

CONSTRUCTING GOOD ALIENS AND GOOD CITIZENS: LEGITIMIZING THE WAR ON TERROR(ISM)

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INTRODUCTION

The United States government's declared and orchestrated war on terrorism has internal as well as external dimensions. Externally, it has identified or attempted to identify the terrorist threat with particular nation states, such as Afghanistan and Iraq.¹ But much of the war has been fought internally. Because the enemy could reside anywhere, even within the United States and within those nation states that the United States would never accuse of sponsoring or even condoning terrorism, the war against terrorism requires allies to turn inward to rout out the enemy. For the United States at least, the revision and deployment of immigration law and policy has played an important role in that inward turn.

This article approaches the internal war on terrorism by contextualizing it historically, particularly within the history of

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1. See, e.g., President George W. Bush, Address to the United Nations General Assembly, Sept. 23, 2003, in *In Bush's Words: "Advance of Democratic Institutions in Iraq Is Setting an Example,"* N.Y. TIMES, Sept. 24, 2003, at A12 ("The former regimes of Afghanistan and Iraq knew these alternatives [to oppose or support terror] and made their choices.") [hereinafter Bush, UNGA Address]. In his January 2003 State of the Union Address, President Bush had already begun to erase any distinction between the war on terrorism and the then potential war against Iraq, stating: "Evidence from intelligence sources, secret communications, and statements by people now in custody, reveal that Saddam Hussein aids and protects terrorists, including members of Al Qaeda." Michael R. Gordon, *Bush Enlarges Case for War by Linking Iraq with Terrorists*, N.Y. TIMES, Jan. 29, 2003, at A1. In his address to the United Nations justifying the war against Iraq eight months later, he stated as a matter of fact: "The regime of Saddam Hussein cultivated ties to terror while it built weapons of mass destruction." Bush, UNGA Address, *supra*.

United States immigration law and policy that has attempted simultaneously to expand and enrich the polity and to exclude or deport "bad aliens," or those aliens seen as posing a threat to the security or cultural unity of the United States.² The events surrounding September 11, 2001 brought back into the fore questions about what groups of aliens, and even citizens, are most likely to pose threats to that security and unity. Of course, September 11 was not the first threat experienced by the United States that provoked a response affecting noncitizens, as well as citizens whose loyalty was questioned. If citizens and noncitizen immigrants had begun to take for granted certain civil rights and liberties before September 11, doing so required forgetting—or at least assuming that Chinese exclusion, immigration quota systems, Japanese internment, and the McCarthy era were securely of the past. For many Muslim residents, forgetting was not possible. The 1996 Antiterrorism and Effective Death Penalty Act,³ which disproportionately affected Arab Muslims,⁴ was a recent reminder of the shadow of suspicion that antiterrorist measures could cast on their lives.

The internal war on terrorism after September 11 recalls much of this forgotten history and demonstrates its ongoing resonance. As new lines are drawn between good and bad aliens and citizens in the "[e]ither you are with us, or you are with the terrorists"⁵ mentality, bad aliens are distinguished from good aliens by place of origin, race or ethnicity, and transnational and political aims. This war revives prototypes of bad aliens that have emerged throughout United States history. These prototypes—the enemy alien, the unassimilable

2. I borrow the good alien/bad alien distinction from Alexander Aleinikoff, who initially used it to refer to a distinction he argued the Supreme Court made between those aliens who have lawfully entered and resided in the country and those who have not. See T. Alexander Aleinikoff, *Good Aliens, Bad Aliens and the Supreme Court*, in 9 DEFENSE OF THE ALIEN 46 (Lydio F. Tomasi ed., 1987). For other explorations of how distinctions have been drawn between good and bad aliens, see Panel Discussion, *Immigration Politics and Sovereignty: National Responses to "Bad" Aliens*, 88 AM. SOC'Y INT'L L. 439 (1994).

3. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248 (codified as amended at 8 U.S.C. § 1189 (1996)). See also Public Notice 2612, 62 Fed. Reg. 52650 (October 8, 1997) (designating Foreign Terrorist Organizations).

4. See *infra* notes 68–70 and accompanying text.

5. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001) available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited Oct. 23, 2003) [hereinafter Bush, Address to Congress]. See also *infra* note 166 and accompanying text.

alien, and the undetectable transnational movement-sympathizing alien—work in tandem in the post-September 11 era, even as their effects are felt most by aliens and sometimes citizens who are perceived to be Muslim or Arab. At both official and unofficial levels, nationals of those majoritarian Muslim states that the United States considers its enemies are particularly suspect. In addition, terrorist profiling exposes alien and some citizen Muslims to heightened scrutiny, and works to discipline those who criticize the government's foreign or national security policy.

In this article, I identify and describe the semiotic dynamic of immigration law's distinctions between good and bad aliens and demonstrate its continuance as an organizing structure in the war on terrorism.⁶ I argue that this dynamic functions to legitimize the war on terrorism by constructing, through a series of disciplining moves long used in immigration law, citizen and alien soldiers in the war on terrorism. Just as denouncing Communism and showing fealty to the United States during

6. Semiotics is the study of signs, and Ferdinand de Saussure is generally considered its founder. See JONATHAN CULLER, *FERDINAND DE SAUSSURE* 108–09 (rev. ed., Cornell Univ. Press 1986) (1976). I am not claiming here to offer a complete semiotics of the immigration law and policy discourse on good and bad aliens and citizens. Rather, I borrow an important insight from semiotics about the value, or relational nature, of signs that sees language as “a system in which all the elements fit together, and in which the value of any one element depends on the simultaneous coexistence of all the others.” FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 113 (Roy Harris trans., 1986) (1983). I deploy this insight to study how good and bad aliens and citizens are constructed in opposition to each other and to explore how the various categories of bad aliens—the enemy alien, the unassimilable alien and the undetectable alien—and their bad citizen counterparts are constructed in relationship to each other. Most of this piece studies the synchronic relationships of these signs, although I have attempted to lay the groundwork for a diachronic analysis. See *id.* at 98 (introducing and describing synchronic linguistics as “concerned with logical and psychological connexions between coexisting items constituting a system, as perceived by the same collective consciousness,” and contrasting it with diachronic linguistics, which is “concerned with connexions between sequences of items not perceived by the same collective consciousness, which replace one another without themselves constituting a system”).

For works that explicitly aim to offer more complete portrayals of the semiotics of legal discourse, see Duncan Kennedy, *A Semiotics of Critique*, 22 *CARDOZO L. REV.* 1147 (2001); Duncan Kennedy, *A Semiotics of Legal Argument*, 42 *SYRACUSE L. REV.* 75 (1991); Oren Bracha, *A Semiotics of Intellectual Property Policy Discourse* (2003) (unpublished manuscript, on file with The University of Colorado Law Review). For general discussions of semiotics and law, see J.M. Balkin, *The Promise of Legal Semiotics*, 69 *TEX. L. REV.* 1831 (1991); Jeremy Paul, *The Politics of Legal Semiotics*, 69 *TEX. L. REV.* 1779 (1991).

the Cold War served as a way of distinguishing oneself from bad aliens, flying the United States flag and supporting and even helping to fight the war on terrorism provide a means of ensuring that one is seen as good. Those who are particularly suspect, Muslim or Arab aliens and even Muslim or Arab citizens, have the greatest incentive to demonstrate their goodness.⁷

Yet, in contrast to what some critics argue,⁸ I maintain that individuals thought to occupy the category of Muslim or Arab are not automatically placed into the bad category. United States policy recognizes that citizens of nation states it considers its friends are not always safe, Muslim aliens are not always unassimilable, and Muslim citizens are not always un-American. Thus, the war on terrorism is *not* simply a war on Muslims, and it is not a holy war.⁹ To the contrary, it largely attains legitimacy by presuming and relying on the existence of a category of good Muslims, both within the United States and abroad.¹⁰ The United States of the twenty-first century maintains an identity as a multicultural, (neo)liberal and tolerant state. To disassociate an entire part of the polity would not be as easy as it might have been in the past. Perhaps more importantly, the good Muslim category provides a means for Muslims both inside and outside of the United States to support the United States's internal as well as external attempts to fight the war on terrorism, thus reinforcing the war's legitimacy.

Muslims can demonstrate their goodness in the same way as other aliens and citizens although, given that they are more likely to be profiled and considered suspect, the stakes are particularly high for Muslims. To be a good alien or good citizen means not to be its opposite; to support the United States is to demonstrate that one is not bad. Posting American flags on

7. This part of the thesis is most obviously indebted to the work of Michel Foucault. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF A PRISON* (Alan Sheridan trans., Vintage Books 1979) (1975).

8. See, e.g., Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1584-85 (2002). See *infra* notes 140-41, 188 and accompanying text for discussion of Volpp's argument.

9. Many critics of the war on terrorism have viewed it as a war against Islam. President Bush's use of the term "crusade" in the early aftermath of September 11 and statements recently disclosed by undersecretary of defense William "Jerry" Boykin have, among other comments by the administration and its supporters, provided fodder for this view. For a discussion of the Boykin debacle, see *infra* notes 196-99 and accompanying text.

10. See *infra* notes 188-202 and accompanying text.

homes, cars, and shops,¹¹ happily submitting to interrogations and searches at the airport, responding to President Bush's call to be vigilant and watch one's neighbors,¹² and—particularly if one is Muslim—continually condemning terrorism while avoiding discussion of United States foreign policy in the Middle East, all provide opportunities for demonstrating loyalty. In other words, alien and citizen soldiers legitimize both internal restrictions on freedom and foreign policy decisions that are designed (or asserted) to pursue the war.

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

Because the post-September 11 events continue to develop, I do not attempt here to make any predictions or reach any conclusions about the war's aftermath. Rather, I claim only to identify a semiotic structure in the history of immigration law, and to study its effects on the first two years of the war on terrorism.

The article proceeds as follows. Part I studies the history of United States immigration law and policy, and other related areas of law, for various lines that have been drawn to distinguish bad aliens from good aliens. Part II discusses how, in the context of the McCarthy era, some of the same demarcations were used to distinguish good from bad citizens based on presumed affiliations with bad aliens or enemy states. Part III focuses on the war on terrorism in the wake of September 11, and contends that the distinctions between good and bad aliens from each of the previously studied historical periods have influenced official and unofficial state imagination of, and response to, the terrorist threat. Part IV argues that the responses to the threat function to legitimize the war on terrorism, and describes that process.

11. See *infra* notes 167–68 and accompanying text.

12. See *infra* notes 169–71 and accompanying text.

I. IMMIGRATION LAW AND BAD ALIENS

Over the past two hundred years, the United States has restricted immigration in different ways to different groups, largely depending upon who or what is considered to pose a threat to national unity or security. During various periods, certain groups or types of people became the target of exclusion, deportation, detention, or heightened scrutiny. To the extent that the treatment was aimed at entire nationalities or races, there was little or no room for individuals within those groups to demonstrate their loyalty, assimilability, or goodness. When entire national groups were presumed but not determined to pose a threat, individuals were sometimes able to distance themselves from their state of nationality or from others from that state. In other words, they could show that they were good, not bad, aliens.

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

United States immigration law provides a rich site for studying the creation and discipline of the polity because of this explicitness about who is considered a potentially good member of the polity and who is presumptively, if not totally, excluded from such membership. Immigration law is also relatively immune from legal challenge from either inside or outside the United States. Despite an increasing proliferation of international human rights law and institutions in numerous areas that were at one point seen as securely within a state's sovereign rights, immigration law—even with its implications for individual and group rights—largely remains outside the ever-lengthening arm of the human rights regime. With the excep-

tions of international refugee and asylum law,¹³ a state's right to determine its membership through policies of admission and deportation has remained firmly within its realm of sovereignty. States may, of course, enter into treaties with other states over immigration matters such as nationality, guest workers and extradition, but customary international law and established human rights regimes have little bearing on such decisions.¹⁴

International law largely defers to states to make their own immigration policy, mostly out of respect for territorial sovereignty. If sovereignty is to have any meaning, it must include a state's right to maintain its physical borders by deciding who may or may not enter. That a state's own laws determine immigration policy does not mean that all state actions regarding immigration necessarily go unchallenged. In some nation states, for example, constitutional rights might be used to oppose certain government policies or actions. Such attempts in the United States, however, have nearly universally failed; the United States Supreme Court has held that the executive branch has plenary power over questions of immigration. At the end of the nineteenth century, the Supreme Court first stated this doctrine. In doing so, it referenced international law's deference to nation states on matters of immigration to justify the executive branch's near-unfettered discretion in such matters.¹⁵

But immigration law is obviously not the only terrain on which the war on terrorism is fought. And immigration law is not isolated from other legal and social regimes that reflect and affect societal understandings about citizenship, patriotism, multiculturalism, and tolerance. Hence, some of the same distinctions drawn in immigration law and policy can often be

13. See generally Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, available at http://www.unhcr.ch/html/menu3/b/o_c_ref.htm.

14. Public international law has addressed nationality, although generally around the issue of which state has the right to represent a given individual before an international body. See, e.g., *Nottebohm Case*, Preliminary Objection (*Liech. v. Guat.*), 1953 I.C.J. 111 (Nov. 18), available at 1953 WL 8; *Nottebohm Case*, Second Phase, 1955 I.C.J. 4 (Apr. 6), available at 1955 WL 1. For discussion of a variety of international legal attempts to regulate nationality, see RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* (2d ed. 1994).

15. See *Chae Chan Ping v. United States* ("The Chinese Exclusion Case"), 130 U.S. 581, 606 (1889), discussed *infra* at notes 34–37 and accompanying text.

found in other areas of the law as well, for example, in criminal law, welfare law, and civil rights law. To the extent that I consider these other areas of the law in this part and elsewhere, I maintain that they rely upon the same semiotic structure I identify in immigration law. In Part II, for example, I move outside immigration law by studying how a distinction between good and bad citizens—both native born and naturalized—has also emerged in response to foreign threats to the integrity of the nation. In particular, I discuss the internment of Japanese Americans during World War II and the treatment of citizens suspected to be Communists during the 1950s.

This part sets forth the three classes or prototypes of bad aliens against which, I argue, the United States has at least in part constructed its immigration law and policy as well as other laws that attempt to respond to perceived threats to national security. I present this exploration of the history and (re)creation of the bad alien in different moments in the history of United States immigration law not only to study how bad aliens have been defined, but also to explore the way that the existence of bad aliens structures the conduct of their opposites. How should good aliens prove themselves?

A. *The Enemy Alien*

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

Of course, United States law does not formally require noncitizens living in the United States to give up their loyalty to their country of nationality unless and until they become naturalized citizens of the United States.¹⁶ Presumably, one

16. See Immigration and Nationality Act § 337(a), 8 U.S.C. § 1448 (2000) (requiring persons applying for naturalization to take an oath of renunciation and allegiance). Peter Spiro has argued for the elimination of the renunciation oath. See Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY

can and often does live in the United States as a nonimmigrant or as a noncitizen immigrant with full attachment and loyalty to the country of her citizenship.¹⁷ Depending upon the state of nationality, this attachment is sometimes seen as threatening, while other times it is accepted as natural and benign (and occasionally even charming).

The first federal government restriction on immigration to the United States responded to the threat of infiltration by nationals of enemy states. In reaction to "the French Revolution, and the ensuing turmoil in Europe, [which] had raised new fears about foreign political intrigue and influence,"¹⁸ Congress passed the Alien and Sedition Acts of 1798, which included the Alien Enemy Act.¹⁹ The Alien Enemy Act granted authority to the executive during times of declared war or foreign incursion to "apprehend[], restrain[], secure[] and remove[], as alien enemies" all unnaturalized males over thirteen years of age who were "natives, citizens, denizens, or subjects of the hostile nation or government."²⁰ With this Act, Congress chose to regulate immigration federally to prevent states from unwittingly allowing enemies into the country. As one supporter of the legislation explained at the time:

If no law of this kind was passed, it would be in the power of an individual State to introduce such a number of aliens

L.J. 1411 (1997). Despite that the oath has never been enforced, in that applicants "have never been required to demonstrate that they have taken steps to make good on their renunciation," *id.* at 1459, Spiro argues that requiring the oath "pose[s] serious societal costs by suppressing naturalization rates." *Id.* at 1416.

Although dual citizenship is generally disfavored, the United States permits dual citizenship in a number of situations. For a list of these situations, see T. Alexander Aleinikoff, *Between Principles and Politics: U.S. Citizenship Policy*, in FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 119, 138–39 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000).

17. American immigration law makes a fundamental distinction between two broad categories of aliens, immigrants and nonimmigrants. Aleinikoff, *supra* note 16, at 119–20.

18. STAFF OF SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, 167 (1981) [hereinafter 1981 SCIRP REPORT].

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

20. Alien Enemy Act § 1. The Sedition Act, which eventually expired, was even more broad, permitting the executive to deport "all such aliens as he shall judge dangerous to the peace and safety of the United States." Act of June 25, 1798, ch. 58, § 1, 1 Stat. 570, 571 (1798) (expired 1800).

into the country, as might not only be dangerous, but as might be sufficient to overturn the Government, and introduce the greatest confusion in the country.²¹

The Alien Enemy Act specifically tied United States foreign relations to immigration. Indeed, in 1800, James Madison justified the Act based on the war powers granted to Congress.²² For Madison, distinguishing between alien enemies and alien friends (all aliens that are not alien enemies²³) was crucial.²⁴ Alien friends, as individuals, were under the jurisdiction of municipal law, while the law of nations governed alien enemies.²⁵

The Alien Enemy Act has been applied throughout the years, most notably during the Second World War. In 1940, national security was at the heart of immigration policy and was manifested in part in the President's Reorganization Plan No. V, which transferred the Immigration and Naturalization Service ("INS") to the Department of Justice from the Department of Labor.²⁶ In 1941, hundreds of thousands of Italians, Germans, and Japanese were considered enemy aliens and registered under the Alien Registration Act. They were restricted in their travel and conduct and subject to internment.²⁷ By 1942, the INS had detained many and placed many more in relocation centers.²⁸ Although today most people in the United States would seem to agree that the internment of United States citizens of Japanese, Italian, and German descent was

21. 8 ANNALS OF CONG. 1985 (1798) (cited in 1981 SCIRP REPORT, *supra* note 18, at 167-68).

22. See Gerald Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 936 (1991). Neuman criticizes the Madisonian argument. See *id.* at n.150 ("This, of course, is a serious weakness in Madison's argument. Putting aside the federalism question, he did not adequately explain how executive expulsion of alien enemies could be reconciled with separation of powers, due process, or the jury trial guarantee, or why it need not be.").

23. *Id.* at n.149 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 360-61 (William C. Jones ed., Bancroft-Whitney 1916) (1765)).

24. *Id.* at 936.

25. *Id.* at 936-37.

26. CONG. RESEARCH SERV., 96TH CONG., REPORT ON THE HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE 47 (Comm. Print 1980) [hereinafter 1980 SCIRP REPORT].

27. *Id.* at 49. Months later, Hungarians, Romanians, and Bulgarians were classified as enemy aliens. *Id.*

28. *Id.* at 49-50. For discussion of the treatment of United States citizens of Japanese, Italian, and German descent during the war, see *infra* notes 98-102 and accompanying text.

morally, if not legally, wrong,²⁹ the detention of noncitizens seems to have caused significantly less concern. The Alien Enemy Act remains a part of the law.

Blanket suspicion of nationals of enemies or potential enemies of the United States has not been limited to actions taken under the Alien Enemy Act itself. In the late 1970s, for example, in response to the Iranian hostage crisis, the INS revoked deferred departure dates previously granted to Iranian nationals (many of whom were students) out of fear that they had retained their loyalty to Iran and were thus a threat to the United States.³⁰

B. The Unassimilable Alien

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

In 1882, Congress passed an act to suspend the immigration of Chinese laborers for ten years.³¹ In 1888, it furthered the effect of the 1882 law by extending the prohibition to those who had previously lived in the United States but had returned

29. *But see infra* note 119.

30. The INS action was judicially upheld as a valid response to the crisis, despite a claim that it violated due process and the Administrative Procedures Act. *Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980). According to the Ninth Circuit Court of Appeals, "[d]ecisions involving the relationship between the United States and its alien visitors often implicate our relations with foreign powers, and because of their political nature, are generally more within the competence of the Legislative and Executive Branches than the Judiciary." *Id.* at 1360. On the question of whether the directive was overly broad in its application to plaintiff, the court stated, "in this sensitive foreign policy area we would resolve the ambiguity in favor of the President." *Id.* at 1361 n.6.

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

home temporarily in accordance with what was then the law.³² The 1888 statute conflicted with earlier treaties between the United States and China, one of which recognized "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration and emigration of [both American and Chinese] citizens."³³ Nevertheless, the United States Supreme Court upheld the statute in *Chae Chan Ping v. United States*, a case commonly referred to as the *Chinese Exclusion Case*.³⁴

In *Chae Chan Ping*, the Court upheld the 1888 act, even though the United States was not at war with China. The Court connected the power of immigration to the nature of sovereignty:

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.³⁵

Thus, the Chinese were not excluded because they were enemy aliens.³⁶ Rather, Congress presumably chose to exclude them, according to the Court, because it "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security. . . ."³⁷ Even in a nation state made up of immigrants, the right types of immigrants would need to be chosen. Many settlers in the United States had fled their homelands, purposefully choosing a new loyalty and ultimately adopting new customs and language, but some potential immigrants—in this case the Chinese—were seen as incapable of doing the same.

United States immigration policy continued, as a formal matter, to address the issue of assimilation well into the next

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

33. *Fong Yue Ting v. United States*, 149 U.S. 698, 733 (1893) (Brewer, J., dissenting) (citing the Burlingame Treaty, July 28, 1868, U.S.-Ch., art. 5, 16 Stat. 739, 740).

34. 130 U.S. 581 (1889).

35. *Id.* at 606.

36. The Court noted, however, that, were the states at war, it "would render the necessity of the proceeding only more obvious and pressing." *Id.*

37. *Id.*

century. In 1907, the Dillingham Commission, a joint congressional-presidential commission on immigration, was established to study United States immigration problems.³⁸ Among the Commission's recommendations published in 1911 were that "the United States should carefully consider the appropriate process and desired results of assimilation . . . and limits should be placed on the number of persons of each race allowed to enter the United States each year."³⁹ The act that emerged in 1917 accomplished a portion of that goal; it codified all previous immigration exclusions, and added to the list of inadmissible classifications those who were illiterate and those coming from a particular zone (which happened to be comprised of most of Asia and the Pacific Islands).⁴⁰ This "barred Asiatic Zone" went from Afghanistan to the Pacific, excepting only Japan and the Philippines, the latter of which was at the time a United States territory.⁴¹ The Immigration Act of 1924 barred from entry all aliens who were not eligible for citizenship.⁴² Given that only whites could be naturalized as citizens, the Japanese also became excludable.⁴³

The 1917 and 1924 acts, in addition to continuing Asian exclusion, reflected increased opposition to immigration during World War I that was based in part on "the alleged illiteracy of

38. 1980 SCIRP REPORT, *supra* note 26, at 23.

39. *Id.* (citing WILLIAM P. DILLINGHAM, IMMIGRANTS AS CHARITY SEEKERS, S. DOC. NO. 61-747, at 45-48 (3d Sess. 1911)).

40. *Id.* at 23 (describing the 1917 immigration act's exclusion of virtually all immigration from Asia and the requirement of literacy as a basis for entry).

41. The zone included parts of China, all of India, Burma, Siam, the Malay States, part of Russia, part of Arabia, part of Afghanistan, the East Indian Islands and most of the Polynesian Islands. Immigration Act of Feb. 5, 1917, ch. 29, §3, 39 Stat. 874, 876 (repealed 1952). See also S. REP. NO. 81-1515 (1950), reprinted in OSCAR M. TRELLES, II & JAMES F. BAILEY, III, 1 IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 54 (1979).

42. Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162 (repealed 1952) ("No alien ineligible to citizenship shall be admitted to the United States . . .").

43. The 1790 Act limited citizenship to "free white person[s]." Act of Mar. 26, 1790, ch. 3, §1, 1 Stat. 103, 103 (repealed 1795). In 1870, the Act was amended to include "aliens of African nativity and to persons of African descent." Act of July 14, 1870, ch. 254 § 7, 16 Stat. 254, 256. The 1870 amendment led to a series of federal cases in which individuals denied citizenship argued that they were white. For discussion of some of these cases, see IAN HANEY-LÓPEZ, WHITE BY LAW (1996); John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000); Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HISTORY 67, 103-17 (1999).

people from [the south and east of Europe] and the concern that they were of races that were more difficult for the United States to assimilate."⁴⁴ In 1921, Congress implemented the Dillingham Commission's recommendation to institute quotas. The quotas were biased in favor of western Europeans in that they explicitly mirrored the demographics of the United States population in 1910.⁴⁵ Thus, the quota for nationals of any given state was based on the percentage of foreign born persons from that state in 1910. In 1924, new quotas were enacted based on the population demographics of 1880, thereby further restricting immigration from non-western European countries.⁴⁶ It was not until 1943 (after the Chinese allied with the United States during World War II) that Chinese were again made admissible.⁴⁷ By 1952, the absolute exclusion of Asians had ended, but strict quotas applied.⁴⁸ The quotas for all nations were not lifted until 1965.⁴⁹

Arabs posed a problem for immigration law during the period of Asiatic exclusion because of uncertainty as to whether they should be considered white. At the time of the 1924 Act, about 200,000 Arabs lived in the United States. Eighty percent were from Syria and Lebanon, and ninety percent of them were Christian.⁵⁰ Many Arabs were granted naturalization, although some judges refused to naturalize Arabs, on the ground that they were Asiatic, even if from outside the barred zone.⁵¹

44. 1980 SCIRP REPORT, *supra* note 26, at 23.

45. *Id.* at 27. See also *id.* at 28–29 for tables showing the effects of the quotas on different nationalities.

46. For a comparison of the effects of the 1921 and 1924 Acts, see *id.* at 35. The quotas did not apply to individuals from Canada, Newfoundland, Mexico, Cuba, Haiti, the Dominican Republic, the Canal Zone, and independent Central and South American countries. *Id.* at 34.

47. *Id.* at 47.

48. Only two thousand individuals whose ancestry was deemed attributable to the "Asia-Pacific triangle," for example, were admitted into the country, regardless of which country they were coming from. See Immigration and Nationality Act of June 27, 1952, ch. 477, § 202(e), 66 Stat. 163, 178 (codified as amended in scattered sections of 8 U.S.C.).

49. Immigration and Nationality Act, Pub. L. No. 89–236, sec. 201, §1(e), 79 Stat. 911, 911 (codified as amended at 8 U.S.C. 1151 (2003)).

50. Louise Cainkar, *The History of Arab Immigration to the U.S.: An Introduction for High School Students*, at <http://www.adc.org/education/AAImmigration2.htm> (last visited Oct. 23, 2003).

51. See Department of Justice, *The Eligibility of Arabs to Naturalization*, 1 INS MONTHLY REV. 12, 15 (Oct. 1943) [hereinafter INS MONTHLY REV.]. The barred zone excluded Persia, part of Afghanistan, part of Russia and most of what

A 1943 INS *Monthly Review* article addressed the question whether Arabs were white, recognizing that the answer had implications at the time for both naturalization and exclusion.⁵² In response to a 1942 federal trial court decision in Detroit holding that Arabs were “not white persons within the meaning of the act,”⁵³ the INS made clear that its view and the view of the Board of Immigration Appeals was “that a person of the Arabian race is eligible to naturalization. . . . Accordingly an Arab who applies for admission to the United States is not excluded because of his race.”⁵⁴ The INS based its view on the government brief submitted in a 1923 Supreme Court case. Although that case involved naturalization of an Indian,⁵⁵ the brief had acknowledged that Asiatic races might be eligible for naturalization. Thus, the INS noted:

Western civilization may, therefore, include so much of the Near East as contributed to, and was assimilable with, the development of the Western civilization of Greece and Rome. Language, literature, religion, government and races, both of the Aryan and Semitic roots, became blended into the European civilization of Rome and were extended by the genius of Columbus to the Americas.⁵⁶

Moreover, the INS continued, because the contributions that Arabs and other Semitics have made to Western civilization have long been well-known, the authors of the original statute in 1790 would not have intended Arabs to be excluded from the category of white persons.⁵⁷ Arabs, it would seem, were a part of the origins of Western civilization and had also been assimilated by it. Both of these factors paved the way for their entrance into the United States.

was then Arabia. See S. REP. NO. 81-1515 (1950), reprinted in TRELLES & BAILEY, *supra* note 41, at 54.

52. See INS MONTHLY REV., *supra* note 51, at 12.

53. In re Ahmed Hassan, 48 F.Supp. 843, 846 (D.Mich. 1942) (quoted in INS MONTHLY REV., *supra* note 51, at 14 (emphasis omitted)).

54. INS MONTHLY REV., *supra* note 51, at 12.

55. See *United States v. Thind*, 261 U.S. 204 (1923). The Court found that Thind, a high caste Hindu from India, was not a white person within the meaning of the statute.

56. INS MONTHLY REV., *supra* note 51, at 15 (citing Brief for the United States at 20-21, *Thind* (No. 222)).

57. *Id.* at 15-16.

Even with the eventual repeal of the explicitly racist immigration preference system, United States law and policy has continued to presume that some aliens are more assimilable than others. That the vast majority of immigrants are admitted through a system of preferences for close family members, for example, guarantees that most of those who come into the country will do so to join already, at least partially, assimilated family members.⁵⁸ Even the lottery system, which is meant to increase immigration from countries from which there has not been an historical pattern of immigration and whose citizens would therefore largely be excluded under the family preference system, seeks to assure some level of assimilation. To be admitted, lottery winners must have a high school education or its equivalent or, within five years of the date of application for a visa, have two years of "work experience in an occupation which requires at least 2 years of training or experience."⁵⁹

Since 1965, the Arab immigrant population in the United States has changed considerably. Approximately sixty percent of Arab immigrants over the past forty years have been Muslim.⁶⁰ Although never specifically excluded on the basis of religion, Muslims have also tended to be seen as unassimilable. Nearly by definition, they are incapable of assimilating to a country in which government-sponsored "cultural diversity" around the (secularized) winter season of Christmas is represented by a Christmas tree, a menorah and a sign saluting lib-

58. Family members of citizens are more readily admitted than those of permanent residents, thereby giving preference to the family members of those who have demonstrated proficiency in English and knowledge of United States history and government. Immigration and Nationality Act, 8 U.S.C. § 1152(a)(4)(A) (1999) (illustrating that the priority system for family-sponsored immigrants prefers relatives of American citizens over noncitizens). Although not a part of immigration law, English-only statutes also provide a means of encouraging linguistic assimilation. See, e.g., English as Official Language, ALA. CONST. amend. No. 509 ("The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced."); ARIZ. CONST. art. XXVIII, § 3 ("Prohibiting this State from using or requiring the use of languages other than English"). See generally Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133 (2001) (providing a comprehensive theoretical framework for the ongoing debate regarding English-only laws and education policies).

59. 8 U.S.C. § 1153(c)(2)(B) (1999).

60. Cainkar, *supra* note 50.

erty.⁶¹ Moreover, United States immigration law has long excluded individuals who are in polygamous marriages,⁶² which, although seemingly passed with Mormons, not Muslims, in mind,⁶³ signals that one practice of Islam will not be tolerated in the United States.

Long before September 11, Muslims and Arabs (the latter of which today are generally presumed to be Muslim) were subject to negative stereotypes.⁶⁴ In particular, they have been stereotyped as terrorists in both the public and private spheres.⁶⁵ The presumption of Arab assimilability from the 1920s seems to have disappeared. Far from assimilable, those thought to be Muslims and/or Arabs are often presumed to pose a threat to both the political and cultural unity of the nation. If they are Muslim, they are suspected of having greater fealty to their religion—one that is often equated with terrorism—than to the United States.

The presumed connection between terrorism and Islam, particularly of the Middle Eastern type, collapses categories of and assumptions about religion, cultural assimilation and politics. Columbus might have been a “genius,”⁶⁶ but new Arab immigrants from the Middle East are considered to be from a different civilization than that of the immigrants from an earlier generation. The terrorism-Islam conflation has become so ingrained in the American mindset that initial media reports after the 1995 bombing of the federal building in Oklahoma

61. See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (Blackmun, J., plurality opinion).

62. 8 U.S.C. § 1182(a)(10)(A) (2003) (“Any immigrant who is coming to the United States to practice polygamy is inadmissible.”).

63. The Supreme Court held that it is constitutional for Congress to prohibit polygamy in *Reynolds v. United States*, 98 U.S. 145, 166 (1878). Polygamists were first excluded in 1891. See Act of Mar. 8, 1891, ch. 551, § 1, 26 Stat. 1084, 1084 (current version at 8 U.S.C. § 1182(a)(10)(A) (2003)).

64. According to Jack Shaheen, who has studied images of Arabs and Muslims in popular culture and the media, Arabs and Muslims have been the only groups in the United States over the past forty years that it has been socially acceptable to portray based on negative stereotypes. See JACK G. SHAHEEN, *THE TV ARAB* 1–3, 122–25 (1984).

65. As Susan Akram stated in 1999: “Arabs and Muslims are vulnerable as immigrants or non-immigrants residing in the United States because of the negative stereotyping equating them with terrorists” Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 *GEO. IMMIGR. L.J.* 51, 54 (1999).

66. See *supra* note 56 and accompanying text.

simply assumed that the culprits were from the Middle East.⁶⁷ That event breathed new life into the term "domestic terrorism," by continuing to distinguish the acts of Timothy McVeigh and Terry Nichols from acts committed by "terrorist groups," which are presumed to be foreign. Ironically, in the wake of the "domestic terrorist" bombing, perpetrated by homegrown citizens of European stock, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the Antiterrorism and Effective Death Penalty Act (AEDPA). The effects of the anti-terrorist provisions of those laws have largely been felt by Arabs and Muslims in the United States.⁶⁸ Discussing this series of events, Kevin Johnson has noted that "[m]any Arab Americans generally feel that the 'war on terrorism' during the 1990s in fact has been a war on them."⁶⁹ In criticizing the enforcement of the part of the AEDPA that permits secret evidence to be used in deportation hearings against aliens accused of terrorist activity, the ACLU's legislative counsel noted in February 2000 that "[v]irtually every recent secret evidence case that has come to public attention involves a Muslim or an Arab."⁷⁰

To the extent that Muslims have been stereotyped as terrorists, terrorists have been presumed to be Muslim, and generally Arab. As such, even Christian Arabs or Arabs from countries whose governments are friendly to the United States have often been considered unassimilable. This historical sus-

67. Some still insist on a connection between the Middle East, and even Osama bin Laden himself, and the Oklahoma bombing. See, e.g., The Oklahoma Bombing Investigation Committee, at <http://www.okcbombing.org> (last visited Oct. 23, 2003) (an organization which claims to have a mission to "find the whole truth" and expose a cover-up surrounding the post-bombing investigation and official report).

68. See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 322-23 (2002); David Cole, *Secrecy, Guilt By Association, and The Terrorist Profile*, 15 J.L. & RELIGION 267, 268 (2000-2001).

69. Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to, "Is There a Plenary Power Doctrine?,"* 14 GEO. IMMIGR. L.J. 289, 300 (2000).

70. Gregory T. Nojeim, *Statement by Legislative Counsel Gregory T. Nojeim on the Use of Secret Evidence in Immigration Proceedings Before the House Judiciary Subcommittee on Immigration and Claims*, ACLU (Feb. 10, 2000), at <http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=5074&c=98> (last visited Oct. 23, 2003).

picion serves to reinforce public acceptance of profiling in the current war on terrorism.⁷¹

C. *The Undetectable Transnational Movement-Sympathizing Bad Alien*

If the twentieth century began and ended with an idea that United States officials could know a bad alien when they saw one—either because the bad alien was the national of an enemy state or unable to assimilate—the middle of the century called such an understanding into question. As far back as 1903, United States immigration law has excluded individuals who advocate the overthrow of the government by violent means.⁷² Initially aimed primarily at anarchists, the law was expanded in 1918 to include those who were members of certain described subversive organizations.⁷³ By the early 1940s, the law began to be used to deport individuals who were or had ever been members of the Communist Party.⁷⁴ During the Cold War, then, immigration law returned to the nineteenth century explicit concern with protecting national security.

71. See *infra* Part III.

72. The Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214 (repealed 1907) provided for the exclusion of anarchists and others who advocate the overthrow of the U.S. government. For subsequent acts describing types of persons prohibited from residing in the United States, see Act of Mar. 26, 1910, ch. 128, § 2, 36 Stat. 263, 263–64 (reinstating the prohibition of persons who were anarchists and who advocated violent overthrow of the government); Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 875–76 (adding those teaching disbelief of organized government).

73. See Act of May 22, 1918, ch. 81 § 1, 40 Stat. 559, 559 (current version at 8 U.S.C. § 1185 (2003)); see also Act of Oct. 16, 1918, ch. 186, § 1, 40 Stat. 1012; Act of June 5, 1920, ch. 251, 41 Stat. 1008 (amending the Act of Oct. 16, 1918, and expanding excludable classes of aliens to include those who write or publish material advocating the overthrow of government, those who distribute such material or are affiliated with any such organization, and those persons who give pecuniary assistance to such organizations).

74. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), discussed *infra* notes 84–92 and accompanying text; *id.* at 588 n.15 (discussing the history of the authorization of deportation on ideological grounds). Communists were not excluded by name until 1950. At that point, Congress chose to exclude Communists specifically to avoid the necessity of proving that individual members were attempting to overthrow the government. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT 49 (Comm. Print 1988).

In 1957, Robert Divine explained what he saw as a shift in emphasis in immigration law from that of the preceding decades:

Previously the primary motivation of the restrictionists had been racial and cultural nationalism—the desire to preserve the predominant cultural patterns and ethnic composition of the United States by limiting immigration. With the rise of totalitarian governments and the crisis of the second World War, a new stress on nationalism in its most fundamental meaning, the security of the nation, became evident. . . . The fear of Communistic infiltration, which played such a large role in mid 20th-century American life, permeated discussions of immigration legislation and tended to replace the old fear of ethnic invasion as the dominating concern in immigration policy.⁷⁵

Thus, while the enemy alien and unassimilable aliens were marked by racial or national difference, the undetectable alien posed an altogether new challenge. As with the enemy alien, the threat was associated with foreign powers. But this time the foreign powers were more amorphous than in the past. They were not necessarily state-based, and they had a new strategy; they attempted to infiltrate and infect the local population. Although the foreign threat had its origins in an enemy state (the Soviet Union), it could not be contained. Sympathizers were part of a transnational organization, and could potentially enter the United States from many different countries. Thus, white Europeans, many from countries whose nationals had long been admitted to the United States, posed the threat. Neither the alien infiltrators nor the citizens they successfully affected or infected were easily identifiable.

In response to this foreign threat, Congress passed a variety of measures specifically aimed at members of the Communist Party, rather than simply considering the Communist Party to be one of the described subversive organizations in the earlier law. New laws targeted foreign nationals, but were also aimed at naturalized and even United States-born citizens. The Internal Security Act of 1950, which required American Communist Party members to register with the Attorney Gen-

75. ROBERT A. DIVINE, *AMERICAN IMMIGRATION POLICY, 1924-1952* 163 (1957).

eral, constituted one such measure.⁷⁶ Part of the Act refers to the need for security and safety of the United States during World War II, thereby implying the necessity for wartime incarceration of Japanese Americans.⁷⁷ The difference, of course, was that Communists from Europe, as a subset of Europeans, were not as readily detectable as Japanese Americans who were all presumed to be disloyal.

The Internal Security Act built upon earlier ideological grounds aimed at anarchists by specifically identifying Communist or totalitarian organization membership as a ground for exclusion, deportation, or denial of naturalization. It also raised the bar for naturalization by requiring the ability to read, write, and speak English.⁷⁸ To the extent that the bad alien might be detectable, language would seem to have been one possible, if overly broad, identifier.

The legislation was passed, Congress made clear, to prevent Communist infiltration. Congress began its description of the general threat as follows:

There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.⁷⁹

Although Congress clearly believed that a foreign government controlled the movement,⁸⁰ it did not refer specifically to the Soviet Union. Even if the Soviet Union was thought to head the movement, the movement's transnationalism posed the threat. Because agents of this decidedly foreign movement

76. Internal Security Act of 1950, ch. 1024, tit. 1 § 7, 64 Stat. 987, 993–95 (repealed 1968).

77. Internal Security Act of 1950, ch. 1024, tit. 2 §§ 101(10)–(11) & 103(a), 64 Stat 987, 1020–21 (repealed 1971).

78. Internal Security Act § 30, 64 Stat. at 1018 (codified as amended at 8 U.S.C. § 1423 (2003)).

79. Internal Security Act. § 2(1), 64 Stat. at 987 (repealed 1993).

80. Internal Security Act. § 2(4), 64 Stat. at 987 (“The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.”).

might be nationals of one of many countries, including "friendly" states, excluding or deporting nationals of particular states would not stop the infiltration. Thus the legislation aimed to prevent infiltration and infection of the local population by identifying Communists, both those who attempted to enter the country and those who were already present.

That immigration was seen as infiltration is exemplified in a paragraph explaining the necessity for the law: "One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society."⁸¹ Communists did not, however, need to be naturalized to cause problems. Their travel "from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement."⁸² Though not under the purview of the Immigration and Naturalization Service, foreign representatives were also feared because they could "inspire" Communist networks in the United States, as they "are sent into the United States ostensibly as attachés of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities . . ."⁸³ Immigration law during this era aimed to exclude Communists and to ensure that, when it had failed to prevent their entry, it could remedy the failure through deportation.

In the late 1940s, even before the passage of the Internal Security Act, three resident aliens—one each from Greece, Italy, and Russia—were placed in deportation proceedings for their membership in the Communist Party.⁸⁴ They had all lived in the United States for at least twenty-five years, were married to citizens, and had citizen children.⁸⁵ They did not deny that they had been members of the party, but each had left the party before 1940.⁸⁶ In 1952, the United States Supreme Court upheld the deportations under a 1940 Act, due largely to the failure of the aliens to become naturalized citi-

81. Internal Security Act. § 2(14), 64 Stat. at 989.

82. Internal Security Act. § 2(8), 64 Stat. at 988.

83. Internal Security Act. § 2(12), 64 Stat. at 988-89.

84. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

85. *Id.* at 581-583.

86. *Id.* *Harisiades*, who maintained close association with members of the Communist Party, did not actually leave the party voluntarily, but was kicked out.

zens.⁸⁷ They were suspect because they had not, through naturalization (an opportunity which, unlike the Chinese in *Chae Chan Ping*,⁸⁸ they had been afforded), renounced their "foreign allegiance or formally acknowledg[ed] adherence to the [United States] Constitution"⁸⁹ For the Court, noncitizen residents, even those with close ties to the United States, continued to be identified with their foreign allegiance, even when the allegiance was to a transnational entity.⁹⁰ The Court found it well within Congress's power over immigration matters to guard against calls of loyalties from the Communist Party or from foreign states with large Communist Party membership.⁹¹ Indeed, the Court analogized the situation to that of enemy aliens:

Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy But it does not require war to bring the power of deportation into existence Congressional apprehension of foreign or internal dangers short of war may lead to its use.⁹²

In essence, the Court empowered the executive to treat aliens from non-enemy states as enemy aliens.

Over time, the fear of Communist infiltration subsided. Nevertheless, even after the fall of the Soviet Union and the Berlin Wall, United States immigration law has continued to exclude Communist Party members from entering the country,

87. *Id.* at 580.

88. See *supra* note 37 and accompanying text.

89. *Harisiades*, 342 U.S. at 585.

90. See *id.* at 585–86 ("By withholding his allegiance from the United States, he leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect.").

91. See *generally id.* at 595–96. In 1940, the U.S. Communist Party had expelled all aliens, which accounted at least in part for one plaintiff's termination of membership. Although not basing its holding on this fact, the Court noted that "[w]hen the Communist Party as a matter of party strategy formally expelled alien members en masse, it destroyed any significance that discontinued membership might otherwise have as indication of change of heart by the individual." *Id.* at 595.

92. *Id.* at 587.

even as visitors.⁹³ Indeed, post-Cold War amendments simply provided an exception for individuals who do not pose a threat to United States security and whose Communist Party membership either was involuntary⁹⁴ or has been terminated for two or five years prior to entry, depending on the type of regime currently in power in their country.⁹⁵

II. BAD CITIZENS

Thus far, we have explored the historical demarcations that immigration law has used to distinguish good aliens from bad aliens. A similar semiotic dynamic accounts for distinctions often drawn between aliens and citizens, as well as between good and bad citizens. We have already seen the role that race and assumptions about assimilability played in the determination of eligibility for citizenship. Citizenship was initially made available only to free white persons, decades later extended to former slaves,⁹⁶ and only made available to most Asians in the 1940s and 1950s.⁹⁷ But not all citizens are immune from generalized suspicion or even accusations of treachery. It is assumed that some naturalized citizens never truly switch their loyalty to the United States and that some (previously) loyal citizens are subject to the influence of transnational movements. Thus, United States law has at times deployed the same distinctions used to differentiate aliens to distinguish citizens as well, thereby identifying enemy citizens, unassimilable citizens, and undetectable transnational movement-sympathizing citizens.

The internment of Japanese Americans in World War II provides the most obvious example of the treatment of enemy

93. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(D)(i) (2000) ("Any immigrant who is or has been a member of or affiliated with the Communist party or any other totalitarian party . . . is inadmissible.").

94. *Id.* § 1182(a)(3)(D)(ii).

95. *Id.* § 1182(a)(3)(D)(iii)(I). This section makes an exception for those whose

membership or affiliation terminated at least—(a) 2 years before the date of such application [into the US], or (b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship

96. *See supra* note 43.

97. *See supra* notes 48–49 and accompanying text.

citizens. In 1942, President Roosevelt issued Executive Order 9066, ordering the removal of all persons of Japanese ancestry—citizens and noncitizens alike—from eight western states and from certain specified military areas.⁹⁸ He issued this order despite conclusions by the FBI, the Justice Department and the Army that such a measure was unnecessary.⁹⁹ In total, around 120,000 individuals of Japanese descent—sixty percent of whom were citizens—were evacuated in order to protect “against espionage and against sabotage.”¹⁰⁰ They were eventually moved to “relocation camps,” where they were asked to sign a loyalty oath. The very small percentage who did not sign the oath were labeled “disloyal,” but even those who signed the oath were not released unless they joined the armed forces.¹⁰¹ Hence, the government made it impossible for Japanese and Japanese Americans to prove their loyalty in a way that would allow them to live freely in the affected states or military zones.

There was an obvious racial component to the treatment of Japanese Americans during the war. Long-held assumptions about Asian unassimilability likely played a role in differences in treatment of Japanese Americans and of Italian Americans and German Americans. The latter two groups were also subject to internment during this period, but they were not presumed to be disloyal. There were no blanket internments; rather, internment was based on individual review of personal records and loyalty.¹⁰² Thus, opportunities provided Italian

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

99. See *Korematsu v. United States*, 584 F. Supp. 1406, 1416–17 (N.D. Cal. 1984).

100. Exec. Order No. 9066, 7 Fed. Reg. at 1407.

101. See Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Defiance, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 21–22 (2002).

102. See COMM. ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, 102D CONG., PERSONAL JUSTICE DENIED 284–85 (Comm. Print 1992) (cited in Paula Branca-Santos, *Injustice Ignored: the Internment of Italian-Americans During WWII*, 13 PACE INT’L L. REV. 151, 177 n.187 (2001)).

The United States Supreme Court, in upholding a curfew on Japanese American citizens during the war, acknowledged that United States policies for many years—including those prohibiting immigration and naturalization, the right to own property and the right to marry Caucasians—had contributed to the inability of Japanese Americans to assimilate. See *Hirabayashi v. United States*, 320 U.S. 81, 96–97 n.4 (1943). That United States policies were partly responsible did not,

Americans and German Americans to demonstrate their goodness were denied Japanese Americans.

During the McCarthy era, Congress spent much of its energy attempting to rout out the undetectable Communist-sympathizing citizen. Hence, the Internal Security Act, combined with the McCarran-Walter Act of 1952¹⁰³ and the Smith Act,¹⁰⁴ punished those citizens thought to possess greater affinity and loyalty to a foreign transnational movement than to the United States. Indeed, the Internal Security Act evinced a belief that the Communist movement could most successfully infiltrate if citizens could be brought on board. Importantly, when United States citizens—both naturalized citizens and citizens by birth—participated in the Communist movement, they were considered foreigners. They had “repudiate[d] their allegiance to the United States, and in effect transfer[red] their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.”¹⁰⁵

The “Red Scare” during the McCarthy era contained a fear that even seemingly loyal citizens could be duped into joining the Communists. A Ninth Circuit judge, for example, described the Congressional findings for necessity of the Internal Security Act as follows: “Out of this moving factual appraisal of an outstanding conspiracy of aliens and a few mentally intoxicated or drugged citizens and a sprinkling of the vicious, directed by

however, change the fact that many had not assimilated, *see id.* at 97–98, and that many Japanese Americans continued to be loyal to Japan. Ultimately, for the Court:

[w]hatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.

Id. at 99.

103.. The Immigration and Nationality Act, ch. 2 § 340(c), 66 Stat. 163, 261 (1952) (current version at 8 U.S.C.A. § 1451(c) (2002)) (providing for the revocation of naturalization for any citizen who becomes a member of enumerated transnational organizations such as the Communist Party).

104. Smith Act, ch. 645 § 2385, 62 Stat. 683, 808 (1948) (current version at 18 U.S.C. § 2385 (2003)) (penalizing anyone who advocates the overthrow of the United States government or the government of any State, Territory, District or Possession thereof).

105. Internal Security Act of 1950, tit. 1, § 2(9), 64 Stat. 987, 988 (repealed 1993).

a foreign government, came the authority of Congress"¹⁰⁶ If some thought wayward citizens had been intoxicated or drugged, others imagined an "Invasion of the Body Snatchers"—their bodies had been overtaken by the enemy. Even when drugged or snatched, citizens were held to task for their disloyal thoughts and actions. Hence, those who hoped to avoid suspicion, citizens and noncitizens alike, would need to appear as anti-Communist, or as American, as possible.

Although the bulk of the McCarthy era acts have either been repealed or are no longer enforced,¹⁰⁷ the law continues to question the loyalty of certain citizens. With the end of the Cold War, terrorism began to replace Communism as the primary threat to national security. Like Communism, terrorism is transnational. The protection of national security against terrorist threats requires preventing the physical entry of terrorists and ensuring that citizens and noncitizens inside the country do not support terrorist efforts. Thus, the Anti-Terrorism and Effective Death Penalty Act of 1996 made it a crime to provide material support to groups or organizations that the United States government categorizes as terrorist. The AEDPA specifically applies to citizens as well as noncitizens within the jurisdiction of the United States.¹⁰⁸ Because the majority of designated terrorist organizations are Muslim or Arab,¹⁰⁹ Arab and Muslim citizens and noncitizens have been the primary targets of prosecution.¹¹⁰ When applied to citizens,

106. *Carlson v. Landon*, 186 F.2d 183, 187 (9th Cir. 1950). In that case, the court—while outlining significant discretion for the Attorney General—refused to interpret the Act to permit the Attorney General to hold, without a hearing and without offering any evidence, an alien suspected of being a Communist. *Id.* at 185–86. Perhaps, then, the judge's description was meant as sarcasm. Regardless, it seems to have expressed the dominant narrative of the day.

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

108. 18 U.S.C. § 2339B(a)(1) (2000) ("Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both.").

109. Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997) (Fifteen out of thirty-one designated terrorist organizations were Muslim and/or Arab). The percentage has since increased. See U.S. Dept. of State, *Patterns of Global Terrorism 2002*, <http://www.state.gov/s/ct/rls/pgtrpt/2002/pdf> (last visited Nov. 5, 2003).

110. See Akram & Johnson, *supra* note 68, at 301–08; Cole, *supra* note 68, at 268; see also Adrienne R. Bellino, *Changing Immigration for Arabs with Anti-*

the gist of the accusation is that the citizens are more loyal to terrorist organizations (which, by their very definition, are in opposition to the United States) than to their country of citizenship.

III. BAD ALIENS AND BAD CITIZENS IN THE WAR ON TERRORISM

The post-September 11 war on terrorism demonstrates the continuing organizing power of the demarcations between good and bad aliens and good and bad citizens that immigration and other laws rely upon and perpetuate. In the United States's internal war on terrorism, the terrorists to be kept out or routed out are at various times imagined to be enemy aliens, unas-similable aliens, or undetectable transnational movement-sympathizing bad aliens. The government has used measures ranging from slowed immigration,¹¹¹ mass interviews of young Arab men,¹¹² required registration of aliens from certain countries,¹¹³ secret detention,¹¹⁴ the USA PATRIOT Act,¹¹⁵ the crea-

Terrorism Legislation: September 11th Was Not the Catalyst, 16 TEMP. INT'L & COMP. L.J. 123, 131-35 (2002).

111. See, e.g., *infra* notes 127 & 139 and accompanying text.

112. See Robert E. Pierre, *In a Detroit Suburb, Fear and Anxiety Permeate Arab Enclave Near Detroit: Muslim Americans Feel They Are Targets in War on Terror*, WASH. POST, Aug. 4, 2002, at A1 (early Sun. ed.) (describing the FBI's interviews of 5,000 Arab men); Naftali Bendavid, *Ashcroft: U.S. to Interview 3,000 More Arab Nationals*, CHI. TRIB., Mar. 21, 2002, at N13 (adding an additional 3,000 interviews of Arab and Muslim men to the ongoing 5,000 interviews).

113. See *infra* notes 120-21 and accompanying text.

114. See, e.g., Carl Tobias, *Detentions, Military Commissions, Terrorism, and Domestic Case Precedent*, 76 S. CAL. L. REV. 1371, 1371 (2003).

115. USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). In September 2003, President Bush called for an expansion of the USA Patriot Act to allow federal agents to issue "administrative subpoenas" without the approval of a judge or grand jury, expand the federal death penalty to cover more terrorist crimes, and make it more difficult for suspected terrorists to post bail. David E. Sanger, *Patriot Act Weak, Bush Says: President Seeks More Power for Feds in War on Terrorism*, DENV. POST, Sept. 11, 2003, at A1. Opponents of the expansion argued that the Administration's proposals would weaken the supervisory role of the judiciary and give federal agents excessive discretion in investigating terrorist cases. Eric Lichtblau, *Despite Assurances, Bush's Plan is Rekindling Concern*, N.Y. TIMES, Sept. 14, 2003, at A32.

In November 2003, President Bush signed into law the Intelligence Authorization Act for Fiscal Year 2004, Pub. L. No. 108-177, 117 Stat. 2599 (2003), authorizing funding for United States intelligence agencies and "expand[ing] the list of [financial] institutions" from which United States intelligence agencies can obtain financial data "to include car dealers, pawnbrokers, travel agents, casinos,

tion of the Department of Homeland Security,¹¹⁶ and calls for vigilance by ordinary (loyal) citizens and aliens¹¹⁷ to fight its war. Together, this arsenal is aimed at bad aliens and citizens that embody one or more of the three prototypes described above.

At least initially, the enemy was considered to have been undetected, if not completely undetectable. Immediately following September 11, there were endless expressions of amazement that the September 11 hijackers seemed to have blended in. Not only had the United States government failed to detect them; the hijackers had managed to live in the country largely unsuspected, but also apparently unaffected by the liberty and democracy that surrounded them. Despite the hijackers' apparent assimilation, the government still attempts to find and capture future would-be terrorists at entry through profiling based on stereotypes developed out of the enemy and unassimilable alien categories. Whether such profiling is appropriate or justified after September 11, and a lot of people argue that it is,¹¹⁸ the government has been careful not to rely on profiling alone. The existence of truly random searches at airports, for example, provides a visible means of impressing upon a large part of the population that Muslims and Arabs are not singled out for scrutiny. Even those who are singled out are given the opportunity to "pass," to demonstrate that they are good. Thus, the war on terrorism oscillates between profiling justified by security concerns on one hand and insistence and reliance upon the existence of good Muslims on the other. Simple profiling or large-scale deportation or internment would

and other businesses." 149 CONG. REC. E2399 (daily ed. Nov. 20, 2003) (statement of Rep. Udall), http://fas.org/irp/congress/2003_cr/h112203.html. This act has been criticized by some who view the bill as an attempt to enact the "enormously unpopular 'Patriot II' legislation" in a piece-by-piece fashion in order to avoid debate and resistance. See 149 CONG. REC. at E2428 (statement of Rep. Paul).

116. The Department of Homeland Security was created pursuant to The Homeland Security Act of 2002, § 101, 6 U.S.C. § 111 (2003).

117. See *infra* notes 169–71 and accompanying text.

118. The justifications began soon after September 11. See e.g., Sam Howe Verhovek, *Americans Give in to Race Profiling*, N.Y. TIMES, Sept. 23, 2001, at A1 (discussing how African Americans, Hispanic Americans, and Caucasian Americans think that such profiling, though wrong, is justified); see also David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 974–75 (2002) (citing polls taken soon after September 11 concluding that 60% of the American public favored ethnic profiling if directed at Arabs and Muslims).

not fit neatly into the contemporary self-image of the United States as a country of tolerance.¹¹⁹ More importantly, I argue, the maintenance of a good citizen, even a good Muslim, category is essential to the legitimization of the war on terrorism. The best way for aliens and citizens—Muslims and non-Muslims alike—to ensure that they do not fall into any of the “bad” categories is to support openly the war on terrorism.

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

A. *The Alien Enemy*

The Alien Enemy Act underscores the extent to which United States immigration law generally assumes that noncitizens living in the United States are loyal to the state of their nationality. One of the assumptions underlying the Alien Enemy Act is still very much in force—nationals of states that the United States identifies as terrorist sponsors are particularly suspect.

The INS’s recent special registration requirement for certain nonimmigrant males over the age of sixteen from nearly every Muslim country in the Middle East, some African Muslim countries, and North Korea is largely, though not exclu-

119. For an excellent description of the function of tolerance in contemporary United States state discourse, see WENDY BROWN, *REGULATING AVERSION: A CRITIQUE OF TOLERANCE IN THE AGE OF IDENTITY* (forthcoming 2004).

Some have argued that post-September 11 treatment of citizens and aliens is not as distinguishable from Japanese and Japanese American internment as we might imagine. See, e.g., Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A “Constant Caution” in a Time of Crisis*, 10 *ASIAN L.J.* 37, 45–48 (2003). Moreover, there are those who continue to defend *Korematsu*, suggesting that mass internment of specified groups of citizens is not beyond the legal pale in certain situations. See, e.g., WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 195–205* (1998); Christopher Marquis, *Lawmaker Says Interning U.S. Japanese Was Proper*, N.Y. TIMES, Feb. 6, 2003, at A23, LEXIS, Nexis Library, NYT File (citing Representative Howard Coble of North Carolina’s statement that the internment of Japanese Americans during WWII was appropriate).

sively, aimed at citizens of states with which the United States has poor relations or sees as potential enemies.¹²⁰ The special registration began to receive significant media coverage when Pakistan and Saudi Arabia were added to the list of states whose citizens were required to register.¹²¹ Some criticized the addition of these two countries precisely because both states have been considered allies, even in the war on terrorism.¹²² If citizens of enemy countries are thought to be enemies, citizens of friends are also generally thought to be loyal to the United States. Hence, prior to September 11, Saudis were rarely turned down for visas to the United States¹²³ and, once they

120. Citizens of Iran, Iraq, Libya, Sudan, and Syria were "called-in" for the first registration. The second group was comprised of citizens of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. United States Immigration and Customs Enforcement, Special Registration, <http://www.ice.gov/graphics/enforce/imm/specreg/index.htm> (last modified Dec. 24, 2003).

121. See Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77642 (Dec. 18, 2002) (adding Saudi Arabia and Pakistan to the special registration list).

122. See, e.g., Dan Herbeck, *Registration of Visitors Called Unfair*, BUFFALO NEWS, Jan. 10, 2003, at C1, LEXIS, Nexis Library, BUFFNEW File ("If Pakistan has been a true friend to the U.S., why are people from Pakistan being subjected to this?"); Scott Shane, *Registration Rules Puzzle, Anger Pakistanis in U.S.: Crowd At Embassy in D.C. Hears Explanation of New INS Regulations*, BALTIMORE SUN, Jan. 5, 2003, at 3A. It has since come to light that Saudi Arabia might have had financial ties to hijackers. See Josh Meyer, *U.S. Suspects Saudis Helped Finance 9/11 Hijackers' Effort*, CHI. TRIB., July 25, 2003, at C12 ("Top U.S. officials believe the Saudi Arabian government not only thwarted their efforts to prevent the rise of Al Qaeda and stop terrorist attacks, but also may have given the Saudi-born Sept. 11 hijackers financial and logistical support . . .").

123. Indeed, because of its close ties to Saudi Arabia, the United States had recently implemented a "U.S. Visa Express Program" in Saudi Arabia, which allowed Saudis to get visas in a similar manner to Europeans. The program significantly sped up the visa application process and increased chances of approval. In fact, only three percent of Saudi applicants were rejected in 2000. This process was in contrast to the heightened scrutiny experienced by citizens of Iran, Iraq and other countries on the State Department's list of states that are likely to support terrorists. Visitors from those countries were subjected to background interviews and fingerprinting, and, if found eligible for visas, often waited months to receive them. Duff Wilson & James Neff, *Terrorists Exploited Their Saudi Visas: U.S. Has Been Lax in Monitoring Visas, Particularly from Rich Ally*, SEATTLE TIMES, Nov. 11, 2001, at A10.

The State Department described the U.S. Visa Express process as follows: Acting Deputy Chief of Mission and Consul General Mr. Thomas Furey inaugurated on May 27 new nonimmigrant visa application procedures for qualified Saudi and Third Country visa applicants throughout the Kingdom of Saudi Arabia. The new system, called "U.S. Visa Express," simplifies the visa application process so that qualified applicants no

made it into the country, they were unlikely to be deported. Indeed, the deportation rate for Saudi Arabian citizens was the lowest of all nationalities in 2000. Only five were deported in that year.¹²⁴ Even in the days immediately following September 11, when most flights were still grounded, it appears that the Bush White House approved the evacuation of about 140 Saudis from the United States in order to protect them from feared retribution.¹²⁵

The relationship between the United States and Saudi Arabia, however, has been strained since September 11. The fact that fifteen of the nineteen hijackers were Saudi Arabian citizens could be read to suggest that Saudi Arabia was not an ally after all. It has certainly led to accusations that, even if Saudi Arabia did not explicitly condone terrorism against the United States, it did not take sufficient measures to prevent such actions.¹²⁶ Slowing down the visa process for Saudi young men, initiated soon after the discovery of the hijackers' identities,¹²⁷ and adding Saudi Arabia to the special registration list suggest the United States's uncertainty about the extent to which Saudi Arabia is a clear ally.¹²⁸

longer need to come to the U.S. Embassy to obtain nonimmigrant visas. Similar arrangements have been in place for some time now at many of the U.S. Embassies in Europe, eliminating the inconvenience for visa customers of having to wait in line.

United States Embassy, Nonimmigrant Visas, at <http://usembassy.state.gov/riyadh/wwwhvzxp.html> (last visited Oct. 18, 2001). Recent attempts to access the information on this web page have been unsuccessful because the site states that it is "currently under construction."

124. Wilson & Neff, *supra* note 123.

125. Eric Lichtblau, *White House Approved Departure of Saudis After Sept. 11, Ex-Aide Says*, N.Y. TIMES, Sept. 4, 2003, at A19, LEXIS, Nexis Library, NYT File.

126. See, e.g., James Dao, *Saudis Brush Aside Criticism of Record Against Terrorism*, N.Y. TIMES, Dec. 4, 2002, at A1. The relationship between the United States and Saudi Arabia has been further strained by U.S. assertions that the Saudis are not fully cooperating with the war on terrorism. See, e.g., Don Van Natta, Jr. & Timothy L. O'Brien, *Two Years Later: The Arab Connection; Saudis Promising Action on Terror*, N.Y. TIMES, Sept. 14, 2003, at 1 (discussing in part how Saudi Arabia had continued to refuse American officials access to the families of the September 11 hijackers).

127. At least initially, there was some indication that the heightened scrutiny of visa applicants from Saudi Arabia was only temporary. According to Secretary of State Colin Powell, "[w]e are sensitive to how it will affect our friends." Wilson & Neff, *supra* note 123, at A10.

128. But see, Don Van Natta, Jr. & Timothy L. O'Brien, *U.S. Sees Saudi Gains in Fighting Terrorism*, DENV. POST, Sept. 14, 2003, at 18A (detailing recent Saudi government efforts to block funding of terrorists groups through mosques).

The measures could also be read, however, as an acknowledgement that individuals' loyalties might not be to the states of which they are citizens. Indeed, the events of September 11 suggest that one's primary loyalties might not be to a state at all, but instead to a transnational, international, or regional group or subgroup. As Vincent Cannistraro, former counter-terrorism chief of the Central Intelligence Agency, noted when the State Department decided to slow visas to young Saudi men: "Bin Laden has recruited extremists all over the world. You close off all Saudi visas, then maybe you'll see Swedish Muslims as suicide bombers."¹²⁹

B. The Unassimilable Alien

For years, the United States has imagined and aided in the construction of the terrorist as indisputably "other." In her insightful article on terrorism written after the first World Trade Center bombing, Ileana Porras describes a popular Western image of the terrorist:

The terrorist is always "enemy." The trick is to locate him in the category of the most terrifying and traditional enemy, that one which the public is accustomed to thinking of as the barbarous and primitive outsider. The enemy of legend and history books, the bloodthirsty invader of our collective imagination and individual nightmares. The moslem moorish turkish invader of europe dark mysterious turban wearing merciless scimitar wielding head cutting harem keeping mosque going minaret prayer chanting magician christian hating jerusalem prophanator holy war maker of the past has made a remarkable comeback.¹³⁰

Porras notes how even "normal-looking" terrorists are described to look foreign. Thus, shortly after the 1993 bombing, *Time* described Mohammed A. Salameh, a Jordanian suspect, as "dressed in sneakers and a light gray sweat suit that billowed around him."¹³¹ Porras argues that "the author has cre-

129. Wilson & Neff, *supra* note 123.

130. Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, in *AFTER IDENTITY: A READER IN LAW AND CULTURE* 294, 302 (Danielsen & Engle, eds. 1995).

131. *Id.* at 304 (quoting George J. Church, *A Case of Dumb Luck*, *TIME*, Mar. 15, 1993, at 26) (emphasis in original).

ated an image of Salameh wearing traditional Arab robes, billowing in the wind. It is an image not of Salameh but from *Lawrence of Arabia*.¹³² Moreover, officials described Salameh as a nomad, which Porras identifies as "induced by the same familiar exotic."¹³³ Apparently, he often changed residences. According to an FBI investigator: "One search is leading to another. *But these are nomadic people*. While it may lie in the culture, they bounce from place to place. All different people sleep there, stay a short time, then leave."¹³⁴

If the familiar is turned into the foreign—and unassimilable—Porras also demonstrates how those suspected of terrorism who look indisputably foreign are made recognizable. She quotes a *New York Times* article from the time:

The striking thing about Sheik Omar Abdel Rahman as he was led by the guards into federal court in Manhattan last week was not that he seemed a strange and exotic figure in his clerical robes, dark glasses and red and white turban. Rather, it was that he was entirely familiar . . . immediately recognizable.¹³⁵

Like Osama bin Laden today, the Sheik's photograph had been proliferated throughout the media and he had become recognizable. As such, the American public was accustomed to seeing "strange and exotic" figures. Those figures, however, became synonymous with and reinforced the popular image of a terrorist.

The stereotype of Muslims as terrorists is still very much alive in the wake of September 11. It frames one of the strategies by which the United States government attempts to detect terrorists. Profiling makes those who appear Muslim presumptively terrorist and, as with initial reactions to the Oklahoma City bombing, terrorists are generally thought to be Muslim. Since September 11, the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act have been used to detain and deport

132. *Id.*

133. *Id.*

134. *Id.* (quoting Ralph Blumenthal, *Suspect in Trade Center Bombing Now Seen as Part of Conspiracy*, N.Y. TIMES, Mar. 9, 1993, at A1) (emphasis in original).

135. *Id.* at 303 (quoting Blumenthal, *supra* note 134).

Muslims in disproportionate numbers.¹³⁶ Islamic organizations in the United States have been subjected to intense scrutiny, investigated and searched in attempts to find ties to Al Qaeda.¹³⁷ The scrutiny has been extended to individual Muslims in the United States who have given money or are involved with such organizations.¹³⁸ Although nearly all foreigners entering the United States have difficulty obtaining visas and are subjected to heightened security in the airports, reports suggest that Muslims and Arabs, or those thought to be Muslim, have had a particularly difficult time regardless of their country of origin.¹³⁹

These are only a few of a growing number of examples of the deployment and effects of post-September 11 profiling. Leti Volpp has identified five ways that the United States government has responded to September 11 by directly or indirectly relying on racial profiling in constructing and perpetuating an identity category of "persons who appear 'Middle Eastern, Arab, or Muslim.'"¹⁴⁰ These means range from state detention of large numbers of noncitizens to "private" extralegal violence that she attributes to the disciplining power of the state.¹⁴¹

136. Akram & Johnson, *supra* note 68, at 322; *see also* Bellino, *supra* note 68, at 131–34.

137. *See* Raymond W. Busch & Dennis Murphy, *In Anti-Terrorist Raids, Issues of Tact and Tactics*, WASH. POST, April 11, 2002, at T05 (describing "Operation Green Quest" where nineteen Muslim organizations and homes in Northern Virginia were legally searched); *see also* Mary Jacoby, *Charity: Government Zips its Lips on Frozen Funds*, ST. PETERSBURG TIMES, Jan. 13, 2002, at 1A (describing the federal raid on the Global Relief Fund, a Muslim charity located in suburban Chicago), <http://pqasb.pqarchiver.com/sptimes/index.html?ts=1066190839>.

138. *See supra* note 137; *see also* Andrew Gumbel, *The Disappeared*, INDEP. (London), Feb. 26, 2002, at 1/7 (describing the arrest of the founder of the Global Relief Fund, Rabih Haddad, on December 14, 2001).

139. *See, e.g.*, Jim Rankin, *Canadian Humiliated by Immigration Staff*, TORONTO STAR, Feb. 14, 2003, at A01 (describing the ordeal of a Canadian woman of Indian heritage with the U.S. Immigration and Naturalization Service); *Author Cancels US Tour Over 'Profiling'*, BBC NEWS ONLINE, Nov. 3, 2002 (discussing the refusal of celebrated Canadian author of Indian heritage, Rohinton Mistry, to continue with U.S. book tour due to invasive and humiliating INS security procedures), at <http://news.bbc.co.uk/2/hi/entertainment/2392847.stm> (last visited Feb. 25, 2003).

140. Volpp, *supra* note 8, at 1577.

141. *See id.* at 1577–81 (listing the following as forms of racial profiling by the government and the public: the arrest and detention of 1,200 noncitizens who appear to be Middle Eastern, Muslim, or South Asian; the investigatory interviews of 5,000 male noncitizens from Middle Eastern or Muslim countries; selective immigration enforcement through the Absconder Apprehension Initiative that targets removal of 320,000 Middle Eastern or Muslim noncitizens who have

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

Prior to September 11, those Muslims who groomed and dressed like Osama Bin Laden or Sheik Omar Abdel Rahman were presumed to be unassimilable. To have any chance of assimilation, Muslims from the Middle East would need to project the opposite image. The September 11 hijackers purposefully took advantage of that possibility for assimilation, thereby calling into question the prevailing assumption that terrorists would be so unassimilable that they would be recognizable. At least six of the September 11 hijackers were personally interviewed before receiving visas.¹⁴² Some were admitted to flight schools specifically sanctioned by the INS to grant visas. And, as the next section elaborates, they mostly lived among Americans who never suspected them.

C. The Undetectable Transnational Movement-Sympathizing Bad Alien

With the success of the September 11 hijackers, fear of the undetectable bad alien has made a comeback. Perhaps some terrorists are identifiable based on stereotypes, but the September 11 hijackers apparently assimilated. As political scientist Stephen Cimbala notes: "These men were not your stereotype of the young, grimy, desperate fanatic. These were older, middle-class men, cool, methodical, and very able to assimilate."¹⁴³ Indeed, that they entered and remained undetected as terrorists is a major source of the terror. Just as mass murder-

been issued final orders of deportation; the exclusion of Middle Eastern, South Asian, and Muslim passengers from airplanes and airports; and the perpetration of more than 1,000 hate crimes against those appearing Middle Eastern, South Asian, or Muslim).

142. Wilson & Neff, *supra* note 123.

143. *Terrifyingly Ordinary Neighbours—Act of War: Profile of a Hijacker*, DAILY TELEGRAPH (SYDNEY), Sept. 24, 2001, at 4, LEXIS, Nexis Library, DAITEL File [hereinafter *Terrifyingly Ordinary Neighbours*].

ers and wife-beaters often seem like such nice, quiet men to their neighbors, the terrorists went largely unsuspected. As if on cue, the martial arts instructor of a Lebanese hijacker recalled: "He was a quiet person, with a soft demeanour He was always polite to the staff and respectful—not the stereotype of the kind of terrorist you see in movies."¹⁴⁴ Someone who lived in the same hotel in Florida as one of the hijackers said they had conversations about football and baseball.¹⁴⁵ The hijackers joined gyms and went to bars and adult video shops. One apparently placed a personal ad on the internet. Some lived with wives and children. The men wore Western clothes and had no facial hair. In short, they blended in.

In fact, blending in appears to have been part of the strategy, as indicated by *Military Studies in the Jihad Against the Tyrants*,¹⁴⁶ the Al Qaeda training manual discovered shortly after the attacks. Whether or not they had actually read the manual, the hijackers seem to have lived by the book. An important part of the manual describes how operatives should blend in: "[A]nyone willing to 'undergo martyrdom' should be 'able to act, pretend and mask himself' behind enemy lines."¹⁴⁷ Would-be martyrs are instructed to "[m]aintain an appearance 'that does not indicate Islamic orientation (beard, toothpick, book, long shirt, small Koran),'"¹⁴⁸ not to travel with wives who appear Islamic,¹⁴⁹ not to address each other with traditional Islamic greetings (which invoke Allah), not to appear too inquisitive, and not to cause trouble where they live.¹⁵⁰ The manual also calls upon operatives to live in newly-developed suburban neighborhoods where individuals are unlikely to know each other.¹⁵¹ In other words, would-be martyrs in the United States

144. *The New Breed of Terrorists*, STRAITS TIMES (SING.), Sept. 25, 2001, at 10, LEXIS, Nexis Library, STRAIT File.

145. *Terrifyingly Ordinary Neighbours*, *supra* note 143.

146. The United States Department of Justice has posted an English translation of the manual online, available at <http://www.usdoj.gov/ag/trainingmanual.htm> (last updated Oct. 8., 2002).

147. *Manual Tells Terrorists How to Blend In*, HOUSTON CHRON., Sept. 21, 2001, at <http://www.chron.com/cs/CDA/story.htm/special/terror/response/1057308> (last visited Dec. 1, 2003) [hereinafter *Manual Tells Terrorists How to Blend In*].

148. *Id.*

149. *60 Minutes II: By the Book* (CBS television broadcast, Oct. 9, 2001), <http://www.cbsnews.com/stories/2001/09/26/60II/main312674.shtml> (last visited Oct. 28, 2003).

150. *Manual Tells Terrorists How to Blend In*, *supra* note 147.

151. *Id.*

should take advantage of Americana. While everyone in the neighborhood is out "bowling alone,"¹⁵² Al Qaeda operatives are free to do their work.

If the intent of the September 11 hijackers was to blend in, the fact that they successfully escaped detection caused alarm. How could evil people behave so normally? Perhaps more importantly, how did they get into the United States (most of them officially) in the first place? Terrorists should stick out like a sore thumb; they should not be the nice guys who live next door.

The Congressional investigation into September 11 suggests that perhaps the government missed clues about the hijackers—that the "success" of the hijackers was due at least in part to security failures.¹⁵³ A Congressional investigation was not required, however, to spur the government into beefing up security. Almost immediately following September 11, the United States deployed overt, even official, profiling. The new terrorist profile is intentionally overly broad. September 11 made clear that, due to the transnational character of the threat, a focus on nationals of those countries most suspected of sponsoring terrorism would be too narrow. Similarly, given that even Arab Muslims know how to assimilate, any profile would need to include in its scope those terrorists that might attempt to hide behind an American-acting veil.

Given the broad scope of the profile, what is a good Muslim to do? Demonstrating fealty to the United States, in part by accepting such profiling as a legitimate means to fight terror, would seem to provide a new means of assimilation. Of course, as a result of alien registration, only aliens with a perfect immigration history are entitled to become good Muslims.¹⁵⁴ Oth-

152. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

153. STAFF OF THE SENATE SELECT COMM. ON INTELLIGENCE AND THE HOME PERMANENT SELECT COMM. ON INTELLIGENCE, 107TH CONG., *FINDINGS OF THE FINAL REPORT ON THE JOINT INQUIRY INTO THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001*, 2 (Dec. 10, 2002) (Comm. Print 2002), at <http://intelligence.senate.gov/findings.pdf> ("Although relevant information that is significant in retrospect regarding the attacks was available to the Intelligence Community prior to September 11, 2001, the Community too often failed to focus on that information and consider and appreciate its collective significance in terms of a probable terrorist attack."); see also James Risen, *C.I.A.'s Inquiry on Qaeda Aid Seen as Flawed*, N.Y. TIMES, Sept. 23, 2002, at A1.

154. See Michael Powell, *Groups Decry Immigration Rule*, WASH. POST, Nov. 13, 2003, at A11 (describing "[a] coalition of legal advocacy groups" alleging "that

ers must either defy registration or risk deportation, neither of which removes one from the category of bad alien.

D. Bad Citizens

The more the United States learns about the workings behind September 11 and the operations of the Taliban and Al Qaeda, the more it becomes clear that transnational alliances had infiltrated, if not infected, the local population. At first, bad citizens were found abroad. John Walker Lindh and Yasser Essam Hamdi were both captured on the battleground in Afghanistan. But Jose Padilla was arrested inside the country and accused of plotting to detonate a dirty bomb.¹⁵⁵ Although the case against Lindh (eventually resolved through a plea bargain) was brought in federal court, Hamdi and Padilla are being held indefinitely by the military. Even as enemy combatants, their citizenship is acknowledged in that they are being held within the United States rather than at Guantanamo Bay. But, unlike John Walker Lindh, they have—at least for the time being—been denied access to the federal courts.¹⁵⁶ Hamdi's and Padilla's citizenship would seem to be fragile—neither fully American nor other. It is difficult to ignore in this regard that Hamdi was born in the United States

a federal program requiring males from 25 predominantly Muslim nations to register with the Immigration and Naturalization Service has resulted in the arrest and deportation of thousands of laborers, students and parents for what are characterized as minor, often technical violations.”).

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

156. On January 9, 2004, the United States Supreme Court agreed to review a decision by the Fourth Circuit that held that President Bush had the right to detain Hamdi indefinitely as an enemy combatant and deny him access to a lawyer. See *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *reh'g denied, reh'g en banc denied*, 337 F.3d 335 (4th Cir. 2003), *cert. granted*, 2004 WL 42546 (U.S. Jan. 9, 2004). The Bush administration has decided to allow Hamdi to consult with a lawyer, while reiterating its position that the President, not the courts, has the discretion to make this decision. Jerry Markon & Dan Eggen, *U.S. Allows Lawyer for Citizen Held as 'Enemy Combatant'; Reversal Comes on Eve of Court Filing*, WASH. POST, Dec. 3, 2003, at A1.

In contrast to the Fourth Circuit, the Second Circuit recently held that President Bush lacked the authority to hold Padilla indefinitely as an enemy combatant. *Padilla v. Rumsfeld*, Nos. 03-2235(L), 03-2438 (Con.), 2003 WL 22965085 at *23 (2d Cir. Dec. 18, 2003). The Bush administration is planning to appeal that decision to the United States Supreme Court. Linda Greenhouse, *Justices to Hear Case of Citizen Held as Enemy*, N.Y. TIMES, Jan. 10, 2004, at A1.

to Saudi parents and spent most of his life in Saudi Arabia and that Padilla is of Puerto Rican descent and spent time in Pakistan. While John Walker Lindh came from a white well-off family and was thought by many to be a confused young man—perhaps invaded by the body snatchers—Hamdi and Padilla are considered to have intentionally pursued the enemy's goal of attacking the United States.

The perception of disloyal tendencies that define the bad alien categories has bled over into the identification of bad citizens. The fear that terrorists would naturalize in order to undermine the system is perhaps not as strongly felt or expressed as it was in the 1950s. In fact, little distinction seems to have been made between United States-born and naturalized citizens in the internal war on terrorism. Rather, regardless of birth, Muslims and Arabs form most of the suspect class. While insisting that not all Muslims are terrorists, the government seems willing to use and encourage profiling to attempt to rout out those who are. Whether through government investigations and raids or "private" vigilance, the brunt of the internal war has fallen on Muslims, particularly those of Arab descent (now that Americans seem to have learned the difference between Sikhs and Muslims). Citizens are less likely than noncitizens to be held as "material witnesses," to be moved around to different undisclosed locations, and to be denied counsel.¹⁵⁷ Still, citizens are not immune to accusations of terrorism.

In both Lackawanna, New York (near Buffalo), and Portland, Oregon, Muslim citizens—nearly all of Arab descent—have been arrested on terrorism-related charges. The New York group was originally suspected of constituting an Al Qaeda cell,¹⁵⁸ while those in Oregon were thought to be "terror-

157. See Mark Bixler, *Egyptian in Fear of Wrong Move*, ATLANTA J.-CONST., Sept. 4, 2002, <http://www.ajc.com/news/content/news/sept11/04ziada.html> (stating that hundreds of Muslims have been detained and deported on minor immigration violations such as failing to inform the INS of a change of address).

158. Six suspects ended up pleading guilty to training with a terrorist organization, but prosecutors did not even attempt to prove that they were a terrorist cell. The case has come under recent media scrutiny for what the *New York Times* calls "a more measured victory over a profoundly ambiguous threat." Matthew Purdy & Lowell Bergman, *Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, at A1.

ist wannabes."¹⁵⁹ If the blending in of the September 11 hijackers called into question the extent to which alien terrorists were identifiable, the possibility of citizen terrorism has only further complicated the situation. As a CBS news report on the Oregon case noted: "What is striking about these arrests is the same thing that stuck out in the Buffalo case: once again the suspects aren't foreign born agents, but homegrown Americans."¹⁶⁰

Other citizens have been arrested on lesser charges. As mentioned earlier, since the 1996 Antiterrorism and Effective Death Penalty Act, the United States has suspected many Muslim charity organizations of being terrorist fronts.¹⁶¹ After September 11, the United States increased scrutiny of such organizations, often arresting or detaining those involved, including citizens.¹⁶² Enaam Arnaout, for example, a Syrian-born American citizen who served as executive director of a Muslim charity, Benevolence International Foundation, has been in federal custody since April 2002. He was initially charged with perjury for lying about his ties to Osama bin Laden. He later admitted that, although he had once had a relationship with bin Laden, it had ended before he created the Foundation in the 1990s.¹⁶³

Even talking about terrorism in the wrong place has made some citizens suspect. Medical students and United States citi-

159. *Terror Arrests in Oregon, Michigan*, CBSNEWS.COM (Sept. 4, 2002) <http://www.cbsnews.com/stories/2003/02/25/attack/main541875.shtml> (last visited Oct. 28, 2003).

160. *Id.*

161. *See supra* notes 136–37 and accompanying text.

162. *See* Laurie Cohen and Noreen Ahmed-Ullah, *Muslims Wary as U.S. Probe is Revived*, CHI. TRIB., Aug. 22, 2002, at 1, LEXIS, Nexis Library, CHTRIB-File. (describing fears among Muslims that FBI is unfairly targeting Islamic non-profit organizations).

163. Arnaout has since been indicted on charges of money laundering, fraud, and conspiracy to engage in racketeering. In discussing the charges, Attorney General Ashcroft stated, "We will find the sources of terrorist blood money . . . we will shut down these sources, and we will ensure that both terrorists and their financiers meet the same swift, certain justice of the United States of America." John W. Fountain, *After Indictment, Protesters Rally*, N.Y. TIMES, Oct. 10, 2002, at A19. In February 2003, Arnaout plead guilty to having illegally funneled funds to rebel fighters in Chechnya and Bosnia, but all charges relating to links with Al Qaeda or terrorism were dropped by the prosecutor. Eric Lichtblau, *February 9–15: International; Plea in Terror Case*, N.Y. TIMES, Feb. 16, 2003, sec. 4, at 2.

zens Ayman Gheith, Omer Choudhary, and Kambiz Butt¹⁶⁴ made national headlines when Florida troopers detained them for seventeen hours after a woman claimed to have overheard them in a restaurant discussing a terrorist plan. While Florida police searched their car, the FBI searched the hotel room they had stayed in the previous night and other officials checked databases for ties to terrorist organizations. The men denied engaging in any of the discussion described by the woman and were eventually released when no evidence of wrongdoing was found.¹⁶⁵

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

Bad aliens and citizens only exist in opposition to a perceived category of the good. As the consequences increase for being bad, so do the stakes in being identified as good. The war on terrorism clearly draws the lines—if you are not with us, you are against us.¹⁶⁶ Thus, aliens and citizens alike, although particularly Muslims or those who might be identified as Muslim, must demonstrate their loyalty; they must support the war on terrorism. More than supporting—or not opposing—the war on terrorism, good citizens and aliens are asked to participate in the fight both by speaking out in favor of the war and assisting in the discipline of bad aliens and citizens.

164. Two of the students were naturalized United States citizens and one was born in the United States. *Man in Terror Scare Says Woman is Lying*, CNN.COM, Sept. 13, 2002, <http://www.cnn.com/2002/US/09/13/alligator.alley/index.html> (last visited Feb. 10, 2003) [hereinafter *Terror Scare*].

165. *Id.*

166. See Bush Address to Congress, *supra* note 5 (“Either you are with us, or you are with the terrorists. (Applause.) From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.”). President Bush has maintained this line throughout the war on terror. In his September 2003 address to the UN defending his policy in Iraq, he stated:

Events during the past two years have set before us the clearest of divides, between those who seek order and those who spread chaos; between those who work for peaceful change and those who adopt the methods of gangsters; between those who honor the rights of man and those who deliberately take the lives of men and women and children, without mercy or shame.

Between these alternatives, there is no neutral ground.

Bush UNGA Address, *supra* note 1.

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

(1) in response to the terrorist attacks on the United States on September 11, 2001, United States citizens should join together to defend and honor the Nation and its symbols of strength; and

(2) for a period of 30 days after the date on which this resolution is agreed to, each United States citizen and every community in the Nation is encouraged to display the flag of the United States at homes, places of work and business, public buildings, and places of worship to remember those individuals who have been lost and to show the solidarity, resolve, and strength of the Nation.¹⁶⁷

The resolution appears to have been enormously successful, although it might merely have been an acknowledgment of what was already occurring. In either event, citizens and aliens alike (even though the latter were formally excluded from the resolution) bought flags and accepted free ones, putting them on homes, cars, and shops as a sign of loyalty.¹⁶⁸ Turning down a flag from the Boy Scouts would be unpatriotic. On the flip side, a Muslim proudly displaying an American flag might be considered a good Muslim.

Eventually, though, flag waving was not sufficient. Although it might have initially provided a means by which

167. H.R. CON. RES. 225, 107th Cong. (2001). As Nebraska Representative Doug Bereuter commented, "By flying the flag across our nation and at official U.S. posts around the globe, we can pay tribute to those we lost and demonstrate our solidarity. We all must stand together to denounce the cowardly acts of terrorism against our nation and the civilized world." Doug Bereuter, *Fly the Flag—No Act of Terrorism will Break America's Spirit*, YORK NEWS-TIMES, Sept. 19, 2001, http://www.yorknewstimes.com/stories/091901/edi_0919010003.shtml.

168. And they were read as signs of loyalty and support. As President Bush remarked:

We're a nation of patriots. The attacks of September 11th, and the attacks that have followed, were designed to break our spirit. But instead, they've created a new spirit in America. We have a renewed spirit of patriotism. We see it in the countless flags that are flying everywhere in America.

Remarks by the President in Announcement of Lessons of Liberty Initiative at Thomas Wootton High School (Oct. 30, 2001) at <http://www.whitehouse.gov/news/releases/2001/10/20011030-7.html> (last visited Dec. 1, 2003).

United States residents could feel that they were doing something to show their support for the war on terrorism, it did little to reduce the threat. While the Bush administration began to structure its homeland security, it called for a method of disciplining that—ironically—was commonly used in Communist systems. To prevent bad aliens and citizens from blending in, good aliens and citizens were encouraged to police their neighbors.¹⁶⁹ The government issued a *Citizen's Preparedness Guide* and posted it on the web:

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

Take what you hear seriously. If you hear or know of someone who has bragged or talked about plans to harm citizens in violent attacks or who claims membership in a terrorist organization, take it seriously and report it to law enforcement immediately.¹⁷⁰

At one point, the Department of Justice proposed but eventually abandoned a Terrorist Information and Prevention System ("TIPS"), which called upon those who routinely enter homes in the United States—electricians, cable TV workers, and postal delivery workers—to contact a toll-free number to report suspicious activities.¹⁷¹

169. See Frank T. Csongos, *U.S.: Bush Urges Americans to be Vigilant*, RADIO FREE EUROPE/RADIO LIBERTY, INC. (Nov. 9, 2001), at <http://www.rferl.org/nca/features/2001/11/09112001084849.asp> (last visited Jan. 27, 2003).

170. *Terrorism, What Do We Do?*, <http://www.co.hanover.va.us/sheriff/crimeprev-terrorism.htm> (last visited October 25, 2003).

171. Ritt Goldstein, *U.S. Planning to Recruit One in 24 Americans as Citizen Spies*, SYDNEY MORNING HERALD, Jul. 15, 2002, at 7, <http://www.smh.com.au/articles/2002/07/14/1026185141232.html>. Due to initial public opposition based on the program's potential violation of civil liberties (of all citizens, good or bad), the Bush administration dropped the use of postal and utility workers from the program. Frank James, *Bush Scales Back Terror Tip Program; Postal and Utility Workers Dropped*, CHI. TRIB., Aug. 10, 2002, at 10. Later, it abandoned the program altogether. Details about TIPS were located at <http://www.citizencorps.com> during the proposal phase in summer 2002, but the website has since been shut down in accordance with the government's decision not to pursue the program.

Eunice H. Stone responded to the government's general exhortation to vigilance when she called police to say she heard three medical students talking about a terrorist threat in a Florida restaurant.¹⁷² Even after the men were eventually cleared, some commentators speculated that the men had intentionally played upon Stone's stereotypes and discussed terrorism to frighten her.¹⁷³ The police considered charging the medical students with an anti-Klan statute prohibiting terrorist threats, but not investigating Stone on suspicion of filing a false report. Rather, the police commended her: "We don't think she made it up We commend her for reporting what she believed to be accurate and would encourage other citizens to do so."¹⁷⁴ Others supported Stone as well. Indeed, she received flowers and cards from anonymous donors with statements such as, "To Eunice—Thanks for saving the nation."¹⁷⁵

The three medical students also sought to be good citizens in the end. They refused to criticize the police, insisting the officers were just doing their job.¹⁷⁶ At the same time, Ayman Gheith—the student most easily identified as Muslim by his dress—suggested he had internalized the disciplining lesson well before the accusations: "Would you lose control of the conversation and joke about September 11th?" he asked when talking to the media.¹⁷⁷ "Is that even an option?"¹⁷⁸ Perhaps it was clear to Gheith that self-censorship was prudent because others had learned the lesson the hard way. In the end, Gheith and his colleagues did not condemn the state for its actions. Far from it, as good citizens, they supported the action.

172. For further discussion of this case, see *supra* text accompanying notes 164–65. See also Robert L. Steinback, *Who, if Anybody, Erred in Alligator Alley Terror Scare?*, MIAMI HERALD, Sept. 20, 2002, <http://www.miami.com/mld/miamiherald/4119272.htm> (last visited Oct. 10, 2003).

173. *Id.* It was reported that the students admitted they were initially angry about the suspicious looks they got from Stone, causing them to make some remarks to mock her scrutiny. See *id.*

174. *Id.* (quoting assistant special agent Jerry L. Scott).

175. *Id.*

176. See *Terror Scare*, *supra* note 164 ("[Gheith] said he didn't blame authorities because they were simply working off the information given to them, although he did note it was unusual to get 'pulled over by 700 cops.' 'The police officers were very gracious. They were very nice people. They did their job, obviously,' he said.").

177. *Id.*

178. *Id.*

There are many reasons to believe that self-censorship is prudent. Muslims are not the only ones who have been censored either directly or indirectly. When colleges and universities—traditionally sites for debate, activism, and opposition—censured faculty and staff who seemed to respond inappropriately to the attacks, even non-Muslims recognized the imprudence of criticism. History Professor Richard Berthold, for example, told two of his classes at the University of New Mexico on September 11 that “[a]nyone who would blow up the Pentagon would have my vote.”¹⁷⁹ The resulting discipline was multi-level. Berthold received death threats that kept him off campus. An unidentified person left a message on the provost’s voicemail threatening that if Berthold were not “ousted” within twenty-four hours, he would be ousted by other sources. State politicians demanded his firing and accused him of committing treason. Ultimately, the University barred Berthold from teaching freshmen for a year, placed a letter of reprimand in his personnel file, and announced that he would undergo an in-depth post-tenure review. University Provost Brian L. Foster noted: “There are a lot of things you can’t say with impunity, even on a college campus.”¹⁸⁰ Like the three medical students, Berthold understood. Responding as a good citizen, he called the reprimand “an entirely appropriate response to the stupidity and callousness of those remarks.”¹⁸¹

Professor Berthold was not alone. Some academics who aimed to use September 11 as an opportunity to discuss United States foreign policy in the Middle East faced similar discipline. City University of New York Chancellor Matthew Goldstein denounced faculty members who participated in a forum that criticized United States foreign policy, to which the forum participants attributed the attack. The faculty members, he contended, were making “lame excuses” for the terrorists.¹⁸² The University’s Board of Trustees condemned the forum as “seditious.”¹⁸³ UCLA library assistant Jonnie Hargis was suspended without pay for one week when, in response to an email

179. John K. Wilson, *Censorship of Anti-War Views*, in *The State of Academic Freedom, 2001-2002: A Report*, § 2(a), COLLEGEFREEDOM.ORG, <http://www.collegefreedom.org/report2002.htm> (last visited Oct. 29, 2003).

180. *Id.*

181. *Id.*

182. *Id.* § 2(b).

183. *Id.*

sent around the office by one of Hargis's colleagues entitled "America: The Good Neighbor," Hargis sent an email criticizing American policies in Iraq and Israel.¹⁸⁴

Even arguing for the protection of civil liberties in the aftermath of September 11 has been a risky business. During a commencement address at California State University on September 15, 2001, the audience booed Janis Besler Heaphy, president and publisher of the *Sacramento Bee*, when she urged them to "safeguard their rights to free speech and a fair trial."¹⁸⁵ Then, when she argued that "the Constitution makes it our right to challenge government policies," the crowd responded with heckling so severe that the university president could not quiet the audience.¹⁸⁶ Heaphy eventually left the stage without concluding her talk.

Granted, many of these incidents occurred immediately in the wake of September 11. In that sense, it could be argued that tensions were heightened, everyone was feeling especially vulnerable, and the reactions were extreme. Yet, the lack of substantive debate in the United States about foreign relations, civil liberties in time of emergency, and the wisdom of the war on terrorism remains. Even where there is significant opposition to United States foreign policy, the opposition rarely extends to the war on terrorism. Indeed, opponents of the war against Iraq often invoke Bush's inability to connect Saddam Hussein to terrorism, implying that the presence of such a connection might have validated the war. Support for the war on terrorism continues to be high, even in times when support for the Iraqi war has been low.¹⁸⁷ This widespread support for the

184. Hargis's email stated: "This is all well and good but avoids the fact that U.S. taxpayers fund and arm an apartheid state called Israel, which is responsible for untold thousands upon thousands of deaths of Muslim Palestinian children and civilians. So, who are the "terrorists" anyway?" *Id.* § 2(c). He was then charged with "contribut[ing] to a hostile and threatening environment" for his colleagues who have "ethnic, religious, and family ties to Israel." *Id.*

185. *Id.* § 2(f).

186. *Id.*

187. In September 2003, for example, only 51% of Americans approved of how President Bush was handling the situation in Iraq. Newsweek Poll, Sept. 11–12, 2003, available at <http://www.pollingreport.com/iraq.htm> (last visited Oct. 13, 2003). At the same time, 67% of Americans approved of the administration's handling of the U.S. campaign against terrorism. ABC News Poll, Sept. 4–7, 2003, available at <http://www.pollingreport.com/terror>. This latter number was down from April 2003 when 79% professed approval of the administration's handling of the war on terrorism. *Id.* To the extent that the war against Iraq has

war on terrorism, both internal and external, could be seen as a sign of the legitimization process. The multiple layers of discipline have produced good citizens and aliens.

If good citizens and aliens are necessary to legitimate the war on terrorism, good Muslims are an important part of the project. Over and over, government policies both support and belie the bad alien categories as they apply to Muslims. They support them by unabashedly treating Muslims, particularly Muslim Arabs, differently from the rest of the population. We have already discussed how racial profiling along a new identity category, as Leti Volpp describes it, is rampant; those detained and questioned by the state, assaulted by United States citizens, and suspected by vigilant neighbors, coworkers, and people at the next table almost always appear Middle Eastern, Arab, or Muslim.¹⁸⁸ At the same time, though, the Bush administration has repeatedly distinguished between most Muslims in the United States and the bad Muslims who commit or support acts of terrorism. Hence, the President visited a mosque days after September 11, while at the same time preparing to wage war on Afghanistan. President Bush has met with Muslim leaders and made statements calling for tolerance for Muslims, even while enforcing policies that discriminate against them.¹⁸⁹

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

I also want to speak tonight directly to Muslims throughout the world. We respect your faith. It's practiced freely by many millions of Americans, and by millions more in countries that America counts as friends. Its teachings are good and peaceful, and those who commit evil in the name of Allah blaspheme the name of Al-

been perceived as part of the United States's campaign against terrorism, these numbers might actually underrepresent general support for the war on terrorism.

188. See generally Volpp, *supra* note 8; see also *supra* note 140-141 and accompanying text.

189. See, e.g., President George W. Bush, "Islam is Peace" Says President, Remarks by the President at Islamic Center of Washington, D.C. (Sept. 17, 2001) at <http://www.whitehouse.gov/news/releases/2001/09/20010917-11.html> (last visited Oct. 15, 2003).

lah. (Applause.) The terrorists are traitors to their own faith, trying, in effect, to hijack Islam itself. The enemy of America is not our many Muslim friends; it is not our many Arab friends. Our enemy is a radical network of terrorists, and every government that supports them. (Applause.)¹⁹⁰

Although this quotation does not directly acknowledge friendly Muslims within the United States, other statements around the time did convey this message. Two days after September 11, for example, President Bush urged tolerance toward Muslims in the United States and Arab Americans: "[O]ur nation must be mindful that there are thousands of Arab Americans . . . who love their flag just as much as . . . [we] do. And we must be mindful that as we seek to win the war that we treat Arab Americans and Muslims with the respect they deserve."¹⁹¹ A few days later, he again pointed to the flag, declaring, "there are millions of good Americans who practice the Muslim faith who love their country as much as I love the country, who salute the flag as strongly as I salute the flag."¹⁹²

Over a year after September 11, President Bush continued to persist in this message and to distance himself from those who argued against tolerance such as Christian Right leader Jerry Falwell, who described the prophet Mohammed as a "terrorist," and conservative commentator Pat Robertson, who said, "Adolf Hitler was bad, but what the Muslims want to do to the Jews is worse."¹⁹³ President Bush responded to those statements, maintaining that "[s]ome of the comments that have been uttered about Islam do not reflect the sentiments of my government or the sentiments of most Americans."¹⁹⁴ Identifying his own views with those of the American citizenry,

190. Bush, Address to Congress, *supra* note 5.

191. President George W. Bush, President Pledges Assistance for New York in Phone Call with Pataki, Giuliani: Remarks by the President in Telephone Conversation with N.Y. Mayor Giuliani and N.Y. Governor Pataki (Sept. 13, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/20010913-4.html> (last visited Oct. 29, 2003) (*quoted in* Wendy Brown, Lecture at the University of Texas 10 (Feb. 28, 2002) (on file with the University of Colorado Law Review)).

192. President George W. Bush, Remarks by the President at Photo Opportunity with House and Senate Leadership (Sept. 19, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/20010919-8.html> (last visited Feb. 25, 2003) (*quoted in* Brown, *supra* note 191, at 7).

193. Randall Mikkelsen, *Bush Takes on Christian Right Over Anti-Islam Words*, REUTERS, Nov. 13, 2002, <http://www.submission.org/islam/editorial-NOV02.html> (last visited Oct. 15, 2003).

194. *Id.*

Bush continued: "By far, the vast majority of American citizens respect the Islamic people and the Muslim faith. After all, there are millions of peaceful-loving Muslim Americans."¹⁹⁵

Two years after September 11, the publication of anti-Islamic comments by Deputy Undersecretary of Defense Lieutenant General William "Jerry" Boykin evinced tension within the administration about the nature of the war on terrorism. The White House was ultimately forced to separate itself from Boykin's statements, including his claim that "the enemy" is neither Osama bin Laden nor Saddam Hussein. Rather, "[t]he enemy is a spiritual enemy. He's called the principality of darkness. The enemy is a guy called Satan."¹⁹⁶ Upon return from a trip to Indonesia where Muslims had complained about General Boykin, President Bush stated that the comments do not "reflect my point of view, or the view of this administration."¹⁹⁷ He went on to explain the necessity for maintaining an image of tolerance:

It seemed like to me that we've got a challenge to make sure that people in countries like Indonesia understand the nature of the American people, that how we think is going to be an important part of good diplomacy in the long run. That we've got to fight off the imagery of a society which condemns entire swaths of people because of the acts of a few—which is not the way we are.¹⁹⁸

Perhaps most importantly, President Bush, or at least members of his cabinet, used the discussion over Boykin to make clear that the President did not believe the war on terrorism to be a holy war. Before Bush officially distanced himself from Boykin's comments, National Security Advisor Condoleezza Rice explained the President's position:

The president has been absolutely clear that this is not a war of religions. . . . Islam is a peaceful religion. The president is respectful of those who practice the Islamic faith. . . . The president will very soon during Ramadan, for instance,

195. *Id.*

196. Lisa Myers, *Top Terrorist Hunter's Divisive Views*, (Nightly News with Tom Brokaw, NBC television broadcast, Oct. 15, 2003), <http://www.msnbc.com/news/980764.asp?cp1=1>.

197. John Hendren, *President Decries General's Remarks*, L.A. TIMES, Oct. 29, 2003, at A4.

198. *Id.*

welcome Muslim leaders to the White House for an Iftar, because he wants it to be very clear that this is no war of civilizations, this is no war of religions¹⁹⁹

With this statement, Rice foreshadowed and participated in the President's move to deny that Boykin's comments reflected the position of the administration.

It is tempting to read these gestures as disingenuous. Volpp argues that any message of tolerance or respect of Islam has been drowned out by a more consistent anti-Muslim and anti-Arab message conveyed by profiling and by statements characterizing the war against terrorism as "a battle for civilization" and as "a crusade."²⁰⁰ I suggest instead that the legitimization of the war on terrorism *depends upon* the dual message. In this sense, I agree with Wendy Brown, who has used some of these quotations and other quotations to argue that tolerance provides a means of legitimizing the post-September 11 state. For her, the bargain for the tolerance is that American Muslims leave their subnational or transnational identity in the private realm. As such, the identity remains hidden, never to emerge to challenge public discourse.²⁰¹

Although I agree with much of Brown's analysis, I read the bargain slightly differently. Good Muslims must do more than not challenge the state by keeping their Islam private, by being a part of a "docile, individuated, deactivated citizenry;"²⁰² they must demonstrate their allegiance to the United States by supporting it in its efforts to fight the war on terrorism. They must show they love the flag—even salute it "strongly"—to

199. *This Week with George Stephanopoulos: Conversation with Condoleezza Rice* (ABC television broadcast, Oct. 19, 2003), LEXIS, Nexis Library, ALLNWS File.

200. Volpp, *supra* note 8, at 1582.

201. Brown, *supra* note 191, at 6 ("[O]ne of the functions of tolerance in the development of modernity is the brokering of a deal in which individuals from subnational or minority communities are brought into the nation-state on the condition that the belief world from which they hail is excluded from legitimate public discourse.").

This promotion of a thin multiculturalism is not unique to the United States after September 11. Charles Hale has described how the neoliberal Guatemalan state is engaged in a similar process in Guatemala where good Mayans—those that do not challenge the authority of the state—are accepted into, even required for the perpetuation of, the neoliberal state. See Charles R. Hale, *Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala*, 34 J. LATIN AM. STUDIES 485 (2002).

202. Brown, *supra* note 191, at 11.

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

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

The category of the good Muslim also plays an important role abroad. Good Muslims in the Middle East have long been essential to the foreign policy of the United States. They are now necessary for the external war on terrorism. That war depends upon Arab and predominantly Muslim states—from Pakistan to Qatar—to be "peace-loving," which in this case means to support the war on terrorism.

CONCLUSION

I completed the first draft of this article in November 2001, just two months after September 11. It has thus been over two years in the making. Investigations have been conducted; security has been tightened; suspects have been arrested, detained, and sometimes released while others have pleaded guilty and been sentenced; federal courts have granted and denied jurisdiction; wars have begun; leaders have been deposed, installed, and caught hiding in "rat holes"; diplomacy has been

strengthened and strained; and claims about terrorist connections and influences have been made and disclaimed and made anew. And somewhere along the way, the "war on terrorism" morphed into a "war on terror."²⁰³

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

That said, the basic structure of the original draft remains. I identified the three types of bad aliens early on, in addition to the semiotic structure that distinguished them from their good

203. Media references to the "war on terror" have increased steadily since September 11, while the use of "war on terrorism" has decreased. A Lexis search of United States newspapers from the periods September 11 through September 30 in each of three consecutive years indicates that in 2001, the term "war on terrorism" was used 3.69 times as often as the "war on terror." In 2002, it was used 3.1 times as often. During the same time period in 2003, however, "war on terrorism" appeared only 1.5 times more frequently than the "war on terror." By December 2003 (December 1–15), "war on terrorism" was used only 1.33 times more than "war on terror."

I have found surprisingly little reference to this shift. Norman Solomon recognized it in February 2003, noting that "[t]he word 'terror' has become a linguistic staple in news media. For keeping the fearful pot stirred, it's better than the longer word 'terrorism,' which refers to an occasional event. The shortened word has an ongoing ring to it." Norman Solomon, *Playing The* (Feb. 13, 2003), at <http://www.zmag.org/content/showarticle.cfm?sectionID=21&ItemID=3034>.

That said, President Bush referred to the "war on terror" from the beginning. See, e.g., Bush, Address to Congress, *supra* note 5 ("Our war on terror begins with al Qaeda, but it does not end there."). Indeed, a search of www.whitehouse.gov indicates 710 references to the "war on terror" in contrast to 630 to the "war on terrorism." See <http://www.whitehouse.gov> (last visited Jan. 11, 2004). Lauren Berlant provocatively describes what she sees as the effects of the administration's attempt to wage a war on terror, rather than on terrorism or terrorists, noting in part:

The vague, shapeless, and pseudo-transparent qualities of Terror, and the relative autonomy of Terror from events and agents, make it possible for the government to motivate a situation of unending war and juridical crisis as though these practices constitute the just response of a representative state to the felt needs of its citizens.

Lauren Berlant, *The Fact of Feelings: Anticommunism, Antiterror, and State Emotionalism*, in *DISSENT IN DANGEROUS TIMES* (forthcoming 2004) (chapter on file with The University of Colorado Law Review).

counterparts. The post-November 2001 events only served to reinforce that dynamic, as well as the disciplining mechanisms that discourage both noncitizens and citizens from criticizing the war on terror. I have necessarily simplified the historical narratives of the births of the prototypes, but I hope I have complicated interpretations of the current war on terror that read it as a holy war (on either side), as simple maintenance of national security, as blatant deprivation of civil liberties, as overt or covert racism, as progress or regress.

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

Regardless of where we see ourselves positioned in relation to the war, we need to remember that the war is not only internal. Many people in the United States experience a threat—from potential future acts of terrorism akin to September 11, from the United States government's crackdown on immigration, from vigilante "justice" gone amok, from deprivation of civil liberties, or from a combination of some or all of the above. Outside the United States, though, the differences among those of us who live within its borders are often erased. However much we might at times feel victimized, we are often collectively perceived as a threat.

In October 2003, the European Union commissioned a Gallup poll that asked 7,500 people in member states to identify, from a list the pollsters provided, those countries they considered to pose a threat to world peace. Fifty-three percent of the respondents listed the United States, tying it for second place with North Korea and Iran. Israel was in first place with fifty-nine percent of respondents naming it as a threat. Behind

the United States, North Korea, and Iran were (in the following order) Iraq, Afghanistan, Pakistan, Syria, Libya, Saudi Arabia, China, India, Russia, Somalia, and the European Union.²⁰⁴ The European Union denounced the poll result ranking Israel as the greatest security threat, largely out of concern that the poll represented anti-Semitic sentiments and because of potential diplomatic consequences with Israel.²⁰⁵ In contrast, there was no similar denouncement of the perception that the United States posed a threat.

Even nationals of our traditional allies, then, read the United States government's responses to national (in)security as threatening. Concerns for national security have always provided grounds for extraordinary internal measures. Even in international human rights law, derogation of certain rights is permissible when the life of the nation is threatened.²⁰⁶ Indeed,

204. See Alan Cowell, *The Struggle for Iraq: President Bush Visit Spurs Protests Against U.S. In Europe*, N.Y. TIMES, Nov. 16, 2003, at A20 (based on a correction from Nov. 19); Michael Thurston, *Israel is World's Greatest Threat, America Second: EU Poll*, AGENCE FRANCE PRESSE, Nov. 3, 2003, LEXIS, Nexis Library, ALLNWS File, citing full results:

A total of 53 percent said Iran, North Korea and the United States pose a threat, followed by 52 percent for Iraq, 50 percent for Afghanistan and 48 percent for Pakistan. After that came Syria on 37 percent; Libya on 36 percent; Saudi Arabia on 36 percent; China on 30 percent; India on 22 percent; Russia on 21 percent; Somalia on 16 percent and the EU itself on 8 percent.

205. See, e.g., Press Release, Statement by President Prodi on the Flash Eurobarometer Survey Findings, (Nov. 3 2003), at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action=gettxt=gt&doc=IP/03/1503|0|RAPID&lg=EN&display=:

I am very concerned at the results of this survey. They point to the continued existence of a bias that must be condemned out of hand. To the extent that this may indicate a deeper, more general prejudice against the Jewish world, our repugnance is even more radical. In the Europe born in reaction to the horrors of war and the Shoah there is no place for anti-Semitism and it cannot be tolerated.

Even before the poll had been officially released, the Israeli Ambassador to Italy had declared that it was proof of anti-Semitism and could have serious diplomatic consequences. See Thurston, *supra* note 204.

206. See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, pt. II, art. 4(1), 999 U.N.T.S. 171, 174 (entered into force on March 23, 1976) [hereinafter International Covenant]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, § I, arts. 8(2), 9(2), 10(2), 11(2), 213 U.N.T.S. 221, 230 & 232 (entered into force on Sept. 3, 1953) [hereinafter European Convention]; American Convention on Human Rights, Nov. 22, 1969, pt. I, ch. IV, art. 27(1), 9 I.L.M. 673, 683 (entered into force on July 18, 1978) [hereinafter American Convention]. Certain rights, such as the right to life, freedom from torture, freedom from slavery, freedom from imprisonment based on debt, are specifically non-derogable. See International Covenant, pt. II, art.

some of the very allies whose citizens are now critical of the Bush administration's policies have invoked the derogation principles during their own crises.²⁰⁷ Yet, many are unwilling to acquiesce in the external portion of the war on terrorism waged by the United States.

The tension between the United States and Saudi Arabia over the past couple of years suggests that the long relied-upon dichotomy between allied states and friendly states is fragile. Now that fragility has extended even to European allies. Disagreements over the war in Iraq have called into question the extent to which all European states fall into the good state category, and even more so whether their nationals can be presumed to be loyal to the United States. The European Union poll makes it clear that many Europeans see the United States as unfriendly, if not as the enemy. Thus, the United States has had less success at disciplining other states and their citizens in legitimizing the external war than it has had with disciplining its own residents. Only time will tell whether and to what extent the internal legitimization process will continue to be successful.

4(2) at 174; European Convention, § I, art. 15(2) at 232; American Convention, pt. I, ch. IV, art. 27(2) at 683.

207. See, e.g., *Lawless v. Ireland* (No. 3), App. No. 332/57, 1 Eur. H.R. Rep. 15, 16 (1961), 1961 WL 21025 (finding a rights violation but permitting derogation due to Ireland's invocation of such a threat); *Klass v. Germany*, App. No. 5029/71, 2 Eur. H.R. Rep. 214, 214-15, 232 (1978), 1978 WL 58126 (upholding a German law that permitted state authorities to secretly open and inspect mail and listen to telephone conversations because of "the 'imminent dangers' threatening the 'free democratic constitutional order' and 'the existence or the security' of the State," which was the threat of highly sophisticated forms of espionage and terrorism).