

LOVE AND WAR: FAMILY MIGRATION IN TIME OF NATIONAL EMERGENCY

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ABSTRACT

Is there a constitutional right to family-sponsored immigration? What does love have to do with it? Is family immigration about rights of citizens or interests of aliens? Can the nation invoke the war justification for regulating family immigration by excluding enemy aliens en masse? Can the nation stigmatize alien family members as a potential security risk only by using their nationality? Is it national discrimination?

The 9/11 Commission found that the INS failed to see the nexus between immigration policies and national security; it failed to understand that the presence of a terrorist in the country may, by itself, be a lethal weapon. The Commission noted that “for terrorists, travel documents are as important as weapons.”

This article seeks to map the subject of migration in times of war and national emergency. It explores this issue through one type of migration – family migration—as it reflects the interests of foreigners but also the rights of citizens and represents the most difficult clash arising between civil liberties and national interests. The main argument is that despite the strong case for individual rights, admission policies should be seen as an important counterterrorism measure. Admission of family members in time of war and national emergency should be regulated by setting a ‘Presumption of Dangerousness’ stating that every non-resident enemy alien—or non-resident alien under the rule of states sponsoring terrorism—may present a security risk. But while the traditional laws of war as applied during the two World Wars banned any contact between enemy aliens in a categorical and collective manner, recent developments in international human rights law require mitigation of these outdated prohibitions. I thus suggest sustaining the presumption of dangerousness yet enabling it to be rebutted in particular

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cases in order to achieve individual justice. Continuing in this direction, I suggest a revision to the Immigration and Nationality Act.

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INTRODUCTION

The “War on Terror” and ongoing international armed conflicts in Africa, Asia and the Middle East have brought the clash between individual rights and rights of nations back to the forefront of legal debate. Immigration policies are a challenging arena in which to balance human rights against national security needs. Terrorism manifests itself not in a single, isolated event occurring in a vacuum. Terrorism requires long preparation, intelligence gathering and familiarity with the adversary’s way of life. In light of that, immigration laws and policies have to assert themselves as key partners in counterterrorism efforts. The 9/11 Commission found that several federal systems had failed to detect the entry of terrorists and thus were not able to prevent the attacks; a significant failure occurred in the implementation of immigration policies.¹ The Commission reports that the Immigration and Naturalization Service (INS) “had perhaps the greatest potential to develop an expanded role in counterterrorism;”² but instead, the INS focused on detecting entry into the country of criminals and illegal immigrants rather than potential terrorists.

This article seeks to map the subject of migration in times of national emergency. It explores this issue through family-sponsored migration as it touches upon the interests of foreigners, the rights of citizens and the difficult clash between individuals seeking happiness in mutual love and national interests. The main argument is that admission policies should be seen as an important counterterrorism measure. I argue that in today’s emergencies, as in classical war, love and family may be exploited by individuals against the nation’s interests; family may become weapons in the hands of the enemy. Therefore, family migration in time of national emergency should be regulated by establishing a “Presumption of Dangerousness” stating that every non-resident enemy alien – or non-resident alien under the rule of states sponsoring terrorism – may present a security risk. But while traditional laws of war, applied during the two World Wars, banned any contact between enemy aliens in a categorical and collective manner – forbidding family migration along with trade, student exchanges and tourism – recent developments in international human rights law require mitigation of these outdated prohibitions. I thus argue for sustaining the presumption of dangerousness but providing for its refutation in special cases for the purpose of achieving individual justice.

The article proceeds in four parts: Part I takes a journey into the realm of love and war by addressing five historical and mythological legends of love

1. See THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 80 (2004) (henceforth: “the 9/11 Commission”). The Commission inquired into how the terrorists were admitted into the U.S., how they managed to stay so long and how some of them even succeeded to become naturalized. This article addresses the first issue of admission policies.

2. *Id.*

and war. These tales show how a private love story between foes may affect an entire nation. They also outline two types of security concerns: (1) exploitation of love and family ties for political purposes and (2) inevitable conflicts between family loyalty and national loyalty.

Part II brings the discussion back to reality by describing a modern case of love and war. It depicts how family migration from the West Bank and Gaza Strip to Israel has been exploited to spread terror within Israel. The Israeli experience also demonstrates a rare situation where legislators have regulated wartime family migration by imposing strict categorical restrictions on migration of people residing in the West Bank and Gaza Strip. This regulation was challenged in the Israeli Supreme Court as representing an unlawful hurdle to what the petitioners termed the “right to love.” The Court’s decision deals with the tension between immigration policies connected with emergencies and the right to form a family life with a foreign spouse. The Court reinforced family-sponsored migration as a constitutional right but temporarily curtailed its protection based upon national security needs.

Part III turns to the philosophy of war. It explores the philosophical foundations of the emergency acts banning contacts between enemy aliens which have emerged in many countries during the Twentieth Century. In particular, I examine the prohibition imposed on migration of enemy aliens. Taking a Kantian approach, I suggest an updated legal rule based on the presumption of dangerousness. Under this rule, subjects of warring nations can be presumed, en masse, to pose a threat to national security *unless* refuted in an individual case. This part also sketches the justifications for such a presumption and its refutability and suggests a revision to the Immigration and Nationality Act (INA) categories of inadmissibility.³

Part IV analyzes the standing of the refutable presumption of dangerousness according to constitutional standards. The discussion begins with the right to family life: should this right encompass the freedom to form a family with an alien within the state’s territory? To this question I respond “yes.” However, I argue that infringement of family migration based on security needs may sometimes be constitutionally permissible. I then ask whether imposing restrictions on migration of aliens of a particular nationality should be regarded as national discrimination. My response is, again, “yes.” Yet I recognize that nationality may sometimes be a legitimate criterion—and an inevitable reality—in immigration policy.

I. A JOURNEY INTO THE REALM OF LOVE AND WAR

A. The Dilemma of Love and War

Katharine

3. See 8 U.S.C.A. §1182 (2008).

Is it possible dat I sould love de enemy of France?

King Henry V

No; it is not possible you should love the enemy of France, Kate; but, in loving me, you should love the friend of France; for I love France so well . . . and, Kate, when France is mine and I am yours, then yours is France and you are mine.

WILLIAM SHAKESPEARE, HENRY V, act V scene II⁴

Henry V's courtship of Katharine is considered one of the best love scenes ever written by Shakespeare. The French had suffered a catastrophic defeat on the Battle of Agincourt in October 1415—one of the greatest battles in history—at the hands of the English forces led by Henry V.⁵ The scene takes place in the French Royal Palace. Standing near King Charles VI, her father, Henry beguiles lovely Princess Katharine and proposes to her. “I know no ways to mince it in love but directly to say ‘I love you,’” Henry confesses, “You have witchcraft in your lips, Kate . . . Do you like me, Kate?” Katharine hesitates. She feels something is wrong with Henry's proposal. She challenges, “Is it possible that I shall be in love with an enemy of my country?” Henry has no choice. He has to admit that it is a very problematic situation. He then takes a different course, declaring that he is not the enemy of France—“in loving me, you should love the friend of France.”⁶ Henry kisses her, they get married and Katharine gives birth to Henry VI, the crown prince. Their marriage leads to a peace agreement between France and England, the Treaty of Troyes.

There is no doubt about Henry's goal—the romance was just an excuse. Henry's purpose in marrying Katharine was guided by *realpolitik*⁷ for he was plotting to expand his political influence and hold over French territories.⁸ It was all about politics: power, lands, glory. The marriage was a political solution. Nonetheless, Henry chose to bind the political marriage with love—his insistence on being loved by Katharine turned it into a romantic issue. Katharine grasped the challenge right away. Marrying Henry is one thing—loving him is one step forward. How can she love someone who destroyed her country and subdued her family? The days of royal marriage as a means of making peace are over, but this scene epitomizes, in a nutshell, the

4. THE COMPLETE WORKS OF WILLIAM SHAKESPEARE 515-18 (1994). The play *Henry V* provides a fascinating glance about the laws of war in late medieval Europe.

5. *Id.*; see also THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES (1993).

6. For historical evidence of this drama, see J. Hamilton Wylie, *Memorandum Concerning a Proposed Marriage between Henry V and Catherine of France in 1414*, 29(114) ENGLISH HISTORICAL REV. 322 (1914).

7. WEBSTERS NEW COLLEGIATE DICTIONARY 962 (7th ed. 1973): “Politics based on practical and material factors rather than on theoretical or ethical objectives.”

8. Shakespeare, *supra* note 4.

dilemma of love and war.⁹

B. *Lethal Love*

Love stories between enemies have often been accompanied by the fear and suspicion that the romance is not a case of true love but of exploitation; that love is only a pretense, used to infiltrate enemy lines and thus plant a secret agent in the enemy's midst. Most James Bond films, particularly *From Russia with Love*, were crafted according to this scenario.¹⁰ The enemy wants to defeat you and he won't hesitate to use any means for achieving it—including a sexy Russian agent. Ian Fleming's plot was modeled on a well-known precedent: the remarkable biblical story of Samson and Delilah. Samson, a Hebrew hero, falls in love with Delilah, an attractive Philistine woman, during a period of conflict between the Israelites and the Philistines.¹¹ The Philistines are afraid of Samson; hence, they approach Delilah and induce her with eleven hundred silver coins to find the secret of Samson's strength.¹² Focusing on the mission, Delilah uses her charm and beauty: "How canst thou say, I love thee, when thine heart is not with me?"¹³ Samson, succumbing to Delilah's implorations, reveals his secret but she at once delivers the information to her countrymen.¹⁴ Samson is captured and their affair ends with his dramatic, vengeful suicide.¹⁵

A similar end concludes the affair between Attila the Hun and Odabella. Attila, the leader of the Hunnic Empire and a fierce warrior, conquered and cruelly ravaged significant parts of the Roman Empire.¹⁶ The Roman Caesar could hardly subdue Attila in the field and therefore approached Odabella, an alluring woman whose family was slaughtered by Attila and who was seeking revenge.¹⁷ Attila was smitten by Odabella and proposed to her. On the night of their wedding, Odabella killed Attila by putting poison in his cup while the Roman troops invaded the Hun's camp.

Another interesting drama is that of Judith and Holofernes as it appears in the Apocryphal book of Judith.¹⁸ Holofernes was the commander of the army

9. *Id.*

10. The film is based on a famous novel, IAN FLEMING, *FROM RUSSIA WITH LOVE* (1957).

11. Judges 13:1, 16:4 (King James).

12. *Id.* at 16:5.

13. *Id.* at 16:15-16.

14. *Id.* at 16: 17-21.

15. *Id.* at 16: 28-31.

16. For Attila's story see MICHAEL A. BABCOCK, *THE STORIES OF ATTILA THE HUN'S DEATH: NARRATIVE, MYTH, AND THE MEANING* (2001).

17. The story of Attila and Odabella is the focus of a famous opera by Giuseppe Verdi, *Attila*. There is, however, a dispute about the real historical reason for Attila's death and about the love story's credibility. See MICHAEL A. BABCOCK, *THE NIGHT ATTILA DIED: SOLVING THE MURDER OF ATTILA THE HUN* (2005).

18. The book is part of the Septuagint and the Old Testament of the Bible. As in the story of Attila's death, historians are divided on the historical reliability of Judith's story. For Judith's story see CAREY A. MOORE, *JUDITH* (1995). For historical review see E. L. Hicks, *Judith and Holofernes*, 6 *J. OF HELLENIC STUD.* 261 (1885); Roger J. Crum, *Severing the Neck of Pride: Donatello's: 'Judith*

sent by Nebuchadnezzar, King of Assyria. He had conquered most of the nations around Israel and brutally shattered their temples. The Israelites were vainly seeking a way to save the Temple. Judith, a brave and good-looking Jewish woman, arrived at Holofernes' camp. She ingratiated herself to him while promising not only sexual satisfaction but also valuable intelligence about the Israelites. While he slept, she beheaded him, put his head in her basket and returned to her kinsmen. Having lost their leader, the Assyrians left the region, leaving the Temple intact.

C. *Conflicting Loyalties*

In examining the mythology, we soon realize that not all love affairs between enemies are conspiracies. Sometimes we meet a case of true love, which turns out to be a risky affair due to the intimidation directed at one partner by his or her nation's loyalists. Let's return to Samson. Samson's first wife was a Philistine woman from Timnath.¹⁹ On the day of the wedding feast, Samson made a wager with the Philistines by posing them a conundrum: "Out of the eater came forth meat, and out of the strong came forth sweetness."²⁰ The Philistines failed to solve Samson's riddle.²¹ With no other choices left they turned to Samson's spouse and threatened her—"entice thy husband, that he may declare unto us the riddle, lest we burn thee and thy father's house with fire."²² Samson's wife loved him but her family was being threatened.²³ She then came to Samson and pleaded:

Thou dost but hate me, and lovest me not: thou hast put forth a riddle unto the children of my people, and hast not told it me . . . [then] he told her, because she lay sore upon him: and she told the riddle to the children of her people. And the men of the city said unto him . . . What is sweeter than honey? What is stronger than a lion? And he said unto them, "If ye had not plowed with my heifer, ye had not found out my riddle."²⁴

Another drama appears in *Aida*, the opera by Verdi. The libretto tells the story of Aida – an Ethiopian Princess captured by the Egyptians and serving as a slave in their royal palace – and Radamès, commander in chief of the Egyptian army, who is loved by Amneris, the Princess of Egypt. The story takes place during a war between Egypt and Ethiopia. The Ethiopian King Amonasro, captured by Radamès, is taken to Egypt as a prisoner of war.

and Holofernes' and the Recollection of Albizzi Shame in Medicean Florence, 22 *ARTIBUS ET HISTORIAE* 23 (2001).

19. Judges 14:1-3 (King James).

20. *Id.* at 14:14.

21. *Id.*

22. *Id.* at. 14:15.

23. *Id.*

24. *Id.* at 14:16-18.

When Amonasro learns that Radamès is in love with his daughter, he asks her to seduce Radamès and make him tell her the route that the Egyptians plan to take in their battle against the Ethiopians. Aida struggles between her love to Radamès and her loyalty to her people:

Amonasro

Our people even now are ready for battle.
All is prepared, and we shall conquer.
One thing is lacking – for me to know.
The route that the enemy will follow.

Aida

A horrid thought!
What are you asking of me? No, never!

Amonasro (*repulsing her*)

You call yourself my daughter!
Waves of blood are flowing over the vanquished cities.
See – from the black swirls the dead arise.
They point at you and cry, “Because of you, our Country dies!”

Aida

Have pity! Father, have pity!

Amonasro (*repulsing her*)

You are not my daughter!
Remember that a whole People, conquered and suffering can rise
again through you.

Aida

O fatherland, what a price I must pay, for thee!²⁵

This monumental drama has a tragic end. Aida eventually chooses loyalty to her father and her fatherland.²⁶ She seduces Radamès and reveals the Egyptians’ military plan to her father.²⁷ Radamès, who has betrayed Egypt for Aida’s love, is buried alive in an underground tomb, into which Aida has secretly entered.²⁸ They die in one another’s arms.²⁹

D. Choosing the Right Methodology

While these dramas are often treated as love stories, a contemporary

25. ANTONIO GHISLANZONI, *AIDA* (1956). For brevity, part of the dialogue has been omitted.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

reading of the text raises a war puzzle. Is Samson a soldier? Is Delilah a civilian? It might not be so clear after all. Delilah's affair with Samson was part of a national mission. Delilah was recruited by the Philistines and acted under their command.³⁰ She did not wear a uniform, but rather was disguised as a civilian. Is she, then – in our modern terminology – an “unlawful enemy combatant?” Is she like the German spies uncovered in Florida during World War II?³¹ What about Samson: he held top secret information – the source of his strength – a lethal weapon created by God himself.³² He impetuously revealed it to a woman he loved.³³ Was this treason? Samson was a Hebrew hero but was not an official army officer. Was he a soldier? As a soldier, he would be a legitimate target for killing under the law of war.³⁴ Was Delilah's deadly love an act of war? Who was the target: Samson or the whole Hebrew nation? What about the woman from Timnath: She married Samson but betrayed his trust. It had nothing to do with military secrets – her family was under severe threat. Could she claim a necessity defense? What about Judith: she killed Holofernes when the Israelites were under imminent attack. Was it self-defense or a preemptive strike? Judith was not a spy. She had a specific mission: kill a brutal conqueror who sought to wipe her country off the map. Was her act similar to Israel's “targeted killing policy?”³⁵ We may see all these stories differently once analyzed under the lens of modern laws of war.

History has criticized Delilah for her heartless betrayal.³⁶ It is true: Delilah betrayed Samson's love, and worse, she did it for money. Yet putting aside her mercenary motives, Delilah did exactly what was expected of her; she remained loyal to her nation in time of war.³⁷ The Philistines were threatened by Samson's strength. Had the Book of Judges been written by a Philistine, Delilah would have been glorified for her patriotic valor, like Judith.³⁸ Moreover, history has been misusing the story of Delilah as a general warning against women. Many paintings on this subject emphasize the seductive woman's use of erotic relations in order to humiliate men.³⁹

30. Judges 16:5 (King James).

31. See *Ex Parte Quirin*, 317 U.S. 1 (1942) (holding that eight German saboteurs who entered the U.S. are unlawful combatants and hence are not entitled to access to federal courts).

32. Judges 13:3-5 (King James).

33. *Id.* at 16:16-17.

34. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 198 (2004).

35. For Israel's ‘targeted killing policy’ see HCJ 769/02 the Public Committee against Torture in Israel v. The Government of Israel (Dec. 14, 2006).

36. For a review, see MIEKE BAL, *LETHAL LOVE: FEMINIST LITERARY READINGS OF BIBLICAL LOVE STORIES 37-67* (1987) (Bal criticizes popular culture for misusing the story of Delilah against women and provides an alternative feminist reading of the text).

37. The story occurred when the Israelites were under Philistine subordination. The text does not clearly identify Delilah as a Philistine but only as a woman in the Valley of Sorek. Still, most biblical commentators and historians agree that she was a Philistine.

38. For an interesting analysis, see Susan Ackerman, *What if Judges Had Been Written by A Philistine?*, 8(1/2) *BIBLICAL INTERPRETATION* 33 (2000).

39. For a review, see Madlyn Kahr, *Delilah*, 54(3) *ART BULLETIN* 282 (1972); Madlyn Kahr, *Rembrandt and Delilah*, 55(2) *ART BULLETIN* 240 (1973).

Composers, artists, poets and priests have blamed women for abusing sex to control men, for being *femmes fatales*. What has been left out all along is that all these women were the enemy. These episodes are not about love but about war. During war, nations fight with all they have—planes, tanks, swords, knights and human beings. Delilah, Odabella and Judith were all on a war mission; they were not interested in a relationship.

The methodology applied in the discussion of love and war can affect our views about these stories. If Samson and Delilah's story is merely a love story, then it is easy to see Delilah as a disloyal witch. Yet, if the love story is a cover for a war mission, we can easily perceive Delilah as a brave warrior. Popular history, however, has declined to grant Delilah a medal of honor. We have a clear image of what a soldier looks like: a man who wears a uniform, high-laced boots and a steel helmet. Delilah is different: She is a voluptuous woman using sexual charm while dressed in ordinary clothes. She subdues the enemy not with a sword but with love. Is she not a warrior, then? Is war only about machine guns?

E. *A Paradox of Love and War*

The connection of love with war raises a paradox related to the protection of nations. In *The Social Contract*, Rousseau indicates that marriage is a civil contract “without which society cannot even subsist.”⁴⁰ In marrying someone we promise a lifelong commitment. We promise to love each other for better or worse. At the same time, by declaring a pledge of allegiance, we promise to be loyal to the “flag of the United States of America, and to the Republic for which it stands, one Nation under God . . .”⁴¹ In most countries, as part of the naturalization process, newcomers have to swear an oath of allegiance to their host country and to defend it against all enemies.⁴² Defending “persons and goods of each associate” is part of the social contract.⁴³ Rousseau, however, did not anticipate a possible clash between the Civil Contract and the Social Contract, between the loyalty of love and group loyalty.⁴⁴ Yet, what if my beloved is among the enemy? Should I defend her or my country? This is not an easy question. In the *Iliad*, King Agamemnon chose to sacrifice his daughter Iphegenia to his war mania; Prince Paris, on the other hand, chose Helen—even though he could have known his act may endanger Troy.

Any conclusion drawn from history and mythology to modern times might

40. See JEAN J. ROUSSEAU, *THE SOCIAL CONTRACT* (translated by G.D.H. Cole, 2007, Book IV, Ch. 8) (henceforth: “ROUSSEAU, *THE SOCIAL CONTRACT*”).

41. On the pledge of allegiance, patriotism and citizenship see PLEDGING ALLEGIANCE: THE POLITICS OF PATRIOTISM IN AMERICA'S SCHOOLS (Joel Westheimer ed., 2007).

42. See 8 U.S.C. §1448.

43. See ROUSSEAU, *THE SOCIAL CONTRACT*, *supra* note 40 at book I, ch. VI.

44. For a comprehensive discussion on loyalty and its different dimensions see GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 25-40 (1993).

be of course intellectually problematic. Yet it does not mean that history and mythology have no lessons to teach us. This is not a philosophical and historical inquiry though. The issue at stake is legal: balancing love and loyalty between persons belonging to warring nations with the threat posed to these nations, understanding the differing motives and considerations and offering legal solutions to these dilemmas.

II. LOVE AND WAR: ISRAEL AS A CASE STUDY

Israel provides a fascinating modern instance of the love and war saga. It has everything needed for good drama: two warring peoples fighting for the same land, a frontier separating families, love stories during a conflict which prelude acts of terrorism and tragic endings for both sides. I first describe the armed conflict between Israel and the Palestinians. I then move to cases of exploitation of family migration to spread terror, and present Israel's controversial legislative response. I conclude this section with a discussion of a recent decision of the Israeli Supreme Court that upheld this legislative.

A. *Family Migration, Terror and the Israeli-Palestinian Conflict*

Israel's War of Independence caused the separation of extended families that had lived together in Palestine. Palestinians who currently live across the Israeli-Palestinian border share the same ethno-cultural origin, but even more so they share immediate family ties. Following the Six Day War, these ties were significantly strengthened but the outbreak of an armed conflict in late September 2000 between Israel and the Palestinians placed a severe burden on these relations.⁴⁵ In the course of the conflict, immediate family ties sometimes became a means for spreading terror inside Israel. During the Passover holiday in March 2002, a suicide bombing occurred in a restaurant in Haifa.⁴⁶ The terrorist was a Palestinian from the West Bank who held an Israeli ID following his migration, sponsored by an Israeli Palestinian citizen.⁴⁷ During the next months, twenty-six Palestinian family immigrants were involved in terror attacks within Israel; forty-five people were killed and dozens wounded.⁴⁸ Because of the security fence that prevented easy entry from the Palestinian territories, family migration became the main legal path for terrorists to enter Israel.⁴⁹

45. The conflict has been defined by the Israeli Supreme Court as an "International Armed Conflict," governed by the laws of war. See H CJ 769/02 Public Committee, *supra* note 35.

46. See James Bennet, *Bomber Strikes Jews and Arabs at Rare Refuge*, N.Y. TIMES (April 1, 2002).

47. See Dan Izenberg, *Terror Ploy May Have Blown Family Reunification*, JERUSALEM POST (April 11, 2007).

48. See Shachar Ilan, *Missing Documents and other Excuses*, HAARETZ (June 24, 2007) [Hebrew].

49. Another route is temporary worker status. Under Israeli law, this is not an immigration status as workers stay in Israel for a limited time, do not hold an Israeli ID, have limited freedom of

In light of these events, the General Security Services (GSS) urged the Israeli government to ban the immigration—family migration included—of persons residing in the Palestinian territories. The GSS held that family migration from the Palestinian territories posed a severe threat to national security. This threat took two forms. First, family migration was fictitious from the start; the immigrants arrived in Israel with the intent to misuse their immigration status for perpetrating acts of terrorism.⁵⁰ Second, family migration became dangerous only after entry into Israel, when terrorist groups intimidated the immigrants—as well as their families left behind—and demanded cooperation.⁵¹ Family members were attractive targets of intimidation because their status as Israeli residents provided freedom of movement in Israel and across the border for family visits in the Palestinian territories. The GSS, however, could identify only twenty-six cases of persons who exploited their immigrant status for terrorism. No official statistics exist, but Israel's Attorney General estimated that more than 120,000 Palestinians have been admitted on the basis of family migration since the 1994 Oslo Accords.⁵² This relatively low percentage of actual terrorists among Palestinian immigrants raises a dilemma: should Israel ban the entry of so many *only* because of a few rotten apples?

B. *Regulating Family Migration in Times of National Emergency*

On May 12, 2002 the Israeli government adopted a new policy.⁵³ Previously, family migration was equally available to all foreigners: every non-Jewish person⁵⁴ asking for family reunification had to apply for temporary residence status and could be naturalized after four-and-a-half years. Under the new policy, the government banned family migration of persons who resided in the Palestinian Authority. This policy has since become law: The Citizenship and Entry into Israel Act (Temporary Order) 2003.⁵⁵ Article 2 of the Act provides that “the Minister of the Interior shall not grant an inhabitant of an area citizenship” and “shall not give him a license to reside or to stay in

movement, are not allowed a driver's license and their employers are subject to strict inspections. Only one person among this group was involved in terrorist activity between September 2000 and September 2007. *See* the Response of the State Regarding HCJ 466/07 Israeli Civil Liberties Union v. Minister of the Interior at para 97 [Hebrew].

50. *See* State Response to HCJ 7052/03 Adalah v. Minister of the Interior (November 6, 2005) at para 4-17, *available at* http://elyon1.court.gov.il/files_eng_03/520/070/a47/03070520.a47.pdf (last visited Oct. 20, 2008).

51. *Id.*

52. The exact number of Palestinian family immigrants admitted during recent years is the subject of controversy. Justice Ayala Procaccia notes that “Since 1994, approximately 130,000 residents of the [Palestinian] territories received one status or another in Israel.” *See* HCJ 7052/03, *supra* note 50, at para 16 to her opinion (May 14, 2006). Other estimates range from dozens of thousands to more than a hundred thousand.

53. *See* CABINET DECISION NO. 1813 (May 12, 2002) [Hebrew].

54. Jews can immigrate to Israel on the basis of the Law of Return, 1950. People who do not fit these criteria can immigrate along the path of family reunification with Israeli citizens.

55. *See* S.H. 544.

Israel.”⁵⁶ The term “area” refers to the West Bank and Gaza.⁵⁷ As a temporary order, it was first meant to be in force for only one year but, as the conflict continued, the Knesset extended its force.⁵⁸ Following petitions to the Israeli Supreme Court sitting as the High Court of Justice (HCJ), the Knesset amended the Act in 2005 to focus on high-risk groups instead of categorically banning of all Palestinians.⁵⁹ Article 3 of the amended Act provides:⁶⁰

Notwithstanding the provisions of Article 2, the Minister of the Interior may, at his discretion, approve the request of a resident of the area to be granted a permit to stay in Israel by the regional commander -

- (1) as regards a male resident of the area who is over 35 years of age— to prevent the separation from his female spouse who is staying lawfully in Israel;
- (2) as regards a female resident of the area who is over 25 years of age – to prevent the separation from her male spouse who is staying lawfully in Israel.

The foundation for this rule is a study made by the GSS indicating that the highest risk is posed by admission of immigrants of certain ages.⁶¹ In addition, the Act includes several exemptions: the Minister of the Interior is authorized to grant entry to a minor who is a resident of the area and under 14 years of age; an adult is eligible for entry for reasons of medical treatment, employment and if he or she can prove “a material act to advance the security, economy or other important matters to the State.”⁶²

The Act does not explicitly invoke the term “enemy aliens.” Rather, it refers to non-exempt residents in the West Bank and Gaza Strip. Using a territorial rule was not surprising since the Palestinian Authority is not a sovereign state and its residents have no precise nationality which can be indicated on their passport.⁶³ The Act was controversial from the beginning because it exempted Israeli citizens who, as settlers, reside in the Palestinian territories. This distinction is due to the Knesset’s position that Jews who reside as settlers in the Palestinian territories are not under the Palestinian

56. *Id.* at art. 2.

57. *Id.* at art 1.

58. Citizenship and Entry into Israel (Temporary Provision) (Extension of the Validity of the Law) Order, 5764-2004.

59. Citizenship and Entry into Israel (Temporary Provision) (Extension of the Validity of the Law) Order (no. 2), 5765-2005

60. *Id.* at art. 3.

61. The GSS revealed that 90% of people involved in terrorism against Israel are in the 16-35 age group; 97% of suicide bombers are of this age. *See* State Response to HCJ 7052/03, *supra* note 50.

62. *See* articles 3a, 3a1, 3b, 3c and 3d to the Citizenship and Entry into Israel Act of 2005.

63. Some of the Palestinians residing in the West Bank and the Gaza Strip are in fact Jordanian citizens. Using nationality as a criterion could have made the analogy of enemy aliens more difficult to justify as Jordan is not an enemy state to Israel.

Authority's rule and hence present no threat.⁶⁴ Another problem was conceptual: the ban on contacts between enemy aliens is customarily a reciprocal concept. For example, during World War II there was a two-way ban on immigration of Germans to America and of Americans to Germany. Yet, unlike sovereign states, the Palestinian Authority cannot control immigration into its territories, some of which is subject to Israeli belligerent occupation.⁶⁵ And, the Palestinian Authority cannot impede the growth of Jewish settlements in the West Bank. These differences have raised serious problems when comparing the Israeli-Palestinian conflict to classic wars between sovereign nations.

C. *A Right to Love?*

Not surprisingly, the Act provoked an unprecedented debate. Within a short time, numerous petitions were submitted to the HCJ. The argument centered, among other things, on a peculiar subject: the "right to love." Petitioners argued, "This Act is about the right to love and to be loved," and "love defies ethnic borders."⁶⁶ Law review essays followed the same course. Four Professors from Haifa University demanded legal recognition for "the power of love."⁶⁷ A leading Israeli philosopher wrote that the Act limits "the right to realize love" and "to establish a family."⁶⁸ "From a Lover to a Foe," exclaimed another.⁶⁹

Although the Act is problematic, it does not block either love or family life. Residents in the West Bank and Gaza who wish to form a family with an Israeli citizen can do so in any territory outside Israel – even though it is a difficult course for most. Nonetheless, the debate centers on the subject of encumbered love. It is clear why a legal controversy over family migration becomes an emotional dispute about love. Love is a powerful argument. Delilah, Odabella, Aida and the Philistine woman from Timnath—all utilized the mighty power of love.

D. *The Supreme Court Ruling*

On May 14, 2006 the Israeli Supreme Court sitting as the HCJ delivered its

64. Article I of the Act exempts every "resident of an Israeli settlement in the Area". This exemption is another of the many pernicious outcomes of the anomaly of Jewish-Israeli enclaves located in territory which is not part of Israel.

65. See H CJ 769/02 Public Committee, *supra* note 35.

66. See Supplemental Brief of Petitioners regarding H CJ 8099/03 The Israeli Civil Liberties Union v. Mister of interior (Nov. 5, 2003) [Hebrew].

67. See Guy Davidov, Amnon Reichman, Ilan Saban & Yonatan Yovel, *State or Family? The Citizenship and Entry to Israel Act (Temporary Order) 2003*, 8 MISHPAT UMIMSHAL 643, 651 (2005) [Hebrew].

68. See Chaim Gans, *Unification of Palestinian Families in the Jewish State*, 10 Adalah's Newsl (Feb. 2005), available at [<http://www.adalah.org/newsletter/eng/feb05/come1.doc>].

69. See Aeyal Gross, *From Lovers to Foes: Justice, Truth, Integrity and Common Sense: Between Israel and Utopia in the Citizenship Law*, 23 HAMISHPAT 79 (2007) [Hebrew].

ruling. In a six to five decision—not a typical event for the court—the HCJ sustained the Act.⁷⁰ The majority opinion upheld the Act while the dissenting justices believed it to be unconstitutional.⁷¹ However, a close reading of the decision reveals that the essence of the dissenting opinion, written by Supreme Court President and Chief Justice Aharon Barak, was in fact sustained by the majority.⁷² Justice Levy, the balancing vote, apparently believed the Act was unconstitutional but upheld it based on its status as a “temporary order,” to be reconsidered by the Knesset.

Deputy Chief Justice Mishael Cheshin wrote the core majority opinion. His ruling is based on three premises: (1) there is an ongoing war between Israel and the Palestinians; (2) people who live under the Palestinian Authority rule are enemy aliens; and (3) nations can ban migration of enemy aliens. Hence, his conclusion is that Israel can ban family migration of people residing in the Palestinian Authority. As Justice Cheshin phrased it:

Israel is not Utopia. Israel finds itself in a difficult armed conflict with the Palestinians. An Authority against a State. One collective against another. And this armed conflict has become like a war [. . .] it follows from this that the residents of the territories—Judaea, Samaria and the Gaza Strip—are enemy nationals [. . .] in times of war the citizens of the warring states become hostile to one another, and that every citizen will regard himself as loyal to his country and place of birth and hostile to the enemies of his place of birth [. . .] it has been determined in international law that when there is a dispute between nations, a nation may prohibit the nationals of the foreign nation, as such, from entering or immigrating to it. The reason for this is that because of the strong and special ties that they have to their place of birth, people and family members, enemy nationals, as such, constitute a special risk group. Admittedly, not all enemy nationals are actually enemies, but in the heat of an armed conflict there arises a quasi-presumption that enemy nationals—all enemy nationals—are enemies of the state, and the state has no legal duty to rebut the presumption and distinguish between an enemy national who is likely to endanger the state and its residents and an enemy national who is unlikely to endanger the state.⁷³

Justice Cheshin noted that since Israel is involved in a collective struggle,

70. The case raises numerous constitutional issues—such as the scope of judicial review in time of war, the power of Parliament to craft an immigration policy for preserving the culture of the majority, the legal status of the right to family life, enforcing standards of by-impact discrimination during war, etc—which go far beyond the scope of this article. For an analysis of the decision see Daphne Barak-Erez, *Israel: Citizenship and Immigration Law in the vise of Security, Nationality, and Human Rights*, 6 INT’L J. CONS. LAW 184 (2008).

71. The plurality opinion includes Justices Adihel, Cheshin, Grunis, Levy, Naor and Rivlin; the dissenting opinion includes Justices Barak, Beinisch, Hayut, Joubran and Procaccia. *Id.*

72. *Id.*

73. See HCJ 7052/03, *supra* note 50, at ¶ 3, ¶ 12, ¶ 79, ¶ 81 at 129, 136, 187-88 (Cheshin J., majority opinion).

it cannot individualize the enemy.⁷⁴ During war, Israel has no effective way to identify those whose marriage is real and sincere.⁷⁵ Citizens who wish to have families with enemy aliens can do so outside Israel as the right to family life – even if constitutionally protected under Israel’s Basic Laws⁷⁶ – does not include the right to “import” a family member into Israel.⁷⁷ In Cheshin’s view, the Act is not discriminatory because the person’s nationality is only a by-product of being an enemy alien.⁷⁸ The Act is not aimed solely against Palestinians because Israeli Arabs can marry Palestinians all over the world – excluding those territories where the war is being conducted.⁷⁹ Justice Cheshin added that rescinding the act’s collective ban and its replacement by individualized inspections “is likely to lead to quite a high probability of an increase in terror activities in Israel; to the killing and wounding of residents of the state; to a real and tangible weakening of the feeling of stability; and as a result of all of these to the undermining of democracy itself.”⁸⁰

Chief Justice Barak dissented, stressing that the issue at stake is not aliens’ interests but citizens’ constitutional right.⁸¹ Every citizen has a constitutional right to form a family with persons whom they love and to establish it in Israel—where they have historical, cultural and societal roots.⁸² Chief Justice Barak ruled that the Act’s impact is discriminatory because it is based on nationality; the burden falls mostly on Israeli Arabs. He was willing to assume that no intentional discrimination existed yet the important element is not intent but effect.⁸³ As for the security risks posed by the spouse, he held that “liberty is about higher risk-taking.”⁸⁴ He ruled that:

The additional security that the blanket prohibition achieves is not proportionate to the additional damage caused to the family life and equality of the Israeli spouses. Admittedly, the blanket prohibition does provide additional security; but it is achieved at too great a price. Admittedly, the chance of increasing security by means of a blanket prohibition is not ‘slight and theoretical.’ Notwithstanding, in comparison to the severe violation of human dignity, it is disproportionate.⁸⁵

74. *Id.*

75. *Id.* at para 78-84 (Cheshin J., majority opinion).

76. *See* ¶ 53, ¶ 58 at 168, 173 (Cheshin J., majority opinion); *See also* ¶ 39, ¶ 59 at 157, 173 (Cheshin J., majority opinion). Although Israel does not have a formal Constitution, its Basic Laws are regarded as having Constitutional validity. Courts have the power to declare null and void unconstitutional acts which violate constitutional rights. However, there is no explicit right of family life under the basic laws. Some Justices have inferred this right and based it on their interpretation of the constitutional right of Human Dignity.

77. *Id.* at ¶ 48-57 (Cheshin J., majority opinion).

78. *Id.* at ¶ 91-92 (Cheshin J., majority opinion).

79. *Id.* ¶ 16 at 138-39. (Cheshin J., majority opinion).

80. *Id.* ¶ 109 at 205-06 (Cheshin J., majority opinion).

81. *Id.* at 17, 102-07 (Barak C.J., dissenting).

82. *Id.* ¶ 17, ¶ 34, ¶ 43 at 30, 51, 62 (Barak C.J., dissenting).

83. *Id.* ¶ 51 at 68 (Barak, C.J., dissenting).

84. *Id.* ¶111 at 122 (Barak C.J., dissenting).

85. *Id.* ¶ 91, ¶ 92 ¶ 96 at 108, 112 (Barak C.J., dissenting).

In Barak's view, banning family migration should only be possible under individual inspection of risks posed by a certain applicant. The collective aspect of the Act thus yields an unconstitutional ban that does not allow a case-by-case consideration.⁸⁶ Therefore, it should be invalidated.⁸⁷

Following the HCJ ruling, the Knesset amended the Act and extended its validity, forbidding family migration not only of people who reside under the Palestinian Authority's rule, but also of every "resident or citizen" of Iran, Syria, Lebanon and Iraq. The new Act uses the criteria of territory or citizenship for defining dangerous aliens yet does not explicitly invoke the doctrine of enemy aliens. The Knesset also established a "humanitarian committee" for reviewing individual cases.⁸⁸

The Israeli case puts forth a modern though distinctive instance of love and war. Even though Israel is a *sui generis* case, it raises a general dilemma: how can we reconcile the sweeping ban adopted by the Knesset, which places too great an emphasis on national interests, with the sweeping permission proposed by the petitioners, which sanctifies individual rights? Is there a third way? Dealing with this issue requires returning to the philosophy of war: can collectives be at war while their subjects live together in peace?

III. LOVE AND WAR: PHILOSOPHY, LAW AND POLICY

Between the two World Wars, many countries adopted new laws aimed at restraining contacts between subjects of warring nations. A well-known example is the "trading with the enemy" acts that ban commercial relations between enemy subjects. Although it is not directly regulated, most states have practically banned family migration of enemy aliens. These prohibitions, many of which exist until this very day, are categorical and harsh. In this part, I first describe the philosophical foundations for such prohibitions by invoking the Kantian approach, which considers war as placing the subjects of combating nations into a state of mutual hostility, hence justifying a ban on their intercourse, as opposed to the Rousseauian approach, which considers war as combat between states but not between men. I then focus on the regulation of family migration of enemy subjects. However, this concept of war has harsh implications for individual rights and is incompatible with human rights law. I therefore suggest a new policy, based on a presumption of dangerousness under which enemy aliens – and people of similar status – are inadmissible en masse, but nonetheless offered a route for refuting the presumption in particular cases.

86. *Id.* at ¶ 112-13 (Barak C.J., dissenting).

87. *Id.* at ¶ 114 (Barak C.J., dissenting).

88. See The Citizenship and Entry into Israel Act (Temporary Order) 2007, art.3a, available at <http://www.adalah.org/features/famuni/famuni-mar07-law.pdf>.

A. *Individuals at War*

Modern laws of war are derived from the ancient philosophy of war as a collective struggle between parties, usually states and nations. Under this conception, the entire collective goes to war; individuals at war were generally considered to follow their nation.⁸⁹ Immanuel Kant analogizes a nation at war to a family unit. The subjects of each nation “are born of the same mother (the Republic)” and thus “constitute as it were one family (gens, natia), whose members (citizens of the state) are of equal high birth and do not mix with those who may live near them in a state of nature.”⁹⁰ Kant concludes that war is “not only the relation of one state toward another as a whole, but also the relation of individuals of one state toward the individuals of another.”⁹¹ Citizens owe allegiance to their nation, adopt its position and, as a result, lose their own private identity. Most philosophers have seen war to be a collective enterprise whereby the subjects of each nation are treated, en masse, as an enemy by the other. Francis Lieber, the first to systematically codify the laws of war – known as the *Lieber Code* – notes that the “citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of war.”⁹²

Rousseau challenged the concept of all-against-all war. He conceived war as a contest between states; civilians became enemies only by accident:

War is constituted by a relation between things, and not between persons . . . War then is a relation, not between man and man, but between state and state, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers . . . each state can have for enemies only other states, and not men; for between things disparate in nature there can be no real relation.⁹³

Rousseau believes that war can only exist between “public persons” and could never exist between individuals. Unlike Kant, who believes that subjects of warring nations should not mix with one another, Rousseau asserts that these subjects can never be enemies except by chance – as soldiers in the battlefield. While Kant asserts that a state of peace needs to be formally instituted – because a state of war exists in the state of nature⁹⁴ – Rousseau considers war as a Social Institution, which should be formally

89. See GEORGE P. FLETCHER, *ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM* 46, 51, 71, 73 (2002).

90. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* § 53 at 343-50 (Mary Gregor, trans., Cambridge University Press 1991).

91. *Id.*

92. See FRANCIS LIEBER, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD*, General Order No. 100, §21 at 18 (1863). The Lieber Code was signed by President Abraham Lincoln during the Civil War.

93. See ROUSSEAU, *THE SOCIAL CONTRACT*, *supra* note 40 at book 1 ch. 4.

94. See KANT'S *POLITICAL WRITINGS* 98 (Hans Reiss ed., translated by H.B. Nisbet, 1970).

instituted by states since “the relations between men were too unsettled for genuine wars to develop.”⁹⁵ Rousseau distinguishes between combatants and civilians; the latter are not members of the belligerent forces and take no direct part in wars. Hence, they should not suffer war injuries and their rights are not to be infringed by military operations. This idea, now part of the Geneva Conventions, is recognized by Kant as well.⁹⁶ But Rousseau goes one step forward.⁹⁷ He not only claims that civilians should be protected against the power of belligerents but also that they have a right to free trade with enemy aliens as no quarrel exists between civilians.

This concept of war has created a “we-they” division between warring collectives. The great challenge was, and still is, setting up a rule for identifying the ‘we’ and the ‘they’. Since the Peace of Westphalia, which created a new order of sovereign states, nations have used two legal rules for identifying enemy aliens. Under British law, the rule used is a *Territorial Rule*,⁹⁸ under which citizens of any state who voluntarily reside in an enemy territory are considered enemy aliens. That is, if a person lives in an enemy territory or under enemy control, he or she is an enemy alien.⁹⁹ The crucial criterion is the person’s domicile, irrespective of nationality. A different rule is the *Citizenship Rule*, under which an enemy alien is an enemy national, irrespective of his or her domicile. This was, and still is, the law in most European countries. This rule was also adopted in the American Alien Enemies Act of 1798, which has never been repealed,¹⁰⁰ and in the United States Supreme Court decision *Johnson v. Eisentrager*.¹⁰¹

95. Stanley Hoffmann, *Rousseau on War and Peace*, 57(2) AMER. POLITICAL SCIENCE REV. 317, 321 (1963); ROUSSEAU, THE SOCIAL CONTRACT, *supra* note 14 (Men “have no mutual relations stable enough to constitute either the state of peace or the state of war, [hence they] cannot be naturally enemies”).

96. See KANT, THE METAPHYSICS OF MORALS, *supra* note 90 at 347-48.

97. See JEAN-JACQUES ROUSSEAU, THE STATE OF WAR (trans. by C. E. Vaughan, 1917).

98. For the British territorial rule see at length James W. Garner, *Treatment of Enemy Aliens*, AMER. J. INT’L L. 13(1) 22 (1919); R. F. Roxburgh, *The Alien Enemy in English Law*, 2 J. COM. LEGIS. & INT’L L. 269 (1920); Malcolm M. Lewis, *Domicile as a Test of Enemy Character*, 4. BRIT. Y. B. INT’L L. 77 (1923-1924); ARNOLD D. MCNAIR & ARTHUR D. WATTS, THE LEGAL EFFECTS OF WAR 40-81 (1948); G.H.L. Fridman, *Enemy Status*, 4(4) INT’L & COMP. L. QUARTERLY 613 (1955).

99. The history and development of the territorial rule under British law are summarized in several decisions handed down during the two World Wars. See *Porter v. Freudenberg*, 1 K.B. 857 (1915) (“the test of a person being an alien enemy is not his nationality but the place in which he resides or carries on business. A person voluntarily resident in, or who is carrying on business in, an enemy’s country is an alien enemy.”); *Schaffenius v. Goldberg*, 1 KB 284, 287 (1916) (“alien enemy character for the purpose of all civil rights is to be determined by commercial domicile and not by nationality.”); *Rodriguez v. Speyer Brothers*, AC 59, 135 (1919) (“nationality is no longer a test of alienage in the enforcement of civil rights. The test is the place where a person voluntarily resides . . . a person who is a British subject or the subject of a neutral State is regarded for all purposes as an enemy alien if he is voluntarily residing in . . . a hostile country”); *V/O Sovfracht v. Schappij*, 1 All ER 76 (1943) (an alien enemy “does not mean a subject of a state at war with this country, but a person, of whatever nationality, who is carrying on business in, or is voluntarily resident in, the enemy’s country”).

100. See J. Gregory Sidak, *War, Liberty and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1405-25 (1992) (discussing the history and textual meaning of the Alien Enemies Act of 1798).

101. See *Johnson v. Eisentrager*, 339 U.S. 763, 769 n.2 (1950) (sustaining the definition of enemy aliens as nationals of one state at war with another).

These rules were harsh. During the two World Wars, two exceptions entered this collective characterization of war. *First*, before WWII, there was usually no exception made for asylum seekers and refugees. However, subjects of ethnic repression in an enemy state were not seen as part of the enemy collective. Jews in Germany were not part of the German collective during WWII, the same as is with the Bahai in Iran and current victims of the Darfur conflict. This idea captures the Kantian concept of *Hospitality*.¹⁰² Kant claims that an alien has a “right of resort” – in modern terminology, the right to asylum – to enter the enemy territory “as long as he behaves in a peaceful manner.” The state may close its borders to an enemy subject, but only if denying him entrance does not cause his death.

Second, individuals who are citizens of one nation, but also share the ethnic origin of another warring nation, were often treated by their own nation as a member of the enemy nation. Yet persons who are citizens or permanent residents of one nation but share their ethnic origin with an enemy nation are not to be seen as enemy aliens or considered as presenting a security risk. Thus, the policy of internment of American citizens of Japanese ancestry during WWII had little to do with the doctrine of enemy aliens;¹⁰³ it was an expression of anti-Japanese sentiment. The criterion used was national origin rather than nationality.¹⁰⁴

B. *Family Migration and Wartime Regulation*

The collective concept of war had legal implications in many countries. Kant implied that nations at war should regulate not only relations between countries but also between men.¹⁰⁵ During the twentieth century, many states strictly forbade contacts between their subjects and enemy subjects.¹⁰⁶ This prohibition was rigid. In a similar manner, marrying an enemy alien was often equal to betraying the war effort. When French women slept with German soldiers during WWII, their hair was viciously shaved for dishonoring France.¹⁰⁷ We have almost no case law on this matter and very little literature. Arnold McNair notes that enemy aliens cannot even exchange binding promises to marry each other.¹⁰⁸ A note published in the *Harvard*

102. See KANT'S POLITICAL WRITINGS, *supra* note 94 at 105-08.

103. See *Korematsu v. United States*, 323 U.S. 214 (1944).

104. See *Hirabayashi v. United States*, 320 U.S. 81, 96-98 (1943).

105. See KANT, THE METAPHYSICS OF MORALS, *supra* note 90 at 343-44 (“in the Right of Nations we have to take into consideration not only the relation of one state toward another as a whole, but also the relation of individual persons of one state toward the individuals of another, as well as toward another state as a whole.”).

106. Such acts were passed in the U.S., Australia, Britain, Israel and several European states. See, e.g., Samuel A. Lourie, “Enemy” Under the Trading with the Enemy Act and some Problems of International Law, 42(3) MICH. L. REV. 383 (1943); Ludwell H. Johnson, *The Business of War: Trading with the Enemy in English and Early American Law*, 118(5) AMER. PHIL. SOC. 459 (1974).

107. For a literary description of these barbaric acts of revenge see MARGUERITE DURAS, *HIROSHIMA MON AMOUR* (Richard Seaver, translator, 1961).

108. See McNAIR & WATTS, *supra* note 53 at 132, 341.

Law Review during WWI likewise stated:

The general rule of American and British courts is that contracts made with alien enemies during war are illegal and void . . . So far the restrictions have been applied only to financial and commercial contracts, though the language of the prohibitions, taken literally, is broad enough to cover even a promise to marry an enemy alien.¹⁰⁹

Modern laws of war stipulate detailed rules for protecting enemy civilians. These rules center around the Geneva Convention (IV) Relative to the Protection of Civilian Persons in time of War.¹¹⁰ However, the Convention does not explicitly regulate the issue of family migration. This subject remains unsettled. The Convention only requires facilitation of family reunification when a family unit was dispersed during war and, if possible, family meetings.¹¹¹ Family *reunification*, in this context, means reunion of a pre-existing family unit, split by the conduct of war. International human rights law apparently did not anticipate a situation of wartime family *formation* – namely, a family founded after the war had already started; there is nothing about this issue even in the additional protocols of the Geneva Conventions¹¹² or in the Hague Convention.¹¹³ A first attempt to regulate it was made during deliberations on the right to marry and to found a family, secured in article 23(2) to the International Covenant on Civil and Political Rights (1966). However, the U.N. General Assembly directly rejected a suggestion to recognize the right to marry as a non-derogable right in time of public emergency. The primary reason for the rejection was the fear of family migration of enemy aliens in times of war.¹¹⁴

109. See *Effect of War on Contracts*, 31 HARV. L. REV. 640, 641-42 (1918).

110. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, (entered into force Oct. 21, 1950) [hereinafter Geneva Convention].

111. *Id.*, art. 26. (“each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.”).

112. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 74, June 8, 1977, 1125 U.N.T.S. 37 (entry into force 7 Dec., 1979) (providing that “the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts.”). For a similar provision see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4(3)(b), June 8, 1977, 1125 U.N.T.S. 609.

113. Convention Respecting the Laws and Customs of War on Land art. 46, Oct. 18 1907, 36 Stat. 227, 1 Bevans 631 (entry into Force: 26 January 1910).

114. See Michael J. Dennis, *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AMER. J. INT’L. L. 119, 137-38 (2005) (noting that “when the General Assembly later reviewed Article 4 at its 1963 session, states examined whether it was appropriate to make Article 23(2) nonderogable as well (right of men and women to marry). The proposal was withdrawn after several states maintained that they must be entitled to prevent marriage domestically during periods of hostilities.”).

The U.S. presents an extreme example of suspicion from admission of enemy aliens in times of war. By late 1945, after the German surrender, numerous marriages took place between American soldiers and German subjects,¹¹⁵ prompting Congress to enact the War Brides Act of 1945 to expedite the spouses' admission.¹¹⁶ In an infamous case, *Knauff v. Shaughnessy*, the U.S. Court of Appeal of the Second Circuit upheld the exclusion of a German war bride held at Ellis Island without a hearing based on confidential information. Despite her moving personal story as a Jewish survivor who left Germany before the war and honorably served with the British Royal Air Force, and even though the warfare was over, the Court ruled that "the power of Congress to deny admission of aliens is absolute";¹¹⁷ it held that exclusion of enemy aliens is a categorical policy and requires no proof on individual cases.¹¹⁸ The Supreme Court upheld this ruling, saying that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."¹¹⁹ The Court ruled that exclusion of enemy aliens is "a fundamental act of sovereignty" which "stems not alone for legislative power but is inherent in the executive power to control the foreign affairs of the nation."¹²⁰ In the dissenting opinion, Justices Jackson, Black and Frankfurter held against the collective dimension of this rule. Under their view, the Government cannot presume a security risk without a "notice of charge, evidence of guilt, and a chance to meet the charge."¹²¹ This chilling case, where Mrs. Knauff was held for years without a hearing, has never been overruled.¹²²

C. *The Loyalty to Love and Group Loyalty*

A core reason for suspicion of newly established family relations with enemy aliens lies in the tension between national loyalty and family loyalty.

115. These marriages between American GI's and German women were between combatants and civilians, not between civilians from warring nations who usually had little interaction in the course of war.

116. See War Brides Act of 1945, Pub. L. No. 79-271, 59 Stat. 659 (1945). The Act provided:

[A]lien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of the effective date of this Act, be admitted to the United States.

Id. The act expired in 1948. *Id.*

117. *Knauff v. Watkins*, 173 F.2d 599, 603 (1949).

118. *Id.*

119. See *Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950). Ms. Knauff was finally admitted but only after the press and members of Congress supported her admission. For her life story see ELLEN R. KNAUFF, *THE ELLEN KNAUFF STORY* (1952).

120. *Id.* at 542.

121. *Id.* at 550-52 ("this American citizen is told he cannot bring his wife to the United States, but he will not be told why . . . so he went to court and sought a writ of *habeas corpus*, . . . and the Government tells the Court that not even a court can find out why the girl is excluded.")

122. For a criticism see Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1394-96 (1953).

Belonging to a nation requires loyalty to some national group values; being a family member means a devotion to one's kin and one's spouse. This reality creates a dilemma in cases of irreconcilable conflict between national and family loyalties. The case of *Haupt v. United States*, the first time in history that the U.S. Supreme Court sustained a conviction of treason, is a good example of this conflict.¹²³ The petitioner, Hans Haupt, was a naturalized American citizen born in Germany. He was convicted of treason in a jury trial and sentenced to life imprisonment. The jury found that Haupt had given shelter to a German enemy agent who had entered the U.S. for purposes of sabotage. Haupt also helped him buy a car and obtain employment in a plant manufacturing military equipment. Under the U.S. Constitution, the Government had to prove that the defendant "adher[ed]" to an enemy of the United States by giving that enemy "aid and comfort" during war.¹²⁴ But Hans Haupt had a powerful defense: the German saboteur, Herbert Haupt, was his son. Giving him a place to sleep or finding him a job should not to be regarded as adhering to the enemy but as a natural parental duty. Indeed, if the defendant's motivation was not to adhere to Germany but to aid his son, he should have been found not guilty. But the jury found, and the Court affirmed, that the defendant was well aware of his son's wartime mission. He was harboring him as a son but also as a German saboteur. Justice Murphy dissented; he refused to see the acts of the father as "adhering" to the enemy. Rather, under his view, it was an assistance "which springs from the well of human kindness, from the natural devotion to family and friends, or from a practical application of religious tenets. Such acts are not treasonous even though, in a sense, they help in the effectuation of the unlawful purpose."¹²⁵ Justice Murphy argued that the same act could have been motivated by different causes – and that the relevant motive may influence the legal consequences.¹²⁶

The Haupt case emphasizes the difficult dilemma of a person who has to choose between national loyalty and the loyalty to kin. The law often tolerates this dilemma. Spouses enjoy the privilege of marital confidence which secures the contents of their confidential communications and a testimonial privilege which allows them to avoid testifying against one another. Bearing witness against a kinsman on the stand is tantamount to endangering the very fabric of family life. This dilemma may be greater when citizens and their spouses come from different warring states yet belong to the same ethnic nation. Alongside family ties, they hold ethnic and

123. 330 U.S. 631 (1947).

124. U.S. Const. art. III, § 3 (defining act of treason). See J.H. Leek, *Treason and the Constitution*, 13 J. POL. 604 (1951) (discussing constitutional aspects of treason).

125. *Haupt*, 330 U.S. 631 at 646-49.

126. *Id.* at 647 (noting that "to rise to the status of an overt act of treason, an act of assistance must be . . . an act which is consistent only with a treasonable intention and with the accomplishment of the treasonable plan.").

national ties. These forces may influence their civil allegiance¹²⁷ as both their family ties and their ethno-national attachments sail in the same direction.

Imposing restrictions on family migration of enemy aliens is aimed at preventing the dilemma of choosing between fidelity to one's nation and a private relationship. But these strict restrictions only codify that dilemma: citizens are now forced to choose between their state and their families. This prohibition can no longer hold under modern human rights law. To resolve this conflict between national laws and modern conceptions of human rights, I suggest sustaining the traditional presumption of dangerousness with the stipulation that persons involved be allowed to refute that presumption in order to achieve individual justice.

D. *Family Migration and the Presumption of Dangerousness*

The doctrine of enemy aliens presumed that in times of war a person is regarded as a danger *solely* on his or her status as an enemy alien. This presumption is not identical to the rules for identifying enemy aliens. The presumption is simply that once a person is identified as an enemy alien, he or she poses a security risk. It is based on the premise under which nationality or place of residence indicates per se the person's loyalty or disloyalty to a specific nation. In current time, the doctrine's rationale can be similarly applicable to states sponsoring terrorism without waging war.

In *Principles of the Penal Code*, Jeremy Bentham discusses the concept of "presumed offences" where a person is presumed to have committed a crime not on the basis of direct evidence but because of indirect evidentiary circumstances. In ordinary criminal offenses – such as murder, rape and robbery – the perpetrator is being punished for her wrongdoing. In a presumed offense, on the other hand, there is no direct evidence of wrongdoing. Rather, the criminal offense is inferred from an act which, by itself, is not a crime. Bentham gives the example of a person who is in possession of a ship with an altered name.¹²⁸ In eighteenth century England, this act was a crime. Criminalization of the act was due to the phenomena of stolen ships, whose names were altered by repainting the ship's mark in order to avoid the authorities' inspections. Painting private property was not a crime in itself. Yet, from the practice of altering the name of ships without registering the change – which had been proved as a predictor of stolen ships – English law inferred that unless the new name is registered, the ship is presumed to be stolen and the possessor is presumed to be a criminal. The relatively high

127. See Daniel Druckman, *Nationalism, Patriotism, and Group Loyalty: A Social Psychological Perspective*, 38 MERSHON INT'L. STUD. REV. 43 (1994) (analyzing how feelings of individuals and a membership in different ethno-national reference groups influence and shape feelings expressed to the nation as a whole).

128. JEREMY BENTHAM, THE THEORY OF LEGISLATION 425-427 (C. K. Ogden ed., Richard Hildreth trans., K. Paul, Trench, Trubner & Co. Ltd. 1931)(1789) (noting that "it is an offence to obliterate the marks upon shipwrecked property, because such an act indicates intention of theft.").

percentage of stolen ships from among the group of ships with altered names justified a presumption of criminality.

The crime of possessing a ship with an altered name no longer exists today but the concept of presumed offenses is still with us. For instance, in criminal law we have the idea of statutory rape – a crime of having sexual relations with a minor under the age of consent. The law presumes that a minor lacks the mental maturity to participate in an act of free choice regarding sexual relations even if he or she consents to such relations. Similarly, fixing a minimum age for driving, voting and drinking is based on irrefutable presumptions. An individual under the minimum age cannot refute the presumption; she cannot prove, for example, that she has the maturity required for voting. The law assumes that people of a certain age possess or lack certain traits. It is not a desirable method but often the only option available in daily life. The insurance industry is another example. Insurance premiums are generally a function of actuarial generalizations regarding different variables – age, gender, occupation, marital status, geography, etc. An insured person has no “right to exit”. For example, in many countries men pay a higher rate than women for car insurance because of the presumption that the driver’s gender is an effective predictor of reckless driving. A particular male driver cannot prove that he is a careful driver and thus avoid the presumption. Societies need rules – and generalized rules always yield errors in individual cases.¹²⁹

Statistical generalizations might be reliable even when most of the individuals in the generalized group present no particular risk. Generalizations are essentially comparative. A generalization according to which “young men are reckless drivers” may be reliable even when most young men are cautious drivers. It does not imply that all or even most young men are in fact reckless drivers. It merely implies that young men, as a class, are higher-risk drivers than are young women, old men and drivers as a whole. This generalization is still reliable even if only thirty percent of young men are, individually, reckless drivers – as long as this percentage is much higher than the comparative percentage of reckless drivers in other groups. The value of the generalization lies in a unique trait of a certain group when compared with others. Frederick Schauer has commented that the value of the generalization “Swiss cheese has holes” lies “in the fact that Swiss cheese generally has holes and most other kinds of cheese generally do not. If all cheese had holes, saying ‘Swiss cheese has holes’ would be as odd as saying, in most contexts, that ‘Volvos have four wheels.’”¹³⁰

129. See FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* 29-30 (2003) (providing moral justifications for the use of statistical generalizations).

130. *Id.* at 11-12, 66-69.

The presumption of dangerousness relies on a similar rationale.¹³¹ It presumes that enemy aliens present a high-risk group during war. It does not mean that all or most enemy aliens pose an individual threat. Rather, it means that enemy aliens, as a class, present higher risks than do other groups, such as nationals of friendly states. The validity of the presumption is still reliable even if it only applies to a few individuals so long as one group's risk is higher than another group's risk. Obviously, there are many enemy aliens who present no particular risk, but these individuals do not invalidate the rule that enemy aliens, as a group, are more dangerous than other groups, such as non-enemy aliens. A demand of individuation of enemy aliens obviates the rule. It is like demanding an individual check of the maturity of a seventeen-year-old boy who wants to vote – or, vice versa, an individual check of the maturity of people above the age of eighteen. But rules, based on irrefutable presumptions, simply do not allow it. It may be arbitrary, but the alternative is sometimes simply impractical.

One of the main arguments against the use of statistical generalizations rests on the accompanied undesirable stigmatization. Making generalized statements about people might violate their right to human dignity since they are treated as objects rather than human beings. This concern, however, does not fully apply to the case of presuming dangerousness during wartime. Enemy aliens are presumed to be loyal to their nation. Presuming that person X is loyal to her nation does not denigrate her – nor does it violate her right to human dignity. On the contrary, denigration of human dignity usually does occur when presuming that person X is disloyal to her own nation. A Japanese citizen who lived in Japan during World War II would not have been disgraced by the presumption that she was loyal to Japan. But, loyal Japanese-American citizens could have been disgraced when their descent was used as an excuse for group suspicion.¹³² In wartime, loyalty to the nation – as well as disloyalty to the enemy nation – is not a source of shame but a source of pride.

Being an enemy alien – or an alien under the regime of a state sponsor of terrorism – is a status which may be used for inadmissibility. Such attitudes result mainly from the nature of war. Unlike domestic law, which requires that liability be focused on individual conduct, wars are about collective actions. Looking at each person in detail is a less arbitrary solution but sometimes a practically impossible task in times of war. Nations at war do not usually have the ability to conduct individualized investigations of suspected wrongdoers like an officer in the street or at the airport would.

131. The presumption of dangerousness differs from other irrefutable presumptions, such as those used by the insurance industry. For instance, the scope and severity of denial of family life is stronger than the property rights involved in the insurance premiums—and it includes country of origin as a *sole* factor and not only as one among other factors. Yet, the governmental interest achieved is also a stronger one—national security during war.

132. *Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Justice Murphy, dissenting).

Universities and employers can ascertain the character of every applicant by reviewing her file, but in war this screening might exceed the government's capabilities. It is not because the process is time-consuming or costly but because nations very often do not have consular officers stationed on enemy soil who can thoroughly screen documentation, examine personal histories and verify data. Moreover, the Israeli experience shows that sometimes the alien becomes a terrorist only *after* his admission due to the terrorist organizations' intimidation on his family left in his country of origin.¹³³

American law includes broad categories of inadmissibility. Section 212(a) of the INA provides that aliens are inadmissible to the United States on the basis of health-related, criminal-related and security-related grounds. No specific category termed "enemy aliens" exists; security grounds for inadmissibility refer mainly to terrorist activities, association with terrorist organizations, membership in a totalitarian party, participation in Nazi-based persecution, and association with instances of genocide and other compelling foreign policy interests.¹³⁴ Most of these grounds require individually targeted investigations by a consular officer. However, the INA includes some presumptions which can hardly be refuted. For instance, the INA provides that "an alien who is an officer, official, representative, or spokesman of the Palestinian Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity."¹³⁵ In addition, it presumes a potential threat to national security not only when the applicant was or is engaged in terrorism but also when there is a "reasonable ground to believe" that the alien "is likely to engage after entry in any terrorist activities."¹³⁶ This catch-all phrase provides room to deny admission to the United States based on indirect circumstantial evidence rather than direct evidence of dangerousness.

Immigration policies are full of such presumptions even in peacetime. New Zealand, to take an extreme questionable, bans family migration of its citizens' foreign spouses if they fail a body mass index test.¹³⁷ The presump-

133. H CJ 7052/03, *supra* note 50, at 16, 109-12 (Cheshin J., majority opinion) ("it is not merely that there is an inherent difficulty in examining *ab initio* the positions and beliefs of the resident of the territories, to find out whether he supports our enemies or not; we also cannot ignore a real concern, which has been proved in the past, that the terror organizations will recruit the spouse who is a resident of the territories into its ranks only *after* he has been given a permit that allows him to enter Israel and to move freely in Israel . . . in such circumstances . . . is an impractical mission—I will go further and say, an impossible mission").

134. For categories of inadmissibility, see § 212 of the INA, 8 U.S.C.A. §1182 (2008). The criteria relating security-related grounds appear in § 212(a)(3). It includes aliens who have engaged in terrorist activities, members of a terrorist organization, having received military-type training from or on behalf of any terrorist organization, endorsement or espousal of terrorist activities, support of a terrorist organization, or persuading others to endorse or espouse terrorist activities and being associated with a terrorist organization.

135. *Id.* at § 212(a)(3)(b)(i)(IX).

136. *Id.* at § 212(a)(3)(b)(i)(II).

137. Aida Edemariam, *Are You too Fat to Emigrate?*, THE GUARDIAN, Nov. 20, 2007, available at <http://www.guardian.co.uk/g2/story/0,,2213843,00.html>.

tion being that overweight immigrants will become burdens on the health care services.¹³⁸ The Netherlands bans family migration of people who do not speak Dutch or who do not accept Dutch culture.¹³⁹ The law presumes that if the immigrants comply with its standards, they will be more easily integrated and thus become successful citizens. The United States limits the number of fiancé visas per lifetime which its citizens can request.¹⁴⁰ If a petition filed by a citizen for a fiancé visa has been approved twice before, the third petition will be rejected. The presumption is that the third marriage is not *bona fide*.¹⁴¹ Several European states have fixed a minimum age for marriage migration. In Denmark, marriage-sponsored migration is possible only if both spouses are above the age of twenty-four.¹⁴² What triggered these laws was increased concern over forced marriages. Couples above the minimum age are presumed to have consented to the marriage. My point is that all these restrictive rules are based on presumptions which are usually irrefutable—even though some of these laws may be considered morally reprehensible.

E. *Family Migration and Individual Justice*

An irrefutable presumption of dangerousness is too sweeping. Most immigrants in fact pose no risk and cruelly pay the price for a few rotten apples. Israel provides examples of thousands of people who just wish to live together in peace yet whose shared family lives in Israel are banned due to the Israeli-Palestinian conflict. In one case, a Palestinian Israeli man and a Palestinian woman from the West Bank met while studying for their masters degree at McGill University in Canada; they fell in love and got married in 2003. To date, Israel has not rescinded the ban against her admission into the country.

The case of family migration is unique: *First*, unlike insurance premiums, which rely on statistically sound generalizations, the Israeli case shows that the empirical ground for the presumption is relatively weak. *Second*, family migration deals with a fundamental right – family life. Unlike detaining an immigrant at a port of entry, which might deny her liberty for a short time,

138. Obesity is used to predict life expectancy and potential future diseases. *See id.*

139. Sergio Carrera, *'Integration' as a Process of Inclusion for Migrants?: The Case of Long-Term Residents in the EU*, 219 Center for European Policy Studies (2005); Sergio Carrera, *A Comparison of Integration Programmes in the EU: Trends and Weaknesses*, 1 Challenge: Liberty and Security (2006).

140. *See* International Marriage Broker Regulation Act of 2005 §832(a)(1), 8 U.S.C.A. §1375a (2006).

141. *See* Kerry Abrams, *Immigration Law and Regulation of Marriage*, 91 MINN. L. REV. 1625, 1662-1664 (2007) (arguing that “while it is possible that citizens who sponsor more than two fiancés in their lifetime are more likely to be engaging in immigration fraud, it is also highly likely that large numbers of these citizens are simply unlucky in love.”).

142. *See* Amnon Rubinstein & Liav Orgad, *Human Rights, National Security and Jewish Majority: The Case of Marriage Migration*, 35 HAPRAKLIT L. REV. 315, 351-352 (2006) [Hebrew] (discussing recent legislation regarding family migration in several European states).

banning entry of relatives entails perpetual denial of citizens' family life. *Third*, unlike statistical generalizations based on a set of different factors, infringement of the right to family life is based on a single factor – nationality or domicile. All these considerations call for caution in the application of the said presumption and argue for creation of broad exceptions.

In the *Adalah* case, a few Israeli justices urged the Knesset¹⁴³ to adopt a presumption of enmity that can be rebutted in particular circumstances.¹⁴⁴ In this way, the state retains the presumption toward the group while doing justice toward the individual. This suggestion is compelling: what could be more noble than individuation of the enemy by singling out only dangerous civilians? To this end, current exceptions, such as the case of asylum seekers and refugees, are insufficient since they display a collective dimension: an alien can ask for entry only if belonging to a specific exempted group.

I suggest allowing enemy aliens to prove that the rationale of the presumption of dangerousness is inapplicable in their individual cases. But because in most cases there is no embassy in an enemy or hostile country— e.g., there is no U.S. embassy in Iran and Syria and there is no Israeli embassy in most of the Middle Eastern countries – the screening process of aliens, examining and verifying of their documents, histories and identities should be held in an embassy existed in a different country. Unlike Israel, the U.S. issues immigrant and nonimmigrant visas for applicants from Iran and Syria given that they can be effectively checked and interviewed in a U.S. embassy in a different country.¹⁴⁵ In evaluating present and future risks, the government can take into account various factors. The formulation of the presumption as well as its exceptions could go something like this:

I. In General¹⁴⁶

An enemy alien, or an alien from a state sponsoring terrorism, is inadmissible.

II. Exceptions

Clause I shall not apply to:

(A) An immediate family member who a consular officer or the Attorney General knows, or has reasonable ground to believe, poses no threat to the national security;

(B) A child who is 14 years of age or younger.

143. The Knesset is the Israeli Parliament. See art. 1 of the Basic Law: The Knesset (1958).

144. See H CJ 7052/03, *supra* note 50 (Barak, C.J., para 113, Hayut, J., para 5 and Levi, J., para 9).

145. http://travel.state.gov/visa/temp/info/info_4385.html.

146. This formula is as close as possible to the formula of the INA, §212(a)(3).

III. Factors to be taken into Account

(A) In determining whether an alien is admissible under clause II(a), the consular officer or the Attorney General shall consider, at minimum, the alien's:

- (I) History;
- (II) Immigration record;
- (III) Age;
- (IV) Memberships, affiliations and associations;
- (V) Renouncement of allegiance to another country;
- (VI) Family ties with the state's citizens.

(B) The consular officer and the Attorney General may also consider any affidavit of support or documentation submitted by the family sponsor, humanitarian purposes and compelling foreign policy interests.

In the wake of 9/11, Congress has embraced a similar presumption regarding *nonimmigrant* visas from states sponsoring terrorism. Section 306 of the Enhanced Border Security and Visa Reform Act of 2002 provides:¹⁴⁷

No nonimmigrant visa . . . shall be issued to any alien from a country that is a state sponsor of international terrorism *unless* the Secretary of State determines, in consultation with the Attorney General and the heads of other appropriate United States agencies, that such alien does not pose a threat to the safety or national security of the United States

The justification for this presumption probably relies on the fact that all of the 19 hijackers were Muslim-Arab men from the Middle East who legally entered the country on a nonimmigrant visa.¹⁴⁸ Some people believe that this reality justifies extra scrutiny for nonimmigrant Middle Eastern Muslim Arabs.¹⁴⁹ The application of the presumption only to nonimmigrant visas is based on the supremacy of family migration in the U.S. system but also on the simple fact that in the U.S., unlike Israel, the security risk came from nonimmigrant visitors, such as students, tourists and business travelers. Yet, as the former counsel of the 9/11 Commission Janice Kephart noted, there is evidence that terrorist organizations are planning to plot married U.S. citizens to infiltrate terrorists into the country.¹⁵⁰ Thus, it can be argued that

147. 107 P.L. 173; 116 Stat. 543 (2002). Up to now, this provision has been applied to Iran, Syria, Sudan and Cuba. See [http://travel.state.gov/visa/temp/info/info_1300.html].

148. See Janice L. Kephart, *Immigration and Terrorism: Moving Beyond the 9/11 Staff Report on Terrorist Travel* (Center Paper 24), CENTER FOR IMMIGRATION STUDIES, Sept. 1, 2005.

149. See JASON L. RILEY, LET THEM IN: THE CASE FOR OPEN BORDERS, 205-06 (2008) ("all nineteen of the 9/11 hijackers were Middle Eastern Arabs, just like more than 90 percent of the foreigners caught plotting or committing terrorist acts in the United States since the 1993 World Trade Center bombing. Given this pattern, extra scrutiny of immigrants and visitors from countries with links to terrorism is warranted").

150. Kephart, *supra* note 148, at 12-14 (describing terrorists' plans to take over by abusing the course of family migration).

the presumption of dangerousness should be extended to family migration as well. The 9/11 Commission found that there is a nexus between immigration policies and national security; it noted that ‘for terrorists, travel documents are as important as weapons.’¹⁵¹

The implementation of such a policy may differ from one nation to another. The U.S. is not a typical case to use it since its effectiveness may be doubtful given the U.S. unique features. Unlike Israel, which combats a well-defined collective in defined territories, the United States’ War on Terror is waged against an enemy who has neither a specific territory nor nationality. In addition, Israel has only one international airport and a few sea and land ports. Monitoring entry of aliens is thus a relatively easy task. The U.S., in contrast, has 216 international airports, 143 seaports and 115 land ports.¹⁵² With nearly 500 million entries every year, it is more difficult to control its borders. Terrorists who wish to obtain a U.S. visa may do so through alternative routes: The U.S. issues at least 50,000 visas every year – nearly five percent of the total¹⁵³ – under the Diversity Visa Program; these visas are randomly chosen by lottery.¹⁵⁴ Terrorists may also try to obtain Border Crossing Cards through Canada or Mexico, or abuse the Visa Waiver Program, implemented in 27 countries, for exemption from inspections in U.S. consulates abroad.¹⁵⁵ Terrorists can get in from Europe, Canada or Mexico on different visas; thus, unlike Israel, the presumption may be of little help in targeting travel of terrorists in the American case.¹⁵⁶

IV. LOVE, WAR AND THE CONSTITUTION

This section examines the constitutional validity of the refutable presumption of dangerousness with respect to two fundamental rights. First, I ask whether the right to family life encompasses a constitutional protection for admission of family members. I conclude that family life should include the

151. See NATIONAL COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, *supra* note 1 at 383-84. On July 2002, the White House disclosed its new immigration strategy: “Our great power leaves these enemies with few conventional options for doing us harm. One such option is to take advantage of our freedom and openness by secretly inserting terrorists into our country to attack our homeland. Homeland security seeks to deny this avenue of attack.” See National Strategy for Homeland Security (2002).

152. See RUTH E. WASEM, JENNIFER LAKE, LISA SEGHELLI, JAMES MONKE & STEPHEN VINA, BORDER SECURITY: INSPECTIONS PRACTICES, POLICIES AND ISSUES 2 (CRS Report to Congress 2004).

153. See KELLY JEFFERYS & NANCY RYTINA, U.S. LEGAL PERMANENT RESIDENTS: 2005 2 (Department of Homeland Security 2005).

154. See § 203(a)(3) of the INA.

155. See RUTH E. WASEM, VISA ISSUANCES: POLICY, ISSUES AND LEGISLATION 7 (CRS Report for Congress 2003) (Wasem notes that in 2001, there were 17 million entries under the VWP). Travelers under the VWP have an exemption from background checks abroad. The VWP allows travelers to stay in the U.S. up to 90 days. Wasem notes that terrorists “believed they would receive less scrutiny during the immigration inspection process if they applied for admission into the United States under the VWP.” *Id.* at 8.

156. Compare Bill H. Hing, *Misusing Immigration Policies in the Name of Homeland Security*, 6 CENTENNIAL REV. 194 (2006) (arguing that had changes in immigration policies been in force before the 9/11 attacks, it would not have prevented the attacks).

right to live with foreign relatives within the nation's territory but nevertheless that this right can be curtailed on the basis of security needs. Second, I ask whether excluding family members of a particular country of origin leads to discrimination of citizens who wish to enjoy family life with their relatives.¹⁵⁷ I conclude that national disparities may be evidenced in such a policy, but that country of origin may nevertheless be a legitimate factor in immigration connected with war.

A. *Family Life and the Presumption of Dangerousness*

Although the right to family life is not explicitly guaranteed in either the United States Constitution or in Israel's Basic Laws, it is difficult to conceive of a right as fundamental as family life. Several countries' constitutions directly afford protection to family life.¹⁵⁸ In U.S. law, the courts provide a constitutional protection to some aspects of family life under the concept of liberty and privacy.¹⁵⁹ In Israel, the HCJ infers that family life is a "derivative" constitutional right from the constitutional right of human dignity. Certain elements of family life are also protected by international law.¹⁶⁰ However, the right to family life, despite its importance, has several limitations, both under domestic and international law. Government intervention in family life exists in various fields.¹⁶¹ First, nations monitor entry into marriage – they often deny same-sex marriages and uniformly prohibit polygamous marriages, etc; they impose restrictions on who can marry; and they often stipulate waiting periods between marriages.¹⁶² Second, nations manage different aspects of family life – such as mandatory property regimes and, at times, encouragement of high birthrates.¹⁶³ Third, nations control exit

157. I address here neither the issue of procedural due process safeguards that are to be granted in cases of inadmissible aliens, nor the legal definition of 'family'. I also do not address procedural aspects of consular decisions nor judicial review of these decisions.

158. See Bundesverfassung der Schweizerischen Eidgenossenschaft [BV] [Constitution] April 18, 1999, SR 101, RO 101, art. 14 (Switz.); Ir. CONST., 1937, art. 41, available at <http://taoiseach.gov.ie/index.asp?docID=243> (last visited October 24, 2008); Regeringsformen [RF] [Constitution] 8:2 (Swed.); Grundgesetz für die Bundesrepublik Deutschland [GG] [Constitution] art. 6 (F.R.G.).

159. See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (holding the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"); *Roberts v. United States Jaycees*, 468 U.S. 609, 618-620 (1984) (holding the Constitution protects the right to enter into and maintain intimate human relationships); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (holding the Constitution protects the right to marry and have a family).

160. See, e.g., art. 16 of the Universal Declaration of Human Rights (1948); art. 23 of the International Covenant on Civil and Political Rights (1966); art. 10(1) of the International Covenant on Economic, Social and Cultural Rights (1966); art. 8 of the European Convention of Human Rights (1950); art. 18 and 20 of the African Charter on Human and Peoples' Rights (1986); art. 7 of the Convention on the Rights of the Child (1989).

161. See ABRAMS, *supra* note 141 (analysis of regulation of family life in four different stages: Courtship, entry into marriage, maintaining an intact marriage and exit from marriage); Jennifer M. Chacón, *Citizenship and Family: Revisiting Dred Scott*, 27 J. L. & POLICY 45, 65-66 (2008).

162. ABRAMS, *supra* note 141.

163. *Id.*

from marriage – such as regulation of the terms for divorce.¹⁶⁴

The question is whether the right to family life encompasses the right to live together with a foreign spouse and children in one's state territory. In other words, does a citizen have a right to marry an alien and thereby facilitate her admission? From the citizen's perspective, there is no place to distinguish between an alien-relative and a citizen-relative since kinship is not a matter of nationality. Hence, when Congress excludes foreign relatives, the injury caused is not only to the inadmissible aliens but also to the citizens, whose right to family life is being denied. The state may have no legal obligations towards aliens, but it surely has legal obligations towards its own citizens. From the nation's perspective, however, implementation of this obligation may not be so simple. Unlike other individual rights – such as the right to vote and freedom of movement – realization of the right to family life involves another person.

Different countries have resolved this issue distinctly. American law has not yet directly granted constitutional protection to the concept of family migration. In the aforementioned case of *Knauff v. Shaughnessy*, the Supreme Court disregarded the constitutional interests of a U.S. veteran by denying the admission of his German war bride. Invoking the war justification, the Court indelicately denied her a hearing despite her special status under the War Brides Act.¹⁶⁵ Justice Frankfurter dissented, finding that the Congressional intent in passing the War Brides Act was to grant a right not to aliens but to American veterans.¹⁶⁶ Under the dissenting opinion view, the denial of Knauff's admission was also a denial of her husband's constitutional right.

In *Fiallo v. Bell*, the U.S. Supreme Court was similarly asked whether restrictions on family migration of illegitimate children, seeking admission by virtue of their relations with their natural father, a U.S. citizen, infringed upon interests of aliens or of citizens. Justice Powell, writing for the majority, did not directly resolve this issue but noted that although citizens have an interest in admission of their relatives, this issue "is rooted deeply in fundamental principles of sovereignty."¹⁶⁷ Justices Marshall and Brennan dissented. They were unwilling to ignore the constitutional rights of U.S. citizens in admitting their children, noting that¹⁶⁸

“[U]ntil today [we] thought it clear that when Congress grants benefits to some citizens, but not to others, it is our duty to insure that the

164. *Id.*

165. *See* *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (holding that “an alien who seeks admission to the U.S. may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe.”).

166. *Id.* at 548.

167. *Fiallo v. Bell*, 430 U.S. 787, 800 (1977).

168. *Id.* at 800 (Marshall, J., dissenting).

decision comports with Fifth Amendment principles of due process and equal protection. Today, however, the Court appears to hold that discrimination among citizens, however invidious and irrational, must be tolerated if it occurs in the context of the immigration laws.”

In their opinion, the subject of the law is U.S. citizens, not aliens; thus, “it is irrelevant that aliens have no constitutional right to immigrate” since U.S. citizens are those who have a constitutional right “to be reunited in the United States with their immediate families.”¹⁶⁹

In Israel, the HCJ has split on the very same issue. A plurality, headed by Chief Justice Aharon Barak, decided that the right to family life includes a constitutional right of the Israeli citizen-spouse to live with a foreign immediate-relative in Israel – where citizens have cultural and societal roots.¹⁷⁰ The dissenting opinion, written by Justice Cheshin, denied that this aspect of family life was constitutionally protected.¹⁷¹ Justice Cheshin determined that family migration involves only the unprotected interests of migrants and not the constitutional rights of Israeli citizens.

It is reasonable to assume that citizens have constitutional grounds for admitting their family members. U.S. law gives a preference to immediate relatives, which constitute the largest class of immigrants to the U.S., with no annual quota imposed on their admission.¹⁷² The visa petition for family-sponsored migration of immediate relatives – defined by the INA as spouses, minor children and parents (when the child is over 21 years of age) – can be initiated only by a U.S. citizen; the immediate relative is only the beneficiary. Another preference is the Family-Sponsored Preference, which applies to visa petitions for admitting other preferred family members, such as unmarried sons, daughters and siblings.¹⁷³ Again, these preferences are granted to citizens, not to aliens. They are based on U.S. citizens’ interests in living together with their families – as well as on the government’s interest under which citizens living together with their families are presumed to be “more stable and more likely to integrate into society.”¹⁷⁴

The refutable presumption of dangerousness contains a proper balance between the right to family life of citizens and the compelling interest of

169. *Id.* at 806-07 (Marshall, J., dissenting).

170. *See* HCJ 7052/03, *supra* note 50 (Barak, J., para 34).

171. *Id.* at 165-71 (Cheshin, J.). Justice Cheshin wrote the majority opinion but his ruling on the right to family life under the Basic Laws was not received support by the majority.

172. *See generally* THOMAS A. ALEINKOFF, DAVID MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 302-31 (Thomson/West 5th ed. 2003) (reviewing family reunification categories).

173. *See* § 203(a) of the INA. Preference allocation on this category is limited by annual numerical ceilings; applications are usually processed in a chronological order.

174. *See* ABRAMS, *supra* note 141 at 1637-1638 (noting “immigrants who have families living with them are more stable and more likely to integrate into society. This stability, some believe, reduces crime, increases immigrant economic productivity, and prevents the immigrant from sending the money he or she earns to a different economy through remittances to family members who remain in the country of origin.”).

border security. On one hand, it intercepts security threats posed by admitting enemy aliens; on the other hand, it enables the citizens to challenge the reliability of the presumption in individual cases. It compels the Government to take into account a set of individual factors which include, at minimum, the applicant's immigration record, affiliations and associations, age and immigration history/record, as well as any affidavit of support and humanitarian purpose. It also exempts children under a certain age from this policy.

A refutable presumption of dangerousness seems to satisfy international law as well. International law recognizes the importance of family life and the importance of facilitating unification of families dispersed because of war. Nevertheless, it does not directly establish a protected right to family-migration, even in peacetime.¹⁷⁵ The state's interest in controlling its border, even when applicable to family migration, has always been regarded as part of its sovereignty and right of self-determination. The European Court of Human Rights has supported for years the wide discretion of European states to regulate family migration in order to protect state interests.¹⁷⁶ The Court has protected family-sponsored migration only in those rare cases where admitting aliens into Europe was the sole option for maintaining family life such as when the foreign relative was politically persecuted in his or her country and when the citizen-spouse had no cultural alternative but to live in a foreign country.¹⁷⁷

To sum up, citizens may have strong arguments for a constitutionally protected right to partake in family life with an alien in their own country. That is, infringement of this right should survive constitutional scrutiny; grounds for inadmissibility of family members – such as moral defects, criminal history, health, economic disqualification and national security – have to be examined through constitutional standards because they involve rights of citizens. Yet, the exercise of this right may sometimes be curtailed by compelling governmental interests, such as national security in times of war.

175. For a comprehensive review see Arturo John, *Family Reunification for Migrants and Refugees: a Forgotten Human Right?* (2004), available at http://www.fd.uc.pt/hrc/working_papers/arturojohn.pdf (concluding that “family reunification appears to be relegated to a lower tier of international and regional texts. A 1999 ILO report in fact affirmed that the States: ‘are not bound by any provision of international law to guarantee family reunification’... in all the international instruments adopted, States have opposed any recognition of a right to family reunification that might be considered to substantially curb States’ sovereign right to control who may enter or settle in its territory.”). See also Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 US DAVIS L. REV. 701, 721-29 (2005).

176. *Abdulaziz Cobales and Balkandali v. U.K.*, (1985) 7.E.H.R.R. 471; *Gul v. Switzerland*, (1996) 22 E.H.R.R. 93 ECHR; *Ahmut v. The Netherlands*, (1997) E.H.R.R. 62 ECHR; FAMILY REUNIFICATION EVALUATION PROJECT 21–22 (The European Commission, Brussels 2004)(analyzing the concept of family migration under international law norms).

177. For a review see John, *supra* note 109; Rubinstein & Orgad, *supra* note 88, at 328-41.

B. *Equal Protection and the Presumption of Dangerousness*

The first question is whether excluding entry of enemy aliens can be considered as national discrimination against *aliens*. The starting point for analysis is the Constitution. In many countries, constitutions do not generally apply extraterritorially for non-citizens and thus do not provide equal protection to aliens outside the sovereign territory.¹⁷⁸ International law requires states not to discriminate against people on the grounds of nationality yet grants them broad discretion regarding immigration and citizenship laws. The International Covenant on Civil and Political Rights (ICCPR) allows member states to derogate from their obligations in time of public emergency but only when such derogations “do not involve discrimination *solely* on the ground of race, color, sex, language, religion or social origin.”¹⁷⁹ That is, the ICCPR does not outlaw the factor of nationality *per se*. An explicit prohibition to discriminate against aliens based on nationality appears in the International Convention on the Elimination of all Forms of Racial Discrimination, requiring that member states’ immigration and citizenship laws will “not discriminate against any particular nationality.”¹⁸⁰ However, this provision—as well as other sources of equal protection under international human rights law—has been interpreted during the years to provide little protection in the field of immigration law.¹⁸¹

I would argue that even if we accept that aliens have a wartime self-executing right not to be discriminated against on the basis of nationality, denying admission of enemy aliens should not always be seen as discrimination. Otherwise, any prohibition of contacts between enemy aliens – such as a prohibition of trade with the enemy – might be regarded as discrimination since the people affected by these prohibitions often have a particular national identity. For instance, when President Roosevelt denied Germans’ access to American civil courts during World War II,¹⁸² it was a violation of their right to the writ of habeas corpus but certainly not discrimination against people of German origin. Had Congress wished to discriminate against a particular national group, it would have prohibited admission of persons belonging to such a group – irrespective of where they lived. Such discrimination existed in the past, e.g., when Congress excluded admission of

178. For American law, *see* *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). For British law, *see* *R (Al Skeini) v. Secretary of State for Defence*, EWCA Civ 1609 (2005). For Canadian law, *see* *Schreiber v. Canada* 1. S.C.R. 841 (1998); *R. v. Hape*, SCC 26 (2007). For Israeli law, *see* HCJ 8276/05 Adalla v. Minister of Defense (December 12, 2006), *available at* http://www.hamoked.org/items/318_eng.pdf.

179. *See* International Covenant on Civil and Political Rights art. 4, *opened for signature* December 16, 1966, 999 U.N.T.S. 171. (henceforth “ICCPR”).

180. *See* International Convention on the Elimination of All Forms of Racial Discrimination art. 1(3), *opened for signature* December 21, 1965, 60 U.N.T.S. 195.

181. Augustine-Adams, *supra* note 175, at 729-34.

182. *See* *Johnson*, 339 U.S. 763 (1950).

Chinese only because of their descent,¹⁸³ and when persons of Japanese descent were considered ineligible for naturalization only because of their race.¹⁸⁴ But laws which prohibit admission of enemy aliens do not follow this course. The Israeli Act, e.g., does not affect the Arab Palestinian communities in Jordan, Egypt or any other state exclusive of the Palestinian territories. Palestinians who are not enemy aliens, such as citizens of Saudi Arabia and Libya, are not in principle prohibited from admission. The goal of the Act is not to restrict admission of Palestinians, but only of Palestinian enemy aliens.

An interesting illustration of this argument is the case of detention of Haitians by the U.S. Government. By July 1981, dozens of Haitians had arrived by boats at the southern shores of Florida asking for political asylum. The Government, asserting that the Haitians were not refugees but economic migrants, denied their admission and incarcerated them in a detention facility in Brooklyn. Detained on American soil, the Haitians invoked the Equal Protection Clause.¹⁸⁵ They contended that excluding them without parole – while aliens from other countries were granted parole – was a racist policy against “blacks” and against “Haitians.”¹⁸⁶ Judge Carter of the Southern District of New York ruled that since the policy applied solely and uniformly to Haitians, it was discriminatory by impact based on national origin and ethnicity.¹⁸⁷ Judge Carter found no intent to discriminate against Haitians, but nevertheless elaborated that “a prima facie case of discrimination may be made out by a showing of highly disproportionate impact.”¹⁸⁸ He noted that even though discriminatory impact alone was rarely determinative, it could shift the burden of proof to the government. Yet the Court of Appeals for the Second Circuit reversed by noting that:¹⁸⁹

The District Court, applying by analogy the principles of domestic discrimination cases under the Fifth and Fourteenth Amendments, held

183. The constitutionality of the Chinese Exclusion Act of 1882— which excluded not only Chinese nationals but every person of Chinese descent, even if returning residents asking for reentry after leaving with a valid certificate—was upheld in the Supreme Court in one of the most notorious cases in American history. *See* *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). For an excoriation, *see* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987).

184. *See* *Ozawa v. United States*, 260 U.S. 178 (1922) (holding that people of Japanese descent are not ‘white’ and hence are not an admissible race for naturalization); *United States v. Thind*, 261 U.S. 204 (1923) (holding that a ‘high-caste Hindu’ is not eligible for naturalization because he is not a ‘Caucasian’).

185. *Vigile v. Sava*, 535 F. Supp. 1002, 1005 (S.D.N.Y.1982).

186. *Id.* at 1007.

187. *Id.* at 1016 (“even though Congress may employ race or national origin as criteria in determining which aliens to exclude from the country, a district director of the Immigration and Naturalization Service may not apply neutral regulations to discriminate on such grounds. Such invidious racial or national origin based discrimination constitutes abuse of discretion when insinuated into a neutral grant of decision-making authority”)

188. *Id.* at 1017.

189. *See* *Bertrand v. Sava*, 684 F.2d 204, 218 (1982). The Supreme Court reached a similar conclusion in similar cases of Haitians— even though it avoided a direct confrontation with the constitutional issue of the Fifth Amendment. *See* *Jean v. Nelson*, 472 U.S. 846 (1985).

that a showing of highly disproportionate discriminatory impact had been made, and that the burden of proof thereupon shifted to the Government . . . Whatever shifting of burden may be permissible in cases based upon the Government's affirmative duty not to discriminate in employment and housing, none is permissible here.

Under Aristotle's definition, equality means equal treatment of equals and different treatment of different; it demands that the difference be relevant to the goal sought.¹⁹⁰ It can be thus argued that imposing restrictions on enemy aliens and on non-enemy aliens is not to be regarded as similar cases which should be treated similarly but, rather, as different cases which should be treated differently. That is because the difference between foe and friend is relevant for evaluating security risks. The distinguishing factor is not descent but enmity. The fact that a wartime policy has ethnic implications derives from the nature of war as combat between nation-states.¹⁹¹

The more crucial question is therefore whether the policy offered by a presumption of dangerousness constitutes discrimination against *citizens*? Citizens enjoy equal protection. Congress, for example, cannot embrace a rule allowing white citizens to admit their family members while denying this option from black citizens. Even if the Plenary Power Doctrine¹⁹² grants Congress the power to exclude aliens in an "absolute and unqualified" manner,¹⁹³ family migration is still a different case because it involves citizens.¹⁹⁴

Is a law that excludes relatives of citizens of a certain national origin tantamount to national discrimination? In *Fiallo v. Bell*, the petitioners argued that a distinction made by Congress between natural fathers and mothers of illegitimate children violated the Equal Protection Clause.¹⁹⁵ The

190. See ARISTOTLE, NICOMACHEAN ETHICS, II3IAI5-25 (W. D. Ross trans., 1925); ARISTOTLE, POLITICS, 3.1280a8-15, I282bI8-23 (Ernest Barker trans., 1946).

191. Cf. Thomas Buergerthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS, 72, 83 (Louis Henkin ed., 1981) (noting that "measures having a legitimate purpose but which affect a racial or religious group in particular would not be prohibited. For example, measures taken during a public emergency in a part of the country whose inhabitants belong to a religious minority would not be illegal merely because they affected that group.").

192. The Plenary Power Doctrine, developed by the last 19th century, gives Congress and the President very broad authority to regulate immigration law almost free of judicial review. The literature on the Plenary Power Doctrine is vast. See, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725 (1996); Cornelia T.L. Pillard, Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power Judicial and Executive Branch Decision Making in Miller v. Albright*, SUP. CT. REV. 1 (1999).

193. See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

194. See Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens'*, 41 VILL. L. REV. 725 (1996).

195. See *Fiallo*, 430 U.S. 787, 791 (1977).

law supported admission of an illegitimate child of a natural mother, but denied admission of the same child if the petition was filed by a natural father. The petitioners claimed that such a policy creates gender-based discrimination among citizens.¹⁹⁶ The majority opinion denied their claim, ruling that at stake are not rights of U.S. citizens but rather interests of aliens.¹⁹⁷ However, as already mentioned, the dissenting opinion held that the case involves the rights of citizens, not of aliens¹⁹⁸ and, hence, Congress drew unlawful discriminatory lines among citizens.¹⁹⁹

In a similar case, *Nguyen v. INS*, the petitioner challenged gender-based discrimination between a father and a mother of an out-of-wedlock child.²⁰⁰ The relevant policy relating to the acquisition of citizenship of an out-of-wedlock child, born outside the U.S. to a citizen parent and a non-citizen parent, depended on whether the citizen-parent was the father or the mother.²⁰¹ The law declares that an out-of-wedlock child born abroad to a U.S. citizen father and a non-citizen mother can attain citizenship at birth only after several additional conditions are met²⁰² These conditions do not apply if the child was born to a citizen mother and a non-citizen father.²⁰³ The petitioner was born in Vietnam to a U.S. citizen father and a non-citizen mother. To transmit citizenship to his child, the father was required to satisfy preconditions for proving their biological relationship.²⁰⁴ Justice Kennedy, speaking for the majority, held that the Government had an interest in assuring a biological link between the citizen-parent and the child and that this biological link “is verifiable from the birth itself” in the case of a mother; the father, however, had to provide alternative “clear and convincing evidence of parentage.”²⁰⁵ Although Justice Kennedy found no constitutional problem in the case, the dissenting opinion found violations of U.S. citizens’ equal protection.²⁰⁶ Here, again, the court was split on the equal protection question.

It is hard to understand how this discrimination withstood the scrutiny of

196. *Id.*

197. *Id.* at 800, at n.6.

198. *Id.* at 800, 807-08

199. Compare to Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 318-19 (1977) (noting this policy “discriminate[s] among citizens and resident aliens according to legitimacy and gender . . . had the statute discriminated between men and women or between legitimate and illegitimate children with respect to any other privilege or benefit—for example, welfare—I have little doubt that the Court would have held it invalid. But because the benefit was paid out in the form of immigration preferences rather than dollars, the Court [upheld it].”).

200. See Tuan Anh Nguyen v. INS, 533 U.S. 53 (2001).

201. *Id.* at 59-60.

202. *Id.*

203. *Id.*

204. *Id.* at 57-58.

205. *Id.* at 62-63. The father was asked to prove his paternity by one of three alternatives—legitimation, a declaration of paternity under oath or a court order of paternity. He successfully passed a DNA test but the Court was unwilling to accept it since Congress doubted its reliability.

206. *Id.* at 86. (O’Connor, Souter, Ginsburg and Breyer J.).

equal protection, but this case is important to our discussion in at least two respects. First, the Court assumed that the Constitution applied in the case and analyzed the issue under the Equal Protection Clause, even though the Court distinguished this case from *Fiallo*.²⁰⁷ Second, the *Fiallo* and *Nguyen* decisions involve discrimination against citizens, not aliens. Both cases raise issues of discrimination based on distinctions between U.S. citizens. The case of enemy aliens, however, is distinguishable. Denying admission of enemy aliens says very little about citizens, as *all* citizens are forbidden to petition for their enemy alien relatives. Rather, the relevant distinction is between aliens – enemy and non-enemy aliens.

A distinction based on country of origin is occasionally an inevitable reality even if it affects citizens as well. For example, economic sanctions against an enemy nation may harm the commercial interests of citizens and affect their freedom of trade. Similarly, international embargoes often harm the rights of citizens of the countries issuing these restrictions, and this harm may be substantial, particularly against certain national groups. True, the curtailment of civil liberties is much less critical in the cases of sanctions and embargoes than in the case of family life but the point is that no one could seriously claim that these policies are discriminatory. U.S. immigration policy allows citizens of designated countries to enter its borders for 90 days as temporary visitors without obtaining a visa under the Visa Waiver Program.²⁰⁸ Unlike other foreign nationals, each applicant is exempted from a background check in a U.S. consulate abroad. If excluding enemy aliens is national discrimination, then the entire visa system, and perhaps other immigration policies, may be regarded as discriminatory.²⁰⁹

After the terror attacks of September 11, 2001, the U.S. Attorney General required special registration procedures – under the National Security Entry-Exit Registration System (“NSEERS”) – from every male non-immigrant alien of particular designated countries: Iraq, Iran, Sudan, Syria and others. When these people arrived at the INS offices, a removal order was issued against them. This policy was brought to court as a violation of the Equal Protection Clause as it is aimed only against Muslims from certain countries. Several courts dismissed this claim by ruling that “distinctions on basis of nationality may be drawn in the immigration field” and “so long as such

207. Unlike *Fiallo*, which dealt with admission of aliens, *Nguyen* dealt with the issue of naturalization; the Court analyzed whether the petitioner was a citizen in the first place.

208. See ALISON SISKIN, VISA WAIVER PROGRAM (CRS Report for Congress, 2004). The list includes 27 countries as follows: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland and the UK.

209. See *Jean v. Nelson*, 472 U.S. 846, 864 (1985) (Marshall, J., dissenting) (“For better or worse . . . nationality classifications have played an important role in our immigration policy.”).

distinctions are not wholly irrational they must be sustained.”²¹⁰ Up until now, every circuit court of appeal which had considered the NSEERS program ruled that it did not violate the equal protection clause.²¹¹ These are harsh decisions, which are to be objected to among other reasons because the petitioners were U.S. residents. Yet the courts ruled that as long as the distinction is based on a *prima facie* legitimate and *bona fide* reason, aliens can be classified on the basis of their nationality. The courts held that special procedures are necessary because of the involvement of persons from these countries in terrorism.

Numerous cases uphold the idea that nationality may be a relevant factor in immigration laws. During the Cold War, the U.S. Government deported permanent residents solely because of their membership in the Communist Party.²¹² The pivotal factor was not nationality but membership in an “enemy party.”²¹³ Justice Jackson held that “though the resident alien may be personally loyal to the United States, if his nation becomes our enemy, his allegiance prevails over his personal preference, and makes him also our enemy.”²¹⁴ Consequently, no family migration between citizens and members of the Communist party was permitted.

In a similar manner, when the U.S. suspended diplomatic relations with Iran in the late 1970s, Iranian students in the U.S. were asked to show INS officers documents proving that they were lawfully residing in the U.S.²¹⁵ A few Iranian students challenged this policy, asserting that it violated their equal protection because it was aimed against Iranians.²¹⁶ The Court of Appeal for the District of Columbia Circuit rejected this claim. The court found the factor of nationality to be relevant in the field of immigration policy – as long as its use is not irrational. The court noted that “classifications among aliens based upon nationality are consistent with equal protection.”²¹⁷

These are hard cases in which the courts present no theory for controlling unwanted migration; the decisions are often arbitrary with no distinctions

210. See *Roudnahal v. Ridge*, 310 F.Supp.2d 884, 892 (N.D. Ohio 2003). See also *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (“the Executive should not have to disclose its ‘real’ reasons for deeming nationals of a particular country a special threat . . . even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.”).

211. See *Kandamar v. Gonzales*, 464 F.3d 65, 72-73 (1st Cir. 2006) (holding that “Congress may permissibly set immigration criteria based on an alien’s nationality or place of origin . . . [for] monitoring nationals from certain countries to prevent terrorism.”); *Rajah v. Mukasey*, 2008 WL 4350021 (C.A.2); *Ali v. Gonzalez*, 440 F.3d 678, 681 n. 4 (5th Cir. 2006); *Zafar v. U.S. Att’y Gen.*, 461 F.3d 1357, 1367 (11th Cir. 2006); *Shaybob v. Att’y Gen.*, 189 Fed.Appx. 127, 129-30 (3d Cir. 2006); *Malik v. Gonzales*, 213 Fed.Appx. 173 (4th Cir. 2007).

212. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 581-84 (1952).

213. *Id.* at 590-91.

214. *Id.* at 587.

215. See *Narenji v. Civiletti*, 617 F.2d 745, 746-47 (D.C. Cir. 1979).

216. *Id.*

217. *Id.*

made between different circumstances. My concern is whether inadmissibility of enemy aliens is unlawful discrimination against citizens when it is carried out by means of family migration. This case involves national security matters – it is not a typical immigration case. It also involves non-resident aliens outside the territory – it is not a case of residents asking admission while already in the territory or of aliens at a port of entry. In light of that, I would argue that the solution of a refutable presumption makes no distinction among citizens but only among admissible and inadmissible aliens. In effect, this policy might affect citizens as well with the impact being particularly harsh in countries having minorities who seek family ties with people of a certain nationality. Provided that no threat to national security exists, these people should thus be admitted.

CONCLUSION

We have to get used to a new concept of war. The “War on Terror” is not World War II. We should expect the use of neither classic visible weapons nor traditional means and methods of warfare. The new war’s combatants could be civilians; the war zones could be our neighborhoods. Terrorists have not hesitated to resort to cruel and unusual techniques; manipulation of the aspiration for family life has not been excluded. We naturally strive to put family life off limits to government intervention. Family is associatively linked with love – and love (we hope) leads to the pursuit of happiness. But once we understand that romance and family migration may be exploited for the purpose of terrorism, we understand that immigration laws and policies have to be used as a defensive measure.

The 9/11 Commission reports that the U.S. Government failed to see the nexus between immigration policies and national security, a systematic defect that prevailed prior to the attacks.²¹⁸ The Government failed to perceive its immigration laws and policies as counter-terrorism measures; it focused on preventing crime rather than terror. The system failed to understand that the presence of a terrorist in the country may, by itself, be a lethal weapon. The Commission pointed out that, “for terrorists, travel documents are as important as weapons.”²¹⁹ It recommends adopting a new system that would also be regarded as a counter-terrorism measure.²²⁰

Israel is a unique case of a modern love and war saga. Yet a security risk presented by wartime family migration may exist in other countries as well. Although all the nineteen hijackers on September 11, 2001 were lawfully

218. See NATIONAL COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, *supra* note 1 at 383-84 (“in the decade before September 11, 2001, border security—encompassing travel, entry and immigration—was not seen as a national security matter.”).

219. *Id.* (“before 9/11, no agency of the U.S. government systematically analyzed terrorists’ travel strategies. Had they done so . . . [it] could have allowed authorities to intercept 4 to 15 hijackers.”).

220. *Id.* at 385-90.

admitted into the country on nonimmigrant visas, eighteen other terrorists who had operated between the early 1990s and 2004 were granted permanent status due to their marriage to American citizens.²²¹ This *modus operandi* may become more acute in the near future.

The current situation presents a real challenge to any democracy facing a national emergency. The case of family migration in times of war is an issue which requires taking into account not only national security needs but also the citizen's fundamental right to family life – as well as the citizen's right to be treated equally. Categorical exclusion of enemy aliens is a harsh policy – yet an uncontrolled admission is not wise, either. This situation calls for a new, more balanced solution. The presumption, suggested in this article, offers such a balanced solution. It allows nations to exclude enemy aliens – or non-resident aliens under the rule of states sponsoring terrorism – but enables admission in individual suitable cases. It presumes a certain degree of risk from subjects of warring nations but allows a refutation in particular cases in order to achieve individual justice.

221. Kephart, *supra* note 148, at 12-14.