *passim*. Cf. *Scott v. Sandford*, 60 U.S. 393, 407 (1856).

members of any social class [in this society].”<sup>146</sup> The proverbial bottom line: racial profiling of Muslim Americans represents a twenty-first century intersection of racism and religious intolerance.

If American history instructs anything, it tells us that being without legally enforced rights can lead to terror, including summary executions and disappearances as was reflected in widespread lynching, burning at the stake and kidnapping of blacks during and after slavery.<sup>147</sup> Such degradation was justified on the basis that the victims were “just niggers.”<sup>148</sup> As a society, we have moved away from that awful southern and American heritage, but it threatens us again if we choose to go down its path once more, for the first path descends into a societal

146. Theodore W. Allen, *The Invention of the White Race* vol. 1, 32 (Verso 1994).

147. See N.A.A.C.P., *Thirty Years of Lynching in the United States, 1889-1918* (Arno Press & N.Y. Times 1969) (Apr. 1919) (documenting the lynching of over three thousand individuals during a thirty year time period, giving some details regarding one hundred of the murders, and pointing out that the number of lynchings was probably understated); Stewart E. Tolnay & E.M. Beck, *A Festival of Violence: An Analysis of Southern Lynchings: 1882-1930* (U. Ill. Press 1995) (discussing some of the broader societal causes for lynching while describing some illustrative cases); and James Cameron, *A Time of Terror* (TD Publications 1982) (firsthand account of an African American criminal defendant who was nearly lynched by a mob following his arrest and charge with murdering a white man). A particularly gruesome murder/lynching occurred in Coweta County, Georgia in 1899, when Sam Hose was burned at the stake and dismembered, and the pieces of his cooked remains were sold to on lookers. According to the New York Tribune:

Before the torch was applied to the pyre, the Negro was deprived of his ears, fingers and other portions of his body with surprising fortitude. Before the body was cool, it was cut to pieces, the bones were crushed into small bits and even the tree upon which the wretch met his fate was torn up and disposed of as souvenirs.

The Negro's heart was cut in several pieces, as was also his liver. Those unable to obtain the ghastly relics directly, paid more fortunate possessors extravagant sums for them. Small pieces of bone went for 25 cents and a bit of the liver, crisply cooked, for 10 cents.

*Thirty Years of Lynching*, *supra* at 13.

148. For example, in *Adventures of Huckleberry Finn*, Mark Twain brilliantly captured the low regard in which the lives of blacks were held in antebellum America. In describing some of his travels to Aunt Sally (who had mistaken him for her nephew, Tom Sawyer) Huckleberry Finn concocted a tale about why he was delayed: “We blowed out a cylinder-head.” Mark Twain, *Adventures of Huckleberry Finn*, in *The Works of Mark Twain: Adventures of Huckleberry Finn* vol. 8, 279 (Walter Blair & Victor Fischer eds., U. Cal. Press 1988). In response to Aunt Sally's inquiry regarding whether anyone was hurt, Huck responded: “No'm. Killed a nigger.” *Id.* Sally replied: “Well, it's lucky; because sometimes people do get hurt. Two years ago last Christmas, your uncle Silas was coming up from Newleans on the old Lally Rook, and she blowed out a cylinder-head and crippled a man. And I think he died, afterwards. He was a Babtist.” *Id.* Twain's satire reverberates an uncomfortable echo of some contemporary attitudes about the supposed inhumanity of people of darker colors. See e.g. Heidi Beirich & Mark Potok, *Creator Crack-Up: With its Leader Imprisoned, its name Illegal and its Ranks Thinned by Splits, the World Church of the Creator is on the Ropes*, Intelligence Rpt. No. 109 (S. Poverty L. Ctr. 2003) (available at <<http://www.splcenter.org/intel/intelreport/article.jsp?aid=23>>) (accessed Mar. 1, 2004) (discussing recent arrest of Mathew Hale, leader of the racist and anti Jewish World Church of the Creator organization on charges, among other things, that he solicited the murder of a federal judge).

abyss.

There exists a second path. Along the less-traveled road, we spot signs that these times of great societal stress could signal the birth pangs of a new and more hopeful world in which individual character trumps artificial categories like race. These signs are reflected in the lives of persons like Mahatma Gandhi, Dr. Martin Luther King, Jr., Mother Teresa and Bishop Desmond Tutu, whose contributions have spanned the historical period touched upon here. The spirit in which they moved is reflected in the actions of those courageous souls who died attempting to rescue others in the September 11 catastrophe, those who gave selflessly following the calamity to help the bereaved, injured and devastated, and those today who still work non-violently to prevent such disasters from recurring. These noble hearts reflect the hope of a brighter tomorrow.

Following this second path can move us beyond narrow-minded, pecking-order worldviews of race premised on erroneous beliefs of racial supremacy, and instead impel us toward a uniracial worldview that there is unity in diversity: we are one human race.<sup>149</sup>

Which road will we choose? Lord Acton is quoted as saying that power corrupts and absolute power corrupts absolutely.<sup>150</sup> The prospect of having citizens tried, convicted and executed in secret in response to an ill-defined “war on terror” without some independent judicial oversight smacks of the tyranny of the infamous “Star Chamber”<sup>151</sup> of centuries past. To make matters worse, to have one weakened group of citizens singled out as social scapegoats is not only unpatriotic and unfair, it is simply uncivilized. We must be vigilant and treat our neighbors as ourselves.

In the past, the “N” word has in many minds been associated with a debased social status—being treated not as a human but as a thing. American Muslims seem to be rapidly, though involuntarily, assuming N . . . status. This is not the American way: or is it?

---

149. See Stubbs, *supra* n. 11.

150. Gertrude Himmelfarb, *Lord Acton: A Study in Conscience & Politics* 239 (U. Chi. Press 1952).

151. Michael Stuckey, *The High Court of Star Chamber* 85 (Gaunt, Inc. 1998) (noting that the term Star Chamber has become “equivalent for the vernacular ‘kangaroo court.’”). Stuckey argues that objective evidence supports the proposition that generally “the Star Chamber was an institution at the centre of social and legal reform.” *Id.* at 2. See Cora L. Scofield, *A Study of the Star Chamber: Largely Based on Manuscripts in the British Museum and the Public Record Office* (Burt Franklin Research & Source Works Series B. Franklin 1969) (originally published 1900) (evaluating some primary though admittedly incomplete sources relevant to better understanding the nature and function of the Star Chamber).

115]        *BOTTOM RUNG OF AMERICA'S RACE LADDER*        151

In these circumstances, dare we ask an even more haunting question: *Who will be next?* Perhaps a leading anti-Nazi activist in the pre World War II “confessing church,” Pastor Martin Niemöller, said it best:

They came first for the Communists  
    and I didn't speak up because I wasn't a Communist  
Then they came for the Jews,  
    and I didn't speak up because I wasn't a Jew.  
Then they came for the trade unionists  
    and I didn't speak up because I wasn't a trade unionist.  
Then they came for the Catholics  
    and I didn't speak up because I was a Protestant  
Then they came for me  
    and by that time no one was left to speak up.<sup>152</sup>

---

152. Pastor Martin Niemöller, Speech (Colum. Theological Seminary, Decatur, Ga. 1959 or 1960) <[www.serendipity.li/cda/niemoll.html](http://www.serendipity.li/cda/niemoll.html)> (accessed Apr. 12, 2004).