

10-31-2004

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

Muneer I. Ahmad  
mia3@law.georgetown.edu

Follow this and additional works at: <http://scholarship.law.berkeley.edu/californialawreview>

 Part of the [Law Commons](#)

---

### Recommended Citation

Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004).  
Available at: <http://scholarship.law.berkeley.edu/californialawreview/vol92/iss5/1>

### Link to publisher version (DOI)

<http://dx.doi.org/doi:10.15779/Z389H84>

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

# California Law Review

---

VOL. 92

OCTOBER 2004

No. 5

---

Copyright © 2004 by California Law Review, Inc.

## A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion\*

Muneer I. Ahmad†

### TABLE OF CONTENTS

Introduction.....	1261
I. “Private” and “Public” Racial Violence in the Aftermath of September 11 .....	1265
A. “Private” Racial Violence.....	1265
B. “Public” Racial Violence.....	1267
II. The Construction of “Muslim-looking” People and the “Logic” of Fungibility.....	1278
III. Understanding the Origins of Post-September 11 Hate Violence....	1282

---

Copyright © 2004 Muneer I. Ahmad and California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

† Associate Professor of Law, American University Washington College of Law. Earlier versions of this Article were presented at the Feminism and Legal Theory Workshop, Cornell Law School, Ithaca, New York (Apr. 2002), the Simpson Center for the Humanities, University of Washington, Seattle, Washington, (Nov. 2002), and the American Studies Association Annual Conference, Washington, D.C. (Nov. 2001). I have benefited from invaluable comments on drafts of this Article from Sameer Ashar, Susan Bennett, Pamela Bridgewater, Elizabeth Bruch, Devon Carbado, Susan Carle, Bob Chang, Christine Farley, Lewis Grossman, Cheryl Harris, Darren Hutchinson, Peter Jaszi, Mark Niles, Victoria Nourse, Nancy Polikoff, and Chandan Reddy. This Article was made possible by generous support from Dean Claudio Grossman. In addition, I received outstanding research assistance from Albert Ting, Sunita Patel, and Debby Morgan. I am especially indebted to Leti Volpp and Teemu Ruskola for their engagement in this project. I am also grateful to Karen Tumlin and Kendra Nielsen at the *California Law Review* for their exceptional editing.

A. The Perpetrators' Biases Were Not Personal, But Broadly Shared. ....	1295
B. The Perpetrators' Behavior Was Aberrant, But Their Biases Were Not. ....	1299
C. The Perpetrators Were Understood To Be Motivated By Vengeance Rather Than Mere Hatred.....	1299
IV. Post-September 11 Racial Violence as Crimes of Passion .....	1302
A. The Perpetrators' Claims of Male Honor.....	1308
B. The Perpetrators' Claims of Loyalty.....	1310
C. The Perpetrators' Claims to Property .....	1313
D. The Perpetrators' Claims of Violation and Betrayal.....	1314
V. Endorsing Passion .....	1317
A. A Shared Ideology of Violence .....	1319
B. The Role of Law in Fomenting Violence After September 11 .....	1321
C. The Role of Violence in Fomenting Law After September 11 .....	1325
Conclusion .....	1327

# A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion\*

Muneer I. Ahmad

## INTRODUCTION

September 11 will long be associated with unthinkable violence. The sheer magnitude of the terrorist attacks, the visual imagery of the collapsing towers of the World Trade Center, and the extensive media attention given to the victims have defined the violence of September 11 in unitary terms. But in the aftermath of the terrorist attacks, another form of violence spread across the country: in the days and weeks after September 11, over one thousand bias incidents against Arabs, Muslims, and South Asians were reported.<sup>1</sup> These incidents, including the murders of as many as

---

\* I borrow the phrase “a rage shared by law” from Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1393 (1997) (referring to “a rage shared by the law”).

1. Throughout this article, I refer to the post-September 11 experience of Arabs, Muslims, and South Asians. These are partially overlapping categories which are both under-inclusive and over-inclusive of the racial violence I seek to address. As I argue in greater detail below, *see infra* notes 71-81 and accompanying text, post-September 11 hate violence and governmental profiling regimes have helped to create a new racial construct of “Muslim-looking” people. Because this new racial category is informed by various characteristics, both real and perceived, such as religion, skin color, other aspects of phenotypic appearance, name, national origin, dress, language, and accent, in theory and in practice it encompasses a broad range of racial and ethnic communities. Thus, hate violence may be directed toward Sikhs or non-Muslim Latinos because of a mistaken assumption that they are Muslim or Arab. *See infra* note 75 and accompanying text. However, not all “Muslim-looking” people have been affected equally in the aftermath of September 11. Hate violence has been directed primarily toward Arabs, Muslims, and South Asians (and Sikhs in particular). Similarly, governmental profiling has often been framed in terms of national origin, although not all Arab, Muslim, and South Asian nationals have been subject to the same restrictions. (For example, Indians were not subject to the government’s Special Registration program. *See infra* note 55 and accompanying text.) I recognize the discursive and imperfect nature of the terminology I have chosen, but for the most part adhere to it rather than using the “Muslim-looking” category for two reasons. First, it roughly describes the communities for whom I believe the most post-September 11 violence has been intended or by whom the most violence has been experienced, even if they have not experienced all forms of post-September 11 violence equally. Second, each of the categories in my grouping—Arabs, Muslims, and South Asians—has a social and political salience as an identity group with which individuals self-identify. In contrast, the “Muslim-looking” category is purely an ascriptive identity, and an absurd and incoherent one at that. My reservations about it notwithstanding, I use the term “Muslim-looking” from time to time in this Article to emphasize that it is not only Arabs, Muslims, and South Asians who are affected by post-September 11 hate violence and governmental profiling, even if it is these communities that have been most dramatically transformed by these practices.

nineteen people, assaults of scores of others, vandalism of homes, businesses and places of worship, and verbal harassment of countless individuals, form part of the subterranean history of September 11. While the violence of September 11 itself is largely thought to have been incomprehensible, post-September 11 hate violence is remarkable precisely because it is something we can understand. Although condemned as individual acts of criminality, the phenomenon of hate violence toward Arabs, Muslims, and South Asians is one that appeared to need little explanation; it was accepted as a regrettable, but expected, response to the terrorist attacks. As early as September 12, 2001, major newspapers reported predictions of the violence against these communities.<sup>2</sup>

The physical violence exercised upon the bodies of Arabs, Muslims, and South Asians has been accompanied by a legal and political violence toward these communities. In the first two years after September 11, the United States has developed a corpus of immigration law and law enforcement policy that by design or effect applies almost exclusively to Arabs, Muslims, and South Asians. These laws operate in tandem with the individual acts of physical violence that have been carried out against these same communities, thereby aiding and abetting hate violence. Taken together, the multiple assaults on the bodies and rights of Arabs, Muslims, and South Asians produce a psychological violence as well and reracialize the communities they target as “Muslim-looking” foreigners unworthy of membership in the national polity.

Having occurred in a time of national tragedy, and in the wake of a far grander spectacle of violence, it is perhaps inevitable that the hate violence against Arabs, Muslims, and South Asians would receive short shrift in governmental, media, or public attention. This Article attempts to trace a genealogy of the racial violence in the aftermath of September 11, with three purposes in mind: (1) to explicate the mutually reinforcing relationship between individual hate crimes and governmental racial profiling, and the racialization they jointly effect; (2) to explore the psychological motivations for individual hate crimes against Arabs, Muslims, and South

---

Finally, I use the “Arab, Muslim, and South Asian” and “Muslim-looking” categories to describe both citizens and noncitizens of the United States. While much of the post-September 11 hate violence and governmental profiling has been experienced by noncitizens, U.S. citizens have been subjected to such violence as well.

2. See, e.g., Edward Hegstrom & Tara Dooley, *Houston Muslims, Arab Leaders Condemn Attacks*, HOUS. CHRON., Sept. 12, 2001, at 24A (noting local and national fear of harassment among Muslims); Caryle Murphy & Emily Wax, *Muslims Condemn Acts, Fear Reprisals; D.C. Area Islamic Groups Urged to Take Precautions*, WASH. POST, Sept. 12, 2001, at B6 (noting that Muslims who wear religious attire were urged to stay out of public areas); Larry B. Stammer & Teresa Watanabe, *Muslims in Southland Brace for Retaliation*, L.A. TIMES, Sept. 12, 2001, at A38 (reporting Islamic schools, centers and mosques closed for fear of revenge assaults); Robert Tomsho, *A Day of Terror: Islamic-Americans Grapple with Quick Backlash*, WALL ST. J. ABSTRACTS, Sept. 12, 2001, at A12 (reporting Muslim-American organizations’ preparation for backlash).

Asians, and how state-sponsored violence against these communities has reflected that psychology; and (3) to illuminate how the interrelationship among different systems of subordination serves to normalize such violence.<sup>3</sup>

There is a danger that hate violence against Arabs, Muslims, and South Asians is understood as a passing, or past, phenomenon. Such an assumption ignores the steady stream of violence directed against these communities long after September 11. Nearly two years after the terrorist attacks, this violence continued, including: the stabbing in the back of a Muslim woman in Virginia, while her perpetrator called her a “terrorist pig”<sup>4</sup>; the brutal beating of a Hindu pizza delivery man in Massachusetts who was mistaken for a Muslim<sup>5</sup>; and a cross-burning in front of an Islamic center in Maryland.<sup>6</sup> Events such as these suggest that, rather than an isolated phenomenon, the racialization of Arabs, Muslims, and South Asians after September 11 is ongoing. Indeed, the reconstruction of Arab, Muslim, and South Asian identity after September 11 constitutes a major shift in American racial conceptualization. Hate violence has played a major role in this process, and continues to do so.<sup>7</sup> Moreover, the very persistence of this violence suggests that it and underlying biases toward Arabs, Muslims, and South Asians have been normalized.

By situating post-September 11 violence within the history of hate violence in the United States, we can begin to understand how the recent experiences of Arabs, Muslims, and South Asians figure into an American tradition of violence as a means of racial differentiation. However, such historical context also suggests that the violence directed toward Arabs,

---

3. I realize that in focusing attention on the violence done to Arabs, Muslims, and South Asians in the United States, I open myself up to the criticism that I am implicitly downgrading the magnitude of the violence done to the victims of the September 11 attacks. I have no interest in a comparison of victimhood. The killings of September 11, the hate killings post-September 11, and the killings of innocent civilians in Afghanistan and Iraq all result in the loss of life. If one is serious about the proposition that all life is equal, then all killings are and should be subject to scrutiny.

4. See Emad Mekay, *Rights: U.S. Muslims Fear Government Harassment Will Worsen*, INTER PRESS SERVICE, Oct. 9, 2003, at 2003 WL 6917481.

5. See Jules Crittenden, *Cops Say Attack on Pizza Guy was Hate Crime*, BOSTON HERALD, June 25, 2003, at 5 (quoting local police chief as stating, “The added brutality was due to his ethnicity . . . [o]nce they looked at him, they thought he was Arabic or Islamic. They were yelling at him, ‘Go back to Iraq!’ . . . [h]e kept telling them that he was a Hindu from India.”). A young Pakistani man in New Jersey was also beaten to death while delivering a pizza. While the motive for this killing has not been established, many fear that it, too, was a hate crime. See Ronald Smothers, *Calls for Justice and Mercy Over a Pakistani’s Killing*, N.Y. TIMES, Oct. 14, 2003, at B5.

6. Jamie Stockwell, *Two Teens Charged With Burning Cross Near Mosque*, WASH. POST, Aug. 2, 2003, at B5.

7. More recent statistics confirm that post-September 11 violence has not ceased. The Council on American-Islamic Relations reports that anti-Muslim acts increased by 70% in 2003 (compared with 2002). See Council on American-Islamic Relations, *Unpatriotic Acts: The Status of Muslim Civil Rights in the United States 2004*, available at <http://www.cair-net.org/asp/execsum2004.asp> (last visited Sept. 1, 2004).

Muslims, and South Asians has been different in kind from many hate crimes in recent memory. For example, the killings of James Byrd and Matthew Shepard have been viewed as incomprehensible acts of violence.<sup>8</sup> In contrast, although Americans have condemned the killings of Arabs, Muslims, and South Asians after September 11, these killings have been understood as the result of a displaced anger, one with which many Americans have sympathized and agreed. By this account, the perpetrators of hate crimes against Arabs, Muslims, and South Asians were not guilty of malicious intent or depraved indifference, but of expressing a socially appropriate emotion—overwhelming anger in the aftermath of the terrorist attacks—in socially inappropriate ways. Borrowing from criminal law, the hate crime killings before September 11 were understood as crimes of moral depravity, while the hate killings since September 11 have been understood as crimes of passion. Whereas crimes of moral depravity are devoid of any justification whatsoever, crimes of passion are treated as morally understandable though still illegal transgressions.

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

In Part I of this Article, I provide an overview of the racial violence that has occurred in the aftermath of September 11, including both individual hate crimes and governmental policies of racial profiling, and I argue that they mutually reinforce a shared racist ideology. In Part II, I review the construction of a new racial identity for Arabs, Muslims, and South Asians, and the logic of fungibility whereby these and other disparate groups are assimilated into a single category of “Muslim-looking” people. In Part III, I discuss the psychological origins of post-September 11 hate violence against Arabs, Muslims, and South Asians, and I explain how this violence differs from a paradigmatic understanding of hate crimes that emerged in the 1990s.

In Part IV, I explore an alternative legal framework, the “crime of passion,” and argue that this model provides a more accurate account for the popular understanding of post-September 11 racial violence. My interest here is not primarily to investigate the use of the crime of passion

---

8. See *infra* notes 115-92 and accompanying text.

defense by the perpetrators of post-September 11 hate violence, but to demonstrate how its traditional features undergird public and private forms of racial violence against “Muslim-looking” people and help to normalize such violence as understandable, although inappropriate, responses to the terrorist attacks. I address the tension between emotionalism and reason inherent in the legal and extralegal responses to the terrorist attacks, and I suggest that much like in the paradigmatic crime of passion, where an enraged husband kills his wife’s lover upon discovering them in the marital bed, these post-September 11 responses have been understood as acts of passion.

In Part V, I return to the relationship between individual acts of violence and governmental profiling and argue that a value symmetry of racism between the two precludes coherent state condemnation of the individual violence. Rather, the state’s condemnation of the hate violence belies its own subscription to racist ideology with respect to Arabs, Muslims, and South Asians. I conclude that we are now in the first moments of national reconsideration of our anti-terrorism policies, and that an important opportunity exists to make circumspect corrections to the emotionally driven, racially informed policies currently in place.

## I.

### “PRIVATE” AND “PUBLIC” RACIAL VIOLENCE IN THE AFTERMATH OF SEPTEMBER 11

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

Feminist insight counsels deep skepticism of public/private distinctions because spheres of privacy are frequently the products of state action (or inaction) and because the state is itself selectively constitutive of private concerns. Inquiry into post-September 11 violence provides fresh evidence for such skepticism, as the supposedly public and private violence enacted against Arabs, Muslims, and South Asians, far from being separate and discrete phenomena, operate in tandem.

#### A. *“Private” Racial Violence*

In the immediate aftermath of the terrorist attacks, Arab, Muslim, and South Asian communities in the United States experienced a wave of



violence far greater in magnitude than they had ever experienced before. In total, over one thousand separate bias incidents were reported in a period of eight weeks, and though the rate of new incidents has slowed, it continues today, fueled most recently by the war in Iraq.<sup>9</sup> Chief among the post-September 11 violence were the murders of as many as nineteen people, including Balbir Singh Sodhi, Waqar Hasan, Adel Karas, Saed Mujtahid, Jayantilal Patel, Surjit Singh Samra, Abdo Ali Ahmed, Abdullah Mohammed Nimer, and Vasudev Patel.<sup>10</sup> In addition, these incidents have included the fire bombings of mosques, temples, and gurdwaras; assaults by fist, gun, knife, and Molotov cocktail; acts of vandalism and property destruction against homes and businesses; and innumerable instances of verbal harassment and intimidation.<sup>11</sup> The actual number of incidents is impossible to know, as racial shame, uncertain immigration status, and

---

9. See ASIAN AM. LEGAL DEFENSE & EDUC. FUND, WORLD TRADE CENTER AND PENTAGON ATTACKS: THE ANTI-ASIAN AMERICAN BACKLASH (2002), available at <http://www.aaldef.org/images/101101list.pdf> (last visited Apr. 11, 2004) [hereinafter AALDEF, WORLD TRADE CENTER]; S. ASIAN AM. LEADERS OF TOMORROW, AMERICAN BACKLASH: TERRORISTS BRING WAR HOME IN MORE WAYS THAN ONE (2001), available at <http://www.saalt.org/biasreport.pdf> (last visited Apr. 11, 2004) (documenting 645 bias incidents occurring within just six days of September 11). Additional information on the history and continuing reports of bias incidents is available on the website of the Council on American-Islamic Relations, at <http://www.cair-net.org> (last visited Apr. 11, 2004). As more time has passed, the physical nature of the bias has subsided, but has come to take new forms. In particular, reports of housing and employment discrimination against Arabs, Muslims, and South Asians have increased significantly. See AM.-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: THE POST-SEPTEMBER 11 BACKLASH 92-103, 105-16, 120-31 (2003), available at [http://www.adc.org/hatecrimes/pdf/2003\\_report\\_web.pdf](http://www.adc.org/hatecrimes/pdf/2003_report_web.pdf) (last visited Apr. 12, 2004) [hereinafter ADC REPORT] (describing specific accounts of discrimination in employment, educational institutions, and the media); LAWYERS COMM. FOR HUMAN RIGHTS, A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11 (2002); NAT'L ASIAN PAC. AM. LEGAL CONSORTIUM, BACKLASH: WHEN AMERICA TURNED ON ITS OWN, A PRELIMINARY REPORT TO THE 2001 AUDIT OF VIOLENCE AGAINST ASIAN PACIFIC AMERICANS (2002) [hereinafter NAPALC, BACKLASH], available at [http://www.napale.org/literature/annual\\_report/9-11&2000\\_download.htm](http://www.napale.org/literature/annual_report/9-11&2000_download.htm) (last visited Apr. 11, 2004).

10. See Robert Hanashiro, *Hate Crimes Born Out of Tragedy Create Victims*, USA TODAY, Sept. 11, 2002, available at [http://www.usatoday.com/news/sept11/2002-09-11-mesa\\_x.htm](http://www.usatoday.com/news/sept11/2002-09-11-mesa_x.htm) (citing the nonprofit Campaign for Collateral Compassion for the proposition that nineteen killings are being investigated as hate crimes); Robert E. Pierre, *Victims of Hate, Now Feeling Forgotten*, WASH. POST, Sept. 14, 2002, at A1 ("At least a dozen murders are being investigated as hate crimes by authorities."); Jim Walsh, *Roque Guilty in Sikh Murder; Insanity Defense Fails; Jury to Decide on Death Penalty*, ARIZ. REPUBLIC, Oct. 1, 2003, at 1 (collecting cases of nine Arab, Muslim, or South Asian individuals killed in the month after the September 11 attacks). The exact number of people killed in post-September 11 hate violence is a matter of dispute. In some cases, admissions by the perpetrators make unambiguously clear that these were hate crimes. See *infra* notes 215-18 and accompanying text. In others, circumstances strongly suggest bias motivation, but either the perpetrators have not been apprehended, or have refused to make statements, or have denied any bias motivation. In many of these cases, law enforcement, families, and community groups have disagreed as to whether they were hate crimes. Alan Cooperman, *Sept. 11 Backlash Murders and the State of 'Hate': Between Families and Police, a Gulf on Victim Count*, WASH. POST, Jan. 20, 2002, at A3. For more descriptions of some of these murders, see *infra* notes 152-60 and accompanying text.

11. See *supra* note 9.

language barriers inhibit many victims of hate crimes from ever reporting them.<sup>12</sup>

### B. "Public" Racial Violence

This physical violence against Arabs, Muslims, and South Asians, on its face private, vigilante,<sup>13</sup> and extralegal,<sup>14</sup> has been accompanied by a quickly developed and broadly applied governmental policy of racial profiling of these communities. Within days after the terrorist attacks, racial profiling emerged as the government's primary weapon of choice in the newly declared war on terrorism. Racial profiling, a term that on September 10 described the phenomenon of pretextual police stops of African Americans and Latinos, came suddenly to apply to the singling out of Arabs, Muslims, and South Asians as terrorism suspects after September 11. Whereas 80% of Americans opposed racial profiling prior to September 11, after the attacks almost the same percentage favored profiling of those assumed to be Arab or Muslim.<sup>15</sup>

The popular and political acceptance of racial profiling of Arabs, Muslims, and South Asians is represented clearly in the Bush Administration's recently announced policy guidance to end racial profiling by federal law enforcement officials.<sup>16</sup> The guidance purports to make good on a series of pre-September 11 promises to end racial profiling.<sup>17</sup> However, it carves out a gaping exception for "law enforcement activities involving threats to national security or the integrity of the nation's borders."<sup>18</sup> The guidance explicitly authorizes federal law enforcement

---

12. See DEEPA IYER, S. ASIAN AM. LEADERS OF TOMORROW, RAISING OUR VOICES, A RESOURCE GUIDE 13 (2002) (identifying immigration status, language proficiency, fear of deportation, and unfamiliarity with criminal justice system as reasons for under-documentation of hate crimes).

13. See Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 1441 (2002) (describing post-September 11 violence as "vigilante racism").

14. See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1580 (2002) (describing post-September 11 violence as "extralegal racial profiling").

15. Nicole Davis, *The Slippery Slope of Racial Profiling: From the War on Drugs to the War on Terrorism*, COLORLINES, Dec. 2001, at 2.

16. U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003), available at [http://www.usdoj.gov/crt/split/documents/guidance\\_on\\_race.htm](http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm) [hereinafter GUIDANCE].

17. See, e.g., President George W. Bush, Videotaped Remarks to the NAACP Convention (July 9, 2001), in 37 PUB. PAPERS OF THE PRESIDENTS OF THE U.S. 28 (2001) (describing his request for Attorney General John Ashcroft "to develop specific recommendations to end racial profiling" and stating that "racial profiling is wrong, and it must be ended in America"); see also Nick Anderson, *Black Lawmakers Press Ashcroft*, L.A. TIMES, Mar. 1, 2001, at A16 (stating that Ashcroft was "'eager' to respond to Bush's call for recommendations on measures to end racial profiling"); Julian Bond & Wade Henderson, *The Bias the Candidates Deplore*, N.Y. TIMES, Oct. 13, 2000, at A33 (stating that then-Governor Bush would support a federal law to end racial profiling); President George W. Bush, Address of the President to the Joint Session of Congress (Feb. 27, 2001), at <http://www.whitehouse.gov/news/releases/2001/02/20010228.html> (last visited Apr. 11, 2004) (stating that racial profiling is wrong and promising an end to racial profiling in America).

18. GUIDANCE, *supra* note 16.

officials, including airport screeners and border personnel, to consider race and ethnicity in the course of “matters of national security, border integrity or the possible catastrophic loss of life.”<sup>19</sup> The result of this policy guidance is to ban racial profiling in counterterrorism efforts of everyone except Arabs, Muslims, and South Asians,<sup>20</sup> as the profiling of these communities is almost always on the purported basis of national security, and because it is almost exclusively these communities that are suspected of terrorism.<sup>21</sup>

The national security exception is particularly troubling in light of the federal government’s abuses to date in its anti-terrorism investigations and prevention activities, as documented by the Office of the Inspector General (OIG), the internal watchdog of the Department of Justice (DOJ). Having reviewed the cases of 762 noncitizens (almost all of whom are believed to be Arab, Muslim, or South Asian) detained during the first eleven months after September 11, the Inspector General found that the FBI and Immigration and Naturalization Service (INS) “made little attempt to distinguish” between immigrants who had potential ties to terrorism and

---

19. *Id.* The only caveats are that law enforcement officials may not rely “solely upon generalized stereotypes,” and may consider race and ethnicity only to “the extent permitted by the Constitution and laws of the United States.” *Id.* This is to say that with regard to terrorism matters, law enforcement officials may engage in as much racial profiling as is constitutionally or otherwise legally permissible. This stands in sharp contrast to the provisions of the policy guidance governing routine law enforcement and law enforcement related to specific, non-terrorism investigations. The limitations imposed there apply “even where the use of race or ethnicity might otherwise be lawful.” *Id.* With respect to specific, non-terrorism investigations, however, the guidance allows federal law enforcement officers to “consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization.” *Id.*

20. It should also be noted that the guidance’s vaguely defined rubric of “border integrity” appears to authorize the racial profiling of Latina/os that has long taken place along the United States-Mexico border. My thanks to Melissa Onken for this insight.

21. The policy guidance has been subject to other important criticisms as well. For example, the National Asian Pacific American Legal Consortium has noted that the guidance fails to prohibit profiling on the basis of religion or national origin. See Press Release, Nat’l Asian Pac. Am. Legal Consortium, DOJ’s Guidance on the Misuse of Race and Ethnicity by Federal Law Enforcement Agencies Falls Short of Presidential Commitment, Highlights Need for Federal Legislation (June 18, 2003), at [http://www.napalc.org/programs/immigration/pr/2003\\_06\\_18\\_Profiling.htm](http://www.napalc.org/programs/immigration/pr/2003_06_18_Profiling.htm) (last visited Apr. 12, 2004). This criticism is especially important for two reasons. First, although I argue that the post-September 11 profile of Arabs, Muslims, and South Asians has substantial racial content, it is also based upon appearance-based ascriptions of religion and citizenship status. In addition, the profile could be understood as targeting individuals of specific ethnicities. Second, the history of racial profiling prior to September 11 reveals that certain communities of color—Latina/os and Asian Americans, in particular—are frequently profiled on the basis of presumed ethnicity and citizenship status. This is especially true of Latina/os in areas proximate to the United States-Mexico border. See, e.g., Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897 (2002). For other criticisms of the guidance, see Press Release, Am. Civil Liberties Union, ACLU Says New Justice Department Racial Profiling Policy Lacks Enforcement Tool, Suffers from Huge National Security Loophole (June 17, 2003), at <http://www.aclu.org/news/NewsPrint.cfm?ID=12928&c=133> (last visited Apr. 11, 2004) (noting that the guidance “include[s] a broad and largely undefined exception when ‘national security’ concerns come into play”).

those who were merely swept up by chance in the course of the federal investigation.<sup>22</sup> The OIG found further that the INS failed to serve the detainees with timely notice of the charges against them, DOJ improperly detained many of the detainees even after immigration judges had ordered them removed, and many of the detainees were subjected to “unduly harsh” conditions of detention, which included “a pattern of physical and verbal abuse.”<sup>23</sup> Two conclusions can be drawn from the report. First, in each of these putative terrorism detentions, the government has failed to allege one concrete terrorism connection. Although most of these detainees have been deported for minor immigration violations, not one has been charged with terrorist activity.<sup>24</sup> Second, by treating all Arabs, Muslims, and South Asians caught up in the federal dragnet as presumptively terrorists, the government violated the due process rights of hundreds, if not thousands, of immigrants merely because they “looked” like terrorists.<sup>25</sup>

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

Dozens of stories have emerged of Arabs, Muslims, and South Asians being stopped in airports.<sup>26</sup> The most egregious incidents involved those in

---

22. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS* (June 2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf> [hereinafter OIG REPORT].

23. *Id.*

24. David G. Savage, *High Court Refuses to Take Up Case on Post-Sept. 11 Arrests; Bush Administration Kept Secret the Names of Middle Eastern Men Detained in a Roundup*, L.A. TIMES, Jan. 13, 2004, at A1 (noting that of the hundreds of men picked up for questioning after September 11, some were deported for “minor, technical violation[s] of their immigration status”); OIG REPORT, *supra* note 22, at 12 (noting the types of immigration violations on which September 11 detainees were arrested as including overstaying visas and entering the country illegally); see also Laura Parker & Kevin Johnson, *Doctor Returns Home After FBI Drops Warrant*, USA TODAY, Sept. 26, 2001, at A3 (illustrating examples of immigration enforcement over minor violations, including a Lebanese national picked up for changing employers in contravention to his work visa).

25. See MUZAFFAR A. CHISHTI ET AL., MIGRATION POLICY INST., *AMERICA’S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11*, at 9-10 (2003), available at [http://www.migrationpolicy.org/pubs/Americas\\_Challenge.html](http://www.migrationpolicy.org/pubs/Americas_Challenge.html) (last visited Apr. 11, 2004).

26. Although many of these incidents involve profiling of Arabs, Muslims, and South Asians by airline personnel, they are properly considered within the realm of public violence because of the statutory authority under which such profiling has been undertaken. Specifically, 49 U.S.C. § 44902(b) grants air carriers the discretion to refuse to transport a passenger whom the carrier “decides is, or might be, inimical to safety.” 49 U.S.C. § 44902(b) (2000) (emphasis added). Similarly, airport security

which Arab, Muslim, and South Asian passengers were removed from planes they had already boarded because flight attendants, pilots, or even other passengers felt uncomfortable with them on board.<sup>27</sup> The case of Ashraf Khan is representative. A thirty-two-year-old Pakistani businessman and lawful permanent resident of the United States for eleven years, Khan boarded a Delta Airlines flight in San Antonio to attend his brother's wedding in Pakistan.<sup>28</sup> After Khan took his seat in first class, the pilot of the plane told Khan that he and the crew did not feel safe with Khan on board and had him removed.<sup>29</sup> In Tampa, Mohamed el-Sayed, a U.S. citizen of Egyptian origin denied passage on a United Airlines flight, was later informed by an airport manager that the pilot refused to fly with el-Sayed on board, stating, "[w]e've reviewed your profile; your name is Mohamed."<sup>30</sup> And in Austin, two Pakistani men were removed from an American Airlines flight to the applause of the remaining passengers.<sup>31</sup> Over thirty such incidents have been reported.<sup>32</sup>

Although airplane and airport incidents have been egregious, the government's practice of secret arrests has been far more troubling. Within days after the terrorist attacks, the federal government began a nationwide dragnet, arresting and detaining between 1200 and 2000 Arabs, Muslims, and South Asians.<sup>33</sup> While many of these individuals are believed to have been held as material witnesses or on minor immigration violations, neither the names of these individuals nor the nature of the charges against them have been disclosed to the public.<sup>34</sup> Even the exact number of such arrests

---

screeners, though once private, served in a quasi-public capacity, carrying out a federally mandated policy. The Aviation and Transportation Security Act, enacted on November 19, 2001, federalized the screeners. Pub. L. No. 107-71, § 101(a), 115 Stat. 597, 597 (2001).

27. ADC REPORT, *supra* note 9, at 21-31.

28. Sasha Polakow-Suransky, *Flying While Brown*, AM. PROSPECT, Nov. 19, 2001, at 14.

29. *Id.*

30. *Id.* at 15.

31. Jonathan Osborne, *Passenger Ejections Seen As Profiling*, AUSTIN AM.-STATESMAN, Sept. 29, 2001, at A1.

32. *See id.*; *Bias Incidents Against Muslims are Soaring, Islamic Council Says*, N.Y. TIMES, May 1, 2002, at A3; Sam Howe Verhovek, *Americans Give in to Race Profiling*, N.Y. TIMES, Sept. 23, 2001, at A1 (citing denial of three "Middle Eastern-looking" men to board a Northwest Airlines flight and Khan's denial to fly); ADC REPORT, *supra* note 9, at 25-31 (chronicling ejections from airplanes by "ordinary citizens," flight crew, and pilots). A number of legal challenges have been mounted to these instances of airplane profiling. *See, e.g.*, Chowdury v. Northwest Airlines Corp., 238 F. Supp. 2d 1153 (N.D. Cal. 2002); Dasrath v. Cont'l Airlines, 228 F. Supp. 2d 531 (D.N.J. 2002); Bavava v. United Airlines, 249 F. Supp. 2d 1198 (C.D. Cal. 2002).

33. *See, e.g.*, 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) (citing the arrest and detention of approximately one thousand people as part of the DOJ investigations into September 11 attacks); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960 (2002).

34. The government's refusal to disclose this information has been upheld in *Center for National Security Studies v. U.S. Department of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004). *See Cole, supra* note 33, at 960-61.

is unknown, because the government has refused to release such information.<sup>35</sup> As the OIG report makes clear, many of the people caught up in this investigative sweep had no connection to terrorism. Rather, they were Arab, Muslim, and South Asian men encountered coincidentally in the course of the government's September 11 investigation.<sup>36</sup> In a separate program instituted after September 11, the government called in eight thousand Arab, Muslim, and South Asian men for "voluntary" interviews with the FBI, some of whom were deported thereafter.<sup>37</sup>

The government's most robust racial profiling practices have come in the immigration context, most often on a theory of preventive law enforcement. In order to prevent future terrorist attacks, the government has committed to using "every available tool," including the immigration

---

35. Cole, *supra* note 33, at 960.

36. See OIG REPORT, *supra* note 22, at 16-17 (noting arrests of individuals based on leads that were "quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant"); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002) (describing the arrest and detention of a Pakistani man during an INS sweep of a Brooklyn mosque). These arrests reflect a larger government commitment to secrecy. In addition to its refusal to disclose the names of September 11 detainees, the charges against them, or even the total number of detainees, the government has closed many immigration proceedings to the public. See Memorandum from Chief Immigration Judge Michael Creppy, to All Immigration Judges and Court Administrators [hereinafter Creppy Memorandum] (Sept. 17, 2002), available at [http://archive.aclu.org/court/creppy\\_memo.pdf](http://archive.aclu.org/court/creppy_memo.pdf) (last visited Apr. 12, 2004). This practice has been challenged, resulting in a circuit split. While the Third Circuit Court of Appeals upheld the practice, the Sixth Circuit invalidated the closures. Compare *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003), with *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), *reh'g den'd*, 2003 U.S. App. LEXIS 1278 (6th Cir. 2003)). Moreover, even before September 11, the government had expanded its use of secret evidence against people suspected of terrorism, authorized by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. See generally 28 U.S.C. §§ 2244-2266 (1996). These secret evidence provisions have, since 1997, been used almost exclusively against Arabs and Muslims, underscoring the existence of a racial profile of Arabs and Muslims preceding September 11. See generally Akram & Johnson, *supra* note 33, at 321-27; Cole, *supra* note 33; Douglas Montero, *U.S. Secret Evidence Law Terrorizes Innocent Arabs*, N.Y. POST, Jan. 9, 2000, at 22.

37. The Attorney General announced an initial round of five thousand interviews in November 2001, followed by three thousand additional interviews announced in March 2002. The interviews were of men between the ages of eighteen and thirty-three from countries with suspected terrorist links who entered the United States on nonimmigrant visas after January 1, 2000. See Brook A. Masters & Cheryl W. Thompson, *U.S. Plans to Query More New Arrivals; 3,000 Foreign Nationals Added to List*, WASH. POST, Mar. 21, 2002, at A18; Jodi Wilgoren, *Prosecutors Begin Effort to Interview 5,000, But Basic Questions Remain*, N.Y. TIMES, Nov. 15, 2001, at B7; Press Conference, U.S. Att'y Gen. John Ashcroft (Mar. 20, 2002), at <http://www.usdoj.gov/ag/speeches/2002/032002agnewsconferenceedvainterviewprojectresultsannouncement.htm>. As Karen Tumlin describes, the voluntary interview program was used to selectively deport immigrants of certain nationalities:

While the [DOJ] pledged that these interviews were informational only, many immigrants were placed in deportation proceedings as a result of technical violations discovered in this process. The deportation of voluntary interviewees belied the purported information-gathering aim of these interviews. Instead, the deportations confirmed fears among immigrants and their advocates that the voluntary interview program was a veiled attempt to rid the nation of groups the administration considered likely terrorism suspects.

Karen Tumlin, Comment, *Suspect First: How Terrorism Policy is Reshaping Immigrant Policy*, 92 CALIF. L. REV. 1173, 1187 (2004) (footnote omitted).

laws.<sup>38</sup> Where noncitizens are involved, immigration law provides the government with far greater latitude to engage in preventive practices than does the criminal law. The Supreme Court has long held that deportation is not punishment, and therefore immigration proceedings are civil rather than criminal.<sup>39</sup> As such, noncitizens in immigration proceedings do not enjoy many of the constitutional protections afforded criminal defendants. As Daniel Kanstroom describes, "This principle reduces to the basic idea that noncitizens have no substantive claim to remain in the United States and are therefore subject to whatever rules Congress chooses to make, even if they are retroactive. They are not being punished; they are simply being regulated."<sup>40</sup> Unlike criminal defendants, noncitizens in immigration proceedings do not enjoy a presumption of innocence,<sup>41</sup> and silence may be used against them.<sup>42</sup> There is no grand jury,<sup>43</sup> no right to appointed counsel,<sup>44</sup> no speedy trial guarantee,<sup>45</sup> no jury trial and increasingly, no right to

---

38. Speaking on September 19, 2001, Attorney General Ashcroft stated:

When circumstances require us to use the full force and effect of the order, we will do so. I make no apology—I make no apology for being forceful in our enforcing the law and requiring adherence to the law. This investigation will pursue violators and use every tool available to us to curtail and prevent and disrupt any effort to further inflict this kind of damage on the United States or our citizens.

U.S. DEP'T OF STATE, FOREIGN GOVERNMENTS PROTECT TERRORIST NETWORKS SAYS ASHCROFT (Sept. 19, 2001), at <http://usinfo.state.gov/topical/pol/terror/01091911.htm> (last visited Apr. 10, 2004).

39. See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) ("While the consequences of deportation may assuredly be grave, they are not imposed as a punishment."); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime.").

40. Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1895 (2000).

41. A noncitizen facing deportation bears an initial burden of proving, by clear and convincing evidence, that he or she is lawfully present in the United States pursuant to a prior admission. 8 U.S.C. § 1229a(c)(2)(B) (2003). Only after this burden has been met does the burden shift to the government, to prove by clear and convincing evidence that the noncitizen is deportable. *Id.* § 1229a(c)(3)(A). The clear and convincing standard is less stringent than the beyond a reasonable doubt standard in criminal proceedings. See *Woodby v. I.N.S.*, 385 U.S. 276, 284-86 (1966).

42. See *Bustos-Torres v. I.N.S.*, 898 F.2d 1053, 1056-57 (5th Cir. 1990) (holding Miranda warnings are not required in deportation proceedings); Daniel Kanstroom, *Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L.J. 599, 602-04 (1990).

43. Removal proceedings against a noncitizen are initiated by filing a notice to appear with the Immigration Court. 8 C.F.R. § 1239.1(a) (2003). A wide range of immigration officials are granted the discretionary power to issue a notice to appear, including, *inter alia*, district directors of the immigration service, border patrol agents, supervisory asylum officers. *Id.*

44. Noncitizens in removal proceedings have the right to be represented by counsel, but neither a constitutional nor a statutory right to counsel at the government's expense. 8 U.S.C. § 1362 (2000); see also *Uspango v. Ashcroft*, 289 F.3d 226, 231 (3d Cir. 2002) (holding noncitizens in removal proceedings have no Sixth Amendment right to counsel). Failure to provide counsel at government expense may, in theory, constitute a due process violation under the Fifth Amendment, but only in cases where the absence of counsel results in fundamental unfairness or significant prejudice. See, e.g., *U.S. v. Torres-Sanchez*, 68 F.3d 227, 230-31 (8th Cir. 1995); *Castro-O'Ryan v. U.S. Dep't. of Immigration & Naturalization*, 847 F.2d 1307, 1313 (9th Cir. 1987); *Aguilera-Enriquez v. I.N.S.*, 516 F.2d 565, 568 (6th Cir. 1975) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

release on bond pending trial or removal.<sup>46</sup> The exclusionary rule does not apply,<sup>47</sup> and immigration regulations may be applied retroactively, without violating the Ex Post Facto Clause.<sup>48</sup> Although Fifth Amendment due process rights apply in theory, the protections are minimal at best. The rules of evidence do not apply,<sup>49</sup> and the government may use secret evidence against the noncitizen.<sup>50</sup> Moreover, the government has tried, with some success, to close proceedings to the public.<sup>51</sup> In light of these strategic advantages, it is not surprising that among the thousands of arrests that have been made as part of the “war on terrorism,” only a handful have involved terrorism criminal prosecutions, while hundreds, if not the majority, have been based on immigration violations.<sup>52</sup>

The breadth of the federal immigration power derives not only from the lack of positive rights granted to noncitizens, but also from the near total deference that the courts grant the political branches in the exercise of the immigration power pursuant to the plenary power doctrine.<sup>53</sup> Such

---

45. See *Argiz v. U.S. Immigration*, 704 F.2d 384, 387 (7th Cir. 1983) (per curiam) (holding speedy trial guarantee of Interstate Agreement on Detainers not applicable to deportation hearing because deportation is civil rather than criminal).

46. Noncitizens facing removal on the grounds of having committed certain criminal offenses face mandatory detention. 8 U.S.C. § 1226(c) (2000). The Attorney General has the discretion to release certain other noncitizens on bond pending a decision regarding the noncitizen’s removal. *Id.* § 1226(a). The favorable exercise of that discretion, however, has been constrained significantly since September 11. For a discussion of additional restrictions on bond release, see *infra* notes 82-89 and accompanying text.

47. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

48. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 593-96 (1952) (upholding retroactive application of Alien Registration Act of 1940 because of inapplicability of Ex Post Facto Clause in immigration proceedings).

49. The Federal Rules of Evidence are used as guidance in immigration courts but are not formally applied. See *Matter of D-*, 20 I. & N. Dec. 827, 831 (1994) (holding the rules of evidence generally are not applicable in immigration court proceedings). Proffered evidence need only be “reasonable, substantial, and probative.” 8 U.S.C. § 1229a(c)(3)(A) (2000); see also 8 C.F.R. § 1240.7 (2003) (“The immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.”).

50. See generally Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40 & 42 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 § 213, Pub. L. No. 107-56, 115 Stat. 272, 285-86 (2001) (amending 8 U.S.C. § 3103a) [hereinafter USA PATRIOT Act]. Long before obtaining this statutory authority, the government has enjoyed court-approved use of secret evidence against noncitizens. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

51. See *supra* note 36 and accompanying text.

52. See *Akram & Johnson*, *supra* note 33, at 331.

53. The plenary power doctrine has been described as the rule that “the power of Congress over the admission of aliens to this country is absolute.” RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 22.2 (2d ed. 1992). In accordance with this doctrine, the courts have granted extraordinary deference to Congress in the regulation of



deference removes the check on executive and legislative power that judicial review normally provides. The political branches, and the executive in particular, therefore wield a nearly free hand in the crafting and administration of immigration policies. Such unfettered discretion is inherently subject to abuse and has enabled the government's deployment of racial profiling in immigration enforcement.<sup>54</sup>

Immigration enforcement profiling has taken two forms: race-based immigration policies, and selective (racist) enforcement of race-neutral policies. First, a series of immigration policies devised since September 11 on their face single out Arabs, Muslims, and South Asians for disparate treatment. Most blatant has been the "Special Registration" program, which requires certain immigrant men from twenty-six countries, all but one of them Muslim countries, to register with the government and to submit to interrogation.<sup>55</sup> Similarly, at the outset of the war against Iraq, the Department of Homeland Security announced that people from thirty-three countries (again, almost all of them Muslim countries) who sought asylum upon entry to the United States would be subject to mandatory detention,

---

immigration and have relied upon it in restricting the due process rights of noncitizens. Although routinely criticized by commentators, the plenary power doctrine retains its fundamental vitality. As one such critic, Gabriel Chin, has noted:

*Plessy, Lockwood, Davis, and other disgraceful cases of that era are not just dead but dishonored, usually discussed if at all as evidence of a lamentable history of bigotry in American law. The cases that created the plenary power doctrine, by contrast, not only continue to be cited but, in the words of one distinguished authority, "said nearly everything the modern lawyer needs to know about the source and extent of Congress's power to regulate immigration."*

Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6 (1998) (footnote omitted). See also *infra* note 81 and accompanying text. The plenary power doctrine is frequently criticized by immigration scholars. See, e.g., Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L. J. 289, 290 n.5 (listing articles critical of the plenary power doctrine).

54. See Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L. J. 13, 20-24 (2003) (arguing that the plenary power cases support a range of otherwise constitutionally suspect post-September 11 immigration enforcement practices).

55. See 8 C.F.R. § 264.1 (2003). Among the information sought in the interrogations were the following: place of birth; home address and phone number; date of arrival in the United States; height, weight, hair color, and eye color; financial information; and the addresses, birthdates, and phone numbers of parents and any "foreign" friends. Am. Immigration Lawyers Ass'n, Office-by-Office Summary of How INS is Handling Call-In Special Registration, (Dec. 18, 2002), at [www.aila.org/newsViewer.aspx?bc=273&docID=9278](http://www.aila.org/newsViewer.aspx?bc=273&docID=9278) (last modified Feb. 20, 2003). Although the government initially announced that all temporary visitors would be required to register, the program has not been expanded beyond the twenty-six countries. Registration of Certain Nonimmigrant Aliens From Designated Countries, 68 Fed. Reg. 2,363 (Jan. 16, 2003); 67 Fed. Reg. 77,641 (Dec. 18, 2002); 67 Fed. Reg. 70,525 (Nov. 22, 2002); 67 Fed. Reg. 66,765 (Nov. 6, 2002); Registration and Monitoring of Certain Nonimmigrants From Designated Countries, 67 Fed. Reg. 57,032 (Sept. 6, 2002).

even though asylum applicants from other countries of the world would not.<sup>56</sup>

Such racially defined immigration laws and policies, enacted after September 11, have been complemented by a policy of selective enforcement of pre-existing immigration laws against Arabs, Muslims, and South Asians.<sup>57</sup> For example, in January 2002, the DOJ announced the Alien Absconder Initiative, purporting to identify and deport 315,000 undocumented people who have ignored court orders to leave the United States.<sup>58</sup> Although theoretically applicable to all immigrants, the government announced that the program would begin with six thousand immigrants from Muslim countries despite the fact that such immigrants comprise only a small percentage of “absconders.”<sup>59</sup> In some instances, the government has reprised obscure and previously unenforced immigration laws, and applied them, seemingly exclusively, against Arabs, Muslims, and South Asians. Chief among these is a requirement that immigrants notify the INS of a change of address within ten days of moving.<sup>60</sup> Despite the fact that INS prosecution guidelines provide that violation of this requirement should ordinarily not be a sole basis for removal, it threatens to become exactly that with regard to Arabs, Muslims, and South Asians.<sup>61</sup>

---

56. See Press Kit, U.S. Dep’t of Homeland Sec., Operation Liberty Shield (Mar. 18, 2003), at [http://www.dhs.gov/dhspublic/interapp/press\\_release/press\\_release\\_0115.xml](http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0115.xml) (last visited Apr. 12, 2004) (“Asylum applicants from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated will be detained for the duration of their processing period.”). Curiously, the only public document in which this policy was memorialized was this press release.

57. Although the Supreme Court has been hostile to selective enforcement claims, *see infra* note 325 and accompanying text, I maintain that selective enforcement practices are constitutionally suspect under the Due Process and Equal Protection Clauses.

58. ADC REPORT, *supra* note 9, at 36-37.

59. See Deputy Attorney General Releases Internal Guidance for ‘Absconder’ Apprehensions, 79 No. 8 Interpreter Releases 261 (2002); Dan Eggan, *Deportee Sweep Will Start With Mideast Focus*, WASH. POST, Feb. 8, 2002, at A1 (noting that the operation would focus on immigrants from countries identified as having an al Qaeda presence, even though the vast majority of absconders are Latin American); Internal Memorandum from Larry Thompson, Deputy Attorney General, Guidance for Absconder Apprehension Initiative (Jan. 25, 2002), at <http://news.findlaw.com/hdocs/docs/doj/absconder012502mem.pdf>; ADC Report, *supra* note 9, at 36-37 (“[B]y adding the 6,000 presumed Middle Easterners to the database first, and others among the 300,000 afterwards, the government is placing a priority on removing a group of absconders based on their presumed ethnicity.”).

60. 8 U.S.C. § 1306(b) (2003); *see also* ADC REPORT, *supra* note 9, at 135.

61. See Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 48,818 (July 26, 2002) (announcing government’s intention to enforce the ten-day requirement); *War on Terrorism: Immigration Enforcement Since September 11, 2001: Hearing Before the Subcomm. on Immigration, Border Sec. and Claims of the House Comm. on the Judiciary*, 108th Cong. (2003) [hereinafter *War on Terrorism*] (statement of Laura Murphy, Am. Civil Liberties Union), available at <http://www.house.gov/judiciary/murphy050803.htm>; *see also* 81 INTERPRETER RELEASES 721 (Vol. 81, n.22, May 28, 2004) (reporting that the FBI may now arrest immigrants for civil as well as criminal violations under the INA, including failure to file a change of address form). The racially targeted use of the change of address requirement is exemplified by the case of Thar Abdeljabar, a traveling Palestinian salesman. Abdeljabar, a lawful permanent resident, was stopped by police in Raleigh, North Carolina, for driving four miles per hour over the speed limit. The police called the FBI after finding

In addition to its own profiling, the government has subscribed to profiling by ordinary citizens as well. Many Arabs, Muslims, and South Asians were detained after September 11 based on "tips" by neighbors, coworkers, and complete strangers that particular individuals looked suspicious.<sup>62</sup> The government selectively followed up on such tips when Arabs, Muslims, and South Asians were involved,<sup>63</sup> thereby endorsing the prejudice and profiling of the informants.

The government's racial profiling in immigration enforcement is reflected with stunning clarity in INS statistics, which show a dramatic increase in the numbers of immigrants from Muslim countries apprehended by the INS. Between September 2001 and September 2002, the number of deportable Pakistanis apprehended increased 228% over the previous year.<sup>64</sup> The number of Saudis increased by 239%, Algerians by 224%, Egyptians by 83%, and Moroccans by 76%.<sup>65</sup> The increase in the number of immigrants from Muslim countries removed (as opposed to merely apprehended) during this time is similarly dramatic: 129% for Pakistanis, 113% for Saudis, 111% for Algerians, 199% for Egyptians, and 229% for Moroccans.<sup>66</sup> During this same time, the total number of deportable immigrants apprehended *decreased* by 23%, and the total number of immigrants

---

cash and a map with circled cities that he used for his work. Abdeljabar was questioned, but not charged, by the FBI, only to be charged by the INS for failure to file a change of address form. Although the INS attempted to deport him on this ground, an immigration judge ruled that it could only remove those noncitizens who intentionally fail to report an address change. Mark Bixler, *High Response to Address Law Swamps INS*, ATLANTA J.-CONST., Sept. 18, 2002, at F3; *War on Terrorism*, *supra*; see also Haroon Siddiqui, *In the Land of Freedom and Liberty Washington is Breaching What It's Preaching*, TORONTO STAR, June 8, 2003, at F1.

62. See Chishti, et. al., *supra* note 25, at 12; Ashar, *supra* note 36, at 1190; OIG Report, *supra* note 22, at 16-17. In July 2002, the Attorney General announced plans to implement the Terrorist Information and Prevention System (TIPS). The program would have used people in certain industries, such as truckers, utility workers, mass transit workers, and postal workers, to voluntarily report suspicious activity to federal authorities. Immediately criticized across the political spectrum as a "snitch system" in which American citizens would spy on one another, the program was scaled back and eventually abandoned. See Adam Clymer, *Traces of Terror: Security and Liberty: Worker Corps to be formed to Report Odd Activity*, N.Y. TIMES, July 26, 2002, at A18; Edward Epstein, *Retiring Army Holds Nothing Back; Candor Resonates Across House Aisle*, S.F. CHRON., Aug. 16, 2002, at A1; Frank James, *Bush Scales back Terror Tip Program: Postal and Utility Workers Dropped*, CHI. TRIB., Aug. 10, 2002, at B10.

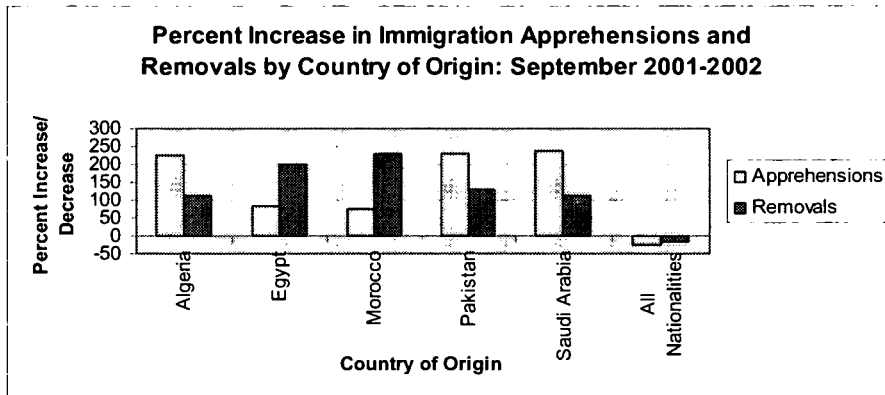
63. CHISHTI, ET AL., *supra* note 25, at 12.

64. Compare IMMIGRATION & NATURALIZATION SERV., FISCAL YEAR 2002 INS STATISTICAL YEARBOOK (2002), at 180 tbl.39, available at <http://uscis.gov/graphics/shared/aboutus/statistics/ENF2002tables.pdf> [hereinafter FY 2002 INS STATISTICAL YEARBOOK], with IMMIGRATION AND NATURALIZATION SERV., FISCAL YEAR 2001 STATISTICAL YEARBOOK (2001), at 10 tbl.58, available at <http://uscis.gov/graphics/shared/aboutus/statistics/ENF2001tables.pdf> [hereinafter FY 2001 INS STATISTICAL YEARBOOK].

65. Compare FY 2002 INS STATISTICAL YEARBOOK, *supra* note 64, at 180 tbl.39, with FY 2001 INS STATISTICAL YEARBOOK, *supra* note 64, at 10 tbl.58.

66. FY 2002 INS STATISTICAL YEARBOOK, *supra* note 64, at 190 tbl.46.

removed decreased by 16%.<sup>67</sup> Although many variables contribute to the number of immigrants from a particular country apprehended in a given year, there is a clear trend in favor of immigration enforcement against Arabs, Muslims, and South Asians, even at a time when the total number of immigrants apprehended and deported has decreased significantly.



The purportedly private killings and other bias incidents discussed earlier are clearly forms of hate violence, but governmental racial profiling should be understood as such as well. Indeed, physical violence against Arabs, Muslims, and South Asians, and racial profiling of these same communities, are best understood as different facets of the same social, political, and cultural phenomena. Each is constitutive of the other: 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>68</sup> Alternatively, post-September 11 hate violence should be understood as a form of racial profiling.<sup>69</sup> In either case, our understanding of one enhances our grasp of the other, and for this reason the analyses of each are largely interchangeable.<sup>70</sup>

67. Apprehensions of deportable immigrants from certain other countries decreased dramatically. For example, the number of deportable Mexicans apprehended decreased by 24%, Cubans by 36%, and Dominicans by 37%. *Compare* FY 2002 INS STATISTICAL YEARBOOK, *supra* note 64, at 180 tbl.39, with FY 2001 INS STATISTICAL YEARBOOK, *supra* note 64, at 10 tbl.58. Removal numbers for immigrants from these countries also decreased: 23% for Mexicans, 24% for Cubans, and 13% for Dominicans. *Compare* FY 2002 INS STATISTICAL YEARBOOK, *supra* note 64, at 190 tbl.46, with FY 2001 INS STATISTICAL YEARBOOK, *supra* note 64, at 27 tbl.65.

68. I address the logic of racial profiling in greater detail in Part II.

69. Leti Volpp adopts this view in her description of post-September 11 hate violence as "extralegal racial profiling." Volpp, *supra* note 14, at 1580.

70. Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 72 Soc. Text 101, 104 (2002).

## II.

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

Both individual acts of hate violence and governmental racial profiling have helped to create a new racial construct: the "Muslim-looking" person.<sup>71</sup> The logic of post-September 11 profiling turns on an equation of being Muslim with being a terrorist. For the perpetrator of post-September 11 hate violence, the error lies in assuming that because all of the September 11 terrorists were Arab and Muslim, all Arabs and Muslims must be terrorists themselves, or terrorist sympathizers. The logic of governmental profiling is only slightly more nuanced: (1) because all of the September 11 terrorists were Arab and Muslim; (2) because most Arabs are Muslims; and (3) because the terrorists claim religious motivation for their actions; (4) all Arabs and all Muslims are likely to be terrorists.

Like other instances of racial profiling, this construct relies upon a reductive equation of certain perceived identity characteristics with specific, suspect conduct. Under earlier profiling regimes, for example, African American and Latino appearance has been equated with criminality,<sup>72</sup> Latino appearance with illegal border crossing,<sup>73</sup> and Asian appearance with treason.<sup>74</sup> In each case, the result is to treat all people appearing to share a certain identity characteristic as fungible with some object—real or imagined—of suspicion.

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

---

71. See Hing, *supra* note 13, at 443-44 (describing the grouping of "Muslims, Middle Easterners, and South Asians"); Volpp, *supra* note 14, at 1576 (describing a new identity category as "persons who appear 'Middle Eastern, Arab, or Muslim'").

72. See Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Lu-in Wang, "Suitable Targets"? Parallels and Connections Between "Hate" Crimes and "Driving While Black," 6 MICH. J. RACE & L. 209, 210 (2001).

73. See Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121, 159-61 (2001); Johnson, *supra* note 21.

74. See Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1694 (2000).

phenotypic stereotype of the terrorist.<sup>75</sup> “Looking,” not “Muslim,” is the operative word in “Muslim-looking.”

The profiling effected by hate violence depends upon two different assumptions of fungibility. The first associates all Muslims with the terrorists who perpetrated the September 11 attacks. The second identifies all “Muslim-looking” people as Muslims. The end result is to view “Muslim-looking” people as stand-ins for the terrorists themselves. The “logic” of these twin fungibilities is, of course, devoid of much logic at all and appears to derive from fear, ignorance, and pre-existing racisms rather than any rational decisionmaking.<sup>76</sup>

Governmental profiling is similarly flawed in its logic.<sup>77</sup> One might argue government profiling is based upon neither religion nor race, but national origin.<sup>78</sup> While the government’s targeted immigration enforcement has relied nominally upon national origin rather than race,<sup>79</sup> the government’s application of these purportedly national origin-based policies has ensnared countless individuals who are not citizens of the government’s list of designated countries. In particular, many “Muslim-looking” Canadians have been caught up in the government’s dragnet, a phenomenon best exemplified by the U.S. government’s deportation of Maher Arar, a Canadian citizen, to Syria.<sup>80</sup> The “Muslim-looking” profile may be

---

75. As Leti Volpp has noted, this newly constituted racial group is in fact a consolidation of several different racial and ethnic groups. Volpp, *supra* note 14, at 1576.

76. See Akram & Johnson, *supra* note 33, at 301-26 (arguing that post-September 11 profiling of Arabs and Muslims relied upon pre-September 11 constructions of Arabs and Muslims as terrorists); Lynda Gorov, *False Leads Abound Since Disaster*, BOSTON GLOBE, Apr. 29, 1995, at 10; Charles M. Sennott, *After Bombings, America Faces Up to Prejudice*, BOSTON GLOBE, June 21, 1995, at 1.

77. See generally Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195 (2003) (arguing that post-September 11 racial profiling is ineffective because it curtails deeper and more meaningful criminal investigation). *But see* Stephen J. Ellmann, *Racial Profiling and Terrorism*, 19 N.Y.L. SCH. J. HUM. RTS. 305, 337, 343 (2003) (arguing that racial profiling can make a “real contribution” to protecting against terrorism, but not without profound costs, and endorsing a form of “emergency profiling”).

78. See Mariano-Florentino Cuéllar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9, 9 (2003) (noting that profiling on the basis of national origin “may be less troubling to some than outright racial profiling,” and that it may find more support “because it is not an obvious violation of the law”).

79. See *supra* notes 55-56 and accompanying text (discussing the Special Registration program and Operation Liberty Shield).

80. Arar, a naturalized Canadian citizen who left Syria fifteen years earlier, was detained at John F. Kennedy Airport in New York while in transit from Zurich to Montreal after a family trip to Tunisia. U.S. immigration officials accused Arar of having terrorist connections, detained and interrogated him, and ultimately deported him to Syria, seemingly over the objections of the Canadian government. See Anthony DePalma, *Canadian Immigrant Arrested at J.F.K. is Deported to Syria*, N.Y. TIMES, Oct. 12, 2002, at A14; Daniel J. Wakin, *Tempers Flare After U.S. Sends a Canadian Citizen Back to Syria on Terror Suspicions*, N.Y. TIMES, Nov. 11, 2002, at A9; see also Sheema Khan, *An Outrage Against Canada*, TORONTO GLOBE & MAIL, Oct. 16, 2002, at A17 (describing Arar case and collecting stories of other Canadian citizens caught in the U.S. immigration system after September 11). The situation became so severe that the Canadian government took the extraordinary step of issuing a travel advisory for its citizens born in Iraq, Syria, Yemen, Pakistan, and Saudi Arabia who were contemplating travel

heterogeneous to some degree, featuring racial, religious, and national origin characteristics, but race, and to a lesser extent religion, predominate over national origin in frequent and troubling ways.<sup>81</sup> Moreover, governmental profiling has relied upon assumptions of fungibility in much the same way that hate violence after September 11 has.

The pervasiveness of this governmentally constructed profile and its implications for individuals outside of the Arab, Muslim, and South Asian communities is exemplified in a recent decision of the Attorney General regarding the seemingly non-terrorism related issue of Haitian boatpeople seeking refuge in the United States.<sup>82</sup> The Attorney General reviewed a decision by his own Board of Immigration Appeals, *In re D-J-*, upholding the release on \$2500 bond of an eighteen-year-old Haitian man and his seventeen-year-old brother, both of whom had fled Haiti by boat and requested asylum in the United States upon interdiction by the U.S. Coast Guard.<sup>83</sup> The Attorney General revoked bond and announced a blanket policy of mandatory detention for all Haitian boatpeople seeking entry to the United States, based on two national security concerns. First, the Attorney General argued that releasing the Haitians on bond would encourage more Haitians to come to the United States, requiring attention from the Coast Guard and the military, thereby diverting these resources from counterterrorism efforts.<sup>84</sup> Second, noting a national security concern raised by the prospect of undocumented noncitizens from Haiti being released within the United States without adequate background checks, the Attorney General wrote that the State Department has “noticed an increase in third country

---

to the United States. See *Canada Issues U.S. Travel Warning* (Oct. 30, 2002), at <http://www.cbsnews.com/stories/2002/10/30/world/main527560.shtml>. After ten months in Syria, Arar was released and returned to Canada. Arar alleges he was beaten, tortured, and forced to make false confessions while in Syrian custody and has sued U.S. officials under the Torture Victims' Protection Act. See Kathleen Harris, *Arar Files Suit Against Yanks; Wants To Clear His Name So He Can 'Move Forward,'* TORONTO STAR, Jan. 23, 2004, at 32. Under intense political pressure, the Canadian government has agreed to a public inquiry into the role of Canadian officials in the arrest and detention of Arar. See Kathleen Harris, *'Great Day' For Justice; Maher Arar Gets Public Inquiry,* TORONTO STAR, Jan. 29, 2004, at 5. It has also been disclosed that the Ottawa Police Service and the Royal Canadian Mounted Police (RCMP) were involved in the Arar matter. See Kathleen Harris, *New Twist in Arar Case; Ottawa Cops Admit Playing a Part,* TORONTO SUN, Mar. 10, 2004, at 37. Meanwhile, Arar's wife, Monia Mozigh, now a public figure in Canada due to her efforts to free her husband, became a candidate for Member of Parliament. See Kathleen Harris, *Arar's Wife Wants to Be MP for NDP,* TORONTO SUN, Mar. 11, 2004, at 38.

81. The government also has an incentive in characterizing its policies as based on national origin alone, because the plenary power doctrine grants broad authority to discriminate on the basis of national origin in immigration matters in ways that are constitutionally impermissible outside of the immigration context. See *supra* note 53 and accompanying text.

82. *In re D-J-*, 23 I. & N. Dec. 572 (2003).

83. See Susan Benesch, *Haitians Trapped by 'War on Terrorism'*, at <http://www.amnestyusa.org/amnestynow/haiti.html> (last visited Apr. 12, 2004).

84. *In re D-J-*, 23 I. & N. Dec. at 578.

nations (*Pakistanis, Palestinians, etc.*)<sup>85</sup> using Haiti as a staging point for attempted migration to the United States,<sup>86</sup> thereby necessitating the mandatory detention of all people fleeing Haiti for the United States.<sup>87</sup>

The first of these rationales might be understood as an example of the elasticity of the national security argument in policymaking after September 11, but the second argument is more profound for its cursory deployment of the Muslim-terrorist equation. Mere mention of “Pakistanis, Palestinians, etc.,” and parenthetically at that, is sufficient to establish a terrorist concern regarding the flow of refugees from Haiti with almost no further analysis or facts. At first glance, this may seem like the kind of national origin-based policymaking that pervades immigration law, rather than any more pernicious form of profiling. However, a closer reading suggests otherwise, for the Administration is not only concerned about Pakistanis and Palestinians. Rather, Pakistanis and Palestinians represent some larger class of people, as evident by the “etc.” which follows, and which is not explained anywhere in the opinion.<sup>88</sup> One might ask what the “etc.” means. It seems quite clear that it is not intended to include Irish, Italian, or Guatemalan citizens, just as it seems clear that it *is* intended to include Syrian, Indonesian, and Saudi citizens. Although the government’s concern here ostensibly is with its limited capacity to “promptly undertake an exhaustive factual investigation concerning the status of hundreds of undocumented aliens,”<sup>89</sup> it is expressed explicitly in terms of only two nationalities and metonymically implicates nationals of all Muslim countries. Thus, in the government’s usage, Pakistanis and Palestinians do not represent third country nationals, but third country Muslims, a point so obvious that the Administration need not speak its name.

As with other profiling regimes, post-September 11 profiling suffers from gross overbreadth, but unlike other regimes its overbreadth is largely forgiven.<sup>90</sup> Further inquiry into post-September 11 hate violence sheds light

---

85. There is a grammatical incongruity between the phrase “third country nations” and the exemplifying parenthetical referring to nationalities (“Pakistanis, Palestinians, etc.”). The poor drafting aside, it seems clear that the concern is for certain third country nationals—that is, individuals who are neither Haitian nor American.

86. *Id.* at 579 (emphasis added).

87. This policy of mandatory detention currently applies only to Haitians. Apart from the Administration’s trafficking in racial stereotypes discussed in the text above, this policy fits into a pattern of exceptionalism in U.S. refugee policy with regard to Haiti that has been criticized as racially motivated. *See, e.g.,* Joyce A. Hughes & Linda R. Crane, *Haitians: Seeking Refuge in the United States*, 7 *GEO. IMMIGR. L.J.* 747 (1993).

88. Nor is the claim of such use of Haiti as a staging ground substantiated beyond the Attorney General’s mention of this claim by the State Department.

89. *In re D-J-*, 23 I. & N. Dec. at 580.

90. Further evidence of this overbreadth is provided by the decision to restrict airport security screening jobs to U.S. citizens. The presumption here is that all noncitizens are a terrorist threat. *See Gebin v. Mineta*, 239 F. Supp. 2d 967 (C.D. Cal. 2002) (challenging citizenship requirement of the Aviation Transportation and Security Act on equal protection and due process grounds), *vacated by* 328



on why the public has tolerated such extensive racial violence from “private” and “public” actors alike.

### III.

#### UNDERSTANDING THE ORIGINS OF POST-SEPTEMBER 11 HATE VIOLENCE

Hate violence against Arabs, Muslims, and South Asians did not begin with the September 11 attacks, nor is such violence or its racializing effect a new phenomenon. Rather, they fit into multiple, larger histories of anti-immigrant discrimination and racial violence in the United States. In this Section, I note briefly pre-September 11 racialization of Arabs, Muslims, and South Asians, and the parallels between post-September 11 violence and the historical racialization of Asian Americans. I then turn to consider a typology for understanding hate violence that has emerged in recent years, and how post-September 11 violence has been understood as categorically different from the paradigmatic hate crime.

Hate violence against Arabs, Muslims, and South Asians is a recurrent rather than a new phenomenon. During the first Gulf War in 1991, for example, Iraqi Americans, Arab Americans, and Muslims of many nationalities experienced hate violence.<sup>91</sup> More tellingly, in the immediate aftermath of the 1995 bombing of the Oklahoma City federal building, “experts” concluded that the bombing bore the “hallmarks” of Middle Eastern terrorism and suspicion focused on Arabs and Muslims.<sup>92</sup> As a result, 220 incidents of hate crimes against Arabs and Muslims were reported nationwide and several Arab and Muslim men were detained before Timothy McVeigh, a white man, was identified as the bomber.<sup>93</sup> These incidents reflect the existence of a reflexive association of terrorism with Arabs and Muslims that has developed over a course of decades.<sup>94</sup>

---

F. 3d 1211 (9th Cir. 2003). The Aviation Transportation and Security Act has since been amended to make U.S. nationals as well as U.S. citizens eligible for the screening positions. Homeland Security Act of 2002, Pub.L. No. 107-296, 116 Stat. 2135.

91. See, e.g., Peter Y. Hong, *Leaders in Southland Say Attacks on their People and Businesses Increased after the 1991 Gulf War and Bombings in New York City and Oklahoma City*, L.A. TIMES, Feb. 9, 1998, at B3; David L. Shutz, *W. Springfield Police Faulted Over Handling of Attack at Mosque*, BOSTON GLOBE, Apr. 21, 1992, at 20 (quoting local citizen claiming that after the Gulf War, racial slurs and vandalism have increased, in part due to the media’s stereotype of Muslims as terrorists). This violence repeated during the second Gulf War. David Reyes, *Reports of Anti-Arab Bias Up in ‘01*, L.A. TIMES, Apr. 12, 2002, at B7.

92. See Sam Vincent Meddis, *12 kids among 31 dead in Oklahoma bombing; Oklahoma learns ‘no place is safe.’* USA TODAY, Apr. 20, 1995, at A1 (quoting former FBI and CIA director William Webster as saying that the Oklahoma City bombing bears “hallmarks” of Middle Eastern terrorism).

93. See Laurie Goodstein, *Report Cites Harassment of Muslims; Many Cases Followed Oklahoma City Bombing*, WASH. POST, Apr. 20, 1996, at A3 (reporting a finding by the Council on American-Islamic Relations that 216 of the 296 reported anti-Muslim bias crimes in 1996 occurred in the week following the Oklahoma City Bombing).

94. See Natsu Taylor Saito, *Symbolism Under Seige: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists”*, 8 ASIAN L. J. 1, 12 (2001) (describing how media representations, anti-terrorism legislation, and the use of indefinite detention and secret evidence prior

In the years preceding September 11, South Asians increasingly had become the targets of hate crimes as well.<sup>95</sup> As Rosemary George has noted, many South Asians in the United States have long denied that they possess a racial identity, choosing instead cultural modes of self-identification.<sup>96</sup> Similarly, Vijay Prashad has argued that South Asians in the United States have accepted a racial (and racist) accommodation by which they deny their racial identity in exchange for class mobility.<sup>97</sup> While not specifically associated with terrorism in the way that Arabs and Muslims have been, in recent years South Asians nonetheless have become identified as a distinct and foreign racial group, the efforts of some South Asians to avoid such a racialized fate notwithstanding. This has been especially true in light of the rapid growth of South Asian communities in the past two decades.<sup>98</sup> The growing visibility of South Asians in the United States may have led to increased hate violence, which in turn has played an important role in infusing South Asian American identity with racial

---

to September 11 had already raced Arab Americans and Muslims as terrorists); Akram & Johnson, *supra* note 33, at 301-27 (discussing evolution of the racialized association of Arabs and Muslims with terrorists).

95. The 1998 and 1999 National Asian Pacific American Legal Consortium annual audits on anti-Asian violence reported that South Asians comprised the Asian Pacific American ethnic group with the highest numbers of reported violent incidents. Fifty-two incidents against South Asians were reported in 1999 and forty-two in 1998. See IYER, *supra* note 12, at 13 (citing NAT'L ASIAN PAC. AM. LEGAL CONSORTIUM ET AL., CHALLENGING THE INVISIBILITY OF HATE: 1999 AUDIT OF VIOLENCE AGAINST ASIAN PACIFIC AMERICANS; NAT'L ASIAN PAC. AM. LEGAL CONSORTIUM ET AL., THE NEED FOR INCREASED COMMITMENT TO REPORTING AND COMMUNITY EDUCATION: 1998 AUDIT OF VIOLENCE AGAINST ASIAN PACIFIC AMERICANS). In the late 1980s, South Asians in New Jersey and New York were victims of a spate of hate crimes by vigilante groups that called themselves the "dotbusters", so named after the *bindi* worn by many Hindu women. See Deborah N. Misir, *The Murder of Navroze Mody: Race, Violence, and the Search for Order*, 22 AMERASIA J., Summer 1996, at 55 (1996).

96. Rosemary Marangoly George, "From Expatriate Aristocrat to Immigrant Nobody": *South Asian Racial Strategies in the Southern Californian Context*, 6 DIASPORA 31, 31 (1997).

97. VIJAY PRASHAD, *THE KARMA OF BROWN FOLK* 94 (2000).

98. Immigrants from South Asia came to the United States in significant numbers starting as early as the mid-nineteenth century, when primarily Punjabi farmers settled in California's Central Valley. KAREN ISAKSEN LEONARD, *THE SOUTH ASIAN AMERICANS* 39 (Ronald Bayor ed., 1997). The creation of the Asiatic Barred Zone, however, prohibited immigration of natives or descendants of natives of several continental Asian countries, including the Asian subcontinent, halting South Asian immigration early on. See Chin, *supra* note 53, at 14 (citing Act of Feb. 5, 1917, ch. 29, §3, 39 Stat. 874, 876). Congress had begun limiting immigration from China in 1882 and from Japan in 1907-08. Chin, *supra* note 53, at 13-14. Anti-Asian immigration restrictions were only fully lifted with the Immigration and Nationality Act of 1965, at which time large numbers of South Asians begin to immigrate to the United States again. See Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.). In recent years, the South Asian community has grown dramatically; the Indian population alone increased 105.9% from 1990 to 2000. See Asian Am. Fed'n Census Info. Ctr., *Census 2000: Detailed Asian Groups in the United States (2000)*, at <http://www.aafny.org/cie/dl/unitedstates.pdf> (last visited Sept. 1, 2004). (This data excludes figures for Bhutanese, Maldivians, and Nepalese.) There are approximately 1.9 million South Asians in the United States today. JESSICA S. BARNES & CLAUDETTE E. BENNETT, U.S. DEPT. OF COMMERCE, *THE ASIAN POPULATION: 2000*, at 9 (2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf>.

content even prior to September 11.<sup>99</sup> These histories demonstrate that the hatred manifest in post-September 11 violence was not solely a product of September 11. Rather, there is a genealogy of racism toward Arabs, Muslims, and South Asians that predates the terrorist attacks and that perpetrators of post-September 11 violence tapped into after September 11.

Racial violence against Arab, Muslim, and South Asian communities after September 11 also finds precedent in the histories of episodic violence against other immigrant communities, particularly Asian Americans. For example, Bill Ong Hing drawn parallels between post-September 11 violence and episodes of racial violence against Chinese, Korean, and Filipino immigrant laborers in late 19th and early 20th century California.<sup>100</sup> Moreover, the post-September 11 experience of “Muslim-looking” people bears a striking resemblance to the racialization of Japanese-Americans during World War II, and recalls the persistent tropes of disloyalty and perpetual foreignness that have long been associated with Asian Americans.<sup>101</sup> As Natsu Saito has argued persuasively, the internment of Japanese Americans was not merely “an unfortunate by-product of ‘racial prejudice and wartime hysteria’” with its genesis in the immediate aftermath of the bombing of Pearl Harbor, as the traditional narrative provides,<sup>102</sup> nor was it “an aberration, an instance in which our nation temporarily strayed from its basic commitment to due process and equal protection.”<sup>103</sup> Rather, when viewed within the context of Asian American history, internment was only the latest in a long lineage of racial prejudice toward Asian Americans. Saito argues:

---

99. See Misir, *supra* note 95, at 56 (arguing that hate violence against Indians was the result of increasing racialization and the Indian community’s increasing visibility); Janet Dang, *Anti-Asian Hate Crimes on the Rise*, ASIANWEEK, Jan. 12-18, 2000, at [http://www.asianweek.com/2001\\_01\\_12/news1\\_antiasianerimerising.html](http://www.asianweek.com/2001_01_12/news1_antiasianerimerising.html) (citing National Asian Pacific American Legal Consortium staff member Aryani Ong for the proposition that increases in hate violence toward South Asians could be due to growth in the South Asian population, particularly on the East Coast).

100. Hing writes:

In the mid-1800s, Chinese miners were targets of wanton abuse. An 1862 California legislative committee developed a list of eighty-eight Chinese miners who were murdered in what the committee labeled “a wholesale system of wrong and outrage practiced upon the Chinese population of this state, which would disgrace the most barbarous nation upon earth.” In the 1870s, the homes of many Chinese living in California’s Sacramento Valley were burned down. In 1885, six hundred unarmed Chinese coal miners were fired upon in Rock Springs, Wyoming; twenty-eight were killed and fifteen wounded. In 1913, fifteen Korean fruit pickers in Riverside County, California, were threatened by a crowd that forced them to leave town. Similarly, in a San Joaquin County, California town in 1921, fifty-eight Japanese laborers were rounded up by armed men and forced out of town. In 1930, a mob of four hundred attacked the Northern Monterey Filipino Club near Watsonville, California, killing one Filipino and injuring dozens more.

Hing, *supra* note 13, at 446 (internal citations omitted).

101. See *infra* notes 237-46 and accompanying text.

102. Saito, *supra* note 94, at 4 (footnote omitted).

103. *Id.* at 8-9.

One need only look at the social, political, economic, and legal history of Asian Americans in the United States, from the enforcement of the 1790 Naturalization Act's limitation of citizenship to 'free white persons,' to the exploitation of Chinese labor in the mines and building of the railroads, to lynchings and Jim Crow laws, to Chinese exclusion in the 1880s and the exclusion of the Japanese in the early 1900s, to the alien land laws, and to the National Origins Act of 1924, to see that the military orders to exclude and then imprison 'all persons of Japanese ancestry, both alien and non-alien' were really a logical extension of all that had come before.<sup>104</sup>

Arguing that internment was aberrant only in degree, Saito insists upon a historicized understanding of the Japanese-American experience as characteristic of a long-established presumption of Asian American foreignness.<sup>105</sup>

Writing just prior to the terrorist attacks, Saito argued presciently that pre-September 11 racialization of Arabs and Muslims in the United States mapped onto the presumption of disloyalty and foreignness so familiar to Asian Americans, and she suggested the political possibility of internment of Arab Americans.<sup>106</sup> Although internment has not come to pass, Saito was accurate in her prediction of expanded racial violence against Arabs and Muslims.<sup>107</sup> Her analysis counsels that the post-September 11 racialization of Arabs, Muslims, and South Asians not be viewed as either aberrational in the context of American immigrant history, or as a product of September 11 alone. Rather, it should be understood as yet another manifestation of entrenched anti-immigrant discrimination, one which began long before the terrorist attacks.

While part of a historical tapestry of anti-immigrant racial violence, the post-September 11 experience of Arabs, Muslims, and South Asians also fits into another framework of violence against marginalized groups which, since the 1980s, has been described factually and legally as hate crime.<sup>108</sup> Understood as criminal acts motivated by animus toward

---

104. *Id.* at 8 (footnotes omitted).

105. *Id.* at 9.

106. "Just as Asian Americans have been 'raced' as foreign, and from there as presumptively disloyal, Arab Americans and Muslims have been 'raced' as 'terrorists': foreign, disloyal, and imminently threatening." *Id.* at 12 (footnotes omitted).

107. As Saito notes, "we need not postulate the wholesale internment of Arab Americans to see how many of the issues faced today by Arab Americans parallel those Asian Americans have encountered." *Id.*

108. The term "hate crime" was introduced by United States Representatives John Conyers, Barbara Kennelly, and Mario Biaggi, who in 1985 co-sponsored the bill that became the Hate Crime Statistics Act. JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 4 (1998). The legal category to which "hate crime" refers in this legislation is based upon model "ethnic intimidation" legislation drafted in 1981 by the Anti-Defamation League of B'nai B'rith. *Id.*

individuals because of their race, ethnicity, religion, sexual orientation, or gender, among other characteristics,<sup>109</sup> hate crimes could encompass the whole history of racial violence<sup>110</sup> in the United States, from slavery to the extermination of Native Americans,<sup>111</sup> to lynchings of African Americans,<sup>112</sup> to mob violence against Asian laborers in California.<sup>113</sup> Despite this seeming expansiveness, an anti-hate crimes movement, which emerged in the 1980s and 1990s,<sup>114</sup> has endowed the term “hate crime” with particular meaning, thereby shaping popular understanding of contemporary racial violence as a different, if not new, manifestation of racism in the United States.

As the anti-hate crime movement has developed, media, activists, and politicians have helped to establish a paradigmatic hate crime in legal thought and in the public imagination. Two hate crimes in recent memory—the killings of James Byrd and Matthew Shepard, both in 1998—have come to epitomize a broadly shared conception of hate violence. Those cases serve as a useful point of comparison for post-September 11 hate violence, for this more recent hate violence bears much in common with them. And yet, despite these similarities, the public has understood the post-September 11 hate violence in markedly different terms.

On June 7, 1998, James Byrd, an African American man from Jasper, Texas, was chained to the back of a pick-up truck and dragged to death by three white men with ties to white supremacist groups.<sup>115</sup> Before Byrd died, the three white men dismembered and finally decapitated him. Prior to killing Byrd, one of his tormentors reportedly stated that he was “fixin’ to scare the s[hit] out of this n[igger],” and that he was “going to start The Turner Diaries early.”<sup>116</sup> The gruesome murder attracted national attention

---

109. See Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 564 (1998) (defining hate crime as “acts of violence motivated by animus against persons and groups because of race, ethnicity, religion, national origin or immigration status, gender, sexual orientation, disability (including, for example, HIV status), and age”); see also JACOBS & POTTER, *supra* note 108, at 11 (describing hate crime as “not really about hate,” but instead as concerning “criminal conduct motivated by prejudice”).

110. Maroney, *supra* note 109 at 565 (noting that the hate crime category encompasses a broad array of historical practices).

111. See JACOBS & POTTER, *supra* note 108, at 59 (pointing to history of racial violence by European settlers toward Native Americans, to refute the claim of anti-hate crime movement that the country is experiencing unprecedented levels of racial violence); Maroney, *supra* note 109, at 565-66 (citing JACOBS & POTTER).

112. For a discussion of the relationship of lynching to the contemporary conception of hate crime, see *infra* notes 133-41 and accompanying text.

113. See *supra* note 100 and accompanying text.

114. For a concise description of the anti-hate crime movement, see Maroney, *supra* note 109 at 566-67 (describing the emergence of an anti-hate crime social movement in the 1980s and 1990s as a product of converging interests among civil rights and victims’ rights movements).

115. Richard Stewart, *Trio Charged in Jasper Slaying*, HOUS. CHRON., June 10, 1998, at A1, available at <http://www.chron.com/cs/CDA/ssistory.mpl/special/jasper/accused/228324>.

116. *Id.* (expletives deleted in original).

and widespread condemnation, and it mobilized support for strengthening Texas's hate crime statute and for passing federal hate crime legislation.<sup>117</sup>

Four months later, twenty-two-year-old Matthew Shepard, an openly gay man in Laramie, Wyoming, was kidnapped, beaten, burned, and then tied to a fence and left to die by three young men who were later overheard making anti-gay remarks.<sup>118</sup> Like the Byrd killing, this case galvanized not only the gay community,<sup>119</sup> but mainstream opposition to violence against gays and lesbians as well.<sup>120</sup> The killing was roundly condemned and added further impetus to the drive for hate crime legislation at both the state and federal levels.<sup>121</sup>

The coincidence of the two brutal killings within a matter of months rendered Byrd and Shepard national symbols of the anti-hate violence movement. President Clinton regularly invoked Byrd's and Shepard's names and memories in advocating passage of federal hate crime legislation,<sup>122</sup> and the media committed extensive coverage to the killings, the trials and sentencings of their perpetrators, as well as the struggles of Jasper, Texas, Laramie, Wyoming, and the nation to come to terms with such violence.<sup>123</sup> The Byrd and Shepard killings provoked a sustained

---

117. See Rick Lyman, *Hate Laws Don't Matter, Except When They Do*, N.Y. TIMES, Oct. 18, 1998, at D6. The enhanced hate crime legislation introduced in Texas in 1999 was entitled the James Byrd, Jr. Act. See Robert Mayer, *Senate OKs Hate Crime Bill*, DAILY TEXAN, May 8, 2001, at <http://tspweb02.tsp.utexas.edu/webarchive/05-08-01/>.

118. See James Brooke, *Gay Man Beaten and Left for Dead*, N.Y. TIMES, Oct. 10, 1998, at A1 (reporting that Shepard's killers were overheard making anti-gay remarks.) The killers had posed as gay men and lured Shepard out of a bar and into their pick-up truck. *Id.*

119. See Michael Cooper, *Killing Shakes Complacency of the Gay Rights Movement*, N.Y. TIMES, Oct. 21, 1998, at A5.

120. Speaking on the Senate floor in support of federal hate crime legislation in 2000, Republican Senator Gordon Smith stated, "When James Byrd Jr. was dragged to death on a dusty Texas road, something happened to me. I was horrified beyond my ability to express it. . . . When Matthew Shepard was beaten to death on a Wyoming prairie, left on a fence to die, something happened to me." Gordon continued, "What I'm saying to fellow Christians everywhere is that it's time to say to the gay community, I do not agree with you on everything, but I can help you." Susan Milligan, *Senate to Vote on 'Hate Crimes'*, BOSTON GLOBE, June 20, 2000, at A3.

121. Lyman, *supra* note 117.

122. See, e.g., Charles Babington, *Clinton Urges Congress to Toughen Laws on Hate Crimes*, WASH. POST, Oct. 16, 1999, at A11 (quoting President Clinton as saying, "Hundreds of Americans, like young Matthew Shepard in Wyoming or James Byrd in Texas, have been killed or injured simply because of who they are—because of their race, their faith, because they're gay . . . . And I think this is important for America and important for our leadership at home and around the world.").

123. See generally Barb Berggoetz, *Gay Man's Killing Got More Coverage; Stats Show Blacks More Likely to be Victims, Researcher Says*, INDIANAPOLIS STAR, Jan. 16, 2004, at 7B (discussing researcher's finding that there were approximately fifteen hundred newspaper and television stories covering the Shepard killing, and approximately one hundred on the Byrd killing); Chris Bull, *All Eyes Were Watching*, ADVOCATE, Nov. 24, 1998, at <http://www.advocate.com/html/stories/0098/media.asp> (stating that "[p]erhaps no previous case of antigay violence has so galvanized public sympathy for the plight of gay men and lesbians in America" and that coverage of the Shepard killing "was certainly greater than the vast majority of bias-related murders") (internal quotation omitted). Notably, many of the stories about the Shepard killing sought to connect his murder with the slaying of Byrd. See *id.*

national discussion on racism, bigotry, and homophobia.<sup>124</sup> The condemnation of the Byrd and Shepard killings was vociferous, governmental responses were significant, and public attitudes toward hate violence were transformed.

The Byrd and Shepard killings closely fit a prototype of hate crime that has developed in the past two decades.<sup>125</sup> In the prototypical hate crime, the perpetrator and victim are strangers; the perpetrator is provoked not because of something the victim has done, but because the perpetrator views the victim as fungible with a racial or social group that the perpetrator hates; the crime evinces the perpetrator's hostility toward the particular group as the perpetrator often makes derogatory comments about the victim's racial or social group before, during, or after the attack; and the crime features extreme, gratuitous violence.<sup>126</sup>

In addition to this prototype of a hate crime, Lu-in Wang has identified three assumptions that define the prototypical hate crime perpetrator.<sup>127</sup> First, the perpetrator's bias toward a particular racial or social group is understood to be personal.<sup>128</sup> Second, that bias is understood to be deviant and irrational; "it is abhorrent and aberrant, and it makes no logical sense."<sup>129</sup> Finally, the perpetrator's bias is so irrational that animus motivates him to commit a crime for the sole purpose of inflicting harm on a member of the target group.<sup>130</sup>

As Wang has argued, political, legal, media, and public attention to hate violence has depended upon this construction of hate crime and its perpetrators as extreme, deviant, and illogical.<sup>131</sup> Indeed, such a construction permits the "viewer" of hate violence to distance herself from the perpetrator and the crime. By branding the actions of a hate crime perpetrator

---

124. See generally Rick Bragg, *Unfathomable Crime, Unlikely Figure*, N.Y. TIMES, June 17, 1998, at A1 (describing the Byrd murder as "a crime so cruel it sickened people across the country"); Charisse Jones, *Gay Student's Brutal Death Stokes Hate Crime Debate*, USA TODAY, Oct. 13, 1998, at A1 (citing the deaths as "spur[ring] the nation to examine issues of tolerance and bigotry"); Sheba R. Wheeler, *DU Hosts Trio's Push for Tolerance*, DENVER POST, Aug. 5, 2001, at B5 (citing Denver University's continued campaign to raise awareness about racism and homophobia by showing a documentary about the Byrd and Shepard murders).

125. See Lu-in Wang, *The Complexities of "Hate,"* 60 OHIO ST. L. J. 799, 801 (1999); Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 48-56 (1997) [hereinafter Wang, *Transforming Power of "Hate"*]. Wang argues that these prototypes result in an oversimplified understanding of hate crimes and hate crime perpetrators, and that a more nuanced understanding of each would improve legal and social efforts to address the harms of hate crimes. I rely upon Wang's work here for the more limited purpose of explicating a paradigmatic understanding of hate crimes and hate crime perpetrators that has taken hold in the legal and popular imaginations.

126. Wang, *Transforming Power of "Hate,"* *supra* note 125, at 49-50.

127. Wang, *The Complexities of "Hate,"* *supra* note 125, at 815-16.

128. *Id.* at 817-21.

129. *Id.* at 821-24.

130. *Id.* at 825-30.

131. Wang, *Transforming Power of "Hate,"* *supra* note 125, at 49.

as deviant, the viewer implicitly positions herself on the side of normalcy, untainted by the deviance that, by this account, motivates the perpetrator. As Wang has noted, a “[h]ate crime is often viewed as an extreme or isolated phenomenon that involves conduct that is dramatic and aberrant and is perpetrated by deviant, rage-filled individuals who are ‘out of touch’ with the rest of society.”<sup>132</sup> Thus, the construction of this prototype of hate violence enables the full moral condemnation of the perpetrators and the crimes because it involves no self-condemnation in the process.

One might question whether the Byrd and Shepard killings reflect a new paradigm of hate violence, or merely renew an old one. Specifically, the lynching of African Americans in the aftermath of the Civil War possesses its own paradigmatic status.<sup>133</sup> Indeed, lynching has been described as “the archetypal ‘hate’ crime . . . the exemplar to which each new incident of bias-motivated violence evokes inevitable comparison.”<sup>134</sup> Moreover, the Byrd and Shepard killings have been described as modern-day lynchings.<sup>135</sup> Such comparisons are not without basis, as lynching established the hallmarks of contemporary hate crime: it clearly involved violence enacted out of racial bias,<sup>136</sup> the violence was designed not only to punish an individual, but to terrorize entire black communities,<sup>137</sup> and its violence was frequently gruesome.<sup>138</sup> Despite these fundamental similarities, important distinctions exist. In particular, unlike the contemporary hate crime, in which the perpetrator’s bias is presumed to be aberrant, lynchings depended upon and received the imprimatur of rationality and normalcy offered in the form of mainstream, white southern approval of the practice. The racial code of white supremacy that lynching enforced was not outside the mainstream of white southerners, it *was* the mainstream, as reflected by the fact that lynchings were almost always carried

132. Wang, *supra* note 72, at 212.

133. Used initially to punish suspected criminals and Tories during the American Revolution, after the Civil War lynching emerged as a ritualized form of mob violence enacted by whites against African Americans as “a means to intimidate, degrade, and control black people throughout the southern and border states . . .” ROBERT L. ZANGRANO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950*, at 3 (1980); *but see* W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930*, at 19 (1993) (arguing that descriptions of lynching as “a simple ritualistic affirmation of white unity” obscure the heterogeneity of white supremacist strategies and methods reflected in various lynching practices). There were 4,743 recorded lynchings between 1882 and 1968, of which 72.7% of victims were African American. ZANGRANO, *supra* at 4.

134. Wang, *The Complexities of “Hate,” supra* note 125, at 831.

135. Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 *LAW & INEQ. J.* 263, 264 (2003); *see also* Wang, *The Complexities of “Hate,” supra* note 125, at 831 (describing the Byrd killing as a lynching).

136. In addition to the racial animus inherent to lynching, historians have identified instrumental purposes served by the practice including the maintenance of white control over land, labor, and politics. *See* Wang, *The Complexities of “Hate,” supra* note 125, at 836-867.

137. *See* BRUNDAGE, *supra* note 133, at 18-19.

138. Ifill, *supra* note 135, at 282-83 (describing torture, mutilation, and dismemberment of lynching victims).



out by mobs,<sup>139</sup> were frequently attended by hundreds, if not thousands of spectators,<sup>140</sup> and often occurred with the complicity of law enforcement officials.<sup>141</sup> In sharp contrast to lynchings, in their paradigmatic form contemporary hate crimes depend upon an ascription of aberrance to the crime and its perpetrator, and a condemnation of both by the community.

The Byrd and Shepard killings were assimilated into and simultaneously helped to popularize these paradigms of hate crime and hate crime perpetrators. Consistent with the paradigmatic hate crime, the perpetrators were understood as virtual strangers to their victims,<sup>142</sup> and the perpetrators were understood to have killed their victims out of a bias toward the social groups to which each victim belonged—African Americans and gays, respectively. The perpetrators of each crime were reported to have made derogatory remarks just before or just after the killings.<sup>143</sup> Moreover, Byrd's dismemberment and decapitation and Shepard's burning and being tied to a fence to die both demonstrate extreme, gratuitous violence.

Consistent with the paradigm of hate crime perpetrators, Byrd's and Shepard's killers were characterized as acting out of personal bias, rather than out of broadly held societal beliefs.<sup>144</sup> This has the effect of localizing the racism and homophobia of Byrd's and Shepard's killers, and ignores the role that less extreme practices of racism and homophobia that permeate society may have played in reinforcing the perpetrator's prejudices.<sup>145</sup> Thus, defining the perpetrators' bias as personal enables both a denial and a condemnation of racism and homophobia generally.

---

139. BRUNDAGE, *supra* note 133, at 18-19; Ifill, *supra* note 135, at 280-81.

140. Ifill, *supra* note 135, at 285.

141. BRUNDAGE, *supra* note 133, at 18; Ifill, *supra* note 135, at 281.

142. They were not, in fact, total strangers: Shepard had met his killers in a bar, and one of Byrd's killers claimed to have seen him around town. See Brooke, *supra* note 118, at A1; Stewart, *supra* note 115, at A1.

143. See *supra* notes 116 and 118 and accompanying text.

144. Media and public officials' descriptions of the killers attempted to separate the killers' beliefs from society's. For example, an article in the *Houston Chronicle* reporting on the filing of charges against Byrd's killers describes the perpetrators as "three young men with a *fetish* for white supremacy." Stewart, *supra* note 115, at A1 (emphasis added). The language of "fetish" denotes white supremacy as abnormal and deviant, and implicitly casts the "normal" people of mainstream society, in Texas and elsewhere, as wholly free of racism. The *Chronicle* story later notes that Byrd's killers "may have become enamoured with the Aryan Nation and the Ku Klux Klan," thereby equating white supremacy with membership in extremist organizations, and eliding the multiple expressions of white supremacy such as housing and employment discrimination, racial profiling, and racially disparate criminal prosecution and sentencing. *Id.* The story also quotes Sheriff Billy Rowles as stating, "We have no organized KKK or Aryan Brotherhood groups here in Jasper County," an obvious attempt to characterize the racism of Byrd's killing as foreign to the people and culture of the place in which it occurred. See *id.* The *Chronicle* reports that Rowles's claim "prompted whoops and catcalls" from African American residents of Jasper County. *Id.*

145. See Wang, *The Complexities of "Hate," supra* note 125, at 817 (arguing that the prototype of hate crime perpetrators obscures the fact that "the perpetrators' bias is socially reinforced, and not simply personal").

The second assumption regarding the prototypical hate crime perpetrator—that his bias is deviant and irrational—also holds true in the popular understanding of the Byrd and Shepard killings. The deviance of Byrd's killers was a particularly prominent feature in legal and popular accounts of the killing.<sup>146</sup> State prison officials said that at least two of the killers were members of the Ku Klux Klan and that they bore white supremacist tattoos on their bodies.<sup>147</sup> The deviance of these killers was so extreme that members of a local chapter of the KKK in Texas held a rally to distance themselves from the killers of Byrd.<sup>148</sup> Thus, the bias of the perpetrators was so aberrant that it was deemed irrational, illogical, and beyond comprehension.<sup>149</sup> Once again, the construction of the perpetrators' biases as aberrant and illogical disavows these biases from the mainstream. Moreover, implicit in the robustness of the condemnation of these killings is a rejection of the bias toward African Americans and gays that the crimes are understood to express, even as less visible and less graphic structural discrimination against African Americans and gays persists.<sup>150</sup>

Finally, the popular understanding of the Byrd and Shepard killings constructed the perpetrators as killing their victims for the purpose of inflicting harm not merely on the victims themselves, but also on the racial and social groups to which they belonged. This assumption rests upon a conception of hate crime as communicative of violence to entire communities, rather than targeted only at individual victims. The prototype demands not only that such violence be communicated, but that such communication be the sole intention of the perpetrator.<sup>151</sup> This leaves no room for mixed or

146. See *Statement of the Anti-Defamation League on Bias-Motivated Crime & H.R. 1082—The Hate Crimes Prevention Act*, August 4, 1999, 21 CHICANO-LATINO L. REV. 53, 53 (2000) (describing the murders of Shepard and Byrd as “particularly . . . depraved”); *Texas Atrocity Raises Questions for All Americans*, Editorial, L.A. TIMES, June 11, 1998, at B8 [hereinafter *Texas Atrocity Raises Questions*] (describing the murder of Byrd as “an act of barbarism, a crime that should be incomprehensible”).

147. Bragg, *supra* note 124.

148. *Id.*

149. See Lyman, *supra* note 117, at D6 (describing Shepard's killing as “utterly senseless”); *Texas Atrocity Raises Questions*, *supra* note 146, at B8.

150. By condemning the most extreme forms of racism and homophobia, both the government and the public can avoid engagement with and even disclaim the pervasiveness of other forms of such discrimination. See Maroney, *supra* note 109, at 585 (arguing that supporting hate crime legislation “allows government authorities to condemn the most extreme manifestations of prejudice without committing to eradication of lessor, more pervasive forms”); Wang, *The Complexities of “Hate,”* *supra* note 125, at 823 (citing Maroney). For a discussion of how the government's prosecutions of post-September 11 perpetrators obscure and normalize its own racism, see *infra* note 304 and accompanying text.

151. As Wang notes, this demand is at odds with many hate crime laws, which require only that the defendant's bias motivation be “substantial” or “significant.” Wang, *The Complexities of “Hate,”* *supra* note 125, at 825. Moreover, it ignores substantial social science research which suggests that “when the victim and target group perceive that the victim was selected on the basis of social group status, they experience the crime as they would a ‘hate’ crime,” regardless of the perpetrator's actual

ulterior motives. The fullness of the condemnation of hate crimes depends upon these crimes being motivated only by a desire to do harm to particular racial and social groups.

On first inspection, the post-September 11 violence against Arabs, Muslims, and South Asians, and the killings in particular, bear important resemblances to the Byrd and Shepard killings. For example, Balbir Singh Sodhi, a fifty-two-year-old Sikh gas station operator in Mesa, Arizona, was shot to death on September 15, 2001, four days after the terrorist attacks.<sup>152</sup> Before going to Sodhi's gas station and shooting him while Sodhi was planting flowers outside of the station, his killer, Frank Roque, was overheard ranting at a bar ranting that he wanted to kill "ragheads."<sup>153</sup> (Roque subsequently shot a Lebanese man at another service station, and fired shots into the house of an Afghan family.<sup>154</sup>) Sodhi was with three Mexican men when Roque approached, but only Sodhi, clad in a traditional Sikh turban, was shot.<sup>155</sup> The murder of Vasudev Patel is strikingly similar. Patel operated a gas station in Mesquite, Texas.<sup>156</sup> On the morning of October 4, 2001, Mark Anthony Stroman, an avowed white supremacist, entered the gas station, stated "God Bless America," and shot Patel in the chest.<sup>157</sup> On the day of his arrest, Stroman had planned to visit a Dallas mosque. "I was going to go in shooting Arabs," he said.<sup>158</sup> In the days immediately following September 11, Stroman had already killed a Pakistani store clerk, Waqar Hasan, and blinded a Bangladeshi clerk, Rais Bhuiyan, in separate shootings before killing Patel.<sup>159</sup> In both the Sodhi and the Patel killings, the perpetrators were strangers to their victims, appeared to have selected their victims because of the victims' perceived membership in a particular racial or social group, communicated the racial motivation of their crimes through the utterance of derogatory remarks, and exercised gratuitous violence against them, and seemingly intended to communicate a message of antipathy to the racial and religious communities from which they hailed (or from which they were believed to hail). Although the Sodhi and Patel killings lacked the gruesomeness of the Byrd and Shepard killings—they were assassinations rather than spectacles of violence—by all other measures, the Sodhi and Patel killings were prototypical hate crimes.

---

intent. *Id.* at 829-30; Wang, *Transforming Power of "Hate," supra* note 125, at 112-24 (describing social science research).

152. Pierre, *supra* note 10, at A1.

153. *Id.*

154. Laurie Goodstein & Tamar Lewin, *Victims of Mistaken Identity, Sikhs Pay a Price for Turbans*, N.Y. TIMES, Sept. 19, 2001, at A1.

155. *Id.*

156. Pierre, *supra* note 10, at A10.

157. *Id.*

158. *Id.*

159. *Id.*; Tim Wyatt, *Killer of Gas Clerk Gets Death Penalty*, DALLAS MORNING NEWS, Apr. 5, 2002, at A27.

As individual crimes, these cases are being prosecuted fully; both Roque and Stroman have been convicted and sentenced to death for the murders they committed.<sup>160</sup> However, these cases, and the thousands of other incidents of hate violence against Arabs, Muslims, and South Asians have failed to capture the national attention in the way that the Byrd and Shepard killings did.<sup>161</sup> While government leaders condemned the post-September 11 hate violence,<sup>162</sup> and some sympathy was expressed for its victims, the condemnations and the sympathy differed in extent, if not in kind, from that expressed for the victims of previous hate crimes. The public has not memorialized the victims<sup>163</sup> and has not demanded legislative reform of the hate crime laws.<sup>164</sup> The victims of post-September 11 violence have not become symbols of something larger. Rather, they have been largely forgotten. For example, the widow of Waqar Hasan, rather than receiving the sympathy of the nation for her loss, now faces deportation.<sup>165</sup> Similarly, those subjected to post-September 11 hate violence, and

---

160. See *Man Sentenced to Death for 9/11 Revenge Killing*, L.A. TIMES, Apr. 6, 2002, at A12 (stating Mark Stroman was sentenced to death for “rage” shooting); *Suspect in Sikh’s Killing will Face Death Penalty*, L.A. TIMES, Nov. 7, 2001, at A10 (reporting Frank Roque’s sentence).

161. While the same could be said of most violent crimes, my interest is in why, within the context of hate crime, some cases capture and sustain public attention and others do not.

162. See Richard A. Serrano, *Ashcroft Denies Wide Detainee Abuse*, L.A. TIMES, Oct. 17, 2001, at A4 (reporting that Attorney General John Ashcroft met with leaders of Arab, Muslim, and Sikh communities, pledging to press hate crime prosecutions and stating “such attacks are un-American and unlawful”); see also *Bush Urges Respect Toward US Muslims*, BOSTON GLOBE, Sept. 14, 2001, at A26 (quoting Bush as stating, “[W]e must be mindful that as we seek to win the war, that we treat Arab-Americans and Muslims with the respect they deserve . . . . We should not hold one who is a Muslim responsible for an act of terror.”); Alfredo Corchado, *President Denounces Anti-Muslim Behavior: 350 Complaints Reported Nationwide Since Tuesday’s Attacks*, DALLAS MORNING NEWS, Sept. 18, 2001, at A13 (quoting Bush as saying, “The face of terror is not the true face of Islam. . . . In our anger and emotion, our fellow Americans must treat each other with respect.”); *Radio Messages on Tolerance*, N.Y. TIMES, Sept. 28, 2001, at A27 (quoting Ashcroft’s public service announcement in which he stated, “We must not target Arab-Americans, American Muslims or Sikhs.”).

163. One notable exception to this general neglect was the “Balbir Singh Sodhi Embrace Diversity Memorial Event,” hosted by the Sodhi family and the local Sikh community on September 4, 2002, in Mesa, Arizona. See Stephanie A. Miller, *Memorial for Mesa Man Slain in 9/11 Backlash Draws 500*, ARIZ. REPUB., Sept. 15, 2002, at B3 (quoting an organizer as saying, “We’re trying to remember the other victims of backlash after 9/11 and to keep the effort moving forward of sharing, educating and welcoming people to promote understanding and diversity and the oneness of God”).

164. On May 1, 2003, Senator Edward Kennedy introduced the Local Law Enforcement Enhancement Act of 2003 (LLEA), which would add actual or perceived sexual orientation, gender, and disability to federal hate crime laws, and would authorize greater federal assistance to be provided to local law enforcement officials investigating or prosecuting hate crimes. S. 966, 108th Cong. (2003). (Federal law currently addresses only certain bias crimes motivated by race, color, religion, or national origin. See 18 U.S.C. § 245(b)(2)(B) (2004).) In introducing the bill, Senator Kennedy made brief mention of post-September 11 hate violence, see 149 CONG. REC. S5652-53 (daily ed. May 1, 2003) (statement of Sen. Kennedy), but there has been little public demand or media coverage linking such violence to a need for enhanced hate crime legislation. LLEA was approved by the Senate on June 15, 2004. S. Arndt. 3183 to S. 2400, 108th Cong. (2004).

165. In February, 2003, a private bill was introduced in the House of Representatives to allow Waqar Hasan’s wife and four children to gain lawful permanent resident status. The bill was passed by the House of Representatives on July 6, 2004, and after being sent to the Senate, was referred to the

the survivors of those killed by it, have been excluded from eligibility for virtually all of the major September 11-related charities,<sup>166</sup> suggesting a hierarchy of loss that places the victims of hate violence at the bottom. Whereas the name “Matthew Shepard” is now synonymous with anti-gay bias, the names Waqar Hasan, Balbir Singh Sodhi, and Vasudev Patel conjure up nothing more than the vague image of a terrorist.<sup>167</sup>

Undoubtedly the unique political moment of September 11 and its aftermath accounts for some of this difference in public response to the hate violence.<sup>168</sup> Most Americans had barely begun to comprehend the loss of life exacted on September 11 when the hate violence began. It is, then, perhaps understandable that a nation consumed with the trauma of the terrorist attacks might be inattentive to further “collateral” loss of life. However, it is not merely that the magnitude of the September 11 attacks made them more worthy of condemnation and its victims more worthy of sympathy. Rather, the difference in public response to the post-September 11 hate violence can be attributed to a difference in how hate violence against Arabs, Muslims, and South Asians was understood as compared with previous instances of hate violence.

Despite the seeming conformity of post-September 11 hate violence to the hate crime prototype, several important distinctions exist in how the violence against Arabs, Muslims, and South Asians has been comprehended. Unlike prototypical hate crimes, the perpetrators of post-September 11 hate violence have not been understood as acting out of personal bias, but instead out of bias which resonated with much of the country. Because the perpetrators’ emotional reactions of anger and desire for retribution were shared by much of the public, the perpetrators’ *bias* was not understood to be deviant or irrational, even though their *actions* may have been so understood. And finally, whereas in the prototypical hate crime the perpetrator is understood to be enacting violence for the sole purpose of telegraphing harm to a target group, here the perpetrators’ motives were understood to be both revenge and intimidation. As such, they were subject to a different, and lesser, moral scrutiny. Each of these

---

Senate Judiciary Committee. As of August 24, 2004, the bill was still pending before that committee. H.R. 867, 108th Cong. (2003); see also Frank Trejo, *Slain Man’s Family in Limbo: Wife, Kids Hoping For Legal Status After 9-11 Revenge Attack in Dallas*, DALLAS MORNING NEWS, Feb. 13, 2003, at 28A; Tara Petersen, *Rallying in the Rain for Hasan’s Family*, SENTINEL, Sept. 18, 2003, at [http://ebs.gmnews.com/news/2003/0918/Front\\_page/003.html](http://ebs.gmnews.com/news/2003/0918/Front_page/003.html).

166. See Jon Yates, *Prejudice Also Claimed Victims in Sept. 11’s Wake*, CHI. TRIB., May 5, 2002, at 1 (reporting that victims of post-September 11 hate violence have been ruled ineligible for the \$930 million American Red Cross Liberty Fund, among others).

167. Ahmad, *supra* note 70, at 107.

168. The fact that, unlike the prototypical hate crime, post-September 11 hate crimes have not featured gruesome violence might also help to explain the difference in how post-September 11 violence has been understood, but I do not believe this accounts for the difference fully.

distinctions between popular understandings of post-September 11 violence and previous hate crimes is taken up below.

*A. The Perpetrators' Biases Were Not Personal, But Broadly Shared.*

First, it is difficult to understand as personal to the perpetrator the bias against “Muslim-looking” people to which the violence is attributed. Rather, biases against Arabs, Muslims, and South Asians were widespread in the immediate aftermath of the terrorist attacks.<sup>169</sup> The condemnation of the Byrd and Shepard killers depended upon an ability of the general public to put moral distance between itself and the perpetrators, to disclaim racism and homophobia as widely held beliefs, and certainly as beliefs that the general public sanctioned. Thus, condemnation of the Byrd and Shepard killers localized the racism and homophobia of the perpetrators, and it permitted the public to define itself as free of such biases. While such implicit claims of freedom from racism and homophobia were undoubtedly counterfactual in 1998, a claim of freedom from bias against “Muslim-looking” people in the immediate aftermath of September 11 is nearly impossible to maintain. The biases of the perpetrators of post-September 11 violence were the biases of much of the country. Thus, the perpetrators were not understood to be acting solely out of personal animus, but out of an animus for which there was substantial social reinforcement available.

Nearly three years after the terrorist attacks, it may be difficult to recall exactly how much hostility, anger, and suspicion there was toward “Muslim-looking” people in the aftermath of the attacks. Although evidence of continuing bias against Arabs, Muslims, and South Asians is abundant,<sup>170</sup> the immediate aftermath of the attacks—the time in which the hate violence spiked—was a moment of overwhelming and complex emotionalism. This was most clearly expressed by people who found themselves engaging in racial profiling of Arabs, Muslims, and South Asians, despite their intellectual opposition to it. Many such sentiments were captured in the media. For example, the following was broadcast on National Public Radio the week after the terrorist attacks:

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

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

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

---

169. See *infra* note 178 and accompanying text.

170. See *infra* note 178 and accompanying text.

CHAN: Let's just get bombs. Let's just get bombs on planes. *I don't care how many innocent people get wiped out. Just level them, whoever that is.*<sup>171</sup>

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

I saw a very suspicious-looking gentleman—I'll be honest—and I stared him down, as if to say, "Just what do you think you're doing?" And when he saw me, he moved around the corner and went to another phone. *There was definitely that look of hate in my eyes. There was a look of blame.*<sup>172</sup>

Comments such as these reflect both anger and moral outrage. The anger is evident from the desire to fight back ("Let's just get bombs on planes.") as well as feelings of hatred ("There was definitely that look of hate in my eyes.").<sup>173</sup> Moreover, this anger finds expression in moral terms ("I don't care how many innocent people get wiped out. Just level them, whoever that is." "Just what do you think you're doing?" "There was a look of blame."). Importantly, these expressions of moral outrage were not made in the abstract, but were directed toward and enacted upon individual Arabs, Muslims, and South Asians, as in the case of the individual staring down the turbaned man in New York City.<sup>174</sup> Thus, the anger triggered by the September 11 attacks found expression in moral outrage directed at people who were thought to look like the September 11 terrorists.<sup>175</sup>

171. Margot Adler, *Profile: Reactions People Are Having to Suddenly Being Suspicious of Anyone Who is Muslim or Arab*, (Nat'l Pub. Radio broadcast, Sept. 20, 2001) (emphasis added). The reporter began this story by relating that while in the airport she was giving special scrutiny to men who appeared to be from the Middle East. "Shocked to find myself engaging in racial profiling," she states, "I find that I am not alone." *Id.*; see also Verhovek, *supra* note 32, at A1 (emphasis added):

Ron Arnold understands racial profiling. "I'm a black American, and I've been racially profiled all my life," said Mr. Arnold, a 43-year-old security officer here, "and it's wrong." But Mr. Arnold admits that he is engaging in some racial profiling himself these days, casting a wary eye on men who look to be of Middle Eastern descent. If he saw a small knot of such men boarding a plane, he said: "I'd be nervous. *It sickens me that I feel that way*, but it's the real world."

172. Adler, *supra* note 171 (emphasis added).

173. See Linda J. Skitka et al., *Political Tolerance and Coming to Psychological Closure Following the September 11, 2001 Terrorist Attacks: An Integrative Approach*, PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN (forthcoming 2004) (manuscript at 13, on file with CALIF. LAW REV.) (assessing anger of respondents in nationwide poll four days after September 11 by degree to which they felt angry, a desire to fight back, outrage, and hatred in response to the terrorist attacks).

174. It is possible, if not likely, that this turbaned man was Sikh rather than Muslim or Arab. Many Sikh men, who wear turbans and long beards, were targeted in post-September 11 hate violence because they were mistaken to be Muslim. As a result, Sikhs have borne the disproportionate brunt of hate violence in the aftermath of September 11. See IYER, *supra* note 12, at 14; Goodstein & Lewin, *supra* note 154, at A1; Sikh Mediawatch & Res. Task Force, Common Stereotypes About Sikhs and Sikhism, at <http://www.sikhmediawatch.org/pubs/smartypub8.htm> (last updated Feb. 2002) (discussing the difference between Arabs, Muslims, and Sikhs).

175. Such feelings of anger and suspicion found support and reinforcement in the media. For example, Peggy Noonan, a former speechwriter for Ronald Reagan and George H.W. Bush, recounted

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

Recent social science research supports the conclusion that the anger and consequent moral outrage expressed in the excerpts above were common emotional reactions among Americans in the immediate aftermath of September 11. In one study, in which respondents were contacted only

---

in the *Wall Street Journal* her encounter with two “Mideastern looking men” videotaping St. Patrick’s Cathedral in New York a few days after September 11. Peggy Noonan, *Profiles Encouraged*, WALL ST. J., Oct. 19, 2001, at <http://www.peggynoonan.com/article.php?article=72> (last visited Apr. 12, 2004) (article originally printed in the Oct. 19, 2001, edition of the *Wall Street Journal*). Noonan describes how she and her son stared at these men and “eyeballed them hard.” Undeterred, the men “stared back at us in what I thought an aggressive manner: a deadeye stare, cold, no nod, no upturned-chin hello.” *Id.* Regretting not having confronted the men, Noonan writes the following:

I think there are a lot of “sleeper cells”—not a few, as we all hope, but a lot. I think some of them are in Queens and Brooklyn and Manhattan, and in Jersey City and elsewhere in New Jersey. Boston, too. Maybe some are in the capital or Virginia or Maryland. Maybe some of those who delivered anthrax to the U.S. Capitol took a taxi. Maybe on the other hand they took the shuttle from LaGuardia. Certainly we know some cell or cells are in Florida.

I think some cell members may not be sure what their next move is. They’re not sure of their next assignment. They haven’t been told, or they haven’t, perhaps, chosen. I think cell members have been going around taking home movies of potential targets. I suspect they’ve been downloading them into computers and shooting them off to Osama and his lieutenants in the caves. I suspect they’ve been building a video library of places they might hit over the next few months and years and decade. And I think once they take one of the targets down they’ll happily return to the scene of the crime, take a nice tourist-type videotape of the crater they made—they’ll tell the cops they want to record the brave rescue workers—and send it triumphantly home.

*Id.* Noonan concludes, “In the past month I have evolved from polite tip-line caller to watchful potential warrior.” *Id.*

On the one hand, this passage can be read as an expression of fear. The concern that there may be other sleeper cells waiting to spring attacks upon the country is real. See Jerry Seper, *Islamic Extremists Invade U.S., Join Sleeper Cells*, Wash. Times, Feb. 10, 2004 (reporting that government officials believe there are hundreds of operatives in sleeper cells in forty states) at <http://www.washingtontimes.com/national/20040209-115406-6221r.htm>. On the other, Noonan stokes the anger that many people were already feeling toward Arabs, Muslims, and South Asians, an anger deriving not merely from the violence done on September 11, but by a felt sense of betrayal by a group of strangers in our midst. By focusing on the brazenness of the terrorists she suspects still to be in the country, Noonan does more than reinforce feelings of vulnerability; she urges a moral outrage at the audacity of these “Mideastern looking men,” and counsels active confrontation with them. Thus she is transformed into a “potential warrior.”



days after September 11, 20% of the sample reported making comments like “we should just nuke them,” 38% talked about the need to go to war, and 23% reported “trying to blow off steam” by expressing their anger about the situation.<sup>176</sup> Whereas public opinion polls have consistently shown a willingness of most Americans to sacrifice civil liberties in order to combat terrorism,<sup>177</sup> as well as dramatically increased hostility to outgroups (i.e., Arabs, Muslims, and South Asians),<sup>178</sup> this study suggests that the high levels of moral outrage and outgroup derogation are likely the result of anger rather than fear or other associated emotions triggered by the September 11 attacks.

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

---

176. See Skitka et al., *supra* note 173, at 20.

177. See, e.g., Nat'l Pub. Radio et al., *Poll: Security Trumps Civil Liberties* (Nov. 30, 2001), at <http://www.npr.org/news/specials/civillibertiespoll/011130.poll.html> (finding between 51%-79% of respondents in favor of granting law enforcement expanded powers to intercept mail (57%), detain suspects for a week without charge (58%), wiretap telephones (68%), intercept email (72%), and examine telephone records (79%)) (last visited Sept. 1, 2004); Richard Morin, *Poll: Half of All Americans Still Feel Unsafe; Majority Would Give Up Some Civil Liberties to Improve Security After Sept. 11*, WASH. POST, May 3, 2002, at A7; LISA FERRARO PARMELEE, INTERGROUP RELATIONS BEFORE AND AFTER 9/11: A REVIEW OF THE PUBLIC OPINION DATA 34-38 (The Nat'l Conference for Community and Justice 2002) (summarizing various polls regarding civil liberties). As David Cole argues, despite this general willingness of Americans to give up certain civil liberties, it has not been all Americans' civil liberties that have been sacrificed. Rather, the rights of some—namely, noncitizens—are being sacrificed for the security of American citizens. Cole, *supra* note 33, at 17-21. As I argue here, there is a racial bias in the curtailment of civil liberties as well.

178. See PARMELEE, *supra* note 177, at 28, 32 (citing ABC News/*Washington Post* poll taken on September 13, 2001, finding 43% of respondents stated the terrorist attacks would make them more suspicious of people of Arab descent, and citing a Wirthlin poll taken within days of the attacks, finding that 44% of respondents thought the attacks represented the desires and feelings of Muslim American citizens toward the United States). A poll by the Council on American-Islamic Relations published in August 2002 found that 57% of Muslim Americans reported experiencing bias or discrimination since the terrorist attacks, and 87% said they knew a Muslim who had experienced discrimination. Significantly, 79% also reported experiencing kindness or support from people of other faiths. See News Release, Council on Am.-Islamic Relations, *Poll: Majority of U.S. Muslims Suffered Post 9/11 Bias; More Than Three-in-Four Also Experienced Acts of Kindness* (Aug. 21, 2002), at <http://www.cair-net.org/asp/article.asp?id=895&page=NR> (last visited Jan. 28, 2004).

*B. The Perpetrators' Behavior Was Aberrant, But Their Biases Were Not.*

Unlike the racism and homophobia attributed to the killers of James Byrd and Matthew Shepard, the biases underlying the hate violence against Arabs, Muslims, and South Asians are not easily characterized as aberrant. Rather, September 11 fortified a social norm of bias against "Muslim-looking" people. Indeed, many Americans experienced anger, suspicion, and feelings of betrayal toward Arabs, Muslims, and South Asians not unlike that attributed to the post-September 11 perpetrators. Mark Stroman, the man who killed Waqar Hasan and Vasudev Patel in the aftermath of the terrorist attacks, voiced a similar sentiment after his arrest, stating, "I did what every American wanted to do but didn't."<sup>179</sup> Stroman overstates the case, because a rational distinction can and should be drawn between emotion on the one hand, and behavior on the other. It is this distinction that permitted even those Americans who felt similar anger or disgust toward Arabs, Muslims, and South Asians to place moral distance between themselves and the perpetrators of post-September 11 violence.

Thus, the behavior in these incidents was aberrant, just as it was in the Byrd and Shepard killings. However, the biases underlying the Byrd and Shepard killings found little sympathy among the public, or at least the mainstream media; it was the perpetrators' racism and homophobia that were found aberrant, and not only the resulting behavior. In contrast, the biases underlying the behavior of the post-September 11 perpetrators had broad resonance with many Americans.<sup>180</sup> The result was a condemnation of the violence, but one which lacked the full moral force of those in the Byrd and Shepard killings, as many Americans could not disavow their felt biases against Arabs, Muslims, and South Asians in the immediate aftermath of the attacks as easily as they could racism and homophobia at the time of the Byrd and Shepard killings.<sup>181</sup>

*C. The Perpetrators Were Understood To Be Motivated By Vengeance Rather Than Mere Hatred.*

The prototypical conception of hate crimes casts the perpetrator as motivated exclusively by the perpetrator's hatred for the racial or social group to which the victim belongs. As previously discussed, that hatred is understood as personal to the perpetrator, rather than broadly shared by society, and as aberrant and irrational. Despite the efforts of advocacy groups and prosecutors to frame post-September 11 violence crimes as

---

179. Pierre, *supra* note 10.

180. See *supra* note 176 and accompanying text.

181. Condemnation of the post-September 11 killings may have served an additional role of aiding those Americans who felt ashamed of their bias toward Arabs, Muslims, and South Asians, by masking their inner emotional response with outward expressions of disapproval.

motivated by hatred toward Arabs, Muslims, and South Asians, however, they have been understood broadly as being motivated by a desire for vengeance.<sup>182</sup> Of course, vengeance for the September 11 attacks is not rationally obtained through attacks on “Muslim-looking” people, and therefore the violence is irrational. However, what makes it irrational is a gap in logic, and not the underlying desire for vengeance. A desire for vengeance found broad support among the American public, and ultimately found expression in American foreign policy<sup>183</sup>; by virtue of this broadly held desire, vengeance was *made* rational, and with it, bias against “Muslim-looking” people.<sup>184</sup> Thus, the motives of the post-September 11 perpetrators were shared by many Americans after September 11, even as the perpetrators’ chosen means of achieving it were disavowed.

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

As Lu-in Wang notes, “when a bias-motivated crime is seen as being ‘rational’ in some way, the bias required for condemnation becomes invisible.”<sup>185</sup> Here, the violence done by post-September 11 perpetrators has not been seen as rational; to the contrary, the violence has been condemned as irrational. However, because the emotion motivating the violence has resonated with many Americans, this suggests that the bias against “Muslim-looking” people has been seen as rational, even as the resulting crime has not.

This direct relationship between the degree of rationality attributed to underlying biases in bias-motivated crime and the degree of condemnation of the crime may be seen more clearly by considering other instances of hate violence that do not fit the prototype. For example, while the Shepard

---

182. See, e.g., *Man Sentenced to Death for 9/11 Revenge Killing*, *supra* note 160. The very headline of this story, as well as its description of Mark Stroman’s killing of Vasudev Patel and Waqar Hasan, reflect and reinforce the understanding that these murders were motivated by vengeance.

183. I am referring here to both the war in Afghanistan and the broader war against terrorism.

184. Insofar as a desire for vengeance translated into bias toward “Muslim-looking” people, see *supra* notes 170-78 and accompanying text, the normalization of one implies the normalization of the other.

185. Wang, *supra* note 72, at 216.

killing was roundly condemned, other anti-gay murders have found greater public sympathy with the killer's bias. In the "Jenny Jones case," for example, Jonathan Schmitz, a guest on a talk show, killed a gay man who had confessed his affection for Schmitz on air.<sup>186</sup> Charged with first degree murder, a jury found Schmitz guilty of the lesser offense of second degree murder after he claimed that he killed out of embarrassment at having been subjected to a homosexual advance.<sup>187</sup> That Schmitz's defense was permitted, and that it had some success in the courtroom, suggests that his "homosexual panic" defense<sup>188</sup> has some purchase with the public, even if it is viewed with some skepticism. This is to say that by sympathizing with the embarrassment Schmitz claimed to feel by being subjected to homosexual desire, the jury endorsed the rationality of his anti-gay bias.

In contrast, the claimed provocation of the "black rage" defense has been largely dismissed, and thereby rendered irrational. Black rage, the notion that environmental factors such as racism and economic exploitation can create a kind of temporary insanity leading to criminal conduct by African Americans against white individuals, should be understood as a bid for understanding racially-informed violence as rational human behavior.<sup>189</sup> That bid has been rejected, as in the case of Colin Ferguson, the Long Island Rail Road shooter,<sup>190</sup> thereby enabling full and ready condemnation of racial violence by African Americans against whites.

As discussed in greater depth below, post-September 11 violence has featured claims of provocation as well, and I argue that those claims have been rendered rational by way of public sympathy.<sup>191</sup> Thus, while post-September 11 violence has been described nominally as hate crime, in light of paradigmatic hate crimes in recent years, it has been experienced as something else. While most Americans could easily condemn the actions of post-September 11 violence, it seems that many, simultaneously, shared the rage of the perpetrators. Such emotional sympathy for hate crime

---

186. See *People v. Schmitz*, 586 N.W.2d 766, 768 (Mich. Ct. App. 1998).

187. Kara S. Suffredini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279 (2001).

188. For a discussion of this defense and its pretensions to psychiatric disorder, see *id.*

189. See generally PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* (1997).

190. On December 7, 1993, Colin Ferguson, a thirty-five year lawful permanent resident from Jamaica, boarded a Long Island Rail Road commuter train in New York City and opened fire, killing five people and injuring many others. All of those shot were white or Asian, and handwritten notes taken from Ferguson listed the "reasons for this (shooting): Adelphi University racism, EEOC racism, Workmen's Compensation Board. Racism of Gov. Cuomo's staff... Additional reasons for this: Caucasian racism and Uncle Tom Negroes." Patt Milton, *Race-Obsessed Loner Blamed in Train Tragedy*, ASSOC. PRESS, Dec. 8, 1993, 1993 WL 4570682. Ferguson also referred to "Chinese racism." *Id.* See also Christopher Slobogin, *Race-Based Defenses—The Insights of Traditional Analysis*, 54 ARK. L. REV. 739, 770 (2002) (discussing the black rage defense in the context of the Ferguson case).

191. See *infra* notes 194-219 and accompanying text.

perpetrators is, for better or for worse,<sup>192</sup> at odds with the prototypical conception of hate crimes. Rather than seeking to assimilate post-September 11 violence into the prevailing framework for hate violence, I propose viewing the post-September 11 phenomenon through a different framework entirely; borrowing from another area of criminal law, responses to the post-September 11 violence suggest that these incidents have been understood not as prototypical hate crimes, but as crimes of passion.

#### IV.

##### POST-SEPTEMBER 11 RACIAL VIOLENCE AS CRIMES OF PASSION

Ultimately, people have reacted to post-September 11 hate violence differently than they have to earlier instances of hate violence because it has been understood as a fundamentally different class of crime. The killings of James Byrd, Mathew Shepard, and other hate crime victims were deemed incomprehensible either because the underlying ideologies—white supremacy, and to a lesser degree, homophobia—were rejected by the mainstream, their persistence in American society notwithstanding,<sup>193</sup> or because the desire to inflict severe bodily harm on the basis of such ideological commitments defied general understanding. In contrast, the killings of Balbir Singh Sodhi, Waqar Hasan, and the many others after September 11, while deplored as wrong, have been understood as the result of a displaced anger, that underlying anger being one with which many Americans sympathized and agreed.<sup>194</sup> The perpetrators of these crimes, then, were guilty not of malicious intent, but of expressing a socially appropriate (and approved) emotion in socially inappropriate ways. We can view the hate crime killings before September 11 as having been understood as crimes of moral depravity, while the hate killings since September 11 have been understood as crimes of passion.

The term “crime of passion” is used both popularly and legally to describe the killing of an intimate when the motive for such killing is un-

---

192. Lu-in Wang has argued that the normative power of paradigms of hate crime perpetrators has blinded many people to the fact-specific context of individual crimes. See Wang, *The Complexities of “Hate,” supra* note 125, at 816-17.

193. Of course, one can find countless examples of the gap between rhetorical condemnation of white supremacy and homophobia, and the substantive commitments to them. This is especially true of homophobia, as gay and lesbian equality remains a deeply contested political issue, as evident in the recent push for a constitutional amendment banning gay marriage. See S.J. Res. 26, 108th Cong. (2003) (declaring that “marriage in the United States shall consist only of the union of a man and a woman” and prohibiting the interpretation of state or federal laws as requiring government to confer marital status on “unmarried couples or groups”); H.J. Res. 56, 108th Cong. (2003). I do not mean to suggest that homophobia has been deemed unacceptable as a general matter. Rather, in the specific context of the Shepard killing, many people expressed a willingness to distance themselves from homophobia, if only in that brief, historical moment.

194. I use the past tense here because in the time that has elapsed since the September 11 attacks, emotions have cooled and changed. This is consistent with the crime of passion trope I am advancing here. See *infra* notes 312-22 and accompanying text.

derstood, if not wholly sanctioned. I introduce the crime of passion concept here not as a doctrinal description of post-September 11 violence, but as an analytical trope that aids in understanding the nature of this violence. As such, my project does not call for strict application of the law of passion. Nonetheless, some inquiry into the historical development and contemporary application of the doctrine is useful, as it reveals important insights about prevailing, popular understandings of passion and the cultural norms implicated by them. These nonlegal understandings of passion then become useful in examining post-September 11 violence and suggest how the violence was normalized.

The crime of passion concept is captured in law as the “heat of passion” or provocation defense to murder. At common law, the defense provided either partial excuse or partial justification for intentional killings in which the perpetrator was found to have been adequately provoked. Either because of some offending conduct of the decedent, some understandable inability of the perpetrator to maintain self-control, or some combination of the two, the intentional killing is mitigated, typically from murder to voluntary manslaughter.<sup>195</sup> At base, the heat of passion defense forgives in part the intentional killing of another, out of recognition of special emotional circumstances. The defense is a “concession to human weakness,”<sup>196</sup> an acknowledgment of human frailty in the face of extraordinary emotional challenge.

Although formalist distinctions are often drawn between emotion and reason (the latter being law’s supposed primary concern), emotion is confronted in many areas of law.<sup>197</sup> Crimes of passion stand as a particularly frank acknowledgment that emotion is not merely a deviance that can be regulated through the exercise of reason, but a constitutive part of human experience that sometimes gains the protection of law, thereby trumping, in whole or in part, the moral claims of reason. Put differently, passion has honorary reason status.<sup>198</sup> There are numerous examples of emotion providing the foundation for moral and legal claims, such as the role of victim impact statements in criminal sentencings, and the relevance of remorse in

---

195. The question of whether the provocation defense partially excuses the provoked killer, or partially justifies the killing, remains contested. See Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467 (1988) [hereinafter Dressler, *Provocation*]; Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982) [hereinafter Dressler, *Rethinking Heat of Passion*]. The modern trend is to focus on the perpetrator’s self-control rather than the conduct of the decedent, and therefore to treat provocation as a form of excuse. Dressler, *Provocation*, *supra* at 467. However, common law cases suggest elements of both excuse and justification, as courts have inquired into both the agency of the perpetrator and the actions of the decedent. Dressler, *Provocation*, *supra* at 467-68; Dressler, *Rethinking Heat of Passion*, *supra* at 427-29.

196. Dressler, *Provocation*, *supra* note 195, at 467.

197. See Susan A. Bandes, *Introduction to THE PASSIONS OF LAW* 1, 2 (Susan A. Bandes ed., 1999).

198. My thanks to Peter Jaszi for suggesting this formulation.

death penalty cases.<sup>199</sup> But of course, not all emotions are accorded special status. To the contrary, many are deemed unruly and inappropriate, and in dire need of law's discipline. In the context of crimes of passion, the question is, why does the law forgive some emotions but not others?<sup>200</sup>

Although modern formulations of the heat of passion defense reflect significant evolution,<sup>201</sup> it is the common law conception that pervades the popular imagination. While under traditional and modern approaches the heat of passion defense is available in a range of situations, one specific scenario has come to represent the archetypal crime of passion: that of an enraged, loyal, humiliated husband killing his wife's lover upon discovering the paramour in the marital bed.<sup>202</sup> It is this scenario of female infidelity and resulting male rage that can illuminate our understanding of hate violence in the aftermath of September 11.

From its early origins until today, the heat of passion defense has been preoccupied with female infidelity. Emerging in the 17th century as a means of distinguishing voluntary manslaughter as a morally less grave killing than murder (for which the sentence was death),<sup>203</sup> the defense originally defined five categories of adequate provocation: aggravated assault or battery; mutual combat; commission of a serious crime against a close relative of the defendant; illegal arrest; and observation by a husband of his wife<sup>204</sup> committing adultery.<sup>205</sup> Whereas murder came to be characterized as killing with malice aforethought, or killing by one with a callous heart (i.e., "cold-blooded" killings), these categories of conduct defined a less serious mental state of "heated blood" ("*chaude melle*").<sup>206</sup> Despite the existence of multiple categories of provocation, a wife's adultery was considered the most severe provocation, and retains special status in

---

199. Bandes, *supra* note 197, at 2-3.

200. See Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1336 (1997) (noting the essential difficulties of the heat of passion defense as "why the law partially excuses some, but not all, emotional defendants and defines some, but not all, passions as rational").

201. Modern formulations of the provocation defense require provocation that would cause a "reasonable person" to lose normal self-control. See MODEL PENAL CODE § 210.3 (1962) [hereinafter MPC]; WAYNE R. LAFAVE, CRIMINAL LAW § 15.2 (4th ed. 2003); see also CYNTHIA LEE, MURDER AND THE REASONABLE MAN 25-45 (2003). In contrast to the early common law approaches, these formulations permit the defense to be raised in any situation.

202. See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 72 (1992) (noting that "English and American jurists and legal scholars repeatedly refer to adultery as the paradigm example of provocation adequate enough to mitigate what would otherwise be murder to a voluntary manslaughter conviction").

203. JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 20 (1992).

204. Adultery committed by the husband was not considered adequate provocation. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.07[B][2][a] n.185 (3d ed. 2001) (noting that gender bias of the common law rule would not apply today); LEE, *supra* note 201, at 22.

205. See DRESSLER, *supra* note 204, § 31.07[B][2][a]; HORDER, *supra* note 203, at 24 (describing four categories rather than five, omitting mutual combat).

206. HORDER, *supra* note 203, at 23-24.

contemporary understandings of crimes of passion.<sup>207</sup> One can find precursor developments to the heat of passion defense in adultery cases as early as the 14th century.<sup>208</sup> Writing in 1707, Holt CJ stated, “[W]hen a man is taken in adultery with another man’s wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of the man, adultery is the highest invasion of property . . . .”<sup>209</sup> Two hundred fifty years later, H.L.A. Hart needed rely only on “‘common sense’ generalizations about human nature” for the proposition that men are “capable of self-control when confronted with an open till but not when confronted with a wife in adultery.”<sup>210</sup>

The common law conception of crimes of passion reflected a cultural and historical understanding of each category of provocation not merely as an infringement of rights, but as an affront to one’s honor, for which some response, even a violent response, was deemed appropriate. As Jeremy Horder describes:

Men of honour were expected to retaliate in the face of an affront. Retaliation would, so it was held, protect the natural honour of the retaliator from the threat posed by the affront. This was because retaliation would, as it were, “cancel out” the affront, and would demonstrate that the person affronted was not cowardly, and that he did not “lack spirit,” to use Aristotle’s term. The need to avenge an affront was thought to be one of the most important “laws” of honour.<sup>211</sup>

And so it was that the laws of homicide were brought into conformity with the laws of honor, not excusing the exercise of violence entirely, but doing so partially, out of law’s sympathy with man’s (and only man’s<sup>212</sup>) need to defend his honor.

207. See Denna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN’S STUD. 71, 72 (“[S]cholars repeatedly refer to adultery as the paradigm example of provocation . . .”).

208. In a case from 1341, reported by Thomas Green, Robert Bousserman discovered another man in his home having intercourse with his wife, and killed the man with a hatchet. Although the doctrine of provocation was not available to the jury at that time, the doctrine of self-defense was. In order to rationalize the law of homicide with the obvious sympathy felt by the jury for Mr. Bousserman, the jury retold an improbable tale of a trespasser entering the Bousserman home while the married couple slept, the wife awaking and getting into bed with the intruder, and the intruder subsequently attacking Bousserman with a knife when he awoke and sought out his wife. By this account, Bousserman’s only recourse was to kill the intruder in self-defense. HORDER, *supra* note 203, at 9 (citing THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800*, at 42-43 (1985)).

209. HORDER, *supra* note 203, at 39 (quoting *R. v. Mawridge* (1707) Kel. 119, 137).

210. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 33 (1968).

211. HORDER, *supra* note 203, at 26-27 (footnote omitted).

212. Gender bias in the common law approach to provocation stems not merely from male conceptions of honor, but also from a series of other gender-based assumptions. As Cynthia Lee writes:

If we look carefully at the early common law categories of legally adequate provocation, it becomes apparent that they were created with the hot-blooded man in mind. Men were



The relevance of a crime of passion analysis to post-September 11 hate violence is largely, but not entirely, metaphorical. In some cases, heat of passion may have animated legal defenses, even if not used explicitly.<sup>213</sup> Apart from the actual operation of the defense in the courtroom, however, the crime of passion construct helps to illuminate the causes of post-September 11 violence, and to explain why these hate crimes have been popularly understood differently from previous hate crimes. Moreover, the crime of passion construct reveals how fundamentally gendered much of this violence has been, and how it has figured in the racialization of Arab, Muslim, and South Asian communities in the United States.

If in the paradigmatic case, the killer's passions are rooted in the love of his wife,<sup>214</sup> we can understand the post-September 11 killers' passion to be love of nation, the killings a visceral reaction born out of patriotic fervor. The feminized nation is the beloved, violated by the terrorists of September 11, who were all men. By this account, the killings of (and other attacks on) Arabs, Muslims, and South Asians can be understood as the avenging of a male humiliation brought on by the violation of the beloved. Of course, a critical distinction is that the post-September 11 victims are proxies for the paramour, whereas in the archetypal crime of passion, it is the paramour himself who is killed. Resonant with the early history of crimes of passion, the post-September 11 killings were a form of honor crime, the honor being defended not only that of the feminine nation, but of the masculine killer.

Transposing the crime of passion metaphor to post-September 11 violence in this fashion, we can understand the perpetrators acting neither with malice aforethought nor with a callous heart, but out of quintessentially heated blood. The terrorist attacks were assaults not just on property that the perpetrators of post-September 11 violence claimed as their own, but

---

thought more likely than women to be subjected to an aggravated assault or battery. Men were thought more likely than women to be involved in mutual combat. They were also thought more likely than women to respond with violence to a serious crime committed against a close relative.

LEE, *supra* note 201, at 20. Many have argued that gender bias persists in contemporary applications of the defense of provocation. For example, Deborah Coker has argued that heat of passion doctrine operates to reinforce male excuses and justifications for domestic violence. Coker, *supra* note 202. Victoria Nourse has argued that the application of modern formulations of the provocation defense in intimate homicides masks a set of gendered assumptions about relationships. Nourse, *supra* note 200, at 1387.

213. Mark Stroman did not put on an affirmative defense but made several public claims that he was motivated by the September 11 attacks. At his sentencing, he waved a small American flag. See Gaiutra Bahadur, *A Hate Crime Killing Threatens New Tragedy*, PHIL. INQUIRER, Jan. 12, 2003, at B1, available at 2003 WL 2551388; Tim Wyatt, *Gas Clerk Killer is Convicted; Man Blamed Shooting and Other Incidents On Anger Over Sept. 11*, DALLAS MORNING NEWS, Apr. 3, 2002, at 17A.

214. Less romantically, the killer's passions could be understood to be rooted in a sense of his own honor, as represented by the undamaged condition of the beloved.

on their sense of honor, here expressed as resurgent nationalism. The perpetrators' attacks, then, have been understood as undertaken in the heat of passion to avenge the affront to their national honor, and because the provocation is one with which we sympathize, it mitigates our condemnation of the act.

The clearest evidence of the perpetrators' claimed motivations for their violence comes from their own statements. When Frank Roque, the killer of Balbir Singh Sodhi, was arrested, he stated, "I'm a patriot . . . I'm a damn American all the way."<sup>215</sup> A man who tried to run over a Pakistani woman with his car declared that she was "destroying my country."<sup>216</sup> Mark Anthony Stroman, who killed Waqar Hasan and Vasudev Patel and shot a third South Asian man, said he did so out of revenge for the terrorist attacks.<sup>217</sup> Brent Seever, who was convicted of shooting Ali Almansoop, a Yemeni immigrant who had lived in the United States for thirty years, told the police, "I was motivated by all this terroristic activity."<sup>218</sup> Such statements were among the first to signal a much broader and sustained resurgence of patriotism in the aftermath of September 11. Describing this remarkable transmogrification of hate violence, Robert Chang wrote, "Hate crimes become redeployed as patriotic gestures, when belongingness is exercised through the negation or abjection of those people marked as truly different."<sup>219</sup>

Implicit in the violence of the post-September 11 perpetrator are claims of honor, loyalty, property, and violation. Notably, all four claims are strongly inflected by gender. While in the paradigmatic crime of passion the husband acts to redeem his besmirched honor, the perpetrator of post-September 11 violence strikes for the honor of the nation. Whereas the husband is presumptively loyal (in contradistinction to the adulterer), so, too, is the perpetrator of post-September 11 violence (in contradistinction to the terrorists). Just as the wife is viewed as the property of the husband, so does the post-September 11 perpetrator lay claim to the nation. And finally, the violation of the husband's wife by her lover parallels the violation of the feminized (and raced) nation by the terrorists, nineteen swarthy, foreign men. Each of these claims is explored in greater detail below.

---

215. Goodstein & Lewin, *supra* note 154, at A1.

216. Stuart Millar, *Violent Attacks on Arab Americans*, GUARDIAN, Sept. 14, 2001, at 10.

217. See Richard A. Serrano, *Deluge of Hate Crimes After 9/11 Pours Through System*, L.A. TIMES, July 6, 2002, at A8.

218. See David Shepardson, *Yemeni Immigrant's Killer Convicted*, DETROIT NEWS, June 26, 2002, at C2.

219. Robert S. Chang, *(Racial) Profiles in Courage, Or Can We Be Heroes Too?*, 66 ALB. L. REV. 349, 364 (2003).

A. *The Perpetrators' Claims of Male Honor*

Jeremy Horder's description of the early law of passion highlights the central role that traditional conceptions of honor have played in the development of the heat of passion defense.<sup>220</sup> The availability of the defense only to men witnessing their spouse's adultery, and not to women, suggests that this honor has been distinctly male. Thus, the law operates to forgive men's aggression when their honor is at stake. While anger toward "Muslim-looking" people was felt on a national level, like most violent crime, the hate violence after September 11 has been perpetrated predominantly by men.<sup>221</sup> Viewing this violence within the crime of passion framework reveals the ways in which male honor has been endorsed and forgiven after September 11.

In defense of their actions, several of the hate crime perpetrators claimed to have been acting in defense of the country. Implicitly, these individuals purported to be defending their country's honor, or, as Frank Roque, Balbir Singh Sodhi's killer, put it, to be patriots.<sup>222</sup> Roque's invocation of patriotism as a defense for his behavior mirrors a broader deployment of patriotism as a shield from criticism in the war against terrorism. To the extent that national responses to post-September 11 violence have been muted, as I have argued, they have had the effect of condoning, if not endorsing outright, violent excess in the name of honor.

Honor crimes in the Muslim world<sup>223</sup> have become a topic of great interest in the West in recent years, but far less attention has been paid to how violence in defense of honor operates in the United States. Lama Abu-Odeh has observed that, in keeping with Orientalist tradition, honor is frequently associated with the East, and passion with the West.<sup>224</sup> The assumptions here are that honor is regressive, illegitimate, sexist, and constitutive of the East, while passion is progressive, legitimate, gender-neutral, and constitutive of the West. In a similar vein, Leti Volpp has suggested that attempts to differentiate post-September 11 violence enacted in or by the United States from the violence of the terrorists reinscribe Orientalist

---

220. See *supra* notes 203-04 and accompanying text.

221. See FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2002: UNIFORM CRIME REPORTS 232 (2003), at <http://www.fbi.gov/ucr/02cius.htm> (noting that 82.6% of violent crime arrestees in 2002 were men) (last visited Sept. 1, 2004); *accord id.* at 239, tbl.33 (showing 1993-2002 arrest statistics broken down by sex of arrestee).

222. See *supra* notes 215-17 and accompanying text.

223. The paradigmatic honor crime involves the killing of a woman by her father or brother for having, or being suspected of having, sex before or outside of marriage. Lama Abu-Odeh, *Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West,"* 1997 UTAH L. REV. 287, 287 (1997).

224. *Id.* at 292, 304-06. Abu-Odeh goes on to argue the falsity of this dichotomy, pointing to the growing role of honor within crimes of passion in the United States and the trend in the criminal law of several Arab countries toward greater focus on passion.

associations of the West with reason and the East with irrationality.<sup>225</sup> Hate violence after September 11 bears all the characteristics typically associated with Eastern honor. As such, it should be understood as a form of honor crime, in which national honor (patriotism) is redeemed through the killing of another.

The racial (and racist) designs of post-September 11 hate violence and governmental profiling are readily apparent, but an inquiry into the role of honor in such violence exposes its gendered and sexualized dimensions as well. Not unlike post-September 11 hate violence, the war on terrorism, in both its domestic and international forms, seems animated by a militarized defense of male honor. The militarism ascendant since the terrorist attacks quickly recalls the familiar ties between masculinity and violence, and predictably has found expression in masculinist terms.<sup>226</sup>

Specifically, the post-September 11 defense of honor has enlisted two methods of gender-related subordination—misogyny and homophobia—that have long been deployed to shore up the masculine self. For example, flyers circulating in New York, and later on the Internet, depicted Osama bin Laden being sodomized by the World Trade Center, with the caption “You like skyscrapers, bitech?”<sup>227</sup> The Associated Press published a photograph of a bomb intended for Afghanistan on which an American Navy officer had written “HIGH JACK [sic] THIS FAGS.”<sup>228</sup> Similarly, soon after the terrorist attacks, rumors began to circulate that Mohamed Atta and possibly others among the terrorists were homosexuals.<sup>229</sup> Reports also began to circulate about homosexual practices, particularly between older men and young boys, in Kandahar, the spiritual center of the Taliban, and elsewhere in Afghanistan.<sup>230</sup>

This simultaneous invocation of racism, misogyny, and homophobia speaks to the constitutive interrelationship of different systems of subordination. As Nancy Ehrenreich has argued, systems of subordination are

225. Volpp, *supra* note 14, at 1586-91; see generally EDWARD SAID, *ORIENTALISM* (Vintage Books 1979) (1978).

226. See SUSAN JEFFORDS, *THE REMASCULINIZATION OF AMERICA: GENDER AND THE VIETNAM WAR 168-69* (1989) (arguing that popular representations of the Vietnam War seek to promote associations of warfare and masculinity).

227. Eliza Byard, *Queerly Un-American*, *FEMINIST NEWS* (Columbia U. Inst. for Research on Women and Gender, New York, N.Y.), Jan. 2002, at 6. A version of the flyer, with accompanying music, is available at <http://911digitalarchive.org/diganimbackup/skysca~1.swf> (last visited Apr. 12, 2004).

228. Hank Stuever, *The Bomb With a Loaded Message*, *WASH. POST*, Oct. 27, 2001, at C1 (noting that the photograph, available at <http://www.snopes.com/rumors/bomb.htm> (last visited Apr. 12, 2004), was removed from its wire by the Associated Press after protests by U.S. gay rights groups); see also Byard, *supra* note 227, at 6.

229. See, e.g., Michelangelo Signorile, *The Mohamed Atta Files*, *NEWSWEEK*, Oct. 31, 2001, at <http://msnbc.msn.com/id/3067491/>.

230. See, e.g., Tim Reid, *Kandahar comes out of the closet*, *TIMES* (London), Jan. 12, 2002, at 16; Maura Reynolds, *Kandahar's Lightly Veiled Homosexual Habits*, *L.A. TIMES*, Apr. 3, 2002, at A5.

mutually supportive, operating not merely simultaneously, but in coordination with one another.<sup>231</sup> It is therefore to be expected that one mode of subordination will be called upon to reinforce another. The defense of male honor represented by post-September 11 hate violence, and writ large in the form of the government's war on terrorism, does not exist within a purely gendered ecosystem. Rather, race, sexuality, and class permeate it as well, such that the exercise of any one form of subordination is likely to be inflected by all others.<sup>232</sup> Thus, the crime of passion trope helps to reveal the operation of gender and sexuality norms in the exercise of violence against "Muslim-looking" people, which in turn helps to explain how such violence has been normalized.

These persistent attempts to feminize and (homo)sexualize the enemy underscore that what is at stake in American wars since Vietnam is not merely national security, international order, or terrorism, but American masculinity.<sup>233</sup> This rendering of the terrorists as feminine, homosexual, and deviant, and the exercise of violence against them, helps to rehabilitate the male honor so grievously injured by the September 11 attacks. Like the betrayed husband in the crime of passion paradigm, here, too, the country is "remasculinized" by defining itself "in opposition to an enemy feminine."<sup>234</sup> Significantly, it is an enemy racialized and sexualized as well.<sup>235</sup> Borrowing from Jeremy Horder's description of men of honor, this retaliation in the face of an affront "demonstrate[s] that the person affronted was not cowardly, and that he did not 'lack spirit' . . . ." <sup>236</sup>

### B. *The Perpetrators' Claims of Loyalty*

In the archetypal crime of passion, the cuckold is presumed to be faithful. Because the wife is viewed merely as property, devoid of agency, in the traditional model it is not the wife who has been unfaithful to the husband, but the lover who has violated a code of honor to which both men were party. In the post-September 11 context, the perpetrators of hate

---

231. Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 *UMKC L. REV.* 251 (2002).

232. Jasbir Puar and Amit Rai have noted the intersections of race and class in depictions of the September 11 terrorists. For example, they reference a picture circulating on the Internet that features Osama bin Laden as a 7-Eleven convenience store cashier, thereby identifying bin Laden with (and as) working-class Arabs and South Asians who frequently staff convenience stores in the United States. Jasbir K. Puar & Amit S. Rai, *Monster, Terrorist, Fag: The War on Terrorism and the Production of Docile Patriots*, 72 *SOCIAL TEXT* 117, 126 (2002).

233. See JEFFORDS, *supra* note 226, at 168 (describing use of the male Vietnam veteran as "an emblem for a fallen and emasculated American male").

234. JEFFORDS, *supra* note 226, at 171.

235. As Jasbir Puar and Amit Rai describe, "[t]he forms of power now being deployed in the war on terrorism . . . draw on processes of quarantining a racialized and sexualized other . . ." Puar and Rai, *supra* note 232, at 117.

236. HORDER, *supra* note 203, at 27.

violence act out of a self-conceived loyalty, whereas the terrorists have clearly demonstrated their treachery.

If perpetrators of post-September 11 violence were attacking the *actual* terrorists, people who were in fact involved in the terrorist attacks, then the perpetrators' claims of loyalty would be unremarkable. However, because the logic of post-September 11 hate violence depends upon a substitution of anyone "Muslim-looking" for the terrorists, the claims of loyalty are more troubling; once this substitution is made, it is all "Muslim-looking" people, and not merely the nineteen terrorists, who are presumptively disloyal. This broad ascription of disloyalty reinscribes persistent, racialized anxieties about immigrant loyalty.<sup>237</sup> Asian Americans, in particular, have long been suspected of divided, if not clandestine, loyalties, as epitomized by the incarceration of 120,000 Japanese Americans during World War II, on the basis of wholly unsubstantiated claims of disloyalty.<sup>238</sup> More recently, the federal government's prosecution of Wen Ho Lee, the Chinese American nuclear scientist, on suspicion of sharing nuclear secrets with China, revived old anxieties about Asian American disloyalty.<sup>239</sup> Similarly, the profiling of Arabs, Muslims, and South Asians at borders, in airports, and even after lawful admission to the United States,<sup>240</sup> casts these communities as presumptively untrustworthy, disloyal, and threatening to the nation. Again, it is not merely that governmental policies encode pre-existing suspicions of Arab, Muslim, and South Asian loyalty (although these exist as well), but that they are vital to the construction and maintenance of the "Muslim-looking" construct and the presumption of suspicion.

The U.S. military's recently aborted prosecution of James Yee, a Muslim chaplain at Guantanamo Bay, provides fresh evidence of the government's role in reinscribing persistent mythologies of Asian American disloyalty, and creating newer ones with regard to Arabs, Muslims, and South Asians. Yee, a Chinese-American graduate of West Point who converted to Islam, was arrested on September 10, 2003, apparently on suspicions of his involvement in an espionage ring.<sup>241</sup> He was eventually

---

237. See Gotanda, *supra* note 74.

238. For general history of Japanese American internment, see LESLIE T. HATAMIYA, *RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988* (1993); MINÉ OKUBO, *CITIZEN 13660* (1983); MICHÉ WEGLYN, *YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS* (1976); Chris K. Ijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 19 B.C. THIRD WORLD L.J. 385 (1998).

239. For a discussion of racialization of Chinese Americans as "foreign" in the Wen Ho Lee case, see Gotanda, *supra* note 74, at 1692-94, 1698.

240. See *supra* notes 16-63 and accompanying text.

241. Neil A. Lewis & Thom Shanker, *As Chaplains' Spy Case Nears, Some Ask Why It Went So Far*, N.Y. TIMES, Jan. 4, 2004, at A1; Eric Lichtblau, *Army Cleric Who Ministered to Detainees is Arrested*, N.Y. TIMES, Sept. 21, 2003, at A24.

charged with two counts of disobeying orders, for taking classified materials home and wrongly transporting classified information, and was kept shackled in a maximum security facility while the charges were pending.<sup>242</sup> Charges of adultery and keeping pornography on a government computer were later added, though all charges were dismissed within a matter of months.<sup>243</sup> The fanfare with which Yee was initially prosecuted and the subsequent steady deterioration of the government's case mirrored the prosecution of Wen Ho Lee,<sup>244</sup> and helped to conjoin the history of perceived Asian American disloyalty with the newly ascendant narrative of Arab, Muslim, and South Asian threat.

Suspensions of Asian American and now Arab, Muslim, and South Asian disloyalty are especially pernicious because they continue well beyond the attaining of juridical citizenship. Wen Ho Lee was a U.S. citizen, as were the vast majority of Japanese Americans interned during World War II.<sup>245</sup> Thus, the claims of loyalty and disloyalty attending post-September 11 violence reinforce the construction of some racial communities as "perpetual foreigners,"<sup>246</sup> incapable of full assimilation into the United States, or in any event, undesirable as citizens because of their questionable loyalties.

Though loyalty has, once again, established a dividing line between citizen and noncitizen, this time it has done so in racialized terms. As Leti Volpp argues, "The 'imagined community' of the American nation, constituted by loyal citizens, is relying on difference from the 'Middle Eastern terrorist' to fuse its identity at a moment of crisis."<sup>247</sup> Thus, a racialized identity of loyal citizens is consolidated in opposition to the presumptively disloyal identity of Arabs, Muslims, and South Asians. The effect is to exclude Arabs, Muslims, and South Asians from the nation-state, if not

---

242. Neil A. Lewis, *Lawyer Upset By Treatment of Ex-Chaplain For Detainees*, N.Y. TIMES, Oct. 25, 2003, at A14; Eric Schmitt, *Ex-Chaplain With Detainees is Charged*, N.Y. TIMES, Oct. 11, 2003, at A10.

243. Lewis & Shanker, *supra* note 241; Neil A. Lewis, *Charges Dropped Against Chaplain*, N.Y. TIMES, Mar. 20, 2004, at A1. The Army reprimanded Yee on the adultery and pornography matters. See Reuters, *Army Rebukes Muslim Chaplain Over Adultery and Pornography*, N.Y. TIMES, Mar. 23, 2004, at A20. He has appealed the reprimand, and seeks a formal apology from the military. See Associated Press, *Army Chaplain Appeals*, N.Y. TIMES, Mar. 30, 2004, at A17.

244. See Sarah Kershaw, *Guantanamo Chaplain and His Wife Speak Out*, N.Y. TIMES, Dec. 5, 2003, at A24 (noting comparison between Yee and Wen Ho Lee cases).

245. See HATAMIYA, *supra* note 238, at 7 (noting that 77,000 of the approximately 120,000 persons of Japanese ancestry who were interned were U.S. citizens); WEN HO LEE, *MY COUNTRY VERSUS ME* (2001).

246. See Hing, *supra* note 13, at 444-45; Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871, 879 (describing racialization of citizenship); Saito, *supra* note 94, at 21 (2001) (discussing perpetual foreignness as a factor in post-September 11 racialization of Arab Americans).

247. Volpp, *supra* note 14, at 1595 (footnote omitted).

physically, then in terms of the rights they enjoy within the territorial United States.<sup>248</sup>

Importantly, claims of loyalty situate the perpetrator of post-September 11 violence as innocent, in contrast to the wrongdoing of the disloyal “Muslim-looking” person. Attention and blame is shifted entirely to the conduct of the other, thereby positioning the perpetrators as victims. Such claims of innocence echo those made by the nation as a whole in the aftermath of September 11.

### C. *The Perpetrators’ Claims to Property*

The 17th century conception of adultery as legally adequate provocation posited the wife as the property of her husband. The affront to the husband’s honor was an offense to property, albeit property of the highest order.<sup>249</sup> As Victoria Nourse has observed, adultery as a source of provocation “enforc[ed] rules of gender relations grounded in an older idea of property.”<sup>250</sup> Similarly, the attacks of September 11 have been understood as attacks on the territory, or physical property, of the United States. Indeed, one of the most offensive aspects of the September 11 attacks is, arguably, that they occurred on American soil. The perpetrator of post-September 11 violence lays claim to the nation not only as his beloved, but as his possession; retribution for injury to property requires first claiming that property as one’s own. Again, this claim by itself is uncontroversial; the nation arguably is susceptible to multiple claims of ownership. However, the problem with this claim resides, once more, in its substitution of all “Muslim-looking” people for the terrorists.

By virtue of this substitution, it is not merely the nineteen terrorists who are excluded from ownership in the United States, it is all Arabs, Muslims, and South Asians who are dispossessed of their own claims on the nation. The question raised here is, “who is constitutive of the nation?” Post-September 11 hate violence communicates who is not—namely, Arabs, Muslims, and South Asians. The post-September 11 violence signals that whether citizens or not, whether here legally or not, the ties that Arabs, Muslims, and South Asians have to the United States are insufficient for these communities to claim full ownership. What renders them

---

248. As Volpp writes, “Those who appear ‘Middle Eastern, Arab, or Muslim’ and who are formally citizens of the United States are now being thrust outside of the protective ambit of citizenship as identity.” Volpp, *supra* note 14, at 1598.

249. See HORDER, *supra* note 203, at 24 n.8 (noting that the traditional killing of the male adulterer rather than the adulterous wife “reflected the view . . . that wives were men’s property, not capable of rational moral decision-making, and thus not to be fully blamed for having been seduced”); *Id.* at 39 (quoting Holt CJ as stating that “a man cannot receive a higher provocation” than catching another man in the act of adultery with his wife).

250. Nourse, *supra* note 200, at 1341.



categorically ineligible for full status is their racial position as “Muslim-looking” individuals.

*D. The Perpetrators’ Claims of Violation and Betrayal*

Inherent to the provocation in the archetypal crime of passion is the notion of violation. Importantly, it is not the wife’s rights or interests that the law understands as violated, but those of the husband. The clear implication is that the lover, and not the wife, has committed an injustice against the husband. Drawing upon Aristotle’s conception of the unjust man, Jeremy Horder argues that in the context of crimes of passion, wherein a man provokes another by committing adultery with his wife, “he commits injustice through taking unfair advantage.”<sup>251</sup> The feeling of unfair advantage presumes a fixed set of rules to which both men were party, but which one—the lover—has violated. The cuckold’s claim of violation, then, expresses a deeper feeling of betrayal. In the post-September 11 context, we can similarly understand the sense of betrayal the perpetrators feel as the taking of unfair advantage. Whereas the shared set of rules violated in the archetypal crime of passion was a code of honor, in the post-September 11 context it might be understood as the immigration laws. By virtue of the rule of fungibility, all “Muslim-looking” people are taking or have taken unfair advantage. More broadly, the resulting immigration restrictions have affected not only immigrants from Muslim countries, but instead have spilled over onto all immigrants.<sup>252</sup>

The claim of betrayal made here is related to, yet distinct from, the claim of loyalty. Whereas the post-September 11 perpetrator’s claim of loyalty frames all “Muslim-looking” people as presumptively disloyal, such prospective disloyalty results from the feeling of betrayal the September 11 attacks generated.

The betrayal exercised by the nineteen terrorists is obvious. Just as the cuckold feels foolish for having trusted in the male code of honor, so, too, did many Americans, including the post-September 11 perpetrators of violence, feel duped by those who took advantage of the relative permissiveness of American immigration laws. Sixteen of the nineteen hijackers were

---

251. HORDER, *supra* note 203, at 49.

252. This has included, *inter alia*, restrictions on student visas, *see infra* note 259 and accompanying text, restrictions on bond release, *see supra* note 46 and accompanying text, and policies of mandatory detention of Haitian asylum seekers, *see supra* notes 82-87 and accompanying text. Moreover, as Kevin Johnson has argued, increased immigration enforcement, new citizenship requirements for employment, and increased local involvement in immigration enforcement are likely to have a collateral effect on other immigrants, and Mexicans in particular. Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849 (2003). As Johnson notes, past anti-terrorism reform of immigration law, in the aftermath of the Oklahoma City bombing, had grave consequences for Mexican immigrants. *Id.* at 852-55 (discussing the impact of the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

in the United States legally. Three had entered the United States legally, but subsequently overstayed their visas.<sup>253</sup> One entered the United States on a student visa, but never attended school.<sup>254</sup> Moreover, two of the hijackers, who were on tourist visas, applied to adjust to student visas and subsequently studied at a flight school.<sup>255</sup> It is therefore not surprising that many would feel that the September 11 attacks abused American hospitality.

The post-September 11 attribution of the betrayal of the nineteen terrorists to all “Muslim-looking” people implicates a larger question of the relationship of immigrants to the nation. The sense of betrayal communicated by the post-September 11 violence prefigured a national anxiety about how open and trusting the American society should be. Thus, claims of betrayal, writ large and held by the nation, have provided the justification for a massive overhaul of immigration law and policy. Specifically, immigration law, which previously represented an uneasy balance between service to immigrants and enforcement against them, has been recast as a matter of national security. This fact is represented most clearly in the dismantling of the INS as an organ of the Department of Justice, and in its reconstitution as part of the newly created Department of Homeland Security.<sup>256</sup>

Immigration has long been a divisive issue in the United States, with immigration restrictions alternately relaxed and tightened in response to economic, political, cultural, and humanitarian concerns. A narrative of “a nation of immigrants” coexists uneasily with histories of xenophobia, anti-Semitism, and racism in American immigration policy.<sup>257</sup> The claim of

---

253. See Mike Allen & Eric Pianin, *Bush Seeks Tighter Rules on Entry; Plan Would Track Students, Step Up Efforts to Deport Suspects*, WASH. POST, Oct. 30, 2001, at A1.

254. *Id.*

255. See Dan Eggen & Mary Beth Sheridan, *Terrorist Pilots' Student Visas Arrive*, WASH. POST, Mar. 13, 2002, at A1.

256. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. While the changes in immigration law and enforcement since September 11 are dramatic, they fit into a larger pattern of restriction, criminalization, and punishment in immigration law that predates the terrorist attacks. In particular, massive immigration reform in 1996 constituted what Peter Schuck termed “the most radical reform of immigration law in decades—or perhaps ever.” PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* 143 (1998). It was in that year that Congress passed, and President Clinton signed, the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 12134 (1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996). In addition, welfare reform legislation enacted in 1996 denied most public benefits to legal immigrants. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. Some, though not all, of these benefits were later restored. See Noncitizen Benefit Clarification and Other Technical Amendments of 1998, Pub. L. No. 105-306, 112 Stat. 2926.

257. The period of Asian exclusion, which began in 1882 and continued for decades thereafter, stands as a signal example of racism and xenophobia. Restrictions were first imposed on Chinese immigrants, starting with the Chinese Exclusion Act of 1882. Concerns about Japanese immigration led to the “Gentlemen’s Agreement” of 1907-08, under which the Japanese government refused to allow laborers to immigrate to the United States. Growing Indian immigration led to the creation of the Asiatic Barred Zone and prohibitions on nearly all immigration from Asia. These restrictions on Asian

betrayal made by the perpetrators of post-September 11 violence threatens to shift this debate significantly by bolstering nativist appeals. The Bush administration made exactly such an appeal in reviving the age-old trope of the treachery of immigrants—of all immigrants, and not just those who are “Muslim-looking”—to support new immigration restrictions in the aftermath of September 11. George W. Bush made this clear six weeks after the terrorist attacks, when he announced his intention to tighten the immigration laws: “Never did we realize then that people would take advantage of our generosity to the extent they have.”<sup>258</sup>

Not surprisingly, student visa rules were among the first, but hardly the last, to be tightened.<sup>259</sup> Moreover, although many of the reforms racially target Arabs, Muslims, and South Asians, in other instances the Administration has cynically exploited a national feeling of betrayal to punish immigrants as immigrants, even when no plausible connection to terrorism exists. The announcement of the Department of Justice to mandatorily detain Haitians seeking asylum on U.S. shores without the opportunity for bond because of their purported threat to national security exemplifies this phenomenon.<sup>260</sup>

Returning to the crime of passion analogy, one can understand post-September 11 violence as dramatizing both the nation’s ambivalence toward immigrants and the dangerous tilt against them that has followed. Considering a second iteration of the crime of passion motif illuminates this relationship. Although the archetypal crime of passion consists of the husband killing his wife’s paramour upon discovering their adultery, the provocation defense has also been made available in instances where the husband kills the wife and not the lover.<sup>261</sup> Unlike the archetypal scenario, this version presumes that the wife has agency and is therefore blameworthy.<sup>262</sup> Moreover, it presumes that there once existed a love relationship

---

immigration were accompanied by a variety of state and federal laws restricting the rights of Asian immigrants in the United States. For a discussion of this history, see Chin, *supra* note 53, at 12-15. The refusal of the United States to accept Jewish refugees fleeing Europe in the lead-up to World War II—purportedly because the relevant immigration quotas had already been filled—has been interpreted, rightly in my mind, as motivated by anti-Semitism. See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193 (2003); see generally HENRY L. FEINGOLD, *THE POLITICS OF RESCUE: THE ROOSEVELT ADMINISTRATION AND THE HOLOCAUST, 1938-1945* (1970); SAUL S. FRIEDMAN, *NO HAVEN FOR THE OPPRESSED: UNITED STATES POLICY TOWARD JEWISH REFUGEES, 1938-1945* (1973); GORDON THOMAS & MAX MORGAN-WITTS, *VOYAGE OF THE DAMNED* (1974).

258. Allen & Pianin, *supra* note 253, at A4.

259. See Victor C. Romero, *Noncitizen Students and Immigration Policy Post-9/11*, 17 GEO. IMMIGR. L.J. 357 (2003) (summarizing noncitizen student-related provisions of the USA PATRIOT Act, the Border Commuter Student Act of 2002, and the proposed Capital Student Adjustment Act).

260. See *supra* notes 82-89 and accompanying text.

261. See Coker, *supra* note 202, at 109, 111 (discussing the application of heat of passion defense to men who kill their wives and allege adultery as their provocation).

262. See HORDER, *supra* note 203, at 24 n.8.

between husband and wife and that the betrayal of the wife, not an outside force, violated that love.

Transposing this iteration of the crime of passion motif to post-September 11 violence, we can understand the immigrant not as the interloping paramour, but as the beloved wife, and the post-September 11 perpetrator as the husband, but more importantly, as a stand-in for the nation.<sup>263</sup> By this account, the immigrant was once beloved by the nation, but the immigrant has betrayed the “generosity” and the kindness of the nation, thereby inviting retribution. Thus, both iterations of the crime of passion motif may be at play in post-September 11 violence, capturing the duality of American thought regarding immigrants, and expressing a sense of betrayal in both regards: on the one hand, the immigrant-as-enemy has engaged in exactly the treachery of which immigrants have long been suspected, and on the other hand, the trust placed in immigrants has been taken for granted. In both cases, the betrayal provokes a visceral and deadly response.

## V.

### ENDORISING PASSION

Accepting that intense and complicated emotion triggered by the terrorist attacks motivated the post-September 11 violence, the question still remains as to whether such emotion has warranted forgiveness, in whole or in part, of the perpetrator’s conduct. The provocation defense is a legal embodiment of emotional judgment,<sup>264</sup> lending sympathy to some acts of homicide, while denying it to others. Of course, the law can construe all homicides as motivated by passion of some sort, which raises the question of which passions merit the law’s sympathy and which do not.

As Victoria Nourse has argued, when the law metes out punishment, it expresses emotional judgments as to the underlying crime.<sup>265</sup> By punishing a rapist, for example, the law expresses an emotional judgment that rape is wrong and worthy of retribution. Where a crime of passion is involved, “the provoked killer’s claim for our compassion is not simply a claim for sympathy; it is a claim of authority and a demand for our concurrence.”<sup>266</sup>

Where the law does in fact share the provoked killer’s judgments as to wrongfulness and blameworthiness, then the provocation defense ought to be made available. Put another way, the law of passion should apply where a shared set of values mediates state and individual violence. To do

---

263. The language used by the perpetrators of post-September 11 violence strongly suggests that many of the perpetrators viewed themselves as the nation’s representatives. See *supra* notes 215-18 and accompanying text.

264. See Nourse, *supra* note 200, at 1392.

265. *Id.* at 1393.

266. *Id.*

otherwise would render the law incoherent; it cannot be that an emotional judgment is legitimate when made by the law, but not when made by an individual actor.<sup>267</sup> If one accepts that law is at times an expression of popular will,<sup>268</sup> then the law of passion gives partial excuse to conduct that most people would themselves excuse. Such value symmetry is necessary in order to ensure the coherence of law. “[T]he more strongly [most people] would be moved to kill by circumstances of the sort that provoked the actor to the homicidal act, and the more difficulty they would experience in resisting the impulse to which he yielded, the less does his succumbing serve to differentiate his character from theirs.”<sup>269</sup> The effect of granting partial excuse is to legitimize the values of the majority, and by extension, of the state. This is an inverse operation to the one Lu-in Wang described, whereby condemnation of certain conduct (such as the James Byrd or Matthew Shepard killings) creates moral distance between the condemner and the condemned<sup>270</sup>; here, an act of forgiveness reinforces moral sameness.

It is in the province of moral sameness between individual and state that the heat of passion defense is strongest. As Nourse writes:

[S]ome provoked murder cases temper our feelings of revenge [toward the provoked killer] with the recognition of tragedy. Some defendants who take the law in their own hands respond with *a rage shared by the law*. In such cases, we “understand” the defendant’s emotions because these are the very emotions to which the law itself appeals for the legitimacy of its own use of violence. At the same time, we continue to condemn the act because the defendant has claimed a right to use violence that is not his own.<sup>271</sup>

As discussed previously, the perpetrators of post-September 11 violence act out of a rage based upon claims of honor, loyalty, property, violation, and betrayal.<sup>272</sup> They act in the names of the victims of September 11, whose lives the terrorists took so violently and unjustifiably. They act out of retribution against a class of people whom they believe to be blameworthy for the September 11 attacks. As Nourse suggests, law’s sympathy should be based upon the extent to which the law itself shares these emotional judgments of blame.<sup>273</sup>

---

267. *Id.* at 1396 (“[T]he law . . . suffers contradiction when it refuses to embrace a sense of outrage [on the part of a provoked defendant] which is necessary to the law’s rationalization of its own use of violence”) (emphasis omitted).

268. Public choice theorists might dispute my description of law as an expression of popular will.

269. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281 (1937) (quoted in MPC, *supra* note 201, § 210.3 cmt. 5(a) at 56).

270. See *supra* note 132 and accompanying text.

271. Nourse, *supra* note 200, at 1396 (internal citation omitted; emphasis added).

272. See *supra* notes 220–63 and accompanying text.

273. Nourse, *supra* note 200, at 1396.

The conduct of the state with regard to Arabs, Muslims, and South Asians since September 11 suggests that, to a significant degree, the law shares these emotional judgments with the perpetrators of post-September 11 violence. Like the post-September 11 perpetrators, the state claims an intimate relationship with the nation, claims the nation as its property, proclaims its loyalty, and feels a sense of betrayal. Moreover, the state has purported to act in the names of the victims of the terrorist attacks, invoking their memory as justification for a broad range of anti-terrorist policies. Finally, through its policies of racial profiling and racially targeted immigration enforcement, the state has, like the post-September 11 perpetrators, adjudged all “Muslim-looking” people to be terrorists, and carried out acts of retribution against them. Through its commitment to the rule of fungibility, the state lays blame in much the same way as the post-September 11 perpetrators. The rage of the post-September 11 perpetrators, then, is a rage shared by the law.

Put slightly differently, we can understand the state and the perpetrators of post-September 11 violence as possessing a shared ideology of violence. This ideology is expressed in inescapably racist terms, and depends upon the rule of fungibility: people who look like terrorists are likely to be terrorists, and should be punished accordingly. Importantly, the state does more than merely condone the ideology of the post-September 11 perpetrators. The state helps to constitute that ideology and to legitimize it through the active involvement of the state apparatus. Thus, rather than merely encoding the ideology of violence espoused by the hate crime perpetrators, the state participates in its creation and enactment.

#### A. *A Shared Ideology of Violence*

The complex interaction of the state and “private” actors in the aftermath of September 11 recalls Kendall Thomas’s analysis of law and homophobic violence.<sup>274</sup> Following the Supreme Court’s ruling in *Bowers v. Hardwick*,<sup>275</sup> Thomas theorized that homophobic laws (such as the anti-sodomy statutes applied only to gays and lesbians at issue in *Bowers*<sup>276</sup>) and individual acts of violence (such as physical attacks on gays and lesbians in the United States) operate in tandem. Drawing upon the work of feminist theorists as well as the theories of Michel Foucault, Thomas argued that actions of the state interpolate a specific politics into otherwise

---

274. See Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992). Leti Volpp similarly relies upon Thomas’s analysis, and like Thomas, invokes the work of Michel Foucault, in her analysis of post-September 11 hate violence. Volpp, *supra* note 14, at 1582-83.

275. 478 U.S. 186 (1986).

276. A similar statute in Texas was challenged in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003). There, the Supreme Court expressly overturned *Bowers*, finding that the statute violated the right to privacy. *Id.* at 2484 (holding that “*Bowers* was not correct when it was decided, is not correct today, and is hereby overruled”).

private conduct.<sup>277</sup> Thus, while one individual may act out homophobic violence upon the body of another, such violence is in fact an expression of a state ideology of homophobia as embodied in, among other places, homosexual anti-sodomy statutes.

Foucault rejected a state-centered orientation on the question of power and instead insisted that power operates in relational rather than institutional terms. This is to say that power does not emanate from the state alone, but instead multiple, unequal, and shifting points exercise power.<sup>278</sup> Thus, Foucault situated power within a dynamic matrix in which the state is but one among a multitude of relational players.<sup>279</sup>

Thomas adopted Foucault's view of the dispersal of power, but he sought to connect exercises of power among private citizens to the power of the state. Thus, he wrote, "the state power in contemporary American society can be seen not only in the force relations involving public officials and private citizens, but in those among citizens as well."<sup>280</sup> He argued that although purportedly private conduct, homophobic violence is in fact enabled and underwritten by the state,<sup>281</sup> suggesting that the state is an original power linked inextricably to private, homophobic violence. By this account, the state deputizes private actors with the authority to engage in homophobic violence, so as to effect the will of the state. Thus, "homophobic violence punishes what homosexual sodomy laws prohibit."<sup>282</sup>

The parallels between homophobic laws and homophobic violence, on the one hand, and post-September 11 racial profiling and post-September 11 hate violence, on the other, are obvious. Just as homosexual sodomy laws can be said to express "the official 'theory' of homophobia,"<sup>283</sup> racial profiling policies script a state theory of racial subordination. What is fundamentally different in the post-September 11 context, however, is that it is not only private citizens who put the state theory into practice. Rather, through its direct engagement in racial profiling, the state is an active participant in the process as well.

---

277. Thomas, *supra* note 274, at 1481 ("[T]he fact that homophobic violence occurs within the context of 'private' relations by no means implies that such violence is without 'public' origins or consequences. The apparently private character of homophobic violence should not blind us to the reality of the state power that enables and underwrites it.")

278. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME ONE* 102 (Robert Hurley, trans., Vintage Books 1978).

279. *Id.* at 92-93.

280. Thomas, *supra* note 274, at 1481.

281. *Id.* at 1482.

282. *Id.* at 1485-86.

283. *Id.* at 1485.

*B. The Role of Law in Fomenting Violence After September 11*

Thomas's invocation of Foucault usefully highlights three theories about law and public-private discourse. These theories are what I term the immanence of law, the generative nature of law, and the legitimizing force of law. First, Thomas insists upon the pervasiveness of state power within the social and political matrix.<sup>284</sup> Foucault's description of power as diffuse and multi-locational sought to disrupt assumptions about the state as the unitary site of power. Consistent with Foucault's rejection of a statist view, Thomas recognizes an unequal relationship between private parties whose relative positions are differentiated by homophobia, and recognized homophobic violence as a locus of power independent of the state.<sup>285</sup> But even as he distinguishes the distinct origins and existence of state power and homophobic violence, Thomas remains preoccupied with state power. Whereas most typically read Foucault as de-centering the state, Thomas focuses on how state power interacts with, and indeed predominates, other sites of power. In this regard, Thomas works within a narrower space than is commonly associated with Foucault, viewing state power not as exclusive, but as worthy of special attention in its pervasive, overbearing connection to other sites of power.<sup>286</sup>

This argument regarding the immanence of law bears more in common with the work of Nicos Poulantzas who, far more than Foucault, insisted upon the predominant role of the state in the exercise of power, and

---

284. I distinguish the immanence of state power, by which I mean its pervasive influence, from the immanence of power itself, a characteristic ascribed by Foucault: "It seems to me that power must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization . . ." FOUCAULT, *supra* note 278, at 92-93.

285. "The terroristic dimensions of homophobic violence compel us to understand it as a mode of power. To put the point in slightly different terms, homophobic violence is a form of 'institution,' in the sense that John Rawls elaborates that concept." Thomas, *supra* note 274, at 1467.

286. As Thomas argues, "Foucault's theory of power denies neither the importance nor the efficacy of state institutions. His is a rather more modest claim: '[I]f one insists too much on its role, on its exclusive role, one risks missing all the mechanisms and effects of power which do not pass directly by the State apparatus, but which often support it, transmit it, give it its maximum effectiveness.'" *Id.* at 1480 (internal citation omitted). According to Leti Volpp, the argument that dispersed power has links to the state may amount to reading Foucault "against the grain," given Foucault's interest in showing that power exists in sites independent of the state. Volpp, *supra* note 14, at 1583 n.25 (citing Hugh Baxter, *Bringing Foucault into Law and Law into Foucault*, 48 STAN. L. REV. 449, 474-76 (1996)). Volpp notes further, however, that Foucault understood what he called "governmentality"—the instruments of governance—as both internal and external to the state. Volpp, *supra* note 14, at 1583 n.25. Others have criticized Foucault for focusing on localized, micro-powers, or what he termed "capillary" power, see FOUCAULT, *HISTORY OF SEXUALITY*, *supra* note 278, at 96-97, and thereby ignoring the significant concentration of power that the state represents. See ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW* 270-73 (1993); Stuart Hall, *The Toad in the Garden: Thatcherism Among the Theorists*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 35, 52 (Cary Nelson & Lawrence Grossberg, eds., 1988) (discussing "constituted points of condensation" in contradistinction to Foucault's dispersal of power). My analysis accepts these critiques, as I am insisting upon the significance of state power in its relation to other sites of power in society, and social relations of "private" citizens in particular.



in particular, in the exercise of violence.<sup>287</sup> Because of the state's monopoly of violence, Poulantzas argued, the instruments of state power, including law, occupy a privileged position in structuring social and political relations.<sup>288</sup>

Second, Thomas's use of Foucault expresses the generative nature of law,<sup>289</sup> or what Foucault calls the "productivity" of power. By insisting upon the productivity of power, Foucault sought to repudiate the notion that power was primarily "negative, prohibitive and interdictive."<sup>290</sup> Instead, he argued that power "produces reality; it produces domains of objects and rituals of truth."<sup>291</sup> This is to say that power does not merely prescribe, it creates norms of behavior, social expectations, and political realities. Thomas described homosexual anti-sodomy laws as deeply generative in that they "actively produce and perpetuate the homophobia that motivates the perpetrators of violence against persons who are (or are thought be) gay or lesbian."<sup>292</sup> Thus, homophobic laws generate norms that permit or enable homophobic violence.

Here again, Poulantzas proves useful in elaborating on the relationship between law and violence, for he argues that law is constitutive not only of social and political norms, it is constitutive of violence itself.<sup>293</sup> Through its own exercise of violence, and the regulation of the violence of others, the law gives "coded form" to physical violence and organizes public violence more generally.<sup>294</sup> In so doing, law designates the objects of violence, and establishes the methods for its enactment.

Thomas is careful to avoid an argument of causation, and insisted that a causal link is irrelevant to the argument that homophobic law and homophobic violence are bound up together.<sup>295</sup> In disavowing a claim of

287. Poulantzas criticized Foucault for neglecting the role of law as an organizing power, writing: Inevitably, Foucault is led to underestimate at the very least the role of law in the exercise of power within modern societies; but he also underestimates the role of the State itself, and fails to understand the function of the repressive apparatuses (army, police, judicial system, etc.) as a means of exercising physical violence that are located at the heart of the modern State.

NICOS POULANTZAS, *STATE, POWER, SOCIALISM* 77 (Patrick Camiller trans., Verso 1980) (1978).

288. *Id.* at 77, 83.

289. This is often referred to as the "constitutive" view of law, as it posits that rather than simply reflecting existing social norms and relations, law plays a critical (though not totalizing) role in constituting them. For discussion of various constitutive accounts of law, see Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70, 70-71 (Gerald L. Geison ed., 1983); HUNT, *supra* note 286; Teemu Ruskola, *Legal Orientalism*, 101 *MICH. L. REV.* 179, 200-03 (2002).

290. Thomas, *supra* note 274, at 1478.

291. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 194 (Alan Sheridan trans., 1977).

292. Thomas, *supra* note 274, at 1486 n.194.

293. POULANTZAS, *supra* note 287, at 77-78, 83.

294. *Id.* at 77, 79.

295. Thomas, *supra* note 274, at 1486 n.194.

causation, Thomas introduces the third, distinct theory about the relationship between law and violence, namely, the legitimizing effect that homophobic laws have on homophobic violence. What law produces, according to Thomas, is the ideology of homophobia, but not necessarily homophobic violence. While social and political forces outside the state are actively engaged in the production and maintenance of homophobia,<sup>296</sup> a state-produced theory of homophobia carries the authority of law. Thus, homophobic laws lend the imprimatur of the state to the consonant homophobic violence undertaken by “private” actors.

Each of the three theories of state power operates in the context of post-September 11 hate violence. First, state power has assumed a profoundly more prominent position in the aftermath of September 11, as the magnitude of the attacks redirected public attention to the state’s basic responsibility of ensuring personal safety, and renewed the public’s previously dwindling regard for government.<sup>297</sup> It is not merely that terrorism became the state’s top priority. It also became the rationale for a massively expanded exercise of state power, both domestically and internationally, in the form of the war on terrorism. After the September 11 attacks, the only acceptable topic of conversation was terrorism, and the most important speaker was the government.<sup>298</sup>

It is in this context of newly predominant state power that we can understand the generative effects of state power. Although the Bush Administration has rhetorically condemned post-September 11 hate violence,<sup>299</sup> through its policies of racial profiling it has projected violence against Arabs, Muslims, and South Asians as a social norm. By casting all “Muslim-looking” people as potential terrorists, the state constructs the social meaning of those bearing Arab, Muslim, and South Asian appearance as legitimate targets of violence. In the words of Poulantzas,

---

296. *Id.*

297. See David M. Shribman, *A Renewed Public Interest, Trust In Government*, BOSTON GLOBE, Oct. 16, 2001, at A13.

298. See David L. Eng, *The Value of Silence*, 54 THEATRE J. 85, 86-87 (2002) (arguing that the silence of mourning in the aftermath of the terrorist attacks was quickly filled with state speech of nationalism).

299. Even in rhetoric, however, the Administration and other government officials have been inconsistent. As early as September 16, 2001, George W. Bush proclaimed a U.S. “crusade” against terrorism. James Reston, Jr., *Unleashing Forces of an Age-Old Cause*, Opinion, SYDNEY MORNING HERALD, Mar. 29, 2003, at 12. On the same day that President Bush visited the Islamic Center in Washington, D.C., and stated that Americans should not blame Muslims for the terrorist attacks, Congressman John Cooksey of Louisiana told a radio station, a person who has “a diaper on his head and a fan belt wrapper around the diaper” needs to be singled out for questioning. Dennis Camire, *Muslim Council Seeks Action Against Cooksey for Slur*, GANNETT NEWS SERVICE, Sept. 21, 2001, 2001 WL 5112923. More recently, Lieutenant General William Boykin has repeatedly characterized the war on terror as a battle between Christian civilization and Satan, and has termed the God worshipped by Muslims an idol. See William M. Arkin, *The Pentagon Unleashes a Holy Warrior; A Christian Extremist In a High Defense Post Can Only Set Back The U.S. Approach to the Muslim World*, Commentary, L.A. TIMES, Oct. 16, 2003, at B17.

governmental profiling policies give “coded form” to violence against Arabs, Muslims, and South Asians.<sup>300</sup>

Finally, the exercise of state power through the Administration’s corpus of racial profiling policies lends legitimacy to the individual acts of violence carried out against Arabs, Muslims, and South Asians. Because the rage of post-September 11 perpetrators is the rage of law, state power provides cover for what otherwise would be deemed wholly immoral violence. It is, then, not surprising that the perpetrators of post-September 11 violence would claim the mantle of the state in defense of their crimes; the actions of the state make that mantle freely available for loan.

It is important to note that the state can legitimize acts of violence without wholly decriminalizing them. The mere existence of criminal statutes that prosecute perpetrators of hate violence does not remove or preclude legitimation by the state. Criminal law as doctrine is only one expression of state power, and criminal sanctions are only one potential consequence of its contravention. But state power is multi-dimensional and multi-vocal. Lax enforcement, low profile enforcement, and state policies that implicitly or explicitly approve of bias diffuse the meaning of criminal statutes and thereby alter the condition of the law. Such contradictions within law’s discourse create the space within which perpetrators, while perhaps not wholly exonerated, escape the fullness of law’s condemnation.<sup>301</sup> As Thomas stated, people who commit acts of violence against gays and lesbians “can be said to do so under color, or more precisely, under cover of law.”<sup>302</sup>

Even the fact that some of the post-September 11 perpetrators have been sentenced to death does not preclude state legitimation of post-September 11 violence when such death sentences are viewed in the larger context of the government’s broad regime of profiling.<sup>303</sup> The prosecutions

---

300. POULANTZAS, *supra* note 287, at 79.

301. Poulantzas described the potential for law’s discursiveness to produce contradiction, stating, “The state institutional structure is always organized in such a way that both the State and the dominant classes operate at once in accordance with and against the law.” POULANTZAS, *supra* note 287, at 85. But, Poulantzas argued, the image to emerge from such contradiction will inevitably support the dominant class’s representation of social reality and power. *Id.* at 83. By this account, although the claim to anti-racism supported by the prosecutions of post-September 11 perpetrators is contradicted by the government’s corpus of racial profiling policies, the anti-racism narrative is likely to emerge as the true reality.

302. Thomas, *supra* note 274, at 1491.

303. See *supra* note 160 and accompanying text. This governmental maneuver is not unlike recent decisions by the federal government to seek the death penalty in cases involving white defendants. These decisions have come in the face of sustained charges of racial discrimination in the application of the death penalty, and can be read as a cynical method of inoculation against the charges. Although the defensive method is different, the defense is the same. That more white people have been added to death row does not address the operation of bias among prosecutors, jurors, and judges, just as the prosecutions of post-September 11 hate crime perpetrators fail to address systemic biases that permeate federal law enforcement policy after September 11. My thanks to Cheryl Harris for suggesting this analogy.

and death sentences notwithstanding, the overwhelming trajectory of government action has been in the direction of racial profiling. Given the multivalent nature of state power, it should not be surprising that some government action would oppose individual acts of violence against Arabs, Muslims, and South Asians. In fact, such condemnation is necessary for the maintenance of the government's legitimacy, not because it involves racial bigotry, but because it intrudes upon the government's monopoly on violence. Vigilante racism required governmental condemnation not because it was racist, but because it was vigilante. Although racism against Arabs, Muslims, and South Asians was denounced by government officials, it is difficult to take the pronouncements seriously given the weight of racist policies adopted by the government.

Governmental condemnations can also be understood as a defense to the charge of state-sponsored racism. By condemning the racism of others, and of private actors in particular, the government implicitly seizes the mantle of equality. As the arbiter of racism, it lays claim to being free of racism itself. If it were not, the government's very ability to adjudicate the racism of others would be thrown into question. Thus, the condemnation of the most extreme racist acts of others obscures and normalizes the government's own racism.<sup>304</sup>

### C. *The Role of Violence in Fomenting Law After September 11*

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

The hate violence can be read as a referendum on what would be politically palatable with regard to governmental responses to September 11, authorizing incursions on previously settled rights and expectations in the name of national security. That so many people gave violent expression to their anger about the September 11 attacks provided a measure of political

---

304. This is the same dynamic at play whenever a hate crime is condemned, whether by the government or by individuals. See *supra* note 150 and accompanying text.

cover for state action far less extreme than extra-judicial killings, but far more extreme than might have been tolerated previously: racial profiling, immigrant detention, immigration restrictions, and abrogation of due process. By this account, the people have spoken, many of them with their firearms and fists. One might even conclude that the hate violence was an indication of the level of public tolerance for “collateral” killings in military action undertaken by the United States. Indeed, we should understand the hate killings after September 11 as the first “collateral damage” in the war on terrorism.

Recent comments by U.S. Commission on Civil Rights member Peter Kirsanow further illuminate the ways in which individual acts of violence have enabled the exercise of state power. Responding to reports of civil rights violations of Arab Americans, Kirsanow stated, “If there’s another terrorist attack, and if it’s from a certain ethnic community or certain ethnicities that the terrorists are from, you can forget civil rights in this country.”<sup>305</sup> He went on to predict that there would be “a groundswell of public opinion to banish civil rights”<sup>306</sup> and that “we will have a return to Korematsu.”<sup>307</sup> He concluded, “I think the best way we can thwart that is to make sure that there is a balance between protecting civil rights, but also protecting safety at the same time.”<sup>308</sup> In subsequent comments, Kirsanow elaborated, “[n]ot too many people will be crying in their beer if there are more detentions, more stops, more profiling,”<sup>309</sup> a position clearly informed by the public’s acquiescence to and active participation in the violence already done to the bodies and rights of Arabs, Muslims, and South Asians.<sup>310</sup>

These remarks have been understood as a warning that critics should tone down their complaints of civil rights and civil liberties violations by the Bush Administration.<sup>311</sup> One can read in them a political calculation that popular sentiment will sanction extreme exercise of state power, and that the state will “yield” to it. Kirsanow’s comments make clear that the deployment of either public sentiment or private violence in service of extraordinary exercise of state power is not free of manipulation. Yet, state co-optation of public acquiescence to hate violence says as much about the

---

305. Lynette Clemetson, *Civil Rights Commissioner Under Fire for Comments on Arabs*, N.Y. TIMES, July 23, 2002, at A14.

306. Niraj Warikoo, *Arabs in U.S. Could Be Held, Official Warns*, DETROIT FREE PRESS, July 20, 2002, at [http://www.freep.com/news/metro/civil20\\_20020720.htm](http://www.freep.com/news/metro/civil20_20020720.htm) (last visited Sept. 1, 2004).

307. Clemetson, *supra* note 305.

308. *Id.*

309. Warikoo, *supra* note 306.

310. Niraj Warikoo, *Muslims and Arab Americans See Their Civil Rights Eroded*, DETROIT FREE PRESS, Oct. 24, 2001, at 5A.

311. See Chisun Lee, *Rounding Up the ‘Enemy,’* VILLAGE VOICE, Aug. 6, 2002, at 48 (noting that Kirsanow implied that without increased security measures there could be a racist backlash similar to the World War II internment of people of Japanese ancestry).

power of private violence as it does about the power of the state: the veneration of democracy that adheres to widespread private violence and its acceptance lends legitimacy to drastic exercises of state power, while the sovereignty of the state lends legitimacy to the exercise of private violence resonant with the values of the state. One cannot exist without the other.

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

#### CONCLUSION

At common law, the heat of passion defense is only available if there has not been a "cooling-off" period of sufficient duration between the provocation and the subsequent homicide. Only when such a period does not exist is the provocation deemed adequate to merit mitigation.<sup>312</sup> The law bases this doctrinal requirement on the assumption that "[f]or the reasonable man, at least, passion subsides and reason reasserts its sway as the provoking element grows stale."<sup>313</sup> Nearly three years after the September 11 attacks, it remains to be seen whether and to what extent reason will reassert its sway. What is clear is that passion, and not reason, has driven much of the governmental and individual engagement in the war on terrorism, and that such passion, shared by many and endorsed by law, has been claimed to justify violence to the bodies and psyches of Arabs, Muslims, and South Asians. However comprehensible rash and unthinking behavior might have seemed in the immediate aftermath of the terrorist attacks, three years is a sufficiently long cooling-off period such that anger, fear, and betrayal can no longer constitute governing principles for the nation, its government, or its citizens. Instead, the passage of time and the distance we have gained from the emotional confusion created by the terrorist attacks demand that we engage in a more considered analysis of how best to confront the very real threats facing the country today.

The predictions made immediately after September 11 that Arabs, Muslims, and South Asians would encounter a "backlash" of hate

---

312. MPC, *supra* note 201, § 210.3 cmt. 5(a) at 55.

313. *Id.* at 59.

violence<sup>314</sup> reflected an implicit understanding of the uncontrollable power of emotion in times of crisis. But it is not just emotion, or more properly emotionalism, in its generic sense, that was understood as a predictable reaction to the terrorist attacks. Rather, it was a racially targeted emotion lacking rational support. It would be one thing if, in the aftermath of the attacks, large numbers of people committed random acts of violence, but it is quite another when the vector of that violence has racial direction. This can be distilled even further to a recognition of the enduring operation of racism, even at a time when many people (and courts) are reluctant to acknowledge any significant role of race in contemporary society. Violence against Arabs, Muslims, and South Asians, and their resulting re-racialization, remind us of the persistence of race and racism in American law, culture, and society.<sup>315</sup> So conditioned is the American recourse to racial explanation, so ingrained in the country's history and contemporary institutions, that it has taken the form not of deliberate decision-making, but of impulse, of reflex, and of passion. Society's ready understanding of the crimes of racial violence following September 11 demonstrates how far our nation is from recognizing and addressing the operation of race. It is when, in the aftermath of national tragedy, racial scapegoating is *not* expected that we will have made meaningful progress in healing our persistent racisms.

There are some encouraging signs suggesting that governmental mistreatment of Arabs, Muslims, and South Asians (particularly via indefinite detention and denial of access to counsel) may finally be coming under meaningful scrutiny by the courts, the press, and the public.<sup>316</sup> This reflects

---

314. See *supra* note 2 and accompanying text.

315. See generally DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (arguing that racism is a permanent feature of American society).

316. Most notably, the Supreme Court has dealt the Bush Administration two serious setbacks with regard to its post-September 11 detention policies. First, the Court rejected government arguments that individuals held at Guantánamo Bay, Cuba, facing indefinite detention, may not challenge the legality of their detention. *Rasul v. Bush*, 124 S. Ct. 2686 (2004). Rather, the Court held that the detainees could challenge their detention in federal court, and that the federal court had jurisdiction to hear the cases under the *habeas corpus* authority granted by 28 U.S.C. § 2241. The same day that *Rasul* was decided, the Court also handed down its decision in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). The petitioner, Yaser Hamdi, is an American citizen who was captured in Afghanistan and designated an "enemy combatant" by the United States for allegedly taking up arms with the Taliban against U.S. forces. The government maintained that it could detain Hamdi indefinitely, without charge, and without access to counsel, but the Court concluded that due process requires that Hamdi "be given a meaningful opportunity to contest the factual basis for [his] detention before a neutral decisionmaker." 124 S. Ct. at 2635. The Court also held that Hamdi "unquestionably has the right to access to counsel". *Id.* at 2652. A third case, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), was also decided that same day. José Padilla, a U.S. citizen apprehended in the United States and detained without access to a lawyer upon designation as an "enemy combatant" because of an alleged plot to release a "dirty bomb," challenged the authority of the government to detain him militarily. The Second Circuit Court of Appeals had held that the government lacked such authority. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003). The Supreme Court did not reach the merits of the case, and instead reversed and remanded on the ground that the case was not properly brought in the District of

a broader, growing concern that the executive branch has overreached its authority and that Congress may have acted rashly in crafting anti-terrorism policy. This latter concern is especially evident in the chorus of criticism befalling the USA PATRIOT Act,<sup>317</sup> passed by Congress a mere forty-five days after September 11. Although trumpeted as anti-terrorism legislation, it vastly expands police powers in terrorism and non-terrorism cases alike.<sup>318</sup> As some members of Congress have admitted, they voted for the legislation without having read it entirely.<sup>319</sup> As of June 2004, over 330 communities have passed resolutions calling for its repeal, in whole or in part.<sup>320</sup> It appears that we are in a moment—perhaps the first moment—of reconsidering national policy on the war against terrorism, a time of considered deliberation after a period of reflexive, emotionally driven action. We have, as a nation, begun to cool off.

And yet, the complete return of reason is neither assured nor sufficient. A few recent victories notwithstanding, courts have upheld key portions of the Administration's anti-terrorism policies,<sup>321</sup> and it remains unclear how much deference the Supreme Court will give the executive in future anti-terrorism cases, particularly in light of the broad deference the Court has typically given in immigration matters.<sup>322</sup> Moreover, to the extent that society has questioned governmental anti-terrorism policies, it has been on the basis of civil liberties concerns rather than civil rights concerns. The courts have addressed questions such as the government's

---

New York, but instead should have been filed in the District of South Carolina, where Padilla is detained.

317. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered Titles of U.S.C.).

318. For example, section 213 of the Act expands the government's ability to search private property without notice to the owner, and section 215 of the Act expands the government's ability to look at third party records related to an individual's activity. USA PATRIOT Act §§ 213, 215, 18 U.S.C. § 3103a (2003), 50 U.S.C. § 1861 (2003). These expanded powers are not limited to cases involving suspected terrorism.

319. See Howard Blume, *The Anti-PATRIOTS*, LA WEEKLY, Nov. 7-13, 2003, at 17 (reporting that former Republican Representative Bob Barr admitted that he and other members of Congress did not have enough time to read the entire bill); see also Kelly Patricia O'Meara, *Police State*, INSIGHT ON THE NEWS, Nov. 9, 2001 (quoting Representative Ron Paul of Texas, Republican, as saying that the text of the USA PATRIOT Act was unavailable to members of Congress prior to their vote), at <http://www.insightmag.com/main.cfm?include=detail&storyid=143236> (last visited Sept. 1, 2004).

320. A list of these communities is available from the American Civil Liberties Union. Am. Civil Liberties Union, List of Communities that have Passed Resolutions, at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207> (last visited June 26, 2004).

321. See, e.g., *Center for National Security Studies v. U.S. Department of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 1041 (2004) (upholding government decision to withhold from the public names of post-September 11 detainees); *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), cert. denied, 123 S. Ct. 2215 (2003) (upholding government decision to close certain immigration proceedings to the public); but see *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), reh'g den'd, 2003 U.S. App. LEXIS 1278 (6th Cir. 2003) (invalidating closure of immigration proceedings to the public).

322. See *supra* notes 53-54, 81 and accompanying text.



power to detain an individual indefinitely<sup>323</sup> or to deny a detained individual access to counsel,<sup>324</sup> but have not inquired into selective law enforcement on the basis of race, or the substantive due process rights of immigrants. To a large degree, the issues addressed by the courts reflect choices made by advocates to frame these cases in civil liberties rather than civil rights terms. Those choices, in turn, reflect strategic decisions as to the likelihood of success of alternative legal arguments. Thus, advocates have eschewed selective enforcement arguments, given the courts' demonstrated hostility to such claims in immigration and law enforcement contexts generally.<sup>325</sup> One can hardly blame advocates for choosing those arguments most likely to succeed in challenging suspect governmental policies, and yet one consequence of these choices is to perpetuate the juridical silence on race that had largely prevailed prior to September 11. Also left uninterrogated are the substantive ties between race, gender, and sexuality that animate the current moment of subordination.

Though it would be naïve to attribute all individual and governmental actions affecting Arabs, Muslims, and South Asians to race, it would be equally naïve to ignore its operation. Long after W.E.B. Du Bois's prediction that the "color line" would preoccupy the United States in the 20th century,<sup>326</sup> the aftermath of September 11 reminds us that racism, and its companion systems of subordination, remain quintessentially American passions. They cannot be tempered until they are understood, and they cannot be understood until they are acknowledged. The loss of life and dignity suffered by Arabs, Muslims, and South Asians provides an important opportunity to confront anew the passions that never seem to leave us. Foregoing this opportunity all but ensures the ungovernability of the racial rage of individuals, and the rage shared by law.

---

323. See *Rasul*, 124 S. Ct. 2686; *Hamdi*, 124 S. Ct. 2633.

324. See *Hamdi*, 124 S. Ct. at 2652.

325. See *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 488 (1999) (holding that, as a general matter, "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation"); see also *Whren v. United States*, 517 U.S. 806 (1996) (holding that the Fourth Amendment does not protect against racially-motivated traffic stops, and that allegations of selective enforcement should be brought under the Equal Protection Clause).

326. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 12 (Gramercy Books 1994) (1903) ("The problem of the twentieth century is the problem of the color-line—the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea.").