

# TERRORISTS & MUSLIMS: THE CONSTRUCTION, PERFORMANCE, AND REGULATION OF MUSLIM IDENTITIES IN THE POST 9/11 UNITED STATES

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Where there is power there is resistance.<sup>2</sup>

Sadly, some of us Muslims are often quite rude to one another: not only do we brand each other as infidels, we oppress each other... Words like *kufr* (infidelity), *shirk* (associating partners with God, i.e. polytheism), and *bid'a* (heretical innovation) flow far too easily from our tongues. The finger that used to point up at the end of prayers towards the Heavens now points most frequently at another Muslim. That same index finger that used to be a reminder of Divine Unity (*tawhid*) is now a symbol of accusation and *takfir* (branding another an infidel).<sup>3</sup>

My argument is that there need not be a “doer behind the deed,” but that the “doer” is variably constructed in and through the deed.<sup>4</sup>

## I. INTRODUCTION

[1] In a column in *The Washington Post*, a professional U.S. analyst of the War on Terrorism is quoted as saying: “The jihad will vanish only when *the* Muslim world sees terrorists as heretics, and not as holy warriors.”<sup>5</sup> The columnist further opines: “The American role will be to shield moderate Muslims from intimidation and violence as the struggle progresses.”<sup>6</sup> Despite the increased coverage of all things Islamic in all its variety, writers, analysts, and policymakers

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<sup>2</sup> MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 95 (Vintage Books 1990) (1976).

<sup>3</sup> Omid Safi, *Introduction*, in *PROGRESSIVE MUSLIMS: ON JUSTICE, GENDER, AND PLURALISM* 13 (Omid Safi, ed., 2003).

<sup>4</sup> JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 142 (1990).

<sup>5</sup> Jim Hoagland, *Islam's Civil War*, WASHINGTON POST, Mar. 3, 2004, at A27 (emphasis added).

<sup>6</sup> *Id.* (internal quotation marks omitted).

routinely fall back on an image of singularity to which they address their advice and excoriations. It seems that in an effort to create the knowable, all Muslims and the myriad of places they live have been collapsed into a fungible people and a seamless geography.<sup>7</sup> This tendency to create simplicity from complexity is not confined to the media. Indeed, the desire to reduce the heterogeneous Muslims into a knowable subject has also been felt by the State and by Muslims in the West. The way in which an otherwise unruly plurality is ordered is through the creation of meta-identities which Muslims are then expected to perform. These meta-identities are the Terrorist, the Believer and the Moderate.<sup>8</sup>

[2] In this article, I examine these identities and argue that they are discursive formations or the phantasmatic effects of discourse; constructions that are performed and that change over time and vary by context.<sup>9</sup> As such, they do not harbor real subjects. Real Muslims are far more hybrid and multiplicitous, and therefore, much harder to neatly categorize. The Terrorist, for instance, is a conglomeration of *characteristics* taken from Muslim practices of their religion, racial difference and political beliefs (a literal and conservative interpretation of Islam and a refusal to disavow violence) that come together to form a character. It is an identity that is decoupled from the actions of terrorism.<sup>10</sup> In the case of the Believer the construction is

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<sup>7</sup> Cf. Ahmet Karamustafa, *Islam: A Civilizational Project in Progress*, in PROGRESSIVE MUSLIMS: ON JUSTICE, GENDER, AND PLURALISM 98 (Omid Safi ed., 2003) (noting the difficulties in defining Islam).

<sup>8</sup> I borrow the term “moderate” from Jim Hoagland who uses it to distinguish these kinds of Muslims from the “extremists.” See Hoagland, *supra* note 5.

<sup>9</sup> BUTLER, *supra* note 4.

<sup>10</sup> I want to make clear here that when I refer to Terrorists, I am referring to those people who have been detained for attributes or acts other than acts of terrorism. By acts of terrorism, I mean all overt acts as well as conspiring with those who are terrorists to commit acts.

undertaken by the dominant Muslim community. The Believer is comprised of primarily religious characteristics that draw heavily on the traditional Arab-Muslim practice of Islam. Finally, the Moderate is an identity that has been created and used by the State to delineate the difference between good Muslims and bad Muslims within the Muslim communities separating those tolerant, peaceful Muslims who support and legitimize the State's effort to regulate Muslims from the unassimilable, conservative Muslims and those who refuse to condemn the violence of those who oppose the U.S.<sup>11</sup>

[3] Muslim performances of these identities include simulation of certain "symptoms" of terrorism as well as either covering certain already existing identity traits in order to heighten others or passing as someone completely assimilated to the society in which they live. And the result of performance is, I argue, intensified scrutiny, marginalization, and regulation of Muslims. Particularly in the case of the Terrorist, because performance is often a simulation which the State cannot tell apart from the "real," the performer is regulated as though he were a real terrorist.<sup>12</sup> Believers are also regulated but less severely because their regulation comes at the hands of the dominant Muslim community and not law enforcement. The Believer is used to police the borders of the community, setting the standards of practice and belief that result in either inclusion or exclusion as a Muslim, voice or silence, visibility or invisibility in both the community and in public fora. And the Moderate is used to demonstrate which points of view

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<sup>11</sup> See, e.g., Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)* 75 U. COLO. L. REV. 59 (2004); Jim VandeHei, *Bush Shifts on Muslim Protests: Violence is Condemned Not the Cartoons* THE WASHINGTON POST Feb. 9, 2006, at A01.

<sup>12</sup> See JEAN BAUDRILLARD, *Simulacra and Simulations*, in *SELECTED WRITINGS* 169 (Mark Poster ed., 2001).

and political positions will result in regulation by the State and which will not.<sup>13</sup> Moderates who do not criticize the State's regulation of Muslims in the domestic war on terrorism and who are willing to condemn the Muslim community, particularly those who are not sufficiently supportive of the State's policies, are likely not be regulated.<sup>14</sup> Even if Moderates do criticize the State for regulation of Muslims, they do not challenge the pressure to assimilate into mainstream America, thereby colluding with the State to create the division.<sup>15</sup> Thus, the Moderate is used to exemplify the kind of Muslim "we" like.

[4] In order to demonstrate how these constructed identities are performed and deployed to regulate Muslims, I undertake the short genealogies of the Terrorist and the Believer which can be traced to a common "Arab" stereotype and also the genealogy of the Moderate Muslim which can be traced to the Manichean tendency to separate subject populations into good and bad.<sup>16</sup> Because the identities are constructed through a process of discursive bricolage that cobbles together elements of older stereotypes, the genealogies provide a historical foundation from which I can then examine the way in which the new constructions are performed by Muslims in the present. Finally I assess the manner by which performance causes regulation and the response to these discursive, constitutive, and regulatory pressures of both the State and the dominant Muslim community. Some of the techniques of resistance are dictated by shortcomings in the law that do not account for discrimination that occurs at the intersection of race and religion. Other modes of resistance to subordination are social rather than legal and require coalition-building that does not rely on identity groups. Indeed, I suggest that

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<sup>13</sup> See Engle, *supra* note 11, at 62-64, 100-10.

<sup>14</sup> Engle, *supra* note 11, at 62-64, 100-10.

<sup>15</sup> Engle, *supra* note 11, at 62-64, 100-10.

<sup>16</sup> See FRANTZ FANON, *THE WRETCHED OF THE EARTH* 37-46 (1963).

performance of a variety of identities by individuals may achieve the same outcome of disarranging the current dominant identity formations. I hope to unsettle the notion that there is a singular Muslim world, a Muslim culture, a singular Muslim community and to challenge various other reductionist tendencies that elide and repair fragmentations of identity in most Muslims in the West in ways that describe caricatures rather than complex realities. Such unidimensional understandings of Muslims make subordination easier. Further, I hope to show that because identities are constructed and performed, there are alternative identities and performances possible that may challenge the disciplining nature of these identities. Ultimately, the goal of the article is not to resolve the various crises of identity that affect Muslims in the United States but to offer caution to those who would take these identity categories as fixed and immutable and to those who would perform them without considering the consequence of such performances.

## II. THE GENEALOGY, CONSTRUCTION AND PERFORMANCE OF MUSLIM IDENTITIES

### A. *Genealogies*

[5] A veritable industry around Islam and Muslims has sprung up in the last three years. Books proliferate; “experts” analyze, advise, and pontificate; and fields of Middle Eastern and Islamic studies have been reinvigorated even while being attacked for the supposed bias of their scholars.<sup>17</sup> The mill that has produced so much knowledge has brought into the limelight certain ideas about who Muslims are, what they believe, and what their presence in the U.S. means.<sup>18</sup>

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<sup>17</sup> See, e.g., <http://www.campuswatch.org/> (last visited Oct. 25, 2005) (The website is a project of the Middle East Forum whose mission is to review, critique, and improve Middle East studies in North America.).

<sup>18</sup> See, e.g., FAWZIA AFZAL-KHAN, SHATTERING THE STEREOTYPES: MUSLIM WOMEN SPEAK OUT (2005); LINDA BRANDI CATEURA, VOICES OF AMERICAN MUSLIMS: 23 PROFILES (2005);

The more discourse that takes place, the more identities proliferate. The purpose of these genealogies is to examine the old identities from which the three new ones that are the main concern of this article arise. The Terrorist, which draws from “the Arab terrorist” stereotype prevalent in the 70s and 80s,<sup>19</sup> and the Believer, which draws from the Arab-Muslim identity, can be analyzed together because they share a common Arab ancestry. It is this commonality, then, that holds the key to understanding how Believers and Terrorists are made new and often mistaken for each other.

[6] The American stereotype of the Arab is born of a sporadic engagement with the Middle East consisting mostly of a patchwork of inherited knowledge of Arabs from colonial Europe,<sup>20</sup> the occasional popularity of books by American scholars and “experts,” and through media reports on conflicts in the Middle East.<sup>21</sup> With the end of the colonial period, the first source of general information also came to an end. Unlike the ex-colonial powers which had residual knowledge of the Arabs, no matter how caricatured and influenced by racism, the United States had no such familiarity on which it could rely, leaving only the news reports to educate the masses and the product of fledgling academic departments to educate those few elites who took the trouble to be educated.<sup>22</sup> But in general, it is safe to say that Americans’ perceptions of

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TARIQ RAMADAN, *WESTERN MUSLIMS AND THE FUTURE OF ISLAM*, (2003); PAUL FINDLEY, *SILENT NO MORE: CONFRONTING AMERICA’S FALSE IMAGES OF ISLAM* (2001).

<sup>19</sup> See, Narmeen El-Farra, *Arabs and the Media*, J. MED. & PSYCH. I No. 2 available at <http://www.calstatela.edu/faculty/sfischo/Arabs.html> (Spring 1996).

<sup>20</sup> EDWARD W. SAID, *ORIENTALISM* 12 (1978).

<sup>21</sup> See, e.g., THOMAS FRIEDMAN, *FROM BEIRUT TO JERUSALEM* (1990); BERNARD LEWIS, *WHAT WENT WRONG: THE CLASH BETWEEN ISLAM AND MODERNITY IN THE MIDDLE EAST* (2003).

<sup>22</sup> See SAID, *supra* note 20, at 1-4.

Arabs (and Islam) has been largely shaped by media;<sup>23</sup> first through news coverage of the various crises that have occurred in the region such as the nationalization of the Suez Canal, the Iranian Revolution, the Arab-Israeli conflicts<sup>24</sup> and through ongoing crisis reportage of Palestinian acts of terrorism, and second, through portrayals of Arabs by Hollywood.<sup>25</sup> It is also safe to say that the coverage of Arabs in the news as well as the portrayals of Arabs by filmmakers have been denigrating.<sup>26</sup>

[7] In the news, the familiar conflict between Palestinians and the Israeli State gives us ready examples of this prejudice. While Palestinian Liberation Organization (“PLO”) bombings and assassinations have made the news on a regular basis, Israeli acts of violence and its history of terrorism are given legitimacy because they are state actions and often interpreted away as self-defense against Arab aggression.<sup>27</sup> From a psychologist’s perspective, Narmeen El-Farra studied the media portrayals of Arabs, and describes in her work how the media uses the term “terrorism” to describe the actions of those they disapprove but similar actions done by friends are described in less inflammatory terms.<sup>28</sup> Words used in the press to describe Israeli forces include “troops, commandos, security forces,” while Palestinians were described as “guerrillas,

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<sup>23</sup> See generally EDWARD W. SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD* (1981).

<sup>24</sup> *Id.* at 5, 12, 47.

<sup>25</sup> JACK G. SHAHEEN, *REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE* 12-14 (2001).

<sup>26</sup> *Id.*

<sup>27</sup> Susan M. Akram & Kevin R. Johnson, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy: Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 304 (2002).

<sup>28</sup> See El-Farra, *supra* note 19.

infiltrators, and raiders.”<sup>29</sup> Thus, the very language and framing of the issues puts Arabs at a disadvantage, equating their tactics with terrorism and delegitimizing their causes.<sup>30</sup> Moreover, acts of violence and sabotage perpetrated by Zionists against Arabs within the United States rarely achieved this kind of newsworthiness. A Rand study found the Jewish Defense League (“JDL”) to be one of “the most active terrorist groups, as classified by the FBI, in the United States.”<sup>31</sup> The JDL was responsible for bombing Arab foreign offices and offices of Arab organizations. According to the FBI, Jewish organizations were responsible for twenty terrorist incidents in the 1980s.<sup>32</sup> Yet, Jewish groups are seldom characterized as “terrorists.”

[8] Compounding the coverage of Arab violence by news media, Hollywood has created a typecast of the Arab villain. Jack Shaheen’s research on popular films is illuminating on this point. The media have portrayed Arabs in a manner that would have caused outrage if applied to any other ethnic or religious minority in the United States. In a survey of hundreds of Hollywood movies, Arabs and Muslims are portrayed as terrorists, invaders, and “lecherous, oily sheikhs;” they are called “devil-worshippers,” “rag heads,” and “towel-heads.”<sup>33</sup> Arab women

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<sup>29</sup> El-Farra, *supra* note 19 (citing MORRIS INTERNATIONAL, THE ARAB IMAGE IN WESTERN MASS MEDIA (1980)).

<sup>30</sup> El-Farra, *supra* note 19.

<sup>31</sup> Akram & Johnson, *supra* note 27, at 303-304 (quoting BRUCE HOFFMAN, TERRORISM IN THE UNITED STATES AND THE POTENTIAL THREAT TO NUCLEAR FACILITIES 12-15 (1986)).

<sup>32</sup> Akram & Johnson, *supra* note 27, at 304 (quoting *Domestic Terrorism in the 1980's*, FBI, OCTOBER 1981 LAW ENFORCEMENT BULLETIN 13. Moreover, groups like the Anti-Defamation League of B’nai B’rith have long undertaken a campaign of silencing Arab academics like Edward Said and Walid Khalidi. *Id.* (quoting ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, PRO-ARAB PROPAGANDA IN AMERICA: VEHICLES AND VOICES: A HANDBOOK 75, 91 (1983)).

<sup>33</sup> SHAHEEN, *supra* note 25, at 11-14.

are depicted as mute, shrouded, and helpless or as exotic odalisques and belly dancers.<sup>34</sup> The killing of Arab men, women, and children elicit cheers and clapping by film audiences.<sup>35</sup> Indeed, because the death of “evil” Arabs and Muslims cannot be mourned, it is easy to consider them sub-human or worthy of destruction.<sup>36</sup> Such unsympathetic portrayals of Arabs have called into question the very possibility of Arabs as citizens of the United States and their right to participate in the political life of the nation.<sup>37</sup> Public officials have returned campaign contributions made by Arabs and Muslims implying the money was tainted.<sup>38</sup> There is a

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<sup>34</sup> SHAHEEN, *supra* note 25, at 22.

<sup>35</sup> SHAHEEN, *supra* note 25, at 15.

<sup>36</sup> See *Imus anchor on Palestinians: "Stinking animals. They ought to drop the bomb right there, kill 'em all right now,"* MEDIA MATTERS FOR AMERICA (Nov. 19, 2004), available at <http://mediamatters.org/items/200411190009>.

MSNBC's *Imus in the Morning* offered derisive, racist commentary about Palestinians during the November 12 funeral of deceased Palestinian Authority leader Yasser Arafat. Regular *Imus* guest and sports anchor Sid Rosenberg referred to Palestinians as "stinking animals" and suggested: "They ought to drop the bomb right there, kill 'em all right now." On November 19, the program broadcast a radio segment featuring a guest -- parodying General George S. Patton, Jr. -- who said that the recent report of a U.S. Marine shooting an unarmed, injured Iraqi insurgent provided the enemy "with another cozy 'al Jazeera moment' for the Muslim masses to respond to with their routine pack-of-rabid-sheep mentality." The guest also referred to a deceased Iraqi insurgent as "a booby-trapped raghead cadaver."

*Id.*

<sup>37</sup> Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1583 (2002).

<sup>38</sup> Akram & Johnson, *supra* note 27, at 310-11. Senator Hillary Clinton returned \$50,000 to various Muslim organizations, Congressional candidate Joe Kennedy returned a \$100 contribution from former U.S. Senator and Arab-American James Abourezk, and Philadelphia mayoral candidate Wilson Goode returned over \$2000 in contributions from Arab-Americans. *Id.*

suspicion that it is gained from and given to support terrorism; that by simply *being* Arab or Muslim, donors are *engaged* in some sort of illicit anti-American activity.

[9] The history of sporadic engagement, exposure to repeatedly negative media images, and the construction of Arabs as suspicious aliens or disloyal citizens has made it easy to conflate (revolutionary or terrorist) *actions* with (Arab) *propensities* and eventually with (Islamic) *nature*.<sup>39</sup> The latter part of collapsing Arab propensities into Islamic nature is something that has been mirrored in the reactions of Muslims; because of the conflation, attacks on Arabs are often felt to be attacks on Islam itself and, therefore, Muslims in general.<sup>40</sup> This has become common

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<sup>39</sup> See, e.g., Leslie Wayne, *The 2004 Campaign: Arabs in U.S. Raising Money to Back Bush*, NEW YORK TIMES, Feb. 17, 2004, at A1. Ignorance persists to this day: this article describes Iranians and Pakistanis under the banner of “Arab-Americans.” *Id.* A correction was printed the following day, but nevertheless, the fact that the confusion occurred is instructive with regard to how little has changed in the cultural and geographical understanding of the “Islamic” world. See also Arab-American Anti-Discrimination Committee, Action Alert: Ad in “The Nation” Maligns Palistinians, available at <http://capwiz.com/adc/issues/alert/?alertid=8371286&type=CU> (last visited Feb. 8, 2006) (“Especially outrageous is the racist implication that the Palestinians are inherently prone to violence and deception . . .”).

<sup>40</sup> See, e.g. Islam Online, *Fatwa Bank, Palestine: It’s Significance for Muslims*, available at [http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask\\_Scholar/FatwaE/FatwaE&cid=1119503545400](http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503545400) (last visited Mar. 30, 2006). The question presented was “about Palestine and its significance for Muslims, would you please enlighten me on this issue?” The following are excerpts from the answer or the fatwa:

Palestine is part and parcel of *the Muslims’ identity*. Each Muslim has a big role to play regarding Palestine and its people. Each should support the Palestinian cause according to his means. Those who are well-off should give charity, and those who pay the Zakah ought to allocate part of it to help their oppressed Muslim brothers and sisters in Palestine as well as in the whole world. Every Muslim can champion the cause of his Ummah from the place where he lives.

*Id.* See also, Karen Fragala, *Understanding Islam*, MSNBC, available at <http://www.msnbc.msn.com/id/3067495/> (last visited Mar. 30, 2006). The following is an excerpt from her interview of Karen Armstrong, a well-known religious scholar, note the interchanging of the terms Muslim and Arab which indicates the way in which the two identities are bound together:

enough that when Arabs are criticized, Muslims tend to feel that criticism personally.<sup>41</sup> More specifically, there continues to be a sense among many Muslims that the Palestinian-Israeli conflict implicates the entire Muslim world and that attacks on Palestinians are attacks on Muslims even when they occur against Palestinian Christians.<sup>42</sup> Furthermore, attacks on “Arab” norms such as polygamy as medieval and uncivilized practices offends all Muslims regardless of their position on multiple marriages, because they are sanctioned by Islam.<sup>43</sup>

[10] One reason this conflation of the Arabic and Islamic persists is the continual primacy of the Arabic language and Arab norms which remains relatively unquestioned among pious

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*[Fragala:] All Muslims, regardless of faction, oppose Israel and cite American support of the country as one of Washington’s fundamental affronts against Arab interests. Why has this issue in particular united Muslims across the barriers of state and doctrine?*

*[Armstrong:] In the Arab world, Israel has acquired this nimbus of symbolic value, an image of absolute Muslim impotence [against] the united powers of the West. It’s not that they had anything against the Jews when this happened—there is no tradition of anti-Semitism in the Arab world—they’ve had to borrow European anti-Semitic tracts to enunciate their new hatred. So you see the Arab Palestinians losing their homes, and 50 years of a world completely indifferent to the Palestinian issue. This has acquired the same kind of symbolic focus as evolution and abortion in the United States.*

*Id.* (emphasis added).

<sup>41</sup> See El-Farra, *supra* note 19.

<sup>42</sup> See *supra* note 40.

<sup>43</sup> See Flavia Agnes, *Women, Marriage and the Subordination of Rights*, in SUBALTERN STUDIES IX: COMMUNITY, GENDER, AND VIOLENCE 106, 130 (Partha Chatterjee & Pradeep Jeganathan, eds. 2000). Indeed, polygamy (and the treatment of women) has been used as a stick with which to beat “Islam” for its misogyny. Yet, it is true that Islam is not the only religion to accept polygamy. Indeed, polygamy as a cultural norm is far more widespread than many believe. Note that the rate of polygamous marriages are fairly similar among Hindus and Muslims in India.

Muslims.<sup>44</sup> From the injunction to perform prayer in Arabic, to the printing of the Qur'an in Arabic (because no translation can convey the meaning of the original), to the standards of modesty and personal hygiene for men and women, and the family laws that have become the Islamic norm, Arabic culture pervades Islam.<sup>45</sup> Religiously, Arab lands are the center of Islamic geography. The holiest sites of Islam are in Saudi Arabia and historic Palestine/Israel.<sup>46</sup> The Prophet, a seventh-century Arab, is the model Muslim to whose example all Muslims aspire.<sup>47</sup> Given that the Prophet was a person of history, it is to state the obvious to say that the religious contents of the *Sunnah*, or the way of the Prophet, cannot be disentangled from the cultural practices of his day.<sup>48</sup> Further, the codification of the *Sunnah* into the *shari'ah*<sup>49</sup> means that

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<sup>44</sup> YUSUF AL-QARADAWI, *THE LAWFUL AND THE PROHIBITED IN ISLAM* 238 (1994).

<sup>45</sup> *Id.* at 80-82, 148-235.

<sup>46</sup> The center of the Islamic world is Mecca, towards which every Muslim is enjoined to pray five times every day. USC-MSA Compendium of Muslim Texts, *Facing the Ka'bah* available at [http://www.usc.edu/dept/MSA/fundamentals/pillars/prayer/albaani/prayer\\_9.html](http://www.usc.edu/dept/MSA/fundamentals/pillars/prayer/albaani/prayer_9.html) (last visited Mar 30, 2006). Islam's second holiest site, the Dome of the Rock which is now in Israel has been one reason for the continued support of Palestine in Islamic populations that are not Arab. Islam Online, *supra* note 40 ("The significance of Palestine in the Islamic faith is evident by the frequent references to it in both the Qur'an and the *hadiths* (traditions) of Prophet Muhammad (peace and blessings be upon him). The greatest significance of Palestine for the Muslims is that it contains Baitul-Maqdis (the noble sanctuary), the holiest place in Islam outside of the Hijaz. Both Al-Masjid Al-Aqsa and the Dome of the Rock are built in the area of the Baitul-Maqdis.")

<sup>47</sup> *See* AL-QARADAWI, *supra* note 44.

<sup>48</sup> *See* University of Southern California, *USC-MSA Compendium of Muslim Texts*, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/> (last visited Mar. 30, 2006). In Islam, the Arabic word *sunnah* has come to denote the way Prophet Muhammad (saas), the Messenger of Allah, lived his life. *Id.* The *Sunnah* is the second source of Islamic jurisprudence, the first being the *Qur'an*. *Id.* Both sources are *indispensable*; one cannot practice Islam without consulting both of them. *Id.* The Arabic word **hadith** (pl. *ahadith*) is very similar to *Sunnah*, but not identical. A *hadith* is a *narration* about the life of the Prophet (saas) or what he approved – as opposed to his life itself, which is the *Sunnah* as already mentioned. *Id.*

culture is also codified and promulgated over the generations and over vast geographies with no other connection to Arab culture.<sup>50</sup>

[11] As the “West” pushes into the “East” through economics and politics, traditional elements in the Eastern Islamic countries have begun to call for a return to the Golden Era of Islam and the example of the Prophet.<sup>51</sup> Extremists in almost all Islamic nations are willing to jettison their own cultures, which are tainted with the “unIslamic,” for a pure Islam.<sup>52</sup> Yet, there is little recognition that the practice of a “pure” Islam still involves the acceptance of codified Arab cultural norms.<sup>53</sup> This is not to say that Islam practiced outside the Arab world is not variant and multifaceted, that it is not imbued with the culture of the native soil in which it was transplanted: it certainly is. Nor is it to say that there is something wrong with those who seek

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<sup>49</sup> See University of Southern California, *USC-MSA Compendium of Muslim Texts*, available at <http://www.usc.edu/dept/MSA/reference/glossary/term.SHARIAH.html> Shari’ah is defined as:

The root of this word is Shara'a; and some other names of it are Shar', Shir'ah and Tashri'. The Shari'ah is the revealed and the canonical laws of the religion of Islam.

The legislative power in the government lies in the hands of legislative assembly. The legislators are to make rules and regulations within the scope and dimensions of the Qur'an and the Sunnah of the Prophet (s.a.w.). These rules constitute the Shari'ah.

*Id.*

<sup>50</sup> All Muslims are required to follow both the *Qur'an* and *Sunnah* regardless of where they are. *See id.* In a sense then, all Muslims remain linked to Arabic culture and language. *See* IMAM MUHAMMAD SHIRAZI, *FUNDAMENTALS OF ISLAM* 1-3, 81-83 (2001).

<sup>51</sup> BENJAMIN R. BARBER, *JIHAD VS. MCWORLD* 207-09 (1995).

<sup>52</sup> *See* OLIVIER ROY, *GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH* 329 (2004).

<sup>53</sup> *See* MUHAMMAD ABDUL-RAUF, *THE ISLAMIC VIEW OF WOMEN AND THE FAMILY* 11 (3d ed. 1995) (1977).

to emulate the Prophet. It is meant simply to show that Arabic cultural motifs have been transplanted and co-exist sometimes easily and sometimes uneasily with the traditional practices of all non-Arab countries.<sup>54</sup> And it is also to highlight the importance of Arabic language and norms in the lives of Believers.

[12] The genealogy of both the Terrorist and the Believer, to summarize the above discussion, share an ancestry linked together by the centrality of Arabs. Both these identities also cause the performer of the identity to stand out. S/he is made visible through these “Arab” markers and is also made unassimilable. Thus, the adoption of Arab norms by the pious Muslim Believer will also implicate him as a Terrorist. The only way to avoid detection therefore is to conform to styles of dress and behavior that conceal religious affiliation.

[13] The pressure to avoid regulation felt by the Muslim community has been reinforced by calls from the dominant society, the State, and from liberals within the community for more support for moderate Muslims.<sup>55</sup> This has been largely in reaction to the Terrorist and the Believer.<sup>56</sup> As a result, the Moderate persona has emerged to present an alternative for those Muslims who do not wish to be categorized as “bad” Muslims, that is, as Terrorists or even unassimilable Believers who remain more “them” than “us.” The history of such inclinations to create binary distinctions can be traced back to the Manichean ordering of imperialist states.<sup>57</sup>

As postcolonialist theory has argued, dividing populations into the good and the bad has been a

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<sup>54</sup> See Vladamir N. Basilov, *Chosen by the Spirits*, in SHAMANIC WORLDS: RITUALS AND LORE OF SIBERIA AND CENTRAL ASIA 41 (Marjorie Mandelstam Balzer, ed. 1997).

<sup>55</sup> See Hoagland, *supra* note 5.

<sup>56</sup> See Engle, *supra* note 11.

<sup>57</sup> See FANON, *supra* note 16.

trademark of divide-and-rule imperialism.<sup>58</sup> By bifurcating a population, the imperial power is able to use one half to control, surveil, and regulate the entirety.<sup>59</sup> As such, the United States' construction of these divisions can be viewed as strongly influenced by, if not part of the history of imperialism. The Manichean tendency in the United States in particular has manifested itself in two parallel ways: First, there has been the deployment of laws to define and perhaps construct "good" citizens as opposed to "bad" citizens to ensure the safety of the entire society.<sup>60</sup> Second, there has been a concerted effort to define and support the good Muslims within the Muslim community to counteract the bad Muslims.<sup>61</sup>

[14] The first thread that contributes the genealogy of the Moderate is the semiotic construction of good and bad aliens and citizens through the use of immigration laws and means that regulate "foreign" presence in the State.<sup>62</sup> This construction has been theorized by Karen Engle who notes:

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

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<sup>58</sup> See BILL ASHCROFT, GARETH GRIFFITHS, AND HELEN TIFFIN, *POST-COLONIAL STUDIES: THE KEY CONCEPTS* 133-35 (2000) Ashcroft states, "In the field of post-colonial studies, Manicheanism is a term for the binary structure of imperial ideology . . . by which imperial discourse polarizes the society, culture and the very being of the colonizer and colonized into the Manichean categories of good and evil." *Id.* at 134.

<sup>59</sup> Engle, *supra* note 11, at 100-11.

<sup>60</sup> Engle, *supra* note 11, at 100.

<sup>61</sup> Engle, *supra* note 11, at 106.

<sup>62</sup> Engle, *supra* note 11, at 100-11.

in the fight both by speaking out in favor of the war and assisting in the discipline of bad aliens and citizens.<sup>63</sup>

[15] Yet the State does not alone create the “good” Moderate identity; rather, it signals that certain groups are more desirable than others.<sup>64</sup> It attaches importance to signifiers of belonging such as respect for the flag, and other patriotic symbols.<sup>65</sup> The Muslim community already has a population that desires to reconcile its “otherness.”<sup>66</sup> Therefore, the seed of assimilationism finds fertile ground in a population presented with the choice to be either a good, assimilated citizen or bad, unassimilated (read disloyal) Other.<sup>67</sup> The desire for acceptance and better opportunities means that many within the community will choose the path of least resistance and assimilate. As Kenji Yoshino has noted:

Assimilation is the magic in the American Dream. Just as in our actual dreams, magic permits us to transform into better, more beautiful creatures, so too in the American Dream, assimilation permits us to become not only Americans, but the kind of Americans we seek to be . . . . This vision of assimilation is profoundly seductive and is, at some level, not just American but human. Surrendering our individuality is what permits us to enter communities larger than the narrow stations of our individual lives . . . . To speak a language, to wear clothes, to have manners – all are acts of assimilation.<sup>68</sup>

[16] Assimilation for Muslims implies active support of the State against the bad Muslims (becoming informers and agents of the State), to the acceptance of secular, Westernized modes

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<sup>63</sup> Engle, *supra* note 11, at 100.

<sup>64</sup> Engle, *supra* note 11, at 110-11.

<sup>65</sup> Engle, *supra* note 11, at 101.

<sup>66</sup> See Reza Aslan, Speech to the 5<sup>th</sup> Annual Conference of the Muslim Public Affairs Council, Dec. 17, 2005. Audio of the speech available at <http://www.mpac.org/convention/audio.aspx> (last updated Dec. 22, 2005).

<sup>67</sup> See Engle, *supra* note 11.

<sup>68</sup> Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 771 (2002).

of behavior in contrast to the archaic, medieval Believer with his disturbing religious zeal.<sup>69</sup> In the United States, the archetype of the Good Other is no stranger. Perhaps the most famous is the character of Uncle Tom.<sup>70</sup> The Uncle Tom character was made famous in the Civil War era and has come to stand for a person who is obsequious towards the “master.”<sup>71</sup> While I emphatically do not suggest that all those who seek to assimilate out of fear or who are fully assimilated because they have been born and raised in the United States are Uncle Toms or sympathizers, I do distinguish between those who actively support the division into good and bad along the lines propagated by the State and those who challenge it.<sup>72</sup> As part of the genealogy of the Moderate, therefore, the characteristic of Uncle Tom that carries through is not the fact that the Moderate seeks to fit into or is integrated into the society in which he lives, but rather that he is advertently or inadvertently used to regulate dissenters, opponents, and other “bad” elements within his own community without resisting.<sup>73</sup>

## B. *Identities*

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<sup>69</sup> See, e.g., Engle *supra* note 11.

<sup>70</sup> See Gregory M. Lamb, *What we've made of Uncle Tom*, THE CHRISTIAN SCIENCE MONITOR (Oct. 29, 2002), available at <http://www.csmonitor.com/2002/1029/p17s02-legn.html>; See also Dr. David Pilgrim, *The Tom Caricature*, Ferris State University Jim Crow Museum of Racist Memorabilia (Dec. 2000), available at <http://www.ferris.edu/news/jimcrow/tom/>.

<sup>71</sup> *Id.* I recognize that the character written by Harriet Beecher Stowe was more complex in his original form. I refer here to the subsequent character that evolved into a pejorative representation of a “race-traitor.”

<sup>72</sup> See generally IBN WARRAQ, LEAVING ISLAM: APOSTATES SPEAK OUT (2003) (containing a number of testimonies from those who have left Islam).

<sup>73</sup> See Aslan, *supra* note 66. Aslan refers to the Muslim world with no distinctions whatsoever; he claims that we in America have voices unlike anywhere else in the Muslim world despite the fact that there are some functioning democracies (Bangladesh, Turkey). “In our very identities we are the embodiment of the reconciliation and merging of American and Muslim values.” Aslan, *supra* note 66.

[17] I now turn from the genealogical history of the new identities to the present and the identities themselves.<sup>74</sup> As amalgams of their predecessors, the new constructions will bear a number of resemblances to the Arab-terrorist, to the Arab-Muslim or to Uncle Tom. But there will also be some critical differences that are a result of their unique time and place: the post 9/11 United States.

[18] Who is the Terrorist? S/he is clearly no longer only the Arab terrorist typified in the U.S. by the likes of Yasser Arafat and members of Hamas.<sup>75</sup> Part of the answer can be inferred from the expansion of the term to signify “Arabs and Muslims” of all cultural and ethnic backgrounds.<sup>76</sup> This became the case particularly when “radicals” from other areas of the world began to adopt a similar ideological language.<sup>77</sup> But the label achieved a level of ubiquity only after the advent of the War on Terrorism. Now, every country with a resistant, subordinate Muslim population or a criminal gang that happens to be comprised of Muslims has found this most convenient signifier that provides an advantageous global political alignment with the most powerful nation in the world. For example, the Philippines has attached the “Terrorists” label to

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<sup>74</sup> This is not to say that the Arab archetypes aren't still current. They return to our consciousness with each picture from the Middle East whether it be from Iraq, Afghanistan or the West Bank. To claim that they are historical antecedents to the current constructs is not to decommission them. *See generally* SHAHEEN, *supra* note 25.

<sup>75</sup> Although they are no longer the only “terrorists,” we are never allowed to forget that they are still terrorists by any number of news stories that continue reporting the Palestinian-Israeli conflict in the tradition of their predecessors. *See, e.g.*, Martin Asser, *Will Hamas Ever Recognise Israel?* BBC NEWS (Feb. 8, 2006), available at [http://news.bbc.co.uk/2/hi/middle\\_east/4686844.stm](http://news.bbc.co.uk/2/hi/middle_east/4686844.stm); Jonathan Finan, *Gunmen Kill Head of Fallujah City Council*, THE WASHINGTON POST Feb. 8, 2006, at A12; Alan Cowell, *The Islamic Flare-Up: Roots of Dispute*, THE NEW YORK TIMES, Feb. 8, 2006, at § A, 10, col. 1.

<sup>76</sup> *See generally* Sunita Patel, *Performative Aspects of Race: "Arab, Muslim, and South Asian" Racial Formation After September 11*, 10 ASIAN PAC. AM. L.J. 61 (2005).

<sup>77</sup> *See generally* EMMANUEL SIVAN, *RADICAL ISLAM: MEDIEVAL THEOLOGY AND MODERN POLITICS* (1990).

Abu Sayaf, garnering help from the United States in combating that group's terrorism, (kidnapping of Western tourists for ransom) whereas before 9/11, it had referred to that group as a gang.<sup>78</sup> The Chinese have done the same with their oppressed Uighur population, the Russians have used it to describe the Chechens, and the Indians have labeled the Kashmiri groups as Terrorists.<sup>79</sup> That the use of violence and similar tactics constitute terrorism is not debated here; rather, what is of particular interest is that the attachment of this label signals in such a manner as to obscure the political and historical nuances of the groups that drive their various projects.<sup>80</sup> In other words, they are made homogenous and illegitimate through this convenient term.

[19] But given their very obvious differences both in location and in their stated goals, how is the Terrorist signifier able to homogenize these groups into an undifferentiated enemy of the United States and, as is argued by some, of Western civilization (if not civilization itself)?<sup>81</sup> In order to discover this homogenizing factor, we must consider the ideological vernacular used by most of these groups which is one of their few shared elements. Whereas in the past, it was

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<sup>78</sup> Carol Foo, *September 11: One Year On*, CHANNEL NEWS ASIA, available at [http://www.channelnewsasia.com/cna/sept11/tv/cnb\\_sea1.htm](http://www.channelnewsasia.com/cna/sept11/tv/cnb_sea1.htm) (last visited Oct. 25, 2005). It is true that the founder of Abu Sayyaf was a fighter in Afghanistan and had ties to Osama bin Ladin, but it is unclear whether the movement's aims or goals have ever been in alignment with that of Al Qaeda. See generally ROY, *supra* note 52.

<sup>79</sup> See Erkin Alptekin, *China Continues to use the War Against International Terrorism to Persecute Uighurs*, UNPO (Mar. 5, 2004), available at [http://www.unpo.org/news\\_detail.php?arg=21&par=113](http://www.unpo.org/news_detail.php?arg=21&par=113); Julius Strauss, *Mad Vlad' urges West and Russia to destroy Islam*, TELEGRAPH NEWSPAPER ONLINE (Feb. 13, 2004), available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/02/13/wrus13.xml>.

<sup>80</sup> What are the similarities between Abu Sayaf and the Muslim Brotherhood? Or Lashkar-e-Taiba in Kashmir and the Chechen fighters? By labeling all of these groups terrorists, the implication is that they all harbor the same political goals of overthrowing the "West" as does the arch-terrorist group Al-Qaeda.

<sup>81</sup> See ROY, *supra* note 52, at 9.

likely that the vernacular used by most of these groups to proclaim their disaffection would have been Marxist, today it is religious, it is Islamist.<sup>82</sup> And the Terrorist is a label is easily attached to those who use Islamist ideological vernacular that supports violence in opposition to the “West” (and its violence).<sup>83</sup> This allows for the questioning of Islam’s capability to co-exist with the “modern” world, if not for the assumption that it is ideologically opposed to “Western civilization.”<sup>84</sup> Adherence to Islam – equated to an anachronistic adherence to Islam’s medieval customs and laws – boiled down to a cultural essentialism, is dusted off and paraded as proof of such incompatibility, and then becomes a marker for the Terrorist.<sup>85</sup>

[20] A Terrorist is a Muslim even if a Muslim is not necessarily a Terrorist.<sup>86</sup> Such an equation allows for the caricaturing of entire civilizations with their internal heterogeneity, the erasure of the heterogeneity of the various majority Muslim nations that make up “the Muslim world,” and an easy glossing of radicals’ non-religious, political complaints against the West. All this notwithstanding, the U.S.’s own vital part in manipulating certain customs and beliefs when it was convenient to its political aims is often also forgotten.<sup>87</sup>

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<sup>82</sup> ROY, *supra* note 52, at 41-46.

<sup>83</sup> ROY, *supra* note 52, at 12-15; See MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 82-83 (2004).

<sup>84</sup> See ROY, *supra* note 52, at 9 (discussing Samuel Huntington and Bernard Lewis’s cultural essentialism).

<sup>85</sup> See, e.g., SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN*, in *IS MULTICULTURALISM BAD FOR WOMEN* 9-24 (Joshua Cohen, Matthew Howard, Martha C. Nussbaum, eds. 1999) (in which she argues that Arab and other cultures bring with them institutions that harm women like polygamy, treat women as criminals when they bring rape charges, brutalize women through practices like clitoridectomy and child marriage.)

<sup>86</sup> SHAHEEN, *supra* note 25, at 11. See also *supra* notes 17-54 and accompanying text.

[21] Even so, the identity of the Terrorist encompasses more than simply an anti-Western ideology couched in Islamist language and religious adherence to Islam. From the beginning of the War on Terror, there has been a racial component to the Terrorist.<sup>88</sup> Given the U.S.'s fetishization of race as a marker of criminality, to which the sordid history of racial profiling in drug interdiction attests, the fact that race is involved here too is to be expected. Terrorists, like drug dealers and smugglers, are raced quintessentially as "colored" Muslims with strange names and weird accents. The raced Terrorist quiets the anxiety that mainstream Americans can never know the "enemy amongst us."<sup>89</sup> By creating a Muslim race, the classic "othering" tool of the

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<sup>87</sup> Joe Stephens & David B. Ottaway, *From the U.S., the ABC's of Jihad: Violent Soviet-Era Textbooks Complicate Afghan Education Efforts*, WASHINGTON POST, Mar. 23, 2002, at A1. Stephens & Ottaway state:

In the twilight of the Cold War, the United States spent millions of dollars to supply Afghan schoolchildren with textbooks filled with violent images and militant Islamic teachings, part of covert attempts to spur resistance to the Soviet occupation. The primers, which were filled with talk of jihad and featured drawings of guns, bullets, soldiers and mines, have served since then as the Afghan school system's core curriculum . . . . As Afghan schools reopen today, the United States is back in the business of providing schoolbooks. But now it is wrestling with the unintended consequences of its successful strategy of stirring Islamic fervor to fight communism . . . . Children were taught to count with illustrations showing tanks, missiles and land mines, [USAID] agency officials said. They acknowledged that at the time it also suited U.S. interests to stoke hatred of foreign invaders.

*Id.* When the "freedom fighters" had done their job and then proceeded to run amok, using their violent tactics against their own people and then eventually us here in the United States, a label already in currency against Arabs was at hand for application. It would not be surprising if many more Terrorist organizations cropped up in the coming years.

<sup>88</sup> See Deborah A. Ramirez, Jennifer Hoopes, and Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1224-33 (2003).

<sup>89</sup> See Council on American-Islamic Relations ("CAIR"), *NY Congressman calls U.S. Mosque Leaders "An Enemy Amongst Us"* (Feb. 11, 2004), available at <http://www.cair-net.org/asp/article.asp?id=160&page=AA>.

U.S. is effectively deployed as part of the Terrorist so that “real” Americans can “see” the outsider.<sup>90</sup>

[22] The two markers – religion and race – taken together are then conflated into a “Muslim race.” They are the two key ingredients in the “matrix of otherness.”<sup>91</sup> Because of this construction, the markers of the Believer and the Terrorist become coextensive. This has meant that when ordinary Muslims, particularly those of color, seek to perform their religion in any outward way, they send up the proverbial red flag as potential Terrorists.<sup>92</sup> Religion then becomes subordinated to race in the identification and pursuit of the Terrorist, which is why many non-Muslims are also captured in the State’s regulatory efforts.<sup>93</sup> The typical Terrorist then can be boiled down to a Muslim who displays outward markers of his or her religion and who is non-white. While the actions of Terrorists certainly do matter, it is primarily the religion and race markers that make them vulnerable to profiling.<sup>94</sup> Unfortunately, the dominant Muslim community constructs the Believer in ways that overlaps with the Terrorist and only exacerbates the scrutiny of Muslims.

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<sup>90</sup> See generally Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717 (2003). Two actions prove this point: profiling deployed by the State on one hand and the analysis of Muslims’ position as “Black” on the other. *Id.* Both force Muslims into the U.S.’s racial dynamics without regard to the actual color of the bodies of Muslims and the subordination they experience as a religious minority.

<sup>91</sup> Akram & Johnson, *supra* note 27, at 299.

<sup>92</sup> See *infra* notes 136-170 and accompanying text discussing the regulation of Muslims triggered by outward religious signifiers such as presence at a mosque, wearing of clothing, and the carrying of religious literature.

<sup>93</sup> Akram & Johnson, *supra* note 27, at 311-12.

<sup>94</sup> See generally Ramirez, *supra* note 88.

[23] Despite the multiplicity of identity communities common in any pluralistic society,<sup>95</sup> the dominant Muslim community that seeks to speak for Muslims in general consistently prefers a particular kind of Muslim persona over others. Among the heterogeneous population of Muslims rubbing elbows at the local mosque, it is often the Arab-Muslims who have an innate legitimacy while “others” have to prove theirs.<sup>96</sup> Partially, this position of privilege helps to create all non-Arabs as mere converts without enough grounding in Islam to represent it.<sup>97</sup> This dominance of Arab-Muslims and the projection of a unified community plays into the idea that Arabs represent a Muslim race, which then mirrors the State’s construction of a raced Muslim Terrorist. The Believer, in other words, bears a striking resemblance to an Arab-Muslim or someone who practices Islam within an Arabic cultural paradigm.<sup>98</sup>

[24] Women Believers are prone to be the most easily distinguished from other Muslim women. As such, it may be helpful to consider the Believer construct as women perform it. Before I consider the elements of the Believer that stand out in this context, I want to make clear that the wearing of *hijab* or the veil, is not necessarily a litmus test of political persuasion.<sup>99</sup> But,

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<sup>95</sup> MIRANDA JOSEPH, *AGAINST THE ROMANCE OF COMMUNITY* vii-ix (2003).

<sup>96</sup> Vinay Lal, *Terrorism as a Way of Life*, in *ASIAN AMERICANS ON WAR AND PEACE* 129, 131-32 (Russell C. Leong & Don T. Nakanishi, eds., 2002).

<sup>97</sup> IRSHAD MANJI, *THE TROUBLE WITH ISLAM: A MUSLIM’S CALL FOR REFORM IN HER FAITH* 135 (2003).

<sup>98</sup> See Ramirez, *supra* note 88, at 1229-30.

<sup>99</sup> See generally FATIMA MERNISSI, *THE VEIL AND THE MALE ELITE, A FEMINIST INTERPRETATION OF WOMEN'S RIGHTS IN ISLAM* (1992). See also Lama Abu-Odeh, *Post-Colonial Feminism and the Veil: Considering the Differences*, 26 *NEW ENG. L. REV.* 1527, 1527 defining the hijab (or the veil) as:

[T]he current dress adopted by Muslim women in the Arab world, as followers of contemporary fundamentalist movements. In its most common form, the veil entails

I believe that it does reveal something about the wearer's belief about correct practice that falls in line with the Believer construct. Moreover, the dominant Muslim community reinforces the idea that Muslim women are the hijab-wearing, women Believers, thereby mirroring precisely the very stereotyping they decry.<sup>100</sup>

[25] Women Believers who are the most regulated by community, are characterized as:

sweet creature[s that] can easily be seductive. Her gaze . . . her voice, her gait, her bosom, her legs and the form of her feet and the shape of her ankles [are seductive as well]. If you leave a sweet thing uncovered, you will be inviting swarms of dirty creatures to prey upon it and corrupt it.<sup>101</sup>

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covering the woman's hair with a scarf that is ordinarily white, leaving the face exposed. All of the body is usually covered with a loose dress of dark colors with buttons from top to bottom. Women typically wear western clothes beneath this dress which they take off, along with the scarf, when they are in the sole company of women. These women do not usually cover their hands with gloves, nor do they wear makeup.

*Id.*

<sup>100</sup> See generally CAIR, *Stereotypes and Civil Liberties, the Status of Muslim Civil Rights in the United States 2002*, available at <http://www.cair-net.org/civilrights2002/civilrights2002.pdf> (last visited November 28, 2005).

<sup>101</sup> ABDUL-RAUF, *supra* note 53, at 26. Although Abdul-Rauf's book may seem outdated having been first published nearly three decades ago, these attitudes are far from being abandoned. His book has seen three editions. Neither is Abdul-Rauf alone in his essentialist ideas. Take for instance the following statements made by Imam al-Qaradawi which are found on a Believing "sister's" site:

1- Islam protects femininity to keep the stream of tenderness and beauty running. For this reason some of the things that men are forbidden to do are permissible for women.

2- Islam supports femininity in view of its relative weakness, placing it in the hands of a supporting man, securing the costs of living and the provision for her needs. Whether under the guardian care of her father, her husband, her son or her brother, she will be provided for by them as an obligation under the shar'a. No basic need should compel her then to wade in the unexplored stretches of life with its conflicts, within the hustle of competitive men to win her bread-something that has befallen the Western woman under severe necessity in which neither father, brother, son or uncle look after her. The result is that she has to accept any kind of work for whatever payment in order to survive.

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3- Allah's Religion protects her morals and decency, guards her reputation and dignity, and defends her chastity against evil thoughts and tongues, and tries to foil tempting hands that seek to harm her. In order to achieve these noble objectives, Islam makes it *incumbent on the woman* to lower the eyes and preserve chastity and purity.

"And tell the believing women to lower their gaze (from looking at forbidden things), and protect their private parts (from illegal sexual acts etc)". [Surah 24:31]

Preserve a decent, unrevealing manner of dress and ornamentation, all without being oppressive towards her. "and not to show off their adornment except that which is apparent and to draw their veils all over Juyubihinna (we. their bodies, faces, necks, and bosoms, etc.)" [ Surah 24:31] The visible or apparent ornament that the verse refers to has been interpreted to be inclusive of kohl, the finger ring, the face, the two hands and, some exegetes and jurists establish, the two feet. [ At the time of the Prophet (blessings and peace be upon him). it was customary for some women to cover their face. The flexibility of Islam allows the woman the option of covering her face or not. (editor's note)]

Cover the other attractions that do not show, such as the hair, neck and throat, arms and legs, from all people except her husband, and her consanguineous, non-marriageable relations or mahrim [ Those persons whom the woman is forbidden to marry because of the proximity of the relation. (editor's note)] (brothers, uncles etc.) whom she finds it hard to hide these from. "and not to reveal their adornment except to their husbands, fathers, their husband's fathers, their sons, their husband's sons, their brothers or their brother's sons, or their sister's sons or their (Muslim) women (i.e. their sisters in Islam), or the (female) slaves whom their right hands possess, or old male servants who lack vigour, or small children who have no sense of the shame of sex". [Surah 24:31]

\* Maintain *steadiness in gait and speech*. "And let them not stamp their feet so as to reveal what they hide of their adornment". [Surah 24:31] and " if you keep your duty (to Allah), then be not soft in speech, lest he in whose heart is a disease (of hypocrisy or evil desire for adultery, etc.) should be moved with desire, but speak in an honourable manner. [Surah 33:32]

Therefore she is not (as some wrongly understand) forbidden to speak; nor is her voice a shameful thing to show. On the contrary. She is commanded in the Quran to speak in good faith. [bullet] Be above all acts meant to excite and tempt men in a way reminiscent of the showiness of Pre-Qur'anic ignorance or Jahiliyya. or in the manner of modern jahiliyya. This showiness contradicts the conduct of a decent woman.

According to Muhammad Abdul-Rauf, Muslim women should cover their entire body with the exception of their face and their hands and if duty requires, their arms.<sup>102</sup> And, needless to say, woe to those who participate in the “institutions of hot pants [and] miniskirts” because these are “destructive Satanic works” and tolerance of such evils as “female public exposure, dating, and

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\* Avoid being in seclusion with a man who is neither a husband nor a non-marriageable relation, so as to keep a barrier between herself or the other man and all thoughts of sin, and between her good name and false rumours. The Prophet (blessings and peace be upon him) says, "No man should be in seclusion with a woman and no woman should travel except with a non-marriageable relation," or her husband of course.

\* Avoid male gatherings except on the grounds of necessity or an appreciable interest and only to the necessity or limit. Attending the congregational prayers in the mosque, seeking learning, co-operation in charity and promotion of piety are fields in which a woman's presence with men is accepted so that she will not be deprived of her right to participate in serving her community, and only on condition that she observes the limits of the Islamic code on social life.

With these directions and regulations, *Islam provides safety for the woman and her femininity from impious tongues; it preserves her decency and chastity by distancing her from all factors of deviation.* Islam guards her honour against the slurs of slanderers and spreaders of calumny. Above all, it protects her soul and calms her nerves against the tension, instability and trepidation that spring from wild imaginations or obsessed hear torn between the factors of agitation and excitement. At the same time, Islam protects the man from anxiety and aberration, the family from disintegration, and the society from collapse and decay.

Yusuf al-Qaradawi, *Status of Women in Islam* (Sheik Mohammed Gameeah trans.), available at <http://www.jannah.org/sisters/qaradawistatus.html> (last visited Feb. 1, 2006) (emphasis added). The results of “promiscuous mixing” moreover, is divorce, disease and defamation, not to mention illegitimate children. *Id.* I note here that Imam Qaradawi uses the active voice for Islam as though it were capable of action. Rather than stating that men, primarily, and also women certainly are the ones who can “protect” or “violate” a person, he chooses to cover the actions of the Believers who would undertake the policing of these boundaries behind a generalized reference to the religion which cannot. *Id.*

<sup>102</sup> ABDUL-RAUF, *supra* note 53, at 25.

easy mixing” results in the destruction of the moral edifice.<sup>103</sup> Thus, women who perform the Believer are generally veiled and wear their legitimacy as a covering. Other Muslim women who have never veiled (like many South Asian Muslims and indeed many Arab women) are measured by this yardstick of compliance with the law and found to be wanting in the performance of their religious obligations.<sup>104</sup>

[26] The code of piety Abdul-Rauf sets out is a traditional one that also includes the belief in the divinity of the Qur’an and the prescription that Believers must live according to the *shari’ah*.<sup>105</sup> In the West, where *shari’ah* cannot be enforced as law, Muslims are encouraged to follow these “values.”<sup>106</sup> According to such traditional accounts of Islam, there are Believers and Unbelievers.<sup>107</sup> The one who was born a Muslim but does not believe in the divinity of the central texts of Islam is an apostate with no standing in the community.<sup>108</sup> The result is that those Muslims who do not follow these prescriptions and who, therefore, do not carry any

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<sup>103</sup> ABDUL-RAUF, *supra* note 53, at 26.

<sup>104</sup> I should note here that the Believer construct is a creation of the Muslim diaspora in the United States and Europe. In the Muslim countries themselves, where the native culture is not as contested, *hijab* is less fraught with meaning. *See generally* Lama Abu-Odeh, *supra* note 99.

<sup>105</sup> ABDUL-RAUF, *supra* note 53, at 26.

<sup>106</sup> ROY, *supra* note 52, at 335-37.

<sup>107</sup> *See generally* QARADAWI, *supra* note 44, at 238-52 (defining Believers).

<sup>108</sup> *See* ABDULLAHI AHMED AN-NA’IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS AND INTERNATIONAL LAW 109 (1990) (“[A]lthough *rida* [apostasy] is condemned by the Qur’an in the strongest terms, the Qur’an does not prescribe any punishment for apostasy in this life. Nevertheless, the majority of Muslim jurists have classified apostasy as . . . punishable by death as prescribed in the Sunna.”)

external markers of the Believer, like the veil or the kufi<sup>109</sup> may evade detection, albeit at the cost of being marginalized and de-legitimized within the dominant Muslim community as not being a Believer.<sup>110</sup>

[27] As a response to both the Terrorist and the Believer, the Moderate identity seeks to create an alternative that allows Muslims to reconcile their Muslim values with their American values.<sup>111</sup> Moderate Muslims are therefore, good Muslims who have assimilated into the mainstream; they are Westernized, educated, urbane, and patriotic. As Engle observes:

Good Muslims must do more than not challenge the state by keeping their Islam private, by being part of a “docile, individuated, deactivated citizenry;” they must demonstrate their allegiance to the United States by supporting it in its efforts to fight the war on terrorism. They must show they love the flag – even salute it “strongly” – to avoid suspicion.<sup>112</sup>

And from this position of assimilation and patriotism, they are able to offer criticism of the Terrorist and the Believer. Indeed, they are lauded as being courageous for standing up and speaking out against the terrible elements of “their” community.<sup>113</sup> Yet in their censure, there is a dialectical reifying dynamic that suggests that there is validity and substance to the Believer

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<sup>109</sup> A *kufi* is an Islamic skull cap not to be mistaken for the style of Arabic script that also goes by that name.

<sup>110</sup> See, e.g., Wing, *supra* note 90, at 722-23 (describing how her partner, who wears a kufi, is often mistaken for a Muslim).

<sup>111</sup> See Aslan, *supra* note 66.

<sup>112</sup> Engle *supra* note 11, at 109-110 (citing President George W. Bush, *President Pledges Assistance for New York in Phone Call with Pataki, Guiliani: Remarks by the President in Telephone Conversation with NY Mayor Guiliani and NY Governor Pataki* (Sept. 13, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/20010913-4.html>, as quoted in Wendy Brown, *Lecture at the University of Texas* 10, 11 (Feb. 28, 2002) (on file with the University of Colorado Law Review)).

<sup>113</sup> See Rod Dreher, *Inside Islam: A brave Muslim speaks*, NATIONAL REVIEW ONLINE, Jan. 8, 2002, available at <http://www.nationalreview.com/dreher/dreher010802.shtml>.

and the Terrorist. Thus, when a Moderate Muslim like Irshad Manji writes about her disaffection with Islam, she addresses her criticisms to the monolithic construct, never challenging the underlying idea that Islam and Muslims are one uniform religion and people.<sup>114</sup> She writes from a self-blinded position that assumes all Muslims are Believers with the exception of those who are Moderates like her. In fact, the very title of her book *The Trouble with Islam* – not even *The Trouble with Muslims* or *The Trouble with Extremists* exemplifies her position. Her project is written against the convenient fiction of a uniform, totalized faith and people that reifies that very fiction by mistaking it for real.<sup>115</sup> Hence, Moderate Muslims have not lost the opportunity to capitalize on a moment when almost anything can be said about Muslims and Islam and be heard.<sup>116</sup> As Mari Matsuda has observed, “[a]n interesting form of

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<sup>114</sup> See MANJI, *supra* note 97.

<sup>115</sup> For instance, she begins her book as a letter. She addresses all Muslims as “My fellow Muslims” leaving absolutely no one out. MANJI, *supra* note 97, at 1. When confronted with the request to “reconcile” her faith with the barbarism that periodically, even frequently, occurs in a Muslim country, rather than appreciating the absurdity of such a request, she is genuinely perplexed. MANJI, *supra* note 97, at 26, 27. Asking a single adherent to answer for an event, a crime, a degradation happening thousands of miles away in a different country and a different language between people with nothing in common – perhaps not even a religious practice when one digs below the labels – is nothing short of totalizing and essentializing as though each and every Muslim is responsible for the actions and beliefs of every other Muslim. And indeed, it implies that Islam itself imposes this uniformity.

<sup>116</sup> See, e.g., Jim VandeHei, *supra* note 11 (discussing the cartoons published by a Danish newspaper denigrating the Prophet Muhammad.) One cartoon reads: “Prophet! daft and dumb, keeping women under thumb.” *Id.* For all 11 cartoons, see [http://www.faithfreedom.org.nyud.net:8090/Gallery/Mo\\_Cartoons.jpg](http://www.faithfreedom.org.nyud.net:8090/Gallery/Mo_Cartoons.jpg). Note the stereotypically menacing way in which the Prophet is depicted. The ensuing firestorm of rage was considered an attack by Muslims on free speech. Charles Krauthammer, *God help us from the voices of reason*, TOWNHALL.COM Feb. 10, 2006 available at <http://www.townhall.com/opinion/columns/charleskrauthammer/2006/02/10/185941.html> (last visited Mar 30, 2006). In my view, such a position is typical of liberals who would shield an individual’s right to desecrate a holy figure behind free speech, but cannot understand the desire of one billion adherents to Islam’s desire to be free of that point of view.

material backlash is the recent phenomenon of conferring star status, honoraria, book contracts, and grants to people of color who are willing to attack their own.”<sup>117</sup>

[28] Another manifestation of the Moderate Muslim is the proponent of tolerance, non-violence, and of Liberal readings of religious texts.<sup>118</sup> While tolerance is a hard notion to stand against, and indeed, in a pluralistic society, it seems particularly anti-social to do so, the problem is not so much with the concept as it is what the proponents obscure through its use. Such Moderates tend to align their readings of Islam with popular viewpoints that make Islam and Muslim the least threatening to dominant society.<sup>119</sup> For example, one Moderate has garnered much attention for his various efforts at highlighting the tolerant and Liberal characteristics of Islam.<sup>120</sup> He is a vocal proponent of human rights and for highlighting the tolerant aspects of

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<sup>117</sup> Mari J. Matsuda, *Change, Backlash and Learning to Talk*, in *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 119, 122-23 (1996) (citing generally DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A FREE SOCIETY* (1995) and SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VERSION OF RACE IN AMERICA* (1991)).

<sup>118</sup> Safi, *supra* note 3, at 23-26.

<sup>119</sup> Safi, *supra* note 3, at 23-26. I note here that supporting non-violence is laudable unless it is directed only at one side. In the case of Moderates, my criticism is that they tend to condemn the violence of Muslims while ignoring or justifying the violence of the U.S.

<sup>120</sup> See Dreher, *supra* note 113 (portraying Abou El Fadl heroically as a lone struggler against the radicals and Terrorists and even against the Believers). Dreher notes:

UCLA law professor Khaled Abou El Fadl, 38, is a devout Muslim whose brilliant writings on Islamic law and fearlessness in public defense of human rights have made him one of the most formidable weapons in the battle against Islamic fundamentalism.

The *Islamofascists*, unsurprisingly, want the Egyptian-born legal scholar dead. He understands. He used to be one of them.

“But in [American] society, you know that sometimes it's important to sacrifice yourself or other cherished things for the principle of liberty.”

Islam; he has argued that the fundamentalist interpretations of jihad as holy war have no foundation in Islam, and has encouraged an “Islamic Reformation.”<sup>121</sup> He seeks to convince both bad Muslims and American society that Islam should be properly understood as a peace-loving, liberal religion and those truly troubling elements of it are merely aberrant

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Finally, the professor blames the "siege mentality" of Muslim émigrés for their post-9/11 silence. Many Muslims admit among themselves that the terrorists are a disaster for the Islamic community, he claims.

*Abou El Fadl doesn't have much respect for leading Muslim-American advocacy groups, who in his view shy away from addressing plainly and directly things they fear will make Muslims look bad. He says the Koran commands believers to speak truthfully and to stand for justice, no matter what the result. Less caginess and more honesty in the public square about the fundamentalist problem would be a public-relations boon to the American Muslim community, he believes.*

*Because governmental and religious authorities in the Middle East have intimidated publishers into shunning the work of scholars like himself, Abou El Fadl thinks the United States could do much long-term good by establishing foundations and publishing houses to fund and distribute the writings of moderate Muslim intellectuals at prices the Arab street can afford.*

Despite his tireless efforts to spark an Islamic Reformation, Abou El Fadl doesn't expect to live to see his ideas bear fruit. Islam has become obsessed with power at the expense of its ethical tradition, he asserts, turning the faith into a force for oppression.

*Though his is a lonely struggle, Abou El Fadl is encouraged by the words of support he receives from like-minded Muslims — to a point. Last week, the Los Angeles Times published a long, sympathetic profile of him, which prompted 40 e-mails from Muslims praising him for his work. (emphasis added)*

<sup>121</sup> See e.g., KHALED ABU EL FADL, THE PLACE OF TOLERANCE IN ISLAM (2002). Particularly important are the responses offered by Tariq Ali and Abid Ullah Jan who take great exception with the distractions of an overly theological discussion of tolerance that detract from the real political injustices felt by many Muslims. Tariq Ali, *Theological Distractions* in THE PLACE OF TOLERANCE IN ISLAM 37 (2002). Jan's piece is particularly virulently anti-Western, nevertheless, it presents a distinct view that resonates with many Muslims. See Abid Ullah Jan, *The Limits of Tolerance* in THE PLACE OF TOLERANCE IN ISLAM 42 (2002).

interpretations.<sup>122</sup> The Moderate, therefore, is an identity that seeks to quiet the anxiety that radical Muslims create.

[29] The way in which the Moderate is performed are through acts of covering and passing. The Believer also covers certain characteristics in order to fit into the dominant Muslim community. The Terrorist, on the other hand, performs this identity through simulation of activities that could be innocent but for the identity of the doer. That identity causes otherwise innocent deeds to become threatening simulations of terrorism

C. *Performances: Simulation, Covering and Passing*

[30] Performance of the Terrorist or the Believer is not a matter of slipping in and out of roles. Rather, it is the simulation of symptoms of those particular identities without the reality of the “disorder”. As Baudrillard claims: “It is no longer a question of imitation, nor of reduplication, nor even of parody; It is rather a question of substituting signs of the real for the real itself . . . . [n]ever again will the real have to be produced.”<sup>123</sup> Simulation conceals the fact that performance is not tethered to the “Truth” or a reality.<sup>124</sup> In other words, the dramatis persona of the Terrorist exists without the necessity of an act of terrorism *per se*. The State can regulate anyone it designates as a “Terrorist” because it is his/her potential to act or his or her simulation of action that is taken in lieu of the “real.” Again, according to Baudrillard:

To dissimulate is to feign not to have what one has. To simulate is to feign to have what one hasn't. One implies a presence, the other an absence. But the matter is more complicated, since to simulate is not simply to feign: “Someone who feigns an illness can simply go to bed and pretend he is ill. Someone who simulates an illness produces in himself some of the symptoms (Littre)”. Thus

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<sup>122</sup> ABOU EL FADL, *supra* note 121, at 13-23.

<sup>123</sup> BAUDRILLARD, *supra* note 12, at 170.

<sup>124</sup> BAUDRILLARD, *supra* note 12, at 170.

feigning or dissimulating leaves the reality principle intact: the difference is always clear, it is only masked whereas simulation threatens the difference between “true” and “false,” between “real” and “imaginary.” Since the simulator produces “true” symptoms, is he or she ill or not?<sup>125</sup>

Thus, both Terrorists and Believers simulate certain symptoms of their identity which makes the ability to take them for “real” that much easier. For example, given that active practice of Islam is considered a marker for both the Terrorist or the Believer, performing acts of Islam can be taken as a simulation of terrorism and may signify the performers as Terrorists.

[31] Simulation makes it easy to regulate, police, and order the actors. In fact, Baudrillard wonders whether the “repressive apparatus” might react more violently to a simulation of an illegal act than to the real event because while the latter transgresses legal boundaries, the former calls into question the principle of reality itself.<sup>126</sup> There is no objective difference between a simulated theft and a real one, the web of artificial signs is inextricably mixed up with the real. And the punishment of a simulation (a fake hold-up or a fake terrorist threat) is always punished as something “real” and not as a *simulation* “since it is precisely as such that no equivalence with the real is possible, and hence no repression either.”<sup>127</sup> Thus, people playing paintball or target shooting will find themselves entangled in the “reality” of being charged with “training for terrorism” even though they may not be *actually* training.<sup>128</sup> And if they happen to have

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<sup>125</sup> BAUDRILLARD, *supra* note 12, at 170-71.

<sup>126</sup> BAUDRILLARD, *supra* note 12, at 171.

<sup>127</sup> BAUDRILLARD, *supra* note 12, at 181 (emphasis added).

<sup>128</sup> See, e.g., Jerry Markon, *Final Defendant in 'Va. Jihad' Case Acquitted*, WASHINGTON POST, March 9, 2004, at A1. In this case, the charges were dismissed with respect to some of the defendants. *Id.* However, it is unlikely that any of the defendants would have been acquitted had they simulated with real guns and not been playing a popular game. The report notes that six men pled guilty and three others were convicted of being jihadists, for preparing for jihad abroad by playing paintball and firing weapons in the Virginia countryside. *Id.* U.S. Attorney Paul

politically unpopular views or religious affiliation, these too will add to the simulation and cause them to be viewed as a “real” threat without the need of any terrorist act.<sup>129</sup>

[32] Believers in the community are often captured as Terrorists because they share both racial and Islamic markers. However, the acts that signal that they are dangerous have more to do with performance of their religion in an overt manner and their simulation of an imagined Muslim ethnicity rather than performance of actions that could be considered dangerous.<sup>130</sup> For instance, the performance that leads to regulation is going to the mosque dressed in a way that clearly marks one as a Muslim – wearing a head covering or wearing a *keffiyeh* or a *kufi*. Simulating a fictive Muslim ethnicity and practicing Islam, in this situation, are artificial signs of danger that result in reality of heightened scrutiny.

[33] This fictive Muslim ethnicity is increasingly performed by many Muslims who have heeded the call to leave behind cultural differences in order to become a Muslim minority community in the United States.<sup>131</sup> I would argue that the only way in which a Muslim ethnicity is possible is if Muslims of non-dominant cultures (like South Asians, Central Asians, and sub-Saharan Africans to name a few) actively simulate that ethnicity and cover their own. Covering requires the performer to play down certain attributes in favor of others.<sup>132</sup> In this case, the attributes to be played down are the already existing race and culture of non-dominant Muslims

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McNulty is quoted as saying “This case was difficult from the start because of the secrecy and location of the conduct and *the scarcity of evidence*, but it was important for us to pursue.” *Id.* (emphasis added).

<sup>129</sup> See Engle, *infra* note 215.

<sup>130</sup> See *supra* notes 86-98 and accompanying text.

<sup>131</sup> See Aslan *supra* note 66.

<sup>132</sup> See Yoshino, *supra* note 68, at 772.

in favor of the Believer's homogenizing ethnicity. In other words, brown Muslims are defined by their practice of Islam and not by any other cultural or racial attributes that are considered only secondary – even while these supposedly secondary attributes often are what mark them as Other in conjunction with Islam. Indeed, it is the race then that becomes conflated with religion and instead of the South Asian being a brown Muslim, Muslim itself becomes conflated with and equivalent to brown-ness. Performance of the Believer or even the Moderate then requires the downplaying of any distinct cultural content of a non-dominant ethnicity in favor of allowing color and the dominant (Arab) ethnicity to become equivalent to a Muslim race.<sup>133</sup>

[34] Finally, it is important to note that Muslims are able to pass as non-Muslims if they shed visible markers of their religion or if they happen to be of the dominant race.<sup>134</sup> Examples of such Muslims are white-looking Asians and Arabs, Europeans (Bosnians and Turks) and indeed white Americans along with Muslims of color who do not carry any markers of religion. Muslims who choose to pass are clearly not performing the Believer. Yet, even if they are passing for non-Muslim, those who are raced may not be able to pass in other ways. A South Asian woman who does not wear hijab, for example, could be any number of religions but she is clearly a racial minority – an identity that she can only cover. That racial feature may still call her out as a threat but her non-performance of the Believer will lessen that likelihood.<sup>135</sup>

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<sup>133</sup> See generally ROY, *supra* note 52, at 328-35.

<sup>134</sup> See generally Patel, *supra* note 76, at 69-76. Note that the very construction of Muslims as “brown” allows for this passing. See also *supra* notes 87-97 and accompanying text.

<sup>135</sup> See generally Yoshino, *supra* note 68. Using Yoshino's theorizing of covering and passing in the gay context, in the above discussion, I apply it here to religion. Like sexual orientation and unlike skin color, religion can be covered and those who profess to be secular Muslims can evade detection as Muslims altogether. For instance, a South Asian Muslim woman who does not perform the Believer would be hard to tell apart from a South Asian Hindu woman. Both may be victims of racism but the Muslim can only be regulated *as a Muslim* only if she performs

[35] In the following section, I argue it is through the use of race and religion together that the State pursues and regulates Terrorists. Believers, on the other hand, are regulated by the dominant Muslim community through the articulation of acceptable religious behavior and practices that also create a pressure to cover cultural attributes. Finally, Moderates who tend to cover their religious attributes or pass are not so much regulated as they are used to regulate the bad: Terrorists and Believers. They also tend to obscure other performances of Muslim identity which may be difficult to categorize into good and bad.

### III. DEPLOYING IDENTITY AND REGULATING THE IMAGINED: “REAL” IMPACTS ON MUSLIM BODIES AND BEHAVIOR AFTER 9/11

#### A. *Profiling, Detentions and Deportations: Deploying the “Terrorist” to Regulate muslims*

[36] Despite the State’s disavowal of racial profiling as a weapon in the domestic War on Terror, its actions have proved its claims to be disingenuous. In the years after 9/11, ethnicity and national origin have been used to single out Muslims as Terrorists.<sup>136</sup> The State has pursued those who belong to mosques and donate to Islamic charities.<sup>137</sup> Those with Arabic-sounding

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the Believer identity. Secular Muslims, in my definition, are those who either do not believe in the divinity of Islamic texts or who practice their faith along the lines drawn by secular society – in private.

<sup>136</sup> DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 47 (2003) (citing Testimony of Nihad Awad, Executive Director, CAIR, before the House Judiciary Committee, The Effect of Racial Profiling in the American Muslim Community Since September 11, 2001, Jan. 24, 2002; Human Rights Watch, “*We Are Not the Enemy*”: Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim after September 11 (Nov. 2002), 14; *Bias Incidents Against Muslims Are Soaring, Islamic Council Says*, NEW YORK TIMES, May 1, 2002, A3; Susan Sachs, *For Many American Muslims, Complaints of Quiet but Persistent Bias*, NEW YORK TIMES, April 25, 2002, at A16).

<sup>137</sup> Douglas Farah, *U.S. Links Islamic Charities, Terrorist Funding*, WASHINGTON POST, August 20, 2003, at A2. See also *Financial Institutions Blacklist Muslims*, CAIR, available at <http://www.cair-net.org/asp/article.asp?id=145&page=AA> (June 18, 2003).

names have been identified as suspect.<sup>138</sup> Communities distinguishable as Arab or Muslim have been intensely scrutinized. A 2002 study prepared by CAIR on the status of Muslim civil rights reports a 43 percent increase in valid complaints of violations from the previous year.<sup>139</sup> It states that all of the experiences reported to CAIR in the post-September 11 period “have common elements of setting religious and ethnic features of Muslim life or Muslim religious and political views apart from what is considered normal or acceptable.”<sup>140</sup> This sentiment clearly also holds true among the citizen majority, which prior to 9/11, was opposed the use of racial profiling.<sup>141</sup> Before the attacks, several cases involving police profiling of black men had fueled resentment among minorities and triggered calls for reform in police practices.<sup>142</sup> The State responded by publicly repudiating the usefulness of this strategy in detecting criminals and by making efforts to eliminate profiling.<sup>143</sup> The about-face from this position in the days following the attacks is remarkable, although not unforeseeable. Before 9/11, very few journalists or academics would likely have written in support of profiling; now we have several who consider profiling as a “potentially useful tool” and “discrimination we’re afraid to be against.”<sup>144</sup> The belief that

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<sup>138</sup> CAIR, *supra* note 100, at 1.

<sup>139</sup> CAIR, *supra* note 100, at 1.

<sup>140</sup> CAIR, *supra* note 100, at 1..

<sup>141</sup> See David A. Harris, *Racial Profiling Redux*, 22 ST. LOUIS U. PUB. L. REV. 73, 73-74 (2003); CAIR, *supra* note 100, at 10.

<sup>142</sup> See Harris, *supra* note 141, at 79-80.

<sup>143</sup> See Harris, *supra* note 141, at 83-87.

<sup>144</sup> See Michael Kinsley, *Discrimination We're Afraid to Be Against*, in RIGHTS VS. PUBLIC SAFETY AFTER 9/11 53 (Amitai Etzioni & Jason H. Marsh eds., Rowman & Littlefield Publishers, Inc. 2003) (2001); John Derbyshire, *A (Potentially) Useful Tool*, in RIGHTS VS. PUBLIC SAFETY AFTER 9/11 57 (Amitai Etzioni & Jason H. Marsh eds., Rowman & Littlefield

terrorists can be detected, not because of their acts of terror but because of some visible sign, is a function of what is included in the identity of the Terrorist: religious markers, “Arab-sounding” names, and skin color.<sup>145</sup> Thus, airlines are able to remove people from planes who “look” like Terrorists without having any actual ability to distinguish the Muslim or even the non-Muslim brown-skinned peoples, such as Hindus, Arab-Christians, and Latinos, from a “real” terrorist, someone who is created by the deed of, or at the very least an attempt at, terrorism.<sup>146</sup>

[37] The reliance on the Terrorist has meant that the State’s regulatory activities are easily evaded by an unmarked terrorist who has yet to act.<sup>147</sup> Despite the fact that Timothy McVeigh, Richard Reid, John Walker Lindh and Jose Padilla are also terrorists, it has not been the practice of law enforcement to profile their ethnicities in their search to uncover “evil-doers.”<sup>148</sup> Nor has the existence of these men sparked any discussion about the loyalty of white men or Latinos in America.<sup>149</sup> No matter how many times the *fact* that terrorists, thus far, have come in a variety of colors and ethnicities is brought to the collective attention, there is a sense of *unreality* and disbelief about it; as though it is just not possible and the concentration of efforts on “raced” bodies alone is the most logical means of detecting people whose terrorist identity is constituted

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Publishers, Inc. 2003) (2001). *See also* Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675 (2003).

<sup>145</sup> *See generally* COLE, *supra* note 136, at 47-55.

<sup>146</sup> COLE, *supra* note 136, at 48 (citing Stuart Taylor, *The Case for Using Racial Profiling at Airports*, 33 NATIONAL JOURNAL 38 (Sep. 22, 2001)).

<sup>147</sup> COLE, *supra* note 136, at 55.

<sup>148</sup> COLE, *supra* note 136, at 55. *See also* Volpp, *supra* note 37, at 1583-85.

<sup>149</sup> Volpp, *supra* note 37, at 1584-85.

through their actions/deeds rather than by the State.<sup>150</sup> This has created a great deal of pressure on those who are unable to shed markers of the State-constructed identity and whose behavior would not otherwise have raised any particular suspicions solely because those markers are written on the body.<sup>151</sup>

[38] Profiling is often the means to detention, prosecution, and/or deportation. In the months after 9/11, the State detained approximately 1,200 Muslim men with suspected links to terrorism.<sup>152</sup> An additional 1,100 people were detained under the “Absconder Apprehension Initiative, which expressly targets for prioritized deportation the 6,000 Arabs and Muslims among the more than 300,000 foreign nationals living here with outstanding deportation orders.”<sup>153</sup> By May 2003, a further 2,747 Arab and Muslim non-citizens had been detained

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<sup>150</sup> See COLE, *supra* note 136, at 24. Given that Jose Padilla is Hispanic, Timothy McVeigh, John Walker Lindh, and Richard Reid is white, and Zacarias Moussaoui is African, it seems peculiar to cling to the notion that we can tell who is going to be a terrorist. Evidence of this tendency to focus on raced bodies can be found in the disparate impact on Arab and Muslims of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214-1319 (1996), and the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-10 to 3009-747 (1996) after the Oklahoma bombings conducted by a white male. See also Akram and Johnson, *supra* note 26, at 322-333.

<sup>151</sup> See generally Mervat F. Hatem, *Racial Profiling in the Pursuit of Arabs and Muslims in the U.S.*, in *IT’S A FREE COUNTRY: PERSONAL FREEDOM IN AMERICA AFTER SEPTEMBER 11* (Danny Goldberg et al. eds., 2002).

<sup>152</sup> COLE, *supra* note 136, at 25 (citing Dan Eggen & Susan Schmidt, *Count of Released Detainees is Hard to Pin Down*, WASHINGTON POST, Nov. 6, 2001, at A10). The Eggen and Schmidt article also reported that the U.S. would stop reporting on detention tallies).

<sup>153</sup> COLE, *supra* note 136, at 25 (citing *The War on Terrorism: Immigration Enforcement Since Sep. 11, Before the House Committee on the Judiciary Subcommittee on Immigration, Border Security and Claims*, 108th Cong. 14-19 (May 8, 2003) (Prepared Statement of Michael T. Dougherty, Director of Operations)).

under a registration program.<sup>154</sup> Over 5,000 people since the events of 9/11, therefore, have been subject to detention, oftentimes in secret, for possible links to “Islamic” terrorism.<sup>155</sup>

[39] According to John Ashcroft who was the Attorney General of the United States at the time of these events, the best way to prevent terrorism is to take “suspected terrorists in violation of the law off the streets and [keep] them locked up.”<sup>156</sup> But the success rate of this plan, if it was actually a plan to catch terrorists, has been miserable at best.<sup>157</sup> A small fraction of those initially detained were charged with terrorism-related infractions, the rest were prosecuted for immigration violations not linked with terrorism.<sup>158</sup> Catching immigration law violators does not automatically guarantee terrorists will be caught unless something links the two. The link between an immigration lawbreaker and a terrorist lawbreaker that allows a Muslim or an Arab to go from being one to the other is the contents or characteristics of their Believer identity, which is largely coextensive with the Terrorist identity.<sup>159</sup> Sameer Ashar narrates the story that

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<sup>154</sup> COLE, *supra* note 136, at 25 (citing Michael Powell, *An Exodus in Brooklyn*, WASHINGTON POST, May 29, 2003, at A1).

<sup>155</sup> COLE, *supra* note 136, at 25.

<sup>156</sup> John Ashcroft, Prepared Remarks for the U.S. Mayors Conference (Oct. 25, 2001), *available at* [http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10\\_25.htm](http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm).

<sup>157</sup> *See* COLE, *supra* note 136, at 25.

<sup>158</sup> COLE, *supra* note 136, at 25-26.

<sup>159</sup> *See* Engle, *supra* note 11, at 75-76 (claiming that the “terrorism and Islam conflation has become so ingrained in the American mindset that initial media reports after the 1995 bombing of the federal building in Oklahoma simply assumed that the culprits were from the Middle East”).

illustrates this translation.<sup>160</sup> His client, a fifty-eight year old man from Pakistan, overstayed his visitor's visa.<sup>161</sup> He was living in the basement of a Brooklyn mosque when INS officials arrested him at his home.<sup>162</sup> There appeared to be no reason for this particular man's arrest "other than the fact that he was brown-skinned, Muslim, and present at the Brooklyn mosque on the morning of the INS sweep."<sup>163</sup> This raises the question: why is *the INS* conducting sweeps of mosques instead of the police or the FBI, *if the purpose is to capture terrorists*? In my view, the sweep of the mosque was intended to capture Believers who are considered threats because they "act like" Terrorists.

[40] This identity-based profiling that "translates" Arabs and Muslims into Terrorists is most obvious where the State interrogates legal visa holders and law-abiding citizens. In 2001-2002, the state began "voluntary" interviews with some 5,000 legal Muslim foreign nationals in the first wave, and then an additional 3,000 similar individuals in the second wave.<sup>164</sup> According to a report by CAIR, less than twenty individuals were arrested on unrelated charges from those interviews.<sup>165</sup> In addition to the voluntary interviews, the Department of Homeland Security began the domestic registration program requiring men from Muslim nations "to come in for

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<sup>160</sup> Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002).

<sup>161</sup> *Id.* at 1186.

<sup>162</sup> *Id.* at 1186-87.

<sup>163</sup> *Id.* at 1188.

<sup>164</sup> Harris, *supra* note 141, at 88.

<sup>165</sup> CAIR, *supra* note 100, at 8.

questioning, fingerprinting and photographing.”<sup>166</sup> More than 83,000 men were labeled as “high national security concerns” based on their citizenship, and deportation proceedings were started against 14,000 people.<sup>167</sup> None of these people were charged with terrorism.<sup>168</sup> The program was discontinued in December 2003 after sowing resentment and suspicion of the State in predominantly Muslim communities.<sup>169</sup>

[41] Because the State relies on religious markers as an indicator of terrorist potential, those Muslims who perform the Believer are more likely than those who do not perform the identity to be caught in the profiling dragnet.<sup>170</sup> When the dominant Muslim community reinforces and disseminates the characteristics of the “Believer” by regulating the boundaries of behavior and practice, it too regulates Muslims in a way that has serious consequences.

*B. Representation and Legitimacy: Deploying the Believer*

[42] In the United States, community as a concept is overused.<sup>171</sup> It is an idea that has been shrouded in romance.<sup>172</sup> Community is where one finds succor and support - the place where one gains the strength to resist the various encroachments of power.<sup>173</sup> These qualities are commonly assumed. However, community also has rules and boundaries and a claim on identity

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<sup>166</sup> Cam Simpson & Flynn McRoberts, *U.S. Ends Muslim Registry*, CHICAGO TRIBUNE, Dec. 2, 2003, at C1.

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

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

<sup>169</sup> *Id.*

<sup>170</sup> See Akram & Johnson, *supra* note 27, at 299.

<sup>171</sup> JOSEPH, *supra* note 95, at vii.

<sup>172</sup> See JOSEPH, *supra* note 95, at vii.

<sup>173</sup> JOSEPH, *supra* note 95, at vii.

formation.<sup>174</sup> In order to reap the benefits of any community, one has to *belong*, and belonging often means the suppression of differences in order to accentuate similarities.<sup>175</sup> *The Muslim Community*, to which media, scholars, and certain groups of Muslims like to refer, is not a single entity. It is comprised of numerous subgroups that do not necessarily align with each other.<sup>176</sup> Aside from the religious self-identification of “Muslim,” it is hard to conceive of a more diverse minority group in the United States. The “Community,” if one can even speak in the singular, is made up of Muslims from East Asia, South Asia, Sub-Saharan Africa, North Africa, the Arabian Gulf, the Arabian peninsula, the Levant, Europe, and the United States who are linguistically, culturally, and ethnically different from each other.<sup>177</sup> Moreover, as current news stories have highlighted, Islam is also broken into sects: Shiites, Sunnis, Ahmedis, Qadianis, and Aga Khanis, just to name a few.<sup>178</sup> At various times, they have fought with each other; Iraqis against Iranians,

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<sup>174</sup> JOSEPH, *supra* note 95, at 57.

<sup>175</sup> JOSEPH, *supra* note 95, at 57. *See generally* BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983).

<sup>176</sup> *See, e.g.*, Noreen S. Ahmed-Ullah et al., *Struggle for the soul of Islam; Hard-liners won battle for Bridgeview mosque*, CHICAGO TRIBUNE, Feb. 8, 2004, at C1.

<sup>177</sup> *See* Amina Wadud, *American Muslim Identity: Race and Ethnicity in Progressive Islam*, in *PROGRESSIVE MUSLIMS: ON JUSTICE, GENDER, AND PLURALISM* 270, 270-74 (Omid Safi, ed. 2003). I have had the personal experience of having to justify publicly reading the translation of a verse of the Qur’an in an ecumenical roundtable to a “brother” who thought it improper for a woman to represent the Islamic religion. If South Asians are a minority in the “Muslim community,” the African-American Muslims are markedly inferior in status. From conversations with black Muslims at Georgetown University Law Center, it is clear that they suffer the most from the “crisis of legitimacy.”

<sup>178</sup> *See e.g.*, Riaz Khan, *Suicide Bomber Hits Shiite Procession*, ABC NEWS INTERNATIONAL, February 9, 2006, available at <http://abcnews.go.com/International/wireStory?id=1598263>; Dexter Filkins, *Iraqis Are Urging Unity in Government, but Political Rifts May Be Too Deep*, THE NEW YORK TIMES, Jan. 22, 2006, at § 1, 4, col. 1; *In depth, Sudan: A Nation Divided*, BBC

Pakistanis against Bangladeshis, Kurds against Turks, Sunnis against Shi'as.<sup>179</sup> Just as the idea of *the* “Muslim” is a fiction, the idea of *the* “Muslim community” or a Muslim race is also a fiction.<sup>180</sup> In order to create a unified community, the dominant Muslim community does not ask that Muslims shed their race, and in fact, there has been an effort to educate the public that there is no single Muslim race;<sup>181</sup> however, it does create a pressure on Muslims to shed their cultural identities. Shedding cultural attributes only reinforces the notion that Muslims can be “discovered” through a simplistic set of religious identifiers packaged in the Believer.

[43] I would argue that whether or not one belongs to the dominant Muslim community is determined by the extent to which one conforms to the Believer identity. Indeed, given the scrutiny under which Muslims find themselves, it is not surprising that notions of unity and community that bolster the desire to “be” a Believer are increasingly appealing.<sup>182</sup> The more a

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NEWS, Jan. 22, 2006, available at [http://news.bbc.co.uk/1/hi/in\\_depth/africa/2004/sudan/default.stm](http://news.bbc.co.uk/1/hi/in_depth/africa/2004/sudan/default.stm).

<sup>179</sup> See generally, IRA LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES (2002).

<sup>180</sup> See ROY, *supra* note 52. That is to say, in general, Muslims tend to congregate with those of similar culture and background. However, in the United States and in Europe, as Muslims have become unmoored from their culture of origin, they have begun to substitute Islam as a culture. ROY, *supra* note 52, at 328-35. In that sense, the trend is towards a homogenization but there are still divisions along sectarian lines and among conservatives, liberals and progressives. ROY, *supra* note 52, at 328-35.

<sup>181</sup> See, e.g., CAIR, American Muslim Outreach Efforts, available at <http://www.cair-net.org/default.asp?Page=americanMuslimOutreachEfforts> (last visited Feb. 4, 2006); Muslim Public Affairs Council, Community Affairs, available at [http://www.mpac.org/community\\_menu.aspx](http://www.mpac.org/community_menu.aspx) (last visited Feb. 4, 2006)

<sup>182</sup> Geneive Abdo, *Interest in Religion, Politics Deepens*, CHICAGO TRIBUNE, April 6, 2004, at C13. This article is also available at the University of Ottawa’s Muslim Student Association’s website, <http://www.uomsa.com/home/index.php?option=content&task=view&id=25&Itemid=2>. I use “Community” to refer to those groups of Believers who seek to represent Muslims as a whole in the public discourse. Such groups range from the conservative to the liberal organizations, mosques, and other institutions.

Muslim is a Believer, the more likely that person is to have legitimacy within the community, to find that succor that is missing in the mainstream society. But to be a Believer is to conform to a particular view of how Islam ought to be performed and what it means to be a Muslim.<sup>183</sup> In this way then, the Believer is deployed by the dominant Muslim community to regulate the members of the community – conferring voice and visibility to those who perform the identity and obscuring those who do not.<sup>184</sup> The regulation of Muslims by the dominant Muslim community is quite real.<sup>185</sup> One way that this has occurred is through the dissemination of certain Believer characteristics through an effort on the part of the dominant Muslim community to educate the public about Muslims and Islam.<sup>186</sup> Ostensibly, the hope is that through the dissemination of particular kinds of information, the negative reputation of Islam will be rehabilitated and Muslims will be viewed more sympathetically than they have been thus far.<sup>187</sup> But what exactly is being produced and disseminated in these attempts to improve the public image of Islam and Muslims?

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<sup>183</sup> See sources cited *supra* note 18.

<sup>184</sup> See, e.g., Jihadwatch, *Stalinism at CAIR: photo doctored for Islamic correctness* (Sep. 15, 2005), at <http://www.jihadwatch.org/archives/008110.php>. (reporting that CAIR “created” a photoshop hijab for a muslim woman who attended a candlelight vigil marking 9/11).

<sup>185</sup> I note here that the idea of the Muslim Ummah is synonymous with the idea of a Muslim community. Recent events in Iraq and Pakistan between Shi’a and Sunni groups, and historically between Kurds, Iraqis, and Turks, and between Iran and Iraq illustrate the lie to any notions of unity. See, e.g., Wadud, *supra* note 177.

<sup>186</sup> See, e.g., CAIR, *supra* note 181.

<sup>187</sup> See generally CAIR, *Islam in America Ad Campaign*, available at <http://www.americanmuslims.info> (last visited Mar. 19, 2006).

[44] In the public arena, the private hierarchies within many Muslim organizations reproduce themselves.<sup>188</sup> Men, and more precisely immigrant men, dominate the representation of the religion to the near complete exclusion of women and non-Arab Muslims.<sup>189</sup> The representatives of the dominant Muslim community rarely, if ever, acknowledge the existence of, let alone address the needs of, large groups of secular or non-practicing Muslims in the United States or of non-orthodox Muslims who do not subscribe to the practices of the dominant group particularly when it comes to conventions like hijab, marriage, and social relations.<sup>190</sup> Because of this non-conformity, unorthodox Muslims are construed as outsiders. This erasure of secular Muslims and of Muslims who practice Islam outside the boundaries drawn by the Community<sup>191</sup> means that the only real image that people get of Muslims is that of the stereotypical Believer practicing

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<sup>188</sup> See Wadud, *supra* note 177, at 273.

<sup>189</sup> Wadud, *supra* note 177, at 273. Aminah McCloud, an African American, is quoted as saying, “When folks want to know about Islam, they have always gone to the immigrant community.” Wadud, *supra* note 177, at 273. (citing Michelle Cottle, *Native Speakers; African American Muslims, and Why It's Hard to be Both*, THE NEW REPUBLIC, Nov. 19, 2001). Wadud further observes that after September 11, the national character of Islam in America portrayed to the general American public was “overwhelmingly male and immigrant. Many African American representatives were silenced or marginalized.” *Id.* See also, Islamic Society of North America, Board of Directors available at <http://www.isna.net/about/board.html> (last visited Feb 6, 2006); CAIR Board of Directors, available at <http://www.cair-net.org/default.asp?Page=Board> (last visited Feb. 6, 2006); American Muslim Council, Board of Directors available at <http://www.amcnational.org/index.html> (last visited Feb. 6, 2006); *But cf.* Muslim Public Affairs Council, at [http://www.mpac.org/home\\_contact.aspx](http://www.mpac.org/home_contact.aspx) (last visited Mar. 25, 2006).

<sup>190</sup> See, e.g., Jihadwatch, *supra* note 184.

<sup>191</sup> Most religious Muslims maintain that to be a secular Muslim is generally an oxymoron, either one is a Muslim or one is not because Islam is a belief system. Belief is constructed as the belief in one God, the truth of Muhammad’s prophethood, the injunction to perform the five pillars. See CAIR, *About Islam*, available at <http://www.cair-net.org/default.asp?Page=aboutIslam> (last visited Feb. 9, 2006). However, there are Muslims in every country that do not practice Islam religiously and nevertheless align themselves with Muslim interests. This false binary of “either in or out” constructs the borders of the Muslim community in a very concrete and definite way. Considering that Muslims are diverse, this makes little sense.

“pamphlet Islam.”<sup>192</sup> Even while organizations like CAIR decry such stereotyping, they also promote it. For instance, they have launched a public campaign to portray American Muslims as diverse and until 2004 all the women shown were in hijab.<sup>193</sup> In 2004, they introduced a campaign that included one woman without hijab.<sup>194</sup> Yet in September 2005, they crudely drew a head-covering on a woman not wearing one in a picture of a candlelight vigil being held in remembrance of 9/11.<sup>195</sup> What is one to make of the conflicting portrayals of Muslim women? What does the forcible (even though only on the page) covering of a woman’s hair convey to those who would like to participate in similar activities but do not conform to the Believer?

[46] Attempts to voice dissent from this ordering are often met with the deployment of the disciplinary label of “apostate.”<sup>196</sup> This label works to marginalize the perspectives of secular, non-orthodox Muslims. The silencing within the community is compounded with the invalidation of critiques offered in both support of Muslims and about Muslims as being insufficiently grounded in “Islamic” tradition.<sup>197</sup> Indeed, conformity with the religious practice guidelines of the dominant Muslim community may not be enough to legitimize Muslims. As I noted above, the representation of the “community” has been in the hands primarily of Arab-

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<sup>192</sup> See Safi, *supra* note 3, at 22-23.

<sup>193</sup> See *supra* note 187.

<sup>194</sup> See CAIR, *Public Service Announcements*, June 16, 2004, available at <http://www.cair-net.org/default.asp?page=PSAJun2004> (last visited Mar. 30, 2006).

<sup>195</sup> See Jihadwatch, *supra* note 184.

<sup>196</sup> See Safi, *supra* note 3.

<sup>197</sup> Safi, *supra* note 3, at 7-9.

Muslims or immigrant Muslim men.<sup>198</sup> Even though race is not a critical factor in the Believer identity, I have argued there is most certainly a bias in favor of those with Arabic language capabilities and those with an Arabic ethnicity.<sup>199</sup> Even practicing Muslims of non-Arab descent may find that they are not quite as equal within the community as they would like.<sup>200</sup>

[47] Irshad Manji describes an incident at one of her speaking engagements, which serves as an example of this inequality within the Muslim community.<sup>201</sup> In this incident, a Pakistani woman, who had come to protest against Manji along with other Muslims, was told by an Arab co-protester that she was not a “real” Muslim, but only a convert.<sup>202</sup> The implication is clearly that converts do not know as much about Islam as those born Muslims. Moreover, given that this Pakistani woman was presumably born a Muslim as most Pakistanis are, the further implication is that only Arabs are legitimately “pure” Muslims or “real” Muslims because “Islam was revealed to the Arabs.”<sup>203</sup> The cultures of Muslims who are not Arabs then become sites of struggle. The choices become to either conform to a largely Arab template by alienating one’s

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<sup>198</sup> See *supra* notes 95-110 and accompanying text.

<sup>199</sup> See *supra* notes 95-98 and accompanying text.

<sup>200</sup> See MANJI, *supra* note 97, at 135.

<sup>201</sup> See MANJI, *supra* note 97, at 135. I have witnessed this kind of delegitimization personally. A college friend of mine was chastised thoroughly by a Moroccan woman after being asked to recite a prayer in Arabic. Apparently the Moroccan felt that my Pakistani friend’s Arabic accent was so horrendous that it was insulting to her. My friend’s response was bewilderment at this outrage. She had been saying this prayer her whole life. And to my ears, which are accustomed to hearing various Arabic dialects, she was not unintelligible. I cite this example to elucidate further how felicity with Arabic language often allows Arab-Muslims to assume a superiority over those who simply say their prayers in the language.

<sup>202</sup> *Id.*

<sup>203</sup> MANJI, *supra* note 97, at 135.

culture of origin or attempt to retain a cultural as well as a Muslim identity.<sup>204</sup> Those who resist cultural erasure are often not considered Muslim at all, regardless of their practices.<sup>205</sup>

[48] What are the consequences of the “Believer” becoming the prevailing image of Muslims?

I submit that it is a dialectical reification of the Terrorist construct through shared markers. For instance, according to the federal law enforcement officials training local police, Terrorists would carry phony passports, fake driver’s licenses, and “*prayer rugs and copies of the Koran.*”<sup>206</sup> Clearly, in the eyes of the State, the two constructs refer to each other in ways that makes it easy to trade one for the other. Thus, if Muslims really want to resist the way in which Believers are interchangeable with Terrorists, the dominant Muslim community must present a more diverse picture that destabilizes the belief that you can identify a Muslim on sight by color or through particular religious behavior or even beliefs.<sup>207</sup>

C. *Moderates: Exemplifying the Good to Discipline the Bad*

[49] Complicating any attempt to create a diverse picture, however, is the identity of the Moderate.<sup>208</sup> Moderate Muslims, who are still within the practicing community, also patrol the

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<sup>204</sup> See generally ROY, *supra* note 52, at 326-340.

<sup>205</sup> Lal, *supra* note 96, at 131-132.

<sup>206</sup> Harris, *supra* note 141, at 88 (emphasis added).

<sup>207</sup> I note that at the time of this writing, such a move towards presenting more diversity is taking place. CAIR’s latest publicity includes Muslims of various ethnic backgrounds. See *supra* note 181. This is certainly a step forward.

<sup>208</sup> The reason that such a construct complicates the attempts at diversity is because it creates distrust within the various Muslim communities. Those who espouse non-violent yet progressive agendas could be confused with those who advertently or inadvertently advance the State’s regulation of Muslims through liberal arguments against violence that do nothing to address the root causes of much of the violence done by Muslims. In my view, Irshad Manji’s work is an example of a critique that takes into account only the misdeeds of Muslims. See MANJI, *supra*

border of Islam. The Moderate is a good, liberal Muslim who is against violence, and is tolerant while remaining faithful.<sup>209</sup> The Moderate seeks to present a more inclusive, sanguine Muslim character who, because s/he has assimilated and shares liberal values and a more or less liberal agenda, is less threatening and far more comprehensible to mainstream society.<sup>210</sup> The Moderate's main goal is to discourage Muslims from supporting those individuals and organizations that are not in line with the State or with "American values." As a result, they seek particularly to push any Muslim who refuses to abjure violence as a form of resistance outside the boundaries of the community.<sup>211</sup> The good Muslim is then a "peace-loving" Muslim even though s/he may support the war on terror and the "necessary" violence of preventing further attacks on the United States. Whether through fear of or faith in the State, Moderates are typically flag-waving Muslims who do not criticize the government.

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note 97. As such, in my view, it supports the State's justifications for regulation and it also advances society's general disregard of Islam and Muslims.

<sup>209</sup> See generally ABOU EL FADL, *supra* note 121. It is not argued that there is no place for tolerance in Islam. However, liberals like Abou El Fadl seem to ignore the actual injustices faced by Muslims which are often the root causes of violence. As Jan's critique elucidates, he looks at the violence of extremists while seeming to turn a blind eye to the violence of the "West." See Jan, *supra* note 121.

<sup>210</sup> See Engle, *supra* note 11, at 100-11.

<sup>211</sup> See ABOU EL FADL, *supra* note 121, at 3-26. Abou El Fadl argues that Wahhabism defies the "true" values of Islam. ABOU EL FADL, *supra* note 121, at 3-26. His position seems to exclude the fact that all religious texts have a variety of interpretations all of which can be supported and that claiming that one set of values is "true" is basically the mirror argument to the one made by conservatives. See also KHALED ABOU EL FADL, *THE GREAT THEFT: WRESTLING ISLAM FROM THE EXTREMISTS* (2005)

[50] As Karen Engle has noted, the State has repeatedly signaled that such Moderates are the good Muslims.<sup>212</sup> To quote the highlights of President Bush's October address to the National Endowment for Democracy:

**Muslims Are Playing A Vital Role In The War On Terror.** Muslim leaders are denouncing terrorism, and the time has come for all responsible Islamic leaders to denounce an ideology that exploits Islam for political ends and defiles a noble faith. Many Muslims have joined the fight against extremism. The United States is proud to stand by those who stand up for the liberty, justice, and humanity of their own tradition.<sup>213</sup>

**In Pursuit Of Their Goals, Islamic Radicals Are Empowered By Helpers And Enablers.** They are sheltered and supported by authoritarian regimes - allies of convenience like Syria and Iran - that share the goal of hurting America and moderate Muslim governments, and that use terrorist propaganda to blame their own failures on the West, America, and Jews. They are strengthened by front operations - such as corrupted charities - and those who aggressively fund the spread of radical, intolerant versions of Islam. The militants are aided by elements of the Arab news media that incite hatred and anti-Semitism, feed conspiracy theories, and speak of a so-called American "war on Islam" - with seldom a word about American action to protect Muslims in Afghanistan, Bosnia, Somalia, Kosovo, Kuwait, and Iraq.<sup>214</sup>

It is clear from these statements that the State does not seek to directly police those who conform to the Moderate Muslim. However, the Moderate construct acts as an example to Muslims who can conform to it if they wish to escape regulation. The result has been not only a reluctance to resist or criticize the State when it arrests Muslims as Terrorists as was the case with the three medical students in Florida who were arrested after a good citizen reported them for allegedly

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<sup>212</sup> See Engle, *supra* note 11 at 103.

<sup>213</sup> President George W. Bush's Address to the National Endowment for Democracy, *America Has A Clear Strategy For Victory In The War On Terror* Oct. 6, 2005 available at <http://www.whitehouse.gov/news/releases/2005/10/20051006-2.html> (last visited Mar. 30, 2006).

<sup>214</sup> *Id.*

discussing a terrorist plot.<sup>215</sup> It has also the more subtle effect of creating a self-regulating population which is afraid to give to Islamic charities, to speak out when they are profiled and mistreated, and who are now afraid to speak on the phone with loved ones abroad.<sup>216</sup>

Nevertheless, there is still resistance and hope for resistance to such regulations based on identity.

#### IV. RESISTANCE: MUSLIM, IS IT THE NEW BLACK?

[51] According to Foucault, power is pervasive; it exerts itself from multiple points rather and from many directions.<sup>217</sup> Like power, resistance is also pervasive and exerted from various

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<sup>215</sup> See Engle, *supra* note 11, at 103. Engle describes the scenario in the Terrorist is deployed by a private citizen to capture three Muslim students:

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

The three medical students also sought to be good citizens in the end. They refused to criticize the police, insisting the officers were just doing their job.

Engle, *supra* note 11, at 103. (citing Robert L. Steinbeck, *Who if Anybody, Erred in the Alligator Alley Terror Scare?*, MIAMI HERALD, Sept. 20, 2002, available at <http://www.miami.com/mld/miamiherald/4119272.htm>. See also Kelli Arena et al., *Man in Terror Scare Says Woman is Lying*, CNN, available at <http://www.cnn.com/2002/US/09/13/alligator.alley/index.html> (Sep. 13, 2002).

<sup>216</sup> See Farah, *supra* note 137. See also Barton Gellman & Dafna Linzer, *Pushing the Limits of Wartime Powers*, THE WASHINGTON POST, Dec. 18, 2005, at A01; Dan Eggen, *Bush Authorized Domestic Spying*, THE WASHINGTON POST Dec. 16, 2005, at A01; Walter Pincus, *Pentagon Will Review Database on U.S. Citizens* THE WASHINGTON POST, Dec. 15, 2005, at A01.

points.<sup>218</sup> However, it is not exerted from outside the discursively constructed world, from the unspeakable or the ontological.<sup>219</sup> Because religious identity is always within the discursive realm, for Muslims, the way to resist discursive construction cannot be that suggested by Baudrillard: silence.<sup>220</sup> Rather, resistance must come from constructing and performing alternative identities that unsettle the dominant identities privileged by the State and the community.<sup>221</sup> Another reason why Muslims must engage in the conversation is that silence results not in resistance, but in co-optation of their experience by other narratives that are also seeking to create resistance in and through discourse.<sup>222</sup>

[52] One such narrative is that of racial subordination as theorized by Critical Race Theory (“CRT”).<sup>223</sup> By taking the particular subordination of “Arabs” and “Muslims” and abstracting its racial dimension, Critical Race Theorists make a synecdochic move mirroring that of the State and the dominant Muslim community.<sup>224</sup> Where the State absorbs all Muslims though particularly raced ones, regardless of their actions, into the category of potential Terrorists and the community erases the differences in belief and practice through its presentation of a Believer

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<sup>217</sup> FOUCAULT, *supra* note 2, at 93-94.

<sup>218</sup> *Cf.* FOUCAULT, *supra* note 2, at 95-96.

<sup>219</sup> FOUCAULT, *supra* note 2, at 95-96.

<sup>220</sup> *See* BAUDRILLARD, *supra* note 12, at 7.

<sup>221</sup> *See* BUTLER, *supra* note 4, at 142-49.

<sup>222</sup> Moreover, it is important to not allow a few identities to dominate the field for this also does not result in the kind of destabilizing resistance that prevents the discursive constructs to ossify into “reality.”

<sup>223</sup> Wing, *supra* note 90.

<sup>224</sup> Wing, *supra* note 90, at 728 (“After September 11, Muslims and Arabs and *people who look like them* have been under siege.”) (emphasis added)

meta-identity, CRT elides the difference in subordination that comes from race and religion's intersection into racial discrimination.<sup>225</sup> Undoubtedly, CRT has much to offer Muslims in understanding the interplay of the meta-narratives of race in the United States. However, the elision of religion under race that attends the theorizing of Muslims as constructed "Blacks," subsumes the importance and uniqueness of the religious dimensions of this subordination, a dimension that is distinct in its Orientalist history.<sup>226</sup>

[53] CRT assumes that because the State has deployed racially-based measures, the best defense is to respond accordingly.<sup>227</sup> While this may be a matter of expediency when real bodies and lives are at stake, there can be no doubt that such a response is a tacit legitimization of the State's call. In other words, the very fact that theorists writing against racial profiling do not challenge the construction of "Muslim" as a race, but rather offer ways in which they should resist *because* it is constructed as a race, indicates that there is a certain resignation about the

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<sup>225</sup> Wing, *supra* note 90, at 719-736. Wing traces the profiling of Arabs and Muslims and the discrimination that they have faced in pre and post 9/11 United States. From there, she seems to assume that the use of such tools on "other" subordinate races results in a black "construction." Wing, *supra* note 90, at 719-736. In my view, this move erases the differences between the way the victims of such tools are treated. For instance, Wing fails to account for the Orientalism that often informs "Western" views of Islam which in turn heavily influences how the predominantly Christian "West" interacts with Muslims. While I do not want to make too much of the religious difference, the complete absence of the role of Orientalism is misleading.

<sup>226</sup> Arabs in the United States have had a strange history as a "race." Arabs and South Asians were to be considered "white" or "Caucasian" until the Supreme Court ruled in *Saint Francis College v. Al-Khazra*, that it was possible for Arabs to claim racial discrimination. 481 U.S. 604, 613 (1987). What seems quite clear is that race is legally and socially constructed, as CRT has shown. Adrien Katherine Wing, *Introduction*, CRITICAL RACE FEMINISM: A READER 5 (Adrien Katherine Wing ed., 2003). Ultimately, there is no such thing as an "Arab" look and the construction of this appearance is a result of a need for knowledge of the difference that underscores the obsession of race in the United States. Moreover, the linking of "Arab" and "Muslim" camouflages the move that often occurs in writing about State regulation in the War on Terrorism: the elision of race and religion.

<sup>227</sup> Wing, *supra* note 90, at 739.

dialectic between law/State's ability to call identities into being or to reconstitute them to fit a political agenda and the constructive response/resistance that comes from the people who perform those identities.<sup>228</sup> In resisting profiling through the courts and asserting the civil rights of "Arabs and Muslims," the very idea that Muslim (like Arab) exists as a racial category deployed by the State is never unsettled. Further, if "Arabs and Muslims" press their civil rights against profiling based on race discrimination, they simply complete the identity equation in which that specific resistance is a form of compliance with and acknowledgment of the identity construct and is in itself co-constructive.<sup>229</sup>

[54] As Wendy Brown writes about the proliferation of politicized identities, once these identities are used to press for legal redress for an injury, they become a permanent feature of the legal landscape, "[codifying] . . . the meanings of their actions against all possibilities of indeterminacy, ambiguity, and struggle for resignification or repositioning."<sup>230</sup> In other words, bringing race discrimination actions because one was profiled as a Muslim and gaining a legal

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<sup>228</sup> See, e.g., Charu A. Chandrasekhar, *Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians* 10 ASIAN L.J. 215 (2003).

<sup>229</sup> See WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 27 (1995). With regard to developing a critique from the perspective of the injured, Brown observes:

[I]t delimits a specific site of blame for suffering by constituting sovereign subjects and events as responsible for the "injury" of social subordination. It fixes the identities of the injured and the injuring as social positions, and codifies as well the meanings of their actions against all possibilities of indeterminacy, ambiguity, and struggle for the resignification or repositioning. This effort also cast the law in particular and the state more generally as neutral arbiters of injury rather than as themselves invested with the power to injure.

*Id.*

<sup>230</sup> *Id.*

remedy, *co-creates* “Muslim” as a race. Once legally enshrined, that act of creation becomes difficult to reverse.<sup>231</sup>

[55] The move to resist the regulation of Muslims, particularly through the use of litigation strategies based on race discrimination is, therefore, problematic. Moreover, such a move would mask the fact that many Muslims already have a race which is why they are being profiled in the first place. To create a “new” race out of a “religion,” which the State seeks to do by constructing Terrorists as racially distinct as well as religiously distinct, then subsumes already existing racial characteristics that call out the person being profiled, or detained.<sup>232</sup>

[56] For instance, a Sikh or a Hindu from Punjab is neither an Arab nor a Muslim, but this does not prevent him from being profiled, at least on first glance, any more than his Punjabi Muslim neighbor.<sup>233</sup> The commonality is that they have a visible marker written on their body that a non-raced (white) Muslim does not. Additionally, the level of profiling directed at the immigrant Muslim communities of color might not be the same as that directed at African-American Muslim communities.<sup>234</sup> Thus, the question to be asked in the profiling scenario is, “Do they look Muslim?” The answer should always be in the negative.<sup>235</sup> They look black or

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<sup>231</sup> *Id.*

<sup>232</sup> This is to say that most of the victims of such profiling are already “raced” in one way or the other. To pursue an anti-profiling strategy based on a “Muslim” race would essentially ignore that their pre-existing, ontological color is being substituted for race. White males, at least to my knowledge, rarely match the profile of terrorist just as they did not match the profile of drug dealer. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 47-52 (1999) (discussing drug courier profiles).

<sup>233</sup> Chandrasekhar, *supra* note 228, at 215-216.

<sup>234</sup> *See* Muneer Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1261-64 (2004).

brown and that is the visual marker that profilers are using.<sup>236</sup> The Expansion of CRT and use of litigation (or changes in the law) in ways that enshrine and codify Muslim as a race ought to be undertaken very carefully and resisted if possible because it reinforces the homogenizing tendency of both the Believer and the Terrorist. If Muslims choose to resist state regulation on the basis of race, it is likely that they already have an existing racial identity to which they can look without arguing that they were profiled because they “looked Muslim.”<sup>237</sup>

[57] Nevertheless, I recognize that the intersectional nature of race and religion creates a gap, limiting the legal strategies available. This gap has already been theorized in the context of employment discrimination against black women.<sup>238</sup> In their article, Carbado and Gulati posit the hypothetical of a senior black female associate who is denied partnership in her firm.<sup>239</sup> However, black males, Asian males and white females are promoted to partnership.<sup>240</sup> In the scenario, the courts dismiss the black woman’s claim because there is no legislative history

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<sup>235</sup> See Wing, *supra* note 90, at 723. I also note that Wing, though asserting that race is socially constructed and that Arabs and Muslims are a heterogeneous group, nevertheless seems to believe that there is a particular “look” which she advises her sons to avoid in case they are mistaken for Arabs. Wing, *supra* note 90, at 722-23. While I understand that no one wants to be profiled, the very fact that one knows *how not to look* implies that one believes that there *is a look*.

<sup>236</sup> *Id.*

<sup>237</sup> See, e.g., Harris, *supra* note 141, at 77. Harris argues that the Court’s solicitude to profiling in the war on drugs augurs ill for the use of litigation to overturn profiling in the war on terrorism. Harris, *supra* note 141, at 77.

<sup>238</sup> See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, in *CRITICAL RACE FEMINISM: A READER* 318-21 (Adrien Katherine Wing, ed. 2003).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 319

creating a specific class of “black women.”<sup>241</sup> Under separate categories of race and gender, she cannot show evidence of discrimination because the firm has promoted blacks (men) and women (white).<sup>242</sup>

[58] A similar situation exists for Muslims. They are not discriminated solely for their race, which could put them in any number of minority groups. Nor are they discriminated solely on the basis of their religion because white Muslims, until they act as terrorists or perform the Believer, are fairly sure to evade regulation. Thus the majority of Muslims profiled are at the intersection of race and religion and there are few legal strategies that work effectively at this junction.<sup>243</sup>

[59] Given the weak protection afforded to religious minorities<sup>244</sup> and the State’s racial strategies that have consequently privileged private acts of discrimination,<sup>245</sup> the analysis of

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<sup>241</sup> *Id.* at 319-320.

<sup>242</sup> *Id.* at 320.

<sup>243</sup> Strategies that have been used are generally been particular to the facts of each case. For instance, an employment discrimination strategy was used in *EEOC v. Trans States Airlines, Inc.* 356 F. Supp. 2d 984 (2005), a case where a Muslim pilot sued his employer for dismissing him a week after 9/11. A challenge based on 4<sup>th</sup> Amendment was used in the case of Brandon Mayfield, *see* Letter from Anthony D. Romero, Director of the American Civil Liberties Union, to Senator Feinstein Addressing Abuses of the Patriot Act by the Government (April 4, 2005), *available at* <http://www.aclu.org/safefree/general/17563leg20050404.html>. For more information on religion as a suspect category and religious discrimination, *see* MICHAEL S. ARIENS & ROBERT DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* 374-77 (2d ed. 2002).

<sup>244</sup> Religion is protected primarily by the First Amendment. *See* ARIENS & DESTRO, *supra* note 243:

[T]he Court does not generally use equal protection analysis when it decides petitions for redress of grievances that can be resolved under the Religion Clause. Although there is case law that indicates that religion is a suspect classification,” the Court has never used that term in a case in which it actually found that intentional religious discrimination had taken place. *Compare Burlington*

“racialization” done by CRT understandable. The historic conflation of Arabs and Muslims and the State’s deployment of profiling, a strategy used primarily against African-Americans and Latinos, makes anti-race discrimination strategies an obvious choice for resistance.<sup>246</sup> However, CRT does not adequately theorize how responding with traditional anti-race discrimination strategies reiterates the State’s construct rather than challenging it.<sup>247</sup>

[60] Resisting in ways that challenge the identities created by the State requires a rethinking of individual identity and de-centering the dominant community identity. It also requires coalition-building where the resulting group is not dependent on fixed identities, but rather on shared goals

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*Northern Railroad Co. v. Ford*, 504 U.S. 648, 651 (1992) (stating that religion is a suspect classification) and *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976 (dictum stating religion is a suspect-classification) with *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* 508 U.S. 520 (1993) and *Sherbert v. Verner* 374 U.S. 398 (1963) (Free Exercise Clause violation premised on “burden” rather than the statute’s unequal treatment of Sabbatarians and Sunday observers).

*Id.* at 376.

Unless religion is formally made a suspect category under Equal Protection jurisprudence, it would seem that there is no guarantee that the court will find religious discrimination under equal protection. Muslims would have to rely on race primarily in their legal challenges to discrimination under equal protection. See Yoshino, *supra* note 72, at 927-930.

<sup>245</sup> See Ahmad, *supra* note 234.

<sup>246</sup> See *supra* notes 91-94 and accompanying text.

<sup>247</sup> Wing, *supra* note 90, at 749. Despite my agreement with Wing’s proposal for coalition-building, I do not agree that the coalitions should be built around race. Wing, *supra* note 90, at 739-57. I certainly do not agree with her view that minorities that do not want to be socially constructed as “black” and would rather “view their problems through the prism of religion or culture or ideology” and “still socially construct themselves as white.” Wing, *supra* note 90, at 739-57. For instance, I do not believe that I am constructed as only “black.” The intersections of being brown, immigrant, educated, Muslim and a woman make my experience far more multifaceted than a “black” construction would allow. That does not mean that I consider myself to be constructed “white” either. Rather, I prefer to “realize” the constructedness of identity and race and perform a variety of different identities depending on the context. Instead of being confined to one construction, it is better, in my view, to have a closet full of drag outfits of identity which we can put on when we need or want to.

and desired outcomes. It means that Muslims must resist the desire to become more palatable by assuming the liberal Moderate identity. To adopt such an identity, in my view, would foreclose truly resisting the power of construction that makes “us” at the expense of “them.”

[61] In the previous discussion on community, I critiqued the dominant Muslim community as a site of discipline and regulation of identity.<sup>248</sup> Here, I want to consider ways in which the idea of community can be rehabilitated from that critique while avoiding current romantic notions that unduly valorize. Indeed, without community of some kind, we can only hope to live out our lives as atomistic individuals in nuclear families. The solution is not to stop practicing community as it were, but to be aware of where “the practice of community might offer effective resistance and where it is a site of cooptation, hegemony, and oppressive reiteration of norms.”<sup>249</sup>

[62] The question remains, how can community be restructured so as to be less disciplinary and more effective as a site of resistance? If the current conception of a successful community is one that is homogenous, universalizing particular traits, one response is to create communities that embrace heterogeneity.<sup>250</sup> This move would provide spaces in which Muslims of all varieties would be welcome. In order to resist the Believer-Terrorist constructs that rely on a particular set of attributes, the more Muslim communities present themselves as heterogeneous along *all* attributes, the more likely they are to de-center and destabilize the idea that Muslims are knowable through the constructs characteristics. The implication of this move is that both liberal and conservative Muslims must stop policing the boundaries of community.

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<sup>248</sup> See *supra* notes 171-207 and accompanying text.

<sup>249</sup> JOSEPH, *supra* note 95, at xxv (citing EVE SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990)).

<sup>250</sup> See JOSEPH, *supra* note 95, at xxxiii, 172.

[63] Muslims must be willing to confront the current leadership of their communities when that leadership seeks to erase differences and present the universal identity of the “Muslim” to society. This means embracing and promoting cultural diversity rather than shedding culture in favor of the pseudo-ethnicity created through religious practices.<sup>251</sup> It must be clear that such attempts to project a meta-identity simply reinforce the ability of the State, as well as others, to create identities like the Terrorist, the disloyal citizen, or any number of other regulatory identities based on the Believer.<sup>252</sup>

[64] Moreover, accepting differences in political positions as well as practice allows Muslims, who have been placed outside the boundaries, sufficient voice to critique those who have willingly assumed a “good” identity at the expense of the rest. Consider the publicity garnered by one such Moderate Muslim who has authored a polemic criticizing a fictionally monolithic Islam.<sup>253</sup> The mainstream public is more than willing to listen to such writers who reinforce their often denigrating and simplistic view of Muslims by attacking the oversimplified Believer construct as though it really does represent Muslims.<sup>254</sup> Choosing to ignore, marginalize or

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<sup>251</sup> See ROY, *supra* note 52, at 328-40.

<sup>252</sup> See generally, Farid Esack, *In Search of Progressive Islam Beyond 9/11*, in PROGRESSIVE MUSLIMS, *supra* note 3, at 78-97.

<sup>253</sup> See MANJI, *supra* note 97.

<sup>254</sup> For examples of Manji’s views and reviews of her writings, see Muslim Refusenik, Official Website of Irshad Manji, Interviews with and Commentaries by Irshad, *available at* <http://www.muslim-refusenik.com/inthenews.html> (last visited Feb. 9, 2006). Manji’s book, *The Trouble With Islam*, is an indictment of Islam, totalizing in its generality, sweeping in its conclusions and as erasing of secular progressive Muslims as anything out of the conservative “*minbar*.” See *supra* note 115. Manji is quite willing to highlight the variety of wrongs done by Muslims while utterly ignoring or rationalizing the injustices done by the liberal states that she holds up as models of tolerance. MANJI, *supra* note 97, at 204-217. This typically liberal one-sidedness explains why she has been hailed as a “voice of reason” by both “good Muslims” and those outside the Muslim fold ranging from evangelical Islamophobes to Liberals. See *All*

discipline those who write neither apology nor indictment, who are willing to criticize the violence of the State as well as that of the terrorist - Muslims who are, in a word, progressive - continues to give life to the Believer as well as the Terrorist while allowing Moderates to voice a one-sided critique. In order to fully resist the constructive and regulatory power of both the State and the community, Muslims cannot accept the false dichotomy of performing either the pious and conservative Believer or the non-violent, tolerant “good” Moderate Muslim. Instead, Muslims can only trouble these constructions by being willing to inhabit multiple spaces. By engaging culture, linguistic differences, different races and ethnicities, and gender, Muslims and indeed all Others may find that it is harder to neatly categorize and thereby regulate them.

[65] Finally, the idea that rigid identity communities are necessarily the best vehicles to resist subordination by the State must be relinquished for more fluid constructions that allow people with similar political goals to coalesce and work towards just outcomes. One example of this kind of coalition that transcends the religious dimension of identity is Operation Homeland Resistance (“OHR”), which was formed in response to the 9/11 attacks and the large-scale State programs of pursuit instituted shortly thereafter.<sup>255</sup> OHR is composed of people and organizations that span the political and ethnic spectrum, coming together for the purpose of

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*Things Considered: Analysis: American Release of Irshad Manji’s book, “The Trouble With Islam,”* (National Public Radio broadcast, Jan. 14, 2004), available at <http://www.npr.org/programs/atc/transcripts/2004/jan/040114.ludden.html> (last visited, Nov. 25, 2005). See also, Harry Antonides, *Islam: Friend or Foe*, CHRISTIAN COURIER, available at <http://www.christianity.ca/news/commentary/2005/11.000.html> (Nov. 25, 2005). There are some excellent points in the book that I agree with, but overall, in my opinion, Manji squandered her opportunity by being so biased. On the other hand, a book on progressive Muslims – edited by Omid Safi and published in the same year – has not gotten much, if any, publicity. See PROGRESSIVE MUSLIMS: ON JUSTICE, GENDER, AND PLURALISM, *supra* note 3.

<sup>255</sup> For more information on Operation Homeland Resistance (“OHR”), see <http://www.homelandresistance.org> (last visited Apr. 9, 2004).

resisting the State.<sup>256</sup> This kind of fluid coalition is, in my view, better at upsetting constricted notions of citizenship, the “us vs. them” Manichean ordering and regulatory identity

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<sup>256</sup> The groups that are part of this coalition are: ACT UP/NY; African Ancestral Lesbians United for Societal Change (AALUSC); Al-Awda: the Palestine Right to Return Coalition; Al-Fatiha NYC; ANSWER (Act Now to Stop War and End Racism); The Audre Lorde Project (ALP); Baptist Ministers’ Conference of Greater New York City Vicinity Civic Committee; Black Radical Congress/United New York; Blacks Against the War; CAAAV Organizing Asian Communities; Center for Immigrant Families; The Center for Anti-Violence Education; Chica Luna Films; Coalition for Humane Immigrant Rights-Los Angeles; Coalition for the Human Rights of Immigrants; Coalition for the Human Rights of Immigrants-Detention Working Group (CHRI-Dets); Congress for Korean Reunification-NY Chapter; Critical Resistance-NYC; Desis Rising Up and Moving (DRUM); FIERCE!; FREE CUNY; Funding Exchange; Green Party of NY State; Haïti Progrès; Haiti Support Network (HSN); Haitian Women for Haitian Refugees; Harlem Anti-War Coalition; Harlem Tenants Council; Incite! Women of Color Against Violence; International Possibilities Unlimited; International Socialist Organization; Jews Against The Occupation (JATO); Jews for Racial and Economic Justice (JFREJ); Justice Committee/National Congress for Puerto Rican Rights; Khmer Girls in Action (KGA); Latinos Contra la Guerra; M27 Coalition; Malcolm X Grassroots Movement; Media Jumpstart; Military Families Speak Out; New Jersey Solidarity - Activists for the Liberation of Palestine; NYC AIDS Housing Network; New York City Labor Against the War; No Blood For Oil; New York Solidarity for a Free Palestine; NYU Students for Justice in Palestine; Not In Our Name, NION, Houston; Notutdol - For Korean Community Development; Peace Action of New York State; People Organized to Win Employment Rights (POWER); Peoples’ Law Collective; Perfect Peace Ministry Youth Outreach; The Praxis Project (Washington DC); Prison Moratorium Project; Project Reach; Racial Justice 911: People of Color Against War; Queer Economic Justice Network; Quilombo NYC; St. Mary’s Episcopal Church; Sista II Sista; Solidarity New York; Sistas on the Rise; Student Liberation Action Movement (SLAM), Hunter College; Students for Freedom in Palestine, NYU; Students Promoting Empowerment And Knowledge (SPEAK), Columbia University; SUSTAIN (Stop U.S. Tax Aid To Israel Now)-NYC; United For Peace and Justice-New York; UPROSE; Vieques Brigade; Vieques Support Committee; White Rabbit Cult; and Youth Ministries for Peace and Justice. The following individuals are part of this coalition: Sam Anderson, Reparations Mobilization Coalition; Charles K. Armstrong, Professor & Chair, Center for Korean Research, Columbia University; Heidi Boghosian, Executive Director, National Lawyers’ Guild; Adrienne Maree Brown of Conscious Movements Collective; Leslie Cagan; Janet Cyril; Shamita Das Dasgupta; Rev. David Dyson, Lafayette Avenue Presbyterian Church; Max Elbaum (CA); Rabbi Michael Feinberg, Greater NY Labor Religion Coalition; Saru Jayaraman, Exec. Dir. ROC-NY, Prof, City University of New York; Walter Johnson, History & American Studies, NYU; Melanie Kaye/Kantrowitz, Director, Queens College Worker Education Ext. Center; Robin D. G. Kelley, Dep’t of History at NYU; Roz Lee; Rachel Mattson; Michael Palm, NYU GSOC-UAW Local 2110; Richie Perez; Liz Roberts, Resistance in Brooklyn; Aarti Shahani; Sheila Stowell; Seung Hye Suh (CA); Marian Thambynayagam; Steve Williams, Director of POWER (CA); Bob Wing, War Times; and Alan

constructions, than either legal action alone or action taken by a besieged identity community that is already considered threatening. I would argue that coalitions that combat these identities are more likely to have a social and political impact even if they are ultimately unable to change the law.<sup>257</sup>

## V. CONCLUSION

[66] As the domestic War on Terrorism becomes a war of attrition, the State has invested heavily in the construction of a particular identity that is both the receptacle of the public's fear and hatred and the object of the State's regulation. That construct is the Terrorist. By using elements of the Believer that the community has projected as *the* Muslim identity, the State, in the name of prevention, has used the Terrorist to pursue ordinary Muslims who have committed no acts of wrongdoing. This article has attempted to show how these two identities have been constructed and how Muslims have performed them and been regulated or disciplined through them.<sup>258</sup> Moreover, I have also argued that the State has resorted to a Manichean ordering of good and bad reminiscent of imperial strategies of divide and rule to separate Muslims.<sup>259</sup> This too has led to internal regulation of the community and self-regulation to avoid being "mistaken" for terrorists.<sup>260</sup>

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Yang. See OHR, *Endorsers*, available at <http://www.homelandresistance.org/index.php?name=endorsers> (May 15, 2003).

<sup>257</sup> See Harris, *supra* note 141, at 77. Harris argues that legal strategies to overturn profiling are unlikely to work given the Supreme Court's precedents and its unwillingness to second-guess the legislative and executive branches. Harris, *supra* note 141, at 77.

<sup>258</sup> See *supra* notes 74-216 and accompanying text.

<sup>259</sup> See *supra* notes 55-73 and accompanying text.

<sup>260</sup> See *supra* note 217-247 and accompanying text.

Within the borders of the United States, the perpetrators of the anthrax attacks are still at large and in the world, Osama bin Laden is yet to be found. The State has chosen to divert our attention from these failures by concentrating on thousands of Muslim and Arab men who have been detained, questioned, and deported but not for terrorism.<sup>261</sup> If the Believer identity had not shared so many characteristics with that of the Terrorist, it is questionable whether the State would have deployed such a racially charged measure as profiling. If the conflation of these two identities were effective at detecting terrorists, presumably there would have been success in capturing those dangerous to our security. However, as long as the State continues to pursue people for performance of religion and their color and not for acts of terrorism, it will not see the kind of success that the victims of 9/11 deserve. Furthermore, Arabs and non-Arab Muslims will remain a balkanized minority regarded with suspicion and living in constant fear because no matter what they do, they will always bear markers that make them suspect.

[67] Moreover, the constructed nature of identities means that more are always in the pipeline. They will emerge to replace old identities or simply take their side. Already, during the time of this writing the Terrorist identity has shifted to accommodate the savvy, handsome, technically proficient, and thoroughly Westernized Terrorist like those in the *Showtime* mini series, *Sleeper Cell*.<sup>262</sup> Such a development moves us from the belief that we can tell Terrorists apart through visible markers to the much more anxiety-provoking sense that Terrorists cannot be known on simply through visual clues, that they are hidden amongst us. It also reiterates the notion that

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<sup>261</sup> Flynn McRoberts, Liz Sly & Cam Simpson, *Torn From Families and Jobs, Deportees Face Bleak Future*, CHICAGO TRIBUNE, Nov. 17, 2003, at CN1.

<sup>262</sup> *Sleeper Cell* (Showtime television broadcast, Dec 4, 2005 to Dec. 18, 2005), available at <http://www.sho.com/site/sleepercell/home.do> (last visited, Feb. 9, 2006).

they may not be the kind of practicing Muslims that have been profiled thus far. While this may be a good development insofar as it may prevent pious Muslims from being unnecessarily profiled for performing their religion in traditional ways, it refocuses the attention evenly on all Muslims blurring the divide between “good” and “bad” and increasing the need to demonstrate goodness more visibly. In a sense then, the dominant society (not just the State and the Muslim community) through media once again contributes to regulation by homogenizing Muslims. What matters is not the performance of identity (Believer or Moderate) but the fact that all Muslims, whatever their identity, are potentially enemies. Bad Muslims now disguise themselves as assimilated good Muslims. Therefore, the need for vigilance, which has sometimes turned to vigilante-ism, is far greater because the enemy could be anywhere and anyone.<sup>263</sup>

[67] Assuredly, the regulations of Muslims will develop as more Terrorist identities are created. And Muslims will have to find ways to challenge and resist such constructions while also resisting the constructions of “good” Muslim and the Believer.<sup>264</sup> The more Muslims are able to see that identity is constructed,<sup>265</sup> that what it means to be a Muslim is multi-faceted and divergent, contingent on culture, history, family, and a host of other factors, the more they will be able to resist simplifications that make it easy to regulate them. But resistance also entails a willingness to accept that because constructions of identity depend on a variety of factors, their performances can never be uniform. Not all Muslims will perform Muslim identities according to a single script. Practicing Muslims cannot be expected to shed all their differences for a false

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<sup>263</sup> See Ahmad, *supra* note 234.

<sup>264</sup> See *supra* notes 248-257 and accompanying text.

<sup>265</sup> BUTLER, *supra* note 4, at 142.

and forced unity. Moreover, a willingness to inhabit multiple discursive spaces, the willingness to perform multiple identities is perhaps a better way to dislodge the meta-narratives of identity based on race and religion that continue to create an experience of subordination in the post 9/11 world.