

## THE CITIZEN AND THE TERRORIST

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*Since the terrorist attacks of September 11, 2001, there have been more than one thousand incidents of hate violence reported in the United States. How do we understand the emergence of this violence in a context of national tragedy? This Article suggests that September 11 facilitated the consolidation of a new identity category that groups together persons who appear "Middle Eastern, Arab, or Muslim," whereby members of this group are identified as terrorists and disidentified as citizens. While the stereotype of the "Arab terrorist" is not an unfamiliar one, the ferocity with which multiple communities have been interpellated into this identity category suggests there are particular dimensions converging in this racialization. The Article examines three: the fact and legitimacy of racial profiling; the redeployment of Orientalist tropes; and the relationship between citizenship, nation, and identity.*

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### INTRODUCTION

In the wake of the terrorist attacks of September 11, 2001, there have been more than one thousand incidents of hate violence reported in the United States.<sup>1</sup> How do we understand this violence, and in particular, its

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1. As of February 8, 2002, 1717 cases of "Anti-Muslim incidents" had been reported to the Council on American-Islamic Relations (CAIR) since September 11, 2001, <http://www.cair-net.org> (last updated Feb. 8, 2001). CAIR reports the following: 289 reports of physical assault or property damage; 11 deaths; 166 incidents of discrimination in the workplace; 191 incidents of

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."<sup>2</sup> 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.

### I. ON RACIAL PROFILING

Before September 11, national polls showed such overwhelming public opposition to racial profiling that both U.S. Attorney General John Ashcroft and President George W. Bush felt compelled to condemn the practice.<sup>3</sup> There was a strong belief that racial profiling was inefficient, ineffective, and unfair.<sup>4</sup> This all seems a distant memory. There is now

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airport profiling; 224 incidents of intimidation by the Federal Bureau of Investigation (FBI), the police, or the Immigration and Naturalization Service (INS); 74 incidents of discrimination in school; 315 reports of hate mail; 56 death threats; 16 bomb threats; and 372 incidents of public harassment. See *id.*

My figure of one thousand incidents in all likelihood vastly underestimates the violence. Between September 11, 2001, and January 31, 2002, in six jurisdictions in the state of California alone, the state attorney general reported 294 incidents of anti-Arab hate crimes (defined as reported hate crimes against Arab Americans, Muslim Americans, Afghan Americans, Sikhs, South Asians, and others mistaken for Arabs or Muslims) under investigation. See Press Release, Office of the Atty. Gen., State of Cal, Dep't of Justice, Attorney General Releases Interim Report on Anti-Arab Hate Crimes, <http://caag.state.ca.us/newsalerts/2002/02-014.htm> (Feb. 28, 2002).

2. 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.

3. 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 A1.

4. See, e.g., Reginald T. Shuford, *Civil Rights in the Next Millenium: Any Way You Slice It: Why Racial Profiling is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371 (1999). For a sampling of the extensive literature on racial profiling, see generally DAVID COLE, NO EQUAL JUSTICE: RACE AND



public consensus that racial profiling is a good thing, and in fact necessary for survival.<sup>5</sup> 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 have been identified as engaged in terrorist activity.<sup>6</sup> While the

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CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002); RANDALL KENNEDY, *RACE, CRIME AND THE LAW* (1997); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 *UCLA L. REV.* 1075 (2001); Devon W. Carbado, *E-Racing the Fourth Amendment*, 100 *MICH. L. REV.* (forthcoming 2002); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 *U. MIAMI L. REV.* 425 (1997); Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 *UCLA L. REV.* 1689 (2000); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 *WASH. U. L.Q.* 675 (2000).

5. See Sam Howe Verhovek, *Americans Give in to Race Profiling*, *N.Y. TIMES*, Sept. 23, 2001, at A1; see also Nicole Davis, *The Slippery Slope of Racial Profiling: From the War on Drugs to the War on Terrorism*, *COLORLINES*, Dec. 2001, at 2 (noting that 80 percent of Americans were opposed to racial profiling before September 11, but that polls now show that 70 percent believe some form of racial profiling is necessary to ensure public safety).

6. 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 U.S. Attorney General the power to take into custody any alien who is certified, on 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 U.S. Department of Justice revealed that it has 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 has 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. See e-mail from David Cole to Leti Volpp, Associate Professor, American University, Washington College of Law (Apr. 23, 2002, 1:40 p.m. EST) (on file with author).

We in fact do not know the cumulative total of persons that have been put in detention, because the government has refused to release this figure to the public since November 2001. See Kate Martin, *Civil Liberties Since September 11, 2001*, Statement to Committee of the Judiciary, House of Representatives (Jan. 24, 2002) (transcript available at <http://cnss.gwu.edu/~cnss/arrests/ankmtestimony012402.doc>) (noting that as of November 5, 2001, the Department of Justice announced that 1147 persons had been detained and subsequently stopped giving out the total number of detainees, but that "it is clear there have been hundreds more arrests since early November"). There may be as many as fifteen hundred to two thousand persons who have been detained, virtually all of whom are Arab and Muslim immigrants. David Cole, Presentation at the Third Annual Peter M. Cicchino Symposium, American University, Washington College of Law (Apr. 18, 2002), in *AM. U. J. GENDER SOC. POL'Y & L.* (forthcoming 2002). The administration defended this policy of secrecy through claiming concern for the privacy rights of the detainees. See Dan Eggen, *Ashcroft Defends Not Listing Detainees: Privacy Rights At Issue, He Says*, *WASH. POST*, Nov. 27, 2001, at A4. Lucas Guttentag, Director of the American Civil Liberties Union's (ACLU's) Immigrants' Rights Project responded as follows: "It is ironic that the government is now concerned about rights when it has arrested and jailed hundreds of people without giving the American public any proof that the detainees are being treated fairly." *Id.* (quoting Lucas Guttentag).

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.<sup>7</sup> 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.<sup>8</sup>

The U.S. Department of Justice has also engaged in racial profiling in what has been described as a dragnet—seeking to conduct more than five thousand 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 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.<sup>9</sup> The Department of Justice has directed the U.S. Attorneys to

7. See, e.g., Dan Eggen & Susan Schmidt, *Count of Released Detainees Is Hard to Pin Down*, WASH. POST, Nov. 6, 2001, at A10 (“Since Sept. 11, hundreds of people—many of them Middle Eastern men—have been detained in connection with the probe into the suicide hijackings . . .”); see also Susan Akram & Kevin Johnson, *The Civil Rights and Immigration Aftermath of September 11, 2001: The Targeting of Arab Americans*, ANN. SURV. AM. L. 9 (forthcoming 2002) (manuscript at 9, on file with author) (asserting the largest numbers of detainees are from Pakistan and Egypt, and pointing out that the detentions have apparently failed to produce any direct links to the terrorist acts).

8. MIGRATION POLICY INSTITUTE—NYU IMMIGRANT RIGHTS CLINIC, *THE ROLE OF ETHNIC PROFILING IN LAW ENFORCEMENT AFTER SEPTEMBER 11TH 1*, at [http://www.nlg.org/post911/resources/NYU\\_project\\_descript.pdf](http://www.nlg.org/post911/resources/NYU_project_descript.pdf) (last visited Mar. 18, 2002) (stating that “media reports and anecdotal evidence strongly suggest that suspicions and anonymous tips—based purely on ethnic and/or racial stereotypes—have motivated the bulk of arrests made”). The case of Rafiq Butt, who died in October 2001 while in INS detention, suggests the role that identity has played in generating suspicion. He was picked up after a call from the pastor of St. Anthony’s Church to report that two vans had stopped outside the apartment Mr. Butt shared with three Pakistani men in Queens, New York. As one document obtained from the INS stated: “When the doors of these vans were opened, at least six (6) Middle Eastern males exited from each vehicle and immediately went into the residence.” Somini Sengupta, *Ill-Fated Path to America, Jail and Death*, N.Y. TIMES, Nov. 5, 2001, at A1. Since Mr. Butt had overstayed his visitor visa, he was removable and accepted voluntary departure. He died in the Hudson County Correctional Center, one of the many jails and prisons in the country that the INS uses for detention purposes. See *id.* at B8. See also Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. (forthcoming 2002) (draft on file with the author) (describing case of client who was arrested for being “brown-skinned and Muslim, and therefore at the Brooklyn mosque” on the morning of an INS sweep). See also Hanna Rosin, *Snapshot of an Immigrant’s Dream Fading*, WASH. POST, Mar. 24, 2002, at A1 (describing a case where a police officer stopped for gas and called the INS because of the attendant’s “horrible English,” and the attendant is being deported for overstaying a student visa).

9. 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 (describing the coercion involved in interviews); CNN, *INS Memo Cites Possible Detention for Those Questioned in Terror Probe* (Nov. 29, 2001), available at <http://www.cnn.com/2001/US/11/29/inv.terrorism.interviews/> (describing an INS memo stating that interviewees could be held without bond if an immigration violation is



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.<sup>10</sup>

Most recently, U.S. 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 Al Qaeda terrorist presence or activity."<sup>11</sup> Thus, the government has moved to the head of the list of an estimated 320,000

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suspected). Attorney General John Ashcroft recently proffered as an inducement for noncitizens the possibility of legal immigration status in the United States. See Neil A. Lewis, *The Informants: Immigrants Offered Incentives to Give Evidence on Terrorists*, N.Y. TIMES, Nov. 30, 2001, at B7. This potential legalization was through the S visa, which can be granted for critical reliable information essential to the success of an authorized criminal investigation or prosecution and can be converted after three years into a green card. See 22 C.F.R. § 41.83 (2002). Represented by Ashcroft as a new program, which the S visa is not, the proffer of potential legalization contains no guarantee that those noncitizens who made their identity known to the government to share information that did not turn out to be helpful, would not be removed from the country. See Dan Eggen, *U.S. Dangles Citizenship to Entice "Cooperators"*, WASH. POST, Nov. 30, 2001, at A1.

10. See e-mail from Reginald Shuford to Leti Volpp, Associate Professor, American University, Washington College of Law (Jan. 3, 2002 3:15 p.m. EST) (describing the case of the student) (on file with the author). Students here 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 is detaining and removing many noncitizens through the use of laws that were previously largely unenforced, or through applying laws differently than in the past. See Rosin, *supra* note 8, at A10. See also Akram & Johnson, *supra* note 7, at 10 (pointing out that no evidence that any of the five thousand interviewees were involved in terrorist activities has emerged). Importantly, a number of local law enforcement agencies resisted the federal request to assist in these interviews, suggesting tensions between state and federal agencies on the issue of race profiling. *Id.* at 26.

Criticism of these interviews as targeting Muslims and Arabs with little payoff has not deterred the Department of Justice from recently announcing a plan to pursue an additional three thousand interviews with men who entered the United States more recently than those sought in the first round. See Jonathan Peterson, *U.S. Will Interview More Foreigners in Fight on Terrorism*, L.A. TIMES, Mar. 21, 2001, at A20.

11. See GUIDANCE FOR ABSCONDER APPREHENSION INITIATIVE (Jan. 25, 2002), <http://news.findlaw.com/legalnews/us/terrorism/documents/> (last visited Feb. 28, 2002); Jonathan Peterson, *Deportation Sweep Targets Middle Easterners*, L.A. TIMES, Jan. 9, 2002, at A5. This appears to be an expansion of a similar program upheld by the U.S. Court of Appeals for the D.C. Circuit during the Iran Hostage Crisis, when the attorney general promulgated a regulation requiring all Iranian citizens on nonimmigrant student visas to report to local INS offices to provide information as to their residence and status. Students who failed to comply were subjected to deportation. This was held not to constitute an equal protection violation, since the court regarded the regulation as a classification among aliens based upon nationality that was supported by a rational basis. The rationale for the classification was that the order constituted "a fundamental element of the President's efforts to resolve the Iranian crisis and to maintain the safety of the American hostages in Tehran." See *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979).



individuals with final orders of deportation those noncitizens of Middle Eastern or Muslim background.<sup>12</sup> 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."<sup>13</sup> Countless men have been kicked off airplanes, because airline staff and fellow passengers have refused to fly with them on board, despite U.S. Department of Transportation directives to protect the civil rights of passengers.<sup>14</sup> 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.<sup>15</sup>

Lastly, since September 11, the general public has engaged in extralegal racial profiling in the form of over one thousand incidents of violence—homes, businesses, mosques, temples, and gurdwaras firebombed; individuals attacked with guns, knives, fists, and words; women with headscarves

12. See Susan Sachs, *U.S. Begins Crackdown on Muslims Who Defy Orders to Leave Country*, N.Y. TIMES, Apr. 2, 2002, at A13 (stating that the crackdown concentrates on an estimated six thousand persons who come from Arab and other Muslim countries, and describing federal law enforcement agency efforts in hunting down and arresting Muslim immigrants).

13. U.S. 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, available at 2001 WL 5112923. Cooksey later said that he regretted his choice of words, but insisted on the use of racial profiling in airport security. *Id.*

14. Sasha Polakow-Suransky, *Flying While Brown*, AM. PROSPECT, Nov. 19, 2001, at 14 (describing the cases of passengers cleared for boarding by law enforcement officers, who were kicked off planes when pilots refused to fly with them, and subsequent U.S. Department of Transportation investigations); Niraj Warikoo, *Racial Profiling: Muslims and Arab Americans See Their Civil Rights Eroded*, DETROIT FREE PRESS, Oct. 24, 2001, [http://www.freep.com/news/nw/terror2001/arab24\\_20011024.htm](http://www.freep.com/news/nw/terror2001/arab24_20011024.htm) (describing flying while Arab). The anxiety airline passengers feel was documented in a CNN/USA Today/Gallup poll taken that showed that 58 percent of those surveyed backed more intensive security checks for Arabs, including those who are United States citizens, compared with other travelers, 49 percent favored special identification cards for such people, and 32 percent backed "special surveillance" for them. See Sam Howe Verhovek, *Once Appalled by Race Profiling, Many Find Themselves Doing It*, N.Y. TIMES, Sept. 24, 2001, at [http://www.nytimes.com/learning/teachers/featured\\_articles/20010924Monday.html](http://www.nytimes.com/learning/teachers/featured_articles/20010924Monday.html).

For a passenger's description of her use of racial profiling, see Lori Hope, *Did I Save Lives or Engage in Profiling?*, NEWSWEEK, Apr. 1, 2002, at 12. Hope describes alerting flight attendants to a passenger, who she calls "Nine-C." Hope describes Nine-C as "olive-skinned, black-haired, and clean-shaven, with a blanket covering his legs and feet," which she thought was strange, since she felt warm, and nobody else was using a blanket. Hope watched Nine-C for ten minutes, during which time he sat motionless, except for "glancing nervously down the aisle every few minutes." Then his leg started to shake and he seemed to reach for something under the blanket, and he bent over. Hope "sensed something horrible." She looked at her son and "thought of his potential, his brilliance as a musician and mathematician," and alerted a flight attendant. When Hope next looked up from the book she was reading, Nine-C had been removed from the plane. *Id.*

15. See Darryl Fears, *Turbulence on Flight 363: Prudence, or Profiling? Secret Service Agent Rebut's Airline Account of Boarding Clash*, WASH. POST, Jan. 13, 2002, at A3; Roland Watson, *Stand-off on Flight Ban for U.S. Agent*, TIMES OF LONDON, Jan. 5, 2002, at 16.

beaten, pushed off buses, spat upon; children in school harassed by parents of other children, by classmates, and by teachers.<sup>16</sup> We know of at least five people who have been killed since September 11 in incidents of hate violence: a Sikh Indian, killed in Mesa, Arizona; a Pakistani Muslim killed in Dallas, Texas; an Egyptian Coptic Christian, killed in Los Angeles, California; a Sikh Indian killed in Ceres, California; and an Indian Hindu killed near Dallas, Texas.<sup>17</sup>

These myriad attacks have occurred, despite Bush meeting with Muslim leaders, taking his shoes off before he visited the Islamic Center in Washington, D.C., and stating that we must not target people because they belong to specific groups.<sup>18</sup> 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."<sup>19</sup>

16. See SOUTH ASIAN AMERICAN LEADERS OF TOMORROW, AMERICAN BACKLASH: TERRORISTS BRING WAR HOME IN MORE WAYS THAN ONE (2001), available at [www.peopleforpeace.org/docs/BiasReport.pdf](http://www.peopleforpeace.org/docs/BiasReport.pdf); *Hate Crime Reports Up in Wake of Terrorist Attacks*, CNN.com, Sept. 17, 2001, at <http://www.cnn.com/2001/US/09/16/gen.hate.crimes/index.html> (last visited May 15, 2002).

17. See Muneer Ahmad, *Homeland Insecurities: Racial Profiling the Day After 9/11*, 22 SOC. TEXT (forthcoming 2002) (manuscript at 3, on file with the author); *Death for 11 Sept. Revenge Killer*, BBC News, Apr. 5, 2002, at [http://news.bbc.co.uk/1/hi/english/world/americas/newsid\\_1912000/1912221.stm](http://news.bbc.co.uk/1/hi/english/world/americas/newsid_1912000/1912221.stm) (last visited May 15, 2002). Mark Stroman was sentenced to death in April 2002, for the October 4, 2001, murder of Vasudev Patel, an immigrant from India who had worked as a gas station attendant near Dallas. Holding a small American flag during the sentencing, Stroman showed no reaction. In a television interview in February, he stated, "I'm not a serial killer. We're at war. I did what I had to do. I did it to retaliate against those who retaliated against us." *Id.* Stroman is also accused of killing Waquar Hassan in Dallas, Texas, on Sept. 15, 2001. *Id.*

How many killings post-September 11 should be understood as motivated by anti-Arab or anti-Muslim bias is a subject of dispute. See Alan Cooperman, *Sept. 11 Backlash Murders and the State of "Hate": Between Families and Police, a Gulf On Victim Count*, WASH. POST, Jan. 20, 2002, at A3. The U.S. Department of Justice Civil Rights Division lists nine killings as "possible hate crimes," the Council on American-Islamic Relations lists eight, and the American-Arab Anti-Discrimination Committee puts the figure at six. *Id.* Other killings that may have been hate crimes include the murder of Abdullah Nimer, a Palestinian American who was slain October 3, 2001, while selling clothing in Los Angeles, California, and Abdo Ali Ahmed, a naturalized citizen from Yemen, who was shot in the stomach at his gas station and convenience store in Reedley, California on September 29, 2001. *Id.* at A14.

I recognize that some might express the sentiment that five deaths pale in comparison to the almost three thousand killed in the World Trade Center attack. I am not seeking to make an analogy between these different kinds of murders, but rather to foreground a harm that has both resulted from the World Trade Center attack and that has not received sufficient attention.

18. 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 A1.

19. I mean by targets those who have been subjected to the specific practices of racial profiling, in the form of detention, questioning, and selective deportation. But I would also note here that the bombing of Afghanistan clearly has implications for those within the borders of the United States who are considered to be fungible with Afghan people, who are then targets of hate



Furthermore, President Bush and other top officials have characterized the war against terrorism as a battle for "civilization"—indeed, a "crusade."<sup>20</sup> While this characterization occasionally acknowledges the heterogeneity of Muslim practices, its ideological effect is the legitimation of the religious and modern 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.<sup>21</sup> Through these actions and these 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 U.S. populace, in the form of hate violence attacks, as bearing a relationship to the explicit racial profiling by the government.<sup>22</sup> As we know

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violence in a form of bringing the war "home." In raising the consequences of the bombing for those within the United States, I do not want to understate the effects on the people of Afghanistan; while a total civilian death count is not generally discussed in the mainstream U.S. media, alternative U.S. media and the media in other countries present estimates that there have been between three thousand and eight thousand civilians killed. See, e.g., *Afghanistan's Civilian Deaths Mount*, BBC NEWS, Jan. 3, 2002, [http://www.news.bbc.co.uk/hi/english/world/south\\_asia/newsid\\_1740000/1740538.stm](http://www.news.bbc.co.uk/hi/english/world/south_asia/newsid_1740000/1740538.stm); Ian Traynor, *Afghans Are Still Dying as Air Strikes Go On, But No One is Counting*, GUARDIAN, Feb. 12, 2002, <http://www.guardian.co.uk/afghanistan/story/0,1284,648784,00.html>; Howard Zinn, *What if the American Public Could See the Dead in Afghanistan as We've Seen the September 11 Victims? Where Would the "War on Terrorism" Be Then?*, NATION, Feb. 11, 2001, at 16. The *New York Times* finally broke its silence on the question of the toll of civilian deaths in a cover story in February. See Barry Bearak, *Uncertain Toll in the Fog of War: Civilian Deaths in Afghanistan*, N.Y. TIMES, Feb. 10, 2002, at A1. For an example of the pressure on the U.S. media to censor reports of civilian casualties, see FAIRNESS & ACCURACY IN REPORTING, ACTION ALERT: CNN SAYS FOCUS ON CIVILIAN CASUALTIES WOULD BE "PERVERSE" (2001), at <http://www.fair.org/activism/cnn-casualties.html> (describing a memo to staff by CNN Chair Walter Isaacson, stating that it "seems perverse to focus too much on the casualties or hardship in Afghanistan").

20. 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"); Michael Hirsh & Roy Gutman, *Powell's New War*, NEWSWEEK, Feb. 11, 2002, at 24 (describing George Bush's use of "axis of evil" and describing the fight as one "the president has starkly cast as civilization vs. barbarism"); 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").

21. For a criticism of the persistence of the paradigm of the West's superiority over Islam in explaining the attacks of September 11, rather than understanding this "carefully planned and horrendous, pathologically motivated suicide attack and mass slaughter" as "the capture of big ideas" [using the word loosely] by "a tiny band of crazed fanatics for criminal purposes," see Edward W. Said, *The Clash of Ignorance*, ZNET, at <http://www.zmag.org/terrorframe.htm> (last visited May 15, 2002).

22. Muneer Ahmad suggests that this relationship is that hate violence and racial profiling are mutually constitutive: Hate violence is the end product of racial profiling's flawed logic (people who "look Muslim" are more likely to be terrorists, therefore if we are attacking terrorism we should attack people who "look Muslim"), just as racial profiling can be viewed as a form of psychic or physical violence flowing from bias. See Ahmad, *supra* note 17, at 5. For an examination of the similar dynamics of hate crimes and racial profiling, see generally Lu-in Wang, "Suitable Targets"?



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 sovereignty, discipline, and government.<sup>23</sup> Power is "exercised from innumerable points, in the interplay of nonegalitarian and mobile relations."<sup>24</sup> Simply because the state does not officially sponsor an activity does not mean that the state does not bear a relationship to that activity.<sup>25</sup> In simultaneously advocating policies of colorblindness for citizenry while engaging in racial profiling for noncitizens, and publicly embracing all religions<sup>26</sup> while particularly privileging Christianity,<sup>27</sup> 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.<sup>28</sup>

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*Parallels and Connections Between "Hate" Crimes and "Driving While Black,"* 6 MICH. J. RACE & L. 209 (2001) (asserting that both practices tend to construct particular social groups as "suitable targets" through a feedback loop that perpetuates both forms of discrimination).

23. Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT, STUDIES IN GOVERNMENTALITY* 87, 102 (Graham Burchell et al. eds., 1991).

24. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 94 (Vintage Books 1990) (1978).

25. 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, when Foucault sought to show how power was not solely concentrated in the state. See Hugh Baxter, *Bringing Foucault into Law and Law into Foucault*, 48 STAN. L. REV. 449, 474-76 (1996) (reviewing ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* (1994)) (describing legal academic attempts to deploy Foucault, who sought to escape the "discourse of sovereignty"). However, Foucault's examination of what he named governmentality should not be understood to mean that Foucault denied the existence of the state, see, e.g., Foucault, *supra* note 23, at 103 (observing that governmentality is at once internal and external to the state).

Another productive link may be the work of legal realists in asserting that the state is implicated in all purportedly private transactions. See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943). While admittedly the legal realists were describing the domain of the market, in which the state would back with force the recognition of property or contract rights, rather than the domain of individual violence, we could consider how the state has helped construct the relative "bargaining power" of assailant and victim.

26. 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 (describing the Bush administration as creating a "Christian nation," and describing George Bush's speech to "hundreds of Chinese schoolchildren on why America is a great nation," among his reasons being "that the overwhelming majority of us believe in God").

27. See, e.g., David Cho, *Bush Celebrates "Courageous Souls,"* WASH. POST, Nov. 27, 2001, at B4 (recounting George Bush's reception for the Christian relief workers released from Afghanistan). Bush described the women's ordeal as "a story about the faith that sustained them" and called them "courageous souls" for "keeping their faith in God strong." *Id.*

28. I borrow this argument from Kendall Thomas, although I am not arguing here that we should understand this hate violence as a delegation of state power that would create cognizable violations under the U.S. Constitution. See Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1477-90 (1992) (linking the government's refusal to strike down sodomy

While 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."<sup>29</sup> 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/os are now deemed safe and not required to prove their allegiance.<sup>30</sup> 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 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.<sup>31</sup> This did not

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laws used to punish gay men and lesbians to the epidemic of homophobic violence, and suggesting that the state thus delegates power to citizens who engage in homophobic violence).

29. 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); see also Inderpal Grewal, *TRANSNATIONAL AMERICA: GENDER, CLASS AND ETHNICITY IN THE SOUTH ASIAN DIASPORA* (forthcoming 2002) (manuscript on file with the author).

30. Grewal, *supra* note 29. 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.

31. See Paola Bacchetta et al., *TRANSNATIONAL FEMINIST PRACTICES AGAINST WAR* (October 2001), <http://home.earthlink.net/~jenniferterry/transnationalstatement.html> (last visited Apr. 30, 2002). This statement, written collectively by feminist theorists Paola Bacchetta, Tina Camp, Inderpal Grewal, Caren Kaplan, Mino Moallem, and Jennifer Terry, provides in part: When the "terrorists" are people of color, all other people of color are vulnerable to a scapegoating backlash. Yet when white supremacist Timothy McVeigh bombed the Murrah federal building in Oklahoma City, killing 168 men, women, and children, no one declared open season to hunt down white men, or even white militia members.



happen because Timothy McVeigh did not produce a discourse about good whites and bad whites,<sup>32</sup> because we think of him as an individual deviant, a bad actor. We do not think of his actions as representative of an entire racial group. This is part and parcel of how racial subordination functions, to understand nonwhites as directed by group-based determinism but whites as individuals.<sup>33</sup> Racial profiling also did not happen because, as a white man, Timothy McVeigh was seen by many as one of "us"—as the *New York Times* editorialized at that time, there was "sickening evidence that the enemy was not some foreign power, but one within ourselves."<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> These cases—along with the case of French citizen Zacarias Mousaoui, the only person currently facing charges in the United States in connection to the September 11 attacks—belie the purported effectiveness

Id.

32. See UCLA LAW SCHOOL STATEMENT OF CONCERNED FACULTY (making this point and opposing racial profiling) (on file with the author); see also Carbado, *supra* note 4 (discussing the "good black"/"bad black" dichotomy) (manuscript at 189–98, on file with author).

33. See Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN., 89, 94–99 (2000) (describing cases that demonstrate that the actions of whites are more often perceived as the acts of individuals, rather than reflecting norms associated with race, while the converse holds true for persons of color).

34. Linda Greenhouse, *Exposed: Again, Bombs in the Land of the Free*, N.Y. TIMES, Apr. 23, 1995, § 4, at 1. For a critical analysis of how geopolitics of a "heartland" space operated to divide the "national" from the "international" in terms of "inside" and "outside" in discourses of the Oklahoma City bombing, see Matthew Sparke, *Outsides Inside Patriotism: The Oklahoma Bombing and the Displacement of Heartland Geopolitics*, in RETHINKING GEOPOLITICS 198, 199 (Gearóid Ó Tuathail & Simon Dalby eds., 1998).

35. See generally *Who is Richard Reid?*, BBC NEWS, Dec. 28, 2001, [http://www.news.bbc.co.uk/hi/english/uk/newsid\\_1731000/1731568.stm](http://www.news.bbc.co.uk/hi/english/uk/newsid_1731000/1731568.stm).

36. See Donald G. McNeil, Jr., *The Foreign Solider: Body Confirms Suspicions About Frenchmen in Al Qaeda*, N.Y. TIMES, Dec. 28, 2001, at B5 (describing an estimated 100–150 French citizens fighting with Al Qaeda).

37. See generally *Critical Resistance*, <http://www.criticalresistance.org> (last visited Feb. 25, 2002). For the argument that the fight against the prison industrial complex, and specifically, state violence in the form of policing, detention, and prisons, has become a crucial political arena for the immigrant rights movement post-September 11, see Jane Bai & Eric Tang, *The War at Home: National Targeting of Non-Citizens Takes on New Dimensions*, COLORLINES, Spring 2002, at 17.



of racial profiling: Not all terrorists are persons who appear "Middle Eastern, Arab, or Muslim."<sup>38</sup>

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 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."<sup>39</sup> And reading Heidegger is a potential terrorist activity.

## II. 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 U.S. nation projects a series of anxieties regarding internal and external threats to the coherence of the national body.<sup>40</sup> 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.<sup>41</sup> 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

38. For a criticism of the overreliance on race in suspect descriptions, see generally Banks, *supra* note 4. For a criticism of the rationality of current practices of racial profiling, see Victor Romero, Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11, Paper Presented at the DePaul Law Review Symposium (Mar. 9, 2002) (unpublished manuscript, on file with author).

39. See Arundhati Roy, *War is Peace*, OUTLOOK INDIA, Oct. 29, 2001, <http://www.outlookindia.com/archivecontents.asp?fmt=20011029>.

40. I borrow this metaphor from Lisa Lowe, who writes of the phantasmic role played by the figure of the Asian immigrant on which the U.S. nation projects a series of complicated anxieties. See LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS 18 (1996).

41. See generally EDWARD SAID, ORIENTALISM (1978); EDWARD SAID, CULTURE AND IMPERIALISM (1993). In presenting this bifurcation, I do not intend to suggest that Orientalism was not 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).

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.<sup>42</sup>

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<sup>43</sup>— "white men saving brown women from brown men."<sup>44</sup> 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 Bush and First Lady Laura Bush—was that Afghan women needed to be saved from the Taliban and Islamic barbarism.<sup>45</sup> 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 United States has been deeply implicated.<sup>46</sup> We must remember where the Taliban came

42. Witness Italian Prime Minister Silvio Berlusconi's comments about the superiority of Western civilization. Silvio Berlusconi boasted of the "supremacy" and "superiority" of Western civilization, called on Europe to recognize its "common Christian roots," and claimed links between Islamist terrorism and the antiglobalization movement as the enemies of Western civilization.

Standing beside German Chancellor Gerhard Schröder at a joint press conference, Berlusconi declared that he and his host

"consider that the attacks on New York and Washington are attacks not only on the United States but on our civilisation, of which we are proud bearers, conscious of the supremacy of our civilisation, of its discoveries and inventions, which have brought us democratic institutions, respect for the human, civil, religious and political rights of our citizens, openness to diversity and tolerance of everything."

John Hooper & Kate Connolly, *Berlusconi Breaks Ranks Over Islam*, *GUARDIAN*, Sept. 27, 2001, <http://www.guardian.co.uk/waronterror/story/0,1361,558866,00.html> (quoting Silvio Berlusconi).

It is important to note that the sovereign division between civilization and barbarity that has surfaced is identical to that which defined both the juridical constitution of Spanish colonial rule and U.S. imperialism in the Philippines. See John D. Blanco, *Civilization and Barbarism in the Philippines, Circa 1898* (unpublished paper, on file with author).

43. Leti Volpp, *Feminism Versus Multiculturalism*, 101 *COLUM. L. REV.* 1181, 1196–97 (2001).

44. Gayatri Spivak, *Can the Subaltern Speak*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271, 297 (Cary Nelson & Lawrence Grossberg eds., 1988).

45. 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>. See, e.g., Judith Apter Klinghoffer, *Afghanistan: A Just War*, *HIST. NEWS NETWORK*, Jan. 21, 2002, <http://historynewsnetwork.org/articles/article.html?id=518> (justifying the American war in Afghanistan "because it enabled Afghani women to claim their place in the sun").

46. See BACCHETTA ET AL., *supra* note 31; Charles Hirschkind & Saba Mahmood, *Feminism, The Taliban, and the Politics of Counter-Insurgency*, 75 *ANTHROPOLOGICAL Q.* (forthcoming 2002)



from, that U.S. administrations thought that religious fundamentalists made better anti-Communist fighters, and so supported the mujahideen who became the Taliban.<sup>47</sup> 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.<sup>48</sup> Furthermore, the long-term impact of the war on the "liberation" of the women of Afghanistan remains an open question.<sup>49</sup>

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.<sup>50</sup> The East was the site of passiv-

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(manuscript at 4-7, on file with author) (describing the United States' role in creating conditions in Afghanistan and the elision of this history in the linkage made between women's oppression, Taliban evil, and Islamic fundamentalism).

47. See Rasil Basu, *The Rape of Afghanistan*, ZNET, Dec. 30, 2001, <http://www.zmag.org/terrorframe.htm> (describing the role of the United States in supporting fundamentalist groups that destroyed women's rights that had been improved under Soviet occupation, and expressing skepticism as to the sudden concern of the American government with the plight of Afghan women). For more information on the history of U.S. funding of the mujahideen in Afghanistan, see EQBAL AHMAD, *TERRORISM: THEIRS & OURS* 12, 22 (2001); Hirschkind & Mahmood, *supra* note 46; Amitava Kumar, *Nothing to Write Home About*, AMERASIA J., *supra* note 2, at 181, 187-88; Vijay Prashad, *War Against the Planet*, AMERASIA J. *supra* note 2, at 31, 31-39.

48. Ahmad, *supra* note 17, at 11.

49. 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. On the former, see John Daniszewski, *Post-Taliban Kabul Marks International Women's Day Celebration*, L.A. TIMES, Mar. 9, 2002 at A3, describing the observance of International Women's Day, and noting that "[t]here was nary a burka in sight at the ceremony . . . . Nevertheless, on the streets of this capital and in the countryside, virtually all women still wear the all-encompassing, identity-hiding cloak in public." *Id.*; see also Robert Fisk, *Brace Yourself for Part Two of the War for Civilisation*, ZNET, at <http://www.zmag.org/terrorframe.htm> (last visited March 5, 2002).

Fisk writes:

With a headache as big as Afghanistan, reading through a thousand newspaper reports on the supposed "aftermath" of the Afghan war, I'd become drugged by the lies. Afghan women were free at last . . . . We could ignore the fact that, save for a few brave female souls, almost all Afghan women in Kabul continued to wear the burqua.

*Id.* On the latter, see REVOLUTIONARY ASSOCIATION OF THE WOMEN OF AFGHANISTAN, STATEMENT ON THE US STRIKES ON AFGHANISTAN (2001), <http://rawa.fancymarketing.net/us-strikes.htm>. The statement from RAWA, which since 1977 has struggled for the rights of women in Afghanistan, provides:

If until yesterday the US and its allies, without paying the least attention to the fate of democracy in Afghanistan, were supporting the policy of Jihadis-fostering, Osama-fostering and Taliban-fostering, today they are sharpening the dagger of the "Northern Alliance" . . . . The continuation of US attacks and the increase in the number of innocent civilian victims not only gives an excuse to the Taliban, but also will cause the empowering of the fundamentalist forces in the region and even in the world.

*Id.*

50. See ANN LAURA STOLER, *RACE AND THE EDUCATION OF DESIRE: FOUCAULT'S HISTORY OF SEXUALITY AND THE COLONIAL ORDER OF THINGS* 128-29 (1995); see also JEAN L. COMAROFF



ity and irrationality, awaiting the conquest by the masculine and rational West.<sup>51</sup> 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 U.S. national identity to race, gender, and sex.<sup>52</sup> 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?"<sup>53</sup> Post-September 11 nationalist discourses reinscribe both compulsory heterosexuality<sup>54</sup> and the dichotomized gender roles upon which it is based: the masculine citizen-soldier, the patriotic wife and mother, and the properly reproductive family.<sup>55</sup>

In 1997, Lauren Berlant presciently suggested that there was a coupling of the ideas of suffering and American citizenship.<sup>56</sup> 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 recently written, cases of hate violence before September 11—such as the murders of Matthew Shepard and James Byrd—were deemed incomprehensible.<sup>57</sup> In contrast, hate attacks after September 11

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& JOHN COMAROFF, OF REVELATION AND REVOLUTION: CHRISTIANITY, COLONIALISM, AND CONSCIOUSNESS IN SOUTH AFRICA 105–08 (1991).

51. See MEYDA YEGENOGLU, COLONIAL FANTASIES: TOWARDS A FEMINIST READING OF ORIENTALISM 11 (1998) (noting that the Orient is a fantasy built upon sexual difference, as "always veiled, seductive, and dangerous," a "natural territory" for the conquest of the civilized European man).

52. 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); STOLER, *supra* note 50.

53. Ahmad, *supra* note 17, at 10 (citing Elisa Byard, *Queerly Un-American*, NEWSLETTER OF THE INST. FOR RES. ON WOMEN & GENDER (Colum. U.), Jan. 2002, at 6).

54. On the relationship between nationalism and sexuality, see generally GEORGE L. MOSSE, NATIONALISM AND SEXUALITY: RESPECTABILITY AND ABNORMAL SEXUALITY IN MODERN EUROPE (1985).

55. BACCHETTA ET AL., *supra* note 31.

56. See LAUREN BERLANT, THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS ON SEX AND CITIZENSHIP 1 (1997). She writes:

In the cartoon version of the shaken nation, a citizen is defined as a person traumatized by some aspect of life in the United States. Portraits and stories of citizen-victims—pathological, poignant, heroic, and grotesque—now permeate the political public sphere, putting on display a mass experience of economic insecurity, racial discord, class conflict, and sexual unease.

*Id.* While Berlant's insights stem from examining forms of suffering that pre-date the trauma of September 11, citizenship and suffering seem very much coupled in the present moment, since the collective experience of having suffered the great shock of those attacks has served to bind together national identity.

57. See Ahmad, *supra* note 17, at 8. For a description of the murders of Matthew Shepard, a gay man tied to a wooden fence, and James Byrd, a black man chained to and dragged by a pick-up truck, see Lu-in Wang, *supra* note 22, at 215 & nn. 21–22.

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.<sup>58</sup> 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!"<sup>59</sup>

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.<sup>60</sup> In particular, Sikh men, who are religiously mandated to wear turbans, have been conflated with Osama Bin Laden and have suffered significant violence.<sup>61</sup> South Asian Americans have suddenly been subjected to racist attack and galvanized as a political community.<sup>62</sup> As a response to such a heterogeneous racial interpellation, the claim of racial or religious misrecognition ("I'm not Muslim")<sup>63</sup> 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

58. See Ahmad, *supra* note 17, at 8-9.

59. Joseph Trevino & Gendy Alimurung, *The Hate Files*, L.A. WEEKLY, Sept. 21, 2001, <http://www.laweekly.com/ink/01/44/cover-alimurung.shtml>. The suspect, Frank Roque, was also reported as being suspected of shooting an Afghan family and a Lebanese gas station worker the same day. See Emil Guillermo, *The War Has Already Started in America*, ASIAN WK., Sept. 21, 2001, [http://www.asianweek.com/2001\\_09\\_21/opinion\\_emil.html](http://www.asianweek.com/2001_09_21/opinion_emil.html).

60. See Davis, *supra* note 5, at 2 (describing Latinos subjected to racial profiling post-September 11).

61. See website of the Sikh Coalition, at <http://www.sikhcoalition.org/ListReports.asp> (visited March 7, 2002) (listing 226 incidents and hate crimes).

62. Sarah Wildman, *All for One*, NEW REPUBLIC, Dec. 24, 2001, <http://www.tnr.com/doc.mhtml?i=20011224&s=diarist122401> (describing how the "sting of hundreds of hate crimes and thousands of ugly comments" has "probably done more to unify America's disparate South Asian communities than any event since the mass migration that brought them to these shores in large numbers three decades ago").

63. 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 "Sikhs are not Muslims" and "Bush, Educate the American people that Sikhs are not Muslims or Arabs").



they would not be targeted.<sup>64</sup> Others are importantly arguing that this is a moment for constructing coalitions.<sup>65</sup>

There are obviously enormous resonances in what has been happening to the treatment of Japanese Americans during World War II, whereby the fungibility of members of a racially defined community was considered to make it impossible to screen individually loyal citizens from enemy aliens.<sup>66</sup> 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."<sup>67</sup>

And, in fact, a Gallup poll found that one-third of the American public surveyed thought that we should intern Arab Americans.<sup>68</sup> 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.<sup>69</sup> Japanese American internment constituted a pivotal moment in American Orientalism; the present moment is another.

64. See, e.g., Sharon Boswell & Lorraine McConaghy, *Abundant Dreams Diverted*, SEATTLE TIMES, June 23, 1996, at B2 (describing how, after a curfew was imposed on Japanese and Japanese American residents in Seattle, many of the city's other Asian residents sported buttons such as "Chinese" or "Not from Nippon").

65. For the argument that Arab and South Asian communities should use this moment as an opportunity to forge coalitions, see Ahmad, *supra* note 17, at 12-14. For a similar argument at an earlier moment, that of California post-Proposition 187 and Proposition 209, 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).

66. See generally ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"*, 8 ASIAN L.J. 1 (2001). On the relation of Japanese American internment and racial profiling post 9-11, see Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, AMERASIA J., *supra* note 2, at 43, 45-49 (arguing against racial profiling and for the recognition of how racism warps what we believe to be rational calculations).

67. Timothy Egan, *In Sacramento, a Publisher's Questions Draw the Wrath of the Crowd*, N.Y. TIMES, Dec. 21, 2001, at B1 (quoting Bob Buckley, computer science professor at California State University, Sacramento).

68. Gallup Poll Analysis: The Impact of the Attacks on America, <http://www.gallup.com/poll/releases/pr010914c.asp> (showing that one in three Americans favors internment for people of Arab descent).

69. See Keith Aoki, *Civil Rights: Six Experts Weigh In*, TIME, <http://www.time.com/time/nation/article/0,8599,186583,00.html> (last visited Apr. 11, 2002).

### III. 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.

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.<sup>70</sup> 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*.<sup>71</sup> 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.<sup>72</sup>

70. 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). Citizenship as formal legal status means who can possess national citizenship—in the United States, as differentiated from the noncitizen, or "alien," and granted through birth or naturalization. Citizenship as rights signifies the rights necessary to achieve full and equal membership in society. This approach tracks efforts to gain the enjoyment of civil, political, and social rights in Western capitalist societies. In the context of the United States, citizenship as rights is premised on a liberal notion of rights, and the failure to be fully enfranchised through the enjoyment of rights guaranteed under the Constitution is often described as exclusion or as "second-class citizenship." Citizenship as political activity posits political engagement in the community as the basis for citizenship, as exemplified both by republican theories that played a key role in the founding of American democracy, as well as by a recent renaissance of civic republicanism. *Id.*

71. See *id.* at 479–88 (describing literature on citizenship in its psychological dimension as addressing the nature of identifications and solidarities individuals feel and maintain with one another).

72. As Judith Butler writes:

We are used to thinking of power as what presses on the subject from the outside, as what subordinates, sets underneath, and relegates to a lower order. This is surely a fair description of part of what power does. But if, following Foucault, we understand power as forming the subject as well, as providing the very condition of its existence and the trajectory of its desire, then power is not simply what we oppose but also, in a strong sense, what we depend on for our existence and what we harbor and preserve in the beings that we are. . . . "Subjection" signifies the process of becoming subordinated by power as well as the process of becoming a subject.



The focus, then, is not initially from the perspective of the citizen who includes, but 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.<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup> 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 terrorist)). This process of interpellation of those who appear "Middle Eastern, Arab, or Muslim" is taking place through the racial profiling by both government officials and the U.S.

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JUDITH BUTLER, *THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION 2* (1997).

73. 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). While the idea of interpellation is generally associated with Althusser, Frantz Fanon should also be recognized as having theorized the process of interpellation. He writes:

"Look, a Negro!"

I came into the world imbued with the will to find a meaning in things, my spirit filled with the desire to attain to the source of the world, and then I found that I was an object in the midst of other objects.

Sealed into that crushing objecthood, I turned beseechingly to others. Their attention was a liberation, running over my body suddenly abraded into nonbeing, endowing me once more with an agility that I had thought lost, and by taking me out of the world, restoring me to it. But just as I reached the other side, I stumbled, and the movements, the attitudes, the glances of the other fixed me there, in the sense in which a chemical solution is fixed by a dye. I was indignant; I demanded an explanation. Nothing happened. I burst apart. Now the fragments have been put together again by another self.

*Id.*

74. ALTHUSSER, *supra* note 73, at 174–75.

75. *Id.* at 176.

public.<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup> Thus, one may formally be a U.S. citizen and formally entitled to various legal guarantees, but one will stand outside of the membership of kinship/solidarity that structures the U.S. 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 Amer-

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76. Janet Halley understands interpellation to include not only a call from above, from a high center of power, for example, the police, 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.

77. As Judith Butler states, the manner in which a subject is constituted by being hailed, addressed, named, always contains the possibility of misrecognition. For example, when the name called is not a proper name but the naming of a social category, this can serve either as a source of enabling political possibilities or as a regressive and totalizing reduction of identity. See BUTLER, *supra* note 71, at 96–97. Thus, one can be hailed as a putative terrorist and a noncitizen through the process of misrecognition.

I am not addressing here the relation between subject formation and possibilities of resistance. For a discussion of how subjects occupy and work with potentially injurious identities, see *id.*, at 95–105. See also Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *CORNELL L. REV.* 1259 (2000).

For a developed theory that builds upon Althusser’s theory of subject formation and interpellation to describe a mode of dealing with dominant ideology that neither opts to assimilate within such a structure nor strictly oppose it, but rather works on and against dominant ideology, see JOSÉ ESTEBAN MUÑOZ, *DISIDENTIFICATIONS: QUEERS OF COLOR AND THE PERFORMANCE OF POLITICS* 11 (1999). Muñoz examines how queers of color—whom he calls “disidentificatory subjects”—identify with ethnos or queerness despite the phobic charges in both fields. *Id.* at 11. He suggests that, like “a melancholic subject holding on to a lost object” a disidentificatory subject works to invest this lost object with new life. *Id.* at 12.

78. See Bosniak, *supra* note 70, at 479 (asserting that the “feeling of citizenship” that we experience is “not merely a product of the ways in which citizenship is conceived and practiced in our legal and political worlds”).



ican national identity reappears to haunt their ability to enjoy citizenship as a matter of rights, in the form of being free from violent attack.

Thus, the boundaries of the nation continue to be constructed through excluding certain groups. The "imagined community"<sup>79</sup> 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 U.S. war effort rest on an image of anti-democracy, in the form of those who seek to destroy the "American way of life."<sup>80</sup> 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 equality, these were in fact only guaranteed to propertied, European male subjects.<sup>81</sup> While some might believe in the promise of universality—that one can infinitely expand the ambit of who is entitled to rights and freedoms—race and other markers appear and reappear to patrol the borders of belonging to political communities.<sup>82</sup> Despite the liberal uni-

79. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 7 (1991) (writing that the nation is "an imagined political community"). Anderson posits nationalism and racism as antithetical: "[T]he fact of the matter is nationalism thinks in terms of historical destinies, while racism dreams of eternal contaminations, transmitted from the origins of time through an endless sequence of loathsome copulations: outside history." *Id.* at 136. Allan Pred productively contrasts this with Etienne Balibar's theorizing on the relationship of race and nationalism. See ALLAN PRED, *EVEN IN SWEDEN: RACISMS, RACIALIZED SPACES, AND THE POPULAR GEOGRAPHICAL IMAGINATION* 27, 27 n.45 (2000). Pred, invoking Balibar, writes that historically racism and nationalism were not merely mutually articulating discourses, but an interconnected set of practices that at once socially normalized and corporeally excluded. *Id.* at 27. Balibar argues that racism is not an expression of nationalism, but a supplement internal to nationalism, always in excess of it, but always indispensable to its constitution and yet always still insufficient to achieve its project. ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, *Racism and Nationalism*, in *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* 37, 54 (Chris Turner trans., 1991). See also ARJUN APPADURAI, *MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION* 146 (1996) (arguing that very often the creation of primordial sentiments, such as racial, religious, and cultural fundamentalisms, are close to the center of the project of the modern nation-state).

80. 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." For a discussion of how our ideas of freedom have come into existence and their relation to lines of power, truth, and ethics, see generally NIKOLAS ROSE, *POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT* (1999) (analyzing the relationship of freedom to contemporary governmentality).

81. See generally DAVID THEO GOLDBERG, *RACIST CULTURE* (1993); DAVID THEO GOLDBERG, *THE RACIAL STATE* (2002). See also Stuart Hall, *Conclusion: The Multi-cultural Question*, in *UN/SETTLED MULTICULTURALISMS: DIASPORAS, ENTANGLEMENTS, TRANSDISRUPTIONS* 209, 234 (Barnor Hesse ed., 2000) (observing that European imperialist expansion was presented in terms of a universalizing civilizing function, so that Western particularism was rewritten as a global universalism).

82. The reaction of George H.W. Bush (the elder Bush) to John Walker, the "American Taliban" (or, in California parlance, the "Marin Taliban"), raises interesting questions about this

versalizing discourse of citizenship, not all citizens are equal.<sup>83</sup> These events make apparent how identity in the form of foreignness, or perpetual extraterritorialization,<sup>84</sup> 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.<sup>85</sup> 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 com-

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policing and these exclusions. Asked what he thought would be the appropriate punishment for Walker, Bush answered: "I thought of a unique penalty: make him leave his hair the way it is and his face as dirty as it is and let him go wandering around this country and see what kind of sympathy he would get." Lawrence Donegan, *Hollywood Scrambles for Film Rights to Life Story of Taliban's U.S. Recruit: All-American Boy Who Became a Muslim Soldier*, OBSERVER, Dec. 23, 2001, at 5. There are obvious resonances here with being homeless, which Rosalyn Deutsche suggests should be replaced as a category of analysis by the categories evicted, excluded, and expelled. I am indebted to Donald Moore for this cite. See ROSALYN DEUTSCHE, *EVICIONS: ART AND SPACIAL POLITICS* 49-107 (1996). She writes:

The homeless person . . . is constructed as an ideological figure, a negative image created to restore positivity and order to social life . . . when public space is represented as an organic unity that the homeless person is seen to disrupt from the outside, the homeless person becomes a positive embodiment of the element that prevents society from achieving closure.

*Id.* at 277-78. John Walker is similarly one who disrupts the organic unity of the nation, and thus there has been advocacy of expelling him, through the form of his execution or the loss of his U.S. citizenship. See, e.g., Maurice Timothy Reidy, *American Taliban's Fate Remains Foggy*, HARTFORD COURANT, Dec. 18, 2001, at A1. The article begins: "Should he be tried as a traitor? Stripped of his citizenship? Or maybe just strung up?" *Id.*

83. See Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States*, 76 OR. L. REV. 567, 616-19 (1997) (discussing second-class citizenship of native-born and immigrant black women in the United States); Leti Volpp, "Obnoxious to Their Very Nature": *Asian Americans and Constitutional Citizenship*, 5 CITIZENSHIP STUD. 57, 62-67 (2001), reprinted in 8 ASIAN L.J. 71, 77-83 (2001) (describing how racialization of Asian Americans limits their enjoyment of citizenship as political activity and citizenship as identity).

84. 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.

85. In the words of Lauren Berlant:

Transnational capital and global media produce subjects and publics that are no longer organized around the politics of representation within the confines of a single state, and states increasingly ally with transnational capital in organizing processes of production that transect their borders. In addition, the combination of migration and new technologies of travel and interpersonal communication have so changed and challenged the ways national life operates. . . . But this does not mean that states are not still powerful political agents, or that the ideology of nationhood has become enervated, the faint howling of an archaic dream of democratic legitimation. Indeed, it is precisely under transnational conditions that the nation becomes a more intense object of concern and struggle.

BERLANT, *supra* note 56, at 13.



plete 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.<sup>86</sup>

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.<sup>87</sup> 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."<sup>88</sup> 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."<sup>89</sup>

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.<sup>90</sup> Chuh emphasizes the link between transnationalism and state coercion, and reminds us of the forced removal and internment of Japanese Americans by the U.S. government during World War II.<sup>91</sup> 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 intern-

86. Alex Aleinikoff similarly points out that while it has "become fashionable to predict the decline of the nation-state at the hands of sub-national and supra-national forces," the postnational perspective is not an accurate depiction of U.S. 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).

87. Arjun Appadurai, *Patriotism and Its Futures*, 5 PUB. CULTURE 411, 411 (1993) [hereinafter Appadurai, *Patriotism*]. A revised version also appears in APPADURAI, MODERNITY AT LARGE, *supra* note 79, at 158. Appadurai acknowledges that the nation-state, in its classical territorial form, is not yet "out of business." Appadurai, *Patriotism and Its Futures*, *supra*, at 421. Yet he also argues that today we are in a "postnational, diasporic world." *Id.* at 425.

88. *Id.* at 425.

89. *Id.* at 424.

90. Kandice Chuh, *Transnationalisms and its Pasts*, 9 PUB. CULTURE 93, 95 (1996). I am indebted to Laura Kang for calling my attention to this juxtaposed reading of Appadurai and Chuh, see Laura H.Y. Kang, "Comfort Me": Mediated Affiliations and Disciplined Subjects in Korean/American Transnationality, Paper Presented at the American Studies Association Annual Meeting (Nov. 9, 2001) (on file with author). See also Partha Chatterjee, *Beyond the Nation? Or Within?*, 56 SOC. TEXT 57 (1998) (critically responding to Appadurai and suggesting that the postnational turn will in fact strengthen present inequalities, and arguing that strategies must first look within the nation-state to examine the relationship between civil society and modernity on the one hand and political society and democracy on the other).

91. Chuh, *supra* note 90, at 96-104.

ment camps, or ejecting them from membership through violence against their bodies.<sup>92</sup>

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.<sup>93</sup>

### 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.<sup>94</sup>

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!

92. Parenthetically, Mike Masaoka, Executive Director of the Japanese American Citizens League during World War II, suggested at that time that Japanese Americans brand themselves for easy identification and to prove their loyalty. He also suggested they create suicide battalions. See Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 19 B.C. THIRD WORLD L.J. 385, 406 (1998).

93. Arjun Appadurai does recognize that his own body is racialized, biologized, minoritized in the United States, yet believes that America could be the special site of a postnational politics, since America "may be alone in having organized itself both around a modern political ideology in which pluralism is central to the conduct of democratic life," and has also "generated a powerful fable of itself as a land of immigrants." Appadurai, *Patriotism*, *supra* note 87, at 424-25.

94. On the correlation of citizenship with membership, see T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CON. L.Q. 915, 917-19 (1995) (suggesting a broader definition of membership); Hiroshi Motomura, *Whose Immigration Law? Citizens, Aliens and the Constitution*, 97 COLUM. L. REV. 1567, 1586 (1997) (reviewing GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996)) (examining how citizenship provides membership for overseas citizens). See also T. Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 FORDHAM L. REV. 1689, 1692 (2001) ("By defining insiders, the concept of citizenship necessarily defines outsiders; and by guaranteeing full and equal rights for those within the charmed circle it supports fewer rights—or at least less attention—for those outside the circle.").



MALE CALLER: What makes you think these people have rights?  
Those are Arabs; they have no rights. Deal with it!<sup>95</sup>

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 *desaparecidos* of Chile.<sup>96</sup> What might it mean to expand who occupies the category of our disappeared, from those killed in the World Trade Center, to consider also 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.<sup>97</sup> Who is the "us" in the U.S.?

95. See Brian Dickerson, *ACLU Finds Intervention Not Welcome*, DETROIT FREE PRESS, Dec. 7, 2001, [http://www.freep.com/news/metro/dicker7\\_20011207.htm](http://www.freep.com/news/metro/dicker7_20011207.htm) (describing the response to an announcement by the Michigan chapter of the American Civil Liberties Union that it would provide free legal counsel to any of the 566 Middle Eastern men the FBI wanted to interview in the Detroit area). Of course, noncitizens do have rights under our Constitution, in its invocation of "persons" and not "citizens." See Susan Gzesh & Mae Ngai, Letter to the Editor, *In Crime, Immigrants, Citizens Have Same Rights*, CHIC. TRIB., Dec. 31, 2001, at 16.

96. See Ariel Dorfman, *America Looks at Itself Through Humanity's Mirror*, L.A. TIMES, Sept. 21, 2001, at B15. Dorfman, shortly after September 11, wrote:

What I recognize is something deeper, a parallel suffering, a similar pain, a commensurate disorientation. I still cannot believe what I am witnessing on the screen—hundreds of relatives wandering the streets of New York, clutching photos of sons, fathers, wives, lovers, daughters, begging for information, asking if they are alive or dead—the whole United States forced to look into the abyss of what it means to be *desaparecido*, disappeared, with no certainty or funeral possible for those missing.

*Id.*

97. For an example centering those currently detained, and, in fact, analogizing them to his parents, Russian immigrants jailed in the Palmer Raids, see Clancy Sigal, *John Ashcroft's Palmer Raids*, N.Y. TIMES, Mar. 13, 2002, at A25.

An article by Hanna Rosin in the Washington Post also accomplishes the kind of recentring I am thinking of here. See Rosin, *supra* note 8, at A1. I describe the article at length, as a rare example of reporting that has been able to breathe life into the story of a person detained in the sweeps following September 11.

Rosin describes the case of Ansar Mahmood, who had won a green card through the visa lottery program, and thus became a legal permanent resident of the United States in 1999. Mahmood worked delivering pizza at Domino's in Hudson, New York, and was able to save enough money to pay for his sisters in Pakistan to go to school and for his father, who had suffered a heart attack, to get medication. His oldest sister, Mariam, had said when he called last fall, "Working, working, this is all we know about your new life." So he set out to give them a fuller picture of his life in Hudson. He snapped pictures of his apartment complex, the Domino's where he worked, scenic spots along his delivery route. With thirty-six shots gone, he figured he could take one more. After delivering a pizza on October 9, 2001, he drove to what a regular customer had once told him was the highest point in Hudson, with the clearest view of the mountains. He asked the man at the guard post to take his picture overlooking the town's main water treatment plant. This was at the height of the anthrax scare. The police were called, and he was arrested on suspicion of being a terrorist. Cleared within two days, his brush with the law led to an unlikely nickname at work: "Hey, Big Terrorist Guy, get me some Cheesy Bread." But in the process of their search for evidence of terrorist activity, investigators found that Mahmood had helped a friend from Pakistan who was undocumented find an apartment and pay the first month's rent and

car insurance. So Mahmood was charged with harboring an illegal immigrant—a charge that, before September 11, 2001, was used almost exclusively against smugglers at border points. *Id.* at A10–A11. Mahmood says he did not know the friend was undocumented but also says he would never ask and could not have acted differently. The woman was his best friend's sister. As Rosin writes, Mahmood looks even younger than twenty-four, and cries openly. "He cries with gratitude when he mentions the American girls who had semi-adopted him during his two-year journey in the States: Jessica, his fellow waitress at Pizza City in Salisbury, Md., who taught him to drive; Kelly at the Domino's in Hudson, who stood up for him when the mayor came to grandstand at the store after the anthrax scare." *Id.* at A10. Mahmood could not believe he would get deported. The day before he was taken into INS custody, he worked his usual thirteen hours. The following day he wore his Domino's uniform to his attorney's office so he could go straight from there to work, but instead was arrested and placed in detention. After the February deportation hearing he wept, so much that he borrowed a pair of glasses to cover his eyes. "Maybe God will help me" he said. *Id.* at A11.

Rosin's article was followed by an editorial in the *Washington Post* titled "Free Ansar Mahmood." As the editorial points out, most of the immigrants detained have been cleared of any connection to terrorism but are being deported nonetheless, with no possibility of return. The editorial states that there "probably aren't many people on whom authorities couldn't pin something if they looked hard enough," and that Ansar Mahmood's story causes us to think twice—from what we know about him "it doesn't seem to us that America is better off without Mr. Mahmood." *Free Ansar Mahmood*, WASH. POST, Mar. 27, 2002, at A20.



# Race, Law and Society

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**ASHGATE**

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