2001

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Recommended Citation

Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 Fordham L. Rev. 2825 (2001).

Available at: <https://ir.lawnet.fordham.edu/flr/vol69/iss6/15>

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UNEQUAL JUSTICE: ARABS IN AMERICA AND UNITED STATES ANTITERRORISM LEGISLATION

*Michael J. Whidden**

Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.¹

INTRODUCTION

In 1995, 168 people were killed and 850 others were injured when the Alfred P. Murrah Building in Oklahoma City was bombed.² It was “the worst terrorist attack and the most egregious mass murder in American history.”³ Two Americans, Timothy McVeigh and Terry Nichols, were charged with and convicted of the crime. To “ensure that there [was] never another Oklahoma City,”⁴ legislators responded by passing the Antiterrorism and Effective Death Penalty

* I would like to thank my wife Christie, who provided me with constant encouragement, interest, and advice, as well as the many others—too numerous to adequately thank here—who assisted in the production of this Note.

1. *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting).

2. *The FBI: A Comprehensive Reference Guide* 95 (Athan G. Theoharis et al. eds., 1999) [hereinafter *The FBI*].

3. Kenneth S. Stern, *A Force upon the Plain: The American Militia Movement and the Politics of Hate* 9 (1996).

4. *Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. (Apr. 27, 1995) (statement of Sen. Arlen Specter, Chairman, Comm. on the Judiciary), available at LEXIS, Federal News Service [hereinafter *Specter Statement*]; see Presidential Statement on Senate Passage of Antiterrorism Legislation, 31 Weekly Comp. Pres. Doc. 993 (June 7, 1995), available at LEXIS, Public Papers of the President (“I am gratified that the Senate has passed a sweeping, bipartisan antiterrorism bill, as I called for in the wake of the bombing in Oklahoma City. This legislation will give law enforcement the tools it needs to do everything possible to prevent this kind of tragedy from happening again.”).

Act of 1996 ("AEDPA").⁵ While it addressed a variety of issues, the legislation was a public response to terrorism.⁶ Its antiterrorism measures, however, effectively function as "draconian immigration law."⁷ At worst, AEDPA does "nothing" to prevent terrorism in general;⁸ at best, it fights international terrorism,⁹ not the domestic terrorism involved in Oklahoma City.

AEDPA's terrorism-related provisions have been harshly criticized as "extraordinary violations of many fundamental rights, including free speech, free association, due process, [and] fair trial."¹⁰ While such critics have attacked the individual provisions of the Act on constitutional grounds,¹¹ this Note seeks to scrutinize AEDPA through the broader notion of "equal justice."¹² Specifically, three of its most controversial provisions¹³ will be discussed.¹⁴ One provision

5. AEDPA is titled as "[a]n Act [t]o deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). Among its various non-terrorism provisions are revision of the process for habeas corpus appeals of state-level criminal convictions in federal courts, including capital punishment cases; requirements for victim restitution by certain criminal offenders; modification of criminal laws concerning nuclear materials and biological and chemical weapons; and requirements for the marking of plastic explosives. See Cong. Info. Serv., C.I.S./Annual 1996—Legislative Histories of U.S. Public Laws 155 (1997), available at LEXIS, CIS Legislative History.

6. See James X. Dempsey & David Cole, *Terrorism & the Constitution: Sacrificing Civil Liberties in the Name of National Security* 114 (1999) (describing the political pressure for antiterrorism legislation that resulted from the Oklahoma City bombing); Richard Lacayo, *Rushing to Bash Outsiders*, Time, May 1, 1995, at 70 (reporting that antiterrorism legislative proposals before the Oklahoma City bombing were "low-profile" and changed to "top priority" afterward).

7. Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 St. Mary's L.J. 833, 839 (1997).

8. Nadine Strossen, *The Current Assault on Constitutional Rights and Civil Liberties: Origins and Approaches*, 99 W. Va. L. Rev. 769, 771 (1997); see also Cato Institute, Cato Handbook for Congress, 105th Congress (1998), at <http://www.cato.org/pubs/handbook/hb105-21.html> (last visited Feb. 19, 2001) ("While the 1995 terrorism bill, one of the most repressive measures ever enacted by the U.S. Congress, was promoted as a response to the Oklahoma City bombing, not a single item in the entire bill would have prevented that heinous crime or assisted in its solution." (emphasis added)).

9. See discussion *infra* Part I.C.1; Lacayo, *supra* note 6 (asserting, before the Oklahoma City culprits were definitely identified, that federal antiterrorism measures pushed in the wake of Oklahoma City were "pointed in the wrong direction" if the act was committed by Americans).

10. Strossen, *supra* note 8, at 787.

11. See generally Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 Geo. Immigr. L.J. 51, 51-52 (1999) (criticizing the secret evidence provision); David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 Sup. Ct. Rev. 203, 246-48 (1999) [hereinafter Cole, *Hanging with the Wrong Crowd*] (criticizing the fundraising provision); Strossen, *supra* note 8, at 786-91 (criticizing various provisions).

12. See discussion *infra* Part I.A.

13. See Akram, *supra* note 11, at 70-71. See generally Johnson, *supra* note 7, at 877 (arguing that AEDPA restricts alien rights in order to preserve the existing social

permits the government to deport "alien terrorists" based on secret evidence.¹⁵ Another provides for the designation of "foreign terrorist organizations,"¹⁶ and it works in tandem with the third provision, which prohibits fundraising intended for such organizations.¹⁷

Arabs¹⁸ in America¹⁹ have been particularly burdened by AEDPA. Of the approximately two dozen immigrants currently detained on

order); Strossen, *supra* note 8, at 787 (arguing that AEDPA authorizes "extraordinary violations of many fundamental rights").

14. Professor Susan Akram has identified another troublesome AEDPA provision. See Akram, *supra* note 11, at 71. Section 411 prevents an individual from being admitted into the United States if he or she was a member of a "foreign terrorist organization, as designated by the Secretary [of State]." AEDPA § 411 (codified at 8 U.S.C. § 1182(a)(3)(B)(i)(V) (1999)). See generally Robert Plotkin, *First Amendment Challenges to the Membership and Advocacy Provisions of the Antiterrorism and Effective Death Penalty Act of 1996*, 10 Geo. Immigr. L.J. 623, 625-26 (1996) (criticizing AEDPA's provision for excluding and deporting aliens because of their membership in a foreign terrorist organization or advocacy of terrorism). Because there appears to have been few, if any, noteworthy cases involving the deportation of an alien solely based on his membership, however, this Note will focus on the secret evidence and fundraising prohibitions. See Telephone Interview with Kareem Shora, Esq., Legal Advisor, American-Arab Anti-Discrimination Committee (Jan. 19, 2001) (stating that he was not aware of people being deported solely based on their membership with a "foreign terrorist organization").

15. Section 401 of AEDPA amended the Immigration and Nationality Act ("INA") by creating a removal court for "alien terrorists" in which "[t]he judge shall examine, ex parte and in camera, any evidence for which the Attorney General determines that public disclosure would pose a risk to the national security of the United States or to the security of any individual because it would disclose classified information." AEDPA § 401 (codified at 8 U.S.C. § 1534 (e)(3)(A)). An "alien terrorist" is "[a]ny alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity," which may include an act that merely "affords material support to [any person or group]... conducting a terrorist activity." AEDPA § 401 (codified at 8 U.S.C. §§ 1531(1), 1227(a)(4)(B), 1182(a)(3)(B)(iii)).

16. Section 303 states that a person who "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than ten years, or both." AEDPA § 303 (codified at 18 U.S.C. § 2339B(a)(1) (2000)).

17. Section 302 amended the INA by providing for the designation of "foreign terrorist organization[s]" by the Secretary of State for two year periods. A group may be designated as such "if the Secretary finds that (A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in 8 U.S.C. § 1182(a)(3)(B)); and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States." AEDPA § 302 (codified at 8 U.S.C. § 1189(a)(1) (Supp. V 2000)).

18. "Arab" generally refers to peoples from the Arabic-speaking nations of Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, the United Arab Emirates, Yemen, and portions of Somalia and Djibouti, as well as Palestinians. Michael W. Suleiman, *Introduction: The Arab Immigrant Experience*, in *Arabs in America: Building a New Future* 1, 1 (Michael W. Suleiman ed., 1999); see also Albert Hourani, *A History of the Arab Peoples* 478-79 (Warner Books 1992) (1991) (identifying all members of the League of Arab States (the "League")). The League is a group formed in 1945 to encourage and formalize Arab unity. See *id.* at 355-56. The membership list is identical to those Arab nations identified by Michael Suleiman. See Suleiman, *supra*, at 1. But see Suad Joseph, *Against the Grain of the Nation—The*

secret evidence, almost all are either Arab or Muslim.²⁰ Of the twenty-eight "foreign terrorist organizations" designated by the Secretary of State in 1999, half are either Muslim or Arab.²¹ These burdens have been imposed despite the fact that Arabs have been responsible for very few terrorist attacks on American soil.²² This Note places the Arab experience in the context of American history, where society has repeatedly targeted and stigmatized immigrant groups and ethnic minorities, and contends AEDPA is a modern example of such discrimination. Specifically, AEDPA violates the principle of "equal justice" by unjustly stigmatizing Arab people in America. "Equal justice," as derived from ancient philosophy and American constitutional principles, demands equal treatment of the law to prevent stigmatization of certain groups and guarantee their optimal contribution to society.²³

Part I places AEDPA in an appropriate historical context. It defines a principle of "equal justice" consistent with ancient Greek

Arab-, in Arabs in America, *supra*, 257, 260 (arguing that it is impossible to find an agreed definition for "Arab"). This Note will also consider Iran as an Arab nation because discrimination against Iranian-Americans during the 1979 hostage crisis has been considered the first prominent example of anti-Arab bias. See *infra* text accompanying notes 194, 287. Although Turkey, in its previous incarnation as the Ottoman Empire, extended to much of the Arab world, see Hourani, *supra*, at 472-75, it will not be considered Arab for the purposes of this Note since it is not a member of the League.

19. This Note will use the term "Arab" to refer to either American citizens of Arab descent (i.e., Arab Americans) or Arab people present in the United States without citizenship. Collectively, the groups will be referred to as "Arabs in America."

20. Susan Aschoff, *Bail Is Granted in Secret Evidence Case*, St. Petersburg Times, Dec. 7, 2000, at 1A [hereinafter Aschoff, *Bail is Granted*].

21. The fourteen Arab or Muslim groups are al Qa'ida, Abu Nidal Organization, Abu Sayyaf Group, Armed Islamic Group, Gama'a al-Islamiyya, Hamas, Harakat ul-Mujahideen, Hizballah, al-Jihad, Mujahedin-e Khalq Organization, Palestine Islamic Jihad—Shaqi Faction, Palestine Liberation Front—Abu Abbas Faction, Popular Front for the Liberation of Palestine, and Popular Front for the Liberation of Palestine-General Command. See Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112 (Oct. 8, 1999) [hereinafter Designation of Foreign Terrorist Organizations]; U.S. Dep't of State, Patterns of Global Terrorism: 1998, in 17 Terrorism: Documents of International and Local Control 165, 238-67 (Yonah Alexander & Donald J. Musch eds., 1999) [hereinafter 1998 Global Terrorism Report] (describing the activities and areas of various international terrorist groups). In comparison, there are two Israeli groups (Kach and Kahane Chai), two Japanese groups (Aum Shinrikyo and Japanese Red Army), two Turkish groups (Kurdistan Workers' Party and Revolutionary People's Liberation Party/Front), two Colombian groups (National Liberation Army and Revolutionary Armed Forces of Colombia), two Greek groups (Revolutionary Organization 17 November and Revolutionary People's Struggle), two Peruvian groups (Shining Path and Tupac Amaru Revolutionary Movement), one Spanish group (Basque Fatherland and Liberty), and one Sri Lankan group (Liberation Tigers of Tamil Eelam). See Designation of Foreign Terrorist Organizations, *supra*; 1998 Global Terrorism Report, *supra*, at 238-67.

22. *Infra* text accompanying note 24; discussion *infra* Part II.A-B.

23. *Infra* text accompanying notes 52-53.

thought and American constitutional ideals. This part also discusses the historical basis of inequality in America, and it presents AEDPA as a continuation of that unfortunate tradition. Part II examines the sources of terrorism in the United States by both international and domestic groups. Of the eighty-seven terrorist incidents in the United States from 1984 to 1998, only one other act of terrorism, besides the World Trade Center ("WTC") bombing, was tied to an Arab group.²⁴ In contrast, during the same period, numerous terrorist acts and potential acts were tied to domestic and extreme right-wing groups.²⁵ Part II then describes anti-Arab bias in the United States over the last thirty years. This ingrained attitude is consistent with the American inclination to target foreign minorities in a time of crisis. This part also considers the impact of unconscious racial bias in the criminal justice system, where prosecution of the 1990s' two most notorious terrorist bombings indicated that Arabs, as opposed to domestic terrorists, were the more dangerous threat.

Part III argues that AEDPA's enforcement directly stigmatizes Arabs and indirectly encourages societal discrimination. Together, the two effects violate "equal justice" by affecting Arab self-esteem and disabling their political, social, and economic participation in, and contributions to, American society. Part III suggests a number of corrective measures including revising the foreign terrorist organization designation process, government tracking of anti-Arab hate crimes, and the adoption of two pending proposals that repeal the use of secret evidence and restrict the investigative excesses of the government. It concludes by asserting that society must achieve equal

24. For the total number of terrorist incidents in the United States as well as those linked to domestic and international groups, see Counterterrorism Threat Assessment and Warning Unit, U.S. Dep't of Justice, *Terrorism in the United States: 1998*, at 23, available at <http://www.fbi.gov/library/terror/terr98.pdf> [hereinafter 1998 U.S. Terrorism Report] (listing, for 1990 through 1998, thirty terrorist incidents including two tied to international groups); FBI, *Terrorism in the United States: 1993*, in 9 *Terrorism: Documents of International and Local Control* 431, 445-46 (Howard S. Levie ed., 1996) (indicating, for 1989, four terrorist incidents, and noting that *no acts of international terrorism occurred in the United States from 1984 through 1992*); Terrorist Research and Analytical Center, FBI, *Terrorism in the United States: 1988*, in *The 1988-89 Annual on Terrorism* 39, 50 (Yonah Alexander & Abraham H. Foxman eds., 1990) (listing, for 1987 and 1988, sixteen terrorist incidents); Terrorist Research and Analytical Center, FBI, *Analysis of Terrorist Incidents in the United States: 1986*, in *The 1987 Annual on Terrorism* 191, 201 (Yonah Alexander & Abraham H. Foxman eds., 1989) (listing, for 1984 through 1986, thirty-seven terrorist incidents). The terrorism records relied upon here are those which are publicly available because the author did not have access to classified information maintained by the Justice or Defense Departments.

25. See, e.g., discussion *infra* Part II.B.1-2 (detailing extreme right-wing terrorist activity which included, *inter alia*, the mid-1980s crime spree of The Order; two 1993 pipe bombings in the state of Washington; a 1995 conspiracy to use a biological weapon in Minnesota; a 1996 conspiracy to blow up several federal buildings in West Virginia; and 1997-98 bombings of women's health clinics).

justice for Arabs in America and, more importantly, for all Americans.

I. THE DISPARITIES OF EQUAL JUSTICE

A. *The Ideals of "Equal Justice"*

Although there are many relevant definitions of "equal justice," this Note identifies two in particular: first, a theoretical understanding of "equal justice" as originated in classical Greek antiquity and, second, the American conception of "equal justice" which is inextricably tied with, and given substance by, the constitutional guarantee of "equal protection of the laws."²⁶ This Note will primarily rely on the latter understanding because it is substantively recognized in American jurisprudence. As will be illustrated, however, American "equal justice" also assures the more abstract classical "equal justice."

"Justice" is a common, yet difficult to define, word. Its definition can be circular,²⁷ relativistic,²⁸ or uninspiring.²⁹ Eric Rakowski adopted Aristotle's definition that "justice is some kind of equality,"³⁰ but limited his notion of "justice" to equality of "resources and opportunities."³¹ Antiquity offered a similar focus upon opportunity. In the Socratic dialogues of *Plato's Republic*, Socrates contended that in a just society "everyone must pursue [the] occupation . . . for which his nature best fitted him."³² Attainment of this natural position ought not be thwarted or affected by, for example, wealth or the mob.³³ Justice, in other words, is the realization and fulfillment of one's natural abilities. An unjust society will undermine and prevent such accomplishment.

What, however, is "equality?" It can simply be defined as the state of being "identical."³⁴ Thus, "equal justice" ensures that people have identical opportunities to realize and fulfill their natural abilities. Understanding this classical principle is not merely academic because, as Gordon Wood observed, both the Founding Fathers and Revolutionary America in general had a "compulsive interest in the ancient republics [that] was . . . crucial to their attempt to understand

26. U.S. Const. amend. XIV, § 1, cl. 4.

27. Justice is "the maintenance . . . of what is just." Webster's Ninth New Collegiate Dictionary 655 (1988) [hereinafter Webster's Dictionary].

28. Justice is "the quality of conforming to law," whatever that law may be. *Id.*

29. Justice is "the administration of law." *Id.*

30. Eric Rakowski, *Equal Justice* 1 (1991) (quoting Aristotle, *Politics* 1282 b18).

31. *Id.* (describing that justice focuses upon fortune and the equality thereof).

32. Plato, *The Republic* 97-98 (G.M.A. Grube trans., Hackett Publishing Co. 1974).

33. *Id.* at 99.

34. See Webster's Dictionary, *supra* note 27, at 420.

the moral and social basis of politics."³⁵ The Founders wrestled with the principles of Plato and Aristotle, among other epic thinkers, in formulating their governmental experiment.³⁶ Although classical thought does not bind American constitutional principles, it casts a profound light on them.

Equal justice in America more narrowly focuses on how people are treated by the law,³⁷ which is reflected in the heralded words inscribed on the United States Supreme Court building: "Equal Justice Under Law."³⁸ Indeed, the principle of equality "is one of the great themes" in American culture.³⁹ As Kenneth Karst has written, "From the Declaration of Independence to the pledge of allegiance, the rhetoric of equality permeates our symbols of nationhood. Over and over in our history, from the earliest colonial beginnings, equality has been a rallying cry, a promise, an article of national faith."⁴⁰

Discussion of equality centers upon the post-Civil War Fourteenth Amendment and Equal Protection Clause,⁴¹ yet the notion of equality has evolved throughout American history.⁴² The Declaration of Independence righteously asserted the "self-evident" truth that "all men are created equal,"⁴³ but the proposition was only applicable to white men.⁴⁴ The Civil War was imbued with "egalitarian rhetoric,"⁴⁵ which became entrenched in the Fourteenth Amendment's guarantee that no State shall "deny to any person . . . the equal protection of the laws,"⁴⁶ including non-whites in the rhetoric for the first time.⁴⁷ Later,

35. Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 50 (W.W. Norton & Co. 1972) (1969).

36. *Id.* at 8.

37. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 119-20 (1976) (stating that "equal justice" prohibits adjudicators from considering "certain irrelevant characteristics," like race or wealth, of people who appear before the court).

38. Kenneth L. Karst, *Why Equality Matters*, 17 Ga. L. Rev. 245, 247 (1983) [hereinafter Karst, *Why Equality Matters*].

39. Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution 1* (1989) [hereinafter Karst, *Belonging to America*].

40. *Id.*

41. See Karst, *Why Equality Matters*, *supra* note 38, at 247 ("[T]he equality that matters in our Supreme Court is not the simple abstraction that likes should be treated alike. It is the equality guaranteed in the equal protection clause of the fourteenth amendment and elsewhere in the Constitution.").

42. For recent evolution of the concept of equality, compare Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 344 (1949) (stating that equality required that "those who are similarly situated be similarly treated") with Karst, *Why Equality Matters*, *supra* note 38, at 249 (stating that equality, as a substantive constitutional right, is "the right not to be stigmatized by the organized community.").

43. The Declaration of Independence para. 2 (U.S. 1776).

44. See J. R. Pole, *The Pursuit of Equality in American History* 5 (2d ed. rev'd 1993).

45. Karst, *Why Equality Matters*, *supra* note 38, at 270.

46. U.S. Const. amend. XIV, § 1, cl. 4.

47. See Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law* 628 (13th ed.

the struggle for equality resurfaced in the twentieth century's civil rights movement.⁴⁸ At the core of the Fourteenth Amendment is "the presumptive right 'to be treated by the organized society as a respected, responsible, and participating member.'"⁴⁹ The principle of "equal citizenship" thus prohibits stigmatizing members of society,⁵⁰ thereby protecting self-respect and encouraging personal aspirations.⁵¹

These protective concerns dovetail with the rationale underlying ancient "equal justice."⁵² The American principle mandates that the law does not stigmatize people and therefore prevents the state from impeding individual or group accomplishment. The ancient principle goes beyond this negative rule to affirmatively assert that people must have equal opportunity to realize their potential, which, in effect, provides the rationale for "equal protection of the laws."⁵³

When free from stigma, one shares more fully in the public life⁵⁴ and fulfills the obligations of a citizen to, for example, obey the law and care for oneself.⁵⁵ By preventing stigmatization, society empowers people to achieve within the polity. As a full participant, an individual can realize his or her potential; he or she can attain a natural, or optimal, position in society. Further, it reinforces self-respect within minority groups,⁵⁶ which encourages cultural identity and group membership.⁵⁷ These dynamics, however, do not merely benefit minority group members but rather serve "important roles in supporting a vibrant community and society" empowered to contribute to the polity.⁵⁸ Thus, equality is essential not just to benefit the minority groups it protects, but to benefit the entire democracy.

Additionally, "equal justice" ensures the proper functioning of the American democracy by protecting "discrete and insular minorities" against the prejudice⁵⁹ which "distorts reality."⁶⁰ By eliminating this

1997).

48. See Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 Wm. & Mary L. Rev. 1, 2 (1988).

49. Karst, *Why Equality Matters*, *supra* note 38, at 247-48.

50. Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 6 (1977) [hereinafter Karst, 1976 Term Foreword].

51. See *id.* at 6-7; see also Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 Ind. L.J. 119, 127 (1997).

52. See *supra* text accompanying notes 32-33.

53. U.S. Const. amend. XIV, § 1, cl. 4.

54. Karst, 1976 Term Foreword, *supra* note 50, at 9.

55. *Id.* at 9-10.

56. See Yang, *supra* note 51, at 127, 133-34.

57. See *id.* (noting that discrimination and exclusion affect race and religion, qualities which "are indicative of an individual's self-identity and sense of belonging to a particular cultural community").

58. *Id.* at 133.

59. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

60. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 153 (1980).

distortion, various groups are able to recognize their "overlapping interests"⁶¹ and not be blinded by irrational hostilities toward a racial minority.⁶² The political system thereby avoids the "violence of faction" that James Madison considered the propensity of popular government—a vice which results in the "mortal diseases" of "instability, injustice, and confusion."⁶³

B. *The Reality of "Unequal Justice"*

Despite the ever-present theme of equality, inequality has existed throughout American history for many visible minorities and foreign-born residents and citizens.⁶⁴ The compromises reached at the Constitutional Convention to ensure that southern states joined the Union illustrate the fledgling nation's equivocal commitment to equality.⁶⁵ The most portentous compromises were the continuation of African slavery, the twenty-year postponement of the termination of the slave trade, and the valuation of each African as merely three-fifths of a person for representational purposes.⁶⁶ Eighty years later, the United States Supreme Court found it "absolutely certain" that the Founding Fathers neither included nor contemplated inclusion of the "African race" under the meaning of citizen.⁶⁷ Stephen Douglas, during the Lincoln-Douglas debates, shared this view and unambiguously extended it to all other races.

[A] negro is not and never ought to be a citizen of the United States. I hold that this Government was made on the white basis by white men, for the benefit of white men and their posterity forever, and should be administered by white men and none others. . . . [T]he signers of the Declaration[,] . . . when they declared all men to be created equal . . . desired to express by that phrase white men, men of European birth and European descent, and had no reference either to the negro, the savage Indians, the Fejee [sic], the Malay, or any other inferior and degraded race⁶⁸

61. *Id.*

62. *Id.* ("Race prejudice divides groups that have much in common (blacks and poor whites) and unites groups (white, rich and poor) that have little else in common than their antagonism for the racial minority.") (quoting Frank Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 Cal. L. Rev. 275, 315 (1972)).

63. The Federalist No. 10, at 45 (James Madison) (Clinton Rossiter ed., 1961).

64. Arabs in America are both new arrivals to the nation and a visible minority. Because they are implicated by AEDPA as immigrants, however, this section will briefly address discrimination against both such groups and focus on discrimination against those who are foreign-born.

65. See Karst, *Belonging to America*, *supra* note 39, at 48.

66. *Id.*

67. *Dred Scott v. Sandford*, 60 U.S. 393, 423 (1856).

68. Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 Mich. L. Rev. 604, 605-06 (1983) (quoting Speech of Stephen A. Douglas at Jonesboro (Sept. 15, 1858), in *Political Debates Between Hon. Abraham Lincoln and*

Still one century later, Jim Crow laws continued to consign African Americans to a subordinate status.⁶⁹

While the story of African Americans provides the most prominent example of discrimination against visible minorities, other groups have also been subordinated based on their foreignness and perceived disloyalty. As Natsu Taylor Saito explained, "[t]he American identification of foreign origins with *disloyalty* to the United States . . . has been a prominent theme throughout American legal history."⁷⁰ In the nation's early years, the Alien Enemies Act of 1798,⁷¹ in conjunction with the Sedition Act of 1798,⁷² was enforced primarily against foreigners who criticized the government.⁷³

In the nineteenth century, the United States opened its borders to Chinese immigration, which provided cheap, flexible labor for the growing nation.⁷⁴ Because of anti-alien sentiment⁷⁵ and pervasive stereotypes of the Chinese, however, restrictive immigration laws were eventually passed. For example, an 1875 federal statute prohibited immigration by criminals and prostitutes, which were widespread stereotypes of the Chinese.⁷⁶ The Chinese were also perceived as racially inferior. In 1876, a congressional committee reported: "There is not sufficient brain capacity in the Chinese race to furnish motive power for self-government. Upon the point of morals, there is no Aryan or European race which is not far superior to the Chinese."⁷⁷ Five years later, as the need for cheap labor subsided,⁷⁸ the Chinese Exclusion Act of 1882 explicitly excluded Chinese from immigration to the United States⁷⁹ and continued to do so for sixty-

Hon. Stephen A. Douglas 116 (1860)).

69. See Karst, *Belonging to America*, *supra* note 39, at 64-69.

70. Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 Or. L. Rev. 261, 278 (1997) (emphasis added) (quoting Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 Wm. & Mary L. Rev. 805, 855 (1994)).

71. "The Alien Enemies Act of 1798 allowed the President, in his discretion, to seize and summarily deport an alien . . ." Saito, *supra* note 70, at 278.

72. The Sedition Act of 1798 made it a crime to strongly criticize government officials. *Id.* at 279.

73. *Id.*

74. Foreign labor was considered desirable because it kept the labor force divided by ethnicities, it was a bargaining chip when American labor demanded higher pay and better working conditions, and it was an easily controllable labor source which could simply be let go when production demands eased. *See id.* at 298-99.

75. Anti-alien fervor took root in the western United States after the Panic of 1873, the Depression of 1877, and a contemporaneous drought. *See id.* at 299.

76. *Id.* at 299-300.

77. Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 Law & Soc. Inquiry 1, 4 (2000).

78. Saito, *supra* note 70, at 299 (describing the declining demand for Chinese labor as the transcontinental railroad was completed, the Gold Rush ended, and economic crises hit the country).

79. Chinese Exclusion Act, ch. 126, § 1, 22 Stat. 58, 59 (1882) (repealed 1943) ("[T]he coming of Chinese laborers to the United States . . . is . . . suspended; and

one years.⁸⁰ Although the legislation had resulted from a treaty with China, in 1884 Congress expanded the prohibition to anyone of Chinese descent.⁸¹ Three subsequent Supreme Court cases concerning the Exclusion Act affirmed the "foreignness" stigma attached to Chinese.⁸² They were considered outsiders threatening to overwhelm the nation and endanger stability.⁸³

During this time, California state and local authorities also subjected the Chinese to unequal treatment.⁸⁴ In 1876, the state sought to impress its anti-Chinese sentiment upon the nation by issuing a report to Congress entitled "An Address to the People of the United States upon the Evils of Chinese Immigration."⁸⁵ The landmark case, *Yick Wo v. Hopkins*, recounted a San Francisco ordinance which made it a misdemeanor to operate a laundry without the consent of a municipal board unless the laundry's building was made of brick or stone.⁸⁶ Evidence showed that more than 150 Chinese citizens were arrested for operating a laundry in a wooden building while none of the non-Chinese operators in wooden buildings were arrested.⁸⁷ Additionally, the board denied permission to

during such suspension it shall not be lawful for any Chinese laborer to come, or, having so come after [enactment][.] . . . to remain within the United States.").

80. See Saito, *supra* note 70, at 300.

81. See Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. Rev. 1689, 1697-98 (2000); Act of July 5, 1884, ch. 220, § 15, 23 Stat. 115, 118 (1884) (repealed 1943) ("[T]he provisions of [the Chinese Exclusion Act] shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power."). The Exclusion Act's ambiguity was revealed in a Massachusetts case where the court refused to apply the legislation to a British subject born in Hong Kong and of Chinese ancestry because it considered "Chinese" a political, not racial, term. See Gotanda, *supra*, at 1697-98 (citing *United States v. Douglas*, 17 F. 634 (C.C.D. Mass. 1883)).

82. See Gotanda, *supra* note 81, at 1698-1701 (comparing *Chew Heong v. United States*, 112 U.S. 536 (1884); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)). In *Fong Yue Ting*, the Court found

After some years' experience . . . the government of the United States was brought to the opinion that the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests . . .

Id. at 1701 (quoting *Fong Yue Ting*, 149 U.S. at 717).

83. See Gotanda, *supra* note 81, at 1699-1701.

84. See Calavita, *supra* note 77, at 4 ("Since the early 1850s, a virulent anti-Chinese movement in California . . . had produced numerous state and municipal laws aimed at restricting participation of the Chinese in certain industries and controlling Chinese immigration to that state." (citations omitted)).

85. *Id.*

86. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

87. *Id.* at 359.

continue business to 201 Chinese petitioners while granting permission to all but one non-Chinese.⁸⁸

The internment of over 110,000 Japanese Americans during World War II⁸⁹ provides the most recent and chilling example of unequal treatment of a foreign group in the United States. "Few episodes in American history," Peter Irons wrote, "have been as widely condemned."⁹⁰ As early as 1945, Eugene Rostow criticized the Japanese internments in *The Yale Law Journal* as "the worst blow our liberties have sustained in many years."⁹¹ Starting in 1942, Japanese Americans were confined behind the barbed wire of internment camps spread from Arkansas swamps to California deserts.⁹² After Japan's surrender in 1945, it took almost an entire year for some internees to finally be released.⁹³

The road to internment began in February 1942 when President Roosevelt granted authority to Henry Stimson, then Secretary of War, to establish military zones "from which any or all persons" could be excluded.⁹⁴ By the end of the year, almost all Japanese Americans on the West Coast, pursuant to military orders, were removed to internment camps.⁹⁵ The Supreme Court, in the landmark case of *Korematsu v. United States*, upheld internment as constitutional based on the following rationale:

[Toyosaburo Korematsu] was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.⁹⁶

Contrary to the military's estimates of danger, however, racial prejudice was the "dominant factor" in the decision to intern.⁹⁷

88. *Id.* at 359, 374. The United States Supreme Court ultimately found that such treatment was unconstitutional because it violated the equal protection clause. *See id.* at 374; *see also* Amy Grossman Applegate, *Prosecutorial Discretion and Discrimination in the Decision to Charge*, 55 Temple L.Q. 35, 41-42 (1982) (discussing *Yick Wo v. Hopkins*).

89. Peter Irons, *Justice at War*, at vii (1983).

90. *Justice Delayed: The Record of the Japanese American Internment Cases*, at ix (Peter Irons ed., 1989).

91. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489, 490 (1945).

92. Irons, *supra* note 89, at vii, 7.

93. *Id.* at 7.

94. *Id.*

95. *Id.*

96. *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (emphasis omitted).

97. Rostow, *supra* note 91, at 496. Professor Rostow noted that labor leaders,

Indeed, there was little, if any, justification for targeting the Japanese as a threat.⁹⁸ No person of Japanese ancestry had ever been convicted for sabotage or espionage as a Japanese agent⁹⁹ whereas many Caucasian persons were.¹⁰⁰ Congressional testimony by General John L. Dewitt, who played a "central role" in the decision to intern,¹⁰¹ illustrates the virulent prejudice behind the internment decision.

[There is] development of a false sentiment on the part of certain individuals and some organizations to get the Japanese back on the west coast. *I don't want any of them here. They are a dangerous element.* There is no way to determine their loyalty . . . The danger of the Japanese was, and is now—if they are permitted to come back—espionage and sabotage. *It makes no difference whether he is an American citizen, he is still a Japanese.* American citizenship does not necessarily determine loyalty . . . You needn't worry about the Italians at all except in certain cases. Also, the same for the Germans except in individual cases. But *we must worry about the Japanese all the time until he is wiped off the map.*¹⁰²

Notably, Italian and German nationals living in the United States were not interned¹⁰³ while Japanese were, even if they were American citizens. Additionally, the nation's policy did not actually protect against the one threat that had struck American soil—Japan. The bombing of Pearl Harbor, Hawaii, showed that territory was vulnerable in its proximity to Japan. The 160,000 Hawaiian Japanese residents, however, were not interned *en masse*.¹⁰⁴ Moreover, forty-three percent of the Japanese interned on the West Coast were under

"one of the strongest anti-Japanese groups in [the] West Coast," led resistance to prevent returning Japanese to their homes. *Id.* at 501 n.35; see also Irons, *supra* note 89, at 9-13 (discussing the anti-Japanese sentiment that had existed in the West since the end of the nineteenth century).

98. See Rostow, *supra* note 91, at 496-97; see also Irons, *supra* note 89, at 53-54 (describing the Attorney General's conversation with President Roosevelt in which he contended that the Army offered no reason to justify mass evacuation).

99. Justice Delayed, *supra* note 90, at 105 (citing a 1982 report that there was "not a single documented act of espionage, sabotage or fifth column activity . . . committed by an American citizen of Japanese ancestry or by a resident Japanese alien on the West Coast").

100. Rostow, *supra* note 91, at 497.

101. See Irons, *supra* note 89, at 25.

102. Rostow, *supra* note 91, at 531-32 (quoting *Hearings Before Subcomm. of House Comm. on Naval Affairs on H. R. 30*, 78th Cong., 1st Sess. 739-40 (1943)) (emphasis added).

103. See Justice Delayed, *supra* note 90, at 105; see also Rostow, *supra* note 91, at 508 (noting that there were 690,000 Italians and 314,000 Germans living in the United States at the time of the exclusion orders). While Professor Rostow did not clearly state that his figures concerned Italian and German nationals, the fact that there were more than eight million people of German descent living in the United States in 1917 leads to the conclusion that his numbers concerned only those of Italian and German citizenship. See Justice Delayed, *supra* note 90, at 119.

104. Rostow, *supra* note 91, at 494.

fifteen years of age or older than fifty,¹⁰⁵ certainly not the typical ages for a saboteur.

Many, if not most, Americans probably consider themselves beyond treating others with such overt unequal treatment, or "first-order" discrimination, whereby a group is excluded because of its race or ethnicity.¹⁰⁶ While many believe that society has moved beyond such inequality, however, a new "second-order" discrimination manifests itself under "facially innocent criteria."¹⁰⁷ A law may discriminate in the purpose of its enactment and enforcement, rather than on its face.¹⁰⁸ More generally, people may discriminate based on the "unconscious racism" which pervades all of American society.¹⁰⁹ Charles Lawrence described the inculcation of such racism:

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.¹¹⁰

Thus, discrimination against a group may exist without any intent to treat that group differently because of their race.

The case of Wen Ho Lee offers a current example of unconscious racism.¹¹¹ The United States government investigated Lee, an

105. *Id.* at 507 (citing U.S. Army, Western Defense Command, Final Report, Japanese Evacuation from the West Coast, 1942 (1943, released 1944)).

106. *See* Fiss, *supra* note 37, at 170-71.

107. *Id.* at 171; *see also* James Waller, *Face to Face: The Changing State of Racism Across America* 6 (1998) ("Like a clever virus, old-fashioned racism responded to the escalation of tolerant social and legal reforms by mutating into more subtle, covert, and socially acceptable modern forms of racism.").

108. *Cf.* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 318-21 (1987) (objecting to the doctrine of discriminatory purpose that a plaintiff must satisfy to challenge the discriminatory effect of a "facially neutral law" because it requires proof of discriminatory purpose and supporting, alternatively, the view that disproportionate impact of a law should trigger constitutional protections).

109. *See id.* at 329-44.

110. *Id.* at 322.

111. *See* Gotanda, *supra* note 81, at 1690-91 (contending that "the case against Wen Ho Lee [was] about race" and exemplified "racial profiling"). For a summary of the Lee case, *see* Matthew Purdy, *The Making of a Suspect: The Case of Wen Ho Lee*, N.Y. Times, Feb. 4, 2001, at A1 and Matthew Purdy & James Sterngold, *The Prosecution Unravels: The Case of Wen Ho Lee*, N.Y. Times, Feb. 5, 2001, at A1, a two-part series reviewing the development and resolution of the Wen Ho Lee case.

American scientist born in Taiwan, for stealing nuclear secrets that government experts contended were the "crown jewels" of the nuclear weapons program.¹¹² The investigation, begun in 1995, resulted in a fifty-nine count indictment accusing Lee of mishandling classified information to benefit a foreign nation based on his downloading of nuclear weapon secrets to ten computer tapes.¹¹³ Before trial, prosecutors imprisoned Lee in solitary confinement, shackled for nine months, on the grounds that he "could cause the loss of 'hundreds of millions of lives.'"¹¹⁴

Asian American groups and the American Civil Liberties Union charged that the scientist was unfairly singled out because of his Chinese ancestry.¹¹⁵ Indeed, government intelligence officials had asserted that it was appropriate to place Asian Americans under special scrutiny because Chinese spies focused their recruiting efforts on them.¹¹⁶ While one may defend such heightened monitoring as a means to protect sensitive nuclear secrets, investigators prosecuted Lee when "a lot of Caucasians" behaving similarly were not charged.¹¹⁷ Moreover, some experts contended that the information Lee had downloaded was insignificant, certainly not of the sensitivity maintained by the government.¹¹⁸

The question of discriminatory prosecution grew so prominent that the judge ordered prosecutors to turn over thousands of pages of documents so that he could assess the possibility of selective

112. James Sterngold, *U.S. to Reduce Case Against Scientist to a Single Charge: Surprise Plea Bargain*, N.Y. Times, Sept. 11, 2000, at A1.

113. James Sterngold, *Nuclear Scientist Set Free After Plea in Secrets Case; Judge Attacks U.S. Conduct*, N.Y. Times, Sept. 14, 2000, at A1 [hereinafter Sterngold, *Nuclear Scientist Set Free*].

114. *Id.*

115. Joint Press Statement by Asian Pacific American Organizations Regarding Wen Ho Lee (Dec. 16, 1999), available at <http://www.ocaatl.org/jpr.htm>; James Sterngold, *Judge Orders U.S. to Turn Over Data in Secrets Inquiry: A Prosecution Setback*, N.Y. Times, Aug. 30, 2000, at A1 [hereinafter Sterngold, *Judge Orders U.S.*].

116. Sterngold, *Nuclear Scientist Set Free*, *supra* note 113.

117. William J. Broad, *Bias Seen in Spy Case*, N.Y. Times, Aug. 22, 1999, §4 (Week in Review), at 2 (quoting the former head of counterintelligence at Wen Ho Lee's lab as stating that "[a] lot of Caucasians with equivalent access to secrets and trips to China were not investigated" (internal quotes omitted)).

118. James Risen & Jeff Gerth, *U.S. Says Suspect Put Code On Bombs in Unsecure Files*, N.Y. Times, Apr. 28, 1999, at A1 ("[O]ne American scientist said the codes and accompanying data [transferred by Lee] were not, by themselves, sufficient to produce an exact copy of an American weapon."); James Sterngold, *Defense Argues Ethnicity Made Scientist a Suspect*, N.Y. Times, Aug. 16, 2000, at A20. *The New York Times* reported:

The defense has affidavits from a former director of the Los Alamos National Laboratory and other experts arguing that much of what Dr. Lee downloaded . . . was either already available publicly or would be of modest use or none to most countries, and was not even given a secret classification until after Dr. Lee had been fired . . .

Id.

prosecution.¹¹⁹ The actual weakness of the government's case, as well as the exaggeration of the charges against Lee that had justified his harsh pre-trial confinement, were exposed¹²⁰ when prosecutors agreed to drop all but one charge in a plea deal, which resulted in a sentence of time served in exchange for Lee's cooperation with investigators.¹²¹ After Lee's release, President Clinton expressed his own misgivings about Lee's possibly inflated indictment.¹²²

The fact that the President joined the presiding judge in questioning the prosecutors' case suggests that they both suspected the government's investigation of the Taiwanese American was rooted in more than just facts. Indeed, White House Press Secretary Joe Lockhart suggested that unfounded fears about Chinese espionage, fanned by "near hysterical investigative reporting" and "explosive comments from political leaders," may have influenced the prosecutors' decisions.¹²³ Although Lee avoided the serious prison

119. Sterngold, *Judge Orders U.S.*, *supra* note 115.

120. See *Statement by Judge in Los Alamos Case, With Apology for Abuse of Power*, N.Y. Times, Sept. 14, 2000, at A25. The judge asked rhetorically of Dr. Lee: What was the government's motive in insisting on your being jailed pretrial under extraordinarily onerous conditions of confinement until today, when the executive branch agrees that you may be set free essentially unrestricted? . . . Why were you charged with the many Atomic Energy Act counts for which the penalty is life imprisonment, all of which the executive branch has now moved to dismiss and which I just dismissed?

Id.

121. See Sterngold, *Nuclear Scientist Set Free*, *supra* note 113; James Sterngold, *Prosecutors Cancel First Appointment to Debrief Wen Ho Lee*, N.Y. Times, Oct. 7, 2000, at A9.

122. David Johnston, *Clinton Criticizes Officials' Actions Against Scientist: "Quite Troubling to Me"*, N.Y. Times, Sept. 15, 2000, at A1. *The New York Times* quoted President Clinton as saying:

I always had reservations about the claims that were being made denying him bail. . . . So the whole thing was quite troubling to me and I think it's very difficult to reconcile the two positions that one day he's a terrible risk to the national security and the next day they're making a plea agreement for an offense far more modest than what had been alleged.

Id.

123. *Clinton and Aide Answer Questions*, N.Y. Times, Sept. 16, 2000, at A12; see *The Times and Wen Ho Lee*, N.Y. Times, Sept. 26, 2000, at A2 [hereinafter *The Times and Wen Ho Lee*] (referring to media industry criticism that *New York Times* reporting "had stimulated a political frenzy amounting to a witch hunt"); see also Edward Liu, *Case of the Los Alamos Spy: Is Wen Ho Lee Guilty of Espionage or Ethnicity?*, S.F. Chron., Mar. 22, 1999, at A21 ("Despite any facts or even charges, many journalists, talk-show hosts and public officials have attacked like barracudas since The New York Times broke the story."); Robert Scheer, *Spy Scandal Is Much Ado About Nothing*, L.A. Times, Mar. 16, 1999, at B7 ("The current China spy hysteria is based on a hyping of threats that are woefully irrational."). While defending its reporting, the *New York Times* noted several deficiencies in its coverage of Wen Ho Lee, including its failure to temper inflammatory declarations such as Lee "may be responsible for the most damaging espionage of the post-cold war era." See *The Times and Wen Ho Lee*, *supra* (internal quotes omitted). For examples of the "near hysterical" newspaper coverage, see Editorial, *Blunders at Los Alamos*, Atlanta Const., Apr. 30, 1999, at A22 (calling the possible computer code loss the "country's

time that the media and prosecution called for, his experience underscores the entrenched nature of xenophobia and racism that continues in American society.

C. *The Antiterrorism and Effective Death Penalty Act of 1996*

Some contend that AEDPA continues the American history of discrimination against foreigners.¹²⁴ First, particular aspects of AEDPA's legislative history indicate that its promulgation may have been improperly motivated by fears of foreign terrorist attacks.¹²⁵ Additionally, AEDPA's three controversial provisions—those which establish the process for designating “foreign terrorist organizations,” prohibit fundraising for such groups, and authorize the use of secret evidence—may be discriminatorily applied.¹²⁶

1. Legislative History

Although the terrorist bombing in Oklahoma City spurred AEDPA's enactment,¹²⁷ the legislation has been harshly criticized as an election year ploy,¹²⁸ doing little for terrorism and a lot to oppress foreigners.¹²⁹ Legislators reacted to public concerns about both safety and the economy by producing a “quick fix” solution directed at foreigners who historically have provided a convenient scapegoat during times of social anxiety.¹³⁰

most serious espionage loss in a generation and perhaps ranks with the most serious in its history”); Editorial, *The China Blind Spot*, N.Y. Times, May 16, 1999, §4, at 16 (“It is hard to imagine a more damaging American security failure than the serial hemorrhage of nuclear-weapons secrets and other military information to China over the last two decades.”); Debra J. Saunders, Editorial, *America's Doormat Says: Spies Welcome*, S.F. Chron., May 28, 1999, at A25 (criticizing prosecutors for not aggressively pursuing Lee).

124. See Akram, *supra* note 11, at 53-55; see also Johnson, *supra* note 7, at 834-39.

125. See discussion *infra* Part I.C.1.

126. See discussion *infra* Parts I.C.2-4.

127. See Specter Statement, *supra* note 4 (“What happened last week in Oklahoma City was an unspeakable tragedy. . . . We in Washington have no more solemn responsibility in this time of national suffering than to ensure that there is never another Oklahoma City.”); Remarks on Antiterrorism Legislation, 31 Weekly Comp. Pres. Doc. 789 (May 8, 1995), available at LEXIS, Public Papers of the President (“I sent that [antiterrorism legislation] to Congress because it will strengthen our ability to investigate and prosecute and to deter . . . the kind of horror we endured at Oklahoma City and of course at the World Trade Center.”)

128. See Johnson, *supra* note 7, at 877 (“In an election year . . . it was difficult for any member of Congress to vote against a bill entitled the ‘Antiterrorism and Effective Death Penalty Act of 1996’—whatever its provisions . . .”); Strossen, *supra* note 8, at 771 (describing the support presidential candidates President Bill Clinton and Senator Bob Dole gave to AEDPA as the political atmosphere became hostile toward civil liberties).

129. See *supra* text accompanying notes 7-9.

130. See Strossen, *supra* note 8, at 777.

While a number of speakers at Congressional hearings warned of the international terrorist threat,¹³¹ the hearings inadequately addressed the domestic group threat revealed by Oklahoma City.¹³² Ambassador Philip Wilcox, Jr., who participated in drafting the proposed Act, warned that "Islamic extremist groups are fighting a vicious rear guard action against [Middle East] peace [efforts]."¹³³ Deputy Attorney General Jamie S. Gorelick illustrated the Clinton Administration's fixation on international terrorism when she insisted that the Oklahoma City bombing must be seen in the broader context of a disparate list of terrorist acts which included the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland; the 1993 WTC bombing; the April 1995 Tokyo nerve gas attack by a domestic Japanese group; the 1995 murder of two American consulate employees in Pakistan; and only one other domestic terrorist event involving a domestic group.¹³⁴ Similarly, in stating its support for the legislative measures, the Anti-Defamation League placed Oklahoma City exclusively in the context of overseas-related terrorism.¹³⁵ Discussion of domestic militia groups and views opposing the legislation¹³⁶ apparently had

131. See *infra* text accompanying notes 133-35.

132. Editorial, *The Militia Threat*, N.Y. Times, June 14, 1997, at 20 ("The [Oklahoma City] bombing has not spurred the political action that it should. Congress has held only two days of hearings on the militia movement . . ."); cf. Dempsey & Cole, *supra* note 6, at 107-10 (describing AEDPA hearings as "one-sided" as most witnesses were "strongly and uncritically supportive" of the legislation).

133. *Counterterrorism Legislation: Hearing on S. 390, A Bill to Improve the Ability of the United States to Respond to the International Terrorist Threat, and S. 735, A Bill to Combat Terrorism Before the Senate Subcomm. on Terrorism, Technology, and Gov't Info. of the Comm. on the Judiciary*, 104th Cong. 11 (May 4, 1995) [hereinafter *Counterterrorism Legislation Hearing*] (statement of Philip C. Wilcox, Jr., Coordinator for Counterterrorism, Dep't of State), available at LEXIS, Federal News Service.

134. See *Combating Domestic Terrorism: Hearing Before the House Subcomm. on Crime of the Comm. on the Judiciary*, 104th Cong. 8 (May 3, 1995) (statement of Jamie S. Gorelick, Deputy Attorney General, Dep't of Justice), available at LEXIS, Federal News Service. The only other domestic event Gorelick mentioned involved two people in Minnesota who made a deadly toxin with intent to use it. *Id.*

135. See *International Terrorism: Threats and Responses: Hearings on H.R. 1710, Comprehensive Antiterrorism Act of 1995, Before the House Comm. on the Judiciary*, 104th Cong. 427-28 (June 13, 1995) [hereinafter *International Terrorism Hearing*] (statement of Ruth Lansner, Chair, Nat'l Legal Affairs Comm., Anti-Defamation League of B'nai B'rith), available at LEXIS, Federal News Service.

136. See, e.g., *Terrorism in the United States: The Nature and Extent of the Threat and Possible Legislative Responses: Hearings Before the Senate Comm. on the Judiciary*, 104th Cong. 33-35 (Apr. 27, 1995) (statement of Ronald K. Noble, Under Secretary for Enforcement, Dep't of the Treasury), available at LEXIS, Federal News Service [hereinafter *Noble Statement*] (describing the increasing "anti-government and anti-law enforcement violence" of radical right-wing groups); *Counterterrorism Legislation Hearing*, *supra* note 133, at 45-49 (May 4, 1995) (statement of Robert S. Rifkind, President, The American Jewish Comm.), available at LEXIS, Federal News Service (opposing the secret evidence and fundraising prohibition provisions); *International Terrorism Hearing*, *supra* note 135, at 319 (June 12, 1995) (statement of

minimal impact because the legislation, as passed, was almost the same as pre-Oklahoma City antiterrorism proposals.¹³⁷

To evaluate the Oklahoma City bombing in such a context would likely slant legislation away from domestic groups and toward international groups. President Clinton himself underscored the types of threats AEDPA was directed against during his remarks at the Act's signing, when he commented on the 1983 Marine barracks bombing in Beirut; the 1985 *Achille Lauro* hijacking outside Alexandria, Egypt; the 1988 Lockerbie bombing; the 1993 WTC bombing; and Oklahoma City.¹³⁸ All incidents except Oklahoma City were linked to Middle East groups.¹³⁹ AEDPA's proponents seemingly responded to Oklahoma City by attacking international terrorism instead of the most recent and real threat of domestic terrorism. They evaluated their response in an international context and not a domestic one, and instead of branding militias or other right-wing groups as the primary "terrorist" threat and burdening them with restrictive legislation, the government opted for the politically easier group—foreigners.¹⁴⁰

2. Designating a "Foreign Terrorist Organization"

AEDPA's fundraising prohibition restricts donations by American sources to foreign terrorist organizations, but it first depends upon which groups the Secretary of State designates as "foreign terrorist organizations."¹⁴¹ The Secretary may identify an organization as a "foreign terrorist organization" for a two year period¹⁴² if it is (a) a foreign organization (b) that engages in terrorist activity and (c) such activity threatens the security of either the United States or its citizens.¹⁴³ Classified information may be considered when making the designation and is only disclosed for judicial review ex parte and

Gregory T. Nojeim, Legislative Counsel, American Civil Liberties Union), *available at* LEXIS, Federal News Service (arguing that the proposed antiterrorism measures do "substantial damage to civil liberties").

137. See Dempsey & Cole, *supra* note 6, at 105 (asserting that AEDPA included all the "critical" provisions of an antiterrorism bill proposed by the Clinton Administration two months before the Oklahoma City bombing).

138. See Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 718 (April 29, 1996), *available at* LEXIS, Public Papers of the President.

139. The Beirut bombing was tied to the Islamic Jihad. See Elisabeth Frater, *When the Evidence Is Secret*, Nat'l J., Jan. 6, 2001, at 38. The *Achille Lauro* hijacking was attributed to Palestinians. See Alan Cowell, *Hijacker Defends Achille Lauro Killing*, N.Y. Times, Nov. 14, 1988, at A3. The Lockerbie bombing was linked to Libyans. See Donald G. McNeil, Jr., *Libyan Convicted by Scottish Court in '88 Pan Am Blast*, N.Y. Times, Feb. 1, 2001, at A1.

140. See Strossen, *supra* note 8, at 777-78.

141. See generally AEDPA § 302 (codified at 8 U.S.C. § 1189 (1999)), AEDPA § 303 (codified at 18 U.S.C. § 2339B (2000)).

142. 8 U.S.C. § 1189(a)(4)(A).

143. See *supra* note 17.

in camera.¹⁴⁴ Within thirty days of the list's publication, organizations may seek to have their designation reviewed by the District of Columbia Circuit Court of Appeals,¹⁴⁵ but individual criminal defendants may not question the validity of a designation.¹⁴⁶ The appeal is evaluated using five criteria¹⁴⁷ but the court is prohibited from reviewing the Secretary's national security concerns¹⁴⁸ and it may not evaluate the validity of material, even hearsay, considered by the Secretary.¹⁴⁹ Because of the tremendous deference given to the Secretary of State and the vagueness of AEDPA's criteria, which could describe "hundreds if not thousands of groups worldwide," selective enforcement based upon the "politics of the moment" is inevitable.¹⁵⁰

3. Prohibiting Material Support

The restrictions placed upon anyone attempting to provide material support or resources to any designated group are substantial.¹⁵¹

144. 8 U.S.C. § 1189(a)(3)(B).

145. *Id.* § 1189(b)(1).

146. *Id.* § 1189(a)(8).

147. The statutory standards for the court are the following:

Scope of Review.

The Court shall hold unlawful and set aside a designation the court finds to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;

(D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), or

(E) not in accord with the procedures required by law.

AEDPA § 302 (codified at 8 U.S.C. § 1189(b)(3)).

148. *See People's Mojahedin Org. of Iran v. United States*, 182 F.3d 17, 23-24 (D.C. Cir. 1999) (finding the court may not consider the third criteria for designating a "foreign terrorist organization," whether the group's activity threatens security, *see supra* note 17, because it relates to the Executive Branch's foreign policy decision-making which is "not subject to judicial intrusion or inquiry" (quoting *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948))).

149. The court in *People's Mojahedin* indicated its frustration with not being able to evaluate hearsay evidence:

We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. . . . [T]he record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. . . . [The Secretary's] conclusion [that the organizations were foreign and engaged in terrorism] might be mistaken, but that depends on the quality of the information in the reports she received—something we have no way of judging.

182 F.3d at 25.

150. *Dempsey & Cole, supra* note 6, at 120-21.

151. *See Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1132 (9th Cir. 2000) (saying the AEDPA provision for foreign terrorist organizations "has teeth").

Anyone within or subject to United States jurisdiction may be fined or imprisoned for up to ten years if he or she "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so."¹⁵² Because of AEDPA's concern with cutting off all support, it accounts for the fungibility of money with particularly uncompromising results.

Under [AEDPA], it is a crime to send crayons to a day-care center or blankets to a health care facility run by a designated group, even if the donor can prove that he intended the crayons or blankets to be used for lawful purposes and that they were in fact so used ... [because] money that a terrorist group saves on donated crayons could be used to purchase bombs.¹⁵³

Furthermore, financial institutions that become aware they possess or control funds of a foreign terrorist organization or its agent must retain those funds and report to the Treasury Department or be subject to fines starting at \$50,000.¹⁵⁴

David Cole has criticized AEDPA's fundraising prohibition as unconstitutional¹⁵⁵ because the right to associate is not effective without the right to financially support one's chosen group.¹⁵⁶ Such an infringement is particularly debilitating in a republic, where the right to association is indispensable to the effective functioning of the government.¹⁵⁷ Moreover, the sole circuit court assigned to hear an organization's appeal of its designation suggested that the designation process itself may be flawed.¹⁵⁸

4. Using Secret Evidence

Section 401 of AEDPA amended a prior immigration act¹⁵⁹ to allow secret evidence in deportation hearings against alien terrorists. Under this provision of AEDPA, an "alien terrorist"¹⁶⁰ detained on secret

152. 18 U.S.C. § 2339B(a)(1) (2000). Included as "material support or resources" are "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." *Id.* §§ 2339B(g)(4), 2339A(b). *But see Humanitarian Law Project*, 205 F.3d at 1137-38 (upholding a district court ruling that "training" and "personnel" were impermissibly vague and unenforceable).

153. Cole, *Hanging with the Wrong Crowd*, *supra* note 11, at 247.

154. AEDPA § 302 (codified at 18 U.S.C. §§ 2339B(a)(2), 2339B(b)).

155. See Cole, *Hanging with the Wrong Crowd*, *supra* note 11, at 246-50.

156. *Id.* at 248.

157. *Id.* at 250-51.

158. See 8 U.S.C. § 1189(b)(1) (1999) ("[A]n organization ... may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit."); *supra* note 149.

159. See AEDPA, Pub. L. No. 104-132, § 401(a), 110 Stat. 1214, 1258 (1996) (codified at 8 U.S.C. §§ 1531-37) (amending the Immigration and Nationality Act).

160. AEDPA § 401 (codified at 8 U.S.C. § 1531) (establishing the term "alien terrorist"); 8 U.S.C. § 1227(a)(4)(B) (defining that an alien terrorist is one "who has

evidence has his or her case heard before a removal court¹⁶¹ where due process procedures allow him or her to have an unclassified summary¹⁶² of the government's secret evidence and a hearing before a federal judge.¹⁶³ Oddly, however, the government has never detained an alien under AEDPA.¹⁶⁴ Rather, critics contend, the Immigration and Naturalization Service ("INS") has used AEDPA to expand powers under its own less restrictive immigration regulations concerning secret evidence.¹⁶⁵ AEDPA, in essence, signaled to the INS that there was political support to apply INS secret evidence procedures more aggressively.¹⁶⁶ The dramatic increase in INS cases relying on secret evidence since AEDPA's passage provides compelling support. From 1988 to 1999, almost every secret evidence case arose in the four-year period after AEDPA passed in 1996.¹⁶⁷

engaged, is engaged, or at any time after admission engages in any terrorist activity"); *id.* § 1182(a)(3)(B)(iii) (defining "engage in terrorist activity").

161. *Id.* § 1533.

162. *Id.* § 1534(e)(3)(B)-(C).

163. Frater, *supra* note 139 (summarizing the critical aspects of AEDPA's secret evidence provisions); AEDPA § 401(a) (codified at 8 U.S.C. § 1532) (establishing a removal court composed of five federal district court judges).

164. Frater, *supra* note 139 (reporting that an INS spokesman acknowledged that "the INS has not prosecuted a single case under [AEDPA's] procedures"); Akram, *supra* note 11, at 72.

165. Akram, *supra* note 11, at 72 ("[T]he INS has not prosecuted a single case under the special 'alien terrorist' removal procedures authorized by AEDPA. Instead, acting on the perceived authority of these provisions, the INS began relying on a particular [earlier] provision in the immigration regulations . . ."); *see also* Margaret Graham Tebo, *Locked Up Tight*, A.B.A. J., Nov. 2000, at 44, 48 ("In regulations crafted in light of the [AEDPA's] statutory changes, the INS outlined other expanded powers for itself.").

166. *See* Susan Aschoff, *The Politics of Immigration*, St. Petersburg Times, Dec. 21, 1997, at 1F [hereinafter Aschoff, *Politics of Immigration*] ("The INS has had [secret evidence] power for years, but its new aggressiveness reflects Congress' get-tough directive, the Anti-Terrorism Act of 1996."); Telephone Interview with Professor Susan M. Akram, Clinical Professor of Immigration and Comparative Refugee Law, Boston University School of Law and Supervising Attorney, Boston University Civil Litigation Program (Jan. 23, 2001). Professor Akram has been involved in the secret evidence cases for Mazen al-Najjar and Anwar Haddam. Frater, *supra* note 139; Akram, *supra* note 11, at 51 n.*.

167. According to the most comprehensive information available, there have been thirty-three secret evidence cases since 1987. *See* Akram, *supra* note 11, at 52 n.4 (listing twenty-six people who have faced or were facing proceedings dependent on secret evidence and reporting six new cases for which the names were not available); American-Arab Anti-Discrimination Committee, 1996-97 Report on Hate Crimes & Discrimination Against Arab Americans 32 (1997) [hereinafter 1996-97 ADC Report] (listing one additional case concerning Anwar Haddam). Excluding the "Los Angeles Eight" defendants whose cases began in 1987, *see* Akram, *supra* note 11, at 73, there have been, at most, 25 cases since 1987. Of those 25 cases, at least 19 were initiated after AEDPA passed. *See* David Cole, *INS Terrorizes Arabs in the U.S.*, Legal Times, May 18, 1998, at 29 [hereinafter Cole, *INS Terrorizes Arabs*] (indicating that the following cases were instituted after AEDPA was passed: Mazzen al-Najjar, Ali Termos, Hany Kiareldeen, Yahia Meddiah); Akram, *supra* note 11, at 52 n.4, 76, 78 (6 unidentified individuals, Nasser Ahmed, and the "Iraqi Seven"); 1996-97 ADC Report, *supra*, at 32 (Anwar Haddam).

The INS method is to conduct "routine deportation hearings" against a suspected terrorist, which allow the Service to deny bond for release based on secret evidence in an immigration court.¹⁶⁸ Proceeding against suspects in the immigration court system places the suspect at a unique disadvantage. First, immigration judges are not able to address constitutional issues because their positions are administrative.¹⁶⁹ Thus, an immigration court may not consider the due process concerns of presenting evidence that is unreviewable by the defendant. Second, INS regulations do not require a summary of classified evidence for a suspected alien.¹⁷⁰ Third, by proceeding in immigration courts, the government avoids having to actually charge someone with terrorist activity, which carries a higher burden of proof.¹⁷¹ Fourth, the Justice Department oversees immigration courts.¹⁷² As a result, a suspect's case may be investigated, prosecuted, and adjudicated exclusively within one department of the executive branch—respectively, by the FBI, federal attorneys, and immigration courts.¹⁷³ Without a systematic check against prosecutorial abuses or mistakes, a defendant who cannot see the evidence against him or her is in an extremely disadvantaged position from which to avoid prosecution.

In reviewing one secret evidence case, Judge William Walls expressed that "reliance on secret evidence raises serious issues about the integrity of the adversarial process, the impossibility of self-defense against undisclosed charges, and the reliability of government processes initiated and prosecuted in darkness."¹⁷⁴ In another case, the judge wrote, "[t]he poisonous atmosphere created by secret accusation is impossible to completely eradicate," even if such tactics are helpful in antiterrorism measures.¹⁷⁵ David Cole has criticized the tactic as raising "serious constitutional questions," particularly in its application against deportees accused of being members of terrorist groups.¹⁷⁶

168. Frater, *supra* note 139 (reporting the "far from unique" example of Mazen al-Najjar's case and describing the general INS technique).

169. See Akram, *supra* note 11, at 72; see also Susan Aschoff, *Accused of Being Suspicious*, St. Petersburg Times, May 7, 2000, at 1F [hereinafter Aschoff, *Accused of Being Suspicious*].

170. Akram, *supra* note 11, at 72.

171. See *id.*

172. Susan Aschoff, *In Immigration Even Judges May Not See Evidence*, St. Petersburg Times, Sept. 6, 1999, at 1A [hereinafter Aschoff, *In Immigration*].

173. See *id.*

174. *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999). The court ultimately ordered that the defendant, Hany Mahmoud Kiareldeen, be released. *Id.* at 419.

175. Aschoff, *In Immigration*, *supra* note 172 (quoting immigration Judge Donn Livingston upon releasing Nasser Ahmed).

176. Cole, *INS Terrorizes Arabs*, *supra* note 167.

To lock up any human being based on secret evidence is to deny him the most basic component of due process—a meaningful opportunity to defend oneself. It is simply impossible to defend against secret evidence: How do you prove that you are not a member of a terrorist organization, where there is no evidence to refute and the organization hasn't even been named?¹⁷⁷

Susan Akram identified some of the specific governmental abuses secret evidence facilitates. She found that the government made allegations without evidentiary support, mistranslated evidence, and erroneously classified documents.¹⁷⁸ Former Central Intelligence Agency Director James Woolsey gained access to previously secret documents when he stepped in to represent a group of detained Iraqis.¹⁷⁹ He found “serious errors” in Arabic-English translations, stereotyping based on both ethnicity and religion, and allegations rooted in rumors and inter-group rivalry.¹⁸⁰

For almost four years newspapers across the country have expressed opposition to secret evidence proceedings.¹⁸¹ In addition, over one hundred congressional representatives have stated their opposition by introducing the Secret Evidence Repeal Act, sponsored by Representative David Bonior of Michigan.¹⁸² Finding the use of secret evidence in immigration actions unconstitutional,¹⁸³ the bill proposes repealing its use in a number of different immigration proceedings.¹⁸⁴ While encouraging, the bill remains nothing more than an expression of disapproval because it has been pending since June 1999.¹⁸⁵

In summary, this part has established the background necessary for evaluating AEDPA. Equal justice demands equal and unstigmatizing treatment of all groups and people in order to ensure they realize

177. *Id.*

178. Akram, *supra* note 11, at 81-90.

179. See *infra* text accompanying notes 432-39 (discussing the cases of the “Iraqi Seven”).

180. Akram, *supra* note 11, at 87-88.

181. E.g., Anthony Lewis, Op-Ed, *The Uses of Secrecy*, N.Y. Times, Nov. 4, 2000, at A21; Bill Maxwell, *Secret Evidence Prevents Basic Fairness*, St. Petersburg Times, June 4, 2000, at 1D; Ralph Ranalli, *Security Laws Tilt Balance of Rights*, Boston Globe, Feb. 20, 2000, at B1; Nat Hentoff, Op-Ed, *Prosecution in Darkness*, Wash. Post, Nov. 6, 1999, at A25; Ronald Smothers, *U.S. Bars or Expels Suspect Immigrants On Secret Evidence*, N.Y. Times, Aug. 15, 1998, at A1; Bill Maxwell, *Enter Here, and Abandon Basic Rights*, St. Petersburg Times, Sept. 28, 1997, at 1D.

182. Secret Evidence Repeal Act of 2000, H.R. 2121, 106th Cong. (2000), available at <http://thomas.loc.gov/home/c106query.html>.

183. *Id.* § 2(3) (“Use of secret evidence in immigration proceedings deprives the alien of due process rights guaranteed under the United States Constitution and undermines our adversarial system, which relies on cross-examination as an engine of truth-seeking.”)

184. *Id.* §§ 3-6.

185. See *id.* (stating the bill’s date of introduction as June 10, 1999).

their full potential.¹⁸⁶ The history of the United States, however, presents an enduring trend of discrimination against foreigners and minorities.¹⁸⁷ Recently, the United States government enacted antiterrorism legislation directed against foreign threats, providing for the designation of foreign terrorist organizations, the prohibition of fundraising for such organizations, and the authorization of secret evidence in certain immigrant deportation hearings.¹⁸⁸ The next part will examine recent terrorist activity in the United States and illustrate the extent of Arab involvement, as well as society's perception of Arab involvement, in such activity.

II. THE UNJUSTIFIED LINK BETWEEN ARABS AND DOMESTIC TERRORISM

This part will determine whether AEDPA properly focused on Arabs as a domestic terrorist threat, particularly in light of the Oklahoma City bombing. Although Arabs have been involved in terrorist activity, very little terrorism on American soil has involved Arab groups.¹⁸⁹ In contrast, domestic groups, militia, and other right-wing extremists in particular, have been prominent sources of terrorism.¹⁹⁰ This part concludes by presenting the anti-Arab sentiment that pervades American society, and attributing AEDPA's treatment of Arabs to such racism.¹⁹¹

A. Arabs and Terrorism in the United States

The current plight of Arab Americans is a striking example of inequality in the United States as members of the group are subject to restrictive, if not draconian, immigration laws and often are branded with the label of disloyalty. The perception of Arabs as terrorists has come to dominate the public imagination.¹⁹² *The Los Angeles Times* eloquently described the common perception: "[W]ords and images [run] together like watercolors on a child's easel—Arabs, mosque, terrorism, Muslims, extremists—making it hard to tell where one began and another left off."¹⁹³ This almost reflexive association became ingrained during the Iranian hostage crisis in 1979 and the Persian Gulf War in 1991.¹⁹⁴ The hostage-taking left an indelible

186. See discussion *supra* Part I.A.

187. See discussion *supra* Part I.B.

188. See discussion *supra* Part I.C.

189. See discussion *infra* Part II.A.

190. See discussion *infra* Part II.B.

191. See discussion *infra* Part II.C.

192. Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 Utah L. Rev. 119, 134.

193. Larry B. Stammer & Somini Sengupta, *Muslims Enter American Mainstream*, L.A. Times, Apr. 6, 1993, at 4 (italics omitted), available at LEXIS, News, Los Angeles Times.

194. See Lynne Duke, *Islam Is Growing in U.S., Despite an Uneasy Image*:

impression on Americans, "striking this country with thunderclap force, becoming a crisis of an overwhelming and all-absorbing nature."¹⁹⁵ Unfortunately, network television news presented a skewed perspective, showing the audience images of "fist-shaking [Iranian] mobs" outside the embassy while barely explaining the "internal Iranian setting" which made the hostage crisis so intractable.¹⁹⁶ Ten years later, the Persian Gulf War and the constant barrage of its images provided by CNN reinforced American perception of Arabs as the enemy as bombs rained down on Baghdad.

Moreover, while they are closely associated with Islam, only twelve percent of the United States' four to five million Muslims are Arab¹⁹⁷ and those Arab Muslims comprise a minority of the Arab American community.¹⁹⁸ American society, however, identifies Arabs and Islam as virtually one and the same.¹⁹⁹ Coupled with this presumption is the prevailing misrepresentation of Islam as bent on a holy war against the United States.²⁰⁰ While extremists may invoke the Koran to justify terrorism,²⁰¹ the "vast majority" of Islamic worshippers are "decent, law-abiding, productive citizens."²⁰² Even those who commit terrorism in the name of Islam decry the inaction of "fellow" Muslims.²⁰³

Particularly for Immigrants, Anxiety Lingers About American Attitudes, Wash. Post, Oct. 24, 1993, at A1.

195. Don Oberdorfer, *Why the Hostage Crisis Held Us All Hostage*, Wash. Post, Feb. 1, 1981, at C1.

196. *Id.* (describing a study by an Arizona State University professor finding that "the network evening news programs, in ten sample periods over eight months, beamed Iranian crowds and demonstrations into American homes on sixty occasions, compared to only three interviews with unofficial, non-demonstrating Iranians who might have explained what the crowds were screaming about").

197. See Duke, *supra* note 194. Non-Arab Muslims include African Americans (42 percent), Indians or Pakistanis (25 percent), Africans (5 percent), Iranians (4 percent), Turks (4 percent), Southeast Asians (4 percent), and Caucasians (4 percent). *Id.*

198. This fact is determined by taking 12 percent of the nation's four to five million Muslims (480,000 to 600,000) and comparing it to the overall Arab population of 2.5 to 3 million. *Id.*; Suleiman, *supra* note 18, at 2.

199. See Joseph, *supra* note 18, at 260.

200. See *id.* at 261. As Suad Joseph observed:

Some political analysts have argued that Islam is the West's new evil empire. Islam is frequently represented as a militaristic religion bent on jihad (holy war), inherently and historically hostile to the democratic, capitalist, Christian West. . . . Adherents of Islam are frequently viewed as mindless, fanatic followers of mad clerics.

Id.

201. See, e.g., Brief for Appellee at 58, *United States v. Siddig Ali*, (2d Cir. 1999) (No. 96-1044(L)) (on file with the *Fordham Law Review*) [hereinafter Appellee Brief] (quoting a speech by Sheik Ahmad Ali Abdel Rahman in which he stated, "the [Koran] makes [terrorism] among the means to perform *jihad* in the sake of Allah, . . . to terrorize the enemies of God and our enemies too").

202. Editorial, *Don't Judge Islam by Verdicts*, Orlando Sentinel, Mar. 8, 1994, at A10.

203. Two members of the terrorist conspiracy to blow up New York City

From 1984 through 1998, of the eighty-seven terrorist incidents in the United States, two were committed by Arab groups.²⁰⁴ The February 26, 1993, noontime bombing of the WTC, which killed six people and injured more than one thousand,²⁰⁵ was the more frightful event. After the FBI traced a van believed to have contained the bomb to one suspect, four Arab men were arrested and ultimately sentenced to 240 years in prison.²⁰⁶ Fearing that the bombing was merely part of an ongoing conspiracy, the FBI intensified surveillance of New York-area Islamic fundamentalists.²⁰⁷

In June 1993, authorities finally uncovered an organization plotting numerous terrorist acts, of which the WTC bombing was a "small part."²⁰⁸ The terrorist conspiracy had targeted the United Nations building, the Holland and Lincoln Tunnels, and the George Washington Bridge.²⁰⁹ They had also plotted to assassinate a number of important public figures, including former Egyptian President Hosni Mubarak,²¹⁰ and considered kidnapping others.²¹¹ They were motivated by a desire to advance Muslim interests by striking the United States in order to alter its Middle East policies.²¹² Ten people

landmarks expressed such frustration. Siddig Ibrahim Siddig Ali saw himself and fellow conspirators as "among the 'very few Muslims' willing to 'strike back' against their oppressors." Appellee Brief, *supra* note 201, at 153. Similarly, Mohammed Saleh observed that in their *jihad*, "Muslims will remain as stones to be played with and kicked around everywhere. . . . And unfortunately, there is [sic] no Muslims to retaliate. . . . To have weight anywhere. . . . It's a disaster." *Id.* at 137 (omissions in original).

204. See *supra* text accompanying note 24.

205. The FBI, *supra* note 2, at 94.

206. *Id.* at 94-95. Two other Arab suspects, Ramzi Yousef and Eyad Ismoil, were also later arrested. *Id.* at 95

207. *Id.*

208. Mary B.W. Tabor, *U.S. Indicts Egyptian Cleric as Head of Group Plotting 'War of Urban Terrorism'*, N.Y. Times, Aug. 26, 1993, at A1 (quoting assistant United States' Attorney Andrew McCarthy (internal quotes omitted)); see Appellee Brief, *supra* note 201, at 8 (describing that members of the terror conspiracy were part of an organization that had been involved with the WTC bombing); see also *id.* at 89 (quoting a recording of one conspirator who stated that "the [WTC] operation was not done by a single person. It was a group effort. We all had confidence in [the WTC bombers]" (ellipses omitted)).

209. The FBI, *supra* note 2, at 95.

210. Tabor, *supra* note 208.

211. See Ralph Blumenthal, *Plot to Abduct Nixon to Free Blast Suspects*, N.Y. Times, Sept. 6, 1993, at 17 (reporting that suspects considered kidnapping former President Richard M. Nixon and former Secretary of State Henry Kissinger).

212. See The FBI, *supra* note 2, at 94; see also Appellee Brief, *supra* note 201, at 93 (referring to a discussion among conspirators that the United Nations would be a desirable target because it "was a prime tool through which the United States operated a 'new government which rules the world' and executed resolutions oppressive to Muslims everywhere"); *id.* at 96 (considering the lower Manhattan offices of the FBI as a target because it would encourage "Muslims all over the world"); *id.* at 98 (considering the kidnapping of former President Nixon and former Secretary Kissinger because they had depicted Islam as a "great" threat and stating that Nixon had maintained an American presence in the Middle East "to demolish

were ultimately convicted of "seditious conspiracy to wage war against the United States and forcibly to oppose its authority" for engaging in their "war of urban terrorism."²¹³ They received sentences ranging from twenty-five years to life imprisonment.²¹⁴ Three others were found guilty on other charges.²¹⁵

The only other Arab terrorism on American soil, as reported by the FBI from 1984 to April 1996 (when AEDPA was enacted), was a limited incident in April 1992.²¹⁶ Five opponents of Iran's Islamic government, bearing knives, invaded the Iranian mission to the United Nations.²¹⁷ During their two-hour takeover they destroyed property and took three hostages.²¹⁸ The attack, part of a coordinated attack on Iranian embassies and consulates in nine other nations, was a retaliation for Iran's bombing of the rebels' base in Iraq and evidently not directed at the United States.²¹⁹ Because the violence was driven by intra-Arab issues, it doubtlessly raised far less public concern than the later WTC-related activity.

According to the FBI, after AEDPA's enactment in 1996, no Arab groups were definitively involved in any of the nine terrorist incidents in the United States through 1998, although two failed letter bombs in 1997 were traced to Egypt.²²⁰ Of thirty-seven *potential* terrorist events from April 1996 through 1998, eleven were attributed to international sources, only one of which was actually tied to an Arab source.²²¹ In

the Islamic awakening in any . . . countries" of the region); *id.* at 108 (referring to the planned bombings of the Lincoln and Holland tunnels as ones which "would paralyze the economy" and that such bombing must be "under the flag of God" (internal quotes omitted)).

213. Appellee Brief, *supra* note 201, at 2, 7.

214. *Id.* at 7.

215. The FBI, *supra* note 2, at 95.

216. 1998 U.S. Terrorism Report, *supra* note 24, at 23.

217. See Robert D. McFadden, *Iran Rebels Hit Missions in 10 Nations*, N.Y. Times, Apr. 6, 1992, at A3.

218. See *id.*

219. See *id.*

220. See 1998 U.S. Terrorism Report, *supra* note 24, at 24 (listing terrorist incidents and indicating no group identified as a main suspect in the letter bombings); Counterterrorism Threat Assessment and Warning Unit, U.S. Dep't of Justice, Terrorism in the United States: 1997, at 2, available at <http://www.fbi.gov/library/terror/terr97.pdf> [hereinafter 1997 U.S. Terrorism Report] (detailing the letter bombing incidents in Washington, D.C. and Leavenworth, Kansas).

221. See 1998 U.S. Terrorism Report, *supra* note 24, at 5-7 (detailing 1998 terrorist preventions); 1997 U.S. Terrorism Report, *supra* note 220, at 3-5 (detailing 1997 terrorist preventions and, in particular, ten failed letter bombs and a planned attack by two Palestinian men on a New York City subway line); Counterterrorism Threat Assessment and Warning Unit, U.S. Dep't of Justice, Terrorism in the United States: 1996, at 6-9, available at <http://www.fbi.gov/library/terror/terr96.pdf> [hereinafter 1996 U.S. Terrorism Report] (detailing 1996 terrorist preventions). The FBI calls such potential events "terrorist preventions." They are defined as "a documented instance in which a violent act by a known or suspected terrorist group or individual with the means and a proven propensity for violence is successfully interdicted through investigative activity." 1998 U.S. Terrorism Report, *supra* note 24, at ii.

one other notable incident, an Arab individual injured six people and killed another along with himself atop the Empire State Building, but he was not tied to any terrorist group and was considered by authorities to be a "lone, deranged man."²²²

There have also been a number of overseas terrorist acts by Arab groups. With respect to pre-AEDPA incidents,²²³ the last major international event, the Lockerbie bombing of Pan Am flight 103, had been committed seven years before Oklahoma City. Since AEDPA was enacted, the most notable overseas terrorist incidents by Arab or Islamic groups against the United States were the 1996 truck bomb explosion in Dhahran, Saudi Arabia, which killed nineteen American soldiers; the 1998 bombings of the American embassies in Kenya and Tanzania which killed over two hundred people; and the 2000 bombing of the U.S.S. Cole in Yemen which killed seventeen sailors.²²⁴ These incidents may justify antiterrorism measures, but as will be discussed in Part III,²²⁵ they neither adequately explain why AEDPA failed to respond to domestic group threats nor why AEDPA was directed at what *might* happen on American soil instead of what *actually* happened on American soil. Moreover, the incidents do not justify the branding of Arabs as terrorists while avoiding such treatment of domestic groups.

B. Domestic Sources of Terrorism in the United States

FBI statistics indicate that most acts of domestic terrorism²²⁶ are not committed by Muslim or Arab groups. Indeed, from 1984 to 1998, 95 percent of the terrorist incidents in the United States were attributed to domestic groups.²²⁷ In the three years after the Oklahoma City bombing, 1996 to 1998, almost 70 percent of all potential terrorist events were attributed to domestic sources, and the figure climbs to 96 percent if we discount one series of intercepted letter bombs in

222. Matthew Purdy, *Empire State Gunman Gave No Hint of Anger, His Hosts Say*, N.Y. Times, Feb. 27, 1997, at B1; see also Robert D. McFadden, *Shots Send Empire State Crowd Fleeing*, N.Y. Times, Feb. 24, 1997, at A1.

223. See *supra* text accompanying note 138.

224. See Craig Pyes et al., *One Man and a Global Web of Violence*, N.Y. Times, Jan. 14, 2001, at A1.

225. See *infra* text following notes 355, 483.

226. "Terrorism" is defined by the federal government as "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." 1998 U.S. Terrorism Report, *supra* note 24, at i (quoting 28 C.F.R. § 0.85).

227. See *supra* text accompanying note 24. This figure is determined by dividing eighty-three, the number of incidents definitely not tied to international groups or likely not tied to them (thus removing from the total number of terrorist incidents the WTC bombing, the 1992 hostile takeover, and the two letter bombs), into the total number of incidents, eighty-seven. See *supra* text accompanying notes 24, 205-07, 216-20.

1997.²²⁸ More specifically, in 1993, for example, there were two bombings by an extreme right-wing group in Tacoma, Washington, and nine fire bombings by an animal rights group, the Animal Liberation Front, in Chicago, Illinois.²²⁹ In 1994, there were no incidents of terrorism at all.²³⁰ Indeed, when AEDPA was passed in 1996, the looming threat was extreme right-wing domestic groups, particularly militias.²³¹

Militia groups started appearing in 1994. The involvement of Timothy McVeigh, who had lingered in the militia movement, in Oklahoma City alerted the public to the militia danger but a number of experts had already forecast the growing threat of right-wing terrorism. In 1994, a detailed study of terrorism in America by Brent L. Smith warned that "right-wing . . . terrorists show distinct promise of increasing in number and activity."²³² In October 1994, Morris Dees of the Southern Poverty Law Center wrote to Attorney General Janet Reno to warn her of the militia threat.²³³ Responding to a congressional request, Kenneth Stern issued a report warning of the militia movement nine days before the Oklahoma City bombing.²³⁴

The militia movement is composed of armed, paramilitary, extremist groups and sympathizers dedicated to armed opposition to the allegedly tyrannical federal government, considered to be conspiring globally in the "New World Order."²³⁵ The movement consists of unrelated groups throughout the United States motivated by recent firearm restrictions such as the Brady Law and fatal law enforcement mistakes in Ruby Ridge, Idaho and Waco, Texas.²³⁶

228. See *supra* note 221 and accompanying text.

229. 1998 U.S. Terrorism Report, *supra* note 24, at 23-24.

230. *Id.* at 24.

231. See generally Morris Dees with James Corcoran, *Gathering Storm: America's Militia Threat* (1996) (analyzing the development of militia groups and their ideology); Stern, *supra* note 3 (same).

232. Brent L. Smith, *Terrorism in America: Pipe Bombs and Pipe Dreams* 200 (1994).

233. See Dees, *supra* note 231, at 6-7.

234. See Stern, *supra* note 3, at 13-15. Kenneth Stern has been a hate group expert for the American Jewish Committee since 1989 and previously was the director of the National Organization Against Terrorism. *Id.* at 304.

235. Mark Pitcavage, *The Militia Watchdog* [hereinafter *Militia Watchdog*], at <http://www.militia-watchdog.org/students.htm> (last updated Nov. 1, 1998) (describing, in the "Frequently Asked Questions" section, what a militia is). Dr. Pitcavage is currently a director with the Anti-Defamation League. *Militia Watchdog*, *supra*, at <http://www.militia-watchdog.org/pitman.htm> (last modified Sept. 4, 2000). He previously worked as the Director of the Research Center for the State and Local Anti-Terrorism Training Project, a government project to provide more information about terrorism to state and local law enforcement authorities. *Militia Watchdog*, *supra*, at <http://www.militia-watchdog.org/students.htm> (describing, in the "Frequently Asked Questions" section, who Mark Pitcavage is).

236. Southern Poverty Law Center, *False Patriots: The Threat of Antigovernment Extremists* 4 (1997). The Brady Law, passed in 1993, required a background check on all gun purchasers and a waiting period of five days on the sale of all handguns. Dees,

They are part of a broader “very, very extreme right-wing” movement that believes in white supremacy, opposition to abortion, hatred of homosexuality, hatred or fear of foreigners, and isolationism.²³⁷

While the words of right-wing militia interests are not, and should not, be criminal unto themselves, they reveal a frightening world view hardly different from that which is expressed by Arab extremists invoking *jihad* to justify their violence.²³⁸ A publication of the Militia of Montana revealed the paranoia that drove their opposition to gun control efforts:

There are individuals in this world, within this country, and in our own government who would like to rule the world. These power hungry individuals have corrupted our government and are working on sabotaging our freedom by destroying the Constitution of the United States, in order to establish the “New World Order.” . . . To bring about this New World Order, and ultimately the single World Government, [they believe] the American people must be disarmed.²³⁹

William Pierce, the leader of a racist and anti-Semitic group called the National Alliance, wrote an underground book, *The Turner Diaries*, which he sells as a “Handbook for White Victory.”²⁴⁰ Timothy McVeigh had sold the book, his “bible,” on the gun show circuit.²⁴¹ Over 200,000 copies of the book have been sold.²⁴² The 1978 book depicts the bombing of a federal building that is ominously similar to McVeigh’s act²⁴³ and provides a chilling justification for the violence.

It is a heavy burden of responsibility for us to bear since most of the victims of our bomb were only pawns who were no more committed to the sick philosophy or the racially destructive goals of the System than we are But there is no way we can destroy the System without hurting many thousands of innocent people—no way. It is a cancer too deeply rooted in our flesh. And if we don’t destroy the System before it destroys us—if we don’t cut this cancer out of our living flesh—our whole [White] race will die.²⁴⁴

supra note 231, at 73-74. See *infra* text accompanying notes 249-58 for a discussion of the incidents at Ruby Ridge and Waco.

237. Militia Watchdog, *supra* note 235, at <http://www.militia-watchdog.org/students.htm> (describing, in the “Frequently Asked Questions” section, what the right-wing is).

238. See *supra* notes 201, 212.

239. Dees, *supra* note 231, at 80 (quoting a publication of the Militia of Montana) (internal ellipses omitted).

240. *Id.* at 137-38.

241. *Id.* at 4, 156.

242. *Id.* at 137.

243. *Id.* at 146-47.

244. *Id.* at 147 (quoting a statement by the main character of *The Turner Diaries*).

Sixteen years after the book's publication, Pierce remained unrepentant in his hatred when he proclaimed, "millions of white Americans who five years ago felt so cowed by the government and [the Jewish-]controlled media . . . are becoming fed up, and their exasperation is giving them courage" to join his movement.²⁴⁵

1. Terrorist Activity of Domestic Groups Prior to AEDPA

Violent activity and conspiracies have corresponded with such words and ideology. In the mid-1980s, an Aryan Nation offshoot, The Order, engaged in a rampage of violence to advance its revolution.²⁴⁶ Inspired by *The Turner Diaries*, they counterfeited money, robbed over \$4 million, bombed a synagogue, and killed at least three people in their quest to overthrow the United States government and establish an exclusively White fascist nation.²⁴⁷ Law enforcement ultimately charged twenty-four members for racketeering based on their various conspiracies; twenty-three people were convicted.²⁴⁸

Two confrontations in the early 1990s, at Ruby Ridge, Idaho and Waco, Texas, served as catalysts for the militia movement.²⁴⁹ Although the episodes were not deemed official terrorist acts,²⁵⁰ these fatal showdowns illustrated the fervent opposition of domestic right-wing groups against the federal government. In 1992, in Ruby Ridge, white separatist Randy Weaver, with his wife, four children, and a family friend, resisted well over one hundred law enforcement authorities after federal marshals attempted to arrest him for failing to make a court date stemming from illegal gun sales.²⁵¹ Protestors for the Weavers carried signs saying "Government Lies, a Patriot Dies," "Christians Against Tyranny," and "FBI Burn in Hell."²⁵² Those in support included Aryan Nation members, skinheads, and Order members' families.²⁵³ After an eleven-day standoff, the bloodshed underscored the vehemence of government opposition: three people dead (a federal marshal, Weaver's wife Vicki and his son Sam) and three people shot (a federal marshal, Weaver, and Weaver's friend).²⁵⁴

245. *Id.* at 5 (ellipses in original) (quoting Pierce).

246. *See* Stern, *supra* note 3, at 53-56.

247. *See id.*

248. *Id.* at 56.

249. *See id.* at 58 (contending that the standoffs at Ruby Ridge and Waco, along with the passage of the Brady Bill, "catalyzed the growth of militia groups across America").

250. *See* 1998 U.S. Terrorism Report, *supra* note 24, at 23-24 (reflecting the absence of the incidents at Ruby Ridge, Idaho and Waco, Texas on the FBI's summary of terrorist incidents from 1990 to 1998).

251. Stern, *supra* note 3, at 21-24.

252. *Id.* at 24-25.

253. *Id.* at 27.

254. *Id.* at 24, 25, 31-32.

The standoff in Waco, Texas truly “galvanized” the militia movement;²⁵⁵ it is quite possible that Timothy McVeigh memorialized the Waco events by bombing the Murrah building on its two-year anniversary.²⁵⁶ Seeking to execute warrants for illegal firearms on the Branch Davidian compound, federal authorities set off a fifty-one day confrontation which resulted in, initially, a shootout that killed four federal agents, wounded other agents, killed a few of the Branch Davidians, and wounded two others and, ultimately, an inferno that killed more than eighty people including children.²⁵⁷ Waco, “with its overtones of the abuse of state power” reflected by the tragedy, stimulated the growth of the militia network.²⁵⁸ The escalating tension and violence that the Davidians were willing to absorb in resisting the government again illustrated the depth of anti-government sentiment.

In this context, the FBI recorded four incidents of right-wing terrorism between 1990 and April 1996 (when AEDPA was signed into law), including two July 1993 bombings in Washington state, by the American Front Skinheads—one of a gay bar in Seattle and the other of the NAACP headquarters in Tacoma.²⁵⁹ More generally, from 1989 through 1991, the Justice Department reported that the number of bombing incidents in the United States increased from 1208 to 2499;²⁶⁰ none were acts of Arab terrorism.²⁶¹ In 1993, there were forty-three deaths and over three hundred injuries due to bombings not tied to international terrorist groups.²⁶²

Because the FBI’s application of the “terrorist” label has often been suspect and haphazard,²⁶³ other right-wing terrorist incidents and

255. *Id.* at 63.

256. *See Dees, supra* note 231, at 157, 189 (noting that McVeigh was very bothered by the events at Waco and that the Oklahoma City bombing occurred on Waco’s two-year anniversary).

257. *See Stern, supra* note 3, at 59-60.

258. *Id.* at 63-64 (internal quotes omitted).

259. *See Terrorist Research and Analytical Center, FBI, Terrorism in the United States: 1994, in 13 Terrorism: Documents of International and Local Control* 161, 173 (Donald J. Musch ed., 1997). Up the IRS, Inc. committed the other two right-wing incidents in 1990 and 1991. *Id.* at 191.

260. *See* 139 Cong. Rec. 4220-21 (1993) (reporting a statement by Sen. Alfonse D’Amato in which he cited the Department of Justice’s 1991 Bomb Summary while discussing the death penalty for acts of terrorism).

261. *See supra* text accompanying note 24 (indicating that the FBI recorded no acts of international terrorism on United States soil from 1984 through 1991).

262. This figure was calculated by subtracting the WTC casualty numbers (six deaths and approximately one thousand injured) from the total deaths and casualties recorded for 1993 (forty-nine deaths and 1323 injured). *See The FBI, supra* note 2, at 94 (reporting that six people were killed and “more than 1000” were injured in the WTC bombing); Noble Statement, *supra* note 136, at 33 (reporting that forty-nine people were killed and 1323 were injured in 1993 by bombings); U.S. Dep’t of State, *Patterns of Global Terrorism, 1994, in 10 Terrorism: Documents of International and Local Control* 567, 648 (Howard S. Levie ed., 1996) (reporting that 1006 casualties resulted from international terrorist incidents in North America in 1993).

263. *See Telephone Interview with Mark Pitcavage with the Anti-Defamation*

activity may be unearthed by applying the definition to reported events. In December 1994, an anti-abortion protestor killed two clinic receptionists and injured five during a two-day shooting spree of three different clinics in Massachusetts and Virginia.²⁶⁴ The killings were the outgrowth of "a violent, insurrectionary" anti-abortion movement linked to seven murders and at least forty bombings and attacks of abortion centers from 1993 to 1998.²⁶⁵ In other words, the spree was one of numerous acts of anti-abortion terrorism. In March 1995, two members of the anti-government Minnesota Patriots Council were convicted for conspiracy to use ricin, an extremely deadly poison used as a biological weapon.²⁶⁶ A speck of ricin can kill a person and it is 12,000 times more lethal than rattlesnake venom.²⁶⁷ In October 1995, an Amtrak train was derailed, killing one person and seriously injuring twelve, and a letter expressing outrage about Ruby Ridge, Idaho and Waco, Texas attributed the incident to the "Sons of the Gestapo."²⁶⁸ In merely the first six months after the Oklahoma City bombing, there were six other near-incidents with right-wing groups.²⁶⁹

League (Nov. 17, 2000); Smith, *supra* note 232, at 5 (describing how criminologists contend the term "terrorism" must include, among other acts, violations of human rights and how scholars consider terrorist statistics "meaningless" because of the government's problematic definition of "terrorism"); cf. 1998 U.S. Terrorism Report, *supra* note 24, at i ("There is no single, universally accepted, definition of terrorism."). See *supra* note 226 for the FBI's definition of "terrorism."

264. John Kifner, *Suspect in Clinic Killings Eludes Hunt But Is Caught in 3d Attack, in Virginia*, N.Y. Times, Jan. 1, 1995, at 1. Supporters defended the actions of the suspect, John Salvi, making such statements as: "We love you. We support you;" "John Salvi was acting in defense of innocent life . . . He was willing to pay the ultimate price to stop legalized killing;" and "That [abortion clinic] was packed with customers yesterday. It was justified." Chris Black, *Alleged Killer Seen As Hero By Activists Outside Va. Jail*, Boston Globe, Jan. 2, 1995, at 8. John Salvi was ultimately convicted and sentenced to life imprisonment. John Ellement & Judy Rakowsky, *Salvi Found Dead in Prison Cell*, Boston Globe, Nov. 30, 1996, at A1. Almost two years after the attacks, he committed suicide in his jail cell. *Id.*

265. John Kifner, *Finding a Common Foe, Fringe Groups Join Forces*, N.Y. Times, Dec. 6, 1998, at 3.

266. Dees, *supra* note 231, at 212. Ricin was also found on another man, Thomas Lavy, who proved to have "survivalist" group connections. *Id.* at 211-12. After being arrested in December 1993 by Canadian authorities, Lavy fled and was recaptured in Arkansas in 1995. See *id.*

267. *Id.* at 211.

268. See Terrorist Research and Analytical Center, FBI, *Terrorism in the United States: 1995*, in 13 *Terrorism: Documents of International and Local Control* 193, 199 (Donald J. Musch ed., 1997).

269. See Stern, *supra* note 3, at 251-53 (describing, *inter alia*, the arrest of an Aryan Nation member possessing vials containing bubonic plague bacteria, the theft of five hundred pounds of explosives from a mine, and a plot to blow up an IRS office center).

2. Terrorist Activity of Domestic Groups After AEDPA

Right-wing terrorist activity continued after April 1996, when AEDPA was passed. In July 1996, the Justice Department uncovered an Arizona militia group, the Arizona Vipers, that had made a video depicting how to blow up several local buildings, including those for the Federal Bureau of Investigation, the Secret Service, the Immigration and Naturalization Service, the police, and the National Guard.²⁷⁰ During arrests of the twelve suspects, authorities seized a "witches' brew of explosives" and an "arsenal" of firearms and ammunition.²⁷¹ The suspects were eventually convicted for conspiracy to make bombs and for weapons charges, receiving sentences of one to nine years.²⁷² At the end of July 1996, a bomb linked to right-wing extremists exploded at the Atlanta Olympics, killing two and injuring 112 people.²⁷³

In October 1996, the FBI arrested seven West Virginia Mountaineer Militia members for plotting to blow up a Bureau fingerprinting facility and several other government buildings.²⁷⁴ The group's leader, Floyd Looker, had agreed to sell blueprints of the facility to an undercover agent posing as a broker for a Middle East terrorist network.²⁷⁵ The group had even considered assassinating United States Senator Jay Rockefeller and Federal Reserve Chairman Alan Greenspan in a "holy war" against the federal government.²⁷⁶ Looker was ultimately sentenced to eighteen years in prison for conspiring to manufacture and deal in explosives.²⁷⁷

In 1997, the FBI recorded two suspected acts of domestic terrorism against presumable right-wing targets: the bombing of a women's health facility and an "alternative lifestyle night club."²⁷⁸ The Bureau further prevented seven other acts of probable right-wing terrorism, including the arrests of a group planning to engage United Nations troops which they believed were stationed at an army base in Fort Hood, Texas.²⁷⁹ The primary suspects, self-proclaimed "Brigadier

270. William Hermann et al., *Vipers' Arsenal Is Seized*, Ariz. Republic, July 3, 1996, at A1.

271. *Id.*

272. 6 *Militia Members Sentenced to Jail*, The News and Observer (Raleigh, NC), Mar. 20, 1997, at A8; 71-Month Sentence for Viper Militia Member, Chi. Trib., Apr. 3, 1997, at 8.

273. 1996 U.S. Terrorism Report, *supra* note 221, at 4; see *infra* note 282.

274. See David Johnston, 7 in *Paramilitary Group Arrested in West Virginia*, N.Y. Times, Oct. 12, 1996, at A8.

275. *Id.*

276. *FBI Documents Say a Militia Discussed Killing Greenspan*, Chi. Trib., June 13, 1997, §1, at 15.

277. *Militia Leader Gets 18-Year Sentence, Denies Bomb Plot*, Chi. Trib., Mar. 29, 1998, at 8, available at LEXIS, News, Chicago Tribune.

278. 1997 U.S. Terrorism Report, *supra* note 220, at 3.

279. *Id.* at 4.

General" Bradley Glover²⁸⁰ and Michael Dorsett, were each sentenced to five years.²⁸¹

In 1998, the FBI recorded five incidents of domestic terrorism, one of which was the bombing of a women's health clinic in Birmingham, Alabama, linked to right-wing sources.²⁸² The Bureau was further involved in preventing twelve incidents of terrorism by domestic groups.²⁸³ The most prominent case involved several members of the white supremacist group "The New Order" who plotted to commit numerous crimes, including killing the founder of the Southern Poverty Law Center, poisoning the water supply of East St. Louis as a diversion for a bank robbery, and attacking the New York office of a Jewish social service organization.²⁸⁴ Four defendants were sentenced to prison.²⁸⁵

C. The Unjust Origins of AEDPA

In the face of a burgeoning homegrown terrorist movement, the United States directed its most public antiterrorism measure at international groups. No American groups connected to terrorism were subject to AEDPA's foreign-oriented antiterrorist provisions. To understand the reasons this may have happened, this section examines society's prejudice against Arabs and illustrates the racism that was bound to affect the nation's response to terrorism. Further, it suggests that the unconscious racism of society may potentially affect prosecutors' decisions in investigating Arab suspects.

Some commentators suggest that the government's reaction to Oklahoma City, as embodied in AEDPA, was inextricably tied to racism, whether unconscious or conscious.²⁸⁶ The unjustified attention

280. *Id.*

281. *See Man Given 5-Year Term for Plot on Fort Hood*, Austin-Am.-Statesman, Jan. 8, 1999, at B3 (Bradley Glover); *Bomb Suspect Sentenced*, Hous. Chron., Oct. 30, 1998, at 38A (Michael Dorsett).

282. 1998 U.S. Terrorism Report, *supra* note 24, at 3. The report tied the bombing to Eric Rudolph and the Army of God, who were connected to the July 1996 bombing of Atlanta's Centennial Park during the Summer Olympics, the January 1997 bombing of an Atlanta abortion clinic, and the February 1997 bombing of an Atlanta "alternative lifestyle" club. *Id.*

283. *Id.* at 5-7.

284. *Id.* at 5.

285. *Supplier to Supremacists Gets 2 Years*, St. Louis Post-Dispatch, Nov. 24, 1998, at B2. The column reported that all but one of five suspects had been sentenced to prison. *Id.* No subsequent newspaper reports were available providing the outcome of the fifth suspect's trial.

286. Kenneth Stern offered a compelling consideration:

Pretend for a moment that the militias had been mostly black; now imagine how fast [congressional] hearings into them would have been convened after [the Oklahoma City bombing]. . . . If you don't think that the color of the alleged bombers' skin and of the groups to which they were linked was the key factor for many politicians, recall the first days after the bombing, when the media assumed that Islamic terrorists were guilty. Even those public

directed at Arab and Muslim terrorists is consistent with anti-Arab bias that has permeated society. It is exhibited within the general population, law enforcement, and the media. Anti-Arab sentiment was evident during the 1979 hostage crisis and prominently re-emerged during the Persian Gulf conflict in 1990-91²⁸⁷ despite the fact that the United States was allied with many Arab nations including Saudi Arabia, Kuwait, and the United Arab Emirates. Indeed, serious hate crimes against Arabs—assaults, arsons, and bombings—increased from thirty-nine in 1990 to 119 in 1991.²⁸⁸ More generally, scores of Arabs were subject to threats and harassment, vandalism was directed against Arabs at least fifteen times, and there were, at a minimum, two shootings.²⁸⁹

The WTC bombing by Islamic extremists again tainted Arabs. A 1993 poll found that Islam was the “least-favored of all religions in America.”²⁹⁰ Anti-Arab sentiment appeared in areas far from New York City: Los Angeles, San Diego, Cleveland, and Raleigh, North Carolina.²⁹¹ Politicians were accused of rushing to unjustly blame Arabs. Sixteen Christian religious groups wrote to Congress, “We are alarmed by the ease with which . . . Islam[] is cited as the factor that distinguishes, motivates and funds the men accused of the WTC bombing as well as many of the perpetrators of violence in Middle Eastern countries.”²⁹² Specifically, they criticized immigration proposals that would “abet religious and ethnic stereotyping of Muslims and Arabs.”²⁹³

Such anti-Arab sentiment was reflected in statements made by Senator Frank R. Lautenberg when he learned of the connection one

officials who did not scapegoat Islam argued that the ideological system that gave license to “the bombers” should be condemned [whereas they did not do so when militia groups were implicated].

See Stern, *supra* note 3, at 211.

287. See Duke, *supra* note 194.

288. Deborah Sontag, *Muslims in the United States Fear an Upsurge in Hostility*, N.Y. Times, Mar. 7, 1993, at A1 (citing statistics provided by the ADC).

289. See American-Arab Anti-Discrimination Committee, 1991 Report on Anti-Arab Hate Crimes: Political and Hate Violence Against Arab-Americans 11-22 (1992) (on file with the *Fordham Law Review*).

290. Michael Katz, *Poll Says Islam Least-Favored U.S. Religion; Muslims Blame Media*, Chi. Trib., Apr. 9, 1993, §1, at 6.

291. See American-Arab Anti-Discrimination Committee, Hate Crimes Against Arab-Americans and American Muslims in the Wake of the World Trade Center Bombing 2 (Mar. 1993) (on file with the *Fordham Law Review*); Barbara Kingsley, *Muslims Tell Lawmaker of Prejudice Concerns*, Plain Dealer (Cleveland), Apr. 13, 1993, at 6B. For example, a mosque in Kent, Ohio received a phone call promising to “get” Muslims in retaliation for the WTC bombing. *Id.* Similarly, a Cleveland Islamic Center received threatening calls. *Id.*

292. *Congress Urged to Avoid Casting Suspicion on Arabs*, Orlando Sentinel, Apr. 10, 1993, at B6 (internal quotes omitted).

293. *Id.* (internal quotes omitted).

suspect charged with the bombing had with "violent Moslem fundamentalist groups."

These reports must serve as a *clarion call* for the concerted effort, in conjunction with other nations, to investigate, to identify, and to root out groups who, under *the banner of Islam*, perpetrate violence throughout the world and operate as enemies of peace and stability. . . . [T]his brutal bombing against innocent American civilians, on U.S. territory, makes one thing crystal clear: If *the long arm of Middle East terrorist groups* can strike at Americans hard at work [at] the World Trade Center in Manhattan, then no American is safe.²⁹⁴

Although he immediately added that a "majority" of Muslims reject terrorism, the disclaimer was weak because a mere majority does not preclude a large minority of Muslims from being terrorists.²⁹⁵ Furthermore, his dispassionate disclaimer could not remove the stigma attached by his previously heated language. A previous warning by Senator Orrin Hatch not to stoke anti-Arab bias suggested that the Senate had already seen other such heated statements.²⁹⁶

A comparison of Senator Lautenberg's oratory with the measured words of Senator Thomas Daschle after two American suspects were arrested for the Oklahoma City bombing shows a revealing contrast.

It is imperative that we find ways for Americans from diverse backgrounds with sometimes very divergent points of view to live harmoniously.

The first step toward that goal is for us to talk to each other. . . .

If we listen to one another, we are likely to find our differences are not as great as some of the intemperate rhetoric makes them appear. . . .

....

The bombing in Oklahoma City is the result of evil, *misguided* people. We do not yet know what their motivation was; we can only speculate. But *we can ask ourselves if our increasingly hateful public*

294. 139 Cong. Rec. 4312 (1993) (emphases added).

295. See *id.* ("Clearly, the majority of Moslems in the United States reject this cult of terrorists. One's religion is no mark of one's politics. The Moslems of this Nation certainly do not support violence against fellow Americans and others.").

296. See 139 Cong. Rec. 4477 (1993). Senator Orrin Hatch cautioned:

In the case of the World Trade Center bombing, we again must beware of those who would condemn all Arab-Americans for the actions of a few scurrilous and cruel individuals. . . . Americans must not hold all Arabs or Moslems responsible for the World Trade Center bombing simply because the principal suspect happens to be an Arab.

Id.

*discourse is falling on ears receptive to hate, if it is providing a context for hands ready to undertake hateful acts.*²⁹⁷

Senator Daschle urged the nation to understand the environment that encouraged Timothy McVeigh to kill 168 people; he did not invoke a "clarion call" to fight right-wing extremists. He isolated McVeigh as the cause of the bombing and did not blame his ideology or political beliefs; McVeigh was not placed under the "banner" of militia extremists. The speech assuaged public anxiety about militia groups; it did not foment public fear that the "long arm" of right-wing extremism can strike at anyone if it can strike at Oklahoma. Indeed, the Senator suggested there may be collective blame.²⁹⁸

Oklahoma City led to more backlash against Arabs. A "wave of anti-Moslem, anti-Arab hysteria" immediately followed the bombing as many experts and media linked the bombing to Islamic groups.²⁹⁹ In the first three days after the Oklahoma City bombing, 222 attacks against Muslims were recorded³⁰⁰ even though the Caucasian American suspect Timothy McVeigh was linked to the bombing within two days.³⁰¹ Attacks included spitting at women, death threats, gunshots at mosques, and a fake bomb thrown at a child day care center.³⁰² At schools and universities, Muslim and Arab students were subject to harassment.³⁰³ Arab Muslims around the United States grew keenly aware of the pervasive anti-Arab sentiment.³⁰⁴

Such bias was also evident in law enforcement and among terrorist experts. On the day of the Oklahoma City bombing, the FBI

297. 141 Cong. Rec. 11,197 (1995) (emphases added); see also 141 Cong. Rec. 11,185 (1995) (reporting Senator James M. Inhofe's statement that "[t]he bombing in my State was not the work of the left or the right, of conservatives or liberals, Republicans or Democrats, or even right-wing extremists, as some people would say").

298. Of course, the terrorist act of a fellow American may naturally require more understanding than one by an outsider because such a source of violence has developed and lived, and may continue to live, among us. Nevertheless, Senator Lautenberg's words stigmatized an entire group while Caucasian perpetrators were treated with circumspection. Moreover, consider that while 168 people were killed by McVeigh, only 5 were killed by the Arab group.

299. See 141 Cong. Rec. 11,940 (1995) [hereinafter Senator Abraham Statement] (reporting the statement of Senator Spencer Abraham); Stern, *supra* note 3, at 182-83.

300. James Brooke, *Attacks on U.S. Muslims Surge Even as Their Faith Takes Hold*, N.Y. Times, Aug. 28, 1995, at A1.

301. See John Kifner, *Authorities Hold a Man of 'Extreme Right-Wing Views'*, N.Y. Times, Apr. 22, 1995, at 9.

302. Brooke, *supra* note 300.

303. Senator Abraham Statement, *supra* note 299.

304. See, e.g., Emily M. Bernstein, *Fear About Retaliation Among Muslim Groups*, N.Y. Times, Apr. 21, 1995, at A26 (quoting an Arab Muslim in Oklahoma who feared anti-Arab bias); Michael Grumwald, *Muslims Fear Being Made Scapegoats*, Boston Globe, Apr. 21, 1995, at 1 (Muslims in Boston); Don Lattin, *Muslims, Others Feel Scapegoated by Speculation*, S.F. Chron., Apr. 20, 1995, at A11 (Muslims in San Francisco).

immediately focused on Arabs³⁰⁵ as did the Pentagon.³⁰⁶ The special agent in charge of the Oklahoma FBI readily dismissed a tie to the Branch Davidians, merely calling it an "obvious coincidence" that the bombing's date marked the two-year anniversary of the Waco confrontation.³⁰⁷ Former CIA and FBI director, William Webster, said the bombing had the "hallmarks" of Middle East terrorism.³⁰⁸ Another former CIA official urged, in *The Boston Globe*, that "[t]he foreign supporters must be identified."³⁰⁹ The editor of a Middle East-related periodical declared that the West was "under attack."³¹⁰ He warned, "People need to understand that this is just the beginning. The fundamentalists are on the upsurge, and they make it very clear that they are targeting us. They are absolutely obsessed with us."³¹¹ A former congressman, within hours of the bombing, discussed on CBS television the "very clear evidence" that linked "fundamentalist Islamic terrorist groups" to the bombing.³¹²

Law enforcement's dragnet immediately fell upon Arabs. A "suspicious Jordanian-American man" was apprehended by London authorities and turned over to "an army of federal agents" the day after the bombing.³¹³ The man raised suspicion because he had flown from Oklahoma City and had telephone equipment in his luggage.³¹⁴

305. See Arnold Hamilton, *Terror: Oklahoma City Car Bomb Kills at Least 31*, Dallas Morning News, Apr. 20, 1995, at 1A. The article described an FBI communiqué which stated: "We are currently inclined to suspect the Islamic Jihad as the likely group. . . ." *Id.*; see also Jere Hester & Dave Eisenstadt, *Terror Blast Kills Scores: Suspects Spotted in Texas*, Daily News (N.Y.), Apr. 20, 1995, at 2 (quoting a "top FBI official" who stated, "[a]s of right now, we are focusing on Muslim terrorism" because the Oklahoma City bombing was almost "exactly the same" method as that in the WTC bombing).

306. See Peter Copeland, *Experts Say Attack Reveals Vulnerability*, Rocky Mtn. News (Denv.), Apr. 20, 1995, at 4A. A Pentagon official assured people that their reaction was "not business as usual" and that "[a]ll the national intelligence agencies are spinning up and dredging through everything they have." *Id.* Pentagon involvement strongly suggested concern with a foreign threat, that is, international terrorists.

307. See Hamilton, *supra* note 305.

308. See Sam Vincent Meddis, *Oklahoma Learns "No Place Is Safe"*, USA Today, Apr. 20, 1995, at 1A (internal quotes omitted).

309. Vincent M. Cannistraro, Editorial, *Evening Up the Books?*, Boston Globe, Apr. 21, 1995, at 23. The editorial's author was a former CIA chief of counterterrorism. *Id.*

310. Meddis, *supra* note 308 (internal quotes omitted) (quoting Daniel Pipes, editor of the *Middle East Quarterly*).

311. *Id.* (internal quotes omitted) (quoting Daniel Pipes).

312. Walter Goodman, *Wary Network Anchors Battle Dubious Scoops*, N.Y. Times, Apr. 20, 1995, at B12 (internal quotes omitted) (quoting former representative Dave McCurdy).

313. Helen Kennedy, *Wanted; Global Manhunt Targets 2 in Okla. Bombing*, Boston Herald, Apr. 21, 1995, at 1, available at LEXIS, News, The Boston Herald.

314. *Id.* While no explanation was given for the reason telephone equipment may have raised suspicions, one may surmise that such equipment may appear similar to, or be used in, bomb equipment.

In another case, three Arab men asking for directions from an Oklahoma Highway Patrol officer somehow raised his suspicion, prompting him to investigate their license plate number,³¹⁵ which had been illegally switched from a rental car. The three men were arrested³¹⁶ and one was immediately identified as a suspect.³¹⁷

Such law enforcement treatment of Arabs started in the late 1960s,³¹⁸ persisted into the 1970s and 1980s,³¹⁹ and grew prominent in the early 1990s when, for example, federal agents initiated questioning of Arab residents in Texas, California, New York, Arkansas, and Ohio.³²⁰ With the onset of the Persian Gulf war, the FBI began targeting "in earnest" the Arab community.³²¹ Confronting Arabs throughout the nation, the FBI and some local officials questioned people about their political viewpoints, opinions about Saddam Hussein, and attitudes concerning Israel and United States Middle East policy.³²² The FBI reportedly continued its surveillance of certain Arab communities after the war.³²³ A Brooklyn mosque was monitored by FBI agents in March 1993, and the surveillance resulted in the arrest of three Arab men for a cause unrelated to terrorism.³²⁴

The news media fostered such public prejudice, in part, by emphasizing connections between terrorists and Arabs or Muslims when it would not do so for non-Arab groups.³²⁵ Furthermore, it reinforced stereotypes by associating Arab peoples with negative

315. *Id.*

316. *Id.*

317. *Id.*; see also *Bomb Rocks Federal Building in Oklahoma*, Chi. Trib., Apr. 19, 1995, at 1.

318. See James G. Abourezk, *Arab-Americans Suffering with Guilt by Unfair Association*, Buff. News, May 2, 1993, at H10. Former Senator Abourezk described FBI harassment of a Palestinian American woman who hosted a group of West Bank mayors touring the United States. *Id.* The FBI did not investigate the Minneapolis mayor who co-hosted with her. *Id.* Sen. Abourezk also recounted FBI harassment, which "most likely" included burglarization, impersonation, and threats of an Arab American attorney who was the plaintiff in a 1972 American Civil Liberties Union lawsuit. *Id.*

319. See Dempsey & Cole, *supra* note 6, at 44-46 (detailing the FBI's nationwide monitoring of the non-criminal conduct of a Palestinian student organization, the General Union of Palestinian Students, from 1979 to 1989).

320. See *id.* at 42-44.

321. Akram, *supra* note 11, at 52 n.5.

322. *Id.*

323. *Id.*

324. Sontag, *supra* note 288. The agents checked the license plate of one car and discovered it was stolen. *Id.* Although they arrested the three Arab American men, the suspects were later released. *Id.*

325. Wiley Hall III, *Arab-Americans: Rush to Judgment*, Times-Picayune (New Orleans), Apr. 28, 1995, at B7 [hereinafter Hall, *Rush to Judgment*] ("[T]he major media outlets have been very careful not to unfairly link all angry white men, or even all right-wing extremists, to the Oklahoma City bombing."); Betty Liu Ebron, *U.S. Arabs, Muslims Allege Bias*, Dallas Morning News, Mar. 14, 1993, at 37A (noting that the media will emphasize an Arab connection to terrorism but will not do so for a Christian or Jewish group).

attributes.³²⁶ In 1993, two prominent and otherwise respected publications portrayed shockingly stereotypical and insulting images of Arabs. *The New Yorker* magazine depicted a scene on a July 1993 magazine cover where three children, one Caucasian, one Hispanic, one African, were building an elaborate sandcastle which is destroyed by a fourth child wearing Arab headdress.³²⁷ *The Washington Post* ran a cartoon titled, "Let's Play Where's Abu" and challenged the reader to find among a throng of immigrants "the terrorist Abu Ben Fotwa El Fadwa El Fatweh [who] is carrying a huge bomb strapped to his waist."³²⁸ Even Disney was accused of encouraging anti-Arab prejudice with the lyrics from its movie "Aladdin."³²⁹ Two Congressmen unambiguously stated their concerns in the House of Representatives about such ethnic stereotyping.³³⁰ Representative David E. Bonior asserted that "[a]nti-Arab bias is very real—it is prevalent in our television programs, newspapers, and, yes, our magazines."³³¹

The Oklahoma City tragedy provided another occasion to tarnish and stigmatize Arabs. The media may have been objective when it reported investigative updates about possible suspects,³³² but it inexplicably continued focusing on an Arab link after two Caucasians, possibly white supremacists, were identified as primary suspects.³³³

326. See Moustafa Bayoumi, Letter to the Editor, *Don't Let Trade Center Blast Ignite Witch Hunt*, N.Y. Times, Mar. 23, 1993, at A22 (criticizing the newspaper's description on March 5 of a bombing suspect as having a "beakish nose" and "hollow cheeks").

327. See Porras, *supra* note 192, at 134.

328. See 139 Cong. Rec. 18,246 (1993) (reporting the statement of Representative David E. Bonior discussing media coverage of the Arab community).

329. *Id.* The lyrics that appeared in the movie theater version of "Aladdin" sang:

Oh, I come from a land
From a faraway place
Where the caravan camels roam.
Where they cut off your ear
If they don't like your face
It's barbaric, but hey, it's home.

Id. Disney ultimately removed the fourth and fifth lines. *Id.*

330. See *id.* (reporting the statements of Representatives David E. Bonior and John Dingell discussing media coverage of the Arab community).

331. *Id.*

332. See, e.g., Hester & Eisenstadt, *supra* note 305 (reporting the FBI was seeking three men of Middle Eastern descent); Michael Taylor & Louis Freedberg, *Timing and Method Put Focus on Militant Groups*, S.F. Chron., Apr. 20, 1995, at A13 ("[E]xperts immediately pointed to the timing of the attack—which appeared calculated to maximize carnage—as a signature of Muslim terrorists who have carried out similar bombings.").

333. See Mimi Hall, *Arab-Americans Once Again Targets*, USA Today, Apr. 21, 1995, at 3A (describing that a Middle Eastern tie was "a notion replayed again and again in media reports" after arrest warrants for two white men were issued); see, e.g., Editorial, *Striking Back*, Wash. Times, Apr. 21, 1995, at A22 (arguing that an international group would likely be behind the bombing and that the United States must pay particular attention to Middle Eastern terrorism, which is "most likely to

One troubling example of anti-Arab sentiment in the media occurred on a WABC radio talk show discussing the Oklahoma City bombing. The host, responding to a caller who cautioned against a rush to blame Muslims, exclaimed, "What I would like to do is put you up against the wall with the rest of them, and mow you down along with them—execute you with them."³³⁴ Another radio host requested from his listeners: "Tell me what you'd like to do with these towelheads."³³⁵ At least one reporter acknowledged the news media's anti-Arab inclination when he wrote, "In hindsight . . . our first suspicions should not have fallen on Arab Americans but on angry young white men."³³⁶

Popular opinion mirrored the media's perspective. A *USA Today* poll after the bombing indicated the social climate was ripe to direct society's ire against foreigners and, perhaps, make Arabs scapegoats. Increased surveillance of foreigners in America was supported by 63 percent while surveillance of American citizens was only supported by 37 percent.³³⁷

Such a society was not only more likely to unreasonably apprehend an Arab terrorist threat, as compared to a domestic threat, but it was also more likely to have prosecutors and investigators, as fellow members of society, who share such sentiment. As a result, the criminal proceedings against the Oklahoma City and WTC-related suspects may possibly have exaggerated the Arab terrorist vis-à-vis the militia terrorist threat. While prosecutors ultimately convicted a wide-reaching "jihad organization"³³⁸ of almost twenty people somehow connected to the WTC bombing,³³⁹ only two lone Americans in the Oklahoma City bombing were convicted. The respective results reinforced what anti-Arab bias had predisposed society to believe: foreign elements were the threat. Consequently, Congress' antiterrorism response may have been a response only to the more dangerously perceived terrorist source.

target the United States", despite a cover article and graphic about the two primary Caucasian suspects); Kennedy, *supra* note 313 (focusing approximately one-half of the article on Muslim suspects despite reporting the investigation's "big break" in identifying two Caucasian suspects and noting that no claims of responsibility by Muslim groups had been taken seriously by law enforcement).

334. Brooke, *supra* note 300.

335. Grumwald, *supra* note 304.

336. Hall, *Rush to Judgment*, *supra* note 325. Hall noted in retrospect that the Republican revolution in the 1994 elections, the membership growth in anti-government groups, and the fact that April 19 was the anniversary of the Waco, Texas showdown were factors that should have led the public away from suspecting Arabs. *Id.*

337. Andrea Stone & Tom Squitieri, *Bomb Forces Question: How Safe Are We?*, *USA Today*, Apr. 21, 1995, at 1A.

338. Richard Bernstein, *U.S. Portrays Sheik as Head of a Wide Terrorist Network*, *N.Y. Times*, May 6, 1994, at A1.

339. In addition to the six men convicted for the WTC bombing, thirteen others were convicted for a broader conspiracy to bomb various New York City sites (of which the WTC had been one). See *supra* text accompanying notes 206, 213, 215.

If society's racism is typically "unconscious" and hidden, rather than conscious and overt,³⁴⁰ and law enforcement personnel are members of that same society, law enforcement may likely be unconsciously racist to at least some extent. Thus, when one considers the broad discretion granted to prosecutors,³⁴¹ it is quite possible that government investigations may either overestimate the threat posed by foreigners or underestimate the threat posed by citizens, and allot resources accordingly.³⁴² As a result, they may collect more evidence to ensure a broad-reaching prosecution and successful conviction.³⁴³

For example, consider that the FBI had started monitoring the WTC-related group in 1989, four years before the defendants were ultimately arrested.³⁴⁴ This was long before the 1993 WTC bombing by four associates would draw attention to their group. In 1991, the government first infiltrated the group with an undercover informant.³⁴⁵ His work provided prosecutors with hundreds of hours of secretly recorded video and audio tapes, evidence upon which the government's terror conspiracy indictments "relied heavily."³⁴⁶ Moreover, consider the seniority of government officials involved in the WTC investigation. President Bill Clinton was briefed, in advance, on the raids to arrest the terror conspiracy suspects.³⁴⁷ Attorney General Janet Reno was significantly involved in delaying arrest of the group's leader, Sheik Omar Abdel Rahman, to ensure enough evidence was compiled against him and, more generally, to continue surveillance of "Islamic extremism."³⁴⁸ Indeed, she, along with United States Attorney Mary Jo White, withstood heavy criticism for steadfastly gathering evidence and not simply arresting him.³⁴⁹ The decision to ultimately arrest Rahman was made by top

340. See *supra* notes 106-09 and accompanying text.

341. See Margaret E. McGhee, *Prosecutorial Discretion*, 88 Geo. L.J. 1057, 1058-60 (2000) ("A prosecutor has far-reaching authority to decide whether to investigate, . . . to determine whether to bring charges, what charges to bring, when to bring charges, and where to bring charges.").

342. Note, *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1522 (1988) [hereinafter *Developments in the Law*] (noting the broad discretion given to prosecutors in the "screening stage").

343. See *id.* at 1524.

344. Appellee Brief, *supra* note 201, at 17-18 (describing FBI surveillance of the group in July 1989).

345. The undercover informant was a former Egyptian soldier who was involved with the group for two periods: from the fall of 1991 through July 1992, and then from March 1993 through the June 1993 arrests. See Appellee Brief, *supra* note 201, at 33-34, 46, 70, 174.

346. Tabor, *supra* note 208.

347. Robert D. McFadden, *8 Seized as Suspects in Plot to Bomb New York Targets and Kill Political Figures*, N.Y. Times, June 25, 1993, at A1.

348. David Johnston, *Reno Sees Growing Evidence and Makes Call*, N.Y. Times, Aug. 26, 1993, at B4.

349. See *id.* Then-Senator Alfonse D'Amato was among Reno's harshest critics, particularly because he apparently was an assassination target. See *id.*

Justice Department officials.³⁵⁰ To the extent that the Justice Department may also be affected by conscious or unconscious racism, it is not unlikely that Arab suspects would be prosecuted differently than domestic Caucasian suspects.³⁵¹

Arabs have committed few acts of domestic terrorism since 1983,³⁵² while domestic groups have been the cause of almost all terrorism on American soil.³⁵³ Considering these facts and society's anti-Arab sentiment, one must conclude that AEDPA's focus on Arabs was unwarranted by terrorist trends and rooted, at least in part, in an entrenched racist impulse.³⁵⁴ The following part will illustrate the subsequent effects AEDPA has had on the Arab community.

III. AEDPA'S STIGMATIZATION OF ARABS AND THE NEED FOR SOLUTIONS

This part will demonstrate that AEDPA has stigmatized the Arab community and, thus, the legislation violates equal justice. The enforcement of AEDPA has directly stigmatized Arabs in its almost exclusive enforcement against the Arab community and the harshness of its application. As a result, AEDPA implicitly justifies societal discrimination against Arabs, which has been manifest in treatment by government agencies, individuals, and business entities. This part therefore proposes solutions to the problem of unequal justice and argues that every American has a fundamental interest in ensuring equal justice for Arab residents and for all.

A. Application of AEDPA Against Arabs

AEDPA's impact has been disproportionately felt by Arabs in its designation of foreign terrorist organizations, the application of the fundraising prohibition, and the authorization of secret evidence.³⁵⁵ By issuing a list of foreign terrorist organizations of which half are Arab or Muslim groups,³⁵⁶ the government has branded them in public as the United States' primary terrorist threat. By definition, no domestic extreme right-wing group can fall within the "foreign" terrorist group designation. The Ku Klux Klan may be a hate group, but that denotes its members as "haters" or "racists." Hamas, and thirteen other Arab groups, have been officially branded terrorism groups, which not only labels members as "terrorists"—a more

350. *See id.*

351. While this issue is beyond the scope of this Note, it should be considered when evaluating the respective threats uncovered by the WTC and Oklahoma City investigations.

352. *See discussion supra* Part II.A.

353. *See discussion supra* Part II.B.

354. *See discussion supra* Part II.C.

355. *See discussion supra* Part I.C.

356. *See supra* text accompanying note 21.

pejorative term than "hater" or "racist"—but also subjects them, almost exclusively, to AEDPA's other harsh provisions. In applying the fundraising prohibition, the government has subjected numerous Arab and Muslim groups to intense scrutiny and inhibited their ability to legitimately contribute to charity, burdens which are not proportionately imposed by AEDPA against other ethnic groups.³⁵⁷ Through the use of secret evidence almost exclusively against Arabs and Muslims, the government degrades each individual, dispirits his or her family, and suggests to the surrounding community that Arabs are so dangerous that they are unworthy of our most basic constitutional protections.

1. Designating "Foreign Terrorist Organizations"

Although Arab groups may be a publicly prominent cause of violence or terrorism abroad,³⁵⁸ AEDPA was intended to prevent the terrorism on American soil that Oklahoma City painfully represented.³⁵⁹ Nevertheless, it publicly brands only international groups based on two vague criteria that are subject to limited judicial review: (1) whether they engage in terrorist activity and (2) if such activity threatens the nation or its citizens.³⁶⁰ Groups like the American Front Skinheads, the Arizona Vipers, the West Virginia Mountaineer Militia, and other right-wing groups that have committed or plotted terrorist violence in the United States meet this criteria,³⁶¹ yet AEDPA does not officially brand them as terrorist threats or subject them to any such constitutionally suspect restrictions.³⁶² Although some may argue that domestic groups should have more constitutional protections than international groups, the mere disproportionate impact of AEDPA on Arabs creates a critical problem with regard to racism in the United States. By failing to label domestic groups as a terrorist danger, the government enhances the perceived dangerousness of international groups.

The government further supported the notion that Arabs are the most dangerous threat to the nation by identifying Arab and Muslim groups as fourteen of the twenty-eight most dangerous terrorist organizations.³⁶³ The fourteen non-Arab and non-Muslim groups represent eight disparate nationalities from South America, Europe, and Asia.³⁶⁴ Notably, the government failed to include the Irish

357. See *infra* text accompanying notes 373-74.

358. See *supra* text accompanying notes 134, 224.

359. See *supra* note 4 and accompanying text.

360. See discussion *supra* Part I.C.2.

361. See *supra* text accompanying notes 259, 270-85.

362. By definition the pertinent AEDPA provisions are directed at, and implicate only, foreign groups. They do not affect domestic groups.

363. See *supra* note 21.

364. See *supra* note 21.

Republican Army ("IRA") in its list. In fact, three Senators attacked the IRA's absence when the initial foreign terrorist organization list was released in 1997.³⁶⁵

The State Department explained it did not so designate the IRA because of the group's recent cease-fire and peace negotiations.³⁶⁶ Palestinian groups, however, remained on the list under the umbrella of the Palestinian Liberation Organization ("PLO") even though the PLO had entered peace talks with Israel and concluded three peace agreements.³⁶⁷ Although no IRA terrorism has recently touched United States soil, the same may be said for the activities of any of the Palestinian groups.³⁶⁸ Nevertheless, the IRA is able to continue raising money in the United States, while Palestinian groups are not.

2. Prohibiting Material Support

The singling out of Arabs under AEDPA is compounded by the enforcement of AEDPA against any party suspected of contributing to terrorist groups, even for their many non-violent activities.³⁶⁹ Under AEDPA, anyone who attempts to give material support or resources to a designated terrorist organization may be imprisoned for ten years and fined at least \$50,000.³⁷⁰ The first charge for providing "material support" was brought in 1998 against Fawzi Mustapha Assi.³⁷¹ Indeed, in 1998 alone, the FBI was investigating at least twenty Muslim groups in the United States.³⁷² Although other groups have been examined,³⁷³ the government admits that its focus is on

365. Jacqueline Benson, Comment, *Send Me Your Money: Controlling International Terrorism by Restricting Fundraising in the United States*, 21 Hous. J. Int'l L. 321, 347 (1998) (describing the opposition of Senators John Kyl, Dianne Feinstein, and Jesse Helms). Senator Jesse Helms questioned the State Department's decision because the United States Embassy in London was a "medium threat" risk. Press Release, Senator Jesse Helms, Helms Letter to President Urging Designation of IRA as a Foreign Terrorist Organization (Oct. 21, 1997), available at LEXIS, FDCH Congressional Press Releases. He attributed the risk level to the embassy's concerns about the IRA, particularly in light of the group's seventeen terrorist acts beginning in 1991, which included mortar attacks on airplanes at Heathrow Airport and an attempted assassination of British Prime Minister John Major. See *id.*

366. See Benson, *supra* note 365, at 347 n.168.

367. Akram, *supra* note 11, at 71 n.116.

368. See Designation of Foreign Terrorist Organizations, *supra* note 21 (promulgating the most recent list of foreign terrorist organizations); 1998 U.S. Terrorism Report, *supra* note 24, at 23-24 (describing all terrorism incidents in the United States for 1990-1998).

369. See *supra* text accompanying note 153.

370. See *supra* text accompanying notes 152-54.

371. John Mintz & Michael Grunwald, *FBI Terror Probes Focus on U.S. Muslims: Expanded Investigations, New Tactics Stir Allegations of Persecution*, Wash. Post, Oct. 31, 1998, at A1. Assi was monitored for five months before being charged. *Id.* (noting the FBI started monitoring Assi in February 1998 and charged him after a July 1998 airport stop). He was ultimately released on bail and fled to Lebanon. *Id.*

372. *Id.*

373. See *id.* (describing investigations of Puerto Rican, Irish, and Spanish groups).

Muslim groups,³⁷⁴ which debilitates Arab Americans in two manners. First, Arabs themselves sense the almost paranoid view the government has of their group.³⁷⁵ As a result, there is a "chilling effect" on the First Amendment activity of Arab groups intimidating them into curtailing their speech and restricting their associations.³⁷⁶ Second, the surrounding non-Arab community is arguably influenced by, and perhaps ultimately subscribes to, such paranoia as it either witnesses the questioning and scrutiny by authorities or hears of such treatment in the media, whether or not the charges are ever actually proven true.³⁷⁷ The government's selective enforcement of this provision of AEDPA accentuates the stigma against Arabs and sends a discriminatory message to the community.

In contrast, two Israeli foreign terrorist organizations, Kach and Kahane Chai (collectively, "Kahane"), have raised money apparently unobstructed by AEDPA.³⁷⁸ In Israel, the groups have been outlawed for their "Arab-hating" ideology since 1994, the same year a Kahane supporter shot twenty-nine Muslims to death while they prayed in a mosque.³⁷⁹ Kahane was considered "a cult of violence and racism"

374. *Id.* ("[O]fficials acknowledge that their main focus is on Muslim individuals and groups.").

375. See, e.g., Gordon Trowbridge & Lama Bakri, *Local Arabs Fear Fed Scrutiny*, Detroit News, July 25, 2000, at 1A (quoting a local Arab leader commenting on the arrests of some Arab American men suspected of fundraising for a Lebanese terrorist group: "It's intimidating. It seems like the Arab community has been singled out"); Teresa Watanabe & Eric Lichtblau, *FBI Accused of Terror Overreaction: Muslims Claim They Were Singled Out for Questioning in the Federal Effort to Squelch Millennium-Related Terrorism; Agents Deny Bias*, L.A. Times, Jan. 10, 2000, at B1 (quoting a California Islamic fundraiser who was questioned by FBI agents about whether she knew an Algerian man arrested in Seattle allegedly trying to enter the United States with explosives: "Who do they think we are? . . . That we Muslims have a terrorist in every family? Sometimes it just gets ridiculous.").

376. Dempsey & Cole, *supra* note 6, at 11. To illustrate the effect a government fundraising investigation can have on a suspect's life, consider the treatment of one subject who was investigated by the government under an Executive Order with "similar effect," *id.* at 141, as AEDPA:

FBI agents tail him everywhere and question people he meets. In June, prosecutors filed an unprecedented "forfeiture complaint" seizing his bank accounts and taking steps to remove him, his wife, . . . and their four young children from their house. . . .

Now . . . the Salah family is living on donated food. Salah is no longer allowed to have financial dealings—including with his lawyer and his doctor—unless they obtain special Treasury Department licenses.

Mintz & Grunwald, *supra* note 371.

377. See, e.g., David Firestone, *Possible Terrorist Links Sting Quiet Neighborhood*, N.Y. Times, July 24, 2000, at A10; William Gaines & Andrew Martin, *Terror-Funding Probe Touches Suburban Group*, Chi. Trib., Sept. 8, 1998, at 1; Judith Miller & Riva D. Atlas, *Citibank Weighs Ending Ties with an Arab Bank: Asks Treasury Department for Guidance*, N.Y. Times, Jan. 24, 2001, at C2; Judith Miller, *U.S. Contends Muslim Charity Is Tied to Hamas*, N.Y. Times, Aug. 25, 2000, at A21.

378. See Dean E. Murphy, *Terror Label No Hindrance to Anti-Arab Jewish Group*, N.Y. Times, Dec. 19, 2000, at A1.

379. See *id.*

and remains potentially dangerous although its support has shrunk.³⁸⁰ Nevertheless, the organization freely and publicly fundraises in the United States.³⁸¹ They avoid authorities by simply changing organizational names, suggesting that Kahane is subject to minimal scrutiny by federal authorities.³⁸² Kahane's Brooklyn leader stated that law enforcement officials consider them "nice people" and leave the group alone.³⁸³ Indeed, federal authorities allowed the leader of Kach to enter and travel around the United States for a speaking tour during which he would attend a \$35,000 New York fundraiser.³⁸⁴ Justified or not, such apparent indifference by authorities indicates to the public that *this* terrorist group is not dangerous and avoids stigmatizing Israelis or Jews.

Particularly problematic for domestic Arab groups is that a number of overseas terrorist sponsors also fund religious and charitable projects.³⁸⁵ Hamas operates "orphanages, old-age homes, hospitals, women's clinics, religious colleges, sports clubs, kindergartens and vocational schools" in addition to a match-making service.³⁸⁶ The group provides irreplaceable benefits to "tens of thousands" of indigent Palestinians.³⁸⁷ Indeed, Hamas arguably provides more charitable services to Palestinians than their own governmental entity, the Palestinian Authority.³⁸⁸ Another "foreign terrorist organization," Hezbollah, operates three hospitals, nine schools, and thirteen dental clinics while also "provid[ing] drinking water to Beirut slums and rebuild[ing] roads and houses destroyed [by] fighting."³⁸⁹

No Arab in America can financially contribute to such worthwhile endeavors undertaken by such prominent and influential groups.³⁹⁰

380. *See id.* (internal quotes omitted).

381. The article described a Brooklyn fundraising dinner for 350 attendees who will pay one hundred dollars apiece to a fund which supports pro-Kahane causes. *Id.* One of the group's leaders stated, "We operate openly and have nothing to hide." *Id.*

382. *See id.*

383. *Id.*

384. *See id.* In apparent incredulity, an Islamic group spokesman, Ibrahim Hooper, commented: "Can you imagine the outcry if both the head of Hamas and Hezbollah went on a speaking tour of America?" *Id.*

385. *See U.S. Seizes Cleric's Possessions in Uganda Bomb Plot Inquiry*, Dallas Morning News, Sept. 24, 1998, at 15A, available at LEXIS, News, The Dallas Morning News ("A number of Middle Eastern organizations that have sponsored terrorism, including the Palestine Liberation Organization, Hezbollah, Hamas and a variety of Iranian foundations, also have funded charitable and religious projects.").

386. Deborah Horan, *Terrorists Maintain Foothold in Palestinian Society: Hamas Contributes to Social Services in West Bank and Gaza*, Hous. Chron., Sept. 28, 1997, at 32A.

387. *Id.*

388. *See infra* note 390.

389. Larry Kaplow, *Hezbollah Turns to PR to Fight off Terroristic Image*, Atlanta J.-Const., Mar. 4, 1999, at B1.

390. *See* Marjorie Miller, *Hezbollah Battles to Shed Extremist Image in Lebanon*, L.A. Times, Nov. 28, 1997, at A1 ("Hezbollah has come of age. . . . They have gained experience. They're systematic. They're good at management, and they don't waste

Such a restriction impinges on a fundamental Islamic tenet requiring 2.5 percent of each Muslim's annual income to be given to charitable organizations.³⁹¹ While these organizations may have ties to groups involved in paramilitary activity, they also do substantial communal work. To prevent Arabs from donating money to any such organization denies the reality that the Palestinian cause, or a conservative Islamic movement, is a part of many Arabs' associative ties. This effect, in itself, may stigmatize Arabs in their own eyes by indicating the "inferiority" of their group.³⁹² In the eyes of the community, the stigma attaches itself not simply when one is found guilty of contributing to a terrorist organization, but when one is investigated or accused of being associated with a group being investigated.³⁹³ This process contributes to the terrorist-image many Americans have and the consequent stereotypes reinforced.³⁹⁴

3. Secret Evidence

As previously noted, secret evidence proceedings have not been brought under AEDPA but instead under more lenient INS regulations exploited in an accommodating political environment.³⁹⁵ The INS regulations give the government almost unfettered power as the defendant cannot raise constitutional defenses, the prosecutor need not even summarize classified evidence nor file criminal charges, and one federal department manages the entire affair.³⁹⁶ A disproportionate number of secret evidence cases are brought against Arabs, which imposes harsh, constitutionally-suspect situations on each person and his or her family. Arabs likely view themselves as stigmatized members of society due to the focus and harshness of treatment. The investigations alone reinforce terrorist suspicions and the government's tactics suggest to society that a group is so untrustworthy or dangerous that it is unworthy of basic constitutional rights. Because Arabs are virtually the only group subject to such treatment,³⁹⁷ they become unjustifiably perceived in the public consciousness as terrorists.

time trying to make themselves popular with the usual propaganda."'). Another newspaper observed that Palestinians were more dependent on Hamas-affiliated charities than on the Palestinian Authority for support. Horan, *supra* note 386.

391. Horan, *supra* note 386.

392. Cf. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-94 (1954) (finding that segregation of African American schoolchildren denotes to them that they are inferior).

393. See Dempsey & Cole, *supra* note 6, at 11 (describing the "corroding effect" law enforcement activity has on the ability of a community to integrate politically and socially into American society).

394. See discussion *supra* Parts II.A, II.C.

395. See *supra* text accompanying notes 164-73.

396. See *supra* text accompanying note 168-73.

397. See Aschoff, *Bail Is Granted*, *supra* note 20.

The numbers speak for themselves. Of approximately twenty-four current secret evidence cases, almost all involve Muslims or Arabs.³⁹⁸ For years different sources have reported that such selective enforcement³⁹⁹ infects the government's actions. Even two United States Senators, Edward Kennedy and Spencer Abraham, ordered a review of secret evidence cases and noted the "'disturbing' fact that only Arab immigrants are jailed on secret evidence."⁴⁰⁰

A comparison of the situations of three former Irish terrorists residing in the United States to that of a Palestinian, Mazen Al-Najjar, suggests the racism, or politics reinforcing racism, behind the application of secret evidence proceedings against immigrant terrorists. Gabriel Megahey, an Irish immigrant living in the United States, freely attended a 1997 immigration conference in Washington, D.C., although he had previously served five years in a United States prison for smuggling guns to the IRA in the 1980s.⁴⁰¹ Noel Gaynor, also living in the United States and attending the conference, had a similar terrorist past, having been convicted as a lookout in the killing of a police officer in Northern Ireland in the 1970s.⁴⁰² The third person, Malachy McAllister, has been in the United States since 1996 despite previously serving prison time in the United Kingdom, where, in the 1980s, he stood guard while a partner shot a police officer and later plotted to murder another one.⁴⁰³ An immigration judge has ordered his deportation, but nothing in his story suggests that he has ever been detained because of secret evidence.⁴⁰⁴

These three men were not simply accused terrorists; prosecutors had met the burden of proof to convict them for their violent actions supporting a terrorist group. Nonetheless, they freely resided in the United States undisturbed by administrative proceedings that could potentially incarcerate them based on secret evidence. In contrast, from May 1997 through December 2000, Mazen Al-Najjar sat in jail without being charged with anything.⁴⁰⁵ Indeed, since convicted Irish

398. *Id.*

399. Akram, *supra* note 11, at 52 (stating in 1999 that secret evidence was a "systematic attack" on a "very defined group": Arabs and Muslims); Aschoff, *Politics of Immigration*, *supra* note 166 ("If you look at the secret evidence cases across the country . . . they're all against Arabs and Muslims."); Cole, *INS Terrorizes Arabs*, *supra* note 167 (reporting in 1998 that "all of the individuals involved [in secret evidence cases] are Arabs, and most are Muslims"); Tebo, *supra* note 165, at 48 (reporting in 2000 that more than ninety percent of cases involve Arab Muslims).

400. Susan Aschoff, *At Last Unveiled, Evidence Falls Short*, Oct. 4, 1998, St. Petersburg Times, at 1A [hereinafter Aschoff, *At Last Unveiled*].

401. See Aschoff, *Politics of Immigration*, *supra* note 166.

402. See *id.*

403. See Dan Barry, *Haunted by an Earlier Life: A Deportation Order Is Also a Separation Order*, N.Y. Times, Jan. 23, 2001, at B1.

404. See *id.*

405. See Susan Aschoff, *Al-Najjar Finally Out After 3 Years*, St. Petersburg Times, Dec. 16, 2000, at 1A [hereinafter Aschoff, *Al-Najjar Finally Out*].

terrorist Malachy McAllister took up his United States residence in 1996, at least nineteen Arab immigrants who were never charged, much less convicted of anything, have been subject to government efforts to detain them based on secret evidence.⁴⁰⁶

This disparity in treatment may be partially attributed to the differences between the Irish-English and Arab-Israeli conflicts as well as the United States' prioritization of each in its foreign policy. It may also be understandable because the WTC bombing threatens Americans more directly than any Irish terrorist activity. But consider the extent of IRA violence: the group has killed over 1600 people since 1969, and in 1998 an IRA splinter group killed twenty-nine people.⁴⁰⁷ How much of the disparity in treatment is due to the political strength of Irish political groups and the political weakness of Arab or Muslim groups?⁴⁰⁸ And how much is that disparity in political influence simply due to bias against Arabs? Susan Aschoff described the political shifts one Congressman made between Arab and Irish groups:

[D]elay [in designating "foreign terrorist organizations"] infuriated Rep. Benjamin Gilman . . . who threatened to slash [State] [D]epartment salaries until the list was produced. When it was released, Gilman said the "administration is finally waking up to the serious threat of foreign terrorist organizations."

Yet the same congressman six months earlier urged President Clinton to permit [one Irish terrorist] to stay in the United States. "His participation in a bombing of a police barracks in Northern Ireland, for which he served his time . . . was based on the nature of the political situation at the time," Gilman wrote.

Legislators apply their labels with Post-It Note adhesive: One violent attack is heinous terrorism, another a political act. A radical group operating solely abroad is less evil than one also operating in the United States. Followers of Islam are extremists, believers in God are devout.⁴⁰⁹

United States history and the current treatment of Arabs suggest that anti-Arab bias is certainly a factor in causing such contrasting treatment.⁴¹⁰ Based in such bias, the use of secret evidence fosters the public's perception of Arabs with suspicion and paranoia, sentiments that consequently justify infringement of Arabs' basic fundamental rights.

406. See *supra* note 167 (indicating nineteen secret evidence cases have been brought since April 1996).

407. See James F. Clarity, *Leverage and Folk Memory Keep I.R.A. Armed*, N.Y. Times, Oct. 26, 1998, at A3.

408. See Aschoff, *Politics of Immigration*, *supra* note 166 ("The Irish have powerful friends in Congress; the Arabs have cautious acquaintances.").

409. *Id.* (second omission in original).

410. See discussion *supra* Parts I.B, II.C.

A secret evidence proceeding also has tragic real-world consequences for its target and family. The suspect must endure incarceration without being able to refute an unknown accusation. Spouses and children may see their parent, husband, or wife arrested without knowing the reason and endure painful separation. The conditions of detention are also no different than imprisonment.⁴¹¹ A secret evidence "detainee" lives with convicted criminals, receives the same treatment from guards as other inmates, wears prison uniforms, eats prison food, conforms to the same visitation rules, and showers the permitted three times per week.⁴¹²

Meanwhile, the lives of a detainee and his family must continue for better or worse. Jobs may be lost. Families may break up. Arab Americans may observe such constitutionally suspect treatment given to a fellow Arab and sense the suspicion underlying its rationale. To avoid such incarceration, the government may offer one option: stop resisting deportation and find a new country in which to live.⁴¹³ After being identified as possible terrorists, however, they are "tainted goods" who will not be accepted by other countries because of the terrorist label.⁴¹⁴ The stories of three separate secret evidence cases illustrate the personal stigma and dehumanization that members of the Arab community experience.⁴¹⁵

In Florida, Mazen Al-Najjar, a Palestinian, was incarcerated from May 1997 through December 2000,⁴¹⁶ leaving behind three children and his wife.⁴¹⁷ He began living in the United States in 1981 and obtained his Master's Degree from North Carolina Agricultural and Technical State University in 1984.⁴¹⁸ At the time of his detention, Al-Najjar was the editor-in-chief for the research journal of a University of South Florida think tank, the World and Islamic Studies Enterprise ("WISE"), devoted to encouraging dialogue about Middle East issues.⁴¹⁹ The INS alleged he was connected to the Palestinian Islamic Jihad, which WISE was known to support, but Al-Najjar and his

411. See Tebo, *supra* note 165, at 44-45.

412. See *id.*

413. Susan Aschoff, *Immigrants All Packed with Nowhere to Go*, St. Petersburg Times, June 7, 1999, at 1A [hereinafter Aschoff, *Immigrants All Packed*].

414. *Id.* (describing the plight of Mazen Al-Najjar's family who obtained five visas to Guyana only to have them rescinded when the government discovered the terrorist accusations).

415. See generally, Dempsey & Cole, *supra* note 6, at 128-37, for a more detailed discussion of the cases concerning Mazen Al-Najjar, Hany Kiareldeen, and the Iraqi cases, as well as Nasser Ahmed, Ali Khalil Termos, Imad Salin Hamad, Yahia Meddah, and Anwar Haddam.

416. See *supra* text accompanying note 405. See generally Aschoff, *Accused of Being Suspicious*, *supra* note 169 (recounting the secret evidence proceedings for Mazen Al-Najjar).

417. Aschoff, *Accused of Being Suspicious*, *supra* note 169.

418. *Najjar v. Reno*, 97 F. Supp. 2d 1329, 1332 (S.D. Fla. 2000).

419. Akram, *supra* note 11, at 76.

attorney were not permitted to review the evidence purportedly linking him.⁴²⁰ Instead, Al-Najjar received an unclassified summary which merely stated: "This Court was provided with information as to the association of [Al-Najjar] with the Palestinian Islamic Jihad."⁴²¹ When a judge finally ordered Al-Najjar's release for lack of evidence, the Justice Department further prolonged his incarceration by filing three stays; Al-Najjar was released nine days later, after 1300 days of imprisonment.⁴²²

In New Jersey, Hany Mahmoud Kiareldeen, also a Palestinian, was imprisoned from March 1998⁴²³ to October 1999.⁴²⁴ Kiareldeen had been living in the United States since 1990, married an American citizen in 1997, and had a daughter from a previous marriage.⁴²⁵ He had been a manager in an electronics store.⁴²⁶ He was initially detained for overstaying his student visa, and then the INS introduced secret evidence to oppose his application for relief.⁴²⁷ Kiareldeen received a one-page summary of the evidence against him alleging that he was a member of an unnamed terrorist organization, he associated with someone involved with the WTC bombing, and he had threatened the Attorney General.⁴²⁸ One source, and perhaps the only source, of claims against him appeared to be his estranged wife who, several times before, had made allegations against him that were dismissed as unfounded.⁴²⁹ Ultimately, the government never brought criminal charges and the FBI closed its investigation in July 1999.⁴³⁰ Nevertheless, INS appeals and stays kept Kiareldeen imprisoned for another three months, after already serving sixteen months, before his eventual release.⁴³¹

"The Iraqi Seven" came to the United States as part of a government-assisted evacuation of six thousand Iraqi Kurds who had participated in CIA efforts to overthrow Saddam Hussein.⁴³² After being brought to the United States, the government decided they were security risks and detained them in California for two years based on

420. *Najjar*, 97 F. Supp. 2d at 1333.

421. *Id.* at 1333-34.

422. Aschoff, *Al-Najjar Finally Out*, *supra* note 405.

423. *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 404 (D.N.J. 1999).

424. American-Arab Anti-Discrimination Committee, 2000 Report on Hate Crimes & Discrimination Against Arab Americans (forthcoming 2001) (draft manuscript at 36, on file with the *Fordham Law Review*) [hereinafter 2000 ADC Report].

425. *Kiareldeen*, 71 F. Supp. 2d at 404.

426. Cole, *INS Terrorizes Arabs*, *supra* note 167.

427. *Kiareldeen*, 71 F. Supp. 2d at 404.

428. See Akram, *supra* note 11, at 77.

429. Dempsey & Cole, *supra* note 6, at 135.

430. *Kiareldeen*, 71 F. Supp. 2d at 405.

431. See *id.* at 404-05.

432. Akram, *supra* note 11, at 78.

secret evidence.⁴³³ Such poor treatment of former allies compelled James Woolsey, as an attorney and former CIA director, to become involved in the case.⁴³⁴ While imprisoned, their families were resettled so far away that they could not afford to visit.⁴³⁵ One man was divorced by his wife during incarceration.⁴³⁶ Another man missed the first two years of his daughter's life while his wife depended on welfare.⁴³⁷ Evidence that came to light was uncorroborated, filled merely with suspicion, and laced with anti-Arab comments.⁴³⁸ Five of the men were ultimately able to join their families in Nebraska but were subject to in-house confinement, telephone monitoring, and permission for at-will government searches.⁴³⁹

B. Evidence that Arabs Have Been Stigmatized

AEDPA's enforcement against Arabs has entrenched society's perception and treatment of them in conformity with their stereotype. The resultant discrimination is evidenced in the policies of the Federal Aviation Administration ("FAA"), the occurrence of hate crimes, and the existence of general societal discrimination. The government, in disproportionately subjecting Arabs to such harsh and stigmatic treatment, has invited this discrimination and further stigmatization.⁴⁴⁰ Such treatment, with "the sanction of law," marks the group as inferior.⁴⁴¹ Not only does AEDPA's discrimination affect the self-image of Arabs,⁴⁴² but it affects the perspective society as a whole has of them. The terrorist stigma becomes the "basis" for how society treats Arab people, retrospectively justifying the discriminatory treatment by presuming that Arabs *must* deserve it.⁴⁴³ Discrimination, by society as a whole, is encouraged.⁴⁴⁴

The FAA has instituted procedures for profiling airline passengers, a procedure which has invited criticism from the American-Arab

433. Aschoff, *Immigrants All Packed*, *supra* note 413.

434. *See id.*; *see also* Aschoff, *At Last Unveiled*, *supra* note 400 (quoting Woolsey emphatically contending, "[t]he whole idea that you can be imprisoned indefinitely and sent back [to Iraq] to be tortured and killed on evidence you can't see . . . [is] absolutely outrageous").

435. *See* Aschoff, *Immigrants All Packed*, *supra* note 413.

436. *Id.*

437. *Id.*

438. *See* Aschoff, *At Last Unveiled*, *supra* note 400. One agent commented, "It's been my experience working with these people that they lie, they lie an awful lot." *Id.* Another wrote in his report: "There is no guilt in the Arab world. It's only shame." *Id.*

439. *See* Akram, *supra* note 11, at 78 n.168.

440. *See* Karst, *Belonging to America*, *supra* note 39, at 26.

441. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

442. *See supra* text accompanying note 392.

443. *See* Karst, *Belonging to America*, *supra* note 39, at 26.

444. *Cf. Developments in the Law*, *supra* note 342, at 1513 (contending that discrimination by the police stigmatizes the subject group as people "less worthy of equal respect").

Anti-Discrimination Committee ("ADC") and other civil rights groups.⁴⁴⁵ The resulting discrimination has been called "Flying While Arab."⁴⁴⁶ Passengers have heard the announcement, "All Arabic-speaking passengers step to the side."⁴⁴⁷ In the sixteen months after the unexplained 1996 crash of TWA flight 800, the ADC reported over two hundred complaints of airline profiling, "more than at anytime since the Gulf War."⁴⁴⁸ Furthermore, in response to the crash, a White House commission recommended precautionary measures against international terrorists even though a cause for the disaster had not yet been determined and has since been attributed to a combustible fuel tank ignited by an electrical surge.⁴⁴⁹

One particular recommendation, a passenger profiling system, was instituted in January 1998 after being abandoned for more than twenty years.⁴⁵⁰ Arabs had reason to be concerned because they were already being subject to airport discrimination.⁴⁵¹ Their fears were thereafter justified by the "hundreds" of reports of discrimination submitted by Arab travelers.⁴⁵² The ADC has concluded that profiling "is systematic and very widespread."⁴⁵³

The ADC lists a multitude of airport profiling complaints. The following are a mere sampling. In 1996 at Newark Airport, a Palestinian American woman was subjected to a fifty minute interrogation after describing her name as Arab in response to a question from the ticketing agent.⁴⁵⁴ In 1997 at a Tampa airport, an Arab mother and son were questioned and had all their luggage searched by airport security in front of all other passengers before boarding their flight.⁴⁵⁵ In July 1999 at a Chicago airport, a man had answered all routine ticket counter questions when, after smelling something unusual, the ticket counter claimed she heard him say he had a bomb, whereupon he was arrested by the police even though

445. See Michael Higgins, *Looking the Part: With Criminal Profiles Being Used More Widely to Spot Possible Terrorists and Drug Couriers, Claims of Bias Are Also on the Rise*, A.B.A. J., Nov. 1997, at 48, 49-50.

446. Ronald Fernandez, Editorial, *Not Quite White; Facing Negative Stereotypes, Post-World War II Wave of Immigrants Have United Under 'Arab American' Banner*, Hartford Courant, Sept. 1, 2000, available at LEXIS, News, The Hartford Courant.

447. Higgins, *supra* note 445, at 50.

448. *Id.*

449. See Angie Cannon, *FBI, Cops Targeting Domestic Terrorism; Oklahoma City Raised Awareness*, Times-Picayune (New Orleans), Mar. 30, 1997, at A1; Laurence Zuckerman, *Board Approves Final Report on Crash of T.W.A. Flight 800*, N.Y. Times, Aug. 24, 2000, at B6.

450. See 2000 ADC Report, *supra* note 424, at 22-23.

451. See *supra* text accompanying note 448.

452. See 2000 ADC Report, *supra* note 424, at 23-24.

453. *Id.*

454. 1996-97 ADC Report, *supra* note 167, at 20.

455. *Id.* at 24. In fact, they again had their bags searched by security in the boarding area. *Id.*

they did not find anything in his bag.⁴⁵⁶ In November 1999 at a Columbus airport, two Arab doctoral students were met upon landing by local police, FBI agents, and bomb-sniffing dogs and detained for eight hours after they had asked "suspicious questions" at their departure point about when the plane arrived and whether it was full.⁴⁵⁷

The ADC recorded over twenty hate crimes in 1996 and 1997, a figure it believes to be a "severe undercount."⁴⁵⁸ The following incidents from around the United States provide a sampling of the bias to which Arabs were subject during that period. In Virginia, a teenager was verbally and physically assaulted by a 32-year old Caucasian male who called him and his father numerous racial epithets including "dirty Arab."⁴⁵⁹ In California, an arsonist burned down a newly-constructed Arab American mosque.⁴⁶⁰ In North Carolina, a 13-year old died due to a gunshot wound from an attacker who had previously been making racial comments against the deceased.⁴⁶¹ In New York, an immigrant was killed in a tenant dispute by his landlord, who had allegedly stated a hatred for immigrants.⁴⁶² In Maryland, an Arab American woman activist, in the fifth hate crime against her in three years, had her two family cars slashed and broken into, and swastikas scratched into them.⁴⁶³

More hate crimes have arisen since 1999 according to a preliminary ADC report. In Colorado, the bombing of an Islamic center was averted after police chased the plotter and found him with bomb components, guns, machetes, and ammunition.⁴⁶⁴ The suspect claimed to be "an enemy" of Islam who wanted to "kill Iraqis."⁴⁶⁵ In Illinois, someone threw a large piece of concrete into the glass front door of a mosque.⁴⁶⁶ In Tennessee, a Muslim worshipper was shot by a gunman, who had a history of taunting neighborhood worshippers, and was chased into his mosque, where the gunman attempted to shoot into its

456. 2000 ADC Report, *supra* note 424, at 26.

457. *Id.* at 28 (internal quotes omitted).

458. See 1996-97 ADC Report, *supra* note 167, at 6. The ADC is the only organization in the United States that collects data concerning discrimination and hate crimes against Arab Americans. *Id.* The Justice Department compiles hate crime statistics, but the ADC reported as of 1997 that their categories do not include anti-Arab acts. *Id.* at 5. The FBI's 1999 Uniform Crime Report indicates that the FBI has yet to expand their categorization. See FBI, Uniform Crime Reports: Crime in the United States—1999, 59, available at <http://www.fbi.gov/ucr/99cius.htm> (last visited Jan. 7, 2001) [hereinafter 1999 FBI Crime Report].

459. 1996-97 ADC Report, *supra* note 167, at 6.

460. *Id.* at 7.

461. *Id.*

462. *Id.* at 8.

463. *Id.* at 9.

464. 2000 ADC Report, *supra* note 424, at 5-6.

465. *Id.*

466. *Id.* at 6.

locked door.⁴⁶⁷ Hate has also manifested itself in the cyber world, where people have received hateful e-mails. One message stated that "history repeatedly has proved [sic] that if Arabs get a chance they will be the most evil creatures walking on this planet."⁴⁶⁸ Another e-mail accused its recipient, "[y]ou encourage your youth to die so that you can publish their deaths in world newspaper [sic] in the hope of gaining world sympathy. How sick and misled you are."⁴⁶⁹

Discrimination also exists in the workplace and everyday activities for Arabs. In 1996 and 1997, the ADC received numerous complaints. In Boston, a dispatcher was called such ethnic slurs as "sand nigger," "Achmed," and "camel jockey," by co-workers and his supervisor.⁴⁷⁰ In Detroit, an employee sued his company, alleging that he was denied promotions due to his ethnicity; the company ultimately settled out of court with him.⁴⁷¹ In San Francisco, an airline employee won a lawsuit charging his employer with giving discriminatory work assignments and subjecting him to workplace hostility due to his Jordanian origins.⁴⁷² In Virginia, a real estate agent allegedly refused rental property to an Arab American couple.⁴⁷³ In Massachusetts, two men attempting to rent from a truck rental center allegedly had a manager yell at them, after they complained about harassing treatment: "What are you going to do? Blow up the store like you did to the Oklahoma Building?"⁴⁷⁴

The ADC's current draft 2000 report provides a list of more such discrimination after 1997. In particular, they record approximately twenty-five incidents of workplace discrimination per week.⁴⁷⁵ The following two cases typify the hostile and degrading conditions to which Arab employees are often subject. In Virginia, a woman server was degraded by comments calling her "camel jockey" and "bitch" and Arab customers "cheap."⁴⁷⁶ Although the hostile environment forced her to leave, the employer later issued an apology and asked for her return.⁴⁷⁷ In Michigan, employees obtained a settlement with Detroit Edison after charging the company with discriminatory hiring and promotion.⁴⁷⁸

Each of these forms of discrimination are deemed acceptable in large part by American society. Discrimination against perceived

467. *Id.* at 7.

468. *Id.* at 9.

469. *Id.* at 11.

470. 1996-97 ADC Report, *supra* note 167, at 11-12.

471. *Id.* at 13.

472. *Id.* at 14.

473. *Id.* at 17.

474. *Id.*

475. 2000 ADC Report, *supra* note 424, at 13.

476. *Id.* at 17.

477. *Id.* at 17-18.

478. *Id.* at 20.

“terrorists” is acceptable. Yet, in reality, such discrimination is one more example of racism and prejudice in America—the same impulses that subjected African Americans to slavery, Chinese to exclusion, and Japanese Americans to internment.⁴⁷⁹ In each case, the American government has cited a “necessity” for such discrimination—African Americans were needed as slave labor for the nation’s southern economy, the Chinese were inferior and criminal people, and Japanese Americans were a threat to national security.⁴⁸⁰ There will always be excuses to discriminate against a certain class of people. But to fully realize the American concept of equal justice requires equal justice for all of its people.

C. Bringing Equal Justice to Arabs in America

1. Proposed Solutions

To eliminate the unequal justice AEDPA has brought to Arabs, this Note makes three recommendations. First, and most importantly, antiterrorism legislation should be revised to include domestic terrorist groups, not just those which are international. By doing so, Arabs will have a less exaggerated presence on the government’s list of terrorist organizations,⁴⁸¹ thus removing the unwarranted stigma of the “terrorist” label. Society will be less apt to mostly associate them with terrorism when other domestic groups are identified as terrorist organizations as well. Furthermore, the legislation should clearly and publicly establish the standard for making the terrorist list and provide explanation as to why certain groups qualify. The government’s current definitions for either a terrorist activity or organization are “vague and subject to political manipulation.”⁴⁸²

This measure is not merely necessary because of AEDPA’s discriminatory treatment of Arabs, but because such treatment is completely unjustified. While the historical trend of overseas terrorism by Arab groups⁴⁸³ is the most compelling argument for focusing antiterrorist protections at Arab groups, the thrust of domestic antiterrorism measures in the wake of Oklahoma City should have been directed at the domestic threats that had *actually* manifested themselves on American soil before contemplating and countering international threats that *might* arise here. The government may rely on classified information as support for AEDPA’s international focus, but to accept such justification would, in effect, grant the sort of unfettered discretion internment during

479. See discussion *supra* Part I.B.

480. See *supra* text accompanying notes 66-68, 76-77, 94-102.

481. See *supra* text accompanying note 21.

482. Akram, *supra* note 11, at 71 n.113.

483. See *supra* text accompanying notes 138, 224.

World War II illustrated to be vulnerable to constitutional abuse. Furthermore, part of Arab Americans' problems is that society has so readily associated their community with a terrorist threat here despite very few domestic incidents of Arab terrorism. Classified information showing more Arab terrorist activity would not alter the conclusion that based on what society does know, it has unjustly treated Arabs.

The attendant problem of reviving aggressive Hoover-era FBI investigations into domestic groups⁴⁸⁴ may be prevented by affording full constitutional protection to any groups on the list, as they operate within the United States. The new antiterrorism measures should further guarantee such protection to individual members who reside in the United States, regardless of their citizenship. An Arab in America who is allegedly a member of the terrorist group Hamas, a group trying to influence America's Palestinian policy, should not be at a greater disadvantage than a Caucasian American in The New Order,⁴⁸⁵ a group seeking to affect social policy.

This approach would also prevent the exaggerated labeling of terrorist sources that the WTC-related investigations may have induced.⁴⁸⁶ The government may have broader flexibility to investigate groups while they are overseas, but domestic investigations should not subject residents to potential systemic disadvantages resulting from unconscious racism manifested in prosecutors' discretion.⁴⁸⁷ Any person in the United States would thereby have full protection under the Constitution, ensuring that the "terrorist" label is applied equally on the merits, and not affected by prejudice.

Second, the government should track hate crimes against Arabs. The FBI's current record, the Uniform Crime Report on Hate Crimes, recognizes anti-Muslim attacks but not those which are anti-Arab.⁴⁸⁸ Such a corrective measure would be appropriate because the government has been complicit in stigmatizing Arabs. Society should know that Arab people are a group whose full participation in society is as fully protected as other groups currently tracked.⁴⁸⁹

Finally, Congress ought to reconsider a recently proposed bill and a long-standing petition which specifically address problems initiated

484. See David M. Park, *Re-Examining the Attorney General's Guidelines for FBI Investigations of Domestic Groups*, 39 Ariz. L. Rev. 769, 771 (1997); The FBI, *supra* note 2, at 195. During the mid-1970s, the Senate's Church Committee discovered that the FBI under Director J. Edgar Hoover had been monitoring all major protest groups with wiretaps, bugs, informants, and break-ins. See Dempsey & Cole, *supra* note 6, at 6.

485. See *supra* text accompanying note 284.

486. See *supra* text accompanying notes 338-39.

487. See *supra* text accompanying notes 340-43.

488. See *supra* note 458.

489. The hate crimes currently tracked are "Anti-White," "Anti-Black," "Anti-American Indian/Alaskan Native," "Anti-Asian/Pacific Islander," and "Anti-Multi-Racial Group." 1999 FBI Crime Report, *supra* note 458, at 59. The report also tracks hate crimes against Hispanics in a separate section. *Id.*

by AEDPA. The Secret Evidence Repeal Act, sponsored by Representative David E. Bonior, addresses perhaps AEDPA's most egregious feature.⁴⁹⁰ The bill recognizes the unconstitutionality of secret evidence and repeals its use in the bond hearings commonly used against Arabs as well as other proceedings.⁴⁹¹ By enacting this bill the nation may prevent the resultant debilitation and stigmatization of such proceedings. A petition, *Law Professors' Petition to Congress*, addresses the broader concern of AEDPA's chilling effect on the social and political activity of Arab Americans.⁴⁹² Signed by over five hundred law professors at almost 150 schools, the signers call on Congress to "enact legislation that will prevent the FBI and other federal law enforcement agencies from undertaking investigations that threaten the exercise of First Amendment rights."⁴⁹³ By limiting investigative powers, the public branding that Arab groups are subject to without evidence to support criminal charges would be reduced.

2. Why America Must Reestablish Equal Justice

Arabs in America have many obvious reasons to demand equal justice. By removing the unwarranted terrorist stigma, they become less of a disfavored group subject to hate crimes and everyday discrimination. Freed of such obstacles, each Arab person will be enabled to fulfill his individual potential and attain his optimal position in society.⁴⁹⁴ More fundamental to the American constitutional system, Arabs will be more fully able to politically participate when the stigma is removed.⁴⁹⁵ Unlike other immigrant groups, Arabs, often mistakenly perceived as Muslims, have encountered an "extraordinary roadblock" in their efforts to have "mainstream influence."⁴⁹⁶ Their impediment has been attributed to their perceived religious connections to the Middle East,⁴⁹⁷ and therefore the terrorism often related to the region.

The 2000 New York campaign for United States Senator between Senator Hillary Clinton and former Representative Rick Lazio illustrated Arabs' current disability. Lazio, based on an erroneous newspaper report, zealously attacked Clinton for accepting a \$50,000 donation from the American Muslim Alliance; he called the

490. Secret Evidence Repeal Act of 2000, H.R. 2121, 106th Cong. (2000), available at <http://thomas.loc.gov/home/c106query.html>.

491. See *id.* §§ 2(1), 4-6.

492. See Dempsey & Cole, *supra* note 6, at 163.

493. *Id.*

494. See *supra* text accompanying notes 54-58.

495. See *supra* text accompanying notes 59-63.

496. Dean E. Murphy, *For Muslim Americans, Influence In Politics Still Hard to Come By*, N.Y. Times, Oct. 27, 2000, at A1 [hereinafter Murphy, *For Muslim Americans*].

497. *Id.*

contribution "blood money" because the group allegedly advocated armed force in supporting Palestinian rights.⁴⁹⁸ Clinton validated Lazio's attack by renouncing the contribution,⁴⁹⁹ without apparently discovering the accusation's falsity or defending the group, thereby perpetuating the stigmatization of Arabs. An Alliance member described the episode in all-too-familiar terms: "Muslim Americans and Arab-Americans are being muddled and universally associated with acts of terrorism."⁵⁰⁰

The Arab sense that they are stigmatized in American politics is not a new revelation. In 1997, one activist commented: "If a Sen[ator] Kennedy goes and talks on the Irish, there is very little opposition. The minute (a congressman) does something about Arabs, he's going to find 10 other senators immediately on his back."⁵⁰¹ By eliminating the unjustified terrorism label that has cast them as disloyal and debilitated their political participation, Arabs may achieve their rightful influence in politics and society.

By upholding "equal justice," society also prevents the distortions which can hinder our constitutional system.⁵⁰² Decisions and compromises must be based upon genuine overlapping interests, not prevented or infected by irrational prejudices.⁵⁰³ Thus, in adhering to equal justice, the democratic processes function efficiently and properly, and we prevent the "instability, injustice, and confusion" that James Madison warned were "mortal diseases" to our society.⁵⁰⁴ Not only do we prevent the collapse of our constitutional framework, however, we ensure its just and equal functioning. Policies and legislation will be directed at the genuine source of a problem as revealed through rational deliberation, not the scapegoat unearthed by irrational and distorted prejudice.

Such benefits apply to society's treatment of every ethnic group. In an America seeking to maintain preeminence in a globalizing world and heading toward a point where Caucasians will be a minority in the nation (and already are a minority in California),⁵⁰⁵ the principle of

498. See Anthony York, *Muslim Group May Endorse Hillary Clinton: The Campaign Says It Would Not Accept the Support of the American Muslim Alliance*, Salon.com, Nov. 2, 2000, at <http://www.salon.com/politics/feature/2000/11/02/ama/print.html> (last visited Nov. 2, 2000); Eric Boehlert, *Hillary's Middle East Crisis: The New York Daily News Breaks A Big Story About Controversial Arab Donations to Clinton That Everyone—including the Daily News—Later Gets Wrong*, Salon.com, Nov. 3, 2000, at <http://www.salon.com/politics/feature/2000/11/02/news/print.html> (last visited Nov. 2, 2000).

499. York, *supra* note 498.

500. *Id.*

501. Aschoff, *Politics of Immigration*, *supra* note 166 (quoting Sami Al-Arian, the brother-in-law of a secret evidence detainee).

502. *Supra* text accompanying notes 59-63.

503. *Supra* text accompanying notes 61-62.

504. The Federalist No. 10, at 45 (James Madison) (Clinton Rossiter ed., 1961).

505. See Michael Lind, *The Beige and The Black*, N.Y. Times, Aug. 16, 1998, at 38

equal justice must be guaranteed for everyone. The fact pattern that led to AEDPA and its application against Arabs may be repeated against others. For example, will future campaign finance reform fully address the problem or focus on Asian Americans who were tarnished in the Clinton fundraising scandals?⁵⁰⁶ Does America's current war against drugs actually attack the epidemic or simply Hispanic and African Americans?

In the end, however, equal justice is a principle that promises the attainment of positive results, not merely the avoidance of negative ones. Along with the immediate benefits that accrue to Arabs who become unshackled from the terrorist stigma, society stands to unlock tremendous untapped potential and realize unanticipated advantages. The ability of Arabs to maximize their talents ensures their greater contribution to society, in turn providing a richer pool of talent for developing future doctors, politicians, business people, scientists, and every other occupation. In foreign relations, society stands to gain a unique "window into Islam"⁵⁰⁷ helping to ensure policy is not "based on selfish interests, bias, or domestic political concerns [which] may unnecessarily make us a target for the wrath of others."⁵⁰⁸ Against terrorism, equal justice will ensure that we genuinely act toward preventing terrorist activity by all groups and not just society's scapegoat, thereby providing effective protection for society, not the patchwork defensive measures AEDPA represents.

A nation upholding equal justice and preventing the stigmatization of ethnic groups and their members is predestined for cultural and societal enrichment. In such a society, Tseming Yang described, "[b]oth religious and racial minority groups can serve as incubators for views that are different and contribute to the robust exchange of ideas in a democracy. Cultural pluralism thus contributes to the cultural diversity and richness of the mainstream culture that can strengthen our system of democracy."⁵⁰⁹ By eliminating the unequal justice of AEDPA, we begin realizing such a vibrant future for Arab Americans, for minority groups of all backgrounds, and for the nation itself.

(describing U.S. Census Bureau projections predicting the proportion of Caucasians will decrease to merely 52.7 percent of the population in 2050); Todd S. Purdum, *Non-Hispanic Whites a Minority, California Census Figures Show*, N.Y. Times, Mar. 30, 2001, at A1.

506. See Murphy, *For Muslim Americans*, *supra* note 496.

507. Stammer & Sengupta, *supra* note 193.

508. Stansfield Turner, *Do Not Bow Down to Terrorism*, St. Louis Post-Dispatch, Mar. 14, 1993, at 3B.

509. Yang, *supra* note 51, at 133 (citations omitted).

CONCLUSION

As a nation expressly dedicated to equality and constantly replenished by new immigrants and their cultures, future American society is unavoidably and undeniably affected by how it cultivates the resources of its present populace. We will achieve less than our collective potential if we inhibit certain groups' ability to maximize their group potential. Arabs in America currently strive to live and succeed in a society that unjustly perceives them as terrorists and subjects them almost exclusively to constitutionally-suspect legislation in the form of AEDPA, which responds to and perpetuates that fear. For the benefit of Arabs and for the overall good of the nation, Congress should rectify the injustice AEDPA has wrought and guarantee "equal justice" for the Arab community and for all people.