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LATCRITICAL PERSPECTIVES: INDIVIDUAL LIBERTIES, STATE SECURITY, AND THE WAR ON TERRORISM: Justice and Equity for Whom? A Personal Journey and Local Perspective on Community Justice and Struggles for Dignity

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**BIO:**

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**SUMMARY:** ... They certainly were on my mind my senior year in college, when I considered writing my thesis on the legal cases connected with the incarceration of Japanese Americans during World War II. ... In Oregon, seven law enforcement agencies have begun voluntarily collecting information during traffic stops to help determine whether officers commit racial profiling. ... Regardless, the data show that higher percentages of Blacks and Latinos are stopped than are Whites, while - at least in Hillsboro - lower percentages of contraband are found on Latinos than on Whites. ... Today the term "military necessity" has given way to "national security," but the impact is the same: just as it was four decades ago, race is still used as an indicator of loyalty (now called patriotism) and is still justified because of stereotypes and prejudices that lead to discrimination. ... Here in Oregon, the state legislature and governor saw fit to take such steps, and working with organizations such as APANO ensures that immigrant justice and the dignity of communities of color will remain front-burner issues for government officials and political leaders alike. ...

**HIGHLIGHT:** Saying I am Asian and feminist and radical and a law professor and a product of affirmative action challenges existing assumptions that Asian women are compliant, good with numbers and not words, sexually available, and not in need of affirmative action. It also challenges the view that benefiting from affirmative action is something shameful rather than a source of pride in the door-opening struggles of the past.

- Mari J. Matsuda n1

[\*1133]

I can't remember when I first started thinking about community, justice, and struggles for dignity. Maybe I've thought about these topics all my life. They certainly were on my mind my senior year in college, when I considered writing my thesis on the legal cases connected with the incarceration of Japanese Americans during World War II. The issue had personal relevance for me. After all, my parents, grandparents, aunts, uncles, and other relatives all had been rounded up and put into "those camps." I knew that legal cases had

challenged the constitutionality of the evacuation and incarceration of Japanese Americans and failed. But my thesis advisor asked, "After you describe the [\*1134] legal decisions as racist, then what will you say?" I didn't have an answer, so I pursued another thesis subject altogether. That was 1972.

Little did I realize that I would return to the topic of the incarceration many times: as a third-year law student studying one of the legal cases challenging the incarcerations, as a member of the Japanese American Citizens League (JACL) fighting for reparations for Japanese Americans who had been in the camps, as the lead attorney in the reopening of one of the cases in 1983, and - today - as an Oregon citizen concerned about the possibility of large-scale racial profiling of Arab Americans and "Arab-looking" individuals in my community.

I

### Starting Down the Path

It was what I viewed as discriminatory practices at a Lake Placid, New York resort where I worked for several months in college that prompted me to get a law degree. With another female co-worker, I tried to convince the waitresses to threaten to strike because of inequitable treatment by the maitre d', which led to gross differences in pay.<sup>2</sup> But when challenged, the maitre d' said two things to me: "You don't have a union and we can fire the lot of you tomorrow, and we can do this because our board of directors is composed of eleven lawyers in New York City." Not surprisingly, the other waitresses were unwilling to strike, and I left within a few weeks because I was unwilling to work in such an environment.

I didn't know about the law. I had been raised on a berry and vegetable farm in Boring, Oregon. My siblings and I grew up poor, without indoor plumbing. Some winters we ate government surplus food. I had never met a lawyer, never traveled east of Boise, Idaho until I was nineteen, and went to college on my mother's advice. She told all four of us kids to get our education and get off the farm. So off I went, first to Oregon State University and then to Vassar College. Thank goodness I didn't listen to my high school guidance counselor! Even though I was valedictorian [\*1135] of my class, he suggested I live at home and go to the local community college - his vision of my future. I knew very little else. Had it not been for my older brother Jerry, I never would have found Vassar or even imagined myself going to a Seven Sisters college.

I decided to attend law school because I wanted to have the same power that the board of directors from the New York resort wielded, but I wanted to use it to change things - to pursue justice and fight for others who did not have the education or knowledge to fight for themselves.

In my third-year Constitutional law class we read *Korematsu v. United States*, which tested the constitutionality of the military exclusion order as it related to U.S. citizens.<sup>3</sup> Fred Korematsu, a U.S. citizen, was arrested for refusing to comply with the military order excluding all persons of Japanese ancestry (including U.S. citizens of Japanese descent) from continuing to live in certain areas on the West Coast. Korematsu, a U.S. citizen by birth, refused to leave California and was arrested and convicted of violating Public Law 503 (which criminalized violations of military orders authorized under Executive Order 9066, the executive order that conferred upon the Secretary of War the authority to designate military areas from which persons can be excluded). His case landed in the U.S. Supreme Court and spawned the strict scrutiny doctrine under the Fourteenth Amendment. Unfortunately the Supreme Court found the military's action constitutional based upon military necessity. In *Hirabayashi*, the Supreme Court said that "distinctions between citizens solely because of their ancestry are by their nature odious to a free people."<sup>4</sup> The Court went on to find in *Korematsu* that such restrictions are immediately suspect, and any governmental discrimination based on race would be subjected to the highest levels of scrutiny.<sup>5</sup> The Court then upheld the government's claims of the "military necessity" in the exclusion Japanese Americans, <sup>6</sup> based largely on the report of Lieutenant General John L. DeWitt, the head of the Western

Defense Command, which included eight western states that had been declared a [\*1136] "theater of operation."n7 As a result, the Court found that the race-based curfew and exclusion of Japanese Americans was constitutionally permissible. n8

I remember thinking that doing anything to right Korematsu and cases like it, would make my three years of law school torture worthwhile. But what could I do? The cases had gone to the highest court in the land and been upheld. The next court was a celestial one, and I wasn't ready to argue before that one yet.

So there was little to do except fume at the injustice, both of the Supreme Court decision itself and how the case had been presented in class - as just another dry, boring opinion of no great consequence to anyone. The professor's lackluster presentation and my classmate's inability to comprehend the magnitude of the injustice added insult to injuries I had already felt in my life: the cloud of having been raised by people the government considered disloyal, of thinking my parents must have done something wrong or they would not have been incarcerated, of being asked, "What are you?" for most of my life, so that I realized that most people thought of me as foreign. I wanted to be White because, when I was growing up, it symbolized beauty, power, and authority.

It was only after college when I was teaching English in Japan that I had an epiphany about my identity: I am Japanese American, and both of those descriptors - Japanese and American - are important. Given that identity, I realized I would be in the [\*1137] minority no matter where I lived. Whether I chose to feel good about that or not, it was a fact nonetheless.

## II

### A Mission of Justice and Equity

Once I realized I did have a choice about embracing my heritage, I made mine and came back to the states with renewed purpose and focus. I was a Japanese American and my mission was about justice and equity. I went to the Northwestern School of Law at Lewis and Clark College and became politically active and involved, helping to start the Minority Law Students Association. With several African American students, I fought to reinstate students of color who, with little financial or academic support in their first year, didn't make it to their second. My political awareness and activities, and my increased confidence in my Japanese American identity, fueled my resentment about the injustice of Korematsu and my anger at my professor and fellow law students who had very little interest in a dusty case from World War II.

After graduation I became involved in the JACL, a national civil rights organization started by people of my parents' generation (the Nisei, or second generation - the first generation born in the United States). I was appointed to the National Redress Committee, which sought reparations for the Japanese Americans who had been incarcerated during World War II. What began as a community effort soon grew into a national movement by the Japanese American community and other civil rights groups. It was an exciting time for those of us in the trenches, organizing within local communities for compensation and more: for restoration of an entire community's dignity.

The incarceration had been a case of mass racial profiling, buttressed by the military, condoned by the executive branch, and largely unfettered by the judiciary. It was completely wrong, but at the time few people stepped forward and there was little resistance, even within the Japanese American community. In fact, during the war the JACL stated that Japanese Americans should willingly submit to incarceration, to show their loyalty. The organization was steadfastly against any formal legal challenges such as those fostered by Messrs. Korematsu, Yasui, and [\*1138] Hirabayashi.n9

Some forty years later, though, the JACL was moving forward (although timidly at first) to address these wrongs, and I found myself in the middle of several controversies regarding individual payments versus funds entrusted for the entire community. After battling that issue and seeing a resolution pass the JACL

national convention in 1978, my time on the National Redress Committee was over. I went back to local politics and projects in Oregon.<sup>n10</sup>

### III

#### Reopening Cases of Japanese American Incarceration

In 1982, I received several calls regarding the reopening of the Japanese American incarceration cases. One came from Minoru Yasui, a Japanese American who had been imprisoned during World War II, and another came from Dale Minami, one of several young Japanese American and other ethnic American lawyers [\*1139] in California, Oregon, and Washington who together were reopening the Japanese American incarceration cases based on newly discovered evidence.<sup>n11</sup> Dale Minami became the lead attorney for Fred Korematsu, whose original case I had studied in law school, and I came to represent Mr. Yasui.

In March 1942, Minoru Yasui, the first Japanese American admitted to law practice in Oregon, faced a dilemma: General DeWitt of the Western Defense had imposed a curfew on everyone of Japanese ancestry under President Roosevelt's Executive Order No. 9066.<sup>n12</sup> Mr. Yasui believed the order to be unconstitutional [\*1140] and chose to test the entire internment program by seeking his own arrest and surrendering his liberty, so that the constitutionality of the wartime program could be litigated. He walked into the Portland police department, showed them his papers, and was arrested. Thereafter, he spent nine months in solitary confinement as his case went through the court system.

Mr. Yasui had intentionally placed his trust in the courts, believing the justice denied him by the executive and legislative branches would be restored by the judiciary. However, he was mistaken. Convicted by the District Court of Oregon on November 16, 1942, for violating a military curfew, he appealed his case, first to the Ninth Circuit Court of Appeals, where the court declined to rule, and then to the United States Supreme Court.<sup>n13</sup>

In the early 1980s, evidence discovered by Professor Peter Irons, Aiko Herzig-Yoshinaga, and others revealed that during the prosecution of Mr. Yasui's case, as well as those of Mr. Hirabayashi and Mr. Korematsu, military officials and government prosecutors deliberately and intentionally committed misconduct and fraud.<sup>n14</sup> In their respective petitions for writ of error coram nobis, Messrs. Korematsu, Hirabayashi, and Yasui argued that the government altered, destroyed, and suppressed material evidence proving that the curfew and internment were factually unsupportable.<sup>n15</sup> General DeWitt's decision to impose a military [\*1141] curfew was not based upon military necessity, but rather on racial discrimination. General DeWitt even wrote that people of Japanese ancestry were inherently disloyal and that one could not tell the "sheep from the goats."<sup>n16</sup>

In addition, government attorneys failed to inform the Supreme Court about an Office of Naval Intelligence report finding that Japanese Americans were not a danger to the United States, or about Federal Bureau of Investigation and Federal Communications Commission investigatory reports that refuted claims of Japanese espionage, sabotage, and disloyalty.

On February 1, 1983, Mr. Yasui filed a Petition for Writ of Error Coram Nobis, presenting the government's fraud upon the Court and seeking redress for his conviction, not only for himself but also for the thousands of other Japanese Americans who had been incarcerated.<sup>n17</sup> On January 16, 1984, in a hearing held before the Honorable Robert C. Belloni, the government agreed that Mr. Yasui's conviction should be vacated.<sup>n18</sup> However, the government also argued that there was no "case or controversy" and that, because Mr. Yasui had suffered no lasting consequences, there was no need for a hearing, and therefore Mr. Yasui's petition should be dismissed.<sup>n19</sup> Mr. Yasui argued that the court had a duty to "protect the public interest" by examining the constitutional aspects of the petition.<sup>n20</sup>

The court rendered its opinion on January 26, stating as follows:

The two requests reach the same result. The only difference is that petitioner asks me to make findings of governmental acts of misconduct that deprived him of his Fifth Amendment rights. ... I decline to make such findings forty years after the [\*1142] events took place. There is no case nor controversy since both sides are asking for the same relief but for different reasons. The Petitioner would have the court engage in fact finding which would have no legal consequences. Courts should not engage in that kind of activity.n21

Thrilled about the vacation of the conviction but unsatisfied by the court's lack of an evidentiary hearing, Mr. Yasui appealed his case to the Ninth Circuit Court of Appeals, requesting a substantive proceeding. On November 12, 1986, before the appellate court could review the substance of the appeal, Mr. Yasui passed away. Shortly thereafter, the government moved to dismiss the pending appeal as moot, which the Ninth Circuit granted on March 23, 1987. The dismissal was appealed by Minoru Yasui and True S. Yasui, his wife, to the United States Supreme Court, requesting a petition for Writ of Certiorari to review the Ninth Circuit's March 23 judgment and order of dismissal.n22 Unfortunately, the High Court also found the case to be moot.

Minoru Yasui's long journey for justice came to an end without court findings of governmental misconduct, but Yasui did experience the victory of seeing his conviction erased.n23

#### IV

##### Who Is Subject to Racial Profiling Today?

I chose to be the lead attorney on the Yasui case because I did not want what happened to my relatives to happen to any other group of people. Although that was my intention, I didn't really believe that such a miscarriage would happen again - that is, racial profiling to such a degree that U.S. citizens would be denied due process and equal protection, or the threat of mass incarceration.n24

[\*1143] Such racial profiling and mass incarceration did not occur after the bombing of the federal building in Oklahoma City. The government did not round up thousands of young White men who fit Timothy McVeigh's description. Masses of White men did not declare that they wouldn't mind having their civil rights violated if it made other people feel safer. There were no polls about whether racial profiling of young White men should be conducted for national security reasons. No one said that in times of crisis, some people's rights must fall by the wayside.

Why not? Why not then, after such a disaster and so many deaths? Why not White men? Why instead has there been profiling throughout the decades of immigrants from Asia, countries south of the U.S. border, the Middle East, and other parts of the world? Why weren't young White men detained for security reasons, and why weren't thousands of them considered criminal suspects?

Japanese Americans were subjected to racial profiling during World War II because they were thought to be disloyal and unpatriotic by virtue of their race. General Dewitt stated their racial affinities were not severed by migration - that, even though many second and third-generation Japanese had been born on U.S. soil, held U.S. citizenship, and had become Americanized, Japanese Americans were an enemy race.

Perhaps due to the advent of Congressional action for redress, Japanese Americans today are not, once again, subjected to the treatment they endured during World War II. Instead, other more disenfranchised groups have become the targets of racial profiling. For example, Arabs, Arab Americans and other citizens and immigrants have been profiled for more than a decade. An ABC News poll conducted in 1991 found that "majorities of Americans saw Arabs as 'terrorists' (fifty-nine percent), 'violent' (fifty-eight percent) and

'religious fanatics' (fifty-six percent). And a Gallup poll conducted two years later found that two-thirds of Americans believed there were 'too many Arab immigrants in the United States.'"n25

Shortly after September 11, sentiments ran high, with a Newsweek [\*1144] poll finding that thirty-two percent of Americans favored putting Arabs under special surveillance like that of Japanese Americans during World War II.n26 In other words, roughly one-third of Americans feel that Arabs pose some hidden threat. n27 This form of racial profiling is national but can also be felt locally in Oregon. n28

In a January 2002 telephone poll of 800 Oregon adults, seventeen percent said that Oregon police "often" or "always" make traffic stops on the basis of a motorist's race.n29 Another thirty-nine percent said that the police "sometimes" do this. n30 More than fifty percent of those polled, then, believe that the police sometimes, often, or always make traffic stops based on race, rather than on probable cause for having committed a crime. In the wake of September 11, the survey also suggested that Oregonians are ambivalent about whether racial profiling is always a bad thing. n31 In fact, twenty-one percent of those asked said they felt that after September 11 it was "more appropriate" than before for police to use race as a reason to stop people suspected of violating the law. n32 Only seven percent said they thought the attacks made race-based stops "less appropriate." n33

When people answered those questions, do you think they were contemplating young White men and women being stopped as possible suspects? Or is it easy to give away someone else's [\*1145] rights when you think such curtailment will not impinge on you? A California Supreme Court justice once said the problem with civil liberties is that the middle class has little experience with their homes or cars being unlawfully searched, or the feelings that accompany having their property unlawfully seized.n34 If such acts were to occur more frequently, the middle class would be more mindful of protecting everyone's civil liberties.

Why do we allow and even encourage racial profiling? Data released by the Portland police in August 2001, which include police stops up to June 30 of that year, found the following in Portland:n35

- . Citywide, African Americans were about 2.7 times as likely to be stopped by police as Whites were.
- . Once stopped, African Americans faced the same probability of being charged with a traffic or criminal offense as Whites.
- . The greatest disparities were in the Central Precinct, which covers most of the west side of Portland and downtown:
  - . African Americans were five times more likely than Whites to be stopped by police.
  - . Hispanics were slightly more likely than Whites to be stopped.
  - . Asian Americans were less likely than Whites to be pulled over.
  - . Native Americans were stopped in proportion to their percentage within the general population.

V

## Making Choices About Racial Profiling

### A. Police Department Data Collection

Fortunately, at least a few states are reexamining practices that might constitute or lead to racial profiling.n36 In Oregon, seven [\*1146] law enforcement agencies have begun voluntarily collecting information during traffic stops to help determine whether officers commit racial profiling.n37 In addition,

"Oregon was the first state in the nation where law enforcement agencies and their union representatives adopted resolutions denouncing 'racial profiling' practices." n38

So far, most of the data have been collected in the city of Hillsboro. Out of 23,532 traffic stops between May 2, 2000, and January 31, 2002, twenty-six percent involved Latinos, who make up nineteen percent of Hillsboro's population.n39 Searches were conducted during seven percent of the stops involving Latinos, compared to four percent of stops involving Whites.n40 Yet in only seven percent of those searches involving Latinos did officers find contraband, while they found contraband in ten percent of their searches involving Whites. n41

While many people believe that cases of racial profiling by police occur only as a result of unconscious or subconscious, rather than intentional decisions, others would disagree. Regardless, the data show that higher percentages of Blacks and Latinos are stopped than are Whites, while - at least in Hillsboro - lower percentages of contraband are found on Latinos than on Whites. This latter statistic is not what many expect. Also, as Oregon Governor John Kitzhaber stated, "Law enforcement can't protect the public if the public doesn't believe law enforcement is treating everyone fairly."n42

#### B. Law Enforcement Contacts Policy and Data Review Committee

In January 2002 Oregon Governor John Kitzhaber appointed eleven members to a new Law Enforcement Contacts Policy and Data Review Committee (LECPDRC), which will help law enforcement agencies evaluate data collected on police stops and [\*1147] assist communities in developing policies, training, and procedures for police on interacting with the people they stop and question.

I am particularly pleased to have been appointed to this new committee because I have been concerned about the legislation that grew out of Oregon House Bill 2433 (HB 2433), which was enacted by the Oregon Legislative Assembly in 1997.n43 HB 2433 expanded Oregon law enforcement officers' authority to stop someone when the officers reasonably suspect that the person is "about to commit" a crime. n44 I spoke against the statute because to me it felt too similar to racial profiling, and to what General DeWitt said about Japanese Americans during World War II - that because Japanese Americans had not yet committed an act of sabotage or espionage, it was more likely that, when they did, it would be a significant one. n45 Predicting the possibility of criminal activity is a threat to civil liberties and human dignity because it gives police officers the legal license to act upon their conscious or unconscious prejudicial assumptions about subordinated groups. By analyzing demographic data and working with communities and state and local law enforcement agencies, the LECPDRC can help police perform their missions without inequitable or unlawful discrimination based on race, color, or national origin.

I have been working on the Community Relations subcommittee of the LECPDRC. The subcommittee's goals include evaluating law enforcement policies and informing communities about them, helping communities and law enforcement agencies work together to increase public safety and the public's trust and confidence in law enforcement, publicizing successful efforts to reduce discrimination based on race, color, or national origin during law enforcement stops, and helping communities and law enforcement agencies that want to involve individuals in advancing the goal of data collection.

I come to this work as a member of a community that has been subjected to mass racial profiling and as a professional who has worked to reverse racial profiling and develop communities, cultural competency, and an understanding of diversity. I have spent a majority of my career working to build better relationships [\*1148] among seemingly opposite and opposing sides. I have especially been a voice for understanding "the other," the subordinated groups who are struggling for political empowerment and dignity and safety in law enforcement encounters and living conditions. As a Reginald Heber Smith Community Fellow at Legal Aid in Portland, an attorney for the Urban Indian Council Indigent Criminal Defense Unit, a

community activist, and a cross-racial coalition builder, my constituency is communities of color in Oregon.

Yet even with this experience, it has been exceedingly difficult to build relationships among all committee members, to dialogue about the frustrations that communities of color have experienced, and to have others appreciate the slow and frustrating process of building trust between racially diverse communities and law enforcement. A single conference or training will not build that foundation of trust, especially when Oregon has a history as a White homeland.<sup>n46</sup> For many communities in Oregon, a one-time activity instead of thoughtful processes and a long-term commitment is just more of the same. In fact, "doing something to them," rather than being equitable partners, has for many communities been the rule rather than the exception, and it gives short shrift to important community needs.

The jury is still out on whether the subcommittee's work will rise to the challenge of Oregon's history and whether we will muster the imagination and creativity that are needed to reach our goals. The benefits of our work, when they are achieved, will be at the level of the human heart as well as the head.

### C. Asian Pacific American Network of Oregon

I also have been involved recently with the Asian Pacific American Network of Oregon (APANO), helping organize and moderate a forum for political candidates in Oregon. APANO is a coalition of Asian Pacific groups that work on social justice, [\*1149] immigrant rights, and other issues faced by Asian and Pacific Islander communities in Oregon. Led by Thach Nguyen, a Vietnamese American and resident of Portland, APANO sponsored its second-ever political candidate forum for the Asian Pacific American community in April 2002. More than 120 people from the Hmong, Cambodian, Lao, Mien, Japanese, Chinese, Filipino, Caucasian/European American, and Korean communities attended, as did candidates in five political races in Oregon's May 2002 election, including candidates for governor, the Portland city council, and president of the metropolitan Portland regional government. (Future candidates would do well to attend upcoming APANO forums; in the last election, turnout of registered Asian/Pacific Island voters topped eighty percent, the highest of any community of color).<sup>n47</sup>

The forum clearly shows that changes in attitudes are afoot. Some candidates brought materials translated into Asian languages, and all faced questions on such topics as Food Stamps and housing support for local Asian/Pacific Island immigrants, English as a second language instruction, state funding for bilingual education, racial profiling, building trust between law enforcement officials and Asian/Pacific Islander communities, and issues with the Immigration and Naturalization Service. In addition, the APANO provided simultaneous Hmong interpretation via electronic headsets and walked attendees through the various ballot initiatives, explaining which ones APANO supported, opposed, and took no position on. Some candidates understand that issues important to immigrants and other communities of color should also be important to them, as these communities' expectations translate into both votes for candidates supportive of immigrant justice, fair labor practices, and education, and votes against racial profiling and other indignities.

## VI

### Race in the Face of "National Security"

Today the term "military necessity" has given way to "national security," but the impact is the same: just as it was four decades ago, race is still used as an indicator of loyalty (now called patriotism) [\*1150] and is still justified because of stereotypes and prejudices that lead to discrimination.

As happened with Japanese Americans in World War II, the current government has arrested and detained more than a thousand "suspected" terrorists and has imprisoned U.S. citizens indefinitely without bail,



without having filed criminal charges, and without providing access to attorneys.<sup>n48</sup> In addition, the government has proposed the creation of detention camps for U.S. citizens deemed "enemy combatants," without judicial review. <sup>n49</sup> The government believes that, in the name of safety, racial profiling is justified now as it was then. In the name of safety, Congress passed the USA Patriot Act in 2001, just weeks after the September 11 tragedy. <sup>n50</sup> While neutral on its face, this legislation is being used against Arab Americans, Muslim Americans, and South Asian Americans. Why? Because those who committed the acts on September 11 are believed to be Arab immigrants. But there is another reason: Arab Americans, Muslim Americans, and South Asian Americans are easy to identify, they can be targets of U.S. cultural scapegoating, and doing something against "them" ("the other") can make "us" (those who are not "the other") feel safer.

But at what cost do we ease our fears? Judge Marilyn Hall Patel stated in her opinion vacating Fred Korematsu's conviction that it is in times of war, distress, and military necessity that we need to be the most vigilant about protecting rights and abhorring racial profiling.<sup>n51</sup> The court stated:

Korematsu remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international [\*1151] hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.<sup>n52</sup>

Scrutiny of the government is fundamental to the preservation of civil liberties, as is federal legislation against racial profiling. Here in Oregon, the state legislature and governor saw fit to take such steps, and working with organizations such as APANO ensures that immigrant justice and the dignity of communities of color will remain front-burner issues for government officials and political leaders alike.<sup>n53</sup>

Can Yasui v. United States happen again? Yes, in a minute. What would cause it to happen again? According to Dr. Roger Daniels, the Charles Phelps Taft Professor of History at the University of Cincinnati, it would be the erosion of civil liberties by legislation and fiat disguised as fighting terrorism.<sup>n54</sup>

What would stop Yasui v. United States from happening again? Ordinary people who are willing to take extraordinary steps and who dare to fight for the democratic principles and constitution that once made this country stand out among the world's nations - people like Minoru Yasui, who fought for more than forty years to right wrongs. He was an ordinary person who took extraordinary action. His was a struggle for dignity and respect, as well as for the legal protection afforded by the U.S. Constitution. When we first started the case, he said, "I don't know if we're going to win, but we're going to give 'em hell!" After his death, those words rang in my ears as we continued the battle. At times, when my life seemed hard and I was feeling sorry for myself, I needed only to remember Minoru's struggles and my troubles would diminish. Working with him - admiring him - I often wondered whether I had the courage to put my liberty and professional status on the line for justice, the way he did.

I still have not answered that question fully. But I do have answers for the young waitress I used to be in Lake Placid, New [\*1152] York; the senior college student who wanted to write her thesis on the Japanese American wartime cases; and that third-year law student angered by the Korematsu decision and her professor and classmates' reactions. I would tell her "You're on the right track. Activism for justice and equity is your calling in this lifetime; it is your mission to fulfill. You can be a prophet for justice. Just keep going."

**FOOTNOTE-1:**

n1. Mari J. Matsuda, *Where is Your Body?*, at xii-xiii (1996).

n2. Pay was just one of the inequities. Others included segregation of African American employees in their "own" dining hall, while the rest of us ate in another one. The housing for African American employees was called "colored people's quarters." African Americans cleaned the rooms and worked in the kitchen, but only one, who was very fair-skinned, served guests in the dining room.

n3. [Korematsu v. United States, 323 U.S. 214 \(1944\).](#)

n4. [Hirabayashi v. United States, 320 U.S. 81, 100 \(1943\).](#) See Eric K. Yamamoto & Susan Kiyomi Serrano, *The Loaded Weapon*, 27 *UCLA Amerasia J.* 51 (2001).

n5. [Korematsu, 323 U.S. at 216.](#)

n6. [Id. at 227.](#)

n7. The initial version of General DeWitt's Final Report is significant because it demonstrated that the decision to incarcerate Japanese Americans was based on racial and cultural prejudice, rather than military considerations. In particular, the report concluded:

It was impossible to establish the identity of the loyal and the disloyal [Japanese Americans] with any degree of safety. It was not [that] there was insufficient time in which to make such a determination; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the "sheep from the goats" was unfeasible.

United States Army, *Final Report: Japanese Evacuation from the West Coast, 1942*, at 9 (1943).

The report also included unsubstantiated allegations of espionage and sabotage. *Id.* However, Dewitt failed to include information from the FBI, Federal Communications Commission (FCC), and Office of Naval Intelligence (ONI) refuting these allegations. See Kenji Murase, Ph.D., *Coram Nobis Timeline*, 11 *Nikkei Heritage* 12 (1999); [Korematsu, 323 U.S. 214](#). See also [Hirabayashi, 320 U.S. 81](#); [Yasui v. United States, 320 U.S. 115 \(1943\)](#).

n8. [Korematsu, 323 U.S. at 224.](#)

n9. In all three cases, Fred Korematsu, Gordon Hirabayashi and Minoru Yasui challenged military curfew and exclusion orders directed at all persons of Japanese ancestry. Korematsu resided in San Leandro at the time, Hirabayashi was a student at the University of Washington in Seattle, and Yasui had returned to his home state of Oregon at the outbreak of the war. All three were convicted at the federal district court level and all three convictions were upheld by the High Court, which affirmed the constitutionality of the military order. See [Korematsu, 323 U.S. 214](#); [Hirabayashi, 320 U.S. 81](#); [Yasui, 320 U.S. 115](#).

n10. The redress movement took many twists and turns, including the 1980 Act of Congress that established the Commission on Wartime Relocation and Internment of Civilians (CWRIC). Pub. L. 96-317, amended by Act of Feb. 10, 1981, Pub. L. 97-3, 95 Stat. 5 (1981); Act of Mar. 16, 1982, Pub. L. 97-1512, 96 Stat. 11 (1982); Act of Dec. 21, 1982, Pub. L. 97-377, 111A, 96

Stat. 1911 (1982). This commission conducted hearings in which many former internees testified, reviewed government documents, and interviewed those still alive who had been responsible for the decision to impose curfews, removal, and incarceration. One major finding was that military necessity did not warrant the exclusion and detention of ethnic Japanese and that the "broad historical causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria and a failure of political leadership." [Korematsu v. United States, 584 F. Supp. 1406, 1416 \(N.D. Cal. 1994\)](#) (quoting United States Comm'n on Wartime Relocation and Internment of Civilians, *Personal Justice Denied*, 18 (1997)). *Personal Justice Denied* was originally published in two volumes by the U.S. Government Printing Office in 1982 and 1983. The present volume was first published by The Civil Liberties Public Education Fund and the University of Washington Press in 1997. "As a result, 'a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.'" [Korematsu, 584 F. Supp. at 1416.](#)

n11. As Dale recalls the events, I was the only Japanese American lawyer he knew in Oregon!

n12. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942):

WHEREAS the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104) [footnote omitted]:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded there from, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, [footnote omitted] and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization,

food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, [footnote omitted] prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

Id.

n13. [United States v. Yasui, 48 F. Supp. 40 \(D. Or. 1942\)](#), petition for cert. filed, (9th Cir. Mar. 30, 1943) (No. A-817), at 3-4. See also Charlie Davis, Land of the Free? A Story of Two Oregon Lawyers and the Limits of Citizenship in War-Time Portland, Or. State Bar Bull. 24 (July 1999).

n14. Shizue Seigel, "It was Bigger Than All of Us" ... : The Behind-the-Scenes Story of the Coram Nobis Team, 11 Nikkei Heritage 6-7 (1999).

n15. See *Yasui v. United States*, 83-151-BE, slip op. (D. Or. 1984) (No. 84-3730). See also [Korematsu v. United States, 584 F. Supp. 1406 \(N.D. Cal. 1984\)](#); [Hirabayashi v. United States, 627 F. Supp. 1445 \(W.D. Wa. 1986\)](#).

n16. See Final Report, supra note 7, at 9.

n17. The cases of Fred Korematsu and Gordon Hirabayashi were also reopened. Rod Kawakami et al., East Wind: The Corum Norbis Cases, 135 Pac. Citizen 9 (Oct. 18-31, 2002). The idea for reopening these World War II cases was suggested in the late '70s and early '80s by two Nisei attorneys, Frank Chuman and William Marutani. They proposed an obscure legal procedure - writ of error coram nobis - to re-litigate the wartime cases, but the problem was that no evidence indicating governmental misconduct was available at the time. It was not until Peter Irons and Aiko Herzig-Yoshinaga uncovered documents that showed governmental fraud in the original wartime cases before the United States Supreme Court that these cases were reopened in 1983. See id.

n18. *Yasui v. United States*, 83-151-BE, slip op. (D. Or. 1984) (No. 84-3730).

n19. Id.

n20. See Brief for Petitioner, *Yasui v. United States*, 83-151-BE, slip op. (D. Or. 1984) (No. 84-3730).

n21. *Yasui v. United States*, 83-151-BE, slip op. (D. Or. 1984) (No. 84-3730).

n22. [Yasui v. United States, 772 F.2d 1496 \(9th Cir. 1985\)](#), petition for cert. filed (U.S. June 21, 1987) (No. A817).

n23. Daniel Levitas, The Radical Right after 9/11: The Attacks Hardened the Resolve of Immigrant Bashers and Anti-Semites," *The Nation*, July 22, 2002, at 23.

n24. Racial profiling is a more recent term first used in connection with law enforcement activities in stopping drivers for no other discernible reason than the driver's race. See Paula Daniels, National Asian Pacific American Bar Association (NAPABA) Position Paper:

Recommendations for Oversight of the USA Patriot Act and for Federal Racial Profiling Legislation 6 (2002), available at <http://www.na-paba.org/uploads/napaba/RPPaperFinal.pdf>. NAPABA defines racial profiling as "law enforcement initiated action that relies on the race, ethnicity or national origin of an individual rather than the behavior of the individual or information that leads the agency to a particular individual who has been identified as being, or having been, engaged in criminal activity." *Id.* at 7, n.21 (citing Northeastern University School of Law Professor Deborah Ramirez).

n25. Levitas, *supra* note 23, at 23. See also Natsu Taylor Saito, Symbolism Under Siege: Japanese American Redress and the Racializing of Arab Americans as 'Terrorists'. [8 Asian L.J. 1, 5 \(2001\)](#).

n26. Levitas, *supra* note 23, at 23.

n27. Professor Saito wrote that just as Asian Americans have been

'raced' as foreign, and from there as presumptively disloyal, Arab Americans and Muslims have been 'raced' as 'terrorists': foreign, disloyal and imminently threatening. Although Arabs trace their roots to the Middle East and claim many different religious backgrounds, and Muslims come from all over the world and adhere to Islam, these distinctions are blurred and negative images about either Arabs or Muslims are often attributed to both.

Saito, *supra* note 25, at 5 (footnotes omitted); Daniels, *supra* note 24, at 8. "As Ibrahim Hooper of the Council on American-Islamic Relations notes, 'The common stereotypes are that we're all Arabs, we're all violent and we're all conducting a holy war.'" Daniels, *supra* note 24, at 9.

n28. No federal laws prohibit the use of racial profiling by federal law enforcement agencies. Daniels, *supra* note 24, at 9.

n29. Jeff Wright, Survey Question Rankles, *The Register Guard* (Eugene, OR), Feb. 6, 2002, available at <http://www.registerguard.com/news/20020206/la.racialprofiling.0206.html> (reporting data from a survey conducted by the Oregon Annual Social Indicators Survey, Jan. 2002).

n30. *Id.*

n31. *Id.*

n32. *Id.*

n33. *Id.*

n34. See Wright, *supra* note 29.

n35. Angie Chuang & Steve Suo, Data: Police Still Twice as Likely to Stop Blacks, *Oregonian*, Aug. 31, 2001, at B5.

n36. These states include California ([Cal. Penal Code 13519.4](#) (2002)), Connecticut ([Conn. Gen. Stat. 54-11](#) (2002)), Kentucky ([Ky. Rev. Stat. 15A.195](#)), Minnesota ([Minn. Stat. 626.8471](#) (2002)), Nebraska ([Neb. Rev. Stat. 20-503](#)), Nevada ([Nev. Rev. Stat. 289.820](#) (2002)), Oklahoma (Okla. Stat. 34.3 (2002)), Rhode Island ([R.I. Gen. Laws 31-21.1-2](#)), and Texas ([Tex. Crim. Pro. Code Ann. 3.05](#) (2002)). See also Daniels, *supra* note 24, at 13-14.

n37. The seven agencies include the police departments of Hillsboro, Portland, Corvallis, Salem, Marion County and Eugene, and the Oregon State Police. See Law Enforcement

Contacts Policy and Data Review Committee, A Brief Retrospective (Feb. 5, 2002). For more specific information of the Committee, see generally Law Enforcement Contacts Policy and Data Review Committee, Meeting Minutes (Feb. 5, 2002).

n38. A Brief Retrospective, *supra* note 37.

n39. Wright, *supra* note 29.

n40. *Id.*

n41. *Id.*

n42. *Id.*

n43. H.B. 2433, 69th Or. Leg. Assemb., Reg. Sess. (1997).

n44. *Id.*

n45. Final Report, *supra* note 7. See also Daniels, *supra* note 24, at 2.

n46. Oregon passed its first exclusionary law in 1844. The law made it illegal for African Americans to come into or reside within the limits of the Oregon Territory. See generally Cathy Ingalls, Shedding Light on Black History, Albany Democrat-Herald (Albany, OR), Mar. 31, 2003, available at [http://mvonline.com/dhonline/dh\\_0526-24.html](http://mvonline.com/dhonline/dh_0526-24.html). The original Oregon Constitution (1857) made it illegal for people of color not only to live in the state, but to hold real estate, use the court system, engage in business requiring contracts, or to vote. For a copy of the original 1857 Oregon Constitution, see <http://bluebook.state.or.us/state/constitution/OGConstitution/ORConstitution/OriginalHeading.htm>.

n47. Interview with Thach Nguyen, Immigrant and Refugee Community Organization, in Portland, Or. (Apr. 30, 2002).

n48. Jacob Sullum, Trial Run: Accused Terrorists Get Due Process - When the Government Feels Like It (Sept. 20, 2002), at <http://www.reason.com/sullivan/092002.html>.

n49. Jonathan Turley, Camps for Citizens: Ashcroft's Hellish Vision, L.A. Times, Aug. 14, 2002, at B11.

n50. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), H.R. 3162, 107th Cong. (Oct. 25, 2001).

n51. [Korematsu v. United States, 584 F. Supp. 1406, 1420 \(D. Cal. 1984\).](#)

n52. [Id. at 1416.](#)

n53. In Oregon, the Asian/Pacific Islander community has the highest percentage of possible registered voters of any community of color: 82.5%. Interview with Thach Nguyen, Immigrant and Refugee Community Organization, in Portland, Or. (Apr. 30, 2002).

n54. Martha Nakagawa, As September 11 Anniversary Approaches, Groups Debate Whether it Should be a National Holiday, 131 Pac. Citizen 1-2 (Aug. 16-Sept. 5, 2002). Dr. Roger Daniels is a pioneer scholar on Japanese American history who served in the merchant marines during World War II.