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# OUTSIDERS LOOKING IN: THE AMERICAN LEGAL DISCOURSE OF EXCLUSION

Luis E. Chiesa<sup>1</sup>

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<sup>1</sup> Associate Professor of Law, Pace Law School. I am indebted to my research assistant, Celia Curtis, for her valuable research and suggestions.

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## OUTSIDERS LOOKING IN: THE AMERICAN LEGAL DISCOURSE OF EXCLUSION

*“There are citizens of the United States, I blush to admit, born under other flags but welcomed under our generous naturalization laws to the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life...”<sup>2</sup>*

-President Woodrow Wilson, Annual Address to Congress, December 1915.

*“The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become ‘Americanized’ the racial strains are undiluted.”<sup>3</sup>*

-Lieutenant General John L. DeWitt, Final Report on the Japanese Evacuation from the West Coast, 1942.

*“Citizens and noncitizens, even if equally dangerous, are not similarly situated.”<sup>4</sup>*

-Justice Antonin Scalia dissenting in *Hamdi v. Rumsfeld*, 2004.

*“My view with regard to profiling noncitizens is different. Noncitizens are not expected to be loyal to the United States and so the concern with alienating them by profiling is less acute. No foreigner expects to be treated identically to a citizen.”<sup>5</sup>*

-Judge Richard Posner’s blog comments about the considerations that should be taken into account when deciding whether to engage in racial profiling.

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<sup>2</sup> President Woodrow Wilson, Annual Address to Congress (Dec. 7, 1915).

<sup>3</sup> Lieutenant General John L. DeWitt, *Final Recommendations of the Commanding General, Western Defense Command and Fourth Army, Submitted to the Secretary of War, February 14, 1942*, in FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, 1942 34 (1943).

<sup>4</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 575 n.5 (2004) (Scalia, J., dissenting).

<sup>5</sup> Posting of Judge Richard Posner to The Becker-Posner Blog, [http://www.becker-posner-blog.com/archives/2005/01/comment\\_on\\_prof.html](http://www.becker-posner-blog.com/archives/2005/01/comment_on_prof.html) (Jan. 23, 2005, 20:05 EST).

## OUTSIDERS LOOKING IN: AN INTRODUCTION

Shortly after the birth of our nation, Congress enacted the Alien Friends Act, which granted to President John Adams the power to detain and deport aliens from any country deemed “dangerous to the peace and safety of the United States” without affording them due process of law.<sup>6</sup> After the riots and criminal attacks on prominent public figures that took place subsequent to the end of World War I, the government ordered various raids directed at deporting aliens who sympathized with anarchist or communist ideals.<sup>7</sup> In the wake of the attack on Pearl Harbor, President Franklin Roosevelt ordered the internment of Japanese Americans in concentration camps with the alleged purpose of guaranteeing national security.<sup>8</sup> As part of a sweeping government effort to quell terrorism after 9/11, President Bush signed an executive order allowing special military tribunals to try foreigners suspected of committing such acts.<sup>9</sup> As a result, the military facilities at Guantánamo Bay are being primarily used as prisons for the indefinite detention of non-citizens designated by President Bush as enemy combatants.

All of these governmental acts have one thing in common: they distinguish between “us” and “them,” “good guys” and “bad guys,” “friends” and “enemies,” “insiders” and “outsiders.” Near the end of the 18<sup>th</sup> century, aliens (outsiders) enjoyed less

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<sup>6</sup> An Act Concerning Aliens, ch. 58, 1 Stat. 570, 570-71 (1798) (expired 1800). This act was commonly known as the Alien Friends Act. Another law, commonly known as the Alien Enemies Act and adopted at the same time as the Alien Friends Act, provided that the president could detain and deport aliens of an *enemy nation* residing in the United States. See An Act respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §21).

<sup>7</sup> See generally Harlan Grant Cohen, Note, *The (Un)favorable Judgment of History: Deportation Hearings, The Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. REV. 1431 (2003).

<sup>8</sup> *Hirabayashi v. United States*, 320 U.S. 81, 102 (1943).

<sup>9</sup> Elisabeth Bumiller & David Johnston, *A Nation Challenged: Immigration; Bush Sets Option of Military Trials in Terrorist Cases*, N.Y. TIMES, Nov. 14, 2001, at A1.

constitutional freedoms than citizens (insiders). After Pearl Harbor, United States law distinguished between the Japanese people (them) and the American people (us). Today, in the post 9/11 world, those associated with so-called “fundamentalist Islam” (bad guys) are treated differently than those who are supposedly willing to defend freedom (good guys). In light of these examples, it is hard to deny that there has always existed, and still exists, an American legal discourse of exclusion. This discourse of exclusion has been repeatedly used to legitimate the adoption of measures that target certain groups of people primarily on the basis of their status as members of a particular class. Those who have been the focus of these measures have, despite their presence in the country, experienced what it feels like to be an outsider looking in.

The existence of this legal discourse of exclusion raises various important queries. What are the philosophical and historical roots of the governmental tendency to inequitably target certain groups of people as a way to safeguard the rest of the populace? Why is it that the State typically makes use of discourses of exclusion in order to handle emergency situations, such as the turbulent riots that broke out in the United States after World War I or the frightening period that resulted after the attacks on the World Trade Center? Is it judicious for government to disproportionately burden certain groups of the population when the security of the nation is at stake? The purpose of this article is to explore these fundamental problems. I will do so in four steps.

In Part I, I will examine the political philosophy of various prominent European and American thinkers in order to explain why discourses of exclusion seem to lie at the heart of social contract theories of the State. This might explicate why governments have always been seduced by the idea that it might be legitimate to safeguard the rights of some (the non-excluded) at the expense of the rights of others (the excluded).

The next part will be dedicated to briefly recounting several instances in which the government of the United States has placed unfair burdens on some groups of people in order to guarantee the safety of the rest of the population. I will focus on four cases, namely: the curtailing of the free speech rights of aliens during the Quasi-War of 1798, the persecution of political dissidents after both world wars, the branding of Japanese Americans as an “enemy race” that needed to be contained in

order to avoid another Pearl Harbor, and the recurrent attempt to treat suspected terrorists differently depending on whether or not they are American citizens. This historical inquiry will reveal that the United States government has continuously engaged in the practice of inequitably burdening certain groups of people during times of actual or perceived emergency.

In Part III I will attempt to demonstrate that the State cannot legitimize the use of an official discourse of exclusion by pointing to the existence of a state of emergency. Even if one accepts that the government can justifiably impose significant burdens on the population during times of emergency, it does not follow that it can do so in an inequitable manner. Besides the fact that enacting measures that target certain groups of people is constitutionally suspect on various grounds,<sup>10</sup> the benefits of making use of such measures do not outweigh the costs. The short-term profits seem to be offset by the fact that trading their liberties for our wellbeing will render us less safe in the long run. Even though these types of measures might help prevent attacks against our nation in the near future, they may also undermine our legitimacy both here and abroad. Ultimately this has the potential of increasing our vulnerability

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<sup>10</sup> Measures targeting groups of people on the basis of their political ideals may contravene the First Amendment's guarantees of freedom of speech and association. See generally *United States v. Robel*, 389 U.S. 258 (1967). If, on the other hand, the measure allows the government to search or detain the actor solely because he is a member of particular class, the measure could violate the Fourth Amendment, since it would allow the seizure or search of the person on the basis of his status and not on the constitutionally accepted ground of probable cause or, at the very least, reasonable suspicion.

Measures that purport to punish otherwise non-criminal conduct or to aggravate the punishment of conduct that is already considered criminal exclusively because the actor's status are also problematic. This would contradict the basic tenet that people should be punished for engaging in wrongful acts, not for being members of a particular class. This seems to run afoul the Eighth Amendment's prohibition of cruel and unusual punishment as interpreted by the United States Supreme Court in *Robinson v. California*. 370 U.S. 660, 666-67 (1962) (striking down as cruel and unusual a California law that made it illegal to be addicted to narcotics). It should be pointed out, however, that the Supreme Court jurisprudence with regard to the constitutionality of criminalizing conduct in view of the status of the alleged perpetrator is muddled, to say the least. See, e.g., *Powell v. Texas*, 392 U.S. 514 (1968). These types of measures could also be void because they unconstitutionally establish guilt by association alone. See *Robel*, 389 U.S. at 265, 281-82.

because it will most likely diminish cooperation from those who will probably be in a better position to furnish us with valuable information about possible attacks against our nation.<sup>11</sup>

Finally, in Part IV, I will discuss the potential perils of attempting to inequitably target certain groups during times of emergency by examining and critiquing the recent enactment of a statute<sup>12</sup> that authorizes the construction of a wall along the U.S.-Mexico border. Contrary to what its proponents have suggested, this measure, which asymmetrically requires Mexicans to assume a burden that is not imposed on our neighbors to the north, will likely augment the risks of a future terrorist attack, not reduce them.

## I. DISCOURSES OF EXCLUSION AND CONTRACTARIANISM

Discourses of exclusion find solid grounding in social-contract theories of the State. This is most evidently the case when the exclusionary discourse is employed to justify inequitably targeting foreigners in order to maximize the rights of citizens. There is ample support in the contractarian literature in favor of depriving aliens of liberties solely because of their status since, as Professor Gerald Neuman has correctly stated, “by definition, aliens began as outsiders to a particular social contract.”<sup>13</sup> Hence, because of their condition as foreigners, aliens have no natural claim to sharing the rights that insiders enjoy as ratifiers of the societal pact.

Similarly, the liberal German philosopher Christian Wolff argued that non-citizens “are bound only to do and not to do the things which must be done or not done by citizens at the time under the same circumstances, *except in so far as particular*

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<sup>11</sup> DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM xxii (2003).

<sup>12</sup> Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638, § 1 (codified at 8 U.S.C. 1103 (2006)).

<sup>13</sup> Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 923 (1991).

laws introduce something else concerning foreigners.”<sup>14</sup> In the same vein, the Swiss legal scholar Emerich de Vattel argued that aliens only possessed those privileges that the State chose to give to them, thus making them members of an “inferior order” who, despite having the same obligations towards the government as citizens, had fewer rights.<sup>15</sup>

The tendency to exclude some people from the protection of our laws based on social contract theories of the state has also influenced the thinking of various American political scholars. At the turn of the 19<sup>th</sup> century, for example, the Federalist lawyer from New England, Harrison Gray Otis, stated that foreigners laid outside of the scope of the procedural and substantive safeguards conferred by the Constitution of the United States because said instrument only protected those who had been parties to the ratification.<sup>16</sup> Likewise, a Federalist committee asserted that since “the Constitution was made for citizens . . . [aliens] have no rights under it, but remain in the country and enjoy the benefit of the laws . . . as a matter of favor and permission.”<sup>17</sup> Consequently, the committee concluded that the rights of aliens may be withdrawn whenever the Government believed that continuing to afford them with the same rights as citizens would be dangerous to the general welfare.<sup>18</sup>

A contractarian reading of the Constitution has also informed the opinion of several justices of the United States Supreme Court. Thus, in *United States v. Verdugo-Urquidez*,<sup>19</sup> Chief Justice Rehnquist concluded that non-resident aliens are not part of “the people” protected by the Fourth Amendment’s prohibition of unreasonable searches and seizures because they

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<sup>14</sup> 2 CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* 153 (Joseph H. Drake trans. 1934) (quoted in Neuman, *supra* note 13, at 925 n.83) (emphasis added).

<sup>15</sup> 1 EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* § 213 (1758).

<sup>16</sup> Neuman, *supra* note 13, at 929.

<sup>17</sup> *Id.* at 931 (citing 9 ANNALS OF CONG. 2987 (1799)).

<sup>18</sup> *Id.*

<sup>19</sup> 494 U.S. 259 (1990).



are “not part of [our] national community” and have not “otherwise developed sufficient connection with this country to be considered part of that community.”<sup>20</sup> In doing so, he further suggested that non-resident aliens are also not part of “the people” whose rights to freedom of speech and association are protected by the First Amendment.<sup>21</sup>

More recently, in *Hamdi v. Rumsfeld*,<sup>22</sup> Justice Scalia argued that citizens detained as enemy combatants have the right under the Suspension Clause of the Constitution to challenge the legality of their detention in federal court, whereas aliens do not.<sup>23</sup> He arrived at this conclusion even though the text of the Suspension Clause remains silent as to whether or not aliens are included within the protection afforded by the provision.<sup>24</sup> As usual, Justice Scalia grounded his position on an originalist reading of the Constitution. Even though at first glance there seems to be no clear connection between originalism and contractarianism, upon closer inspection it seems contractarianism is linked to most originalist theories of interpretation. Since social contract theory “seems to have informed our Nation's founders,”<sup>25</sup> any philosophy of constitutional adjudication that purports to appeal to the meaning of the text at the time of the founding will be underpinned by contractarian understandings of the obligations that the State owes to citizens and non-citizens.<sup>26</sup>

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<sup>20</sup> *Id.* at 265.

<sup>21</sup> *Id.* If we take Justice Rehnquist's conclusions seriously, it seems to follow that foreign journalists temporarily staying in the United States who are neither residents nor citizens do not have a constitutionally protected right to freedom of speech and press.

<sup>22</sup> 542 U.S. 507 (2004) (Scalia, J., dissenting).

<sup>23</sup> *Id.* at 558-59.

<sup>24</sup> U.S. CONST. art. 1, § 9.

<sup>25</sup> *Davis v. Fulton County*, 884 F. Supp. 1245, 1254 n.7 (E.D. Ark. 1995).

<sup>26</sup> See Michael C. Dorf, *Integrating Normative and Descriptive Normative Constitutional Theory: The Case of Original Meaning*, 15 GEO. L.J. 1765, 1766 (1997) (stating that the political theory underlying originalism is “a form of social contract theory.”).

Once it is accepted that social contract theories can serve to legitimize the practice of discriminating between citizens and aliens, it is not difficult to imagine how these theories can also lead to justifying the practice of inequitably targeting a group of people even though they are citizens. Although citizens have a prima facie right to share whatever benefits might be afforded to people who are insiders to the compact upon which societal life was erected, they may lose this right if they can be linked in some way to those who are not bound by the social contract.<sup>27</sup> This is particularly the case when the government determines that the societal group to which the citizens have been linked poses a significant danger to the rest of the citizenry and to the continued existence of social life according to the terms of the original pact. Thus, as Professor David Cole has lucidly argued, it is usually quite easy for the State to cross “the citizen-non-citizen divide” and conclude that certain citizens should be inequitably targeted by the government on the basis of a diagnosis of dangerousness that stems from their racial (i.e. Japanese internment during WWII) or political (i.e. McCarthyism) ties to people who are believed to pose a threat to the rest of the populace.<sup>28</sup>

Since the political philosophy undergirding the legal discourse of exclusion is germane to the social contract theory that informed the ideas of our founding fathers, it should come as no surprise that the United States government has recurrently made use of the logic that flows from the contractarian considerations detailed here. Undoubtedly, an understanding of the theoretical roots of the discourses of exclusion that give rise to the use of measures that disproportionately burden certain groups of people helps us to explain why our political institutions have repeatedly yielded to this exclusionary logic. It does not, however, provide us with a completely adequate account of why the use of such measures has been so seductive during times of perceived emergency. Such an account can only be afforded upon an examination of the historical instances in which our government has opted to

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<sup>27</sup> People may not be bound by the terms of the social-contract either because they were never parties to the compact or because they have decided to live outside of its terms.

<sup>28</sup> COLE, *supra* note 11, at 85-87.

target certain groups as a way to protect the rest of the populace. This is precisely the purpose of Part II of this article.

## II. OUTSIDERS V. INSIDERS - THE AMERICAN EXPERIENCE WITH LEGAL DISCOURSES OF EXCLUSION

### A. FOREIGNERS (AND THEIR FRIENDS) AS OUTSIDERS

#### 1. French Aliens as Outsiders - The Quasi War of 1798 and the Alien and Sedition Acts

The first time that the United States officially toyed with a discourse of exclusion on the basis of non-racist motivations was in 1798.<sup>29</sup> Francophobia infiltrated the hearts and minds of Americans soon after diplomatic relations with three French intermediaries turned sour during the spring of 1798. The public was irate after learning that the French agents had demanded a substantial loan from the U.S. government, a formal apology from President John Adams and a bribe before they would engage in peace negotiations with the United States.<sup>30</sup> This breakdown in diplomacy between the two countries, which came to be known as the XYZ affair, fueled anti-French sentiment in America and gave the faltering presidency of John Adams a “much-needed boost.”<sup>31</sup>

After the Federalist Congress was informed of the XYZ affair in April 1798, a military showdown with the French seemed inevitable. Even though there was never a formal declaration of

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<sup>29</sup> It should go without saying that our government employed a legal discourse of exclusion against black slaves from the time of our founding until well into the 20<sup>th</sup> century. This discourse of exclusion was grounded on racism and prejudice. The focus of this article, however, is documenting and critiquing the American government’s attempt to justify the use of such discourses by appealing to seemingly neutral and non-racist arguments. Thus, I will focus on examining governmental measures that inequitably target certain social groups on the basis of allegedly non-prejudiced grounds.

<sup>30</sup> JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 41 (2002) [hereinafter SIMON].

<sup>31</sup> *Id.*

war, hostilities between both countries began in 1798 and lasted until 1800.<sup>32</sup> This conflict, which was fought almost entirely at sea, is referred to as the Quasi-War of 1798.<sup>33</sup> In the wake of the Quasi-War, Congress enacted the Alien Friends and Sedition Acts with the alleged purpose of protecting Americans from attacks from aliens of “enemy powers” (i.e. French aliens). These Acts were manifestly designed to discriminate against French aliens and their sympathizers solely on the basis of their status as members of an enemy race that was considered to be dangerous to the peace and security of the United States.<sup>34</sup> While the Alien Friends Act proved to be a useful tool to silence French aliens who were critical of the administration, the passage of the Sedition Act provided the government with an equally powerful mechanism for suppressing American critics.<sup>35</sup> The Sedition Act was primarily directed toward destroying Jeffersonian Republican opposition to the Federalist Party.<sup>36</sup> Various well-known Jeffersonians, mostly journalists and editors, were indicted for violating its provisions.<sup>37</sup>

History has not been kind to the Alien and Sedition Acts. President Jefferson, whose Republican Party ousted the Federalists from power in the election of 1800, believed that the laws were unconstitutional and did not renew the Alien Friends Act after it expired in 1800. The Sedition Act was also allowed to expire.<sup>38</sup> Most scholars have since agreed with Jefferson’s assessment of the acts. Similarly, the Supreme Court has stated in dicta that “[a]lthough the Sedition Act was never tested in this

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<sup>32</sup> See generally SIMON, *supra* note 30.

<sup>33</sup> Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT’L L. & POL. 1, 48-52 (Fall 1999).

<sup>34</sup> See SIMON, *supra* note 30, at 51.

<sup>35</sup> James Morton Smith, *The Enforcement of the Alien Friends Act of 1798*, 41 MISS. VALLEY HIST. REV. 85 (1954).

<sup>36</sup> SIMON, *supra* note 30, at 51.

<sup>37</sup> See *id.* at 52-55 for a sampling of those indicted.

<sup>38</sup> ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 65 (1991).

Court, the attack upon its validity has carried the day in the court of history.”<sup>39</sup>

The enactment of the Alien and Sedition Acts marked the beginning of a sorry chapter in American law and politics in which specific groups of people have been forced into the status of outsiders looking in. By branding French aliens and their American sympathizers as members of an enemy class whose civil liberties could be curtailed in order to protect the peace and security of the rest of the populace, the government paved the way for the enactment of future statutes that legitimized measures that inequitably target certain people in the name of national security. It should thus come as no surprise that with the advent of World War I, the United States again resorted to a discourse of exclusion in an attempt to protect the country from internal and external threats.

## 2. Russian Aliens as Outsiders – The Palmer Raids

Less than a year after the cessation of World War I hostilities, an elaborate scheme to mail 36 bombs to well-known statesmen and politicians was exposed.<sup>40</sup> The targets included Supreme Court Justice Oliver Wendell Holmes, entrepreneurs J.P. Morgan and John D. Rockefeller, and the Attorney General at the time, A. Mitchell Palmer.<sup>41</sup> In June of 1919, nine bombs were detonated in eight different American cities, including one in Palmer’s Washington, D.C. home.<sup>42</sup> The attacks came at a time in which the American people were becoming increasingly suspicious of anyone who advocated anarchist or communist ideals, particularly foreigners.<sup>43</sup>

Governmental reaction to the events was swift. Less than six months after the bomb scares, Attorney General Palmer and the chief of the Justice Department’s Bureau of Investigation, J. Edgar Hoover, ordered law enforcement authorities to engage in

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<sup>39</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

<sup>40</sup> Cohen, *supra* note 7, at 1453.

<sup>41</sup> *Id.* at 1453 n.104.

<sup>42</sup> *Id.* at 1454 n.108. *See also* COLE, *supra* note 11, at 118.

<sup>43</sup> *See* Cohen, *supra* note 7, at 1454-55.

a series of raids against members of the alleged radical groups who were thought to be behind the attacks.<sup>44</sup> The raids were undertaken without regard to traditional principles of constitutional law. The venerable Fourth Amendment requirement that there be probable cause before governmental authorities engage in a search was blatantly ignored. Instead, the chief criterion for determining whether someone ought to be arrested or searched was if he was a member of certain groups, including the “Union of Russian Workers, the Communist Party, and the Communist Labor Party.”<sup>45</sup>

Unsurprisingly, the vast majority of the people targeted during the Palmer Raids were foreigners, especially Russians and Eastern Europeans.<sup>46</sup> The raids took place during a time in which many Americans believed that a Bolshevik revolution in the United States was unavoidable. As a result of the widespread hysteria that accompanied the predictions of a communist coup in our country, it seemed natural at the time to focus the nation’s investigative efforts on Russian aliens and their sympathizers. Thus, equipped with the tools provided by the Alien Control Act of 1918,<sup>47</sup> thousands of Russian non-citizens were arrested on the basis of their suspected ties with radical anarchist or communist groups. In fact, many people were arrested simply because their names appeared on the membership lists of local Russian or Communist Clubs.<sup>48</sup> In a patent denial of due process, the Immigration Bureau rules regarding aliens’ access to counsel at the subsequent deportation hearings were amended to deny the aliens this right, as well as the right to examine the evidence to be used against

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<sup>44</sup> *Id.* at 1457.

<sup>45</sup> *Id.* at 1458.

<sup>46</sup> *Id.* Law enforcement officials were instructed that “[o]nly aliens should be arrested; if American citizens are taken by mistake, their cases should be immediately referred to the local authorities.” *Colyer v. Skeffington*, 265 F. 17, 37 n.2 (D. Mass. 1920), *rev’d*, *Skeffington v. Katzeff*, 277 F. 129 (1st Cir. 1922).

<sup>47</sup> Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012 (repealed June, 1952).

<sup>48</sup> This was done without regard to how the names came to be on the lists. In some cases, the arrested non-citizens legitimately had no idea they were “members” of the Communist party. *See* COLE, *supra* note 11, at 119-21.

them until the inspector decided that the “hearing [had] proceeded sufficiently in the development of the facts to protect the Government’s interests.”<sup>49</sup>

As with the targeting of French aliens during the Quasi-War of 1798, governmental authorities in the post World War I period resorted to imposing unfair burdens on certain groups of people in an attempt to secure the nation during a time of perceived emergency. Up to this point, however, only the liberties of non-citizens (French aliens and Russian aliens) were being eroded in an effort to protect the country. Things would change when less than twenty years later, the government decided that it could no longer ensure security by targeting only foreigners. A special committee of Congress had started investigating “unpatriotic” activities and American citizens would no longer be safe from investigation solely on the basis of their status as members of a particular class.

## B. AMERICANS AS OUTSIDERS

### 1. Political Dissidents as Outsiders - Anti-Communism and the Second Red Scare

Things settled down for a while after the Palmer Raids. American authorities had arrested nearly ten thousand Russian aliens suspected of having radical ties and sent a couple of hundred back to the Soviet Union in “Soviet Arks.”<sup>50</sup> With the fears of a Bolshevik revolution on United States soil dissipating, most Americans were content to sit back and enjoy the Roaring Twenties. Before long, however, we were focused on a new enemy. With the events leading up to World War II unfolding in rapid succession, concern over Nazi Germany emerged and feelings of unease about communist Russia resurfaced. Fearing that some of the pernicious ideals underlying these political movements had started to contaminate people on this side of the Atlantic, the House of Representatives, with Congressmen Martin Dies, Jr. and Samuel Dickstein in the lead, created the

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<sup>49</sup> *Colyer*, 265 F. at 46.

<sup>50</sup> Cohen, *supra* note 7, at 1460.



Special Committee on Un-American Activities (later HUAC) in 1938 to investigate unpatriotic behavior.<sup>51</sup>

Perhaps because of America's marriage of convenience with Russia during the Second World War, the HUAC's monitoring activities were relatively minor in comparison to what was to take place after the defeat of the Axis alliance in 1945. Fueled by Churchill's famous warning about the descent of an iron curtain through Europe,<sup>52</sup> the Republican Party, which had soundly trounced the Democrats in the elections of 1946,<sup>53</sup> revamped the HUAC and embarked on an unprecedented effort to detect homegrown threats.

Since the numerous acts of the HUAC are well documented, there is no need to detail them here,<sup>54</sup> although a couple of them are worth mentioning. In 1947, for example, the Committee grew increasingly suspicious about the existence of a Soviet spy network in Hollywood. This prompted it to launch an investigation with the purpose of determining whether various members of the Hollywood community identified themselves as communists.<sup>55</sup> The probe was so far-reaching that not even ten year old child star Shirley Temple was spared from questioning by the Committee.<sup>56</sup>

As a result of this investigation, ten Hollywood screenwriters were sentenced to twelve months in prison for refusing to answer the Committee's questions about their political

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<sup>51</sup> William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375, 398 (2001).

<sup>52</sup> Prime Minister Winston Churchill, Speech at Westminster College (Mar. 5, 1946). According to Churchill's famous words, "[f]rom Stettin in the Baltic to Trieste in the Adriatic, an iron curtain has descended across the Continent." *Id.*

<sup>53</sup> The Republican campaign capitalized on the growing fear of Communist expansion in America.

<sup>54</sup> See generally WALTER GOODMAN, *THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE UN-AMERICAN ACTIVITIES* (Farrar, Straus, and Giroux, 1968) (1964).

<sup>55</sup> Steven J. Bucklin, *To Preserve These Rights: The Constitution and National Emergencies*, 47 S.D. L. REV. 85, 90 n.48 (2002).

<sup>56</sup> *Id.* at 90.



affiliations and alleged ties with the Communist Party.<sup>57</sup> The “Hollywood Ten,” as they would come to be called, claimed that they possessed a First Amendment right to decline responding to the Committee’s questions, not wanting to compromise their freedom of association.<sup>58</sup>

The governmental targeting of people who were suspected of holding communist views reached its zenith when in 1950 a democratically led Congress overrode President Truman’s veto to pass the Internal Security Act (“ISA”).<sup>59</sup> The ISA required, among other things, that Communist organizations register with the Attorney General.<sup>60</sup> It also called for the creation of the Subversive Activities Control Board (“SACB”) which was to be in charge of overseeing the registration procedure.<sup>61</sup> Any alien who was found to be a member of an organization investigated by the SACB, was not allowed to become a U.S. citizen. Furthermore, any naturalized citizen could be denaturalized in five years on the basis of their membership in any of the targeted groups.<sup>62</sup>

In view of the sweeping scope of the ISA, its constitutionality was challenged on various occasions on First Amendment grounds. Even though the Supreme Court initially upheld the validity of the law,<sup>63</sup> it ultimately struck down most of its provisions in several well-known cases.<sup>64</sup> The Court put the last

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<sup>57</sup> Kalah Auchincloss, Note, *Congressional Investigations and the Role of Privilege*, 43 AM. CRIM. L. REV. 165, 176 (2006).

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

<sup>59</sup> Internal Security Act of 1950, 50 U.S.C.A. §§ 781-858 (repealed 1993). Commonly known as The Subversive Activities Control Act of 1950.

<sup>60</sup> Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 13-14 (1991).

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

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

<sup>63</sup> *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

<sup>64</sup> See *Aptheker v. Sec’y of State*, 378 U.S. 500, 514 (1964) (striking down the section of the ISA that made it a felony for a member of a Communist organization to apply for, use or attempt to use a passport); *Albertson v.*

nail on the ISA's coffin in *United States v. Robel*, where it concluded that the ISA statute unconstitutionally "establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it."<sup>65</sup>

Despite the fact that most provisions of the ISA were eventually declared unconstitutional, the measures adopted by the government during the first decades of the Cold War represented a disturbing change in American policy. Whereas the laws enacted in the name of national security during the Quasi War and before and after World War I were specifically tailored to disaffect aliens, the anti-communist statutes enacted after the Second World War were designed to marginalize citizens on the basis of their affiliation with certain groups. Some Americans finally had a taste of how it felt to be an outsider looking in.

## **2. Racial Groups as Outsiders— The Japanese Internment Camps**

Americans linked to communist organizations were not the only ones who received short shrift as a result of the concerns over national security that emerged during World War II. Americans of Japanese ancestry fared much worse. On February 19, 1942, President Roosevelt issued Executive Order 9066, which authorized the military to prescribe areas "from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion."<sup>66</sup>

As it turned out, the Armed Forces ended up designating the entire West Coast as a military area from which those with enemy race lineage (i.e. Japanese Americans) could be excluded. What followed was one of the most disgraceful episodes in the

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Subversive Activities Control Bd., 382 U.S. 70, 74-78 (1965) (holding that to require registering as members of the Communist Party is inconsistent with the protection of self-incrimination clause).

<sup>65</sup> *United States v. Robel*, 389 U.S. 258, 265 (1967).

<sup>66</sup> Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

history of the United States. In less than a year, military authorities had forcefully displaced well over 100,000 Japanese people and relocated them to several internment camps located in various states.<sup>67</sup> Nearly two-thirds of the internees were American citizens.<sup>68</sup> To add insult to injury, the Supreme Court upheld the constitutionality of Executive Order 9066 in the now infamous decision of *Korematsu v. United States*,<sup>69</sup> on the grounds that the establishment of the internment camps was justified in virtue of military necessity.<sup>70</sup>

*Korematsu* is now considered to be one of the worst opinions ever handed down by the Supreme Court.<sup>71</sup> One would believe that after apologizing to the survivors of the internment and awarding a Presidential Medal of Honor to the plaintiff in the *Korematsu* case, the government had come to the conclusion that adopting measures that inequitably target certain groups of people during times of emergency was unwise. Nevertheless, in 2004 Fred Korematsu found himself filing an *amicus curiae* brief<sup>72</sup> in the case of *Rasul v. Bush*<sup>73</sup> opposing the government's claim that it could indefinitely detain enemy combatants in Guantánamo Bay without allowing them to challenge the legality of their detention. Much to Fred Korematsu's surprise, the government was again employing the type of measures that led to his detention in the name of national security.

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<sup>67</sup> See Memorandum from Milton. S. Eisenhower, Director, War Relocation Authority, to Members of Congress (Apr. 20, 1942), available at [http://www.trumanlibrary.org/whistlestop/study\\_collections/japanese\\_internment/documents/pdf/6.pdf#zoom=100](http://www.trumanlibrary.org/whistlestop/study_collections/japanese_internment/documents/pdf/6.pdf#zoom=100).

<sup>68</sup> Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1618 (2005).

<sup>69</sup> 323 U.S. 214 (1944).

<sup>70</sup> *Id.* at 223.

<sup>71</sup> Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72, 83 (1996).

<sup>72</sup> Brief for Fred Korematsu as Amici Curiae Supporting Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-343), 2004 WL 103832.

<sup>73</sup> 542 U.S. 466 (2004).

### C. ALIENS (MOSTLY MUSLIM) AS OUTSIDERS – GUANTÁNAMO BAY AND THE WAR ON TERROR

September 11, 2001 changed the way Americans look at the world. Airplanes and subways don't seem to be as safe as we once thought they were. We are now willing to tolerate increased security measures at airports and train stations in order to minimize the possibility of being the victim of another attack. The attacks on the Twin Towers also changed the way that the government looks at things. New tools are thought to be needed in order to wage the war on terrorism. One of the government's weapons of choice in this new war is instituting programs that curtail the rights of aliens in an effort to gain intelligence that might prove to be crucial to stopping the next attack. The establishment of prison facilities in Guantánamo for the indefinite detention of enemy aliens constitutes the most poignant example of such efforts.

During the last few years, the Executive Branch has vehemently argued that Guantánamo detainees have no access to federal courts by claiming that foreigners detained as enemy combatants do not have a right to petition for habeas corpus, even though equally dangerous citizens detained in the same manner presumably do. Fundamental to this claim is the government's contention that aliens are not part of "the people" protected by the Constitution of the United States. As a result of this contractarian view of the bill of rights, on September 28, 2006, Congress passed the Military Commissions Act of 2006,<sup>74</sup> which, among other things, declares that no state or federal court shall have jurisdiction to entertain a habeas corpus petition **filed by non-citizens** designated by the President as enemy combatants.

As we can see, history has a tendency to repeat itself. More than two hundred years ago, the American government unfairly targeted French aliens with the alleged purpose of guaranteeing the security of the rest of the populace. Today we are targeting Muslim aliens in much the same manner, for what essentially seems to be the same reasons.

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<sup>74</sup> Pub. L. No. 109-366, 120 Stat. 2600 (2006).

## D. AMERICA'S EXPERIENCE WITH DISCOURSES OF EXCLUSION – PRELIMINARY CONCLUSIONS

This brief historical recount reveals that government has typically targeted groups of people in an inequitable manner as a way of attempting to neutralize what at the time appeared to be significant threats to the social order. It is difficult to explain why the government has repeatedly decided to act in this way when it is perceived that our national security is threatened. While racism<sup>75</sup> and xenophobia<sup>76</sup> can partially account for some of the measures that have been discussed here, there seems to be an even more fundamental explanation for these events. Governmental authorities appear to believe that engaging in these types of acts during times of crisis can somehow make us safer. If this is the case, various queries require our attention. The most fundamental of these is determining whether it is true that engaging in such practices actually maximizes our security. It is to this question that I now turn.

## III. THE PERILS OF UNFAIRLY TARGETING SOME GROUPS OF PEOPLE IN ORDER TO SAFEGUARD THE REST OF THE POPULACE

### A. PRELIMINARY CONSIDERATIONS

Given that government tends to gravitate towards the inequitable targeting of allegedly dangerous groups of people during times of crisis, it seems logical to ask whether doing so really helps us to successfully secure our nation. In this section it will be argued that, contrary to what has traditionally been contended by our government, engaging in these discriminatory practices is misguided because the benefits of making use of such practices have not been proven to outweigh the costs of implementing them. For the purposes of this discussion, I will assume that the objective of targeting some people in order to protect the rights of many is to secure the continued existence of

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<sup>75</sup> For example, that against the Japanese during WWII, for example.

<sup>76</sup> For example, that against French aliens during the Quasi War of 1798 and against Russian aliens during the period after WWI. Xenophobia may also partially explain the measures recently taken against Muslims in the post 9/11 era.

the State, by preventing extremely harmful attacks from being carried out and not to further racist agendas.<sup>77</sup>

Furthermore, I will avoid delving into the constitutional questions raised by engaging in such acts because those who have advocated its use clearly believe that there is a law of necessity that trumps the provisions of the Constitution that might be nominally infringed during times of national emergency.<sup>78</sup> Thus, in an effort to engage in a fruitful exchange with those who believe that employing the insider/outsider distinction is sometimes an indispensable tool in the fight to secure our nation in moments of crisis, I will steer clear of deontological arguments based on the inviolability of certain constitutional rights and will focus on advancing consequentialist arguments that show that unfairly burdening some groups of people as a mechanism for maximizing the security of those not burdened by the measures is unwise.

## B. THE REINFORCED BELIEFS ARGUMENT

One of the major drawbacks of excluding some groups from having access to the full protection of our laws as a way to protect the security of the rest of the population is that the strategy can backfire because of what I call the “reinforced beliefs argument.” In the context of terrorism, the argument can be summed up in the following manner:

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<sup>77</sup> Unfortunately, this assumption is not entirely supported by the past practices of our nation. It seems quite clear, for example, that the creation of the Japanese internment camps was motivated by racial prejudice.

<sup>78</sup> The position that the law of necessity might require that the government disobey the Constitution has been defended by numerous well-known scholars. The most recent defense of this view was advanced by Judge Richard Posner. See RICHARD POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 158 (Geoffrey R. Stone ed., 2006) (defending the position that the law of necessity might require the government to disobey the Constitution); see also Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004).

In Germany, it has also been argued that the government may make use of a criminal law for outsiders to deal with emergencies, particularly terrorism, even if doing so seems to nominally infringe the Rule of Law and the Constitution. See Günther Jakobs, *¿Terroristas como Personas en Derecho?*, in *DERECHO PENAL DEL ENEMIGO: EL DISCURSO PENAL DE LA EXCLUSIÓN* 77-93 (Manuel Cancio Meliá & Carlos Gómez Jara-Díez eds., 2006).

(1) Terrorists firmly believe that the people they are attacking deserve to be harmed because they are members of a State (or people) that they consider to be acting immorally or unjustifiably.

(2) When the country that is threatened by the possibility of an attack resorts to measures that inequitably target certain groups of people it reinforces the terrorists' beliefs that the country they purport to attack acts in an immoral manner.

(3) Thus, requiring that a particular group of people carry a greater burden than the rest of the populace might lead to an increase of attacks because it strengthens the convictions of terrorists' regarding the immorality of the State that they purport to attack.

The recent American experience with terrorism lends credence to the validity of the first premise of the reinforced beliefs argument. It is common knowledge that Al-Qaeda "motivate[s] their members through claims that the West has socially, economically and politically humiliated Islamic society."<sup>79</sup> This leads members of the organization to believe that killing innocent civilians in these western countries, particularly the United States, is morally justified because these innocent civilians are in some way associated with the allegedly humiliating acts that their country has performed. It also seems to be true that this belief is usually the product of deeply held political and/or religious convictions that are not easily manipulated or changed.<sup>80</sup>

As a result of this, it seems fair to conclude, as is posited in the second premise of the argument, that targeting foreigners (especially Muslim aliens) by restricting their liberties more than the rest of the population will reinforce Al-Qaeda's claim that the United States debases Islamic communities. The treatment of the predominantly Muslim aliens detained in Guantánamo Bay presents a case in point. The evidently discriminatory treatment of these detainees only seems to confirm our enemy's claim that we humiliate foreigners, especially Muslims. This, in turn, validates their beliefs about the immorality of our country.<sup>81</sup>

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<sup>79</sup> Peter Fedynsky, *What Motivates a Terrorist?*, VOICE AM., Apr. 13, 2006, [http://www.voanews.com/english/archive/2006-04/Terrorist\\_Motives2006-04-13-voa52.cfm?CFID=104014423&CFTOKEN=17679335](http://www.voanews.com/english/archive/2006-04/Terrorist_Motives2006-04-13-voa52.cfm?CFID=104014423&CFTOKEN=17679335) (last visited Mar. 29, 2008) (discussing an interview with Brad O'Neill, Director, Insurgency Studies at National War College, in Washington, D.C.).

<sup>80</sup> *Id.*

<sup>81</sup> See generally Charles H. Anderton & John R. Carter, *Applying Intermediate Microeconomics to Terrorism*, 37 J. ECON. EDUC. 442 (2006). "Hence, the prisoner abuse scandal can be seen as a form of 'negative



If it is true that inequitably targeting certain groups can lead to a corroboration of the claims of immorality put forth by our enemies, then making use of such measures as a way to combat terrorism might be counterproductive in two ways. First, it might lead to engendering more resolute terrorists who have found in America's use of exclusionary measures an additional reason for attacking the country. Second, it might provide some individuals who previously had no intention of attacking our country with new reasons to believe that the use of force against our nation is morally justifiable.<sup>82</sup>

### C. THE SUBSTITUTION ARGUMENT

Adopting measures that target some groups of people to the exclusion of others presents a further problem which can be illustrated by what I call the "substitution argument." In a nutshell, the substitution argument holds that restricting the liberties of some during times of national emergency does not make us safer because those intent on harming us will readily adapt by looking for people in the non-excluded groups who will help them carry out their plans. The effect of this is that members of the targeted class will be substituted by people who are not being targeted in an attempt to circumvent the precautionary measures undertaken by the country.

The Israeli experience with terrorism lends support to the aforementioned argument. Take, for example, the notorious case of Kozo Okamoto.<sup>83</sup> Okamoto orchestrated a terrorist attack that took place on May 30, 1972, at Israel's Lod Airport in Tel Aviv.<sup>84</sup> After getting off an Air France's flight to Tel-Aviv, Okamoto and his accomplices proceeded to the baggage claim area where they took machine guns and hand grenades from

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advertising' that may have reshaped terrorist preferences toward more terrorism." *Id.* at 450.

<sup>82</sup> JAYNE DOCHERTY, CTR. FOR JUSTICE & PEACEBUILDING, WHAT MOTIVATES THE TERRORIST OR POTENTIAL TERRORIST? (2001), <http://www.emu.edu/cjp/bse/bse-motivates.html> (last visited Mar. 29, 2008) (stating that "[t]he moderation and nonviolence of the sympathizers can change, particularly if the claims listed above are validated by events in the international arena.").

<sup>83</sup> See generally Patricia G. Steinhoff, *Portrait of a Terrorist: An Interview with Kozo Okamoto*, 16 ASIAN SURV. 830 (1976) (recounting Okamoto's Lod Airport terrorist attack).

<sup>84</sup> *Id.* at 830.



their suitcases and opened fire on the people in the terminal.<sup>85</sup> After all was said and done, Okamoto had killed twenty-six innocent civilians, mostly Puerto Rican Christians on their way back from a pilgrimage to sacred sites in Israel.<sup>86</sup> It turned out that Okamoto, who was a member of the Japanese Red Army, was sponsored by the Popular Front for the Liberation of Palestine (“PFLP”).<sup>87</sup> The PFLP obviously decided to sponsor Okamoto and his Japanese co-conspirators in an attempt to avoid raising suspicions about the impending attack. The strategy worked, for Okamoto and his gang attracted little attention before the terrorist acts took place. The Okamoto case exemplifies a paradigmatic instance of substitution, in which the terrorist PFLP successfully managed to take advantage of the fact that Israeli authorities were focusing their counterterrorism efforts on identifying potentially dangerous Middle Eastern men by encouraging people from a different race than the one being targeted by the authorities to engage in acts of terrorism.

The recent rise of terrorist acts perpetrated by women represents another example of how organizations adopt substitution techniques as a way of frustrating governmental attempts to secure their nation by disproportionately burdening people from a particular demographic group. In 2002, for example, the world was surprised when it was confirmed that close to 20 women took part in the taking of 700 hostages in a Moscow theater.<sup>88</sup> That same year, the first female suicide bombers appeared in Israel.<sup>89</sup> The increase in attacks carried out by women is, at least in part, the product of the conscious decision of terrorist organizations to recruit people who are not being targeted by the government in an attempt to sidestep

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<sup>85</sup> *Id.* at 839.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 830.

<sup>88</sup> Alexis B. Delaney & Peter R. Neumann, *Another Failure of Imagination?: The Spectacular Rise of the Female Terrorist*, INT’L HERALD TRIB., Sept. 4, 2004, available at [http://www.iht.com/articles/2004/09/06/edneumann\\_ed3\\_.php](http://www.iht.com/articles/2004/09/06/edneumann_ed3_.php).

<sup>89</sup> *Id.*

preventive security measures. Hence, as it has been pointed out:

After the attacks of Sept. 11, the security measures introduced at airports, train stations and other public places were geared toward the perpetrators of the hijackings. As all the members of the group around Mohammed Atta were young, male and of Middle Eastern origin (as well as appearance), it was little surprise that this became the prototype at which law enforcement agencies around the world were looking most closely. Terror networks like Al Qaeda were quick to spot this vulnerability, and consequently set out to recruit operatives who did not fit the standard description.<sup>90</sup>

The conscious effort made by terrorist networks to employ techniques of substitution as a way to exploit the vulnerabilities of security measures that rely heavily on the targeting of a particular group of people as presumptively dangerous individuals demonstrates the potentially catastrophic shortcomings of such measures. Consequently, as a result of substitution techniques, disproportionately targeting certain demographic groups might make us less safe in the long run.

#### D. THE LEGITIMACY ARGUMENT

Disproportionately targeting certain groups of the population during a time of crisis is also problematic because of what I call the “legitimacy argument.” The following example illustrates the considerations underpinning the argument. Those who have recently taken the New York City subway have probably seen an ad posted in some subway cars by the city’s Metropolitan Transit Authority (“MTA”) that features photographs of a dozen sets of eyes with the headline “There are 16 million eyes in the city. We’re counting on all of them.”<sup>91</sup> According to the MTA, the purpose of the ad is to “remind customers of the need to stay aware of their surround[ing]s and

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<sup>90</sup> *Id.*

<sup>91</sup> Metropolitan Transp. Auth., The MTA Newsroom, MTA Rolls out “The Eyes of New York” ad Campaign, <http://www.mta.info/mta/news/newsroom/eyesecurity.htm> (last visited Mar. 29, 2008).

to report anything suspicious.”<sup>92</sup> Evidently, the point of the message is to stress the fact that cooperation of the city’s residents and visitors with local authorities is vital to ensuring security.

It should be noted, however, that such cooperation can only be expected if the people believe that the government is acting in a legitimate manner. Thus, if local law enforcement authorities are perceived to be acting illegitimately, the prospects for cooperation from subway riders diminish. As Professor Strauss has stated, “the characteristic feature of a claim of illegitimacy is the assertion that, as a moral matter, full obedience [to a governmental act] is not required.”<sup>93</sup> Thus, obedience to authorities and cooperation with the government decreases as the perceived legitimacy of law enforcement agencies diminishes.

Once one accepts that an increase in the perceived illegitimacy of a government augments the probability that the people will not obey authorities, it is easy to see why adopting measures that inequitably burden some groups of people will probably reduce cooperation of the populace with the State. Selectively targeting a group of people will almost inevitably alienate a substantial portion of the targeted population. This makes us less safe because it diminishes the probability that members of the alienated group will cooperate with the police and other law enforcement agencies in their attempts to prevent attacks. The following example provided by Professors Tyler and Fagan explains this phenomenon:

Thinking that one has been stopped by the police because of one’s ethnicity reflects the belief that one has been profiled. This judgment has negative consequences during personal encounters with the police, because it encourages resistance and antagonism, as well as undermining the legitimacy of the police. On the community level, if members of the community believe that profiling is widespread, they are less supportive of the police.

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

<sup>93</sup> David A. Strauss, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1861 (2005).

These profiling effects emerge because people view profiling as an unfair policing procedure.<sup>94</sup>

The pernicious effects of unfairly targeting some social groups as a mechanism for maximizing our security are exacerbated by the fact that the people whose cooperation authorities typically need the most are precisely those who are being targeted. If it is true that those who are being targeted constitute a particularly dangerous group of people, then it should follow that the government should not want to alienate those who are in a particularly privileged position to observe suspicious activity that, if communicated to the police in a timely fashion, might lead to the prevention of attacks on the community.

The abovementioned problem is compounded when one considers that cooperation from other countries, especially Middle Eastern states, which is also essential to our efforts to minimize the occurrence of terrorist attacks in our country, is probably lessened when we make use of the measures that are being critiqued here. The reason for this is that unfairly targeting certain portions of the population breeds anti-American sentiment across the globe, particularly in the countries of origin of those who are targeted the most. In short, adopting measures during times of crisis that unfairly burden a particular group of people emasculates our legitimacy both domestically and internationally. This will, in all probability, hinder our efforts to secure our nation because it will undercut local and foreign cooperation with our government.

## E. THE PRESUMPTION ARGUMENT

I have chosen to dub the last argument that I will advance against the practice of unfairly targeting certain groups of people during times of emergency as “the “presumption argument.” It can be summarized in the following manner:

- (1) Since acts that inequitably burden some groups of people have unquestionable adverse effects on the

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<sup>94</sup> Tom Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in their Communities?* 29 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 06-99, 2006), available at <http://ssrn.com/abstract=887737>.

targeted group, engaging in such acts is presumptively wrong.

(2) Government can justifiably engage in presumptively wrongful conduct if it can demonstrate that the adverse effects of performing the act are offset by the benefits it generates.

(3) An answer to the question about whether the benefits of targeting certain groups of people during times of crisis outweigh the costs is elusive because there is currently no way of meaningfully assigning probabilities to the possible beneficial effects of engaging in such a practice.<sup>95</sup>

(4) Thus, the government cannot justify the practice because it has no way of proving that doing so will have a beneficial effect, whereas there is little doubt that doing so will adversely affect the members of the group being targeted.

The first premise of the argument creates a presumption against adopting measures that inequitably target members of a particular group of people in light of its manifestly adverse effects. Since the negative effects of such acts are well documented, there is no need to go over them in detail here. It suffices to say that engaging in these types of acts surely has the following detrimental effects: (1) it contributes to the stigmatization of the group being targeted;<sup>96</sup> (2) it generates feelings of resentment on the part of the targeted people; and (3) it restricts the rights or benefits of the members of the targeted group. It thus seems sensible to conclude that, in light of the aforementioned considerations, the costs of engaging in these acts are not small or negligible. This should lead us to deem such acts as *prima facie* or presumptively wrongful.

With regard to the second premise, it seems to be obvious that the State should be able to inequitably target certain groups of people only if it can show that doing so is in the best interests of society as a whole. This dovetails with the case law that requires courts to inquire whether a governmental act that discriminates on the basis of race or another of the so-called

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<sup>95</sup> See Steven N. Durlauf, *Racial Profiling as a Public Policy Question: Efficiency, Equity, and Ambiguity 4* (Jan. 6, 2005) (unpublished paper, available at <http://www.ssc.wisc.edu/econ/archive/wp2005-01.pdf>).

<sup>96</sup> GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 9-10 (2002).

suspect classifications is narrowly tailored to advance a compelling state interest. In such cases, the courts are called to balance the negative consequences of discrimination against the positive aspects that the act seeks to produce. If the adverse effects of the conduct are thought to outweigh its potential benefits, the governmental act will be invalidated under the Equal Protection Clause.<sup>97</sup> The contention defended here is similar. As a result of the non-negligible costs of engaging in acts that inequitably target certain groups of people, the State should be required to satisfactorily prove that performing such acts “meets other social goals in a way [that can] overcome [the adverse effects of the act].”<sup>98</sup>

The third premise is grounded on the fact that deciding if the targeting of certain social groups will contribute to achieving a socially desirable outcome is impracticable because there does not currently seem to be a way of adequately quantifying the benefits that such a policy might engender. It is not altogether clear, for example, whether the *en masse* preventive detention of non-citizens carried out by the United States government in the wake of 9/11 has led to any tangible benefits. Since the attacks on the World Trade Center, more than 5,000 aliens have been preventively detained. As of the moment that this article was written, none of those detentions has culminated in the conviction of a person for engaging in a terrorist act.<sup>99</sup> This, of course, does not mean that the detentions have not yielded any benefits. As we all know, it is usually very difficult to prove a negative. It cannot be ruled out that the preventive detention of aliens after 9/11 has spawned non-trivial benefits despite the 0 for 5,000 statistic. However, statistics such as these do appear to highlight the fact that it is very difficult to express in objective terms whether such conduct actually produces positive consequences. Contrarily, quantifiable information tending to

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<sup>97</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (deciding whether the positive effects of a discriminatory act outweighed its adverse consequences).

<sup>98</sup> Durlauf, *supra* note 95, at 6.

<sup>99</sup> COLE, *supra* note 11, at 26. Zacarias Moussaoui was convicted of conspiring to engage in the acts leading up to the attacks of 9/11 in March, 2006. It should be noted, however, that Moussaoui was arrested before the 9/11 attacks and his arrest did not constitute an instance of successful preventive detention post-9/11. *Id.*

demonstrate the ineffectiveness of these strategies abounds. Besides the abovementioned statistic, one could point out that the federal government's "Special Registration Program," which targeted men from Muslim and Arab countries by requiring them to be fingerprinted, photographed and interviewed, has failed to produce a single charge of terrorism related activity even though over 80,000 people were targeted.<sup>100</sup>

If we couple these figures with the reinforced beliefs, substitution and legitimacy arguments discussed in the previous subsections, the benefits of targeting certain groups, whether it is because they are aliens (preventive detention statistic) or because they are part of a particular ethnic group (Special Registration program statistic), are, at the very least, unclear. Consequently, it is fair to state that it cannot be objectively concluded that the benefits of employing such measures outweigh the costs, for although the drawbacks of engaging in such a tactic seem evident, the benefits of doing so do not.

Once we accept the abovementioned premises, the conclusion set forth in (4) should naturally follow. If unfairly targeting certain groups of people is presumptively wrong and the government cannot demonstrate in a meaningful manner that engaging in such an act furthers some other societal goal, the conduct should not be allowed. Since the government should only be permitted to perform prima facie wrongful acts when it can afford reasons that justify the conduct all things being considered, the failure to provide such reasons should lead to a rejection of the practice.<sup>101</sup>

#### IV. THE SECURITY FENCE ACT OF 2006 – A CASE STUDY ON THE PERILS OF THE LEGAL DISCOURSE OF EXCLUSION

The best way to illustrate the arguments advanced in Part III against the judiciousness of adopting measures that inequitably target certain groups during times of crisis is by way of a recent

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<sup>100</sup> *Id.* In the context of targeting outsiders by profiling them, there seems to be a growing consensus about the fact that there are no studies that demonstrate the empirical benefits of profiling. See Durlauf, *supra* note 95, at 4.

<sup>101</sup> Durlauf, *supra* note 95, at 6.



example. Less than a year ago, Congress enacted the Security Fence Act of 2006 (“SFA”), which authorizes the construction of a 700 mile wall along the U.S.-Mexico border.<sup>102</sup> Many lawmakers seem to believe that erecting such a structure will, among other things, minimize the possibility of a terrorist attack because, as U.S. Representative Duncan Hunter (R-CA) has stated, fences “would be a hindrance to terrorists should they decide to come across a land border between the U.S. and Mexico and to California.”<sup>103</sup> The SFA has alienated Mexicans and Latinos both here and abroad, who wonder why the government had specifically chosen to target their border even though the border with Canada is three times longer than the one with Mexico.

The absence of a fence with our friends to the north will likely cause our potential attackers to adapt by attempting to enter our country through Canada instead of Mexico. This constitutes a classic example of substitution techniques that might be used by terrorists as a way to get around measures like the SFA. The foolishness of believing that the SFA will lead to a reduction in terrorism is further highlighted by the fact that none of the people who have attempted to commit acts of terrorism in the United States have come through Mexico, whereas at least one entered the country through the Canadian border.<sup>104</sup>

Construction of the wall could also end up hurting our national security initiatives, for it will likely lead to a deterioration of U.S.-Mexico relations during a time when close collaboration between both countries is critical to waging the war against terror. This fear has been corroborated by the concerns voiced by the two most recent Mexican presidents who

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<sup>102</sup> Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638, § 1 (codified at 8 U.S.C. 1103 (2006)).

<sup>103</sup> Telephone Interview by John Hawkins with Duncan Hunter, Congressman, Former Chairman of the Armed Services Committee, *available at* <http://rightwingnews.com/interviews/duncanhunter.php> (edited transcript).

<sup>104</sup> Matthew B. Stannard, *While Security Fears Stoke Support for Barrier, Wall's Merits for War on Terror are Debatable*, S.F. CHRON., Feb. 26, 2006, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/02/26/MNGTLGQ25E129.DTL>.



have denounced the idea of building a wall to separate the two countries as “shameful,”<sup>105</sup> “deplorable,”<sup>106</sup> and as a mistake akin to the building of the Berlin Wall.<sup>107</sup> Breeding such feelings of resentment amongst the Mexican people could undercut our efforts to secure the nation, since it will likely diminish the perceived legitimacy of American strategies to fight terrorism. If this were to happen, one should expect cooperation of Mexicans and Hispanics with our government to decrease as well. Given that Latinos account for over 15% of the population of the United States, it does not seem like a good idea to enact measures that tend to alienate them.<sup>108</sup> This is especially the case when the benefits of adopting such measures remain unclear.

Since the SFA has both the likelihood of increasing the use of substitution techniques that might encourage potential terrorists to enter the country by crossing the Canadian border and the potential for reducing Hispanic cooperation with law enforcement authorities, it could very well be the case that the law might actually make us less safe. Such is the paradoxical nature of governmental acts that inequitably burden a particular group of people with the alleged purpose of promoting the security of the rest of the population. They tend to achieve exactly the opposite of what was intended by those that promoted their adoption.

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<sup>105</sup> *Mexico's Vicente Fox: U.S. Border Wall Plan “Shameful”*, NEWSMAX.COM, Dec. 19, 2005, <http://archive.newsmax.com/archives/ic/2005/12/19/144336.shtml> (statements made by Ex-President Vicente Fox’s at an event for migrants in Guanajuato).

<sup>106</sup> *Mexico Urges Canada to Help Oppose Border Fence*, CVT.ca, Oct. 26, 2006, [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061026/mexico\\_fence\\_061026/20061026?hub=TopStories](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061026/mexico_fence_061026/20061026?hub=TopStories) (statements between President Felipe Calderón and Canadian Prime Minister Steven Harper).

<sup>107</sup> *Id.*

<sup>108</sup> See Press Release, U.S. Census Bureau, Hispanic Heritage Month 2007: Sept. 15-Oct. 15. (July 16, 2007) available at <http://www.census.gov/Press-Release/www/2007/cbo7ff-14.pdf>.

## CONCLUSION

During the last two hundred years, our government has frequently enacted measures that unfairly burden certain social groups during times of crisis. The historical analysis set forth in Part II of this article reveals that adoption of such measures is usually justified by an appeal to national security. Thus, we have been told that we need to exclude some groups from the full protection of our laws in order to guarantee the safety of the rest of the populace.

I believe that this is a false dichotomy. There is no need to debate whether we should inequitably target certain groups of people as a way to maximize our security because there is no hard evidence tending to prove that doing so will really make us safer. Moreover, it seems that in light of the reinforced beliefs, legitimacy, substitution and presumption arguments advanced in Part III, there is reason to believe that adopting such laws will make us less secure in the long run.