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# As Respected as a Citizen of Old Rome: Assessing Good Moral Character in the Age of National Security

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## INTRODUCTION

In order to naturalize as a U.S. citizen, immigrant applicants must demonstrate, among other requirements, that they possess "good moral character."[1] The contours of this requisite character remain ambiguous, as the statute defines the term only in the negative using a noninclusive list of statutory bars, such as

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1. Immigration and Nationality Act of 1952, 8 U.S.C. § 1427(a) (2012).

commission of murder and illegal gambling.[2] Because the boundaries of the good moral character (GMC) requirement are not fixed, the assessment of whether an applicant possesses sufficient character has varied depending on changing societal values and mores.[3] Applicants must guess how to affirmatively demonstrate GMC; often, applicants point to their charitable donations and involvement with religious and civic organizations as evidence of good character.[4]

But for many Muslim immigrants, involvement with Islamic organizations leads to difficulties in the naturalization process. Post-9/11 Islamophobia has been accompanied by suspicion that all Islamic charities are fronts for terrorist organizations.[5] Consequently, Muslim applicants for naturalization bear not only the burden of demonstrating GMC in a way palatable to naturalization examiners but also of explaining, minimizing, or apologizing for cultural and religious affiliations.

A glaring disconnect exists between the stated purpose of the GMC requirement and its practical effect on how citizenship is conceptualized and dispensed among members of the national community. This Note argues that the federal government's use of the GMC requirement as a basis for denying naturalization claims functions to exclude Muslims from citizenship on the basis of their religious and cultural affiliations. Exclusion from citizenship keeps Muslim and Arab immigrants at the margins of American society and bars them from full participation in the civic sphere.

We begin this Note by providing an overview of the conditions the United

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2. *Id.* § 1101(f) (listing statutory bars to a finding of good moral character). "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character." *Id.*

3. 7 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 95.04 (Matthew Bender ed., rev. ed. 2015).

4. *See, e.g.*, *In re* [Identifying Information Redacted by Agency] Application: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii) (Sept. 15, 2009), 2009 WL 4983107 (DHS) (applicant brought evidence establishing her volunteer service and donations to show good moral character); *In re* [Identifying Information Redacted by Agency] Application: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) (Sept. 11, 2008), 2008 WL 5237056 (DDHS) (immigration judge considered "evidence of service in the community, including donations to charities and participation in committees to improve services to the Latino community" as evidence of good character); *In re* [Identifying Information Redacted by Agency] Petition: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii) (May 14, 2008), 2008 WL 4051965 (petitioner supplied receipt of donation to Goodwill as evidence of Good Moral Character).

5. *See* Laila Al-Marayati, *American Muslim Charities: Easy Targets in the War on Terror*, 25 PACE L. REV. 321, 321 (2005) ("The U.S. government has not obtained a single terrorist conviction of any of the principals of these [Muslim charities based in the United States] nor has the government proven conclusively that any of the funds were used to finance activities at all related to the events of 9/11 or to al-Qaeda. Yet, the government continues to display its closures of Muslim charities as evidence of progress being made in the War on Terror."); Walter Pincus, *Foreign Aid Groups Face Terror Screens*, WASH. POST (Aug. 23, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/08/22/AR2007082202847.html [http://perma.cc/R4XK-LLT4].

States imposes on applicants seeking naturalization, focusing on the GMC requirement. Part II discusses the post-9/11 political landscape for Muslim naturalization applications and uses two case studies, the stories of Tarek Hamdi and Jamal Atalla, to explore the way in which the Department of Homeland Security (DHS) has operationalized the GMC requirement to deny American citizenship to Muslim Americans. Part III critiques the use of the GMC requirement as a tool to deny citizenship and argues that it functions, in effect if not also in purpose, as a state-sponsored mechanism to disempower a vilified immigrant group in the name of national security. Finally, Part IV provides concrete proposals for modification of the GMC requirement.

## I. TO WHOM SHOULD WE GRANT CITIZENSHIP?

### *A. The Process of Naturalization*

For many permanent resident aliens in the United States, the process of applying for naturalization and citizenship is administrative and ministerial in nature.[6] To walk permanent residents through the naturalization process, the U.S. Citizenship and Immigration Service (USCIS)[7] publishes *A Guide to Naturalization*, the first section of which welcomes applicants for citizenship, expresses pleasure at the prospect of a new U.S. citizen, and recognizes the country's immigrant roots.[8] The guide also highlights benefits of naturalization, including the following privileges: voting in federal elections; getting priority when petitioning to bring family members permanently to the United States; obtaining citizenship for children born abroad; travelling with a U.S. passport; becoming eligible for federal jobs and elected office; and showing patriotism for the United States.[9]

Current immigration laws provide that aliens must meet ten basic requirements for citizenship eligibility, including requirements that an applicant have permanent resident status and the ability to meet both continuous residence and good moral character requirements.[10] Once an applicant meets these

6. As a starting point, however, the authors note that most citizens acquire citizenship status without even the administrative or ministerial showing required by the naturalization process "as a result of good fortune in having been born at the right place or to the right parents." 7 GORDON ET AL., *supra* note 3, § 91.01.

7. The Executive Branch of the U.S. government has plenary power over questions of immigration. *See* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889). Furthermore, international law generally defers to nation states to determine its membership through admission and deportation policies. *See* Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 64–65 (2004).

8. U.S. CITIZENSHIP & IMMIGRATION SERVS., A GUIDE TO NATURALIZATION 1 (2012), http://www.uscis.gov/files/article/M-476.pdf [http://perma.cc/UF67-AGRH] [hereinafter USCIS, A GUIDE TO NATURALIZATION].

9. *Id.* at 2.

10. The requirements include:

(1) the applicant must be admitted to permanent resident status; (2) the applicant must have a continuous residence in the United States for a minimum period (normally five years); (3) the applicant must be residing in the state of application for a minimum period of three

requirements, he or she is eligible to submit an N-400 application for citizenship.[11] Running ten pages, the N-400 application asks citizenship applicants for basic biographical information,[12] such as their name, contact information, residence, employment, and physical characteristics for purposes of an FBI criminal records search.[13] The application also asks detailed questions about the applicant's marital history, children, and time spent outside of the United States.[14]

Nearly a full page of the application focuses on the applicant's affiliations, asking applicants to list every "organization, association, fund, foundation, party, club, society, or similar group" the applicant has ever "been a member of, involved in, or in any way associated with" anywhere in the world.[15] Another full page of the application is dedicated to character questions, including pointed questions about crime, habitual drinking, prostitution, polygamy, gambling, supporting dependents, and giving false or misleading information to obtain an immigration benefit.[16]

The USCIS initially has sole authority to grant or deny a naturalization application.[17] In April 2002, USCIS officers began checking the names of foreign nationals seeking immigration benefits against the Interagency Border Inspection System, a multiagency database of lookout information.[18] Naturalization applicants also undergo FBI fingerprinting and name checks as part of the N-400 application process.[19] Furthermore, applicants identified as "national security concerns" by the FBI receive heightened review under the Controlled Application Review and Resolution Program (CARRP) instituted in 2008.[20] As a result of this security

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> months; (4) the applicant must have been physically present in the United States for a minimum period (at least half the period of required continuous residence); (5) the applicant must have the ability to read, write and speak ordinary English; (6) the applicant must have knowledge of U.S. history and government; (7) *the applicant must have good moral character*; (8) the applicant must have continuous residence in the U.S. from the date of filing the naturalization application until actual admission to citizenship; (9) the applicant must have attained 18 years of age at the time of filing for naturalization (subject to certain exceptions); (10) the applicant must be attached to the principles of the U.S. Constitution.

AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION PROCEDURES HANDBOOK § 22:9 (2015) (emphasis added).

11. USCIS, A GUIDE TO NATURALIZATION, *supra* note 8, at 1.

12. The N-400 application is available online through the USCIS. Application for Naturalization, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Sept. 13, 2013), http://www.uscis.gov/files/form/n-400.pdf [http://perma.cc/FQ4T-6SE6].

13. *Id.* at 2–4.

14. *Id.* at 4–6.

15. *Id.* at 7.

16. *Id.* at 8.

17. FRAGOMEN ET AL., *supra* note 10, § 22:25.

18. *Id.* (discussing a USCIS policy memorandum); *see also* Heena Musabji & Christina Abraham, *The Threat to Civil Liberties and Its Effect on Muslims in America*, 1 DEPAUL J. SOC. JUST. 83, 84–92 (2007).

19. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-06-06, A REVIEW OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES' ALIEN SECURITY CHECKS (2005).

20. JENNIE PASQUARELLA, AM. CIVIL LIBERTIES UNION OF S. CAL., MUSLIMS NEED NOT APPLY: HOW USCIS SECRETLY MANDATES THE DISCRIMINATORY DELAY AND DENIAL OF CITIZENSHIP AND IMMIGRATION BENEFITS TO ASPIRING AMERICANS 11 (2013), http://www.aclusocal.org/CARRP/ [http://perma.cc/QZ6N-ZUCC] (follow "Download the Report" hyperlink).

screening, the processing of naturalization applications and petitions slowed considerably across the country.[21]

Following completion of security checks, USCIS schedules an interview with the naturalization applicant, called the naturalization examination.[22] These exams include three parts: a test of the applicant's ability to read, write, and speak English; a test of the applicant's knowledge of the U.S. government and U.S. history; and an adjudicator's review of the N-400 application for accuracy and completeness.[23] If an applicant meets all the statutory requirements for naturalization, an adjudicator must grant the application.[24] This decision must be made within 120 days,[25] and though processing times vary, USCIS aims for the naturalization process to average six months from the filing of a naturalization application.[26] The last step in the naturalization process is a naturalization ceremony, where the applicant returns his or her permanent resident card, takes the oath of allegiance, and receives a certificate of naturalization.[27]

Applicants denied citizenship may request an administrative hearing before a different immigration officer within thirty days of receiving his or her notice of denial.[28] More formal than initial naturalization interviews, administrative review hearings often involve legal representation, submission of written briefs, subpoenaed witnesses, and presentations of evidence.[29] The 1952 Immigration and Nationality Act (INA) also provides for de novo federal court review of a final administrative denial, which all but requires legal assistance.[30]

### *B. The Good Moral Character Requirement*

For many, the GMC requirement is an automatic, insignificant part of the naturalization process. However, the requirement has proven persistent—Congress has required applicants for American citizenship to show affirmative proof of good character before naturalizing as citizens of the United States since passing the first

21. *Id.*; *see* FRAGOMEN ET AL., *supra* note 10, § 22:25; Musabji & Abraham, *supra* note 18, at 84–92 (discussing the CAIR litigation challenging the FBI's name check programs that have indefinitely delayed thousands of naturalization applications, of whom "an overwhelming number" are Muslim); *see also* Yakubova v. Chertoff, No. 06CV3203(ERK)(RLM), 2006 WL 6589892 (E.D.N.Y. June 28, 2006).

22. U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL § 72.3(e)(1) (2012), http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1.html [http://perma.cc/5BD2-94ZF] [hereinafter USCIS, FIELD MANUAL].

23. *Id.*

24. *Id.*

25. *Id.*; *see also* 8 C.F.R. § 335.3 (2015).

26. USCIS, A GUIDE TO NATURALIZATION, *supra* note 8, at 10.

27. *Id.* at 31.

28. FRAGOMEN ET AL., *supra* note 10, § 22:26.

29. *Id.*

30. *Id.*

naturalization statute in 1790.[31] Balancing the nascent country's republican ideals[32] and need for growth and labor[33] with the virulent xenophobia and nativism of its representatives,[34] the first Congress extensively debated the merits of various prenaturalization requirements and the types of citizens these requirements would attract.[35] Georgian Representative James Jackson introduced the idea that prospective citizens should serve a probationary period of residency, and be required to bring testimonials of proper and decent behavior in order to naturalize.[36] Concerned with the respectability and character of the American name, Jackson hoped this requirement would allow the title of a "citizen of America" to become as "highly venerated and respected as was that of a citizen of old Rome."[37] Though Jackson recognized that "the difficulty will be to determine how a proper certificate of good behavior should be obtained,"[38] Congress adopted his proposal as a requirement that applicants for citizenship make proof to the satisfaction of a common law court of record that "he is a person of good character."[39]

Five years later, Congress repealed the 1790 Act, raising the residency requirement for naturalization to five years, and requiring a resident alien to show that he "has behaved as a man of good moral character" for two years prior to admission as a citizen.[40] Insertion of the word "moral" into the character requirement initially drew opposition because of the possible religious connotations associated with the word.[41] However, representatives quickly attacked this

31. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103 (repealed Jan. 29, 1795) ("[A]ny alien, being a free white person, . . . may be admitted to become a citizen thereof, on application to any common law court of record, . . . and making proof to the satisfaction of such court, that he is a person of good character . . . .").

32. Representative Page, for example, noted that after having boasted of "having opened an asylum for the oppressed of all nations, and established a Government which is the admiration of the world," that high bars of admission to "the full enjoyment of that asylum" would be inconsistent with the stated principles of the nation. *Rule of Naturalization*, 1 ANNALS OF CONG. 1109, 1110 (1790) (Joseph Gales ed., 1834). Representative Page continued, saying further that "[i]t is nothing to us, whether Jews or Roman Catholics settle amongst us; whether subjects of Kings, or citizens of free States wish to reside in the United States, they will find it their interest to be good citizens, and neither their religious nor political opinions can injure us, if we have good laws, well executed." *Id.*

33. Representative Burke, for example, stressed the importance of "fill[ing] the country with useful men, such as farmers, mechanics, and manufacturers," advocating for "every encouragement to them to emigrate to America." *Id.* at 1117.

34. *Id.* at 1112. Representative Smith cautioned that if emigrants are easily admitted into civic life, it "may create great uneasiness in neighborhoods which have been long accustomed to live in peace and unity." *Id.*; *see id.* at 1117 (stating that Representative Sedgwick was "against the indiscriminate admission of foreigners," preferring higher naturalization standards to ensure that America was not "overrun with the outcasts of Europe"); *see also* Comment, *The Evaluation of Good Moral Character in Naturalization Proceedings*, 38 ALB. L. REV. 895, 895 (1974) (recognizing that representatives were wary of an "influx of undesirable aliens").

35. Comment, *supra* note 34, at 896.

36. *Rule of Naturalization*, 1 ANNALS OF CONG. at 1114.

37. *Id.*

38. *Id.*

39. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103 (repealed Jan. 29, 1795).

40. Act of January 29, 1795, ch. 20, 1 Stat 414, 415 (repealed Apr. 14, 1802).

41. *Naturalization Bill*, 4 ANNALS OF CONG. 1026, 1026 (1794); Lauren Gilbert, *Citizenship, Civic*

opposition as slanderous to the American character.[42] Massachusetts Representative Theodore Sedgwick clarified that the word "moral" had "no particular reference whatever to religion," and was defined in opposition to immoral rather than in relation or reference to religious opinions.[43] According to Sedgwick, neither "good"[44] nor "moral"[45] would be difficult to distinguish or define.

Despite Representative Sedgwick's optimism, interpretation of the boundaries of this "good moral character" statutory requirement for naturalization proved highly variable, tricky to standardize, and difficult to determine over time. With no affirmative definition of "good moral character" advanced in either the 1790 or 1795 naturalization statutes, district courts across the country developed inconsistent formulations and tests for assessing whether applicants for citizenship held the requisite character.[46] In fact, "good moral character" became a quality determined more easily in its breach than in its observance, and defined by the exclusion of bad character rather than by complete incorporation of good or moral character traits.[47]

Between 1795 and 1952, when weighing the character of an applicant's conduct, courts relied on proxies, such as federal and state criminal laws, moral standards prevailing in the alien's community, or moral standards current nationwide, as the basis for determining good and bad conduct.[48] During this time, scholars vigorously debated the relative merits of these differing court-developed standards as well as other possible ways to determine good moral character. At the turn of the twentieth century, for example, scholars argued whether the good moral

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*Virtue, and Immigrant Integration: The Enduring Power of Community-Based Norms*, 27 YALE L. & POL'Y REV. 335, 351–52 (2009); Steven L. Strange, *Private Consensual Sexual Conduct and the "Good Moral Character" Requirement of the Immigration and Nationality Act*, 14 COLUM. J. TRANSNAT'L L. 357, 358 n.4 (1975).

42. *Naturalization Bill*, 4 ANNALS OF CONG. at 1026.

43. *Id.*

44. *Id.* ("The word good, itself, is very equivocal in its meaning.").

45. *Id.* ("We can everywhere tell, by the common voice of the World, whether a man is moral or not in his life, without difficulty.").

46. Albert S. Persichetti, *Good Moral Character as a Requirement for Naturalization*, 22 TEMP. L.Q. 182, 185 (1948) (discussing the lack of uniformity in GMC determinations, and urging attorneys to determine the attitude of the particular court before filing a petition for naturalization on behalf of a client).

47. Comment, *supra* note 34, at 896; *see also* Persichetti, *supra* note 46, at 184 (commenting that specific acts of bad behavior tend to establish lack of GMC, and that it follows that an absence of bad behavior would indicate the presence of good moral character); Elmer Plischke, *"Good Moral Character" in the Naturalization Law of the United States*, 23 MARQ. L. REV. 117, 118 (1939) ("Unfortunately a negative approach must be taken, determining what does not constitute 'good moral character,' rather than what does.").

48. Rachel A. Hexter, *Naturalization—"Good Moral Character" Requirement Is a Question of Federal Law,* Nemetz v. INS*, 647 F.2d 432 (4th Cir. 1981)*, 6 SUFFOLK TRANSNAT'L L.J. 383, 385 (1982); *see also* Comment, *supra* note 34, at 907 (discussing the National Standards Test, the Local Standards Test, and a Hybrid Test used by courts to determine good moral character); Clayton Lilienstern, Note, *An Alien Is Not To Be Denied Naturalization on the Ground of Lack of Good Moral Character When He Has Committed Adultery if Extenuating Circumstances Exist*, 4 HOUS. L. REV. 558, 558–59 (1967) (discussing the national and local standards tests for GMC).

character determination should be an objective or subjective standard,[49] and whether the good moral character naturalization criterion should be more or less restrictive.[50] In the mid-twentieth century, scholars and jurists disagreed over which decision makers would be best situated to make the good moral character determination.[51] Whether influenced by these arguments or not, the courts gradually relaxed earlier, more rigorous, good moral character standards in light of perceived moral trends in the decades leading up to 1950.[52]

In an effort to achieve a more uniform approach to naturalization,[53] Congress added an enumerated list of statutory bars to showing good moral character in the definitional section of the INA,[54] otherwise known as the McCarran-Walter Act.[55] Although the statute again avoided comprehensive definition of "good moral character," the list of statutory bars generally attempted, in each case, to "negate a specific court decision"[56] and included conduct that Congress believed was universally recognized as socially unacceptable.[57] Congress enacted the McCarran-Walter Act over President Truman's veto.[58] The President subsequently commissioned the Commission on Immigration and Naturalization in 1953, which

49. *See Naturalization*, 19 HARV. L. REV. 392 (1906) (disagreeing with a 1905 article by Henry Stockbridge that argued the GMC inquiry should be subjective—stating that an applicant need not actually possess GMC, but must only prove that he has behaved as one possessing GMC).

50. *See id.* at 393 ("Surely one instance of yielding to the common propensity for doing what the crowd does, is not necessarily behavior incompatible with good character and a belief in the Constitution."); *cf.* W.G.S., *Qualifications of Aliens for Naturalization*, 8 MICH. L. REV. 42, 44 (1909) (arguing that the danger is in a liberal interpretation of naturalization laws rather than a strict interpretation, and asserting that the standard for aliens should be higher than "some of our native-born citizens could meet" because naturalization is a "*privilege* and not the *right* of the alien").

51. Note, *Judicial Determination of Moral Conduct in Citizenship Hearings*, 16 U. CHI. L. REV. 138, 139 (1948) (Judge Learned Hand and Judge Frank agreed that they did not want to make the moral standard decision, and the article suggests possible alternatives such as (i) an advisory group of ethical leaders, (ii) a general poll, or (iii) a jury.); *cf.* Recent Decisions, *Aliens—Naturalization—Period of Good Behaviour*, 35 VA. L. REV. 264, 265 (1949) (arguing that, in any given case, the court is in the best position to appraise the character of the petitioner and should therefore be allowed to exercise broad judicial discretion in the GMC determination).

52. PRESIDENT'S COMM'N ON IMMIGRATION & NATURALIZATION, WHOM WE SHALL WELCOME, at xi (1953).

53. Hexter, *supra* note 48, at 386; Strange, *supra* note 41, at 358 n.4.

54. Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 172 (1952) (codified as amended at 8 U.S.C. § 1101(f) (2012)) ("For the purposes of this Act—No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was—(1) a habitual drunkard; (2) one who during such a period has committed adultery . . . (4) one whose income is derived principally from illegal gambling activities; (5) one who has been convicted of two or more gambling offenses committed during such period; (6) one who has given false testimony for the purpose of obtaining any benefits under this Act; (7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more . . . (8) one who at any time has been convicted of the crime of murder.").

55. Strange, *supra* note 41, at 357.

56. PRESIDENT'S COMM'N ON IMMIGRATION & NATURALIZATION, *supra* note 52, at 246.

57. Hexter, *supra* note 48, at 383.

58. PRESIDENT'S COMM'N ON IMMIGRATION & NATURALIZATION, *supra* note 52, at xi.

disagreed with Congress's approach and found the statutory bars narrow and inflexible.[59] The Commission recommended that the statute continue to require naturalization applicants to establish good moral character without defining the term.[60]

Despite the Commission's recommendations, the statutory bars have remained a part of the INA, and since 1952, arguments have centered on the addition or removal of statutory bars to an applicant's showing of good moral character. Scholars have argued, for example, that former Nazi concentration camp guards cannot show good moral character.[61] They have also argued for the removal of adultery as a statutory bar if extenuating circumstances exist to justify the adultery.[62] Congress, responding to these concerns and others, has amended the per se bars to remove adultery and convictions of a single offense of simple possession of not more than thirty grams of marijuana as absolute bars to findings of good moral character.[63] Courts continue to show flexibility in the application of the good moral character requirement.[64]

In 1990, Congress transferred the authority to grant naturalization from the courts to the Attorney General.[65] Although courts maintain jurisdiction to review naturalization denials de novo,[66] USCIS administrators now decide the vast majority of naturalization applications.[67] As a result, transparency in the naturalization process has dropped tremendously, as has the volume of federal district court opinions addressing good moral character. As Law Professor Lauren Gilbert has recognized, this change has hindered the ability of lawyers and researchers to identify, evaluate, and challenge the standards that naturalization examiners use in determining good moral character.[68]

Now, the good moral character provision is deployed to deny naturalization to applicants whose conducts or acts "offend the accepted moral character standards of the community in which the applicant resides" during or before the five years prior to applying for citizenship.[69] The limited statutory period for the

59. *Id.* at 275.

60. *Id.* at 246.

61. K. Lesli Ligorner, Note, *Nazi Concentration Camp Guard Service Equals "Good Moral Character"?:* United States v. Lindert, 12 AM. U. J. INT'L L. & POL'Y 145, 193 (1997).

62. Lilienstern, *supra* note 48, at 562.

63. Austin T. Fragomen, Jr., *Immigration and Nationality Act of 1981*, 16 INT'L MIGRATION REV. 206, 207 (1982).

64. *See, e.g.*, Nemetz v. INS, 647 F.2d 432, 435–36 (4th Cir. 1981) (refusing to apply local standards when petitioner lived in a state that prohibited private, consensual sodomy between adults).

65. The Immigration Act of 1990, Pub. L. No. 101-649, tit 4, sec. 401, § 310(a), 104 Stat. 4978, 5038; *see* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1300 (Robert C. Clark et al. eds., 5th ed. 2009).

66. Immigration and Nationality Act of 1952, 8 U.S.C. § 1421(b)–(c) (2012).

67. *See* LEGOMSKY & RODRIGUEZ, *supra* note 65, at 1300 (discussing the change and using "administrative naturalization" rather than the familiar "judicial naturalization" to describe naturalization by application).

68. Gilbert, *supra* note 41, at 359.

69. Though the statutory period is five years, *see* 8 U.S.C. § 1427(a)(3), the USCIS Adjudicator's

good moral character requirement, combined with authorization for consideration of acts conducted before the statutory period, shows clear congressional intent to allow adjudicators to consider evidence of reformation in determining good moral character.[70]

## II. CITIZENSHIP AFTER 9/11

### *A. The Political Landscape*

The September 11, 2001, World Trade Center terrorist attacks sparked an increasingly negative attitude toward Muslim Americans in the United States and a widespread demonization of Muslim immigrants.[71] Since 9/11, Muslim Americans have reported pervasive threats of violence and intimidation, hate crimes, harassment, and religious and racial profiling in communities across the country.[72] This wave of negative public opinion and backlash against Muslim Americans has required practicing Muslims to publicly and repeatedly condemn the acts of 9/11 and explain that Islam prohibits terrorism,[73] as well as demonstrate their "goodness" in opposition to the "bad Muslim" radical extremists that orchestrated 9/11.[74]

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Field Manual instructs adjudicators to consider conduct prior to that period, USCIS, FIELD MANUAL, *supra* note 22, § 73.6(a).

70. 7 GORDON ET AL., *supra* note 3, § 95.01[1][a] ("The purpose of [the] provision [allowing adjudicators to take into account conduct before the statutory period] is to determine whether the applicant has actually reformed." (citing Tieri v. INS, 457 F.2d 391 (2d Cir. 1972)).

71. This negative attitude has manifested against Muslim Americans broadly, though Muslim immigrants can be of any race, ethnicity, geographic origin, and political persuasion. LORI PEEK, BEHIND THE BACKLASH: MUSLIM AMERICANS AFTER 9/11, at 9 (2011). Estimates of the Muslim American population have ranged from two to seven million, Nina J. Crimm, *The Moral Hazard of Anti-Terrorism Financing Measures: A Potential to Compromise Civil Societies and National Interests*, 43 WAKE FOREST L. REV. 577, 592–93 (2008), with Islam as the fastest growing religion in the United States, PEEK, *supra*, at 10, 14.

72. *See generally* PEEK, *supra* note 71, at 16 ("[This book] documents the verbal harassment; violent threats and intimidation; physical assault; religious profiling; and employment, educational, and housing discrimination that Muslims faced following 9/11."); *id.* at 6 (discussing media attacks by television commentators, talk radio hosts, and authors on the Qur'an, Muslim immigration to the United States, and the "Islamic menace" more generally). *But see* BRIGITTE L. NACOS & OSCAR TORRES-REYNA, FUELING OUR FEARS: STEREOTYPING, MEDIA COVERAGE, AND PUBLIC OPINION OF MUSLIM AMERICANS 26 (2007) (recognizing that the news stories that painted American Muslims and Arabs in a negative light decreased from nearly one-third before 9/11 to less than one-fourth immediately afterward, though the news stories switched to overwhelmingly negative portrayals of American Muslims surrounding and after the one-year anniversary of 9/11).

73. PEEK, *supra* note 71, at 24–26 (describing efforts by the Council on American-Islamic Relations, the Muslim Public Affairs Council, the Muslim Students Association National, Muslim and Arab leaders, prominent Islamic religious leaders in the United States, major Arab and Muslim American advocacy groups, and organized groups of individual Muslims to speak out against terrorism). In fact, President George W. Bush, other politicians, and media pundits publicly called for Muslim Americans to affirmatively demonstrate their allegiance or loyalty to the United States in the aftermath of 9/11. *Id.* at 147.

74. *See* Engle, *supra* note 7, at 62 (discussing ways of demonstrating that one is a good alien or citizen). "Posting American flags on homes, cars, and shops, happily submitting to interrogations and

Declaring a "Global War on Terror"[75] in response to the 9/11 attacks, Congress and the George W. Bush administration quickly enacted counterterrorism legislation,[76] developed preventive counterterrorism policies,[77] and pursued aggressive prosecutions of Muslim charities thought to finance global terrorist activities.[78] As detailed by the American Civil Liberties Union (ACLU) in a 2009 report titled *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the "War on Terrorism Financing,"* the federal government has used raids, secret evidence, Department of Treasury asset-freezing blocking orders, and nontransparent procedures and criteria to designate American Muslim charities as terrorist organizations.[79] Although the Department of Treasury has seized the assets of seven U.S.-based American Muslim charities, designating them as terrorist organizations, only three of these organizations have faced criminal prosecution, and only one of the three prosecutions resulted in conviction.[80] Scholars and the 9/11 Commission have criticized the vast overbreadth and procedural deficiencies of the "material support for terrorism" statutes,[81] though the Supreme Court upheld

searches at the airport, responding to President Bush's call to be vigilant and watch one's neighbors, and—particularly if one is Muslim—continually condemning terrorism while avoiding discussion of United States foreign policy in the Middle East, all provide opportunities for demonstrating loyalty." *Id.*

75. This term was adopted by the President George W. Bush administration shortly after the 9/11 attacks, but is now disfavored. Scott Wilson & Al Kamen, *'Global War On Terror' Is Given New Name*, WASH. POST (Mar. 25, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html [http://perma.cc/HZC6-ARWP].

76. *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S. Code).

77. *See generally* Sahar F. Aziz, *Caught in a Preventative Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429, 430–34 (2012).

78. Crimm, *supra* note 71, at 603–04 (discussing attempts by the United States to designate individuals and groups as specially designated global terrorists (SDGTs), specially designated nationals (SDNs), or material supporters of SDGTs and SDNs pursuant to authority granted by the International Emergency and Economic Powers Act and the USA Patriot Act); *see also* AM. CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE "WAR ON TERRORISM FINANCING" 7 (2009), http://www.aclu.org/pdfs/humanrights/blockingfaith.pdf [http://perma.cc/245J-JRH5] [hereinafter ACLU, BLOCKING FAITH].

79. ACLU, BLOCKING FAITH, *supra* note 78, at 7.

80. *Id.* at 11.

81. *Id.* at 10–11 ("A 9/11 Commission staff report on terrorism financing found that the laws that allow the Treasury Department to designate and seize the assets of charities raise 'substantial civil liberty concerns.'"); Al-Marayati, *supra* note 5, at 337–38 ("The ever present threat of the 'terrorist designation' issued by the Treasury Department functions based on the principle of 'guilty until proven innocent.' The use of secret evidence, hearsay, erroneous translations, guilt by association and press reports in recent court cases further erodes the ability of charities to rely on basic assumptions regarding their constitutional rights, especially when the courts ultimately favor the government when 'national security' allegedly is at stake."); Aziz, *supra* note 77, at 459–60 ("Material support laws are so broad and vaguely worded that they effectively criminalize a myriad of activities that would otherwise be constitutionally protected."). *But see* Jennifer Lynn Bell, *Terrorist Abuse of Non-Profits and Charities: A Proactive Approach to Preventing Terrorist Financing*, 17 KAN. J.L. & PUB. POL'Y 450, 452 (2008) (arguing that the government should adopt a more active role in monitoring terror financing).

the statutes as consistent with the First Amendment.[82] Additionally, independent reviews conducted in the United Kingdom, Canada, Sweden, and Luxembourg have cleared some of the designated organizations, chastising the U.S. government for "its inability to show any proof of terrorism funding in the cases under review."[83] Although the blatant prejudice toward Islam has somewhat dissipated with the transition from President George W. Bush to President Barack Obama, the continuing War on Terror has perpetuated the implementation of policies that have a disparate impact on, and in some cases directly target, the Muslim community in the United States.[84]

Increased scrutiny of Muslim American charity organizations by the U.S. government has significantly impacted charitable donations in the Muslim American community.[85] As documented by the ACLU, there is a

> pervasive fear among Muslim charitable donors that they may be arrested, retroactively prosecuted for donations made in good faith to legal Muslim charities, targeted for law enforcement interviews . . . , subpoenaed to testify in a criminal case, subjected to surveillance, deported or denied citizenship or a green card, or otherwise implicated because of charitable donations made in fulfillment of their religious obligation to give Zakat [the Islamic concept of charity or alms].[86]

Two recent federal district court appeals of administrative citizenship naturalization application denials, brought by Muslim Americans, denied citizenship because of donations made to Muslim charities prior to the designation of the charities as "terrorist organizations" by the Treasury Department, show that this fear is justified.[87] In both of these cases, *Atalla v. Kraemer* and *Hamdi v. United States*

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82. Holder v. Humanitarian Law Project, 561 U.S. 1, 24–39 (2010); *see also* Sumeet H. Chugani, Comment, *Benevolent Blood Money: Terrorist Exploitation of Zakat and Its Complications in the War on Terror*, 34 N.C. J. INT'L L. & COM. REG. 601, 638 (2009) ("The courts have consistently found that terrorist designations and blocking orders do not violate a charity's right to speech, association, or free exercise of religion. In multiple instances, First Amendment freedom of religion claims were considered moot because the charitable organizations had failed to hold themselves out as religious-based organizations." (citations omitted)).

83. ACLU, BLOCKING FAITH, *supra* note 78, at 11.

84. *See, e.g.*, PASQUARELLA, *supra* note 20.

85. Crimm, *supra* note 71, at 620 (discussing the chilling effect of Executive Order 13,224 and the USA Patriot Act on Muslim-Americans' philanthropic and charitable wealth redistributions and on operations of U.S.-based Islamic charities); *see also* Joseph McMahon, *Developments in Regulations of NGOs via Government Counter-Terrorism Measures and Policies*, 11 INT'L NGO TRAINING & RES. CENTRE 4 (2007), http://www.intrac.org/resources.php?action=resource&id=299 [http://web.archive.org/web/20100706031048/http://www.intrac.org/resources.php?action=resource&id=299] (follow "Developments in the regulation of NGOs" hyperlink) (citing Neil MacFarquhar, *Fears of Inquiry Dampen Giving by U.S. Muslims*, N.Y. TIMES (Oct. 30, 2006), http://www.nytimes.com/2006/10/30/us/30CHARITY.html).

86. PASQUARELLA, *supra* note 20, at 13; *see also* Chugani, *supra* note 82, at 602.

87. *See* Hamdi v. U.S. Citizenship & Immigration Servs., No. EDCV 10-894 VAP (DTBx), 2012 WL 632397 (C.D. Cal. Feb. 25, 2012); Atalla v. Kramer, No. CV09-1610-PHX-NVW, 2011 WL 2457492 (D. Ariz. June 20, 2011), *aff'd sub nom.* Atalla v. U.S. Citizenship & Immigration Servs., 541 F. App'x 760 (9th Cir. 2013).

*Citizenship and Immigration Services*, the government argued that the applicants could not demonstrate that they possessed GMC because they "associated with" terrorist organizations via donations given through their mosques and provided false testimony by failing to disclose these associations.[88] The *Atalla* and *Hamdi* cases show that Muslim charitable donations are used not only by the DHS to prosecute Muslim immigrants for "material support of terrorism," but also by USCIS to raise suspicions of terror-related activities in order to deny immigration benefits to Muslim applicants.

### *B. Tarek Hamdi*

In 1977, Tarek Hamdi immigrated to the United States from Egypt.[89] While studying at Northeastern University on a student visa, he met Linda Carriere, a U.S. citizen.[90] They married in 1987 and raised four U.S. citizen daughters together.[91] At the time of Hamdi's applications for citizenship, Hamdi worked as a civil engineer in a construction company.[92]

Hamdi obtained lawful permanent resident status in 1988 and, in 2001, he applied to naturalize as a U.S. citizen.[93] Although his application was approved in November 2002, USCIS failed to schedule Hamdi for an oath interview.[94] Two months later, an FBI agent asked Hamdi to meet him at a doughnut shop to discuss his involvement with the Benevolence International Foundation (BIF),[95] a then-exempt not-for-profit organization whose stated purpose was to conduct humanitarian relief projects throughout the world.[96] The interview was conducted as a part of the FBI's investigation into BIF, and Hamdi was not placed under oath or affirmation;[97] however, during the course of the interview, FBI Special Agent Michael Caputo questioned Hamdi about his personal connection to BIF and donations he made to the organization.[98] In March 2003, USCIS learned of the FBI

88. *Hamdi*, 2012 WL 632397, at *4; *Atalla*, 541 F. App'x at 762.
89. *Hamdi*, 2012 WL 632397, at *1.
90. *Id.*
91. *Id.*
92. *Id.* at *14.
93. *Id.* at *2–3.
94. *Id.* at *2.
95. *Id.* at *10.
96. Press Release, U.S. Dep't of the Treasury, Treasury Designates Benevolence International Foundation and Related Entities as Financiers of Terrorism (Nov. 19, 2002), http://www.treasury.gov/press-center/press-releases/Pages/po3632.aspx [http://perma.cc/H286-L2PY]. In 2003, Enaam Arnaout, the leader of the Benevolence International Foundation (BIF), pleaded guilty to a charge of "racketeering fraud conspiracy committed in operation of a charity." United States v. Arnaout, 282 F. Supp. 2d 838, 840 (N.D. Ill. 2003). In a written plea agreement and through evidence introduced at Arnaout's plea hearing, Arnaout admitted to *defrauding BIF donors* by using BIF funds, raised for humanitarian purposes only, for Arnaout's own undisclosed support to militia efforts in Bosnia and Chechnya. *Id.* at 842 ("Arnaout ignores the fact that he consistently represented to donors and government authorities that BIF supported only humanitarian causes.").
97. *Hamdi*, 2012 WL 632397, at *5.
98. *Id.*

interview and reopened Hamdi's case to reevaluate the decision to grant him naturalization.[99] Two years later, in May 2005, government counsel asked the FBI agent who interviewed Hamdi in 2003 to prepare a declaration that described their conversation. [100] USCIS then scheduled Hamdi for a second naturalization interview, which Hamdi missed because he did not receive the notice in time.[101] USCIS denied Hamdi's application for naturalization on the grounds that he failed to appear for the interview.[102]

In 2007, Hamdi applied once again for naturalization and passed the citizenship examination the following year.[103] USCIS Immigration Service Officer Robert Osuna interviewed Hamdi in November 2008 regarding his application.[104] When USCIS had not reached a decision by March 2009, Hamdi filed a lawsuit in U.S. district court seeking to compel adjudication under 8 U.S.C. § 1447(b).[105] The court granted the relief sought, and ordered USCIS to adjudicate Hamdi's application no later than June 15, 2009.[106]

On June 8, 2009, USCIS denied Hamdi's application for naturalization on the basis that Hamdi lacked the requisite "good moral character."[107] Officer Osuna testified that he denied the application "on the basis that [Hamdi] gave false testimony during his interview on November 8, 2008, regarding his alleged affiliation with [BIF], the identity of his last employer, and his employment status."[108]

Hamdi appealed the denial by filing an N-336 Request for a Hearing on Decision in Naturalization. [109] Two USCIS officers interviewed Hamdi in September 2009 and denied the petition on the basis that he gave false testimony regarding BIF on his application and during his interviews.[110]

Represented by the ACLU of Southern California, Hamdi filed a petition in U.S. district court, requesting that the court grant him American citizenship pursuant to the court's authority under 8 U.S.C. §1421(c).[111] After a two-day trial in February 2012,[112] the court found Hamdi statutorily eligible for naturalization under the INA, and ordered USCIS to grant Hamdi's application for naturalization.[113]

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99. *See id.* at *2.
100. *Id.* at *3.
101. *Id.* at *2–3.
102. *Id.*
103. *Hamdi*, 2012 WL 632397, at *1.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at *4.
111. Petition at 1–2, *Hamdi*, 2012 WL 632397 (No. EDCV 10-894 VAP (DTBx)), ECF No. 1.
112. *Id.*
113. Order & Judgment at 1–2, *Hamdi*, 2012 WL 632397 (No. EDCV 10-894 VAP (DTBx)), ECF No. 129.

Hamdi was officially sworn in as an American citizen on May 10, 2012[114]—more than ten years after his initial application for citizenship.

### C. *Jamal Atalla*

Born to Palestinian refugees in Syria, Dr. Jamal Atalla graduated from the Damascus University School of Medicine in 1991.[115] He moved to the United States in 1992 with his wife, Dr. Nadia Katrangi, to obtain medical specialties in internal medicine, nephrology, kidney diseases, and interventional nephrology.[116] Pursuing these advanced trainings, Dr. Atalla attended the University of New York at Buffalo, the University of Kentucky, and the University of Missouri at Columbia, finally working at Indiana Nephrology and finishing his subspecialty training at the Arizona Kidney Disease and Hypertension Center (AKDHC) in Phoenix, Arizona.[117] According to Dr. Atalla's supervisor, the CEO of the AKDHC, Atalla is "a very good man, very honest, very kind, considerate. He's brilliant. He's easy to talk to. He listens well."[118]

A father of four children, all born in the United States, Dr. Atalla has volunteered on the board of directors for the Muslim Youth Center for Arizona as well as the Arizona Cultural Academy, where his children received their schooling.[119] He regularly volunteered free medical services to indigent patients from underserved populations, volunteered time at soup kitchens, and visited the elderly in nursing homes with his family.[120] Dr. Atalla is a practicing Muslim, and is an active member of both his mosque and the greater Islamic community in Phoenix.[121] As a part of their faith, Dr. Atalla and his wife have made monetary donations in various amounts to approximately sixty different organizations, totaling over $130,000 between 2000 and 2010.[122] Dr. Atalla and his wife assumed legal permanent resident status in 1997, and after waiting the statutorily required five years, they applied for U.S. citizenship in May 2002.[123]

Although Dr. Atalla's wife quickly became a naturalized citizen,[124] Dr. Atalla's application for naturalization dragged on. He was interviewed by USCIS three times over the course of six years, finally receiving an application denial in 2008 on a finding of "lack of good moral character."[125] Although one of the interviews was

114. *Hamdi v. U.S.C.I.S.*, ACLU, http://www.aclusocal.org/hamdi/ [http://perma.cc/KEK8-LCWV] (last updated May 10, 2012).

115. Trial Transcript at 27:7–20, Atalla v. Kramer, 2011 WL 2457492 (D. Ariz. June 6, 2011) (No. CV09-1610-PHX-NVW)), ECF. No. 98.

116. *Id.* at 28:12–14.

117. *Id.* at 28:17–24.

118. *Id.* at 22:19–21.

119. *Atalla*, 2011 WL 2457492, at *2.

120. *Id.*

121. *Id.*

122. Trial Transcript, *supra* note 115, at 22.

123. *Atalla*, 2011 WL 2457492, at *1.

124. *Id.* at *2.

125. *Id.* at *6.

not recorded, Dr. Atalla's 2004 and 2008 naturalization interviews focused extensively on Dr. Atalla's volunteer work and donations to the Global Relief Foundation (GRF).[126]

Dr. Atalla's administrative appeal met with the same fate, when the USCIS affirmed their denial on the grounds that Dr. Atalla had "provided false information to obtain an immigration benefit" and "failed to disclose [his] association with numerous organizations with ties to terrorism," because "[o]ne who contributes funds to an organization does have an association with that organization."[127] In 2009, Dr. Atalla filed an action in U.S. district court seeking de novo review of his application for naturalization, and was finally granted citizenship in November 2011.

During the district court adjudication of Dr. Atalla's naturalization application, the Government repeatedly sought to show that: (1) Dr. Atalla provided false statements in his naturalization interviews by denying that he was a member of or associated with GRF; and (2) that he provided false statements by failing to disclose his "associations" with the Holy Land Foundation, BIF, or the Islamic African Relief Agency because he made monetary donations to those organizations.[128] Although the government appealed the district court's grant of citizenship to Dr. Atalla, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's ruling in October 2013.[129]

## III. SPECTER OF TERRORISM

At first glance, these stories seem eerily similar. Both men are married to U.S. citizens and have four American-born U.S. citizen children. Both men are practicing Muslims and are active members of their respective mosques and communities. Both men applied for naturalization but were denied on the grounds that they could not show the requisite good moral character.

But other than these surface-level similarities, Tarek Hamdi and Jamal Atalla have little in common. Hamdi immigrated to the United States from Egypt, met his Caucasian American wife in college in Boston, and spent thirty years as a legal permanent resident before applying for naturalization. Atalla, on the other hand, emigrated from Syria with his wife after they had both obtained medical degrees in Damascus, and he and his wife applied for naturalization together at their earliest possible opportunity.

126. The U.S. Department of the Treasury designated the Global Relief Foundation as an organization providing material support for terrorism under Executive Order 13,224 on October 18, 2002. Press Release, U.S. Dep't of the Treasury, Office of Public Affairs, Treasury Department Statement Regarding the Designation of the Global Relief Foundation (Oct. 18, 2002), http://www.treasury.gov/press-center/press-releases/Pages/po3553.aspx [http://perma.cc/C8MX-3DF2]; *see also Atalla*, 2011 WL 2457492, at *6–7.

127. *Atalla*, at *6 (quoting the N-336 Hearing Decision).

128. *Id.* at *15–16.

129. Atalla v. U.S. Citizenship & Immigration Servs., 541 F. App'x 760, 762 (9th Cir. 2013).

The two men also lead vastly different lives. Hamdi works in the construction industry in small California cities, while his wife raises their four children from their home. In contrast, Atalla and his wife are both practicing doctors in Phoenix, Arizona. When their naturalization applications were denied, Hamdi turned to the ACLU for help, while Atalla hired a private attorney. Though they both donate to charities and volunteer in their communities, Atalla donates much larger sums, more regularly volunteers on long-term pro bono projects, sits on nonprofit boards of directors, and has travelled abroad to found a medical clinic. One would expect that an administrative inquiry into the moral character of an applicant would require a thoughtful analysis of at least some of these factors. Yet, despite the vast differences between these two applicants, USCIS rejected both claims based only on their donations to Muslim charities.

Clearly, the *Hamdi* and *Atalla* cases do not stand for a condemnation of charitable giving. The United States has subsidized charitable giving, including donations to religious institutions, through tax deductions since 1917 as a means of encouraging ongoing philanthropy.[130] In fact, immigrants have historically pointed to their volunteer service and charitable contributions when tasked with affirmatively proving their GMC to immigration judges.[131]

Nor can the *Hamdi* and *Atalla* cases be construed as government disapproval of donations to international causes or a condemnation of religious philanthropy. Between 1990 and 2004, donations from individuals in the United States to charities created or organized outside of the United States increased by 500%.[132] Religion has long driven philanthropy in the West, and the United States remains "one of the most religious industrialized societies in the world."[133] In 2011, as is the case every year, religious organizations received the largest share (nearly a third) of all charitable donations made by individuals in the United States.[134] As the scrutiny over former presidential candidate Mitt Romney's charitable giving has shown, many Mormons tithe, giving ten percent of their income or more to the Church of Jesus Christ of Latter-day Saints.[135] The Hebrew and Christian scriptures, the Quran, and theological writing dating from the fourth century all laud caring for the

130. For a discussion and legislative history of the origins and development of the charitable contribution tax deduction in the United States, see Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 848–56 (2001).

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

132. *See* David J. Berardo, *Practice Guide: How to Contribute to a Foreign Charity and Get a Tax Deduction (Terrorist Traps for the Unwary)*, 29 INT'L LEGAL PRAC. 116, 116 (2004).

133. D. Michael Lindsay & Robert Wuthnow, *Financing Faith: Religion and Strategic Philanthropy*, 49 J. SCI. STUDY RELIGION 87, 88 (2010).

134. GivingUSA, *The Annual Report on Philanthropy for the Year 2011 Executive Summary*, 57 GIVING INST. 1, 11 (2012) ("Every year, the religion subsector receives the largest share of charitable dollars. In 2011, religious organizations received an estimated 32 percent of the total."). In comparison, education organizations, human services organizations, and health organizations received 13%, 12%, and 8% respectively of American charitable contributions in 2011. *Id.* at 10.

135. Michael Paulson, *To Tithe or Not to Tithe…*, N.Y. TIMES (Jan. 29, 2012), http://www.nytimes.com/2012/01/29/sunday-review/religions-inspire-charity.html.

poor, stewardship, and giving regularly for the common good.[136] Yet, USCIS has shied away from denying naturalization applicants on the basis of undisclosed donations to Christian, Jewish, or secular organizations.[137]

Analysis of the Hamdi and Atalla cases shows that the specter of terrorism is driving administrative use of the GMC requirement for naturalization. Since 9/11, the FBI has subjected thousands of individuals to "voluntary" interviews like the one Tarek Hamdi attended in 2003, using information gained from these interviews to prosecute Muslims for making false statements on issues unrelated to terrorism.[138] In addition, the FBI has disproportionately targeted Muslim naturalization applicants for significant secondary and tertiary security checks and accompanying delays on top of the criminal background checks required for all citizenship applications.[139] DHS and the FBI justify these policies and practices using antiterrorism concerns, spurred by national public acceptance of the myth that only Muslim-committed violence is terrorism.[140]

The Council on American-Islamic Relations has challenged the legality of the FBI's post-9/11 practices, forcing USCIS to close long-outstanding naturalization applications held up at the FBI security check stage on stricter time frames.[141] Tarek Hamdi and Dr. Jamal Atalla, caught up in these delays, both received administrative denials of their naturalization applications on the basis of lack of GMC. In response to Hamdi and Atalla's appeals before the U.S. district courts, the government's position in both cases was that the applicants failed to disclose their donations to Muslim charities when asked to list all of the organizations they were associated with on their N-400 applications for naturalization.[142] This failure to disclose the donations constituted provision of "false testimony for the purpose of obtaining any [immigration] benefits," a statutory bar to establishing GMC.[143]

As recognized by the district courts in each case, the government's argument fails on all counts. As the Supreme Court held and the government admitted in *Kungys v. United States*,[144] the false testimony bar to showing GMC was added by

136. Lindsay & Wuthnow, *supra* note 133, at 88.

137. PASQUARELLA, *supra* note 20, at 46.

138. Aziz, *supra* note 77, at 442.

139. *See* Musabji & Abraham, *supra* note 18, at 84–92 (discussing the FBI National Name Check Program, implemented after 9/11 to screen applicants for U.S. citizenship).

140. *See, e.g.*, Aziz, *supra* note 77, at 451–52 (2012) (discussing the backlash against DHS and calling for the resignation of DHS Secretary Janet Napolitano for a 2009 DHS report on "Rightwing Extremism" warning of rising terrorism by right-wing domestic groups using the terms "white supremacist" and "Christian fundamentalist," contrasted with the relative lack of opposition to DHS reports on Muslim extremists).

141. Musabji & Abraham, *supra* note 18, at 84–92 (discussing the CAIR litigation challenging the FBI's name check programs that have indefinitely delayed thousands of naturalization applications, of whom "an overwhelming number" are Muslim); *see, e.g.*, Yakubova v. Chertoff, No. 06CV3203(ERK)(RLM), 2006 WL 6589892 (E.D.N.Y. Nov. 2, 2006).

142. Hamdi v. U.S. Citizenship & Immigration Servs., 2012 WL 632397, at *4; *Atalla*, 2011 WL 2457492, at *2.

143. *See* 8 U.S.C. § 1101(f)(6) (2012).

144. Kungys v. United States, 485 U.S. 759, 780 (1988).

Congress to identify applicants who lacked GMC, not to prevent false pertinent data from being introduced into the naturalization process.[145] The government's use of this false testimony bar in *Hamdi* and *Atalla* cases serves to improperly shoehorn national security concerns into the GMC requirement for citizenship. The ACLU's investigation into the CARRP program has revealed that USCIS officials were specifically instructed to find pretextual reasons for ineligibility if no substantive basis existed for applicants flagged as national security concerns.[146] In addition, if USCIS has legitimate national security concerns about a naturalization applicant, denial of citizenship is not an effective way to safeguard national security, since denied applicants are permitted to remain in the country as legal permanent residents and can even reapply for naturalization at a later date.[147]

The *Hamdi* and *Atalla* cases stand as examples of how the DHS's interpretation of naturalization requirements inhibits us from operationalizing inclusive modes of citizenship that would make a dynamic, diverse, and productive national citizenry. The fact that the underlying basis for the denial of both applications was charity to Muslim organizations suggests that citizenship in a community is not about abstract values like allegiance, charity, and compassion; rather, it is about the culturally specific ways in which those values manifest to benefit a particular community. Law and Humanities scholar Leti Volpp's analysis of citizenship as "cultural" and "anti-cultural" is useful here: "Citizenship positions itself as oppositional to specific cultures, even as it is constituted by quite specific cultural values."[148] The government's contention in both the *Hamdi* and *Atalla* cases, that it was not the donations themselves but the misrepresentations to government officials that indicated lack of GMC, seems insincere. It would not be unreasonable to speculate that had the donations in question been made to organizations like the Boy Scouts of America or the Salvation Army, there would be much less scrutiny over Atalla's and Hamdi's alleged moral defects. The fact that the donations were made to Muslim organizations arouses suspicion because it indicates sympathetic feelings toward a community that has become *persona non grata* in the post-9/11 climate. In this way, charity itself is not an absolute civic virtue; what matters is whether the group that receives such charity is one that the larger community is willing to recognize as a cultural member and therefore worthy of receiving charitable assistance.

Evidence of this bias is manifested in the "specter of terrorism"[149] tone that

145. *Id.*

146. ACLU, BLOCKING FAITH, *supra* note 78, at 3.

147. Julia Preston, *Perfectly Legal Immigrants, Until They Applied for Citizenship*, N.Y. TIMES (Apr. 12, 2008), http://www.nytimes.com/2008/04/12/us/12naturalize.html.

148. Leti Volpp, *The Culture of Citizenship*, 8 THEORETICAL INQUIRIES L. 571, 574 (2007).

149. *See* Order Granting-in-Part and Denying-in-Part Defendants' Motion for Summary Judgment at 3, *Hamdi*, 2012 WL 632397 (No. EDCV 10-894 VAP (DTBx)), ECF No. 93 ("Though the Government raises the specter of terrorism, it does not argue that Hamdi himself is a terrorist, or a supporter of terrorism, or otherwise a risk to national security. The Government argues only that Hamdi

permeated the government's arguments in the legal proceedings. As legal scholar Frederick Schauer argues, we define ourselves through the exclusion of others.[150] Schauer writes:

> We use citizenship to strengthen our sense of national community by making those who are citizens feel especially good about that status . . . . In preferring some, we of course do not prefer others, and it is in a way sad and in a way paradoxical that we hold ourselves together by fencing others out.[151]

It is in this way that immigrants shape the definition of citizenship, even as they are excluded from membership in that group.[152]

Volpp goes further in arguing that American national identity is formed in response to "trauma" (i.e., 9/11 attacks), which has resulted in the redeployment of Orientalist tropes to define "American" in opposition to "Middle Eastern, Arab, or Muslim."[153] Her point seems particularly true when we consider how different Atalla and Hamdi actually were at the time of their respective naturalization applications. They had different ethnicities and nationalities, occupied different social status levels, belonged to different family compositions, and participated in their local communities in different ways. Yet, none of these factors seemed to have any bearing on the government's consideration of whether they could demonstrate GMC. The only issue that mattered was their financial support to Muslim charities. In fact, the briefs submitted by the government in each case were virtually identical. We can read these facts to mean that, in this political moment, no amount of

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lied in an effort to gain citizenship, and therefore lacks the good moral character necessary to naturalize.").

150. *See* Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1517 (1986).

151. *Id.*

152. *See* Linda Bosniak, *Universal Citizenship and the Problem of Alienage*, 94 NW. U. L. REV. 963, 965–66 (2000).

153. This racialization of a "Middle Eastern, Arab, or Muslim" identity has been discussed extensively by scholars before and since 9/11. Among other flaws, this constructed identity ignores other aspects of identity formation and through law and policy enacts and maintains racial hierarchy. *See* Ali A. Mazuri, *Is There a Muslim-American Identity?: Shared Consciousness Between Hope and Pain*, 8 J. ISLAMIC L. & CULTURE 65, 67–68 (2003) (discussing "four identities" of Muslim Americans, recognizing that Muslim is often a secondary or tertiary identity for Muslim Americans); *see also* Margaret Chon & Donna E. Arzt, *Walking While Muslim*, LAW & CONTEMP. PROBS., Spring 2005, at 215, 221 (citing Sunita Patel, *Performative Aspects of Race: "Arab, Muslim, and South Asian" Racial Formation After September 11*, 10 UCLA ASIAN PAC. AM. L.J. 61 (2005); and Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN AM. L.J. 1, 12 (2001)) (discussing the racialization of religious difference after 9/11 and the symbolic and material enactment of hierarchy using legal initiatives). *But see* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 195 (2d ed. 2006) ("Arab Americans may be suffering from a sort of collective punishment from whites by being regarded as terrorists, as fundamentalist, as uncivilized or differently civilized, but I do not see systematic evidence suggesting they are developing an oppositional identity such as that exhibited by other minorities."). *See generally* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

assimilation to Anglo-American culture can erase a person's membership in a group that has become the "other" against which "American" is defined.

It is also important to note the practical consideration that a tremendous amount of resources were used to litigate the issue of naturalization in the *Atalla* and *Hamdi* cases, even though the stakes on both sides were relatively low. When an applicant loses an appeal of an N-400 application denial, the loss does not permanently bar him or her from citizenship.[154] The immigrant applicant remains eligible to remain in the United States as a legal permanent resident (LPR) and to reapply for naturalization at a later date.[155] Because LPRs have a broad range of legal rights, the government's denial of citizenship status coupled with the permission to remain in the country as an LPR threatens to create "denizens," a term used by Sociologist Yasemin Soysal to describe a new class of people who are neither immigrants nor citizens.[156] In writing about the social role of guest workers in Western Europe, Soysal argues that the emergence of denizens has led to a "decoupling of citizenship rights and identity."[157]

Clearly, there is some larger function served by vigorous litigation of citizenship. For both the naturalization applicant and the government, citizenship is something of value. We can read the government's efforts to prevent Hamdi and Atalla from obtaining citizenship as a way of policing the social boundaries of citizenship. If citizenship is a "test of how seriously we take the idea of the nation as a relevant community,"[158] then these case studies indicate that citizenship has not lost its value over time, as "decline-of-citizenship" theorists suggest.[159] If anything, the expansion of removal laws and general restructuring of immigration law over the past fifteen years has reshaped the definition and significance of citizenship. Citizenship remains a useful tool for shaping the composition of a national community, both by regulating who may be a "citizen" in the strictly legal sense and

154. *See* FRAGOMEN ET AL., *supra* note 10, § 22:26; *see also* Immigration and Nationality Act § 310(c), 8 U.S.C. § 1421(c) (2012) ("A person whose application for naturalization . . . is denied, after hearing before an immigration officer under section 1447(a) of this Title, may seek review of such denial before the United States district court for the district in which such person resides in accordance with chapter 7 of title 5. Such review shall be de novo . . . .").

155. *See* 8 U.S.C. § 1421(c).

156. *See* Gershon Shafir, *Introduction: The Evolving Tradition of Citizenship*, *in* THE CITIZENSHIP DEBATES: A READER 1, 18 (Gershon Shafir ed., 1998).

157. *Id.* at 20.

158. Schauer, *supra* note 150, at 1505.

159. A term borrowed from Seyla Benhabib in her book, *The Rights of Others: Aliens, Residents, and Citizens*. Benhabib uses this term to refer to theorists who argue that the rise of international human rights and the expansion of globalization has led to the "devalue" of citizenship as an element of political thought. SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS 115–16 (2004). For an example of this argument, see Peter H. Shuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, *in* IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 51 (William Rogers Brubaker ed., 1989).

by influencing who is a "member" in the social sense.[160] Not only do unjustified citizenship denials result in the maintenance of a narrowly defined citizenry, it also functions to covertly chill First Amendment rights to free speech and association by discouraging Muslim applicants for naturalization from becoming intimately involved in their own religious organizations. In this political moment, citizenship remains reserved for those who are best able to identify themselves as "American"—a label that will remain inaccessible to Muslim, Middle Eastern, and South Asian immigrants so long as the loosely defined War on Terror is waged against those groups.

## IV. LOOKING FORWARD

Since its enactment, the GMC requirement for citizenship has served to exclude "undesirable" immigrants from the polity. Though other bias-ridden restrictions on American citizenship have since been repealed,[161] GMC continues to inject subjectivity and opportunity for bias into the naturalization process. Abuse of the GMC provision should not come as a surprise—throughout American history, facially neutral requirements have been applied in a discriminatory fashion, particularly where, as here, they lack standards of application or allow for substantial decision-maker discretion or interpretive subjectivity.[162]

Because the evolution of federal immigration law over time reflects America's changing social environments for immigrants,[163] the targets of bias-based post-9/11 implementation of the GMC requirement has targeted Muslim immigrants. The farther we get from 9/11, the less our reactive policies, laws, orders, and strategies are defensible without close scrutiny and a historically conscious, socially contextual approach to national security. As Nina Crimm argued over five years ago, "[i]t is time to consider more nuanced, targeted, and tailored designs for anti-terrorism . . . strategies in order to mitigate the potential moral hazard of the current tactics."[164]

We argue that five aspects of the GMC naturalization requirement require close scrutiny and revision in order to minimize abuse of the GMC provision: (1) the purposes and uses of the GMC requirement for naturalization; (2) the appropriate burden of proving GMC; (3) the scope of decision-maker discretion; (4) the vesting of decisional authority and decision-maker oversight; and (5) the

160. For a discussion on "membership," see Joseph H. Carens, *Membership and Morality: Admission to Citizenship in Liberal Democratic States*, *in* IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA, *supra* note 159, at 31.

161. *See, e.g.*, Naturalization Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed Jan. 29, 1795) (describing the limitation of naturalization to "free white person[s]"); *see also* Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed Dec. 17, 1943) (implementing an ethnicity-specific exclusion policy).

162. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (recognizing that facially neutral employment practices can have discriminatory impact despite lack of discriminatory intent).

163. For an extensive documentation of the nativism driving changes in federal immigration law policy in America, see generally PETER SCHRAG, NOT FIT FOR SOCIETY: IMMIGRATION AND NATIVISM IN AMERICA (2010).

164. Crimm, *supra* note 71, at 626.

length of the statutory period for consideration. Finally, we propose all of these recommendations with an eye toward the gradual adoption of a universalist approach to citizenship.

### *A. Purpose and Use*

First, any reconception of the GMC requirement for citizenship must consider the contemporary purposes and uses of the requirement. In the late eighteenth century, Congress hoped that it would serve to elevate the character of and establish respect for the American name in international opinion.[165] Congress explicitly disclaimed any intended reference to religious beliefs or connection between the GMC language and religious opinions.[166] The current use of the GMC requirement to deny applicants naturalization because of charitable contributions to religious organizations undermines the original intent of the provision.

Moreover, use of the GMC requirement in this manner fails to meet purported national security goals. When the government punishes documented charitable giving by Muslim immigrants to large Muslim charities in fulfillment of their religious obligations, it unintentionally encourages secretive donations to less reputable or lesser-known charities that may be under the government's radar. Furthermore, denial of a legal permanent resident's naturalization application serves only as a denial of an immigration benefit and does not trigger removal proceedings or criminal consequences.[167] To the extent that national security concerns animate a finding that these legal permanent residents lack GMC, USCIS generally allows immigrants denied naturalization to stay in the country as LPRs and reapply for citizenship in five years with an entirely new statutory period for consideration.[168]

In addition, alternative paths exist to address concerns about terrorist financing. Highly controversial "material support for terrorism" statutes already provide a basis for DHS to investigate,[169] charge, and prosecute individuals to meet counterterrorism goals related to domestic financing of terrorist activities abroad. If DHS can gather enough evidence to prosecute individuals on this basis, national security concerns should be addressed with those statutes and not imported into the naturalization process. Rather than allow the GMC provision to be used by USCIS in discriminatory ways, Congress should clearly set forth the purpose and permissible uses of the GMC requirement to prevent abuse.

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165. *See supra* notes 36–38 and accompanying text.

166. *See supra* notes 41–43 and accompanying text.

167. *See* USCIS, A GUIDE TO NATURALIZATION, *supra* note 8, at 12 (making no mention of deportation or criminal proceedings following denial of naturalization of application in the "Frequently Asked Questions" section of the guide to naturalization procedures).

168. *See id.*

169. For a critique of the Material Support laws, see Michael G. Freedman, *Prosecuting Terrorism: The Material Support Statute and Muslim Charities*, 38 HASTINGS CONST. L.Q. 1113 (2010).

### *B. Burden of Proof*

Formulation of a workable GMC requirement for naturalization should also pay careful attention to the way burdens of proof affect the implementation of the GMC requirement. Applicants for naturalization generally must demonstrate their eligibility for naturalization by a preponderance of the evidence.[170] In its briefs in the *Atalla* and *Hamdi* cases, however, the government argued that courts have required applicants to prove their good moral character by "clear, convincing, and unequivocal evidence."[171] The district courts in both cases rejected this argument, affirming that an applicant's burden of proving his or her good moral character, as with all other naturalization eligibility requirements, remains "by a preponderance of the evidence." [172]

Because one of the statutory bars to showing GMC is "providing false testimony for the purposes of gaining an immigration benefit,"[173] the burden of proving GMC by a preponderance of the evidence already weighs heavily on naturalization applicants. In Hamdi's case, for example, every answer in Hamdi's unrecorded naturalization interview was held up for scrutiny as false testimony under the aegis of a GMC determination. Hamdi and Atalla had to prove, by a preponderance of the evidence, that every word they uttered or wrote in their naturalization interviews or on their applications was objectively true, and that any misstatements or inaccuracies were subjectively not offered for the purposes of gaining an immigration benefit.[174] Should the Government gain traction with its argument for a higher burden of proof at naturalization, one must wonder how any applicant could prove GMC with clear and convincing evidence. Congress should clarify by statute that the "preponderance of the evidence" standard applies to the GMC requirement for naturalization.

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170. *See* United States v. Hovsepian, 359 F.3d 1144, 1168 (9th Cir. 2004) (stating that it is "plainly true" that a naturalization applicant bears the burden of proving that he or she meets the requirements for naturalization by a preponderance of the evidence); 8 C.F.R. § 316.2(b) (2015) ("The applicant shall bear the burden of establishing by a preponderance of the evidence that he or she meets all of the requirements for naturalization . . . .").

171. *See, e.g.*, Brief for Appellants at 31–32, Atalla v. U.S. Citizenship & Immigration Servs., 541 F. App'x 760 (2013) (No. 11-16987). As support for its argument in these cases, the Government primarily relied on an interpretation of federal precedent indicating that naturalization applicants are required to establish all aspects of his or her eligibility for citizenship by clear and convincing evidence. *See, e.g.*, Dicicco v. INS, 873 F.2d 910, 915 (6th Cir. 1989) (alien plaintiff must establish his eligibility for citizenship by clear, convincing, and unequivocal evidence); *see also* Berenyi v. Dist. Dir., 385 U.S. 630, 637 (1967) ("[I]t has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect.").

172. *See, e.g.*, *Hamdi*, 2012 WL 632397, at *10 (holding that *Berenyi*, 385 U.S. 360, relied upon by the Government to argue for a "clear and convincing" standard, applies when the Government seeks to strip a person of citizenship, but not to naturalization applicants); *see also Hovsepian*, 359 F.3d at 1168; 8 C.F.R. §§ 312.6(a)(7), (b).

173. *See* Immigration & Nationality Act § 101(f)(6), 8 U.S.C. § 1101(f)(6) (2012).

174. *See Hamdi*, 2012 WL 632397, at *10; *Atalla*, 2011 WL 2457492, at *13–15.

### C. *Scope of Discretion*

A third issue that should be addressed with a reformulated GMC requirement is the scope of discretion granted to the decision maker evaluating the character of naturalization applicants. While statutory bars preclude applicants from establishing good moral character, USCIS adjudicating officers may also bar an applicant's naturalization by finding that he or she lacks GMC as a discretionary matter.[175] To make discretionary findings, adjudicating officers are instructed to consider all factors relevant to a case on a case-by-case basis, in relation to "U.S. law, Federal regulations, precedent decisions and their interpretations, and General Counsel opinions."[176] Congress has never articulated a definition for GMC, leaving the decision maker with entirely too much discretion to project and apply his or her own morality when making a GMC determination. Reformulation of the GMC requirement should curtail the scope of discretion allowed to decision makers—for example, by advancing a positive definition of GMC or by promulgating an exhaustive list of bars to showing GMC.

### D. *Decisional Authority*

In addition to the scope of discretion, GMC reform should also consider the identity of the decision maker vested with the authority to determine whether applicants have the requisite character for citizenship. Before the 1990 transfer in decisional authority from federal district courts to USCIS, the naturalization process was considered judicial rather than administrative.[177]

Though jurists in the 1950s questioned their expertise in making GMC determinations,[178] judicial naturalization has the advantage of transparency. Publicly available judicial opinions allow for public oversight of GMC determinations through litigation as community conceptions of "good moral character" change over time. This is particularly desirable in light of CARRP's "deconfliction" process, wherein USCIS officers are required to work with the law enforcement agency in possession of "national security" information of the applicant—usually the FBI—to determine whether the law enforcement agency believes the applicant should be granted the immigration benefit sought.[179] Though administrative determinations may have efficiency benefits, courts have determined that GMC should be measured by the standard of "average citizens of the community in which the applicant resides."[180] The decision maker vested with the authority to make GMC determinations must have the expertise to weigh GMC in relation to relevant legal sources, but must also have the cultural competency to judge applicants by the standards of their respective communities. Congress should consider transferring

175. USCIS, FIELD MANUAL, *supra* note 22, § 73.6(d).
176. *Id.* § 73.6(d)(3).
177. *See supra* notes 49–53, 65–67 and accompanying text.
178. *See supra* note 51 and accompanying text.
179. PASQUARELLA, *supra* note 20, at 1.
180. USCIS, FIELD MANUAL, *supra* note 22, § 73.6(a).

decisional authority back to the judiciary, or providing some means of public oversight and accountability over the administrative determination process.

### *E. Statutory Period*

Last, reform of the GMC requirement should also consider the statutory period for consideration. Under the INA and federal regulations, the statutory period is five years, though consideration of conduct and acts outside the statutory period is "specifically sanctioned by law if the applicant's conduct during the statutory period does not reflect reform of character or the earlier conduct is relevant to the applicant's present moral character."[181] The USCIS Adjudicator's Field Manual therefore instructs adjudicators to focus on conduct during the statutory period, but to extend the inquiry to "the applicant's conduct during his or her entire lifetime."[182]

As discussed by Kevin Lapp in his article, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, the immigration service and many courts have historically taken "a redemptive view toward prior criminal conduct" when evaluating an applicant's GMC.[183] Focusing on character reform during the statutory period, courts have found current GMC despite preperiod criminal conduct such as armed robbery, breaking and entering with intent to commit larceny, and manslaughter.[184]

Though recognition of reform is an admirable principle, the legal fiction created by the five-year statutory period causes inconsistent and undesirable outcomes. For example, the BIF donation focused on in the *Hamdi* case was made in 2000, two years before the 2002–2007 statutory GMC determination period relevant to Hamdi's 2007 naturalization application.[185] Hamdi's case thus shines light on a striking predicament—whether and how a naturalization applicant can demonstrate to an examiner's satisfaction that he or she has "reformed" from a charitable donation made seven or more years prior. The disparity between the options available to applicants who have a prior history of violent criminal conduct and applicants who previously made uninformed donations to charity shows that the concept of reform or redemption assists some naturalization applicants while leaving others permanently banned from naturalization. To offset these inconsistent results, Congress should either strictly limit the statutory period for consideration of GMC to the five years prior to application, or carefully circumscribe the

181. USCIS, FIELD MANUAL, *supra* note 22, § 73.6(a) (citing Immigration and Nationality Act § 316(e), 8 U.S.C. § 1427(e) (2012); and 8 C.F.R. § 316.10(a)(2)).

182. USCIS, FIELD MANUAL, *supra* note 22, § 73.6(a).

183. Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1587–88 (2012).

184. *Id.* at 1588 & nn.107-08 (citing Pignatello v. Att'y Gen., 350 F.2d 719 (2d Cir. 1965); and Dadonna v. United States, 170 F.2d 964, 966 (2d Cir. 1948)).

185. *See Hamdi*, 2012 WL 632397, at *4.

situations in which examiners or judges may consider conduct preceding the statutory period.

### *F. Adoption of a Universalist Approach to Citizenship*

With the emergence of unprecedented globalization, many theorists have called for a new understanding of citizenship. At the core of this new theory of citizenship is the concept of "universal personhood," which replaces the nation-state as the defining site of citizenship.[186] Advocates of this position include scholars such as Linda Bosniak, who argues that "we should 'maintain[] solidarity with the powerless' all over the world regardless of their citizenship."[187] Some have taken the less radical view of "modest cosmopolitanism," arguing that "despite our duties of justice to all people, there will remain individual states, and citizens within those states have more, stronger, and different duties to comembers than to nonmembers."[188]

Within the vast theoretical landscape of citizenship, we situate our ideal society within the universalist school. Nation-based notions of citizenship are necessarily accompanied by exclusionist politics, which are too easily and too often influenced by racism, prejudice, and xenophobia. However, we recognize that our legal system and prevailing political climate make an open-borders system unlikely to manifest in the absence of some dramatic change. To that end, we support the modest cosmopolitanism approach as a short-term strategy for reaching the long-term goal of postnationalist citizenship. That is, a sincere embrace of multiculturalism would require the gradual and persistent expansion of citizenship—both as a legal right and as a civic value—to more and more groups until a nationalist vision of citizenship would no longer be sustainable or even desirable. While the United States portrays itself as the "melting pot," we would argue that, at least when it comes to the dispensation of legal rights, federal immigration policy has not sought to include marginalized groups in the national community of citizens. Our case studies demonstrate that the federal government has imported the prevalent anti-Muslim prejudice from the sociopolitical sphere into the legal arena, the effect of which is to reserve citizenship—in both its legal and civic sense—for those who comply with dominant social pressures.

## CONCLUSION

The *Hamdi* and *Atalla* cases reveal volumes about the nature of citizenship in the present political moment. Not only do they demonstrate the ways in which immigration policy continues to reflect foreign policy prejudices and ambitions, they

186. Shafir, *supra* note 156, at 20.

187. *See* Matthew Lister, *Citizenship, in the Immigration Context*, 70 MD. L. REV. 175, 196 (2010) (quoting Linda Bosniak, *A National Solidarity?: A Response to David Hollinger*, *in* IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY 101, 104 (Noah M.J. Pickus ed., 1998)).

188. *Id.* at 178–79. For more on cosmopolitanism, see JON MANDLE, GLOBAL JUSTICE 88 (2006); and SAMUEL SCHEFFLER, BOUNDARIES AND ALLEGIANCES 111–30 (2001).

stand as stark examples of how centuries-old anxieties about the foreigner permeate contemporary national security concerns. The national trauma of 9/11 has resulted in the social criminalization of entire ethnic groups and religions. Further, these cases indicate that where the criminal justice system fails to physically remove unwanted individuals from the community, the civil immigration system acts to remove those undesirables from the political community by withholding the civic rights that accompany citizenship. In so doing, the federal government is able to police the boundaries of what it means to be a citizen and restrict which individuals may call themselves Americans. Until our society is able to embrace the notion of an open-borders global community, we advocate for the reconsideration of "good moral character" as a requirement for naturalization. If the GMC requirement is to remain intact, it must at least be applied in such a way that it achieves its intended purpose: to enhance the meaning of what it means to be "American" without prejudice to the faiths and ethnicities of immigrant applicants.