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CYRA AKILA CHOUDHURY is Professor of Law at Florida International University College of Law. She is an internationally recognized expert in property, gender, minorities and transnational security, and comparative law. Her scholarship appears in leading international law journals in the United States and a number of edited volumes.

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Islamophobia and the Law

Edited by

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This book is dedicated to all those who have lost their lives, been the subject of violence and hate because they are Muslims, who have been targeted for intervention globally in the Muslim world and who continue to struggle for a more just world in spite of the difficulties. It is also dedicated to my two nieces, Magda and Suraiya. May they thrive in a world with less Islamophobia and hate. May they live in a world that values honesty and kindness.

Cyra Akila Choudhury

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Khaled A. Beydoun

Introduction

Khaled A. Beydoun and Cyra Akila Choudhury

1 WHAT IS ISLAMOPHOBIA?: THE RISE OF A CONCEPT

Muslims in America are no strangers to prejudice and disparate treatment based on perceived difference. Particularly during moments of crisis, whether local or global, media pundits and academics offer opinions about political Islam and modernity regardless of their actual expertise, while Muslims brace for the inevitable backlash. Much of the current Manichean thinking about Islam has a long history and can be traced back to the very first encounters between Christians and Muslims. But more recently scholars like Bernard Lewis and Samuel Huntington have argued that "Islam" is at odds with "the West" – both of these constructed as mutually exclusive and monolithic. As part of this long-standing tradition of scholarship that seeks to differentiate Islam from Judeo-Christianity and Europe, some experts continue to advance the view that Islam is incompatible with liberal values and democracy at large because of the essential differences between the two.

In his pathbreaking work, the late Edward Said argued that what is (mis)understood as "Islam" in the West has largely been a projection of Western fears and fantasy for several centuries. He coined the term Orientalism, and theorized about Western scholars' engagement with Islam and Muslims, to describe this scholarship, which often substituted the voices, experiences, and self-knowledge of Arabs and Muslims with those of Western experts. Some of these experts had never even been to the countries they opined about. While genuine scholars with deep expertise, of course, exist, one of the enduring features of Orientalism is the elevation of the "objective" scholarship of those who are not themselves Arabs or Muslims. This expertise has come with the erasure of bona fide Muslim voices until recently. The self-representation of native scholars, as a result, has often been viewed with suspicion, if not dismissed as biased.

Fast-forwarding several decades, we find the terror attacks of September 11, 2001, a watershed moment in the United States. In their wake, a renewed interest in the

Middle East, North Africa, and Asia flourished, giving rise to both more serious scholarship and self-appointed, neo-Orientalist experts in Islam. And because few non-Muslim Americans have had interactions with Muslims, the portrayals on television, movies, and by scholars have become the prevailing received knowledge for most people. A great deal of what emerged in the aftermath of 9/11, and with the rise of an industry of national security experts like Frank Gaffney and Brigitte Gabriel, has been blatantly prejudiced against Islam and Muslims. For many years, this form of American animus did not have a name – or at least did not have a name that scholars agreed upon, one that mainstream media voices regularly used or that activists and advocates on the ground adopted. However, the political realities and the lived experiences of the post–9/11 world required new terms and fresh theories. Orientalism was still a potent phenomenon, yet the term and theory were largely confined to academic discourses and had been crafted before 9/11.

Unlike earlier crises, the 9/11 attacks were perpetrated on the "homeland." As a result, they made clear for the first time that American communities were vulnerable. The 9/11 attacks were categorically different because the threat was no longer "out there" but could very well penetrate deep within US communities. The response to the attacks, as many of the chapters in this volume describe, ranged from the institutional and political targeting of Muslims through national security measures to private violence unleashed on the streets. Over the decade that followed, the targeting of Muslims as subjects of surveillance, regulation, and violence resulted in the development of a discourse and vocabulary that sought to carefully describe state and private animus. The rise of the term *Islamophobia* can be traced as part of this development, and indeed emerged into a concept within academic literatures, but also was championed by advocates and activists on the ground, in the media, and beyond. The term is now widely understood as a cognizable form of animus toward Muslims and perceived Muslims, but it remains hotly debated and disparately defined.

Some critics, who believe that the perils posed by Islam and Muslims should be legitimately feared and confronted, oppose the term because it makes "irrational" what they claim to be entirely rational. Such critics often see Islam and Muslims as a monolith and argue that treating Muslims differently is a justified response. In fact, the ongoing treatment of Muslims as aberrant threats is precisely one of the reasons the term Islamophobia is useful. Just as Islamophobes carve out Muslims as exceptional threats *because of their connection to Islam*, the term reflects this very specific operation of using a single identity to exceptionalize by focusing on the basis of that identity: Islam.

Academic critics may claim that the term Islamophobia is too diffuse and imprecise to be of much analytical value. After all, it seeks to describe a host of practices and beliefs that may be only loosely related by the reference to Islam or Muslims. But, again, that is precisely why we think the term is valuable. It is capacious enough to capture the complexity of the various theoretical and practical manifestations of a

multifaceted animus towards Islam and Muslims that is not reducible only to race, religion, or national origin. Islamophobia as a theoretical concept attempts to encapsulate the intersectional, shifting, dynamic othering of *Muslims* and *Islam* where these are not incidental but central to that othering, even if combined with other identities. As a result, the term itself is used in multiple ways and in different contexts throughout this volume. Moreover, the subjects of Islamophobia are not only "real" Muslims and believers in Islam, but include those who may be mistaken for Muslims. For instance, when a mathematician is removed from a flight because mathematics is mistaken for Arabic, we understand this to be an example of Islamophobia. When turbaned Sikhs or women wearing a scarves are targeted as Muslims, this is also Islamophobia. These incidents are incomprehensible without the animus towards Muslims and Islam. They cannot be understood as racism or sexism alone. We acknowledge that conceptually Islamophobia is necessarily imprecise, which is both a strength and a weakness. However, no other term makes these phenomena immediately intelligible (even if reductively) to a wide range of audiences in way that resonates now more than at any other time in the history of the United States.

While the targeting of Muslims and the vilification of Islam saw a dramatic increase in the aftermath of 9/11, it took Donald Trump's presidential campaign to elevate Islamophobia to a full-fledged political strategy. From the beginning of his bid for president, Trump took every opportunity to vilify Islam and Muslims. Dismissing white nationalist violence and threats, Trump repeatedly focused on Muslims, tying them collectively to foreign threats. Because of the centrality of this strategy as a means of mobilizing his supporters, Trump could be called the "Islamophobia president."[1] Furthermore, following up on his promises to stop threatening immigrants from invading the country, Trump enshrined Islamophobia as presidential policy during his first week in office by issuing the first travel ban targeting seven Muslim-majority nations.[2] As such, Islamophobia is now firmly at the center of American life. It has become a means by which other political aspirants can gin up fear while consolidating support among a vocal white-supremacist base. The term Islamophobia has now become mainstream among a diverse collective of activists and academics confronting the social, political, and legal phenomena. It is now routinely used in social media, the news, and increasingly in a growing academic literature of which this volume is a part.

While a full review of the literature is beyond the scope of this introduction, it is important to briefly sketch the origins of the term. Islamophobia was established in the scholarly literature by a range of sources. The Runnymede Trust, a British think

[1] Khaled A. Beydoun, *Donald Trump: The Islamophobia President*, Al Jazeera English (Nov. 9, 2016), available at https://www.aljazeera.com/indepth/opinion/2016/11/donald-trump-islamophobia-president-161109065355945.html.

[2] White House, *Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States*, Jan. 27, 2017.

tank, is widely recognized to be the first entity to coin the term Islamophobia. In a study conducted in the early 1990s, it defined Islamophobia as an "unfounded hostility towards Muslims, and therefore fear or dislike of all or most Muslims."[3] This definition did not attain broad acceptance or appeal until after the 9/11 terror attacks and their aftermath, when targeting and scapegoating of Muslims followed. A 2011 study titled *Fear, Inc.: The Roots of the Islamophobia Network in America* built on the foundational definition offered by Runnymede and added another dimension to the anti-Muslim network based in the United States. The study did not offer an explicit definition, but exposed the network of pundits, lobbyists, and organizations committed to and collaborating in the maligning of Islam and Muslims:

> And it all starts with the money flowing from a select group of foundations. A small group of foundations and wealthy donors are the lifeblood of the Islamophobia network in America, providing critical funding to a clutch of right-wing think tanks that peddle hate and fear of Muslims and Islam—in the form of books, reports, websites, blogs, and carefully crafted talking points that anti-Islam grassroots organizations and some right-wing religious groups use as propaganda for their constituency.[4]

Fear, Inc. noted the financial interests pushing Islamophobia and demystified the idea that it was an entirely "irrational" form of animus or fear. Other programs that popularized the term and added to the growing literature were Georgetown University's The Bridge Initiative, a research project on Islamophobia and UCLA's Islamophobia Research and Documentation Project. Professor Stephen Sheehi's book *Islamophobia: The Ideological Campaign Against Muslims* was one of the first monograph-length treatments of the subject.[5] In the United Kingdom, Dr. David Tryer's *The Politics of Islamophobia: Race, Power and Fantasy* examined similar themes, such as the racialization of Muslims.[6] Most recently, in his book *Islamophobia and Racism in America*, sociologist Erik Love also offers a definition of Islamophobia that frames it as racism against Muslims and perceived Muslims.[7] Adopting a critical race theory lens, Love sees Islamophobia as a fluid form of racism unleashed distinctly by state and private actors. These definitions rank among the most resonant and cogent framings of Islamophobia that inform the definition we advance in this book.

In the following section, we develop the concept of Islamophobia in greater depth, exploring some of the shortcomings of the popular use of the term. We then

[3] Robin Richardson, Islamophobia: A Challenge for Us All (1997).

[4] Wajahat Ali, et al., *Fear Inc.: The Roots of the Islamophobia Network in America*, Center for American Progress 1, 9–10 (2011).

[5] *See* Stephen Sheehi, Islamophobia: The Ideological Campaign Against Muslims (2011).

[6] *See* David Tryer, The Politics of Islamophobia: Race, Power and Fantasy (2013).

[7] Erik Love, Islamophobia and Racism in America (2017).

elaborate on the legal definition of the term and how law is an integral part of Islamophobia.

2 TOWARD A COMPREHENSIVE UNDERSTANDING OF ISLAMOPHOBIA

Media pundits and politicians, lawyers and advocates, and scholars within the legal academy and beyond now use the term Islamophobia, further entrenching it into the scholarly and popular lexicons. However, until recently, a comprehensive definition was still lacking, and specifically a definition of Islamophobia that encompasses the law's role in maintaining and perpetuating it, the ties the modern animus toward Islam and Muslims has to preceding systems, and how the intimate relationship between government action and society has the potential to authorize private violence against Muslims. Before we articulate a fuller definition, it is important to briefly discuss the shortcomings of the prevailing uses of the term.

First, popular definitions of Islamophobia tend to center on the acts of individuals, specifically those who are framed as deviants or fringe actors and whose actions are deemed as irrational and disconnected from prevailing political discourses or "War on Terror" policy. Islamophobes, like Craig Hicks, who executed three Muslim students in Chapel Hill, North Carolina on February 10, 2015,[8] are profiled as aberrant, lone actors whose hate for Islam and violent actions are not emblematic of a broader culture or inspired by tropes and narratives endorsed by state policy. However, Islamophobia is far more than mere ignorance or hatred on the part of individuals and supersedes "fear and dislike" of Islam and Muslims[9] on the part of presidents or politicians. These definitions caricature Islamophobia as irrational[10] when, in fact, demonization of Islam and discriminatory policies are rational and increasingly successful strategies. This is exemplified most vividly by Donald Trump's capitalization of Islamophobia to mobilize supporters during the 2016 presidential campaign and placate his base during the earliest stages of his presidency by signing the "Muslim Ban" executive order only one week after his inauguration.

Second, these definitions limit Islamophobia to beliefs and actions held by private actors, not state institutions. This narrow framing exempts the state from charges of propagating Islamophobia and excuses it from accountability. Such a truncated description, particularly during the never-ending global War on Terror, fails to connect how the acts of individuals are inspired by the policies and messages disseminated by the state in its counterterrorism and national security policies and actions. For example, the Supreme Court upholding the (third version) of the

[8] Saeed Ahmed and Catherine E. Schoichet, *3 Students Killed in Chapel Hill Shooting*, CNN (Feb. 11, 2015).

[9] Bridge Initiative Team, *Islamophobia: The Right Word for a Real Problem* (Ap. 26, 2015).

[10] Islamophobia can be deeply irrational. Our point is that it is not always so and that, for several decades, it has proven to be a well-thought out and productive political strategy.

"Muslim Ban" executive order in *Trump v. Hawaii* demonstrates the state's central role in not only endorsing Islamophobic fears and anxieties,[11] but also in authorizing it through symbolic declarations and state action.

Third, standing definitions largely fixate on the most stark and egregious forms of Islamophobia. Namely, recorded and registered hate crimes, attacks on conspicuous Muslims, murders, arson and vandalism of mosques, or explicit slurs, projecting the idea that Islamophobia is limited to openly visible acts of violence or bigotry. By training our attention on the spectacular and the extreme, much of the quotidian forms of Islamophobia that pervade society are ignored. Moreover, people need not confront the ideology of Islamophobia if Islamophobia is reduced to unconnected, random acts of violence and hate that occur spontaneously and therefore cannot be predicted or stopped.

Fourth, definitions of Islamophobia limit its victims to Muslims, when in fact a number of non-Muslim groups are also vulnerable to and targeted by it. Since Islam is commonly "racialized" or perceived in racial or religious terms, ethnic groups – turban-wearing Sikhs, for example – who fit stereotypical caricatures of Muslims and are frequent targets particularly by individual actors. This was vividly illustrated five days after the 9/11 terror attacks when Frank Roque shot and killed Balbir Singh Sodhi, the Sikh owner of a Chevron gas station, in Mesa, Arizona.[12]

Fifth, formative conceptions of Islamophobia have not adequately recognized it as a form of animus that intersects with other forms of subordination and discrimination. As theorized in her landmark piece, "Mapping the Margins: Intersectionality, Identity Politics, and Discrimination Against Women of Color,"[13] Kimberlé Crenshaw examined the compounded stigma faced by women of color along the converging lines of two subordinate identities (gender and racial identity). Crenshaw coined the term *intersectionality*, which is now widely used to denote multiple subordinations. As we note above, Islamophobia is *deeply* intersectional. It is a form of animus that interacts and overlaps with other forms of stigma and subordination, most notably racism, sexism, class/poverty, colorism, and more. The definition of Islamophobia advanced by this project enables an intersectional examination of Islamophobia, and the book comprises articles that underscore this analysis.

Finally, early definitions of Islamophobia characterize it as a modern phenomenon spawned in the aftermath of the 9/11 terror attacks. In her seminal article "The Citizen and the Terrorist," excerpted in this book, Professor Leti Volpp wrote, "We are witnessing the redeployment of old Orientalist tropes. Historically, Asia and the Middle East have functioned as phantasmic sites on which the U.S. nation projects a series of anxieties regarding internal and external threats to the coherence of the

[11] Trump v. Hawaii, 138 S.Ct. 2392, 2402, 201 L. Ed. 2d 775 (2018).

[12] Tamar Lewin, *Sikh Owner of Gas Station Is Fatally Shot in Rampage*, N.Y. Times, Sep. 17, 2001.

[13] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Discrimination against Women of Color*, 43 Stan. L. Rev. 1241, 1241 (1993).

national body."[14] This observation, made in the immediate wake of the 9/11 terror attacks and during the earliest stages of the War on Terror, connected the uptick in animus against Islam and profiling of Muslims with a long-standing discourse of Orientalism that predates Islamophobia but informs and empowers it.[15] Islamophobia, as we argue above, is the progeny of Orientalism which frames the "Orient," of which the monolithic and essential "Muslim world" is a part, as the mirror opposite and civilizational antithesis of the "Occident," or the West.[16] In the next section, we argue that law is vital to theorizing Islamophobia, and any intervention or discourse that seeks to grapple with it.

3 A LEGAL DEFINITION

Law is central to the broader project of Islamophobia. Islamophobia consequently cannot be adequately theorized or explained without an account of the operations of law. By *law*, we mean both positive laws enacted by the state in local, state, and federal institutions, but also the social norms that prevail. As such, our broad understanding of "law" is in keeping with the law and society literature and with the view that overly formal conceptions of the law miss the ways in which society is regulated and regulates itself through informal policing of norms that may not appear in any legislative code or judicial decision. While there are sociological approaches to the study of Islamophobia, we are interested in this volume in the way that Islamophobia pervades legal institutions and enactments, and in the laws' effects on society.[17]

In the *Columbia Law Review Online*, Professor Beydoun advanced a legal definition and theoretical framework for understanding Islamophobia,[18] which we refine and elaborate here. While the authors in this volume may vary in their understanding of the concept, we think that the articulation advanced by Professor Beydoun encompasses the variations found in the chapters and provides a starting point from which to expand the theorization of Islamophobia.

Islamophobia is the presumption that Islam is inherently violent, alien, and inassimilable, combined with the belief that expressions of Muslim identity are correlative with a propensity for violence and terrorism. However, because Islamophobia is part of the cultural and political landscape shaped by centuries of

[14] Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1586 (2002).
[15] Edward Said, Orientalism (1979).
[16] *Id.*
[17] The institutionalization of Islamophobia is made clear in the War on Terror policies and programs, in executive actions and judicial rulings, and most starkly in the wholesale restructuring of the state national security apparatus and the creation of the Department of Homeland Security (DHS).
[18] Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 Col. L. Rev. Online 108, 108 (2016).

differentiation and notions of civilizational superiority, it need not manifest in its most extreme forms.

We suggest that even those who would disavow any belief that Islam is unassimilable and violent may be advancing Islamophobic ideas nevertheless. For example, the common use of the term *moderate Muslim* assumes that there are some "good Muslims" who will assimilate, who are not violent or alien. Yet this very common liberal formulation incorporates ideas that in order to fit in or to be acceptable, Muslims must interpret and perform their faith and identity in line with the dominant culture. There is a shared sense, then, that Islam is Western civilization's antithesis or that it is essentially different and/or incompatible. This is the discursive and structural landscape in which Islamophobia is perpetuated by state institutions, as well as by private institutions and citizens. Furthermore, and to reiterate some earlier points, Islamophobia is a fluid and dynamic process by which law, state policy, and action targeting Muslims endorse prevailing stereotypes and, in turn, embolden private targeting of Muslims and perceived Muslims.[19]

The definition advanced by Professor Beydoun includes three dimensions or subdefinitions, which identify and enable analyses of the distinct forms of Islamophobia that comprise the broader phenomenon. These dimensions are: (1) private Islamophobia; (2) structural Islamophobia, and; (3) dialectical Islamophobia. These are not exclusive nor entirely separate, but interact with one another in complex ways. Professor Choudhury's work has elaborated on the discursive construction of Islam and Muslims as a threat.[20] By capturing and resignifying the language of Islam and redefining words like *shari'ah*, *dhimmi*, *jihad*, and others, Islamophobes discursively link Muslims and the practice of Islam to violence and terror. By asserting that part of Muslim religious practice is to lie to non-Muslims to hide their true purpose of establishing "shari'ah law," all Muslims are rendered dishonest and unable to disavow any such interest. In a maddening catch-22, Muslims can only be believed when they "confess" to espousing the beliefs that they are accused of by Islamophobes. This discursive construction pervades all the dimensions of Islamophobia described in this chapter.

3.1 *Private Islamophobia*

Private Islamophobia is the fear, suspicion, and violent targeting of Muslims by individuals or private actors. This animus is most obviously carried forward by nonstate actors' use of religious or racial slurs, mass protests or rallies, and violence against Muslim or perceived Muslim subjects.[21] Examples of private Islamophobia

[19] *Id.*

[20] *See generally*, Cyra Akila Choudhury, *Shari'ah Law as National Security Threat*, 46 Akron L. Rev. 49 (2013).

[21] *See* Beydoun *supra* note 18 at 111.

include the murder of the three Muslim American students in Chapel Hill; vandalizing and burning of American mosques, which climaxed to 78 separate recorded incidents in 2015;[22] and the increasing incidence of attacks on conspicuous Muslims, most notably Muslim women who wear the hijab, emboldened by the campaign messaging and political rhetoric of Donald Trump. In addition, private actors may use more subtle, less obvious methods to advance Islamophobic policies. Subtler forms may be attempts to question Muslim loyalties, to repress speech against Islamophobia or for causes associated with Arabs and Muslims, and discriminatory hiring practices.

3.2 *Structural Islamophobia*

Structural Islamophobia is the fear and suspicion of Muslims on the part of public institutions manifested through law and policy, through both official discourse and action. These manifestations of state action are built upon the presumption that Muslim identity is associated with terrorism or the threat of it.[23] Structural Islamophobia, while typically exacted and enforced by state actors, is sometimes carried forward by private actors that closely collaborate with state agents, including think tanks, corporations, and other networks.

The most obvious examples of structural Islamophobia are the creation of government institutions like the Department of Homeland Security and departments within existing agencies. Laws, including the U.S. PATRIOT Act and the National Security Exit and Entry Registration System (NSEERS), both enacted after the 9/11 terror attacks; executive actions, including Trump's travel bans or President Barack Obama's "Countering Violent Extremism" program; and the declaration initiating the War on Terror,[24] by George W. Bush ten days after the 9/11 terror attacks primarily targeting Muslims are also part of structural Islamophobia. These structures then endorse and disseminate problematic tropes about Islam and Muslims, resulting in structural Islamophobia. In other words, the state is not only acting by way of law or policy, presidential rhetoric, and national security programming, but is communicating a specific and strategic set of messages to society through institutional action.

3.3 *Dialectical/Co-constructed Islamophobia*

This form of Islamophobia may be the most difficult to grasp for those outside the halls of academia. Professor Beydoun argues that Islamophobia is also a systematic,

[22] Talal Ansari, *There Was a Huge Increase in Attacks on Mosques Last Year*, BUZZFEED, June 20, 2016.

[23] Beydoun, *supra* note 18, at 114.

[24] *Text of George Bush's Speech*, THE GUARDIAN, Sep. 21, 2001.

fluid, and deeply politicized dialectic between the state and its polity, a dialectic whereby the state shapes and reshapes, endorses, and entrenches popular views, stereotypes, and attitudes about Islam and Muslim subjects inside and outside of America's borders.[25] He argues that this is *dialectical Islamophobia*, the process by which state action legitimizes prevailing misconceptions, misrepresentations, and tropes widely held by private citizens and, during times of crisis and political opportunism, emboldens bigotry and violence against Muslims and subjects perceived to be Muslim. Professor Choudhury argues that the dialectic can be understood differently as the tension between Islamophobia and liberal conceptions of multiculturalism. The state and sections of the polity can be on both sides of this tension. What Professor Beydoun describes as a dialectic,[26] Professor Choudhury would define as the co-construction of Islamophobia through an iterative process actively resisted by those on the opposing side of the dialectic: Muslims, civil rights activists, and those opposed to Islamophobia. The "Islamophobic state" and its polity then respond in move and countermove against their opposition and responsive to their supporters, to advance their policy objectives.

The state's rubber-stamping of widely held stereotypes of Islam and Muslims in society through surveillance, religious and racial profiling, and tightened immigration policies is one cornerstone of dialectical Islamophobia. This exchange, by which the broader polity absorbs the state's suspicion of Muslims by way of structurally Islamophobic policies, is an ongoing co-construction that links state policy to hate and violence unleashed by the polity. Another aspect of the dialectic is the way in which private actors influence and direct public and state responses. This is most clearly seen in the ways in which police and law enforcement agencies rely on manifestly Islamophobic private corporations and individuals for training and information. In recent times, Donald Trump has increasingly incorporated the views of Islamophobes like Sebastian Gorka and Steve Bannon in state policy, even giving them governmental roles. Thus, we see that the exchange between public and private is mutually reinforcing. Indeed, the borders between private and public are highly porous.

3.4 *The Interplay among the Three Dimensions of Legal Islamophobia*

Prevailing definitions of Islamophobia overlook the interplay between state policy and the private views about Muslims and Islam. Like other forms of bigotry, the

[25] Beydoun, *supra* note 18, at 119.

[26] What Professor Beydoun describes as dialectical is not what is philosophically understood by that term, which involves the interplay between thesis and antithesis to reveal a greater truth. This truth does not always have to be positive, as Adorno argued in *Negative Dialectics*. Rather Beydoun's framework elaborates one side of a dialectic in which state and polity co-create Islamophobia – feeding each other in its construction – in tension with those who resist it on the opposing side of the dialectic.

shape of Islamophobia is contingent upon mass media representations, political rhetoric, and messaging, but – most crucially – on government programming and policy. The fluid expansion of structural Islamophobia programming, which is reaching a second apex fifteen years after 9/11 with commercial vehicle enforcement (CVE) policing, continuously communicates to the broader polity that Islam is to be viewed with suspicion. This, in turn, keeps the view foremost in people's minds that Muslims and those who may be mistaken as Muslims are potential threats at best and actual terrorists in our midst at worst. The result has been predictable: an increase in violence against Muslims.

Structural Islamophobia conscripts the public through repeated overt or subtle calls to action. For instance, authorities alert private citizens to be on guard for Muslim radicals. They involve the public through paid informant roles or in a private capacity, pushing them to participate in policing Muslims. In turn, private actors often urge government action of a similar sort by calling the police on innocent people, by asking zoning boards to deny permits to build mosques, and by seeking the removal of public officials on the basis of their religion. This dialectic links the structural and private cornerstones of Islamophobia: the rapidly rising animus rooted in centuries'-old tropes and reified by contemporary War on Terror and counterradicalization policy that drive state policing of Muslim communities, and popular violence toward Muslims and perceived Muslims.

Perhaps one of the most obvious examples of how these dimensions of Islamophobia come together is that of the anti-shari'ah bills that have proliferated at the state level from 2007 onwards. These bills were originally drafted as a model law by private actors and organizations that have made it their focus to counter the perceived "green peril." The law was then marketed to legislators in various states, who took up the model and proposed bills in their state legislatures. Some of these bills, including constitutional amendments, have been enacted into law only to fall to constitutional challenge. Nevertheless, the very fact that political representatives have been willing to propose such blatantly unconstitutional laws plays an expressive role in marginalizing Muslims and underwriting violence against an already vulnerable community.

Because this book is about the construction of Islamophobia, we do not explicate the other half of the dialectic, which is the resistance of these constructions. The chapters, however, demonstrate that civil rights activists, lawyers, academics, and ordinary Muslims have not simply allowed Islamophobia to take root unchallenged. Rather, they have actively fought back, using well-established forms of resistance, including law, education, outreach, and popular activism. This dialectic has resulted in the Islamophobic state and polity shifting strategies, which is most evident recently in the three travel bans issued by Donald Trump and by the increasing use of religion-neutral language in the erstwhile anti-shari'ah bills.

4 THE LAW'S ISLAMOPHOBIA[27]

As we have argued earlier in this chapter, Islamophobia is neither a transient nor a temporary form of animus, because of its multifaceted nature. It is woven into the fabric of American political and social life. Beyond the War on Terror, which remains a fixture in American domestic and foreign policy, the roots of modern Islamophobia run deep. Furthermore, politicians continue to find Islamophobia an indispensable tool to rally support, and thus they keep it visible in the public domain. The Trump administration is only the latest exemplar of this. Its use of Islamophobia is simply more brazen than earlier administrations, and it has introduced or raised this latent hate in new communities and mainstream spaces.

This book was conceived of during the year preceding the 2016 presidential election. During that time, the use of populist rhetoric to roil hatred made the need to address the rise of Islamophobia urgent. In the month preceding Trump's electoral victory and then in the first year of his administration, the repeated vilification of Muslims and Islam and the alarming rise in hate crimes against minorities made the book even more important. As we approach another election year, this urgency has not diminished, but rather increased.

The project is driven by the commitment to not only link Islamophobia to its antecedents like Orientalism, racism, and religious bigotry, but also to demonstrate its rapid evolution after the inauguration of the War on Terror and to draw attention to the ways in which Islamophobia in the present context of an increasingly right-wing populist mobilization is different and perhaps even more dangerous.

5 THE STRUCTURE OF THE BOOK

The book contains fourteen chapters, divided into four parts. Part I, "Race and Citizenship," includes four chapters based on or excerpted from articles written in the aftermath of the September 11, 2001 attacks. These early works form the foundational scholarship that gave rise to a growing literature on the treatment of Islam, Arabs, and Muslims in law and society, which eventually coalesced into a body of work on Islamophobia and the law. These chapters are critical to the understanding of how Islamophobia has evolved. Leti Volpp's excerpted article in Chapter 1, "The Citizen and the Terrorist," theorizes the violence done to Muslims after 9/11. She argues that it is not simply the racialization of this community, but the convergence of racial profiling, old Orientalist tropes, and the relationship among citizenship, nation, and identity that explain the "ferocity with which multiple communities have been interpellated as responsible for the events of September [11]."[28]

[27] Chapters that are excerpted from earlier published works are so noted. The citations have been formatted for consistency throughout the book and may differ from their original form.

[28] Volpp, *supra* note 14.

In Chapter 2, Susan Akram and Kevin Johnson's excerpted article, "Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims," underscores the ways in which immigration law and civil rights are intimately connected. The authors argue that the measures taken after 9/11 partake of a long history of suppression of political dissent through national security and immigration laws that violate or deprive people of civil rights protections. In Chapter 3, Karen Engle's excerpt, "Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)," continues the thread in the earlier chapters, historicizing the use of immigration law in the post–9/11 period to exclude "bad aliens." The chapter theorizes how the construction of good/bad aliens and citizens is used as an organizing principle in immigration law and is used to discipline and regulate both aliens and citizens in the War on Terror. In Chapter 4, Muneer Ahmad's excerpt, "A Rage Shared by Law: Post–September 11 Racial Violence as Crimes of Passion," demonstrates how anti-Muslim violence is part of a history of hate crimes, but is also different in that violence is justified as a crime of passion provoked by the terror attacks. This, then, normalizes that violence, making it entirely comprehensible: violence to which we can relate.

Part II of the book, "The Politics of Islamophobia in the Courts," consists of three chapters. The first of these is a transition from the chapters in Part I, which were written immediately after 9/11. In Chapter 5, Shirin Sinnar provides a fresh take on the story of Javaid Iqbal, a man detained in the sweeping immigration raids after the attacks. In "The Lost Story of *Iqbal*," she shows the impact of immigration detention on Muslim communities, making their stories visible in the narrative of the case. Khaled Beydoun's excerpt in Chapter 6, "'Muslim Bans' and the (Re)making of Political Islamophobia," links historical deployments of Islamophobia to the present. It elaborates on the symbiotic connection between Islamophobia and the law by exploring specific legal discourses in national security, immigration, and civil rights. In Chapter 7, "'Islamic Law' in U.S. Courts: Judicial *Jihad* or Constitutional Imperative?," Faisal Kutty takes on the burgeoning anti-shari'ah bills introduced in many states across the country, and demonstrates how ordinary interpretations of religious law in US courts have been politicized into a shari'ah panic.

In Part III, "Islamophobia in Criminal Law and National Security Law," the book then turns to Islamophobia in those specific contexts. In Chapter 8, "A Muslim Registry: A Look at Past Practice and What May Come Next," Abed A. Ayoub provides a history of past registration programs from the Nixon period. His chapter addresses the anxiety about a Muslim registry implemented by the Trump administration and what that may entail. Forms of regulation and surveillance in the War on Terror have proliferated well beyond registries. In Chapter 9, Amna Akbar's excerpt of "National Security's Broken Windows" argues that the state's Countering Violent Extremism measures share many of the problems of community policing. These measures, like broken-windows policing, further marginalize and overpolice vulnerable communities. Chapter 10, SpearIt's excerpt, "Muslim Radicalization in Prison:

Responding with Sound Penal Policy or the Sound of Alarm?," challenges the prevailing ideas about Islam in prisons, particularly attempts to prevent so-called radicalization, a term that he contests.

The book's final section, Part IV, "Law, Society, and Islamophobia," consists of four chapters that explore Islamophobia and the law in the contexts of where we live and worship and in the gendered experiences of Islamophobia. In "Property Lawfare: Historical Racism and Present Islamophobia in Anti-Mosque Activism," Chapter 11 of the book, Cyra Akila Choudhury theorizes the use of property law to maintain the exclusion of minorities (African Americans in the past and Muslim houses of worship in the present) from predominantly white suburbs. Karen Rhone takes up the issue of segregation and its contribution to the denial of Muslims' civil liberties in Chapter 12, "Liberty and Death." Aziza Ahmed's contribution in Chapter 13, "The Gender of Islamophobia," explores the specifically gendered narratives that were advanced both after 9/11 and in the presidential election of 2016, where women's rights and the treatment of LGBT people in Islam became a focus. In the book's final excerpt, Chapter 14, "Coercive Assimilationism and Moslem Women's Identity Performance in the Workplace," Sahar F. Aziz theorizes the ways in which Muslim women's identity performance results in forced assimilation to dominant norms, particularly when it comes to outward displays of religious faith like the wearing of a hijab.

6 CONCLUSION

This edited volume features selections that examine the legal roots of Islamophobia, tracing its evolution from early Orientalism to its modern iteration. The first section of the book includes critical scholarship that was written in the first few years after 9/11. These are important not simply for historical reasons – that history is very recent – but because much of the critique remains relevant in the never-ending War on Terror world. The sections that follow Part I grapple with modern Islamophobic laws, policies and programs that emerged over the last two decades. These selections focus on the most menacing forms of Islamophobia that exist today, providing the reader with an understanding of the legal and administrative programs that form the foundation of structural Islamophobia today. In addition, this edited volume also includes selections that examine the private Islamophobia of individuals and private actors, in spheres including the employment context, property law, and more, which are generally marginalized from mainstream discussions of Islamophobia.

The volume's broad coverage examines Islamophobia at the center and also at the margins. The organization of the book allows it to be read serially to get a comprehensive understanding of Islamophobia as it has evolved since 9/11. Alternatively, chapters can be read or assigned individually according to subject matter. In general, the volume is an opening. It is an attempt to collate the important work that has emerged as a field. It seeks to shift our attention to neglected areas of the law and

also to and inspire future analysis of Islamophobia within all areas, including legal spheres where Islamophobia is thought to be non-germane. It is not exhaustive. Undoubtedly, there are chapters that ought to have been included, but that for concerns of length could not be. While this is the first multiauthor volume addressing Islamophobia and its intimate relationship with the law, we do not expect or anticipate it to be the last. Just as the War on Terror and the rise of populist hate continues to proliferate different forms of Islamophobia, scholars will continue to theorize and suggest ways to understand these phenomena well into the future.

PART I

Race and Citizenship

1

The Citizen and the Terrorist

Leti Volpp[*]

1 INTRODUCTION

In the wake of the terrorist attacks of September 11, 2001, there have been more than 1,000 incidents of hate violence reported in the United States. How do we understand this violence, and in particular, its emergence in a context of national tragedy? What are the seeds of this violence, and how has the political climate following September 11 allowed them to grow? Of course, there are no easy answers to these questions. I would suggest that September 11 facilitated the consolidation of a new identity category that groups together persons who appear "Middle Eastern, Arab, or Muslim."[1] This consolidation reflects a racialization wherein members of this group are identified as terrorists and are disidentified as citizens. The stereotype of the "Arab terrorist" is not an unfamiliar one. But the ferocity with which multiple communities have been interpellated as responsible for the events of September suggests there are particular dimensions that have converged in this racialization. I offer three: the fact and legitimacy of racial profiling; the redeployment of old Orientalist tropes; and the relationship between citizenship, nation, and identity.

[*] This chapter is an excerpt of the previously published article, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575 (2002).

[1] The category of those who appear "Middle Eastern, Arab, or Muslim," is socially constructed, like all racial categories, and heterogeneous. Persons of many different races and religions have been attacked as presumably appearing "Middle Eastern, Arab, or Muslim." South Asians, in particular, along with Arabs and persons of Middle Eastern descent, have been subject to attack, although Latinos and African Americans have also been so identified. The category uses the religious identification *Muslim* as a racial signifier. Persons have been attacked since they "appear Muslim," which, of course, makes no sense, since Muslims can be of any race. For a discussion of the equation of "Muslim" with "Middle Eastern" or "Arab," and the use of "Muslim" as if it were a racial category see Moustafa Bayoumi, *How Does It Feel to Be a Problem?*, Amerasia J. 2001-02, at 69, 72–73.

2 ON RACIAL PROFILING

Before September 11, national polls showed such overwhelming public opposition to racial profiling that both US Attorney General John Ashcroft and President George W. Bush felt compelled to condemn the practice.[2] There was a strong belief that racial profiling was inefficient, ineffective, and unfair.[3] This all seems a distant memory. There is now public consensus that racial profiling is a good thing, and in fact necessary for survival.'[4] There are at least five ways in which this racial profiling has been practiced against persons who appear "Middle Eastern, Arab, or Muslim."

Subsequent to September 11, over twelve hundred noncitizens have been swept up into detention. The purported basis for this sweep is to investigate and prevent terrorist attacks, yet none of the persons arrested and detained has been identified as engaged in terrorist activity.[5] While the government has refused to release the most basic information about these individuals – their names, where they are held, and the immigration or criminal charges filed against them – we know that the vast majority of those detained appear to be Middle Eastern, Muslim, or South Asian.[6] We know, too, that the majority were identified to the government through suspicions and tips based solely upon perceptions of their racial, religious, or ethnic identity.[7]

The US Department of Justice has also engaged in racial profiling in what has been described as a dragnet, seeking to conduct more than 5,000 investigatory interviews of male noncitizens between the ages of eighteen and thirty-three from "Middle Eastern" or "Islamic" countries, or countries with some suspected tie to

[2] *See Attorney General Seeks End to Racial Profiling*, N.Y. TIMES, Mar. 2, 2001, at A20; Steve Miller, *'Profile' Directive Rallies Two Sides: Bush Seeks Data on Police Stops*, WASH. TIMES, Mar. 12, 2001, at Al.

[3] *See, e.g.*, Reginald T. Shuford, *Civil Rights in the Next Millennium: Any Way You Slice It: Why Racial Profiling is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371 (1999).

[4] *See* Sam Howe Verhovek, *Americans Give in to Race Profiling*, N.Y. TIMES, Sept. 23, 2001, at Al.

[5] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107–56, § 412, 115 Stat. 272, 274 (2001) grants the US Attorney General the power to take into custody any alien who is certified, in his reasonable belief, as a terrorist or person engaged in other activity that threatens the national security of the United States. In its first report to Congress, required by the PATRIOT Act, the US Department of Justice revealed that it had not invoked these powers to certify or detain any noncitizens as terrorists. *See* Tom Brune, *U.S. Evades Curbs in Terror Law*, NEWSDAY, Apr. 26, 2002, at A17. Instead, the Department of Justice detained these noncitizens under previously existing immigration law, primarily section 236 of the Immigration and Nationality Act, which gives the attorney general the power to arrest and detain aliens in removal proceedings.

[6] *See, e.g.*, Dan Eggen & Susan Schmidt, *Count of Released Detainees Is Hard to Pin Down*, WASH. POST, Nov. 6, 2001 at A10.

[7] MIGRATION POLICY INSTITUTE-NYU IMMIGRANT RIGHTS CLINIC, THE ROLE OF ETHNIC PROFILING IN LAW ENFORCEMENT AFTER SEPTEMBER 11TH 1.

al-Qaeda, who sought entry into the country since January 1, 2000, on tourist, student, and business visas. These are called voluntary interviews, yet they are not free of coercion or consequences.[8] The Department of Justice has directed the US attorneys to have investigators report all immigration status violations to the Immigration and Naturalization Service (INS), which includes minor visa violations. As a result, one student in Cleveland, Ohio, has been criminally charged and indefinitely detained for telling the Federal Bureau of Investigation (FBI) that he worked twenty hours per week, when he actually worked twenty-seven.[9]

Most recently, US officials have announced the Absconder Apprehension Initiative, whereby the Department of Justice will target for removal those noncitizens who have already received final orders of deportation but have not yet left the country and who "come from countries in which there has been terrorist presence or activity."[10] Thus, the government has moved those noncitizens of Middle Eastern or Muslim background to the head of the list of an estimated 320,000 individuals with final orders of deportation.[11] Here, selective enforcement constitutes a form of racial profiling.

Airport officials, airlines, and passengers have also practiced racial profiling against those appearing "Middle Eastern, Arab, or Muslim."[12] Countless men have been kicked off airplanes because airline staff and fellow passengers have refused to fly with them on board, despite US Department of Transportation directives to protect the civil rights of passengers.[13] And President Bush has said that he would be "madder than heck" if investigators find American Airlines racially profiled his Arab American Secret Service agent in removing him from a flight to the Crawford ranch.[14]

Lastly, since September 11, the general public has engaged in extralegal racial profiling in the form of over 1,000 incidents of violence: homes, businesses, mosques, temples, and gurdwaras firebombed; individuals attacked with guns,

[8] *See* Chisun Lee, *Why People of All Colors Should (Still) Resist Racial Profiling: "Let Us Not Be Suckers for Anybody,"* Village Voice, Dec. 26, 2001.

[9] *See* e-mail from Reginald Shuford to Leti Volpp, Jan 3, 2002 (describing the case of the student). Students in the US on nonimmigrant F-1 visas may only work up to twenty hours per week or are considered to be in violation of the terms of their visa. See 8 CFR § 214.2 (f)(9). The Department of Justice detained and removed many noncitizens through the use of laws that were previously largely unenforced, or through applying laws differently than in the past.

[10] *See* Guidance for Absconder Apprehension Initiative (Jan. 25, 2002), http://news.findlaw.com/legalnews/us/terrorism/documents.

[11] *See* Susan Sachs, *U.S. Begins Crackdown on Muslims Who Defy Orders to Leave Country*, N.Y. Times, Apr. 2, 2002, at A13.

[12] US Congressman John Cooksey, in a radio interview about airline security, said that "any person who has 'a diaper on his head and a fan belt wrapper around the diaper' needs to be singled out for questioning." Dennis Camire, *Muslim Council Seeks Action Against Cooksey for Slur*, Gannett News Service, Sept. 21, 2001.

[13] Sasha Polakow-Suranksy, *Flying While Brown*, Am. Prospect, Nov. 19, 2001, at 14.

[14] *See* Darryl Fears, *Turbulence on Flight 363: Prudence, or Profiling? Secret Service Agent Rebuts Airline Account of Boarding Clash*, Wash. Post, Jan. 13, 2002, at A3.

knives, fists, and words; women with headscarves beaten, pushed off buses, spat upon; children in school harassed by parents of other children, by classmates, and by teachers.[15] We know of at least five people who have been killed since September 11 in incidents of hate violence: an Indian Sikh, killed in Mesa, Arizona; a Pakistani Muslim, killed in Dallas, Texas; an Egyptian Coptic Christian, killed in Los Angeles, California; an Indian Sikh, killed in Ceres, California; and an Indian Hindu killed near Dallas, Texas.[16]

These myriad attacks have occurred, despite Bush's meeting with Muslim leaders, taking his shoes off before he visited the Islamic Center in Washington, DC, and stating that we must not target people because they belong to specific groups.[17] His statements have done little to disabuse people of their "common-sense" understanding as to who is the terrorist and who is the citizen. This is connected to the fact that the government has explicitly engaged in racial profiling in terms of its targets of our "war on terrorism." Furthermore, President Bush and other top officials have characterized the war against terrorism as a battle for "civilization" – indeed, a "crusade."[18] While this characterization occasionally acknowledges the heterogeneity of Muslim practices, its ideological effect is the legitimation of the religious and modem imperative to eradicate either from without or within the forces of despotism, terror, primitivism, and fundamentalism, each of which are coded as Middle Eastern, Arab, and Muslim.[19] Through these actions and statements, the American public is being instructed that looking "Middle Eastern, Arab, or Muslim" equals "potential terrorist."

Despite conventional legal understandings of public versus private and the limits of our doctrine of state action, we can conceptualize the actions of the US populace, in the form of hate violence attacks, as bearing a relationship to the explicit racial profiling by the government. As we know from the writings of Michel Foucault, we should understand power not as limited to the system of "Law-and-Sovereign" and located exclusively in the state, but as far more broadly dispersed, in a triangle of

[15] *See* South Asian American Leaders of Tomorrow, American Backlash: Terrorists Bring War Home in More Ways Than One (2001).

[16] *See* Muneer Ahmad, *Homeland Insecurities: Racial Profiling the Day After* 9/11, 20 Social Text 101 (2001).

[17] *See* Dana Milbank & Emily Wax, *Bush Visits Mosque to Forestall Hate Crimes: President Condemns an Increase in Violence Aimed at Arab Americans*, Wash. Post, Sept. 18, 2001, at Al.

[18] *See, e.g.*, Malcolm Beith, *Welcome to World War I*, Newsweek, Oct. 8, 2001, at 2 (describing George Bush's equation of the "war" on terrorism with a "crusade"); Katha Pollitt, *Egg on the Brain*, Nation, Mar. 4, 2002, at 10 (describing the statement by Attorney General John Ashcroft that "Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you").

[19] For a criticism of the persistence of the paradigm of the West's superiority over Islam in explaining the attacks of September 11, see Edward W. Said, *The Clash of Ignorance*, ZNET, at http://www.zmag.org/terrorframe.htm.

sovereignty, discipline, and government.[20] Power is "exercised from innumerable points, in the interplay of nonegalitarian and mobile relations."[21] Simply because the state does not officially sponsor an activity does not mean that the state does not bear a relationship to that activity.[22] In simultaneously advocating policies of color-blindness for citizenry while engaging in racial profiling for noncitizens, and in publicly embracing all religions[23] while particularly privileging Christianity,[24] the administration has, in the name of democratic inclusion, disingenuously excluded. Thus, that an epidemic of hate violence has occurred within the context of "private" relations does not mean that such violence is without "public" origins or consequences.[25]

Although the Oklahoma City bombing certainly led to enormous concern about the militia movement in the United States, there was little consolidation of a national identity in opposition to Timothy McVeigh's terrorist attack. In contrast, post-September 11, a national identity has consolidated that is both strongly patriotic and multiracial. The multiracial consolidation of what it means to be American was represented in a cartoon, whereby various persons marked on their T-shirts as African American, Irish American, and Asian American dropped the hyphenated identities, so that all in the second frame had become "American."[26] This expansion of who is welcomed as American has occurred through its opposition to the new construction, the putative terrorist who "looks Middle Eastern." Other people of color have become "American" through the process of endorsing racial profiling. Whites, African Americans, East Asian Americans, and Latinas and Latinos are now deemed safe and are not required to prove their allegiance.[27] In contrast, those who inhabit the vulnerable category of appearing "Middle Eastern, Arab, or Muslim" and who are thus subject to potential profiling have had to, as a matter of personal

[20] Michel Foucault, *Governmentality*, The Foucault Effect, Studies in Governmentality 87, 102 (Graham Burchell et al. eds., 1991).

[21] Michel Foucault, The History of Sexuality 94 (Vintage Books 1990) (1978).

[22] I recognize here that I may be said to read Foucault against the grain, through taking his arguments regarding the dispersal of power to suggest that such dispersed power has links to the state.

[23] This public embrace of all religions does not, of course, include atheism or agnosticism. *See* Dan Rothfarb, *One Nation, Under God*, U-WIRE, Mar. 1, 2002, at 5.

[24] *See, e.g.*, David Cho, *Bush Celebrates "Courageous Souls,"* Wash. Post, Nov. 27, 2001, at B4.

[25] I borrow this argument from Kendall Thomas. See Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1477–90 (1992).

[26] This cartoon was described in a lecture by Inderpal Grewal. Inderpal Grewal, Consumer Citizenship, Diasporic Communities & American Nationalism, Lecture at the University of California at San Diego Ethnic Studies Department Series on Transnational Feminism, Culture and Race (Nov. 14, 2001).

[27] Grewal, *supra* note 26. We can anticipate that this is a momentary phenomenon. It is also important to point out that this is a moment also characterized both by racial profiling of African Americans and Latinos who are believed to be "putative terrorists," and by the continued policing of communities of color.

safety, drape their dwellings, workplaces, and bodies with flags in an often futile attempt at demonstrating their loyalty.

Racial profiling only occurs when we understand certain groups of people to have indistinguishable members who are fungible as potential terrorists. 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; he is conceptualized 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.[28] 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."[29]

The ill-advised nature of racial profiling is highlighted by the case of Richard Reid, a British citizen with a white English mother and a black Jamaican father, who attempted to light an explosive in his shoes on a flight from Paris to Miami. He appears to have been recruited to the cause of al-Qaeda in prison.[30] There was recently an article about a French citizen killed in Afghanistan who had been recruited in the French army, and who was a member of what seemed to be a nouveau French Foreign Legion fighting with the Taliban.[31] The recruitment in prison and the recruitment in the army, reminiscent of Timothy McVeigh, raises sharp questions about the military and prison industrial complex as sites of a particular identity formation.[32] These cases – along with the case of French citizen Zacarias Moussaoui, the only person currently facing charges in the United States in connection to the September 11 attacks – belie the purported effectiveness of racial profiling: Not all terrorists are persons who appear "Middle Eastern, Arab, or Muslim."

And these cases in addition belie what, sadly, does not also seem to be apparent: Very few persons who appear "Middle Eastern, Arab, or Muslim" are terrorists. Many men who fall into this category, including law professors, have been subjected

[28] *See* Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN., 89, 94–99 (2000).

[29] Linda Greenhouse, *Exposed: Again, Bombs in the Land of the Free*, N.Y. TIMES, Apr. 23, 1995, § 4, at 1.

[30] *See generally Who Is Richard Reid?*, BBC News (Dec. 28, 2001), http://www.news.bbc.co.uk/hi/english/uk/newsid_ 1731000/1731568.stm.

[31] *See* Donald G. McNeil, Jr., *The Foreign Soldier: Body Confirms Suspicions About Frenchmen in Al Qaeda*, N.Y. TIMES, Dec. 28, 2001, at B5.

[32] *See generally* Critical Resistance, http://www.criticalresistance.org (last visited Feb. 25, 2002).

to questioning. One friend of this author was profiled for reading too slowly. He was working his way through Heidegger while sitting in Newark Airport on his way to a legal history conference, and was questioned because someone had apparently reported a "Middle Eastern–looking man" engaging in the suspicious activity of reading a book for an hour without turning the page. As Arundhati Roy has written, we are in a moment when "War is Peace, Pigs are Horses."[33] And reading Heidegger is a potential terrorist activity.

3 ON ORIENTALIST TROPES

We are witnessing the redeployment of old Orientalist tropes. Historically, Asia and the Middle East have functioned as phantasmic sites on which the US nation projects a series of anxieties regarding internal and external threats to the coherence of the national body.[34] The national identity of the United States has been constructed in opposition to those categorized as "foreigners," "aliens," and "others."

Edward Said describes Orientalism as a master discourse of European civilization that constructs and polarizes the East and the West. Western representations of the East serve not only to define those who are the objects of the Orientalizing gaze, but also the West, which is defined through its opposition to the East. Thus, for example, the West is defined as modern, democratic, and progressive through the East being defined as primitive, barbaric, and despotic.[35] Similar discourses sustain American national identity. American Orientalism references North Africa, the Middle East, and Turkey, as well as East Asia. Collectively, and often indistinguishably, they function as the "East" to America's democratic and progressive "West." September 11 gave this discourse new currency in relation to what are depicted as the barbaric regions of the world that spawn terror.

Rather than understand Orientalism as solely a creature of purported racial difference, it is important to point out that American Orientalism, like European Orientalism, is gendered. Historically, the status of women in need of uplift was a source of justification for Western colonization of regions of the world –"white men saving brown women from brown men."[36] The aftermath of September 11 witnessed the redeployment of this idea. One of the stated justifications for American intervention in Afghanistan – made by both President George W. Bush and First Lady

[33] *See* Arundhati Roy, *War Is Peace*, Outlook India, Oct. 29, 2001, http://www.outlook india .com/archivecontents.asp?fnt= 20011029.

[34] I borrow this metaphor from Lisa Lowe. *See* Lisa Lowe, Immigrant Acts: On Asian American Cultural Politics 18 (1996).

[35] See *generally* Edward Said, Orientalism (1978); Edward Said, Culture And Imperialism (1993). Note that Orientalism was a hybrid and contradictory process. For a discussion of the heterogeneity of Orientalism, *see* Lisa Lowe, Critical Terrains: French and British Orientalisms 1–29 (1991).

[36] Gayatri Spivak, *Can the Subaltern Speak*, in Marxism And The Interpretation Of Culture 271, 297 (Cary Nelson & Lawrence Grossberg eds., 1988).

Laura Bush – was that Afghan women needed to be saved from the Taliban and Islamic barbarism.[37] But long before the Feminist Majority Fund began campaigning on the issue of Afghan women, many women in Afghanistan had been starving and faced with violence, not only because of the Taliban regime but also because of a long history of conflict in the region in which the Unites States has been deeply implicated.[38] We must remember where the Taliban came from, that US administrations thought that religious fundamentalists made better anti-Communist fighters, and so supported the mujahideen who became the Taliban.[39] Saving women from purdah has been propounded as a reason for bombardment, even while, ironically, the epidemic of hate violence in the United States has led to the seclusion of many women identified as "Middle Eastern, Arab, or Muslim" who otherwise face harassment and violence when they venture outside of their homes.[40] Furthermore, the long-term impact of the war on the "liberation" of the women of Afghanistan remains an open question.[41]

In part, the gendering of colonial and Orientalist discourses was achieved by collapsing non-Europeans and women into an undifferentiated field in which passion reigned, not reason.[42] The East was the site of passivity and irrationality, awaiting the conquest by the masculine and rational West.[43] This bifurcation continues to describe the way in which the United States genders the sites of its interventions, which in turn shapes the relationship of US national identity to race, gender, and sex.[44] We should understand nationalism to be constituted through the simultaneous interworkings of racism, sexism, and homophobia. Fliers have circulated in New York City depicting Osama bin Laden being sodomized by the World Trade Center, with the caption, "You like skyscrapers, bitch?[45] Post–September 11 nationalist discourses reinscribe both compulsory heterosexuality and the

[37] Laura Bush, Radio Address to the Nation (Nov. 17, 2001), at http://www.whitehouse.gov/news/releases/2001/11/20011117.html; President George W. Bush Address to Joint Session of Congress and the American People (Sept. 20, 2001), at http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

[38] See Charles Hirschkind & Saba Mahmood, *Feminism, the Taliban, and the Politics of Counter-Insurgency*, 75 Anthropological Q. 339 (2002).

[39] *Id*.

[40] Ahmad, *supra* note 16, at 109–110.

[41] I mean by "liberation" here both Feminist Majority Fund concerns as to women wearing the burqua, and concerns as to the impact of the war on consolidating fundamentalisms.

[42] *See* Ann Laura Stoler, Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things 128–29 (1995).

[43] *See* Meyda Yegenoglu, Colonial Fantasies: Towards a Feminist Reading of Orientalism 11 (1998).

[44] For an analogous argument in the context of European colonialism, *see generally* Ann Mcclintock, Imperial Leather: Race, Gender and Sexuality in the Colonial Contest (1995).

[45] Ahmad, *supra* note 16, at 109.

dichotomized gender roles upon which it is based: the masculine citizen-soldier, the patriotic wife and mother, and the properly reproductive family.[46]

In 1997, Lauren Berlant presciently suggested that there was a coupling of the ideas of suffering and American citizenship.[47] National civic identity has been experienced as a trauma that conflates patriotism, suffering, and abhorrence for what is constructed as oppositional to "America." As Muneer Ahmad has written, cases of hate violence before September 11 – such as the murders of Matthew Shepard and James Byrd – were deemed incomprehensible. In contrast, hate attacks after September 11 are understood as the result of displaced anger, the underlying sentiment with which most Americans agree. Thus, Ahmad argues, the former were understood as crimes of moral depravity, but the post–September 11 attacks are understood as crimes of passion, whereby the passion is love of nation. Perpetrators of post–September 11 hate violence, then, are guilty not of malicious intent but of only misdirecting their anger, so that there is something of an understanding of these acts.[48] This helps explain why many think it their patriotic duty to engage in racial profiling in the form of hate violence. The man arrested for the murder of Balbir Singh Sodhi, the Sikh Indian killed in Mesa, Arizona, reportedly shouted as he was arrested, "I stand for America all the way!"[49]

At the same time that the category of "loyal American" is, at this moment, a broad and encompassing one, there is also great heterogeneity in terms of who has been singled out as a potential terrorist. In particular, Sikh men, who are religiously mandated to wear turbans, have been conflated with Osama bin Laden and have suffered significant violence.[50] South Asian Americans have suddenly been subjected to racist attack and galvanized as a political community.[51] As a response to such a heterogeneous racial interpellation, the claim of racial or religious misrecognition ("I'm not Muslim"),[52] rather than condemnation of violence regardless of its target, is both troubling and reminiscent of the actions of Chinese Americans who wore buttons during World War II that read "I'm Chinese, not Japanese," so they

[46] *Transnational Feminist Practices Against War*, A Statement by Paola Bacchetta, Tina Campt, Inderpal Grewal, Caren Kaplan, Minoo Moallem, and Jennifer Terry, 2 MERIDIANS 302 (2002).

[47] *See* LAUREN BERLANT, THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS ON SEX AND CITIZENSHIP 1 (1997).

[48] *See* Ahmad, *supra* note 16, at 108.

[49] Joseph Trevino & Gendy Alimurung, *The Hate Files*, L.A. WEEKLY, Sept. 21, 2001, http://www.laweekly.com/ink/01/44/cover-alimurung.shtml.

[50] *See* website of the Sikh Coalition, at http://www.sikhcoalition.org/ListReports.asp (listing 226 incidents and hate crimes).

[51] Sarah Wildman, *All for One*, NEW REPUBLIC, Dec. 24, 2001, http://www.tnr.com/doc.mhtml~i=20011224&s=diarist122401.

[52] *See, e.g.*, Onkar Singh, *Attacks on Sikhs Worries Indians*, REDIFF, Sept. 17, 2001, http://www.rediff.com/us/2001/sep/17ny30.htm (describing rally where demonstrators carried placards that read "Bush, Educate the American people that Sikhs are not Muslims or Arabs").

would not be targeted.[53] Others are importantly arguing that this is a moment for constructing coalitions.[54]

There are obviously enormous resonances in what has been happening with the treatment of Japanese Americans during World War II, when the fungibility of members of a racially defined community was considered to make it impossible to screen individually loyal citizens from enemy aliens.[55] Recently, the publisher of the *Sacramento Bee* attempted to deliver a graduation speech at Cal State Sacramento. Booed and heckled, she was unable to finish her speech about the need for the protection of civil liberties; when she wondered what would happen if racial profiling became routine, the audience cheered. Witnesses described the event as terrifying; the president of the faculty senate was quoted in the *New York Times* as stating, "For the first time in my life, I can see how something like the Japanese internment camps could happen in our country."[56]

And, in fact, a Gallup poll found that one-third of the American public surveyed thought that we should intern Arab Americans.[57] Motivation for the internment of over 120,000 Japanese Americans was fear of what we today might call sleeper cells. The fact that the Japanese Americans did not attack after Pearl Harbor was understood to mean that they were patiently waiting to strike and therefore must be interned.[58] Japanese American internment constituted a pivotal moment in American Orientalism; the present moment is another.

4 ON CITIZENSHIP AND IDENTITY

The shift in perceptions of racial profiling is clearly grounded in the fact that those individuals who are being profiled are not considered to be part of "us." Many of those racially profiled in the sense of being the targets of hate violence or being thrown off airplanes are formally citizens of the United States, through birth or naturalization. But they are not considered citizens as a matter of identity, in that they in no way represent the nation.

[53] *See, e.g.*, Sharon Boswell & Lorraine McConaghy, *Abundant Dreams Diverted*, Seattle Times, June 23, 1996, at B2.

[54] For the argument that Arab and South Asian communities should use this moment as an opportunity to forge coalitions, see Ahmad, *supra* note 16, at 111–112. For a similar argument at an earlier moment, see Rosemary Marangoly George, *"From Expatriate Aristocrat to Immigrant Nobody": South Asian Racial Strategies in the Southern California Context*, 6 Diaspora 30, 49–50 (1997).

[55] *See generally* Eric K. Yamamoto et al., Race, Rights And Reparation: Law and the Japanese American Internment (2001).

[56] Timothy Egan, *In Sacramento, a Publisher's Questions Draw the Wrath of the Crowd*, N.Y. Times, Dec. 21, 2001, at B1.

[57] *Gallup Poll Analysis: The Impact of the Attacks on America*, http://www.gallup.com/poll/releases/prO1O914c.asp.

[58] *See* Keith Aoki, *Civil Rights: Six Experts Weigh In*, Time, http://www.time.com/time/nation/article/0,8599,186583,00.html.

We can understand citizenship as made up of four distinct discourses: citizenship as formal legal status, citizenship as rights, citizenship as political activity, and citizenship as identity/solidarity.[59] In focusing on the question of citizenship as identity, it is imperative to isolate two very different conceptualizations of this idea.

The prevalent idea of citizenship as identity focuses on the notion of what I consider *citizenship as a form of inclusion*.[60] Citizenship as a form of inclusion starts from the perspective of the citizen who proceeds to imagine fellow members who are to be included in a network of kinship or membership – those with whom the citizen feels affective ties of identification and solidarity. I want also to suggest that we must think about a very different idea of citizenship as identity, which we could call *citizenship as a process of interpellation*. Citizenship as a process of interpellation starts from the perspective that power both subordinates and constitutes one as a subject.[61] This idea of citizenship foregrounds the role of ideology in either including one as a citizen or excluding one from membership, and then shifts to the standpoint of the subject.

For the idea of interpellation, I am relying on the work of Louis Althusser.[62] Depicting a scene in which the subject is hailed by an officer of the law, Althusser writes:

> Naturally for the convenience and clarity of my little theoretical theatre I have had to present things in the form of a sequence, with a before and an after, and thus in the form of a temporal succession. There are individuals walking along. Somewhere (usually behind them) the hail rings out: "Hey, you there!" One individual (nine times out of ten it is the right one) turns around, believing/suspecting/knowing that it is for him, i.e. recognizing that "it really is he" who is meant by the hailing. But in reality these things happen without any succession. The existence of ideology and the hailing or interpellation of individuals as subjects are one and the same thing.[63]

As Althusser writes, this is not a temporal process that takes place in sequence, but is rather how ideology functions: Individuals are "always-already subjects" of ideology.[64] Through positing an identity dimension of citizenship as a process of interpellation, I want to emphasize how certain individuals and communities are positioned as objects of exclusion: "Hey, you non-citizen!" (or foreigner, or enemy alien, or

[59] These four different discourses have been identified by Linda Bosniak in the context of examining the construct of citizenship beyond the nation-state. *See* Linda Bosniak, *Citizenship Denationalized*, 7 Ind. J. Global Legal Stud. 447, 456–88 (2000).

[60] *Id.* at 479–88.

[61] *See* Judith Butler, The Psychic Life of Power: Theories in Subjection 2 (1997).

[62] *See* Louis Althusser, *Ideology and Ideological State Apparatuses*, *in* Lenin and Philosophy and Other Essays 127, 170–177 (Ben Brewster trans., 1971). *See also* Frantz Fanon, Black Skin White Masks 109 (Charles Lam Markmann trans., 1967).

[63] Althusser, *supra* note 62, at 174–75.

[64] *Id.* at 176.

terrorist). This process of interpellation of those who appear "Middle Eastern, Arab, or Muslim" is taking place through racial profiling by both government officials and the US public.[65] As the individual is hailed in this manner and recognizes the hail, he or she is transformed into a subject of ideology – here, the subject of nationalist ideology that patrols borders through exclusions.[66]

In the American imagination, those who appear "Middle Eastern, Arab, or Muslim" may be theoretically entitled to formal rights, but they do not stand in for or represent the nation. Instead, they are interpellated as antithetical to the citizen's sense of identity. Citizenship in the form of legal status does not guarantee that they will be constitutive of the American body politic. In fact, quite the opposite: The consolidation of American identity takes place *against* them. While many scholars approach citizenship as identity as if it were derivative of citizenship's other dimensions, it seems as if the guarantees of citizenship as status, rights, and politics are insufficient to produce citizenship as identity.[67] Thus, one may formally be a US citizen and formally be entitled to various legal guarantees, but one will stand outside of the membership of kinship/solidarity that structures the US nation. And clearly, falling outside of the identity of the "citizen" can reduce the ability to exercise citizenship as a political or legal matter. Thus, the general failure to identify people who appear "Middle Eastern, Arab, or Muslim" as constituting American national identity reappears to haunt their ability to enjoy citizenship as a matter of rights, in the form of being free from violent attack.

The boundaries of the nation continue to be constructed through excluding certain groups. The "imagined community"[68] of the American nation, constituted by loyal citizens, is relying on difference from the "Middle Eastern terrorist" to fuse its identity at a moment of crisis. Discourses of democracy used to support the US war effort rest on an image of antidemocracy, in the form of those who seek to destroy the "American way of life."[69] The idea that there are norms that are antithetical to "Western values" of liberty and equality helps solidify this conclusion.

We can consider whether the way in which identity disrupts citizenship is inevitable. Race has fundamentally contradicted the promise of liberal democracy, including citizenship. While liberalism claimed to promise universal liberty and

[65] Janet Halley understands interpellation to include not only a call from above, but also "from below," for example, from within resistant social movements. See Janet Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, *in* The Politics of Law 115, 118 (David Kairys, ed., 3d ed. 1998). I would supplement this analysis with the claim that the "call from below" can include hate violence and hate speech.

[66] As Judith Butler states, the manner in which a subject is constituted by being hailed, addressed, named, always contains the possibility of misrecognition. *See* Butler, *supra* note 61, at 96–97. Thus, one can be hailed as a putative terrorist and a noncitizen through the process of misrecognition.

[67] *See* Bosniak, *supra* note 59, at 479.

[68] *See* Benedict Anderson, Imagined Communities 7 (1991).

[69] This is apparent in the name given by the administration to the bombardment of Afghanistan, and to the war on terrorism more generally: "Operation Enduring Freedom."

equality, these were in fact only guaranteed to propertied, European male subjects.[70] Some might believe in the promise of universality – that one can infinitely expand the ambit of who is entitled to rights and freedoms – but race and other markers appear and reappear to patrol the borders of belonging to political communities. Despite the liberal universalizing discourse of citizenship, not all citizens are equal. Identity in the form of foreignness, or perpetual extraterritorialization,[71] means that the circling of wagons is an uneven process, that drawing tighter together takes place through the expulsion of some.

Recent theorizing about diasporic or transnational subjects, while productive in many regards, has on occasion minimized the continued salience of the nation, both in terms of shaping identity and in the form of governmental control. In particular, discussions charting the decline of the nation-state have led to unfortunate implications when two points are stretched to extremes: First, the idea that immigrant communities have complete agency in determining their location and their national identity; and second, the idea that the borders of the nation can be traversed with the greatest of ease and are so reduced as to become almost meaningless.[72]

Arjun Appadurai, in an essay titled "Patriotism and Its Futures," written at what was perhaps a more optimistic moment, suggests that we "need to think ourselves beyond the nation, for we now find ourselves in a postnational era."[73] America, he suggests, is "eminently suited to be a sort of cultural laboratory and a free trade zone" to test a "world organized around diasporic diversity."[74] Appadurai argues that the United States should be considered "yet another diasporic switching point, to which people come to seek their fortunes but are no longer content to leave their homelands behind."[75]

If only this were indeed a postnational era. In a response titled "Transnationalism and Its Pasts," Kandice Chuh criticizes the evenness of power relations within and across national borders implied in Appadurai's postnation.[76] Chuh emphasizes the link between transnationalism and state coercion, and reminds us of the forced

[70] *See generally* David Theo Goldberg, Racist Culture (1993).

[71] By "perpetual extraterritorialization," I mean the manner in which certain immigrants are always already assumed to come from elsewhere, and to belong elsewhere when their behavior affronts.

[72] Alex Aleinikoff similarly points out that the postnational perspective is not an accurate depiction of US models of rights and membership. T. Alexander Aleinikoff, *Between National and Post-National: Membership in the United States*, 4 Mich. J. Race & L. 241, 243 (1999).

[73] Arjun Appadurai, *Patriotism and Its Futures*, 5 Pub. Culture 411 (1993). Appadurai acknowledges that the nation-state, in its classical territorial form, is not yet "out of business." *Id.* at 421. Yet he also argues that today we are in a "postnational, diasporic world." *Id.* at 425.

[74] *Id.* at 425.

[75] *Id.* at 424.

[76] Kandice Chuh, *Transnationalisms and Its Pasts*, 9 Pub. Culture 93, 95 (1996).

removal and internment of Japanese Americans by the US government during World War II.[77] A transnational extension of Japan into the United States was relied upon to justify this dispossession. This memory is instructive to us now. We should remember that the idea of transnationality is not solely one where immigrants function as agents in maintaining diasporic ties, but can be one where a state or its people brands its citizens with foreign membership, extraterritorializing them into internment camps, or ejecting them from membership through violence against their bodies.

We function not just as agents of our own imaginings, but as the objects of others' exclusions. Despite frequent rhetorical claims, this society is neither colorblind nor a happy "nation of immigrants." Certain racialized bodies are always marked and disrupt the idea of integration or assimilation.

5 CONCLUSION

Those who appear "Middle Eastern, Arab, or Muslim" and who are formally citizens of the United States are now being thrust outside of the protective ambit of citizenship as identity. But I want to shift focus here, to bodies that disappear: What of those members of this group who are not formally citizens? Those individuals who are noncitizens – currently being interviewed, deported, and detained – are made even more vulnerable by their noncitizen status and the power of immigration law to control their fate. They are even farther removed from the "us" of America, because of the ways in which we understand citizenship to correlate with membership.

The reaction to the American Civil Liberties Union (ACLU) offering to assist those going through interviews, as recorded on the ACLU hotline and reported in the *Detroit Free Press*, gives a sense of these sentiments:

FEMALE CALLER: How can you guys tell us that people who are not American citizens have rights? Bull crap!
MALE CALLER: What makes you think these people have rights? Those are Arabs; they have no rights. Deal with it![78]

Ariel Dorfman wrote, early after September 11, that the photographs of those missing in the World Trade Center reminded him of the photographs of the *desparecidos* of Chile.[79] What might it mean to shift who occupies the category of

[77] *Id.* at 96–104.
[78] *See* Brian Dickerson, *ACLU Finds Intervention Not Welcome*, DETROIT FREE PRESS, Dec. 7, 2001.
[79] *See* Ariel Dorfman, *America Looks at Itself Through Humanity's Mirror*, L.A. TIMES, Sept. 21, 2001, at B15.

the disappeared, from those killed in the World Trade Center, to consider those noncitizens in detention? Our government has taken them, and we do not know where they are. Are those in detention our disappeared? If not, why not? I raise this to provoke a rethinking of what bodies are centered in our consideration and what bodies disappear. Who is the "us" in the US?

2

Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims

Susan Akram and Kevin Johnson[*]

1 INTRODUCTION

September 11, 2001 was a watershed moment in the history of the United States. After the tragic events of that day, including the hijacking of four commercial airliners for use as weapons of mass destruction, America went to "war" on many fronts, including but not limited to military action in Afghanistan.

As needed and expected, heightened security measures and an intense criminal investigation followed. Almost immediately after the tragedy, Arabs and Muslims, as well as those "appearing" to be Arab or Muslim, were subject to crude forms of racial profiling. Airlines removed Arab and Muslim passengers, including, in one instance, a Secret Service agent assigned to protect President George W. Bush. Immediately after September 11, hate crimes against Arabs, Muslims, and others rose precipitously. In Arizona, a US citizen claiming vengeance for his country killed a Sikh immigrant from India based on the mistaken belief that this turban-wearing, bearded man was "Arab."

Supporters and critics alike saw the federal government as "pushing the envelope" in restricting civil liberties in the name of national security. The civil rights deprivations resulting from federal action reveal that national regulation of immigration is a double-edged sword. Federal preemption of state law is designed to create a uniform immigration law and frequently has served to prevent local discrimination against noncitizens. However, the federal government can also, with few legal constraints, strike out at immigrants across the nation if it sees fit. That suggests that the federal government's role in the regulation of immigration and immigrants, as well as its interaction with the states, deserves most serious attention, especially in times of national crisis.

[*] This chapter is an excerpt of the previously published article, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002).

Besides acting on a national scale in the "war on terrorism" that followed September 11, the federal government took steps that might also have future civil rights consequences. In the investigation of the hijackings, the Department of Justice enlisted the assistance of state and local law enforcement agencies in the questioning of Arabs and Muslims. As part of heightened security measures, the Bush administration considered permanently increasing the role of local police in immigration enforcement, which would represent a significant departure from the near-exclusive federal dominance over this field. Because local police are generally unfamiliar with the immigration laws, they have been involved in well-known episodes of egregious violations of the civil rights of US citizens as well as noncitizens in efforts at immigration enforcement. As a result, state and local involvement in immigration enforcement might have lasting civil rights impacts on immigrants in the United States.

The federal government's response to September 11 demonstrates the close relationship between immigration law and civil rights in the United States. Noncitizens historically have been vulnerable to civil rights deprivations, in no small part because the law permits, and arguably encourages, extreme governmental conduct with minimal protections for the rights of noncitizens. Unfortunately, the current backlash against Arabs and Muslims in the United States fits comfortably into a long history, including the Alien and Sedition Acts of the 1790s, the Palmer Raids and the Red Scare that followed World War I, and other concerted efforts by the US government to stifle political dissent. This backlash is especially troubling because of the possibility exemplified by the internment of persons of Japanese ancestry during World War II that racial, religious, and other differences have fueled the animosity toward Arabs and Muslims.

A complex matrix of otherness based on race, national origin, religion, culture, and political ideology may contribute to the ferocity of the US government's attacks on the civil rights of Arabs and Muslims. As recently stated:

> Most Americans probably feel particularly threatened because the September 11 suicide hijackers were foreign, and some may be especially fearful because they were Arabs. This fear may cause us to exaggerate the danger of future attacks in general, and of attacks by Middle Eastern terrorists in particular. As a result, we may overestimate the effect of racially specific security measures. And unfortunately, we are more willing to accept aggressive measures when they target small and politically disempowered groups, specifically racial and ethnic minorities, and foreign nationals.[1]

As has occurred in the past, the ripple effects of national security measures in the end may adversely affect the legal rights of all noncitizens, not just Arabs and Muslims. Indeed, we contend in this chapter that the civil rights deprivations

[1] Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1430 (2002).

resulting from the war on terrorism may have long-term adverse impacts on the civil rights of citizens as well as noncitizens in the United States. As Professor Edward Said has observed, terrorism in these times "has displaced Communism as public enemy number one."[2] That has translated into a near exclusive focus on "foreign terrorists," particularly Arabs and Muslims.

2 THE DEMONIZATION OF PERSONS OF ARAB AND MUSLIM ANCESTRY

Commentators have observed how popular perceptions of racial and other minorities influence their treatment under the law. As with other minority groups, this proves to be true with respect to Arabs and Muslims. As Professor Natsu Saito summarizes:

> 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, . . . these distinctions are blurred and negative images about either Arabs or Muslims are often attributed to both. 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."[3]

The demonizing of Arabs and Muslims in the United States, accompanied by harsh legal measures directed at them, began well before the tragedy of September 11, 2001. It can be traced to popular stereotypes, years of myth-making by film and media, racism during times of national crisis, and a campaign to build political support for US foreign policy in the Middle East. Since at least the 1970s, US laws and policies have been founded on the assumption that Arab and Muslim noncitizens are potential terrorists and have targeted them for special treatment under the law. The post–September 11 targeting of Muslims and Arabs is simply the latest chapter in this history.

2.1 *The Stereotyping of Arabs as Terrorists and Religious Fanatics*

Similar to the animus toward other racial minorities, anti-Arab, anti-Muslim animus can be viewed as part of a dynamic process of *racialization*. Racialization, as used here, views "race" as "an unstable and 'de-centered' complex of social meanings, constantly being transformed by political struggle."[4] This understanding of race

[2] Edward Said, *The Essential Terrorist*, *in* BLAMING THE VICTIMS: SPURIOUS SCHOLARSHIP AND THE PALESTINIAN QUESTION 149 (Edward Said & Christopher Hitchens eds., 2001).

[3] Natsu Taylor Saito, *Symbolism under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1, 12 (2001).

[4] MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 68 (1986).

breaks with the traditional view that race is fixed by biology; it instead considers "racial formation" to explain how race operates in the United States.

Defining race as a process in which racial difference is socially, not biologically, constructed assists in examining the treatment of Arabs and Muslims in the United States; their experiences show the severe damage that racialization can do, and offers the hope that the process can be reversed. Effectively recognizing that race is the product of social construction, the US Supreme Court held that different groups may be racialized and that Arabs can be discriminated against as members of a different "race," in violation of the civil rights laws.

Through the process of racialization, Arabs and Muslims have been considered racially different from whites and other racial minorities. Professor Nabeel Abraham, a leading commentator on racism against Arabs and Muslims in the United States, identifies three distinct ways in which Arabs and Muslims have been racialized: (1) through political violence by extremist groups based on the Arab-Israeli conflict in the Middle East; (2) by xenophobic violence targeting Arabs and Muslims at the local level; and (3) through the hostility arising from international crises affecting the United States and its citizens.[5] The law and its enforcement also have contributed to the hostility toward Arabs and Muslims in the United States.

2.2 *The Silencing of Arabs through Politically Motivated Violence and Intimidation*

Conflict in the Middle East provokes violence against Arabs and Muslims in the United States, as well as the less well known intimidation tactics followed by some mainstream activist organizations. A Rand Corporation study conducted for the US Department of Energy concludes that the Jewish Defense League (JDL) was, for over a decade, one of the most active terrorist groups, as classified by the FBI, in the United States. The study reviews the violence known to have been committed by the JDL, as well as incidents in which the JDL's involvement was suspected, all of which were described as part of a strategy "to eliminate perceived enemies of the Jewish people and Israel."[6] The violence included bombings of Arab foreign offices, as well as planting bombs in American-Arab Anti-Discrimination Committee Offices across the country. According to the FBI, Jewish extremist organizations were responsible for twenty terrorist incidents in the 1980s. Despite the many incidents of anti-Arab violence at the hands of extremist groups, influential hate crime studies fail to include these groups as perpetrators of these crimes. According to Professor Abraham, "Jewish extremist groups constitute an undeniable source of

[5] Nabeel Abraham, *Anti-Arab Racism and Violence in the United States*, *in* The Development of Arab-American Identity 155, 180 (Ernest McCarus ed., 1994).

[6] Bruce Hoffman, Terrorism in the United States and the Potential Threat to Nuclear Facilities 16 (1986).

anti-Arab hate violence not discussed in conventional accounts of racist violence in the United States."[7]

Even less well-publicized than the anti-Arab violence of extremist groups is the campaign by mainstream organizations, such as the Anti-Defamation League of B'nai B'rith (ADL), to intimidate and silence Arabs and Muslims. Established in the early 1900s as an organization with the mission of fighting anti-Semitism, the ADL gained a reputation as a leading anti-discrimination organization in the United States. Unfortunately, after the creation of Israel in 1948, the ADL added a new mission: to discredit or silence critics of Israel or defenders of Palestinian human rights. The ADL has aggressively engaged in efforts to intimidate Arabs, Muslims, and others with similar views on the Middle East conflict, discouraging them from engaging in political debate. In 1983, for example, the ADL released a handbook entitled *Pro-Arab Propaganda in America: Vehicles and Voices*. It lists as "anti-Israeli propagandists" some of the most prominent scholars on Middle East issues, including Columbia's Edward Said and Harvard's Walid Khalidi,[8] as well as humanitarian organizations dealing with the Middle East or Palestine. Alfred Lilienthal, an influential commentator on Middle East issues, himself on the ADL's blacklist, claimed, "Many ADL charges against critics of Israel are totally inaccurate, questionable, or based upon half-truths" and said that the ADL often characterizes groups or individuals who criticize Israel or Zionism as "extremists" intent on eradicating Israel or inciting anti-Semitism in America.[9]

The handbook was widely distributed throughout the United States, according to critics, to challenge, harass, and silence groups and individuals on the list. The ADL is not the only mainstream organization to distribute lists of Arab-American individuals and groups and those working with them. The American-Israel Public Affairs Committee (AIPAC) issued two similar lists. Through a campaign primarily on college campuses organized against groups and individuals on these lists, AIPAC and the ADL have harassed and intimidated academics and activists for years.

Aside from its campaign to discredit and silence academics on university campuses, the ADL also has sought to silence pro-Muslim and pro-Arab speakers from engaging in public debate concerning the Middle East. Most recently, the Florida ADL unsuccessfully lobbied the Florida Commission on Human Relations to exclude a Muslim representative from a panel at a civil rights conference. Similarly, the American Jewish Committee sought to exclude the executive director of the New York chapter of the Council on American-Islamic Relations (CAIR) from participating in a public forum on multicultural understanding because he was "anti-Israel." The ADL demanded that CAIR's Northern California director be

[7] Abraham, supra note 5, at 157.

[8] Anti-Defamation League of B'nai B'rith, *Pro-Arab Propaganda in America: Vehicles and Voices: A Handbook* 75 (1983).

[9] Dr. Alfred M. Lilienthal, *The Changing Role of B'nai B'rith's Anti-Defamation League*, Wash. Rep. on Middle E. Aff., June 1993, 18.

prevented from testifying about hate crimes before the California Select Committee on Hate Crimes.

The full extent of the ADL's activities against Arabs did not come to light until January 1993, when the results of an FBI investigation of a veteran San Francisco Police Department officer and an ADL-paid undercover agent became public. Law enforcement authorities uncovered computerized files on thousands of Arab Americans and information on Arab organizations as well as many other mainstream organizations. These files reflected surveillance of organizations and leaders, including the NAACP, Greenpeace, ACLU, Asian Law Caucus, National Lawyers Guild, Rainbow Coalition, Jews for Jesus, and three current or past members of the US Congress. The information included confidential law enforcement files and information from the Department of Motor Vehicles. The FBI confirmed that the ADL provided the information from the surveillance activities to the South African government. The ADL's attorney admitted that the ADL had passed surveillance information to Israel. At least one US citizen of Arab descent who had been the subject of surveillance was arrested in Israel when he visited the Israeli-occupied Palestinian territories. When the spying became public, an array of civil rights lawsuits were filed. As part of the settlement of a class action, the ADL was permanently enjoined from illegal spying on Arab American and other civil rights groups.

Despite the settlement and the permanent injunction, the damage to the civil liberties of Arabs in the United States from the ADL's surveillance activities has been done. The discovery of espionage has contributed to the climate of fear for Arab and Muslim Americans. US intelligence agencies may have obtained information on politically active Arab groups and individuals from the ADL that could potentially place them under heightened government scrutiny. Consequently, Arab Americans may perceive that the US government is in collusion with Israeli and anti-Arab organizations. Such perceptions have been reinforced by the revelation that information provided by the ADL triggered the FBI investigation and arrest of a group of noncitizens, known as the L.A. Eight, for alleged "technical violations" of the Immigration and Nationality Act. Furthermore, "No ... major American Jewish organization has condemned the ADL for its political excesses or its documented association with Israeli intelligence organizations."[10] Our research has not discovered any publication in which the ADL admitted culpability or disavowed these activities.

In sum, the ADL has engaged in surveillance of Arab and Muslim groups in an apparent effort to intimidate and silence those voices it deems "anti-Semitic." As Professor Abraham summarizes: "The overall effect of the ADL's practices is to reinforce the image of Arabs as terrorists and security threats, thereby creating a

[10] Michael Gillespie, *Los Angeles Court Hands Down Final Judgement in Anti-Defamation League Illegal Surveillance Case*, WASH. REP. ON MIDDLE E. AFF., Dec. 1999, at 43.

climate of fear, suspicion, and hostility towards Arab-Americans and others who espouse critical views of Israel, possibly leading to death threats and bodily harm."[11]

2.3 *The Impact of Anti-Arab Images in Popular Culture*

Racism against Arabs is not all the work of political activists. Importantly, feeding on existing stereotypes in US society about Arabs and Muslims, media and film have found a ready audience for dangerous and one-dimensional images. Such depictions contribute to the racialization of Arabs and Muslims. In addition, in a study on anti-Arab racism, Professor Abraham documents a range of racial epithets, intolerant speech, and violence directed at Arabs by private citizens and public officials.

The late Jack Shaheen's review of US films offers convincing evidence of the vilification of Arabs and Muslims by the movie industry. Shaheen catalogues hundreds of Hollywood movies in which Arabs or Muslims are portrayed as terrorists or otherwise placed in a negative, often nonhuman, light. Muslims are shown as hostile invaders, or "lecherous, oily sheikhs intent on using nuclear weapons."[12] A far-too-common scene shows a mosque with Arabs at prayer, then cuts away to showing civilians being gunned down.

These movies show Westerners hurling such epithets at Arabs as "assholes," "bastards," "camel-dicks," "pigs," "devil- worshipers," "jackals," "rats," "rag-heads," "towel-heads," "scum-buckets," "sons-of-dogs," "buzzards of the jungle," "sons-of-whores," "sons-of-unnamed goats," and "sons-of-she-camels."[13] Arab women are often portrayed as weak and mute, covered in black, or as scantily clad belly dancers.

The US Department of Defense has cooperated with Hollywood in making more than a dozen films showing US soldiers killing Arabs and Muslims. One-sided film portrayals omit images of Arabs and Muslims as ordinary people with families and friends, or as being outstanding members of communities, scholars, writers, or scientists. Few US movies have depicted Arabs or Muslims in a favorable light, and even fewer have included them in leading roles. Commentators rarely criticize the unbalanced depiction of Arabs and Muslims. The stereotyping and demonizing of Arabs and Muslims by American films may well have gone largely unnoticed because they are entirely consistent with widespread attitudes in US society.

3 RACISM IN TIMES OF NATIONAL CRISES

Times of crisis are often accompanied by hostility toward minorities in the United States. For Arabs and Muslims, this may be even more problematic, as perpetrators

[11] Abraham, *supra* note 5, at 187.
[12] Jack G. Shaheen, Reel Bad Arabs: How Hollywood Vilifies a People 9 (2001).
[13] *Id.* at 11.

of hate crimes against Arabs and Muslims frequently fail to differentiate among persons based on religion or ethnic origin, from Pakistanis, Indians, Iranians, and Japanese to Muslims, Sikhs, and Christian Arabs. The widespread perception in the United States is that Arabs and Muslims are identical and eager to wage a holy war against the United States. In fact, according to a 1993 report, only 12% of the Muslims in the United States at that time were Arab, and Arab Muslims are even a minority in the Arab-American community. Although there are Muslim "extremists," the majority of Muslims are "decent, law-abiding, productive citizens."[14]

Because of the lack of differentiation between different types of Arabs and Muslims, terrorist acts by small groups of Arabs and Muslims often have been followed by generalized hostility toward entire communities of Arabs and Muslims in the United States. For example, after Lebanese Shi'a gunmen in 1985 highjacked TWA Flight 847 to Beirut, beat an American on the plane to death, and held the remaining passengers hostage for over two weeks, violent attacks against persons of Arab and Muslim origin occurred across the United States. Islamic centers and Arab-American organizations were vandalized and threatened. A Houston mosque was firebombed. A bomb exploded in the American-Arab Anti-Discrimination Committee office in Boston, severely injuring two policemen. Later that same year, after terrorists hijacked the *Achille Lauro* cruise liner and murdered a passenger, a wave of anti-Arab violence swept the country, including the bombing of an American-Arab Anti-Discrimination Committee office that killed its regional executive director.

In 1986, in apparent response to the Reagan administration's "war on terrorism" directed at Libya, another episode of anti-Arab harassment and violence broke out. The same night of a US bombing raid on Libya, the American-Arab Anti-Discrimination Committee national office in Washington received threats. Shortly thereafter, the Detroit American-Arab Anti-Discrimination Committee office, the Dearborn Arab community center, and the Detroit Arab-American newspaper received bomb threats. Threats, beatings, and other violent attacks on Arabs were reported across the United States. At this time, someone broke into a Palestinian family's home, set off a smoke bomb inside the house, and painted slogans such as "Go Back to Libya" on the walls.

The Gulf War intensified anti-Arab hostility in the United States. The American-Arab Anti-Discrimination Committee reported four anti-Arab hate crimes for 1990 before the invasion of Kuwait in August. Between the invasion and February 1991, the Committee reported 175 incidents. When US intervention in Kuwait commenced in January 1991, Arab and Muslim businesses and community organizations were bombed, vandalized, and subjected to harassment.

[14] Editorial, *Don't Judge Islam by Verdicts*, Orlando Sentinel, Mar. 8, 1994, at A10.

3.1 *The US Government and the Role of Law*

Institutional racism through the law and its enforcement has contributed to the racialization and targeting of Arabs and Muslims. The federal government's actions taken in the name of fighting terrorism have been followed by indiscriminate threats and violence against Arabs and Muslims in the United States. This frightening pattern has repeated itself in the wake of September 11.

The Nixon administration's Operation Boulder was an early effort of the US government to target Arabs in the United States for special investigation and discourage their political activism on Middle Eastern issues. Ostensibly designed to confront the threat posed by terrorists who took hostages and murdered athletes at the 1972 Munich Olympics, the President's directives authorized the FBI to investigate people of "Arabic background" to determine their potential relationship with "terrorist" activities related to the Arab-Israeli conflict. The FBI admittedly wiretapped prominent Detroit lawyer Abdeen Jabara, then president of the Association of Arab-American University Graduates.

Later in the 1970s, President Jimmy Carter took numerous steps against Iranians and Iran in response to the crisis in which US citizens were held hostage in Teheran. In the 1980s, the Reagan administration's foreign policy also involved combating "terrorism." President Reagan in 1986 announced that the US government had evidence that Libyan leader Muammar Qaddafi was responsible for terrorist attacks, such as those at the Rome and Vienna airports, and was planning further attacks in the United States. The US Navy later that year shot down two Libyan planes off the coast of Libya. President Reagan proclaimed that "we have the evidence" that Qaddafi was sending hit teams to assassinate the US President. Despite official responses from the Austrian, Italian, and Israeli governments that there was no evidence of Libyan involvement in the Rome and Vienna attacks, or that any Libyan "hit squads" had been sent to the United States, the United States bombed Libya. Vandalism and violence against United States residents of Arab or Middle Eastern origin and their community centers, mosques, businesses, and homes followed the public announcements.

In the 1990s, after the US invasion of Kuwait, the US government's "war on terrorism" shifted focus to Iraq and its leader, Saddam Hussein. The Bush administration accused Iraqi forces of atrocities against Kuwaitis. The administration then launched a surveillance program directed at Arab-Americans. The FBI interrogated Arab and Muslim leaders, activists, and antiwar demonstrators across the country. The Department of Justice instituted fingerprinting of all residents and immigrants in the United States of Arab origin; the Federal Aviation Administration commenced a system of airline profiling of persons from the Arab world. Private harassment and violence against the Arab and Muslim communities followed.

Foreign policy has played a large role behind immigration measures directed at Arabs and Muslims in the United States. The Immigration and Naturalization Service (INS) sought to deport noncitizens of Palestinian ancestry at the same time that the federal government attempted to shut down Palestine Liberation Organization (PLO) offices in the United States and at the United Nations. In the 1980s, President Reagan issued a secret National Security Decision Directive that authorized the creation of a network of agencies designed to prevent "terrorists" from entering or remaining in the United States. Under one proposal, intelligence agencies would provide the INS with "names, nationalities and other identifying data and evidence relating to alien undesirables and suspected terrorists believed to be in . . . the US"[15] The Alien Border Control Committee also considered an INS-created strategy called Alien Terrorists and Undesirables: A Contingency Plan, which called for mass arrests and detentions of noncitizens from Arab nations and Iran and suggested using ideological exclusion grounds in the immigration laws to remove noncitizens from Arab countries and Iran already in the United States.

3.2 *Efforts to Stifle Political Dissent: The Case of the L.A. Eight*

Critics long have pointed out that the United States has discriminated against Arabs and Muslims in applying the terrorist exclusion provisions of the Immigration and Nationality Act (INA), the comprehensive US immigration law. Arabs, particularly Palestinians, are the primary groups subject to many of the terrorism provisions. During the Gulf War crisis, for example, government officials fingerprinted and photographed all entrants with Iraqi or Kuwaiti passports, without regard to evidence of past terrorist activities or sympathies.

Related to the terrorist provisions in the immigration laws are those permitting exclusion of noncitizens based on political beliefs or associations, passed during the anti-communist fervor of the McCarthy era. The courts generally upheld application of the ideological exclusions, which provoked sharp academic criticism. In 1977, Congress enacted the McGovern Amendment, which permitted the attorney general to waive the exclusion of any noncitizen affiliated with an organization proscribed by the United States. In 1979, Congress created a single exception to the McGovern Amendment that barred waiver of the exclusion for PLO officials or representatives. In any event, through a variety of means, consular officers could continue to exclude a person based on ideology.

The federal government's efforts to remove the "L.A. Eight" illustrate the extremes to which it will resort in order to deport political dissidents from the

[15] *Legislation to Implement the Recommendations of the Comm'n. on Wartime Relocation and Internment of Civilians: Hearing on H.R. 442 Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary*, 100th Cong. 67 (1987) (submission of Investigations Division of the Immigration and Naturalization Service).

country. The case began before dawn on January 26, 1987, when officers of the FBI, INS, and Los Angeles police department descended on the Los Angeles home of Khader Hamide, a US lawful permanent resident, and his Kenyan-born wife Julie Mungai. The couple were handcuffed, told they were being arrested for "terrorism," and taken into custody while police blocked the street and an FBI helicopter hovered overhead. Six other individuals were arrested that morning.

The INS sought to remove the L.A. Eight from the United States based on political ideology. Both the director of the FBI and the regional counsel of the INS testified before Congress that the sole basis of the government's efforts to deport the L.A. Eight was their political affiliations. In the words of FBI director William Webster, "All of them were arrested because they are alleged to be members of a world-wide Communist organization which under the [INA] makes them eligible for deportation. . . . If these individuals had been United States citizens, there would not have been a basis for their arrest."[16] The evidence underlying the government's charges amounted to a claim that the L.A. Eight read or distributed literature linked to the Popular Front for the Liberation of Palestine (PFLP), which the district court found was engaged in a wide range of lawful activities, from providing education, health care, social services, and day care to cultural and political activities. The district court ruled that the ideological exclusion grounds violated the First Amendment.

In 1990, while the L.A. Eight case was pending, Congress repealed the ideological exclusion grounds of the immigration laws. The INS then instituted new proceedings against the L.A. Eight based on charges of terrorism, as well as on other grounds. The INA permits removal of noncitizens who have "engaged in terrorist activity," which is defined as having committed, "in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time."[17] This broad language authorizes the INS to deport or exclude an individual who has donated money to an organization for its legal, social, or charitable activities if any part of that organization also has engaged in terrorism, as broadly defined.

The thrust of the INS case was based on the L.A. Eight's affiliation with the PFLP. Because this provision had never previously been used by the INS to seek to deport a noncitizen from the United States, the L.A. Eight claimed that the federal government selectively enforced the immigration laws against them for exercising their First Amendment rights. In the end, the Supreme Court ruled that the 1996 amendments to the immigration laws barred judicial review of their claim.

[16] Nomination of William H. Webster: *Hearings before the Select Comm. on Intelligence of the United States Senate*, 100th Cong., 1st Sess. 95 (1987) (testimony of FBI Director William Webster).

[17] INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii).

Following the Court's decision, the case was remanded to the immigration court. In 2001, the court dismissed the primary removal charges on the grounds that they were not meant to apply retroactively. Nonetheless, the INS continues its efforts to deport the L.A. Eight, even relying on secret evidence in seeking removal of two of the eight.

3.3 *The Secret-Evidence Cases*

The INS has selectively targeted Arabs and Muslims through the use of secret evidence – evidence that it refuses to disclose to the noncitizen or his or her counsel – to charge, detain, and deny bond or release in removal proceedings. By 1999, twenty-five secret-evidence cases were pending in the United States.

In *Rafeedie v. INS*,[18] Fouad Rafeedie, a 20-year lawful permanent resident of Palestinian origin, was arrested upon returning to the United States after a two-week trip to a conference in Syria sponsored by the Palestine Youth Organization. He was placed in summary exclusion proceedings based on ideological grounds. The INS claimed that disclosing its evidence against Rafeedie would be "prejudicial to the public interest, safety, or security of the United States."[19] The court of appeals rejected the INS position and required application of the ordinary due-process analysis in deciding whether the federal government's national security interests outweighed Rafeedie's First Amendment rights. The court observed that the only way Rafeedie could have prevailed over the INS's secret evidence would be if he could "rebut the undisclosed evidence against him. . . . It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden."[20]

Since repeal of the ideological-exclusion provisions of the INA in 1990, the INS has relied on secret evidence to detain and deport Arabs and Muslims. Moreover, in response to the 1995 Oklahoma City bombings, Congress enacted anti-terrorism legislation that has facilitated the targeting of Arab and Muslim noncitizens – the Antiterrorism and Effective Death Penalty Act (AEDPA)[21] and the Illegal Immigration Reform and Individual Responsibility Act (IIRIRA),[22] both of which brought about radical changes to the immigration laws and effectively allowed for the possibility of ideological exclusion and removal through secret evidence proceedings.

Bolstered by the 1996 reforms curtailing the rights of noncitizens, the INS brought approximately two dozen deportation actions based on secret evidence,

[18] Rafeedie v. INS, 688 F. Supp. 729 (D.D.C. 1988), aff'd in part, rev'd in part, remanded, 880 F.2d 506 (D.C. Cir. 1989).
[19] *Rafeedie*, 688 F. Supp. at 734–35.
[20] *Rafeedie*, 880 F.2d. at 516.
[21] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[22] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

claiming that disclosing the evidence would compromise the security of the United States. Although the INS denies that it selectively uses secret evidence against Arabs and Muslims, our research has not uncovered a single secret-evidence case not involving an Arab or Muslim noncitizen.

AEDPA established a special procedure for detaining and deporting "alien terrorists" that permitted the use of secret evidence with certain procedural safeguards designed to protect constitutional rights. The INS, however, has never used the procedures; instead, it has relied on preexisting regulations it claims authorize the use of secret evidence in the immigration courts. By so doing, the INS has avoided complying with AEDPA's safeguards, which include requiring the production of an unclassified summary of the secret evidence to the noncitizen and having a federal court assess the constitutionality of the use of secret evidence. This strategy has allowed the US government to avoid charging the noncitizen under a substantive "terrorism" provision of the INA, which would require the government to prove such a charge.

The cases of the Iraqi Seven arose out of the US government's resettlement of Iraqi Kurds after the Gulf War. The Iraqi men, who had all worked for a CIA-funded Iraqi opposition group, were evacuated from Iraq by the United States. The INS commenced exclusion proceedings against them, based on alleged visa violations. Fearing persecution if returned to Iraq, the Iraqi Seven sought asylum in the United States. Relying primarily on secret evidence, the immigration judge found them to be national security risks.

As a result of the litigation, the INS released 500 pages of evidence used against the Iraqi Seven. James Woolsey, the former director of the CIA who directed the US government's efforts to organize the overthrow of Saddam Hussein, was one of the lawyers representing the Iraqis. Besides concluding that hundreds of pages had been erroneously classified, Woolsey found that the evidence was based on serious errors in Arabic–English translations, ethnic and religious stereotyping by the FBI, and reliance on unreliable information, including rumors and innuendo. He claimed that the US government made material misrepresentations to the immigration judge. Despite the weakness of the government's case, the case was only concluded when five of the Iraqis entered into a settlement agreement withdrawing their asylum claims in exchange for release from detention.

Mazen al-Najjar and Anwar Haddam experienced the longest detentions connected with secret-evidence proceedings: first jailed in May 1997, al-Najjar was held for three-and-a-half years; Haddam was held for four years. Al-Najjar, a stateless Palestinian, was editor of the journal of the World and Islam Studies Enterprise (WISE), a think tank based at the University of South Florida devoted to promoting discussion of Middle East issues. The INS arrested al-Najjar and placed him in removal proceedings as part of an FBI investigation against a former WISE administrator who became head of the Islamic Jihad. The arrest and detention were based on secret evidence.

Anwar Haddam was an elected member of the Algerian Parliament. A professor of physics at the University of Algiers, he ran for election as a member of the Islamic Salvation Front (FIS), a moderate Islamic party that swept the 1991 elections with 80% of the vote. The Algerian military staged a coup d'etat, arrested the president of the FIS, and rounded up thousands of its members. Top FIS officials were killed or imprisoned while thousands of FIS supporters were imprisoned, tortured, and executed. A civil war followed, with tens of thousands of deaths. One of the few elected FIS officials who managed to escape Algeria, Haddam entered the United States on a valid nonimmigrant visa in 1992 and later filed an asylum claim. The INS took Haddam into custody and detained him based on secret evidence. In both the al-Najjar and Haddam cases, as the secret evidence has either been unclassified or disclosed, it was demonstrated that the government's "terrorist" claims were based on unreliable evidence. The men were released only after years of detention.

Nasser Ahmed, a father of US-citizen children, was held in custody and denied bond for three-and-a-half years based on secret evidence. Charged in April 1995 with overstaying his visa, he had been released on $15,000 bond while he pursued a claim for political asylum. In 1996, while his own deportation proceedings were ongoing, Ahmed became the court-appointed translator for the attorneys representing Sheik Omar Rahman, later convicted in the 1993 World Trade Center bombing attempt. As Ahmed was going to immigration court for his asylum hearing, the INS arrested him and opposed his release on bond. On remand, the immigration court dismissed the evidence of the government's remaining contentions, on the grounds that it was based on an informant who had personal reasons for seeking Ahmed's deportation.[23]

As the secret-evidence cases have slowly moved toward conclusion, the government's claims in all of the cases have evaporated. No case has included sufficient evidence of terrorism-related charges necessary to justify detention. Besides the individual loss of liberty, these cases have chilled Arab and Muslim political speech.

4 THE CIVIL RIGHTS IMPLICATIONS OF THE MODERN WAR ON TERRORISM

The federal government responded with ferocity to the events of September 11. Hundreds of Arab and Muslim noncitizens were rounded up as "material witnesses" in the ongoing investigation of the terrorism, or detained on relatively minor

[23] *Matter of Nasser Ahmed*, No. A90–674-238 (Immigration Court June 24, 1999) (decision following remand); *In re Nasser Ahmed*, at 7 (Exec. Office Immigration Review, Immigration Court, July 30, 1999) (decision following remand).

immigration violations. The dragnet provoked criticism as a poor law enforcement technique as well as a major intrusion on fundamental civil liberties. Congress swiftly passed the USA PATRIOT Act,[24] which, among other things, allowed the government to detain suspected noncitizen "terrorists" for up to a week without charges, and bolstered federal law enforcement surveillance powers over citizens and noncitizens associated with "terrorism." President George W. Bush issued a military order allowing alleged noncitizen terrorists, including those arrested in the United States, to be tried in military courts while guaranteed few rights. Proposed regulations issued in response to the US Supreme Court decision in *Zadvydas v. Davis*,[25] holding that indefinite detention of noncitizens ordered removed from the country was not authorized by law, include an exception permitting indefinite detention of noncitizens for terrorism and national security reasons. Attorney General Ashcroft issued an interim rule allowing electronic surveillance of attorney–client communications with detained alleged terrorists, which was followed by an indictment of an attorney for allegedly aiding terrorist activities.

To the extent that the United States's responses to September 11 can be characterized as regulating immigration, existing caselaw affords considerable leeway to the political branches of the federal government. The Supreme Court has upheld immigration laws discriminating against noncitizens on the basis of race, national origin, and political affiliation that would patently violate the Constitution if the rights of citizens were at stake. The so-called plenary-power doctrine creates a constitutional immunity from judicial scrutiny of substantive immigration judgments of Congress and the Executive Branch. The doctrine thus allows the federal government, through the immigration laws, to lash out at any group considered undesirable. Such authority increases exponentially when, as in the case of international terrorism, perceived foreign relations and national security matters are at issue. When immigration law and its enforcement rest primarily in the hands of the federal government, uniform national civil rights deprivations may result.

The law supporting much of the immigration and civil rights incursions of the "war on terrorism," including the plenary power doctrine, has been subjected to sustained scholarly criticism. In important ways, contemporary immigration law ignores a constitutional revolution that occurred in the area of civil rights over the latter half of the twentieth century. Nonetheless, much of this body of law – or, more accurately, the perceived immunity from any legal constraints – has guided the Bush administration's domestic responses to the legitimate concerns with terrorism.

[24] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, §§ 412, 201-25, 115 Stat. 272, 350-52, 278-96.

[25] 533 U.S. 678 (2001).

4.1 *The Dragnet*

The events of September 11, 2001 understandably provoked an immediate federal governmental response. Heightened security measures were the first order of the day. Within a matter of weeks, the US government arrested and detained in the neighborhood of 1,000 people as part of the Justice Department's investigation into the September 11 attacks. The mass dragnet of men from many nations, with the largest numbers from Pakistan and Egypt, apparently failed to produce any direct links to the terrorist acts; about 100 were charged with minor crimes and another 500 were held in custody on immigration-related matters, such as having overstayed their temporary nonimmigrant visas. Attorney General John Ashcroft admitted that minor immigration charges would be used to hold noncitizens while the criminal investigation continued.

Information remains sketchy about the persons detained by the US government, because the attorney general refused to release specific information about them, prompting criticism from US Senator Russell Feingold. The Justice Department issued a rule barring disclosure of information about INS detainees held by state and local authorities, which survived legal challenge. After September 11, the immigration courts began holding secret hearings in immigration cases involving Arab and Muslim noncitizens. In sum, the federal government's treatment of the detainees, and its treatment of Arab and Muslim noncitizens in immigration proceedings, were shrouded in secrecy.

To gain information about the detainees, civil rights organizations filed a Freedom of Information Act action. According to one press report, information produced in response to the litigation shows that "the handling of Muslims arrested on immigration charges after Sept. 11 has been fraught with delay and sloppy bookkeeping and that due process was shortchanged."[26]

The nature and conditions of the initial wave of mass arrests and detentions warrant consideration. Arab and Muslim detainees were held for weeks – in some instances, months – without any charges filed against them and without being provided information about why federal authorities continued to detain them. For example, the US government held Dr. al-Badr al-Hazmi, a radiologist who had lived as a lawful permanent resident for years with his family in San Antonio, for two weeks, partly because he shared the same last name – a common one in Saudi Arabia – with two of the September 11 hijackers. The US government arrested and held a Yemeni immigrant for two months who was interrogated and threatened before being released without being charged. One Pakistani student was arrested for visa problems and held in a local jail in Mississippi, where police allegedly watched as he was beaten by other prisoners for being a terrorist. An Egyptian computer

[26] Jim Edwards, *Data Show Shoddy Due Process for Post-Sept. 11 Immigration Detainees*, N.J. L.J., Feb. 4, 2002, at 1.

engineering student was wrongly detained for over three weeks and charged with lying to federal investigators about ownership of an aviation radio allegedly recovered in his hotel room, which (as it turned out) did not belong to him. Given the tenor of the times, it is not surprising that Attorney General Ashcroft lambasted critics of the Bush administration's anti-terrorism measures as aiding the terrorist cause.

The federal government also made it difficult for attorneys for Arab and Muslim detainees to gain access to their clients so that they could provide them with legal advice. In fact, the United States held as an "enemy combatant" (without charges or access to an attorney) a US citizen of Latina/o ancestry who converted to Islam and allegedly was part of a plot to detonate a nuclear device and was arrested on US soil.

The dragnet did not end there. The Justice Department also sought to interview about 5,000 men – almost all of them Arab or Muslim – between the ages of 18 and 33 who had arrived on nonimmigrant visas in the United States after January 1, 2000. There was no evidence that any of the 5000 had been involved in terrorist activities. Although technically voluntary, the interviews with law enforcement authorities undoubtedly felt compulsory to many. Arab and Muslim fears of detention and deportation were reinforced by the November 2001 arrest of Mazen al-Najjar, who had previously been held on secret evidence and released after the government failed to provide evidence that he was engaged in terrorist activity. In March 2002, Attorney General Ashcroft asked US attorneys to interview another 3,000 or so Arab and Muslim noncitizens. Around the time of this announcement, the federal government conducted raids on Arab and Muslim offices and homes in search of terrorist connections.

The questioning of noncitizen Arabs and Muslims could be expected to alienate those interviewed, as well as the communities of which they are a part. A memorandum from the Office of the US Deputy Attorney General offered detailed instructions on information to be solicited and mentioned that the US government should be informed if an interviewee was suspected of being in the country in violation of the immigration laws, implying an effort to remove Arabs and Muslims from the country based on immigration law violations wholly unrelated to terrorism.

The questions directed at the noncitizens suggested that Arabs and Muslims were prone to disloyalty. One line of questioning was as follows: "You should ask the individual if he noticed anybody who reacted in a surprising or inappropriate way to the news of the September 11th attacks. You should ask him how he felt when he heard the news."[27] This tracks questions reportedly asked by federal investigators

[27] Memorandum from the Deputy Attorney General, to all United States Attorneys and all Members of the Anti-Terrorism Task Forces (Nov. 9, 2001), reprinted in DOJ Orders Incentives, *'Voluntary' Interviews of Aliens to Obtain Info on Terrorists, Foreign Students, Visa Processing Under State Dept. Scrutiny*, 78 INTERPRETER RELEASES 1816 app. 1 at 4 (Dec. 3, 2001).

soon after the bombing. At that time, the FBI posed the following questions to Arabs and Muslims:

- How do you feel about what happened last week in New York?
- Does it make you sad?
- Does it make you happy?
- Does it make you angry?
- How do you feel about being American? How do you feel about being an Arab?
- Why is it that America is considered the enemy?[28]

Despite the criticism, legal precedent may exist for the racially skewed dragnet. In *Brown v. City of Oneonta*,[29] a crime victim identified a young African American man as the perpetrator of a burglary and assault who, while committing the crime, cut himself with a knife. The police attempted to question all African American students at the local university and "over the next several days, the police conducted a 'sweep' of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts. More than two hundred persons were questioned during that period, but no suspect was apprehended."[30] Although the police employed an old-fashioned dragnet like those police techniques long condemned as overbroad and overinclusive, the court of appeals held that the sweep did not violate the Equal Protection Clause of the Fourteenth Amendment.

Gross stereotyping led to the assumption that since it was Muslims who perpetrated the terrorism of September 11, therefore it must be Muslims who have information about the terrorist acts. A few Arab and Muslim noncitizens in the United States might have information about terrorist networks. *Oneonta* thus may offer legal justification for the federal government's Arab and Muslim dragnet, even though law enforcement in the case arguably relied excessively on race in the criminal investigation. Besides the fact that the alleged perpetrators of the terrorist acts were Muslim, another consideration – the need to establish a "discriminatory intent" on the part of the government – could make it difficult to prevail on an Equal Protection claim. Nonetheless, the dragnet directed at all Arabs and Muslims is contrary to fundamental notions of equality and the individualized suspicion ordinarily required for a stop under the Fourth Amendment. It exemplifies the excessive reliance on race in the criminal investigation, a frequent law enforcement problem, and shows how, once race (at least of nonwhites) enters the process, it can come to dominate an investigation. To target an entire minority group across the country for

[28] Gina Keating, *ACLU Faults FBI for Aggressive Questioning*, Daily Recorder (Sacramento), Sept. 26, 2001, at 1, 7.

[29] Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000), cert. denied, 534 U.S. 816 (2001).

[30] *Id.* at 334.

questioning is obviously over-inclusive. Over one million persons of Arab ancestry in the United States,[31] all of whom may feel threatened and under suspicion, cannot miss the message sent by the nature of the federal government's investigation.

In important ways, the September 11 dragnet carried out by the federal government resembles the Japanese internment during World War II, although detention fortunately does not appear to be a current part of the US government's strategy. National identity and loyalty are defined in part by "foreign" appearance, ambiguous as that may be. In some ways, the current treatment of Arabs and Muslims is more extralegal than the internment. No executive order authorizes the treatment of Arabs and Muslims; nor has there been a formal declaration of war. Moreover, nationality, which is more objective and easier to apply than religious and racial classifications, is not used as the exclusive basis for the measures. Rather, the scope of the investigation is broad and amorphous enough to potentially include all Arabs and Muslims who may be natives of countries from around the world.

4.2 *Visa Processing and Removals*

Many of the September 11 airplane hijackers appear to have entered the country on student nonimmigrant visas, which provoked concern and an array of federal responses. Visa-monitoring concerns increased exponentially when two suspected terrorists received visa renewals months after their deaths on September 11.

As an initial response, investigators contacted administrators at over 200 colleges to collect information about students from Middle Eastern countries. In December 2001, with a mass arrest, the INS announced its crackdown on noncitizens who violated the terms of their student visas. Arrests focused exclusively on students from nations with alleged terrorist links: Iran, Iraq, Sudan, Pakistan, Libya, Saudi Arabia, Afghanistan, and Yemen. Along similar lines, the Justice Department in January 2002 announced that its Operation Absconder that focused removal efforts on 6000 young men from the Middle East who have ignored deportation orders.

In May 2002, Congress passed the Enhanced Border Security and Visa Reform Act to improve the monitoring of noncitizens in the United States on student and other visas.[32] In June 2002, Attorney General John Ashcroft announced a new National Security Entry-Exit Registration System, which will impose special registration requirements on noncitizens who, as determined by the federal government, pose "national security risks." Specifically, fingerprinting, photographing, and added registration requirements will be required of nationals of Iran, Iraq, Libya, Sudan, and Syria, and of any other noncitizens as determined by the attorney general.

[31] U.S. Census Bureau, Profile of Selected Social Characteristics: 2000, at http://factfinder.census.gov/servlet/QTTable?ds_name=D&geo_id=D&qr_name=ACS_C255_EST_G00_QT02&lang=en).

[32] Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002).

The attorney general will have exclusive authority to designate the noncitizens deemed to be "national security risks."

Any legal challenges to the visa policies and procedures will prove difficult. Visa procedures generally are not subject to judicial review. Indeed, Congress in 1996 extended greater discretion to the State Department in visa processing and, according to some critics, increased the potential for nationality-based discrimination in the visa issuance process. Moreover, the merits of visa decisions by State Department consular officers long have been immune from any judicial review. Selective enforcement claims also face formidable legal barriers.

4.3 *Torture*

The Arab and Muslim dragnet was not the most extreme option considered in the wake of September 11. Indeed, the tenor of the public debate allowed for consideration of policy alternatives that previously would have been virtually unthinkable. Torture to extract information, or the threat of sending a suspect to a country that engaged in torture, was discussed as a policy option. A public reevaluation of the ordinary Fourth Amendment prohibition of such practices ensued.

Torture was contemplated because many of the "material witnesses" arrested and detained in the dragnet in the weeks following September 11 apparently did not provide much information to the US government. Given the relatively indiscriminate nature of the arrests, many in all likelihood did not have any relevant information. Nonetheless, support for torture came from across the political spectrum.

Torture unquestionably is an extreme measure, going well beyond conventional law enforcement techniques. The consideration of extreme measures reveals the popular perception about the nature and inhumanity of Arab and Muslim "terrorists." As Professor Porras observed:

> The terrorist is transformed through ... rhetoric from an ordinary deviant into a frightening, "foreign," barbaric beast at the same time that extra-normal means are called for to fight terrorism. Since terrorists are never imagined as anything other than terrifying, blood-thirsty barbarians, ordinary law is understood to be deficient or insufficient to deal with them.[33]

This classification of Arabs and Muslims as inhuman "others" taps into their enduring demonization as presumptively disloyal and dangerous to the security of the United States.

The legal use of torture hopefully will never come to pass in the United States. However, the fact that it was discussed in polite company in the wake of September

[33] Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 Utah L. Rev. 119, 121 (1994).

11 demonstrates the monumental – although hopefully temporary – shift in public opinion about the need to protect national security whatever the cost to civil liberties.

5 CONCLUSION

The federal government's reaction to the events of September 11 promises to have a deep and enduring impact on civil rights in the United States. As the not-so-distant past demonstrates, immigration reforms and executive action, that have the appearance of responding to the acts of terrorism, will remain with us long after the immediate terrorist threat has passed and adversely affect the rights of all immigrants and many citizens. Moreover, fundamental immigration reform proposals, such as the possible regularization of the immigration status of many undocumented immigrants in the United States and the repeal of special secret-evidence procedures, under serious discussion before September 11, may well go by the wayside. The demise of regularization proposals will maintain the uncertain legal status, and accompanying vulnerability, of undocumented immigrants.

Besides laws designed to improve visa monitoring, Congress has already taken one significant effort at immigration reform. Section 411 of the USA PATRIOT Act expands the definition of "terrorist activity," which justifies exclusion, to include using any "explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." This may result in an additional removal ground for noncitizens convicted of assault and similar crimes not ordinarily thought of as "terrorist" in nature. The Act further provides that a spouse or child of an inadmissible "terrorist" is generally inadmissible as well. A noncitizen also may be deemed inadmissible for being "associated with a terrorist organization,"[34] broad terms reminiscent of the discredited principle of guilt by association. The Act provides for retroactive application of the various changes to the immigration laws.

The USA PATRIOT Act also appropriated funds for increased border enforcement, even though there is no evidence that the alleged terrorists evaded inspection at the national border.[35] In addition, the law allows the federal government greater surveillance powers, which may impact the rights of US citizens. The various provisions of the USA PATRIOT Act likely will be subject to constitutional challenges on a wide variety of grounds.

The stereotyping of Arabs and Muslims historically has had a dramatic impact on immigration law and policy. Separate procedures and the selective enforcement of

[34] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) § 411, Pub. L. No 107-56, 115 Stat. 272 (2001).

[35] *Id.* at § 402 (authorizing appropriations necessary to triple the Border Patrol personnel along northern border).

the immigration laws have adversely affected the civil rights of Arabs and Muslims in the United States. The most recent "war on terrorism" has built on previous anti-terrorist measures. Sadly, but not unexpectedly, private discrimination frequently has accompanied governmental action directed at Arabs and Muslims.

The events of September 11 reveal the limited membership rights accorded persons of Arab and Muslim ancestry in the United States —US citizens as well as immigrants. Such treatment has been suffered by various groups in the nation's history. Many of those groups, such as African Americans, Asian Americans, and Latinos, continue to strive for full membership in this society. Only time will tell whether Arab and Muslim Americans will ever achieve that goal, or perhaps which group will replace them as the demons of tomorrow.

3

Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)

Karen Engle[*]

1 INTRODUCTION

The United States government's declared and orchestrated war on terrorism has internal as well as external dimensions. Externally, it has identified or attempted to identify the terrorist threat with particular nation states, such as Afghanistan and Iraq. But much of the war has been fought internally. Because the enemy could reside anywhere, even within the United States and within those nation states that the United States would never accuse of sponsoring or even condoning terrorism, the war against terrorism requires allies to turn inward to rout out the enemy. For the United States at least, the revision and deployment of immigration law and policy has played an important role in that inward turn.

This chapter approaches the internal war on terrorism by contextualizing it historically, particularly within the history of United States immigration law and policy that has attempted simultaneously to expand and enrich the polity and to exclude or deport "bad aliens," or those aliens seen as posing a threat to the security or cultural unity of the United States. If citizens and noncitizen immigrants had begun to take for granted certain civil rights and liberties before September 11, doing so required forgetting – or at least assuming that Chinese exclusion, immigration quota systems, Japanese internment, and the McCarthy era were securely of the past. For many Muslim residents, forgetting was not possible. The 1996 Antiterrorism and Effective Death Penalty Act (AEDPA),[1] which disproportionately affected Arab

[*] This chapter is mostly composed of excerpts of the previously published article, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. Colo. L. Rev. 59 (2004). In a few instances, when the original sources are not easy to locate or when authors have expounded upon their views in later publications, I have added more contemporary citations in brackets.

[1] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248 (codified as amended at 8 U.S.C. § 1189 (1996)).

Muslims, was a recent reminder of the shadow of suspicion that antiterrorist measures could cast on their lives.

The internal war on terrorism after September 11 recalls much of this forgotten history and demonstrates its ongoing resonance. As new lines are drawn between good and bad aliens and citizens in the "either you are with us, or you are with the terrorists"[2] mentality, bad aliens are distinguished from good aliens by place of origin, race or ethnicity, and transnational and political aims.

In this chapter, I identify and describe the semiotic dynamic of immigration law's distinctions between good and bad aliens and demonstrate its continuance as an organizing structure in the war on terrorism. I argue that this dynamic functions to legitimize the war on terrorism by constructing, through a series of disciplining moves long used in immigration law, citizen and alien soldiers in the war on terrorism. Just as denouncing Communism and showing fealty to the United States during the Cold War served as a way of distinguishing oneself from bad aliens, flying the United States flag and supporting and even helping to fight the war on terrorism provide a means of ensuring that one is seen as good. Those who are particularly suspect, Muslim or Arab aliens and even Muslim or Arab citizens, have the greatest incentive to demonstrate their goodness.

Yet, in contrast to what some critics argue, I maintain that individuals thought to occupy the category of Muslim or Arab are not automatically placed into the "bad" category. United States policy recognizes that Muslim aliens are not always unassimilable, and Muslim citizens are not always un-American. Thus, the war on terrorism is not simply a war on Muslims, and it is not a holy war. To the contrary, it largely attains legitimacy by presuming and relying on the existence of a category of good Muslims, both within the United States and abroad. The United States of the twenty-first century maintains an identity as a multicultural, (neo)liberal, and tolerant state. To disassociate an entire part of the polity would not be as easy as it might have been in the past. Perhaps more important, the "good Muslim" category provides a means for Muslims both inside and outside of the United States to support the United States's internal as well as external attempts to fight the war on terrorism, thus reinforcing the war's legitimacy.

This chapter studies this attempt at legitimization by uncovering the ways that deeply embedded dichotomies in the history of United States immigration and related law have been deployed in the United States's internal war on terrorism. It studies how official United States policy and discourse oscillate between profiling and stereotyping, on one hand, and, on the other hand, a sincere insistence that Muslim citizens and residents are an important and respectable part of the United States polity. That oscillation, I maintain, is crucial to the legitimization project.

[2] President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html.

2 IMMIGRATION LAW AND BAD ALIENS

United States immigration law and policy have drawn lines between good and bad aliens to distinguish nationals of friendly states from those of enemy states, those identified with races and ethnicities seen as capable of assimilating into a country comprised largely of northern Europeans from those considered incapable of such assimilation, and those who are willing to profess loyalty to the United States and denounce anarchy and Communism from those who either refuse to do so or do not do so credibly. Thus, enemy aliens, unassimilable aliens, and undetectable transnational movement–sympathizing aliens have at different times occupied the space of bad alien against which good aliens were defined.

Immigration law is obviously not the only terrain on which the war on terrorism is fought. And immigration law is not isolated from other legal and social regimes that reflect and affect societal understandings about citizenship, patriotism, multiculturalism, and tolerance. Hence, some of the same distinctions drawn in immigration law and policy can often be found in other areas of the law as well – for example, in criminal law, welfare law, and civil rights law. To the extent that I consider these other areas of the law in this part and elsewhere, I maintain that they rely upon the same semiotic structure I identify in immigration law.

This part of the chapter sets forth the three classes or prototypes of bad aliens against which, I argue, the United States has at least in part constructed its immigration law and policy as well as other laws that attempt to respond to perceived threats to national security.

2.1 *The Enemy Alien*

With the significant exception of refugee law and political asylum, when individuals overtly seek refuge from what they argue are oppressive regimes, United States immigration law tends to assume that aliens residing in the United States remain loyal to the country from which they hail. Thus, it is more likely that nationals of allies than nationals of enemies will be permitted to enter the country for purposes of travel, business, and education. When tensions arise between the United States and another country, the United States retains, and has often used, the power first granted by the Alien Enemy Act of 1798 to detain or deport the citizens of that country.[3]

Blanket suspicion of nationals of enemies or potential enemies of the United States has not been limited to actions taken under the Alien Enemy Act itself. In the late 1970s, for example, in response to the Iranian hostage crisis, the Immigration and Naturalization Service (INS) revoked deferred departure dates previously

[3] Alien Enemy Act of July 6, 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21-24).

granted to Iranian nationals (many of whom were students) out of fear that they had retained their loyalty to Iran and were thus a threat to the United States.[4]

2.2 *The Unassimilable Alien*

A century after the Alien Enemy Act was passed, immigration law began to focus on a new issue. In the late nineteenth and early twentieth centuries, Congress became concerned about the influx of foreigners who, although not enemy aliens, might nevertheless fail to weave into the fabric of American life. Indeed, Congress considered the mere presence of these foreigners to pose a serious threat to that fabric. Sometimes these unassimilable aliens were seen as a threat to the maintenance of national sovereignty. Other times, they were imagined to threaten the dominant American language, culture, and prosperity. Often, the two concerns were intertwined.

In 1882, Congress passed an Act to suspend the immigration of Chinese laborers for ten years.[5] In 1888, it furthered the effect of the 1882 law by extending the prohibition to those who had previously lived in the United States but had returned home temporarily in accordance with what was then the law.[6]

In *Chae Chan Ping*, a case commonly referred to as the Chinese Exclusion Case, the Court upheld the 1888 Act, even though the United States was not at war with China. Congress presumably chose to exclude the Chinese, according to the Court, because it "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security."[7]

United States immigration policy continued, as a formal matter, to address the issue of assimilation well into the next century. In 1911, the Dillingham Commission, a joint congressional–presidential commission on immigration established four years prior, recommended that "the United States should carefully consider the appropriate process and desired results of assimilation … and limits should be placed on the number of persons of each race allowed to enter the United States each year."[8] The Act that emerged in 1917 added to the list of inadmissible classifications those who were illiterate and those coming from the "barred Asiatic

[4] The INS action was judicially upheld as a valid response to the crisis, despite a claim that it violated due process and the Administrative Procedures Act. Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980).

[5] Chinese Exclusion Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58, 59 (repealed 1943).

[6] Chinese Exclusion Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (repealed 1943).

[7] 130 U.S. 581 (1889), at 606.

[8] Cong. Research Serv., 96th Cong., *Report on the History of the Immigration and Naturalization Service* (Comm. Print 1980), at 23 (citing William P. Dillingham, *Immigrants as Charity Seekers*, S. Doc. No. 61-747, at 45–48 (3d Sess. 1911)).

Zone," which went from Afghanistan to the Pacific, excepting Japan and the Philippines.[9]

In addition to continuing Asian exclusion, the 1917 Act reflected increased opposition to immigration based in part on "the alleged illiteracy of people from [the south and east of Europe] and the concern that they were of races that were more difficult for the United States to assimilate."[10] In 1921, Congress implemented the Dillingham Commission's recommendation to institute quotas. The quotas were biased in favor of western Europeans in that they explicitly mirrored the demographics of the United States population in 1910.[11]

Arabs posed a problem for immigration law during the period of Asiatic exclusion (which ended in 1952) because of uncertainty as to whether they should be considered white. By 1924, about 200,000 Arabs lived in the United States. Eighty percent were from Syria and Lebanon, and 90 percent of them were Christian.[12] Many Arabs were granted naturalization, although some judges refused to naturalize Arabs, on the ground that they were Asiatic, even if from outside the barred zone.[13]

In response to a 1942 federal trial court decision in Detroit holding that Arabs were "not white persons within the meaning of the act,"[14] the INS made clear that its view was "that a person of the Arabian race is eligible to naturalization.[15]" Moreover, the INS continued, because the contributions that Arabs and other Semitics have made to Western civilization have long been well-known, the authors of the original statute in 1790 would not have intended Arabs to be excluded from the category of white persons.[16]

Even with the eventual repeal of the explicitly racist immigration preference system, United States law and policy has continued to presume that some aliens are more assimilable than others. That the vast majority of immigrants are admitted through a system of preferences for close family members – for example, guarantees that most of those who come into the country will do so to join family members who are already at least partially assimilated.

Since 1965, the Arab immigrant population in the United States has changed considerably. Approximately 60 percent of Arab immigrants over the past forty years

[9] The zone included parts of China, all of India, Burma, Siam, the Malay States, part of Russia, part of Arabia, part of Afghanistan, the East Indian Islands and most of the Polynesian Islands. Immigration Act of Feb. 5, 1917, ch. 29, §3, 39 Stat. 874, 876 (repealed 1952).

[10] 1980 SCIRP Report, supra note 8, at 23.

[11] *Id.* at 27.

[12] Louise Cainkar, *The History of Arab Immigration to the U.S.: An Introduction for High School Students*, available at https://web.archive.org/web/20070607154521/http://www.adc.org/education/AAImmigration2.htm.

[13] *See* Department of Justice, *The Eligibility of Arabs to Naturalization*, 1 INS Monthly Rev. 12, 15 (Oct. 1943).

[14] *In re Ahmed Hassan*, 48 F.Supp. 843, 846 (D.Mich. 1942).

[15] INS Monthly Rev., *supra* note 13, at 12.

[16] *Id.* at 15–16. The 1790 Act had limited citizenship to "free white person[s]." Act of Mar. 26, 1790, ch. 3, §1, 1 Stat. 103, 103 (repealed, 1795).

have been Muslim.[17] Although never specifically excluded on the basis of religion, Muslims have also tended to be seen as unassimilable. Nearly by definition, they are incapable of assimilating to a country in which government-sponsored "cultural diversity" around the (secularized) winter season of Christmas is represented by a Christmas tree, a menorah, and a sign saluting liberty. Moreover, United States immigration law has long excluded individuals who are in polygamous marriages,[18] which signals that one practice of Islam will not be tolerated in the United States.

Long before September 11, Muslims and Arabs (the latter of which today are generally presumed to be Muslim) were subject to negative stereotypes. In particular, they have been stereotyped as terrorists in both the public and private spheres. Far from assimilable, those thought to be Muslims and/or Arabs are often presumed to pose a threat to both the political and cultural unity of the nation. If they are Muslim, they are suspected of having greater fealty to their religion – one that is often equated with terrorism – than to the United States.

The presumed connection between terrorism and Islam, particularly of the Middle Eastern type, collapses categories of and assumptions about religion, cultural assimilation, and politics. New Arab immigrants from the Middle East are considered to be from a different civilization than that of the immigrants from an earlier generation. The terrorism-Islam conflation has become so ingrained in the American mind-set that initial media reports after the 1995 bombing of the federal building in Oklahoma simply assumed that the culprits were from the Middle East. That event breathed new life into the term "domestic terrorism," by continuing to distinguish the acts of Timothy McVeigh and Terry Nichols from acts committed by "terrorist groups," which are presumed to be foreign.

Ironically, in the wake of the "domestic terrorist" bombing, perpetrated by homegrown citizens of European stock, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the Antiterrorism and Effective Death Penalty Act. The effects of the antiterrorist provisions of those laws have largely been felt by Arabs and Muslims in the United States. Discussing this series of events, Kevin Johnson has noted that "many Arab Americans generally feel that the 'war on terrorism' during the 1990s in fact has been a war on them."[19] In criticizing the enforcement of the part of the AEDPA that permits secret evidence to be used in deportation hearings against aliens accused of terrorist activity, the ACLU's legislative counsel noted in February 2000 that "virtually every recent secret evidence case that has come to public attention involves a Muslim or an Arab."[20]

[17] Cainkar, *supra* note 12.

[18] 8 U.S.C. § 1182(a)(10)(A) (2003).

[19] Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to, "Is There a Plenary Power Doctrine?"* 14 Geo. Immigr. L.J. 289, 300 (2000).

[20] Gregory T. Nojeim, *Statement by Legislative Counsel Gregory T. Nojeim on the Use of Secret Evidence in Immigration Proceedings Before the House Judiciary Subcommittee on Immigration*

To the extent that Muslims have been stereotyped as terrorists, terrorists have been presumed to be Muslim, and generally Arab. As such, even Christian Arabs or Arabs from countries whose governments are friendly to the United States have often been considered unassimilable. This historical suspicion serves to reinforce public acceptance of profiling in the current war on terrorism.

2.3 *The Undetectable Transnational Movement-Sympathizing Bad Alien*

As far back as 1903, United States immigration law has excluded individuals who advocate the overthrow of the government by violent means. Initially aimed primarily at anarchists, by the early 1940s, the law began to be used to deport individuals who were or had ever been members of the Communist Party. During the Cold War, then, immigration law returned to the nineteenth-century explicit concern with protecting national security.

While the enemy alien and unassimilable aliens were marked by racial or national difference, the undetectable alien posed an altogether new challenge. As with the enemy alien, the threat was associated with foreign powers. But this time, although the foreign threat had its origins in an enemy state (the Soviet Union), sympathizers were part of a transnational organization, and could potentially enter the United States from many different countries. Thus, white Europeans, many from countries whose nationals had long been admitted to the United States, posed the threat. Neither the alien infiltrators nor the citizens they successfully affected or infected were easily identifiable.

In response to this foreign threat, Congress passed a variety of measures specifically aimed at members of the Communist Party. New laws targeted foreign nationals, but were also aimed at naturalized and even United States–born citizens. The Internal Security Act of 1950, which required American Communist Party members to register with the attorney general, constituted one such measure.[21] This Act specifically identified Communist or totalitarian organization membership as a ground for exclusion, deportation, or denial of naturalization.

That immigration was seen as infiltration is exemplified in a paragraph explaining the necessity for the law: "One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society."[22] Communists did not, however, need to be naturalized to cause problems. Their travel "from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement."[23] Immigration law during this era aimed to exclude

and Claims, ACLU (Feb. 10, 2000), at https://www.aclu.org/other/statement-legislative-counsel-gregory-t-nojeim-use-secret-evidence-immigration-proceedings.

[21] Internal Security Act of 1950, ch. 1024, tit. 1 § 7, 64 Stat. 987, 993-95 (repealed 1968).

[22] Internal Security Act. § 2(14), 64 Stat. at 989.

[23] Internal Security Act. § 2(8), 64 Stat. at 988.

Communists and to ensure that, when it had failed to prevent their entry, it could remedy the failure through deportation.

3 BAD CITIZENS

Thus far, we have explored the historical demarcations that immigration law has used to distinguish good aliens from bad aliens. A similar semiotic dynamic accounts for distinctions often drawn between aliens and citizens, as well as between good and bad citizens. We have already seen the role that race and assumptions about assimilability played in the determination of eligibility for citizenship. Citizenship was initially made available only to free white persons, decades later extended to former slaves, and only made available to most Asians in the 1940s and 1950s. But not all citizens are immune from generalized suspicion or even accusations of treachery. It is assumed that some naturalized citizens never truly switch their loyalty to the United States and that some (previously) loyal citizens are subject to the influence of transnational movements. Thus, United States law has at times deployed the same distinctions used to differentiate aliens to distinguish citizens as well, thereby identifying enemy citizens, unassimilable citizens, and undetectable transnational movement–sympathizing citizens.

The internment of Japanese Americans in World War II provides the most obvious example of the treatment of enemy citizens. In 1942, President Roosevelt issued Executive Order 9066, ordering the removal of all persons of Japanese ancestry – citizens and noncitizens alike – from eight western states and from certain specified military areas.[24] He issued this order despite conclusions by the FBI, the Justice Department and the Army that such a measure was unnecessary. In total, around 120,000 individuals of Japanese descent – 60 percent of whom were citizens – were evacuated in order to protect "against espionage and against sabotage."[25] They were eventually moved to "relocation camps," where they were asked to sign a loyalty oath. The very small percentage who did not sign the oath were labeled "disloyal," but even those who signed the oath were not released unless they joined the armed forces. Hence, the government made it impossible for Japanese and Japanese Americans to prove their loyalty in a way that would allow them to live freely in the affected states or military zones.

During the McCarthy era, Congress spent much of its energy attempting to rout out the undetectable Communist-sympathizing citizen. Although the bulk of the McCarthy era Acts have either been repealed or are no longer enforced,[26] the law continues to question the loyalty of certain citizens. With the end of the Cold War,

[24] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); see Korematsu v. United States, 323 U.S. 214 (1944) (upholding Exec. Order No. 9066 as constitutional).

[25] *Id.*

[26] Immigration and Nationality Act, § 477, 66 Stat. 163 (codified as amended at scattered sections of 8 U.S.C.).

terrorism began to replace Communism as the primary threat to national security. Like Communism, terrorism is transnational. The protection of national security against terrorist threats requires preventing the physical entry of terrorists and ensuring that citizens and noncitizens inside the country do not support terrorist efforts. Thus, the AEDPA of 1996 made it a crime to provide material support to groups or organizations that the United States government categorizes as terrorist. The Act specifically applies to citizens as well as noncitizens within the jurisdiction of the United States.[27] Because the majority of designated terrorist organizations are Muslim or Arab,[28] Arab and Muslim citizens and noncitizens have been the primary targets of prosecution. When applied to citizens, the gist of the accusation is that the citizens are more loyal to terrorist organizations (which, by their very definition, are in opposition to the United States) than to their country of citizenship.

4 BAD ALIENS AND BAD CITIZENS IN THE WAR ON TERRORISM

The post–September 11 war on terrorism demonstrates the continuing organizing power of the demarcations between good and bad aliens and good and bad citizens that immigration and other laws rely upon and perpetuate. In the United States's internal war on terrorism, the terrorists to be kept out or routed out are at various times imagined to be enemy aliens, unassimilable aliens, or undetectable transnational movement-sympathizing bad aliens. The government has used measures ranging from slowed immigration, mass interviews of young Arab men, required registration of aliens from certain countries,[29] secret detention, the USA PATRIOT Act, the creation of the Department of Homeland Security, and calls for vigilance by ordinary (loyal) citizens and aliens to fight its war.

At least initially, the enemy was considered to have been undetected, if not completely undetectable. Immediately following September 11, there were endless expressions of amazement that the September 11 hijackers seemed to have blended in. Not only had the United States government failed to detect them; the hijackers had managed to live in the country largely unsuspected, but also apparently unaffected by the liberty and democracy that surrounded them. Despite the hijackers' apparent assimilation, the government still attempts to find and capture future would-be terrorists at entry through profiling based on stereotypes developed out of the enemy and unassimilable alien categories. Whether such profiling is appropriate or justified after September 11, and a lot of people argue that it is, the government has been careful not to rely on profiling alone. The existence of truly random searches at airports, for example, provides a visible means of impressing upon a large part of the population that Muslims and Arabs are not singled out for scrutiny.

[27] 18 U.S.C. § 2339B(a)(1) (2000).
[28] Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997).
[29] *See infra* note 30 and accompanying text.

Even those who are singled out are given the opportunity to "pass," to demonstrate that they are good. Thus, the war on terrorism oscillates between profiling justified by security concerns on one hand and insistence and reliance upon the existence of good Muslims on the other. Simple profiling or large-scale deportation or internment would not fit neatly into the contemporary self-image of the United States as a country of tolerance. More important, I argue, the maintenance of a good citizen category – even a good Muslim category – is essential to the legitimization of the war on terrorism. The best way for aliens and citizens – Muslims and non-Muslims alike – to ensure that they do not fall into any of the "bad" categories is to support openly the war on terrorism.

When profiling, the enemy alien and unassimilable alien prototypes are at play. Yet, the acknowledgment that profiling does not and cannot altogether distinguish the good from the bad, as well as the reluctance to choose overly broad policies that place Muslims irrefutably in the bad camp, call forth the threat of the undetectable bad alien. The war on terrorism calls forth, responds to, and oscillates between each of the prototypes.

4.1 *The Alien Enemy*

One of the assumptions underlying the Alien Enemy Act is still very much in force – nationals of states that the United States identifies as terrorist sponsors are particularly suspect.

The INS's recent special registration requirement for certain nonimmigrant males over the age of 16 from nearly every Muslim country in the Middle East, some African Muslim countries, and North Korea is largely, though not exclusively, aimed at citizens of states with which the United States has poor relations or sees as potential enemies.[30] The special registration began to receive significant media coverage when Pakistan and Saudi Arabia were added to the list of states whose citizens were required to register. Some criticized the addition of these two countries, precisely because both states have been considered allies, even in the war on terrorism. If citizens of enemy countries are thought to be enemies, citizens of friends are also generally thought to be loyal to the United States. Hence, prior to September 11, Saudis were rarely turned down for visas to the United States and, once they made it into the country, they were unlikely to be deported.

The relationship between the United States and Saudi Arabia, however, has been strained since September 11. The fact that 15 of the 19 hijackers were Saudi Arabian

[30] Citizens of Iran, Iraq, Libya, Sudan, and Syria were "called-in" for the first registration. The second group was composed of citizens of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. United States Immigration and Customs Enforcement, Special Registration, available at https://web.archive.org/web/20100528004142/http://www.ice.gov/pi/specialregistration/archive.htm.

citizens could be read to suggest that Saudi Arabia was not an ally after all. It has certainly led to accusations that, even if Saudi Arabia did not explicitly condone terrorism against the United States, it did not take sufficient measures to prevent such actions. Slowing down the visa process for Saudi young men, initiated soon after the discovery of the hijackers' identities, and adding Saudi Arabia to the special registration list suggest the United States's uncertainty about the extent to which Saudi Arabia is a clear ally.

The measures could also be read, however, as an acknowledgement that individuals' loyalties might not be to the states of which they are citizens. Indeed, the events of September 11 suggest that one's primary loyalties might not be to a state at all, but instead to a transnational, international, or regional group or subgroup. As Vincent Cannistraro, former counterterrorism chief of the Central Intelligence Agency, noted when the State Department decided to slow visas to young Saudi men: "Bin Laden has recruited extremists all over the world. You close off all Saudi visas, then maybe you'll see Swedish Muslims as suicide bombers."[31]

4.2 *The Unassimilable Alien*

The stereotype of Muslims as terrorists is still very much alive in the wake of September 11. It frames one of the strategies by which the United States government attempts to detect terrorists. Profiling makes those who appear Muslim presumptively terrorist and, as with initial reactions to the Oklahoma City bombing, terrorists are generally thought to be Muslim. Since September 11, the AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act have been used to detain and deport Muslims in disproportionate numbers.[32] Islamic organizations in the United States have been subjected to intense scrutiny, investigated and searched in attempts to find ties to al Qaeda. The scrutiny has been extended to individual Muslims in the United States who have given money to or are involved with such organizations. Although nearly all foreigners entering the United States have difficulty obtaining visas and are subjected to heightened security in the airports, reports suggest that Muslims and Arabs, or those thought to be Muslim, have had a particularly difficult time regardless of their country of origin.

These are only a few of a growing number of examples of the deployment and effects of post–September 11 profiling. Leti Volpp has identified five ways that the United States government has responded to September 11 by directly or indirectly relying on racial profiling in constructing and perpetuating an identity category of

[31] Duff Wilson & James Neff, *Terrorists Exploited Their Saudi Visas: U.S. Has Been Lax in Monitoring Visas, Particularly from Rich Ally*, Seattle Times, Nov. 11, 2001, at A10.

[32] Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. Ann. Surv. Am. L. 295, 322 (2002).

"persons who appear 'Middle Eastern, Arab, or Muslim."[33] These means range from state detention of large numbers of noncitizens to "private" extralegal violence that she attributes to the disciplining power of the state.

As pervasive as the profiling has been, it only tells one side of the story. I maintain that today's profiling is both tolerated and even endorsed because it operates alongside an open offer to those identified with profiled groups to demonstrate that they are model members of their groups. Multiculturalism and tolerance continue to be a desirable goal, if not a fact of life. In the spirit of tolerance, good Muslims tolerate profiling. Doing so provides them their greatest opportunity for assimilation.

Prior to September 11, those Muslims who groomed and dressed like Osama bin Laden or Sheik Omar Abdel Rahman were presumed to be unassimilable. To have any chance of assimilation, Muslims from the Middle East would need to project the opposite image. The September 11 hijackers purposefully took advantage of that possibility for assimilation, thereby calling into question the prevailing assumption that terrorists would be so unassimilable that they would be recognizable. At least six of the September 11 hijackers were personally interviewed before receiving visas. Some were admitted to flight schools specifically sanctioned by the INS to grant visas. And, as the next section elaborates, they mostly lived among Americans who never suspected them.

4.3 *The Undetectable Transnational Movement–Sympathizing Bad Alien*

With the success of the September 11 hijackers, fear of the undetectable bad alien has made a comeback. Perhaps some terrorists are identifiable based on stereotypes, but the September 11 hijackers apparently assimilated. As political scientist Stephen Cimbala notes: "These men were not your stereotype of the young, grimy, desperate fanatic. These were older, middle-class men, cool, methodical, and very able to assimilate."[34] Indeed, that they entered and remained undetected as terrorists is a major source of the terror. Just as mass murderers and wife-beaters often seem like such nice, quiet men to their neighbors, the terrorists went largely unsuspected. As if on cue, the martial arts instructor of a Lebanese hijacker recalled: "He was a quiet person, with a soft demeanour. . . . He was always polite to the staff and respectful – not the stereotype of the kind of terrorist you see in movies."[35] Someone who lived in the same hotel in Florida as one of the hijackers said they had conversations about football and baseball.[36] The hijackers joined gyms and went to bars and adult video

[33] Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1577 (2002). [An excerpt of this article appears as Chapter 1 in this book.]

[34] *Terrifyingly Ordinary Neighbours-Act of War: Profile of a Hijacker*, Daily Telegraph (Sydney), Sept. 24, 2001, at 4.

[35] *The New Breed of Terrorists*, Straits Times (Sing.), Sept. 25, 2001, at 10.

[36] *Terrifyingly Ordinary Neighbours*, *supra* note 34.

shops. One apparently placed a personal ad on the Internet. Some lived with wives and children. The men wore Western clothes and had no facial hair. In short, they blended in.

In fact, blending in appears to have been part of the strategy, as indicated by *Military Studies in the Jihad Against the Tyrants*, the al Qaeda training manual discovered shortly after the attacks. Whether or not they had actually read the manual, the hijackers seem to have lived by the book. An important part of the manual describes how operatives should blend in: "Anyone willing to 'undergo martyrdom' should be 'able to act, pretend and mask himself' behind enemy lines."[37] Would-be martyrs are instructed to "maintain an appearance 'that does not indicate Islamic orientation (beard, toothpick, book, long shirt, small Koran),'"[38] not to travel with wives who appear Islamic, not to address each other with traditional Islamic greetings (which invoke Allah), not to appear too inquisitive, and not to cause trouble where they live. The manual also calls upon operatives to live in newly developed suburban neighborhoods where individuals are unlikely to know each other. In other words, would-be martyrs in the United States should take advantage of Americana. While everyone in the neighborhood is out "bowling alone,"[39] al Qaeda operatives are free to do their work.

The Congressional investigation into September 11 suggests that perhaps the government missed clues about the hijackers – that the "success" of the hijackers was due at least in part to security failures. A Congressional investigation was not required, however, to spur the government into beefing up security. Almost immediately following September 11, the United States deployed overt, even official, profiling. The new terrorist profile is intentionally overly broad. September 11 made clear that, due to the transnational character of the threat, a focus on nationals of those countries most suspected of sponsoring terrorism would be too narrow. Similarly, given that even Arab Muslims know how to assimilate, any profile would need to include in its scope those terrorists that might attempt to hide behind an American-acting veil.

Given the broad scope of the profile, what is a good Muslim to do? Demonstrating fealty to the United States, in part by accepting such profiling as a legitimate means to fight terror, would seem to provide a new means of assimilation. Of course, as a result of alien registration, only aliens with a perfect immigration history are entitled to become good Muslims. Others must either defy registration or risk deportation, neither of which removes one from the category of bad alien.

[37] *Manual Tells Terrorists How to Blend In*, Houston Chronicle, Sept. 21, 2001.
[38] *Id.*
[39] *See* Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community (2000).

4.4 *Bad Citizens*

The more the United States learns about the workings behind September 11 and the operations of the Taliban and al Qaeda, the more it becomes clear that transnational alliances had infiltrated, if not infected, the local population. At first, bad citizens were found abroad. John Walker Lindh and Yasser Essam Hamdi were both captured on the battleground in Afghanistan. But Jose Padilla was arrested inside the country and accused of plotting to detonate a dirty bomb.[40]

The perception of disloyal tendencies that define the bad-alien categories has bled over into the identification of bad citizens. The fear that terrorists would naturalize in order to undermine the system is perhaps not as strongly felt or expressed as it was in the 1950s. In fact, little distinction seems to have been made between United States–born and naturalized citizens in the internal war on terrorism. Rather, regardless of birth, Muslims and Arabs form most of the suspect class. While insisting that not all Muslims are terrorists, the government seems willing to use and encourage profiling to attempt to rout out those who are. Whether through government investigations and raids or "private" vigilance, the brunt of the internal war has fallen on Muslims, particularly those of Arab descent (now that Americans seem to have learned the difference between Sikhs and Muslims). Citizens are less likely than noncitizens to be held as "material witnesses," to be moved around to different undisclosed locations, and to be denied counsel. Still, citizens are not immune to accusations of terrorism.

In both Lackawanna, New York (near Buffalo), and Portland, Oregon, Muslim citizens – nearly all of Arab descent – have been arrested on terrorism-related charges. The New York group was originally suspected of constituting an al Qaeda cell, while those in Oregon were thought to be "terrorist wannabes."[41] If the blending in of the September 11 hijackers called into question the extent to which alien terrorists were identifiable, the possibility of citizen terrorism has only further complicated the situation. As a CBS news report on the Oregon case noted: "What is striking about these arrests is the same thing that stuck out in the Buffalo case: once again the suspects aren't foreign born agents, but homegrown Americans."[42]

5 SEMIOTIC DYNAMICS AT WORK: THE CREATION OF GOOD ALIENS AND GOOD CITIZENS TO LEGITIMIZE THE WAR ON TERRORISM

Bad aliens and citizens only exist in opposition to a perceived category of the good. As the consequences increase for being bad, so do the stakes in being identified as

[40] *See* Michelle Garcia, *Appeals Court Weighs Case of Enemy Combatant; Judges Question Executive Branch Powers in Patriot Act*, WASH. POST, Nov. 18, 2003, at A3.

[41] *Terror Arrests in Oregon, Michigan*, CBSNEWS.COM (Sept. 4, 2002), http://www.cbsnews.com/stories/2003/02/25/attack/main541875.shtml.

[42] *Id.*

good. The war on terrorism clearly draws the lines – if you are not with us, you are against us. Thus, aliens and citizens alike, although particularly Muslims or those who might be identified as Muslim, must demonstrate their loyalty; they must support the war on terrorism. More than supporting – or not opposing – the war on terrorism, good citizens and aliens are asked to participate in the fight both by speaking out in favor of the war and assisting in the discipline of bad aliens and citizens.

Flag-waving provided the initial means of showing support for the war. On September 13, 2001, the United States House of Representatives and Senate passed the following concurrent resolution stating:

> (1) In response to the terrorist attacks on the United States on September 11, 2001, United States citizens should join together to defend and honor the Nation and its symbols of strength; and
> (2) For a period of 30 days after the date on which this resolution is agreed to, each United States citizen and every community in the Nation is encouraged to display the flag of the United States at homes, places of work and business, public buildings, and places of worship to remember those individuals who have been lost and to show the solidarity, resolve, and strength of the Nation.[43]

The resolution appears to have been enormously successful, although it might merely have been an acknowledgment of what was already occurring. In either event, citizens and aliens alike (even though the latter were formally excluded from the resolution) bought flags and accepted free ones, putting them on homes, cars, and shops as a sign of loyalty. Turning down a flag from the Boy Scouts would be unpatriotic. On the flip side, a Muslim proudly displaying an American flag might be considered a good Muslim.

Eventually, though, flag-waving was not sufficient. Although it might have initially provided a means by which United States residents could feel that they were doing something to show their support for the war on terrorism, it did little to reduce the threat. While the Bush administration began to structure its homeland security, it called for a method of disciplining that – ironically – was commonly used in Communist systems. To prevent bad aliens and citizens from blending in, good aliens and citizens were encouraged to police their neighbors. The government issued a Citizen's Preparedness Guide and posted it on the web:

> Be Aware. Get to know your neighbors at home and while traveling. Be on the lookout for suspicious activities such as unusual conduct in your neighborhood, in your workplace, or while traveling. Learn to spot suspicious packages, luggage, or mail abandoned in a crowded place like an office building, an airport, a school, or a shopping center. Take what you hear seriously. If you hear or know of someone

[43] H.R. Con. Res. 225, 107th Cong. (2001).

> who has bragged or talked about plans to harm citizens in violent attacks or who claims membership in a terrorist organization, take it seriously and report it to law enforcement immediately.[44]

At one point, the Department of Justice proposed but eventually abandoned a Terrorist Information and Prevention System (TIPS), which called upon those who routinely enter homes in the United States – electricians, cable TV workers, and postal delivery workers – to contact a toll-free number to report suspicious activities.[45]

Eunice H. Stone responded to the government's general exhortation to vigilance when she called police to say she heard three medical students talking about a terrorist threat in a Florida restaurant. Even after the men were eventually cleared, some commentators speculated that the men had intentionally played upon Stone's stereotypes and discussed terrorism to frighten her.[46] The police considered charging the medical students with an anti-Klan statute prohibiting terrorist threats, but not investigating Stone on suspicion of filing a false report. Rather, the police commended her: "We don't think she made it up. ... We commend her for reporting what she believed to be accurate and would encourage other citizens to do so."[47] Others supported Stone as well. Indeed, she received flowers and cards from anonymous donors with statements such as, "To Eunice – Thanks for saving the nation."[48]

The three medical students also sought to be good citizens in the end. They refused to criticize the police, insisting the officers were just doing their job. At the same time, Ayman Gheith – the student most easily identified as Muslim by his dress – suggested he had internalized the disciplining lesson well before the accusations: "Would you lose control of the conversation and joke about September 11th?" he asked when talking to the media. "Is that even an option?"[49] Perhaps it was clear to Gheith that self-censorship was prudent because others had learned the lesson the hard way. In the end, Gheith and his colleagues did not condemn the state for its actions. Far from it, as good citizens, they supported the action.

There are many reasons to believe that self-censorship is prudent. Muslims are not the only ones who have been censored either directly or indirectly. When colleges and universities – traditionally sites for debate, activism, and opposition – censured

[44] United for a Stronger America: Citizens' Preparedness Guide, http://www.weprevent.org/usa/cover.pdf, pg 9.

[45] Ritt Goldstein, *U.S. Planning to Recruit One in 24 Americans as Citizen Spies*, Sydney Morning Herald, Jul. 15, 2002, at 7, http://www.smh.com.au/articles/2002/07/14/1026185141232.html.

[46] Robert L. Steinback, *Who, if Anybody, Erred in Alligator Alley Terror Scare?*, Miami Herald, Sept. 20, 2002.

[47] *Id.* (quoting assistant special agent Jerry L. Scott).

[48] *Id.*

[49] *Man in Terror Scare Says Woman Is Lying*, CNN.com, Sept. 13, 2002, http://www.cnn.com/2002/U.S./09/13/alligator.alley/index.html.

faculty and staff who seemed to respond inappropriately to the attacks, even non-Muslims recognized the imprudence of criticism. History Professor Richard Berthold, for example, told two of his classes at the University of New Mexico on September 11, "Anyone who would blow up the Pentagon would have my vote."[50] The resulting discipline was multilevel. Berthold received death threats that kept him off campus. An unidentified person left a message on the provost's voicemail threatening that if Berthold were not "ousted" within 24 hours, he would be ousted by other sources. State politicians demanded his firing and accused him of committing treason. Ultimately, the university barred Berthold from teaching freshmen for a year, placed a letter of reprimand in his personnel file, and announced that he would undergo an in-depth post-tenure review. University Provost Brian L. Foster noted: "There are a lot of things you can't say with impunity, even on a college campus."[51] Like the three medical students, Berthold understood. Responding as a good citizen, he called the reprimand "an entirely appropriate response to the stupidity and callousness of those remarks."[52]

Granted, many of these incidents occurred immediately in the wake of September 11. In that sense, it could be argued that tensions were heightened, everyone was feeling especially vulnerable, and the reactions were extreme. Yet the lack of substantive debate in the United States about foreign relations, civil liberties in time of emergency, and the wisdom of the war on terrorism remains. Even where there is significant opposition to United States foreign policy, the opposition rarely extends to the war on terrorism. Indeed, opponents of the war against Iraq often invoke Bush's inability to connect Saddam Hussein to terrorism, implying that the presence of such a connection might have validated the war. Support for the war on terrorism continues to be high, even in times when support for the Iraqi war has been low. This widespread support for the war on terrorism, both internal and external, could be seen as a sign of the legitimization process. The multiple layers of discipline have produced good citizens and aliens.

If good citizens and aliens are necessary to legitimate the war on terrorism, good Muslims are an important part of the project. Over and over, government policies both support and belie the bad-alien categories as they apply to Muslims. They support them by unabashedly treating Muslims, particularly Muslim Arabs, differently from the rest of the population. We have already discussed how racial profiling along a new identity category, as Volpp describes it, is rampant; those detained and questioned by the state, assaulted by United States citizens, and suspected by vigilant

[50] John K. Wilson, *Censorship of Anti-War Views*, in *The State of Academic Freedom, 2001–2002: A Report*, § 2(a), CollegeFreedom.org. [*See also* John K. Wilson, Patriotic Correctness: Academic Freedom and Its Enemies (2015), 10–11.]

[51] *Id.* [(*See also* Wilson 2015, 11.]

[52] *Id.* [*See also* Fox News, *Controversial College Vote, No Democratic Elections in Saudi Arabia*, Dec. 12, 2001, https://www.foxnews.com/story/controversial-college-vote-no-democratic-elections-in-saudi-arabia.]

neighbors, coworkers, and people at the next table almost always appear Middle Eastern, Arab, or Muslim. At the same time, though, the Bush administration has repeatedly distinguished between most Muslims in the United States and the bad Muslims who commit or support acts of terrorism. Hence, the president visited a mosque days after September 11, while at the same time preparing to wage war on Afghanistan. President Bush has met with Muslim leaders and made statements calling for tolerance for Muslims, even while enforcing policies that discriminate against them.

Indeed, at times President Bush has seemed keenly aware of and attentive to the Muslim citizenry of the United States. In his public address on September 20, 2001, just over a week after September 11, he called direct attention to the Muslim friends of the United States:

> I also want to speak tonight directly to Muslims throughout the world. We respect your faith. It's practiced freely by many millions of Americans, and by millions more in countries that America counts as friends. Its teachings are good and peaceful, and those who commit evil in the name of Allah blaspheme the name of Allah. (*Applause.*) The terrorists are traitors to their own faith, trying, in effect, to hijack Islam itself. The enemy of America is not our many Muslim friends; it is not our many Arab friends. Our enemy is a radical network of terrorists, and every government that supports them. (*Applause.*)[53]

Although this quotation does not directly acknowledge friendly Muslims within the United States, other statements around the time did convey this message. Two days after September 11, for example, President Bush urged tolerance toward Muslims in the United States and toward Arab Americans: "Our nation must be mindful that there are thousands of Arab Americans . . . who love their flag just as much as . . . [we] do. And we must be mindful that as we seek to win the war that we treat Arab Americans and Muslims with the respect they deserve."[54]

Over a year after September 11, President Bush continued to persist in this message and to distance himself from those who argued against tolerance, such as Christian Right leader Jerry Falwell, who described the prophet Mohammed as a "terrorist," and conservative commentator Pat Robertson, who said, "Adolf Hitler was bad, but what the Muslims want to do to the Jews is worse."[55] President Bush

[53] Bush, Address to Congress, *supra* note 2.

[54] President George W. Bush, President Pledges Assistance for New York in Phone Call with Pataki, Giuliani: Remarks by the President in Telephone Conversation with N.Y. Mayor Giuliani and N.Y. Governor Pataki (Sept. 13, 2001), at https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010913-4.html, quoted in Wendy Brown, Lecture at the University of Texas 10 (Feb. 28, 2002), on file with the University of Colorado Law Review. [Parts of this lecture were later published in Wendy Brown, Regulating Aversion: Tolerance in the Age of Identity and Empire 99 (2009).]

[55] Randall Mikkelsen, *Bush Takes on Christian Right Over Anti-Islam Words*, Reuters, Nov. 13, 2002.

responded to those statements, maintaining that "some of the comments that have been uttered about Islam do not reflect the sentiments of my government or the sentiments of most Americans."[56] Identifying his own views with those of the American citizenry, Bush continued: "By far, the vast majority of American citizens respect the Islamic people and the Muslim faith. After all, there are millions of peaceful-loving Muslim Americans."[57]

Two years after September 11, the publication of anti-Islamic comments by Deputy Undersecretary of Defense Lieutenant General William "Jerry" Boykin evinced tension within the administration about the nature of the war on terrorism. The White House was ultimately forced to separate itself from Boykin's statements, including his claim that "the enemy" is neither Osama bin Laden nor Saddam Hussein. Rather, "the enemy is a spiritual enemy. He's called the principality of darkness. The enemy is a guy called Satan."[58] Upon return from a trip to Indonesia, where Muslims had complained about General Boykin, President Bush stated that the comments do not "reflect my point of view, or the view of this administration."[59]

It is tempting to read these gestures as disingenuous. Volpp argues that any message of tolerance or respect of Islam has been drowned out by a more consistent anti-Muslim and anti-Arab message conveyed by profiling and by statements characterizing the war against terrorism as "a battle for civilization" and as "a crusade."[60] I suggest instead that the legitimization of the war on terrorism depends upon the dual message. In this sense, I agree with Wendy Brown, who has used some of these quotations and other quotations to argue that tolerance provides a means of legitimizing the post–September 11 state. For her, the bargain for the tolerance is that American Muslims leave their subnational or transnational identity in the private realm. As such, the identity remains hidden, never to emerge to challenge public discourse.[61]

Although I agree with much of Brown's analysis, I read the bargain slightly differently. Good Muslims must do more than not challenge the state by keeping their Islam private, by being a part of a "docile, individuated, deactivated citizenry;"[62] they must demonstrate their allegiance to the United States by supporting it in its efforts to fight the war on terrorism. They must show they love the flag – even

[56] *Id.*
[57] *Id.*
[58] Lisa Myers, *Top Terrorist Hunter's Divisive Views*, (*Nightly News* with Tom Brokaw, NBC television broadcast, Oct. 15, 2003).
[59] John Hendren, *President Decries General's Remarks*, L. A. Times, Oct. 29, 2003.
[60] Volpp, *supra* note 33, at 1582.
[61] Brown 2002, *supra* note 54, at 6 ("One of the functions of tolerance in the development of modernity is the brokering of a deal in which individuals from subnational or minority communities are brought into the nation-state on the condition that the belief world from which they hail is excluded from legitimate public discourse."). [*See also* Brown 2009, *supra* note 54, 93.]
[62] *Id.* at 11. [*See also* Brown 2009, *supra* note 54, 102.]

salute it "strongly" – to avoid suspicion. While non-Muslim American citizens and most non-Muslim residents are presumed to be on the "right" side of the war on terrorism, Muslim citizens and aliens must earn such a presumption, one by one. That they do so, actively joining in the war on terrorism, gives the war legitimacy. Citizen and noncitizen Muslims are disciplined into "choosing" the good, thereby creating a population that supports the United States in its war against terrorism at home and abroad. The population legitimizes the war from below.

Tolerance, then, becomes the medium through which the state creates the category of the good Muslim. The more Muslim one appears, the more she needs to demonstrate her allegiance. While stereotyping and its effects might discourage public displays of religion, the good Muslim category encourages public displays of allegiance from those who do not keep their religion at home or in the mosque. Ironically, perhaps displays of allegiance from those who are clearly Muslim best serve the legitimating function. They demonstrate clearly that not all Muslims are terrorists. They also show how some are willing to suffer the consequences of being stereotyped as terrorists in order to support the war on terrorism. Recall that it was Ayman Gheith, the medical student passing through Florida, who was gracious to the police in the end. Of the three students, he was the only one wearing a turban and with substantial facial hair.

6 CONCLUSION

I completed the first draft of this article in November 2001, just two months after September 11. It has thus been over two years in the making. Investigations have been conducted; security has been tightened; suspects have been arrested, detained, and sometimes released while others have pleaded guilty and been sentenced; federal courts have granted and denied jurisdiction; wars have begun; leaders have been deposed, installed, and caught hiding in "rat holes"; diplomacy has been strengthened and strained; and claims about terrorist connections and influences have been made and disclaimed and made anew. And somewhere along the way, the "war on terrorism" morphed into a "war on terror."

Writing about contemporary events is fraught with difficulties. It would have been difficult to predict all the twists and turns that the war on terror would take, and I have continually reevaluated and updated the written product to reflect new events and new strategies deployed in the war. Often, as soon as I felt I had a handle on what was happening, it would slip away. Both the Bush administration's policies and the reactions to them challenged and shifted many of my theories and paradigms, and the article changed accordingly.

That said, the basic structure of the original draft remains. I identified the three types of bad aliens early on, in addition to the semiotic structure that distinguished them from their good counterparts. The post–November 2001 events only served to reinforce that dynamic, as well as the disciplining mechanisms that discourage both

noncitizens and citizens from criticizing the war on terror. I have necessarily simplified the historical narratives of the births of the prototypes, but I hope I have complicated interpretations of the current war on terror that read it as a holy war (on either side), as simple maintenance of national security, as blatant deprivation of civil liberties, as overt or covert racism, as progress or regress.

I do not intend to suggest a conspiracy theory in which the architects of the war set out to create the legitimization scheme I describe. Far from it. "They" (those in visible power) took the lexicon provided through years of immigration law, policy, and theory, and used it in both predictable and unpredictable ways. And so did "we." Like it or not, we are all participants in the war on terror. To write about it, to read about it, to discuss it, to imagine the ways that your friends and the strangers you encounter think about and talk about terror(ism) is to play a role in the war. Whether you fly a flag and whether you protest or support the war on terror, the war in Iraq, the occupation of Afghanistan, or the war between the Israelis and the Palestinians (or think you are taking no position on these wars) in public or in private, you are involved. The stakes are higher for some than others, but our actions and inactions are readable through the dynamics I have outlined above.

4

A Rage Shared by Law: Post–September 11 Racial Violence as Crimes of Passion

Muneer I. Ahmad[*]

1 INTRODUCTION

September 11 will long be associated with unthinkable violence. The sheer magnitude of the terrorist attacks, the visual imagery of the collapsing towers of the World Trade Center, and the extensive media attention given to the victims have defined the violence of September 11 in unitary terms. But in the aftermath of the terrorist attacks, another form of violence spread across the country: in the days and weeks after September 11, over 1,000 bias incidents against Arabs, Muslims, and South Asians were reported. These incidents, including the murders of as many as 19 people, assaults on scores of others, vandalism of homes, businesses, and places of worship, and verbal harassment of countless individuals, form part of the subterranean history of September 11. While the violence of September 11 itself is largely thought to have been incomprehensible, post–September 11 hate violence is remarkable precisely because it is something we can understand. Although condemned as individual acts of criminality, the phenomenon of hate violence toward Arabs, Muslims, and South Asians is one that appeared to need little explanation; it was accepted as a regrettable but expected response to the terrorist attacks. As early as September 12, 2001, major newspapers reported predictions of the violence against these communities.

The physical violence exercised upon the bodies of Arabs, Muslims, and South Asians has been accompanied by a legal and political violence toward these communities. In the first two years after September 11, the United States has developed a corpus of immigration law and law enforcement policy that by design or effect applies almost exclusively to Arabs, Muslims, and South Asians. These laws operate in tandem with the individual acts of physical violence that have been carried out

[*] This chapter is an excerpt of the previously published article, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion* 92 CAL. L. REV. 1259 (2004).

against these same communities, thereby aiding and abetting hate violence. Taken together, the multiple assaults on the bodies and rights of Arabs, Muslims, and South Asians produce psychological violence as well and reracialize the communities they target as "Muslim-looking" foreigners unworthy of membership in the national polity.

Having occurred in a time of national tragedy, and in the wake of a far grander spectacle of violence, it is perhaps inevitable that the hate violence against Arabs, Muslims, and South Asians would receive short shrift in governmental, media, or public attention. This chapter attempts to trace a genealogy of the racial violence in the aftermath of September 11, with three purposes in mind: (1) to explicate the mutually reinforcing relationship between individual hate crimes and governmental racial profiling, and the racialization they jointly effect; (2) to explore the psychological motivations for individual hate crimes against Arabs, Muslims, and South Asians, and how state-sponsored violence against these communities has reflected that psychology; and (3) to illuminate how the interrelationship among different systems of subordination serves to normalize such violence.

By situating post–September 11 violence within the history of hate violence in the United States, we can begin to understand how the recent experiences of Arabs, Muslims, and South Asians figure into an American tradition of violence as a means of racial differentiation. However, such historical context also suggests that the violence directed toward Arabs, Muslims, and South Asians has been different in kind from many hate crimes in recent memory. For example, the killings of James Byrd and Matthew Shepard have been viewed as incomprehensible acts of violence. In contrast, although Americans have condemned the killings of Arabs, Muslims, and South Asians after September 11, these killings have been understood as the result of a displaced anger, one with which many Americans have sympathized and agreed. By this account, the perpetrators of hate crimes against Arabs, Muslims, and South Asians were not guilty of malicious intent or depraved indifference, but of expressing a socially appropriate emotion – overwhelming anger in the aftermath of the terrorist attacks – in socially inappropriate ways. Borrowing from criminal law, the hate crime killings before September 11 were understood as crimes of moral depravity, while the hate killings since September 11 have been understood as crimes of passion. Whereas crimes of moral depravity are devoid of any justification whatsoever, crimes of passion are treated as morally understandable though still illegal transgressions.

Applying this crime-of-passion motif to post–September 11 violence reveals the role that conceptions of emotion, honor, loyalty, violation, and betrayal have played in the national psychology after the terrorist attacks and provides insight into the role that September 11 has played in the national discourse on immigration. Moreover, it suggests that post–September 11 violence constituted an attempt to protect male honor, which in turn helps to explain how violence against Arabs, Muslims, and South Asians has been normalized. Finally, an understanding of the genesis of hate

violence against Arabs, Muslims, and South Asians sheds light on the role of the state in furthering this violence, and on the racializing impact of such collective violence on Arab, Muslim, and South Asian communities.

2 "PRIVATE" AND "PUBLIC" RACIAL VIOLENCE IN THE AFTERMATH OF SEPTEMBER 11

Two forms of racial violence swept across the United States in the aftermath of September 11. The first involved what traditionally would be classified as private violence: violence enacted by one or more private actors upon another, without direct state participation. This is typified by the thousands of physical attacks carried out by individuals against Arabs, Muslims, and South Asians after the terrorist attacks. The second form of violence is traditionally deemed public, because of the direct involvement of state actors. After September 11, this took the form of a broad range of governmental policies that targeted "Muslim-looking" people.

2.1 *"Private" Racial Violence*

In the immediate aftermath of the terrorist attacks, Arab, Muslim, and South Asian communities in the United States experienced a wave of violence far greater in magnitude than they had ever experienced before. In total, over 1,000 separate bias incidents were reported in a period of eight weeks, and though the rate of new incidents has slowed, it continues today, fueled most recently by the war in Iraq. Chief among the post–September 11 violence were the murders of as many as 19 people, including Balbir Singh Sodhi, Waqar Hasan, Adel Karas, Saed Mujtahid, Jayantilal Patel, Surjit Singh Samra, Abdo Ali Ahmed, Abdullah Mohammed Nimer, and Vasudev Patel. In addition, these incidents have included the firebombings of mosques, temples, and gurdwaras; assaults by fist, gun, knife, and Molotov cocktail; acts of vandalism and property destruction against homes and businesses; and innumerable instances of verbal harassment and intimidation. The actual number of incidents is impossible to know, as racial shame, uncertain immigration status, and language barriers inhibit many victims of hate crimes from ever reporting them.

2.2 *"Public" Racial Violence*

This physical violence against Arabs, Muslims, and South Asians – on its face private, vigilante, and extralegal – has been accompanied by a quickly developed and broadly applied governmental policy of racial profiling of these communities. Within days after the terrorist attacks, racial profiling emerged as the government's primary weapon of choice in the newly declared war on terrorism. Racial profiling, a term that on September 10 described the phenomenon of pretextual police stops of

African Americans and Latinos, suddenly came to apply to the singling out of Arabs, Muslims, and South Asians as terrorism suspects after September 11. Whereas 80% of Americans opposed racial profiling prior to September 11, after the attacks almost the same percentage favored profiling of those assumed to be Arab or Muslim.[1]

The popular and political acceptance of racial profiling of Arabs, Muslims, and South Asians is represented clearly in the Bush Administration's recently announced policy guidance to end racial profiling by federal law enforcement officials.[2] The guidance purports to make good on a series of pre–September 11 promises to end racial profiling. However, it carves out a gaping exception for "law enforcement activities involving threats to national security or the integrity of the nation's borders."[3] The guidance explicitly authorizes federal law enforcement officials, including airport screeners and border personnel, to consider race and ethnicity in the course of "matters of national security, border integrity or the possible catastrophic loss of life."[4] The result of this policy guidance is to ban racial profiling in counterterrorism efforts of everyone except Arabs, Muslims, and South Asians, as the profiling of these communities is almost always on the purported basis of national security, and because it is almost exclusively these communities that are suspected of terrorism.

The national security exception is particularly troubling in light of the federal government's abuses to date in its antiterrorism investigations and prevention activities, as documented by the Office of the Inspector General (OIG), the internal watchdog of the Department of Justice (DOJ). Having reviewed the cases of 762 noncitizens (almost all of whom are believed to be Arab, Muslim, or South Asian) detained during the first eleven months after September 11, the Inspector General found that the FBI and Immigration and Naturalization Service (INS) "made little attempt to distinguish" between immigrants who had potential ties to terrorism and those who were merely swept up by chance in the course of the federal investigation.[5] The OIG found further that the INS failed to serve the detainees with timely notice of the charges against them, the DOJ improperly detained many of the detainees even after immigration judges had ordered them removed, and many of the detainees were subjected to "unduly harsh" conditions of detention, which

[1] Nicole Davis, *The Slippery Slope of Racial Profiling: From the War on Drugs to the War on Terrorism*, Colorlines (Dec. 15, 2001), available at https://www.colorlines.com/articles/slippery-slope-racial-profiling.

[2] U.S. Dep't. of Justice, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003), available at http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm.

[3] *Id.*

[4] *Id.*

[5] Office of the Inspector General, U.S. Dep't. of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2003), available at http://www.usdoj.gov/oig/special/0306/full.pdf [hereinafter OIG Report].

included "a pattern of physical and verbal abuse."[6] Two conclusions can be drawn from the report. First, in each of these putative terrorism detentions, the government has failed to allege one concrete terrorism connection. Although most of these detainees have been deported for minor immigration violations, not one has been charged with terrorist activity.[7] Second, by treating all Arabs, Muslims, and South Asians caught up in the federal dragnet as presumptively terrorists, the government violated the due process rights of hundreds, if not thousands, of immigrants merely because they "looked" like terrorists.

Between September 11 and the Bush Administration's announcement of the new policy against racial profiling, the government has developed an elaborate set of racial profiling practices with regard to Arabs, Muslims, and South Asians. The policy guidance serves merely to ratify these practices, which run the gamut of law enforcement and are too voluminous to enumerate here. However, four distinct practices of governmental racial profiling of Arabs, Muslims, and South Asians can be identified: airport profiling, secret arrests, race-based immigration policies, and selective enforcement of immigration laws of general applicability.

Dozens of stories have emerged of Arabs, Muslims, and South Asians being stopped in airports. The most egregious incidents involved those in which Arab, Muslim, and South Asian passengers were removed from planes they had already boarded because flight attendants, pilots, or even other passengers felt uncomfortable with them on board.[8] The case of Ashraf Khan is representative. A 32-year-old Pakistani businessman and lawful permanent resident of the United States for eleven years, Khan boarded a Delta Airlines flight in San Antonio to attend his brother's wedding in Pakistan.[9] After Khan took his seat in first class, the pilot of the plane told Khan that he and the crew did not feel safe with Khan on board and had him removed.[10] In Tampa, Mohamed el-Sayed, a US citizen of Egyptian origin denied passage on a United Airlines flight, was later informed by an airport manager that the pilot refused to fly with el-Sayed on board, stating, "We've reviewed your profile; your name is Mohamed."[11] And in Austin, two Pakistani men were removed

[6] *Id.*

[7] David G. Savage, *High Court Refuses to Take Up Case on Post-Sept. 11*, L.A. TIMES, Jan. 13, 2004, available at https://www.latimes.com/archives/la-xpm-2004-jan-13-na-scotus13-story.html; *Bush Administration Kept Secret the Names of Middle Eastern Men Detained in a Roundup*, L.A. TIMES, Jan. 13, 2004; OIG Report, *supra* note 5, at 12.

[8] Am.-Arab Anti-Discrimination Comm., *Report on Hate Crimes and Discrimination Against Arab Americans: The Post-September 11 Backlash* 21-31 (2003), available at http://www.adc.org/hatecrimes/pdf/2003_report_web.pdf (last visited Apr. 12, 2004).

[9] Sasha Polakow-Suransky, *Flying While Brown*, AM. PROSPECT (Nov. 19, 2001) https://prospect.org/article/flying-while-brown.

[10] *Id.*

[11] *Id.* at 16.

from an American Airlines flight to the applause of the remaining passengers.[12] Over 30 such incidents have been reported.

The government's most robust racial profiling practices have come in the immigration context, most often on a theory of preventive law enforcement. In order to prevent future terrorist attacks, the government has committed to using "every available tool," including the immigration laws. Where noncitizens are involved, immigration law provides the government with far greater latitude to engage in preventive practices than does the criminal law. The Supreme Court has long held that deportation is not punishment, and therefore immigration proceedings are civil rather than criminal. As such, noncitizens in immigration proceedings do not enjoy many of the constitutional protections afforded criminal defendants. As Daniel Kanstroom describes, "This principle reduces to the basic idea that noncitizens have no substantive claim to remain in the United States and are therefore subject to whatever rules Congress chooses to make, even if they are retroactive. They are not being punished; they are simply being regulated."[13] Unlike criminal defendants, noncitizens in immigration proceedings do not enjoy a presumption of innocence, and silence may be used against them. There is no grand jury, no right to appointed counsel, no speedy-trial guarantee, no jury trial and, increasingly, no right to release on bond pending trial or removal. The exclusionary rule does not apply, and immigration regulations may be applied retroactively, without violating the Ex Post Facto Clause. Although Fifth Amendment due process rights apply in theory, the protections are minimal at best. The rules of evidence do not apply, and the government may use secret evidence against the noncitizen. Moreover, the government has tried, with some success, to close proceedings to the public. In light of these strategic advantages, it is not surprising that among the thousands of arrests that have been made as part of the "war on terrorism," only a handful have involved terrorism criminal prosecutions, while hundreds, if not the majority, have been based on immigration violations.

Immigration enforcement profiling has taken two forms: race-based immigration policies, and selective (racist) enforcement of race-neutral policies. First, a series of immigration policies devised since September 11 on their face single out Arabs, Muslims, and South Asians for disparate treatment. Most blatant has been the "Special Registration" program, which requires certain immigrant men from 26 countries, all but one of them Muslim countries, to register with the government and to submit to interrogation. Similarly, at the outset of the war against Iraq, the Department of Homeland Security announced that people from 33 countries (again, almost all of them Muslim countries) who sought asylum upon entry to

[12] Jonathan Osborne, *Passenger Ejections Seen as Profiling*, Austin Am.-Statesman (Sept. 29, 2001).

[13] Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 Harv. L. Rev. 1890, 1895 (2000).

the United States would be subject to mandatory detention, even though asylum applicants from other countries of the world would not.

Such racially defined immigration laws and policies, enacted after September 11, have been complemented by a policy of selective enforcement of preexisting immigration laws against Arabs, Muslims, and South Asians. For example, in January 2002, the DOJ announced the Alien Absconder Initiative, purporting to identify and deport 315,000 undocumented people who have ignored court orders to leave the United States.[14] Although theoretically applicable to all immigrants, the government announced that the program would begin with 6,000 immigrants from Muslim countries despite the fact that such immigrants comprise only a small percentage of "absconders." In some instances, the government has reprised obscure and previously unenforced immigration laws, and applied them, seemingly exclusively, against Arabs, Muslims, and South Asians. Chief among these is a requirement that immigrants notify the INS of a change of address within ten days of moving.[15] Despite the fact that INS prosecution guidelines provide that violation of this requirement should ordinarily not be a sole basis for removal, it threatens to become exactly that with regard to Arabs, Muslims, and South Asians.

In addition to its own profiling, the government has subscribed to profiling by ordinary citizens as well. Many Arabs, Muslims, and South Asians were detained after September 11 based on "tips" by neighbors, coworkers, and complete strangers that particular individuals looked suspicious. The government selectively followed up on such tips when Arabs, Muslims, and South Asians were involved,[16] thereby endorsing the prejudice and profiling of the informants.

The government's racial profiling in immigration enforcement is reflected with stunning clarity in INS statistics, which show a dramatic increase in the numbers of immigrants from Muslim countries apprehended by the INS. Between September 2001 and September 2002, the number of deportable Pakistanis apprehended increased 228% over the previous year. The number of Saudis increased by 239%, Algerians by 224%, Egyptians by 83%, and Moroccans by 76%. The increase in the number of immigrants from Muslim countries removed (as opposed to merely apprehended) during this time is similarly dramatic: 129% for Pakistanis, 113% for Saudis, 111% for Algerians, 199% for Egyptians, and 229% for Moroccans.[17] During

[14] ADC Report, *supra* note 8, at 36–37.

[15] 8 U.S.C.A. § 1306(b) (2003).

[16] Muzaffar A. Chishti et al., Migration Policy Inst., America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11, 12 (2003).

[17] Immigration & Naturalization Serv., Fiscal Year 2002 INS Statistical Yearbook (2002), at 180 tbl.39, available at http://uscis.gov/graphics/shared/aboutus/statistics/ENF2002tables.pdf [hereinafter FY 2002 INS Statistical Yearbook]; Immigration and Naturalization Serv., Fiscal Year 2001 Statistical Yearbook (2001), at 190 tbl.46, available at http://uscis.gov/graphics/shared/aboutus/statistics/ENF2001tables.pdf [hereinafter FY 2001 INS Statistical Yearbook].

this same time, the total number of deportable immigrants apprehended decreased by 23%, and the total number of immigrants removed decreased by 16%. Although many variables contribute to the number of immigrants from a particular country apprehended in a given year, there is a clear trend in favor of immigration enforcement against Arabs, Muslims, and South Asians, even at a time when the total number of immigrants apprehended and deported has decreased significantly.

3 THE CONSTRUCTION OF "MUSLIM-LOOKING" PEOPLE AND THE "LOGIC" OF FUNGIBILITY

Both individual acts of hate violence and governmental racial profiling have helped to create a new racial construct: the "Muslim-looking" person. The logic of post–September 11 profiling turns on an equation of being Muslim with being a terrorist. For the perpetrator of post–September 11 hate violence, the error lies in assuming that because all of the September 11 terrorists were Arab and Muslim, all Arabs and Muslims must be terrorists themselves, or terrorist sympathizers. The logic of governmental profiling is only slightly more nuanced: (1) because all of the September 11 terrorists were Arab and Muslim; (2) because most Arabs are Muslims; and (3) because the terrorists claim religious motivation for their actions; (4) all Arabs and all Muslims are likely to be terrorists.

Like other instances of racial profiling, this construct relies upon a reductive equation of certain perceived identity characteristics with specific, suspect conduct. Under earlier profiling regimes, for example, African American and Latino appearance has been equated with criminality, Latino appearance with illegal border crossing, and Asian appearance with treason. In each case, the result is to treat all people appearing to share a certain identity characteristic as fungible with some object – real or imagined – of suspicion.

Despite its expression in religious terms and its purported concern with violent activity, the "Muslim-looking" construct is neither religion- nor conduct-based. Rather, the profile has considerable, if not predominant, racial content and is preoccupied with phenotype rather than faith or action. As with previous regimes of profiling, this one results in gross overbreadth because of its reliance upon appearance; the regime's ascription of identity characteristics to its subjects dictates the application of the profile. The racial dimension of the construct allows it to capture not only Arab Muslims, but Arab Christians, Muslim non-Arabs (such as Pakistanis or Indonesians), non-Muslim South Asians (Sikhs, Hindus), and even Latinos and African Americans, depending on how closely they approach the phenotypic stereotype of the terrorist. *Looking*, not *Muslim*, is the operative word in "Muslim-looking."

The profiling effected by hate violence depends upon two different assumptions of fungibility. The first associates all Muslims with the terrorists who perpetrated the September 11 attacks. The second identifies all "Muslim-looking" people as

Muslims. The end result is to view "Muslim-looking" people as stand-ins for the terrorists themselves. The "logic" of these twin fungibilities is, of course, devoid of much logic at all and appears to derive from fear, ignorance, and pre- existing racisms rather than any rational decision making.

4 UNDERSTANDING THE ORIGINS OF POST–SEPTEMBER 11 HATE VIOLENCE

4.1 *The Perpetrators' Biases Were Not Personal, but Broadly Shared*

First, it is difficult to understand as personal to the perpetrator the bias against "Muslim-looking" people to which violence is attributed. Rather, biases against Arabs, Muslims, and South Asians were widespread in the immediate aftermath of the terrorist attacks. The condemnation of the Byrd and Shepard killers depended upon an ability of the general public to put moral distance between itself and the perpetrators, to disclaim racism and homophobia as widely held beliefs, and certainly as beliefs that the general public sanctioned. Thus, condemnation of the Byrd and Shepard killers localized the racism and homophobia of the perpetrators, and it permitted the public to define itself as free of such biases. While such implicit claims of freedom from racism and homophobia were undoubtedly counterfactual in 1998, a claim of freedom from bias against "Muslim-looking" people in the immediate aftermath of September 11 is nearly impossible to maintain. The biases of the perpetrators of post–September 11 violence were the biases of much of the country. Thus, the perpetrators were not understood to be acting solely out of personal animus, but out of an animus for which there was substantial social reinforcement available.

Nearly three years after the terrorist attacks, it may be difficult to recall exactly how much hostility, anger, and suspicion there was toward "Muslim-looking" people in the aftermath of the attacks. Although evidence of continuing bias against Arabs, Muslims, and South Asians is abundant, the immediate aftermath of the attacks – the time in which the hate violence spiked – was a moment of overwhelming and complex emotionalism. This was most clearly expressed by people who found themselves engaging in racial profiling of Arabs, Muslims, and South Asians, despite their intellectual opposition to it. Many such sentiments were captured in the media. For example, the following was broadcast on National Public Radio the week after the terrorist attacks:

REPORTER: Amy Chan, a struggling entrepreneur on the Upper West Side of Manhattan, has eaten little and slept less in the last few days, but mostly she's tormented by her own thoughts.

CHAN: I've been so ashamed of some of the feelings that I've had since the World Trade Center disaster.

REPORTER: She's always been against capital punishment, she says, but this week she had thoughts like these.

CHAN: Let's just get bombs. Let's just get bombs on planes. I don't care how many innocent people get wiped out. Just level them, whoever that is.[18]

Similarly, another "person on the street" shared the following, after seeing a man wearing a turban speaking on a pay phone near the Israeli consulate in New York City:

MAN: I saw a very suspicious-looking gentleman – I'll be honest – and I stared him down, as if to say, "Just what do you think you're doing?" And when he saw me, he moved around the corner and went to another phone. There was definitely that look of hate in my eyes. There was a look of blame.[19]

Comments such as these reflect both anger and moral outrage. The anger is evident from the desire to fight back ("Let's just get bombs on planes") as well as feelings of hatred ("There was definitely that look of hate in my eyes"). Moreover, this anger finds expression in moral terms ("I don't care how many innocent people get wiped out. Just level them, whoever that is." ... "'Just what do you think you're doing?' There was a look of blame"). Importantly, these expressions of moral outrage were not made in the abstract, but were directed toward and enacted upon individual Arabs, Muslims, and South Asians, as in the case of the individual staring down the turbaned man in New York City. Thus, the anger triggered by the September 11 attacks found expression in moral outrage directed at people who were thought to look like the September 11 terrorists.

Comments such as these also suggest that emotion, and anger in particular, had overwhelmed principled commitments to liberal ideals. This is evident when the first speaker confesses her shame at "the feelings that I've had since the World Trade Center disaster," and when the second speaker acknowledges her own cognitive dissonance by stating "I'll be honest." Implicit in these apologies is an acknowledgment that the felt response to the September 11 attacks was, for many, at odds with their intellectual ideals of racial equality and color blindness. The fact that the speakers feel shame over their emotion and express such shame by way of confession suggests the involuntary nature of their emotional responses; these are feelings beyond their control. The emotion of the post–September 11 perpetrators, then, was resonant with the emotion of many Americans in the aftermath of the attacks.

[18] Margot Adler, *Profile: Reactions People Are Having to Suddenly Being Suspicious of Anyone Who Is Muslim or Arab*, Nat'l Pub. Radio Broadcast (Sept. 20, 2001).

[19] *Id.*

Recent social science research supports the conclusion that the anger and consequent moral outrage expressed in the excerpts above were common emotional reactions among Americans in the immediate aftermath of September 11. In one study, in which respondents were contacted only days after September 11, 20% of the sample reported making comments like "we should just nuke them," 38% talked about the need to go to war, and 23% reported "trying to blow off steam" by expressing their anger about the situation. Whereas public opinion polls have consistently shown a willingness of most Americans to sacrifice civil liberties in order to combat terrorism, as well as dramatically increased hostility to outgroups (i.e., Arabs, Muslims, and South Asians), this study suggests that the high levels of moral outrage and outgroup derogation are likely the result of anger rather than fear or other associated emotions triggered by the September 11 attacks.

The racial biases toward "Muslim-looking" people expressed by the perpetrators of post–September 11 violence were not only personal to the perpetrators, but rather were also broadly shared by much of the country. These were not private biases existing solely in the minds of an isolated few, but were consistent with prevailing biases of the day. The racially directed anger and moral outrage of the perpetrators of post–September 11 violence, if not the violence itself, found resonance with the emotional responses of many Americans. Put more bluntly, the anger of the perpetrators was the anger of much of the country.

4.2 *The Perpetrators' Behavior Was Aberrant, but Their Biases Were Not*

Unlike the racism and homophobia attributed to the killers of James Byrd and Matthew Shepard, the biases underlying the hate violence against Arabs, Muslims, and South Asians are not easily characterized as aberrant. Rather, September 11 fortified a social norm of bias against "Muslim-looking" people. Indeed, many Americans experienced anger, suspicion, and feelings of betrayal toward Arabs, Muslims, and South Asians not unlike that attributed to the post–September 11 perpetrators. Mark Stroman, the man who killed Waqar Hasan and Vasudev Patel in the aftermath of the terrorist attacks, voiced a similar sentiment after his arrest, stating, "I did what every American wanted to do but didn't."[20] Stroman overstates the case, because a rational distinction can and should be drawn between emotion on the one hand, and behavior on the other. It is this distinction that permitted even those Americans who felt similar anger or disgust toward Arabs, Muslims, and South Asians to place moral distance between themselves and the perpetrators of post–September 11 violence.

Thus, the behavior in these incidents was aberrant, just as it was in the Byrd and Shepard killings. However, the biases underlying the Byrd and Shepard killings

[20] Robert E. Pierre, *Victims of Hate, Now Feeling Forgotten*, WASH. POST, Sept. 14, 2002.

found little sympathy among the public, or at least in the mainstream media; it was the perpetrators' racism and homophobia that were found aberrant, and not only the resulting behavior. In contrast, the biases underlying the behavior of the post–September 11 perpetrators had broad resonance with many Americans. The result was a condemnation of the violence, but one that lacked the full moral force of those in the Byrd and Shepard killings, as many Americans could not disavow their felt biases against Arabs, Muslims, and South Asians in the immediate aftermath of the attacks as easily as they could racism and homophobia at the time of the Byrd and Shepard killings.

4.3 *The Perpetrators Were Understood to Be Motivated by Vengeance Rather Than Mere Hatred*

The prototypical conception of hate crimes casts the perpetrator as motivated exclusively by the perpetrator's hatred for the racial or social group to which the victim belongs. As previously discussed, that hatred is understood as personal to the perpetrator, rather than broadly shared by society, and as aberrant and irrational. Despite the efforts of advocacy groups and prosecutors to frame post–September 11 violence crimes as motivated by hatred toward Arabs, Muslims, and South Asians, however, they have been understood broadly as being motivated by a desire for vengeance. Of course, vengeance for the September 11 attacks is not rationally obtained through attacks on "Muslim-looking" people, and therefore the violence is irrational. However, what makes it irrational is a gap in logic, and not the underlying desire for vengeance. A desire for vengeance found broad support among the American public, and ultimately found expression in American foreign policy; by virtue of this broadly held desire, vengeance was made rational, and with it, bias against "Muslim-looking" people. Thus, the motives of the post–September 11 perpetrators were shared by many Americans after September 11, even as the perpetrators' chosen means of achieving it were disavowed.

Where violence is understood as motivated by irrational hate, there is little sympathy for the perpetrator and little comprehension of the crime. The perpetrator is deemed irrational, and the crime is deemed incomprehensible. Such was the case with the Byrd and Shepard killings. But where the violence is understood as motivated by an emotional desire that many Americans share or with which they sympathize, the motivation is not so readily described as irrational. Rather, the motivations – anger and vengeance – are understood, even as the actions of the perpetrators are disavowed. The motivations, then, are accepted as socially appropriate (which is to say, neither irrational nor aberrant). The perpetrator therefore is understood to be expressing socially appropriate emotions in socially inappropriate ways.

5 POST–SEPTEMBER 11 RACIAL VIOLENCE AS CRIMES OF PASSION

Ultimately, people have reacted to post–September 11 hate violence differently than they have to earlier instances of hate violence because it has been understood as a fundamentally different class of crime. The killings of James Byrd, Mathew Shepard, and of other hate crime victims were deemed incomprehensible either because the underlying ideologies – white supremacy, and to a lesser degree, homophobia – were rejected by the mainstream, their persistence in American society notwithstanding, or because the desire to inflict severe bodily harm on the basis of such ideological commitments defied general understanding. In contrast, the killings of Balbir Singh Sodhi, Waqar Hasan, and the many others after September 11, while deplored as wrong, have been understood as the result of a displaced anger, that underlying anger being one with which many Americans sympathized and agreed. The perpetrators of these crimes, then, were guilty not of malicious intent, but of expressing a socially appropriate (and approved) emotion in socially inappropriate ways. We can view the hate crime killings before September 11 as having been understood as crimes of moral depravity, while the hate killings since September 11 have been understood as crimes of passion.

Transposing the crime-of-passion metaphor to post–September 11 violence in this fashion, we can understand the perpetrators acting neither with malice aforethought nor with a callous heart, but out of quintessentially heated blood. The terrorist attacks were assaults not just on property that the perpetrators of post–September 11 violence claimed as their own, but on their sense of honor, here expressed as resurgent nationalism. The perpetrators' attacks, then, have been understood as undertaken in the heat of passion to avenge the affront to their national honor, and because the provocation is one with which we sympathize, it mitigates our condemnation of the act.

6 THE ROLE OF VIOLENCE IN FOMENTING LAW AFTER SEPTEMBER 11

While post–September 11 racial violence can be linked to the state ideology of racial subordination toward Arabs, Muslims, and South Asians expressed through a panoply of state practices, the history of post–September 11 hate violence suggests that "private" violence may produce and legitimize state power as well. The spontaneity with which hate violence against Arabs, Muslims, and South Asians erupted suggests that private violence against these communities outpaced the violence done by the state. It might also be said that the private violence anticipated state action in that it represented the mood of vengeance and retribution in the nation. Serious consideration of the numerosity and severity of the incidents against Arabs, Muslims, and South Asians makes clear that these attacks were not the isolated acts of a deviant

few, but instead represented a broadly held view of the need to respond to the terrorist attacks quickly and severely.

The hate violence can be read as a referendum on what would be politically palatable with regard to governmental responses to September 11, authorizing incursions on previously settled rights and expectations in the name of national security. That so many people gave violent expression to their anger about the September 11 attacks provided a measure of political cover for state action far less extreme than extra-judicial killings, but far more extreme than might have been tolerated previously: racial profiling, immigrant detention, immigration restrictions, and abrogation of due process. By this account, the people have spoken, many of them with their firearms and fists. One might even conclude that the hate violence was an indication of the level of public tolerance for "collateral" killings in military action undertaken by the United States. Indeed, we should understand the hate killings after September 11 as the first "collateral damage" in the war on terrorism.

Recent comments by US Commission on Civil Rights member Peter Kirsanow further illuminate the ways in which individual acts of violence have enabled the exercise of state power. Responding to reports of civil rights violations of Arab Americans, Kirsanow stated, "If there's another terrorist attack, and if it's from a certain ethnic community or certain ethnicities that the terrorists are from, you can forget civil rights in this country."[21] He went on to predict that there would be "a groundswell of public opinion to banish civil rights"[22] and that "we will have a return to *Korematsu*."[23] He concluded, "I think the best way we can thwart that is to make sure that there is a balance between protecting civil rights, but also protecting safety at the same time."[24] In subsequent comments, Kirsanow elaborated, "Not too many people will be crying in their beer if there are more detentions, more stops, more profiling,"[25] a position clearly informed by the public's acquiescence to and active participation in the violence already done to the bodies and rights of Arabs, Muslims, and South Asians.[26]

These remarks have been understood as a warning that critics should tone down their complaints of civil rights and civil liberties violations by the Bush administration. One can read in them a political calculation that popular sentiment will sanction extreme exercise of state power, and that the state will "yield" to it. Kirsanow's comments make clear that the deployment of either public sentiment or

[21] Lynette Clemetson, *Civil Rights Commissioner Under Fire for Comments on Arabs*, N.Y. Times (July 23, 2002).

[22] Niraj Warikoo, *Arabs in U.S. Could Be Held, Official Warns*, Detroit Free Press (July 20, 2002), available at http://www.freep.com/news/metro/civil20_ 20020720.htm (last visited Sept. 1, 2004).

[23] Clemetson, *supra* note 21.

[24] *Id.*

[25] Warikoo, *supra* note 22.

[26] Niraj Warikoo, *Muslims and Arab Americans See Their Civil Rights Eroded*, Detroit Free Press (Oct. 24, 2001).

private violence in the service of extraordinary exercise of state power is not free of manipulation. Yet state cooptation of public acquiescence to hate violence says as much about the power of private violence as it does about the power of the state: the veneer of democracy that adheres to widespread private violence and its acceptance lends legitimacy to drastic exercises of state power, while the sovereignty of the state lends legitimacy to the exercise of private violence resonant with the values of the state. One cannot exist without the other.

Ultimately, the interdependence of state and individual violence rests upon the symmetry of emotional judgment underlying each. Individual and state violence are both mutually legitimizing and perpetuating; each adds fuel to the fire of the other. The rage is not merely shared, it is lent. The symmetry of their operations notwithstanding, individual and state violence are, of course, not morally equivalent. The hate violence that erupted in the aftermath of the terrorist attacks forecast the state violence to come, but those developments were not ineluctable. The state had the capacity to resist such violence itself, but failed to do so. Moreover, the pervasive, generative, and legitimizing forces of state action necessarily subject the state's conduct to greater moral accountability.

7 CONCLUSION

The predictions made immediately after September 11 that Arabs, Muslims, and South Asians would encounter a "backlash" of hate violence reflected an implicit understanding of the uncontrollable power of emotion in times of crisis. But it is not just emotion, or more properly emotionalism, in its generic sense, that was understood as a predictable reaction to the terrorist attacks. Rather, it was a racially targeted emotion lacking rational support. It would be one thing if, in the aftermath of the attacks, large numbers of people committed random acts of violence, but it is quite another when the vector of that violence has racial direction. This can be distilled even further to a recognition of the enduring operation of racism, even at a time when many people (and courts) are reluctant to acknowledge any significant role of race in contemporary society. Violence against Arabs, Muslims, and South Asians, and their resulting reracialization, remind us of the persistence of race and racism in American law, culture, and society. So conditioned is the American recourse to racial explanation, so ingrained in the country's history and contemporary institutions, that it has taken the form not of deliberate decision-making, but of impulse, of reflex, and of passion. Society's ready understanding of the crimes of racial violence following September 11 demonstrates how far our nation is from recognizing and addressing the operation of race. It is when, in the aftermath of national tragedy, racial scapegoating is not expected that we will have made meaningful progress in healing our persistent racisms.

Though it would be naïve to attribute all individual and governmental actions affecting Arabs, Muslims, and South Asians to race, it would be equally naïve to

ignore its operation. Long after W. E. B. Du Bois's prediction that the "color line" would preoccupy the United States in the twentieth century,[27] the aftermath of September 11 reminds us that racism, and its companion systems of subordination, remain quintessentially American passions. They cannot be tempered until they are understood, and they cannot be understood until they are acknowledged. The loss of life and dignity suffered by Arabs, Muslims, and South Asians provides an important opportunity to confront anew the passions that never seem to leave us. Foregoing this opportunity all but ensures the ungovernability of the racial rage of individuals, and the rage shared by law.

[27] W. E. B. Du Bois, The Souls of Black Folk 12 (1994).

PART II

The Politics of Islamophobia in the Courts

5

The Lost Story of *Iqbal*

Shirin Sinnar[*]

1 INTRODUCTION

Every first-year law student reads *Ashcroft v. Iqbal*,[1] the 2009 Supreme Court decision that transformed pleading standards across civil litigation. Now an established part of the civil procedure canon, the 5–4 decision significantly eased the standard for dismissing complaints for failure to state a claim, upending the liberal pleading regime that had marked federal litigation for half a century. The old standard judged the factual sufficiency of complaints only according to whether they gave defendants fair notice of the basis for the plaintiff's case, rather than screening cases on their merits.[2] *Iqbal* required instead that a plaintiff set out facts to persuade a judge that her claim was "plausible." The new pleading standard attracted enormous attention from lawyers, legal scholars, and lower courts. Indeed, by 2015, the decision had already become one of the five most cited Supreme Court decisions of all time.[3]

Although scholars have exhaustively critiqued the decision on procedural grounds and attempted to measure its impact on civil litigation, two aspects of the decision have received far less attention than they deserve. First is the experience of Iqbal himself: Javaid Iqbal, the Pakistani immigrant and cable repairman who challenged the conditions of his confinement in the wake of September 11, 2001. Iqbal was described in the decision summarily as a foreigner, a suspect, and (at best) a victim of abuse, and his own story is at risk of disappearing.

[*] This chapter is an excerpt of the previously published article, *The Lost Story of Iqbal*, 105 GEO. L.J. 379 (2017).

[1] 556 U.S. 662 (2009).

[2] *See* Conley v. Gibson, 355 U.S. 41, 45–48 (1957).

[3] *See* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 389–93 (2016) (listing the 100 Supreme Court decisions most cited by federal courts and tribunals as of Sep. 9, 2015).

Second, the *Iqbal* decision's factual and normative account of the post–9/11 immigrant detentions, out of which Iqbal's claims arose, has not generated nearly the level of scholarly critique that it merits. The memory of those detentions is now receding – both for legal scholars and for a generation of law students too young to recall the daily announcements of immigrants detained in the terrifying aftermath of September 11. For those whose knowledge of the detentions comes solely from their reading of *Iqbal*, the detentions would likely come across as relatively limited in scope, rational in design, and problematic only in the conduct of low-level officials. In stating that an "obvious alternative explanation" for the detentions existed, apart from discrimination, the Court presented the detentions as essentially legitimate – indeed, as self-evidently so.

This chapter challenges the Court's rendition of *Iqbal* and the post–9/11 immigrant detentions. In doing so, it shows how procedural decisions can contribute to shaping broader narratives that may ultimately affect substantive rights. It first tells the lost story of Javaid Iqbal himself. This retelling of *Iqbal* opens with Iqbal's working-class immigrant life in New York before his arrest – a narrative that unsettles the Court's simple identification of Iqbal as a suspect and a foreigner. It then highlights the transnational and enduring effects of his detention: although the Court presented Iqbal's deportation as the final legally relevant moment of his story, the experience of being branded a terrorist followed Iqbal to Pakistan and haunts him fifteen years later. This expanded version of Iqbal's story thus challenges the assumptions that the majority opinion invites: that factual suspicion existed to connect Iqbal to terrorism and that the detentions imposed only temporary and limited harm. Moving beyond *Iqbal*, the chapter also recovers the lost story of the detentions. That story is lost not in the sense that it has never been told, but rather, in that the Court starkly mischaracterized it. The detentions may represent the most pernicious use of race and religion as proxies for suspicion in the post–9/11 period, yet the *Iqbal* opinion summarily legitimized them.

Iqbal specifically held that the complaint at issue did not sufficiently allege that defendants Attorney General John Ashcroft and FBI Director Robert Mueller personally engaged in discriminatory conduct. The role of these high-level officials in ordering the detentions – and the extent to which they explicitly relied on race and religion in their decision-making – remains unclear. [In 2017, the Supreme Court dismissed legal claims against Ashcroft and Mueller in *Ziglar v. Abbasi*, a separate legal challenge to the post-9/11 detentions, eliminating the opportunity to uncover additional facts through discovery.[4] But evidence that had previously emerged in that litigation challenged the *Iqbal* majority's bald conclusion that discrimination by these officials was simply implausible.]

The key aim of this chapter, however, is not to critique the holding of *Iqbal*, but to contest its narrative – a narrative that rendered Iqbal and other detainees nearly

[4] 137 S. Ct. 1843 (2017).

invisible, that minimized the harm of the mass arrests, and that declared the detentions to be likely lawful.

2 THE LOST STORY: JAVAID IQBAL

A quarter-century ago, critical race theorist Richard Delgado argued that complaints and judicial opinions alike offer "stylized versions" of a person's experience, relying on "existing statutory and case law as a type of 'screen' that makes certain facts relevant and others not."[5] He noted that complaints alleging race discrimination may struggle to relate stories in terms that courts will accept, leading to dismissals that further validate dominant narratives.

Sympathetic to such critiques, this part of the chapter aims to recapture Iqbal's lost story, a story that begins and ends outside the bounds of the "material" facts. The account draws heavily on the author's interviews with Iqbal, including an in-person interview in Lahore, Pakistan, in January 2016. Wherever possible, it corroborates facts using multiple sources, including court documents from multiple cases. Even now, however, a good deal of relevant material, especially government documents, remains undisclosed or sealed pursuant to protective orders. For all these reasons, this account cannot be read as a complete or judicially determined presentation of the facts.[6]

2.1 *The Immigrant Experience*

In 1992, Iqbal arrived at JFK Airport from Faisalabad, Pakistan, brought into the country on a false passport by immigration smugglers. He settled in Long Island, and for nearly a decade, he worked long hours at multiple jobs to send money to family back home. For much of that time, Iqbal worked as a gas station attendant in Huntington, Long Island, sometimes seven days a week, opening at 5 in the morning and closing at 10 at night. At other times, he rang up purchases at a 7-Eleven, made sandwiches at Subway, washed dishes at a bar, and worked the graveyard shift as a security guard. Finally, after a customer at the Gulf's gas station in Huntington told him of an opening at a leading New York cable company, he landed the job he ended up loving most. Interviewed fifteen years later, Iqbal still relished the memories of his around-the-clock availability as a "cable guy" in Long Island:

> I was the only person who had [the] radio 24 hours – me and the truck, 24 hours with me. Because whenever they got emergency, they called, "Iqbal! You gotta go

[5] Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2428 (1989).

[6] Much of the information in this part comes from interviews with Iqbal, including all quoted material not otherwise cited.

> to exit 47, the lady got no TV. Right away. Go ahead there." 50 dollar for the gas, 50 dollar tip. 100 bucks. So I was greedy about that, that every dollar makes [a] difference. I send money home. And I will change my family's life.

As he came to know the community through his work as a gas station attendant and cable repairman, Iqbal increasingly felt at home in America. Eventually, Iqbal married an American woman whom he met while working at the gas station, moved in with her and her children, and applied for a green card based on his marriage. After four-and-a-half years of marriage, the two separated.[7] Iqbal moved into a tiny studio apartment in Long Island that he shared with a roommate who worked the night shift.

Iqbal's decade on Long Island had features common to those of many undocumented immigrants and other features that may have distinguished it. Like other immigrants, Iqbal worked for part of his time in the United States using a false identity, one that he purchased from two men in Brooklyn for $1,500. The use of a false ID later figured heavily in the criminal case brought against Iqbal in the fall of 2001, as did more serious allegations that he was also engaging in financial fraud.

2.2 *Arrest and Detention*

On the morning of September 11, Iqbal had an appointment to renew his work authorization card with the US Immigration & Naturalization Service (INS) in lower Manhattan. He never made it there: as he neared the office, one block away from the World Trade Center, he saw the first plane heading toward the Twin Towers. When the second plane hit some twenty minutes later, and it became clear to everyone in the area that a terrorist attack was unfolding, Iqbal joined the crowds of New Yorkers fleeing the scene.

Less than eight weeks later, on November 2 or 3, 2001, Iqbal was arrested. As Iqbal recounted, it was a Friday night, and he was home alone. He heard a helicopter hovering close by and, pushing back the curtains, saw police cars in the street. Iqbal had no inkling that the police attention was directed at him until he heard a knock at his door. Two officers started searching the room. According to Iqbal, several things in the apartment caught their interest. First, on top of the TV, they found a letter from the INS informing Iqbal of his appointment in lower Manhattan on the morning of September 11. The officers accused him of lying about having the

[7] *See* Nina Bernstein, *2 Men Charge Abuse in Arrests after 9/11 Terror Attack*, N.Y. Times (May 3, 2004), available at http://www.nytimes.com/2004/05/03/nyregion/2-men-charge-abuse-in-arrests-after-9-11-terror-attack.html?_r=0 [https://perma.cc/XY4K-5K72] [hereinafter Bernstein, *2 Men Charge Abuse*]; Nina Bernstein, *Held in 9/11 Net, Muslims Return to Accuse U.S.*, N.Y. Times (Jan. 23, 2006), http://www.nytimes.com/2006/01/23/nyregion/held-in-911-net-muslims-return-to-accuse-us.html [https://perma.cc/5E9Y-YJNR].

appointment and of going to the World Trade Center with the intent of helping the hijackers. According to Iqbal, the officers again appeared to grow suspicious when they came across an issue of *Time* magazine featuring the burning World Trade Center on the cover and a Pakistani newspaper reporting on the attacks.

On the Monday following his arrest, Iqbal was arraigned before a magistrate judge in the US District Court for the Eastern District of New York, who entered an order to detain him. That day, Iqbal was brought to the Metropolitan Detention Center (MDC) in Brooklyn and housed with the general inmate population. Later that month, a grand jury indicted Iqbal on two counts of identity fraud for obtaining a driver's license in the name of Abdul Khaliq and for possessing a Social Security card in that name. In December, Iqbal pled not guilty to both charges. In February 2002 a grand jury charged Iqbal with conspiracy to utter counterfeited securities, uttering forged securities, and identity fraud, specifically accusing Iqbal of creating checks in the names of various financial institutions and depositing them in bank accounts in his name. Iqbal initially entered a not-guilty plea to the new charges.

2.3 *Confinement at the Metropolitan Detention Center*

During his two months of confinement in the general inmate section of the MDC, Iqbal heard rumors about the "K Unit" of a new building in the MDC, which ultimately housed eighty-four inmates arrested in connection with the September 11 investigation. Still, Iqbal did not imagine that he would be sent there until it actually happened. His transfer occurred on January 8, 2002, the same day that the government indicated in court that it might seek a superseding indictment. No public information explains what prompted the transfer – whether it was new information that had emerged in the criminal investigation, the announcement in court of Iqbal's retention of private counsel, or something entirely unrelated.

That evening, correctional officers brought him to a room on a separate floor where a guard announced his presence: "Captain, here's the one." According to Iqbal, he saw nearly a dozen men waiting in the room. Upon Iqbal's arrival, several officers kicked and beat him, called him a "terrorist," punched him in the face, and threw him against the wall. Around March 20, 2002, prison guards subjected Iqbal to a second particularly severe attack. That day, officers conducted three strip and body-cavity searches of Iqbal, and he protested when the officers ordered a fourth search. In retaliation, the guards punched Iqbal in the face and kicked him, causing him to bleed. Despite his requests for help, Iqbal stated that he did not receive medical care for two weeks after the incident.

During his six months in the Administrative Maximum Special Housing Unit, or ADMAX SHU, Iqbal was usually confined in his cell for all but one hour each day. MDC guards regularly called him a "terrorist," a "killer," a "Muslim bastard," and a

"Muslim killer."[8] On cold winter mornings, prison guards brought detainees, undressed, outside to the tenth floor of the MDC and then watched how they reacted to the freezing temperatures. Iqbal says that he and other detainees repeated religious incantations to withstand the cold. In the ADMAX SHU, strip and body-cavity searches were routine: Iqbal experienced them each morning as well as multiple times before and after visits to court or to the medical clinic. Deprived of adequate food and subjected to harsh treatment, Iqbal lost over forty pounds in detention.

Iqbal also recalled how the prison guards spoke of his religion. When the guards granted an inmate's request for a copy of the Quran, they threw the Quran on the ground and shouted at the detainees. Iqbal described the scene, unconsciously slipping into an American accent fifteen years later as he recalled their words:

> And then, you know, they shout at us: "This is what you read? This is what makes you terrorists? This is what makes you terrorists?" Then they curse. "You guys are gonna get killed here. We make sure you guys get killed here because you killed our innocent people. . . . We're gonna make your countries miserable for [the] rest of their lives.

During his six months in the K unit, Iqbal was hindered from meeting or communicating with his lawyers. Many of these allegations align with findings of the Justice Department Inspector General, which conducted more than 100 interviews and obtained videotape evidence in its investigation of conditions at the MDC.[9]

In April 2002, Iqbal pled guilty to two charges – conspiracy to make, utter, or possess counterfeited securities, and fraud with identification documents – and the government dismissed charges related to making the forged and counterfeited securities and a separate charge of identity fraud. He later told *The New York Times* that he pled guilty only to escape the abuse.[10] On September 17, 2002, Judge I. Leo Glasser sentenced him to sixteen months imprisonment, a $200 assessment, and three years of supervised release, with the condition that he not return to the United States illegally.

Iqbal received a hearing before an immigration judge who asked whether he wanted to fight his deportation or accept voluntary deportation to Pakistan. Tired of confinement and convinced that the US government would never let someone once branded a terrorist stay in the United States, Iqbal agreed to voluntary removal.

[8] First Amended Complaint & Jury Demand at 16, Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG (E.D.N.Y. Nov. 10, 2009).

[9] *See* Office of the Inspector Gen., U.S. Dep't of Justice, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York 6–7 (2003).

[10] *See* Bernstein, 2 *Men Charge Abuse*, *supra* note 7.

2.4 *Life after Litigation: "It's Not Over"*

Six years after the settlement of the case, Iqbal describes the consequences of his detention as ongoing – as inflicting "day-by-day punishment." Militant groups continue to harass his family and seek to recruit them in order to capitalize on his story. Most significantly, he maintains that his refusal to go along with their entreaties led to the lodging of false capital charges against his teenaged son and the issuance of a death warrant against the son from local religious authorities.

Beginning when his eldest son was in his final year of high school, Iqbal recounted, the groups that regularly harassed Iqbal began appealing to him to send his son to join them:

> So they start asking me, give my son for them . . . so "we should get revenge from United States because they've done wrong with you...." I said, "I get my revenge. But not with gun – with pen. I lived there. I know the society of United States of America, I know the people, I know the system. In that system, if you're right, and somebody has done wrong with you, don't give up. Stand up for your right. You will get your right...." But they never give up.

The men followed his son to school, appealing to him to seek revenge on his father's behalf. Iqbal and his son both refused the entreaties. Then, in an act that Iqbal understood to be retaliation for their refusal, someone accused his son of burning papers with Islamic religious writing on them – a criminal violation under Pakistan's penal code. A judge then issued an arrest warrant against Iqbal's son, but for the far more serious offense of defiling the name of the Prophet, a charge that carries a death sentence under Pakistani law. While the criminal case was still pending, in May 2014, an independent local religious institution issued a *fatwa*, or legal opinion, decreeing that Iqbal's son and five other youth were guilty of disrespecting the Prophet of Islam and that the "punishment in law and *Sharia* is [a] death sentence."[11]

Terrified of the potential repercussions, and without informing anyone, Iqbal's son fled. Neither Iqbal nor his family members have heard from him since – it has been "utter silence."

Iqbal is convinced that the militants who had targeted him were responsible for the false case against his son. The charges and death warrant against his son made Iqbal question his decision to speak out about his experience in the United States.

Haunted by the disappearance of his son and afraid for his other children, Iqbal describes life now as "worse than being at the MDC." Having once been branded a terrorist, he says, "I am free but not free." He is anxious to raise his children without harassment or fear, and he remains wistful about the life he once had in America: "If

[11] Evidence of Sharia Verdicts Serial No. 199, Jamia Rizvia Mazhar-e-Islam (May 10, 2014) (on file with author).

they asked me [my] last wish today, and if they asked me, 'Would you wish to go to America?' I would [a] thousand times say, 'Yes, yes, yes,' but not by myself – with my kids. Take me there. And I will be working again in the street as a cable guy."

Fifteen months of confinement as a terrorist seared into Iqbal one image of the US government, but a decade in Long Island had exposed him to another America – one of kind people, economic opportunity, relative freedom, and a legal system that offered the hope of challenging injustice. Those dueling images seem to confound him, even now.

2.5 *Reimagining Iqbal*

What should one take away from the lost story of Iqbal? First, an extended account invites us to humanize the individual considered in cursory and categorical terms by the Court and rendered a procedural symbol by lawyers. Second, this account challenges the implication in the majority opinion that a legitimate factual basis for suspicion connected Iqbal to terrorism. In the end, all signs suggest that Iqbal was fully cleared: he was released from the MDC's maximum security unit, permitted to return to Pakistan mere months after his sentencing, allowed to return to the United States for his deposition, and eventually given hundreds of thousands of dollars in a settlement with the US government. Moreover, during the five years in which he pursued the case, the government never publicly indicated that it had had a credible basis for suspecting him of terrorism, although it presumably had every incentive to share such information. Despite all this, the Court's framing of the basis for the post–9/11 detentions as targeting those suspected of involvement in terrorism continues to associate Iqbal with terrorism in the US public record.

Third, Iqbal's story suggests that the effects of the detentions were not as limited in space or time as readers of the Supreme Court decision might have assumed. The categorical exclusion of those within a racial or religious group is often justified as a temporary process of sorting the loyal from the disloyal, with the implication that the status quo *ante* will be restored after the emergency passes. Proponents of the internment of Japanese Americans, of the post–9/11 detentions, and of the exclusion of Muslim immigrants from the United States have all justified such measures in this fashion. But Iqbal's story challenges the tendency to characterize such practices as imposing limited harm; as in his case, such measures may affect individuals and societies far beyond the United States and for far longer than the immediate application of a policy.

3 THE LOST STORY: RACE, RELIGION, AND THE POST–9/11 DETENTIONS

This part turns from Iqbal's individual story to the post–9/11 detentions as a whole. Hundreds of individuals were arrested and detained in connection with the

September 11 investigation, most of them for immigration violations alone; a smaller number, like Iqbal, faced criminal charges. The *Iqbal* decision presented the detentions as affecting primarily Arab Muslims, as targeting those with suspected connections to terrorism, and as occurring without the personal involvement of Ashcroft or Mueller in discriminatory decisions. A more grounded account of the post–9/11 detentions suggests instead the following: First, the detainees were likely not predominantly "Arab Muslim," and Iqbal was not Arab – which at least partly undermines the basis for the Court's assertion that any profiling was rationally tied to both the religion and national origin of the terrorists. Second, significant evidence supports the idea that the ethnicity and religion of individuals factored heavily into investigative and detention decisions, as opposed to the detentions being race- or religion-blind in design and disproportionate only in effect. Third, the factual basis linking detained individuals to suspicions of terrorism was often thin or absent, and many government officials knew that at a fairly early stage of the mass detentions.

3.1 *Demographics of the Detainees*

At the most elemental level, the opinions in *Iqbal* are striking in that they implied that most detainees, including Iqbal, were "Arab Muslim." The majority opinion called the arrests "likely lawful and justified" because the September 11 attacks were "perpetrated by 19 Arab Muslim hijackers" who belonged to a group "headed by another Arab Muslim . . . and composed in large part of his Arab Muslim disciples" – all of which, the Court said, made it unsurprising that law enforcement actions would disproportionately affect "Arab Muslims."[12]

Iqbal, of course, was Pakistani, not Arab, and as far as can be discerned from public data, perhaps only half of the total detainees held on immigration charges came from Arab countries. According to the Inspector General, the top ten nationalities of the 762 aliens detained for immigration violations in connection with the September 11 investigation through August 2002 were as follows: Pakistan (254 individuals), Egypt (111 individuals), Turkey, Jordan, Yemen, India, Saudi Arabia, Morocco, Tunisia, and Syria.[13] Thus, the single largest number of detainees came from a non-Arab country (Pakistan, at fully a third of the total number), and non-Arab countries accounted for three of the top six nationalities represented (Pakistan, Turkey, and India).

The Court's repeated references to "Arab Muslims" suggests either that the Court did not know the difference between "Arabs" and "Muslims" and treated the

[12] *Iqbal*, 556 U.S. at 682.

[13] Office of the Inspector Gen., U.S. Dep't of Justice, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks 2, 5, 21 (2003) [hereinafter, Office of the Inspector Gen.].

categories as interchangeable, or that it believed that those who were detained largely shared both the ethnicity and religion of the hijackers.

The first possibility, if true, would suggest a striking level of ignorance on the part of the nation's highest court: Arabs and Muslims, after all, are distinct groups, both as a definitional and empirical matter. *Arab* describes a person who identifies with a particular linguistic and cultural heritage, whereas *Muslim* describes an adherent of a religion, Islam. Although most Arabs are Muslims, millions are not; in fact, about three-quarters of Arab Americans are Christian.[14] Moreover, not all, or even most, Muslims are Arab: Arabs constitute only 15–18 percent of the worldwide Muslim population, and only one of the ten countries worldwide with the largest Muslim populations is predominantly Arab.[15] Thus, *Arab* and *Muslim* are no more synonymous than *white* and *Christian*.

The Justices may simply have conflated the two groups without hesitation, which is consistent with the human tendency to absorb social constructions of race without conscious recognition. Leti Volpp has argued that the September 11 attacks consolidated "a new identity category that groups together persons who appear 'Middle Eastern, Arab, or Muslim.'"[16] Government policies and over 1,000 acts of hate violence targeted those perceived to be Middle Eastern, Arab, or Muslim, defining that category in opposition to a "strongly patriotic and multiracial" new American national identity.[17] Muneer Ahmad similarly identified "a new racial construct" after the September 11 attacks, focused on "the 'Muslim-looking' person," an identity that "capture[d] not only Arab Muslims, but Arab Christians, Muslim non-Arabs (such as Pakistanis or Indonesians), non-Muslim South Asians (Sikhs, Hindus), and even Latinos and African-Americans, depending on how closely they approach[ed] the phenotypic stereotype of the terrorist."[18]

The emerging post–9/11 construct not only swept in members of distinct groups somehow perceived to be linked to the terrorists – it also combined the dual stereotypes associated with racial and religious aspects of the profile. As a racial construct, the profile projected deep-seated historical racism against other nonwhite communities onto the group newly anointed as the enemy. But the construct also drew on ideas about Islam as a religion: the hijackers' expressed religious motivation for their actions made it possible not only to draw on generations-old fears of Islam, but also to justify the profile in terms of a potentially shared ideology rather than crude biology. In merging Arabs and Muslims, the new construct thus borrowed

[14] D.C., Md., & Va. Advisory Comms. to the U.S. Comm'n on Civil Rights, *Civil Rights Concerns in the Metropolitan Washington, D.C., Area in the Aftermath of the September 11, 2001, Tragedies* 5–6 (2003).

[15] *Id.* at 7.

[16] Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1576 (2002).

[17] *Id.* at 1579–81, 1584, 1590.

[18] Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 Calif. L. Rev. 1259, 1278–79 (2004).

from the worst of both racial and religious tropes, while making the profile appear more respectable than one that relied on race alone.

But perhaps the Court did not conflate Arabs and Muslims and instead assumed that most of those detained actually shared both the religious and ethnic identities of the hijackers. If so, the belief was wrong – and the ethnicity of the plaintiff in the case, if not the demographic statistics in the Inspector General report that the Court cited, ought to have given the Court pause. Nor was it a harmless error: the majority specifically rejected the plausibility of Iqbal's discrimination claims on the grounds that the ethnic and religious composition of those detained matched the ethnic and religious composition of the hijackers and al Qaeda. To the extent that only one (or neither) characteristic matched, it weakened the Court's argument for the rationality of the linkages. In fact, with respect to Iqbal and the large number of non-Arab detainees, their status as non-Arabs ought to have delinked them from terrorism based on the stated reasons for the Court's crude profile, because their ethnicity actually differentiated them from the hijackers, from Osama bin Laden, and from many al Qaeda members. The Court's confident assertion of a legitimate policy of identifying terrorist suspects thus rested on a basic factual misrepresentation.

3.2 *Race and Religion in Investigative and Arrest Decisions*

The most serious problem with the Court's discussion of the detainees, however, was not that the Court thought they were Arab Muslims, but that it assumed that either (1) profiling had not occurred or (2) any profiling that had occurred was rational and justified. In contrast to the first possible assumption, abundant evidence suggests that race, ethnicity, and religion – or perceptions as to those characteristics – drove many of the initial decisions to scrutinize those who ended up being classified as September 11 detainees. These facts belie any argument that the detentions were neutral at their inception and only disparate in their effect. And in contrast to the Court's implication that the detentions focused on those with a suspected relationship to terrorism, the facts suggest that, for many of the detainees, no individualized basis for suspicion existed apart from observations of facially innocuous conduct and the perceived race or religion of the individuals. Far from a "legitimate" effort to arrest those who had a "suspected link to the attacks,"[19] it appears instead that federal officials detained many people who were simply brown and undocumented and who happened to fall under the gaze of law enforcement officers or fearful members of the public.

It does appear that the FBI had an individualized factual basis for suspicion of *some* immigrant detainees, at least at the outset. For instance, a May 2002 FBI list of Special Interest Cases, released in discovery, included some individuals who had lived with, attended flight school with, or otherwise directly associated with one or

[19] Ashcroft v. Iqbal, 556 U.S. 662, 682 (2009).

more of the hijackers.[20] Although none of the detainees were ultimately implicated in the attacks, the initial information in such cases included facts that would likely have created an investigative interest independent of racial or religious affiliation.

In many other cases, however, no such individualized factual basis for suspicion appears to have existed. The Inspector General's report did not focus on the basis for investigative decisions but nonetheless observed that the "leads that resulted in the arrest of a September 11 detainee often were quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant."[21] The report listed several examples of detainees who attracted scrutiny based on ordinary behavior tied to a racial descriptor. For instance, "several Middle Eastern men" were arrested as September 11 detainees when law enforcement authorities found pictures of famous buildings, including the World Trade Center, during traffic stops.[22] Another noncitizen was classified as a September 11 detainee after someone reported to the FBI that the grocery store where the individual worked was "operated by numerous Middle Eastern men, 24 hours – 7 days a week" and that there were "too many people to run a small store."[23]

Widespread news accounts and human rights reporting likewise suggested that vague suspicions based on the perceived ethnicity or religion of individuals undergirded many investigatory and arrest decisions. A Human Rights Watch report described how tips from "spouses, neighbors, or members of the public" or chance encounters with law enforcement ensnared many immigrants.[24] It detailed, for instance, the stories of two Somali men accosted as suspicious because they had kneeled to pray in a parking lot; of an Egyptian man detained after he asked a Newark police officer for directions; and of an Iranian citizen stopped for speeding whose Muslim-sounding name apparently attracted the officer's notice. One journalist reported, based on interviews with FBI officers in New York, "It seemed that anyone who had ever seen a Muslim or suspected a neighbor of being a Muslim called in," and said that FBI agents receiving such tips "tried to prioritize.... But mostly they went after everything."[25]

In the *Iqbal* oral argument, Chief Justice Roberts took issue with Iqbal's lawyer's statement that individuals were "swept up" in the immigration or criminal justice system.[26] But widespread reports of the detentions suggest that, for a significant number of detainees, that is exactly what happened: although they may well have violated immigration or criminal laws, they fell under suspicion only because of

[20] *See* Joint Terrorism Task Force Special Interest Cases at 6, 11, Turkmen v. Ashcroft, 915 F. Supp. 2d 314 (E.D.N.Y. 2013) (No. 02-CV-2307).
[21] *See* Office of the Inspector Gen., *supra* note 13, at 41 (2003).
[22] *Id.*
[23] *Id.* at 17.
[24] *See* Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* 12–15 (2002).
[25] Steven Brill, After: How America Confronted the September 12 Era 37–38 (2003).
[26] *See* Transcript of Oral Argument at 57, *Iqbal*, 556 U.S. 662 (No. 07-1015).

widespread public and law enforcement attention directed toward "Muslim-looking" immigrants in New York and elsewhere.[27] The actual basis for the detentions, therefore, undermines the Court's depiction of a rational process of identifying those with suspected connections to terrorism.

3.3 *Designation of Immigrants as September 11 Detainees*

Although many individuals appear to have attracted law enforcement scrutiny largely because of their perceived race or religion, the extent to which such factors affected the subsequent classification of detained individuals is less clear. Much of this information is not yet in the public domain. One of the most comprehensive accounts of the detentions, the Inspector General's report, concluded that detainees were classified as being "of interest" to the September 11 investigation mostly on the basis of "the type of lead the law enforcement officers were pursuing when they encountered the aliens, rather than any evidence that they were terrorists."[28] If this is so, then the initial decision to investigate an immigrant on terrorism suspicions, even if those suspicions were based on racial or religious biases, would have directly affected the subsequent classification of a detainee.

Once designated as September 11 detainees, the Inspector General's report found, immigrants became subject to an unwritten but "clearly understood" policy, decided at the highest levels of the Justice Department and FBI, that prohibited their release until the FBI could clear them of connections to terrorism.[29] The agencies maintained this policy even though officials within the INS, FBI, and Justice Department knew early on that many September 11 detainees "might not have a nexus to terrorism."[30] The report concluded that:

> Even in the hectic aftermath of the September 11 attacks, . . . the FBI should have taken more care to distinguish between aliens who it actually suspected of having a connection to terrorism as opposed to aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism but simply were encountered in connection with a [September 11-related] lead.[31]

The ultimate disposition of the September 11 detainee cases supports the idea that little factual evidence connected those arrested to terrorism. According to David Cole, not a single person subjected to detention in the United States after September 11 was charged with any connection to the September 11 attacks, and only three

[27] *See* Irum Shiekh, Detained Without Cause: Muslims' Stories of Detention and Deportation in America after 9/11, at 19, 21 (2011) (arguing based on oral histories of 40 ex-detainees that "one story after another reveals that racial profiling triggered suspicion against individuals and that specific questions about their religion led to their arrests").

[28] Office of the Inspector Gen., *supra* note 13, at 41.

[29] *Id.* at 37–40.

[30] *Id.* at 45.

[31] *Id.*

noncitizen detainees arrested in the investigation – a group of Arab men from Detroit – were charged with terrorism offenses of any kind.[32] The Detroit men were ultimately acquitted, and the government repudiated its case against them and investigated the prosecutors who brought the case for ethical violations. A close analysis of statistics released in 2012 by the Justice Department's National Security Division on unsealed international "terrorism and terrorism-related" convictions supports Professor Cole's assertion that the September 11 investigation did not result in convictions for offenses directly related to international terrorism.

The absence of convictions for terrorism offenses does not rule out the possibility that the government brought *non*-terrorism charges against other individuals whom it actually suspected of supporting terrorism. The National Security Division statistics list over 100 defendants, including Iqbal, who were identified during the September 11 investigation and convicted of some criminal offense.[33] But the document specifically states that it lists these individuals "regardless of whether investigators developed or identified evidence that they had any connection to international terrorism."[34] Additionally, the short sentences that most of these defendants received suggest that there was little to connect them to terrorism; for instance, a 2003 study found that the median sentence for terrorism-related cases after September 11 was only fourteen days.[35]

4 REREADING *IQBAL* AT THE JUNCTURE OF PROCEDURE AND SUBSTANCE

From the moment the Supreme Court issued *Iqbal*, legal scholars and lawyers recognized the potential for the procedural ruling to affect substantive rights. Many feared that plausibility pleading would specifically harm those asserting civil rights and discrimination claims: Legal scholars noted that the information needed to plead discriminatory intent, such as the facts regarding the defendant's state of mind or the internal development of government policies, would frequently be within the defendant's sole possession. Moreover, critics observed that the Court's invitation to

[32] David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism 25–26, 240 n.12 (2003). Two US citizens detained as "material witnesses" were also charged with terrorism-related crimes.

[33] U.S. Dep't of Justice, National Security Division Statistics on Unsealed Terrorism and Terrorism-Related Convictions 9/11/01 – 12/31/11, 13–17 (2012).

[34] U.S. Dep't. of Justice, Introduction to National Security Division Statistics on Unsealed Terrorism and Terrorism-Related Convictions, 2 (2012).

[35] *Criminal Terrorism Enforcement Since the 9/11/01 Attacks*, Transactional Records Access Clearinghouse (Dec. 8, 2003), available at http://trac.syr.edu/tracreports/terrorism/report031208.html# [https://perma.cc/2P3V-C3UF]; *see also* Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, Wash. Post (June 12, 2005), available at http://www.washingtonpost.com/wp-dyn/content/article/2005/06/11/AR2005061100381.html?sid=ST2010111602361 [https://perma.cc/4JKF-ATXA] (noting that of 142 individuals linked to terrorist groups, 39 were convicted of minor crimes, producing modest punishments).

evaluate pleadings based on "judicial experience and common sense" licensed judges to draw on intuitions that might differ based on race, gender, or other identities.[36] For all of these reasons deriving from the interaction of procedural standards with substantive law, critics feared that the impact of *Iqbal* would fall particularly harshly on marginalized groups.

Although this scholarship has examined in depth the impact of plausibility pleading on racial equality claims, the lost story of *Iqbal* and the post–9/11 detentions suggests that there is more to be said regarding the decision's effects on subordinated groups and the particular way in which procedure and substance interact to produce that effect. In the guise of a procedural decision, *Iqbal* presents a particular narrative of race and security that may affect readers' perceptions of the propriety of law enforcement practices, the scope of the harm they impose on minority communities, and their ultimate legality.

4.1 Effects of *Iqbal* on Substantive Law

The effect of *Iqbal* may be to normalize expansive uses of racial and religious criteria by law enforcement and to desensitize legal audiences to the effects of such policies on minority communities.

At least two courts have explicitly invoked *Iqbal*'s account of the detentions – rather than its procedural holding alone – to legitimize other race- or religion-based investigative practices and to discount the scope and severity of the harms inflicted. The Fourth Circuit did so in *Monroe v. City of Charlottesville*,[37] a case far removed from national security concerns. There, the plaintiff in a putative class action alleged that, after reports of serial rapes committed by a suspect described as a young black man, the Charlottesville, Virginia police approached 190 "youthful-looking black males" and asked them for DNA samples.[38] The court dismissed the equal-protection claim, holding that the police's use of race to identify individuals based on victim descriptions of the suspect did not constitute a governmental racial classification entitled to strict scrutiny. In justifying this conclusion, the Fourth Circuit relied extensively on *Iqbal*, liberally citing the Supreme Court's decision and specifically its statement that, given that Arab Muslims had committed the September 11 attacks, it was unsurprising that a lawful investigative policy would disproportionately affect Arab Muslims.

The court thus took from *Iqbal* a particular substantive message quite apart from the plausibility of the pleading: it read the case as foreclosing the possibility of an invidious governmental racial classification where the suspects in an investigation

[36] Ramzi Kassem, *Implausible Realities: Iqbal's Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 Penn St. L. Rev. 1443, 1455–63 (2010).

[37] 579 F.3d 380 (4th Cir. 2009).

[38] *Id.* at 382.

were described as being of a particular race. The decision itself had not resolved what level of constitutional scrutiny should be applied to review a law enforcement investigation of individuals of a particular race based on a victim's description of the suspect, nor had it addressed the circumstances in which state interests might render such an investigation constitutional despite use of a racial classification. Yet *Monroe* read *Iqbal* as legitimizing law enforcement practices that take race or religion into account, not just as rejecting the factual sufficiency of a particular complaint.

Moreover, *Monroe* used *Iqbal* to license a law enforcement practice in spite of its harm to large numbers of people. The court opined that the massive questioning in Charlottesville was not a "dragnet," because police had not questioned all black men in the city but "only" the 190 individuals who came to the attention of police for some other reason.[39] Because *Iqbal* had approved the investigation of "thousands of Arab Muslim men," the Fourth Circuit stated, the decision left "no doubt as to the justifiability of the City's investigation" in Charlottesville.[40]

Monroe demonstrates the potential of *Iqbal* to color perceptions of racialized investigations even outside the national security context. The impact of *Iqbal* is likely to be greatest, however, where investigations relate directly to Muslims or terrorism. A striking example is a federal district court's opinion summarily endorsing the New York Police Department's (NYPD) systematic surveillance of New Jersey Muslims, while quoting *Iqbal* at length. In *Hassan v. City of New York*, various Muslim individuals and organizations alleged that the NYPD had launched a broad program to infiltrate and monitor Muslims in New Jersey after September 11, 2001, solely because they were Muslim and without reasonable suspicion of wrongdoing. The plaintiffs alleged that the NYPD collected the license plate numbers of mosque congregants, sent undercover officers to monitor Muslim businesses and neighborhoods, and snooped in "bookstores, bars, cafes, and nightclubs" to document Muslim life.[41] Judge Martini found the equal-protection claim in the case so flawed that he dismissed it in a seven-page opinion issued without oral argument. Judge Martini quoted in full the paragraph in *Iqbal* that found an "obvious alternative explanation" for the widespread detentions of Muslims. He concluded that New Jersey Muslims could not state a discrimination claim against the NYPD because "the motive for the Program was not solely to discriminate against Muslims, but rather to find Muslim terrorists hiding among ordinary, law-abiding Muslims."[42]

In addition, the district court took *Iqbal* to stand for a substantive proposition that the decision had not directly stated (let alone defended): a law enforcement practice that expressly classified people according to race or religion would not trigger heightened scrutiny unless plaintiffs could show an invidious motive.

[39] *Id.* at 390.
[40] *Id.*
[41] Hassan v. City of New York, 804 F.3d 277, 285 (3d Cir. 2015) (quoting complaint).
[42] *See* Hassan v. City of New York, No. 2:12-3401, 2014 WL 654604, at *7 (D.N.J. Feb. 20, 2014), *rev'd*, 804 F.3d 277 (3d Cir. 2015).

Equal-protection jurisprudence has developed in recent decades along two strands: in one strand, explicit racial classifications are entitled to strict scrutiny, regardless of governmental intent, although in the second strand, facially neutral policies receive strict scrutiny only if plaintiffs can establish an unlawful intent. Judge Martini's decision apparently read *Iqbal* to mean that, even if an explicit classification existed, a state policy could trigger heightened scrutiny only if plaintiffs established an illegitimate motive. *Iqbal*, however, required a showing of an invidious motive in a context where the Court had rejected as conclusory the plaintiff's allegation that Ashcroft and Mueller agreed to confine him on account of his religion and/or race, presumably leaving no express classification at issue.

The Third Circuit overturned Judge Martini's decision in an impassioned opinion that both refuted this interpretation of equal protection doctrine and affirmed the significance of the harm at stake. The Third Circuit opinion in *Hassan* shows that some lower courts have felt free to challenge or sidestep the signals in *Iqbal* as to the Court's beliefs about the substantive legal standard. Indeed, the fact that *Iqbal*'s key holding is procedural enables courts to overlook its substantive reflections on profiling, where they could not so easily neglect a plainly substantive holding on equal protection law. A decision insinuating an objectionable view of the merits is in that respect less dangerous than one that explicitly reaches it.

But there are two respects in which a procedural decision insinuating a view of the merits may be more harmful than a substantive decision squarely reaching it. First, as in *Iqbal*, the substantive questions at hand may not have been briefed and argued by the parties, resulting in a decision that is especially thinly reasoned. A second reason that a procedural decision signaling a view of the merits is especially problematic is that its substantive reflections may not result in the attention and critique that an avowedly substantive decision would generate. Without significant opposition from dissenting Justices, scholars, or commentators, the substantive messages can be more readily transmitted and absorbed by legal readers.

4.2 Effects of *Iqbal* on Legal Audiences

Iqbal has made it easier to justify the broad use of race and religion in law enforcement investigations and to minimize acknowledging the impact on large numbers of people. Although only a few courts have expressly cited the decision on substantive grounds, other judges, lawyers, and law students may well have absorbed similar messages from reading and relying on it.

The starting point is to recognize the viral nature of a landmark procedural decision. As can only be expected for a Supreme Court decision that changed a 50-year-old trans-substantive pleading standard, *Iqbal* has been quoted everywhere. As of 2016, over 100,000 federal court opinions have cited it. Importantly, many lower court decisions have cited not just the new standard for assessing pleadings, but the particular language that the Supreme Court used to conclude that the

complaint in *Iqbal* fell short. Thus, numerous lower courts reproduced the Court's assertion that lawful policies furnished an "obvious alternative explanation" for the detentions and that it should be "no surprise" that the detentions disproportionately affected Arab Muslims.[43]

With the allegations in the *Iqbal* complaint taken as the standard for implausibility, lower courts and litigants have powerful incentives to analogize or distinguish the facts before them from the facts of *Iqbal*. Of course, the lawyers who make these arguments and the courts that accept them do not necessarily believe that Iqbal's allegations were obviously implausible or that the detentions were obviously lawful. Rather, the nature of legal argumentation requires litigants to make arguments analogizing or distinguishing Supreme Court precedent, whatever their views on the rightness of the original decision. So for some of the lawyers and judges citing *Iqbal* in this fashion, doing so is purely instrumental. But for others, whose a priori views on the decision are unsettled, the mere act of repeating the narrative in legal briefs or judicial opinions may reinforce their perceptions of its basic validity.

In sum, federal judges, litigants, and law students read *Iqbal* for its transformation of procedural law, but without necessarily recognizing or critiquing its basic narrative. The historical understanding they obtain from the decision – coupled with the Court's message that the detentions were likely legitimate – may predispose readers to view less suspiciously other calls for the profiling of immigrants in response to national security concerns.

5 CONCLUSION

As much as *Iqbal* is a case about procedure, it is also a case about substance – about the use of race and religion as proxies for suspicion in investigative and detention decisions. As the Court was oblivious to Iqbal as an individual, blind to the role of race and religion in the post–9/11 detentions, and indifferent to the harm of the practices it so casually legitimized, *Iqbal* calls for renewed substantive appraisal.

[43] *See, e.g.*, Starr v. Baca, 652 F.3d 1202, 1214 (9th Cir. 2011); Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1290 (11th Cir. 2010); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 596–97 (8th Cir. 2009); Major Tours, Inc. v. Colorel, 720 F. Supp. 2d 587, 606 (D.N.J. 2010).

6

"Muslim Bans" and the (Re)making of Political Islamophobia

Khaled A. Beydoun[*]

1 INTRODUCTION

It is well known that they [Arabs] are part of the Mohammedan world and that a wide gulf separates their culture from that of the . . . Christian people.

– Judge Arthur J. Tuttle, December 15, 1942

[I call for] a total and complete shutdown of Muslims entering the United States.

– Donald Trump, December 7, 2015

Donald Trump's December 2015 proposal to "ban Muslims" marked a new high-point in political animus toward Muslims. It also ushered in a new era of explicit Islamophobia within the political sphere, spearheaded by the man who would come to symbolize it. Far more than a fringe or aberrant policy position, Trump's Muslim ban helped deliver him the presidency, and developed into a cornerstone of his campaign for the White House.

Roundly condemned by a broad gamut of critics, Trump's ban targeting Muslim immigrants was framed as politically deviant, "a relatively new phenomenon,"[1] or an ideological break from "everything we [Americans] stand for and believe in."[2] However, closer examination of American legal history reveals otherwise.

Trump's "Muslim ban" is not unprecedented, but rather, harkens back to a 154-year period (from 1790 through 1944) when immigration law banned the naturalization of Muslim immigrants. This period, referred to by legal historians as the Naturalization Era, links the anti-Muslim rhetoric of today with foundational

[*] This chapter is an excerpt of the previously published article, *"Muslim Bans" and the (Re) making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733 (2017).

[1] Georgetown University Bridge Initiative, *Islamophobia in the 2016 Elections* (Apr. 25, 2015).

[2] Former Vice-President Dick Cheney made these remarks, as discussed in Vince Warren, *Anti-Muslim Hate Is a Continuation, Not an Aberration*, HUFF. POST (Dec. 11, 2015).

American immigration policy – policy that preceded the blatant anti-Muslim fear and animus that gripped the 2016 presidential campaign and, more deeply, the latent suspicion of Islam that guides prevailing counterterror policy.

Islamophobia, which began to take form as a recognizable phrase and distinct form of bigotry following the terrorist attacks of 9/11, was materially driven by the discursive political and legal redeployment of Orientalist baselines and stereotypes that followed. Thus, while the term *Islamophobia* became prominent in political parlance and academic discourses in the aftermath of the 9/11 terror attack, it is firmly rooted in the images, ideas, and epistemology of its precedent system, Orientalism.

Like other forms of bigotry, "Islamophobia is not fixed or static. Rather, it is a fluid and dynamic system whereby lay actors and law enforcement target Muslim Americans based on irrational fear and hatred," Wajahat Ali et al. note.[3] Islamophobia is, on one hand, formal law and policy. But it is also political language, campaign platforms, get-out-the-vote tactics, and strategically deployed media sound bites from presidential candidates seeking office – including the highest office of the land. This was luridly clear during the 2016 presidential campaign, when the underbelly of Islamophobic tropes that drove foundational American policy was redeployed to mobilize voters and drive a new era of white-supremacist populism.

2 AMERICA'S FIRST "MUSLIM BAN"

More than two centuries before a "Muslim ban" headlined the *New York Times* or was breaking news on *Fox News*, Muslims were statutorily barred from becoming American citizens. From 1790 through 1944, Muslims were deemed alien, inassimilable, and threatening to American society, and were banned from becoming naturalized citizens. The Naturalization Act of 1790, which mandated that naturalized citizens be ordained "free white persons" by a civil court, functioned as a per se ban on Muslims immigrants long before 9/11, and well before Trump's proposed Muslim ban.

2.1 *The Naturalization Act of 1790*

For the majority of America's existence as a sovereign nation, whiteness and citizenship were legally conflated. In other words, one had to be white in order to become a naturalized citizen. Enacted on March 26, 1790, the Naturalization Act defined the legal and racial parameters for naturalization as an American citizen:

[3] Wajahat Ali et al., *Fear, Inc.: The Roots of the Islamophobia Network in America*, Center for American Progress (Aug. 26, 2011), a pivotal study outlining the complex systems that form, facilitate and dispense anti-Muslim bigotry in the United States.

> Any Alien being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof on application to any common law Court of record in any one of the States wherein he shall have resided for the term of one year at least.

The Act limited citizenship to immigrants who could convince a court that they fit within the statutory definition of "free white persons." Second, an immigrant could only apply after meeting the two-year residency requirement. The Act was reformed in 1795 and 1798, most notably extending the residency requirement from two to five years.

Civil court judges were tasked with interpreting the statutory meaning of whiteness. Employing a number of rotating racial tests, judges arbitrarily emphasized the importance of physical appearance, eugenics, framers' intent, the common-sense understanding of whiteness, and in the case of immigrants from the Muslim world, religion. Again, whiteness was not merely a racial classification during the Naturalization Era, but a "material concept imbued with rights and privileges."[4] The greatest right, citizenship, was inscribed into it, which, considering the deeply embedded narrative of rivalry between Orient and Occident, Muslims and Christians, brought forth the functional enactment of a Muslim naturalization ban that prevailed for 164 years.

2.2 *The Muslim Naturalization Ban*

For the majority of the United States's existence as a sovereign nation, Muslims were banned from becoming naturalized citizens. The Naturalization Act's mandate of "whiteness" as a prerequisite for citizenship compelled Muslims – and immigrants presumed to be Muslims because of their place of origin – to persuade judges that they fit within the statutory definition of whiteness. In line with Orientalist baselines, which framed Islam as a monolithic race, culture, and civilization, more than a bona fide religion, the faith of immigrants often served as a proxy for whiteness (or otherness), with Christianity functioning as the former, and Islam the latter.

If Islam conflicted with whiteness, then Christianity functioned as a gateway toward citizenship for immigrants from Muslim-majority states.[5] During the first naturalization case involving a petitioner from the "Muslim world," George Shishim declared before Judge Hutton of the Los Angeles Superior Court, "If I am Mongolian, then so was Jesus, because we come from the same land."[6] Thus, Shishim not

[4] John Tehranian, Whitewashed: America's Invisible Middle Eastern Minority, 15 (2009).

[5] Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 NYU Surv. of Am. L. 29 (2013).

[6] Sarah Gualtieri, *Syrian Immigrants and Debates on Racial Belonging in Los Angeles, 1875–1945*, 15:1 Syrian Studies association News. 1 (2009).

only invoked that his Christian identity merited a finding of whiteness, but also that his hailing from the very same land as Jesus – Christianity's seminal figure – compelled such a finding.

During the proceeding, it appeared that Hutton was skeptical of Shishim's Christian bona fides because of his Lebanese, Middle Eastern, origins. However, Shishim's appeal tying his geographic origins to that of Jesus rebutted that presumption, leading Hutton to rule that Shishim fit within the statutory definition of whiteness, because he was able to overcome the presumption (or suspicion) that he was Muslim by persuasively demonstrating that he was in fact *racially and religiously* Christian. Thus, Shishim's twofold demonstration of Christianity (as religion and race) functioned as his pathway toward whiteness and citizenship, in the process enabling him to circumvent the standing Muslim naturalization ban.

For subsequent immigrant petitioners from the Muslim world, *Shishim* established the precedent that performing Christianity within the courtroom and before the judge was the optimal pathway toward whiteness and citizenship. One year later, Costa George Najour overcame the Muslim naturalization ban by demonstrating to a Georgia court that he too was Christian.[7] Subsequently, a Massachusetts and an Oregon court also found a Syrian Christian and Lebanese Christian white by law.[8] In both instances, the presumption of Muslim identity, based on the geographic origins of the petitioners, was overridden by their in-court performance of Christianity.

However, not every Christian petitioner from the Muslim world overcame the Muslim naturalization ban. One case involving an immigrant petitioner from modern-day Lebanon, *Ex parte Shahid*, illustrates how Muslim identity was acutely racialized during the Naturalization Era. Like Shishim and Najour, Shahid asserted his Christian faith to rebut the presumption that he was a Muslim. However, Judge Smith of the South Carolina court viewed his dark skin as evidence of miscegenation with Muslims. Smith described the immigrant petitioner to be "about [the color] of a walnut, or somewhat darker than is the usual mulatto of one-half mixed blood between the white and the negro races."

Persuaded more by phenotype than faith, Smith denied Shahid's petition for naturalization. Again, as in *Shishim* and in a notable prerequisite case involving an Armenian petitioner, the court framed religion as much along racial terms as it did faith, pushing Smith to opine:

> What is the race or color of the modern inhabitant of Syria it is impossible to say. No geographical area of the world has been more mixed since history began. Originally of Hittite or non-Semitic races … then again followed by another Semitic conquest in the shape of the Arabian Mahometan [Muslim] eruption.[9]

[7] *In re Najour*, 174 F. 735 (1909). Najour was a Lebanese Maronite residing in Georgia.
[8] *In re Mudarri*, 176 F. 465 (C.C.D. Mass. 1910); *In re Ellis*, 179 F. 1002 (1910).
[9] *Ex parte Shahid*, 205 F. 812 (E.D.S.C. 1913).

Smith's framing of Ottoman rule as the "Mahometan eruption" illustrates an aversion to Islam, which today would be characterized as an example of structural Islamophobia. More than a century before the Muslim identity of Syrian refugees fleeing civil war and persecution from ISIS (the Islamic State of Iraq and Syria) , the South Carolina judge viewed Islam with the very same suspicion and fear gripping immigration officials, politicians, and pundits today. Fear of Muslims, both in 1913 and 2016, share a common thread and kindred orientation toward Islam as emblematic of a national security threat.

The Muslim naturalization ban continued until 1944. While a 1915 Fourth Circuit Court decision narrowly established that Syrian Christians "were to be classed as white people,"[10] bona fide Muslim immigrants were still categorically barred from naturalization. This had the effect of suppressing Muslim migration into the United States, encouraging religious conversion on the part of many who did migrate, and branding Islam with the seals of foreignness and fear for those who practiced it stateside.

The Muslim naturalization ban lasted until American geopolitical interests in the Muslim world shifted, specifically when the need for Saudi oil facilitated its judicial dissolution in 1944 with the ruling in *Ex parte Mohriez*.[11] However, even after its dissolution, the Immigration Act of 1924 instituted immigration quotas against African, Asian and Arab regions – home to significant Muslim populations. Dissolved in 1965, the Act effectively extended the Muslim naturalization ban by prohibiting the entry of Muslim immigrants for an additional 21 years, illustrating that Trump's proposal was neither novel nor unprecedented.

3 THE MODERN LAW OF AMERICAN ISLAMOPHOBIA

Prohibitions against the citizenship of Muslims during the Naturalization Era root modern law and policy that similarly profile Muslims as inassimilable and threatening. Contemporary laws, particularly policy and programming rolled out after 9/11, restricted Muslim immigrants beyond American borders and closely monitored Muslim citizens and communities with them. Both fronts were prompted by structural Islamophobia, "the fear and suspicion of Muslims on the

[10] Dow v. United States, 226 F. 145, 146 (4th. Cir. 1915). *See generally* Sarah M. A. Gualtieri, Between Arab and White: Race and Ethnicity in the Early American Diaspora (2009), for a history of the experience of the early waves of Syrian immigrants.

[11] Mohammed Mohriez, a native of Saudi Arabia, was the first Muslim immigrant petitioner granted citizenship. *See Ex parte Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944). The *Mohriez* decision, and the delivery of naturalization to Muslim petitioners from the Arab world, were in part driven to facilitate American foreign policy interests in Saudi Arabia, and the Arab World at large.

part of institutions, most notably, government agencies, that is manifested through the enactment and advancement of policies."[12]

Certainly, whenever a domestic terrorist attack takes place in America, many quickly turn to tropes of an encroaching Islamic menace, a violent foreigner or, in line with prevailing national security parlance, the looming homegrown radical. While these tropes have taken on new forms and frames, they are conceptually and substantively based on formative stereotypes. These very stereotypes underlie the state suspicion of Muslims and Islam that steers modern state's counterterror policy.

3.1 *Post–9/11 Policy*

State suspicion and systematic surveillance of Muslim Americans commenced well before 9/11. However, because the terrorists were Muslims – albeit adherents of a fringe interpretation of Sunni Islam, Wahhabism – the state centered its expanded counterterror programming in the directions of Muslim foreign nationals and citizens. With the creation of the Department of Homeland Security (DHS) on November 25, 2002, electronic surveillance became the strategic cornerstone of the domestic counterterror strategy, following the deadliest terror attack in US history.

In addition to expanded surveillance capacities, the Bush administration structurally overhauled the state's immigration and national security functions around the heightened fear of Muslim threat. The newly minted DHS swallowed up previously standalone immigration, customs, and emergency management functions of the state. The DHS consolidated the state's immigration and emigration regimes, and functioned as the institutional fulcrum for the sweeping federal and local antiterror surveillance and policing sanctioned by the USA PATRIOT Act.

In the name of national security, the USA PATRIOT Act circumvented the Fourth Amendment to advance the Bush administration's unprecedented surveillance and religious-profiling programs and, in the process, severely diminished the First and Fourth Amendment rights of Muslim Americans. For the state, monitoring Muslim subjects and spaces, such as mosques and community centers, was an acceptable collateral cost in exchange for achieving its stated national security aims. The DHS's perception of Islam as threatening and Muslims as menacing formed the foundation of the state's War on Terror strategy, extending the Orientalist tropes of the Naturalization Era into the Post–9/11 era.

In addition to two wars fought abroad and broadly expanded domestic surveillance and policing at home, the post–9/11 moment witnessed the enactment of a second policy that bore many parallels with the Muslim ban put in place during the Naturalization Era. In June 2002, Attorney General John Ashcroft instituted the National Security Entry Exit Registration System (NSEERS), a sweeping

[12] Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116, Col. L. Rev. online, 1 (2016).

immigration tracking program that almost exclusively targeted Muslim immigrants, nonimmigrants, and permanent residents. The Special Registration provision of NSEERS required all male teens and adult nationals of 25 different countries to allow themselves to be fingerprinted and registered by the federal government or be subject to immediate deportation to their home countries. With the sole exception of North Korea, every single one of the 25 countries on the Special Registration bulletin was either a Muslim or Arab nation.[13]

NSEERS explicitly reintegrated the Orientalist baseline that Muslims were presumptive national security threats. Geographic origins, in addition to race and religion, signaled likelihood of national security threat. NSEERS was dissolved in 2011.

The Islamophobic laws enacted after 9/11 harvested rife anti-Muslim hatred and hysteria on the ground. If government agencies and laws, such as DHS and the PATRIOT Act, deemed Muslim Americans as presumptive terrorists, then it was only logical that private citizens would follow suit, and mimic that violence against a subset of the polity designated as an enemy group.

Discrimination and violence toward Muslim Americans, and those perceived to be Muslims, skyrocketed after 9/11. In the immediate wake of 9/11, the FBI reported a 1500% increase in hate crimes against "people of Middle Eastern descent, Muslims, and South Asian Sikhs, who are often mistaken for Muslim" from 27 in 2000 to 481 in 2001. The American-Arab Anti-Discrimination Committee (ADC) reported over 700 violent incidents targeting the same demographic.[14] In addition, as many as 20 Muslim or Muslim-looking people were killed during the immediate aftermath of 9/11. Many of them were Sikh Americans, stereotypically believed to be Muslims because Sikh men tend to be brown-skinned, have beards, and wear turbans. The expansion of War on Terror policy emboldened vigilante violence on the ground, vividly manifesting dialectic Islamophobia between the state and private actors.

3.2 *Beyond the Post–9/11 Police State*

Although it was widely believed that Islamophobia would decline after 9/11's immediate aftermath, recent events, state policy, and bigoted political rhetoric indicate otherwise. This growing Islamophobia, which reached climactic proportions during and after the 2016 presidential campaign, did not arise in a vacuum, but rather, in great part, it was spurred on and stoked by the structural Islamophobia that continued beyond the policies enacted after 9/11.

[13] Kathleen R. Arnold, *Arab Americans*, in Anti-Immigration in the United States: A Historical Encyclopedia 43 (ed., Kathleen R. Arnold, 2011).

[14] Sahar F. Aziz, *Sticks and Stones, The Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N. Y. City U. L. R. 33 (2009).

The post–9/11 moment spawned new actors and empowered existing elements of the Islamophobia cottage industry. This small group of individuals and institutions wield considerable influence over national and international views of Islam and Muslims. Emboldened by sweeping counterterror measures and a rising culture of anti-Muslim fear and suspicion, these actors turned their organizing efforts against Islam to state legislatures, and specifically lobbied state legislatures to enact "anti-shari'ah laws" as a means of deepening the scrutiny of Muslim Americans and enshrining the notion that Islam was inherently un-American into state constitutions.

Proponents of anti-shari'ah legislation defined shariah law as "a 'totalitarian ideology' and 'legal-political-military doctrine,' committed to annihilating Western civilization as we known it today."[15] Relying on principal Islamophobic baselines, which frame Islam as a competing political ideology as much as they do a religious scripture, shari'ah law abolitionists authored a model statute that would prohibit state judges from considering foreign laws or rulings that violate constitutional rights in the United States. The model statute, titled American Law for American Courts, was passed on to allied congressmen and women within state legislatures, and subsequently rewritten into bill form.

Anti-shari'ah bills became prominent items of discussion in state legislatures across the country. Uddin and Pantzer note, "As of June, 2011, there were forty-seven bills in twenty-one states that were seeking to ban the use of shari'ah and/or any category of international law."[16] Spearheaded by the Louisiana and Tennessee legislatures, nearly half of the country's states entertained the idea of banning Islamic law.

One state, Wyoming, even engaged the idea of prohibiting its judiciary from citing other states that may permit the use of shari'ah law.[17] In addition to crippling the ability of judges to and juries to engage the religious and cultural dimensions of Muslim subjects coming before the court, anti-shari'ah legislation conflicts with the Establishment Clause and, perhaps more acutely, with the Free Exercise rights of Muslim Americans. Anti-shari'ah bills were passed in Arizona and Oklahoma. Although the anti-shari'ah legislation movement has been stalled, the Trump administration has revitalized energy around it, and is pushing new versions forward.

While anti-shari'ah bills circulated through state legislatures, the federal government was busy retooling and shoring up its counterterror strategy to respond to rising Muslim "radicalization" – "the process by which an individual adopts an extremist ideology that is linked to terrorist activity."[18] Although not explicitly associated with Islam, the term has been discursively and politically linked to Muslims, who are

[15] Asma T. Uddin and Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 First Amend. L. R. 365 (2012).
[16] Uddin and Pantzer, *supra* note 15, at 370.
[17] *Id.* at 372.
[18] Amna Akbar, *Policing "Radicalization,"* 3 U. C. Irvine. L. R. 809, 811 (2013).

believed to subscribe to shari'ah and are subsequently mobilized to carry forward the "civilizational clash" with the United States, very clearly illustrating the kindred Islamophobic thread that links anti-shari'ah legislation with Countering Violent Extremism (CVE) policing.

In practice, CVE policing links radicalization – or the propensity for radicalization – with Muslim identity. CVE is specifically focused on monitoring observant Muslim Americans, particularly those transitioning from secular to devout lifestyles, members of the community with dissident views or critical political views, and individuals that express their Muslim identities conspicuously. In "Policing 'Radicalization'," Amna Akbar observes: "Radicalization suggests that the path from Muslim to terrorist is a predictable one produced by or correlated with religious and political cultures of Muslim communities. Government radicalization discourses and programs are almost entirely fixated on Islam and Muslims."[19]

CVE policing is not, in practice, concerned with other forms of radicalization or violent extremism. Rather, radicalization is functionally framed by the DHS as a purely Muslim phenomenon, in turn adding CVE policing to the corpus of state surveillance and policing programs dedicated entirely to preventing and punishing Muslim threat – real and imagined.

CVE policing enlists local law enforcement to work closely with Muslim communities to prevent the formation of radicalization among subjects and, if that fails, to preempt terrorist attacks. Through recruitment of local Muslim informants and interlocutors from within the community, counterradicalization logic asserts that a prospective radical can be preempted with early intervention and, if not, prevented from taking action after a subject has been radicalized.

In line with formative radicalization and counterradicalization theory, CVE policing frames radicalization as "an identifiable and predictable process by which a Muslim becomes a terrorist," broken down into four stages: "(1) preradicalization, (2) identification, (3) indoctrination, and (4) action."[20] The earlier the intervention by law enforcement and its proxies, CVE theory posits, the stronger the likelihood of preventing conspiracies to commit terror acts. Therefore, CVE policing is not punishing criminal action, but an inchoate [[crime]] or no crime at all, based on the presumption or perception that a Muslim actor is taking steps toward committing an act of terror.

Thus, the definition of radicalization, though racially and religiously neutral, is disproportionately – if not exclusively – deployed against Muslim subjects. In 2014, pilot CVE programs extending federal policing tools to local law enforcement were implemented in Boston, Minneapolis, and Los Angeles. These three cities are not only home to large Muslim American populations, but more specifically, to indigent

[19] *Id.* at 84.
[20] *Id.* at 814.

Muslim American communities. These pilot cities illustrate the embryonic stages of a policing program the state seeks to expand nationally.

Like the Naturalization Era ban on Muslims, AEDPA in 1996, and the PATRIOT Act, CVE policing and future renditions of counterradicalization programming facilitate Islamophobia on the ground, and for many political candidates, create political incentives for fear-mongering, which endorses and emboldens the anti-Muslim rhetoric from hopeful presidential candidates, illustrating very vividly, for the American and international audiences closely following the 2016 presidential campaign, the intimate nexus between the law and politics of American Islamophobia.

4 THE POLITICS OF ISLAMOPHOBIA

The positioning of Islam as alien, and Muslims as foreigners, facilitates the *seeing* of Muslims as national security threats and the *unseeing* of Muslim Americans as bona fide citizens. The relationship between state policies and political rhetoric is a synergistic and symbiotic one, whereby the former endorses and emboldens the latter. Indeed, the laws that have long framed Muslims as pariahs to be excluded, policed, and punished form the foundation of the political rhetoric espoused by the likes of Donald Trump, Ted Cruz, and Ben Carson, and the new brand of political Islamophobia spreading furiously today.

4.1 *Blatant Political Islamophobia*

During the 2016 presidential campaign, Republican candidates replaced standard dog-whistle rhetoric about Islam with explicit slander of the faith and damaging slurs of its eight million Muslim American adherents. Framing Islam as a rival faith was a staple message coming from leading Republican presidential candidates. Part and parcel of that baseline was the branding of Muslims as a suspicious, violent, and an alien monolith. In turn, these stereotypes led to the casual conflation of Muslim American citizens with foreign nationals, and nearly 1.6 billion followers of the faith with an extremist few. In 2015, anti-Muslim sound bites from Republican candidates seemed like a routine occurrence, and the subject of daily news.

On December 7, 2015, Donald Trump infamously called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[21] Trump's proposal caused an immediate media firestorm and simultaneously galvanized his base of supporters, which

[21] Jenna Johnson, *Trump Calls for "Total and Complete Shutdown of Muslims Coming into the United States,"* WASH. POST (Dec. 7, 2015).

subscribed to the framing of Muslim immigrants as presumptive national security threats. Trump's "Muslim ban," the name many gave it following his proposal, was deemed contrary to American customs and values, although the precedents analyzed earlier in this chapter indicate that it was not. Trump's proposal, which he expanded following July's Republican National Convention, was only the tip of the Islamophobia iceberg mounted during the 2016 presidential campaign.

Months before Trump's proposed travel ban, Republican presidential candidate Ben Carson stated on *Meet the Press* that he would "not advocate that we put a Muslim in charge of this nation," in response to a question about whether "Islam is consistent with the Constitution."[22] Carson's response echoed formative Orientalist beliefs that Islam was antithetical to core American values, and furthermore, that entrusting a Muslim with the presidency would, presumptively, endanger the nation's democratic identity.

Carson's statements juxtaposing Islam with American values aligned with the views of many his fellow Republican candidates. Discussions focusing on Islam were linked to the alleged religious identity of President Obama, Syrian refugees and the threat absorbing them into the country would invite, domestic national security and counterradicalization programs, and the threat of ISIS and other terror networks. Islam was at the center of political debates around national security, whether to admit or deny Syrian refugees, and most notably, radicalization. For Muslim Americans, "Islamophobia [itself] was an election issue,"[23] an election issue that led to the popular view that Muslim Americans were not bona fide citizens, which consequently exposed them to increased bigotry and violence from private actors.

Amid an upward spike in mosque arsons, Trump stated "we're going to have no choice" but to close some mosques.[24] And days after making that statement, he stood by his position that Muslims coming into the country should do far more than submit themselves to a national security registry, stating, "There should be a lot of systems, beyond databases,"[25] in essence, advocating for a broader tracking system than the NSEERS Program enacted after 9/11, which was ultimately suspended in April 2011. Trump justified his proposal by invoking 9/11, stating that, "It wasn't people from Sweden that blew up the World Trade Center."[26]

Although mainstream media fixated on Trump's campaign against Islam and Muslims, he was hardly the lone candidate deriding the faith and its followers.

[22] Staff, *US Republican Hopeful Ben Carson: No Muslims as President*, BBC News (Sept. 29, 2015). Carson made this statement on September 21, 2015.

[23] Mike O'Sullivan, *American Muslims See Islamophobia as Election Issue*, Voice of America (Jan. 29, 2016).

[24] Nick Gass, *Trump: "Absolutely No Choice" But to Close Mosques*, Politico (Nov. 18, 2005).

[25] Vaughn Hillyard, *Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC News (Nov. 20, 2015).

[26] David A. Graham, *America's Autumn of Islamophobia*, The Atlantic (Sept. 21, 2015).

Following the July 15, 2015 shooting in Chattanooga, Tennessee, which involved a Muslim gunman, Rand Paul held, "I'm very concerned about immigration to this country from countries that have hotbeds of jihadism and hotbeds of Islamism."[27] While not as explicit as Trump's comments, Paul's statement echoed the polarizing businessman's idea of halting immigration from "hotbeds of jihadism … and Islamism," synonyms for Muslim-majority states.

Ben Carson, doubling down on his firm opposition to a Muslim American becoming president, stated that he would only appoint a Muslim to the US Supreme Court if the person rejected "the lifestyle … which incorporates Sharia."[28] Extending the trope that Muslim and American identity are antithetical, and thus irreconcilable, Carson stated that Muslim Americans must be "schizophrenic," because "you have two different philosophies warring which are in constant distinction from each other."[29]

Lindsey Graham, Republican Senator from South Carolina who vied for his Party's nomination, issued arguably the most Islamophobic statement of the 2016 presidential campaign. Graham stated, "Everything that starts with 'Al' in the Middle East is bad news,"[30] a statement that associates Muslim names, or Muslim-sounding names, with "bad news," a phrase that, upon closer inspection, is likely code for "terror suspicion," or, more narrowly within today's geopolitical landscape, purported ISIS links. Even Chris Christie, who has a "history of outreach to New Jersey Muslims," strategically "backed away from those ties … during the campaign" to align himself closer to Trump,[31] and capitalized on the political Islamophobia that proved increasingly resonant with voters.

The blatant American political Islamophobia rose from seemingly every corner of the Republican side of the 2016 presidential campaign. Following Trump's lead, candidates behind him employed anti-Muslim rhetoric to compete with the eventual Republican Party nominee and strategically capitalize on the Islamophobic views of growing segments of the electorate. For Trump, Islamophobia was a central message that helped deliver him the White House. Although more conspicuous among Republican presidential hopefuls, political Islamophobia was not exclusive to the Republican Party, but in fact, was facilitated by the policies enacted by the Obama administration.

[27] Matthew Boyle, *Exclusive – Rand Paul on Tennessee Terror: Restrict Immigration from Muslim Nations*, Breitbart News (Jul. 17, 2015).

[28] Islamophobia in the 2016 Election, supra note 1, at p. 26.

[29] Mark Hensch, *Carson: Only 'Schizophrenic' Muslims Practice Sharia, Believe in Democracy*, The Hill (Feb. 16, 2016).

[30] Staff, *Senator Lindsey Graham: Everything That Starts with 'Al' in the Mideast Is Bad News*, Haaretz (May 5, 2015).

[31] David A. Graham, *How Many Muslims Will Vote for Donald Trump*, The Atlantic (Feb. 1, 2016).

4.2 *Un-mosquing Islamophobia: Latent Political Animus*

On February 3, 2015, President Obama finally visited an American mosque. His stop at the Islamic Society of Baltimore came seven years into his presidency, a span that encompassed the rise and fall of Arab Spring revolutions, escalating bigotry toward Muslims, and a protracted war on terror that collaterally impacts America's 8 million Muslim citizens. The length of his avoidance of American mosques is made even more glaring when juxtaposed with his famous speech at Cairo's Al Azhar University, a global center of Islamic education and thought, delivered a year into his first-term.

Seven years earlier in Cairo, Obama openly challenged the clash-of-civilizations rhetoric and policies advanced by the Bush administration. His words sought to mend the wounds inflicted by the War on Terror "crusade" on Muslims stateside and abroad. Following his Cairo speech, Obama was celebrated by Muslims and Muslim Americans as a transformative leader who could undo the damage wrought by previous administrations and, in turn, reconcile tensions between Muslims and the United States. However, the seven years between Obama's historic Cairo speech and his address to Muslim Americans in Baltimore witnessed the expansion of structural Islamophobia (with the formal establishment of CVE policing) within his administration and the growing opposition it caused among Muslim Americans.

Critiqued by many Muslim Americans as long overdue, President Obama's first presidential visit to an American mosque climaxed with a speech that condemned Islamophobia; but a counterterror mandate inspired his visit to a Baltimore mosque. Mirroring his own relationship with Islam and Islamophobia, defined primarily by allegations that he himself was an undercover Muslim, President Obama's engagement of the faith can be best characterized as strategic accommodation and intentional distance.

Barack Obama was rumored to be a Muslim when he campaigned for the presidency. Opponents, most notably Trump, called Obama a Muslim as a means to undermine his political legitimacy and deepen perceptions that he was a foreigner. Perceptions that Obama is a Muslim continued into Obama's second term, illustrating that years-old allegations developed into widely held beliefs. These beliefs had a considerable impact on Obama and confined his outreach and engagement with the Muslim American community, specifically, influencing him to keep political distance in order to retrench perception that he was a Muslim.

Political aversion to mosques, in President Obama's case, exhibits a less-conspicuous brand of Islamophobia. However, what circumstances prompted Obama – during the final quarter of his second term – to finally enter a mosque and speak to its congregation? The fact his visit took place during his second term, and at the close of his administration, meant that the political stakes were far lower. The damage the visit could have done to his administration was minimal, particularly as it expired and he set his sights beyond his presidential post.

The expansion of CVE policing in the aftermath of the San Bernardino and Paris attacks, which is sure to become more intense after the Orlando Massacre, strongly suggest another motive, namely, the state interest to enlist Muslim Americans as strategic supporters of expanding counterradicalization programming and CVE policing, consequently, fusing the latent political Islamophobia of President Obama's decision to stay clear of mosques with the anti-Muslim underpinnings of his cornerstone antiterror policy: CVE policing, which Hillary Clinton would have maintained and expanded if she were elected president.

Although celebrating Muslim contributions to the nation was the motive issued to the media, enlisting Muslim Americans as CVE policing interlocutors and informants was the likely interest prompting Obama's visit. In line with this aim, Obama made "a direct appeal to America's Muslim youth and asking Muslim communities to be 'partners' in state and federal campaigns [CVE policing] to combat militant groups that try to recruit young followers of Islam,"[32] a speech that likely would not have been issued if not for the San Bernardino shooting, President Obama called for closer collaboration with Muslim Americans to combat and counter radicalization.

Mobilizing Muslim American support for CVE policing certainly would be bolstered by the symbolic force of President Obama speaking inside an American mosque and strategically would tap into the unprecedented Muslim American support for the presidential candidate, which after controversial foreign policy decisions and the expansion of Muslim American surveillance, had gradually eroded since 2012. President Obama condemned the explicit Islamophobic rhetoric from Republican candidates and implored, "We can't suggest that Islam is the root of the problem."[33] However, in direct conflict with these words was the primary political objective of his historic address: to promote a counterterror program that suggested that Islam was the root of radicalization, and Muslims were the lone demographic vulnerable to it.

Although speaking at a mosque would have symbolized President Obama's affiliation with Islam before the Paris Attacks of January 2015 and the San Bernardino attack on December 2, 2015, speaking within the mosque's confines signaled the state mandate for expanded CVE policing following these tragedies. Although the president's visit appears to be official acknowledgment of Islam, when it is investigated within the context of the state's interest in expanding CVE policing and enlisting Muslim American support for domestic CVE policing programs, we see that the February 3, 2015, visit to the Baltimore mosque was a materially a calculated presidential maneuver to advance counterterror strategy. This time, instead of fearing the reputational or political damage a mosque visit would incur, President Obama pivoted – seven years after being elected – in order to carry forward

[32] Jack Jenkins, *Obama on Rise of Islamophobia: "An Attack on One Faith Is an Attack on All Our Faiths,"* Think Progress (Feb. 3, 2016).

[33] *Remarks by the President at Islamic Society of Baltimore*, White House (Feb. 3, 2016).

counterterror policies exclusively focused on Muslim American bodies and communities, rooted in a fear as old as the nation itself.

Although the Republican Party, particularly with Trump's ascent, became the Party of blatant and explicit political Islamophobia, the Democratic Party under President Obama stood as the party of expanding structural Islamophobic policy and programming, the latter of which, mirroring Obama's masterful speech at the mosque in Baltimore, used benign and gracious language toward Muslims as a means to enlist them in programming that invites great dangers into Muslim American communities.

4.3 *Latent Political Islamophobia*

Although blatant Islamophobia pervaded the Republican race for the party nomination, and structural Islamophobia dictated the counterterror strategy of the Obama administration, an underlying suspicion of Islam percolated among the Democratic candidates as well. Suspicion of Muslims has undergirded Hillary Clinton's foreign and domestic policy. When she was secretary of state under President Obama, Clinton's engagement with Islam and Muslims largely focused on dealings with foreign states. However, as a presidential candidate, her hiring of Wesley Clark as a campaign consultant raised concerns about her latent Islamophobia.

In July 2015, during an interview with MSNBC, Clark virtually called for internment of "disloyal Americans," implicitly focusing on Muslim Americans, as illustrated by his focus on radicalization. Stimulating a ripe and pervasive fear held by Muslim Americans, Clark made a case for internment more than 70 years after Japanese American internment, when he stated:

> If these people are radicalized and they don't support the United States and they are disloyal to the United States as a matter of principle, fine. It's their right, and it's our right and obligation to segregate them from the normal community for the duration of the conflict [the War on Terror].[34]

Clark's assertion of the "them" versus "us" binary, although he was talking about American citizens in the case of Muslim Americans, manifests the clash-of-civilizations trope that undergirds American Islamophobia.

After Clark's statements, the Clinton campaign did not publicly deny them or release Clark from his campaign surrogate post, leading many to believe that Clinton's nonfeasance amounted to tacit endorsement of them or, at minimum, that publicly condemning the idea of Muslim American internment would garner minimal political points but expose her to increased attack from Republican candidates.

[34] Scot Eric Kaufman, *Wesley Clark: "Disloyal" Americans Should Be Tossed in Internment Camps for the "Duration of the War on Terror,"* Salon (Jul. 20, 2015).

Latent Islamophobic sentiment was also expressed by the most prominent voices within the Democratic Party, including former president Bill Clinton. On the second day of the Democratic National Convention in Philadelphia, Clinton presented an ultimatum to Muslim Americans to either participate in the fight against terrorism, or else, leave: "If you're a Muslim and you love America and freedom and you hate terror, stay here and help us win and make a future together, we want you."[35]

Peter Beinart of *The Atlantic* observed that, "Whether Clinton meant to or not, he lapsed into Trumpism: the implication that Muslims are a class apart, deserving of special scrutiny and surveillance, guilty of terrorist sympathies until proven innocent,"[36] illustrating that Trumpian views on Islam and those of the Democratic Party are most saliently divided along lines of rhetoric. Bill's overtures, however, were not a major departure from the message to Muslims continually delivered by his wife, Hillary. A staunch proponent of CVE policing, Hillary Clinton's framing of Muslims as either good or bad is a staple of her national security vision. This good-versus-bad Muslim binary was on full display after she functionally sealed the Democratic Party nomination in late April:

> After winning four presidential primaries on April 26, Hillary Clinton drew a line between "hard-working, terror-hating Muslims" and (Muslim) terrorists. In front of a raucous audience of supporters in Philadelphia, Clinton only made mention of Muslims in relation to terrorism, and reaffirmed the mythic "good versus bad" Muslim paradigm. Within the broader context of counterradicalization policing, Clinton presented Muslim Americans with an already familiar, yet never more threatening ultimatum: choose the moderate brand of "terror-hating" Muslim identity sanctioned by the state, or be branded with the suspicion that invites its scrutiny, surveillance, and civil liberties infractions.[37]

As observed by law scholar Samuel Rascoff, the "moderate" versus radical Muslim framework posited by Bill and Hillary Clinton, a theoretical cornerstone of CVE policing and the civilizational binary that preceded it, "puts the government in the position, vis-à-vis Islam, of serving as a kind of official theologian, taking positions on the meaning of inevitably contested religious concepts and weighing in on one side of debates that rage within a particular faith tradition," which raises Establishment Clause concerns, in addition to encroachment on the free exercise of religion.[38]

[35] Peter Beinart, *Bill Clinton Lapses into Trumpism*, The Atlantic (Jul. 27, 2016).
[36] *Id.*
[37] Khaled A. Beydoun, *The Myth of the 'Moderate Muslim,'* Al Jazeera English (May 20, 2016).
[38] Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 Stanford L. Rev., 162 (2012).

Clark's assertion of the "them" versus "our" binary, although talking about American citizens in the case of Muslim Americans, manifests the clash of civilizations' trope that undergirds American Islamophobia.

4.4 *Opposing Political Islamophobia*

Despite the prominence of (latent) Islamophobic messaging emanating from the Democratic Party, its most trenchant critiques and staunchest opponents also arose from the left. Martin O'Malley, the former Governor of Maryland who dropped out of the 2016 presidential race after a poor showing in the Iowa Primary, made a statement that articulates the indelibility of American Islamophobia today. He stated, "Sometimes the Islamophobia and xenophobia seeps in the mainstream. I wish it weren't so. But this is the great work of our times that we need to be involving in healing."[39]

Bernie Sanders, deemed the most liberal among the Democrats who vied for the presidency, echoed O'Malley, shouting, "We will not allow ourselves to be divided and succumb to Islamophobia."[40] Sanders, whose historic campaign challenged Clinton for the Democratic nomination, ultimately became the presidential race's anti-Islamophobia champion, and in turn, earned strong support among Muslim Americans.

Support for Sanders among Muslim Americans, particularly the younger demographics, helped him compete in key contests in prominent Muslim American communities and, most memorably, pull off a historic upset in Michigan, home to the most concentrated Muslim American communities. In the Arab American Muslim enclave of Dearborn, for instance, Sanders won 60% of the vote, which led to a stream of media headlines about "Muslims voting for a Jew" the morning after the upset, reinforcing the stereotype that Muslims are inherently at odds with Jews, and vice-versa.[41] Therefore, while Trump benefited tremendously from delivering an Islamophobic message, Sanders's opposition to it also bore political fruit, garnering him votes and visible Muslim American leadership within his campaign.

Indeed, rising fear of Islamophobia – rising from the left and most profusely from the right – pushed Muslim Americans to the polls in record numbers. Growing Islamophobia in America was ranked as the most important issue for Muslim

[39] Islamophobia in the 2016 Elections, *supra* note 1, at 25.

[40] Tom LioBanco, *Sanders on ISIS: "We gotta be tough, but not stupid!,"* CNN (Nov. 16, 2015).

[41] Kate Abbey-Lambertz, *Yes, Muslims Voted for a Jewish Candidate. No, Pundits Shouldn't Be Surprised*, HUFF. POST (Mar. 10, 2016).

voters,[42] and fear of continued and exacerbated injury, all too regular and familiar after 9/11, created the sense of urgency for an unprecedented degree of political involvement.

5 CONCLUSION

The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affect[s] all their intercourse.

– Ross v. McIntyre, US Supreme Court (1891)[43]

Sharia is a mortal threat to the survival of freedom in the United States.

– Herman Cain[44]

Islamophobia occupied center stage in the 2016 presidential race, and reasserted itself firmly within present-day national security policy and programming. On the Republic Party side, bellicose rhetoric against Islam and Muslims has been front and center in candidate debates, television interviews, and voter rallies. Indeed, the brazen Islamophobia emanating from the campaign is emblematic of rising fear of Islam, and animus toward Muslims. But it is not unfolding within a historical, legal, or political vacuum.

Neither new in form or novel in substance, the fear-mongering mobilized by Donald Trump and the collective suspicion of Muslims driving counterterror policies are extensions of old and embedded tropes, which root the American Islamophobia on display today, modern emanations of an ideological campaign that prohibited Muslims from becoming naturalized citizens from 1790 through 1944, and political pronouncements that flatly viewed Islam as a warmongering and violent faith bent on decimating American democracy. These are views that have withstood the test of time, and are incessantly deployed to reestablish the trope that Islam is inherently antithetical to American democracy, and Muslims presumptively are subversive and suspicious.

While the hateful campaigning of politicians often trump the less detectable suspicion of Islam and Muslims displayed on the left in terms of media coverage, both are forms of American Islamophobia that extend from legal and political roots planted centuries ago. Thus, unfolding American Islamophobia should not be framed as a break from American values and tradition.

[42] *CAIR Releases Results of Muslim Voter Survey Ahead of Primary Elections*, CAIR (Feb. 9, 2016),

[43] 140 U.S. 453, 463 (1891). Ross v. McIntyre addressed the applicability of US law to foreign sailors on US ships while in the territory of another country, and namely, regions where American sailors engaged with Muslims.

[44] Peter Beinart, *The GOP's Embrace of Anti-Muslim Bigotry*, The Atlantic (May 25, 2015).

Therefore, although the 2016 presidential race is broadly viewed as a moment marking the emergence of blatant and political Islamophobia, a more precise view is that it witnessed the full-fledged revelation and capitalization of Islamophobia as an effective political tool. Islamophobia is a legacy that pervades American history, and after the 2016 presidential race becomes part of that history, it will surely continue within the American political arena.

7

"Islamic Law" in US Courts: Judicial *Jihad* or Constitutional Imperative?

Faisal Kutty[*]

1 INTRODUCTION

One month after the State of Kansas passed Senate Bill 79, banning the use of foreign law,[1] a Johnson City district court was faced with the consequences when Elahm Soleimani sought the enforcement of her Islamic marriage contract on divorce.[2] Her contract with Farahmarz Soleimani stipulated a *mahr* payment of 1,354 gold coins, a value of $677,000 at the time, in the event of divorce. From the facts, it appears that Farahmarz was more than happy to agree to the *mahr* (payment by the groom to the bride, part of an Islamic marriage) amount at the time of the marriage, given that it was his second marriage and she was twenty-four years his junior.[3]

While introducing the bill for a vote on July 1, 2012, State Senator Susan Wagle told the Kansas legislature that it was "a vote to protect women,"[4] confirming the suspicions of many that it was specifically designed to target "sharī'ah" law. Elham would beg to disagree with the senator, her self-proclaimed and self-appointed savior. The court refused to enforce Elham's request, citing various reasons, the most significant for our purposes being "the religious nature of the [contract]."[5] In its August 28, 2012, ruling, the court concluded that "enforcing the agreement ... would abdicate the judiciary's role to protect such fundamental rights [ostensibly women's' rights], a concern that was articulated in Senate Bill No. 79."[6] Essentially

[*] This chapter is an excerpt of the previously published article, *"Islamic Law" in U.S. Courts: Judicial Jihad or Constitutional Imperative?* 41 Pepp. L. Rev. 1059 (2014).

[1] S.B. 79, 84th Leg. *(Kan. 2012) (enacted).*

[2] Rafia Zakaria, *Sharia Law Ban and Muslim Wives*, Al Jazeera, http://www.aljazeera.com/indepth/opinion/2013/02/20132117472487828 6.html (last modified Feb. 16, 2013, 15:18).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

the court took the position that enforcing the Islamic contract would violate the foreign law ban and the "separation of Church and State [doctrine] under the Establishment Clause of the First Amendment" of the US Constitution.[7]

This contrasts with a decision the same month in New York in *S.B. v. W.A.*, where an American Muslim woman who was married to an Egyptian man successfully enforced her *mahr* of $250,000.[8] The court upheld the contract, even though it was religious in nature and notwithstanding the fact that the actual divorce took place in the United Arab Emirates.[9]

Now rewind back to 1998. That year, in another *mahr* case brought in the state of Massachusetts, Rima Nahavandi sought a court order compelling her husband Ahmad to grant her *mahr* as part of the divorce proceedings.[10] Judge Alexander Waugh wrote: "The agreement should be enforced in an appropriate Islamic tribunal."[11] He identified the threshold questions as: was the contract "a purely secular one governed by [the precedent of] 'neutral principles,'" or was it "so inextricably intertwined with the tenets of the Islamic faith that it cannot be enforced in this Court?"[12] Judge Waugh concluded the latter and refused to order Ahmad Nahavandi to pay the $20,000 *mahr* stipulated in the Islamic marriage contract. The judge did state though that if the wife, Rima, was to get a favorable decision from an Islamic tribunal or imam, then she could have it enforced through the courts.[13]

Before and since the many foreign law/shari'ah law ban proposals, various courts in diverse North American jurisdictions have taken different positions on such religious questions and proposed different solutions. This ground reality of case-by-case decision-making, as disjointed as it is, challenges the view advocated by proponents of the shari'ah law/foreign law ban that "Islamic law" is overtaking American law. Their calls to ban foreign law/shari'ah law demonstrate a lack of understanding of the nuances and sophistication of both American law and, of course, of Islamic law. Such cases highlight the tension inherent when courts engage with religion per se, but in particular with Islam and Muslims in the present Islamaphobic climate.[14]

This chapter argues that in a nation with a constitutional guarantee of freedom of religion, which respects the notions of freedom of contract and legal pluralism,

[7] *Id.*

[8] *Id.*; S.B. v. W.A., No. 51875(U) (N.Y. Sup. Ct. Sept. 26, 2012) (Justicia), *available at* https://law.justia.com/cases/new-york/other-courts/2012/2012-ny-slip-op-51875-u.html

[9] *Id.*

[10] Sylvia Whitman, *Whose Place to Decide? Islamic Family Law Issues in American Courtrooms*, Presented at the Ass'n. of Muslim Social Scientists' 34th Annual Conference: Muslims and Islam in the Chaotic Modern World: Relations among Themselves and with Others (Sept. 30–Oct. 2, 2005) (on file with author), citing Nahavandi v. Nahavandi, No. FM-12-2237-97, (N.J. Ch.).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

religion must not be excluded outright from the calculus of court decisions if we are to ensure equal treatment and access to justice in a multireligious society. Contrary to those who argue that the United States is experiencing creeping shari'ah and that courts have caved in to judicial jihad, this chapter posits that courts have simply carried out their constitutional imperative of equal treatment and religious freedom for all within the parameters of the Constitution, principles of comity, freedom of contract, and federal and state public policy goals. Section 1 of this chapter introduces the issue with an overview of First Amendment jurisprudence. Section 2 reviews how US courts have treated cases involving contracts, arbitrations, defenses, and other personal law matters brought by Muslims, or that address the Islamic faith. Section 2 also views this debate through the prism of the right to contract, the principle of comity, and public policy. Section 3 presents the argument that, given the essentially multicultural and legal pluralistic nature of American society, constitutional rights to religious freedom and freedom of contract will only have any real value when religious communities, including Muslims, are guaranteed some level of autonomy and access to justice both within and outside US courthouses. Section 4 concludes that, far from succumbing to the shari'ah bogeyman and an imaginary judicial jihad, defending religious freedoms and equal treatment is the only way to remain true to the founding constitutional principles of this great country.

2 THE FIRST AMENDMENT AND RELIGION IN US COURTS

Religious tribunals, religious schools and vouchers, religious symbols, the Pledge of Allegiance, religion and discrimination laws, religious liberty, personal law and status issues, contracts, and inheritance, among others, are some of the catalysts that engage law and religion. To appreciate the tension inherent in these issues, we must first explore the evolving understanding of the First Amendment in US history. Indeed, the First Amendment's protection of religious freedom is one of the most celebrated aspects of the American liberal tradition. Many have argued that this is achieved through a wall of separation. The most acclaimed champion of the notion of a wall of separation between church and state is America's founding father, Thomas Jefferson. In a series of tracts, he argued that true religious liberty can only be attained by privatizing religion and secularizing politics. He further argued that religious privatization is the bargain that must be struck to contain religious bigotry and ensure religious freedom for all. Jefferson, it is argued, wrote this understanding of religious liberty into the First Amendment of the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[15]

[15] U.S. Const. Amend. I. Notwithstanding this view, there is now much scholarship arguing that Jefferson demanded a firm separation of church and state, but never sought a wholly secular public square. *See, e.g.*, John Ragosta, Religious Freedom: Jefferson's Legacy, America's Creed (2003).

Without wading into detailed legislative and judicial histories, this view of the Establishment Clause, though initially dismissed as too radical, was affirmed by the Supreme Court in the 1947 case of *Everson v. Board of Education of Ewing Township*.[16] Justice Hugo Black, writing for the majority, noted: "In the words of Jefferson, the clause against the establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"[17] Then, in 1971, the Supreme Court established a three-part test for First Amendment Establishment Clause challenges in *Lemon v. Kurtzman*.[18] First, the law must have a secular purpose.[19] Second, the primary effect of the law must not be to advance nor hinder religion.[20] Third, the law must not foster excessive government entanglement with religion.[21] All three prongs must be satisfied to pass constitutional muster.[22] As John Witte notes: "This constitutional reification of Jeffersonian logic rendered the establishment clause a formidable obstacle to many traditional forms of state patronage of and co-operation with religion."[23]

With respect to the accompanying Free Exercise Provision, fast-forwarding to the contemporary era, the Supreme Court under Earl Warren adopted an expansive view. The Court required that states have a "compelling interest" in refusing to accommodate religiously motivated conduct in *Sherbert v. Verner*.[24] The case involved Adele Sherbert, who was denied unemployment benefits by South Carolina because she refused to work on Saturdays, something forbidden by her Seventh-Day Adventist faith.[25] In *Wisconsin v. Yoder*, the Court ruled that a law that "unduly burdens the free exercise of religion" without a compelling interest, even though it might be "neutral on its face," would be unconstitutional.[26] The "compelling interest" doctrine became much narrower in 1990, when the Supreme Court held in *Employment Division, Department of Human Resources of Oregon v. Smith* that as long as a law does not target a particular religious practice, it does not violate the Free Exercise Clause.[27] In 1993, the Supreme Court revisited the Free Exercise Clause in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[28] Hialeah had passed an ordinance banning ritual slaughter, a practice central to the Santeria religion, while providing exceptions for some other practices such as the

[16] 330 U.S. 1, 15–16 (1947).
[17] Everson v. Board of Education of Ewing Township, 330 U.S. 1, 15–16 (1947).
[18] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[19] *Id.*
[20] *Id.*
[21] *Id.* at 613.
[22] *Id.* at 612.
[23] John Witte, Jr. *The Study of Law and Religion in the United States: An Interim Report.* 14.3 Eccles. L.J. 338 (2012).
[24] 374 U.S. 398, 403 (1963).
[25] *Id.* at 399.
[26] 406 U.S. 205, 220 (1972).
[27] 494 U.S. 872, 894 (1990).
[28] 508 U.S. 520 (1993).

kosher slaughter practice of Judaism. Since the ordinance was not "generally applicable," the Court ruled that it was subject to the compelling-interest test, which it failed to meet, and it was therefore declared unconstitutional.[29] Defenders of the Free Exercise Clause argue that it is a cornerstone of American history and liberty; critics argue that it grants a privileged and undeserved legal status to increasingly irrelevant religious communities. Courts in Canada and much of Europe have frequently turned to proportionality analysis to determine what provisions ought to be allowed for individuals' religious liberty.[30] In contrast, in the United States, courts have historically attempted to leave such decisions to legislators. This clearly goes against the argument of those advocating for a ban on shari'ah law on the basis that the courts have been giving in to shari'ah.

Recent examples of these tensions in the United States cover a wide range of conflicts, including a proposed circumcision ban in San Francisco,[31] the foreign law/shari'ah law bans,[32] and state laws prohibiting religiously motivated business owners from denying services for same-sex weddings.

Indeed, even the apex court of the nation has itself been called upon to address recent skirmishes between law and religion, issuing decisions in both *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*[33] and *CLS v. Martinez*[34] that consider conflicts between anti-discrimination norms and religious liberty. In November 2013, the Court also heard arguments in *Town of Greece v. Galloway*,[35] in which the Court was asked to determine whether a New York town's practice of having prayer before town board meetings violates the Establishment Clause.[36]

At the end of 2013, the Court agreed to weigh in on the Patient Protection and Affordable Care Act (ACA)[37] requirement that employers provide contraceptive coverage to their employees irrespective of the employers' religious objections. The Court agreed to hear an appeal from the 10th US Circuit Court of Appeals,

[29] *Id.*, at 531.

[30] T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 Emory Int'l L. Rev. 465, 466 (2005).

[31] Madison Park, *San Francisco Judge Removes Circumcision Ban from Ballot*, CNN (July 28, 2011) *available at* http://www.cnn.com/2011/HEALTH/07/28/circumcision.ban.voting/.

[32] *State Legislation Restricting Use of Foreign or Religious Law*, Pew Research Center: Religion & Public Life Project (Apr. 8, 2013) *available at* http://features.pewforum.org/sharia-law-map/.

[33] 132 U.S. 694. (2012).

[34] 130 U.S. 2971 (2010).

[35] 681 F. 3d 20 (2d Cir. 2012).

[36] *Id.*, at 22. The Court held that the town's practice of opening town board meetings with a prayer offered by members of the clergy does not violate the Establishment Clause when the practice is consistent with the tradition long followed by Congress and state legislatures, the town does not discriminate against minority faiths in determining who may offer a prayer, and the prayer does not coerce participation with non-adherents.

[37] Office of the Legis. Counsel, 111th Cong. *Compilation of Patient Protection and Affordable Care Act* (2010) *available at* http://housedocs.house.gov/energycommerce/ppacacon.pdf (Sandra L. Strokoff & Edward G. Grossman).

which sided with Hobby Lobby, an Oklahoma-based chain of craft stores owned by a Christian family who claimed that providing such coverage would violate the company's religious freedom.[38] At the same time it will hear a related appeal from the 3rd US Circuit Court of Appeals, which denied that Conestoga Wood Specialties Corporation had the same religious conscience rights as an individual.[39] Earlier this year, the court also granted an injunction temporarily barring the Obama administration from enforcing the Health and Human Services contraceptive mandate under the ACA against Little Sisters of the Poor.[40]

A review of case law reveals that people of all faiths have used their right to seek relief through the courts when they believe their religious freedom is restricted.[41] Indeed, courts throughout the United States have been called upon to adjudicate assertions of religious freedom in a variety of contexts and faiths where religious beliefs and practices conflict with state law.[42] This should not cause any concern, provided that courts do not become improperly entangled with religion. Anti-shari'ah advocates point to *Allah v. Jordan-Luster*[43] as an example of wading improperly into religion.[44] Shaheed Allah's claim that the prison violated his right to free exercise of religion by not ensuring that all the meat served to him was prepared in accordance with his Islamic beliefs was rejected by the court.[45] Contrary to what anti-shari'ah advocates claim, rather than caving in to this instance of "judicial jihad," the court ruled against the Muslim inmate and held that the prison's practice of serving pork-free meals was a sufficient accommodation.[46]

Anti-shari'ah advocates appear to have a problem with someone even raising Islam in court, but apparently they do not have any issues with other groups raising similar arguments. Many of them appear to blame Muslims for what they see as increasing porousness of the wall of separation. The wall of separation is clearly not as solid or as impermeable as once thought, but for reasons other than those advanced by anti-shari'ah advocates – Islam and Muslims.[47] This shift has taken place not because of

[38] Hobby Lobby Stores, Inc. v. Sebelius, 723 F. 3d 1114 (10th Cir. 2013), cert. granted, 134 U.S. 678 (2013).

[39] *Conestoga Wood Specialties* Corp. v. Sebelius, 724 F.3d 377, 388 (3d Cir. 2013).

[40] Little Sisters of the Poor Home for the Aged v. Sebelius, 134 S. Ct. 893, 893 (2013).

[41] Faiza Patel, Matthew Duss & Amos Toh, *Foreign Law Bans: Legal Uncertainties and Practical Problems*, Ctr. for Am. Progress 1 (May 2013) *available at* http://americanprogress.org/wp-content/uploads/2013/05/ ForeignLawBans.pdf.

[42] *Id.*

[43] No. 04-1083, 2007 WL 2582199 (C.D. Ill. Aug. 3, 2007).

[44] SpearIt, *Religion as Rehabilitation? Reflections on Islam in the Correctional Setting*, 34 Whittier L. Rev. 29, 42 (2012).

[45] Allah, 2007 WL 2582199, at *10.

[46] *Id.*

[47] James Hitchcock, The Supreme Court and Religion in American Life, Vol. 1: The Odyssey of the Religion Clauses (2004); John Witte, Jr., *From Establishment to Freedom of Religion*, 32 Cap. U. L. Rev. 499, 513 (2004); Steven D. Smith, *How Secularists Helped Knock Down the Wall of Separation between Church and State*, Social Science Research Network (Nov. 8, 2007) *available at* http://ssrn.com/abstract=1028602.

foreign law and certainly not due to any takeover by shari'ah advocates.[48] It has simply been a response to the demands from American society.

The evidence clearly reveals that this is not the fault of Muslims or Islamic law. Indeed, as a report by the Brennan Center concluded: "When adjudicated within the guidelines of the First Amendment, cases involving Muslims' right to free exercise no more threaten the imposition of Sharia law than, for example, cases involving the rights of Christians pose a 'Biblical threat' to our courts."[49]

3 CASES INVOKING CONTRACT PRINCIPLES, COMITY, AND PUBLIC POLICY

Disputes involving religion in different manifestations and at various levels set these competing interests in stark contrast and pose complex questions to secular judges. In addition to religious liberty cases, in a growing number of cases, the courts as ultimate arbiters of law are called upon to resolve tensions and determine rights and responsibilities pursuant to certain religious arrangements and settlements. These have included cases involving arbitration, contracts, business disputes, family and other personal law matters, and even cases where defenses rely on manifestations of Muslim culture and different interpretations of Islam are raised. Addressing these issues demands a consideration not only of how to weigh the competing interests addressed in Section 1, but also of the extent to which secular authorities should assess religious obligations. As the Brennan Center report notes: "The anti-Sharia movement also distorts how U.S. Courts treat Sharia and other religious codes such as Catholic canon law and Jewish law. Many persons of faith – including Muslims, Jews, and Catholics – arrange their everyday lives according to religious laws and customs."[50]

American courts have traditionally recognized their ability to consider such cases, provided they are able to adjudicate them using neutral principles of law. These types of cases also engage the notion of freedom of contract, and the principle of comity, and public policy. Though not necessarily distinct or mutually exclusive at all times, each of these has a long track record in the American legal tradition and, I would argue, has served the nation well.

There is a well-known common-law tradition of freedom of contract, which has entrenched itself in the American psyche. The idea of freedom of contract has always elicited heated debate among scholars, and the US Supreme Court has tackled and addressed the issue under the Contract Clause in Article 1, Section 10 of the Constitution and the Fourteenth Amendment Due-Process

[48] *Id.*

[49] ACLU Program on Freedom of Religion and Belief, *Nothing to Fear: Debunking the Mythical "Sharia Threat" to Our Judicial System* 1 (May 2011), *available at* https://www.aclu.org/files/assets/Nothing_To_Fear_Report_FINAL_MAY_2011.pdf.

[50] Patel, *supra* note 41, at 5.

Clause.[51] Without getting into the technical details, the freedom of contract doctrine survives, but with significant powers enjoyed by the state to restrict this right.[52]

This raises the question: Can we support the idea that the state has the right to interfere in how citizens might decide, by mutual consent, to peacefully settle their private disputes and disagreements? This of course goes against the liberal democratic notion of individual freedom and the latitude to make decisions about one's own life. The issue of arbitration and Islamic contracts – family or business – is really one of freedom of contract.

Obviously, it would be discriminatory to prohibit courts from entertaining such matters merely because Islam was involved, without evaluating the merits and substance against long-established American judicial practice and legal precedent. This is precisely what many anti-shari'ah advocates are proposing. A June 2011 report published by a right-wing center founded by anti-Muslim activist Frank Gaffney stated, "Shariah law has entered into state court decisions, in conflict with the Constitution and state public policy."[53] The group's general counsel happens to be none other than the man behind the shari'ah ban campaign, David Yerushalmi.[54] The report claims that there were 150 cases invoking what it inaccurately calls "shari'ah law" in state courts in 23 states.[55] The report also compiled a list of the "Top 20" cases where judges purportedly deferred to shari'ah law.[56]

One of the cases put forth as evidence of the shari'ah onslaught is a business partnership dispute arbitration, *Abd Alla v. Mourssi*.[57] Far from being part of a stealth shari'ah invasion, in the decision the court merely upheld an arbitration award because there was no evidence that the award "was [the] result of fraud, corruption, or other undue means."[58] The court also held that the defendant had run out of time to challenge the tribunal decision.[59]

[51] *See generally* David. E. Bernstein, *Freedom of Contract* (2008) *available at* http://www.law.gmu.edu/assets/files/publications/working_papers/0851%20Freedom%20of%20Con tract.pdf.

[52] *Id.*

[53] Ctr. for Security Pol'y, Shariah Law and American State Courts: An Assessment of State Appellate Court Cases 8 (May 20, 2011), http://www.centerforsecuritypolicy.org/2012/08/30/shariah-law-and-american-state-courts/. *See also Intelligence Files Profiles: Frank Gaffney, Jr.*, S. Poverty L. Ctr. *Available at* http://www.splcenter.org/get- informed/intelligence-files/profiles/frank-gaffney-jr. (last visited Feb. 13, 2014); *see also Issues: Shariah Law*, Am. Pub. Pol'y Alliance *available at* http://publicpolicyalliance.org/issues-2/shariah-law/ (last visited Feb. 13, 2014).

[54] Andrea Elliott, *The Man behind the Anti-Shariah Movement*, N.Y. Times (July 30, 2011) *available at* http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all&_r=0.

[55] Ctr. for Security Pol'y, *supra* note 53, at 10–11.

[56] *Id.*, at 29–42.

[57] 680 N.W.2d 569, 574 (Minn. Ct. App. 2004).

[58] *Id.*

[59] *Id.*

Alternative dispute resolution is an option that any American can resort to.[60] Arbitration is one of these alternatives.[61] It is one of myriad ways through which people can resolve their disputes.[62] The process is based on contract law within the parameters of Constitution, public policy, and arbitration laws.[63] Within these parameters, parties have a significant amount of freedom in its design and in crafting their terms of reference.[64] For instance, parties have full rights to choose what rules will govern the resolution of the dispute – be they religious, secular, the law of other jurisdictions (subject to choice of law and conflict of law rules), or any other mutually agreed upon rules. Although a party cannot unilaterally withdraw from the process after agreeing to arbitration, the process can be altered or terminated if both parties consent. As with any contractual arrangement, courts can stay a pending action while the matter is being arbitrated.[65] Courts can also be called upon to enforce arbitral decisions and will do so, provided that they are not contrary to public policy, discriminatory, totally irrational, or unconscionable.

As with almost all dispute-resolution methods, arbitration must be jointly and voluntarily chosen by the parties to the dispute and cannot be imposed against their will. The only mandatory dispute-resolution option is the court system: a party filing a claim or bringing an action or application through the courts can compel the other party to respond. Even in cases that proceed through the courts, the initiating party must take the first step by filing a claim or otherwise bringing the matter to a court. Generally, an affected party is under no obligation to enforce his rights, whether it be through the courts or otherwise.[66]

The fear-mongering with respect to Islamic arbitration is all the more hypocritical and discriminatory when one considers that various other communities have been arbitrating without outrage or objection. Such a blanket opposition is clearly against long-established American ideals of freedom of contract, other contract law principles, and encouraging people to resolve disputes outside the courts while providing access to the courts to uphold agreements and promises that are within established and accepted parameters.

In the case of a marriage contract or family dispute, arbitration may entail agreeing that a local committee of religious leaders will rule on the division of property following a divorce; or, in the case of a business transaction, it might be deciding that a private arbitration organization or industry association will rule on

[60] Katherine V. W. Stone, *Alternative Dispute Resolution*, *in* Encyclopedia of Legal History (Stan Katz, ed.) *available at* http://ssrn.com/abstract=631346.
[61] Joseph L. Daly, *Arbitration: The Basics*, 5 J. Am. Arb. 1 (2006).
[62] Jerome T. Barrett & Joseph P. Barrett, A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement (2004).
[63] Daly, *supra* note 61, at 1.
[64] *Id.*, at 14–16.
[65] Daly, *supra* note 61, at 16, n.63.
[66] Amanda M. Baker, A *Higher Authority: Judicial Review of Religious Arbitration*, 37 Vt. L. Rev. 157, 162 (2012).

any disagreements. The point is that the arbitration body – regardless of whether it is a rabbinical court, an Islamic tribunal, or a secular body – derives its authority from the consent of the parties requesting arbitration within the confines of established laws, procedures, and public policy. The fact that the parties are choosing to settle their disagreements by reference to their understanding of Islamic law is therefore of no more consequence to society than if they decided to settle the same dispute by tossing a coin, asking a neighbor to decide, or any of the other ways in which human beings settle disagreements peacefully.

In the matrimonial context, anti-shari'ah advocates have pointed to a number of cases to evince the threat posed by Muslims. One such case is *Odatalla v. Odatalla*, where the wife appealed to the courts to enforce the *mahr* provision of her Islamic prenuptial agreement or marriage contract.[67] The court held that "all of the essential elements of a contract [were] present" and ordered the husband to pay $10,000 to his wife.[68] The court noted that enforcement was "based upon 'neutral principles of law' and not on religious policy or theories."[69] The judge wrote: "Why should a contract for the promise to pay money be less of a contract just because it was entered into at the time of an Islamic marriage ceremony? Clearly, this court can enforce a contract which is not in contravention of established law or public policy."[70] The evidence, even in the cases put forth by anti-shari'ah advocates, proves that courts make such determinations on a case-by-case basis. In fact, in *Zawahir v. Alwattar*,[71] the court applied the same contract principles and refused to enforce a *mahr* agreement because the husband only entered into it "as a result of overreaching or coercion."[72]

In addition to cases revolving around *mahr* agreements, courts have also been called upon to determine the validity of marriages conducted in accordance with religious law. In fact, in many instances Muslim couples perform religious ceremonies without following through with the legal registration. Courts are often asked to adjudicate the validity of such marriages as a precursor to determining the other rights flowing from such relationships. In *Mussa v. Palmer-Mussa*, the North Carolina Court of Appeals recognized a couple's Islamic marriage, but not their religious divorce.[73] In *Aleem v. Aleem*, a Maryland court held that a *talaq* (Islamic divorce), granted in Pakistan, was unenforceable because, by being accessible only to men, *talaq* was against public policy under the Equal Rights Amendment of the Maryland Constitution, and it denied due process rights to women.[74]

[67] 810 A.2d 93, 94 (N.J. Super. Ct. Ch. Div. 2002).
[68] *Id.*, at 98.
[69] *Id.*, at 95–96.
[70] *Id.*, at 95.
[71] No. 07AP-925, 2008 WL 2698679 (Ohio Ct. App. July 10, 2008).
[72] *Id.*, at *6.
[73] 719 S.E.2d 192, 194 (N.C. Ct. App. 2011), rev'd, 731 S.E.2d (N.C. 2012).
[74] 947 A.2d 489, 500–02 (Md. 2008).

In the context of custody, American courts have for some time applied the best interest of the child test. This test would, presumably, apply regardless of whether the court was interpreting a religious or nonreligious contract, reviewing an arbitration agreement, or enforcing a foreign judgment or settlement related to child custody. The courts also have inherent common-law *parens patriae* jurisdiction, often supplemented by statute, to intervene when and if necessary to ensure that the best interests of vulnerable children are protected in all contexts.[75] Other cases brought up by anti-shari'ah activists as evidence of creeping shari'ah involve Muslim business people attempting to use Islamic principles in business dealings; innocuous attempts to work around interest prohibitions; zoning and property disputes, attempts to have judgments from Islamic jurisdictions enforced; and even attempts to raise defenses relying on interpretations of Islamic law or certain Muslim cultural practices or views. Anti-shari'ah advocates have pounced on situations where parties attempt to have American courts enforce decisions made in foreign courts. In such contexts, it may be necessary for an American court to consider the foreign law applied to determine whether to defer to the foreign court's decision. This principle of comity, whereby courts of one nation voluntarily recognize the executive, legislative, and judicial acts of another, has a long history in America.[76] Scholars disagree about whether it is a rule of customary international law, but the fact remains that comity plays a significant role in American domestic jurisprudence.[77] In evaluating foreign-law cases, American courts consider whether the foreign jurisdiction's decision, judgment, order, and legal systems practices and procedures violate federal or state public policy.

Anti-shari'ah advocates have cited a number of cases to back their tenuous claim that shari'ah is stealthily sneaking in through the doctrine of comity, but a close examination of the cases they have highlighted contradicts their claim. In *Amin v. Bakhaty*, the Louisiana Supreme Court refused to enforce a custody order, ruling that it was against public policy because Egyptian law did not consider the child's best interest as "paramount."[78] In *Aleem v. Aleem*, a Maryland court refused to enforce Pakistani law pertaining to divorce and division of assets, because Pakistani law did not afford the wife due process, in violation of state public policy.[79] In *Tarikonda v. Pinjari*, a Michigan court denied the recognition of a divorce

[75] Judith Areen, *Intervention between the Parent and Child: A Reappraisal of the State's Role in Child* Neglect *and Abuse Cases*, 63 Geo. L.J. 887, 894–910 (1975); Tanya Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 Hastings Race & Poverty L.J. 1, 30 (2009).

[76] Joel R. Paul, *The Transformation of International Comity*, 71 L. & Contemp. Probs. 19, 38 (2008); William S. Dodge, *International Comity in American Courts*, 1 (unpublished manuscript) *available at* https://www.yumpu.com/en/document/view/11719956/william-s-dodge-american- society-of-international-law.

[77] Dodge, *supra* note 76, at 39.

[78] 798 So.2d 75, 86 (La. 2001).

[79] 947 A.2d 489, 500 (Md. 2008).

conducted according to Indian laws governing Muslim marriage because the wife was not afforded due process or equal protection rights, and the divorce thus violated state public policy.[80] In contrast, in two other cases cited by anti-shari'ah advocates, *Hosain v. Malik*[81] and *Saleh v. United States Department of Justice*,[82] both courts concluded that public policy and American due process standards were not violated. Even in a nonfamily case, *Rhodes v. ITT Sheraton Corp.*,[83] an American court determined that a Saudi Arabian court would not be an adequate alternative forum for a female plaintiff to pursue her claims for a diving injury because of "biases against women and non-Muslims [and] ... systemic prejudices."[84]

Far from supporting the position advanced by anti-shari'ah activists, these cases reveal that courts have granted comity only when doing so would not violate public policy or cherished American due process rights. Indeed, even one of the main proponents of the anti-shari'ah law movement, the American Public Policy Alliance (APPA), acknowledges that:

Granting comity to a foreign judgment is a matter of state law, and most state and federal courts will grant comity unless the recognition of the foreign judgment would violate some important public policy of the state. This doctrine, the "Void as against Public Policy Rule," has a long and pedigreed history.[85]

The last types of cases that anti-shari'ah advocates have attacked involve those where criminal defendants use their religious beliefs as a defense to vitiate their culpability. Again, this is not new or restricted to Muslims. There is a growing body of scholarship exploring this issue as part of individuals' due-process rights to assert their lack of intent. Again, courts have not rejected these arguments outright, but they have measured them against American public policy. Anti-shari'ah activists went as far back as 1976 to find the case of *People v. Benu*, where a Muslim man was charged with child endangerment for arranging the marriage of his underage daughter.[86] The court rejected his "Islamic" argument and found him guilty, just as courts have done in religious defenses raised by Christians. Despite the fact that it is not an exclusively Muslim issue and that it is far more nuanced and complex than they have made it out to be, anti-shari'ah activists were able to latch onto one trial

[80] No. 287403, 2009 WL 930007 (Mich. App. Apr. 7, 2009).
[81] 671 A.2d 988 (Md. Ct. Spec. App. 1996) (examining "whether the Pakistani courts applied a rule of law, evidence, or procedure so contradictory to Maryland public policy as to undermine the confidence in the trial").
[82] 962 F.2d 234 (2d Cir. 1992).
[83] No. CIV.A. 97-4530-B, 1999 WL 26874, at *1, *3 (Mass. Super. 1999).
[84] *Id.*, at *3.
[85] *American Laws for American Courts*, Am. Pub. Pol'y Alliance, (last visited Feb. 15, 2014) [hereinafter American Laws], http://publicpolicyalliance.org/legislation/american-laws-for-american-courts.
[86] 87 Misc. 2d 139, 140 (N.Y. Crim. Ct. 1976).

judge's ruling in New Jersey (which was correctly overturned by a New Jersey court of appeals) to "prove" that shari'ah was taking over America.[87]

4 MULTICULTURALISM AND LEGAL PLURALISM

Effective governance in contemporary liberal societies requires balancing individuals' religious commitments and convictions with the state's need to maintain general rules and standards applicable to all. While these debates implicate a wide range of very broad philosophical, social, and constitutional considerations, another recurring theme is the unique challenge of reconciling conflicts not just between religion and law, but between "religious legal communities" and the law of the nation-state. American Muslim and Jewish communities serve as prime examples of such religious legal communities – that is, communities that experience some of their religious norms through the prism of "legal" rules – and thus the challenges faced by these communities often parallel each other in important ways.[88] What is worthy of note here is that the focus has been on trying to deny Muslims an equal place in the dockets.

A popular war cry of anti-shari'ah advocates in a number of western jurisdictions has been "one law for all" and in the American context, this has morphed into "American Law for American Courts."[89] These rallying cries are, at worst, disingenuous and, at best, inaccurate because these jurisdictions permit parties a variety of routes, options, and choices in resolving their legal issues within a legal framework and, in many cases, even allow parties to opt out of statutory regimes. In addition to the foregoing, in the United States there is diversity among states and between states and the federal realm. Moreover, these simplistic slogans deny the reality on the ground in terms of the prevailing multiculturalism, legal pluralism, choices, and options to opt out.

The foreign law and shari'ah law ban controversy is a compelling case study in multiculturalism and legal pluralism. A multicultural society inherently accepts the idea that the various subgroups within society will celebrate their differences in all areas, including the legal arena. Indeed, this is the essence of multicultural citizenship and stands in stark contrast to the cultural assimilation traditionally demanded of migrants and minorities.[90] Many nations around the world have officially adopted multiculturalism, although the United States has not officially done so.[91]

[87] S.D. v. M.J.R., 2 A.3d 412, 413 (N.J. Super. App. Div. 2010).

[88] Muhammed Elsayed, *Contracting into Religious Law: Anti-Sharia Enactments and the Establishment and Free Exercise Clauses*, 20 Geo. Mason L. Rev. 937, 937–38 (2013).

[89] *American Laws*, *supra* note 85.

[90] Joseph F. Healey, Race, Ethnicity, Gender, and Class: The Sociology of Group Conflict and Change 45 (6th ed. 2012).

[91] Faisal Bhabha, *Between Exclusion and Assimilation: Experimentalizing Multiculturalism*, 54 McGill L.J. 45, 51 (2009).

Nevertheless, a strong argument can be made that multiculturalism is the most accurate characterization of the ethnic interrelationships and diversity in the United States.[92]

The nature and limits of multicultural and multi-religious accommodation within liberal democracies has been the subject of considerable scholarship over the last few decades.[93] The primary focus of pioneering theorists such as Charles Taylor and Will Kymlicka has been the legal accommodation claims of minorities.[94] Much of this discussion has centered on issues of internal self-governance and legal pluralism. Indeed, as Jeff Spinner-Halev and Jacob Levy argue, if liberty is to be meaningful, the liberal state must protect the freedom of religious communities to govern their lives according to their deeply held views.[95]

Over time, scholars have begun to realize that while a state may impose its own law, various other legal systems continue to exist and compete with the state law system. In essence, contrary to conventional wisdom, legal pluralism – not legal centrism - is the norm. As with any controversial term, definitions of legal pluralism abound. John Griffiths, one of the key developers of the theory, defines a situation of legal pluralism as:

> One in which law and legal institutions are not all subsumable within one "system" but have their sources in the self-regulatory activities ... which may support, complement, ignore or frustrate one another, so that the "law" which is actually effective on the "ground floor" of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism, and the like.[96]

This contrasts sharply with legal centralism, which assumes that the state is the only source of law. Many involved in the shari'ah law debate uncritically accept (or pretend to accept) the assumption of exclusive state control over law inherent to the notion of legal centralism. In reality, legal pluralism is predominant in virtually all societies.

The most widely used conception of plural legal systems is Sally Falk Moore's notion of the semi-autonomous social field. These semiautonomous social fields

[92] John A. Garcia, *A Multicultural America: Living in a Sea of Diversity*, *in* Multiculturalism from the Margins 29, 29–38 (Dean A. Harris ed., 1995).

[93] Will Kymlicka, Liberalism, Community and Culture (1989); Richard A. Shweder et al., Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies (Richard A. Shweder et al. eds., 2002).

[94] Kymlicka, *supra* note 93; Charles Taylor et al., Multiculturalism (1994).

[95] Minorities within Minorities: Equality, Rights and Diversity 11 (Avigail Eisenberg & Jeff Spinner-Halev, eds., 2005).

[96] Laura Thompson: *The U.S. and Legal Pluralism: Reckoning Private Rights with the Public*, Clocks & Clouds (Apr. 1, 2016), https://edspace.american.edu/clocksandclouds/2016/04/01/the-u-s-and-legal-pluralism-reckoning-private-rights-with-the-public/

each have rule-making powers and people abide by these rules in contexts ranging from classrooms to sports fields to places of worship.[97]

The evolutionary nature of Islamic law[98] and the multicultural and pluralistic nature of American society provide an opportunity to acknowledge and accept this reality, and to devise a practical model of legal pluralism that can facilitate a harmonious relationship between Islamic law and various state and federal laws and systems. Indeed, as Moore points out, the different legal orders exist in relation to each other and, hence, affect the way that each is able to operate.[99] There is a range of possible relationships that can be devised between Islamic law and state law.

I would concur with Chandran Kukathas and Jeff Spinner-Halev that the state, in a multicultural citizenship model, should grant greater self-governance powers, particularly over issues central to cultural identity and preservation.[100] This would be consistent with the reality of legal pluralism that is evident on the ground. The state should only intervene when a community harms its members (or a segment thereof) or the outside community, or when procedural and constitutional norms are violated. Such an intervention would only be possible and effective if there was formal institutionalization of the practice and interaction between the state and nonstate systems.

A more robust multicultural model, taking cognizance of the reality of legal pluralism also would have facilitated the indigenization process of Islamic law. Such an indigenization would be in line with the essence of multiculturalism and legal pluralism. Moreover, this would have been one of the best ways to ensure that the minority community evolves itself, using its own internal mechanisms and through respectful engagement and interaction with the mainstream community. This would be consistent with Miranda Forsyth's notion of "planned legal pluralism," which would "ensure that the various legal systems in a particular jurisdiction operate in ways that support and enrich each other, rather than undermine and compete with each other."[101] This is not a farfetched theoretical dream, because the evolutionary and context-specific nature of Islamic law makes it conducive to the dialectical model within the broader state legal system.

As scholars have documented, it is impossible to suppress these semi- autonomous social fields entirely within a society.[102] The shari'ah ban controversy provides a timely opportunity to develop and experiment with models of legal pluralism that

[97] Sally Falk Moore, *Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study*, 7 Law & Soc'y Rev. 719, 721 (1973).

[98] Asifa Quraishi-Landes, *Sharia and Diversity: Why Some Americans Are Missing the Point*, Inst. For Soc. Pol'y & Understanding 5 (Jan. 2013) *available at* http://www.ispu.org/pdfs/ISPU_Report_ShariaDiversity_Final_web.pdf.

[99] Moore, *supra* note 97, at 723.

[100] Minorities within Minorities, *supra* note 95, at 10–11.

[101] Miranda Forsyth, *How to "Do" Legal Pluralism*. School of Regulation & Global Governance, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=993617 (June 2007).

[102] Moore, *supra* note 97, at 720.

can balance the competing rights in a manner that attempts to respect all parties and protect the vulnerable. It is also a great occasion to explore how Islamic law and liberal democracy can coexist and complement each other.

5 CONCLUSION

The number of religion and state issues brought before the Supreme Court in recent years underscores an incontrovertible truth in the American legal system: the relationship between the state and religion in this country is still fluid and changing. To put a twist on a well-known saying from Mohandas K. Gandhi, those who thought that religion could be separate and distinct from law understand neither religion nor law. As outrageous as it may appear to anti-shari'ah advocates, if constitutional rights to religious freedom, equal treatment, and freedom of contract are to have any real value, religious communities, including Muslims, must be guaranteed access to justice both in United States courts and outside of the court system. It would be odd and un-American to insist that Muslims must always couch their claims in nonreligious terms to obtain justice while others need not do so.

The idea that people entering freely into a contract have the right to agree as to how they settle any disagreements within the confines of state law is relatively uncontroversial (provided the normal contractual and legal protections are in place) outside the anti-shari'ah group. Consenting and informed adults must be able to make religious choices, even if others do not believe these are "correct" choices. As Ronald Dworkin says about faith (albeit not in the context of this controversy):

We can't ask people to set aside their most profound convictions about the truth of deep moral and ethical issues when we are also asking them to make decisions . . . that are for most people the most basic and fundamental moral and ethical decisions they will in their lifetime be called upon to make.[103]

Scholars have advanced various arguments as to why the Establishment Clause instructs courts not to interfere in cases implicating religious doctrines or practice. These reasons have ranged from adjudicative disability (state has limited competence)[104] to ensuring that the government does not favor any one religion or any particular minority or majority view within a religion.[105] These are all legitimate considerations, but these difficulties and complexities do not justify the court's total or complete prohibition from entertaining religious issues. Moreover, from a religious freedom and equal-treatment perspective, it would be unfair to prevent Muslims from resorting to courts to have their religious disputes resolved when this

[103] Elizabeth Katz, *Dworkin Explores Secular, Religious Models for Society*, Univ. Va. Sch. L. (Apr. 19, 2006) *available at* http://www.law.virginia.edu/html/news/2006_spr/dworkin.htm.

[104] Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes between Religious Institutions and Their Leaders*, 7 Geo. J.L. & Pub. Pol'y 119, 138 (2009).

[105] Laurence H. Tribe, American Constitutional Law § 14–11, at 1231 (2d ed. 1988).

right is available to others. Additionally, from the perspective of access to justice, as made evident from the plight of the two women from our introduction, Elahm Soleimani and Rima Nahavandi, in some cases justice is being denied to deserving Americans simply for the sake of preserving theoretical purity. Michael Helfand makes a strong case for allowing the litigation of certain religious cases that have traditionally not been entertained through the courts when no other forum is available.[106] He points out:

> Indeed, the prohibition against litigating religion in judicial forums has come at a serious cost. As a number of courts have noted, dismissing a case as non-justiciable under the Establishment Clause "imposes a harsh consequence on a plaintiff" and "is a drastic measure, because when a case is nonjusticiable it means the wrong committed, if there is one, cannot be remedied anywhere."[107]

As discussed above and as noted by anti-shari'ah advocates, there are cases where Muslims have sought, directly or indirectly, to use Islamic principles in resolving aspects of their disputes – as is their right. This is nothing unique to Muslims; people of other faiths have regularly exercised the same right. These cases provide evidence of nothing more than the fact that, just like non-Muslims, some Muslims may wish to settle their disputes in accordance with the principles of their faith, and courts will oblige this desire within the confines of American constitutional law and judicial practice and precedent. The courts have also rejected such claims – sometimes for valid reasons, and other times for reasons that we may need to question in a multi-religious legal pluralistic liberal democracy.

The evidence is clear that courts treat claims by Muslims using religious law the same way they deal with claims brought by those of other faiths and those of no faith: sometimes they are accepted and sometimes they are rejected. The nuanced, case-by-case approach that has evolved in the courts, acting through the prism of established Establishment Clause and Free-Exercise Clause jurisprudence, principles of comity, contract law, and public policy, provides sufficient checks to ensure that courts do not become impermissibly entangled with religion and do not allow for Islamic law, or any religious or foreign law for that matter, to become the law of the land. Indeed, as Matthew Franck, a noted legal analyst at the conservative *National Review*, concluded after reviewing the cases identified as transforming American legal culture:

> Thirty-five years' worth of American law, and we have a whopping seven cases in which some "foreign law" was honored (not even Sharia in every case), and not

[106] Michael A. Helfand, *Litigating Religion*, 93 B.U. L. Rev. 493 (2013) (quoting Abdelhak v. Jewish Press Inc., 985 A.2d 197, 211 (N.J. Super. Ct. App. Div. 2009) and Congregation Yetev Lev D'Satmar, Inc. v. Kahana, 879 N.E.2d 1282, 1286 (N.Y. 2007) (Smith, J., dissenting)).

[107] *Id.*, at 496.

enough information even to tell if something truly unjust happened in any of the seven. In the other thirteen cases, shari'ah law principles were rejected either at trial or on appeal.[108]

While his use of the term "Sharia" can be quibbled with, for our purposes suffice it to reinforce this chapter's position that far from evidencing creeping shari'ah or a surrender to judicial jihad, the cases Franck addresses and those touched upon in this chapter only confirm that the American Constitution and legal principles stand firm and preeminent; Muslims merely have had access to the dockets, nothing more and nothing less.

[108] Matthew Franck, *A Solution in Search of a Problem*, Nat'l Rev. Online (June 15, 2012, 5:10 PM) *available at* http://www.nationalreview.com/bench-memos/303028/solution-search-problem-matthew- j-franck.

PART III

Islamophobia in Criminal Law and National Security Law

8

A Muslim Registry: A Look at Past Practices and What May Come Next

Abed A. Ayoub

1 INTRODUCTION

In the 2016 presidential election campaign, candidate Donald Trump made many outlandish, and outright scary promises. One of his more controversial campaign proposals was to implement a Muslim ban, and he showed willingness to implement a Muslim registry. At first this was shrugged off as another attempt by Trump to placate to his voter base. At that point in his campaign, there was no hiding that Trump was exhibiting xenophobic views in an attempt to win votes and support. Once candidate Trump became President Trump, many expected him to pivot away from the divisive rhetoric and embrace a more moderate stance to his policies. It became evident early on after the election that Trump had no plans to change his positions. Controversial Trump proxies such as Sebastian Gorka, Stephen Miller, and Steve Bannon sent the message that Trump was doubling down on his policies, particularly those against Arab, Muslim, and immigrant communities.

Others believed that his policies simply could not be implemented because there was no precedent, or the law would not allow it, regardless of who he appointed as his advisors. What many missed is that the ideas proposed by Trump already existed in one form or another, starting with President Richard Nixon.

This chapter explores the history of past programs, starting with President Nixon and extending to President Obama's administration. It also examines different registry implementations, community responses, and the possibility of similar programs being implemented in the future. It discusses only specific programs that served as precursors to the possible implementation of a Muslim registry and helped set the political precedent for Trump's Muslim ban, to show that the latest proposal is not an exception, but part of an ongoing government practice of regulating Arabs and Muslims. As a disclaimer, the Arab and Muslim communities in the United States both suffer greatly from adverse government policies, including racial profiling, unwarranted and aggressive prosecutions, and surveillance. It is acknowledged that all

these policies have had a significant impact on the respective communities, particularly those implemented in the aftermath of 9/11. This chapter focuses more narrowly on the direct antecedents of the Muslim ban and registry.

2 ARAB AND MUSLIM

For decades, the US government has conflated the definition of Arab and Muslim. Arab identity was inextricably linked to Muslim identity during the Naturalization Era. Playing on fear and using thinly veiled pretexts, the government has sidestepped – and continues to sidestep – legal barriers in order to initiate and maintain programs that openly discriminate against Muslims in the United States. For example, when targeting Muslims, one consistent pretext exploited by the government is the use of "national origin" factors in instituting policies that negatively impact Muslims. In other words, the government has consistently produced programs that target Muslims but sidestep constitutional boundaries set by the First Amendment's Establishment Clause by using national origin as a justification for its policies.

Although Muslims inhabit every corner of the globe, Muslims are represented in the highest numbers in a handful of states in North Africa, the Middle East, South Asia and Southeast Asia. Due to their high concentrations in relatively few states, Muslims can easily be grouped on the basis of national origin. The government was quick to notice this when it first toyed with the idea of enhanced Muslim and Arab surveillance with Operation Boulder in 1972. By the time Donald Trump instituted his Arab and Muslim ban, the state had mastered the use of national origin as a facially legitimate way to discriminate against Muslims. In Trump's initial travel ban, which lists only seven nation-states, Trump was able to directly impact the movement of just under 200 million Muslims. In fact, many policies that have had a negative impact on Muslims in America over the past half-century have used national origin as the basis for their implementation. This has allowed the government to veil its widespread First Amendment violations against Muslims with the coat of national origin.

3 OPERATION BOULDER

Much of the information about Operation Boulder was obtained by the American-Arab Anti-Discrimination Committee (ADC) through a Freedom of Information Act (FOIA) request filed in 2008. The documents obtained revealed a nationwide focus on Arab nationals, including international students and organizations. In 1972, President Richard Nixon initiated Operation Boulder in response to the Munich Olympics terror attack. The attack occurred on September 5–6, 1972, leading to the deaths of eleven Israeli Olympic Team members. The attack was perpetrated by the terror group known as Black September, made up of Palestinian nationals, five of

whom were killed by police; the remaining members were taken into custody. Shortly after the attack, President Richard Nixon and the United States Department of State announced "special measures" for security.

In launching Operation Boulder, President Nixon and his administration cited the "terror threat facing the United States." A memorandum sent from A. J. Decker to Edward S. Miller, Assistant to the Director – Deputy Associate Director of the Federal Bureau of Investigation (FBI), stated that Operation Boulder was launched on September 18, 1972 with the establishment of the Interagency Group on Protection Against Terrorism in the United States (the Interagency Group). The coordinating body was chaired by Assistant Secretary of State for Administration Joseph Donelan.[1]

Another memorandum entitled "Arab Terrorist Activities – Internal Security – Middle East" and dated February 21, 1974, from FBI Director Clarence M. Kelley to Attorney General William Bart Saxbe, provides important information about the program. This memo stated that the aforementioned interagency committee met on four occasions, September 13, 18, 21, and 26, 1972. It also stated that government agencies represented in the group were the Immigration and Naturalization Service (INS); the Bureau of Customs; the Bureau of Alcohol, Tobacco and Firearms; the United States Department of State; the Department of Justice; and the FBI.

The memo stated the Interagency Group recognized that there was considerable ease in obtaining visas to visit the United States. The Interagency Group decided that Operation Boulder would be initiated at the Department of State to screen applicants of Arab background[2] who desired to visit the United States. The sentiment was that such a program would deter travel to the United States by visitors of Arab background.

According to a February 20, 1975 memorandum, "the program involves the systematic screening of visa applications submitted by ethnic Arabs anywhere in the world." During this time period, the US Department of State ran routine checks on the backgrounds of visa applicants. Operation Boulder required that all background checks on Arab visa applicants be handled by intelligence agencies, including the FBI and the Central Intelligence Agency (CIA). This additional step only applied to Arab applicants.

The afore referenced memorandum dated September 25, 1972, provided insight in some of the tactics used in Operation Boulder. The memo following up from the meeting of the Interagency Group was sent from A. J. Decker to E. S. Miller and

[1] Internal FBI Memorandum from A. J. Decker to E. S. Miller, Meeting of Interagency Group on Protection Against Terrorism in the United States, dated September 25, 1972.

[2] For the purposes of Operation Boulder, an Arab is defined as "any ethnic Arab who was born or whose parent(s) was born in one of the following countries; regardless of present nationality or country of residence: Algeria, Bahrain, Egyptian Arab Republic, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Trucial States, Tunisia, Yemen (Sanaa and Aden), United Arab Emirates."

stated that during the meeting Mr. Donelan asked "Immigration and Naturalization Service to request airlines not to grant Transit Without Visa privileges to Arab nationals traveling to the U.S." Additionally, Donelan sought the cooperation of airlines to insure that airline tickets were not issued to Arab nationals for transit throughout the United States. The same memo referenced that during the meeting the representative of the Treasury Department stated that he is "checking into the possibility of a 100 percent Customs check on all persons entering to the United States of Arab birth."

The memo goes on to highlight additional tactics the government would use during Operation Boulder. One such tactic was outlined by the representatives of the INS. The memo read:

> The INS members advised that all Arab overstays in the U.S. are being thoroughly checked by that service looking toward their possible deportation. INS advised there are presently 9,000 Arab students in this country, 15,000 other Arab non-immigrants and 56,000 permanent resident Arab aliens. The Arab residents and non-permanent resident aliens are being screened to insure that their status in the country is legal.[3]

In the same memo, Donelan indicated that "all State Department's posts throughout the world are forwarding to U.S. names of individuals of Arab birth who applied for U.S. visas. These names are in turn being forwarded to CIA and FBI for indices check. This procedure is being handled under the code name Operation Boulder." In October of 1972, the US State Department began to send telegrams to US embassies across the world with the phrase "Operation Boulder," signifying implementation of the program.

Operation Boulder also had a domestic surveillance component. Arab American civil rights and peace activists were targeted, including international students and those doing Palestine-related advocacy. One such document directs the FBI Special Agents in Charge (SAC) in Los Angeles and San Francisco to:

> Immediately ascertain details of Palestine Arab Fund Convention and furnish results of survey of your informant coverage as it is imperative that all individuals in attendance at this convention be identified and their connections with Arab terrorist activities ascertained. In addition to informant coverage, consideration should be given to photographic surveillances or other types of coverage.[4]

Although Operation Boulder did not implement a registry, it was significant as it laid the groundwork for future government programs targeting Arab and Muslim communities. Operation Boulder also set the precedent of denying visas and entry of Arab nationals to the United States on a large scale, and began the use of INS as a tool to target the Arab and Muslim communities. Boston University law professor

[3] Internal FBI Memorandum from A. J. Decker to E. S. Miller, *Meeting of Interagency Group on Protection against Terrorism in the United States*, dated September 25, 1972.

[4] *Id.*

Susan M. Akram noted in a March 2002 article in the *Arab Studies Quarterly* that the "Nixon Administration's 'Operation Boulder' [was] perhaps the first concerted US government effort to target Arabs in the United States for special investigation with the specific purpose of intimidation, harassment, and to discourage their activism on issues relating to the Middle East."[5]

The program was terminated by the State Department in 1975 over the objections of the FBI. However, Operation Boulder set into motion a series of future government programs targeting Arabs and Muslims. And in response to Operation Boulder and the increased surveillance and scrutiny targeting Arab American activists, impacted community members began to organize, despite knowing that they were most likely targets of heightened surveillance for their activism and work.

3.1 *President Jimmy Carter and Iran*

The late 1970s and early 1980s was a critical point in American foreign policy and defense priorities. The increased turmoil in the Middle East, exacerbated by the Iranian Revolution and the Iran hostage crisis in 1979, seeded the War on Terror, which after 9/11 was formalized and expanded to justify many policies that target Arab and Muslim communities.

In November of 1979, President Jimmy Carter took measures against Iranian nationals in the United States, and against those applying for visas to visit the United States, in response to the Iran hostage crisis. President Carter ordered Attorney General Benjamin R. Civiletti to immediately check the approximately 50,000 Iranian students to identify those "not in compliance with the terms of their entry visas and to take the necessary steps to commence deportation proceedings" against them."[6] Students were required to check in and register at designated locations throughout the country.[7]

Under the Carter plan, students and other Iranian nationals who were in the United States without documentation were afforded an opportunity to go through the deportation process.[8] However, the administration did not seek to expeditiously remove these individuals. In addition to the registration of Iranian students, the Carter administration put a ban on visas being issued to Iranian nationals.

The Carter plan targeting Iranian nationals was challenged in court. The case of *Narenji v. Civiletti*[9] was brought by nonimmigrant students from Iran and was heard in the D.C. Circuit Court. A full hearing was held on December 4, 1979. After the hearing Judge Joyce Hens Green held that the challenged regulation impermissibly

[5] Kevin R. Johnson & Susan Akram, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 NYU Ann. Surv. Am. L. 295 (2003), 314.
[6] John Goshki, *Carter Orders Deportation of Illegal Students*, Wash. Post, Nov. 11, 1979.
[7] *Id.*
[8] *Id.*
[9] Narenji v. Civiletti, 481 F.Supp 1132 (1979) 1146.

discriminated against aliens on basis of their national origin and therefore violated the Equal Protection Clause of the Fifth Amendment.[10] The court permanently enjoined further enforcement of the regulation and prohibited the government from using any information acquired through the application of the regulation.

The Carter administration appealed the lower court ruling of *Narenji v. Civiletti*. The case of *Narenji v. Civiletti*, 617 F.2d 745 (1979) was sent to the US Court of Appeals for the District of Columbia. On the appeal, the attorney general claimed that requiring appellee Iranian students to report to immigration officials was constitutional because the regulation's goal was to further the resolution of the Iranian hostage crisis and was rationally based.[11] The Court of Appeals reversed the lower court decision, and upheld the regulation. In its ruling the court held that the INS regulation was a valid exercise of authority delegated to the attorney general under the Immigration and Nationality Act.[12] The court also found that, despite the suspect nature of the national origin discrimination, such distinction are permissible when made by Congress or the executive in the field of immigration as long as they are not "wholly irrational."[13] Additionally, it was the opinion of the Court of Appeals that the district court had overstepped its role and should have declined to review a judgment made by the president in the field of foreign policy, especially when that judgment involved the congressional power over immigration and naturalization.[14]

The actions by the Carter administration are relevant today and have had an impact on programs implemented by other administrations. *Narenji v. Civiletti* provides legal support for the US government's use of immigration policies for national security purposes, and as tools in the War on Terror. The case was used to uphold a legal challenge against the National Security Entry Exit Registration System (NSEERS), a special registration program implemented shortly after the attacks of 9/11 by President George W. Bush. Carter's ban on Iranian nationals was cited as being similar in action to the Muslim ban implemented by Trump in January of 2017. Although the two actions had significant differences, the underlying objective was the same: the banning of Arabs and Muslims from entering the United States, created under the guise of national security.

3.2 *President Ronald Reagan, Libya, and the 1986 Contingency Plan*

Ronald Reagan easily defeated Jimmy Carter to win the presidency in 1980. After taking office, Reagan continued to shift the focus of American foreign policy away from the Cold War towards the Middle East and a more aggressive engagement in

[10] *Id.*
[11] Mary McGowan, *Narenji v. Civiletti: Equal Protection and the Iranian Crisis*, 31 Catholic U. L. Rev. 106 (1981).
[12] *Id.*
[13] *Id.*
[14] *Id.*

countering terrorism. From early on in his presidency, Reagan focused on Libya and Muammar Qaddafi, who he called "the mad dog of the Middle East" during a press conference in 1986.

Just as Nixon and Carter had done before him, Reagan looked to implement specific programs targeting Arab and Muslims under the guise of national security. As part of the effort to counter the perceived threat of Libya and Qaddafi, Reagan commissioned the Alien Border Control (ABC) Committee. The committee was created during a meeting in the Oval Office in June 1985 around the same time the tension between the United States and Libya began escalating.[15] The initial meeting of the committee was held on September 17, 1986, only a few months after the United States executed air strikes on Libyan cities, in what was known as Operation El Dorado Canyon.[16]

The lasting legacy of the ABC Committee is the drafting and publication of a memorandum titled "Alien Terrorists and Undesirables: A Contingency Plan." In 1987, the memorandum was leaked to an attorney representing the L.A. Eight. The case of the L.A. Eight involved eight Palestinian rights activists who were placed in deportation proceedings based on their alleged support for the Popular Liberation Front for Palestine (PFLP), a group within the Palestinian Liberation Organization. The proceedings were brought forward under the rules of "secret evidence." After the leak in 1987, the ABC Committee was abandoned. The ideas of the committee, including the controversial Contingency Plan, were not fully implemented – at least not immediately. In the years to come, the ideas of the Contingency Plan proved to be the foundation and cornerstone of many modern anti-immigrant and antiterror policies.

The Contingency Plan memo indicated that the ABC Committee was divided into four groups, and each group had a specific task. The groups and their tasks were:

- **Group 1**: Develop means and methods to prevent known terrorists from entering the United States;
- **Group 2**: Development of visa restrictions for aliens from certain countries or aliens of certain categories who are likely to be supportive of terrorist activity within the United States;
- **Group 3**: Expulsion from the United States of Alien activists who are not in conformity with their immigration status, and expeditious deportation of aliens engaged in support of terrorism[,] while protecting classified information and its sources; and,

[15] Ben Wofford, *The Forgotten Government Plan to Round Up Muslims*, Politico (Aug. 19, 2016).
[16] *Id.*

- **Group 4**: A review of contingency plans for removal of selected aliens from the U.S. and sealing of the borders.[17]

The participating government agencies that were part of the committee were the Federal Bureau of Investigation (FBI); Customs; the US Marshalls; the Immigration and Naturalization Service (INS); the Central Intelligence Agency (CIA); Department of Justice (DOJ); US State Department; and the Central Intelligence Agency (CIA).

The Contingency Plan described a plan for rounding up thousands of legal alien residents of eight specified nationalities. Furthermore, the plan also detailed legal measures that would be deployed, including rescinding the residents' right to bond and adding the prosecution's right to claim the privilege of confidential (secret) evidence and to exclude the public from deportation hearings. The plan also proposed vigorous prosecutions by the INS.

The Contingency Plan also called for the "suspension of entry" of specified nationals under Section 212(f) of the Immigration and Nationality Act (INA). Under this section, the president could order the INS to suspend entry of any class of aliens whose presence in the United States was deemed detrimental to public safety or national security. This is the same provision later used by President Trump to justify his Muslim ban.[18]

The memo also detailed a plan to detain and intern thousands of aliens while they awaited mass deportation, the implementation of which would require a massive detainment facility, 100 outdoor acres in the backwoods of Louisiana, and included specifications for tents, fencing materials, cot measurements, and plumbing requirements.

At the time the document was leaked and in subsequent interviews in the years following, many members of Reagan's committee insisted that "the document was not seriously considered – a bureaucratic fantasy with few meaningful ramifications – even as they defended the rationale that produced it."[19] The significance to those at the INS was clear – the agency was being used as a national security tool, in the same manner presidents Nixon and Carter used it.

Although only portions of the plan were implemented by the Reagan administration, it laid the groundwork for extreme anti-immigrant policies, and could be used as a guiding document by future administrations in response to a terror attack on US soil.

[17] Internal Memorandum: From the Immigration and Naturalization Service (INS) – Department of Justice (DOJ); To: Distribution List, *Alien Border Control Committee* (Oct. 10, 1986).

[18] Exec. Order No. 13769 (2017), 82 FR 8977.

[19] *See supra*, note 15.

4 GULF WAR I AND SPECIAL REGISTRATION

As Reagan's vice-president, George H. W. Bush was involved in the foreign policy shifts made by Reagan's administration. As president Bush took the United States to war in the Middle East. Between January 16 and January 17, 1991, the United States led coalition efforts against Iraq with a massive air campaign dubbed *Operation Desert Storm*. American military operations in Iraq continue to this very day.

On January 16, 1991, the same day the air strikes in Iraq began, a final rule was published in the Federal Register.[20] The rule required the registration and fingerprinting of certain nonimmigrants entering the United States with Iraqi and Kuwaiti travel documents. The rule was being enforced under Section 263 of the and INA,[21] which authorizes the attorney general to prescribe special regulations and forms for the registration and fingerprinting of certain aliens. At the time the rule was implemented, foreign travelers entering the United States were not required to be fingerprinted or register at their port of entry.

The 1991 rule amended Title 8 of the Code of Federal Regulations by adding a new section, Section 264.3, which "directs certain nonimmigrants bearing Iraqi and Kuwaiti travel documents who arrive in the United States on or after January 10, 1991, to be registered and fingerprinted by the Immigration and Naturalization Service at the Port of Entry to the United States."

In 1993, under the administration of Bill Clinton, the INS removed the regulations specific to Iraqi and Kuwaiti nonimmigrants, but added to the regulations at 8 CFR 264.1(f). The new language created "a provision that allowed the attorney general to require certain nonimmigrants of specific countries to be registered and fingerprinted upon arrival to the United States, pursuant to section 263(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1303(a)."[22]

With the 1993 addition, the attorney general was given authority to designate countries by Federal Register notice whose immigrants would be subject to registration upon arrival. In December of 1993, Attorney General Janet Reno required that nonimmigrants from Iraq and Libya be registered and fingerprinted under the new provision. Kuwait was effectively removed from the registration requirements, while Iraq was once again added. In September of 1996, Attorney General Reno used the same rule to include nationals of Sudan and Iran in the registration list.

The methods used by President George H. W. Bush and President Bill Clinton to implement registries is significant. Both presidents, in line with their predecessors, used the guise of national security, in response to the turmoil in the Middle East, to effectively target Arabs and Muslims for an early version of special registration.

[20] 56 Fed Reg. 1566.
[21] INA 8 U.S.C. 1303(a).
[22] *Id.*

Shortly after the attacks of 9/11, President George W. Bush used the same methods to implement the largest and most robust registration system this country has seen since World War II – NSEERS.

5 POST 9/11 AND THE NATIONAL SECURITY ENTRY EXIT REGISTRATION SYSTEM (NSEERS)

Immediately after the 9/11 attacks, a new era on the War on Terror dawned in the United States. In the weeks that followed, the US government took unprecedented steps in restricting civil liberties in the name of national security. Under the administration of President George W. Bush, the federal government, with support of Congress, enacted the USA PATRIOT Act, which broadened the surveillance power of the state.[23]

One of the more troubling programs implemented by the Bush administration was the National Security Entry Exit Registration System (NSEERS), which was implemented as a counterterrorism tool. It is important to note that the lead architect of the program for the Bush administration was Kris Kobach, who was serving at the time as counsel to Attorney General John Ashcroft. Kobach went on to become one of the most vocal and visible anti-immigrant voices in subsequent years. Working with the Federation for American Immigration Reform (FAIR), Kobach brought numerous lawsuits with the objective of enforcing anti-immigrant laws and measures. Kobach went on to play a significant role in the drafting of Arizona SB1070, which critics deemed one of the most anti-immigrant laws in the country. Ultimately Kobach would become a senior member of Trump's transitional team advising on issues related to immigration.[24]

The foundation for NSEERS was laid prior to the passage of the PATRIOT Act. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, Public Law 110 (IIRAIRA).[25] Section 110 of IIRAIRA introduced the concept of an electronic "entry and exit data system." Section 110 integrated arrival and departure information required under the law in an electronic format and in a Department of Justice or Department of State database, including those databases used at ports of entry and consular offices.[26]

Section 110 of IIRAIRA was amended in 2000 with the passage of the Data Management Improvement Act of 2000 (DMIA). The DMIA amended Section

[23] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[24] Alice Ollstein, *Who Is Kris Kobach*, ThinkProgress, *available at* https://thinkprogress.org/who-is-kris-kobach-d15bed25f216 (Nov. 21, 2016), accessed, Aug. 21, 2017.

[25] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[26] *Id.*

110 to clarify that the new entry and exit system should not be construed to permit the US government to impose any new documentary or data collection requirements. The DMIA also created a task force made up of governmental and private industry representatives to review the establishment of an entry and exit system.

After 9/11, the issue of the entry and exit registration system was revisited by Congress. The PATRIOT Act included a Sense of Congress that stated:

> In light of the terrorist attacks perpetrated against the United States on September 11, 2001, it is the sense of Congress that the attorney general, in consultation with the Secretary of State, should fully implement the integrated entry and exit data systems for airports, seaports, and land border ports of entry, as specified in section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act.[27]

The administration identified INA Sections 261, 262, 263, 264, and 265 as the statutory basis for NSEERS. Additionally, 8 CFR 264.1(f) was expanded and used to implement the NSEERS registration program. The INS amended 8 CFR 214.1 to require nonimmigrants selected for special registration to comply with 8 CFR 264.1 (f) as a condition of maintaining nonimmigrant status.

The program was divided into two phases. The first phase required certain nonimmigrants to register themselves at ports of entry and at local immigration offices for fingerprinting, photographs, and lengthy questioning. In September 2002, the INS announced by Federal Register notice that the "new program would be applied to those who were subject to the earlier registration program, specifically nonimmigrants from Iraq, Iran, Libya, Sudan" and it added nonimmigrants from Syria.[28] The "earlier registration program" mentioned to in the Federal Register notice refers to the 1993 and 1996 registration programs implemented by the Clinton administration.

The second phase, the more controversial aspect of the NSEERS program, was a "domestic" component that solicited registration from more than 80,000 males from Muslim-majority countries who were inside the United States on temporary visas.[29] Known as domestic or call-in registration, it was rolled out in four stages through publication in the Federal Register. Each stage included a separate group of countries, all of which were Muslim-majority nations, with the exception of North Korea. Males over the age of 16 from the designated countries were given a time period where they were mandated to register at a local INS office. The countries included in the designated groups were:

[27] PATRIOT Act, *supra* note 23 at 353.

[28] 67 Fed. Reg. 57032 (Sept. 6, 2002).

[29] Kareem Shora & Sivaprasad Shoba Wadhia, *NSEERS: The Consequences of America's Efforts to Secure Its Borders*, American-Arab Anti-discrimination Committee and Penn State, Dickenson School of Law (2009), 9–10.

- First Group: Iran, Iraq, Libya, Sudan, and Syria;
- Second Group: Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen;
- Third Group: Saudi Arabia and Pakistan;
- Fourth Group: Bangladesh, Egypt, Indonesia, Jordan, and Kuwait.

The implementation of the call-in registration resulted in complete chaos and was a logistical disaster. The program tore apart families, closed businesses, and forever changed the lives of those impacted. The program impacted nonimmigrant visa holders; these are individuals in the United States for a temporary visit, such as students, business travelers, or those in the country for medical treatment. Immigrant visa holders are individuals wishing to live permanently in the United States.

Local INS offices were not adequately trained or equipped to handle the registration process. Those forced to register stood in long lines for hours; some had to drive across state lines to get to the nearest INS office. Many nonimmigrants subject to the NSEERS program did not understand the details of the program, as the rules were unclear and public outreach and notice were insufficient. Those that did not register were charged with "failure to comply," which resulted in being placed in removal proceedings.[30]

In 2003, as part of the Homeland Security Act of 2002, administration of NSEERS was transferred to the Department of Homeland Security (DHS).[31] By interim final rule, NSEERS regulations were amended by the DHS in December of 2003, suspending the 30-day postarrival and annual reregistration requirements.[32] This step by DHS effectively stopped the registration component of NSEERS. Instead, it began to use other systems to ensure nonimmigrants remained in compliance with the terms of their visa and admission.[33]

By 2003 the call-in registration program had been phased out, although the DHS left open the possibility for domestic interviews in the future.[34] While the suspension rule was significant, it did not amend the special registration procedures at ports of entry or exit, nor did it change the penalty scheme for noncompliance.[35]

By September 2003, of the more than 80,000 individuals who had complied with call-in registration, 13,799 were referred to investigations and received notices to

[30] *Id.*, at 15, 19–20.

[31] Homeland Security Act of 2002, Pub. L. 107-296, secs. 402, 441, 442, 451, 1512(d), 1517, 115 Stat. 2135 (6 U.S.C. 202, 251, 252, 271, 552(d), 557); Homeland Security of 2002 Amendments, Pub. L. 10807, div. L, sec. 105 (2003); *see also* 6 U.S.C. 542 note; 8 U.S.C. 1103(a) 1551 note.

[32] 68 Fed. Reg. 67578 (Dec. 2, 2003).

[33] *Id.*, at 67579.

[34] Shoba Sivaprasad Wadhia, *Shutting Down Special Registration*, Medium, https://medium.com/@shobawadhia/shutting-down-special-registration-e40d25e9177b (Dec. 11, 2016). Accessed: Aug. 31, 2017.

[35] *Id.*

appear, and 2,870 were detained.[36] Despite the decision in 2003 to suspend registration, those charged with failure to comply still faced removal proceedings, and remaining in the United States was an uphill battle. It should be underscored that at the time of suspension not a single person was charged with a terrorism-related crime as a result of NSEERS – just as was the case with Operation Boulder, and the prior registration programs under presidents Carter and George H.W. Bush. In other words, these programs did not identify a single terrorist.

In 2011, under the Obama administration, the DHS published a notice in the Federal Register that indicated that the department would no longer register nonimmigrants under NSEERS and would remove all countries from the NSEERS compliance list.[37] This was a partial victory. Although the countries were removed and the registration program was officially over, the statutory regulations allowing for NSEERS were still active. This meant that the program could be reinstated by simply relisting the countries.

The effort to delist the countries was a result of years of advocacy from community organizations, including the American-Arab Anti-Discrimination Committee (ADC); the Center for Immigrants' Rights at the Pennsylvania State Dickinson School of Law; the American Civil Liberties Union (ACLU); the National Lawyers Guild (NLG); and the American Immigration Lawyers Association (AILA). NSEERS was an issue that mobilized the legal and grassroots communities. Organizations worked directly with registrants across the country, providing pro bono legal services and support. Litigation was another strategy, and so was constant pressure put directly on the DHS by representatives from impacted communities. There was a constant demand from impacted communities for the full termination of the NSEERS regulatory framework.

Strong coalitions were built during the fight against NSEERS, and these coalitions would reengage once again to address the issue shortly after the November 2016 election. NSEERS was a policy that openly discriminated against Arab and Muslims. Similar programs had been implemented in the past, but were done quietly. NSEERS was done openly and under the guise of national security. The rationale used for NSEEERS mirrors that used for Trump's Muslim ban. NSEERS brought into the public the use of national security to implement programs targeting Arabs and Muslims.

6 FULL NSEERS TERMINATION

At the time Donald Trump was elected to serve as the 45th president, NSEERS was a distant memory for the community. Few organizations maintained the pressure on the Obama administration, regularly advocating for full termination of the NSEERS

[36] Shora & Wadhia, NSEERS Report *supra* note 29 at 9–10.
[37] 76 FED. REG. 23830 (Apr. 28, 2011).

regulation. Community advocates knew that only a full termination would completely get rid of the program. There were attempts at litigation; however, lawsuits challenging the NSEERS program failed, with the court relying heavily on the precedent of *Narenji v. Civiletti*, the same case that upheld president Carter's registration program.[38]

Once Trump's intentions of establishing a Muslim Registry became known in 2015, there was chatter among advocates that the easiest way for him to do this would be to reactivate NSEERS.[39] At the time, he was still considered a long shot at winning the election. Unsurprisingly, the concerns of advocates and community members escalated after Trump defeated Hillary Clinton in the November election.

Shortly after the election, the anti-NSEERS coalition that formed in the early 2000s began working on a strategy to once again pressure the Obama administration to terminate the regulation. The coalition strongly believed that Trump had intentions of reactivating NSEERS, and treated the matter with a sense of urgency.

The suspicions that Trump would use NSEERS to implement his Muslim Registry were confirmed after the aforementioned Kris Kobach was pictured walking into a meeting with President-Elect Donald Trump on November 21, 2016. At first the picture looked inconspicuous; however, Kobach is pictured holding a briefing memo, which was intended to be confidential. The memo was a "strategic plan" for the DHS, and the top two items were:[40]

1. Update and reintroduce the NSEERS screening and tracking system (National Security Entry-Exit Registration System) that was in place from 2002 to 2005. All aliens from high-risk areas are tracked.
2. Add extreme vetting questions for high-risk aliens: question them regarding support for Sharia law, jihad, equality of men and women, the United States Constitution.

Kobach, the architect of NSEERS, offered photographic evidence that President-Elect Trump was indeed looking to reactivate the program.

On the same day the picture revealed the intention of the Trump administration, the ADC submitted a letter to President Obama on behalf of 200 organizations, calling on his administration to rescind the regulatory framework behind NSEERS.[41] Many of the same organizations who had worked to initially address

[38] Kevin Johnson & Bernard Trujillo, *Immigration Reform, National Security after September 11, and the Future of North American Integration*, 91 Minn. L. Rev. 1369, 1384 (2007).

[39] Kylie Atwood, *Donald Trump Is Not Ruling Out Using Databases to Track Muslims*, CBS News, Nov. 20, 2015.

[40] Caroline Kenny, *Photo of Trump-Kobach Meeting Reveals Apparent DHS Proposal*, CNN (Nov. 21, 2016).

[41] American-Arab Anti-discrimination Committee (ADC), *ADC and 200 Organizations Demand End to NSEERS*, http://www.adc.org/2016/11/breaking-adc-and-nearly-200-organizations-demand-rescinding-of-nseers (Nov. 22, 2016). Accessed: Aug. 11, 2017.

NSEERS were once again working together for a last attempt to get the program fully terminated.

The campaign involved bringing together legal experts, former government officials, security experts, as well as representatives of impacted communities who worked directly with the registrants. The coalition was able to raise public awareness about the history of NSEERS,[42] and the danger of the program under a Trump administration. Conversations and meetings with high-level government officials provided community representatives an opportunity to state their case directly as to why NSEERS must be fully terminated.

On December 23, 2016, the DHS published a notice in the Federal Register indicating that the Obama administration was fully terminating the NSEERS regulations[43] – a victory that community members and advocates worked nearly 15 years to obtain. The Federal Register read, "The Department of Homeland Security (DHS) is removing outdated regulations relating to an obsolete special registration program for certain nonimmigrants."[44] The Federal Register indicated that NSEERS was an obsolete program that had no use. At the time of the decision, the DHS had implemented new programs aimed at capturing data on all travelers entering and exiting the United States, regardless of national origin.

The Federal Register went on to state, "DHS is removing the special registration program regulations found in 8 CFR 264.1(f) ... DHS is making a conforming amendment to 8 CFR 214(f) to remove specific reference to 8 CFR 264(f), which INS added when it implemented NSEERS in 2002."

The decision to terminate NSEERS by the Obama administration was welcomed by many on the left, and specifically, by Muslim Americans and their allies. It is important, however, to note that during his administration Obama did implement problematic programs that targeted Arab and Muslim community members. The Obama administration's insistence on pushing for limiting access to the Visa Waiver Program provided the Trump administration a framework for determining which countries were subject to the Muslim ban. President Trump used the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 (VWP Act) to identify the original countries which were part of the Muslim ban.[45]

[42] American-Arab Anti-discrimination Committee (ADC), *Call on Obama to Rescind NSEERS*, http://www.adc.org/2016/12/take-action-call-on-the-obama-administration-to-rescind-nseers-regulation/ (Dec. 2, 2016). Accessed: Aug. 12, 2017.

[43] Kevin Liptak & Shachar Peled, *Obama Administration Ending Program Once Used to Track Mostly Arab and Muslim Men*, CNN (Dec. 22, 2016).

[44] 81 Fed. Reg. 94231 (Dec. 23, 2016).

[45] Kyle Blaine & Julia Horowitz, *How the Trump Administration Chose the 7 Countries in the Immigration Executive Order*, CNN (Jan. 30, 2017).

7 THE MUSLIM REGISTRY: WHAT'S NEXT?

Within his first weeks in office, President Trump fulfilled his key campaign promise of implementing a Muslim ban. His actions through executive order prompted an immediate nationwide response against the ban. Lawyers and activists flooded to airports, and advocates worked with those from the impacted countries to get a better understanding of what was happening.[46] After multiple versions of the ban, and many lawsuits, the executive order was reviewed by the US Supreme Court in the fall of 2017. In June of 2018 the US Supreme Court, in a 5–4 decision upheld the constitutionality of the Muslim ban. In the decision, the Court found that the president had the authority to implement the ban, and that his history of incendiary statements about Muslims did not undermine his authority.[47]

Trump has shown his willingness to implement a Muslim ban, and did so with three executive orders, but the question remains whether he will move forward with a Muslim registry. Of course, one option available to Trump is to reintroduce an NSEERS-style program, and go through the full notice-and-comment period, followed by implementation. One would believe that if he wanted to go this route he would have done so already. Trump has said in interviews that a registry would not focus on a single religion, at least facially, but rather on individuals from high-risk countries. This is the same reasoning the Trump administration used to defend the Muslim ban, arguing that the order did not explicitly single out Islam in the text of the order. Given the similarities, it is conceivable that any attempt to reintroduce NSEERS or a similar program will be met with immediate legal challenges.

Why hasn't Trump reintroduced NSEERS, or a similar program? Was he serious about a registry? To answer these questions, we must rethink what a Muslim registry would look like today. When the issue of a registry is raised, the immediate image is of Arabs and Muslims being forced to stand in long lines, have their fingerprints taken, and answer intrusive questions, just as they did under presidents Carter, George H. W. Bush, Clinton, and George W. Bush.

As technology has advanced, the US government has likewise enhanced its capabilities at capturing biometric information about travelers entering the United States. Intrusive surveillance programs have also made it easier for government agencies to track individuals, including US citizens. If the objective of a registry is to build a database of a group of individuals, the Trump administration can achieve this objective without the spectacle of a public registration program.

The fact is that Trump may already be building his Muslim registry, by using surveillance tools at his disposal. It is fair to concede the fact that the Trump administration is collecting data on Arabs and Muslims, including US citizens.

[46] Abed Ayoub & Khaled Beydoun, *Executive Disorder: The Muslim Ban, Emergency Advocacy, and the Fires Next Time*, 22 MICH. J. RACE & L. 215 (2017).

[47] Trump v. Hawaii, 138 S. Ct. 2392 (2018).

The collection of data on Arab and Muslim communities has happened under prior administrations. The strategy used may be in line with Operation Boulder, a confidential program that was mostly implemented without public knowledge. Such a confidential program will also prevent any legal challenges, unless of course details of the program are leaked.

The important question to ask is: What will President Trump do with the data and information already collected, and how will he use past practices to decide what his approach will be? In the event of a terror attack of the scope of 9/11, will Trump look at the 1986 Contingency Plan for guidance on how to move forward with large-scale mass round-ups and internment camps? As with many things with the Trump administration, the answer is not clear.

What is certain is that the ideas of bans and registries are not new. These concepts were not introduced by Trump. Trump's rhetoric has followed the actions of his modern-era predecessors, starting with Nixon and going all the way to Obama. What Trump does next will only add to the continuing history of the practice of using registries to target Arab and Muslim community members. Trump's rhetoric against Arabs and Muslims has intensified, and is more explicit. The rhetoric, coupled with the spirit of his policies, continues a long-standing practice of singling out Muslims at the border, and beyond.

9

National Security's Broken Windows

Amna A. Akbar [*]

1 INTRODUCTION

In California's Bay Area, from 2004 to 2008 and likely after that, the Federal Bureau of Investigation (FBI) undertook a mosque outreach project[1] under the auspices of community outreach and engagement. FBI agents met with representatives of area mosques on multiple occasions[2] and openly attended religious sermons. In speaking with congregants, the FBI courted complaints about hate crimes[3] and listened to expressions of anxiety about a federal investigation of imams in nearby Lodi.[4] On one occasion, when a congregant at a particular mosque "expressed an interest in continuing a dialogue with the FBI and agreed to schedule a[n] outreach meeting

[*] This chapter is an excerpt of the previously published article *National Security's Broken Windows*, 62 UCLA L. Rev. 834 (2015).

[1] Am. Civil Liberties Union, ACLU Eye on the FBI: The San Francisco FBI Conducted a Years-Long Mosque Outreach Program That Collected and Illegally Stored Intelligence about American Muslims' First Amendment-Protected Religious Beliefs and Practices (2012) [hereinafter Eye on the FBI (2012)], http://www.aclu.org/files/assets/aclu_eye_on_the_fbi_-_mosque_outreach_ 03272012_0_0.pdf; Am. Civil Liberties Union, ACLU Eye on the FBI: The FBI Is Using the Guise of "Community Outreach" to Collect and Illegally Store Intelligence Information on Americans' Political and Religious Beliefs (2011) [[hereinafter Eye on the FBI (2011)], *available at* http://www.aclu.org/files/assets/aclu_eye_on_the_fbi_alert_-_community_outreach_as_intelligence_gathering_0.pdf [hereinafter FBI Memorandum (Feb. 22, 2005)], http://www.aclu.org/files/fbimappingfoia/20120302/ACLURM017868.pdf.

[2] Memorandum from the Fed. Bureau of Investigation's San Jose Resident Agency (Oct. 4, 2005) [hereinafter FBI Memorandum (Oct. 4, 2005)], http://www.aclu.org/files/fbimappingfoia/20120302/ACLURM017902.pdf; Memorandum from the Fed. Bureau of Investigation's San Jose Resident Agency (June 29, 2007), {hereinafter FBI Memorandum (June 29, 2007), http://www.aclu.org/files/fbimappingfoia/20120302/ACLURM017968.pdf.

[3] FBI Memorandum (Feb. 22, 2005), *supra* note 1.

[4] Memorandum from the Fed. Bureau of Investigation's San Jose Resident Agency (Aug. 25, 2005), http://www.aclu.org/files/fbimappingfoia/20120302/ACLURM017890.pdf.

with the entire Mosque," the FBI "offered to come and speak to the [whole] congregation."[5] FBI records indicate that "all topics from [the] USA Patriot Act to local street gangs were open for discussion."[6]

This Bay Area example illustrates what many want from law enforcement: efforts at improving communication and collaboration with communities typically on the wrong side of the gun. On the surface, it appears the FBI is working to build open lines of communication with Muslim communities, to learn about community concerns, and to provide reassurance that law enforcement is committed to equal protection for all communities. Indeed, the federal government anchors its community engagement with Muslim communities in a broader history and language: that of community policing with marginalized groups in the ordinary criminal context, calling on principles of communication, collaboration, and trust building.

On closer inspection, however, these seemingly supportive practices reveal a more difficult reality. The same redacted FBI documents that memorialize these FBI meet-and-greet efforts are marked as "positive intelligence," and "disseminated outside FBI," indicating that the information was instrumentalized as surveillance. The records detail the FBI's broad collection of information: the topic of a particular sermon is noted,[7] along with names and phone numbers of the people with whom the FBI spoke,[8] the relationship between an Islamic school and its parent organization,[9] the logistics of a community's recent move to a new mosque,[10] and congregants' political opinions. Back at the field office, FBI agents sometimes gathered further information on those with whom they had met. In effect, then, the FBI's outreach aimed in significant part to collect intelligence on local Muslim communities and community institutions, intelligence that could then be leveraged to achieve other ends. This complicated reality – that community policing brings new law enforcement scrutiny to an already marginalized community – also hearkens back to community policing in the ordinary criminal context.

The events in the Bay Area represent just one instance of federal community engagement with Muslim communities. Although law enforcement initiatives aimed at Muslim communities existed before 9/11, these efforts were few and far between. The years following the attack on the World Trade Center saw a push by the Department of Justice (DOJ) and the FBI to engage Muslim, Arab, and South Asian (MASA) communities. The FBI conducted more than 500 meetings with more than 600 organizations and mosques nationwide, and DOJ's Community

[5] FBI Memorandum (Feb. 22, 2005), *supra* note 1.
[6] *Id.*
[7] Memorandum from the Fed. Bureau of Investigation's San Jose Resident Agency (Mar. 8, 2005) [hereinafter FBI Memorandum (Mar. 8, 2005)], http://www.aclu.org/files/fbimappingfoia/20120302/ACLURM017871.pdf.
[8] FBI Memorandum (June 29, 2007), *supra* note 2.
[9] FBI Memorandum (Oct. 4, 2005), *supra* note 2.
[10] Memorandum from the Fed. Bureau of Investigation's San Jose Resident Agency (July 25, 2005), http://www.aclu.org/files/fbimappingfoia/20120302/ACLURM017887.pdf.

Relations Service (CRS) held more than 250 forums across the country.[11] The Department of Homeland Security (DHS) eventually entered the fray, supporting community outreach through its Office for Civil Rights and Civil Liberties (CRCL). More recently, with the rise of the Islamic State of Iraq and Syria (ISIS), the federal government has pushed anew for community engagement as a tool to prevent American Muslims from traveling abroad to join ISIS.

This chapter focuses on federal law enforcement community engagement efforts with American Muslim communities. In government accounts and the popular imagination, community engagement efforts are soft, preventative, collaborative policing efforts, drawing on the history and gravity of community policing in the ordinary criminal context – measures meant to be celebrated across the political spectrum.

A central insight of this chapter is as straightforward as it might be surprising: Community engagement in the national security context shares some of the problems of community policing in the ordinary criminal context. As with the criticisms lodged against broken-windows style community policing, counterradicalization-fueled policing serves to further marginalize an already marginalized community on the grounds of its difference. Moreover, as with community policing, community engagement efforts increase the presence of law enforcement in already overpoliced communities and exacerbate intracommunity inequalities.

2 A TAXONOMY OF NATIONAL SECURITY COMMUNITY POLICING

2.1 *The Schematic of Policing Radicalization*

Mainstream accounts of post–9/11 national security policing emphasize the federal government's new commitments to a preventative framework for fighting terrorism and gathering intelligence. Although this narrative obscures the existence of preventive approaches and intelligence gathering before 9/11, it embodies important kernels of truth: The overt, almost performative, post-9/11 merger of prevention, intelligence gathering, national security, and criminal power changed the nature of contemporary policing in the United States.

Theories of radicalization, counterradicalization, and countering violent extremism (CVE) have been important engines in the movement of national security policing from the realm of emergency to the realm of routine. Radicalization

[11] Heather J. Davies et al., Police Exec. Research Forum, Protecting Your Community from Terrorism: The Strategies for Local Law Enforcement Series: Vol. 2: Working with Diverse Communities 19-20 (2004); Press Release, *FBI Nat'l Press Office, Director Meets with Key U.S. Leaders of National Arab, Muslim, and Sikh Organizations* (Feb. 13, 2002), http://www.fbi.gov/news/pressrel/press-releases/value-of-the-continuing-assistance-from-the-arab-muslim-and-sikh-communities-in-the-overall-effort-to-provide-greater-security-for-all-americans [hereinafter Director Meets with Key U.S. Leaders].

theory – which also grounds ideas about violent extremism – was exported from the British government to the US government through the DOJ and the New York Police Department (NYPD). The theory correlates religiosity and politicization in Muslims with the potential for terrorism. The government's embrace of radicalization theories provides a new imperative to surveil and shape religious and political activities of Muslims. That same embrace has also spawned a growing number of counterradicalization and CVE initiatives, of which law enforcement and community engagement efforts are an increasingly important part.

Law enforcement's embrace of radicalization and counterradicalization has become central in our domestic approach to national security. A 2006 FBI report and 2007 NYPD report constitute the building blocks of this evolution. Since the publication of these reports, both entirely focused on Muslims, US federal and local government literature has taken for granted that a problem of Muslim radicalization exists in – and even plagues – the United States.

The FBI's report, *The Radicalization Process: From Conversion to Jihad*, asserts the existence of an identifiable and predictable process by which a Muslim becomes a terrorist.[12] The FBI identifies the four stages of radicalization as "preradicalization," "identification," "indoctrination," and "action."[13] The report is vague about the data on which it relies, with almost no citations, sourcing, or clear methodology.

The NYPD's report, *Radicalization in the West: The Homegrown Threat*, posits a similar four-stage process: "pre-radicalization," "self-identification," "indoctrination," and "jihadization."[14] Each stage has "specific signatures associated with it."[15] The first three stages of radicalization focus on where Muslims live and congregate, manifestations of their religious and political beliefs, and political, social, and religious activities.[16] The process culminates in the final stage, jihadization, when intent to commit a criminal act first forms.[17]

Despite deep contestation of this theory, a radicalization discourse focused on Muslims has become the mainstay of US law enforcement's preventive approach to national security. Central ideas include the following: First, radicalization is a somewhat predictable process with visible markers and geographies by which Muslims become willing and able to commit violence against the United States (or American interests) in the name of Islam or the global Muslim community. Second, the government, as part of its investment in national security, must monitor

[12] FBI Counterterrorism Div., The Radicalization Process: From Conversion to Jihad 2 (2006).
[13] *Id.*, at 3.
[14] Mitchell D. Silber & Arvin Bhatt, NYPD Intelligence Div., Radicalization in the West: The Homegrown Threat 21 (2007).
[15] *Id.*
[16] *Id.*, at 22–44.
[17] *Id.*, at 47–48.

and counter radicalization. Third, radicalization emerges from religious and political currents within Muslim communities.

Radicalization and counterradicalization have become the language of prevention in national security criminal law. With the federal government at the helm, this commitment is echoed far and wide, from state and local police to DHS, DOJ, FBI, and US Attorneys' offices. As a result, federal law enforcement, with the aid of state and local police, spends considerable resources monitoring and shaping political and religious cultures in Muslim communities.

The federal government has undertaken numerous initiatives to counter radicalization and violent extremism – almost entirely focused on Muslims, despite assurances to the contrary. The House and Senate Homeland Security Committees, for example, have held hearings and issued reports emphasizing the need for government agencies to monitor and respond to radicalization. The White House issued two national security strategy papers in 2010 and 2011, emphasizing the need to counter violent extremism and radicalization,[18] and two blueprints for "empowering local partners to prevent violent extremism in the United States."[19] The DHS, the National Counterterrorism Center (NCTC), the FBI, the National Security Agency (NSA), and the DOJ have also prioritized counterradicalization and CVE programming and research.[20] In 2014, the Obama administration announced a pilot program to respond to the lure of ISIS for American Muslims, the White House held a three-day CVE summit, and the DHS secretary toured mosques around the country.[21]

Community engagement represents but one of a range of policing techniques deployed in counterradicalization efforts. The specific techniques essential to policing radicalization include mapping, voluntary or pretextual interviews, recruitment and deployment of informants, Internet monitoring, and community engagement. These tactics are aimed at gathering intelligence on, as well as shaping, the religious and political currents in Muslim communities – the geographies where Muslims gather and collective identities emerge.[22] The tactics also attempt to

[18] Exec. Office of the President, National Security Strategy 8 (May 2010) [hereinafter National Security Strategy], http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_ strategy.pdf; Exec. Office of the President, National Strategy for Counterterrorism 2 (June 2011) [hereinafter Strategy for Counterterrorism], http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf.

[19] Empowering Local Partners, *infra* note 31, at 1; Exec. Office of the President, Strategic Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States 8 (Dec. 2011), https://www.whitehouse.gov/sites/default/files/sip-final.pdf [hereinafter Strategic Implementation Plan].

[20] Amna Akbar, *Policing "Radicalization,"* 3 U.C. Irvine L. Rev. 827 (2013).

[21] Samantha Masunaga, *Homeland Security Head Aims to Build Trust in L.A. Muslim Community*, L.A. Times (Nov. 13, 2014, 8:35 PM), http://www.latimes.com/local/california/la-me-1114-mosque-visit-20141114-story.html; Julie Hirschfeld Davis, *Obama Urges Global United Front Against Extremist Groups Like ISIS*, N.Y. Times (Feb. 18, 2015), http://www.nytimes.com/2015/02/19/us/obama-to-outline-nonmilitary-plans-to-counter-groups-like-isis.html

[22] Akbar, *supra* note 20, at 854.

identify individuals of concern by relying on participation from Muslim community members and forms of coercion that vary from mild to severe, including incentivized cooperation.

The tactics of policing radicalization exist in symbiosis, all feeding into each other. Given the dynamic relationship among these techniques, a brief summation is necessary in order to appreciate national security community engagement in context.

Mapping refers literally to the practice of generating maps that detail wherever Muslims gather, whether in schools, mosques, or hookah bars. The FBI's 2008 Domestic Investigations and Operations Guide (DIOG) empowers FBI field offices to collect, map, and analyze racial and ethnic demographic information, including the location of businesses and other facilities servicing those demographic groups.[23] Drawing on commercially available information and government databases, FBI offices have mapped the demographics of concentrated Muslim communities. The FBI puts such maps to use in its community engagement efforts.[24]

Voluntary or pretext interviews – known as "knock and talks" in the ordinary criminal context – are a more visible method of policing radicalization. Agents may approach individuals in mosques, or at home, work, or community institutions. They may identify the agency for which they work, or may simply cite a generic relationship with the US government. In theory voluntary, the police contact involves substantial coercive force. Individuals targeted are often "led to believe they [are] compulsory."[25] Law enforcement officials regularly ask about religious and political opinions and activities: the purpose of a recent trip to Pakistan or Saudi Arabia, for example, or opinions on the Arab Spring or drone strikes in Pakistan. These interviews appear to be triggered by national origin and ethnicity as well as by travel and speech activity, including consumption of speech (for example, watching lectures online or visiting particular websites). Interviews are regularly geared toward collecting information on religious and political opinions, whether individual or collective, or cultivating informants, both formal and informal.

Informants are key to national security policing, just as they are in the ordinary criminal context. Problems of police coercion, secrecy, and lack of accountability persist in both contexts. The NYPD, for example, recruits informants for counterterrorism projects by scanning the general citywide arrest rolls for individuals hailing from Muslim countries, regardless of the crime for which they were arrested.

Informants are widespread in Muslim communities, stationed within mosques, Muslim student groups, social networks, and so on. The government's approach in

[23] FBI, Domestic Investigations and Operations Guide §§ 4.3.3.2.1, 4.3.2.2.2 (2008), *available at* http://vault.fbi.gov/administrative-policy-procedures.

[24] Internal Memo from the Fed. Bureau of Investigation Regarding Implementation of Specialized Community Outreach Team 6 (Jan. 7, 2009) (on file with author).

[25] Arun Kundnani, The Muslims Are Coming! Islamophobia, Extremism, and the Domestic War on Terror 214 (2014).

deploying informants in this way is less likely to be geared toward collecting information on a specific individual or criminal plot, and more likely tilted toward gathering "as much information on as many people in the Muslim community as possible."[26] Law enforcement uses informants to gather and test opinions, in a practice reminiscent of past police infiltration of radical political groups such as the Communist Party and various Black liberation organizations. Informants may serve as passive listeners, gathering information about individuals' religious and political views or vulnerabilities (such as immigration status, LGBT/queer identities, or marital indiscretions) that can be used to pressure individuals into becoming informants. Informants also test impressionability, attempting to provoke reactions by making "radical" or "extreme" statements and then monitoring people's responses and their susceptibility to radical or extreme points of view. Perhaps even more troubling, according to a 2014 report by Human Rights Watch and Columbia Law School's Human Rights Institute, all but four of the last decade's high-profile terrorism prosecutions resulted from FBI sting operations, in which the FBI informant was directly involved in proposing, crafting, facilitating, and inducing a terrorist plot.[27]

Law enforcement also monitors what Muslims consume and post about their opinions and activities online, whether via email listservs, blogs, websites, chatrooms, or social media.[28] These efforts seem to focus on those who download content by particular Muslim scholars such as Anwar al-Aulaqi, who post on Muslim-identified news websites or participate in Muslim-identified chat/discussion forums focused on religious discourse and US foreign policy, or those who watch "jihadi" videos. Internet monitoring triggers voluntary interviews as well as informants and undercover law enforcement "urging [young men] down the perceived path toward radicalization."[29]

Post–9/11 changes to the FBI's investigative guidelines allow for broad, minimally regulated use of these tactics. No suspicion of criminal wrongdoing is required before an ordinary agent can deploy these investigative powers. The FBI can use unlimited physical surveillance, conduct pretextual interviews, and deploy

[26] Declarations of Craig Monteilh Submitted by Plaintiffs in Support of Their Oppositions to Motions to Dismiss at 7, *Fazaga v. FBI*, 884 F. Supp. 2d 1022 (C.D. Cal. 2012) (No. 11-00301) [hereinafter Declarations of C. Monteilh].

[27] Human Rights Watch & The Human Rights Inst. at Columbia Law Sch., Illusion of Justice: Human Rights Abuses in U.S. Terrorism Prosecutions 27 (2014) [hereinafter Illusion of Justice], https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/report_final_draft.pdf

[28] Diala Shamas & Nermeen Arastu, Mapping Muslims: Nypd Spying and Its Impact on American Muslims 40 (2013); Illusion of Justice; Adam Goldman & Matt Apuzzo, *Informant: NYPD Paid Me to 'Bait' Muslims*, Associated Press (Oct. 23, 2012), www.ap.org/Content/AP-In-The-News/2012/Informant-NYPD-paid-me-to-bait-Muslims; Ramzi Kassem, *Praying While Muslim*, Nation, July 2–9, 2012, at 25.

[29] *Id.*, at 26.

confidential informants, absent any suspicion of wrongdoing or "particular factual predication."[30] Moreover, these tools can be mobilized based mostly on First Amendment activity – for example, on attendance at a particular mosque or harsh criticism of American foreign policy. Nor are these techniques meaningfully regulated by the Constitution: The techniques do not require a warrant. Moreover, the Fourth Amendment's protections against unreasonable search and seizure can be waived if law enforcement obtains consent, a concept construed loosely and without regard to the particular mechanics of coercion in interactions between police and marginalized communities.

2.2 *The Particulars of Community Engagement*

Countering violent extremism was a signature policy of the Obama administration's national security agenda. In 2011, the White House announced its commitment to community engagement as a "whole-of-government approach" to responding to the threat of radicalization and violent extremism,[31] and then issued a "strategic implementation plan" for its strategy.[32] In so doing, the White House put its weight behind government–community engagement as a national security, CVE, and counterradicalization strategy.

2.3 *The Players*

The Obama administration's community engagement plan leaned heavily on law enforcement. Around the country, with the DOJ and DHS at the helm, federal, state, and local police departments put significant resources toward community engagement programs with Muslim communities.[33] Echoing the imagined role of communities in community policing efforts in the ordinary criminal context, community engagement initiatives are premised on the idea that Muslim communities can serve as key partners in counterterrorism work. Community engagement depends on some form of buy-in from, and contacts in, Muslim communities. Cultivating these contacts is an important aspect of these initiatives. FBI field offices, for example, aim to "identify and develop relationships with community

[30] Office of the Att'y Gen., The Attorney General's Guidelines for Domestic FBI Operations 17 (2008); FBI, Domestic Investigations and Operations Guide 4-13 to 4-14, 5-2, 6-7 (2011) [hereinafter FBI DIOG. 2011].

[31] Exec. Office of the President, Empowering Local Partners to Prevent Violent Extremism in the United States 2, 8 (Aug. 2011), https://www.whitehouse.gov/sites/default/files/empowering_ local_partners.pdf [hereinafter Empowering Local Partners]

[32] Strategic Implementation Plan, *supra* note 19, at 7–21.

[33] *Working with Communities to Disrupt Terror Plots: Hearing before the Subcomm. on Intelligence, Info. Sharing, & Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 111th Cong. 10 (2010) [hereinafter *Working with Communities Hearing*] (statement of Margo Schlanger, Officer for Civil Rights & Civil Liberties, Dep't. of Homeland Sec.)

leaders and other individuals who have influence in their communities and may be helpful conduits of information for the communities."[34] In turn, "these leaders make up a network of contacts the field office can reach quickly in the event there is a threat ... [or] when the FBI needs public assistance to support an ongoing investigation, to address concerns about FBI activities reported in the news media."[35]

While it is unclear precisely how partners are selected, community partners in these efforts include religious and civic organizations. Partners have included major American Muslim civil rights organizations, mosques, community and religious leaders, scholars, and elders.[36] Individuals who participate in one community engagement initiative – such as a citizen-training initiative – often participate in other community engagement efforts.

The DOJ engages in extensive community engagement efforts through many of its offices and divisions. DOJ's community engagement efforts have included its Community Relations Service (CRS), Civil Rights Division, US Attorneys' offices, and Office of Justice Programs.[37] The FBI undertakes its own efforts through its Community Outreach Program.[38] Each of the fifty-six FBI field offices has a community outreach program coordinated by a professional community outreach specialist or a special agent community outreach coordinator.[39] Around the country, US Attorneys have met with Muslim community leaders.[40] Many of these efforts constitute interagency or intergovernmental efforts.

Outreach efforts also take place at the state and local level, though these efforts are mostly derivative of federal efforts. The DOJ and DHS fund and encourage local police departments to initiate outreach with Muslim communities, or to refashion preexisting outreach through a counterradicalization framework. Local initiatives often come out of immigrant outreach efforts: For example, in St. Paul, Minneapolis, the police department's Muslim/Somali outreach was known as the African

[34] *Id.*, at 13 (statement of Brett Hovington, Supervisory Special Agent, Head of Comm. Relations Unit, FBI).

[35] *Id.*, at 14.

[36] *Id.*, at 13; KUNDNANI, *supra* note 25, at 220–21.

[37] Eric Holder, U.S. Att'y Gen., Speech at American Arab Anti-Discrimination Committee's 30th Anniversary National Convention (June 4, 2010), www.justice.gov/ag/speeches/2010/ag-speech-100604.html; JEROME P. BJELOPERA, CONG. RESEARCH SERV., R42553, COUNTERING VIOLENT EXTREMISM IN THE UNITED STATES 5–9 (2014); Aziz Z. Huq, *The Social Production of National Security*, 98 CORNELL L. REV. 17–22 (2013).

[38] *Working with Communities Hearing*, *supra* note 33, at 13 (statement of Brett Hovington, Supervisory Special Agent, Head of Comm. Relations Unit, FBI).

[39] *Id.*, at 15–16; Eric Holder, *supra* note 37.

[40] STRATEGIC IMPLEMENTATION PLAN, *supra* note 19, at 8 (2011); Press Release, Dep't of Justice, Office of Pub. Affairs, Attorney General Holder Announces Pilot Program to Counter Violent Extremists (Sept. 15, 2014), http://www.justice.gov/opa/pr/attorney-general-holder-announces-pilot-program-counter-violent-extremists; Spencer Ackerman, *Obama Administration Launches Program to Combat Radicalization*, THE GUARDIAN (Sept. 15, 2014, 5:18 PM), http://www.theguardian.com/world/2014/sep/15/obama-administration-american-muslims-radicalization.

Immigrant Muslim Coordinated Outreach Program (AIMCOP).[41] The DOJ provided the police department with a $670,000 grant to reframe the preexisting effort to focus on counterradicalization.[42]

2.4 *The Mechanisms*

Within the broader framework of community engagement, federal, state, and local law enforcement have stepped up efforts to establish channels of communication with Muslim communities. While on the surface these efforts are necessarily less secretive than other national security law enforcement efforts – indeed, their basic function is partly aesthetic – the concrete data on these efforts is scattered and incomplete. Government accounts are papered in promotional language, and community accounts are few and far between. Given limited information on what these efforts entail, the parameters in which they function, the absence of a central repository for information, and the fast pace of growth of such efforts, the descriptions given in this chapter are necessarily limited.

As counterradicalization and CVE tools, there are three primary objectives at work in community engagement: relationship and trust building, norms molding, and intelligence gathering. Community engagement is unique in its emphasis on relationship and trust building at the same time that it contributes to norms molding and intelligence gathering.

Meet-and-greet efforts. Meet-and-greet efforts increase the breadth of contact between law enforcement and Muslim communities. These efforts include events, meetings, town halls, conference calls, and mosque visits. After 9/11, the DOJ's CRS began arranging meetings across the country between law enforcement, city officials, and MASA communities.[43] Since 9/11, CRS has held more than 750 town halls and community meetings nationally.[44] FBI field offices have conducted extensive outreach in person and through conference calls.[45] The FBI has also held town halls around the country to "foster dialogue" with Muslim communities. FBI field offices regularly visit local mosques and community centers, even requiring all new agents to meet with Muslim community leaders and mosques.

[41] Michael Price, *Community Outreach or Intelligence Gathering?*, Brennan Center (Jan. 29, 2015), http://www.brennancenter.org/sites/default/files/analysis/Community_Outreach_or_Intelligence_Gathering.pdf., at 5–7; Kundnani, *supra* note 25, at 219.

[42] Price, *supra* note 41, at 5–7; Kundnani, *supra* note 25, at 219.

[43] Heather J. Davies et al., Police Exec. Research Forum, Protecting Your Community from Terrorism: The Strategies for Local Law Enforcement Series: Vol. 2: Working with Diverse Communities 19–20 (2004).

[44] *Initiative to Combat Post-9/11 Discriminatory Backlash*, U.S. Dep't Just., http://www.justice.gov/crt/nordwg.php (last visited Mar. 18, 2015).

[45] *Countering Radicalization: Our Other Prevention Strategy*, FBI.gov (May 10, 2007), http://www.fbi.gov/news/stories/2007/may/radical_051007; Director Meets with Key U.S. Leaders, *supra* note 11; *Starting a Conversation: Muslim Youths See FBI Up Close*, FBI (Aug. 18, 2006), http://www.fbi.gov/news/stories/2006/august/newark_081806.

In part, these efforts seek to identify potential individual partners in Muslim communities. In 2008, the DOJ created Specialized Community Outreach Teams (SCOT) "comprised of special agents, analysts, community outreach specialists, and personnel with language or other specialized skills."[46] SCOT aimed to assist "field offices with establishing new contacts in key communities"[47] and "strategically expand outreach to the Somali community to address counterterrorism-related issues."[48] SCOT provided intelligence gathering and investigative support to field intelligence groups and "operational programs throughout the FBI"; it also sent information to the Behavioral Analysis Unit to "develop a baseline profile of Somali individuals that are vulnerable to being radicalized or participating in extremist activities."[49]

Advisory bodies and round tables. The federal government also organizes regular advisory bodies and round tables with Muslim community leaders and experts, with the hope of cultivating regular channels of communication. Participants are likely to include "representatives of national organizations, community leaders from key cities, and religious and cultural scholars."[50] These meetings are designed to allow community leaders to "learn about significant government policies" and "raise specific issues of concern."[51] The regular format involves senior government officials and, according to government documents, "emphasizes accountability for answers."[52]

Since 2010, the DHS CRCL has run round tables with federal, state, and local government officials and MASA communities around the country, about thirty times a year, and in eight regions with large MASA populations. The DHS round tables consider "the threat posed to those communities by terrorist attempts to recruit their members" and "homeland security, civil rights, and other" issues.[53] The DOJ also ran a bimonthly national round table involving DHS and MASA

[46] Fed. Bureau of Investigation Report from Director's Office to Field Offices, Implementation of Specialized Community Outreach Team (SCOT), at 2 (Jan. 7, 2009) (on file with author); *Working with Communities Hearing*, *supra* note 33, at 17 (statement of Brett Hovington, Supervisory Special Agent, Head of Comm. Relations Unit, FBI).

[47] *Working with Communities Hearing*, *supra* note 33, at 17 (statement of Brett Hovington, Supervisory Special Agent, Head of Comm. Relations Unit, FBI).

[48] Cora Currier, *Spies among Us: How Community Outreach Programs to Muslims Blur Lines Between Outreach and Intelligence*, Intercept (Jan. 21, 2015), https://firstlook.org/theintercept/2015/01/21/spies-among-us-community-outreach-programs-muslims-blur-lines-outreach-intelligence (reporting the SCOT program has ended).

[49] Fed. Bureau of Investigation Report from Director's Office to Field Offices, *supra* note 46, at 5, 7; Price, *supra* note 41, at 4.

[50] *Working with Communities Hearing*, *supra* note 33, at 11.

[51] *Id.*, at 7.

[52] *Id.*, at 11; *Community Engagement*, Dep't Homeland Security (Aug. 27, 2014), http://www.dhs.gov/community-engagement.

[53] *Working with Communities Hearing*, *supra* note 33, at 10-11 (statement of Margo Schlanger, Officer for Civil Rights & Civil Liberties, Dep't. of Homeland Sec.).

community members.[54] In 2009, Attorney General Eric Holder established an Arab/Muslim Engagement Advisory Group, which works in part to improve DOJ's community engagement efforts.[55] Similarly, 38 FBI field offices have established community engagement councils or multicultural advisory councils.[56] State and local law enforcement also engage in such efforts.

Training and education. Exchange of expertise is central to national security community policing. Twin focal points of these efforts are training and education for Muslim communities on the functions of law enforcement and on identifying and responding to radicalization. On law enforcement functions, the FBI runs training academies, with a key constituency in MASA communities, designed to teach the public about the FBI's work.

Federal law enforcement–led radicalization and terrorism education occurs all over the country. DHS CRCL, along with the NCTC Directorate for Strategic and Operational Planning (DSOP), have conducted various trainings and briefings: The Community Awareness Briefing is "designed to help communities and law enforcement develop the necessary understanding of al-Qa'ida and al Qaida [sic] inspired recruitment tactics" and "includes information relating to the foreign fighter recruitment narrative"; and the Community Resilience Exercise is a "half-day table-top exercise designed to improve communication . . . to share ideas on how best to build community resilience against violent extremism. . . [and to] empower communities to develop comprehensive violence prevention and intervention models."[57] In Connecticut, the DHS and NCTC officials held a closed-door briefing with Pakistani American physicians on "what the community needs to know" about "Radicalization and De-Radicalization Strategies."[58] The FBI's Cincinnati field office, in partnership with local US Attorneys' offices and the Columbus Division of Police, hosted a radicalization awareness program for members of the local Somali community.[59]

Some of these initiatives are explicitly geared toward cultivating suspicions of particular religious and political expressions. The New Jersey Office of Homeland Security and Preparedness has established antiradicalization initiatives including

[54] *Id.*, at 9.

[55] Eric Holder, *supra* note 37.

[56] *Working with Communities Hearing*, *supra* note 33, at 14 (statement of Brett Hovington, Supervisory Special Agent, Head of Comm. Relations Unit, FBI).

[57] Office for Civil Rights and Civil Liberties, *Community Engagement Section*, U.S. Dept of Homeland Sec., http://www.dhs.gov/sites/default/files/publications/cve-as/community-engagement-dhs-crcl-poster.pdf (last visited Mar. 18, 2015).

[58] Pakistani Am. Ass'n of Conn. et al., Understanding Radicalization and De-Radicalization Strategies 8 (June 19, 2010).

[59] Ctr. For Human Rights & Global Ju.S.Tice, A Decade Lost: Locating Gender in U.S. Counter-Terrorism 83 [hereinafter A Decade Lost].

outreach to elders and imams of the state's largest mosques.[60] More broadly, there is a tacit educative or acculturation function in all outward-facing community engagement efforts. For example, youth-focused initiatives often include language about the importance of good citizenship to ward off radicalization.[61] Federal, state, and local programs have included engagement through athletic leagues, YWCA programming, resume-writing workshops, and self-defense lessons.[62]

3 DISORDER AND RADICALIZATION

Community policing's elasticity has been integral to its currency and longevity. An approach by local police in the 1970s and 1980s to working with poor, urban Black communities in response to ordinary crime and historical distrust has proved sufficiently flexible to be put to use in service of the post–9/11 paradigm. Federal law enforcement has adopted community policing–like tactics nationwide with Muslim communities in response to national security concerns, deploying the vocabulary and aspirations of community policing.

While community engagement is regularly invoked in the same breath as community policing, the conceptual link between counterradicalization/CVE and broken-windows theory is unnamed. At first blush, there is an obvious parallelism: Counterradicalization defines the contours of community engagement as broken-windows shapes practices of community policing. Both counterradicalization and broken windows theories are preventative theories of crime control laid atop efforts at bettering relationships between marginalized communities and law enforcement. Both theories also motivate traditional policing tactics and approaches beyond those that claim as their central normative force partnerships with the community. Yet there are important theoretical and material distinctions between broken windows and counterradicalization, and between community policing and community engagement.

[60] *Governor Chris Christie Selects Edward Dickson as Next Director of Homeland Security and Preparedness*, N.J. Off. Governor (Feb. 9, 2012), http://www.state.nj.us/governor/news/news/552012/approved/20120209a.html.

[61] *Working with Communities Hearing*, *supra* note 33, at 3 (statement of Michael T. McCaul, Chair, Subcomm. on Intelligence, Information Sharing, & Terrorism Risk Assessment); *id.*, at 12 (statement of Margo Schlanger, Officer for Civil Rights & Civil Liberties, Dep't. of Homeland Sec.); *id.*, at 26 (statement of Omar Alomari, Community Engagement Officer, Ohio Dep't of Safety, Homeland Sec. Div.) (speaking of Ohio Homeland Security's efforts).

[62] Kundnani, *supra* note 25, at 220–21; Price, *supra* note 41, at 5–7; Dave Zirin, *Not a Game: How the NYPD Uses Sports for Surveillance*, Nation (Sept. 10, 2013, 9:00 AM), http://www.thenation.com/blog/176082/not-game-how-nypd-uses-sports-surveillance; Eileen Sullivan, *Community Outreach Key to Obama Counterterror Plan*, Associated Press (May 25, 2013, 11:00 AM), http://bigstory.ap.org/article/community-outreach-key-obama-counterterror-plan; Press Release, FBI Honolulu Div., Kalihi-Waena Elementary School Community Outreach Event (Mar. 18, 2011), *available at* http://www.fbi.gov/honolulu/press-releases/2011/hn031811.htm.

3.1 *Radicalization, Counterradicalization, and National Security*

Like broken-windows theory, radicalization theory has been highly contested and yet broadly influential in shaping contemporary policing. While US government accounts take for granted a problem with radicalization that warrants government intervention, the literatures of governments, academics, experts, and civil society stakeholders around the world express profound disagreement over the meaning of radicalization, and the nature and extent of threat embodied by Muslims.[63] Radicalization discourse purports to predict future terrorism, drawing from studies of prior terrorist acts to identify trends and details that will aid in identifying future terrorists. In so doing, radicalization redefines and expands the legitimate scope of government concern from terrorism (a question of political violence, of crime, even of war crime) to radicalization (a question of religious and political cultures and beliefs).

There are at least two important differences. In terms of (contested) causal claims, broken windows theory focuses on physical signs of disorder as signals of deteriorating social order, whereas radicalization emphasizes ideological currents of disorder as motivators for acts of terrorism. Radicalization's concern is predicated on a false belief in the teleological character of Islam – that if Muslim communities witness conservative religious practice and critical politics, they will view such currents as acceptable and gravitate toward radicalism, thereby producing more terrorists. Second, the theories arguably have propelled different types of police action. Whereas broken windows theory leads to aggressive enforcement against misdemeanor and minor crimes, counterradicalization produces increased surveillance. This distinction has its limits, since broken-windows policing serves an intelligence-gathering function, and counterradicalization shapes prosecutorial priorities. But while both theories expand the role of the state and the blueprint of policing, their mechanics are distinct.

3.2 *Blurring Dissent and Difference with Violence*

Even putting aside the disproportionate focus on Muslims in terrorism studies, there are still key definitional problems with radicalization discourse. Most fundamentally, the terms *radicalization* and *extremism* are used sloppily and with unclear meaning, with a causal connection assumed between radical ideas and committing acts of terrorism.[64]

[63] Aziz Z. Huq, *The Social Production of National Security*, 98 Cornell L. Rev. 651–52 (2013).

[64] Arun Kundnani, *Radicalisation: The Journey of a Concept*, 54 Race & Class 3 (2012); Kundnani, *supra* note 25, at 286; Mark Sedgwick, *The Concept of Radicalization as a Source of Confusion*, 22(4) Terrorism & Pol. Violence 479–94 (2010); Jamie Bartlett, Jonathan Birdwell & Michael King, The Edge of Violence: A Radical Approach to Extremism 29 (2010).

Empirical research "has emphatically and repeatedly concluded" that there is no single terrorist profile and no obvious markers for the process by which someone becomes a terrorist.[65] The process by which people embrace violence is not linear but complex.[66] Importantly, studies of so-called homegrown terrorism also reject the ideas that Islam and terrorism are linked, and that observing the Muslim faith constitutes a step toward violence.[67] Nor is there data to suggest that Muslims are becoming more radical in their views, let alone more violent.[68] National security prosecutions in the headlines provide a skewed sense of the threat; the vast majority of those prosecutions do not charge defendants with any violent crime, or with any intent to commit violent crime, but instead with material support for terrorism, a very broad concept typically far removed from violence.[69]

Despite their continued hold on law enforcement, the NYPD and FBI reports are transparent paper tigers – now deconstructed many times over. The stages and factors of radicalization they list are internally inconsistent and vague enough to justify surveillance of any person who identifies as Muslim, or is linked with Muslim religious or political community. Consider, for example, that the NYPD report marks as "radicalization incubators" the following: "cafes, cab driver hangouts, flophouses, prisons, student associations, nongovernmental organizations, hookah (water pipe) bars, butcher shops and book stores," mostly locations where Muslims or those from Muslim-majority countries are likely to spend their time, whether for religious, political, or sentimental reasons.[70]

The reports offer little to no data in support of their ambitious conclusions, but the lack of substantiation reflects and reconstitutes the marginalization and stigmatization of American Muslims. The data on which the reports rely include national security prosecutions involving questionable tactics by law enforcement: constructing the plot, providing the means, and incentivizing the conduct. In other words,

[65] Faiza Patel, Brennan Ctr. for Justice, Rethinking Radicalization, [[Author: check pages and year pp. 8-12, 2011?]] 8–12 (2011) (citing Sageman and MI5 studies, as well as a Rand Corporation study, and a DHS-supported academic study).

[66] *Id.*, at 10.

[67] *Id.*

[68] Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey: Religious Affliction: Diverse and Dynamic 40 (2008), http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf; Pew Research Ctr., Muslim Americans: No Signs of Growth in Alienation or Support for Extremism 8–9 (2011), http://www.people-press.org/files/legacy-pdf/Muslim%20American%CC20Report%C10-02-12%20fix.pdf (showing substantial majority of Muslim Americans have liberal attitudes on current political issues and identify as Democrats); *Little Support for Terrorism among Muslim Americans*, Pew Forum on Religion and Pub. Life (Dec. 17, 2009), http://www.pewforum.org/2009/12/17/little-support-for-terrorism-among-muslim-americans.

[69] Terrorist Trial Report Card: September 11, 2001–September 11, 2011, Ctr. on L. & Sec. 19–21 (2011); Trevor Aaronson, *The Informants*, Mother Jones (July 29, 2011, 6:44 PM), http://www.motherjones.com/politics/2011/08/fbi-terrorist-informants; Illusion of Justice, *supra* note 27, at 1–4.

[70] Silber & Bhatt, *supra* note 14, at 18, 22, 68, 70–77.

the data result in part from cases in which the FBI created or molded the behavior it then purported to model. In other cases, the defendants never committed a violent act, confounding the link between their behavior and a willingness to commit terrorist acts. Overall, there remains no trustworthy empirical account of radicalization that suggests the idea has explanatory or predictive power.

4 RACIALIZING MUSLIMS

Under the guise of predicting future terrorism, radicalization provides a guide for government activity. In so doing, it redefines and expands the relevant field of state concern: from terrorism to radicalization in Muslim communities. Marking religious and political activities as the indicators of radicalization, the discourse links religious and political practices in Muslim communities with the likelihood of terrorism, inviting state scrutiny into the halls of Muslim communities, and changing the terms of engagement with the state for Muslims. The theory creates the Muslim, her religious and political habits, as an object of policing. The theory is racially productive, contributing to the racialization of American Muslims.

4.1 *Creating Muslim Suspects*

The categories of "law-abiding" and "lawless," "radical" and "moderate," are all overinclusive and indeterminate, depending entirely for their meaning on police deployment and creating deep vulnerability for Muslim communities. Muslims are forced to carry the stigma borne of such intense scrutiny and are powerless to escape it, given that both playing up and minimizing Muslim identity can be seen as potentially suspicious. Evidence suggests, however, that Muslims have changed their behaviors in response to the reality and perception of extensive surveillance. For example, individuals report signaling their Muslimness less openly, by praying at home rather than at the mosque, avoiding political conversation in mosques and other Muslim-specific spaces, and reducing donations to Muslim organizations. Similarly, mosques may ask speakers to avoid political content, including criticism of US foreign policy.[71]

Radicalization discourse crystallizes the Muslim as a figure of legitimate police scrutiny. As Bernard Harcourt observed in the context of broken-windows theory, "The theory of deterrence and punishment focuses on the disorderly person rather than the criminal act, and thereby facilitates a policy of control, relocation, and

[71] KUNDNANI, supra note 25, at 219; Teresa Watanabe & Paloma Esquivel, *L.A. Area Muslims Say FBI Surveillance Has a Chilling Effect on Their Free Speech and Religious Practices*, L.A. TIMES (Mar. 1, 2009), http://articles.latimes.com/2009/mar/01/local/me-muslim1; Alexander J. O'Connor & Farhana Jahan, *Under Surveillance and Overwrought: American Muslims' Emotional and Behavioral Responses for Government Surveillance*, 8 J. MUSLIM MENTAL HEALTH 95, 191 (2014); ILLUSION OF JUSTICE, *supra* note 27, at 165–73.

exclusion of the disorderly . . . the category of the disorderly is the product, in part, of the [policing] itself."[72] Broken-windows theory does its work in a two- step dialectic: It shifts the object of policing from crime to the out-of-place person, and in so doing, constructs the out-of-place person as someone who needs to be surveilled and controlled by the state.

Similarly, radicalization theory and policing shift law enforcement's attention from actual plans to commit a terrorist crime to Muslim religious and political activity by literally marking observance of Muslim religious practice, or expressions of political solidarity with other Muslims, as within its causal framework. The radical Muslim, by virtue of noncriminal behavior – attending a *halaqa* (religious study group), visiting family in Pakistan, growing a beard, or paying off a mortgage[73] – embodies the potential threat of terrorism, and in so doing becomes a legitimate object of policing even when engaging in wholly noncriminal (now suspicious) behavior. "Politicization," "becoming involved in social activism and community issues," and "watching jihadi videos . . . that highlight atrocities committed against Muslims" bring you within the third stage.[74] It is not until the fourth stage that the theory concerns itself with any intent to undertake a criminal act. In other words, you could be three-fourths radicalized – a nearly full-blown threat, one would imagine – and have yet to form any concrete thoughts of committing any crime. You might have radical beliefs, but no intent to commit a violent crime. The conservative Muslim, rolling up his pant sleeve in accord with a certain religious practice, or attending the Friday sermon criticizing US foreign policy, embodies this disorder and the potential for a much larger threat.

The religious and political vectors of radicalization theory work in different, if intersecting, ways; both vectors reflect concerns with the ideas and activities of Muslim communities. The religious vector marks basic observant behavior and conservative modes of Muslim religious practice as radical, and therefore worthy of suspicion. "Giving up cigarettes, drinking, [and] gambling," for example, or "wearing traditional Islamic clothing" are markers of radicalization.[75] It matters both what type of Islam you believe in and what you practice: whether your actions (do you follow to a tee the *hadith* of the Prophet Muhammad?) or level of devotion and study (do you regularly attend a *halaqa*?) adhere to more conservative modes of practice. The "more Muslim" you are in the religious sense, the more radical, and the more potentially threatening you appear to be.

The political vector marks your relationship to the project of American statecraft vis à vis your solidarity with other Muslims. The ideological questions are awash in a loyalty calculus, focused on whether you foreground concern with Muslim

[72] Bernard Harcourt, Illusion of Order: The False Promise of Broken Windows Policing 162 (2001).

[73] Silber & Bhatt, *supra* note 14, at 24, 32–33.

[74] Id.

[75] *Id.*, at 33.

community and Muslim suffering at home and abroad, or the imperatives of the US government in effectuating its policies. Implicit here is the idea that such concern is compatible with American identity only to the extent that it comes second or does not compete with US government interests.

The activity dimensions focus on Muslim engagement with political issues vis à vis other Muslims and the US government. Does this person or community protest US foreign or national security policy? Does this person or community comply with requests to inform on the local mosque when asked by the FBI to do so?

The radicalization and counterradicalization discourses have clear implications for the meaning of good citizenship on the part of American Muslims: To be a good citizen is to have a compliant relationship with the state, rather than to relate from an oppositional or contesting stance. *Are you with us or against us?* remains the question. If radicalization creates ideological force for the idea that the state should monitor Muslims, and radical Muslims in particular, then counterradicalization initiatives operationalize the distinction, offering American Muslims an opening to perform their Americanness by partnering with the government. The distinction emerges not simply from how Muslims signal their identity or allegiance with regard to Muslim religious practices or other Muslims. The distinction between the radical and American Muslim emerges in part from how Muslims relate to US statecraft or US government initiatives.

Counterradicalization creates friction between loyalty to the US project and practices of Muslim identity. In particular, the Muslim concept of the *ummah*, or global Muslim community, comes into conflict with counterradicalization commitments. Resistance to, or criticism of, American foreign policy in Muslim lands is a factor of radicalization. So is concern for Muslim casualties abroad, or discrimination against Muslims in the United States. Traveling abroad to Muslim countries, even for hyphenated second-generation Americans visiting family, suggests a suspicious connection.[76]

In classifying Muslims who attend mosque, who travel or send money abroad, or who oppose the US drone policy in Yemen and Pakistan, as within the process of radicalization toward terrorism, the theory marks individuals and geographies as sufficiently different to be outside the protections of the state, transforming them into legitimate objects of state scrutiny. Radical Muslims become lawless out-of-place subjects, deserving little protection.

Counterradicalization cleaves Muslim from American identities in another way, equating cooperation with the state with Americanness and loyalty, and dissent with Muslimness, radicalization, and terrorism. Efforts at partnering with Muslim communities in counterradicalization efforts create opportunities for American Muslims to signal their allegiance. Like the "regulars" and the "lawful" in the broken-windows account, those considered American Muslims are partners in

[76] *Id.*, at 45.

counterradicalization – they stand for the state's values, will cooperate with the police in their efforts to monitor and influence coreligionists, and will step down in the face of conflict. By exercising a right of refusal to cooperate with the state, the American Muslim moves toward radicalism, the radical emerging in response to the state's policing.

4.2 *Creating the Terms of Racial Obedience*

Radicalization and counterradicalization place identity pressures on American Muslims in their interactions with each other, the public, and the state.[77] To cooperate – no matter the substance of law enforcement's demand and expectation – is to validate one's American identity. To refuse or to dissent is to express radicalism, or at least openness to it.

Radicalization policing creates the "racial obedience toward, and fear of, the police," manifested in "particular kinds of performances . . . to signal acquiescence and respectability."[78] Of course this racialized pressure emerges from a larger social context – people of color are subject to more frequent and more severe police scrutiny, and they are fearful that refusing the police will stoke racial animosity or race-based suspicion and aggravate an already bad situation.[79] Immigrants in particular are less likely to know their rights. In all these contexts, accountability is minimal, so the police "have an incentive to exploit vulnerabilities."[80]

Radicalization theory has created a post–9/11 reality in which Muslims "are more vulnerable to compliance requests, more likely to comply, and have to give up more privacy to do so."[81] Radicalization-informed policing produces a loyalty discourse in which there are "good" and "bad" Muslims, and thereby it "entrenches the idea of [Muslimness] as a crime of identity,"[82] "encourages group surveillance," and incentivizes Muslims "to be available for, indeed advocate for, white racial inspection of [Muslimness]."[83] As with the politics of respectability in Black communities, this approach does not protect the "good" Muslims but, instead, renders all Muslims "vulnerable to racial profiling."[84]

Indeed, radicalization creates geographies of suspicion. While the geography of broken-windows theory was effectively one of class and race, hoisting the specter of the poor Black neighborhood, the sphere of radicalization is religious and cultural (though of course inflected by race and class as well). In large metropolitan centers,

[77] Akbar, *supra* note 20, at 877–78.
[78] Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 966 (2002).
[79] *Id.*, at 971–73.
[80] *Id.*
[81] *Id.*, at 1020.
[82] *Id.*, at 1041.
[83] *Id.*, at 1041–42.
[84] *Id.*, at 1043.

there are certainly physically contiguous neighborhoods where Muslims of similar racial or class backgrounds reside. In the rest of the country, however, Muslims of different classes, races, nationalities, and linguistic and ethnic groups are more dispersed. In these places, government surveillance creates a different kind of geography out of the places where Muslims gather: the mosque, the halal butcher, the Indian or Somali grocery store. And visiting these places makes you vulnerable to police scrutiny.

Beyond the policing practices themselves, there is the realm of public discourse and debate in which Muslims make their choices. The most public and theatrical government initiative drawing attention to radicalization occurred with Congressman Peter King's first in a series of hearings before the House Homeland Security Committee in 2011 and 2012, meant to address "a crisis of radicalization to violence . . . within the Muslim-American community" and a refusal by Muslims to cooperate. Those called by King as representatives of Muslim communities testified that American Muslims were ignoring concerns with radicalization and could do more to cooperate. The witnesses lampooned a number of mainstream and prominent American Muslim advocacy organizations – Muslim Advocates, the Council on American-Islamic Relations, and the Muslim Public Affairs Council, all of which have met regularly with federal, state, and local city officials – for undermining Muslim cooperation with law enforcement efforts. The organizations and other community leaders came under fire, especially for their recent initiatives counseling community members to retain a lawyer before dealing with the FBI.

A loyalty discourse thus took shape during the King hearings, as cooperation with law enforcement was counterposed with Muslims' exercise of their right to counsel.[85] In essence, Muslims were encouraged to waive their rights and cooperate with the state without undertaking any method of self-protection, as a way to demonstrate their Americanness and their loyalty to the American project. No scrutiny was given to the law enforcement efforts with which they were being asked to cooperate.

While the King hearing is a particularly egregious example of a government initiative that creates a binary between Muslim and American identity, other initatives contribute to the same identity cleavage. For example, the White House's various counterradicalization, CVE, and community-government partnerships have all contributed to this discourse, charging all American Muslims with the task of protecting the nation against terrorist threats. In this context, joining hands with counterradicalization efforts, whatever they may entail, becomes the good American thing to do, while refusing becomes the wrong, terrorist, or Muslim option.

[85] KUNDNANI, *supra* note 25, at 215–17.

4.3 *Racializing Ideology*

In addition to shaping modes of political engagement with the state, radicalization discourse and counterradicalization practice affect the parameters of religious and political conversations and contestation by rendering certain viewpoints or topics off limits. Of course it is not just the existence of the discourse at work here – it is the recurring and regularized interactions with police that serve as constant reminders of the stakes for American Muslims.

Much of terrorism and radicalization discourses are enshrouded in a politics of "anti-knowledge."[86] Terrorism studies tend to "reduce complex social, historical, and political dynamics."[87] Chief among the "constraints shaping what can be said about terrorism" is "denial of the possibility of rational causes, and the attribution of terrorism to pure evil."[88] The mainstream narrative "implies that, once an individual has adopted an extremist religious ideology, terrorism will result, irrespective of political context or any calculation on the part of any organisation or social movement."[89] Similarly, radicalization and violent extremism discourse displaces any attention on political context with a focus on theological and psychological factors that supposedly foment radicalization.[90]

Radicalization theory marks certain topics or viewpoints as beyond the pale by suggesting that they are un-American or likely to draw government scrutiny.[91] As a result, radicalization discourse puts pressure on the contours of conversation among Muslim communities about the public issues of our times to which many American Muslims are particularly attuned.[92] American Muslims are thus less likely to vocalize concerns about the exercise of American war power in Iraq, Afghanistan, Pakistan, Somalia, Yemen, and so on.[93] The absence of Muslim voices on these issues is particularly notable, given how much of contemporary US foreign policy is focused on Muslim populations. Equally important, the space for religious debate – on questions such as the meaning of *jihad* or on different modes of

[86] Lisa Stampnitzky, Disciplining Terror: How Experts Invited "Terrorism" 187–88 (2013).

[87] Jasbir K. Puar & Amit S. Rai, *Monster, Terrorist, Fag: The War on Terrorism and the Production of Docile Patriots*, 20 Soc. Text 124 (2002).

[88] Stampnitzky, *supra* note 86, at 180.

[89] Arun Kundnani, *A Decade Lost: Rethinking Radicalisation and Extremism*, Claystone 15 (Jan. 2015), http://www.claystone.org.uk/wp-content/uploads/2015/01/Claystone-rethinking-radicalisation.pdf.

[90] Kundnani, *supra* note 25.

[91] Shamas & Arastu, *supra* note 28; Amna Akbar, *How Tarek Mehanna Went to Prison for a Thought Crime*, Nation (Dec. 31, 2013), http://www.thenation.com/article/177750/how-tarek-mehanna-went-prison-thought-crime.

[92] Shamas & Arastu, *supra* note 28.

[93] *Id.*; Amna Akbar, *supra* note 91.

interpretation – in mosques and other Muslim community space has also shrunk and warped.[94] Arun Kundnani notes, "Since 9/11, mosque leaders have been under pressure to eject anyone expressing radical views, rather than engaging with them and seeking to challenge their religious interpretation, address their political frustrations, or meet their emotional needs."[95]

Moreover, radicalization discourse may serve to pathologize complex social problems, displace the focus from the role of government activity in creating those problems, and place the burden of solving them on already marginalized communities. Broken windows theory could be criticized along the same lines: The underlying roots of ordinary crime – poverty, joblessness, mass incarceration, disenfranchisement – disappear under the discourse of "disorder."

5 CONCLUSION

Is community engagement salvageable? Moving community engagement toward its most democratic aspirations – toward a more genuine exercise in community consultation, contestation, and collaboration – would involve ridding the program of its pernicious baggage. For example, law enforcement could end community engagement's integration with community-wide intelligence gathering, or could decouple community engagement from CVE and counterradicalization.

Certainly there are strong normative reasons, including those that motivate this chapter, to expect and demand that law enforcement account for the realities of marginalized communities. But we cannot expect that dialogue will necessarily lead to accountability, meaningful contestation, or realignment of police approaches in marginalized communities. After all, law enforcement is itself a significant vehicle for marginalization and racialization in the United States. It is reasonable to question whether community policing – or policing at all – can be expected to be the vehicle for the change we are seeking. The problem and the solution may be entirely mismatched.

For community policing to be an effective tool in changing the relationship between the marginalized and law enforcement, marginalized communities cannot simply be offered a seat at the table to participate in preconceived policing programs. They must have the political power to hold police accountable. For community policing mechanisms to offer potential for real change to marginalized

[94] Arun Kundnani, *Missing the Best Chance to Prevent Terror Bombing*, CNN (May 7, 2013, 8:10 AM), http://www.cnn.com/2013/05/07/opinion/kundnani-terror-mosques-surveillance; Arun Kundnani, Inst.of Race Relations, Spooked! How Not to Prevent Violent Extremism 35 (2009).

[95] *Id.*

communities, communities must build capacity and political power to demand accountability. So while we might advocate for law enforcement to engage marginalized communities, we cannot rely on law enforcement initiatives to recalibrate relationships long rife with deep inequality. The pressure for meaningful change must come from outside, from the communities themselves organizing for change.

10

Muslim Radicalization in Prison: Responding with Sound Penal Policy or the Sound of Alarm?

SpearIt[*]

1 APPROACHING AND INTERPRETING PRISONER RADICALIZATION

"Radicalization," according to one inmate, is when "prisons try to promote Christianity and starve Islam." This statement came in a letter from a Muslim inmate, Abdullah al-Muhajair, sent to Representative Peter King in his role as chair of the 2011 US congressional hearings entitled *The Threat of Muslim-American Radicalization in U.S. Prisons*. Representative King's opinion on this matter sees Islamic radicalization as a unique threat since Muslims are, as he claims, "the only group in prison which is tied to overseas terrorists which is part of an existential threat to the United States." Hence, his account of the problem sits diametrically opposed to al-Muhajair's views, and together they underscore the critical need to approach the question of prisoner radicalization with a sense of caution and consistency.

What follows relies on ethnographic sources to explore radicalization among Muslim prisoners. The data sets include testimony from incarcerated Muslims, testimony from congressional hearings, and case studies involving Muslim inmates and extremist violence. The data are examined in light of recent research on administrative and penal policies in prison. Together these sources reveal the complex relationship between the prison environment and radicalization, the internally and externally generated problems, as well as the nature of the prison experience, postrelease experiences, and the relationship between preprison and postrelease experiences.[1]

This chapter starts with a simple question: What exactly is *radicalization*? To be certain, the term is a very recent creation, gaining widespread use in the years

[*] This chapter is an excerpt of the previously published article, *Muslim Radicalization in Prison: Responding with Sound Penal Policy or the Sound of Alarm?*, 49 GONZ. L. REV. 37 (2014). Sources of prisoners' quotes have not been further identified for reasons of confidentiality.

[1] Gaetano Joe Ilardi, *Prison Radicalisation – The Devil Is in the Detail* 2–3 (ARC Linkage Project on Radicalisation, 2010).

following the attacks of 9/11 and becoming intertwined with the Muslim faith. In broad strokes, the term indicates a process or means by which one adopts *radicalism* or *radical* beliefs and behaviors. This much is simple, but determining the exact content of *radical* is not always certain, since the term has historically attached to different meanings. For example, early use of *radical* was loyal to the etymology of *radix*, which meant "radish" or "roots," hence, being a radical connoted one was returning to the "roots" of tradition – the origins or essence. Used this way, *radical* overlaps in meaning with the notion of *fundamentalist*, which similarly conveys a turn to the basics or fundamentals. Later use of *radical*, however, would connote a somewhat opposite meaning, as movement away from a particular norm, being "far out" or "extreme" with respect to the cultural status quo. Such use is not typically viewed as a pejorative, since radicals were often seen as progressives who contributed to the development of thought, politics, and culture.

Today, however, radicalization does not typically have a positive association. More particularly, it has been something of a code for violent behavior and ideology, despite the fact that violence is the exception among radicals. Take, for example, 2006 congressional hearings, where one expert testified: "Occasionally, I am asked to describe the typical radicalized inmate. While it seems a reasonable question, I would suggest that focusing only on individual inmates is not an appropriate solution. In fact, *terrorism* is a team sport."[2] This perspective corroborates the New York City Police Department's model of radicalization, which concludes at a stage of violence called "jihadization."[3] More formal attempts to define radicalization follow suit, including the Department of Justice's definition as "the process by which inmates who do not invite or plan overt terrorist acts adopt extreme views, including beliefs that violent measures need to be taken for political or religious purposes."[4] Characterized as such, radicalization is hardly a principled concept, and instead functions as a catch-all for "what goes on before the bomb goes off."[5] The ascriptions are typically couched in terms of good and bad, right and wrong, and other dichotomies that convey the subjective perceptions of physical danger.

[2] 2006 Senate Hearing (statement by Gregory B. Saathoff, Executive Director, Critical Incident Analysis Group, University of Virginia; emphasis added).

[3] Mitchell D. Silber & Arvin Bhatt, Intelligence Division, New York Police Department, Radicalization in the West: The Homegrown Threat 6–7 (2007), available at http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radical ization_in_the_West.pdf.

[4] Office of the Inspector Gen., U.S. Dep't of Justice, A Review of the Federal Bureau of Prisons' Selection of Muslim Religious Services Providers 6 n.6 (2004) [hereinafter OIG Report]. This definition follows those in Homeland Security circles. *See* Homeland Sec. Policy Inst. & Critical Incident Analysis Grp., Out of the Shadows: Getting Ahead of Prisoner Radicalization 3 (2006) [hereinafter HSPI & CIAG Report]; 2006 Senate Hearing, (statement of Frank J. Cilluffo, Director of Homeland Security Policy Institute, The George Washington University, adopting a variant of this definition).

[5] Peter R. Neumann, *Introduction*, in Perspectives on Radicalisation and Political Violence 6 (Peter R. Neumann et al., eds. 2008).

The logic is flawed; radicalization is an insufficient cause of terrorism, most obviously because most radicals are not terrorists. Indeed extremism cuts both ways, and just as one way can will toward extremist violence, another can will toward extreme pacifism. Individuals like Mahatma Gandhi and Martin Luther King were radicals of the first order, bent on nonviolence at all costs. Yet this dimension of radicalization is lost in today's usage. Unfortunately, violence-based logic leads to fallacious forms of debate in which radicalization is viewed as the root cause of terrorism and, in turn, terrorism is proof of one's radicalization. Yet radicalism itself is an insufficient predictor of terrorism, since most extremists do not engage in violent activities. This point is supported by more recent creations of phrases like *violent radicalization* or *militant radicalization*, to indicate a difference between radical thought and violent behavior. As one study admonishes:

> Radicalization should not be viewed as an escalator, inevitably carrying all the individuals on it inexorably into violence. It is better envisaged as a funnel that large number of individuals may enter but from which only a very small number of individuals emerge. Many will drop out along the way, leaving only a small proportion to cross the Rubicon and become involved in terrorism.[6]

In this crossing, there is no singular pathway to becoming radical, and no single factor for adopting extremist views.

2 ALARMISM AND POLITICAL DISTORTIONS

It is critical to understand how fear-based perceptions about Muslims and Islam have hampered objective inquiry into Islam in prison and, perhaps more critically, how they have concretely informed penal policy. Despite three congressional hearings and a growing body of scholarly research, there are still many unknowns. More certain, however, is that perceptions about Islam in prison are tainted by a climate of suspicion and fear, some of which derives from fears entirely unrelated to Islam, including multiple perceived threats – criminals, prisoners, gang members, African Americans, Latinos, and Muslims – a mix that can easily overflow into unthinking hysteria.

Despite many uncertainties about radicalization as a phenomenon, politicians and other state officials have not refrained from making overreaching claims about radicalization and prisons. To illustrate, during the 2006 US Senate hearings on prisoner radicalization, Senator Jon Kyl (Arizona Republican) asserted, "Jose Padilla, a terrorist accused of trying to build a dirty bomb to unleash in the United

[6] Greg Hannah et al., Radicalization or Rehabilitation: Understanding the Challenge of Extremist and Radicalized Prisoners 3 (2008).

States, was exposed to radical Islam in the U.S. prison."[7] In the 2011 hearings, experts and politicians alike continued to invoke Jose Padilla as an inmate who was radicalized in prison.[8] Even prior to the 2011 hearings, Republican staffers for the Committee on Homeland Security distributed a background sheet entitled *Background Information on Prominent Post–9/11 U.S. Prison Radicalization Cases*, which listed Padilla as a prison convert.[9] However, Padilla did not convert to Islam until *after* he was released, nor did he travel to Afghanistan and Pakistan until seven years *after* his parole.

The same information sheet lists other inaccurate information. It describes James Cromitie as being "radicalized in prison," despite the fact that he was paroled in 2004 and was not arrested on terror-related crimes until five years later. Despite the use of him and others as poster boys for inmate radicalization, there is little evidence, either before or immediately after their incarceration, to connect time in prison causally to acts of violent extremism. The sheet also cites Michael Finton as "radicalized in an Illinois state prison," without evidence to substantiate the claim; similarly, it cites the Lackawanna Six terror plot without any explanation of why this case counts as prison radicalization. Furthermore, it cites to the above-mentioned 2010 report, overseen by Senator John Kerry (Massachusetts, Democrat), which described three dozen prison converts who went to Yemen to learn Arabic. Careful scrutiny of the report raises serious doubts that this should be a part of the information sheet. The report states, "U.S. officials told [c]ommittee staff that they *fear* that these Americans were radicalized in prison and traveled to Yemen for training."[10] These statements came with no citations for the statements, no evidence of the extremism or intent to commit violence, and no mention of who the prisoners were; and the beliefs about radicalization were admittedly based on fear. Although this report contained no verifiable evidence that these individuals had converted, much less were radicalized in prison, the story was accepted and invoked as evidence throughout the rest of the report.

As they did with Padilla, commentators repeatedly cite Richard Reid, the shoe bomber, as an example of prisoner radicalization. Although scholarly works, think-tank publications, and congressional statements and reports cite his name, there is little to support the claim that he was radicalized in prison. In fact, a closer look at the historical record suggests that he likely adopted extremist beliefs and sought to engage in violence after he spent time at the Brixton mosque, where he regularly

[7] Terrorism: Radical Islamic Influence of Chaplaincy of the U.S. Military and Prisons: Hearing before the S. Committee on Terrorism, Technology and Homeland Security, 108th Cong. 1 (2003).

[8] The Threat of Muslim-American Radicalization in U.S. Prisons, Hearing before the H. Comm. on Homeland Security, 112th Cong. (2011).

[9] Background Information on Prominent Post-9/11 Prison Radicalization Cases, House Comm. on Homeland Security (June 15, 2011).

[10] Staff of S. Comm. on Foreign Relations, 111th Cong., Al Qaeda in Yemen and Somalia: A Ticking Time Bomb, S. Prt. 111-40, at 1 (Comm. Print 2010).

heard sermons from the Abdullah el-Faisal, who was arrested in 2003 for attempting to incite violence.

As these cases indicate, inaccuracy and misinformation plague inquiry into Muslim American prisoners. These and other challenges surmount the quest to understand extremism in prison beyond the idea that Muslims are a particularly deadly threat.

3 MUSLIMS IN CRIMINAL JUSTICE

This part explores Islam's legacy in US courts and prisons. For well over half a century, Muslims have used the courts to establish religious rights for inmates at the same time Islamic outreach groups were assisting inmates through prison ministry and reentry support. This history of Islam in prisons offers a compelling counter-narrative to the distortions described earlier in this chapter.

3.1 *Penal and Cultural Impacts*

Like the impact Muslims have had on prison law, the practical impact of the religion on the lives of inmates and prison culture is unmistakable. The religion offers a set of practices and doctrines for inmates, including the proclamation of faith, prayer, charity, and fasting, among other traditional and nontraditional pieties. These practices help develop discipline and structure in individuals whose lives are characterized by chaos and instability, teaching selflessness in a world of self-interest. In turn, inmates refer to Islam through many images, including as a "lifeboat" that saved a life, or as a "sword" that cuts through "ignorance and repression," or as "eye drops for those with irritated eyes." One Latino convert at Folsom State Prison in California explained Islam's meaning for prisoners: "For those that are serious and involved in the greater Jihad (Struggle of Self), Islam is an anchor to a world that is lost to us behind these cement walls and iron bars. It offers love and hope, and most of all, peace that comes when one surrenders to Allah."

It is not uncommon for inmates to interpret and understand their imprisonment within an Islamic framework. This is possible due to the fact that prisons and penance both have a place in Islam. As one Muslim chaplain notes, "A cursory review of the acknowledged intentions of Islam and the Quaker reformists shows that it is apparent the objective of both religious ideologies is to instill penitence in the criminal."[11] One scholar notes prisons were not unfamiliar in the Quran, and are mentioned at least nine times as an institution.[12] In the centuries following the founding of Islam, prisons would become more widely used within Islamic

[11] Mikal Huda Ba'th, Islam in Prisons: As Viewed from the Nation's Capital 3 (1979).

[12] *See* Nawal H. Ammar, *Restorative Justice in Islam: Theory and Practice*, *in* The Spiritual Roots of Restorative Justice 173 (Michael L. Hadley ed., 2001).

governance. Punishment, called *nafi'a*, or "beneficent," was intended to "benefit" the prisoner. Hence, there is considerable overlap with this concept and "penance," which informed the creation of penitentiaries in European Catholic traditions and later, Protestant varieties in the United States. Just how many inmates make these connections is uncertain, but some inmates recognize the importance of imprisonment in religious narrative, as one African American convert from San Quentin State Prison writes, "We must retain in mind that nearly all of the primordial Imams of Ahl Al-Bayt (the household of the Prophet) were imprisoned or under house arrest by the prevailing anti-Hashimite authorities of the time."

Islam's practical value in prison links to a strong emphasis on communal worship and diversity of denominations. Islam offers inmates something different from what Christian reformers envisioned in cloistered reflection or silent prayer. The practices are better suited for building social networks, and as one scholar asserts, "The greater the capacity of the prison jamaat to establish the privilege of congregational prayer, the greater the potential effect on the Muslim."[13] The communal worship, egalitarianism, and positive identity construction all serve to support moral and social discipline in inmates, upholding Quran institutions, encouraging a rigorous program of study and prayer, and offering what Barbara Daly Metcalf describes as "counterdisciplinary resistance" to the hierarchies that define prison culture.[14] For some, it offers a regime to resist American culture in general, particularly "Black Muslim" organizations, which have effectively captured the attention of those who have experienced racial oppression. For others who fall into Sunni circles, there is a very different effect of faith, and there is scriptural emphasis on equality and belief in God and righteous conduct – not skin color, nationality, or political creed. This practical orientation, which supports ties both inside and outside prison, is cited as particularly suited for individuals in an environment where racial tensions run high. For others whose piety flows to Sufi forms of the tradition, inmates whose lives are laced with violence cultivate pacifism and nonviolent principles. Taken wholly, the results are significant, according to one Muslim inmate at the Stafford Creek Corrections Center in Washington state, who describes the long-term effects of commitment to Islam as "wholly positive and liberating despite the anti-Islam rhetoric we hear so much of in the West."

According to such testimony, Islamic values and mores converge with desired penal outcomes on multiple levels, including conversion itself. As a process that involves turning away from previous aspects of one's life, for some, conversion represents the shedding of one's identification as a criminal or gang member. As one inmate from Pelican Bay State Prison described it, "I have seen people who

[13] Robert Dannin, Black Pilgrimage to Islam 176 (2002). The term "jamaat" denotes the Muslim community/congregation or where gatherings/assemblies take place.

[14] Barbara Daly Metcalf, ed., Making Muslim Space in North America and Europe (1996), 131.

were so confused about their present situation (incarceration) that they would victimize each other. But . . . many of them have rehabilitated themselves. These men are now ready to be placed back on the street to keep another generation from coming into prisons."

Sometimes an inmate's conversion to Islam impacts the very inmates who witness the transformation. According to veteran prison preacher Imam Muhammad Abdullah of Taif Tul Islam in Los Angeles, when other prisoners witness the transformative impact of a conversion, this has profound consequences on those inmates:

> The discipline that Islam requires and cleanliness, are really admired by people . . . this begins a conversion of many because they are either living with their former crime partner(s) and they knew his or their past and to see that person or people change right before their very eyes is enough for anyone to see there must be a just god.[15]

Research supports that such transformations have a strong impact on others, as one study noted, "When people say that they feel peace or that they have found freedom within their imprisonment, any listener cannot help but be swayed by the obvious emotion with which they speak."[16]

Although there is need for further research on Islam's influences on inmates, the available scholarship points to positive links between Islam and inmates' cultural attitudes. Islam connects inmates to their African and African American heritage, and so it is hardly cultural apostasy for African Americans to convert to Islam since doing so takes them to the very heart of Africa. It is for this reason that some describe their turn to Islam not as *conversion*, but as *reversion* – not a turn to the faith, but a *return* – a reconnecting and reclaiming of an uprooted past. As one African American inmate describes it, "Islam encourages togetherness, prayer, and aspects of morality that would, literally, awe the average Westerner. Islam encourages family adhesiveness and history . . . and gave me the encouragement to identify with Africa."

Latinos adopt a similar cultural logic and embrace Islam as a way of reconnecting to their Spanish heritage. Although data on Latino conversion is sparse, and even less is known about conversion in prison, some studies confirm its occurrence. For Latinos, the draw of Islam is perhaps unlike that of any other religion due to historical factors similar to those that define the African American experience. As the term "Moor" was embraced by various African American leaders to unite the poor and disenfranchised with Islam, the Latino embrace of Moorish Spain provides a powerful tool to reimagine identity. As one Mexican American convert from Huntsville Unit, a prison in Texas, noted: "When I learned 'ojala' (God willing) was from Arabic, I saw the truth about Hispanics and Islam. I've heard my parents

[15] Email from Muhammad Abdullah to Author (Oct. 25, 2005, 22:50:16 PDT) (on file with author).

[16] Todd R. Clear et al., T*he Value of Religion in Prison*, 16 J. CONTEMP. CRIM. JUST. 53, 62 (2000).

say that a thousand times, but never really thought about it. Now I know and tell others that Mexicans got Islam in their blood."

Highlighting the positive impacts of embracing Islam inside prison walls, however, should not ignore certain negative outcomes. For example, as one African American convert says, "There are no incentives (worldly) to embracing Islam in the prison system, especially since the aftermath of Sept. 11th, and subsequent events which [not] only cast a negative image upon Islam, but have led the US government to view Muslim prisoners as potential terrorists." Yet the hardships that may be involved in accepting Islam do not stop inmates from converting. The consequences have their own set of ramifications, including having to live with the adverse effects. For example, one African American convert asserts, "In the Bible Belt families have been known to disown their loved ones inside because they embrace Islam." Writing from Union Correctional Institute in Florida, he observes, "With all the negative which comes with prisoners embracing Islam, they continue to come to Islam at a steady pace, knowing that it will likely only make their time harder."

Other adverse consequences of accepting Islam run along ethnic lines, and inmates who convert are at risk from members of their own ethnic group. As indicated by one Native American convert from Corcoran State Prison, "When a non-African American accepts Islam such as myself, I opened up a very dangerous door that could lead to physical and verbal abuse bye [sic] fellow Native-Americans because I accepted Islam." His troubles resound with those expressed by a Latino ex-prisoner who himself was not Muslim, but described seeing a Latino convert to Islam who was "dealt with in a horrible way." As these individuals convey, embracing Islam comes with a price tag, sometimes even violence. The overarching conclusion is that the benefits of Islam outweigh the harms and negatives associated with becoming Muslim.

It is also the case that protection-based motives cause some prisoners to turn to Islam. One inmate explains that offering protection is simply a part of being in a Muslim brotherhood: "Some brothers were born Muslim, and chose the street life over Muslim life only to return to it once entering the system, because with the Muslims there is a sense of structure, order, purpose, and some just seek a sense of protection, which is what we are here for." Sometimes a person who enters Islam out of self-interest will end up keeping the faith, as one inmate who converted in a Los Angeles County jail describes: "Although I entered Islam with an ulterior motive, my heart was already open to God, and Allah is slowly but surely purifying my mind and spirit." His words suggest that even if an inmate joins Islam for physical protection, it is no barrier to developing faith. However, such motivations should not be exaggerated, as one ex–gang member writes from prison, "These days when asked if one became Muslim for protection, the retort is 'yes, for Allah's protection!'"

At present, little is known about Islam's impact on gang culture, and little is mentioned in social science studies about the influence of religion on a youth's ability to leave a gang. One researcher has suggested that religion functions similarly

"to gang affiliation and [satisfies] the need to connect to other people."[17] Despite the gap in research, it is clear that many who are now law-abiding Muslims were once gang members, as detailed by one African American prisoner who writes, "When an individual wants to leave the gang life, most likely he enters into this community. He knows that we will support him and assist him put his life in order. It is not unusual to see gang members become ex-gang members." The turn from gangs is complex, yet as another inmate attests:

> I believe the fact [is] that young men in gangs are often primed for Islam as a result of the hardships they endure in their youth. Once in prison they are under no illusion about the American Dream.... Most young men in gangs come from impoverished homes with enormous voids in their lives and Islam brings substance to their lives.

Unfortunately, however, as the next section shows, in prison this is not always the message spread in the name of Islam.

3.2 *Radicalization in Prison*

If we focus on the prison population, we see that evidence shows the number of cases in which an inmate or recent inmate was involved in terrorist activity is extremely small. In the global context, one study identified 46 cases out of tens of thousands of terrorist attacks in which a stretch in prison contributed to a radicalization process leading eventually to a terrorist attack or threat against Western targets between 1968 and 2009. In the United States, there has been little terrorist activity involving Muslim inmates. According to a Congressional Research Service (CRS) study, of 53 identified terror plots of "homegrown *violent* jihadist activity," only one case, the Jamiyyat Ul-Islam Is-Saheeh (JIS), definitively involved violent extremism that was connected to a US prison.[18] These statistics have led one commentator to suggest that if prisons are producing terrorists like a factory, they are doing a terrible job.[19] Furthermore, in 2007, the FBI conducted over 2,088 terrorism threat assessments in prisons and jails across the United States and "determined that there was *not* a JIS-like pattern of terrorist recruitment in U.S. prisons. ... Indeed, the FBI could find no pattern of terrorist recruitment whatsoever."[20]

[17] J. Thomas & B. H. Zaitzow, *Conning or Conversion? The Role of Religion in Prison Coping*, 86 The Prison J. 242, 254 (2006).

[18] Jerome P. Bjelopera & Mark A. Randol, Cong. Research Serv., R41416, American Jihadist Terrorism: Combating a Complex Threat (2010).

[19] Mark S. Hamm, *Locking up Terrorists: Three Models for Controlling Prisoner Radicalization* 3 (2011) (unpublished manuscript; on file with Indiana State University).

[20] Mark S. Hamm, *Prison Islam in the Age of Sacred Terror*, 49 Brit. J. Crim'y. 681 (2009).

3.3 *Prisoner Perceptions*

In his letter to Representative King, al-Muhajair illuminates what has propelled him to become an "enemy of the United States": "I will spare you all the reasons, except to mention … cowardly bombing of Muslim women and children in a sovereign nation … thirty billion a year to Israel in weapons to kill Muslims, genocide of civilians in Iraq, Afghanistan, human rights violations at Gitmo, I am sure you get the point."[21]

Disaffection with government policies abroad and at home is common among Muslim inmates. In al-Muhajair's case, feelings of anger and alienation led him to renounce his citizenship, only to be ignored by the government. He claims to have sent "letter after letter to the INS, Dep[artment] of Justice all in accordance with 8 U.S.C. § 1481 (A)(6)." This particular statute affords a citizen the opportunity to renounce citizenship. Yet al-Muhajair claims that his letters never got a response. He marvels at the government's laxity: "How is it a right given to me by Congress of the United States can be voided by [a]gency in-action?" More ominously, however, al-Muhajair points to the consequences of his treatment. "Seems the [Department] doesn't know what happens when you corner a badger." His statements offer insight into inmate extremism and suggest there is plenty of fuel for radicalization at home. Prison radicals need no proselytizing from foreigners – they are fully capable of radicalizing other inmates on their own. This is obvious in al-Muhajair's letter, which laments, "I don't understand why it is ignored. The holy Quran gives one a choice of fight or flight, why does America want me to fight? I will die for Allah, what land will it be on?"

3.4 *Criminal Justice Critiques*

From the days of Malcolm X to the present, Muslims have condemned the criminal justice system as a major source of oppression against the poor, minorities, and Muslims themselves. This tradition continues, and inmates hold deep animus from their experiences in criminal justice at all levels: cops, courts, and corrections. Regarding the latter, one Muslim prisoner in California describes the environment itself as causing one to seek survival over all: "Prisons are the only means by which man can legally enslave another man, so it is not difficult to see that there is and are ulterior motives for the crafty to keep men down and willing to do whatever to get ahead in this ruthless environment." Similar invective was expressed by an elderly African American prisoner who voiced his disdain for the prison system by

[21] Letter from Roy Wales, a.k.a. Abdullah al-Muhajair, Prisoner, Hudson Correctional Facility, to Peter King, Congressman, U.S. House of Representatives (Mar. 9, 2011) (on file with author) [hereinafter Letter from Prisoner].

unfailingly signing all his letters with his favorite message from the Qur'an: "Free the oppressed (90:11–13)."

Particular tensions for Muslim prisoners arise from negative interactions with prison guards, particularly in the aftermath of 9/11. In Malcolm X's days, guards were antagonistic to the point of radicalizing inmates, as he recalled, "I have heard scores of new prisoners swearing back in their cells that when free their first act would be to waylay those visiting-room guards. Hatred often focused on them."[22] His statement vividly captures the possibility that prison staff and policy can actually stoke inmate radicalization and perhaps, extremist violence as well. The same holds true in the present, as expressed by an ex–gang member, who cites his own experiences of being placed in solitary confinement. He used a homemade wick as an incense holder, which he was previously allowed. "Observing this quite common occurrence, a guard who had previously commented on my religious attire as a 'nightgown' decided that this was some sort of explosive device, and I was subsequently thrown into ad-seg," short for "administrative segregation" or solitary confinement. Another inmate, from Union Correctional Institute in Florida, adds, "We are under tremendous pressure and scrutiny due to the War on Terror; guards target Muslim prisoners for harassment, and sometimes, target other black prisoner[s] for no other reason than because they think they are Muslim." A similar sentiment was expressed by an African American convert, who describes his own daydreams of getting even with guards:

> It may seem petty and stupid, but after while it's aggravating and offends the senses when guards just refer to us as "Taliban" or call one of us "Mohammad." Sometimes I catch myself just fantasizing about how to settle the score and get back at them.... There is one guard in particular – he hates us and it shows. Like I said it's petty, but I'm just saying what happens.

Finding irony in the treatment of Muslims by guards, one prisoner from California State Prison, Corcoran writes, "They always talk about gangs and Islam as if it's the same thing. But they never once look at how they look with their boots, badges, and shaved heads. That's pot calling kettle 'black.'" Another inmate describes experiences with guards in a California prison: "I have been harassed, discriminated against, ridiculed, falsely accused and wrongly placed in ad-seg by a group of guards.... [One guard] openly ridiculed my Islamic clothing." Such treatment leads inmates to other conclusions, like one California convert who writes, "Muslims, in prison, are conscious and the system has declared war on us." Implicit in inmates' views about their treatment at the hands of the justice system is widespread belief that the deck is stacked against criminal defendants. One inmate in California

[22] Malcolm X, The Autobiography of Malcolm X: As Told to Alex Haley (Alex Haley, ed., Oct. 1992), 167.

describes the severity of the system at multiple intersections: "I've been incarcerated for 13 years. I received a 20-year sentence for drug trafficking, and am a first-time offender.... I've been to six different institutions, and of course have been subjected to discrimination for nothing other than being *Muslim*, then there's being a *convict* and being *Black*." Another Muslim inmate described the US government and the criminal justice system as "accomplices" since, according to him, "All minority prisoners are 'political prisoners' because under the current imprisonment policies established by politicians and government officials, all imprisonment is substantively political." For others, Islam is a path to recreating one's self by erasing the iniquities brought on by the justice system, as described by one African American inmate:

> Muslim converts behind bars are those who come from a gang lifestyle and frequent run-ins with police and authorities. And in my opinion, most were subjected to selective justice.... If one was arrested and convicted for robbery, he would be given stiffer punishment if he or she were black or Latino. Islam offers these kinds of people a new start. A chance to dump their baggage of hate and malice.

Of the justice system's branches, for Muslims the overwhelming target of dissent is the prison system. The sustained criticism is noteworthy and images are vivid, such as one inmate's account of life for prisoners: "Each and every day, prisoners are subject to brutality, inhumanity and degradation. Sick prisoners are allowed to linger days and nights in pain without help and who eventually die. Prisoners are thrown down stairs while handcuffed.... Massive psychological torture, and mental illness, uncared for, occurs daily in U.S. prisons."

Muslim prisoners have been profoundly impacted upon discovering Islam in prison. One African American convert indicates how such experiences were deeply linked to his turn to the faith: "I've seen almost every evil that ever could happen within these concentration camp walls, so brotherhood is just not something I've given in to. We are being somewhat oppressed ... these are all crisis [sic] that people of color face daily. Al-Islam is the only answer for men, women, and children." Another inmate in Missouri reiterates the plight for Muslims at his institution: "The Prison Administration here is certainly against us. They do everything in there [sic] power to oppress us."

4 RACIAL AND RELIGIOUS DISCRIMINATION

These experiences in criminal justice offer a sense of general discrimination that Muslims experience, yet Muslims in free society suffer similarly. Al-Muhajair's letter to Representative King cites such oppression as the catalyst for the "Fort Hood shooting": "What do Americans expect, 'Major Malik Nadal?' Work on a base and see every day Muslims being killed (what did you expect??). I think he is a hero and I am sorry he ran out of bullets." Practices of discrimination are sometimes so

pervasive that non-Muslims are subject to hostility simply for looking like Muslims, as Representative Al Green described at the 2011 hearings: "I want you to know that when I board an airplane, I am looked upon with an eye of suspicion. For some reason people tend to think that I am Muslim. For some reason, a person told me I needed to go back home to my foreign country, that I don't belong in this country."[23]

Like the religious discrimination Representative Green relates, inmates commonly cite experiencing racial inequities in American society and prison. This may explain in part why groups like the Nation of Islam (NOI) have been successful in recruiting members—the group speaks to those who experience racism firsthand. For example, Malcolm X's conversion to Islam in prison back in the 1950s was largely based on his attraction to the racial rhetoric, which helped him conclude: "Among all Negroes the black convict is the most perfectly preconditioned to hear the words, 'the white man is the devil.'"[24]

The war on terror is an important symbol of oppression for inmate perceptions. Inmates know firsthand that whether it be the rounding up of Arab Americans or noncitizens, or torture at the Abu-Ghraib and Guantánamo prisons, the burdens of war are not shouldered equally. The use of the word *war*, both literally and metaphorically, might encourage a warlike mentality. There might be little surprise, then, that extremist inmates understand the situation in like terms or, as al-Muhajair's letter explains, "I am a Muslim, and I feel because of America's 'war on Islam' I am the enemy of the United States." In a similar vein, another Muslim inmate adds, "A war is being waged on poor and minority communities across the U.S. The result of all this warfare has been the absolute decimation of our communities, and an ongoing SOCIAL GENOCIDE of people of color. Around the globe we must demand that this social genocide STOP NOW!"

5 CONCLUSION AND FORWARD

These findings lead to telling conclusions that bear on penal and public policy. Perhaps the greatest contribution is showing how political responses to prisoner radicalization are misguided and based on false data and flawed analyses. Although less than a handful of Muslim inmates became involved in terrorist activity in the past decade, the issue has been overblown, perhaps best evidenced by the fact that there were more congressional hearings in the last decade on violent extremism among Muslim inmates than actual instances of it.

[23] *The Extent of Radicalization in the American Muslim Community and that Community's Response: Hearing before the House Comm. on Homeland Sec.*, 112th Cong. 1, in COMPILATION OF HEARINGS ON ISLAMIST RADICALIZATION, Ser. No. 112-9 (2011).

[24] MALCOLM X, *supra* note 22, at 199.

5.1 *The Sound of Sirens*

Violent extremism among Muslim inmate populations is relatively rare in the post–9/11 era. This fact is noteworthy for policymakers since it provides an opportunity to reconsider assumptions and perceptions about Islam in prison. Although some prison systems have adopted aggressive postures toward Muslim inmates, such heavy-handed policies run the risk of backfiring and fomenting radicalism; as Aaron Rappaport et al. note: "Hysteric and stigmatizing reactions can fuel radicalization among prisoners and their followers, contributing to the threat rather than managing it."[25] This is a lesson British prison officials have been learning, since their extreme measures at security have inspired greater resistance among radicals.

The attempt to shape religious ideology by censorship or otherwise is dangerous, and instead may stoke animosity and fear. More specifically, communication management units (CMU) are cited as being counterproductive and increasing levels of radicalization, since they foster tensions among the different Muslims groups in the units. The units have also fostered solidarity and defiance among the CMU inmates in light of heightening conflicts between guards and inmates.

Current approaches to managing Muslim inmates in post–9/11 America pretend to be informed and well-intentioned, but according to one scholar, "There remains a significant lack of careful thinking about the rationales for many widely shared prescriptions. Just as troubling, some worry that no attempt has been made to coordinate the policy prescriptions, resulting in unintended, and in certain cases counter-productive, consequences."[26]

Fears about Muslim radicalization in prison have failed to fulfill doomsday prophecies. There is little extremist violence in the name of religion, and even less activity that involves the dreaded foreign enemy. Despite the dearth of evidence to support the myth of jailhouse jihad, Muslim inmates have been forced to bear the policies that toe this alarmist line. From a penological perspective, these developments are undesirable since, in some instances, the policies ended up causing what they sought to prevent.

Prisons are extreme and dangerous places particularly suited to catalyze extremist thought and behavior, yet researchers are indicating that the risk of radicalization is moderate and falling. Generally speaking, according to reports from the Triangle Center on Terrorism and Homeland Security and the Congressional Research Service (CRS), homegrown terrorism is declining after a brief spike in the period from 2009 to 2011. By relative comparison, deaths due to religious extremism are quite rare, and according to the Triangle Center, since 9/11 there were 33 lives lost

[25] Aaron Rappaport et al., *Homeland Security and the Inmate Population: The Risk and Reality of Islamic Radicalization in Prison, in* Special Needs Offenders in Correctional Institutions 432 (Lior Gideon ed., 2012).

[26] *Id.*, at 433.

due to Muslim American terrorism in the United States, compared to 150,000 murders committed by other Americans in the same period. The occurrence of terrorist acts in prison, according to the CRS report, is even rarer. CRS notes the JIS case as the only documented case of a prison-based jihadist plot in the post–9/11 era. Empirically then, the situation in prison is temperate and, as some researchers have claimed, much of the talk about the risk of radicalization is simply talk, unsupported by research or evidence.

5.2 *Supporting Religious Pluralism in Prison*

Fostering a more diverse and authentic marketplace of Islamic ideas will have a normalizing effect on Islamic practice in prison. In theory, achieving a more pluralistic religious environment strives to stimulate a multiplicity of religious views and options as well as facilitate entry of a more diverse body of Islamic leaders for programming. Practically, this might be carried out in myriad ways, including by broadcasting live prayer services on closed-circuit television, offering Arabic language classes to inmates, and, most critically, creating imam-certification programming. These approaches recognize and emphasize that Islam is a complex tradition, and that adopting any singular approach to the religion is not only dangerous ideologically, but contrary to religious life on the ground. Fostering a marketplace is the opposite of trying to establish what one scholar has dubbed "Official Islam," or a government-sponsored account of Islam.[27]

As for the concrete steps that prison officials and policymakers should take to promote pluralism, lowering barriers for religious leaders to enter stands paramount. The lack of Muslim religious leaders must be remedied such that trained religious leaders are the rule, not the exception. In a Pew survey of state prison chaplains, 55 percent of those surveyed agreed that Islam is the faith group with the greatest need for more volunteers, while 83 percent believed that Christian faith groups have "more than necessary."

Such statistics harken back to al-Muhajair's claim that radicalization occurs when prisons "promote Christianity and starve Islam." State correctional institutions implementing similar bans or severe restrictions should also reassess or, where applicable, develop policies that strike an adequate balance between vetting and providing services.

Prison policies should also encourage what may be described as *religious entrepreneurship*. In such an economy, prison officials and policymakers are encouraged to engage with a wide variety of Muslim organizations to increase access to various types of religious texts and religious workers that adhere to various interpretations of

[27] Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 Stan. L. Review 125 (2012).

Islam. For example, the Ohio Department of Corrections has established a "Best Practices Tool-Kit" for faith-based engagement that offers exemplary programs in which religious programming converges with the goal of crime reduction.[28] In addition, prisons might consider Folsom State Prison's Islamic Studies Program in California, which was reported to help with inmate rehabilitation.[29] To avoid any potential state endorsement of religion and ensure quality control in the curriculum, that program could be done in partnership with an officially accredited academic institution, such as a seminary or theological studies department at a college or university. Saint Louis University's prison program is instructive here, since it began by offering inmates a certificate in theological studies, which has expanded into the opportunity to earn an associate's degree.[30]

Corrections officials would also do well to invest in providing staff with basic religious competency training and recruiting more Muslim staff. Providing staff with basic religious sensitivity training and recruiting Muslim service providers will add more "cultural and political capital" to the prison setting by adding legitimate and moderate voices of religious authority.[31] The measure would also promote further goodwill and increase the respect for prison administration officials among Muslim inmates. The knowledge gained from religious competency training and Muslim prison staff can assist in identifying extremism as well as avoiding unnecessary confrontation with prisoners.

Prison administrations should also provide sufficient worship space for different Muslim subgroups. In recent years, Sunni inmates have sued to have services held separate from Shi'a inmates and vice versa; yet some courts have not been receptive to the idea. In practice, this judicial posture overlooks important sectarian differences, which may have collateral outcomes. For example, as neither sect is recognized as authoritative enough to warrant its own space for worship, there is greater likelihood for rivalry and further antagonism between both sides. Although prison authorities have cited security reasons for not providing separate space for worship, it is precisely because of security concerns – namely, sectarian tensions flaring – that administrators should reconsider the wisdom of their choice. Hence, even though courts have handed down the barest of threshold requirements for accommodating Muslim prisoners, institutions are free to go beyond the minimum and provide separate space for worship.

[28] Ohio Institute on Correctional Best Practices, *Best Practices Tool-Kit: Faith-Based Programming, Reentry and Recidivism* (2007).

[29] Mark S. Hamm, *Prison Islam in the Age of Sacred Terror*, 49 Brit. J. Crim'y 667–69 (2009).

[30] *Prison Program*, Saint Louis University, https://www.slu.edu/arts-and-sciences/prison-program/index.php.

[31] Mark S. Hamm, *Terrorist Recruitment in American Correctional Institutions: An Exploratory Study of Non-traditional Faith Groups* (2007), available at https://www.ncjrs.gov/pdffiles1/nij/grants/220957.pdf.

5.3 *Exploring Religious Programming as Best Practices*

The statement, "Not all will accept the grace and redemption God offers, but we should do all we can to ensure the opportunity for such offers to be made," is a sentiment that might be a guiding principle for exploring the prospects of religious programming as a *best practice* in prison administration. Best practice may be defined as falling on a continuum ranging from those practices that are well established and have clearly demonstrated their effectiveness to other practices, which, although promising, have not yet been fully developed or documented. Hence, although there is scant research available that evaluates the effectiveness of religious organizations, for inmates "what works" often involves religion.

Ultimately, administrators should explore how to harness the rehabilitative aspects of religion more than they have to the present. Religious education and fellowship opportunities should be developed and maintained by institutions without fearing Establishment Clause violations any more than a religious studies department at a state university would. The opportunity for religious study should be afforded to inmates as a programming scheme based on what helps released inmates stay out of prison. Such programming is different qualitatively from other educational opportunities, because of the emphasis on morality and legal conduct. This is not just some area of study, but one that gets at the ultimate questions of life and meaning of existence. For followers of Islam in particular, formal religious education can have a direct impact in reducing radicalization since, according to a recent report, "For radical Islamists, mainstream Islamic scholarship and ethics are a very real threat, perhaps the biggest threat."[32] The opportunities for education in religious programming are valuable in themselves, but particularly because the educational outcomes converge with broader correctional goals and management of extremism.

[32] Azeem Ibrahim, *Tackling Muslim Radicalization: Lessons from Scotland*, Institute for Social Policy and Understanding, June 1, 2010, *available at* www.ispu.org/tackling-muslim-radicalization-lessons-from-scotland/

PART IV

Law, Society, and Islamophobia

11

Property Lawfare: Historical Racism and Present Islamophobia in Anti-Mosque Activism

Cyra Akila Choudhury

Five years ago, a local land-use issue here in New York City became the subject of national debate. Two Muslim men – a real-estate developer and an imam – proposed to build a Ground Zero Victory Terror Mosque two blocks away from the smoldering ruins of the World Trade Center. Haha, no: They proposed to build a fifteen-story Islamic cultural center.[1]

This chapter concerns itself with the use of the law, legal institutions, and processes in anti-mosque activism and litigation to advance a social and political agenda that seeks to marginalize, if not expel, Islam and Muslims from mainstream America. It argues that even though anti-mosque activists who seek redress in courts most often lose, they "win by losing" – a phenomenon well theorized by law and social movement scholars.[2] In other words, the strategy of litigating a narrow legal issue is not so much about winning the lawsuit, but about using the courts to introduce social and political claims that further an Islamophobic agenda. Regardless of the legal outcome, anti-Muslim groups achieve significant results: their use of the law results in political consolidation of the anti-mosque movement, it keeps alive questions about Islam and Muslims' ability to "belong" in the United States, it demonstrates the willingness to fight for a dominant racial ordering that excludes minorities from some neighborhoods, and it forces the internalization of both social and material costs by Muslim communities that go well beyond the costs of litigation. As critical race scholars and critical theorists have long argued, law itself is a political and indeterminate instrument. In the introduction to this volume, we assert that the "law is a central, if not the most central, participant in the broader project of Islamophobia."[3] Khaled Beydoun theorizes that from a legal perspective, Islamophobia can be understood as three intersecting dimensions: private, structural, and

[1] Brendan O'Connor, *The Sad, True Story of the Ground Zero Mosque*, The Awl (2015), https://theawl.com/2015/10/the-sad-true-story-of-the-ground-zero-mosque/ (last visited Aug. 1, 2018).

[2] Douglas NeJaime, *Winning through Losing*, 96 Iowa L. Rev. 941, 945 (2011).

[3] Cyra Akila Choudhury & Khaled Beydoun, *Introduction*, Islamophobia and the Law (2019).

dialectical.[4] This chapter demonstrates this very intersectionality as it appears in anti-mosque activism. It analyzes how the private Islamophobia of community members can become galvanized into community action and, through the use of the structures of the state (zoning commissions and courts), reinforce dialectical Islamophobia, signaling that Muslims must explain, apologize, and justify their actions even when those actions would be entirely uncontroversial for other groups.[5]

The chapter proceeds in two parts. Part 1 describes the kind of property lawfare that is undertaken and the defenses or counter–property lawfare that Muslims engage in to get their mosques built. The point here is to describe the legal strategies and responses in these conflicts and to demonstrate that these are usually very narrow legal issues, which are used to introduce much broader Islamophobic ideas into the conversation and to gin up the property controversy into a national security matter.

Part 2 answers the question, Why should we concern ourselves with these losing legal actions if mosques are, in fact, getting built? I argue that anti-mosque actions are troubling for two reasons: First, they are part of a long history of racial ordering and subordination, in which property has played a prominent part. I draw a linkage between the anti-mosque strategies and those that maintained racial segregation in housing in the post–World War II era. Then, moving away from law, I juxtapose the social responses to housing integration to show some critical continuities and commonalities. The historical parallels and continuities go to the very heart of belonging and inclusion in the United States and the social construction of "American" as a social identity.

The second reason anti-mosque activism is a problem is because there are substantial distributional consequences of these undertakings. Even if anti-mosque legal actions typically do not succeed, they nevertheless have economic and social consequences that are not apparent if one only looks at the outcomes of reported legal actions. These costs are internalized by Muslim communities and they work to dissuade them from pursuing mosque building, as the costs are intended to do. When Muslim communities persevere, their projects cost more money, resulting in a transfer of assets away from the community. Again, this "tax" is part of a history of extracting and redistributing wealth out of minority communities.

Before I elaborate on the main arguments in this chapter, it is important for readers to understand the demographic changes in Muslim communities in the United States that make the need for mosques pressing. In 2000, there were approximately 1,200 mosques nationwide. By the year 2016, that number had doubled. In spite of this growth, Muslims face a mosque shortage, resulting in overcrowding. There is one mosque for approximately every 1,500 Muslims, compared to one church for every 500 or so Christians. The growth in the Muslim

[4] *Id.*
[5] *Id.*

population since the 1980s has led to the establishment of new mosques; 76% of the mosques were established after 1980. The number of mosques in urban areas is decreasing, while the number of mosques in suburban areas is increasing. In 2011, 28% of mosques were in suburbs, up from 16% in 2000. This move to the suburbs away from the inner city indicates that more affluent immigrant Muslims are seeking to build mosques where they live.[6]

The increasing visibility of Muslims after 9/11 has also brought increasing scrutiny of mosques. As Muslims were being targeted for ordinary religious practice and for their identity, mosques were being surveilled and infiltrated as well. While there has been substantial scholarship on surveillance in mosques, what has not been adequately studied is the subject of this chapter: attempts to curtail mosques as structures in and of themselves. As a semipublic, quintessentially Muslim space, the mosque, like the Muslim body, has become a site of conflict. And property law has become a means of engaging in that conflict.

1 PROPERTY LAWFARE: THE LAW'S (MIS)USES IN ANTI-MOSQUE ACTIVISM

In this part of the chapter, I describe the strategies of property lawfare that have been used to try to prevent mosque building, and the use of the law by Muslim communities to resist such obstruction. I discuss these strategies by examining two ordinary cases. I focus on run-of-the-mill mosque projects, rather than the more spectacular cases like the Park51 development (which became misnamed popularly as the Ground Zero mosque), because these small mosques are what most communities attempt to build throughout the country. Space constraints require that the discussion be limited to two representative cases. First, I analyze the controversy about the Islamic Center of Murfreesboro (ICM) in Murfreesboro, Tennessee. This mosque was the target of ongoing action for a number of years and provides a good example of similar conflicts nationwide. Second, I examine the actions against the Dar al Farooq (DAF) mosque in Bloomington, Minnesota, a mosque that is housed in a repurposed Lutheran church. The first is a case of a new mosque being built; the second shows how expanding an existing religious structure can also be met with resistance.

Before describing the ICM case, I want to define *property lawfare*. Property lawfare is derived from the international law term *lawfare*, where it is used to connote the law as a weapon of war. In this context, it is the use of property law (land-use/zoning) to further a specific social and political objective, which is not simply to prevent mosques from existing or expanding, but to call into question the

[6] Shannon Greenwood, *The Muslim American Experience in the Trump Era*, Pew Research Center, *Religion & Public Life*, 3 (2017), *available at* http://pewforum.org/2017/07/26/the-muslim-american-experience-in-the-trump-era/ (last visited Aug. 1, 2018).

presence of Islam in the United States. Legal processes are used to express social disapproval of Muslims, to inject into the public record allegations of jihadism and terrorism, to tie mosques and Muslims to foreign agents trying to overthrow US law and government, and to elevate local zoning controversies into national security matters. Thus, mosque-building lawfare uses law, legal institutions, and processes as a vehicle to achieve its broader objectives: to marginalize and subordinate Muslims.

1.1 *Property Lawfare Cases: Using Zoning to Try to Prevent Mosque Building*

Typically, Muslim communities either seek to build a new mosque or to convert an existing structure to suit their needs. There are two main types of zoning frameworks that mosque builders encounter: areas that are "use by right" and areas that require "conditional use" permits. In areas that are zoned as use by right, the zoning ordinance already contains approval for uses like houses of worship in a residential area. The community then must identify a property to convert or a parcel of land to build on, raise money, hire architects, get a site plan, and submit it to the zoning board for approval. The zoning commission reviews the plans and schedules hearings open to the public. If required, the plans are modified until they comply with the zoning code, after which the commission issues a building permit and work can begin. The property is inspected during the building and after it is completed. If the building meets the zoning and building code standards, the city issues a certificate of occupancy so that the mosque can be officially opened for use.[7]

Projects that are being built or modified in Conditional Use Permitted (CUP) zones require the mosque authorities to get a variance. The mosque may be permitted as "conditional use," providing the criteria required to maintain the neighborhood's purpose and character are met. And if there are accessory uses like a soup kitchen or a child care center, these need to be reviewed and permitted by municipal authorities – the zoning board – and subjected to public hearings before final approval.[8] As described in this chapter, public hearings have given rise to significant anti-mosque action, including litigation. If the mosque already has been built or modified, repeated and harassing complaints about code violations and requests for code enforcement may be the strategy used to dislocate the mosque. In the following pages, the chapter analyzes two cases that demonstrate how property lawfare is waged.

[7] *See generally*, Roman P. Storzer & Blair Lazarus Storzer, *Christian Parking, Hindu Parking: Applying Established Civil Rights Principles to RLUIPA's Nondiscrimination Provision*, 16 Richmond J.L. & Pub. Int. 295 (2013); *Beginner's Guide to Land Use Law*, Pace University School of Law, *available at* https://law.pace.edu/sites/default/files/LULC/LandUsePrimer.pdf, page 6–8 (last visited on Aug. 3, 2018) [hereinafter, Beginner's Guide to Land Use].

[8] *See* Beginner's Guide to Land Use, *supra* note 7 at 6–8.

Case 1: The Islamic Center of Murfreesboro v. Rutherford County, Tennessee (Use as Right)

The Islamic Center of Murfreesboro (ICM) in Murfreesboro, Tennessee, was established in 1982. In 2010, the community had grown to several hundred families and the ICM decided to expand their existing 2,200-square-foot Islamic center to accommodate the larger number of mosque-goers. It obtained a parcel of land in a residential area zoned to allow houses of worship as use of right and submitted plans for a facility that would be 12,000 square feet but zoned to expand up to 52,000 square feet. In May 2010, the planning commission held a regularly scheduled meeting, with proper notice in the local newspaper, the *Murfreesboro Post*, per usual procedure. At the meeting, the planning commission voted unanimously to approve the site plan. The ICM then obtained a building permit and began work.

In September 2010, a group of county residents, Estes et al. (who eventually became Fisher et al.), filed suit in Chancery Court to stop construction on the ICM, arguing that the Rutherford County Regional Planning Commission had not given adequate public notice before approving plans for the Islamic Center's construction in 2010, in violation of the Open Meetings Act and the Tennessee Constitution.[9] Both the notice and constitutional claims were justified by the argument that the community (here the plaintiffs) had a right to challenge the ICM proposal because the mosque presented a threat of bringing shar'iah law, jihadism, and terrorism into the neighborhood. The plaintiffs further raised the constitutional argument that ICM had no right to free exercise under the Tennessee Constitution because shari'ah conflicted with the Constitution and therefore could receive no protection. Chancellor Robert Corlew III heard eight days of evidence on the motion for injunctive relief. During this proceeding, the Department of Justice (DOJ) filed an amicus brief because the plaintiffs had "put into controversy whether Islam is a religion and whether a mosque is entitled to treatment as a place of religious assembly for legal purposes."[10] The DOJ reminded the court that it was charged with enforcing the Religious Land Use and Institutionalized Persons Act (RLUIPA), a federal statute mandating that religious institutions be treated on equal footing with secular ones with regard to land use.[11]

In November 2010, Chancellor Corlew denied injunctive relief and dismissed all claims except the claim that Tennessee's Open Meeting Act had been violated. After another hearing, the Chancery Court issued an opinion on May 29, 2012, holding

[9] Robbie Brown & Christine Hauser, *After Attacks and Threats, Tennessee Mosque Opens*, N.Y. Times (2012), *available at* https://thelede.blogs.nytimes.com/2012/08/10/after-attacks-and-threats-tennessee-mosque-opens/ (last visited Aug. 1, 2018); Estes, et al. v. Rutherford Cty Regional Planning Commission, 2010 complaint.

[10] Amicus brief filed by United States in Estes, et al. v. Rutherford Cty Regional Planning Commission, 2010, 1.

[11] *Id.*

that the notice given in advance of the Planning Commission's May 24, 2010 meeting was inadequate under Tennessee law and the Center's site plan approval was void. But it did not issue an injunction and noted that request for such relief should come in the form of a mandamus action.[12]

By July 2012, the mosque had been substantially completed and ICM requested an inspection and a certificate of occupancy. They were denied by the Chancery Court, precipitating another intervention by the Department of Justice. The DOJ requested a temporary restraining order in federal court based on RLUIPA to force the county to issue an occupancy permit. They were successful, and the ICM was able to begin operations in 2012 in time for the holy month of Ramadan.[13]

Case 2: Dar al Farooq Mosque, Bloomington, Minnesota (Conditional Use Permit)

The case of Dar al Farooq (DAF) mosque in Bloomington, Minnesota, which serves a majority black Somali Muslim population, presents an example of anti-mosque activism that occurs when Muslims convert a building that already exists into a mosque. This project was used as an example by the Center for Security Policy, a leading right-wing organization that purports to concern itself with national security and terrorism, in their training book *Mosques in America*.[14] According to the organization, it demonstrates how zoning laws that allow mosque construction are aiding the infiltration of neighborhoods by radical Muslims. Indeed, the Center believes that municipalities are favoring Muslims rather than treating them neutrally as they are supposed to do.[15]

The Dar al Farooq project differed from the Murfreesboro mosque insofar as there was an existing building. The structure had already been used as a Lutheran church. Mosque leaders had to apply for the renewal of a conditional-use permit to *continue to use it* as a house of worship after it changed hands, yet the community was confronted with objections. According to the opponents of the mosque, Dar al Farooq misled the municipality by failing to disclose how many people would use the mosque, that events would be held at night, particularly during the month of Ramadan, its use of the nearby ball field, its plans for a cemetery, the number of cars that would be parked, and so forth.[16] From 2011 onwards, the Center for Security

[12] *Id.*

[13] *See* Brown, *supra* note 9.

[14] Karen Lugo, Mosques in America: A Guide to Accountable Permit Hearings and Continuing Citizen Oversight (2016).

[15] *Id.*; Karen Lugo, *The Department of Justice Is Privileging Mosques*, American Greatness (2017), https://amgreatness.com/2017/06/16/department-justice-privileging-mosques/ (last visited Aug. 1, 2018).

[16] Mike Hanks, *Bloomington Neighborhood Formalizes Concerns Regarding Islamic Center*, Hometownsource.com (2016), *available at* https://hometownsource.com/sun_current/news/local/bloomington-neighborhood-formalizes-concerns-regarding-islamic-center/article_92155a51-8734-5eac-80b6-949ef35064aa.html (last visited Aug. 1, 2018).

Policy's researcher claims, neighbors repeatedly asked the city to enforce the conditional use permit. It claims that DAF violated the terms of the CUP which gave rise to the right to revoke it. Yet, in their extensive discussion of the many infringements committed by DAF, the report contains the complaints of only two neighbors. A petition given to the Bloomington authorities included the attorney who drafted the petition and two neighbors as signatories.[17] According to news sources, there were no other signatures, the petition did not look official, and the Bloomington municipal authorities were unsure what to do with it.[18] Nevertheless, they have maintained that they have been responsive to complaints, and on their website, there is a "Frequently Asked Questions" section specifically dealing with the mosque.[19]

What we can surmise from this, then, is that a couple of neighbors have taken to repeatedly complaining about the mosque to the city officials. A national right-wing group has used the mosque as an example of the city's giving preferential treatment to Muslims, even as those Muslims flagrantly disobey the conditions of their permit. Of course, upon further examination, the claims are seen to be overblown, to say the least. And certainly, the city officials have not shirked their duties. What is clear is that the prior use by Lutherans was perfectly acceptable; however, the same property's use by Muslims raised concerns within a very small segment of the community.

1.2 *Forms of Property Lawfare*

From the above cases, it ought to be clear that the property law issues raised by the mosque opponents are insubstantial in and of themselves in these cases. Law, in other words, is instrumentalized to further a particular vision of a social and spatial order that already exists and is part of the discourse within the community, even if not universally supported. The law is not central or even particularly important, insofar as the lawsuits do not seek to vindicate a particular legal rule or standard. In other words, the controversies arise primarily from a social disapproval of the mosques, not from the violation of legal rules. Furthermore, the law, both as written and applied, does not always favor mosque opponents; however, the point here is that *property lawfare is not primarily about the law*, but about its uses as a vehicle to advance a political and social agenda.

As can be seen from the Murfreesboro case, the legal issues that arise from zoning in new mosque projects might easily have been resolved by good-faith actors. Technical deficiencies or mistakes could have been corrected, plans resubmitted, and other ameliorative steps taken. However, in some mosque cases like these, ordinary and

[17] Susan Du, *Bloomington Mosque-haters Petition City to Stomp Down on Dar al Farooq*, City Pages (2016), *available at* http://www.citypages.com/news/bloomington-mosque-haters-petition-city-to-stomp-down-on-dar-al-farooq/388851402 (last visited Aug. 1, 2018).

[18] *Id.*

[19] Al Farooq Youth and Family Center (AFYFC), City of Bloomington MN (2018), https://bloomingtonmn.gov/plan/al-farooq-youth-and-family-center-afyfc (last visited Aug. 1, 2018).

foreseeable errors become the basis for demands that the project be stopped. Typically, the dominant lawfare strategy is to litigate even minor issues. In the Murfreesboro case, for instance, the coalition against the mosque filed litigation to enjoin the project on a claim of inadequate notice. Specifically, Fisher et al., the plaintiffs in the case, argued that the notice given failed to comply with Tennesee's Open Meetings Act. As explained earlier, notice for zoning issues had been given in the same manner for other projects. What, then, explains the challenge to the forum for notice in this particular instance? One way to interpret this strategy is by understanding it as pretextual. The litigation is a vehicle by which Fisher can get a public hearing and forum in which to introduce a raft of anti-Muslim ideas into an official record.[20] The expert testimony can then be found by others undertaking similar actions.

The expert testimony in the Murfreeboro case, for example, was given by a known Islamophobe with questionable credentials, Frank Gaffney. Gaffney, who runs the Center for Security Policy and the anti-mosque contingent, repeatedly and spuriously linked radicalization and terrorism (in which he includes the ordinary practice of Islam) to mosques. If one reads the transcript of the hearing, it becomes quite clear that Fisher et al. were not suing to resolve the nonissue of inadequate noticing, but rather using the institutions of the state and the legal process to publicize the racial and religious animus that undergirded their actions. In short, they used legal processes to essentially defame the mosque leaders and tar the community with the brush of terrorism, ginning up a fear of the Other and calling for the "protection" of "our" communities.[21]

In the Dar al Farooq case, the lawfare strategy used is akin to harassment. The continuous use of a complaints mechanism and the demand for "enforcement" of the conditional use permit was aimed at harassing the mosque authorities.[22] While the petition circulated by anti-mosque activists itself does not stray into any overt anti-Muslim statements, the relentless complaints from a very small minority were characterized in at least one newspaper as harassment by "mosque-haters."[23]

Although anti-mosque activists use lawfare to publicize their Islamophobia, Muslim communities seeking to build mosques are not without defenses against such action. Indeed, it can be argued that they are, in fact, in a stronger position to win challenges. However, the use of the law against property lawfare is not counter-lawfare. For Muslims, the substantive rules matter. The law, not just the processes and institutions, is generally on the side of the mosque builders. As such, Muslim communities are not using the law as vehicle to achieve a broader social goal, but rather using it as a defense to vindicate their protected rights.

[20] *See Estes et al.*, complaint, supra note 9.

[21] Estes, Fisher, et al. v. Rutherford Cty Planning Commission, Transcripts of the Proceedings, September 27, 2010, starting at 43. Frank Gaffney's testimony repeatedly links ordinary practice of Islam and shari'ah (the entirety of the religious law) to terrorism.

[22] *See supra* note 19.

[23] *See supra* note 17.

1.3 *Law as Defense: Zoning, RLUIPA, and the First Amendment*

When it comes to countering anti-mosque litigation, the US Constitution's First Amendment is the most obvious defense. The jurisprudence on Free Exercise of religion is well established. Rather than summarize that body of work here, suffice it to say that the state may not discriminate among religions. It can regulate religion through neutral laws of general application not directed at any one religious community, even if it impacts that community more severely.[24] However, it may not carve out one religion for disparate treatment. Against this constitutional backdrop, there is a much more targeted federal law dealing with land use. The Religious Land Use and Institutionalized Persons Act (RLUIPA) passed by Congress in 2000 prohibits a local government from imposing or implementing land use regulation, defined specifically in the Act as zoning and landmarking, in any way that imposes a "substantial burden on the free exercise of individuals or a religious assembly or institution, unless the government can demonstrate that it (1) has a compelling interest for the regulation, and (2) has used the least restrictive means to achieve that interest."[25] The Act requires local, state, and federal bodies to treat religious assemblies on equal terms with nonreligious assemblies such as private clubs or lodges. That is, religious assemblies may not be excluded where secular organizations are permitted, and they must be given the same zoning rights.

In the Murfreesboro case, the DOJ intervened twice in the ongoing litigation, citing RLUIPA. It first intervened when the initial complaint was filed, in order to clarify that Islam was indeed a religion and was protected by the Constitution and the Act. This was a direct counter to the argument that Fisher et al. had made that shari'ah and anyone or any institution that practices shari'ah is not protected, because shari'ah is antithetical to the Constitution. The DOJ had to make clear to the magistrate that Islam was considered a religion for First Amendment purposes.

The second intervention came at the very end of the process in which the DOJ sued Rutherford county in District Court in 2012 to force it to issue a certificate of occupancy. At that juncture, the mosque had already been built and was waiting to open but the Chancery Court, overruling itself, found that the Tennessee Open Meetings Act had, in fact, been violated because proper notice was not given.[26] The DOJ argued that RLUIPA's standard that religions be treated no differently than other nonreligious concerns or other religious groups required the Chancery Court decision to be set aside. The District Court granted the injunction, allowing the mosque to open.

[24] *See generally*, Daniel P. Dalton, Litigating Religious Land Use Cases (2016).

[25] 42 U.S.C. § 2000 (a)(1) (2000).

[26] United States v. Rutherford Cty, 2012 WL 3775980 (M.D. Tenn. Aug. 29. 2012). In the Dar al Farooq case, there was no litigation. Rather, RLUIPA was cited in a caution by the State Attorney to the municipality that it cannot discriminate.

As noted earlier, the legal issues are not particularly challenging or interesting. Over and over again, these cases demonstrate the power of public opinion and activism, even when the law is likely to be in favor of mosque builders. In the ICM case, the Chancery Court succumbed to public pressure from the community and its litigation to rule in a manner that was clearly erroneous, even with the existence of clear constitutional guidance and RLUIPA prohibitions. The *Murfreesboro Post* had been the paper in which all the notices of zoning hearings had been published.[27] The argument that ICM be treated differently because it posed a higher risk was based on nothing but naked bigotry, alternative facts about Islam, and the view that all Muslims are suspect because of a propensity to engage in terrorism. The ICM was clearly treated differently than other organizations by being subject to a different notice standard and vexatious litigation, because some community members simply did not want a mosque in their neighborhood. In other words, it was not the municipality treating the mosque differentially that was the problem, but the demand for that differential treatment and discrimination based on trumped-up national security concerns.

2 PROPERTY LAWFARE AND ITS DISTRIBUTIONAL CONSEQUENCES

2.1 *Maintaining the Distribution of Power: Part of a Broader Pattern of Racial Hierarchy*

Ultimately, most mosques like the ICM and Dar al Farooq are built, expanded, and are functioning. So why, it might be asked, should we care about these anti-mosque actions that fail? I argue in the following pages that there are two main reasons why we should pay attention to these actions. First, even if they fail, these actions are part of an ongoing use of law to draw boundaries, to police social acceptability, and to express social disapproval of a minority group. Drawing on the history of segregation in the United States, I argue that anti-mosque activities are an extension of a racialized spatial construction of belonging in which a dominant group attempts to demarcate its separateness and its superiority, and this often emboldens vigilante violence and private Islamophobia. Second, I argue that even these losing actions exact serious costs on Muslims materially. Such costs are internalized by the community and are rarely fully taken account of, even when Muslims win. In order to understand the harm of this form of Islamophobia, these distributional consequences must be considered.

The use of the law by a dominant community to further particular social preferences is nothing new in the United States. Scholars have been theorizing the legal construction of race, whiteness as property, and the material consequences

[27] Fisher et al. v. Rutherford Cty Regional Planning Commission et al., 2013 WL 2382300 (Tenn. Ct. App. May 29, 2013).

of racial discrimination for a number of decades.[28] Although space does not permit a thoroughgoing review of the theoretical literature, this section draws on critical race theory's insight that power in the United States is distributed along racial lines and that law is part of the structural system that upholds that distribution.[29] Nowhere is that distribution more apparent than in the neighborhoods in which we live. As Richard Rothstein has argued, federal, state, and local government actively engaged in creating segregated neighborhoods through their zoning, lending, and insurance practices even after legal segregation had been struck down.[30] The racial composition of neighborhoods that remain highly segregated by race, with people of color living in less-desirable and poor neighborhoods, is a result of that history.

There is a connection between anti-mosque actions and neighborhood segregation in the United States. These are linked histories. Strategies that served to maintain social redlines around majority-white neighborhoods in the past persist into the present. In order to understand the link between racialized resistance to mosques and past forms of discrimination, I want to juxtapose two historical cases of neighborhood segregation: Levittown, Pennsylvania, and Louisville, Kentucky. By examining these two cases, I want to underscore the social exclusionary practices that were at first underwritten by discriminatory law and then maintained, even after de jure segregation was prohibited. Before proceeding, I want to bracket the legal difference for now because we're obviously comparing two cases with a temporal remove of some 70 years. Although the law formally prohibited violations of equal protection in the postwar era, the Federal Housing Authority that underwrote many mortgages and loans to developers would not give loans to any development that was integrated nor back any home loan to African Americans. Developers had to include restrictive covenants in their developments to ensure that there was no likelihood of integration. Although there was plenty of law both striking down and upholding racial exclusion, it's the social practices of exclusion that I think are important.

2.2 *Neighborhood Segregation and the Creation and Maintenance of Racial "No-Go Zones": Levittown, Pennsylvania, and Louisville, Kentucky*

In 1957, Bill and Daisy Myers, middle-class African Americans, found a white family willing to sell them their house in the new development of Levittown, Pennsylvania. Bill was a war veteran desperate for housing. The couple could not get a bank

[28] *See* Cheryl Harris, *Whiteness as Property*, 106 Harvard L. Rev. 1707 (1993); *see generally*, Gary Peller & Kendall Thomas, Critical Race Theory: The Key Writings That Formed the Movement (1996); Adrien Katherine Wing, Critical Race Feminism: A Reader (2nd ed., 2003); Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction (3rd ed., 2017).

[29] *See* e.g., Khaled Beydoun, American Islamophobia: Understanding the Roots and Rise of Fear (2018).

[30] Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 141–43 (2017).

mortgage, but a black philanthropist from New York gave them a private mortgage, and they bought the house and moved in with their three children. A few days later, a US mail carrier, an employee of the government no less, realized that he was delivering mail to an African American family and delivered his mail while announcing, "N—gers have moved into Levittown." A mob of 600 people gathered outside the Myerses' house. The crowd pelted the house with rocks. Community members rented the house next door and set up a clubhouse from where the Myerses were subjected to round-the-clock harassment; the Confederate flag was flown, music blared all night, crosses were burned, and KKK symbols were painted on the clubhouse. Rocks continued to be thrown, smashing windows in the Myerses' home. One family that supported the Myerses had their house vandalized. The local police, who knew the culprits of the harassment, did not take action. The state police tried to intervene, but to no avail. The harassment and threats continued. Eventually, after four years of this treatment, the Myerses moved back to their African American neighborhood, leaving Levittown largely segregated.[31]

Around the same time – in 1954 – the Wade family, looking for housing in an African American neighborhood, found nothing suitable. With the help of a white family, who purchased and then deeded the house to them, they moved into a house in Shively, an all-white community in Louisville, Kentucky. On the day they moved in, a crowd gathered in front of their house, a cross was burned, and a rock with a message "N——r Get Out" was thrown through their picture window. Later that night, ten rifle shots were fired through their kitchen door. Under the watch of the police, the crowds demonstrated for a month, until the house was dynamited. The police saw nothing. None of the firebombers or vigilantes were arrested, let alone prosecuted, even though they were known to the authorities.[32]

There are many such stories. In Chicago, from 1917 to 1921 there were 58 firebombings of houses bought by African Americans in border areas where whites lived. In the first five years after World War II, there were 357 incidents reported against African Americans trying to buy or rent in white areas. In Philadelphia, in the first six months of 1955, there were 213 violent incidents against African Americans seeking to move out of the ghetto. In Los Angeles, there were firebombings, dynamiting, vandalism, and the murder of an entire family who had moved into a white neighborhood, as a result of a dynamite explosion. In 1985, in Louisville, Kentucky, a black family bought a house in the all-white suburb of Sylvania. The first night their house was firebombed. A month later, the house was destroyed in an arson attack.[33]

[31] *See supra* note 30.

[32] *Id.*, at 148–50. The only people to be arrested were Andrew Wade and a friend for "breach of the peace." The Bradens, who had sold the house to the Wades, were indicted by a grand jury for sedition, and Carl served seven months before the law was repealed.

[33] *Id.*, at 163.

These stories underscore the ways in which neighborhoods maintained their segregated state through a number of strategies. First, the federal government and banks refused to issue mortgages to black buyers. Second, when black buyers were able to obtain funds, often through private means and at a higher rate, they paid a premium for property, resulting in fewer eligible families being able to buy into the neighborhood. Third, while this was certainly not true of all whites, a majority of white families actively thwarted blacks from moving into their neighborhoods through vigilante violence, while the state authorities looked the other way.

2.3 *Connecting History to the Present: Keeping Out the Muslims*

How does this relate to anti-mosque activism? Returning to the ICM and to the DAF and more generally to similar cases, there are some interesting parallels worthy of note. First, the demographics of the locations in which mosques are being built reveal a lack of diversity. Murfreesboro, where the ICM is located, is 75% white, largely middle-class, has people largely born in the state, and has very few foreign-born residents. Bloomington, Minnesota, is similarly 79% white, and no other race exceeds 7%. It is solidly middle-class in terms of household income. So, the first point is that these mosques are being built in predominantly white neighborhoods, rather than in integrated ones, giving rise to racial hostility.

Second, and most important, the communities in which these mosques are being built have used many of the same strategies to prevent African Americans from acquiring homes, or to remove them. In 2010, the ICM placed a sign on its property that read, "Future Home of the ICM." A spray-painted message appeared over it that read: "Not Welcome." Several hundred of people rallied in Murfreesboro against the mosque, holding signs that read: "Mosque leaders support killing converts." Construction vehicles were set on fire and construction companies refused to work with the mosque because of the controversy. Dozens of profanity-laden messages were left by phone. In July 2017, the mosque was spray-painted and bacon was left at the Center.[34]

The DAF in Minnesota similarly began receiving phone calls and threatening messages from the moment it opened, and in July 2017, it was bombed with an improvised explosive device (IED) just before morning prayers.[35] Note that this is a

[34] Nancy De Gennaro, *Murfreesboro Mosque Defaced with Graffiti, Bacon*, U.S.A Today (2017), *available at* https://www.usatoday.com/story/news/nation-now/2017/07/10/murfreesboro-mosque-defaced-graffiti-bacon/466122001/ (last visited Aug. 3, 2018).

[35] Kristine Phillips, *He Wanted to Build Trump's Border Wall. He Was Just Charged in the Bombing of a Minnesota Mosque*, Wash. Post (2018) *available at* https://washingtonpost.com/news/post-nation/wp/2018/03/14/he-wanted-to-build-trumps-border-wall-he-was-just-charged-in-the-bombing-of-a-minnesota-mosque/?utm_term=.bc2f3a6e4802 (last visited Aug. 3, 2018).

mosque that includes services for families and children. Of course, the authorities have not reacted the way they did in the 1950s and the legal landscape has changed; however, it is the similarity between anti-desegregation and anti-mosque actions that is noteworthy here. Across the United States, there have been armed protests at mosques and Quran burnings; people have been followed and attacked, and shot and stabbed near mosques. Hijab-wearing women have experienced violence; there have been shots fired through mosques, rocks thrown through windows, arson, firebombings, and graffiti. Pig's heads and bacon have been thrown in mosques. Violent messages have been left on mosque phones, and imams have been harassed.[36]

As in the post–World War II era with housing integration, today the law and legal institutions are used in combination with vigilantism to try to protect predominantly white neighborhoods from infiltration by disfavored minorities. Anti-mosque activities, in short, should be read as part of the history of property lawfare and community activism, even violence, in which white majorities have excluded minorities from their neighborhoods, claiming that they would bring blight, violence, reduce property values, cause interracial marriages, and bring a host of other social ills. Through denial of access to property, the racial order and purity of these neighborhoods was maintained. In other words, the point here is to demonstrate how Islamophobia is part of a larger construct of racial hierarchy that subordinates others, specifically people of color and of minority religions. It is an irony that while the plaintiffs in the Murfreesboro case raised the issue of "no-go zones" in Europe – which, of course, do not exist – what they have been trying to do is maintain an anti-Muslim no-go zone of sorts in their own community.

Of course, it can be argued that these anti-mosque incidents have to be balanced with the fact that Muslims are not prevented from living in these neighborhoods. And while that is true, this fact should not be overemphasized. Laws prevent housing discrimination, allowing middle-class and wealthy Muslims and blacks to purchase property in these predominantly white neighborhoods. However, even such purchases can be met with resistance and with threats to the peace and safety of the newcomers, as I discuss in the following pages. Furthermore, as long as Muslims integrate but do not congregate, the communal strength of their presence can be ignored or downplayed. Overt markers of difference like mosque buildings, hijabs, or black skin unsettle these spaces of dominance and give rise to rejection and violence.

[36] Jason Le Miere, *Bomb Explodes during Morning Prayers at Minnesota mosque; FBI's Terrorism Task Force Investigating*, Newsweek (2017), *available at* https://newsweek.com/bloomington-mosque-bomb-muslim-attack-minnesota-646974 (last visited Aug. 3, 2018); Matt Stevens, *3 Suspects in Bombing of Minnesota Mosque Face Weapons Charges*, N.Y. Times (2018), *available at* https://www.nytimes.com/2018/03/13/us/minnesota-mosque-bombing-suspects.html (last visited Aug. 3, 2018).

2.4 *The Social and Material Costs of Islamophobia*

Most mosques eventually get built, and Muslim communities across the United States have been very successful in defeating anti-mosque lawsuits. However, it would be a mistake to assume that a favorable outcome for Muslims and the eventual success of the project mean that Muslims have "won." Law and society scholars have theorized the ways in which social movements leverage legal strategies to raise awareness through "losing to win." The loss of the lawsuit in many cases is expected, but the publicity generated and the focus on the issue is the real purpose behind the use of the law. Successful Muslim communities bear a number of social and material costs when anti-mosque activists file complaints and lawsuits. In other words, the distributional consequences are more negative than they appear if one simply looks at the outcome of the legal controversies. The material costs include the economic burden of litigation and increases in building costs. The social costs include the necessity of countering misinformation and Islamophobia in a public forum that then jeopardizes the safety of both the mosque and individual members of the community by focusing the spotlight on them for specious reasons.

After the passage of RLUIPA, mosque organizers in bigger communities have been more willing to sue or involve the Department of Justice. But, as in the case of the ICM, the expense of litigation is only one material cost. Even if mosque builders win and recoup fees, it is often the county that ends up paying that penalty, which is passed on to taxpayers, *including Muslims*. In the ICM case, Rutherford County paid more than $300,000 in attorney's fees. The plaintiffs who created the controversy passed on those costs to taxpayers and, while the monetary effect may be small, it is on principle unfair to require Muslim taxpayers to cover any costs of vexatious litigation against them!

In addition to the money and time spent defending lawsuits or bringing them to get a mosque built, Muslim communities sometimes pay above-market rates for services. In Murfreesboro, the mosque project suffered delays because it could not find contractors willing to complete the work. When it found a general contractor, that company ended up withdrawing, because it could not find subcontractors willing to work on such a controversial project, which was the focus of community vitriol and opposition. The ICM then had to pay significantly more to have the building completed. After construction equipment was set on fire, the community had to hire security.[37]

Even if we account for these economic consequences, according to the Institute for Policy and Social Understanding, the community chooses not to litigate in many of the cases where Muslims are held to a higher standard. Some communities

[37] Nancy De Gennaro & Holly Meyer, *Vandals Target Islamic Center of Murfreesboro with Bacon, Profanity*, Daily News Journal (2017), *available at* https://www.dnj.com/story/news/2017/07/10/islamic-center-murfreesboro-vandalized-again/464315001/ (last visited Aug. 3, 2018).

simply comply with heightened requirements, because they do not want the attention and the displeasure of the community. In the past, these requirements often meant that mosques did not get built, were built in less-than-ideal places, or were delayed for years.[38] These are serious costs, internalized by the community, which they cannot recoup from the anti-mosque activists or the town. Being made to pay a premium or over market price for building mirrors the experience of blacks attempting to purchase houses in white neighborhoods. As historians have documented, blacks often paid significantly more than market rate because of racism – and this practice of extracting wealth or imposing a tax on minorities continues as a strategy to dissuade minorities from building (or buying) in predominantly white neighborhoods.[39]

In terms of social costs, raising the visibility of mosque projects through demonstrations and litigation has led to disinformation being spread both through the courts in opening statements and by expert testimony and such, as well as through the popular press. Muslims have had to repeatedly contend with government officials weighing in on the "validity" of Islam as a bona fide religion and on the "dangers" that Muslims pose, reinscribing and entrenching Islamophobia more deeply each time. Mosques as edifices of Islam become sites of violence and confrontation. Even before they are built, Muslim communities face the prospect of having to convince people that they mean no harm. While Muslims have had to engage in this public-relations strategy for many decades, the increasing Islamophobia after the election of Donald Trump raises questions about whether the government will continue to enforce RLUIPA in an even-handed manner.[40] Meanwhile, Muslims struggle to find space within dominant communities in which to practice their religion, under a constant threat of violence and intimidation.

3 CONCLUSION

Islamophobia operates in multiple registers in the United States. While a great deal has been written about the surveillance of mosques and Muslim communities, very little work has been done to explore the challenges that communities face in creating religious spaces. This chapter has argued that Muslim communities increasingly face property lawfare, or the use of zoning and property law to prevent

[38] Kathleen E. Foley, *Building Mosques in America: Strategies for Securing Municipal Approvals*, Institute for Social Policy and Understanding Report, Oct. 2010.

[39] *See* Rothstein *supra* note 30 at 96–98. There is, of course, a class dimension to this. It is generally wealthy or middle-class Muslim communities that can afford to build new mosques in white neighborhoods and that can also hire representation to litigate if need be. In the African American context, it was middle-class blacks moving into white suburbs and housing developments who were met with resistance and violence.

[40] *See generally*, Eric Treene, *RLUIPA and Mosques: Enforcing a Fundamental Right in Challenging Times*, 10 First Amend. L. Rev. 330 (2012); Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021 (2012).

mosques from being built. Anti-mosque activists strategically use law, legal institutions, and processes to introduce Islamophobia into the public discourse, tying Islam and Muslims to national security concerns. Furthermore, there is a link between the racist methods used by dominant majorities to prevent desegregation in the housing context and those used today by anti-mosque activists. Narratives of security and danger that haunted African Americans as they tried to move to predominantly white neighborhoods now haunt Muslims as they attempt to build houses of worship. Although many building projects are ultimately successful, litigation, negative publicity, increased monetary costs, and social conflict accompany mosque projects. The strategy of extracting wealth or imposing an identity tax on one hand and creating insecurity through violence and threats on the other is one that links black experiences of housing discrimination and Muslim experiences of anti-mosque activism. Both are examples of how property lawfare is used in shoring up both structural racism and Islamophobia.

12

"Liberty and Death"

Karen Ellis Rhone

1 INTRODUCTION

What factors allow a system of law to provide civil protections and liberties for some, but deprivation and death for others?[1] This question is significant for the protection of all civil liberties, since the erosion of one American's civil liberties is a threat to civil liberties nationally. In response, I argue that segregation sustains and exacerbates Islamophobia, because the two are mutually constitutive. The claims and evidence that follow substantiate the argument by demonstrating that the law can work in concert with the state to legally impose segregation – in this case the segregation of Muslim Americans following the September 11 terror attacks. In fact, there is quite a long legacy of legally imposed segregation in the United States, mostly levied against minorities, which culminated into the iconic civil rights struggle of the 1960s.

In the case of Muslim Americans' civil liberties since the September 11 terror attacks, segregation has contributed significantly to an upsurge in Islamophobia. By *Islamophobia*, I mean blind, unsubstantiated fear or hatred of Muslims.[2] There are two forms of segregation that can work to subjugate the civil liberties of Muslim Americans: social segregation and structural segregation. Social segregation tends to manifest as physical, cultural, ideological, or rhetorical separations. Structural segregation tends to manifest more insidiously to promote more systemic forms of barriers to civil liberties through law and policy.

[1] In general, civil rights and liberties are treated as two broad areas of law: *rights* are guaranteed by the First Amendment, e.g., religion, speech, assembly, etc. and *liberties* are protections from governmental intrusion, e.g., crime, due process, interventions by federal, state, and local officials. To be sure, although civil liberties are also broadly protected by the Bill of Rights, they tend to denote protections *from* governmental intrusions.

[2] The use of *Muslims* and *Muslim Americans* throughout the essay always acknowledges the inherent difficulties of accurately discerning whether one actually *is* a Muslim, which can only ever be confirmed through verbal or otherwise definitive forms of self-identification.

Accordingly, the law, across political contexts, performs three critical tasks that provide substance and longevity to Islamophobic policies.[3] First, the law, particularly where knowledge of foreign populations is essential, can sustain conflations between opinion and expertise. Second, the law can either deliberately or unwittingly marginalize and dispossess populations by foreclosing equal access to civil liberties like due process. Dispossession usually occurs through a process of dehumanization. Once populations are dehumanized, they are rendered incapable of making any intellectual or ideational contributions that may disrupt the assumptions and logics that bolster the law. Last, the law can propagate itself globally, since it quite often becomes the basis for domestic and foreign policies. In these cases, policies are based almost exclusively on the dissemination of conflations between opinion and expertise that the law sustains.

Of the three critical tasks that the law performs, the conflation of opinion and expertise did quite a bit of the heavy lifting in this case. Immediately following the September 11 terror attacks, the US government was in deep want of expert public statements that would help the public make sense of the senseless. Accordingly, there was a groundswell of expert public statements, which ultimately formed a fertile ground for Islamophobia. In many cases, these types of public statements engaged in the fetishization and denunciation of Islamic law or pointed to generalizations and presumptions, such as the presumed oppression of Muslim women. Immediately following the September 11 terror attacks, there were two types of expert public statements that tended to increase Islamophobia, as well as the violent outcomes Islamophobia perpetuates, like hate crimes. The first were public statements made by high-ranking government officials who were, in many cases, presumed to be experts, since they had access to a great deal of high-level or classified information and intelligence. The second were public statements made by one or more representatives of an established news source. In most cases, just one of these can hold tremendous amount of influence over law and policy. In this case, both types of statements' influence over law and policy substantially as a positive function of their ability to be disseminated multiple times across multiple geographical spaces, usually through the media.

The designation "expert" became exceedingly problematic since the people who delivered these public statements immediately following the September 11 terror attacks tended to have very little empirical or experiential knowledge of Muslim communities, domestically or internationally. Consequently, several public statements subsequently produced a breeding ground for the legally imposed segregation that continues up to but not excluding the Muslim travel ban of 2018.

[3] References to "the law" are not meant to serve as a reification of law. The law, in this view, is rather meant to convey the law's contradiction – i.e., that such an elaborate and complex set of systems can function productively with such simplicity and coherence.

In sum, the law is typically thought to guarantee the civil liberties of all citizens. However, what follows demonstrates that the law in this case worked to systematically subvert the civil liberties of Muslim Americans following the September 11 terror attacks. By extension, the law can work to systematically subvert the civil liberties of any American up to, but not excluding, death.

2 THE LEGACY OF LEGALLY IMPOSED SEGREGATION IN THE UNITED STATES

Throughout the history of the United States, the law has been instrumental in protecting the civil liberties of some citizens. But, curiously, the law has also been instrumental in demonizing, dispossessing, and defending the deaths of others. Scores of minorities such as Native Americans, Latinos, African Americans, and Asian Americans have lost their civil liberties and, in some cases, their lives because the policies that segregated and disenfranchised them were upheld by law.[4] In fact, there is quite a long legacy of legally imposed segregation in the United States, which culminated in the iconic civil rights struggle of the 1960s. By legally imposed segregation, I mean laws and policies that are enacted and enforced by the state to forcibly separate and disenfranchise groups. Despite some constitutional relief, many of the laws and policies that segregated and disenfranchised minority groups were retained within institutions and continue to impinge on their civil liberties.

Migrants' search for liberty and the legally imposed segregation that keeps them from it are not historically new. Indigenous populations, or Native Americans, were one of the first minority groups to experience legally imposed segregation. In fact, Native Americans have suffered one of the longest histories of legally imposed segregation in the United States. US law and policy promoted westward expansion that increasingly encroached on Native American lands. US law and policy then relocated Native Americans to reservations, which further segregated and disenfranchised them. The Dawes Act of 1887 is a prime example of legally imposed segregation, because it engendered one of the most degrading policies for Native Americans – forced assimilation.[5] The Dawes Act allowed the US president to survey Native Americans' tribal lands, divide them as he pleased, and reallocate them to individuals. This legislation dispossessed Native Americans of their land and forced them to dwell on their own land according to a set of values imposed on them by the US government. Assimilation and segregation represent two sides of the same coin. Assimilation generally requires that citizens either shed or become hostile to the characteristics that differentiate them from established majority groups and

[4] *Disenfranchisement* denotes a general loss of power and the overarching process of being marginalized by the state through law. Loss of the right to vote can be included in this conceptualization, but is by no means the only component.

[5] *See generally* Talal Asad, On Suicide Bombing (2007).

norms. Segregation occurs when citizens cannot – or will not – shed those characteristics. In this case, Native Americans were allowed to retain a portion of their land, but only if they used it according to the laws set forth by the US government, which were diametrically imposed to their own. Historically, the populations that were more willing and able to assimilate tended to fare the best in the United States.[6]

In addition to piercing their civil liberties, Congress did not grant Native Americans basic rights, such as the right to vote, until approximately 1924, which was quite late, comparatively. It was at least 50 years after African Americans were granted the same de jure right.[7] This fact exemplifies how deeply segregated and disenfranchised Native Americans were, and remain. Native Americans did, however, make some progress during the Civil Rights Movement of the 1960s. The Indian Bill of Rights became Title II in the 1968 Civil Rights Act, which applied much of the Bill of Rights to tribal governments. In 1978, the Supreme Court further strengthened the autonomy of Indian tribes in its *Santa Clara Pueblo v. Martinez* decision. Santa Clara Pueblo is an Indian tribe that denied membership to female children of mixed marriages, but granting membership to male children of mixed marriages.

In filing suit, the respondents successfully used a federal court to uphold the Indian Civil Rights Act of 1968, which forbids any tribal government from denying the equal protection of its own laws. Although the petitioner ultimately lost the case, tribal law was upheld in the process, which translated into increased autonomy, albeit limited. However, despite some progress with respect to the equal treatment of Native Americans, much of the population remains segregated both socially and structurally. Moreover, many Native Americans still experience disproportionately high rates of poverty, and almost half live in or near the very reservations that US law and policy relegated them to well over a century ago.[8] Consequently, while the law did provide some liberty to Native Americans over time, it upheld disenfranchisement and death much more frequently.

Unlike Native Americans, who are indigenous, and the migrant communities that voluntarily emigrate to the United States, African Americans are descendants of Africans who were brought to the United States forcibly. The African American case is another illuminating illustration of how the state utilized legally imposed segregation consistently over space and time to demonize, dispossess, and defend the deaths of American citizens. Beginning with the Emancipation Proclamation of 1863, which granted three million slaves in southern areas de jure liberties, legally imposed segregation has remained a more palatable derivative of slavery. This is

[6] *See generally* Shannon Latkin Anderson, Immigration, Assimilation, and the Cultural Construction of American National Identity (2016).

[7] The Fifteenth Amendment, adopted in 1870, granted African Americans the de jure right to vote.

[8] *See generally* Michael J. White, The Segregation and Residential Assimilation of Immigrants (Urban Institute, 1988).

particularly true of the late nineteenth and early twentieth century. During that period US law, in many ways, laid the foundation for overlapping strategies that discredited, disavowed, and disposed of African Americans – by lynching them, for instance. One of the most well-known examples of legally imposed segregation during this period is "Lynch Law."[9]

Lynch Law originated in 1780, initiated by citizens from Virginia, to dissuade a band of horse thieves and counterfeiters from robbing and cheating the community. Subsequently, Colonel William Lynch drafted a constitution specifically for lawless citizens, and Lynch Law, as it came to be known, signified summary punishments without the benefit of due process, enforced by private or unauthorized citizens. Private and unauthorized citizens continued to mete out legally imposed segregation, primarily to African Americans in the form of dispossession, violence, and death. However, over time, lynchings and other blatant forms of segregation by death became unpalatable and unsustainable, particularly alongside contrary political pronouncements – the Declaration of Independence, for example.

In 1954, in *Brown v. the Board of Education*, the Supreme Court declared state laws that established separate schools for blacks and whites unconstitutional. A few months later, Emmett Till, a fourteen-year-old African American boy from Chicago, was brutally murdered in Mississippi because of his race. This juxtaposition exemplifies the lopsided state of social progress at the time. Moreover, it is well documented that state laws maintaining segregation, like those repudiated in *Brown v. the Board of Education*, did not begin to provide de facto integration until well into the 1970s.[10] Much of the conventional wisdom during that time suggested that continuing to segregate African Americans would be increasingly difficult to accomplish and even more difficult to maintain. Accordingly, subsequent processes of segregation evolved, in many ways, to accomplish the same goals, i.e., to demonize, disavow, and dispossess, but in less alarming ways. The simultaneous growth of the penal and corrections system alongside ostensible improvements in civil liberties for African Americans provides clear evidence for this claim. In fact, the emergence and evolution of the penal system is a compelling example of the amalgamation of laws and policies that began to work in concert to continue legally segregating

[9] *See e.g.*, Ida B. Wells-Barnett, Southern Horrors: Lynch Law in All Its Phases (1892).

[10] *See generally* Bernard D. Reams & Paul E. Wilson, Segregation and the Fourteenth Amendment in the United States: A Survey of State Segregation Laws 1865–1953: prepared for United States Supreme Court re *Brown vs. Board of Education of Topeka* (1975); LaMar P. Miller, *Brown plus Thirty: Perspectives on Desegregation: Proceedings of a Conference Commemorating the Thirtieth Anniversary of the 1954 Supreme Court Decision in Brown v. the Board of Education of Topeka, Kansas, Held on September 11–14, 1984* (Metropolitan Center for Educational Research, Development, and Training, 1986); Michael J. Klarman, *Brown v. Board of Education and the Civil Rights Movement* in From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (5th ed., 2007); Peter F. Lau, From the Grassroots to the Supreme Court: Brown v. Board of Education and American Democracy (2004); Donna Jean Murch: Living for the City Migration, Education, and the Rise of the Black Panther Party in Oakland, California (2010).

minority groups physically, economically, and socially.[11] However, the ultimate goal of legally imposed segregation is to socialize subjects in ways that teach them to discipline themselves – this is the cheapest and most efficient way the state can preserve established socioeconomic hierarchies.[12]

Although the subjugation of African Americans has taken several forms from 1890 until today, legally imposed segregation has been the most consistent strategy for demonizing, dispossessing, and defending the deaths of African Americans over time, up to but not excluding the most recent increase in police killings. When minority groups like African Americans are segregated, they benefit the state more for labor and resources, e.g., as slaves, as consumers, paying fines and funding jails as inmates. Conversely, African Americans burden the state when they attempt to access state protections – and services. Consequently, while the law did provide some liberty to African Americans over the last two centuries or so, it has upheld disenfranchisement and death much more.

Latino Americans currently represent approximately 17.8 percent of the total US population and, like other immigrant groups, they began their pursuit of liberty in the United States by steadily increasing their presence in American culture. In fact, Latinos have already become the largest minority group in the United States. Like other minority groups, Latinos have grappled with legally imposed segregation, historically. From approximately 1900–50, Latinos, particularly those of Mexican descent living in the southwestern region of the United States, were deeply segregated. Also like other minority groups, they continue to grapple with legally imposed segregation. Only in 1982 did the Supreme Court, in *Plyer v. Doe*, strike down legislation that withheld education from children whose parents had not been legally admitted to the United States. The Court held that Texas, among other states, was required to demonstrate that depriving immigrants' children of an education would fulfill a substantial state interest – and the government of Texas failed to do so. The state's intent to pierce the civil rights of Latino citizens was an escalation of legally imposed discrimination and segregation, not an exception.

Currently, there are over 5,000 elected Latino American representatives in the US government. But, curiously, that very government seems to be simultaneously dismantling policies that would protect the civil liberties of Latino Americans and minorities more generally. The Trump administration abruptly ended the Deferred Action for Childhood Arrivals (DACA) policy in December of 2017, an immigration program initiated by the Obama administration that received substantial bipartisan

[11] *See e.g.*, Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2012); Alice Goffman, On the Run: Fugitive Life in an American City (2014).

[12] *See generally* Michel Foucault, Discipline and Punish: The Birth of the Prison (2nd ed., 1995).

support.[13] The administration subsequently began to intentionally separate children from their parents at the US border. The administration's motivations appear to be steeped in its overall desire to instill fear in immigrants and loyalty in political supporters.[14] Currently both policies, which are the most recent iterations of legally imposed segregation, are being rigorously contested in courts. As it was with Native Americans and African Americans, although the law did provide some liberty to these minority groups, it has upheld disenfranchisement and death much more frequently.

Asian Americans, by comparison, only account for approximately 7 percent of the US population, yet they have also experienced a disproportionate amount of legally imposed segregation. Asian Americans, particularly those of Japanese descent, historically suffered legally imposed segregation when the US government formally classified many of them as "possible enemy combatants."[15] Japanese Americans were victims of legally imposed segregation following the historic surprise attack on Pearl Harbor on the morning of December 7, 1941. Following the attack on Pearl Harbor, the government was crippled by ongoing fears about future attacks and invasions, particularly on the Pacific Coast, where many Japanese Americans lived. Consequently, the US government preemptively placed over 100,000 Americans of Japanese descent in internment camps. Although the US government's actions were questioned in the courts, the Supreme Court ultimately upheld the internment of Japanese Americans as constitutional, in the historic 1944 case, *Korematsu v. United States*.

Much like the US governments' generalizations and preemptive actions against Japanese Americans during World War II, Muslim Americans and those presumed to be Muslim such as Arabs, Sikhs, and South Asians were also presumed to be a threat following the September 11 terror attacks. In fact, it is well documented that Muslim Americans have been harassed, degraded, and killed much more frequently since the September 11 terror attacks than they were previously. The data further suggest that there has been an uptick in Islamophobia under the Trump administration, which can be explained by the corresponding uptick in policies that intentionally segregate immigrant and minority populations. The law is particularly significant to this discussion because, especially where knowledge of foreign populations is essential, it can facilitate the conflation of opinion and knowledge. The law

[13] Noah Feldman, *The End of DACA Is the Next Big Immigration Fight*, Bloomberg (Aug. 9, 2018), https://www.bloomberg.com/view/articles/2018-08-09/daca-and-dreamers-case-may-be-headed-to-supreme-court-quickly.

[14] Camila Domonoske, *What We Know: Family Separation and "Zero Tolerance" at the Border*, NPR (June 19, 2018), *available at* https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border.

[15] *See generally* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

facilitates conflations of knowledge and opinion by disseminating legal interpretations that reflect the values of those in power at the time – not objective or empirical facts.

Historically, the law has also either deliberately or unwittingly marginalized the civil liberties of minority populations using a process of legal dehumanization. By *legal dehumanization* I mean the process through which the government, or its representatives, deems a US citizen either less than human or otherwise unworthy of basic constitutional rights and civil liberties. In all of the aforementioned cases, legal dehumanization was utilized in some form to explain why minority and immigrant populations were not worthy of consideration by US law. These claims are specifically borne out by national data on hate crimes perpetuated against Muslim Americans and intended Muslims.[16] Following the September 11 terror attacks, many Muslim Americans' civil liberties were compromised, and they were regularly profiled and detained by the state and its representatives. In several cases, Muslim Americans were searched or detained without probable cause. Courts consistently held that these types of state actions are unconstitutional, but this changed significantly once the Bush administration enacted the 2001 USA PATRIOT Act.[17]

Since the USA PATRIOT Act became law, Muslim Americans have been subjected to even more routine infringements on their civil liberties. For example, on July 4, 2015, which was ironically Independence Day, a young woman who emigrated from Saudi Arabia to study English in the United States was captured on Chicago Transit Authority (CTA) surveillance video being searched and detained by Chicago police officers. The video shows the young woman climbing the stairs alone when a group of five officers approach her from behind and throw her to the ground. The officers are then shown performing a full search – removing her hijab and niqab to do so. Hijab and niqab are obvious forms of Islamic expression and adherence and, as such, representatives of the state seem to scrutinize and profile the Americans who wear them much more frequently than they do other people.[18]

Two years after the incident, the US District Court in the Eastern Division of Illinois heard the resulting case, *Matar v. Borchardt*. In her complaint, Ms. Matar claimed that the City of Chicago "failed to monitor, supervise, or train [its] officers." The complaint further argued that Chicago police officers were inadequately

[16] "Intended Muslims" provides for the staggering number of hate crimes perpetuated against persons who were not actually Muslim. Nevertheless, there are also plenty of hate crimes perpetuated against Muslims, including by officers of the state.

[17] The full name of the Act, once its ten-letter abbreviation is extended, is: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.

[18] Christine Hauser, *Women Forced to Remove Hijabs for Mug Shots Settle with New York City*, N.Y. Times (June 8, 2018), *available at* https://www.nytimes.com/2018/02/28/nyregion/muslim-hijab-nypd.html.

trained with respect to the "sensitivity of religious expression and freedom."[19] In response, the City of Chicago filed a motion to dismiss Ms. Matar's complaint, but the court dismissed the motion. Ms. Matar's claims point to systemic problems with Islamophobia, caused in large part by segregation. As demonstrated by the Native American, African American, Latino American, and Asian American cases, legally imposed segregation can deprive citizens of their civil liberties up to, but not excluding, death.

In cases like Ms. Matar's, segregation breeds Islamophobia by promoting ignorance, public fear, and discrimination against Muslim Americans. Islamophobia relies on linguistic, phenotypical, and traditional distinctions to justify long-term spatial and rhetorical separations across the country. Ms. Matar's claim that the City of Chicago failed to adequately train its officers, particularly when it related to religious expression and freedom, draws on the systemic problems of Islamophobia that rely on legally imposed segregation. Ms. Matar's claims also substantiate the aforementioned claim that the law can sustain conflations of opinion and expertise, as well as the policies that authorize, publicize, and promulgate those conflations. Ms. Matar's claim that the City of Chicago failed to adequately train its police officers insinuates the connection between the police officers' level of expertise and their actions. In other words, if the officers had been adequately or properly educated about Islam, Muslims, and citizens' inalienable rights to religious expression and freedom, they might have proceeded differently or, at the very least, with more care. In this case, and more generally, an overall lack of education about Muslims, religion, and related civil liberties seems to frequently produce adverse outcomes, motivated by irrational fears, misinformation, and inexperience.

Hate crime data show that violence against Muslims in the United States has always been disproportionately high, but it increased to unprecedented numbers just after the September 11 terror attacks. Moreover, the 2016 and 2017 rates exceed trends in those post–September 11 surges. These trends are, of course, curious given the US's ostensibly long history of constitutional protections against such blatant violations of civil rights and liberties. Although constitutional protections have indeed widened, particularly over the last 50 years, they still do not seem to sufficiently protect citizens from the aggression and violence they may face explicitly because of their heritage. For Muslims, as it is for Native Americans, African Americans, Latino American, and Asian Americans, the law provides some liberty, but it tends to uphold disenfranchisement and death much more frequently.

3 ADJUDICATING HATE

Since US law historically has meted out both liberty and death to minority groups, how does it respond when both liberty and death comprise the core motivations of

[19] *See generally* Matar v. Borchardt, No. 16-CV-8033, 2017 WL 2214993 (N.D. Ill. May 19, 2017).

those groups' responses? The September 11 terror attack is particularly significant case because it uncovers the underlying assumptions and the possibilities for adjudicating international crimes motivated by hate. The case also reveals how the US government uses the law to make sense of civil liberties more broadly. What follows demonstrates that it is exceedingly difficult to adjudicate hate, particularly when, as it was on September 11, hate is an ongoing crime that can never be fully avenged. This is so because the September 11 attackers committed a mass murder and died of their own free will at the very moment of their crime.

On the morning of September 11, 2001, media in the United States played the horrific imagery surrounding the nationwide terrorist attack in a loop. In other words, Americans were shown the footage over and over again: the first airplane plummeting into the first World Trade Center tower and, minutes later, the second airplane colliding with the second tower. Then viewers heard the horrific screams and desperate cries of both victims and onlookers. Finally, viewers watched both buildings ablaze, until they collapsed into a massive gray cloud of debris. As each building crumbled to the ground, the audience could hear more screaming and crying as they watched what previously seemed unimaginable. The media showed footage of people falling – and some jumping – from the burning towers. Then the media showed victims and onlookers panicking and running away from the menacing cloud of debris, which almost appeared to be chasing them. Many people were covered in thick layers of dust from the debris as they tried to escape, traumatized and crying. Most Americans watched those videos over and over for weeks. It took at least that long for many Americans to really comprehend that almost 3,000 Americans were killed and another 6,000 wounded in a foreign attack on US soil. This heinous act, because of its sheer magnitude, quickly removed the distance between the United States attacks and the actions of terrorists abroad.

Any dreams that modes of segregation would protect the United States from such an event collapsed under the weight of the inconceivable on September 11, 2001. The political and legal circumstances surrounding those attacks reveal how the US government chose to adjudicate an international crime, motivated almost exclusively by hate, perpetrated on its own soil. The legal case against the five al-Qaeda operatives thought to be responsible also reveals how the US government understood civil liberties more broadly, particularly when those civil liberties seemed to chafe against existing public fears stoked by Islamophobia. Public fears have become a key component of Islamophobia because, in many ways, they arise from a collective memory of the death and destruction that occurred during the September 11 terror attacks. Much of the information the government directed and disseminated was constructed based on a profound lack of knowledge and expertise about Muslims, their varied values, as well as and the intense diversity always present within their overlapping communities. The US government and media provided much of the fodder for Islamophobia immediately following the September 11 terror attacks. During that critical period of time, the US government and media failed

to adequately deliberate, yet they intensified their dissemination of problematic information.

Khalid Sheikh Mohammed, one of five al-Qaeda operatives thought to be responsible for the attacks, appeared before a military judge in the United States on Thursday, June 5, 2008. Mohammed and his codefendants testified that they were tortured for five years before they were transferred to Guantánamo Bay, or "Inquisition-land," as one defendant referred to it, in September of 2006. The charges they faced included murder in violation of the law of war, several counts of terrorism, and intentionally causing bodily injury. The government argued that because Mohammad was an enemy combatant, a fairly new legal category, he could not benefit from US domestic constitutional protections like due process. Further, the US government argued that Geneva Convention protections also did not apply, which precluded Mohammad from international legal protections. This case is particularly significant, because it uncovers the underlying assumptions and possibilities for adjudicating international crimes motivated by hate. The case also reveals how the US government understood civil liberties more broadly. To be sure, if constitutional protections such as due process are considered an inalienable right within US borders, it is not clear why some semblance of due process is not afforded the people that the United States tries outside of its borders.

Many consider Guantánamo Bay a "legal black hole" that outstrips due process for detainees who the US government deems ineligible. The idea that enemy combatants do not qualify for due process seems to contradict any global idea of human rights. Yet, this account is corroborated by the US government's own evidence, which states, "the Fifth Amendment due process clause is inapplicable to the conduct of interrogations of alien enemy combatants held outside the U.S.... [because] the Fifth Amendment was not designed to restrict the unique war powers of the President as Commander in Chief."[20] Further, the US government's evidence argues that the Eighth Amendment, which protects against cruel and unusual punishment, does not apply to the detention of wartime detainees, since it was "designed to protect those convicted of [domestic] crimes." The only thing more confounding than the US government's disregard for the due process of enemy combatants is the five al-Qaeda operatives' disinterest in the same. After refusing free counsel provided by the US government, Mohammed, one of the codefendants, stated, "If I'm killed, I will be killed for the sake of God. I've been seeking to be a martyr for years." The judge asked Mohammed several times if he understood that he is facing the death penalty. Mohammed responded, "That is what I wish. I wish to be martyred."

The US government's role is to address a nation bound together by laws, investigations, courts, and justice, all of which presuppose the efficacy of retribution. The

[20] David J. Barron, Waging War: The Clash between Presidents and Congress, 1776 to ISIS (2016).

addressees – the American people – emerge as a cloud of witnesses who identify with the dead, waiting for retribution to produce some semblance of satisfaction. Such satisfaction is thought to come on the heels of actions that eventually quell the outrage that vengeance and retribution seem to presuppose.[21] Accordingly, the case against Mohammed and his codefendants presents a substantive problem for both the US government and the American people. Mohammed and his codefendants are the only remaining vestiges of the most violent foreign attack carried out on US soil in recent memory.

Therefore, the law in this case is mostly powerless to disentangle the crime from the punishment – they are one. This fact forecloses the promise of retribution, since the main perpetrators of the crime have simultaneously taken control of their own fate. The suicide bombers who used airplanes as weapons to kill thousands of people on US soil cannot be punished. They are perpetrators of a mass murder, who died of their own free will at the very moment of their crime. Crime and punishment were united. Consequently, in many ways, the September 11 terror attack is an ongoing crime that can never be fully avenged. However, it is a crime for which victims, including the US government, may ineffectually continue to seek retribution – perhaps in perpetuity. As the United State's interminable struggle for retribution presses on, Islamophobia empowered by legally imposed segregation, domestic hate crimes against Muslims, and interventionist foreign policies in the Middle East North Africa region seem to serve as suitable proxies.

4 SEGREGATION, HATE, AND THE LAW SINCE THE SEPTEMBER 11 TERROR ATTACKS

Ideas, laws, and policies that segregate are dangerous. It is fairly well documented in much of the international work done on genocide that segregation is a crucial step towards the violence and death that typically follow. The data related to hate crimes and violence suggest that there is an intimate relationship between segregation and Islamophobia. Increases in hate crimes since September 11 are more evidence that not only is segregation inexplicably bound up in Islamophobic policies in the United States, it is indeed deadly. Segregation breeds Islamophobia, because it separates Muslim Americans from broader communities both culturally and legally by promoting ignorance, public fear, violence and, in many cases, death. Consequently, hate crimes are exceedingly dangerous, because they create a climate of fear and intimidation that negatively affects the entire country over a longer term. US law is crucial to this relationship, because it can reframe the presence of Muslims as a problem to be solved – social matters to be legislated and adjudicated.

The aforementioned USA PATRIOT Act of 2001 is a prominent example of this type of legislation. President George W. Bush swiftly signed the USA PATRIOT Act

[21] *See generally* ASAD, *supra* note 5.

into law on October 26, 2001, a little over a month after the September 11 attacks. At the time, the legislation was well received by many Americans; many thought it was a productive and measured national response to such a heinous attack. However, the momentum of the attacks exacerbated by profound ignorance, heightened public fear, and vehemence carried the legislation through the entire legislative process without the benefit of sustained discussion or forethought about the long-term effects it might have on the civil liberties of Americans, Muslim or otherwise.

The most significant part of the USA PATRIOT Act, which endeavored to ensure national security and protect American citizens, essentially traded domestic security for civil liberties such as due process and privacy. The legislation achieved higher levels of domestic security by facilitating unprecedented levels of information sharing between state law enforcement and national intelligence agencies like the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA).[22] Consequently, one of the most troublesome provisions of the PATRIOT Act is section 217, which provides the government with virtually unbridled access to surveillance. This, of course, curtails citizens' privacy and allows the government to utilize the intelligence it gathers to arrest and detain Americans presumed to be enemy combatants, thereby eroding US civil liberties more generally.[23] By segregating Muslim Americans physically, ideologically, and legally, this type of legislation stokes the fires of ignorance and hate against citizens who are Muslim, and citizens who are presumed to be.

Another troublesome provision of the USA PATRIOT Act allows the government to either deny or revoke the visa applications of those thought to have promoted terrorism.[24] The logic of this provision in many ways is not only wholly subjective, but it also tracks with the United States's earlier iterations of the Muslim travel ban, because it lacks both logical claims and objectivity. It grants the government the power to determine two key considerations that could be almost entirely motivated by political expediency: which applicants become targets and what constitutes "promoting terrorism."[25] The provision complicates travel for foreign nationals, particularly elites and academics with power or influence, attempting to travel to the United States from a targeted Muslim or Arab country for social or academic reasons. Even more troublesome is the provision's ability to thwart the open exchange of ideas. This is crucial, since the logical bases of US domestic and foreign

[22] *See generally* Charles Doyle, *The USA Patriot Act: A Legal Analysis*, Congressional Research Service Report for Congress (2002).

[23] Jon B. Gould, *Playing with Fire: The Civil Liberties Implications of September 11th*, 62 Public Administration Review 74–79 (2002).

[24] Patrick P. Garlinger, *Privacy, Free Speech, and the Patriot Act: First and Fourth Amendment Limits on National Security Letters*, 84 N.Y.U. L. Rev. 1105 (2009).

[25] Alanna Durkin Richer, *Judges Consider whether President Trump's Past Anti-Muslim Statements Impact Travel Ban*, Reading Eagle (May 8, 2017), https://www.readingeagle.com/article/20170508/AP/305089913.

policies, particularly towards the Middle East/North Africa region and particularly under the current administration, are sorely in need of productive ideas.[26]

These provisions effectively help to further segregate Muslims physically, socially, and intellectually by smuggling into law and policy the assertion that Muslims in the United States are problematic at best, and at worst, deadly. It is fairly well documented in much of the international work done on genocide that segregation is a crucial step towards the violence and death that typically follows. This is so because segregation works in tandem with the process of dehumanization to sustain public ignorance and fear. The more Muslim Americans are separated from non-Muslims, the fewer the opportunities to disrupt the ill supported, stereotypical narratives that indiscriminately characterize Muslims as violent, terrorists, or threats to US security.

Increases in hate crimes since September 11 are more evidence that not only is segregation inexplicably bound up in Islamophobic policies in the United States, it is indeed deadly. The FBI considers hate crimes to be similar to traditional crimes such as murder and arson, but distinct in that they are motivated by an element of bias.[27] Hate crimes are considered particularly heinous because they affect the victim, as well as others in the broader community who share similar characteristics. Consequently, hate crimes are exceedingly dangerous, because they create a climate of fear and intimidation that negatively affects the entire country over a longer term. The US Department of Justice reports that from 2009 to 2014 there was a 50 percent increase in charges and convictions of hate crimes over the previous five years.[28] This confirms that Islamophobia is one example of a more systemic increase in intolerance and bias, all of which rely on ignorance, public fear, and segregation.

In 2014, Kalia Abiade, Advocacy Director of the Center for New Community, testified before the Illinois Advisory Committee to the US Commission on Civil Rights about her concerns related to law enforcement and counterterrorism.[29]

[26] Mark Hamblett, *Circuit Revives Muslim Scholar's Challenge to Ban on U.S. Travel*, NY L.J. (July 20, 2009).

[27] FBI, Hate Crimes, Civil Rights, *available at* https://www.fbi.gov/services/cjis/ucr/hate-crime

[28] "Hate Crimes," Folder, FBI, *available at* https://www.fbi.gov/investigate/civil-rights/hate-crimes (last visited Nov. 30, 2017).

[29] By law, the US Commission on Civil Rights [hereinafter 'Commission'] has established an Advisory Committee in all 50 states, including the District of Columbia. The committees are composed of local citizens who serve without compensation and they advise the Commission on civil rights issues within their states. More specifically, they are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the president and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states. This report is the result of numerous working group sessions, extensive research, and a public hearing held in Aug. of 2014. The report was approved by the Committee on May 18, 2015. United States Commission on

Abiade argued that much of the counterterrorism training was biased against Muslims and, consequently, would likely incite fear and violence within the communities the officers served. The previous year, Rabya Khan, staff attorney for the Council on American Islamic Relations (CAIR) in Chicago, testified before the same committee about a similar training for three police departments in Illinois entitled, "Islamic Awareness as a Counter-Terrorism Strategy." The training was ultimately canceled because the trainer was unqualified as an expert in Islam and counterterrorism strategy – the two most central topics of the training. The training purported to give police officers expert advice on how to differentiate between moderate and radical Muslims.[30] According to Khan, the training material specifically about Islam was rife with inaccuracies, generalizations, and stereotypes that were sure to elicit prejudice against Muslims in thought and deed from the police officers present. Prominent members of nearby Jewish, African American, and Latino communities expressed deep concern about consequences of the training for the community at large, which prompted organizers to cancel the training.

Islamophobia, as well as related conflations of opinion and expertise, explains in large part the perpetuation of hate crimes. It also explains why terrorism has maintained its force globally since the September 11 terror attacks, despite concerted efforts by the US government to reduce it.[31] Islamophobia, emboldened by legally enforced discrimination and segregation, can perpetuate violence against and by Muslims. Empirical investigations overwhelmingly find that migrants from the Middle East North Africa region countries are much more likely to become radicalized *after* emigrating to the United States – not before.[32] Yet, just as it was for Japanese Americans after Japan's historic attack on Pearl Harbor, the FBI detained upwards of 1,300 people, many of them citizens, as possible threats to national security, soon after the September 11 terror attacks.[33]

Scholars who rely on empirical evidence to understand acts of terrorism like suicide bombings found that they occur much more frequently in territories illegally occupied by foreign powers. The evidence also suggests that violence against Americans in the Middle East is more commonly perpetuated against military personnel than against civilians.[34] These points are not meant to condone violence;

Civil Rights, Hate Crimes Advisory, *Hate Crime and Discrimination against Religious Institutions in Illinois*, May 2015 at 45, *available at* https://www.usccr.gov/pubs/docs/06-03-15_HateCrimesStateAdvisory.pdf

[30] *Id.*

[31] *See generally* Joseba Zulaika, Terrorism: The Self-Fulfilling Prophecy (2009).

[32] *See generally* Clark McCauley & Sophia Moskalenko, Friction: How Radicalization Happens to Them and Us (2011).

[33] *See generally* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. Ann. Surv. Am. L. 295, (2002).

[34] *See generally* Robert A. Pape, Dying to Win: The Strategic Logic of Suicide Terrorism (2006).

rather, they are meant to convey a more complete and empirical explanation for the motivations of terrorists within the United States and abroad. As well, several American-born citizens have become radicalized, joining transnational organizations like al-Qaeda and taking up their purported causes both at home and abroad. Consequently, the laws and policies that citizens and migrants perceive to be anti-Muslim or anti-Arab tend to exacerbate these trends. Likewise, a lopsided focus on violence perpetuated only by Muslims and Arabs squanders the opportunity to understand all violent acts, including but not limited to the motivations for mass gun shootings.

Hamdi v. Rumsfeld was filed in response to the detention of Yaser Essam Hamdi, an American citizen whom the US government deemed an enemy combatant. Curiously, the *Hamdi* made it back to the Supreme Court 60 years after the Court's previous decision to uphold Japanese internment camps as constitutional in *Korematsu v. United States*. In response to the complaint that Hamdi was illegally detained, the US government argued that Hamdi – an American citizen – could be held indefinitely without the benefit of due process. The Court again considered the legality of an Executive Order to detain American citizens that the government deemed "enemy combatants."[35] However, unlike its initial *Korematsu* decision, the Supreme Court vacated and remanded the Court of Appeals' previous decision about Hamdi. More specifically, the Supreme Court held that, "although Congress authorized the detention of combatants in . . . narrow circumstances . . . due process demands that a citizen held in the U.S. as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker."[36] The Court's decision confirmed that there can be a great deal of speculation and misinformation accompanying charges filed against an enemy combatant. It is up to the US government – above all else – to preserve and protect the civil liberties of its own citizens since the erosion of one American's civil liberties is a threat to civil liberties nationally.

5 WARS AND THE US FOREIGN POLICIES THAT SEGREGATE MUSLIMS GLOBALLY

Islamophobia persists in large part because conflations of opinion and expertise show up regularly in laws and policies that primarily affect Muslim populations. In fact, US domestic law and policy towards Muslim Americans mirror the general lack of expertise, openness, and diplomacy rife within *foreign* policies towards the Middle East North Africa region. Similarities across domestic and foreign policies represent, in large part, a core logic of Islamophobia, which in turn motivates retaliation by and

[35] *See generally* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).
[36] Hamdi v. Rumsfeld, 542 U.S. 507, 508 (2004).

against Muslims. This is so because, generally, the US representatives who author and impose the laws and policies intended to address Muslim populations domestically and internationally tend to have an inadequate understanding of Islam, Islamic traditions, and of the intense heterogeneity within Muslim populations. Several US laws, policies, and core assumptions are not adequately corroborated by empirical evidence, which renders many of them ineffective and, in the worst cases, deadly.

There have been a great number of academic papers and expert opinions from both the public and private sectors that confirm that the United States sorely needs more effective policies towards Muslims and Arabs globally. Reductive assumptions about Muslims in the United States and abroad became particularly problematic after the September 11 terror attacks, because both US lawmakers and citizens were in deep want of expert analysis that would help make sense of the senseless. Consequently, there was a groundswell of "expert" public statements, which provided a fertile ground for the logic of Muslim segregation and ultimately increased levels of Islamophobia. During that time, topics such as Islamic law and the social status of Muslim women rushed more forcefully to the fore. "Expert" public statements that addressed these issues and others ultimately became a breeding ground for the modes of segregation that followed and remain.

US domestic and foreign policies towards Muslims tend to share an unproductive pattern: they lack both expertise and empirical support. Despite this, Islamophobia before and since the September 11 terror attacks continues to be reinforced by real and metaphorical wars that the United States continues to wage against Muslim and Arab populations both within its borders and globally. For instance, the "Global War on Terror" that began shortly after September 11 has, in many ways, become a pretext for piercing the civil rights of Muslim Americans domestically, as well as advancing anti-Muslim policies abroad. In contrast to previous approaches to Muslims and their global presence, post–September 11th policies more aggressively rely on mass detentions of Muslims within the United States and abroad in places like Guantanamo. Many of these detentions took place across the United States, and abroad in places like Guantánamo.

According to a 2017 Pew survey, almost half of the Muslims in the United States reported being the target of discrimination within the previous year, and those instances increased dramatically during the early months of the Trump administration's transition into office.[37] Even advisors associated with top US intelligence agencies confess that the US government "lacks deep knowledge of the Islamic world and of the diverse ways Muslims understand their faith, their relations with

[37] Emily Cury, *How Muslim Americans Are Fighting Islamophobia and Securing Their Civil Rights*, The Conversation (Sept. 4, 2017), *available at* http://theconversation.com/how-muslim-americans-are-fighting-islamophobia-and-securing-their-civil-rights-82235.

each other, and their vision of, and attitudes toward, the non-Muslim world."[38] Likewise, several Muslim and Arab elites have argued that the United States appears to craft foreign policies that privilege war and intervention in Muslim countries specifically, while suppressing the civil rights of Muslim Americans domestically. Unfortunately, the current administration has consistently demonstrated a clear lack of expertise in general and specifically about Muslim populations. It has also consistently demonstrated disdain for diplomatic solutions.[39] This is not to imply that credible threats to US security do not exist – they abound. However, many of the Trump administration's policies appear to exacerbate them, not productively address them.

Much of national intelligence confirms that terrorist organizations like al-Qaeda and the Islamic State of Iraq and the Levant (ISIL) constitute a "persistent and evolving terrorist threat."[40] Despite this, US domestic and foreign policy do not seem to be evolving to meet the challenges of ongoing and new threats. Muslims are frequently conflated with terrorists in ways that follow a unifying logic – they are so similar that their presence scarcely warrants deeper or empirical investigation. This logic is a key characteristic of Islamophobia. In fact, Islamophobia provides opportunities for public conflations of Muslims, Muslim Americans, and terrorists like al-Qaeda and ISIL that are problematic in at least three distinct ways. First, policies built on these and similar conflations may misdirect and even squander scarce resources, since they tend to pursue targets that are not fruitful. For example, the War on Terror, funded and sustained by the United States, has mostly functioned in this way. It has also, historically, called on cooperation among intelligence agencies within the United States and abroad – global actions that are all motivated by a similarly murky logic. Most importantly, cooperation and information sharing, while useful in some cases, has frequently led to a spillover of both human rights abuses and civil liberties violations abroad.

Second, policies built on these and similar conflations may radicalize or create terrorist sympathizers, particularly when certain populations are persistently targeted or their civil liberties are continually under attack. There is a good deal of evidence from foreign sources that prisons, as well as interrogation and detention centers abroad, plainly contradict the United States's ostensible pledge to uphold human rights and the rule of law. US policies built on conflations of Muslims and terrorists are also especially problematic because they do not tend to include the strategic

[38] Emile A. Nakhleh, A Necessary Engagement Reinventing America's Relations with the Muslim World (2009).

[39] Robby Gramer, Dan De Luce, and Colum Lynch, *How the Trump Administration Broke the State Department*, Foreign Policy (July 31, 2017) *available at* https://foreignpolicy.com/2017/07/31/how-the-trump-administration-broke-the-state-department/.

[40] *See generally* Nakhleh, *supra* note 38.

interests or inputs of other states, ideologically or fiscally, which includes US allies.[41] US policies built on conflations of Muslims and terrorists effectively segregate populations by not allowing them the benefit of input and collaboration. In most cases, US policies in the War on Terror are exported from the United States to countries in and near Muslim nations like Iraq and Afghanistan, for instance.

Third, the so-called War on Terror tends to rely on a law and policy subtext that is almost entirely Islamophobic: anti-Muslim and anti-Arab. Much of the subtext for these laws and policies is motivated by reductive and sensationalized understandings of Muslim values – misunderstandings of Islamic law, for example. Laws and policies associated with the so-called War on Terror are also motivated by hypocritical rebukes of the "anti-democratic norms in Arab and Muslim countries."[42] Curiously, the several domestic acts of terrorism – gun violence and mass shootings, for example – do not seem to garner commensurate prominence, resources, or policy prescriptions.

Together, Islamophobic laws and policies in the United States are borne of a general lack of specificity, empirical knowledge, and empirical investigation about Muslims both in the United States and abroad. Moreover, Islamophobic laws and policies embolden blind, uninformed acts of hate – the kind of hate that causes Americans to harass, attack, and even kill. There have been sustained hate crimes against Sikhs, for example, because attackers could not be bothered to first distinguish them from the Muslims they intended to kill.[43] Accordingly, the so-called War on Terror, interventionist foreign policies, and the much more recent Muslim travel ban, are all examples of US laws and policies that continue to propel the global segregation of Muslims. These types of policies have also, in their austerity, increased the Islamophobic sentiments that breed violence against Americans believed to be Muslims. Going forward, the possibilities for protecting the civil liberties of Muslim Americans are becoming increasingly grim, particularly because the current administration lacks the knowledge or inclination to do so.

[41] Stephen Marrin, *The 9/11 Terrorist Attacks: A Failure of Policy Not Strategic Intelligence Analysis*, 26 Intelligence and National Security 182–202 (Apr. 1, 2011).

[42] *See generally* Wael B. Hallaq, The Origins and Evolution of Islamic Law (Themes in Islamic Law) (2005).

[43] Laurie Goodstein & Tamar Lewin, *A Nation Challenged: Violence and Harassment; Victims of Mistaken Identity, Sikhs Pay a Price for Turbans*, N.Y. Times (Sept. 19, 2001), *available at* https://www.nytimes.com/2001/09/19/us/nation-challenged-violence-harassment-victims-mistaken-identity-sikhs-pay-price.html; Sarah Parvini, *Being Sikh in Trump's America: 'You Have to Go Out of Your Way to Prove You're Not a Threat,'* L.A. Times (June 11, 2017), *available at* http://www.latimes.com/local/california/la-me-trump-sikhs-20170509-htmlstory.html.

13

The Gender of Islamophobia

Aziza Ahmed[*]

1 INTRODUCTION

Since September 11, a critical mass of scholarship has documented how American politicians mobilized the image of marginalized Muslim women and sexual minorities to signal of the backwardness of Islam. In this imagined world of bad Muslims and good Americans, the United States emerges as a bastion of freedom and liberty for women and for lesbian, gay, bisexual, and transsexual (LGBT) people while Muslim people remain unfree, isolated, and oppressed.[1] The campaign and election of Donald Trump in 2016 unleashed a new onslaught of anti-Muslim sentiment as Trump mobilized anti-Muslim tropes while still a candidate. As president, he held true to his campaign promises to limit the entry of Muslims into the United States with a series of executive orders and, finally, a proclamation commonly known as the "Muslim ban."[2] Drawing on the critique of gendered tropes about Islam, this chapter argues that the Trump administration benefited from the use of gendered ideas about Muslims set into motion by prior administrations in order to justify

[*] This paper borrows from Aziza Ahmed, *When Men Are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib* 11 UCLA J. Islamic & Near E.L. 1 (2011).

[1] For a sampling of this literature, *see* Mahmood Mamdani, Good Muslim, Bad Muslim (2004); Lila Abu-Lughod, Do Muslim Women Need Saving? (2013); Joseph Massad, *Re-orienting Desire: The Gay International and the Arab World*, 14.2 Public Culture 361–85 (2002); Chandra T. Mohanty, *U.S. Empire and the Project of Women's Studies: Stories of Citizenship, Complicity and Dissent*, 13.1 Gender, Place and Culture 7–20 (2006); Cyra Akila Choudhury, *Globalizing the Margins: Legal Exiles in the War on Terror and Liberal Feminism's War for Muslim Women*, 9 International Review of Constitutionalism 1 (2010); Cyra Akila Choudhury, *Beyond Culture: Human Rights Universalisms Versus Religious and Cultural Relativism in the Activism for Gender Justice*, 30 Berk. J. of Gender L. & Justice 226 (2015).

[2] Executive Order 13769, 82 C.F.R 8977 (2017).

anti-Muslim lawmaking. In making this argument, this chapter provides an overview of the rich feminist and queer debates on Islam, gender, sex, and sexuality, which have critiqued both Republican and Democratic administrations for their participation in the vilification Muslims and Arabs on gendered grounds and helped justify both the "never-ending" War on Terror and anti-Muslim lawmaking in the United States.

2 SEPTEMBER 11 AND THE BUSH ADMINISTRATION

Immediately following September 11, 2001, pundits and experts theorized the possible motivations for the attack on the World Trade Center. Shocked by the act of terrorism, but willing to see it in broader historical context, some commentators tried to contextualize the violence, arguing that many years of American involvement in the Middle East resulted in anger at the United States. These arguments fell to the wayside with the emergence of another account: that September 11 was not the product of (or even continuance of) long-standing political and economic engagement in the Middle East, but was due to a "clash of civilizations." The clash-of-civilizations narrative drew on the work of scholar Samuel Huntington who, in short, argued that the values of Muslims differ so much from those of people in the West as to make them incompatible. This idea came to prominence when it was taken up by the George W. Bush administration as a primary rationale to understand terrorism.

Historicizing Huntington's account, scholar Mahmood Mamdani dates this type of culture talk to Huntington's 1993 book, *Clash of Civilizations*. For Mamdani, culture talk is the invocation of Islam as a culture, one with no history, politics, or debates. From this viewpoint, Muslims live in an uncivilized culture, petrified long ago. He offers that the term "clash of civilizations," itself was borrowed Bernard Lewis's essay entitled "The Roots of Muslim Rage."[3] In Lewis's article, which appeared in *The Atlantic Monthly* in 1990, he warned Americans:

> For a long time now there has been a rising tide of rebellion against this Western paramountcy, and a desire to reassert Muslim values and restore Muslim greatness. The Muslim has suffered successive stages of defeat. The first was his loss of domination in the world, to the advancing power of Russia and the West. The second was the undermining of his authority in his own country, through an invasion of foreign ideas and laws and ways of life and sometimes even foreign rulers or settlers, and the enfranchisement of native non-Muslim elements. *The third – the last straw – was the challenge to his mastery in his own house, from emancipated women and rebellious children. It was too much to endure, and the outbreak of rage against these alien, infidel, and incomprehensible forces that had*

[3] Mahmood Mamdani, *Good Muslim, Bad Muslim: A Political Perspective on Culture and Terrorism*, 104(3), American Anthropologist 766–75 (2002).

> *subverted his dominance, disrupted his society, and finally violated the sanctuary of his home was inevitable.* It was also natural that this rage should be directed primarily against the millennial enemy and should draw its strength from ancient beliefs and loyalties.[4]

For Lewis, and later for Huntington, the rising animosity of Muslim countries towards the West was due largely to a resistance to modernity by Muslims:

> The war against modernity is for the most part neither conscious nor explicit and is directed against the whole process of change that has taken place in the Islamic world in the past century or more and has transformed the political, economic, social, and even cultural structures of Muslim countries. Islamic fundamentalism has given an aim and a form to the otherwise aimless and formless resentment and anger of the Muslim masses at the forces that have devalued their traditional values and loyalties and, in the final analysis, robbed them of their beliefs, their aspirations, their dignity, and to an increasing extent even their livelihood.[5]

Lewis repeated himself in 2002, after 9/11, in an article entitled "What Went Wrong?":

> To a Western observer, schooled in the theory and practice of Western freedom, it is precisely the lack of freedom – freedom of the mind from constraint and indoctrination, to question and inquire and speak; freedom of the economy from corrupt and pervasive mismanagement; *freedom of women from male oppression*; freedom of citizens from tyranny – that underlies so many of the troubles of the Muslim world. But the road to democracy, as the Western experience amply demonstrates, is long and hard, full of pitfalls and obstacles.[6]

Gender is central to the narrative that Muslim rage drives anti-Western sentiment. In Lewis's account, foundational to the rage of Muslims is the loss of domain for the Muslim man. The emancipated woman threatens the mastery of the Muslim man's home. Women's rights and women's progress are incompatible with Islam. In fact, according to Lewis, the end of women's oppression helps inspire the Muslim man's rage against the West. This description allows Lewis to both explicitly and implicitly reinforce the idea that it is in the West that women have been freed from oppression and that Western freedom is, among other things, the freedom of women from male oppression. The flip of this is also true: that Muslims are backwards, oppressive, and unfree – a lack of freedom that, according to Lewis and Huntington, is the foundation of the problems of the Muslim world.[7]

4 Bernard Lewis, *The Roots of Muslim Rage*, 266.3 The Atlantic Monthly 47–60 (1990). Emphasis added.

5 *Id.*

6 Bernard Lewis, *What Went Wrong?* https://www.theatlantic.com/magazine/archive/2002/01/what-went-wrong/302387/

7 Mahmood Mamdani, *Good Muslim, Bad Muslim: A Political Perspective on Culture and Terrorism*, 104 (3), American Anthropologist 766–75 (2002).

George W. Bush invoked these gendered ideas in his own initiation and escalation of the "War on Terror." As described by Bush, this was a war for good against evil in response to an attack by Muslims against the American values of freedom, peace, and security.[8] As I have documented elsewhere, the War on Terror was spun as an intervention on behalf of women. Channeling Bernard Lewis and Samuel Huntington, Laura Bush, for example, delivering the President's Weekly Address on November 17, 2001, in lieu of her husband, stated:

> I'm delivering this week's radio address to kick off a world-wide effort to focus on the brutality against women and children by the al-Qaida terrorist network and the regime it supports in Afghanistan, the Taliban. That regime is now in retreat across much of the country, and the people of Afghanistan – especially women – are rejoicing. Afghan women know, through hard experience, what the rest of the world is discovering: The brutal oppression of women is a central goal of the terrorists. Long before the current war began, the Taliban and its terrorist allies were making the lives of children and women in Afghanistan miserable. Seventy percent of the Afghan people are malnourished. One in every four children won't live past the age of five because health care is not available. Women have been denied access to doctors when they're sick.... Women cannot work outside the home, or even leave their homes by themselves....
>
> Because of our recent military gains in much of Afghanistan, women are no longer imprisoned in their homes. They can listen to music and teach their daughters without fear of punishment. Yet the terrorists who helped rule that country now plot and plan in many countries. And they must be stopped. The fight against terrorism is also a fight for the rights and dignity of women.[9]

In the culture talk that surrounded the War on Terror, the repeated invocation of women as signifiers of freedom, progress, and modernity brought feminists squarely into the debates about September 11 and the War on Terror. According to Laura Bush, US military intervention was the end to women's "imprisonment in their homes." Laura Bush's claim that the War on Terror would bring the end of oppression for women resonated with some feminists and feminist organizations, who began to see the War on Terror as a means of ending oppression against women in the Muslim world.[10] In other words, the claim that "military gains" would bring gender equality was not limited to conservative politicians and their wives. A subset of progressive feminists declared themselves allies of Muslim women and, in turn, supporters of the War on Terror. Most prominent of these feminist organizations was

[8] George W. Bush, *Address to the Nation on the Terrorist Attacks*, *available at* http://www.presidency.ucsb.edu/ws/?pid=58057

[9] Laura Bush, *Radio Address by Mrs. Bush*, The White House, 3 Apr. 2013, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011117.html.

[10] Karen Engle, *"Calling in the Troops": The Uneasy Relationship between Women's Rights, Human Rights, and Humanitarian Intervention*, 20 Harv. Hum. Rts. J. 75 (2007); Vasuki Nesiah, *From Berlin to Bonn to Baghdad: A Space for Infinite Justice*, 17 Harv. Hum. Rts. J. 75 (2004).

the Feminist Majority Foundation (FMF), which mobilized the feminist rhetoric of a universal patriarchy to argue that the feminist fight is domestic and global: "The Feminist Majority Foundation's Global Campaign has always been based on the belief that the fight we face on the domestic front and the fight we face on the global front for women's rights are not two separate battles: they are one and the same."[11] In turn, the Feminist Majority Foundation celebrated the US government's intervention on the grounds of women's rights:

> The 2001 defeat of the Taliban liberated Afghan women and girls from the regime's draconian decrees. The world witnessed reports of women in Mazar-e-Sharif, Kabul, and other cities going into the streets without male relatives and discarding their burqas – actions that would have garnered brutal punishments under the Taliban.[12]

The position of the FMF resulted in a deep division between feminist organizations and scholars with regard to their relationship to the War on Terror.[13] On one side, represented by FMF, were what some scholars termed the "imperial feminists" – feminists and feminist organizations like the Feminist Majority Foundation that supported interventions into Iraq and Afghanistan.[14] Critical scholarly and activist feminist voices also gained momentum: organizations like Code Pink and feminist scholars, particularly those working from within a postcolonial and Third-World frame, argued against the war as a means to bring equality for women.[15] Many of these critical feminists also took issue with the trope of Muslim women in need of being saved. This rhetoric, critical feminists argued, led to the ongoing vilification of Muslim men, which helped justify military intervention by the West.[16]

Feminist critics were not alone. Queer theorists also picked up on the underlying assumptions about gender and sexuality that drove purportedly progressive agendas. One of the more prominent critiques of international nongovernmental organizations (NGOs), was Joseph Massad's article, "Re-orienting Desire: The Gay International and the Arab World." He argued that international gay rights organizations complicated and repressed the lived experiences of LGBT people in the Arab and Muslim world,

[11] *Campaign for Afghan Women and Girls*, Feminist Majority Foundation, 4 Feb. 2012, *available at* http://feminist.org/afghan/taliban_women.asp (last visited Feb. 4, 2012).

[12] *Id.*

[13] This section of the paper draws on Aziza Ahmed, *When Men Are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib* 11 UCLA J. Islamic & Near E.L. 1 (2011).

[14] *See* Anne Orford, Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law 56–63 (2003).

[15] Chandra T. Mohanty, *U.S. Empire and the Project of Women's Studies: Stories of Citizenship, Complicity and Dissent*, 13 Gend. Place & Culture 7–20 (2006).

[16] *See* Abu-Lughod, *supra* note 2; *see* Orford, *supra* note 14. *See also* Ann Russo, *The Feminist Majority Foundation's Campaign to Stop Gender Apartheid: The Intersection of Feminism and Imperialism in the U.S.*, 8 Int'l Feminist J. Pol., 557–80 (2006). (Both Russo and Orford utilize the term "imperial feminist.")

rather than liberating them.[17] Further, Massad argued that gay liberation organizations "reserve a special place" for Arabs and Muslims in the discourse of rescuing LGBT people. This had two consequences: first, it reinforced the idea that the West is the harbinger of rights for LGBT people and, second, ironically, it incited a backlash against LGBT people where there was none before. This pre-September 11 critique was carried into the post–War on Terror period in reaction to several key moments that raised debates about sexuality, one of which was the scandal of Abu Ghraib in 2003, in which leaked photos of Iraqi soldiers being sexually tortured by female soldiers circulated widely. The images launched a broad discussion of sexualized forms of torture and punishment, which were reported by US detainees in multiple locations, including by men in Guantánamo, and included unwilling sexual acts with female guards, being shown pornography, and being spoken to in a sexual manner.

Mobilizing queer theory to unearth the underlying assumptions of this sexualized torture, Judith Butler argued that the US army considers itself "more sexually 'advanced' is understood to be the case because they, acting as Americans, use sexuality to break down the "putative sexual and moral codes of Islam."[18] For the US military, sexual freedom became an indicator of sexual advancement. In a similar vein, queer theorist Jasbir Puar coined the term "homonationalism." For Puar, homonationalism, which inspired both activist and academic movements, was a term that described "sexual exceptionalism, queer as regulatory, and the ascendency of whiteness" in the War on Terror. Puar highlights how the ongoing positioning of Islam as homophobic and Muslims as highly sensitive to sexual harm results in the US military portrayed as tolerant, accepting, and encouraging of sexual diversity, all while engaging in homophobic and racist acts.[19] Importantly, it also had the effect of erasing sexual diversity in Muslim communities.[20] In the culture talk of the Bush administration, all Muslims were heterosexual. This narrative ran contrary to the emergence of many Muslim LGBT groups forming to challenge the very idea that Islam and a diverse range of sexual expressions were incompatible. The acknowledgment that Muslims actively debate ideas of sexuality within the Muslim community did not comport with the idea of Islam as a static, unchanging, and backwards religion. And, in turn, sexual diversity in Muslim communities was erased from public discourse about the practice of Islam.

[17] Joseph Massad, *Re-orienting Desire: The Gay International and the Arab World*, 14.2 Public Culture 361–85 (2002).

[18] Judith Butler, *Sexual Politics, Torture, and Secular Time*, 59 Brit. J. Soc. 1–23 (2008).

[19] Jasbir Puar, Terrorist Assemblages: Homonationalism in Queer Times (2007); Jasbir K. Puar, *Queer Times, Queer Assemblages*, 23 Soc. Text 121–39 (2005). I have discussed the Abu Ghraib scandal here Aziza Ahmed, *When Men Are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib* 11 UCLA J. Islamic & Near E.L.1 (2011).

[20] For a history of sexual diversity in Muslim communities. see Vanja Hamzic, Sexual and Gender Diversity in the Muslim World: Law, History, and Vernacular Knowledge (2015). On the complexity of sexuality in an Islamic context *see* Lama Abu Odeh, 58 *Honor Killings and the Construction of Gender in Modern Societies*, 911 Am. J. Comp. L. 951 (2010).

3 THE OBAMA ADMINISTRATION

Americans against military intervention held the hope that the election of Barack Obama as president would end the War on Terror. Yet, soon after his tenure began, an increase in drone strikes in Pakistan and the continuation of military operations in Afghanistan made clear that the "never-ending war" would live up to its moniker. While Obama himself was careful not to conflate Islam with backwardness in his speeches, his administration implemented a series of antiterrorism initiatives that built on old ideas or set into motion new narratives about Islam and gender.

During the Obama administration, for example, prior ideas of Muslim women as victims were flipped – now Muslim women were potential terrorists.[21] This was present in the roll-out of the Countering Violence Extremism initiative, which reportedly included seeing women's increasing modesty as signals of radicalization. In other words, adopting the hijab was promoted as a sign of possible extremist tendencies.[22] The perception that Muslim women were terrorists, like their male counterparts, was exacerbated by several events that gained national attention. The first was ongoing reporting that American and other Western women were being recruited, lured, or sometimes went of their own volition to fight with the Islamic State of Iraq and Syria (ISIS). The second, the 2015 San Bernadino attack in which a Muslim couple – a husband and wife – planned and executed an attack on a nonprofit organization, killing 14 people, raised the specter of the dangerous Muslim woman. These conflicting images of Muslim women – one in which the hijab is a sign of oppression and a signifier of Islam's patriarchal structures and another in which the hijab is a form of agency and radicalization – became narratives drawn upon as necessary in debates about Muslims in the United States.

Although not in the register of Islam and the War on Terror, the Obama administration also broadened its own scope of global gender-related concerns beyond women to LGBT individuals who resided in countries perceived to be regressive. These protective measures took a variety of forms. In 2011, for example, President Obama issued a "Presidential Memorandum on International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons," which stated that the Obama administration would protect the human rights of LGBT people everywhere. In 2015, Obama appointed a special envoy on LGBT rights, a move celebrated by some LGBT organizations, including the Human Rights Campaign, one of the largest and most vocal LGBT groups in the United States.[23] Perhaps more consequentially, the US State Department under Obama

[21] Sahar Aziz, *Terror(izing) the "Veil": American Muslim Women Caught in the Crosshairs of Intersectionality*, in The Rule of Law and the Rule of God, 207–32 (2014).

[22] *Id. See also* Faiza Patel, *Rethinking Radicalization*. Brennan Center for Justice, 2011.

[23] Eyder Peralta, *U.S. Appoints First Ever Special Envoy for LGBT Rights*, NPR, Feb. 23, 2015, *available at* https://www.npr.org/sections/thetwo-way/2015/02/23/388482554/u-s-appoints-first-ever-special-envoy-for-lgbt-rights ("At a moment when many LGBT people around the world

signaled its willingness to take action against countries that violated the human rights of LGBT people, which included considering the treatment of LGBT individuals in determining humanitarian assistance to countries.[24] Although these efforts were celebrated by US-based LBGT human rights organizations,[25] they often drew the ire of LGBT individuals living in the aid-receiving countries, who argued that they wanted their countries, often poor and dependent on US assistance, to continue to receive aid, even in the face of regressive LGBT laws. The administration was careful not to conflate Islam with anti-LGBT violence, but the ongoing War on Terror placed the pro-LGBT position of the American government inside broader debates about American intervention in Muslim majority countries. In turn, the idea that American-style "gay liberation" was a sign of modernity and progress revived the long-standing queer critique of progressive LGBT rights organizations that, like the women's rights organizations before them, served as a means of forwarding more militarized forms of US intervention and often incited a more conservative backlash.

The seemingly progressive agenda of the Bush administration's efforts to save women and the Obama administration's attempts to broaden the gender-related concerns of the US government had a dark side. They contributed to the logic of war, invasion, and threats to end foreign aid, accompanied by claims to seek those legally and politically marginalized for reasons of gender. Importantly, the constant invocation of the gendered harms faced by people in Muslim majority countries reinscribed a set of anti-Muslim stereotypes that laid the groundwork for Trump's acceleration of the idea that Muslims are anti-American and thus worthy of exclusion.

4 DONALD TRUMP: EXPLOITING AN EXISTING NARRATIVE ABOUT GENDER AND ISLAM

As the many issues raised by academic and activist critics of the US government remained unresolved, and the War on Terror continued, the run-up to the 2016 election saw an uptick in anti-Muslim rhetoric by political candidates. Several events in

are facing persecution and daily violence, this unprecedented appointment shows a historic commitment to the principle that LGBT rights are human rights… President Obama and Secretary Kerry have shown tremendous leadership in championing the rights of LGBT people abroad. Now, working closely with this new envoy, we've got to work harder than ever to create new allies, push back on human rights violators, and support the brave leaders and organizations that fight for LGBT rights around the world.")

[24] *U.S. Cuts Aid to Uganda, Cancels Military Exercise over Anti-Gay Law*, Reuters, *available at* https://www.reuters.com/article/us-usa-uganda-gay-announcement/u-s-cuts-aid-to-uganda-cancels-military-exercise-over-anti-gay-law-idU.S.KBN0EU26N20140619; Eyder Peralta, *U.S. Says It Will Use Foreign Aid to Promote Gay Rights*, NPR, *available at* https://www.npr.org/sections/thetwo-way/2011/12/06/143221630/u-s-says-it-will-use-foreign-aid-to-promote-gay-rights.

[25] Aeyal Gross, *Homoglobalism: The Emergence of Global Gay Governance, in* Queering International Law (Diane Otto, ed. 2017).

the years preceding the elections brought increased attention to issues of terrorism and Islam and scrutiny of Muslim communities.

First, in 2015 the San Bernadino shootings once again drew attention to terrorism in the national news. The second event was the mass shooting in 2016 at Orlando Pulse, an LBGT nightclub, perpetrated by a man with a Muslim background. Although it was unclear what his motives were, a series of factors, including his prior identification by the FBI as a possible threat, rendered this a terrorist event. Internationally, increased violence in Syria resulted in a large migration of Syrians into Europe. The Syrian refugee crisis provided fodder for conservative politicians and pundits to raise the specter of incoming "hordes" of Muslim refugees. As images of large groups of Arabs crossing borders and sea boundaries flooded the news, politicians around the world embraced their new capacity to galvanize a xenophobic response. Although few Syrians actually ended up in the United States, American political candidates mobilized the fear of a mass migration of Muslims to further antiterrorism, pronational security agendas. In other words, being tough on refugees and asylum claims became synonymous with protecting the country against potential terrorist attacks in the United States. While debates continue as to how and why Donald Trump won the election, many credit his victory to his effective deployment of explicit and implicit racist messaging.

In keeping with the dichotomy set into motion by Lewis and Huntington, Trump was explicit in his association of American freedom with Muslim backwardness. Trump painted the purportedly encroaching Muslim population as a threat to liberal values. While his anti-Muslim rhetoric on the campaign trail was frequent and explicit, it also often took gendered forms. In one high-profile instance, on the anniversary of the shooting at the Pulse nightclub in Orlando, he seized the opportunity to push forward the idea that Muslims are anti-LGBT and anti-woman, and were a threat to American society and culture. Arguing that "Radical Islamic terrorists . . . enslave women, and murder gays," Trump further stated:

> This is a very dark moment in America's history. A radical Islamic terrorist targeted the nightclub, not only because he wanted to kill Americans, but in order to execute gay and lesbian citizens, because of their sexual orientation.
>
> It's a strike at the heart and soul of who we are as a nation. It's an assault on the ability of free people to live their lives, love who they want, and express their identity. It's an attack on the right of every single American to live in peace and safety in their own country.[26]

In the days that followed his statement on Orlando, Trump called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." He continued to make the link

[26] Ryan Teague Beckwith, *Read Donald Trump's Speech on the Orlando Shooting*, Time, June 13, 2016, *available at* http://time.com/4367120/orlando-shooting-donald-trump-transcript/

between Muslims, Islam, and the gendered harms that would come with a Muslim migrant population. Drawing on information produced by the conservative think tank Center for Security Policy, Trump argued that the majority of Muslims felt that they should be able to be governed by shari'ah law. This provided partial justification for the ban because, Trump claimed, shari'ah authorizes "unthinkable acts that pose great harm to Americans, especially women."[27]

Trump's concern for women and LGBT people was misplaced, given the accusations against him of sexual violence. But the political leverage and success that focusing on Islam's purported abhorrence for these groups, in contradiction to Americans' "respect" for their freedoms, gave Trump the incentive to continue, and he did so time and again. During a GOP debate in 2016, for example, Trump reiterated the point that Muslim and American values are inherently different. He stated, "Let me go a step further. Women are treated horribly. You know that. You do know that. Women are treated horribly."[28] In an interview few months later, he reinforced his position, with an attack on Khizr Khan and his wife Ghazala Khan, who came to prominence as advocates against Islamophobia following the death of their son when he was serving in the US military. In a speech that went viral, Khizr Khan spoke of Trump's lack of sacrifice for the United States. In response, Trump suggested that Ghazala Khan, who stood next to her husband without speaking, was not permitted to do so. Pressed further, he turned the conversation to the problem of terrorism in the United States, including the events in San Bernadino and Orlando.[29] The takeaway was clear: Khizr Khan was no patriot, and his presence threatened American values.

Upon his election as president, Trump kept his word to exclude Muslims with what came to be known as the "Muslim ban," formally, Executive Order 13679: Protecting the Nation from Foreign Terrorist Entry into the United States. Upon the enactment of the executive order, litigation ensued immediately, and a temporary restraining order (TRO) prevented the executive order from being implemented. Following the TRO, the Trump administration withdrew EO 13679 and put into place Executive Order 13780. Concerns about gender had a prominent place in both of these orders. EO 13679, for example, stated the United States should not admit "those who engage in acts of bigotry or hatred . . ." including 'honor' killings.[30] Further, the executive order directed the secretary of the Department of Homeland Security, in consultation with the attorney general, to collect and make

[27] Donald Trump, *Statement by Donald J. Trump: Statement on Preventing Muslim Immigration*, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=113841

[28] Charlotte Alter, *Muslim Women Say They Don't Need Donald Trump's Help*, Time, Mar. 11, 2016, *available at* http://time.com/4255987/muslim-women-donald-trump-islam/

[29] David Grahm, *"He Doesn't Know What the Word Sacrifice Means,"* Atlantic, *available at* https://www.theatlantic.com/politics/archive/2016/07/trump-goes-to-war-with-khizr-and-ghazala-khan/493763/

[30] Protecting the Nation from Foreign Terrorist Entry Into the United States § 1, 82 Fed. Reg. 8977 (Jan. 27, 2017).

publicly available "information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals."[31] Put differently, the executive order suggests that the very presence of people from Muslim majority countries may place women at risk for violence.[32] In their amicus brief to the Fourth Circuit, social scientists in support of the respondents, the state of Hawaii, and the International Refugee Assistance Project denounced the use of *honor killings* in the executive order, calling it a term routinely invoked to stigmatize Muslims and propagate anti-Muslim stereotypes.[33] They argued that the term honor-killing negated the government's claim that the executive order was supported by a "facially legitimate and bona fide reason." In other words, the invocation of honor killings made clear the anti-Muslim animus that drove the executive order.[34] Scholars have long highlighted this point. Law professor Leti Volpp, for example, argued that the idea of honor killings has "traction because of already existing scripts about gender, culture, immigration, and Islam." Volpp further argued that "honor killing" has been used "to buttress claims that Islam is evil and that the worst fate imaginable is to be born female into a Muslim family."[35] This proved to be the case in the publicity surrounding the ban. As documented by social scientists in their brief to the Fourth Circuit, conservative news outlets and organizations, including those run by Pamela Geller and Robert Spencer, conflated honor killings with Islam and used the term to further anti-Muslim fervor.

As of December 2017, with litigation ongoing, the United States Supreme Court allowed the third version of the ban to be implemented.[36] Shortly after, the Fourth Circuit found the ban unconstitutional, affirming a nationwide preliminary injunction. Following the injunction, the Trump administration issued Proclamation No. 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted

[31] White House Executive Order 13780 (2017).

[32] In countries that have mobilized xenophobic rhetoric to argue that migrants are unwelcome, particularly during the refugee crisis, this has been blatant. In 2016, a popular Polish magazine ran a cover story about the "Islamic Rape of Europe." The picture on the cover depicted a white woman draped in a European Union flag that was being torn off of her body by disembodied dark-skinned hands. Canada made the distinction between the gay victims of Islam and the possibility of the threat of Muslim men most clear in stating that they would admit 25,000 Syrian refugees, but exclude straight single men – only gay men would be granted asylum, due to the persecution faced by LGBT individuals. The website of the Canadian immigration authority details the process for ensuring that only gay men are identified for entry. *See, Canada to Turn Away Single Men as Part of Syrian Refugee Resettlement Plan*, The Guardian, Nov. 23, 2016, https://www.theguardian.com/world/2015/nov/23/canada-syrian-refugee-resettlement-plan-no-single-men

[33] Brief of Social Science Scholars in Support of Respondents, International Refugee Assistance Project v. Trump, 857 F. 3d 554 (2017).

[34] *Id.*

[35] Leti Volpp, *Framing Cultural Difference: Immigrant Women and Discourses of Tradition*, 22(1) differences 90–110 (2011).

[36] Trump v. Hawaii, 585 U.S. ___ (2018).

Entry Into the United States by Terrorists or Other Public-Safety Threats." The proclamation made it to the Supreme Court. In each version, the gendered tropes about Muslims fade into the background as the proclamations lose their explicit focus on Muslims.

The litigation surrounding the ban focused on core legal questions, including the president's authority to enact such a ban, and discrimination based on religion in violation of the Establishment Clause.[37] In the course of the Court's decision, the majority found that the proclamation was neutral on its face and was rationally related to the government's stated purpose of protecting the country and improving vetting processes for migrants. Justice Sonia Sotomayor's dissent declared that religious animus was the primary motive for the proclamation. Sotomayor focused on the formal statement issued by Trump in December 2015 "calling for a total and complete shutdown of Muslims entering the United States," which stated that "Shariah authorizes . . . unthinkable acts that pose great harm to Americans, especially women."[38] Sotomayor says little on the issue of women besides making mention of this quote,[39] which indicates that while the broader problem of religious discrimination is apparent, the gendered dimension of that discrimination remains obscured. The administration's ultimate victory in the case tells a different story, in which the decades of ideas about Muslims, some taking deeply gendered form, that paint Muslims as harmful, backwards, and opposed to American values of freedom and liberty, are further woven into the fabric of our constitutional democracy.

5 CONCLUSION

The success of the Trump administration's anti-Muslim rhetoric is not without precedent. Rather, as this chapter demonstrates, the Trump administration drew directly from the purportedly progressive interventions set into motion for women and LGBT people by the Bush and Obama administrations. Gender became central to a larger narrative, in which Americans are universally progressive, democratic, and free while Muslims remain backward, primitive, and misogynistic. With the Supreme Court's decision that Proclamation 9645 is constitutional, these ideas have taken on a new legal form and legitimacy.

[37] *Id.*

[38] *Id.* (Sotomayor, S., dissenting).

[39] In recent years, scholars have analyzed the deeply gendered nature of accusations against Islam in the context of migrant life in host countries. In her book In the name of Women's Rights: The Rise of Femonationalism (2017), feminist scholar Sara Farris highlights how in Europe the vilification of Muslim men as a threat to Western society is a central idea mobilized by right-wing nationalists and feminists.

14

Coercive Assimilationism and Muslim Women's Identity Performance in the Workplace

Sahar F. Aziz[*]

1 INTRODUCTION

Unlawful discrimination continues to ail American workplaces. For Americans who belong to racial, ethnic, or religious groups stigmatized as the "other," opportunities to access quality education, political office, and equal opportunity in the workplace are stunted.

When Title VII of the 1964 Civil Rights Act was passed, victims often experienced explicit biases against their protected group. The law's immediate effect was to ban overt prejudice that caused disparate intergroup discrimination on the basis of race, ethnicity, color, gender, or religion. But, as the data show, the absence of discriminatory policies on paper does not always translate into a discrimination-free workplace in practice.[1] Rather, antidiscrimination laws have pushed bias into more covert manifestations, wherein facially neutral factors become proxies for unlawful discrimination. Title VII, therefore, has been relatively successful in rooting out explicit bias in employment while leaving implicit bias untouched.

More specifically, Title VII is ill-equipped to prevent two increasingly prevalent forms of discrimination: (1) implicit bias arising from negative stereotypes of protected classes; and (2) disparate treatment of subgroups of protected classes who do not conform to coercive assimilationist pressures. Taking this into account, courts should not exclude intra-group comparative evidence or singularly focus on

[*] This chapter is an excerpt of the previously published article, *Coercive Assimilationism: The Perils of Muslim Women's Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1 (2014).

[1] Camille Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1190–91 (2004); *see* Johanna Shih, '. . .*Yeah, I Could Hire This One, but I Know It's Gonna Be a Problem*': *How Race, Nativity and Gender Affect Employers' Perceptions of the Manageability of Job Seekers*, 25 ETHNIC & RACIAL STUD. 99, 116 (2002); *see also* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 86, 148 (2013).

inter-group comparative evidence in ascertaining whether unlawful discrimination was the motivating factor in an adverse employment action.

Of course, if the different treatment among the subgroups is based on performance and skills directly related to the work at issue, then no liability should attach. But that is not always the case. Disparate treatment of members of the same protected class may arise from negative racial, ethnic, gender, or religious stereotypes that privileges those able and willing to perform their identity to appease assimilationist demands of the majority group. Such pressures to perform one's identity in accordance with the high-status groups' norms and values produce what I call *coercive assmiliationism*. The effect of failing to adhere to coercive assimilationism is intergroup discrimination based on intragroup differences rooted in implicit or explicit negative stereotyping.

Coercive assimilationism exacts a disproportionately high toll on members of nondominant social groups as facially neutral rules mask a bias in favor of the preferences, interests, and inherited circumstances of the dominant group. Minority employees find themselves expected to behave, talk, and dress in ways that emulate the dominant group, or at the very least ways that do not threaten their power to define professional norms. By the same token, subjective aesthetic values determine who and what is valued and entitled to control the workplace, and by extension the distribution of wealth. Racial or ethnic minorities who engage in cultural displays and exhibit behaviors disfavored or out of sync with the dominant white, Protestant, heterosexual male culture find themselves deemed unprofessional or incompetent, resulting in their exclusion or marginalization in the workplace. As members of the dominant group are able to live and work with minimal pressure to compromise their cultural values and identities, those deemed outsiders are coerced to relinquish or hide their foreign languages, clothing, cultural practices, hairstyles, and associations with other outsiders in order to obtain gainful employment.

The effect is what Laura Roberts and Daryl Roberts call "cultural profiling," where people who fail to show that they fit into a company's culture are not invited to join or are purged if they later exhibit nonassimilationist identities.[2] Behaviors or traits that remind the employer of the employee's low social status and potential to thwart cultural hegemony in the workplace result in adverse employment actions. In contrast, members of minority groups who perform their identities in accordance with coercive assimilationist demands receive better treatment than members of the same group who fail to do so. As a result, members of low-status groups must exert more energy than members of high-status groups to assure their employers that they

[2] *See*, e.g., Tristin K. Green, *Work Culture and Discrimination*, 93 Calif. L. Rev. 623, 628 (2006); Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 Cornell L. Rev. 595, 596 (1999); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 Yale L.J. 2009, 2011 (1995); Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 771 (2002).

are not a threat to the organization's culture.[3] The heightened sense of self-consciousness regarding all aspects of their cultural and status displays imposes psychological stress and health costs on minority employees that go unnoticed by employers and courts.[4]

Although rarely discussed in court opinions, social psychology theories illuminate the gravity of the harms caused by assimilationist pressures on low-status groups to perform their identities to the liking of high-status groups. As such, I examine the identity performance challenges and contradictions faced by Muslim women of color as "intersectionals" based on the following stereotypes: (1) Muslims as terrorists, violent, and disloyal; (2) Muslim women as meek, oppressed, and lacking individual agency; (3) women as sexualized, terminally second-best to men, and uncommitted to their careers; (4) immigrants as forever foreign and undeserving of equal treatment; and (5) ethnic minorities from the Middle East and South Asia as backward, misogynist, and anti-American. I argue that Muslim women of color are at risk of falling between the cracks of Title VII jurisprudence due to courts' unwillingness to recognize the harms and the triple binds caused by coercive assimilationist pressures to conform one's identity to comport to high-status group norms.

Facing the brunt of negative stereotypes of Muslims as terrorists, gender stereotypes of Muslim women as weak and oppressed, and stereotypes specific to her race or ethnicity, a Muslim female employee is caught in a triple bind. Thus, I offer a new doctrinal proposal that addresses intergroup discrimination based on intragroup differences in identity performance. Building off of Melissa Hart and Paul Secunda's work on social framework evidence in employment discrimination, I argue that courts should incorporate social psychology theories to recognize the invidious impact of negative stereotypes in employers' purportedly objective employment

[3] Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 Alb. L. Rev. 299, 303–304 (2005). Since 9/11, the cases of Muslim women not hired or terminated because they wore a headscarf on grounds of violating a dress policy has noticeably increased. Due to religious accommodation doctrines favoring employees, many of these women have won their religious-accommodation claims, in stark contrast to disparate treatment claims based on race or ethnicity. Elwakin v. Target Media Partners Operating Co., No. 11-2648, 2012, WL 669068, (E.D. La. Feb. 29, 2012); EEOC v. Abercrombie & Fitch, 798 F. Supp. 2d 1272 (N.D. Okla. 2011); EEOC v. White Lodging Servs. Corp., No. 3:06CV-353-S 2010 U.S. Dist. LEXIS 32492 (W.D. Ky. Mar. 31, 2010); Mowafy v. Noramco of Del., 620 F. Supp. 2d 603 (D. Del. 2009); EEOC v. Alamo Rent-ACar LLC, 432 F. Supp. 2d 1006 (D. Ariz. 2006); Zayed v. Apple Computers, No. C 04-01787 JW, 2006 WL 889571, at *2; Tyson v. Clarian Health Partners, Inc., No. 1:02-cv-1888-DFHTAB, 2004 U.S. Dist. LEXIS 13973 (S.D. Ind. June 17, 2004).

[4] Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 Duke J. Gender L. & Pol'y 369, 369–70 (2007); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got To Do with It?*, 79 U. Colo. L. Rev. 1355, 1362 (2008) [hereinafter Greene, *Title VII*]. *See* EEOC v. Abercrombie & Fitch, 798 F. Supp. 2d 1272, 1272–78 (N.D. Okla. 2011).

decisions. Following the sex-stereotyping jurisprudence established in *Price Waterhouse Cooper v. Hopkins*,[5] judges should take seriously plaintiffs' circumstantial evidence that stereotypes against race, religion, and gender motivated the employer's action.

While Title VII jurisprudence acknowledges the harms caused by explicit stereotyping in intergroup dynamics, it has yet to meaningfully incorporate the implicit stereotyping that discriminates based on intragroup differences. As such, this article calls on courts to recognize the interaction of identity performance, assimilationist demands, negative stereotyping, and discrimination at the intersection of race, religion, and gender.

2 PERFORMING IDENTITY AT WORK: THE CASE OF MUSLIM WOMEN OF COLOR

Each society experiences social stratification based on the norms, values, and culture of the socially dominant group. Currently in the United States, the socially dominant group is white, Christian, heterosexual, and male. The privileges of membership in the dominant social group are many. Institutional rules put in place by its members allocate resources that secure their status at the top of the social hierarchy. The socially dominant group defines the values, behaviors, and other characteristics that constitute what is normal, competent, good, and professional.[6] Outsiders must assimilate in order to have the opportunity to attain economic, social, and political privileges. Those unable or unwilling to do so pay a high price, including underemployment or unemployment, inaccessibility to quality education, inferior housing, intergenerational poverty, and targeted enforcement of criminal laws. Coercive assimilationism, therefore, imposes dignitary and psychological harms that warrant legal redress.

The antidiscrimination literature is replete with articles on African Americans, African American women, and LGBT communities, but little is written on Muslim women of color. Accordingly, I expand on the literature through an examination of the complexities of Muslim women's experiences through the lens of identity performance theory. Muslim women adopt both individual and group level identity performance. Some Muslim women, for example, increase their identification with Muslim communities, also known as *identity enhancement* or *social competition group strategy*, to maintain a positive social identity and self-esteem in the face of prejudice. By expounding on individual and group-level strategies, I offer a nuanced perspective on how Muslim women's identity performance pressures are both

[5] Roberts & Roberts, *supra* note 4, at 381; Claude Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 Am. Psychologist 613, 617 (1997).

[6] Roberts & Roberts, *supra* note 4, at 399; Mayida Zaal, Tahani Salah & Michelle Fine, *The Weight of the Hyphen: Freedom, Fusion and Responsibility Embodied by Young Muslim-American Women during a Time of Surveillance*, 11 Applied Dev. Sci., 164, 171 (2007).

similar to and different than those faced by other women of color. As a result, Muslim women adopt coping strategies unique to their cultural, religious, and racial circumstances, all of which should be considered by courts presiding over employment cases involving intergroup discrimination against Muslim women based on intragroup difference.

Social psychology scholars Branscombe, Harvey and Ellemers find that when presented with opportunities to gain membership in a higher status group, most people will attempt to negate their identity that is associated with the devalued group and pursue individual mobility strategies.[7] Such findings corroborate racial hierarchy theory in critical race studies, wherein members of stigmatized races may discriminate against other stigmatized races as a means of increasing their association with the dominant white race. Identity negation entails a willingness to make significant changes to one's self-definition in order to decrease or eliminate the negative consequences of an existing identification. Some individuals eliminate an identity by labeling themselves an "ex-member" of the group that has been abandoned. Others go so far as derogating other in-group members as inferior, to distance themselves from the stigmatized group. Similarly, identity denial occurs when an individual denies her identity and attempts to pass as a member of the majority. In the workplace, successful individual mobility strategies can lead to increased opportunities for higher quality work, business development opportunities, good evaluations, promotions, and higher pay. Towards those ends, three individual mobility strategies are most often employed: converting, passing, and covering.

Converting entails changing one's underlying identity altogether. A Muslim woman converts by converting out of Islam into Christianity, the religion of the dominant social group. She legally changes her birth name from a Muslim, Arab, or nonwhite name to an Anglo-sounding name. Her wardrobe and lifestyle eliminate all traces of her Muslim or nonwhite identity. She marries a Christian white male, with whom she socializes in his dominant social group. Their children are raised Christians with Anglo-Saxon names and socialize with other white Christian children. In the end, the converted Muslim woman completely disassociates from her Muslim and ethnic identity as she converts into her Christian white identity. In her mind and the minds of others, she is a member of the socially dominant group.

Passing occurs when the underlying identity is retained but masked.[8] A Muslim woman who passes hides her Muslim identity by adopting an Anglo nickname, such

[7] Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 999–1000 (2006); Banaji & Greenwald, *supra* note 1, at 158–59; Nyla Branscombe, Richard Harvey & Michael Schmitt, *Perceiving Pervasive Discrimination among African Americans: Implications for Group Identification and Well-Being*, 77 J. PERSONALITY & SOC. PSYCHOL. 135 (1999).

[8] *See* Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37 (2009). *See also* John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1718 (2008).

as "Katy" instead of Khadija, but she does not legally change her birth name. Although she may associate with some Muslims privately, she hides these associations from her white Christian coworkers. Instead, she strategically socializes with dominant group members to avoid the stigmatization of being associated with her low-status identity. She partakes in traditionally American social activities such as dancing, drinking, and having a boyfriend – all of which are at odds with the Islam practiced by her in-group. Her Western American wardrobe does not disclose her ethnic roots or religious identity, and her marriage to a fair-skinned man who also passes as white further obscures her racial and ethnic identity. When her underlying identity is discovered, she is often told, "I had no idea you were a Muslim or an Arab," to which she may respond dismissively that it is an accident of birth and irrelevant to her self-identification.

The option to convert or pass is available only to persons whose skin color and phenotype look "white enough" for the dominant social group to believe they are in fact members of the high-status group,[9] Otherwise, failed attempts to convert or pass leave the woman worse off, as she is rejected both by her low-status group and the high-status group. Due to the non-European geographic origins of most Muslim immigrants in the United States, converting and passing are available to very few. Thus, covering by Muslims whose phenotype and physical characteristics are perceived as typical of a particular low-status group is the most common form of identity performance employed to avoid stigmatization.[10]

Covering entails adopting appearances, associations, speech, and behaviors that allay the dominant social group's discomfort with or fear of the low-status group. A Muslim woman engages in racial comforting by allaying the guilt caused by the dominant group's bias against her low-status group. She also engages in racial distancing from her low-status in-group, so that she can be viewed as the exception to negative stereotypes, thereby avoiding stigmatization. Ultimately, the individual does not want to be perceived as "too Black," "too Muslim," "too feminist," or "too Arab," depending on the stigmatized groups to which she belongs. She seeks to assure the dominant group that she will not come to work one day with a headscarf on, start praying at her desk, or proclaim "Allah Akbar" when she receives good news. Whether or not she wants to engage in such acts is irrelevant, because her individuality is subsumed in the negative stereotypes presumed about her low-status group.

[9] Price Waterhouse v. Hopkins, 490 U.S. 228, 228 (1989).

[10] Scholars have noted that many people who belong to the dominant group "do not see the ways in which they are privileged, and so well-intentioned middle class, white liberals often strive to maintain privilege for their children, while denying they are doing so." Avtar Brahi & Ann Phoenix, *Ain't I a Woman? Revisiting Intersectionality*, 5 J. Int'l Women Stud. 75, 80–1 (2004); Banaji & Greenwald, *supra* note 1, at 143–44; Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 Mich. L. Rev. 2479, 2524–25 (1993).

In covering her identity, a Muslim woman retains and discloses her underlying identity but performs in a way that make it more palatable for the socially dominant group. She does not wear a headscarf, she does not speak Arabic or another foreign language in front of her colleagues, she speaks in the local vernacular American accent, straightens her hair, and wears clothes viewed as Western and liberal as opposed to overly conservative and Islamic. She chooses names for her children that are both Arabic and English such as Sara, Adam, Zack, Miriam and Sophia, so that her children can also cover their Muslim and ethnic identities. She makes an effort to inform her coworkers about her active participation in traditionally American activities such as the Parent Teacher Association, volunteering at the Salvation Army, leading her daughter's Girls Scouts troop, donating to the United Way, and other typically American extracurricular activities. Even though she may be a practicing Muslim, she does not publicize her religiosity or seek religious accommodation at work. Nor does she inform her coworkers of her trips back to her country of origin, as this may be perceived as evidence of divided national loyalties.

A Muslim woman who covers her identity also goes out of her way to express her patriotism. She does not criticize American foreign policy. In attempting to racially comfort her colleagues, the Muslim woman laughs with her colleagues at, rather than complaining about, bigoted jokes about Muslims or her ethnic group. She does not challenge stereotypes that Muslims are more prone to terrorism or Muslim women are oppressed. Indeed, she may go so far as to engage in self-hating humor about her backward country of origin and its fanatical religion, to validate mainstream stereotypes. She becomes a "cultural Muslim" rather than a "real" (bad) Muslim whose embrace and practice of her Islamic and ethnic identity are viewed as a threat by her coworkers. The identity-covering Muslim woman becomes the person her employer points to to counter allegations of anti-Muslim, anti-Arab, or even anti-women bias, as well as to tout workplace diversity. As a result, her willingness to accommodate coercive assimilationist pressures makes her more vulnerable to being a token. I now turn to how the triple bind facing Muslim women with intersectional identities makes identity performance in the service of the dominant group a futile endeavor.

3 THE TRIPLE BIND: IRRECONCILABLE INTERGROUP, INTRAGROUP, AND INTERSECTIONAL IDENTITY PERFORMANCE PRESSURES

Much of the literature on performance identity revolves around the psychological, economic, and physical harms associated with accommodating or rejecting what I call coercive assimilationism in the workplace. However, scholarship on women of color in the workplace has yet to address the triple bind faced by Muslim women of color, thereby making them vulnerable to discrimination irrespective of how they perform their identity.

Meanwhile, since the events of September 11, nearly half of Americans view Muslims with suspicion.[11] Muslim employees, therefore, feel pressures to prove their patriotism and be on their best behavior lest they be investigated for ties to terrorism. Not only must a Muslim woman of color decide whether she is willing to succumb to coercive assimilationist demands, but she may not be able to do so in light of the contradictory demands on her identity. Being a "Good Muslim Woman," as defined by the dominant social group, may avoid the adverse effects of negative stereotypes against Muslim women but at the same time may trigger negative stereotypes of women, immigrants, and Muslims.

These contradictory demands expose Muslim women of color to identity-based discrimination irrespective of their willingness or ability to accommodate coercive assimilationism in the workplace, making the incorporation of identity-based discrimination into Title VII jurisprudence all the more compelling.

3.1 *Sandwiched between Intragroup and Intergroup Identity Performance Pressures*

After the September 11 attacks, the headscarf and other forms of traditional Islamic dress came to signify a threat rather than a vulnerability.[12] Muslim women were no longer perceived as benign, helpless creatures in dire need of rescue, but were rather suspiciously associated with their terrorist husbands, sons, and fathers, and "the label 'terrorist' ... seeped corporeally and discursively onto the[ir] female Muslim bod[ies]."[13] American feminists and liberals found themselves conflicted between Orientalist infantilization of Muslim women and a purported clash of civilizations between the free Christian West and the violent Muslim East.

Facing the brunt of negative stereotypes of Muslims as terrorists and gender stereotypes of Muslim women as weak and oppressed, Muslim female employees are caught in a triple bind. The more assertive Muslim women behave to cast off misperceptions of their passivity, the more threatening they are as Muslims to their coworkers. At the same time, Muslim women's assertiveness may violate gender norms, further exposing them to discrimination based on gender stereotyping. But attempts to exercise deference to allay suspicions of women's loyalty reinforce stereotypes of their submissiveness and inability to lead. Further complicating their

[11] *See* Greene, *Title VII*, *supra* note 4, at 1363; *see*, e.g., Kimberly A. Yuracko, *The Antidiscrimination Paradox: Why Sex before Race?*, 104 Nw. U. L. Rev. 1, 19 & 44 (2010).

[12] Nyla Branscombe & Naomi Ellemers, *Coping with Group-Based Discrimination: Individualistic Versus Group-Level Strategies*, in Prejudice: The Target's Perspective, 243, 246–47 (Janet K. Swim & Charles Stangor, eds., 1998) [hereinafter Branscombe & Ellemers].

[13] Mayida Zaal, Tahani Salah & Michelle Fine, *The Weight of the Hyphen: Freedom, Fusion and Responsibility Embodied by Young Muslim-American Women during a Time of Surveillance*, 11 Applied Dev. Sci., 164, 175 (2007).

predicament, the women's nonwhite status imputes to them additional negative stereotypes specific to their ethnicity or race.

Muslim women also experience pressures to perform their identities to accommodate intragroup gender norms. Many Muslims in the United States are first- or second-generation immigrants of non-European origin. Similar to members of other immigrant communities, they are developing new identities, shaped by American culture, cultural practices from their countries of origin, and religious practices. As a consequence, Muslim communities are experiencing significant tensions arising from disagreements between immigrant and American-born members and various ethnic groups with competing visions of the future of Islam in America.[14] Intracommunity gender norms are currently under pressure to adapt to the new economic and social environment where many Muslims are experiencing for the first time the stigma attendant on ethnic and religious minority status. Yet they still face pressures to conform to cultural traditions and practices based on Islamic principles or cultural practices from their country of origin.

Within some Muslim communities, Muslim women face familial pressures to control their sexuality and mobility, because women's morality reflects on the morality of their families and religious and ethnic communities' writ large. As a result, many Muslim women are pressured to follow in-group gender norms that mandate finding a suitable husband approved by their families and preserving the family's reputation. Indeed, unmarried Muslim women often lament about the pressures of living between different worlds wherein they worry about the social price their parents may pay for their choices in violation of traditional Islamic gender norms.[15]

At work, Muslim mothers face the same pressures as other women who struggle to balance their careers with their family commitments. They, too, are suspected by their employer of prioritizing family over work, such that higher quality work, promotions, and opportunities that lead to long-term success and prestige are denied. To offset this stereotype, they feel pressured to work more hours than their male colleagues and demonstrate their willingness to put work over family, even if the same is not expected of male colleagues. All the while, they must be firm but pleasant leaders who keep a smile on their face while male colleagues are forgiven for emotional outbursts caused by the stresses of the job.

Like other women, Muslim women must cautiously guard their professional ambition so as to avoid triggering resentment for being "too political," "too aggressive," or "not a team player."[16] And their personal presentation must adhere to traditional notions of femininity and attractiveness, but be careful not to be seen

[14] *See* Shahnaz Khan, Muslim Women: Crafting A North American Identity 11, 40 (University Press of Florida, 2000).

[15] Green, *supra* note 2, at 652.

[16] *See* Yoshino, *supra* note 2, at 778.

as too sexy, so that they will not be taken seriously or invite sexual harassment. In the end, Muslim women's appearances and behaviors are heavily scrutinized and judged, based on prevailing gender stereotypes.

But the scrutiny does not end there. They are also subject to stereotypes of Muslims in general and Muslim women in particular. The American public views Muslims as highly suspect, as inclined to engage in or support terrorism, and as foreigners from uncivilized nations.[17] Muslim communities are accused of treating Muslim women as property who must obey their husbands and fathers. These stereotypes impose pressure to perform a "Good Muslim Woman" whose assertiveness counters misperceptions about her inability to lead and think independently. Her liberal Americanized dress, consumption of alcohol, and romantic relations with non-Muslims signals full assimilation into American culture. She must also be a "Good Muslim" who repeatedly expresses her patriotism, criticizes her country of origin as backwards, agrees that Islam breeds terrorists, and supports selective counterterrorism enforcement against Muslims as necessary for America's national security.

Regardless of how each woman responds to these conflicting identity pressures, she is often assumed to lack agency by the dominant social group or the Muslim community, who view her behavior as a product of coercion or brainwashing by the other group. The same rebellious nature she employs to fight against coercive assimilationism at work may cause her grief within the Muslim community she seeks to defend, reform, and belong to. Her demands to reinterpret Islamic doctrine and practices, particularly as they apply to women, invite accusations of religious subversion. As she is pulled in multiple directions by pressures to perform to intragroup and intergroup identity demands, each Muslim woman struggles to negotiate the contradictions to develop an authentic identity that allows for both professional success and psychological well-being.

3.2 *Negotiating the Contradictions*

As women at the intersection of various stereotypes, Muslim women of color form a hybridized identity that rescripts notions of what it means to be a Muslim woman, a Muslim, a member of her ethnic or racial group, and a woman. They negotiate their sense of self in a politically charged environment marred by intolerance within mainstream society, and at times, within their Muslim communities. They resist and destabilize assumptions about members of their identity groups to show the dynamic nature of identity.

[17] Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and around the World*, Pew Research Center (Aug. 9, 2017), *available at* http://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/.

As hybridized subjects, they reject the polarity between Orientalism,[18] which imposes racist colonial imagery of Muslims as savages and Muslim women as their oppressed victims, and politicized Islam, which essentializes the ideal Muslim woman as an obedient wife, self-sacrificing mother, and apolitical follower of male religious leadership. Notwithstanding their intragroup contestations, many Muslim women deem the cases of female oppression overemphasized by out-group Western authors as bad faith and profit-driven efforts to reinforce cultural hierarchy and racism against Muslims. Seldom do Western audiences contextualize the extreme cases within the victim's socioeconomic, geographic, and individual circumstances. Nor are Western audiences informed that the male bad actors are violating Islamic beliefs. Refusing to be pigeonholed as either oppressed or liberated, Muslim women in the United States are negotiating their identities in the politics of race, ethnicity, migrant communities in the diaspora, and their family life.

Women who identify as Muslims vary in terms of their levels of religiosity, ranging from cultural to spiritual to devout. Some[19] Muslim women accept religious and cultural rituals as integral to what they deem is their authentic identity, while at the same time rejecting the sexism found in some traditional Islamic practices. The headscarf, for example, allows many women to create a cultural space that reflects their hybridized identities. Some Muslim women who choose to wear the headscarf do so to insulate themselves from intracommunity restrictions that accompany their status as unmarried women. Other Muslim women don a headscarf as a form of resistance against the sexualization of women in American society. In doing so, their headscarves signal to society, and men in particular, their religiosity and adherence to Islamic tenets of premarital abstinence.[20] By using the headscarf to elude gendered restrictions, they are able to take advantage of educational and employment opportunities while retaining their membership within their traditional Muslim community.

Some Muslim women embrace parts of traditional Muslim female identity arising from a subconscious need to belong to the community or from genuine spiritual belief in such practices. But these same women may refuse to perform other parts of traditional Muslim female identity based on their individualized conception of Muslim feminism. They conduct their own research on Islam and decide what they will accept or reject, thereby bestowing upon themselves agency to decide how to shape their intersectional identities. As a result, they may contest the traditional view that the headscarf is mandatory. Instead, they may view the headscarf as either optional or a patriarchal tool to control women originating in male – not divine – prerogatives. They claim a space for themselves within their diverse Muslim

[18] *See, e.g.*, Zainalizadeh v. Neiman Marcus Grp., No. C 01-4207 JL, 2002 WL 31007465, at *1 (N.D. Cal. Sept. 4, 2002).

[19] Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim American Women Caught in the Crosshairs of Intersectionality*, 9 Hastings Race & Poverty L.J. 191 (2012).

[20] Zaal, Salah & Fine, *supra* note 6, at 175.

communities through a rereading of Islamic codes and practices and negotiate a hybridized Muslim female identity. In the end, having the space to develop an authentic identity that reflects a Muslim woman's individual values, norms, and religious beliefs free of disparate treatment is consistent with the purpose and spirit of Title VII.

Current workplace antidiscrimination doctrine, however, fails to take these nuances into account. The following section makes recommendations on how Title VII jurisprudence can incorporate the complex ways that identity performance pressures disproportionately impose harms on protected classes of employees.

4 EXPANDING TITLE VII JURISPRUDENCE TO KEEP UP WITH DISCRIMINATION

Although the harms caused by pressures to perform one's identity to comport with coercive assimilationism are well documented, the question still remains as to whether the law can provide adequate relief without unduly burdening employers.

This section proposes that existing Title VII jurisprudence prohibiting employment discrimination based on sex stereotyping should be expanded to include ethnic, racial, and religious stereotyping to protect employees who competently perform their jobs, but do not or cannot perform their identities in accordance with coercive assimilationism. Such protections are especially important for Muslim women of color, who are faced with the triple bind of having to perform the conflicting identity demands of the "Good Muslim Woman," the "Good Woman," and the "Good Muslim."

I start by arguing that courts should expand Title VII jurisprudence by incorporating social psychology and implicit-bias studies. I then proffer that the seminal gender stereotyping case, *Price Waterhouse Cooper v. Hopkins*, provides a doctrinal foundation for applying stereotyping theory to Title VII jurisprudence. I also examine how courts have failed to incorporate race and ethnicity into workplace stereotyping doctrine, leaving racial, ethnic, and religious minority plaintiffs subject to coercive assimilationist pressures based on negative implicit stereotypes, with no legal recourse. Finally, I analyze the unique case of Muslim women of color as further support for the claim that courts are failing to keep up with the changing nature of discrimination. For these reasons, courts should incorporate stereotyping and implicit-bias theory into disparate treatment jurisprudence such that intergroup discrimination based on intragroup differences falls under Title VII's protection.

4.1 *Incorporating Implicit Bias Analysis into Title VII*

Although Title VII makes it unlawful to discriminate, courts are tasked with defining what discrimination means and what actions meet the definition. Notwithstanding advances in the understanding of bias and discrimination in the social psychology

literature, judicial constructions of discrimination rely on the courts' layperson understandings of the nature of psychological processes that produce bias. For instance, implicit stereotyping theory has minimally influenced federal disparate treatment jurisprudence, notwithstanding its prevalence in the social psychology literature on bias.

For a plaintiff to prove a prima facie discrimination case under Title VII's disparate-treatment theory, the plaintiff must establish the following three things: (1) she is a member of a Title VII protected class; (2) she was subjected to some negative employment action, such as failure to hire or promote, termination, demotion; and (3) her protected-group status was a "motivating factor" in the challenged employment action.[21] The burden of proof then shifts to the employer to produce a legitimate nondiscriminatory reason for the adverse employment action. Upon doing so, the employee must then prove the employer's proffered reasons were a pretext for discrimination.[22]

To prove that her protected-group status was a "motivating factor" in the challenged employment action, courts require plaintiffs to bring forth persuasive evidence of the employer's intent to discriminate or that impermissible stereotypes played a role in the employer's decision-making.[23] In *Price Waterhouse Cooper*, Justice William Brennan explained that a protected class is a motivating factor: "If we asked the employer at the moment of the decision what its reason were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman."[24] Brennan's reasoning assumes the discriminator was conscious that he was discriminating at the time he made the decision.[25] However, numerous social psychology studies demonstrate that "disparate treatment can result from . . . implicit stereotypes" and subconscious biases, in addition to "deliberate, fully conscious" bias.[26]

Whether implicit bias contributes to discrimination depends on "the extent to which particular social norms are salient in [a] particular situation, [the] decision makers' perceptions of control," "relevant information" available, and the

[21] *See, generally*, Nadine Naber, Arab America: Gender, Cultural Politics and Activism 170 (2012).

[22] Zaal, Salah & Fine, *supra* note 6, at 172. *See generally*, Nura Maznavi & Ayesha Mattu, Love Inshallah: The Secret Love Lives of American Muslim Women (2012); Shabana Mir, Muslim American Women on Campus: Undergraduate Social Life and Identity (2014).

[23] Sheryl Sandberg, Lean In, 40–41 (2013).

[24] Leti Volpp, *Citizenship Undone*, 75 Fordham L. Rev. 2579, 2583 (2007); Ramzi Kassem, *Implausible Realities: Iqbal's Entrenchment of Majority Group Skepticism towards Discrimination Claims*, 144 Penn St. L. Rev. 1443, 1457 (2009–2010).

[25] *See generally*, Edward Said, Orientalism (1979).

[26] Zaal, Salah & Fine, *supra* note 6, at 169.

decision-maker's "motivation to avoid biased decision making."[27] A well-meaning decision-maker may be unaware that her employment decision was based on her biased judgment of a negatively stereotyped employee.[28] And yet, courts often reject implicit stereotyping because judicially constructed understandings of discrimination follow Justice Brennan's reasoning, which presumes bias is explicitly expressed and operates with the discriminator's knowledge.[29]

As a consequence, Muslim women of color face three dilemmas with regard to their social identity. First, Muslim women are pressured to perform their identity to assimilate into the dominant social group's norms and culture while facing intragroup pressures by their communities that contradict assimilationist demands. Second, Muslim women of color who choose to succumb to assimilationist identity pressures may find it is simply not possible to evade adverse treatment. The multiple stereotypes and contradictory performance expectations related to their multiple identities as women, Muslims, ethnic minorities, and Muslim women create a no-win situation. Third, the diversity among headscarved and non-headscarved Muslim women of color is obscured by an artificial polarity between assimilation and multiculturalism, stripping them of individual agency – the same Orientalist critique directed at Muslim societies. Ultimately, Muslim women face a false binary between full assimilation requiring that they either disidentify completely from their low-status identities or reject altogether dominant group standards, when in reality, their social identities fall within a wide spectrum between multiple poles.

Incorporating stereotyping and implicit bias into Title VII is certainly not risk-free. Richard Ford reasonably argues that identity-based claims should not be actionable because of the difficulty in determining what constitutes unlawful discrimination.[30] Identity-based rather than phenotype-based discrimination – the existing doctrinal model – entangles courts in defining the "wrong type" of Black, Latino, Muslim, woman, or other protected group such that an employer is guilty of discriminating against a subset of a protected class. Identity-based claims also risk essentializing protected groups into a predetermined list of behaviors, attitudes, norms, and values that must be shown in order to prove unlawful identity-based discrimination. The criteria are often defined by male gatekeepers of a particular minority community, which can perpetuate intragroup disparities based on gender and minority status within the group.

[27] Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 Hastings Race & Poverty L.J. 441, 449 (2008).

[28] Krieger & Fiske, *supra* note 7, at 1032; Greene, *Title VII*, *supra* note 4, at 1379–80; Rich, *supra* note 1, at 1383–84.

[29] Desert Palace, Inc. v. Costa, 539 U.S. 90, 92–93 (2003).

[30] *See generally* McDonnell Douglass Corp. v. Green, 411 U.S. 792, 804 (1973); Mirza v. Neiman Marcus Grp. Inc., 649 F.2d 837, 849 (N.D. Ill. 2009); Zayed v. Apple Computers, No. C 04-01787 JW, 2006 WL 889571, at *9-11 (N.D. Cal. Apr. 5, 2006).

While such critiques are well founded, they underestimate the harm caused by pressures to assimilate into an identity imposed by the dominant group to perpetuate a system that subordinates minority groups – precisely what the Civil Rights Act of 1964 was aimed to prohibit. Institutional pressures to emulate and assimilate into the norms, values, and behaviors of the dominant group signals to low-status groups that their cultural and racial characteristics are unbefitting of a "professional" workplace, and in turn unwelcome.[31] Coercive assimilationist policies, even if implicitly enforced through identity-performance pressures, create a dispiriting environment that penalizes individual authenticity, stifles creativity, increases health risks, and creates hierarchies of power among out-groups based on their ability to effectively perform their identity to serve the interests of the dominant group. All the while, the dominant social group's work performance is unimpeded by coercive demands to look, act, speak, and live like someone else, thereby freeing them to channel their mental energy and time towards bona fide work performance rather than laborious stereotype-driven identity performance.

I now turn to the Supreme Court's decision in *Price Waterhouse Cooper v. Hopkins* wherein it struck down workplace rules that placed women in a double bind, such that accommodating one stereotype triggers violation of another stereotype, resulting in adverse treatment regardless how the woman behaves. Similar considerations should be made in cases involving Muslim women, who face a more taxing triple bind.

4.2 *Price Waterhouse Cooper and Gender Stereotyping*

Stereotyping can be ascriptive or prescriptive. Ascriptive stereotyping "assumes that an individual possesses certain traits and attributes because of her group membership."[32] Her ascriptive status is not dependent on her individual conduct, cannot be changed, and is presumed to be determined at birth.[33] In ascriptive gender stereotyping, for example, women are assumed to be genetically inferior to men in intelligence. Long before the Supreme Court ruled in favor of Ann Hopkins in *Price Waterhouse Cooper v. Hopkins*, ascriptive sex stereotyping had been struck down as unlawful.[34] Prescriptive gender stereotyping, however, is permissible. Prescriptive stereotyping occurs when an employer requires that an employee exhibit certain traits or attributes because of her group membership.[35]

[31] Per *McDonnell Douglass*, at the prima facie stage, in order to justify mandating an employer to produce a legitimate, nondiscriminatory reason for the adverse employment action, the plaintiff must produce persuasive evidence that raises a presumption of unlawful discrimination. 411 U.S. 792.

[32] Price Waterhouse Cooper v. Hopkins, 490 U.S. 228, 250 (1989); *see also* Krieger & Fiske, *supra* note 7, at 1030.

[33] Krieger & Fiske, *supra* note 7, at 1030.

[34] *Id.* at 1059, 1032–33.

[35] *Id.* at 1036, 1050.

Kimberly Yuracko has noted that prior to *Price Waterhouse's* rhetorical ban on sex stereotyping, courts finding in favor of female plaintiffs relied on an unequal burdens test to differentiate between acceptable and unacceptable gender conformity demands, as defined by the social norms of the time.[36] So long as the sex-based dress or appearance codes did not place a disproportionate burden on workers of one sex, whether male or female, workplace requirements that differentiated based on sex were lawful under Title VII.

The unequal-burden test is narrowly interpreted to apply only when gender conformity demands are not justified by conventionally gendered professional norms. Some courts, however, have struck down gender-specific workplace practices that stigmatize women. In the case of *O'Donnell v. Burlington Coat Factory Warehouse, Inc.*, for example, the court struck down the requirement that women wear uniforms while men could wear professional business attire of their choosing.[37] The court reasoned that sex differentiation consistent with conventional gender norms stigmatizes female employees.

The linchpin of *Price Waterhouse* lies in the double-bind test. The Court held that employees were prohibited from imposing gender conformity demands that conflicted with professional role demands. In Hopkins' case, her employer demanded that she be demure, ladylike, and hide her ambitions, notwithstanding that successful performance of her job required her to be assertive and overtly competitive – traditionally male attributes. Hopkins was in a double bind wherein her employer placed her in "an intolerable and impermissible Catch 22: out of a job if [she] behave[d] aggressively and out of a job if [she] d[id] not. Title VII lifts women out of this bind."[38] The court applied the double bind principle broadly to include tensions, in addition to direct conflicts, between gender conformity demands and professional role demands. Although the double-bind concept could logically be extended to racial, ethnic, and religious conformity demands arising out of stereotyping and implicit bias, the courts have declined to do so.

4.3 *Addressing the Case of Muslim Women of Color*

Like other subordinated groups, Muslim women of color must work to prove to their employers that they do not fit multiple negative stereotypes. They must work harder to prove they are independent thinkers and are able to take on responsibility, in order to counter stereotypes that they are meek, oppressed, and subjugated. They must work harder to prove they are loyal team players who are grateful to be in America. They must work harder to prove they are respectful of male authority and adherents to conventional American gender roles in the workplace. And as they

[36] *Id.*
[37] *Id.* at 1030; Greene, *Title VII*, *supra* note 4, at 1379.
[38] Richard Ford, *Race as Culture? Why Not?*, 47 UCLA L. Rev. 1803, 1811 (1999).

maneuver through conflicting identity- performance pressures, they not only risk failing to negotiate the contradictions, but they also suffer palpable psychological costs. The disparate identity-performance demands remind them of their status as members of stigmatized groups. Their mental energies are taxed attempting to accommodate the contradictions while their in-group coworkers benefit from the autonomy to be their authentic selves. The Muslim women who fail or are unwilling to accommodate coercive assimilationism are eventually demoted or terminated, only to face courts indifferent to their plight.

Ultimately, Muslim women of color find themselves in a unique position wherein they face a triple bind. The traits necessary to succeed in a "professional" white-collar work environment – independent thinking, assertiveness, ambition, and drive – are the same traits that trigger racial, ethnic, and religious stereotypes against women, Muslims, and ethnic minorities. Following the findings in Ann Hopkins's case,[39] courts should be more thoughtful and inquisitive in identifying whether stereotyping and implicit bias were "motivating factors" in an adverse employment action.

Accordingly, I propose that courts consider the following three factors in employment discrimination cases involving Muslim women of color:

(1) Do the employer's expectations and evaluation of the Muslim woman employee impose an unequal burden on identity performance compared to other employees who are not Muslim women of color?
(2) Are the employer's actions or rules motivated in part by negative stereotypes of Muslim women as meek, oppressed, or subjugated; of Muslims as terrorists, disloyal or suspect; or of the employee's racial or ethnic group as backward, barbaric, or anti-American?
(3) Does the employer's actions or rules effectively stigmatize the Muslim woman employee as an outsider within the workplace?

In doing so, courts would proactively consider these factors by looking at the evidence proffered by the parties, calling on experts in social psychology, stereotyping, and implicit bias, and holistically looking at what constitutes an adverse employment action to look beyond the failure to hire or employment termination and include unequal access to training, high quality work, interaction with clients, and other opportunities that contribute towards professional growth.

In addressing these three factors, courts should look to whether the traits the Muslim employee is criticized for possessing are traits that her male and non-Muslim coworkers also possess without penalty. Likewise, courts should thoughtfully consider whether her penalized traits – assertiveness, leadership, critical thinking – are traits that contribute towards success in her particular profession. Is her

[39] *See* Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women's Rights 25 (2001).

employer setting her up to be a "Good Woman" employee who is deferential, not ambitious in taking on leadership positions, and in conformity with conventional gender norms that doom her to remain at the margins of her profession? Similarly, is her strength of personality and drive tainted by stereotypes of Muslims and her ethnic group as aggressive and backward, leading to her being labeled a trouble-maker and insubordinate when others outside her identity group are not stigmatized for similar characteristics?

For Muslim women whose religious identity entails visual "markers" such as headscarves, noticeably conservative dress, and requests for religious accommodation, courts should look to the cumulative effect on the employee. Rather than narrowly focus on whether the religious accommodation was in fact granted, courts should inquire as to whether her Muslim identity performance resulted in retaliation through social exclusion from the workplace such that she was subjected to inferior access to training opportunities that contribute towards better work assignments, stronger work evaluations, and future promotions. Courts should inquire whether the Muslim woman employee was given equal access to clients, included in important meetings, provided the same opportunities as her coworkers to learn the latest technologies or methodologies in her profession, and generally treated as an equal member of her team. And if other Muslim women of color were granted such opportunities, courts should ask whether the explanation is due to performing assimilationism or to bona fide performance-based criteria.

When Muslim women are subjected to offensive racial or religious jokes, excluded from social events, and informed of suspicions of their national loyalties, courts should not limit their analysis as to whether such acts rise to a hostile work environment claim. Instead, courts should recognize verbal abuse, insults, inferior training opportunities, inaccessibility to business development opportunities, or excessive scrutiny as evidence of adverse employment actions. Even if such acts alone are not sufficiently severe or pervasive to meet that standard, they may and should be considered in disparate treatment claims wherein the result was failure to promote, demotion, or employment termination. Grudgingly tolerating employees who do not comport their identity performance to coercive assimilationist demands should not be mistaken for equality.

Courts must also recognize that promotions and pay raises do not occur in a vacuum, but rather are an accumulation of work performance integrally linked to the type of work available to an employee and her social inclusion in the workplace. An employee who is not given the opportunity to take on projects that improve her skills or allow her to exhibit her leadership skills is doomed to a marginal position in the workplace and eventually is expelled. Over time, this sets her up for a poor work evaluation and termination at worst or a stagnant professional path at best. Finally, courts must scrutinize employers' common claims that the plaintiff's personality was the motivation for allegedly poor treatment. Such claims are often coded bias against minorities who do not conform to assimilationist demands.

5 CONCLUSION

Although this chapter proposes broader judicial interpretations of what constitutes disparate treatment on account of race, ethnicity, and religion, it does not propose a change in existing burden-shifting tests between parties. The plaintiff continues to bear the burden of proof to proffer a prima facie case of discrimination and show that the employer's alleged nondiscriminatory purpose was a pretext for unlawful discrimination. However, plaintiffs' evidence of coercive assimilationist identity performance should be seriously considered by courts as they take on a more holistic approach that considers the totality of the circumstances. Courts should also look beyond a narrow reading of a performance evaluation and ask whether the employee's racially and religiously salient identity performance caused the employer to set her up for failure in contrast to other employees, whose identities assimilated into the majority's demands. When plaintiffs introduce expert evidence by sociologists about the growing anti-Muslim sentiment after September 11 and negative stereotypes of Muslim women, courts should seriously consider how this impacts the workplace. Likewise, when social psychologists testify about the changing face of discrimination from overt to covert bias and explicit to implicit stereotypes, courts have a responsibility to recognize such bias.

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