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Toward a Political Philosophy of Race

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For Bubba

Whose daily outrage reminds me that
we must always care for the world even when
the world doesn't always care for us.

5

Producing Race

Naturalizing the Exception through the Rule of Law

"The "alien" is a frightening symbol of the fact of difference as such, of individuality as such . . . The danger in the existence of such people is twofold: first and more obviously, their ever-increasing numbers threaten our political life, our human artifice . . .[1]

Introduction

In prior chapters, I identified some of the discursive mechanisms by which Muslims in the United States are understood as the most recent outcaste group. I suggested that several traits have been ascribed to Muslims since 9-11—traits that, when combined, form a powerful indictment of Muslims as an exception to the universal race of (rational) human beings. These traits took on a singular potency when understood as part of an effort to create a new pariah. Through them, Muslims have begun to be depicted as a new race—an evil and less rational race.

I have discussed the identification of Islam with terrorism and the destruction of non-Muslims more generally as forms of inscribed cultural specificity. And as I have discussed already, significant cultural difference—seen as a *threat* to other reasonable and hence law-abiding members of the polity—is understood as holding the potential for criminality, that is, the "unruly." In the case of Muslims, the actions of the group of nineteen on 9-11 have become a synechdoche for the "nature" and unique cultural practices of all members of that ethnic and cultural group. And thus, this synechdoche reinforces the perception of the

entire group as engaging in a set of culturally heterogeneous practices that emerge through their affinity for another tradition or "another" God, and thus, another law than the culture, which binds us as a community. Hence, these practices are seen as profane or criminal practices, in other words, as transgressing or departing from the *common culture that members of different groups should share.*

In what follows, I explore the (second) way in which race functions as technology: by transforming the "unruly" into a set of "naturalized" procedures by which a racialized population is produced. In chapter 4, I catalogued numerous laws and legal actions taken by the U.S. government and other states to target Muslim men and women as terrorists, enemies, criminals, and other kinds of threats to society.[2] That there have been so many criminal, immigration, and "cultural value" laws directed against them suggests that they are easy and obvious targets for outcasting, in large part because of the widespread suspicion that was exacerbated through numerous sources and cast upon them.

As I discussed in chapter 1, juridical productions of race occur by concealing this function behind a more "official" function. In this case, I argue that the creation of "exceptions" to the rule of law is part of the process of racializing a population. Race is not produced—a population is not racialized—through the creation of "exceptions" alone, but functions together with a series of other political operations, such as those discussed in chapter 4, as well as others that I discuss in ensuing chapters. In this chapter I wish to focus on the status of outsiders—as immigrants—because I believe it is a crucial substantiation of the exception narrative as mentioned above. Their identification as immigrants facilitates the indictment of certain outside populations as outcaste or evil races. There are two aspects of a group's status as immigrants: one is the *association* of immigrants with *outsiders* or the "not quite one of us," through phenotypical and cultural differences. The second aspect is that of their nebulous status as immigrants, namely a population who is not-quite-one-of-us; both traits hearken back to the discussion of strangeness from chapter 3. What is important to take away from these "characteristic" marks of immigrants, however, is a crucial perception that enables the recognition of this group in its cultural heterogeneity *as being unworthy of the protection* afforded by a reading of Constitutional rights as *human rights.* Once we ascribe the prior interpretation to a given group, then we might better understand the logic behind the preemptive hunt for "potential terrorists," qua enemies: the idea of "innocent until proven guilty" does not apply to those who are "not-like-us" or "not-human-like-us." I want to explore this concealed racial logic and how it is reconciled with a self-understanding that procedures and the rule of law are being "strictly" followed.

Exceptions and the Rule of Law

As I discussed in chapter 2, the phenomenon of outcasting select populations has often been understood as a consequence of the hypocrisy of liberal democracies. The accusation of hypocrisy emerges when a liberal democratic nation's claim to extend rights equally to its entire population is shown to be untrue, or when equal treatment for certain populations is rescinded in the name of some urgent political concern. Developing the example of populations that are loosely recognized as Arab or Muslim in post–9-11 United States, I argue that such a practice is not hypocritical but rather an intrinsic element of American liberalism; the United States can understand itself *consistently* as aspiring to the liberal democratic project of equal treatment and protection of its members, even when simultaneously marginalizing or ostracizing certain populations within its midst. The consistency of these two practices might be usefully understood as a long-standing mode by which certain ethnically, culturally, or racially conspicuous groups—seen as a threat to a national population that understands itself as internally united, stable, and secure, *but for this group*—are outcasted politically and legally. In the context of the political and ideological framework of the United States, which takes its lead from classic liberal political philosophy, this practice is not necessarily a self-conscious one, but rather one that depends on a dual interpretation of the term "person." Such a dual interpretation in turn corresponds to a vacillating interpretation of constitutional protections. Ultimately, the promise of equal protection is extended to all residents of a polity, as long as they are seen to qualify for membership—not in the polity—but in the set of human beings we call "persons." Even if human rights can conceptually be reintroduced for minorities by special law, this avenue becomes a fruitless avenue of appeal, when the condition of human rights—namely that they be universally extended to all members of the same class is rendered null through the creation of exception populations, as I will discuss further.[3] The notion of exceptions, which Hannah Arendt uses to describe the social perception of the pariah, seems to be particularly insightful here. Arendt discusses exceptions as the method by which members of an outside group can assimilate into a dominant group—namely by showing oneself to be superior in some trait valued by the dominant group.

In what follows, I want to consider an exception in the following way: as the avenue by which one group is seen as inferior in some respect in comparison to another group, dominant or minority.[4] The practice of creating exceptions, as the state has been able to do most recently with Muslims, be they immigrants, potential terrorists, or enemy combatants,

seems to be an intrinsic impulse of societies that wish to reconcile the formal adherence to the principles of liberalism with the fear of extreme cultural heterogeneity in the name of defending rational values, security, and eradicating the threats to freedom within our midst. Considered in this way, the "exception," understood is a particularly powerful weapon in selectively realigning the boundaries of universal human rights.[5]

How does the ideological self-understanding of American liberalism remain consistent with its promise of universalism while constituting exceptions to the society whose members will be awarded full legality and protections? Dialectically speaking, it is only possible to recognize the set of members who are granted rights when we have a clear idea of who is excluded. Liberal political philosophies tend to offer a catalog of interests and characteristics of those human beings who are intended to be the recipients of natural or inalienable rights. John Locke, for example, refers to "reason" as the intellectual faculty and condition by which men know which rights are inalienably theirs. Reason, combined with the need to protect property interests, forms the basis of the argument for the Lockean social contract.[6] The extension of rights in classical liberal thought is neither universal nor inalienable, as feminists have long argued. The circle of membership—the set of individuals who are recognized as citizens and for whom the promise of *rights is indeed universal and inalienable*—often depends on the attentive and obedient subordination of women (in the household, as free labor, mothers, sex partners), and of slaves (who for Locke have been granted their lives in an altruistic gesture by their victorious vanquishers, after a war of aggression has been fought), etc.

And those who are excluded, are excluded "justifiably"—either because their proper roles preclude them from claiming citizenship or rights, or because they have forfeited their rights by misbehaving (i.e., criminals), or because they are not entitled to claim rights because they do not qualify by virtue of some set of political, social, or ontological reasons. In other words, liberalism's promise of universal and alienable rights is often intimately connected to the justified exclusion of some population, that is, an "exception" population.[7]

And so, the state understands or constitutes certain ethnically, culturally, or racially conspicuous groups as not quite capable of engaging in political interaction, or not eligible for "citizenship," the standard trope denoting "full rights and membership in a polity." In a contemporary liberal society such as the United States, this mode of self-understanding involves the selective awarding or privation of certain rights and protections that are normally afforded to citizens and noncitizens alike; it does so by vacillating between an understanding of rights as political (and thus

afforded primarily to those who are full members or citizens) *or* universal (and thus to be extended to individuals in a polity, regardless of their legal status in the polity).[8]

But liberal polities do not engage in a self-conscious creation of exception populations; rather the creation of "exceptionalism" is justified through recourse to certain already given understandings of what constitutes reasonable values. This is often a self-referential and circular move, since the question of reasonable values is precisely always what is under scrutiny in debates between heterogeneous populations.[9]

The American state's justification of the exclusion of certain populations is necessary—for several reasons: First, by continually redrawing the boundaries that circumscribe the set of members who are entitled to the liberal promise of "full, equal, and universal treatment," the state can emphasize and promulgate to members and nonmembers alike the import of its protections. If we were to extend the economistic argument that the value of a good increases in proportion to its scarcity, then it would make sense to say that equal and universal treatment can hardly be recognized and valued unless it was understood to be acquired through difficulty. Otherwise, the truly "universal" and equal treatment of all individuals would be transformed into a ubiquitous, transparent material that enveloped everyone, like air. Second, it is only by identifying an enemy or stranger that a liberal polity can understand itself and its function—the collective and collaborative function of maintaining an internally united, stable, and secure society. And so, the selective criteria by which "members" are constituted enables the state to mark certain populations as insiders, and others as enemies. And thus, by engaging in a selective extension of rights, the state is able to legitimate its inconsistent treatment of different populations while appearing to conform to its supposed promise of universal and identical treatment of all human beings.

Carl Schmitt's discussion of the political, whose existence is predicated on the distinction between friend and enemy, illuminates this point. According to Schmitt, the political is essentially defined through the identification of those who are considered an enemy.[10] An enemy does not need to be evil or ugly, and can even be an economic partner. "But he is, nevertheless, the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible."[11] Thus, an enemy, because he is precisely what the polity is not, is necessary to engender a collective self-recognition.[12] The enemy, for Schmitt, is what the polity understands itself against. The case of Muslim immigrants enables the self-recognition of the U.S. as an internally united population, whose identity can only be understood through the

ostracization of the "enemy" within its midst—that population, which is not only culturally heterogeneous, but appears to constitute a threat to the self-preservation of the polity.

Why must the enemy be internal? Is it not sufficient for internal self-cohesion for a polity to regroup against an external enemy, as Schmitt implies?[13] Of course, it is certainly possible for the latter to occur. But the creation of internal enemies can be a tactic by which sovereign authorities can regulate potentially "unruly" or threatening populations by re-orienting other subpopulations to understand them as a threat to "themselves."[14]

Schmitt's reading of the dynamic between the polity and its enemy is especially astute. However, I wish to go one step further, and suggest that the polity must set the enemy outside the law that pertains to members of that polity in order to continually reinforce this recognition. And this is why the concept of "exception" plays a crucial role in the creation of an enemy group—particularly in a liberal context, where rights are considered the inalienable property of all human beings. The ethos of such universalism is important precisely for its promise of eliminating the capacity to find new groups to marginalize. This is why the notion of exception is crucial to the creation of new outsiders and insiders, that is, because it can explain and justify why rights thought to belong to all human beings should be withheld from some group. The strength of "exceptionalism" lies in showing why the group in question does not meet the requisite criteria for protection by the state. In the case of Muslims—as once was true for Black Americans[15]—they are seen to be not sufficiently human, or if human, then not sufficiently manageable by a dominant political authority or dominant social group to be extended the necessity of human rights. Here, the term "enemy" refers to that group that must be cast out by being marginalized and deprived of the protection of the state. And thus, the enemy represents that group that constitutes an "exception" to the population that the state ostensibly exists to protect.

An "exception" is typically understood as a deviation from the standard. On this reading, we understand the enforcer of the law to be either hypocritical or inconsistent. But what if we were to understand the "exception" as an intrinsic element of the standard *qua law*, as does Giorgio Agamben? For Agamben, the basic expression of sovereignty simultaneously circumscribes the polity, those who will be acknowledged and subject to the law, as well as those who will be forced outside those parameters.[16] The latter group does not "incidentally" become the exception, but rather is intrinsic to the instantiation of the former group, in other words, the group who will be included or protected.[17] Exceptions are intrinsic because they enable sovereign authorities to manage and secure their own claims to power. That is to say, through the creation of potential vulnerability for all populations, sovereign authority gives an incentive to them to avoid being targeted, by being able to focus on another group as a scapegoat. The concept of exception—understood as a "routine exclusion"—enables us to understand how certain subject populations can be marginalized or eradicated as a matter of fact or procedure. If the American state convincingly renders Muslims a new race of "evildoers" with an inherent psychology of terrorism,[18] then it can constitute Muslims as some kind of "exception" population, a population that is simultaneously subject to the law, but not entitled to its protection. As Agamben points out, "It is literally not possible to say whether the one who has been banned is outside or inside the juridical order."[19] As a result, the vulnerability of such a subject in relation to the sovereign renders it possible to be eradicated or marginalized without such destruction being seen as a "sacrifice."[20] By extension, then, exception populations can be abandoned as a matter of "unexceptional" practice. But this creation of exceptions is not particular to immigrants or to Muslims. Agamben's analysis suggests that Michel Foucault is correct to claim that the modern state is, at bottom, a racist one, in that it is its agenda to distinguish and compel one population to live from another population's mandate to death.[21]

Constitutional Rights: Political? Human?

Drawing upon some of the above political frameworks by which enemy populations are understood, I wish to apply the concept of "exception" to the American political and legal context. Exception populations are instantiated and demarcated from a core polity through a dual interpretation of Constitutional protections as political and human rights. In this reading, it seems that the normative significance of the universalism of "natural" or "human" rights can be retained while extending them to select groups, and depriving others of them. Thus, by reading the Constitution as a document that enumerates those rights extended to individuals as human beings, but by offering this reading only to its citizens, the state *de facto* insists upon a second meaning of constitutional protections that illuminates them as political and, hence, selective rights, which can be extended only to "friends," and not enemies, which corresponds to a distinction, simply put, between "us" and "them."

The ambiguous status of Constitutional protections as both political rights and human rights is concealed during times of peace by the generally indulgent extension of a bulk of these protections to citizens and (legal)

noncitizens alike.[22] This ambiguity refers directly, if implicitly, to the question of how to understand the figure of the immigrant. There are several parts to this story. The first part of the story is about immigration as read through the history of American immigration law. The status of immigrants in American legal history is crucial to understanding how pariah groups are created and exceptions are legitimated, because immigration law confirms that arriving outsiders ("aliens") will be generally viewed and treated with suspicion, because of their ethnic and cultural dissimilarities, and distinct geographical origins, from the general American population. The current moment deals with Arab immigrants of Muslim origin, but it resembles in important ways the treatment of other ethnic groups who arrived from the mid-nineteenth to the end of the twentieth century—the Chinese, Sikhs, Mexicans, Irish, Italians, Slavs, Pakistanis, Indians, among countless others—for whom inclusion in the national political imaginary was often an arbitrary and elusive process, and coincided with a concurrent outsider status.

One of the concerns about the way that (mostly male and primarily Muslim) Arab immigrants are currently being treated by the Office of Homeland security is that they are not being extended the general Constitutional protections that are considered "inalienable" for American citizens and often indulgently extended to immigrants during times of relative domestic peace. This division between the Constitutional rights extended to American citizens and those most often arbitrarily extended or withheld from immigrants has its origins in the development of American immigration law.[23] Through a set of strategic administrative and legislative moves beginning in the late 1800s,[24] immigrants became subject to a body of law and to a mode of treatment that is separate and mostly distinct from the rest of American and Constitutional law.[25] These moves enabled the cementing of certain norms in immigration procedures: not required to be extended to immigrants were various rights implied under the Constitution: the writ of habeas corpus, the right to due process, routine judicial review, the right to an advocate or an attorney.[26] There is an enormous burgeoning literature begun well before 9-11, authored by liberal and communitarian scholars from various fields, which debates whether rights such as those listed above should be rights of membership rather than fundamental moral claims due any human being.[27] While I cannot possibly treat this literature adequately here, it is *the fact of the debate* that is of central importance to the argument here.

The tension over whether rights are political or human (universal) emerges from the central question of liberalism, namely that of how "membership" should be understood. The narrowest interpretation of this question is that membership is based on claims to legal recognition by the state. The broadest interpretation is that membership is based on a community of human beings. Membership then connotes at least two different sets of individuals, and possibly many more. But more fundamentally, the tension over the meaning of membership stems from whether it is being read from the "inside" or from without. Kunal Parker terms the former reading of "membership" as a liberal "insider" narrative about citizenship, in other words, one that rests on the uncritical (and mistaken) premise that "members" of a group have the right to exclude or deprive "outsiders" of citizenship rights.[28] Read from the "outside," of course, that is, as pertaining to all human beings, membership would lose its central import, since it would of course render all rights as human rights, to be awarded independently of legal status.

Yet, Hannah Arendt recognizes the central problem of securing rights as human rights. She points out that the recognition of one's human rights is *predicated not on one's status as human, but on one's recognition as a member of a polity.* One must be afforded some vehicle by which to mediate between oneself and the state. It is that recognition upon which the rhetorical discourse of human rights is predicated—namely that human rights are to be accorded to all human beings under any and all conditions. And it is this premise that is betrayed in the absence of national rights:

> If a human being loses his political status, he should, according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declarations of such general rights provided. Actually the opposite is the case. *It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow man.* This is one of the reasons why it is far more difficult to destroy the legal personality of a criminal, that is of a man who has taken upon himself the responsibility for an act whose consequences now determine his fate, than of a man who has been disallowed all common human responsibilities.[29]

In this excerpt, Arendt challenges the very assumption of international human rights that is often accepted uncritically in the contemporary world. Arendt draws on Edmund Burke's point that even savages are accorded human rights, but unless there is a state that recognizes and guarantees them, they remain ineffectual, indeed nonexistent. And here, I would go one step further than Arendt: It is not only the absence of political rights—but the *absence of the dual recognition that political rights are human rights*—that renders the distinction between human being and animal collapsed, such that one becomes a political and legal nonentity.[30]

> The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human. The world found nothing sacred in the abstract nakedness of being human.[31]

To be human is meaningless within the context of a polity if it is not accompanied by certain political protections. And thus human rights can only be secured through the recognition of one's political status as a member of a community. The absence of this dual recognition, then, is especially devastating for the figure of the immigrant.

The case of the American treatment of Muslims is consistent with the history of its treatment of immigrants. In the American context, Constitutional rights are often read either as human or political (membership) rights. Yet, the distinction between human rights and political rights emerges *not only* from the Arendtian point that one must be recognized in the latter, that is, as a member, in order to receive recognition of one's human rights. It also emerges from the ambiguous reading of the central category of individuals to whom rights are thought to be extended: persons. In the standard legal literature, the debate over whether immigrants should receive certain rights of due process and equal protection is thought to rest on the category of "persons," a term constantly present throughout the U.S. Constitution.[32] The powers and equal protections of the Constitution are most famously defined as applying to "any person" within the territorial jurisidiction of the United States, as seen in Amendment XIV.[33]

But this debate emerges from another source as well: the central ambiguity over the meaning of the term "person." As Charles Mills points out, this category, of central importance in the philosophical literature, emerges in challenge to the world of rank and ascribed status, as a way of denoting the central equality of human beings.[34] As a conceptual category, the term "person" has ambiguous dual meaning—one that refers to both a legal as well as an ontological status. How this term is read connects back to the distinct ways in which membership can be construed—from the inside or outside. From the former perspective, "person" is a legal category whose recognition is cemented by the set of laws that liberal institutions uphold and promote. Thus to be a citizen is to be a "legal person," and thereby an "official" member of a polity, distinguished from the "unofficial" or "illegal" denizens of a polity. From the latter, that is, "outsider's," perspective, a "person" is an ontological

category, which entails automatic legal recognition. On this reading, then, Constitutional rights are human rights, which must be extended to all who live within the polity—"members" or not.

However, there is a third dimension that attaches itself to this dual reading of "person." It is a dimension that neatly connects to the ambiguous and shifting reading of Constitutional rights as political or human. The question of whether to grant rights as human rights or political rights depends not only how the term "person" is read Constitutionally, but on whether to read the person in question—in this case, the figure of the immigrant—as merely a human being or as a legal person also. The condition of reading the immigrant in the latter sense requires that they satisfy the crucial criterion: not only must they be "human," but they must be "human-like-us."

Heterogeneity in this case is expressed through the existential status of the immigrant, who lives neither inside nor outside the polity, but hovers on the edge.[35] To clarify, the figure of the immigrant expresses existential heterogeneity through simultaneous or vacillating allegiances to multiple cultures, conventions, nations, or territories. Such plural affinities preclude the immigrant from fitting neatly and easily into the conventions of the society into which he has immigrated. This renders him undependable, an uncertain ally in the quest for the unity, conformity, and stability of any given society, especially during times of crisis. For the dominant "rational" society, then, cultural heterogeneity—in the figure of the immigrant—is again interpreted as the existential inability to live neatly within the community, that is, the inability to be human-like-us. Thus both existential and cultural heterogeneity are perceived as potential threats to the internal stability of a society. And this combination, in turn, renders new immigrants particularly susceptible to being identified as the new enemy.[36]

The most obvious evidence of this reading emerges from the history of the plenary power doctrine with regard to immigration law, which grants it "a unique immunity from judicial review."[37] In 1891, Congress made the deliberate decision to allow the federal administrators final decision-making power over immigration law.[38] This decision cemented an opinion written several years earlier by the Supreme Court in *Chae Chan Ping v. United States.*[39] The Court states that the federal government is allowed full and absolute jurisdiction to prevent the entrance of immigrants. Known as the origins of the plenary power doctrine, this authority is expanded by the Court several years later, allowing the federal government full jurisdiction to "expel or deport foreigners who have not been naturalized."[40] The implication of these decisions is that immigration law is not automatically subject to judicial review, and thus may develop

independently of Constitutional law. The separate development of these two bodies of law, Constitutional and immigration, engender the development of two distinct frameworks of recognizing political subjects. Michael Scaperlanda argues that the recognition of immigrants has vacillated between the "personhood" and "membership" models.[41] The first model treats petitions put forth by immigrants within the context of the Fourteenth Amendment and due process concerns. Full constitutional rights are accorded to those deemed full and proper "persons," in this model. The second model, namely that of membership, treats the concerns of immigrants in terms of whether they are due any of the rights that are accorded to members of the nation-state. As Scaperlanda points out, for much of the last 130 years, the Congressional plenary power doctrine has rendered immigrant law, and the political, social, and economic security of immigrants virtually nonexistent. The models that the courts have used to render immigrants not a part of Constitutional concerns or of "personhood" doctrine have varied, but their consistent results have undermined the legitimacy and consistency of their presence in the American political context.[42]

By contrast, the struggles faced by immigrants and aliens were considered part of the problem that the U.S., as a sovereign nation, had to face—to regulate and control who passed through and stayed within their borders. As foreign nationals, their status was subject to the whims of federal administrators and immigration officials. Their political status was further compromised, as Scaperlanda points out, by the shift in judicial attitudes around the Chinese Exclusion case,[43] which entailed that immigrants were no longer automatically seen as being entitled to the rights of personhood that citizens could take for granted.[44] The implication of these two events was that rather than being included in the American racial conversation, (non-White) immigrants generally, were seen as non-American—foreign—races, having no claims to the set of concerns, characteristics, or rights that American "races" did.[45]

As such, Gabriel Chin argues that immigration law is the last stronghold of racial segregation in the United States, owing largely to the Court's attitude that "aliens of a particular race," may be excluded or removed from the U.S., and have no constitutional rights when seeking admission to the U.S.[46] Further, the Justice Department, one of the venues through which immigration law has been made, has argued that "citizenship" could be withheld from immigrants by reason of inadequate habits, culture, or the "deficiency" of race. Referring to Chinese immigrants, the Justice Department insisted that color-blindness did not extend to aliens: "[T]he Chinese are a people not suited to our institutions, remaining a separate and distinct race, incapable of assimilation, having habits often of the most pernicious character . . . a people of such a character and so inimical to our interests as to require that their coming shall be prohibited."[47] In effect, then by holding that Congress had an absolute power to regulate immigration, a power not articulated in the Constitution, and one that is not subject to judicial review, the Court effectively holds that immigrants are unworthy of the status of "legal person," and hence unworthy of ostensibly "inalienable" protections such as the right to judicial review. This reading of both the immigrant and the Constitution is echoed by Charles Mills, when he astutely points to the implicit presence of non-Whites as crucial to the reification of (White) persons in the Racial Contract of the liberal polity. Labeling them subpersons, Mills says, "Subpersons are humanoid entities who, because of racial phenotype/genealogy/culture, are not fully human and therefore have a different and inferior schedule of rights and liberties applying to them. In other words, it is possible to get away with doing things to subpersons that one could not do to persons, because they do not have the same rights as persons."[48]

Whereas Mills argues this point with regard to raced persons generally, others such as Natsu Taylor Saito illustrate the double standards of liberal protections with specific regard to immigrants. Speaking with regard to Asian immigrants and their continual depiction as non-American, un-American, and "foreign," Saito suggests that the "identification of those that race as foreign must be understood as part of the larger process of maintaining our particular social, racial, and economic hierarchies. Matters of citizenship and foreignness—who is a member of this polity, who should be allowed to live here, who should pay which social costs, and who should receive which benefits—are . . . closely tied to deeply held beliefs about what it is to be an American and what America should be."[49] And yet, the absence of an explicit confession on this front, seems best explained by Alexander Bickel, "It has always been easier, it will always be easier to think of someone as a non-citizen than to decide he is a non-person."[50]

In the American context, that is, as understood through the ethos of immigration law, *one can only be recognized as a legal "person" or a member of a community when one is not merely human, but "human like us."* The message of the American polity is that while Americans will be afforded political rights as if these are human rights, but *non-Americans, because they are not-yet-human-like-us, will, at least until such time as they become American,* be granted human rights only as political rights.[51] That is to say, until such point as membership is afforded, one can only be construed as an enemy, or that "Other" *qua not-yet-human-like-us* to whom, therefore, we have no obligation to extend human rights. Hence, Constitutional rights are understood

as natural rights only for members of the American polity. Here we see an instance of how a category is instantiated through sovereign power, which simultaneously becomes "exceptionalized": the sovereign protection of the state is extended to "all persons," but the question of who is fit for "personhood" is continually and implicitly modified and reconstrued to reproduce certain fundamental divisions between populations.

These divisions are predicated upon a distinction between nonpersons (the enemy or the stranger or the foreigner, per Schmitt) and persons (the set of individuals who constitute the polity). And here is where the tension of liberalism is necessary to continually reproduce its self-understanding as maintaining the promise of universal rights: Under this view, every human being is potentially eligible for recognition as a member of a polity, as long as he/she meets the (fairly rigid—and constantly changing—set of) criteria by which member qua person is defined. And by implication, one can reside in a polity, one can even participate in many practices that citizens do, but one can not be a full member of the polity—entitled to full protections and rights—unless and until one fully meets the criterion of what it means to be human. Short of that moment, one can be understood in various modes that fall short of the definition of human being: stranger, alien, enemy—but most importantly, as "an exception" to the set of individuals in this polity that we call citizens. That is to say, whatever "it" is, it is not "one of us," and therefore we are not obligated to award it Constitutional protections or rights.

Thus, the effect of the stark division between the set of rights afforded to members versus nonmembers is to reinforce the collective self-recognition of a national political imaginary for a set of core constituents who were continually informed that they "are lucky enough to live in a country that believed in democracy and freedom."[52] The right of freedom, in this trope, often implied that it was a human right that human beings in other countries are not lucky enough to be afforded . . . but what is omitted is that other human beings who were not lucky enough to be natural-born American citizens, or given the correct political times and circumstances—to be "naturalized"—are also not lucky enough to be extended this protection by the American government except by fiat and selective discretionary judgments during times of international instability. Non-American immigrants are susceptible to the urgent drawing of lines between friend and enemy, which, at least juridico-politically, occurs primarily through the suspension of procedures that are normally utilized to ascertain the grounds for indicting someone of a crime, or of judging him guilty of one.

The process of "nationalizing" the rights enumerated in the Constitution, and thus correlating the extension of human rights with the

condition of citizenship, effectively elides the issue of whether human rights can ever logically and consistently be considered merely political rights, and whether political rights can ever be justified as less than universal human rights. But what we do know is that this elision also creates the opportunity to turn *any given group—natural-born or immigrant—into an enemy population.* By insisting upon the enemy alien *exception*, the Attorney General's office has returned the American political stage to a pre-Reconstruction era whereby human rights will only be given to those deemed human like us, and those deemed not-quite-human-like-us—whether for just or unjust cause (we will never know since their causes will no longer be stated or heard, much less tried, publicly) will be deprived altogether of the moral claims and rights that are thought to be granted to all human beings in a liberal context: respect, dignity, and recognition. And so, how have Muslims, in the American public mind, become the new exception population? Muslims, following the argument of Agamben, constitute the newest population whose status is that of "bare life" in the American discourse, because they are not-American and (simultaneously) not-yet-human-like-us. And so, they are not worthy of being American, the sign of which is being extended Constitutional protections on the ground of moral claims, that is, as human rights. This ambiguity refers directly, if implicitly, to ambivalence over how to understand the figure of the immigrant. The immigrant's nebulous status, as one of "us" in that he is human, but not (or not yet) human like us, seems to facilitate the distinction between friend and enemy during times of crisis. Again, it is not just cultural difference, but cultural difference perceived as a potential threat that seems to legitimate the generally popular trend of stripping a new group of political and legal protections, as in the case of immigrants of Arab descent or Muslim faith.[53] The moment constituted by the two years after 9-11 has facilitated the current Administration's promulgation of a crisis situation extreme enough to legitimate the *ad hoc* legal distinctions such as "terrorists," "enemy combatants," and "evildoers" versus "Americans," "citizens," and "friends" in direct reference to Muslims.

Conclusion

It is, on one level, a historical commonplace of liberalism that the promise of equal protection has been not extended universally. But the rationale of these "commonsensical" exclusions as "mere" exceptions to the American Constitutional promise of equal treatment and universal protections of all persons within their borders, raises deep suspicions.

The transhistorical constancy, the consistent presence of exceptions within the political and legal history of the United States, compels the urge to ask whether these exceptions really are unwitting, happenstance, or accidental. I suggest instead that exclusion is an intrinsic element of American liberalism, emerging from the impulse to circumscribe and valorize the liberal subject as a privileged member of that polity, granted a treatment that, incredibly enough, is considered elite, and is one for which few are eligible unless they can meet a rigorous and stringent set of criteria. The criteria in question revolve around the reproduction of a set of implicit values and at minimum, the cultural appearance, of those who constitute the full-fledged members and who author the laws of the liberal polity. Through this lens, exclusion is intrinsic to the maintenance and reproduction of liberal values and practices. The figure of the Muslim immigrant is a precise threat to the cultural homogeneity (or limited heterogeneity) and political unity of the liberal polity. But since the self-understanding of American liberalism is at variance with the above description, the method by which such divergence is reconciled is through a vacillating interpretation of the concept of the "person" at the center of that quintessential document of American polity—the U.S. Constitution. There, through the judgment of the Supreme Court, the liberal "person" is sometimes understood as an ontological category and at others, a normative one. This selective, always convenient, interpretation corresponds to a selective interpretation of the nature of the rights thought to ground a liberal polity—sometimes these rights are thought to be inalienable for everyone, and other times, they are thought to be so for members only. This reading of the intrinsic exclusionary impulse of liberalism has often been recognized by various liberal theorists as a necessary, justifiable, impulse. It is one that is embedded in a worldview, as Kunal Parker points out, which leaves the burden of proving that one is worthy of membership on the claimant—always already the "outsider," rather than insisting that exclusion is not a rational impulse. In this logic, the burden of proving the legitimacy of exclusion from a polity should rest on those who wish to exclude, in other words, on the "insiders."

In many ways, the increasingly restricted movement of Muslim immigrants and increasing erosion of the civil liberties and protections of Muslim Americans bears an uncanny resemblance to Hannah Arendt's description of the treatment of Jews by various European states prior to the onset of World War II. Arendt points to statelessness as that condition in which the country of one's origin will no longer claim members of a certain (ethnic) population as one's own, disenfranchising them entirely, and thereby casting them astray and leaving them in the position of having to appeal to the mercy of another nation for protection. Her analysis describes the reluctance of other nations to claim the unwanted as their own, and unwillingness to extend them active economic or legal protections, leaving them in effect "undeportable."[54] The stateless, as Arendt points out, were constituted by minorities who could not claim membership in a nation on the basis of origin or blood, thereby requiring a "law of exception" to guarantee them both recognition and protection in spite of their "insistence" upon claiming a different nationality.[55] On such grounds, the law was transformed from an instrument of the state to an instrument of the nation, thereby rendering human beings members of ethnic groups rather than members of polities, in others words, citizens.[56] Statelessness becomes evident through "denationalization," and through the constitutional inability to guarantee human rights to those who have lost "nationally guaranteed rights." The final evidence of statelessness—and this seems to be the consequence of the first two moves—is that the claim to "inalienable human rights" becomes a demonstrably empty one.[57]

It is difficult to apply fully all the elements of Arendt's understanding of statelessness to Muslims. It is certainly the case that the "denationalization" of Muslims is a post-facto phenomenon, one that appears to have gained momentum as diasporic Muslim immigrants have found themselves under increasing scrutiny by immigration officials. This scrutiny, along with the absence of judicial review, has led to the deportation of scores of immigrants to their "countries of origin" without warning, welcome, or community.[58] The phenomenon of denationalization appears to be closely linked to the American attempts to reinforce an "outsider" status for Muslims in the United States by constructing a certain descriptive conflation of Muslims with terrorism, namely by perpetuating a position that Islam is a religion that should be suspected as embedding certain seeds of terrorist psychology.[59]

The plight of Muslims in the United States is distinct from that of European Jews prior to and during World War II. However, Arendt's discussion of statelessness has a certain resonance with various events in contemporary American political discourse.[60] The more important implication of Arendt's analysis of statelessness is its fundamental implication of rightlessness.[61] The Bush Administration has, according to certain political observers, planned its next round in the war on terrorism to resemble yet another stage in the creation of statelessness and rightlessness not only for immigrants but even for the natural born.[62] The powers of the PATRIOT Act and successive policies are only possible in a social and political milieu where, as Arendt points out, rightlessness has become the order of the day, and the distinction between human being and citizen has been eradicated. It is a milieu that foreshadows

totalitarianism as a condition where the distinction between the public and the private no longer exists, because the possibility of action, of difference, through the right of freedom, has been sharply restricted by the state. Such possibilities occur in a world where "exceptions" are routinely made in the extension of "human rights" to all members of the human class, through the irrationalization, inferiorization, and delegitimation of certain persons based on ad hoc differences—by creating "an illusory line between alien and citizen,"[63] and enemy and friend.

Is there a remedy to the exclusion that is the counterpart to the rhetoric of American liberal universalism? The intrinsicality of exceptions might imply that such a solution is impossible; however, I think we do not need to be so pessimistic. Part of the reason behind the continual repetition of "exceptions" is that they are seen as accidental; that is, their intrinsicality is concealed behind the superficial, if conspicuous, rhetoric of "equal rights." If we can crack open the facade and consider the creation of "exceptions," as a long-standing tendency of American liberalism, rather than a series of isolated accidents, then we can minimize or even anticipate this tendency by looking for warning signs. In so doing, we may be able to avert or head off the creation of potential scapegoats. In other words, a lasting solution requires a change of perspective. Any time a catastrophe occurs is tragic. If it happens repeatedly, then the tragedy becomes continual and repetitive, and there appears to be no end in sight. However, if we recognize this tendency as part of a systemic pattern that occurs on a regular basis, then we might be able to find a solution. Solutions to the problem of "intrinsic" exceptions can only occur by changing the way we understand such events, and deeming them unacceptable, and searching for an extensive reconfiguration of the United States' political framework—one that addresses and rectifies the procedure by which political recognition is awarded by the state, that is, the vehicle of membership. Short of a change in perspective and a new framework, this remedy—and the fulfillment of the promise of liberalism—that remedy remains to be seen.

6

Border-Populations

Boundary, Memory, and Moral Conscience

Introduction

In the prior chapters I discussed some of the events of December 2002, when Attorney General John Ashcroft's office detained male Muslims under the aegis of the PATRIOT Act.[1] Around the same time, and in stark contrast, there was a sudden furor over remarks made by then Senate Majority Leader Trent Lott, who insinuated that segregation might have been a preferred American political condition. Referring to Sen. Strom Thurmond's 1948 segregationist campaign, Lott repeated the gist of comments that he'd made once before, in 1980: "We're proud of it. And if the rest of the country had followed our lead, we wouldn't have had all these problems over all these years either."[2] Rebuttals emerged from various sources across the political spectrum. The right, the far right, the liberal, and the radical left all rushed to express their dismay at Sen. Lott's callous and politically miscalculated remarks. But there was more: in response to Sen. Lott's comments, the varied political factions—in a rarely seen collective, indeed, univocal agreement—declared that segregation, apartheid, and the second-class status of Black Americans was a relic of an unfortunate American past.

As I have argued in prior chapters, liberal polities tend to search for scapegoats who can serve as the latest enemy as a way of managing their populations in the interests of long-term goals.[3] In this chapter, I develop my argument from the last part of chapter 2. The outcasting of new "enemy" populations is augmented through the conspicuous cooptation of a long-standing outsider as part of the core dominant political imaginary. This tendency has reasserted itself most recently in the striking contrast