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## Hate Crimes and the War on Terror

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*Hate Crimes and the War on Terror*  
Cynthia Lee\*

On September 11, 2001, nineteen Arab Muslims hijacked four commercial airplanes in the United States, flying two of these planes into the World Trade Center in New York City, killing an estimated 2,759 people.<sup>1</sup> They flew a third plane into the Pentagon in Northern Virginia, just minutes from Washington, D.C., killing another 125.<sup>2</sup> The fourth plane never made it to its intended target, presumably the White House in Washington, D.C., crashing instead into a remote field in Pennsylvania, killing all 44 on board.<sup>3</sup>

In the days, weeks, and months immediately following the 9/11 attacks, Arab-Americans, South Asian-Americans, Muslim-Americans, and Sikh-Americans were the targets of widespread hate violence.<sup>4</sup> Many of the perpetrators of these acts of hate violence claimed they were acting patriotically by retaliating against those responsible for 9/11.

This chapter situates the private acts of hate violence committed against Arab-Americans, Muslim-Americans, Sikh-Americans, and South Asian-Americans in the aftermath of 9/11 into the broader context of the war on terror. Despite public pronouncements condemning these private acts of hate violence, the government engaged in its own acts of “psychic” and physical violence against Arabs, Muslims, Sikhs and South Asians, all in the name of the war on terror.<sup>5</sup> Like Muneer Ahmad, Leti Volpp, and others, I argue that both private and public acts of violence against individuals perceived to be Arab or Muslim can be understood as two sides of the same coin – a coin made possible by the social construction of the Arab-as-Terrorist stereotype.<sup>6</sup> Obviously, this stereotype affects Arabs, Muslims, and those individuals perceived to be Arab or Muslim. I argue in addition that the Arab-as-Terrorist stereotype affects us all by encouraging lawmakers to give police expanded authority which encroaches on the civil liberties of all citizens.

This chapter is divided into three parts. In Part I, after providing some general background information on hate crimes, I discuss the hate crimes committed in the aftermath of 9/11. In Part II, I examine two common stereotypes about Arabs and Muslims which likely contributed to the post 9/11 backlash against Arabs and Muslims and those perceived to be Arab or Muslim: the Arab-as-Terrorist stereotype and the Arab-as-Foreigner stereotype. In Part III, I suggest that government action in the war on terror was influenced by and reinforced these stereotypes. I conclude by discussing broader possible implications of the Arab-as-Terrorist stereotype.

I

Hate Crimes in the Aftermath of 9/11

A hate crime is a crime against an individual on account of his race, religion, national origin, ethnicity, or some other protected characteristic.<sup>7</sup> Supporters of hate crime legislation argue that hate crimes merit enhanced punishment because of the greater harm they cause. For

example, Frederick Lawrence notes that the harm caused by hate crimes is greater than the harm caused by other crimes because of “the nature of the injury sustained by the immediate victim of a bias crime; the palpable harm inflicted on the broader target community of the crime; and the harm to society at large.”<sup>8</sup>

Hate crime statutes tend to follow one of two models: (1) the "discriminatory selection" model and (2) the "racial animus" model.<sup>9</sup> Under the "discriminatory selection" model, a defendant's punishment is enhanced if he chose his victim because of the victim's membership in a protected group.<sup>10</sup> The prosecutor need not show that defendant acted because of any animus or hostility toward the victim because of his race, religion, ethnicity, gender, or other protected status.

Lu-in Wang gives examples of two defendants who could be punished under the “discriminatory selection” model. First, “[o]ne such perpetrator would be the purse snatcher who preys exclusively on women, not because he feels hostility toward women as a group, but because their general practice of carrying handbags or their typically small stature makes them, for the most part, easier targets than men.”<sup>11</sup> Second, “a juvenile delinquent who chooses to rob grocery stores owned by recent immigrants from Asia because she presumes that those merchants have lots of cash on hand” would be punishable under the discriminatory selection model even if she bore no hostility toward Asians as a group.<sup>12</sup>

Under the "racial animus" model, the defendant must choose his victim because of the victim's membership in a protected group *and* "hatred or hostility toward the target group."<sup>13</sup> The individuals described above (the purse snatcher who targets women and the juvenile delinquent who targets recent immigrants from Asia) would not be subject to enhanced punishment under the racial animus model because they were not acting out of hostility toward the victim's group.

Wang notes that the cases that tend to be prosecuted are those that conform to the "racial animus" model.<sup>14</sup> This is problematic because the racial animus model perpetrates an overly simplistic view of the bias criminal as an irrational deviant unlike most of us.<sup>15</sup> The racial animus model makes it easy for us to distance ourselves from the perpetrators of hate crimes even though we often share many of the same underlying biases.

One of the first laws exclusively criminalizing bias motivated conduct in the United States is found in Section 245 of volume 18 of the U.S. Code, enacted in the 1960s.<sup>16</sup> This statute makes it a crime to try to stop another person on the basis of race, color, national origin or religion from engaging in any one of six federally protected activities: (1) enrolling in or attending a public school; (2) participating in a service or facility provided by a State; (3) engaging in employment; (4) serving as a juror; (5) traveling or using any common carrier (motor, rail, water or air) in interstate commerce; and (6) enjoying the services of any hotel or motel or any restaurant, cafeteria, lunch counter, gas station, motion picture house, theater, concert hall, sports arena, stadium or any other establishment which serves the public.<sup>17</sup>

Because Section 245 is limited to attempts to interfere with the exercise of a civil right,<sup>18</sup> many states began enacting hate crime laws of their own in the 1980s and 1990s.<sup>19</sup> Today, forty-five of the fifty states and the District of Columbia have hate crime laws on the books.<sup>20</sup> All of these statutes criminalize or enhance punishment for conduct motivated by bias on the basis of race, ethnicity, and religion.<sup>21</sup> At least twenty-six states include crimes motivated by sexual orientation bias.<sup>22</sup> At least twenty-four states include crimes motivated by bias on the basis of gender.<sup>23</sup>

In 1990, Congress passed the Hate Crimes Statistics Act which requires the United States Department of Justice to collect data on hate crimes from law enforcement agencies.<sup>24</sup> Specific data about hate crimes against Arabs and Muslims and those perceived to be Arab or Muslim, however, is not collected.<sup>25</sup> Because the data collected by the Department of Justice under this Act inadequately captures information regarding hate violence directed against Arabs and Muslims and those perceived to be Arab or Muslim, it is necessary to look to other sources for such information. A few community-based organizations filled this void by specifically collecting information about acts of hate violence in the wake of 9/11.

For example, South Asian American Leaders of Tomorrow (SAALT) found that in just the first week following the 9/11 attacks, 645 bias incidents directed at individuals perceived to be of Middle Eastern descent, including shootings, verbal harassment in the streets, telephone threats to individuals in their homes, property damage and violence at places of worship, and racial jokes made in the workplace, were reported by newspapers and other media.<sup>26</sup> The Council on American-Islamic Relations (CAIR) received reports of 1,717 anti-Muslim and anti-Arab bias incidents, including violence, threats, hate messages and harassment, airport profiling, and workplace and school discrimination, after September 11, 2001.<sup>27</sup> While some of the incidents included in these numbers are bias incidents, not hate crimes,<sup>28</sup> these reports nonetheless are consistent with information collected by the FBI showing a 17-fold increase in anti-Muslim crimes nationwide in 2001.<sup>29</sup>

Just after September 11, numerous Arabs, Muslims, and individuals perceived to be Arab or Muslim were assaulted, and some killed,<sup>30</sup> by individuals who believed they were responsible for or connected to the attacks on the World Trade Center and Pentagon.<sup>31</sup> The first backlash killing occurred four days after September 11.<sup>32</sup> Balbir Singh Sodhi was shot to death on September 15 as he was planting flowers outside his Chevron gas station.<sup>33</sup> The man who shot Sodhi, Frank Roque, had told an employee of an Applebee's restaurant that he was "going to go out and shoot some towel heads."<sup>34</sup> Roque mistakenly thought Sodhi was Arab because Sodhi, an immigrant from India, had a beard and wore a turban as part of his Sikh faith.<sup>35</sup> After shooting Sodhi, Roque drove to a Mobil gas station a few miles away and shot at a Lebanese-American clerk.<sup>36</sup> He then drove to a home he once owned and shot and almost hit an Afghani man who was coming out the front door.<sup>37</sup> When he was arrested two hours later, Roque shouted, "I stand for America all the way."<sup>38</sup>

The next two killings were committed by a man named Mark Stroman. On September 15, 2001, Stroman shot and killed Waquar Hassan, an immigrant from Pakistan, at Hassan's grocery store in Dallas, Texas.<sup>39</sup> On October 4, 2001, Stroman shot and killed Vasudev Patel, an

immigrant from India and a naturalized U.S. citizen, while Patel was working at his Shell station convenience store.<sup>40</sup> A store video camera recorded the killing, helping police to identify Stroman as the killer.<sup>41</sup> Stroman later told a Dallas television station that he shot Hassan and Patel because, “We’re at war. I did what I had to do. I did it to retaliate against those who retaliated against us.”<sup>42</sup>

Beyond these killings, there were more than a thousand other anti-Muslim or anti-Arab acts of hate which took the form of physical assaults, verbal harassment and intimidation, arson, attacks on mosques, vandalism, and other property damage.<sup>43</sup> Many individuals reported being intimidated on the road by drivers and pedestrians who pointed fingers at them as if shooting them.<sup>44</sup> Businesses were hit with gasoline bombs, and homes and places of worship were vandalized.<sup>45</sup> In approximately one in every five cases, the victim suffered bodily injury from physical assault.<sup>46</sup> In each of these acts of hate violence, the perpetrators chose their victims because they believed them to be Arab or Muslim. Their acts of violence were intended as payback for the death and destruction brought about by terrorists on September 11. Payback, however, makes sense only if the targets of the post-9/11 hate violence were in fact linked to the 9/11 terrorists. No evidence has come to light indicating that any of the backlash victims had anything to do with the 9/11 attacks. The 9/11 terrorists were Arab Muslim men with links to Al Qaeda. Many of the victims of post-9/11 hate violence were neither Arab nor Muslim, yet these men were selected because their perpetrators thought they were Arab or Muslim and in some way responsible for 9/11. How could so many individuals leap to such an erroneous conclusion? The answer, I suggest, lies in the construction of the Arab-as-terrorist stereotype.

## II

### Stereotypes about Arabs and Muslims

Many Americans do not know the difference between Arabs<sup>47</sup> and Muslims and think that all Arabs are Muslim and all Muslims are Arab. Not all Arabs, however, are Muslim and not all Muslims are Arab. Muslims are people who believe in or adhere to the religion of Islam.<sup>48</sup> Though the vast majority of Arabs are Muslim,<sup>49</sup> approximately 15 million Arab Christians reside in Arab-speaking countries today.<sup>50</sup> The majority of Arabs living in the United States today are Christian, not Muslim.<sup>51</sup> A 2001 Zogby survey found that 42% of Arab-Americans are Catholic, 23% are Orthodox, 12% are Protestant, and only 23% are Muslim.<sup>52</sup> In other words, approximately 77% of the Arabs in America are not Muslim.

As noted above, not all Muslims are Arab. Islam has nearly 1.5 billion adherents of many ethnic, national, and racial backgrounds throughout the world.<sup>53</sup> Only 12% of Muslims worldwide are Arab.<sup>54</sup> In the United States, Arab-Americans represent only a small percentage of the total Muslim population. According to one survey, 42% of Muslims in the United States are African-American, 24.4% are South Asian, and only 12.4% are Arab.<sup>55</sup>

One reason why Arabs and Muslims may often be confused is that over 90 percent of all Arabs are Muslim.<sup>56</sup> In addition, there is considerable overlap between Arab and Muslim cultures.<sup>57</sup> According to Sylvia Nassar-McMillan:

Islam is believed to have begun sometime between the 7<sup>th</sup> and 10<sup>th</sup> centuries A.D., when the Prophet Mohammed became known to the people inhabiting the Arabian Peninsula. He claimed to be the messenger of God, delivering the word of God as communicated to him by the Archangel Gabriel. Unifying within their new common faith, the people formed a nation, henceforth known as the Arab Nation.<sup>58</sup>

### *The Arab-as-Terrorist Stereotype*

The conflation of Arabs and Muslims has contributed to the construction of the Arab (or Muslim)-as-Terrorist stereotype.<sup>59</sup> The Arab-as-Terrorist stereotype, however, is not a new stereotype. Even before September 11, Arabs and Muslims were stereotyped as terrorists.<sup>60</sup> As Karen Engle notes, in America, Arabs are presumed to be Muslim, and Muslims are “suspected of having greater fealty to their religion – one that is often equated with terrorism – than to the United States.”<sup>61</sup> Engle points out that “the terrorism-Islam conflation has become so ingrained in the American mind set that initial media reports after the 1995 bombing of the federal building in Oklahoma simply assumed that the culprits were from the Middle East.”<sup>62</sup> As we now know, an American named Timothy McVeigh was responsible for that act of terrorism.<sup>63</sup> Nonetheless, the government received more than 200 reports of harassment, threats and assaults against Arab-Americans and Muslim-Americans following this incident.<sup>64</sup>

In 1980, Dr. Jack Shaheen, Professor Emeritus at Southern Illinois University, began research on motion pictures with Arab portraits and themes.<sup>65</sup> By the completion of his project, Shaheen had found more than 900 feature films released between 1896 and 2001 which contained Arab storylines, settings, and character casts.<sup>66</sup> Not surprisingly, Arabs were portrayed as bad guys in the vast majority of these feature films.<sup>67</sup> Only a handful of films depicted Arabs as heroes or ordinary people.<sup>68</sup>

One example of this can be found in *Rules of Engagement* (2000), a film starring Samuel Jackson and Tommy Lee Jones which Shaheen describes as “promot[ing] a dangerously generalized portrayal of Arabs as rabidly anti-American.”<sup>69</sup> During the film, U.S. Marines open fire on 83 Yemeni men, women, and children.<sup>70</sup> Initially, the audience is led to sympathize with the Yemeni victims. The camera follows a young girl with only one leg who was disabled in the gunfire, then shows other men, women, and children suffering from gunshot wounds at a nearby hospital. As the story unfolds, however, the audience learns that the disabled girl and other apparently innocent victims were not so innocent after all. We find out that the men, women and children in the crowd had weapons and began firing on the Marines who shot back in self-defense.<sup>71</sup> In the end, the U.S. Marines are vindicated. The attack on the Yemeni civilians is portrayed as a justified act.

Another example Shaheen uses is *True Lies* (1994), a film in which Arnold Schwarzenegger plays a secret agent whose mission is to track down nuclear warheads stolen from Kazakhstan. Schwarzenegger finds out that a radical Islamic terrorist group named “Crimson Jihad” is trying to smuggle the nuclear warheads into the United States. The story follows Schwarzenegger’s battles with Salim Abu Aziz, the leader of the terrorist group.

In the meantime, Schwarzenegger's wife, played by Jamie Lee Curtis, is unaware that her husband is a spy and believes he is a boring computer salesman. Curtis craves adventure which she thinks her husband can't give her. Schwarzenegger finds out that his wife is on the verge of having an affair with a man pretending to be a spy. Schwarzenegger decides to engage his wife in a fake spy operation and gets her to perform a striptease in front of him while he hides his face in the shadows. Eventually, Curtis finds out that her husband is a true spy and they live happily ever after.

When *True Lies* was released, it garnered mostly positive reviews. The movie earned \$146 million in the United States and more than \$200 million abroad, making it the third best grossing movie in 1994.<sup>72</sup> Jamie Lee Curtis received a Golden Globe for best actress in a Musical/Comedy.<sup>73</sup> For most people who saw this film when it first came out, Jamie Lee Curtis' striptease scene was probably the most memorable part of the movie, *not* that the movie portrayed Arabs as crazed terrorists intent on harming Americans. This portrayal may not have been particularly striking because it fit within our expectations of what Arab people are like.

While the image of the Arab-as-Terrorist is not a new stereotype, it has become increasingly entrenched in the public imagination since 9/11 because of the increased frequency of news coverage of actual Islamic terrorism. Burned into our memories is the real-life image of hooded masked men holding American journalist Daniel Pearl hostage and declaring his beheading to the world.<sup>74</sup> Anyone who watches the news has seen video footage of jihadist training camps depicting men in black face masks with assault style machine guns engaging in rigorous boot camp exercises as if preparing for hand-to-hand combat. Increasingly we hear of Arab men, and sometimes Arab women,<sup>75</sup> strapping bombs to themselves and acting as suicide bombers.

The effect of these fictional and real-life images of Arabs as terrorists came to a head with the attacks on the World Trade Center and Pentagon. Despite widespread contemporary condemnation of the internment of Americans of Japanese descent during World War II,<sup>76</sup> a Gallup Poll taken after 9/11 found that one in every three Americans supported internment for Americans of Arab descent.<sup>77</sup> And even though racial profiling of African-Americans and Latinos was widely condemned just prior to 9/11,<sup>78</sup> a CNN/USA Today/Gallup Poll taken shortly after 9/11 found that a majority of Americans supported the racial profiling of persons of Middle Eastern descent.<sup>79</sup> The same poll found that 49% of the adults surveyed thought all Arab-Americans should have to carry special identification cards.<sup>80</sup> As Sharon Davies notes, the post-9/11 racial profiling of individuals of Middle Eastern descent was euphemistically called "ethnic profiling" and "was met with shrugs of resignation rather than shouts of protest, signaling a sea change in the nation's thinking about profiling practices from its new, post 9/11 perspective."<sup>81</sup>

There is such anti-Muslim sentiment in America today that opponents of presidential candidate Barack Obama have attempted to spread false rumors over the Internet alleging that Obama is Muslim and a "Muslim plant" in a conspiracy against America.<sup>82</sup> In a poll of American citizens conducted by the Pew Research Center for the People and the Press in August 2007, 45% of respondents said they would be less likely to vote for a candidate who is Muslim

than any other candidate, compared with 25% who said the same about a Mormon candidate and 16% who said the same for a candidate who is an evangelical Christian.<sup>83</sup> Senator Obama, a member of the congregation of the United Church of Christ in Chicago, has openly acknowledged that his paternal grandfather, a Kenyan farmer, was Muslim and that he (Senator Obama) spent part of his childhood living in Indonesia, a predominantly Muslim country.<sup>84</sup> Additionally, Obama's stepfather occasionally attended services at a mosque in Indonesia.<sup>85</sup>

The Arab (or Muslim)-as-Terrorist stereotype victimizes more than just Arabs and Muslims. Anyone who "appears" to be Arab or Muslim is suspect. I put the word "appears" in quotes because Muslim people (adherents of Islam) are of all different colors, races and ethnicities, and one cannot tell simply by a person's appearance whether he or she is Muslim.<sup>86</sup> Moreover, it is difficult to tell from appearance alone whether an individual is Arab. South Asians – individuals from India, Pakistan, Bangladesh, Sri Lanka, Nepal, and Bhutan – are often misidentified as Arab because of their dark skin and dark hair.<sup>87</sup> Sikhs – adherents of the Sikh religion – are also often misidentified as Arab or Muslim because of their long beards and turbans which may remind people of Osama bin Laden, often seen in news footage wearing a long beard and turban.<sup>88</sup> It is telling that the first three individuals killed as part of the backlash against the 9/11 terrorist attacks – Waqar Hasan, Balbir Singh Sodhi, and Vasudev Patel – were of South Asian descent.<sup>89</sup> According to one report, 96% of the victims of backlash violence in the three months following 9/11 were of South Asian descent.<sup>90</sup>

Besides broadening the pool of potential victims, the Arab-as-Terrorist stereotype has also broadened the pool of possible perpetrators of bias-motivated conduct, though not necessarily conduct that would be punishable as a hate crime. Trigger-happy individuals filled with hatred are not the only ones who have been influenced by the Arab-as-Terrorist stereotype. On May 22, 2006, one nervous American Airlines passenger grabbed a fellow passenger sitting directly in front of him as that passenger was settling down with a book and a ginger ale less than an hour into the flight.<sup>91</sup> Thinking he was apprehending a would-be Islamic terrorist, Michael Wilk grabbed the passenger from behind and held him in headlock.<sup>92</sup> He then went into the passenger's pocket and removed his passport and iPod.<sup>93</sup>

It turns out the suspicious looking passenger wasn't an Islamic terrorist but rather a British interior designer with Jewish roots named Seth Stein.<sup>94</sup> Mr. Stein was later told by airline personnel that he was targeted by Wilk because he was using an iPod, had used the lavatory when he got on the plane, and had tan skin that made him appear Arab.<sup>95</sup> Even worse, one or two passengers went up to Wilk (the passenger who assaulted Stein) afterwards and thanked him for his action.<sup>96</sup> American Airlines apologized to Stein and offered him \$2,000, but later withdrew their offer fearing that it would be seen as an admission of liability.<sup>97</sup> In other incidents, commercial airline personnel have barred passengers who were or looked like they were from the Middle East from getting on flights.<sup>98</sup>

Another example occurred on September 13, 2002, when a woman eating breakfast at a Shoney's restaurant in a small town in north Georgia saw three men who appeared to be of Middle Eastern descent and thought she overheard them plotting another 9/11-like attack.<sup>99</sup> Eunice Stone claimed she heard the men say, "Well, if they're mourning 9/11, what are they

going to do about 9/13?”<sup>100</sup> They then laughed and talked about “bringing it down.”<sup>101</sup> Stone took down the license plate numbers from the cars the men were driving and called police.<sup>102</sup>

About 1 a.m. the next day, the three men were pulled over by police on a section of Florida’s Interstate 75 known as Alligator Alley.<sup>103</sup> They were handcuffed, interrogated, and held in separate police cars all night.<sup>104</sup> 17 hours after they were pulled over, they were finally released.<sup>105</sup>

It turns out the three men were medical students heading to a nine week course in Miami. They were also U.S. citizens of Middle Eastern descent.<sup>106</sup> One was born in Detroit, Michigan to Pakistani immigrant parents.<sup>107</sup> The other two men were naturalized U.S. citizens from Jordan living in Chicago.<sup>108</sup> All three men denied joking or talking about 9/11 or another terrorist attack. Stone had also told police that the men she overheard were speaking in Arabic, but only one of the three men knew Arabic, so it would have been impossible for the three of them to carry on a conversation in Arabic.<sup>109</sup>

In response to negative publicity about the incident, Stone stated, “First off, I would like to say that I didn’t do any of this for any kind of publicity. I did it as an American.” Law enforcement authorities and citizens alike praised Eunice Stone for reporting her suspicions to police. Former Senator Bob Graham of Florida, who was serving as the Chair of the Senate Select Committee on Intelligence at the time,<sup>110</sup> told news media, “I especially commend the actions of the private citizen in Calhoun, Georgia, who reported this suspicious activity to the proper authorities. This is exactly the kind of citizen involvement that this war on terrorism is going to require as we seek to protect our homeland.”<sup>111</sup> Tim Moore, a Florida state official, also commended Stone. “Just think if we could get every American to do that, then every town would be safe.”<sup>112</sup>

### *The Arab-as-Foreigner Stereotype*

The “race-ing” of Arab-Americans, Muslim Americans, and those perceived to be Arab or Muslim is multi-faceted.<sup>113</sup> The Arab looking person is not just raced as a terrorist; he is also raced as foreign.<sup>114</sup> As Leti Volpp notes, many of those who were the targets of post-9/11 hate violence were formally citizens of the United States, either through birth or naturalization.<sup>115</sup> Nonetheless, they were not considered citizens as a matter of identity.<sup>116</sup> Just as Japanese Americans during World War II were considered first and foremost Japanese, rather than Americans of Japanese descent (even though many had never even been to Japan), Arab Americans today are considered first and foremost Arabs, rather than Americans of Arab descent.

Recognizing that the “Arab (or Muslim)-looking” person is raced not only as a terrorist, but also as a foreigner helps us understand why the Bush administration has increased funding in two main areas: counter-terrorism and immigration enforcement. In October 2007, the Washington Post reported that under the Bush administration, the Department of Justice has retreated from vigorous prosecutions of mobsters, white collar criminals, environmental crimes, and traditional civil rights infractions and has instead focused on immigration and terrorism related investigations.<sup>117</sup> Apparently, the current administration believes that in order to prevent the next terrorist attack, we must be vigilant about ferreting out illegal immigrants.

The public seems to feel the same way. Since 9/11, anti-illegal immigration fervor has become more pronounced. For example, under mounting pressure from constituents opposed to illegal immigration, in October 2006, Congress passed legislation authorizing the construction of 700 miles of fencing along the U.S. and Mexican border.<sup>118</sup> Also in 2006, anti-illegal immigration forces launched a “Send-A-Brick” campaign, encouraging its supporters to send bricks to members of Congress, asking them to stop the flood of illegal immigration.<sup>119</sup> In 2007, President George W. Bush’s attempts to enact immigration reform legislation met with fierce opposition from his Republican base because of provisions that would have allowed undocumented immigrants to become lawful permanent residents if they fulfilled certain requirements.<sup>120</sup> Since July 2006, more than a hundred municipalities have passed legislation designed to penalize businesses that hire and landlords who rent to undocumented immigrants.<sup>121</sup> Some counties have deputized their police officers to act as immigration officers.<sup>122</sup> In September 2007, Virginia government officials announced they were considering a proposal – the first of its kind in the nation – to build a prison just for illegal immigrants accused of crimes.<sup>123</sup> Eventually, the proposal was rejected by the Virginia Crime Commission’s Immigration Task Force.<sup>124</sup>

### III The War on Terror

In the days, weeks, and months after September 11, 2001, the Bush Administration took conscientious steps to assure the public that its fight was against terrorism, *not* against all Arabs and Muslims. On September 17, 2001, President George W. Bush visited the Islamic Center of Washington, D.C. where he stated, “The face of terror is not the true faith of Islam. That’s not what Islam is all about. Islam is peace. These terrorists don’t represent peace. They represent evil and war.”<sup>125</sup> On September 19, 2001, President Bush told President Megawati of Indonesia, the country with the world’s largest Muslim population,<sup>126</sup> “I’ve made it clear, Madam President, that the war against terrorism is not a war against Muslims, nor is it a war against Arabs. It’s a war against evil people who conduct crimes against innocent people.”<sup>127</sup> Again on September 27, 2001, President Bush told airline employees at O’Hare International Airport in Chicago, Illinois, “Americans understand we fight not a religion; ours is not a campaign against the Muslim faith. Ours is a campaign against evil.”<sup>128</sup>

President Bush also explicitly condemned the acts of bigotry and hatred committed by private individuals against Arabs, Muslims, and those perceived to be Arab or Muslim. In a speech in San Jose, California on April 30, 2002, President Bush declared:

America rejects bigotry. We reject every act of hatred against people of Arab background or Muslim faith. America values and welcomes peaceful people of all faiths – Christian, Jewish, Muslim, Sikh, Hindu and many others. Every faith is practiced and protected here, because we are one country. Every immigrant can be fully and equally American because we’re one country. Race and color should not divide us, because America is one country.<sup>129</sup>

Despite these public pronouncements, post-9/11 government action in the war on terror has helped foster the belief that all Muslims and Arabs are to be viewed with suspicion. Three government actions in particular deserve mention.<sup>130</sup>

### *Post 9/11 Detentions*

First, in the weeks immediately following the September 11 attacks, the government began secretly arresting and detaining Arab, Muslim, and South Asian men.<sup>131</sup> Within the first two months after the attacks, the government had detained at least 1,200 men.<sup>132</sup>

The September 11 detainees were not immediately informed of the charges against them.<sup>133</sup> Some were discouraged from obtaining counsel and others were denied access to counsel.<sup>134</sup> Family members were kept in the dark as to their loved ones whereabouts.<sup>135</sup> Most of the detainees were held for minor immigration violations and had no connection to terrorism.<sup>136</sup> Nonetheless, they were treated like violent criminals and verbally and/or physically abused by corrections officials.<sup>137</sup> Some detainees complained of being called “Bin Laden, Jr.” and being told “You’re going to die here,” and “You’re never going to get out of here.”<sup>138</sup> Others reported painfully tight handcuffs and being repeatedly slammed against the wall.<sup>139</sup> One detainee said that a corrections officer bent his finger back until it touched his wrist.<sup>140</sup> Another detainee said officers repeatedly twisted his arm which was in a cast and a finger which was recovering from a recent operation.<sup>141</sup>

Although the Bureau of Prisons directed the wardens of correctional facilities where the September 11 detainees were being held to preserve videotapes of the detainees in their cells and detainee movement outside the cells, correctional staff destroyed hundreds of tapes, allegedly to free up storage space.<sup>142</sup> Consequently, videotapes that could have helped prove or disprove allegations of abuse raised by September 11 detainees were not available to the Office of Inspector General for the Department of Justice when it conducted an investigation into the treatment of aliens held on immigration charges in connection with the investigation into the September 11 attacks.<sup>143</sup>

### *“Voluntary” Interview Program*

Second, in November 2001, the Department of Justice began efforts to “interview” approximately 5,000 men between the ages of 18 and 33 from Middle Eastern or Muslim nations who had arrived in the United States within the previous two years on a temporary student, tourist, or business visa and were lawful residents of the United States.<sup>144</sup> Four months later, the government announced it would seek to interview an additional 3,000 men from countries with an Al Qaeda presence.<sup>145</sup> According to then Attorney General John Ashcroft, these men were selected *not* because of their ethnicity or religious affiliation, but because they “fit the criteria of persons who might have knowledge of foreign-based terrorists.”<sup>146</sup> To carry out this program, the Justice Department sent out letters “inviting” these men to come for “voluntary” interviews.<sup>147</sup>

Arab-American groups protested that the government was engaging in racial profiling.<sup>148</sup> Ashcroft, however, responded that “[t]hese individuals were not selected in order to single out a particular ethnic or religious group, which suggests that one ethnic or religious group is more prone to terrorism than another. I emphatically reject that proposition . . . .”<sup>149</sup> A few weeks later, however, an internal memo from the INS was leaked to the press, suggesting that the interviews were being used to identify immigration violations and persons connected with the September 11 attacks.<sup>150</sup>

Law professor Tracey Maclin notes that while reasonable minds might differ with the Attorney General’s assertion that the individuals were not racially or ethnically profiled, there was no debate concerning one key point: “[t]here was no evidence revealed to the public that the men targeted for interrogations had any connection with terrorism or the events of September 11.”<sup>151</sup> Maclin concludes that “the government’s investigative procedure following September 11 amounted to an ethnic-based fishing expedition.”<sup>152</sup>

Nonetheless, several prominent legal academics have defended the government’s “voluntary” interview program. Samuel Gross and Debra Livingston, for example, argue that even if the voluntary interview program constituted ethnic profiling, as long as government agents treated the young man of Middle Eastern descent who were asked to come in for interviews with respect, then the program is not objectionable.<sup>153</sup>

Sherry Colb uses the voluntary interview program to examine whether the post-9/11 ethnic profiling of Middle Eastern men is different from the racial profiling of black and brown drivers and concludes that ethnic profiling of men of Middle Eastern descent, what she called nationality-profiling for terrorists, is distinguishable from Driving While Black (a.k.a. DWB) profiling for drug couriers.<sup>154</sup> Colb asserts, “By contrast to *the extremely high probability that an aspiring terrorist will turn out to be Arab and/or Muslim*, the DWB profiling that has for years drawn large-scale condemnation does not carry a similar likelihood of success.”<sup>155</sup> She continues, “[T]he likelihood that a minority driver has drugs in his car, just because he is engaged in one of the minor traffic violations of which almost everyone on the highways guilty, is quite small.”<sup>156</sup> Colb concludes that “under limited circumstances, profiling on the basis of nationality may be constitutionally permissible and even appropriate.”<sup>157</sup>

The problem with Colb’s argument is that she is not comparing apples to apples. If we are asking about the likelihood that a suspect of a particular race or ethnicity will be a terrorist, the question we should be asking is “What is the likelihood that any given Arab American or Muslim American is a terrorist?” *not* “What is the likelihood that a suspected terrorist will turn out to be Arab or Muslim?” Just as a large percentage of African Americans and Latinos have nothing to do with illegal drugs, a large percentage of Arab Americans and Muslim Americans have nothing to do with terrorism. Therefore the likelihood that any given Arab-American or Muslim American is a terrorist is probably quite small.<sup>158</sup>

*Special Registration Program (NSEERS)*

Third, in September 2002, the government implemented a “Special Registration” program also known as NSEERS (National Security Entry-Exit Registration System), requiring immigrant men from 26 mostly Muslim countries<sup>159</sup> to register their name, address, telephone number, place of birth, date of arrival in the United States, height, weight, hair and eye color, financial information and the addresses, birth dates and phone numbers of parents and any foreign friends with the government.<sup>160</sup> Under NSEERS, citizens and nationals of certain countries designated by the Attorney General had to report to the Immigration and Naturalization Service (INS) upon arrival, within 30 days after arrival, every 12 months after arrival, upon changing address, employment, or school, and when departing from the United States.<sup>161</sup> Individuals from designated countries already present in the United States had to submit to a call-in registration program and present themselves in person to the INS by a deadline specified in the Federal Register.<sup>162</sup> They also had to provide photographs and fingerprints.<sup>163</sup> Failure to comply with any of the special registration rules, including failing to report an address change within 10 days, could lead to criminal charges, removal from the United States, and future inadmissibility.<sup>164</sup> Additionally, if an individual failed to comply with these rules, his or her name would be entered into the FBI’s national crime database which is available to state and local police.<sup>165</sup>

Initially, hundreds of non-citizens, including many who were lawfully in the United States pursuing applications for permanent residency, dutifully reported for special registration and found themselves arrested and detained by the INS, creating “a climate of fear and feeling of betrayal was created among immigrant communities targeted for special registration.”<sup>166</sup> Many in the affected communities complained that these arrests unfairly penalized individuals simply attempting to comply with the law.<sup>167</sup> Fearing arrest and imprisonment, many non-citizens from the designated countries left homes and well-established businesses and fled to Canada rather than report, even though they were lawfully in the United States.<sup>168</sup> Aziz Huq, Deputy Director of the Justice Program at the Brennan Center at New York University School of Law, notes that by the program’s conclusion on December 1, 2003, 83,519 men had come forward voluntarily.<sup>169</sup> Of these voluntary registrants, 13,799 had been placed in deportation proceedings.<sup>170</sup> According to James Zogby of the Arab American Institute, “In the end, there was no evidence that any terrorists were apprehended as a result of the effort.”<sup>171</sup>

### *Broader Implications*

The Arab-as-Terrorist stereotype has even broader implications beyond the private acts of hate violence and government action discussed above. The specter of the Arab-as-Terrorist conjures up images of sleeper cells waiting to launch another attack on American soil and encourages citizens and legal decision-makers alike to embrace expansive law-enforcement measures that curtail the civil liberties of us all. For example, shortly after 9/11, Congress hastily passed the USA-PATRIOT Act, giving police the authority to engage in secret searches under a provision known as the “sneak and peek” warrant provision.<sup>172</sup> Under this provision, police can delay giving notice of a search warrant until after executing the search.<sup>173</sup> This provision is not limited to searches of the homes of suspected terrorists. It can be applied to the search of any person’s home as long as the court “finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result.”<sup>174</sup>

The PATRIOT Act also expanded the application of the Foreign Intelligence Surveillance Act (FISA) from situations in which foreign intelligence gathering is the sole or primary purpose of the investigation to situations in which foreign intelligence gathering is a “significant” purpose of the investigation.<sup>175</sup> FISA allows the electronic eavesdropping (wiretapping) of citizens and non-citizens in the United States upon a showing of probable cause that the target is a foreign power or an agent of a foreign power.<sup>176</sup> This is a significant departure from the probable cause showing required under the Fourth Amendment. Probable cause to search means there must be reasonable grounds to believe evidence of a crime will be found in the place to be searched. Probable cause to arrest means there must be reasonable grounds to believe a crime has been committed and that the person being arrested committed it. FISA, in contrast, only requires reasonable grounds to believe the target is a foreign power or an agent of a foreign power. Previously, FISA was understood to cover foreign intelligence investigations, not ordinary domestic law enforcement investigations. As amended, FISA can now be used to collect evidence against a U.S. citizen for use in a domestic criminal case as long as a “significant” purpose of the investigation is foreign intelligence.<sup>177</sup>

The fear of another terrorist attack has already fueled other proposals to enhance police power. For example, Harvard law professor Bill Stuntz suggests that 9/11 justifies (1) increased police power to seize, search, and question groups of individuals without the usual showing of individualized suspicion, (2) secret searches whenever the police want to engage in them, and (3) doing away with the *Miranda* rule.<sup>178</sup>

Acknowledging that young men of Middle Eastern descent have found themselves increasingly the target of suspicion in a post-9/11 world, Stuntz concludes that such ethnic profiling is an inevitable fact of life.<sup>179</sup> Given that the system cannot eliminate the race-based selection of suspects, Stuntz argues it should attempt to reduce the injury those suspects feel once they are selected by law enforcement personnel.<sup>180</sup> Stuntz’s solution to the problem of post 9/11 racial profiling is: (1) to provide incentives for police to engage in group, rather than individual, seizures, and (2) to encourage police to treat all suspects more politely.<sup>181</sup>

Stuntz also argues that in light of 9/11, police should be allowed to engage in secret searches, “whenever the police want to engage in [them], but [would] forbid public disclosure of anything uncovered save in a criminal trial.”<sup>182</sup> He would also limit the types of crimes the government could prove using evidence gathered in a secret search.<sup>183</sup>

Finally, Stuntz suggests that the *Miranda* rule is untenable in a post-9/11 world because a terrorist is more likely than the average suspect to invoke his *Miranda* rights.<sup>184</sup> He therefore proposes doing away with the *Miranda* rule which requires police to cease questioning of a suspect in custody as soon as that person invokes his right to remain silent or his right to counsel. Stuntz would allow police to continue interrogating anyone in custody even if they expressed a desire not to talk or asked to see an attorney.<sup>185</sup> To decrease the possibility of coercion, Stuntz would require all interrogations to be video and audio taped.<sup>186</sup> As recent events have made clear, however, incriminating videotapes have a habit of getting erased or destroyed, and thus are unlikely to provide much deterrent effect.<sup>187</sup>

It is unclear whether Stuntz's proposals have caught the attention of any legislators who may put his proposals into action. Nevertheless, the point is that before 9/11, proposals to allow the police to engage in group seizures without individualized suspicion as a means of dealing with the problem of racial profiling, allowing police to engage in secret searches whenever they want to (not just when a judge pre-authorizes such a search), and allowing police to interrogate suspects who have asked to speak to a lawyer, would have been unthinkable. 9/11 and the specter of the Arab-as-Terrorist have made proposals such as Stuntz's seem more mainstream than they might have appeared before September 11.

### *Conclusion*

Much work needs to be done to mitigate the damage caused by private and public actors responding to 9/11 and the fear of the Arab-as-Terrorist. As Frederick Lawrence has noted, "America, on the whole, has been a staunch defender of the right to be the same or different, although it has fallen short in many of its practices. The question before us is whether progress toward tolerance will continue, or whether, as in many regions of the world, a fatal retrogression will set in."<sup>188</sup> One step in the right direction is recognizing that Arabs and Muslims are not one and the same and that not all Arabs and Muslims are terrorists. Acknowledging the humanity of Arabs and Muslims is a small first step we can take towards combating the Arab (or Muslim)-as-Terrorist stereotype and the hate violence that can result from this stereotype. Beyond this, we must also recognize that the fear engendered by promotion of the Arab-as-Terrorist stereotype can have the deleterious effect of encouraging lawmakers to pass legislation which is aimed at making it easier to detain, question, and search suspected terrorists, but which at the same time can undermine the civil liberties of us all.

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<sup>1</sup> *9/11 Attacks*, N.Y. TIMES, available at [http://topics.nytimes.com/top/reference/timestopics/subjects/s/sept\\_11\\_2001/attacks/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/s/sept_11_2001/attacks/index.html) (last visited Dec. 21, 2007).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* The 9/11 Commission determined through testimony, tapes of passengers' phone calls, and flight data recorders recovered from the crash that crew and passengers on United flight 93 attempted to overpower the terrorists which led the terrorists to crash the plane in Pennsylvania. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS ON THE UNITED STATES (2004).

<sup>4</sup> SOUTH ASIAN AMERICAN LEADERS OF TOMORROW (SAALT), AMERICAN BACKLASH: TERRORISTS BRING WAR HOME IN MORE WAYS THAN ONE (2001); June Han, "WE ARE AMERICANS TOO": A COMPARATIVE STUDY OF THE EFFECTS OF 9/11 ON SOUTH ASIAN COMMUNITIES (2006).

<sup>5</sup> Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004) (arguing that "we might view physical hate violence as the end product of racial profiling's flawed logic, just as racial profiling may be viewed as a form of violence—whether psychic or physical—flowing from bias").

<sup>6</sup> I am not the first person to make this argument. In "*A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*," Professor Muneer Ahmad argues that physical violence against Arabs, Muslims, and South Asians by private individuals and racial profiling of the same communities by government entities "are best understood as different facets of the same social, political, and cultural phenomena." *Id.* at 1277; see also Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (arguing that "we can conceptualize the actions of the U.S. populace, in the form of hate violence attacks, as bearing a relationship to the explicit racial profiling by the government").

<sup>7</sup> A common definition of "hate crime" is "[a] crime motivated by the victim's race, color, ethnicity, religion, or national origin." BLACK'S LAW DICTIONARY 399 (8th ed. 2004). For an excellent resource on hate crimes law, see LU-IN WANG, HATE CRIMES LAW (2001).

<sup>8</sup> FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 4 (1999).

<sup>9</sup> LU-IN WANG, THE COMPLEXITIES OF "HATE," 60 OHIO STATE L.J. 799, 809 (1999).

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<sup>10</sup> *Id.* at 810.

<sup>11</sup> *Id.* at 811.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 812.

<sup>14</sup> *Id.* at 815.

<sup>15</sup> *Id.* Wang argues that the racial animus model makes three erroneous assumptions: (1) that the perpetrator's bias is personal and based on his own negative attitudes toward the targeted social group, (2) that the perpetrator's bias is deviant and irrational, and (3) that the perpetrator commits his crime for no other reason than to inflict harm on a member of the target group. *Id.* at 816. Wang challenges these assumptions by examining two classic forms of hate crime: racial violence against blacks during the country's lynching era and anti-gay violence today. She shows that lynchings during the late 1800s and early 1900s were often motivated by economic considerations and that gay bashings today are often motivated by social considerations. *Id.* at 833-883. Thus, the prototypical hate criminal's bias is not deviant. Rather, it is shared widely by members of his social group. *Id.*

<sup>16</sup> 18 U.S.C § 245 (1994).

<sup>17</sup> *Id.*

<sup>18</sup> Some say the “federally protected activities” requirement in Section 245 makes current federal hate crime legislation useless. See Jason A. Abel, *Americans Under Attack: The Need for Federal Hate Crime Legislation in Light of Post-September 11 Attacks on Arab Americans and Muslims*, 12 ASIAN L.J. 41, 45 (2005).

<sup>19</sup> HUMAN RIGHTS WATCH, “WE ARE NOT THE ENEMY”: HATE CRIMES AGAINST ARABS, MUSLIMS, AND THOSE PERCEIVED TO BE ARAB OR MUSLIM AFTER SEPTEMBER 11, at 6 (2002).

<sup>20</sup> *Id.* The states that do not have any hate crimes legislation are Arkansas, Indiana, New Mexico, South Carolina, and Wyoming. *Id.* at 6 (citing Anti-Defamation League, State Hate Crime Statutory Provisions, <http://www.adl.org/99hatecrime/intro.html> (follow “State Hate Crime Laws” hyperlink) (last visited Jan. 4, 2008)).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

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<sup>24</sup> Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified as amended at 28 U.S.C. § 534 (2007)).

<sup>25</sup> The types of hate crimes that are supposed to be reported to the FBI's Uniform Crime Reporting Program include crimes motivated by bias based on "race, religion, disability, sexual orientation, or ethnicity." U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF INVESTIGATION CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, HATE CRIME DATA COLLECTION GUIDELINES 2 (Oct. 1999). The term "ethnicity" in the statute, however, refers only to whether or not a person is Hispanic. *Id.* In recognition of the fact that there are other ethnicities, the term "ethnicity/national origin" was later adopted to denote "a group of persons of the same of race or national origin who share common were similar traits, languages, customs, and traditions, e.g., *Arabs, Hispanics.*" *Id.* at 2 (emphasis added). This category – ethnicity/national origin – is meant as an umbrella term encompassing "Anti-Hispanic" bias on the one hand and "Anti-Other Ethnicity/National Origin" bias, on the other. *Id.* at 4 (emphasis added). Under this scheme, anti-Muslim bias would fall under the category of religious bias and anti-Arab bias would fall under the category of other ethnicity/national origin bias, but neither is tracked separately.

<sup>26</sup> SAALT, AMERICAN BACKLASH, *supra* note 4, at 3.

<sup>27</sup> COUNCIL ON ARAB-ISLAMIC RELATIONS (CAIR), STEREOTYPES AND CIVIL LIBERTIES: THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 2002, at 9 (2002).

<sup>28</sup> "Hate crimes" are by definition criminal in nature, whereas "bias incidents" are non-criminal bias-motivated actions. *See, e.g.,* Alix Pianin, *What's the Difference Between a Bias Incident and a Hate Crime?*, COLUMBIA SPECTATOR: ONLINE EDITION, Oct. 17, 2007, <http://www.columbiaspectator.com/?q=node/27520>; *see also* Justin Wieland, Note, *Peer-on-Peer Hate Crime and Hate-Motivated Incidents Involving Children in California's Public Schools: Contemporary Issues in Prevalence, Response and Prevention*, 11 U.C. DAVIS J. JUV. L. & POL'Y 235, 237-38 (2007).

<sup>29</sup> HUMAN RIGHTS WATCH, "WE ARE NOT THE ENEMY," *supra* note 19, at 3.

<sup>30</sup> There is widespread disagreement over how many post-9/11 killings of Arabs, South Asians, Sikhs, and/or Muslims, should be counted as hate crimes. The Justice Department's Civil Rights Division listed nine killings across the country as "possible hate crimes" committed in response to 9/11. The Council on American-Islamic Relations counted eight deaths as part of the backlash. The American-Arab Anti-Discrimination Committee thought six killings constituted hate crimes. Alan Cooperman, *September 11 Backlash Murders and the State of "Hate"; Between Families and Police, a Gulf on Victim Count*, WASH. POST, Jan. 20, 2002, at A3. According to Human Rights Watch, at least three and perhaps as many as seven individuals were killed as a result of September 11 backlash. HUMAN RIGHTS WATCH, "WE ARE NOT THE ENEMY," *supra* note 19, at 18.

<sup>31</sup> HUMAN RIGHTS WATCH, "WE ARE NOT THE ENEMY," *supra* note 19, at 18-21 (summarizing post-9/11 anti-Arab and anti-Muslim murders and assaults).

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<sup>32</sup> Julian Borger, *September 11 Revenge Killer To Die for Shooting Sikh*, GUARDIAN, Oct. 11, 2003, at 17 (“The murder of Balbir Singh Sodhi, an immigrant from India and the owner of a petrol station, was the first and one of the worst of the reprisal attacks across the US after September 11, 2001.”).

<sup>33</sup> Robert E. Pierre, *Victims of Hate, Now Feeling Forgotten; Family of Man Killed after 9/11 Finds Little Charity, But Much Hardship*, WASH. POST, Sept. 14, 2002, at A1.

<sup>34</sup> Jim Walsh, “*World Is Watching*” Trial in Post-9/11 Sikh Killing, ARIZ. REPUBLIC, Sept. 3, 2003, at 1A.

<sup>35</sup> Michael Kiefer & Jim Walsh, *9/11-Tied Slayer Won’t Be Executed*, ARIZ. REPUBLIC, Aug. 15, 2006, at 1.

<sup>36</sup> Mike Anton, *After the Attack; The Psychic Toll; Collateral Damage In War on Terrorism*, L.A. TIMES, Sept. 22, 2001, at A26.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* Roque’s attorneys argued that he should be found not guilty by reason of insanity. A jury rejected Roque’s insanity defense and found him guilty of first-degree murder, attempted first-degree murder, reckless endangerment and three counts of drive-by shooting. Roque was then sentenced to death. The Arizona Supreme Court later commuted Roque’s death sentence to life in prison without the possibility of parole on the ground that his mental illness and low IQ were mitigating factors. Kiefer & Walsh, *9/11-Tied Slayer Won’t Be Executed*, *supra* note 35.

<sup>39</sup> Charles Stile, *FBI Probes Slaying of Former New Jersey Shopkeeper*, RECORD, Sept. 19, 2001, at A22.

<sup>40</sup> Katherine Morales, *Murdered Man’s Wife Keeps Alive His Dream*, DALLAS MORNING NEWS, Oct. 6, 2003, at 5B; Frank Trujillo, *Slain Man’s Family in Limbo*, DALLAS MORNING NEWS, Feb. 13, 2003, at 28A.

<sup>41</sup> HUMAN RIGHTS WATCH, “WE ARE NOT THE ENEMY,” *supra* note 19, at 18.

<sup>42</sup> Diane C. Walsh, *Permit Extensions Allow Hate Victim’s Kin to Stay*, STAR LEDGER, Apr. 16, 2003, at 27.

<sup>43</sup> Ahmad, *A Rage Shared by Law*, *supra* note 5, at 1266; *see also* STEREOTYPES AND CIVIL LIBERTIES, *supra* note 27, at 9; HUMAN RIGHTS WATCH, “WE ARE NOT THE ENEMY,” *supra* note 19, at 18-24.

<sup>44</sup> NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM (NAPALC), BACKLASH: WHEN AMERICA TURNED ON ITS OWN 6 (2002).

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 7.

<sup>47</sup> There is no single definition of the word “Arab.” A common definition focuses on linguistics and/or country of origin and defines Arabs as Arabic-speaking people from one of a number of countries. 1 NEW ENCYCLOPAEDIA BRITANNICA 504 (1995). The League of Arab States includes the following 22 countries: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. Sylvia C. Nassar-McMillan, *Counseling Arab-Americans: Counselors’ Call for Advocacy and Social Justice*, 35 COUNSELING & HUM. DEV. 1, 3 (2003). However, even in scholarly circles of Arab-Americans, “there is debate over which of these countries should be included as countries of origin for Arab Americans.” *Id.*

<sup>48</sup> Muslims are people who are adherents of or believers in Islam. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1491 (2002).

<sup>49</sup> Mohammed T. Mehdi, *Arabs and Muslims in American Society*, in THE POLITICS OF MINORITY COALITIONS: RACE, ETHNICITY, AND SHARED UNCERTAINTIES 249, 249 (1996) (noting that 94% of Arabs are Muslim); *see also* MARGARET K. NYDELL, UNDERSTANDING ARABS: A GUIDE FOR MODERN TIMES 83 (2006) (noting that “today over 90% of all Arabs are Muslims”).

<sup>50</sup> JACK G. SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE 5 (2001). *See also* Douglas Stewart, *What You Should Know about Arabs and Arab-Americans*, <http://www.detroitchamber.com/detroit/articles.asp?cid=103&detcid=182> (last visited Jan. 4, 2008) (noting that 90 percent of all Arabs are Muslim).

<sup>51</sup> SHAHEEN, REEL BAD ARABS, *supra* note 50, at 5.

<sup>52</sup> Nassar-McMillan, *Counseling Arab-Americans*, *supra* note 47, at 4 (noting that “the major religious affiliations of Arab-Americans are as follows: Catholic (42%), Orthodox (23%), Muslim (23%), and Protestant (12%)”).

<sup>53</sup> Mehdi, *Arabs and Muslims in American Society*, *supra* note 49, at 249. According to Mohammed T. Mehdi, Arabs number approximately 200 million, so even if all Arabs were Muslim, they would still represent only a small percentage of the overall Muslim population in the world. *Id.*

<sup>54</sup> Rachel Saloom, *I Know You Are, But What Am I?: Arab-American Experiences Through the Critical Race Theory Lens*, 27 HAMLIN J. PUB. L. & POL’Y 55, 57 (2005), *citing* Stewart, *What You Should Know About Arabs and Arab-Americans*, *supra* note 50 (noting that only 12% of Muslims are Arabs).

<sup>55</sup> Ilhan Kaya, *Muslim American Identities and Diversity*, 106 J. GEOGRAPHY 29, 30 (2007), *citing* K.I. LEONARD, MUSLIMS IN THE UNITED STATES: THE STATE OF RESEARCH (2003); Saloom,

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*I Know You Are, But What Am I?*, *supra* note 54, at 58, citing Joyce Howard Price, *1.2 Million Arabs in U.S., Census States*, WASH. TIMES, Dec. 4, 2004.

<sup>56</sup> Mehdi, *Arabs and Muslims in American Society*, *supra* note 49, at 249.

<sup>57</sup> Nassar-McMillan, *Counseling Arab-Americans*, *supra* note 47, at 4.

<sup>58</sup> *Id.*

<sup>59</sup> Ahmad, *A Rage Shared by Law*, *supra* note 5, at 1278 (discussing the construction of a new racial construct called the “Muslim-looking” person); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists”*, 8 ASIAN L.J. 1, 11-15 (2001) (discussing the “racing” of Arab-Americans as terrorists).

<sup>60</sup> Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 75 (2004).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See Lois Romano, *McVeigh Halts Appeals; U.S. Court Rejects Delay; Bomber to Die Monday*, WASH. POST, June 8, 2001, at A1; Jo Thomas, *The Oklahoma City Bombing: the Verdict; McVeigh Jury Decides on Sentence of Death in Oklahoma Bombing*, N.Y. TIMES, June 14, 1997, at 1.

<sup>64</sup> Abel, *Americans Under Attack*, *supra* note 18, at 48.

<sup>65</sup> SHAHEEN, REEL BAD ARABS, *supra* note 50, at 12.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 13.

<sup>68</sup> *Id.* at 10, 13.

<sup>69</sup> *Id.* at 15.

<sup>70</sup> *Id.*

<sup>71</sup> REEL BAD ARABS (Media Education Foundation 2006).

<sup>72</sup> Andrew Hines, *T2 Ushered in \$ 100 mil Era*, VARIETY, April 29, 1996 – May 5, 1996, at 153; Anne Thompson, *They Dubbed to Conquer*, ENT. WKLY., Oct. 27, 1995, at 54.

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<sup>73</sup> Hollywood Foreign Press Association database of Golden Globe awards, <http://www.goldenglobes.org/browse/member/29158> (last accessed January 13, 2008).

<sup>74</sup> Felicity Barringer & Douglas Jehl, *U.S. Says Video Shows Captors Killed Reporter*, N.Y. TIMES, Feb. 22, 2002, at A1.

<sup>75</sup> Amit R. Paley, *Female Suicide Bomber Attacks in Diyala*, WA. POST, Jan. 17, 2008, at A16.

<sup>76</sup> See, e.g., Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1424 (2002) (noting that “[p]erhaps the worst instance of ethnic profiling in American history began on February 19, 1942, when President Franklin Delano Roosevelt signed Executive Order 9066, giving the Secretary of War the power to order over 110,000 Japanese-Americans on the West Coast to be ‘resettle[d]’ in ‘relocation centers’ for the duration of the war”); see also Saito, *Symbolism Under Siege*, *supra* note 59, at 6-8 (discussing the narrative of the internment as having “the markings of a feel-good story: a terrible thing happened, but the nation recognized its wrong and stepped forward to provide some redress”).

<sup>77</sup> Volpp, *The Citizen and the Terrorist*, *supra* note 6, at 1591, citing Gallup Poll Analysis: The Impact of the Attacks on America, <http://www.gallup.com/poll/releases/pr010914c.asp> (showing that one in three Americans polled shortly after 9/11 favored internment for people of Arab descent).

<sup>78</sup> A December 1999 Gallup Poll found that 81% of the public disapproved of racial profiling. Florangela Davila, *ACLU Ads to Spotlight “Racial Profiling” Issue*, SEATTLE TIMES, Apr. 20, 2000, at B5.

<sup>79</sup> Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 46 n.6 (2003).

<sup>80</sup> *Id.*; see also David Van Biema, *As American As . . .*, TIME, Oct. 1, 2001, at 72.

<sup>81</sup> Davies, *Profiling Terror*, *supra* note 79, at 48.

<sup>82</sup> Perry Bacon, Jr., *Foes Use Obama’s Muslim Ties to Fuel Rumors about Him*, WASH. POST, Nov. 29, 2007, at A1.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> It does not make sense to say that someone appears to be Muslim because being Muslim is a religious identity, not a racial identity. See *infra* note 48..

<sup>87</sup> HAN, “WE ARE AMERICANS TOO,” *supra* note 4, at 1 n.1.

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<sup>88</sup> *Id.* at 2 (“Turban-wearing Sikhs have been targeted for hate crimes and profiling incidents since 9/11 because they are often misidentified as Arabs and Muslims.”). *See also* BACKLASH, *supra* note 44, at 3 (noting that during coverage of the 9/11 attacks, the media repeatedly showed pictures of Osama Bin Laden with a long beard and turban which may have led “certain segments of the public [to] identify the turbans and beards worn by Sikh American men with Bin Laden, even though the style of the turbans are not the same.”).

<sup>89</sup> HUMAN RIGHTS WATCH, *WE ARE NOT THE ENEMY*, *supra* note 19, at 18.

<sup>90</sup> BACKLASH, *supra* note 44, at 7 (noting that “[n]early all (96%) of the 243 [post 9/11 backlash] incidents documented by NAPALC and its Affiliates involved victims of South Asian descent, namely immigrants from India or Pakistan). NAPALC (National Asian Pacific American Legal Consortium) also found that in contrast to past practice, the victims and perpetrators of post-9/11 hate violence included women, senior citizens, and even children. *Id.* at 2.

<sup>91</sup> Sophie Goodchild, *Humiliation at 33,000 Feet*, INDEPENDENT ON SUNDAY (London), Oct. 1, 2006, at 3.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Davies, *Profiling Terror*, *supra* note 7979, at 47 n.7.

<sup>99</sup> David Ballingrud et al., *Terror Alert Shuts Florida Road; Three Questioned*, ST. PETERSBURG TIMES ONLINE, Sept. 14, 2002, available at [http://www.sptimes.com/2002/09/14/news\\_pf/State/Terror\\_alert\\_shuts\\_Fl.shtml](http://www.sptimes.com/2002/09/14/news_pf/State/Terror_alert_shuts_Fl.shtml).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

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<sup>104</sup> Kelli Arena et al., *Man in Terror Scare Says Woman Is Lying*, CNN.COM, Sept. 13, 2002, available at <http://archives.cnn.com/2002/US/09/13/alligator.alley/index.html>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*; Ballingrud, *Terror Alert Shuts Florida Road*, *supra* note 99.

<sup>108</sup> Arena, *Man in Terror Scare Says Woman is Lying*, *supra* note 104.

<sup>109</sup> *Larry King Live* (CNN television broadcast Sept. 16, 2002) (interview with 3 men detained by police after a woman thought she overheard them plotting another terrorist attack).

<sup>110</sup> Biographical Directory of the United States Congress, 1774 – Present, available at <http://bioguid.congress.gov/scripts/biodisplay.pl?index=G000352/> (noting that Graham chaired the Senate Committee on Intelligence during the One Hundred Seventh Congress from January 3-20, 2001 and from June 6, 2001 – January 3, 2003).

<sup>111</sup> Ballingrud, *Terror Alert Shuts Florida Road*, *supra* note 99.

<sup>112</sup> *Id.*

<sup>113</sup> Natsu Saito notes that “Arab-Americans and Muslims have been ‘raced’ as ‘terrorists’: foreign, disloyal, and imminently threatening.” Saito, *Symbolism Under Siege*, *supra* note 59, at 12.

<sup>114</sup> *Id.* Other groups, such as Asian Americans and Latinos, have been raced as foreigners. See Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 428-38, 441-42 (1996).

<sup>115</sup> Volpp, *The Citizen and the Terrorist*, *supra* note 6, at 1592.

<sup>116</sup> *Id.*

<sup>117</sup> Dan Eggen & John Solomon, *Justice Department’s Focus Has Shifted: Terror, Immigration Are Current Priorities*, WASH. POST, Oct. 17, 2007, at A1. See also *DOJ White Collar Prosecutions Drop As Terrorism Cases Rise, Study Says*, 78 U.S.L.W. 2232, 2232 (2007) (noting that a survey of federal prosecutions during the Bush administration conducted by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University found that Justice Department prosecutions for white collar crime and official corruption cases dropped significantly and while terrorism-related and immigration prosecutions showed substantial increases since fiscal year 2000).

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<sup>118</sup> Michael A. Fletcher & Jonathan Weisman, *Bush Signs Bill Authorizing 700-Mile Fence for Border*, WASH. POST, Oct. 27, 2006, at A4.

<sup>119</sup> Carl Hulse, *A Build-a-Protest Approach to Immigration*, N.Y. TIMES, May 31, 2006, at A15.

<sup>120</sup> See Michael Abramowitz, *Immigrant Legislation Splits GOP; Right Lashes Out at Bush and Senate over Compromise*, WASH. POST, May 19, 2007, at A1.

<sup>121</sup> Stephen Deere, *City Tries to Sidestep Lawsuits*, ST. LOUIS POST-DISPATCH, Sept. 27, 2006, at D1 (noting new St. Louis ordinance penalizing businesses and landlords that hire and rent to illegal immigrants); Jennifer Edwards, *Butler County Pushes Pledge*, CINCINNATI ENQUIRER, Feb. 7, 2006, at 1C (noting that Butler County, Ohio is considering a plan that would require business owners to sign pledges not to hire illegal immigrants as a condition necessary to receive and keep a license to do business); Jim Lockwood & Maura McDermott, *Law Targeting Illegals Takes Shape in Newton*, STAR-LEDGER, Sept. 1, 2006, at 1 (noting that officials in Newton, New Jersey, are considering legislation that would deny business permits and city contracts for five years to any business owner who hires an illegal immigrant and impose fines on landlords who rent to illegal immigrants ranging from \$1,000 for a first offense to \$10,000 for three or more offenses); Emilie Lounsberry, *Illegal Immigrant Laws Spur Two Suits*, PHILA. INQUIRER, Aug. 16, 2006, at A1 (noting that Riverside, California, bans hiring or renting to illegal immigrants, with employers and landlords facing a fine of \$1,000 for each violation and the denial of business permits and municipal contracts and grants); Laura Parker, *Court Tests Await Cities' Laws on Immigrants*, USA TODAY, Oct. 9, 2006, at 3A (noting that under Hazelton, Pennsylvania's new ordinance, business owners and landlords are penalized if they employ or rent to illegal immigrants by having their licenses to do business revoked); Amy Worden & Mario F. Cattabiani, *Court Voids Hazelton Law*, PHILA. INQUIRER, July 27, 2007, at A1 (noting that more than 100 municipalities have passed legislation modeled after an ordinance enacted in Hazelton, Pennsylvania, penalizing businesses that hire and landlords that rent to illegal immigrants). In July 2007, the Hazelton ordinance was struck down by a federal district court judge. Amy Worden & Mario F. Cattabiani, *Court Voids Hazelton Law*, PHILA. INQUIRER, July 27, 2007, at A1.

<sup>122</sup> Dan Genz, *Crackdown on Illegal Immigration Hitting Its Stride*, EXAMINER (Va.), Dec. 28, 2007, at 4 (noting that police officers in Prince William County, Virginia, will soon start checking whether people pulled over for a traffic offense or stopped for a minor misdemeanor are legally in the United States); Nick Miroff, *Questions Remain on Illegal Immigrants*, WASH. POST, July 12, 2007, at B1 (noting that the Board of County Supervisors in Prince William County, Virginia, unanimously approved a resolution which authorizes police officers to inquire about the residency status of a person if they have probable cause to believe that person is not legally in the United States); Jean O. Pasco, *City's Border Policy Sparks Outcry*, L.A. TIMES, Jan. 4, 2006, at B1 (noting that Costa Mesa in Orange County, California, was the first county to authorize its police department to enforce the nation's immigration laws).

<sup>123</sup> Tim Craig, *Virginia Considers Detention Center for Immigrants*, WASH. POST, Sept. 26, 2007, at A1.

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<sup>124</sup> Nick Miroff & Kristen Mack, *As Hundreds Testify, Prince William's Vote on Immigrant Plan Goes Late*, WASH. POST, Oct. 17, 2007, at A1.

<sup>125</sup> WhiteHouse.gov, Backgrounder: The President's Quotes on Islam: In the President's Words: Respecting Islam, <http://www.whitehouse.gov/infocus/ramadan/islam.html> (last visited Jan. 4, 2008).

<sup>126</sup> See CIA World Factbook, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html#People> (last visited February 1, 2008).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> For a more in-depth critique of government actions in the war on terror and how these actions have contributed to the Arab or Muslim-looking person-as-Terrorist stereotype, see Ahmad, *A Rage Shared by Law*, *supra* note 5.

<sup>131</sup> Ahmad, *A Rage Shared by Law*, *supra* note 5, at 1270; 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, 331 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960 (2002); OFFICE OF THE INSPECTOR GENERAL FOR THE DEPARTMENT OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf> [hereinafter OIG REPORT] (confirming that within two months of the 9/11 attacks, law enforcement authorities had detained, at least for questioning, more than 1,200 citizens and aliens nationwide). According to David Cole, every aspect of the proceedings was closed to the public press and even family members. David Cole, *In Aid of Removal: Due Process Limits on Immigrant Detention*, 51 EMORY L.J. 1003, 1005 (2002). Susan Akram and Maritz Karmely explain the various ways in which these detentions were conducted in secret. Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 625-26 (2005).

<sup>132</sup> OIG REPORT, *supra* note 131, at 1. The Department of Justice stopped reporting the number of individuals detained once the number reached approximately 1,200 because “the statistics became too confusing.” *Id.*

<sup>133</sup> *Id.* at 2 (noting that detainees and their attorneys “alleged that the detainees were not informed of the charges against them for extended periods of time; were not permitted contact with attorneys, their families, and embassy officials; remained in detention even though they had

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no involvement in terrorism; or were physically abused, verbally abused, and mistreated in other ways while detained”).

<sup>134</sup> John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” for “Homeland Security”*: A Constitutional Analysis of the USA PATRIOT Act and the Justice Department’s Anti-Terrorism Initiatives, 51 AM. U. L. REV. 1081, 1117 (2002).

<sup>135</sup> OIG REPORT, *supra* note 131, at 2.

<sup>136</sup> *Id.* at 27 (noting that while some of the arrests resulted in criminal charges, “the vast majority of September 11 detainees were charged with civil violations of federal immigration law.”); *see* Ahmad, *A Rage Shared by Law*, *supra* note 5, at 1271.

<sup>137</sup> OIG REPORT, *supra* note 131, at 142-32.

<sup>138</sup> *Id.* at 143.

<sup>139</sup> *Id.* at 143, 145.

<sup>140</sup> *Id.* at 144.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 150.

<sup>143</sup> *Id.*

<sup>144</sup> Tracey Maclin, “Voluntary” Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror, 73 MISS. L.J. 471, 479 (2003), *citing* Florangela Davis & Mike Carter, *Immigrants Urged to Exercise Rights*, SEATTLE TIMES, Nov. 21, 2001, at B1; *see* Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1417 (2002).

<sup>145</sup> Gross & Livingston, *Racial Profiling Under Attack*, *supra* note 144, at 1417.

<sup>146</sup> Maclin, “Voluntary” Interviews and Airport Searches of Middle Eastern Men, *supra* note 144, at 480, *citing* Memorandum from the Attorney General to all United States Attorneys and all Members of the Anti-Terrorism Task Forces (Nov. 9, 2001).

<sup>147</sup> *Id.* at 481.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 480, *citing* Memorandum from the Attorney General to all United States Attorneys and all Members of the Anti-Terrorism Task Forces (Nov. 9, 2001).

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<sup>150</sup> *Id.* at 482-83.

<sup>151</sup> *Id.* at 486.

<sup>152</sup> *Id.* at 493.

<sup>153</sup> Gross & Livingston, *Racial Profiling Under Attack*, *supra* note 144, at 1436-37.

<sup>154</sup> Sherry F. Colb, *Profiling with Apologies*, 1 OHIO ST. J. CRIM. L. 611, 613 (2004).

<sup>155</sup> *Id.* at 616 (emphasis added).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 624.

<sup>158</sup> In Colb's defense, she does not suggest that pulling over Arabs and Muslims driving on the highway is a sensible way to catch terrorists. Rather, she suggests that if someone in the Arab or Muslim community is likely to have been involved in a terrorist attack, then interviewing a large proportion of the Arab-Muslim community in a respectful manner and compensating the individuals interviewed is likely to bring authorities into contact with someone who has something useful to share with authorities. Communication with Sherry Colb on January 23, 2008) (copy on file with author).

<sup>159</sup> Besides North Korea, all of the countries designated for special registration are predominantly Arab or Muslim. DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES 8-10 (1985). Armenia, a non-Muslim non-Arab country, was designated for a short time, "then removed after a public outcry by the politically-influential US Armenian American community." *Id.* at 8-10 - 8-11.

<sup>160</sup> Ahmad, *A Rage Shared by Law*, *supra* note 5, at 1274 n.55; *see also* Victor Romero, *Race, Immigration, and the Department of Homeland Security*, 19 ST. JOHN'S J. LEGAL COMMENT. 51, 55-59 (2004) (discussing the NSEERS program).

<sup>161</sup> KESSELBRENNER & ROSENBERG, IMMIGRATION LAW AND CRIMES, *supra* note 159, at 8-8.

<sup>162</sup> *Id.* at 8-8 to -9.

<sup>163</sup> *Id.* at 8-9.

<sup>164</sup> *Id.* at 8-12.

<sup>165</sup> *Id.*

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<sup>166</sup> *Id.* at 8-11.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Aziz Z. Huq & Christopher Muller, *The War on Crime as Precursor to the War on Terror* (work-in-progress on file with the author), at 17.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*, citing James Zogby, *Injustice Toward Immigrants*, BALTIMORE SUN, January 13, 2006.

<sup>172</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 213, 115 Stat. 272, 285-86 (2001) [Hereinafter USA Patriot Act].

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* § 218; see also Whitehead & Aden, *Forfeiting “Enduring Freedom” for “Homeland Security,”* *supra* note 134, at 1103 (noting that this change in language “greatly expands the power of federal authorities to apply the relatively loose FISA standards to investigations of both U.S. citizens and residents that only tangentially touch on national security.”).

<sup>176</sup> USA Patriot Act § 218.

<sup>177</sup> *Id.*; see also Akram & Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States*, *supra* note 131, at 639 (noting that § 218 enables law enforcement agencies conducting a criminal investigation to “subvert Fourth Amendment requirements simply by claiming that foreign intelligence-gathering is ‘a significant purpose’ of their investigation”).

<sup>178</sup> William J. Stuntz, *Local Policing after the Terror*, 111 YALE L.J. 2137 (2002).

<sup>179</sup> *Id.* at 2179.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 2179-80. Stuntz would not allow law enforcement to use race, sex, alienage or occupation as a basis for a group search. *Id.* at 2163. He would only allow police to search “classes of people defined by place and time – everyone who happens to be driving past a particular point on a particular road at a particular time, everyone who occupies a given building or public space at a given time, and so forth.” *Id.*

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<sup>182</sup> *Id.* at 2183-84.

<sup>183</sup> *Id.* at 2137.

<sup>184</sup> *Id.* at 2189.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Dan Eggen & Joby Warrick, *CIA Destroyed Videos Showing Interrogations; Harsh Techniques Seen in 2002 Tapes*, WA. POST, Dec. 7, 2007, at A1; Joby Warrick & Walter Pincus, *Station Chief Made Appeal to Destroy CIA Tapes*, WA. POST, Jan. 16, 2008, at A1.

<sup>188</sup> Frederick Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320 (1994).