

# Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship<sup>†</sup>

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## INTRODUCTION

Some time ago, I was on the teaching market and I received an invitation to give a job talk at a law school. I flew to the school, enjoyed a pleasant day of meetings with the faculty, and received strong indications of support for my candidacy. I had been warned about the vagaries of the academic hiring process, so I naturally took this signal with a grain of salt, but remained cautiously optimistic.

The day of the hiring decision arrived, and, as it turned out, a small minority of professors cast their ballots, in block, against my candidacy. Under department rules, full-time tenure-track positions required an affirmative vote of seventy-five percent of the faculty. I ended up one vote shy of the needed supermajority.

The next day, I received a phone call from one of the faculty members. He told me the results of the vote and then dropped a rather curious line: "You shouldn't take any of this personally. The group that voted against you thought you'd be a great colleague and a wonderful addition to the law school. It was just a race issue."

Thoroughly taken aback, I asked him to repeat his comment, just to make sure that I had heard him correctly. I had. Still nonplussed, I robotically mumbled: "Well, it's sad to think that there might still be discrimination against minorities."

"No, no, John. They objected to the fact that you are white," he replied. I was stunned.

"White?" I said.

"Yeah. They insisted that we hire a minority candidate. They've drawn a line in the sand and simply won't accept another white male hire." I chuckled at the unintentional pun and the notion that I was a white male. Apparently, the dissenters to my candidacy were a group of progressive liberals concerned about minority representation on the faculty. Ironically, they appeared indifferent to the lack of a single professor of Middle Eastern descent on the full-time faculty—a fact made more pronounced by the school's presence in a community with a large Middle Eastern population and a ten percent Middle Eastern student body. More concerned with diversity *de jure* than *de facto*, the school counted statistical appearances over reality.<sup>1</sup> Still in shock, I responded:

"They do know that I'm Middle Eastern, don't they?"

"Yes, of course," he said, "so they consider you white." I was flabbergasted. I had suspected that I would come face-to-face with discrimination in the hiring process at some point in my professional experience, but I had never thought that it would be so unabashed and that it would stem from being considered white. At my wit's end, I simply replied:

"White, huh? That's not what they call me at the airport."

Several days later, I received another phone call. This time, it was the dean of the law school on the line. He was calling to present me with a formal offer to join the faculty. I asked him what circuitous chain of events had led to this reversal. Apparently, after consulting with the president and general counsel of the university, he had determined that his faculty's actions had violated numerous federal and state anti-discrimination laws.

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1. As I argue later, race statistics almost uniformly count Middle Easterners as white. Thus, on paper, the hiring of a Middle Eastern male counts as the hiring of a white male.

“They all agreed that they would love to have you on the faculty. The sole objection to your candidacy was your ethnic background—a small block of our faculty objected to the fact that you were white. They wanted the position to go to a minority candidate.”

Needless to say, this bizarre sequence of events left me thoroughly perplexed. Ultimately, after contemplating the circumstances of the offer, I politely declined it. Yet the experience was not without merit. First of all, it served as a remarkable introduction to the realities of the academic hiring process, especially at the law-school level. Secondly, the experience highlighted the degeneration of the politics of race in certain circles. Though ripe for and deserving of further analysis, these topics remain beyond the scope of this particular Article. Instead, I would like to focus on one particular aspect of the story, a critical and wholly unaddressed issue: the ambiguous racial status of Middle Eastern individuals. As this vignette indicates, despite the use of race-based criteria in the hiring process, the racial status of Middle Eastern individuals remains thoroughly nebulous. And, this uncertainty informs problematic social policies and undermines progress in the fight against racial discrimination.

Individuals of Middle Eastern descent are caught in a racial catch-22. Through a bizarre fiction, the state has adopted the uniform and mandatory classification of all individuals of Middle Eastern descent as white. On paper, therefore, they appear no different than the blue-eyed, blonde-haired individual of Scandinavian descent. As a consequence, Middle Easterners are ineligible for affirmative action policies and other remedial benefit systems. Within the confines of our legal education system, the increased presence of Middle Easterners does not count as a contribution towards diversity in the classroom or on the faculty—despite the fact that Middle Easterners advance diversity interests when assessed under both the academic theories of such scholars as Devon Carbado and Mitu Gulati<sup>2</sup> or jurisprudential theories advanced by the Supreme Court in recent years.<sup>3</sup>

All the while, reality does not mesh with the bureaucratic characterization of Middle Eastern individuals as white. On the street, individuals of Middle Eastern descent suffer from the types of discrimination and racial animus endured by recognized minority groups. And, unlike most minority groups, Middle Eastern individuals have endured increasing levels of vilification and demonization in recent years, especially in the wake of the war on terrorism and the 9/11 attacks.<sup>4</sup>

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2. See Devon W. Carbado & Mitu Gulati, *What Exactly Is Racial Diversity?*, 91 CAL. L. REV. 1149, 1150–51 (2003) (reviewing ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* (2002)) (advancing a theory of diversity that contemplates inclusion, social meaning, racially-cooperative citizenship, belonging, color blindness, speech, and institutional culture).

3. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the compelling interest of educational institutions in diverse student bodies on the grounds that diversity promotes cross-racial understanding, enervates invidious racial stereotypes, and enlivens classroom discussion); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–13 (1978) (arguing that race-conscious practices to create racially diverse student communities are permissible to promote “atmosphere[s] of ‘speculation, experiment and creation’”).

4. See, e.g., Susan M. Akram, *The Aftermath of September 11, 2001: The Targeting of Arabs and Muslims in America*, 24 ARAB STUD. Q. 61, 61 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 974–77 (2002) [hereinafter Cole, *Enemy Aliens*] (discussing the profiling of

The dualistic and contested ontology of the Middle Eastern racial condition therefore creates an unusual paradox. Reified as the other, individuals of Middle Eastern descent do not enjoy the benefits of white privilege. Yet, as white under the law, they are denied the fruits of remedial action. As Anita Famili has eloquently noted,

Middle Eastern Americans remain an invisible group. They are both interpolated into the category of Caucasian while simultaneously racialized as an “other.” They are both denied minority recognition while simultaneously identified as distinct. Middle Eastern Americans do not appropriately fit into the prevailing categories of race. Rather, their ethnic/racial identity is constantly contested.<sup>5</sup>

Moreover, the state’s racial fiction fosters an invisibility that perniciously enables the perpetuation and even expansion of discriminatory conduct, both privately and by the state, against individuals of Middle Eastern descent. Specifically, the refusal to keep statistics about those of Middle Eastern descent (as distinct from those of European descent) has forestalled analysis and resolution of the specific issues facing Arab, Iranian, and Turkish Americans—problems that have grown more exigent in the post-9/11 world order.

In analyzing the antinomy of Middle Eastern racial classification, I begin with an examination of the status of Middle Easterners in the traditional racial hierarchy around which life in the United States has organized itself. Specifically, I assess a series of naturalization cases from the turn of the last century that forced courts to opine about the whiteness of individuals of Middle Eastern descent. Despite issuing conflicting rulings on this question, courts reflected similar techniques in reifying racial constructs around an intricate symptomatology wholly unrelated to biology. An exegesis of these decisions reveals a complex racial landscape both fraught with uncertainty and characterized by the denial of many of the hallmarks of white privilege to Middle Easterners.<sup>6</sup> At the same time, these cases, the dramaturgy of whiteness that they fostered, and the intricate negotiations of racial belonging that they precipitated have produced the paradox of Middle Eastern racial heuristics: the classification of Middle Easterners as white before the law but not on the street. I also trace the development of Middle Eastern racial identification from the bottom-up. Drawing on Kenji Yoshino’s theory of “covering,”<sup>7</sup> I cast an eye towards the unique assimilatory coercion that Middle Easterners, by virtue of their precarious position on the cusp of the white/nonwhite divide, face in their daily lives.

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Middle Easterners in the wake of 9/11); David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753, 1753 (2004) [hereinafter Cole, *The Priority of Morality*] (estimating that as of January 2004, 5000 foreign nationals, mostly individuals of Middle Eastern descent, were being held by U.S. authorities “through [their] antiterrorism efforts”); see also Hasti Fakhrai-Bayrooti, Note, *Denial of Public Access to Deportation Hearings: Is it Protecting National Security or Violating Fundamental Liberties?*, 25 WHITTIER L. REV. 203, 210 (2003).

5. Anita Famili, What About Middle Eastern American Ethnic Studies (May 17, 1997), [http://www.urop.uci.edu/symposium/past\\_symposia/1997/ablist3.html](http://www.urop.uci.edu/symposium/past_symposia/1997/ablist3.html).

6. See, e.g., John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000).

7. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) [hereinafter Yoshino, *Covering*].

The peculiar anxieties and challenges of Middle Eastern racial status have grown even more pronounced in recent years as the disconnect between decree and praxis has widened. Unlike virtually every other racial minority in our country, Middle Easterners have faced rising, rather than diminishing, degrees of discrimination over time—a fact indicated by recent targeted immigration policies, racial profiling, a war on terrorism with a decided racial bent, and growing rates of job discrimination and hate crime. Tracing the interpolation of the Middle Easterner as the other, along with the concomitant social, cultural, and religious semiotics at play in the game of racial construction, I argue that, despite its many other successes, the modern civil rights movement has not done enough to advance the freedoms of those of Middle Eastern descent. Specifically, in recent years, we have witnessed the chilling reproblematicization of the Middle Eastern population from friendly foreigner to enemy alien, enemy alien to enemy race.

I then assess how we might begin to address the extant and growing assault on the civil rights of Middle Easterners living in the United States. As I suggest, rather than uncritically dissolving them into the category of whiteness (except when targeting them for profiling purposes), the state should begin to identify individuals of Middle Eastern descent as part of a distinct racial category. A simple, yet crucial, observation undergirds this proposal: in the modern bureaucratic world, the only thing worse than being reduced to a statistic is not being reduced to a statistic.<sup>8</sup> I advocate this proposal cognizant of its risk in essentializing race as fact, rather than as construct. Yet, in the immediate term, the state should take just such a step as the best approach to addressing the unique issues facing the Middle Eastern population.

Finally, and most importantly, I appeal to the legal academy to launch a dialogue, in both its law review literature and in the classroom, on the particular issues facing the Middle Eastern population, particularly in the post-9/11 environment. A central tenet of this plea is a re-examination in what we—as a society and as scholars—count as diversity. In the spirit of such figures as Richard Delgado,<sup>9</sup> Jerome Culp,<sup>10</sup> and Robert Chang,<sup>11</sup> this Article takes a simple, though radical, step: calling for the development

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8. In one sense, Middle Easterners are reduced to a statistic every time they suffer from the practice of racial profiling. Moreover, there may be countless surveillance statistics used for national security purposes (and unavailable to the public) that place Middle Easterners in a distinct category from Caucasians. However, for the purposes of this argument, I am referring to publicly available government statistics—statistics that are used for a variety of purposes, including measuring discrimination, ascertaining rates of representation in the workforce, and determining the political significance of a particular ethnic or racial group.

9. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 563 (1984) (calling for increased diversity in civil rights scholarship).

10. Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 40 (boldly declaring an “African-American Moment” in the legal academy).

11. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1245–46 (1993) (announcing an “Asian American Moment” in the legal academy and noting opportunities to reverse the pattern of discrimination against Asian Americans and the failures of traditional civil rights work and critical race theory to address the unique issues facing Asian Americans).

of a Middle Eastern legal scholarship and advocating the steps necessary to facilitate this new wave of work in critical race theory.

### I. THE RACIAL IDENTIFICATION OF INDIVIDUALS OF MIDDLE EASTERN DESCENT IN HISTORICAL PERSPECTIVE

To understand the present status of Middle Easterners as interpolative subjects of the law and the state, it is necessary to examine the history of Middle Eastern immigration and racial classification. As we shall see, the present racial status of Middle Easterners is an unfortunate extension of a history of jurisprudence in which judges relied upon several flawed, arbitrary, and scientifically suspect doctrines of racial determination.

The racial status of Middle Easterners is not only ambiguous but a conundrum subject to the vicissitudes of history. However, the official government position on the matter of racial categorization is deceptively clear and uncomplicated. The federal government's Equal Employment Opportunity Commission (EEOC) currently divides racial identification into six seemingly simple categories: "White; Black or African American; Hispanic or Latino; American Indian or Alaska Native; Asian; and Native Hawaiian or Other Pacific Islander."<sup>12</sup> According to this rubric, the EEOC classifies Arabs and other individuals from the Middle East, including Turks, Kurds, and Persians, as "white."<sup>13</sup> Similarly, the Code of Federal Regulations defines someone who is "White, not of Hispanic Origin" as "[a] person having origins in any of the original people of Europe, North Africa, or the Middle East."<sup>14</sup> As a result, federal, affirmative action programs, such as the one supported by the Department of Defense, extend to "[a]ll persons classified as black (not of Hispanic origin), Hispanic, Asian or Pacific Islander, and American Indian or Alaskan Native."<sup>15</sup> Thus, individuals from the Middle East are not considered minorities at the federal level, and state guidelines are typically in accord.<sup>16</sup> In California, for example, public universities consider faculty applicants Caucasian if they come from Middle Eastern or North African descent.<sup>17</sup> According to Uncle Sam, therefore, a Middle Easterner is as white as a blond-haired, blue-eyed Scandinavian.

12. Introduction to Race and Ethnic (Hispanic Origin) Data for the Census 2000 Special EEO File, [http://www.eeoc.gov/stats/census/race\\_ethnic\\_data.html](http://www.eeoc.gov/stats/census/race_ethnic_data.html) (last visited Aug. 24, 2006).

13. *Id.*

14. 28 C.F.R. § 42.402(e)(5) (2005).

15. DEP'T OF DEF., DIRECTIVE NO. 14401.1 (1987), available at <http://www.dtic.mil/whs/directives/corres/rtf/d14401x.rtf>.

16. Compare, e.g., U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.003, COMPLIANCE MANUAL SECTION 15: RACE & COLOR DISCRIMINATION 15-3 (2006) (internal citation omitted) (listing "five racial categories: *American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander*; and *White*; and one ethnicity category, *Hispanic or Latino*." (emphasis in original)) with W. Va. Equal Emp. Office, Race & Color Discrimination Definition, <http://www.wvf.state.wv.us/eeo/Race.htm> (last visited November 30, 2006) (adopting the same categories).

17. UCLA Academic Recruitment—Selection Data and Compliance Form, <http://www.apo.ucla.edu/forms/aaform.pdf>.

Interestingly, the only recorded attempt to have Middle Easterners included in affirmative action considerations was squarely rejected. The National Association of Iranian Americans petitioned for eligibility for the Small Business Administration's (SBA) minority procurement affirmative action program.<sup>18</sup> The petition was firmly denied, as individuals of Middle Eastern descent have no place on the SBA's list of "socially disadvantaged groups"—set out by Congress in the Small Business Act<sup>19</sup> as groups who have presumptively "been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities."<sup>20</sup>

The assumption that individuals of Middle Eastern descent have not suffered systemic racial prejudice in American society based on their group identification is unfathomable. Indeed, quotidian realities render laughably absurd the government categorization of Middle Easterners as white. As any Arab, Turkish, or Iranian American will tell you, Middle Easterners are infrequently treated as white people in their daily lives—certainly not when they deal with the Transportation Security Administration at an airport, when they confront law enforcement officials at a border check, or when they encounter the police at an otherwise routine traffic stop. The formal classification of Middle Easterners as white is the product of a sinuous and tortured history that warrants further investigation.

#### A. Constructing Caucasians

Our examination begins with the development of the concept of "Caucasian." The word initially emerged from the annals of anthropology, a field that has historically divided humans into three categories: the Caucasoid, the Mongoloid, and the Negroid. Such theories of race, first promulgated in the late eighteenth-century, rapidly gained popular currency and have colored understandings of racial belonging ever since.

The term "Caucasian" first entered the public discourse with the work of German scholar Johann Friedrich Blumenbach. In his 1775 treatise, *On the Natural Variety of Mankind*, Blumenbach employed the moniker to refer to the inhabitants of Europe, the Middle East (or, Asia Minor/Southwest Asia, as it was known at the time), and North

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18. George R. LaNoue & John C. Sullivan, *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action*, 6 J. POL'Y HIST. 439, 456 (1994); Sean A. Sabin, *Rethinking the Presumption of Social and Economic Disadvantage*, 33 PUB. CONT. L.J. 825, 828 (2004).

19. 15 U.S.C. § 637(d)(3)(C)(ii) (2000) (defining Black Americans, Hispanic Americans, Native Americans, and Asian-Pacific Americans as disadvantaged groups).

20. 13 C.F.R. § 124.103(b)(1) (2006) (designating "Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal)" as socially disadvantaged groups).

Africa.<sup>21</sup> His use of the sobriquet “was purely fortuitous, stemming from his particular fascination and appreciation for a particular skull—that of a Georgian woman—in his collection.”<sup>22</sup> Ultimately, Blumenbach classified humans into five groups (Caucasian, Mongolian, Ethiopian, Malay, and American), and later ethnologists drew on his work and generally reduced that number to three (Caucasian, Mongolian, and Ethiopian) or four (adding either Malay/Australian/Polynesian or Amer-Indians as separate categories).<sup>23</sup> All told, the Caucasian category enjoyed widespread adoption in the major scientific treatises of the nineteenth- and early twentieth-centuries.<sup>24</sup>

The terms “Caucasian” and “white” were soon used interchangeably, and the reasons for this etymological confluence are particularly revealing. As Matthew Frye Jacobson has argued, starting with the Irish Famine of 1840, the United States experienced several waves of immigration that precipitated a “crisis of whiteness.”<sup>25</sup> Until 1840, individuals freely entering the United States descended almost exclusively from Anglo-Saxon stock.<sup>26</sup> Suddenly, individuals from Ireland, Greece, Germany, Italy, and Russia sought refuge in the United States. To the surprise of modern observers, the racial status of these new immigrants was far from certain and their whiteness far from assured.<sup>27</sup> The Irish suffered from pervasive discrimination (“Irish Need Not Apply”) and, bearing the designation “the blacks of Europe,” faced a lengthy

21. JOHANN FRIEDRICH BLUMENBACH, ON THE NATURAL VARIETY OF MANKIND 98–99 (Thomas Bendyshe ed., Bergman 1969) (1775); *see also* Dow v. United States, 226 F. 145, 146 (4th Cir. 1915) (noting that Blumenbach’s work “became known” and “generally accepted” in the United States upon its translation into English in 1807).

22. THOMAS HENRY HUXLEY, METHODS & RESULTS OF ETHNOLOGY (1868) (“Of all the odd myths that have arisen in the scientific world, the ‘Caucasian mystery’ invented quite innocently by Blumenbach is the oddest. A Georgian woman’s skull was the handsomest in his collection. Hence it became his model exemplar of human skulls, from which all others might be regarded as deviations; and out of this, by some strange intellectual hocus-pocus, grew up the notion that the Caucasian man is the prototypic ‘Adamic’ man.”).

23. *In re* Najour, 174 F. 735, 735 (C.C. Ga. 1909); *In re* Kanaka Nian, 21 P. 993, 993 (Utah 1889). Brewton Berry’s observation about this effort to divide humanity by race is particularly instructive as to the arbitrary and constructed nature of the categories used: “Hardly two [scientists] agree as to the number and composition of the races. Thus one scholar makes an elaborate classification of twenty-nine races; another tells us there are six; Huxley gives us four; Kroeber, three; Goldenweiser, five; and Boas inclines to two, while his colleague, Linton, says there are twelve or fifteen. Even my dullest students sometimes note this apparent contradiction.” Brewton Berry, *A Southerner Learns About Race*, COMMON GROUND, Spring 1942, at 88, 90.

24. *See, e.g.*, DANIEL GARRISON BRINTON, RACES AND PEOPLES 171–72 (New York, N.D.C. Hodges 1890); LOUIS FIGUIER, LES RACES HUMAINES (Paris, Hachette 1872); JOHN P. JEFFRIES, THE NATURAL HISTORY OF THE HUMAN RACES 12 (New York, E.O. Jenkins 1869); A.H. KEANE, THE WORLD’S PEOPLES (1908); CHARLES PICKERING, THE RACES OF MAN, at li–liv (London, H.G. Bohn 1851); and JAMES COWLES PRICHARD, THE NATURAL HISTORY OF MAN (London, H. Bailliere 1848).

25. MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 38 (1998).

26. *See, e.g.*, United States v. Thind, 261 U.S. 204, 213 (1923) (noting that the original framers of the Naturalization Act and their forebears had come from “the British Isles and Northwestern Europe”).

27. *See generally* Tehranian, *supra* note 6, at 821–827.



struggle to establish their white status.<sup>28</sup> Italian youngsters in the American South were schooled with black children<sup>29</sup> and their parents' darker skin and facial features were scrutinized as possible evidence of black ancestry.<sup>30</sup> And the Greeks and Slavs initially found themselves excluded from the category of white.<sup>31</sup> As one prominent politician of the time, Senator F. M. Simmons of North Carolina, noted, these new immigrants were "nothing more than the degenerate progeny of the Asiatic hoards [sic] which, long centuries ago, overran the shores of the Mediterranean . . . the spawn of the Phoenician curse."<sup>32</sup>

However, assimilatory forces eventually took hold. The post-1840 immigrant groups, previously referred to as the Celtic, Nordic, Alpine, and Mediterranean races, were gradually absorbed into an allegedly homogenous and mythic "white" race beatified with the scientific term "Caucasian" which granted new legitimacy and virility to the concept of whiteness.<sup>33</sup> In forging a sense of nationhood among its heterogeneous population, America unified itself around this new scientific concept of race. To this day, we unquestionably define any individual of Irish, Italian, Slavic, or Greek descent as white.

But, the reification of whiteness was not without significant complications. Shortly after the ratification of the Constitution, Congress limited the right of naturalization to "any alien, being a free white person."<sup>34</sup> After the Civil War, the Reconstructionists amended this legislation to include "aliens of African nativity and to persons of American descent."<sup>35</sup> And so the law remained until 1952: only individuals of white or

28. See NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 41 (1995).

29. See LEONARD DINNERSTEIN & DAVID M. REIMERS, *ETHNIC AMERICANS: A HISTORY OF IMMIGRATION AND ASSIMILATION* 36 (1982), quoted in MARY C. WATERS, *ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA* 2 (1990).

30. See, e.g., *Rollins v. State*, 93 So. 35 (Ala. Ct. App. 1922) (reversing the conviction of a black man for the crime of miscegenation on the grounds that the state had failed to produce competent evidence that the woman he had married, a Sicilian immigrant, was in fact white by law). In a 1907 debate on immigration reform, congressman John Burnett of Alabama, a member of the House of Representatives Committee on Immigration and Naturalization, epitomized the rampant hostility towards these new immigrants: "I regard the Syrian and peoples from other parts of Asia Minor as the most undesirable, and the South Italians, Poles and Russians next." Nancy Faires Conklin & Nora Faires, "*Colored*" and *Catholic: The Lebanese in Birmingham, Alabama*, in *CROSSING THE WATERS: ARABIC-SPEAKING IMMIGRANTS TO THE UNITED STATES BEFORE 1940*, 69, 76 (Eric J. Hooglund ed., 1987). According to Representative Burnett, these new immigrant groups were, unequivocally, not white. *Id.* at 76.

31. See DINNERSTEIN & REIMERS, *supra* note 29, at 36. As one public candidate in 1920 wrote: "They have disqualified the negro, an American citizen, from voting in the white primary. The Greek and Syrian should also be disqualified. I DON'T WANT THEIR VOTE. If I can't be elected by white men, I don't want the office." PHILIP K. HITTI, *THE SYRIANS IN AMERICA* 89 (1924).

32. JOHN HINGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, 164-65 (1971).

33. See MATTHEW FRYE JACOBSEN, *WHITENESS OF A DIFFERENT COLOR* 78-93 (1998).

34. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414. The current statute, as amended, is the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

35. Act of July 14, 1870, ch. 255, §7, 16 Stat. 254, 256.

African ancestry—but no ancestries “in-between”—could become naturalized citizens. The new wave of immigration in the United States in the post-Civil War era strained the concept of whiteness, stretching it to its outer limits. The controversy eventually found its way to the judiciary, where judges had to ascertain the definition of whiteness. Even the Supreme Court entered the fray, denying petitions by both Takao Ozawa, a Japanese American,<sup>36</sup> and Bhagat Sing Thind, an Indian American,<sup>37</sup> to be declared eligible for naturalization on the grounds of whiteness.

The nineteenth- and early twentieth-century naturalization jurisprudence featured an ostensible struggle between two competing theories of racial determination—the common-knowledge test and the scientific-evidence inquiry.<sup>38</sup> The former doctrine determined race by appealing to the common understanding of a man on the street while the latter premised whiteness on the anthropological and ethnological categories of the era.<sup>39</sup> However, as I have argued elsewhere, courts often used a third, and distinct, test—performativity.<sup>40</sup> Under this dramaturgical standard, courts determine race based on an applicant’s capacity to adopt the hallmarks—specifically certain cultural, religious, social, and economic badges—of whiteness.<sup>41</sup> Thus, the courts’ racial-determination cases frequently placed the

potential for immigrants to assimilate within mainstream Anglo-American culture . . . on trial. Successful litigants demonstrated evidence of whiteness in their character, religious practices and beliefs, class orientation, language, ability to intermarry, and a host of other traits that had nothing to do with intrinsic racial grouping. Thus, . . . courts played an instrumental role in limiting naturalization to those new immigrant groups whom judges saw as most fit to carry on the tradition of the “White Republic.” The courts thereby sent a clear message to immigrants: [t]he rights enjoyed by white males could only be obtained through assimilatory behavior. White privilege became a quid pro quo for white performance.<sup>42</sup>

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36. *See Ozawa v. United States*, 260 U.S. 178, 198 (1922).

37. *See United States v. Thind*, 261 U.S. 204, 215 (1923).

38. *See Tehranian, supra* note 6, at 820 (citing IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996)).

39. *See id.*

40. *See id.*

41. *See id.* at 820–21. With three competing theories—common knowledge, scientific inquiry, and performativity—at the judges’ disposals, the only things constant about reported naturalization cases between 1878 and 1952 were their contradictory results and judicial unease and discomfort with the absurd task at hand. In 1952, when Congress eliminated the racial prerequisites for naturalization eligibility, these three doctrines and the entire race-determination enterprise appeared poised for relegation to the dark reaches of history. Their irrelevance was, however, short-lived, as the government re-entered the racial-classification business in the 1960s. Though the government’s impetus for racial classification had transformed from the limitation of naturalization rights to the protection of civil rights through affirmative action and related policies, the doctrines for making these determinations remained the same. For Middle Easterners, the result was their classification, by law, as members of the white race and their consequent exclusion from many of the civil rights measures of the past half century. However, in recent years, this policy has grown increasingly untenable as discrimination, both public and private, against Middle Easterners has risen dramatically.

42. *See Tehranian, supra* note 6, at 820–21 (footnote omitted).

Significantly, several racial-determination cases involved individuals of Middle Eastern descent. As historical documents, they provide rare insight on the degree to which Middle Easterners were able to exercise the rights and privileges of white Americans in the decades prior to the civil rights movement. They also suggest the symbolic indicia of identification that we still rely on in our social construction of race.

*B. Confronting the Middle East: Early Contemplations of Racial Belonging*

In a series of reported cases, individuals of Middle Eastern descent sued the government, petitioning to obtain naturalization on the grounds that they were white by law.<sup>43</sup> The results of these cases were mixed. Occasionally, and by the thinnest of margins, Middle Easterners were considered white. Often, however, they were not. In the end, it was not biology or any exogenous notion of race that settled the matter; it was assimilability, viewed through the lens of performative criteria, that dominated the jurisprudential calculus.

The first relevant reported decision, *In re Halladjian*,<sup>44</sup> comes from Massachusetts, where the United States government vigorously opposed the naturalization petitions of four Armenians on the grounds that they were not free white persons.<sup>45</sup> The Attorney General interpreted the word “white” as equivalent to “European” and stated that Congress had reasonably limited naturalization rights to individuals of European descent to “describe the variations of domicile or origin which are so closely associated with the mental development of a people.”<sup>46</sup> Based on their Asiatic origins, the government concluded that the Armenian petitioners could not be white.<sup>47</sup>

The court disagreed with the government and bestowed the Armenians with United States citizenship. The court’s analysis is particularly striking. In a move rather unique for its time, the court rejected the very idea of racial purity (if not the entire notion of dividing humanity by race). Noting a long history of intermixing between races throughout the world, especially in the Middle East,<sup>48</sup> the court concluded that “there is no European or white race, as the United States contends, and no Asiatic or yellow race which includes substantially all the people of Asia; that the mixture of races in western Asia for the last 25 centuries raises doubt if its individual inhabitants can be classified by race.”<sup>49</sup> However, reluctantly charged with the duty to categorize the various races of humanity, the court deemed Armenians white by law.

In so doing, the court’s rationale eschewed any contemplation of the scientific bases of racial classifications. Instead, its analysis focused almost exclusively on the issue of assimilability, tacitly conflating (as the government position did) the performance of whiteness with the privileges of whiteness. To that effect, the court emphasized the achievements of Middle Eastern civilizations and the close cultural link between the

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43. Only one individual petitioned to be declared black by law for naturalization eligibility. See *infra* notes 102–104 and accompanying text.

44. 174 F. 834, 835 (C.C.D. Mass. 1909).

45. *Id.* at 835.

46. *Id.* at 837.

47. *Id.* at 838. There is both irony and absurdity in the fact that Armenians are ground zero for “Caucasian” origin.

48. *Id.* at 837–39.

49. *Id.* at 845.

Armenian (and other Middle Eastern) people and the Europeans, pointing out that “a reasonable modesty may well remind Europeans that the origin of their letters was in Phoenicia, the origin of much of their art in Egypt, that Asia Minor claimed, at least, the birthplace of the first great European poet, and that the Christian religion, which most Europeans believe to have influenced their civilization and ideals, was born in Palestine.”<sup>50</sup> The court then explicitly endorsed the ability of Armenians to “become westernized and readily adaptable to European standards.”<sup>51</sup> With assimilability in mind, the conclusion was seemingly inescapable: the Armenians were white.

Other cases, however, took a more restrictive view of whiteness, especially as it related to non-Armenians. In a 1925 case from Oregon, the government sought to cancel Tatos O. Cartozian’s certificate of naturalization on the grounds that his Armenian ancestry precluded his eligibility for naturalization.<sup>52</sup> A United States district court ultimately sided with Cartozian. The court’s analysis sheds light on the prevailing view of Middle Easterners, and on concepts of race, at the time.

In determining that Armenians were white by law, the court made no true assessment of racial criteria. Instead, the court used white performance as a proxy for white racial belonging. As in *Halladjian*, the Armenian’s historical affiliation with Christianity and their impressive capacity for assimilation and intermarriage, attested to by expert witnesses,<sup>53</sup> enabled the court to confidently proclaim them white by law.

Unlike *Halladjian*, however, the *Cartozian* court then went out of its way to distinguish Armenians from other individuals of Middle Eastern descent, particularly on religious grounds. As the court noted,

[a]lthough the Armenian province is within the confines of the Turkish Empire, being in Asia Minor, the people thereof have always held themselves aloof from the Turks, the Kurds, and allied peoples, principally, it might be said, on account of their religion, though color may have had something to do with it. The Armenians, tradition has it, very early, about the fourth century, espoused the Christian religion, and have ever since consistently adhered to their belief, and practiced it.<sup>54</sup>

These comments by the court capture the race-making process in action. The court, seeking to add precision to the whiteness category, turns to factors wholly unrelated to biology in order to define the category’s outer boundaries. Specifically, the court seamlessly conflates religious affiliation with racial belonging. Such an interpolative act undermines the notion of race as an independent truth or exogenously determined fact. Instead, it reveals race as a construct of human institutions and imaginations—a construction and reconstruction that continues to this very day with enormous

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50. *Id.* at 840.

51. *Id.* at 841. As the court wrote, “[t]hey have dealt in business with Greeks, Slavs, and Hebrews, as well as with Turks, they have sought a modern education at Robert College and other American schools in the East, and they have pursued by immigration the civilization of Great Britain and of the United States.” *Id.*

52. *United States v. Cartozian*, 6 F.2d 919 (D. Or. 1925).

53. “[I]t may be confidently affirmed that the Armenians are white persons, and moreover that they readily amalgamate with the European and white races.” *Id.* at 920.

54. *Id.*

consequences,<sup>55</sup> especially as the religious affiliation of the Middle Eastern population in the United States has dramatically shifted from Christianity to Islam.<sup>56</sup>

The *Cartozian* court's analysis also reveals that, while Armenians might qualify as white people, other individuals of Middle Eastern descent were less likely to. In the years both before and after *Cartozian*, courts had opportunities to directly address whether Arabs qualified as white persons for naturalization purposes. Several courts, including those in *Ex parte Dow*<sup>57</sup> and *In re Hassan*,<sup>58</sup> denied Arabs white status. Additionally, later cases from this era determined that Afghanis and Parsees, who claimed descent from the ancient Persians, were not white.<sup>59</sup>

Meanwhile, a number of cases—*In re Najour*,<sup>60</sup> *In re Mudarri*,<sup>61</sup> *In re Ellis*,<sup>62</sup> *Dow v. United States*,<sup>63</sup> and *Ex parte Mohriez*<sup>64</sup>—deemed Arabs white. The courts' differing

55. On a related note, several branches of Christianity have espoused the view—largely abandoned but still extant in some fundamentalist sects—that people of darker skin can become lighter by becoming faithful Christians. This belief is based on the Biblical account of the “curse” placed upon Cain by God. Under one interpretation of this account, dark-skinned people are Cain’s progeny, and they can rid themselves of the “curse” of dark skin by repenting and turning to Christianity. See, e.g., THE BOOK OF MORMON, 2 Nephi 5:21–23, 2 Nephi 30:6 (1908) (recounting the original position of the Church of Jesus Christ of Latter Day Saints on this subject).

56. See *infra* notes 169–74 and accompanying text.

57. 211 F. 486 (D.S.C. 1914), *aff'd on reh'g sub nom. In re Dow*, 213 F. 355 (D.S.C. 1914), *rev'd sub nom. Dow v. United States*, 226 F. 145 (4th Cir. 1915).

58. 48 F. Supp. 843 (E.D. Mich. 1942).

59. See, e.g., *Wadia v. United States*, 101 F.2d 7 (2d Cir. 1939) (denying white status to an individual of Parsee descent); *In re Din*, 27 F.2d 568 (N.D. Cal. 1928) (denying white status to an individual of Afghani descent).

60. 174 F. 735 (C.C.N.D. Ga. 1909) (basing the extension of naturalization on the position that, as Caucasians, Arabs must be white).

61. 176 F. 465 (C.C.D. Mass. 1910). Interestingly enough, the *Mudarri* court noted the inherent uncertainty in the naturalization statute's use of the term “white”:

Hardly any [modern ethnologic theory] classifies any human race as white, and none can be applied under section 2169 without making distinctions which Congress certainly did not intend to draw; e.g., a distinction between the inhabitants of different parts of France. Thus classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase “white person” the meaning which it bore when the first naturalization act was passed, viz., any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting classification of persons in the usage of successive generations and of different parts of a large country. The court greatly hopes that an amendment of the statutes will make quite clear the meaning of the word “white” in section 2169.

*Id.* at 467.

62. 179 F. 1002, 1003 (D. Or. 1910) (granting Syrian petitioners naturalization rights on the theory that they descended from Semitic stock, possessed general acceptance as Caucasians, and had demonstrated assimilability).

63. 226 F. 145, 147–48 (4th Cir. 1915) (granting Syrian petitioner naturalization rights based on the general ethnological view that Syrians are “Caucasian” and the absence of any more “authoritative construction” of what the word “white” meant in the Naturalization Act).

64. 54 F. Supp. 941 (D. Mass. 1944).

conclusions underscore the general uncertainty facing the issue and also serve to undermine the allegedly scientific and rational basis for racial categorization.

In 1914, a federal district court addressed a petition by George Dow, a Syrian man, seeking a declaration of whiteness in order to qualify for naturalization.<sup>65</sup> The court rejected Mr. Dow's plea, declaring him outside the sphere of whiteness.<sup>66</sup> Specifically, the court ridiculed the reductionism of turn-of-the-century academic literature that had pronounced that descendents of European, North African, and Middle Eastern stock belong to a similar racial grouping—Caucasian: "To speak of the Asiatic inhabitants of Persia or India as 'Aryan' or 'Caucasian' is almost as great a contradiction as to call a negro inhabitant of South Africa a Saxon because he speaks English, or an Indian inhabitant of Peru or Mexico a Latin because he speaks Spanish."<sup>67</sup> Such ethnological and anthropological arguments, Judge Smith reasoned, attempted to reclassify as white those "who have been *always* considered as *not* forming a part of the white race."<sup>68</sup> In short, the court acknowledged a clear rift between popular understanding and technical definitions—a tension that continues to survive in our modern treatment of Middle Eastern racial identity.

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65. *Ex parte Dow*, 211 F. 486 (D.S.C. 1914), *aff'd on reh'g sub nom. In re Dow*, 213 F. 355 (D.S.C. 1914), *rev'd sub nom. Dow v. United States*, 226 F. 145 (4th Cir. 1915).

66. Interestingly, the court felt it necessary to repeatedly remind its audience that its decision in no way reflected upon Mr. Dow's objective suitability for citizenship. In a particularly revealing paragraph, Judge Smith noted that:

The court has no hesitation in saying that the applicant now before it would apparently be qualified to form a more desirable citizen than very many of those we now have as citizens, whether by birth or naturalization. No race in modern times has shown a higher mentality than the Japanese. To refuse naturalization to an educated Japanese Christian clergyman and accord it to a veneered savage of African descent from the banks of the Congo would appear as illogical as possible, yet the courts of the United States have held the former inadmissible and the statute accords admission to the latter. This refusal is no reflection upon the excluded Japanese. The statute presents what may appear to be the startling discrimination that it forbids the privilege of citizenship to a Chinese or a Japanese descendant of two historic races that have accomplished so much in the constructive intellectual work of the world, and extends the privilege to a member of a savage negro tribe.

*Ex parte Dow*, 211 F. at 489. Ultimately, the Fourth Circuit reversed the district court's decision on Dow's whiteness. See *Dow v. United States*, 226 F. at 145.

67. *Ex parte Dow*, 211 F. at 488.

68. *Id.* at 488 (emphasis added). Upon rehearing, the court reaffirmed the decision, this time reasoning that the average white citizen of the United States in 1790, the date at which the naturalization statute was drafted, was

firmly convinced of the superiority of his own white European race over the rest of the world, whether red, yellow, brown, or black. He had enslaved many of the American Indians on that ground. He would have enslaved a Moor, a Bedouin, a Syrian, a Turk, or an East Indian of sufficiently dark complexion with equal readiness on the same plea if he could have caught him. The opposite west coast of Africa was accessible for the slave supply; the other sources were not, and the trader who went to get his slaves from them was likely to be made a slave himself.

*In re Dow*, 213 F. at 365.

Similarly, in 1942, the United States District Court for the Eastern District of Michigan held that an Arab male, Ahmed Hassan, did not qualify as a white person entitled to citizenship through naturalization.<sup>69</sup> Significantly, concerns over assimilation and religious difference informed the court's reasoning. As Judge Tuttle argued:

Apart from the dark skin of the Arabs, it is well known that they are a part of the Mohammedan world and that a wide gulf separates their culture from that of the predominately Christian peoples of Europe. It cannot be expected that as a class they would readily intermarry with our population and be assimilated into our civilization.<sup>70</sup>

By contrast, a federal court in Massachusetts held that an Arab man, Mohamed Mohriez, qualified as white.<sup>71</sup> In its short opinion, the court highlighted the close link between the Arab people and the West:

The names of Avicenna and Averroes, the sciences of algebra and medicine, the population and the architecture of Spain and of Sicily, the very words of the English language, remind us as they would have reminded the Founding Fathers of the action and interaction of Arabic and non-Arabic elements of our culture.<sup>72</sup>

In deeming Arabs white, the court also seized upon the role of the Arab people in shaping Western civilization by serving as one of the chief vessels through which ancient Greek philosophical traditions endured to the modern era.<sup>73</sup>

The naturalization cases reveal profound anxiety about the racial classification of individuals of Middle Eastern descent. The most prominent government authority on this matter, the infamous Dillingham Commission, also reflected this state of confusion. Under pressure from lobbying groups such as the Immigration Restriction League, the Senate formed the Dillingham Commission in 1907 to study the history of immigration to the United States. Besides reaching its ultimate conclusion—that many of the social and economic problems facing the country at the time were the direct result of the new wave of immigrants coming into the country since the 1880s—the Commission also sought to parse out the issue of racial classification. Presented to the Senate in 1911, Volume Five of the Commission's report, the *Dictionary of Races or Peoples*, did little, however, to settle the issue.<sup>74</sup>

On one hand, the report embraced a broad definition of "Caucasian," but it did so only begrudgingly. The term "Caucasian," wrote the Commission, encompasses "all races, which, although dark in color or aberrant in other directions, are, when considered from all points of view, felt to be more like the white race than like any of

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69. See *In re Hassan*, 48 F. Supp. 843, 845 (E.D. Mich. 1942).

70. *Id.*

71. See *Ex Parte Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944).

72. *Id.* (citation omitted).

73. See *id.*

74. IMMIGRATION (DILLINGHAM) COMM'N, DICTIONARY OF RACES OR PEOPLES, S. DOC. NO. 61-662, vol. 5 (3d Sess. 1911) [hereinafter IMMIGRATION COMM'N, DICTIONARY OF RACES OR PEOPLES].

the other four races [Mongolian, Ethiopian, Malay, and American].”<sup>75</sup> On the other hand, when dealing with individuals of Middle Eastern descent, the Report took a divided view: “Physically the modern Syrians are of mixed Syrian, Arabian, and even Jewish blood. They belong to the Semitic branch of the Caucasian race, thus widely differing from their rulers, the Turks, who are in origin Mongolian.”<sup>76</sup> Syrians were barely white, Turks were categorically not white, and other groups remained unclassified.

The crisis of whiteness surrounding early Middle Eastern immigration warrants three broad observations. First, racial classification and naturalization eligibility did not merely impact political rights, such as the franchise; instead, they were instrumental in determining who would be granted full participation in the life of the Republic. Judicial declarations of whiteness affected economic and social freedoms. In California, for example, without naturalization, legal immigrants could not own land,<sup>77</sup> and could not obtain fishing licenses or practice law.<sup>78</sup> Whiteness also took on heavy symbolic value, as the extensive procedural posture of and the arguments in the *Dow* case reveal.<sup>79</sup> Thus, as Cheryl Harris has argued, racial identity and property are deeply interrelated concepts, and whiteness has become the basis for allocating social benefits both in the public and private sectors and for entrenching power.<sup>80</sup>

Secondly, the naturalization suits support one of the central tenets of critical race theory: that race is a construction rather than a biological fact, invented and renegotiated to serve evolving social, political, and economic exigencies.<sup>81</sup> This glimpse into the early contemplations of Middle Eastern racial belonging reveals inconsistent results. In many instances, Middle Easterners were extended white status and its attendant privileges. Often, however, they were deemed nonwhite and suffered the social, political, and economic consequences. The central factor guiding judicial determinations, however, was consistent: assimilationist policy considerations dominated the jurisprudence of whiteness, leading courts to dole out white status on the basis of how effectively different Middle Easterners “performed” whiteness. Using the panopticonian gaze of the law, courts attempted to decipher the hieroglyphics of racial identity not through any scientific or biological lens (to the extent that it is even possible) but through dramaturgical criteria—wealth accumulation, educational

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75. JACOBSON, *supra* note 25, at 79 (quoting IMMIGRATION COMM’N, DICTIONARY OF RACES OR PEOPLES).

76. *Dow v. U.S.*, 226 F. 145, 146–47 (4th Cir. 1915) (quoting IMMIGRATION COMM’N, DICTIONARY OF RACES OR PEOPLES).

77. Alien Property Initiative Act (Alien Land Law) of 1920, 1 Cal. Gen. Laws, Act 261 (Deering 1944 & Supp. 1949).

78. See *Morrison v. California*, 291 U.S. 82 (1934); *Cockrill v. California*, 268 U.S. 258 (1925); *Webb v. O’Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923).

79. See *supra*, notes 63, 65–68 and accompanying text; see *infra* notes 110–12 and accompanying text.

80. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

81. See Robert L. Hayman, Jr. & Nancy Levit, *Un-Natural Things: Constructions of Race, Gender, and Disability*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 159 (Francisco Valdes et. al. eds., 2002); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994).



attainment, Christian faith, English fluency, and marriage patterns—to determine racial identity. Indeed, the early years of the Republic witnessed the negotiation of the racial status of myriad immigrant groups. Some groups, such as the Irish,<sup>82</sup> the Italians,<sup>83</sup> and the Slavs,<sup>84</sup> were initially deemed nonwhite and denied the privileges of full participation in the Republic. As perceptions of their assimilability changed, however, they eventually received the white designation. The case of Middle Easterners has been no different—perceptions of assimilability have guided the construction of their racial status to this very day.

Finally, the cases reveal that Middle Easterners found themselves at the heart of the legal struggle over whiteness. This era—the first half of the twentieth-century—witnessed the crystallization of modern legal definitions where Middle Easterners were generally (though not in all instances) deemed white by law. However, their status was very much contested; as the product of performative criteria, their racial status was still subject to flux—a change witnessed in recent years as Middle Easterners have, in the public eye, grown less white. Nevertheless, the government continues to categorize individuals of Middle Eastern descent as white. I now explore some of the reasons for this puzzling schism.

*C. Negotiating Middle Eastern Racial Status in the New America: Covering, Passing, and the Irresistible Urge Towards Assimilation and Ethnic Denial*

The naturalization laws on the books until 1952 forced the government into the racial-determination game. However, while a cursory examination of these cases seems to support a view of classification as a top-down, one-way process, this is not always the case. The construction of race is the result of an intricate series of negotiations spread over time and space. Definitions are not only promulgated and imposed by the government; they are negotiated in the private sector as a part of the everyday conduct of individuals. And, it is in this private arena that Middle Easterners themselves have played a role in actively encouraging recognition of their white status.

In his recent work, Kenji Yoshino has introduced the concept of “covering” to the Critical Race Theory (CRT) literature.<sup>85</sup> Drawing from the work of Erving Goffman,<sup>86</sup> who once observed “that persons who are ready to admit possession of a stigma . . . may nonetheless make a great effort to keep the stigma from looming large[.]”<sup>87</sup> Yoshino calls attention to a rampant, though relatively unappreciated, consequence of

82. See IGNATIEV, *supra* note 28 (providing a thorough historical account of the arduous Irish American struggle for white status, and the key role that Irish Americans’ hypervigilance in the fight against black civil rights played in the struggle).

83. MARY C. WATERS, *ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA 2* (1990) (documenting the racism faced by Italian immigrants in the United States, including, *inter alia*, their relegation to all-black schools in the South) (quoting LEONARD DINNERSTEIN & DAVID M. REIMERS, *ETHNIC AMERICANS: A HISTORY OF IMMIGRATION AND ASSIMILATION* 36 (1982)).

84. See MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 75–79 (1998).

85. See Yoshino, *Covering*, *supra* note 7.

86. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

87. *Id.* at 102.

our national impulse towards assimilation—the covering of disfavored identities. Based on pressures to conform to social norms enforced by the dominant race and culture, a rational distaste for ostracization and social opprobrium can lead individuals to engage in the purposeful act of toning down traits that identify them with a stigmatized group. For example, someone who is a lesbian and says she is a lesbian engages in covering when she “makes it easy for others to disattend her orientation.”<sup>88</sup> Yoshino then challenges the fundamental assumptions of the classic discrimination models by arguing that covering can be every bit as pernicious as two more widely recognized phenomena stemming from assimilationist demands: conversion<sup>89</sup> and passing.<sup>90</sup> Thus, he not only helps to define and assess the practice of covering, but he also calls into question our almost universal embrace of the salutary process of assimilation. Assimilation, he argues, can be both an “effect of discrimination as well as an evasion of it.”<sup>91</sup>

Applying Yoshino’s model in the Middle Eastern context is both revealing and instructive: what, after all, could be more coercively assimilationist than forcibly designating an entire population white *de jure* while simultaneously treating that population as nonwhite *de facto*? Moreover, covering as a response to discrimination comes up repeatedly in the Middle Eastern context. Yoshino argues that homosexuals are more able than both women and racial minorities to integrate themselves into mainstream American society. Though Yoshino eschews absolute distinctions,<sup>92</sup> he nevertheless maintains that all three forms of assimilatory behavior—conversion, passing, and covering—are more available to homosexuals than racial minorities and women.<sup>93</sup>

While there may be general truth to this observation, this is not the case with respect to the Middle Eastern population, who lie on the cusp of the white/nonwhite divide. Like the gay population, and unlike most racial minorities and women, Middle Easterners have the “luxury” of covering in multiple ways, enabling them to perform whiteness and assimilate within mainstream American society, but at a cost to their identity, dignity, and rights. Like the gay population, the Middle Eastern population therefore faces expectations that they engage in self-help to cover up or downplay their Middle Eastern-ness. With the rising levels of intolerance and racial animus against Middle Easterners, this dramaturgical covering response constitutes a rational survival strategy. Yet, it has a pernicious side effect. The availability of covering (and passing and conversion) options makes organization as a group less likely. African Americans, Asians, and women, for example, have fewer assimilatory options and this lack of choice forces group solidarity because of their limited alternatives. By contrast, both the gay and Middle Eastern populations “enjoy” greater assimilatory choices. The result may be short-run freedom from discrimination through mainstream performance but, ultimately, it holds back a group from coalescing around its common interests. The much wider availability of covering options to both the gay and Middle Eastern

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88. Yoshino, *Covering*, *supra* note 7, at 772.

89. Yoshino defines “conversion” as the alteration of one’s identity. *Id.*

90. *Id.* at 777, 781. Yoshino defines “passing” as the hiding, rather than alteration, of one’s underlying identity. *Id.* at 772.

91. *Id.* at 772 (emphasis omitted).

92. *Id.* at 926.

93. *Id.*

populations might explain why both groups have been relative latecomers to the civil rights movement.

Largely due to the existence of distinctive phenotypic characteristics, most African Americans cannot pretend to be anything but African American and most Asian Americans cannot pretend to be anything but Asian American.<sup>94</sup> However, many Middle Easterners can opt out of their racial categorization. Since the stereotypical image of the Middle Easterner is much darker in skin, hair, and eye color than the average Middle Easterner, those who naturally possess lighter skin, hair, and eyes are particularly nimble in their covering. Either way, with the simple change of a revealing first or last name, many Middle Easterners can become Italian, French, Greek, Romanian, Indian, Mexican, Puerto Rican, or Argentine.<sup>95</sup>

One can spot covering behavior throughout the Middle Eastern community. Middle Eastern women frequently dye their hair blonde, or wear colored contact lenses, to downplay their more “ethnic” features. Middle Eastern men will go by the name “Mike” for Mansour, “Mory” for Morteza, “Al” for Ali, and “Moe” for Mohammed. Many Iranians of Jewish backgrounds cover by rationally exploiting mainstream (mis)perceptions of “Jewishness” as both a religion and ethnicity. By identifying themselves to the world as “Jewish” they tend to avoid any further questions about their ethnicity, as people assume their ethnicity is Jewish and that they are, therefore, white (i.e., Ashkenazi Jewish) and not Middle Eastern.

In the wake of 9/11, Middle Easterners throughout the United States felt under attack and responded with a series of rational covering activities just to survive the wave of hate surging throughout the country.<sup>96</sup> Lebanese and Persian restaurants made sure to place conspicuous “Proud to be American” or “I love the U.S.A.” signs over their entrances. Cab drivers from the Middle East and South Asia decorated their vehicles with large American flags.<sup>97</sup> A series of hate crimes prompted many Muslim women and Sikh men to remove their head coverings out of fear of being perceived as Middle Eastern.<sup>98</sup>

We also see covering in even the most simple of choices: hair style. It has long been noted that African American women have a variety of choices on how to wear their hair—including straightened, short, Afroed, or dreaded—each of which ineluctably

94. There are certainly exceptions to this generalization, but I think it is fair to say that a determined individual of Middle Eastern descent would have a much easier time passing herself off as a member of a different ethnic or racial group, or engaging in the act of covering, than an individual of African or East Asian descent.

95. See, e.g., Lorraine Ali, *Laughter's New Profile*, NEWSWEEK, Apr. 22, 2002, at 61 (quoting a line from a routine performed by an Iranian American comedian: “Since September 11, when people ask me about my ethnicity I look them straight in the eye and say, ‘I’m Italian’ . . . . We’re all named Tony now.”).

96. Sunita Patel, *Performative Aspects of Race: “Arab, Muslim, and South Asian” Racial Formation After September 11*, 10 ASIAN PAC. AM. L.J. 61, 83–84 (2005) (describing many of the covering activities undertaken by individuals of Middle Eastern descent in the wake of 9/11).

97. See, e.g., Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1278–80 (2004); THE NEW YORKER, Nov. 5, 2001 (depicting on the cover a Sikh taxi driver whose cab is covered with American flags).

98. Patel, *supra* note 96, at 84.

effects how society perceives them.<sup>99</sup> Hair style functions as a signaling device that determines the degree to which an African American will be racialized as stereotypically “black,” assimilable, or something in between. As Devon Carbado and Mitu Gulati observe, hair choice can therefore serve as a disturbing marketing device:

A black person’s vulnerability to discrimination is shaped in part by her racial position on this spectrum. The less stereotypically black she is, the more palatable her identity is. The more palatable her identity is, the less vulnerable she is to discrimination. The relationship among black unconventionality, racial palatability, and vulnerability to discrimination creates an incentive for black people to signal—through identity performances—that they are unconventionally black.<sup>100</sup>

For a Middle Eastern man, the issue of facial hair is similarly riddled with semiotic landmines. Since at least as far back as Tsar Peter the Great, who in 1698 mandated that all male Russian nobles shave to appear more Western and civilized,<sup>101</sup> facial hair has held symbolic meaning. Over the past two decades, as images of the lavishly bearded Ayatollah Khomeini and Osama bin Laden have flooded the airwaves, the beard, the Middle East, and radical Islam have grown inextricably intertwined in the American imagination. In the post-9/11 world, I do not go to the airport without shaving first. It is covering, plain and simple, and a rational survival strategy. I prefer the close shave to the close full-body-cavity search.

Beyond covering, Middle Eastern assimilation also crosses into the realm of passing and even conversion. As a matter of pride, many Middle Easterners insist on being considered white. In this regard, they are no different than prior immigrant groups. For example, fifty-two reported cases exist from the pre-1952 racial determination trials used to determine naturalization eligibility.<sup>102</sup> In all but one,<sup>103</sup> the petitioners claimed to be white, despite the fact that it was much harder to establish white, rather than black, status. Indeed, at the time, many states had laws on the books declaring any individual with a single quantum of black blood to be black by law.<sup>104</sup>

In a world where racial diversity is not only increasingly tolerated, but celebrated, we have recently witnessed some exceptions to the inexorable gravitation of American

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99. See Devon Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1771–73 (2003) (book review).

100. *Id.* at 1772.

101. See 2 READINGS IN EUROPEAN HISTORY 303–12 (James H. Robinson, ed., 1904–1906) available at <http://www.fordham.edu/halsall/mod/petergreat.html>.

102. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 4 (1996).

103. *In re Cruz*, 23 F. Supp. 774, 774 (E.D.N.Y. 1938).

104. By the early 1900s, several southern states had adopted this “one drop” rule. See Luther Wright, Jr., *Who’s Black, Who’s White, and Who Cares? Reconceptualizing the United States’s Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 524 (1995); PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE* 142 (2002) (noting that Georgia, Virginia, Alabama, and Oklahoma all had laws defining as black anyone with any drop of African ancestry); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (assuming, without question, that the petitioner, who possessed only one-eighth African blood, was black for the purposes of segregation laws). *But see In re Cruz*, 23 F. Supp. at 775 (finding one-quarter African blood insufficient to gain someone recognition of African descent for naturalization purposes).

ethnics to seek white recognition. In Hawai'i, for example, the past few decades have witnessed a remarkable surge in the percentage of individuals who claim Native Hawaiian identity—a surge that cannot statistically be explained by natural growth patterns. For one, Native Hawaiians qualify for numerous social, economic, and political privileges not extended to non-Hawaiians.<sup>105</sup> Even more significantly, the rise of the Hawaiian pride movement, the wake of Hawaiian sovereignty politics, and a revitalization of Hawaiian institutions, including the ancient language, has led to a celebration of all things Hawaiian.<sup>106</sup> At Punahou School, a college preparatory academy long viewed as the bastion of *haole*<sup>107</sup> missionary power, white students don themselves with polysyllabic Hawaiian middle names just to have a claim, however tenuous, to the Hawaiian culture.<sup>108</sup> It is therefore not surprising that recent census numbers show that, compared with a decade ago, almost fifty percent more Hawaiian residents now consider themselves descendant of Native Hawaiian stock: 162,279 in 1990 versus 239,655 in 2000.<sup>109</sup>

However, in the continental United States, white privilege still reigns supreme and, naturally, immigrant groups still seek white recognition.<sup>110</sup> The example of the Iranian American population is instructive. The United States has seen a huge wave of immigration from Iran since the 1979 Revolution. In 1996, it was estimated that almost 1.5 million Iranians resided in the United States, a figure that had grown from just a few thousand in the 1970s.<sup>111</sup> However, despite changes to the 2000 Census that

105. See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 507–09 (2000); Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 540, 554 (1996) (citing the Hawaiian Homes Commission Act § 203, which sets aside 200,000 acres of land for native Hawaiians to rent at a rate of one dollar per year; the Admission Act, which sets aside public lands for the “betterment of the conditions of Native Hawaiians”; and a 1978 Hawaii state constitutional amendment, which sets aside public funds for “educational programs, grants, low-interest loans, and housing assistance” for the “benefit of Native Hawaiians”).

106. See Alex Salkever, *Lure of the Lei: Hawaii's Resurgent Cultural Appeal*, CHRISTIAN SCIENCE MONITOR, Oct. 23, 2002, at 2, available at <http://www.csmonitor.com/2002/1023/p02s02-ussc.html> (documenting the rise of Hawaiian chic); cf. Suein Hwang, *Long Dismissed, Hawaii Pidgin Find sa Place in Classroom*, WALL ST. J., Aug. 1, 2005, at A1 (documenting the recent embrace of Hawaiian Pidgin English by intellectual circles).

107. *Haole* literally means “foreigner” in Hawaiian and is a colloquial term in the Islands for white people. Depending on its tone and context, it is considered innocuous (usually when used as an adjective, as in, “He was with two *haole* gnys”) or an epithet (usually when used as a noun, as in, “Hey *haole*”). See NORTH SHORE (Universal Pictures 1987).

108. See PUNAHOU SCHOOL, THE OAHUAN (1991–2000) (yearbook).

109. See Elizabeth M. Grieco, *The Native Hawaiian and Other Pacific Islander Population: 2000*, CENSUS 2000 BRIEFS, Dec. 2001, at 5, available at <http://www.census.gov/prod/2001pubs/c2kbr01-14.pdf>. Of course, direct comparisons between the 1990 and 2000 statistics from the Census must be tempered with the understanding that the 2000 Census made it easier for individuals to identify themselves with multiple racial designations.

110. This trend is, of course, not limited to recent immigrant groups, but has a long history. See, for example, the history of Irish, Greek, Italian, and Slavic assimilation in the United States. See IGNATIEV, *supra* note 28, at 2–3 (1995); *supra* notes 6, 46–52 and accompanying text.

111. See WORLDWIDE PERSIAN OUTREACH, THE PERSIAN DIASPORA, <http://www.farsinet.com/pwo/diaspora.html> (last visited Nov. 21, 2006). Another, more conservative, estimate suggests

allowed Middle Eastern individuals such as Iranian Americans to identify themselves as something other than just “white,” it appears that very few Iranian Americans took the opportunity to do so. In fact, a mere 338,266 identified themselves as Iranian.<sup>112</sup> The majority of Iranians, it seems, chose conversion. Both leading authorities on this matter and visitors to Los Angeles (also known as Tehrangeles) can attest to how grossly this figure underrepresents the true population figures. The reason is not too difficult to ascertain: ask a typical Iranian American if they are white and they will say, “Of course.” Then, inevitably, they will tell you that the word Iran comes from the Sanskrit word meaning “Land of the Aryans” and that they, not the Germans, are the original Aryans.<sup>113</sup> Throw in the geographical proximity of the Caucasus Mountains to the country and the ostensibly inescapable conclusion is one of whiteness. A recent Ninth Circuit case involving an asylum seeker from Iran epitomizes this mindset. In the decision, issued in 1996, the court notes that the asylum seeker designated his ethnicity as something curiously (feline or libationary?) called “White Persian.”<sup>114</sup>

The craving for such judicial affirmation of whiteness mimics the events of a century earlier, when a federal district court held that Syrians were not white in *Ex Parte Dow*.<sup>115</sup> Denied membership in the racial category needed for naturalization, the petitioners motioned for a rehearing, which the court sympathetically granted.<sup>116</sup> The request for, and acceptance of, the rehearing are particularly salient since they were not grounded in the potential economic or political injury that such a racial judgment would cause Syrian Americans. Instead, the rehearing petition and grant rested upon the profound psychological trauma that a formal designation of nonwhite status would inflict upon Syrians as a group. As the court later wrote:

Deep feeling has been manifested on the part of the Syrian immigrants because of what has been termed by them the humiliation inflicted upon, and mortification suffered by, Syrians in America by the previous decree in this matter which they construe as deciding that they do not (as they term it) belong to the “white race.”<sup>117</sup>

Thus, like the Irish, Slavs, Italians, and Greeks before them, Middle Eastern immigrants have sought to secure their position in American society through the

that the Iranian-American population totaled approximately 690,000 by 2004. See Iranian Studies Group at MIT, *Factsheet on the Iranian-American Community* (Feb. 2004), available at [http://web.mit.edu/isg/PUBLICATIONS/factsheet\\_feb\\_04.pdf](http://web.mit.edu/isg/PUBLICATIONS/factsheet_feb_04.pdf).

112. Iranian Studies Group at MIT, *supra* note 111.

113. See Laleh Khalili, *Forgiving Salm and Tur*, Sept. 29, 1998, <http://www.iranian.com/LalehKhalili/Sept98/Race/> (noting that Iranian Americans frequently “pride [them]selves for being so closely related to the Hansels and Gretels of Europe, . . . defend [their] ‘Aryan’ blood vociferously . . . [and] introduce [them]selves as descendants of a race of Indo-Europeans (or Indo-Aryans)—whatever that is—who came across the Eastern planes[sic] to Iran and who are the ethnic cousins of those healthy and strapping blond-and-blue-eyed Germanic people populating Central Europe”).

114. *Mostofl v. INS*, No. 94-70627, 1996 WL 183740, at \*1 (9th Cir. Apr. 16, 1996).

115. 211 F. 486, 490 (D.S.C. 1914), *aff’d on reh’g*, *In re Dow*, 213 F. 355 (D.S.C. 1914), *rev’d*, *Dow v. United States*, 226 F. 145 (4th Cir. 1915).

116. *In re Dow*, 213 F. 355 (D.S.C. 1914), *aff’g Ex Parte Dow*, 211 F. 486 (D.S.C. 1914), *rev’d*, *Dow v. United States*, 226 F. 145 (4th Cir. 1915).

117. *In re Dow*, 213 F. at 356.

ultimate prize of white recognition. However, formal recognition of this status by state and federal governments belies a history of discrimination and rising levels of hate against individuals of Middle Eastern descent. Moreover, the wide range of both passing and covering activities engaged in by Middle Easterners is a sign of, and response to, this discrimination.

## II. THE MIDDLE EASTERN EXCEPTION: BEARING THE BURDENS, BUT NOT ENJOYING THE PRIVILEGES, OF WHITENESS

As a result of their white status under the law, individuals of Middle Eastern descent have remained ineligible for affirmative action policies and other remedial benefit systems. Paradoxically, however, they continue to suffer from discrimination—and, unlike other minority groups, they have endured growing, rather than waning, levels of prejudice.

### *A. The Myth of Racism as an Historical Phenomenon*

We generally think of racial prejudice as an historical relic, and we look at remedial government programs as attempting to rectify the impact of such past discrimination. Over the past two decades, for example, affirmative action policies have come under fire for creating new discrimination against the majority in order to make up for past discrimination against minority groups.<sup>118</sup> This position, however, paints an incomplete picture of social realities. While the stronger case for affirmative action is as a remedy for present, rather than past, discrimination, the general discourse of race relations, both in criticizing affirmative action and in debating broader social issues, prefers not to acknowledge present discrimination as a widespread phenomenon.

The case of John Rocker, the former Atlanta Braves reliever who was derided in the media several years ago for his racist, homophobic, and xenophobic comments, illustrates the common social dynamic in confronting racism. In an interview conducted by a *Sports Illustrated* reporter, Rocker turned his hatred for New York and its residents into an assault on various minority groups:

Imagine having to take the [Number] 7 train to the ballpark [in New York], looking like you're [riding through] Beirut next to some kid with purple hair next to some queer with AIDS right to some dude who just got out of jail for the fourth time next to some 20-year-old mom with four kids. It's depressing.<sup>119</sup>

Unabashed, he continued, stating that,

[t]he biggest thing I don't like about New York are the foreigners. I'm not a very big fan of foreigners. You can walk an entire block in Times Square and not hear anybody speaking English. Asians and Koreans and Vietnamese and Indians and

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118. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 353 (2004) (Thomas, J., concurring in part and dissenting in part).

119. Jeff Pearlman, *At Full Blast*, *SPORTS ILLUSTRATED*, Dec. 27, 1999, at 62 (alteration in original).

Russians and Spanish people and everything up there. How the hell did they get in this country?<sup>120</sup>

Immediately upon publication of the interview, Rocker faced a maelstrom of public criticism and universal condemnation for his views. He was quickly punished by Major League Baseball and his team; within two years, he found himself entirely removed from professional baseball. Publicly, Rocker's comments were sternly rebuked as ignorant and many individuals even acted shocked that someone would make such statements.

Yet, if one assesses Rocker's comments with any degree of candor, there is nothing extraordinary about what he said in that interview. Quite simply, it is the kind of intolerant and uneducated bigotry that one hears all too frequently in the private realm, if one chooses to listen. However, as a society, we are in such uniform denial about our own prejudices that we publicly lambaste racism, punish purveyors such as Rocker, pat ourselves glibly on the back for being such enlightened citizens, and move on.

Significantly, we ignore the problematic and still festering genesis of Rocker's comments: Rocker said what he thought because, to him, there was nothing wrong with saying it—after all, he was likely reflecting the types of comments that he had probably heard in private throughout his life. Unfortunately, instead of recognizing that the real problem was a racist society that made John Rocker comfortable enough to say what he said, people quickly labeled Rocker as a bad guy, an anomaly, a deviant in the new America. The real lesson was that Rocker should keep his bigotry in the private realm, where it continues to thrive and receive acceptance in some circles, and that he should have simply done a better job of knowing what is acceptable to say in public versus what is acceptable to say in private. Keep the bigotry *sub rosa*: that is the intelligent racist's strategic adaptation to the civil rights movement.

Public discourse almost uniformly designates systemic racism as a decidedly historical phenomenon. Justice O'Connor's majority opinion in the *Grutter* case perfectly captures this myth, deeming with irrational exuberance that there should be no need for affirmative action within twenty-five years: "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>121</sup> Besides the arbitrariness of this time limit and its unwarranted optimism that centuries of pervasive institutional racism can be undone with a few decades of carefully circumscribed government intervention of dubious efficacy,<sup>122</sup> O'Connor's declaration assumes that remedial race-based policies may still be needed in limited forms to attack the vestiges of racism of the past, but that racism does not exist in the present and is unlikely to spur further inequities in the future. Polls have repeatedly shown that most Americans of European descent view discrimination as a

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120. *Id.*

121. *Grutter*, 539 U.S. at 343.

122. *Cf.* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1766–69 (1993) (arguing that the trope of color blindness advocated by opponents of affirmative action is a doctrinal mode of protecting the property interest in whiteness by limiting remediation for past subjugation and therefore enshrining and institutionalizing centuries of white privilege); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 2 (1991) (arguing that color blindness is a form of race subordination in that it denies the historical context of white domination and black subordination).



mere relic.<sup>123</sup> The public discourse on race now focuses on the days of Rosa Parks, the standoff at Central High in Little Rock, and Governor Wallace of Alabama as an ugly page from our *history*, a mere vestige of our past. And we point to the gradual progress of society as a whole in advancing civil rights as evidence of this.

*B. Civil Rights Inchoate: The Rising Tide of Hate Against  
Individuals of Middle Eastern Descent*

However, while civil rights have, as a whole, unquestionably improved in recent decades, this does not necessarily mean that the history of civil rights is one of linear progression. In fact, over time, certain groups have come to enjoy increased civil rights, while others have actually seen rights diminished. Middle Easterners, in particular, fall into this latter category. Indeed, while other ethnic minorities have witnessed their lot improve over the past few decades, Middle Easterners have not. If anything, they suffer from more systemic racism now than ever before, a fact that makes them unique among America's ethnic and racial groups.

Two examples—one played out publicly in recent months, the other privately over the course of a generation—highlight this point. The first anecdote involves the furor over the potential transfer of the operations of several American ports to DP World, a company owned by the government of the United Arab Emirates (UAE)—a controversy that exemplifies the prevailing vision of Middle Easterners as “the other.” Despite the UAE's ostensible role as an ally in the war on terrorism, the fact that port security would remain in United States government hands (via the Coast Guard and the Customs and Border Control Agency), and the financial incentive that any port-management company would naturally have in opposing attacks against its ports,<sup>124</sup> the outcry amongst the American public reached a frenzied level not witnessed in years.<sup>125</sup> Democrats, such as Senators Hillary Clinton and Chuck Schumer and House Minority Leader Nancy Pelosi, jumped at the opportunity to appear tougher than Republicans on a national security issue.<sup>126</sup> In the biting words of *The Economist*, seizure of the ports issue gave Democrats “a soundbite—‘Arab hands off our ports’—that even the

123. See Stephen Magagnini, *Many Blacks, Whites Find Race Issue Can Be a Minefield*, SACRAMENTO BEE, Feb. 23, 1999, at A1; *Americans on Race Relations*, WASHINGTON POST, June 12, 1997, at A16 (noting, inter alia, a 1997 Gallup poll which found that seventy-six percent of whites feel that African Americans are now treated the same as whites in their communities); Jill Darling Richardson, *Poll Analysis: U.S. Nowhere Near Eliminating Racism, But Race-Based Affirmative Action Not the Answer*, L.A. TIMES, Feb. 6, 2003, [http://www.latimes.com/news/nationworld/timespoll/la-na-poll6feb06-481pa3an,1,3273569.story?coll=la-news-times\\_poll-nation](http://www.latimes.com/news/nationworld/timespoll/la-na-poll6feb06-481pa3an,1,3273569.story?coll=la-news-times_poll-nation).

124. *The Politics of National Security: Macho Moms and Deadbeat Dads*, THE ECONOMIST, Mar. 11, 2006, at 25 [hereinafter *The Politics of National Security*].

125. See David Brooks, Op-Ed., *Kicking Arabs in the Teeth*, N.Y. TIMES, Feb. 23, 2006, at A27 (“This Dubai port deal has unleashed a kind of collective mania we haven’t seen in decades. First seized by the radio hatemonger Michael Savage, it’s been embraced by reactionaries of left and right, exploited by Empire State panderers, and enabled by a bipartisan horde of politicians who don’t have the guts to stand in front of a xenophobic tsunami.”).

126. *The Politics of National Security*, supra note 124, at 25; *DP World Seeks U.S. Buyer for Ports*, CNN.COM, Mar. 15, 2006, <http://www.cnn.com/2006/POLITICS/03/15/port.sale/index.html>.

dimkest voter can understand. (Such soundbites have traditionally been a Republican strong point.) It allows them to pander to racist voters with plausible deniability. (Again, this is usually Republican turf.)”<sup>127</sup> Meanwhile, leading members of President Bush’s own party, including Senate Majority Leader Bill Frist, House Speaker Dennis Hastert, and House Majority Leader John Boehner, expressed severe misgivings about the deal, which the Bush administration saw no reason to oppose.<sup>128</sup> The unique lovefest on both sides of the aisle against the President was noted by many observers, including congressional aides who remarked that they had never received such overwhelmingly one-sided emails, letters, and phone calls to their offices on a political issue.<sup>129</sup>

Foreign companies and contractors have long managed operations of American ports—in fact, DP World’s immediate predecessor was a foreign entity.<sup>130</sup> The issue was plainly not one of foreign control—a practice gone unnoticed until the specter of Arab-run port operations arose. Indeed, the port incident epitomized the rampant racism that would cause Americans to harbor such misgivings about Middle Easterners, though not any other group of individuals, from having some control over our infrastructure. Sadly, the veritable orgy of hatred demonstrated that one of the few things that both the populist left and right can agree on is their distaste for Arabs and those from the Middle East.

The second anecdote is personal. My dad, who grew up in Eisenhower’s America, often reminisces at how enthralled people used to be with his ethnic background. From the snowy mountains of New Hampshire, where my dad attended college at Dartmouth, to the plains of Wisconsin, where he visited his college roommates during the Christmas holidays, being Persian in the 1950s was perceived as exotic and exciting. Harems and sheiks, Persian carpets and camels, oases and deserts constituted predominant images of the Middle East in the American mindset. No one thought of fundamentalism and terrorism back then.

Contrast the image of the Middle East in the 1950s with the image that began with the Arab oil embargo in the 1970s and only grew worse with the Iranian hostage crisis and the Iranian Revolution led by the Ayatollah Khomeini. A generation later, when my sister followed my father’s footsteps and attended Dartmouth in the early 1990s, the constant pestering over her ethnic background grew so intolerable that—in a classic case of covering—she changed her last name to my mom’s more ethnically ambiguous maiden name of Kia. Although she is extremely proud of her ethnic heritage and readily acknowledges it, “Middle Eastern” is not the first thought people have when reading her name or meeting her anymore. Instead, they cannot classify her, and that is the way she prefers it. Unfortunately, in the post-9/11 world, the negative associations with and hostility towards individuals of Middle Eastern descent have only gotten worse.

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127. *Id.*

128. *Id.* On March 8, a Republican-dominated House panel voted 62-2 to block the port deal, despite threats of a presidential veto. *Id.*

129. *All Things Considered: Inside the Politics of the Dubai Ports Controversy*, (National Public Radio broadcast, Mar. 9, 2006).

130. See *Bush Says He Will Veto Any Bill to Stop UAE Port Deal*, FOXNEWS.COM, Feb. 22, 2006, <http://www.foxnews.com/story/0,2933,185479,00.html>.

### 1. Reflecting and Perpetuating the Stereotype: Hollywood and the Mass Media

The portraits of Middle Easterners in the popular media reflect the severity of this prejudice. Jack Shaheen's analysis of popular films demonstrates convincing evidence of the vilification and demonization of individuals of Middle Eastern descent by the movie industry.<sup>131</sup> Hollywood does not feature Middle Easterners in starring roles. When they do appear onscreen, the men are typically portrayed as wife beaters, religious zealots, and terrorists.<sup>132</sup> Meanwhile, the women are often cowering, weak, and oppressed. The most recognized Iranian American actress is Shohreh Aghdashloo, and her two most prominent roles have covered both terrains: she played a reticent and abused Iranian American wife in *House of Sand and Fog* (a role for which she received an Oscar nomination) and she played the Islamic matriarch of a domestic terror cell in FOX's drama *24*.

Although other ethnic groups have certainly faced the problem of insidious typecasting on the silver screen,<sup>133</sup> there has also been significant outcry against the practice, and Hollywood has responded by recently distributing movies that subvert such stereotyping of Asians<sup>134</sup> and African Americans.<sup>135</sup> Meanwhile, the public has also grown less tolerant of the demonization of other ethnic groups. The exact opposite appears true with respect to Middle Easterners. In a shocking passage from his book, Shaheen notes that

[N]o Hollywood WWI, WWII, or Korean War movie has ever shown America's fighting forces slaughtering children. Yet, near the conclusion of *Rules of Engagement*, US marines open fire on the Yemenis, shooting 83 men, women, and children. During the scene, viewers rose to their feet, clapped and cheered. Boasts director Friedkin, "I've seen audiences stand up and applaud the film throughout the United States."<sup>136</sup>

Despite this worsening tendency towards depictions of inhumane treatment of Middle Easterners, there is little to no public outcry. As Akram and Johnson keenly observe, "[t]he stereotyping and demonizing of Arabs and Muslims by American films may well

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131. See JACK G. SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE (2001).

132. See, for example, the Ben Kingsley vehicle HOUSE OF SAND AND FOG (Dreamworks 2003) and Sally Field's "Movie of the Week" NOT WITHOUT MY DAUGHTER (Pathé Entertainment 1991).

133. See, e.g., Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992) (documenting the social construction of racial stereotypes, particularly through entertainment and pop-culture media).

134. See, e.g., BETTER LUCK TOMORROW (Paramount Pictures 2002); HAROLD AND KUMAR GO TO WHITE CASTLE (New Line Cinema 2004).

135. See, e.g., DON'T BE A MENACE TO SOUTH CENTRAL WHILE DRINKING YOUR JUICE IN THE HOOD (Ivory Way Productions 1996).

136. SHAHEEN, *supra* note 131, at 15.

have gone largely unnoticed because they are entirely consistent with widespread attitudes in U.S. society.”<sup>137</sup>

Hollywood not only reflects certain stereotypes about Middle Easterners; its recursive role also perpetuate and spreads those stereotypes. It is therefore no surprise that the abstract perceptions of Middle Easterners, as reflected in mainstream depictions, are not merely fictional or theoretical. They are embodied in numerous harsh realities of daily life for Arab, Turkish, and Iranian Americans: hate crimes,<sup>138</sup> special registration requirements,<sup>139</sup> arrest with indefinite detention,<sup>140</sup> racial profiling,<sup>141</sup> and job discrimination.<sup>142</sup>

## 2. Government and Private Action: Special Registration, the War on Terror(ism), Discrimination, and Racial Profiling

The promulgation of government policies targeting individuals of Middle Eastern descent and the racialization of Middle Easterners is, of course, not a new phenomenon.<sup>143</sup> In the wake of the Munich attacks on Israeli athletes at the 1972 Olympic Games, President Nixon set up a special cabinet committee to address the issue of terrorism in the United States. The committee enacted a series of now-forgotten (but eerily familiar) policies, ominously dubbed the “Special Measures,” which placed limitations on Arab immigration into the United States (including access to permanent resident status), increased FBI surveillance of individuals of Arab origin regardless of their immigration status,<sup>144</sup> and facilitated the accumulation of data on

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137. Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 310 (2002).

138. Andrea Elliott, *Reported Hate Crimes Against Muslims Rise in U.S.*, INT’L HERALD TRIB., May 13, 2005, at 2.

139. John Ashcroft, U.S. Att’y Gen., Attorney General Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), <http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>.

140. Cole, *The Priority of Morality*, *supra* note 4, at 1753 (estimating that over 5000 Middle Easterners had been detained after 9/11); David Rosenzweig, *3 Groups Sue Over Arrests of Arab Men*, L.A. TIMES, Dec. 25, 2002, § 2, at 3.

141. Heidee Stoller, Tahlia Townsend, Rashad Hussain & Marcia Yablon, *Developments in Law and Policy, The Costs of Post-9/11 National Security Strategy*, 22 YALE L. & POL’Y REV. 197, 200–22 (2004).

142. The U.S. Equal Employment Opportunity Commission, *Questions and Answers About the Workplace Rights of Muslims, Arabs, South Asians, and Sikhs Under the Equal Employment Opportunity Laws*, <http://www.eeoc.gov/facts/backlash-employee.html> (last visited Nov. 25, 2006).

143. While Leti Volpp argues that the events of 9/11 racialized individuals appearing to be Middle Eastern, Arab, or Muslim, *see* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575–76 (2002), Kevin Johnson notes that the racialization of Middle Easterners predates the 9/11 terrorist attacks. Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1488–89 (2002).

144. The related “Operation Boulder” targeted Arabs in the United States for special investigation and discouraged their political activities, especially on issues related to the Middle

individuals of Arab origin who were “potential terrorists” or likely to assist terrorists.<sup>145</sup>

Only a few years later, the Iranian hostage crisis precipitated a wave of state action targeting Iranian individuals residing in the United States. In Mississippi, the legislature passed an appropriations bill which raised tuition for only those students whose home government did not have diplomatic relations with the United States and against which the United States had economic sanctions.<sup>146</sup> Despite its potential to affect Cuban, Vietnamese, Cambodian, Albanian, Iraqi, and Yemeni students, the bill clearly targeted Iranian students attending state schools.<sup>147</sup> The policy was ultimately struck down as unconstitutional.<sup>148</sup> Meanwhile, New Mexico barred Iranians from attending its state university.<sup>149</sup> A federal district court rejected as pretextual the ostensible paternalistic justification for the measure—the protection of Iranians for fear of their safety—and held that the policy violated the Equal Protection Clause.<sup>150</sup> The courts, however, upheld other actions targeting Iranians in the wake of the hostage crisis, including special registration requirements for all Iranian students.<sup>151</sup>

The rising tide of hate against individuals of Middle Eastern descent has grown even more pronounced in recent years. Indeed, whatever its necessity in some guise, the war on terrorism has borne severe racial undertones. As Kevin Johnson has noted, “[m]any Arab Americans generally feel that the ‘war on terrorism’ during the 1990s in fact has been a war on them.”<sup>152</sup> This sentiment has reverberated with greater vigor in the wake of 9/11. For example, the American-Arab Anti-Discrimination Committee (ADC) has reported a fourfold increase in hate crimes and incidents of discrimination against individuals of Middle Eastern descent since 9/11.<sup>153</sup>

This surge in hate is not just the product of extremist groups operating at the margins; it also emanates from the very mainstream of American society and from the government itself. Indeed, complaints of workplace discrimination against Middle

East. See Susan M. Akram & Kevin J. Johnson, *Race and Civil Rights Pre-September 11, 2001: The Targeting of Arabs and Muslims*, in *CIVIL RIGHTS IN PERIL: THE TARGETING OF ARABS AND MUSLIMS* 9, 18 (Elaine C. Hagopian ed., 2004).

145. See *id.* at 17–19; Nabeel Abraham, *Anti-Arab Racism and Violence in the United States, THE DEVELOPMENT OF ARAB-AMERICAN IDENTITY* 155, 199 (1994); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 *N.Y.U. ANN. SURV. AM. L.* 295, 314, 314 n.107 (2002).

146. *Tayyari v. N. M. State Univ.*, 495 F. Supp. 1365, 1374 (D.N.M. 1980) (citing *Shabani v. Simmons*, No. EC80-160-LS-P (N.D. Miss. July 3, 1980)).

147. *Id.* at 1374 n.9.

148. *Id.*

149. On May 9, 1980, the Regents of New Mexico State University passed a Motion stating that “any student whose home government holds, or permits the holding of U.S. citizens hostage will be denied admission or readmission to New Mexico State University commencing with the Fall 1980 semester unless the American hostages are returned unharmed by July 15, 1980.” *Id.* at 1367–68.

150. *Id.* at 1371–75; see also Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 *HASTINGS CONST. L.Q.* 939, 989–90 (1995).

151. See, e.g., *Narjenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979).

152. Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 *GEO. IMMIGR. L.J.* 289, 300 (2000).

153. *After 9/11, an Assault on Civil Liberties*, *TRIAL*, Oct. 2003, at 56.

Easterners have risen exponentially in recent years.<sup>154</sup> A search of the Lexis federal and state case law database for use of the epithet “sand nigger” reveals thirty results—all of them from cases decided since 1987. A substantial minority (forty-three percent) of these cases were decided in the short time since 9/11.<sup>155</sup> A similar search for use of the pejorative “camel jockey” produces forty-four results—all of them from cases decided since 1985.<sup>156</sup> A substantial minority (almost one-third) of these cases were decided in the brief period since 9/11.

Most disturbingly, the government’s own policies have both reflected and spurred on the wave of hate. Legislation that targets the rights of Middle Easterners continues to be proposed with alarming regularity. A recent bill in California, for example, sought to deprive individuals from many Middle Eastern countries of the right to obtain a driver’s license.<sup>157</sup> Besides the troublesome racial animus underlying this proposal, the bill was not particularly well reasoned. The presumptive fear that a Middle Eastern individual would rent a truck, drive to a prominent California target, and detonate an explosive device is hardly remedied by the state’s refusal to grant driver’s licenses to such individuals. After all, a suicide bomber is not going to let the absence of a driver’s license stop him from carrying out an act of terror. More likely, the bill simply would have deprived hard-working, legal immigrants from the Middle East from enjoying the basic rights to travel and to earn a living—rights freely enjoyed by individuals of other backgrounds.

Government-supported racial profiling of individuals of Middle Eastern descent is one of the most troubling manifestations of the war on terrorism. As David Cole reminds us, prior to 9/11, state legislatures, local police departments, and even the President of the United States and his Attorney General, John Ashcroft, had decried the practice. The United States Customs Service had promulgated new measures to counter racial profiling at the borders. Even a federal law against the practice seemed likely.<sup>158</sup> These official postures reflected an emerging and widespread consensus condemning the practice. In late 1999, a Gallup poll found that fewer than twenty percent of Americans considered racial profiling an acceptable practice.<sup>159</sup>

After 9/11, views changed radically and support for racial profiling tripled. Suddenly, sixty percent of Americans favored racial profiling—in so much as it was directed against Arabs and Muslims.<sup>160</sup> In fact, in a poll taken immediately after 9/11, over thirty percent of Americans supported “special measures” for individuals of Arab descent, including more intensive airport security, special identification, or even

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154. The U.S. Equal Employment Opportunity Commission, *supra* note 142.

155. LexisNexis search of Mega News database, Feb. 27, 2005.

156. *Id.*

157. S. B. 60, 2005–2006 Sess. (Cal. 2005) (excluding persons with identity documents issued by “a state sponsor of terrorism” from proposed immigrant driver licensing scheme).

158. Cole, *Enemy Aliens*, *supra* note 4, at 974; see also *Attorney General Seeks End to Racial Profiling*, N.Y. TIMES, Mar. 2, 2001, at A20; *After 9/11, An Assault on Civil Liberties*, *supra* note 154, at 60.

159. Cole, *Enemy Aliens*, *supra* note 4, at 974 (citing Gallup Poll, *Do You Approve or Disapprove of the Use of “Racial Profiling” by Police?* (Dec. 9, 1999), available at WESTLAW, USGALLUP.120999 R6 009).

160. Cole, *Enemy Aliens*, *supra* note 4, at 974.

internment.<sup>161</sup> Numerous noted legal and political commentators, including Charles Krauthammer, Peter Schuck, and James Q. Wilson, began to advocate racial profiling as an instrumental tool in the fight against terrorism.<sup>162</sup> Seeking to capitalize on the zeitgeist, one spectacularly insensitive congressman, Representative John Cooksey of Louisiana, even declared that anyone with “a diaper on his head and a fan belt around that diaper” ought to be stopped and questioned by the authorities.<sup>163</sup> Notably, support for racial profiling of Arabs and Muslims has even come from the African American community, the group that has historically suffered the most from the practice.<sup>164</sup> Like the Irish, who attained their white and American bona fides through their embrace of the rhetoric of racial supremacy and hatred of African Americans,<sup>165</sup> other minority groups have consolidated their standing as good Americans through support for the targeting of Middle Easterners. As Leti Volpp argues, “[o]ther people of color have become ‘American’ through the process of endorsing racial profiling. Whites, African Americans, East Asian Americans, and Latinas/os are now deemed safe and not required to prove their allegiance.”<sup>166</sup>

In the months and years following the 9/11 attacks, the Bush administration approved a series of homeland security measures, including fingerprinting and pursuing deportation orders, that singled out Arab immigrants—even those with no connection to terrorism.<sup>167</sup> There is deep irony in these policies. The same administration has vociferously opposed affirmative action as an outmoded government program that unnecessarily preserves racial differentiation in the color-blind New America.<sup>168</sup> Yet, it ensures the perpetuation of invidious racial discrimination through its support of profiling practices. Apparently, to the administration and others, remedial programs meant to offset centuries of racial oppression constitute unacceptable violations of the Equal Protection Clause, but the targeting of racial minorities in the dubious name of national security is perfectly sound. If nothing else, the continued vitality (and even legality) of racial profiling undermines a key assumption of opponents of affirmative action: that we live in a society free of most prejudice and discrimination, save affirmative action itself. If the

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161. The Gallup Poll, *The Impact of the Attacks on America*, Oct. 8, 2001, <http://www.galluppoll.com/content/?ci=4972&pg=1> (finding that a third of Americans favor several “more severe measures”) (subscription required).

162. See, e.g., Peter H. Schuck, *A Case for Profiling*, AM. LAW., Jan. 2002, at 59; Stuart Taylor Jr., *The Case for Using Racial Profiling At Airports*, 38 NAT’L J. 2877; Charles Krauthammer, *The Case for Profiling*, TIME, Mar. 18, 2002, at 104; James Q. Wilson & Heather R. Higgins, *Profiles in Courage*, WALL ST. J., Jan. 10, 2002, at A12.

163. *Apology from Congressman*, N.Y. TIMES, Sept. 21, 2001, at A16.

164. See *Nightline*, (ABC television broadcast Oct. 10, 2001).

165. See IGNATIEV, *supra* note 28.

166. Volpp, *supra* note 143, at 1584.

167. For example, on June 6, 2002, Attorney General John Ashcroft proposed implementation of the National Security Entry-Exit Registration System which subjected visitors to the United States from certain countries—predominantly Arab or Muslim—to increased scrutiny, including fingerprinting, periodic registration, and exit controls. See Ashcroft, *supra* note 139.

168. See George W. Bush, U.S. President, Remarks by the President on the Michigan Affirmative Action Cases (Jan. 15, 2003), <http://www.whitehouse.gov/news/releases/2003/01/20030115-7.html>.

government continues to engage in the practice of racial profiling on the grounds that it is an effective tool in protecting our national security, then the government must necessarily admit that we do not live in the race-blind society imagined by opponents of affirmative action.

*C. The Middle Easterner as the Other: The Slippery Slope from Friendly Foreigner to Enemy Alien, Enemy Alien to Enemy Race*

Inextricably intertwined with the rising tide of discrimination facing those of Middle Eastern descent is the mythology surrounding racial construction and intricately related religious, social, and cultural perceptions. For prior generations, individuals of Middle Eastern descent came closer to matching our constructed notions of whiteness. They were largely Christian; they came from an exotic but friendly, romantic, and halcyon foreign land imagined to contain magic lanterns, genies, flying carpets, and belly-dancers; and they served as a chief vessel of the philosophical and cultural heritage of the West.<sup>169</sup> Today, Middle Easterners are inevitably associated with Islam; they come from a decidedly unfriendly foreign land imagined to contain nothing but terrorists, obstreperous mobs chanting "Death to America," unabashed misogynistic polygamists, and religious fundamentalists; and they represent a wholly different civilization from our own—one with which the inevitable and apocalyptic clash of civilizations is unfolding.<sup>170</sup> In popular perception, where the notion of assimilability constitutes the sine qua non of the majority's acceptance of an immigrant group, it is not surprising that Middle Easterners have fared poorly. As Karen Engle has noted, the past century has witnessed a radical transformation in majority perceptions of Middle Eastern individuals: they are, in short, no longer thought capable of assimilation.<sup>171</sup> The changing religious composition of Middle Eastern immigrants to the United States has played a key role in this transformation.

As the naturalization cases make clear, perceptions of race are frequently conflated with perceptions of religion. In 1924, about 200,000 Arabs resided in the United States. Eighty percent of them were from Syria and Lebanon, of which a startling ninety percent were Christian.<sup>172</sup> Given the tendency to conflate race with religious affiliation, and Christianity with assimilability, it is not surprising that, at the beginning of the twentieth-century, courts declared Armenians and even some Arabs white by law and entitled to the privileges of whiteness, including naturalization. However, the composition of the Middle Eastern immigrant population has undergone a dramatic change in recent years. About sixty percent of Arab immigrants arriving in the United

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169. Of course, these romantic images have often served less than salutary ends, providing, as Edward Said has argued, implicit justification for colonial and imperial ambitions by the West towards the Middle East. See EDWARD SAID, *ORIENTALISM* (1978).

170. See, e.g., SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1998).

171. See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 75 (2004).

172. Louise Cainkar, *The History of Arab Immigration to the U.S.: An Introduction for High School Students*, available at <http://www.adc.org/education/AAImmigration2.htm> (last visited Sept. 12, 2006).



States since 1965 identify themselves as Muslim.<sup>173</sup> As the Middle Eastern population of the United States has grown less Christian, it has been perceived as considerably less capable of assimilation and, consequently, less white.<sup>174</sup>

As perceptions of their assimilatory capacity have diminished, Middle Easterners have come to represent enemy aliens, and even an enemy race, in the popular imagination. In the past, the paradigmatic noncitizen was the “Mexican illegal alien, or the inscrutable, clannish Asian.”<sup>175</sup> Today, it is the Arab terrorist and this vision has firmly taken hold of our immigration policies. As Victor Romero argues, “post-9/11, the age-old stereotype of the foreign, Arab terrorist has been rekindled, and placing our immigration functions under the auspices of an executive department charged with ‘homeland security’ reinforces the idea that immigrants are terrorists.”<sup>176</sup> The recent wave of registration and deportation policies aimed at individuals of Middle Eastern descent also highlights this trend.<sup>177</sup>

The promulgation of such racially suspect policies has been all too easy because of the cognitive dissonance between our mythic embrace of a race-blind society and the realities of our equal protection jurisprudence. On the one hand, we have a domestic set of rules that demands government provide equal protection for all, regardless of race, ethnicity, or national origin. On the other hand, through the plenary power doctrine,<sup>178</sup> the Supreme Court has virtually exempted government action in the immigration arena from equal protection scrutiny.<sup>179</sup> As a result, we have legitimized an external set of rules in which the admission and deportation of noncitizens are intricately intertwined with notions of race, ethnicity, and national origin.<sup>180</sup>

Courts have glibly ignored the risks inherent in condoning immigration policies that create a disfavored, or enemy, alien. A war against enemy aliens from a particular

173. Engle, *supra* note 171, at 74.

174. *See infra*.

175. Victor Romero, *Race, Immigration and the Department of Homeland Security*, 19 ST. JOHN’S J. LEGAL COMMENT. 51, 55 (2004).

176. *Id.* at 52.

177. See, for example, the National Security Entry-Exit Registration System (NSEERS), which was formally announced by the attorney general on June 6, 2002 and then added to with the advent of a special “call-in” registration in November 2002. The NSEERS singles out a limited class of noncitizens—male, nonimmigrant visa holders over the age of sixteen who are from one of twenty-five Muslim and Middle Eastern countries—for special registration requirements. See Nancy Murray, *Profiled: Arabs, Muslims, and the Post-9/11 Hunt for the “Enemy Within”* in CIVIL RIGHTS IN PERIL: THE TARGETING OF ARABS AND MUSLIMS 27, 44 (Elaine C. Hagopian ed., Haymarket Books 2004).

178. Under the doctrine, the legislative and executive branches are granted broad authority on immigration issues. Thus, the judiciary generally refrains from exacting constitutional scrutiny of regulations related to immigration.

179. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”); *Galvan v. Press*, 347 U.S. 522, 530 (1954) (discussing Congress’s broad plenary power over immigration); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (holding that immigration decisions by the political branches are “conclusive upon the judiciary” with the need for substantial constitutional scrutiny); *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

180. See Romero, *supra* note 175, at 52.

country or region can rapidly degenerate into a declaration of war against an enemy race. David Cole has poignantly demonstrated how quickly American policy during World War II degenerated from singling out the enemy aliens to persecuting an enemy race. During that era, demands to protect the nation from subversive activities by Japanese nationals residing in the United States devolved into the wholesale targeting of all individuals of Japanese ancestry.<sup>181</sup> In the words of Lieutenant General John L. DeWitt, the driving force behind the Japanese internment, “[a] Jap’s a Jap. It makes no difference whether he is an American citizen or not.”<sup>182</sup> Thus, with the blessing of the Supreme Court,<sup>183</sup> the government rounded up over 110,000 individuals of Japanese ancestry, the majority of whom were American citizens, and threw them into internment camps in the name of national security. The war against a nation became a war against a particular ethnicity. And, in the post-9/11 era, we are in danger of repeating this ugly inistake.

As we all know, each of the perpetrators of the 9/11 attacks was a man of Middle Eastern descent. Thus, supporters of policies targeting Middle Eastern individuals have defended these policies as rational responses to a legitimate threat to the United States. This justification stands on tenuous ground, especially when compared to our national response to the largest terrorist attack on American soil prior to 9/11: the Oklahoma City bombing. Although the mainstream media and the American public initially speculated that the attack was the product of Middle Eastern terrorism,<sup>184</sup> investigations proved otherwise. As we now know, the perpetrators of that attack were a cell of crew-cut sporting, blue-eyed American men of European descent. Interestingly, however, the response to the Oklahoma City Bombing, and the problem of domestic terrorism, had no racist bent. “Timothy McVeigh did not produce a discourse about good whites and bad whites, because we think of him as an individual deviant, a bad actor,”<sup>185</sup> notes Leti Volpp. “We do not think of his actions as representative of an entire racial group. This is part and parcel of how racial subordination functions, to understand nonwhites as directed by group-based determinism but whites as individuals.”<sup>186</sup> For example, anti-abortion bombers are not identified on the basis of their race (often white) or their religion (often Christian), and they are certainly not billed as terrorists. When a Christian individual of European descent commits a barbaric act against civilians, he is simply an outlier, a crazed lone gunman. By contrast, when a Muslim of Middle Eastern descent commits a barbaric act

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181. Cole, *Enemy Aliens*, *supra* note 4, at 989–90.

182. *Id.* at 990 (citing Brief of Japanese American Citizens League, Amicus Curiae at 198, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22), *reprinted in* 42 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 309–530 (Phillip B. Kurland & Gerhard Casper eds., 1975)).

183. *See* *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).

184. *See* Mary Abowd, *Arab-Americans Suffer Hatred After Bombing*, CHI. SUN-TIMES, May 13, 1995. In fact, some have argued that the focus of law enforcement officials on searching individuals of Middle Eastern descent in the wake of the attacks allowed Timothy McVeigh to flee the law initially. *See id.*

185. Volpp, *supra* note 143, at 1585.

186. *Id.*

against civilians, his acts of terrorism are imputed to all members of his race and religion.

*D. Justice Denied: The Judiciary and the Middle Eastern Subject*

Even the court system has functioned less than ideally in protecting the civil rights of those of Middle Eastern descent, and racial determination games have played a role in this shortcoming. In 1978, Majid Ghaidan Al-Khazraji, an Arab American professor, was denied tenure by his employer, St. Francis College. When his efforts to appeal the decision internally failed, he sought redress in the American justice system by filing a section 1981 action against the school, claiming a violation of his civil rights on the grounds of race.<sup>187</sup> The College demurred, arguing that “an ethnic Arab is taxonomically a Caucasian and therefore ‘not a protected person under [s]ection 1981 when he is presumably claiming other Caucasians or whites were improperly favored over him.’”<sup>188</sup> The Pennsylvania federal district court hearing the case agreed, granting summary judgment to the College and holding that a claim of discrimination on the basis of being an Arab was not cognizable under section 1981.<sup>189</sup> Ultimately, the Third Circuit reversed<sup>190</sup> and the Supreme Court agreed.<sup>191</sup> However, the issue occupied the federal court system for almost a decade, forcing both the Third Circuit and Supreme Court to consider an absurd and seemingly facile question: whether Arabs could ever be the victims of racial prejudice.<sup>192</sup>

Despite the Supreme Court’s holding in *Al-Khazraji*, the problematization of whiteness reemerged a few years later. In 1991, Dale Sandhu, an Indian male from Punjab, sued his employer of eight years, Lockheed Missiles and Space Company. According to Sandhu, race discrimination had resulted in his 1990 termination from the company.<sup>193</sup> Initially, a California court quickly dispensed with the case, dismissing the suit on the grounds that Sandhu was technically a Caucasian and that he could therefore not sue his employers for race discrimination.<sup>194</sup> Besides the troublesome assumption that Caucasians cannot seek relief for race discrimination, the trial court’s decision was ironic in light of Supreme Court precedent, *United States v. Thind*,<sup>195</sup> where the Court

187. *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 506 (3d Cir. 1986). Section 1981 provides that “[a]ll persons within the Jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” 42 U.S.C. §§ 1981, 1982 (2000).

188. *Al-Khazraji*, 784 F.2d at 514.

189. *Id.* at 509.

190. *Id.* at 514–18.

191. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

192. As the Third Circuit concluded, “We are unwilling to assert that Arabs cannot be the victims of racial prejudice.” *Al-Khazraji*, 784 F.2d at 517.

193. *Sandhu v. Lockheed Missiles & Space Co.*, 26 Cal. App. 4th 846, 849 (Ct. App. 1994).

194. As the trial court held, “[B]y definition, [Sandhu] is Caucasian . . . [and] a person who is in fact Caucasian may not complain of race.” *Id.* at 850 (second alteration in original) (quoting Judge Stone’s unpublished opinion for the Superior Court of Santa Clara County, No. 718352, Peter G. Stone, Judge).

195. 261 U.S. 204 (1923).

held that Indians were not white for the purposes of qualifying for naturalization.<sup>196</sup> Ultimately, the California Court of Appeals reversed the *Sandhu* decision. But, both the *Al-Khazraji* and *Sandhu* cases reflect the continuing antinomy of whiteness and the tangible problems that result from it. When it was a matter of denying naturalization rights, courts frequently found individuals of Middle Eastern and Indian descent not white; when it was a matter of denying relief for discrimination, courts have found the same individuals white. The results echo the catch-22 illustrated at the outset of this Article.

Middle Easterners have not only seen efforts at justice spurned by the courts; they have also experienced injustice at the hands of the judiciary, a particularly disturbing fact in light of the judicial system's traditional role in serving as the last bastion for the protection of civil rights. Although the evidence is largely anecdotal, the principle of equality before the law is being undermined by the specter of hatred against Middle Easterners. In 2003, a Lebanese American woman appeared in a Tarrytown, New York court for a parking violation. The judge promptly asked her if she was a terrorist. Stunned, she did not answer. Later, according to the woman, the judge castigated her: "You don't want to pay a ticket, but you have money to support terrorists."<sup>197</sup> The woman collapsed. The judge later resigned, admitting the first, but not second, statement.<sup>198</sup>

More recently, in Alexandria, Virginia, Ali Al-Timimi—an Arab American, Muslim, biologist, religious scholar, and lecturer on Islamic studies—faced federal criminal charges for his exhortations to a group of followers.<sup>199</sup> His lectures, argued the government, incited listeners to join the Taliban. In closing arguments, Assistant United States Attorney Gordon Kromberg instructed the jury that Timimi would lie to the jury because the jurors were "kafir"—nonbelievers: "If you're a kafir, Timimi believes in time of war he's supposed to lie to you. Don't fall for it. Find him—find Sheik Ali Timimi—guilty as charged."<sup>200</sup> The jury convicted Al-Timimi and he now faces the possibility of lifetime imprisonment. Whether Al-Timimi's speaking activities constituted unprotected imminent incitements to violence is one question; drawing upon the religious and racial prejudices of jury members in order to assure conviction of a defendant is quite another. Yet, as the Al-Timimi and Tarrytown cases reflect, even the judiciary has threatened to make the civil rights of Middle Easterners yet another casualty of 9/11.

### III. ADDRESSING THE PROBLEM

As this Article has argued, the antinomy of Middle Eastern racial classification has stifled the identification and resolution of problems facing Middle Easterners. While

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196. *Id.* at 206.

197. Lisa W. Foderaro, *Judge's Offhand Terrorism Remarks Anger Arab-American*, N.Y. TIMES, May 22, 2003, at B1.

198. Robert Morlino, "Our Enemies Among Us!" *The Portrayal of Arab and Muslim Americans in Post-9/11 American Media*, in CIVIL RIGHTS IN PERIL: THE TARGETING OF ARABS AND MUSLIMS 71, 72 (Elaine C. Hagopian ed., Haymarket Books 2004).

199. Vanessa Blum, *Putting Islam on the Stand*, LEGAL TIMES (July 8, 2005), available at <http://www.law.com/jsp/article.jsp?id=1120727114514>.

200. *Id.*

the ultimate cure to the ongoing assault on Middle Eastern civil rights may take years to achieve, several relatively simple steps can help initiate meaningful reform. First, we must separate Middle Easterners from the category of “white” in racial statistics. Secondly, we must recognize that Middle Easterners contribute as meaningfully as any minority group to racial and cultural diversity in both educational and workplace environments. Finally, it is time to launch a CRT literature with a Middle Eastern focus.

*A. The Only Thing Worse Than Being Reduced to a Number Is Not Being Reduced to a Number: Quantifying Discrimination Against Middle Easterners*

One of the largest problems facing the Middle Eastern population in the United States is that of invisibility. Specifically, the Middle Eastern population remains unorganized and unrecognized, a fact spurred on by the government’s approach to categorizing them. As noted earlier, there is little doubt that in the wake of 9/11, Middle Eastern individuals have become a key target of racial profiling by police and security officers. However, the magnitude of this practice is impossible to quantify when there are no accurate government measurements of it. And, without data to measure its existence, the problem is underappreciated and potential remedies cannot be effectively assessed.

A recent example from Chicago epitomizes this dynamic. In a misguided, but good-natured, attempt to combat racism, Illinois law now requires police officers to identify the race of individuals they stop. However, in so doing, police officers may only choose from the following list of racial categories: “Caucasian, African[.]American, Hispanic, Asian/Pacific Islander[,] and Native American/Alaskan Native.”<sup>201</sup> When questions arose as to how the Chicago police should classify individuals of Middle Eastern descent, they initially checked the “Asian/Pacific Islander” box.<sup>202</sup> Higher authorities then instructed them to check the “Caucasian” box.<sup>203</sup> Confusion abounded, obfuscating the data and undermining the ability of analysts to parse out its meaning in the first place. As Rouhy Shalabi, the President of the Arab American Bar Association, has argued, “You can’t tell whether Arab[.]Americans are being profiled if we’re counted with whites. Ideally, there should be another box . . . to be more specific.”<sup>204</sup>

In fact, prior to 9/11, a series of high profile studies by social scientists sought to analyze the problem of racial profiling. Remarkably, none of these studies gave Middle Easterners their own category. Instead, the racial profiling of a Middle Easterner counted simply as the racial profiling of a white person—a flagrant shortcoming even at the time of the studies.<sup>205</sup>

201. Dave Orrick, *Police Recording ‘Race’ of Drivers but Some Groups Worry New Law Will Create Inaccurate Data*, CHI. DAILY HERALD, Jan. 2, 2004, at 1.

202. Jennifer Golz, *New Study Examines Racial Profiling*, THE COLUMBIA CHRON. (COLUMBIA C.), Jan. 12, 2004, <http://www.pbs.org/weta/washingtonweek/voices/200401/0112profiling.html>.

203. Orrick, *supra* note 201.

204. *Id.* (omission in original).

205. See, e.g., Ronald Weitzer & Steven Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 SOC. FORCES 1009 (2005) (survey conducted December 2002); THE WASH. POST, KAISER FAMILY FOUND. & HARVARD UNIV., RACE AND ETHNICITY IN 2001:

A failure to recognize Middle Easterners as a separate racial group leads to their relative anonymity as a collective social force. In turn, this translates into a lack of means, ability, and resolve to address issues of diversity and discrimination related to them. In a bureaucratic society, invisibility is the worst of punishments and nothing enhances invisibility more than not being counted.

*B. Defining and Advancing Diversity: The Legal Academy and the Shortcomings of the Extant Literature in Critical Race Theory*

On a related note, the current formatting of racial data has led educational institutions, employers, and other entities to ignore the positive impact that individuals of Middle Eastern descent can have on school and workplace diversity. The creation of a separate racial category for Middle Eastern individuals would aid this cause. Specifically, widespread efforts to quantify minority representation in education and industry have brought attention to systemic discrimination and problems of underrepresentation. This, in turn, has fueled efforts by such institutions to better minority recruitment. Unfortunately, minority numbers reported by schools or employers simply do not count individuals of Middle Eastern descent as anything but white. As a consequence, it is impossible to measure the degree to which individuals of Middle Eastern descent suffer from such discrimination or underrepresentation. Middle Easterners contribute to diversity as much as any other minority group. To the extent that diversity is considered a factor in the educational-admission or job-hiring processes, Middle Eastern extraction should be considered as relevant as African American, Hispanic, Native American, Pacific Islander, or Asian descent.

Indeed, under the factors enunciated in *Grutter*, Middle Eastern descent should qualify as a diversity play, even though it does not: greater representation of Middle Easterners both in the academy and elsewhere promotes cross-racial understanding, enervates invidious racial stereotypes, and enlivens classroom discussion.<sup>206</sup> Quoting Justice Powell's opinion in *University of California v. Bakke*,<sup>207</sup> the *Grutter* Court found that "the 'nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation.'"<sup>208</sup> Strategically, a focus on increased Middle Eastern representation in American society would also advance key foreign policy interests by diluting the belief—most prevalent abroad—that the war on terrorism is tantamount to a war against an entire race and religion. Ensuring that we remain a fluid and open society, especially for those most in fear of stigmatization, removes a blatant hypocrisy that threatens to undermine our efforts to bring democracy to the Middle East and achieve international cooperation in the war on terrorism.

An examination of the legal academy illustrates how the quandary of Middle Eastern classification adversely impacts the place of Middle Easterners in American

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ATTITUDES, PERCEPTIONS, AND EXPERIENCES, <http://www.kff.org/kaiserpolls/upload/Race-and-Ethnicity-in-2001-Attitudes-Perceptions-and-Experiences-Toplines-Survey.pdf> (survey conducted March 2001). For an overview of these studies, see AMNESTY INT'L USA, THREAT AND HUMILIATION: RACIAL PROFILING, DOMESTIC SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES (2004), [http://www.amnestyusa.org/racial\\_profiling/report/rp\\_report.pdf](http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf).

206. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2004).

207. 438 U.S. 265 (1978).

208. *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313) (internal quotation marks omitted).

society. For example, although law schools have taken large strides in recent years with concerted efforts to hire more minorities, none of these efforts have focused on hiring individuals of Middle Eastern descent. On the basis of government classifications, a Middle Eastern presence at a law school is not even considered a plus in the diversity column.

This is simply not adequate, especially given the size of the Middle Eastern population in the United States as a whole and the wide range of legal issues that face individuals of Middle Eastern descent. As far as I can tell, I am the first full time law professor of Persian descent in the United States, and there are only a handful of other full time law professors of Arab, Turkish, or other Middle Eastern lineage. I cannot be sure, however, since Middle Easterners count as white in all official data. Thus, while we have very specific counts for law professors of African, Asian, Pacific Island, Latino, and Native American descent,<sup>209</sup> the numbers are conspicuously absent for professors of Middle Eastern descent.

For example, a recent newsletter for the American Bar Association (ABA) touted and celebrated significant increases in minority hiring on law school faculties. As the article noted, from 2000 to 2004, minorities increased their share of full time faculty positions from 13.9 percent to 16.0 percent.<sup>210</sup> As the newsletter proudly concluded, the data demonstrated “meaningful progress in diversifying the law school community.”<sup>211</sup> However, like almost all data on diversity, no attention was paid to identifying strides towards (or failures in) increasing Middle Eastern representation on faculties. The tacit, yet utterly untenable, assumption is that Middle Easterners do not contribute meaningfully towards racial diversity in the law school community. And, as the anecdote at the outset of this Article indicates, this view is reified through the continued notation of a Middle Eastern hire as a white hire.

The consequences of this situation are far-reaching, and not merely limited to the life of the law school. In his influential commentary, *The Imperial Scholar*, published two decades ago, Richard Delgado noted that much of the most-cited and widely discussed literature on civil rights law was the product of “an inner circle of about a dozen white, male writers who comment on, take polite issue with, extol, criticize, and expand on each other’s ideas.”<sup>212</sup> Delgado then discussed the importance of having legal scholars of African, Latin, Asian, and Native American descent addressing civil rights issues.<sup>213</sup> Ironically, despite his passionate and groundbreaking scholarship and his status as one of the founding members of CRT,<sup>214</sup> Delgado entirely and inexplicably omitted the Middle Eastern category from his argument. Delgado is not

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209. Cf. Delgado, *supra* note 9, at 561 & n.1 (providing specific counts of “Black,” “Hispanic,” and “Native American” law professors using existing publicly available data).

210. John A. Sebert, *From the Consultant*, SYLLABUS: A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO BAR, Feb. 2005, at 4, 4.

211. *Id.* at 5.

212. Delgado, *supra* note 9, at 563; see also Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992).

213. Delgado, *supra* note 9, at 566–73.

214. Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 898 n.16 (1995) (noting that Derrick Bell, Richard Delgado, Charles Lawrence, Mari Matsuda and Patricia Williams are usually considered the founding members of CRT).

alone in this shortcoming—his oversight is pervasive in the academy and American society—and is repeated among critical race scholars, a group one would hope to recognize otherwise. Other leading scholars in the field have discussed the problems facing African, Asian, Latin, and Native Americans, with nary a whisper of those of Middle Eastern descent.<sup>215</sup> Sumi Cho and Robert Westley's comprehensive examination of law faculty hiring<sup>216</sup> is emblematic of this rampant oversight. The article discusses strides made in hiring individuals of African, Asian, Latino, and Native American descent and even contemplates the importance of gender and sexual-orientation diversity on law school campuses.<sup>217</sup> But there is not a single mention of Middle Easterners.

Since Delgado's poignant plea, the academy has made significant strides in addressing his concerns and there is now a flood of CRT literature in law reviews focusing on African, Latin, Asian, and Native American issues—much of it authored by law professors of African, Latin, Asian, or Native American descent. CRT itself emerged from the presence and activism of students of color at several major law schools.<sup>218</sup> Save the recent rash of articles on the issue of racial profiling in the wake of 9/11, however, there is no such corresponding literature addressing the legal issues facing the Middle Eastern population. Given the fact that there are precious few Middle Easterners being granted the privilege of entering the legal academy, this is not surprising.<sup>219</sup>

As Devon Carbado and Mitu Gulati have argued, the debate over affirmative action and race-based preferences has consistently overlooked a critical question of first principles: the meaning of diversity.<sup>220</sup> Under the taxonomy advanced by Carbado and Gulati, diversity serves seven overlapping and interconnected areas: inclusion, social meaning, racially cooperative citizenship, belonging, color blindness, speech, and institutional culture.<sup>221</sup> Increasing the Middle Eastern presence in the law school student body and faculty serves each of these interests recognized under the Carbado/Gulati heuristic.

First, increased student and faculty recruiting advances inclusion by facilitating the entrance of Middle Easterners into the leading institutions of power in American society—the law school, the bar, and the bench. The Middle Eastern population suffers from a shockingly low profile in the nation's political and legal life, especially given its

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215. See, e.g., Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1305–12 (2002) (insightfully discussing the perils of the “Black/White paradigm,” but never once addressing the impact of the divide on individuals of Middle Eastern descent, though extensively contemplating the effect of the paradigm on Asian Americans, Latinos, and Native Americans).

216. Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements That Performed the Theory*, 33 U.C. DAVIS L. REV. 1377 (2000).

217. *Id.* at 1421–22.

218. Carbado & Gulati, *supra* note 2, at 1163.

219. Cf. Chang, *supra* note 11, at 1245–46 (noting an increase in Asian Americans in the legal academy and a corresponding increase in Asian American legal scholarship).

220. Carbado & Gulati, *supra* note 2, at 1150.

221. *Id.* at 1151.



relatively high rates of educational attainment and economic wherewithal.<sup>222</sup> Made over a century and a half ago, Alexis de Tocqueville's admonishment about power in the United States still rings true: "If I were asked where I place the American aristocracy, I should reply, without hesitation, that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar."<sup>223</sup> The gateway to the bar and bench is the American university or, more specifically, the American law school. As Carbado and Gulati argue, "[u]niversities and colleges define American democracy and serve as gateways to its benefits. To the extent that certain groups are excluded from universities and colleges, a democratic process failure has occurred."<sup>224</sup> Given the vital role of the law in American social structure, we must focus on expanding the opportunities for Middle Easterners with the same vigor with which we seek to advance the African American, Native American, Pacific Islander, Hispanic, and Asian American presence on both the bench and bar.

Secondly, by recruiting more individuals of Middle Eastern descent both to the student body and faculties, law schools would achieve a central aim of diversity programs: subversion of stereotypes through exposure. Presently, the only time law schools appear to make an effort to recruit a scholar of Middle Eastern descent is when they seek to fill an adjunct position for the requisite biennial courses on Islamic law that most law schools offer. Take a simple look at any law school faculty roster: the only individuals of Middle Eastern descent that you are likely to see are those teaching the Shari'a. One can only imagine the outrage that would result if law schools only recruited African Americans to teach courses on slavery, Latinos to teach immigration, or Asian Americans to teach CRT. This decision—unconscious though it may be—both results from and reinforces a central stereotype that colors American perceptions of Middle Easterners: the inextricable association of the Middle East with Islam, especially its more radical elements.

In reality, the vast majority of the world's Muslims are located outside of the Middle East. Moreover, the Middle East is filled with individuals of other religions. Armenia was, of course, the first nation in the world to adopt Christianity as the state religion.<sup>225</sup> Moreover, the Middle East is rife with religious diversity. Take the Iranian population, for example. With images of the Ayatollahs in mind, the link between Iran and Islam has been inextricably forged into the mind of mainstream America. However, sizable portions of the Iranian American population are not Muslim. In Los Angeles County alone, there are 35,000 Iranian Americans of Jewish faith.<sup>226</sup> Yet the specter of Islamic fundamentalism is so intertwined with our perceptions of Iran that the existence of an Iranian Jew (let alone in vast numbers) is frequently a shock to the average American. In fact, Iran is home to one of the world's oldest continuous Jewish

222. In this way, the Middle Eastern population is quite similar to the Asian American population. Cf. Chang, *supra* note 11, at 1249–50 (arguing that "the exclusion of Asian Americans from the political and legal processes has led to an impoverished notion of politics and law that furthers the oppression of Asian Americans").

223. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 355 (Francis Bowen ed., Henry Reeve trans., Univ. Press 4th ed. 1864) (1835).

224. Carbado & Gulati, *supra* note 2, at 1154.

225. Under the leadership of King Trdat III, Armenia became the first Christian nation in A.D. 301. See Michael Bobelian, *Vartke's List*, LEGAL AFFAIRS, March/April 2006, at 38.

226. Michael Aushenker, *Praying for Justice*, JEWISH J.L.A., Apr. 14, 2000.

settlements outside of Israel, dating from 722 B.C.E. to the present day.<sup>227</sup> Large pockets of Iranians of Bahá'í and Zoroastrian faith also live in the United States. General recruiting efforts aimed at Middle Easterners would help acknowledge that Middle Easterners are capable of doing something in the legal academy besides teaching Islamic law. As far too few Americans recognize, the Middle East is a place of tremendous religious diversity and many Middle Eastern Americans, myself included, are not Muslim.

Thirdly, improving the Middle Eastern presence at law schools advances racially cooperative citizenship by providing students and faculty with greater opportunities to mediate and contemplate social, political, and legal issues relevant to both the classroom and scholarship. Middle Eastern legal theorists would be indispensable to negotiating the tensions between American law and non-Christian traditions including, but not limited to, Islam; they can provide critical guidance to emerging democracies in the Middle Eastern world as they grapple with the delicate and intricate task of constitution drafting; and they can play a valuable role in cross-cultural liaising.<sup>228</sup>

Fourth, by counting Middle Eastern individuals as a plus in the diversity column, we would be sending a message of belonging. This message can temper the daily headlines replete with messages of ostracism and otherness—headlines that inform Middle Easterners that we do not want their hands on our ports and that we do not want them immigrating into our country. Integration would facilitate the view that we do not, as a society, reduce every Middle Easterner into a monolithic enemy of the West.

Fifth, advancing Middle Eastern diversity on campuses ultimately serves the goal of color blindness. When there is only a single voice coming from a race, people will be forced to “gather the insight and experience of an entire race from one person.”<sup>229</sup> To that end, the instigation for this Article is instructive. So long as the vast problems discussed herein continue to go unaddressed in the law review literature, I feel a nagging urge to speak up on behalf of the “race” to which I am categorized, even though the general focus of my own research, writing, and teaching is intellectual property, Internet, and constitutional law. I therefore become (self?) racialized because there are so few others of Middle Eastern descent on American law faculties. In short, the stunning absence of legal scholarship on the pressing issues facing individuals of Middle Eastern descent compelled me to write this Article. In doing so, I am reminded of the words of Robert Chang in his landmark article, *Toward an Asian American Legal Scholarship*:

I have been told that engaging in nontraditional legal scholarship may hurt my job prospects, that I should write a piece on intellectual property, where my training as a molecular biologist will lend me credibility.

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227. Houman Sarshar, *Preface to ESTHER'S CHILDREN: A PORTRAIT OF IRANIAN JEWS*, at ix, x (Houman Sarshar ed., 2002).

228. *But see* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809–19 (1993) (questioning the assumption of a “voice of color”); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1787–810 (1989) (challenging the idea that scholars of color have unique standing in, or contribute a unique voice to, race-related scholarship).

229. Carbado & Gulati, *supra* note 2, at 1157.

I try to follow this advice, but my mind wanders. I think about the American border guard who stopped me when I tried to return to the United States after a brief visit to Canada. My valid Ohio driver's license was not good enough to let me return to my country . . . .

. . . .

These are the thoughts that intrude when I think about intellectual property. I try to push them away; I try to silence them. But I am tired of silence.

And so, I raise my voice.<sup>230</sup>

I raise my voice in the hope that, ultimately, the entire categories of race will eventually be dissolved and irrelevant.

Finally, advancement of Middle Eastern presence in the legal academy advances the richness and range of perspectives brought to the law school classroom and law review literature<sup>231</sup> and broadens institutional activities to cover issues of concern to this significant segment of American society.

### *C. A Middle Eastern Moment?*

In 1991, Jerome Culp boldly declared the beginning of an African American Moment in the legal academy, where "different and blacker voices will speak new words and remake old legal doctrines. Black scholars will demand justice with equality and nonblack scholars will understand."<sup>232</sup> In 1993, Robert S. Chang referenced Culp in decreeing an Asian American Moment in the legal academy, "marked by the increasing presence of Asian Americans in the legal academy who are beginning to raise their voices to 'speak new words and remake old legal doctrines.'"<sup>233</sup> Both Culp and Chang had good reasons for optimism. Significant strides had been made in the prior two decades in increasing the numbers of both African and Asian American law students and faculty members. In fact, by 1993, two journals dedicated exclusively to Asian American issues were in circulation.<sup>234</sup>

Unlike Jerome Culp and Robert Chang, I cannot optimistically announce a Middle Eastern Moment in the legal academy. There are simply too few Middle Easterners in the legal academy to effectuate such a moment. It is unknown how many law students of Middle Eastern descent there are in the United States because no one bothers to count. Middle Easterners, unlike African, Latin, Asian, and Native Americans, are not actively recruited by law schools and they are not seen as contributors to diversity on campus. They are given no voice and they are not seen as having a voice.

230. Chang, *supra* note 11, at 1244–45.

231. For example, the development of CRT itself stemmed from the presence and activism of students of color on several major law schools campuses. See Carbado & Gulati, *supra* note 2, at 1163 (arguing that "[t]he development of Critical Race Theory . . . is directly linked to the presence and activism of students of color at Harvard Law School and Boalt Hall, among other institutions"); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiv, xix (Kimberlé Crenshaw et al. eds., 1995); MARI J. MATSUDA, WHERE IS YOUR BODY?: AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW 50 (1996); Cho & Westley, *supra* note 216, at 1378–79, 1404.

232. Culp, *supra* note 10, at 40–41 (citation omitted).

233. Chang, *supra* note 11, at 1245–46.

234. *Id.* at 1246 n.8.

But as the events in recent years have made plain, increased attention must be given to the particular legal issues facing individuals of Middle Eastern descent in the United States. Like its predecessors, a Middle Eastern legal scholarship will recognize that Middle Easterners are “differently situated historically with respect to other disempowered groups. But it will also acknowledge that, in spite of these historical differences, the commonality found in shared oppression can bring different disempowered groups together to participate in each others’ struggles.”<sup>235</sup> The almost complete absence of a Middle Eastern voice in the legal academy renders all but impossible the achievement of such a goal. The purpose of this Article is, therefore, rather modest. I hope it plays a role, no matter how small, in leading us toward a day when we can even contemplate a Middle Eastern Moment in legal scholarship.

*D. A Word of Caution: The Risk of Essentialization*

The position advocated by this Article does run certain risks. First, I am advancing the creation of a broad category of “Middle Eastern” even though one does not necessarily exist in the minds of those whom it would include. Secondly, by collapsing individuals of Arab, Turkish, and Persian descent into a racial category dubbed “Middle Eastern,” we run the risk of essentializing racial identity. Such a categorization inevitably downplays the diversity within the group and might simply serve popular perceptions of a monolithic Middle Easterner, rather than attacking the stereotyping that plagues our society. However, I believe the potential benefits of such a tack outweigh the risks of essentialization.

First, some might object that Middle Easterners do not necessarily think of themselves as Middle Eastern, but rather as members of a particular ethnicity (Arab, Turkish, or Persian) or as part of the “white” race. Nevertheless, the notion of a Middle Eastern race has already been constructed from without and, whether or not individuals who fall within its parameters like it, it is here to stay. As attested by the myriad examples detailed in this Article, the term is already being used as an oppressive force. Individuals of Arab, Turkish, and Persian descent will be deemed “Middle Eastern” by society when it inures to their disadvantage—at the border, in security lines at the airport, at traffic stops, and by prosecutors and jurors. Though the transparent wings of the government count Middle Easterners as white in official, released statistics, you can bet that the Transportation Security Administration (TSA) does not lump Middle Easterners into the category of white when profiling individuals at airports and the FBI does not call Middle Easterners white when trailing “persons of interest.”

The fact that the term “Middle Eastern” has been used instrumentally to regulate and marginalize individuals who fall within its definition may lead some to denounce its use as an official racial category. Yet this is not reason to shirk from use of the term. As Robert Chang has observed with respect to the term “Asian American,”

I hesitate to define “Asian American” further because this term is malleable and is often used by the dominant group to confer and deny benefits . . .

. . . [L]ike its predecessor, “Oriental,” . . . [it] was created in the West from the need to make racial categorizations in a racially divided or, at least, a racially diverse society.

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235. *Id.* at 1249 (referring to the development of an Asian American legal scholarship).

Regardless of its origins, however, “Asian American” can serve as a unifying identity based on the common experiences of Asian Americans because of the inability of most non-Asian Americans to distinguish between different Asian groups.<sup>236</sup>

Finally, the risk of essentialization is tempered by the vast benefits that would accrue from wresting the term “Middle Eastern” as one imposed from without to one embraced from within. As Kenji Yoshino has eloquently stated:

[T]he risk of essentialization ought not to be understood in a vacuum, but rather relative to the risks of alternative regimes. It is the risk of essentialization that facially lends such credibility to formalistic regimes that denude identities of any content, such as color-blindness, sex-blindness, and orientation-blindness. Yet while the risk of essentialization is a serious one, I believe that the costs of such formalistic regimes are greater.<sup>237</sup>

Admittedly, forcing individuals from widely varied linguistic, religious, and cultural traditions into one category is an act rife with danger. For example, the use of the designator “Asian” to capture such diverse ethnicities as the Japanese, Chinese, Korean, Vietnamese, Indians, Thai, Indonesians, Malaysians, and Filipinos has sometimes obfuscated the true impact of social policies on these constituent and discrete populations. Witness the effect of Resolution SP-1<sup>238</sup> and Proposition 209<sup>239</sup> on the student population at University of California (UC) law schools. With the repeal of affirmative action in the UC system, the percentage of Asian law students matriculating at UCLA, Boalt Hall, UC Hastings, and UC Davis changed only negligibly. As a result, many observers concluded that the policy change did no harm to the Asian community, benefited white law school candidates, and harmed Latino, African, and Native Americans.<sup>240</sup> However, a more nuanced examination of the data suggests otherwise.<sup>241</sup> Although those of Chinese, Japanese, and Korean ancestry may, on average, possess higher incomes and higher degrees of formal education than whites, this is not true of many other Asian populations within the United States, including those of Filipino, Vietnamese, Laotian, and Cambodian descent. As it turns out, therefore, the end of affirmative action in the UC system resulted in a precipitous decline in enrollment of law students of Filipino and Southeast Asian descent, matched by a commensurate rise in enrollment by students of Japanese, Chinese, and Korean

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236. *Id.* at 1246 n.7 (fourth alteration in original) (citation omitted).

237. Yoshino, *supra* note 7, at 933.

238. University of California Board of Regents Res. SP-1 (1995, rescinded 2001), *available at* <http://www.universityofcalifornia.edu/news/compreview/sp1.pdf> (forbidding the consideration of race, ethnicity, and sex in admissions decisions in the University of California system).

239. CAL. CONST. art. 1, § 31 (eliminating all affirmative action programs in public employment, public education, and public contracting in the State of California).

240. *See, e.g.*, ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION 105–09, 171 (2002).

241. *See* Carbado & Gulati, *supra* note 2, at 1153.

descent.<sup>242</sup> The categorization of such diverse ethnicities as Arabs, Turks, and Persians under the banner of “Middle Eastern” runs similar risks.

However, the limitations behind broad racial categories do not render such terms meaningless. In the words of Angela Harris, racial categories can be used by the very categorized groups themselves as “strategic identity” to organize a voice for common interests and issues.<sup>243</sup> Indeed, Latino, Asian American, and even African American identities “reflect the political organization of distinct ethnicities and nationalities”<sup>244</sup> to serve instrumental goals on behalf of their “membership.” Thus, even if the term Middle Eastern is imposed on us from without and it is subject to imprecision and inaccuracies, there is tremendous value to strategically adopting the term to give a voice to individuals who presently have little political and legal capital.

Finally, to avoid essentialization, one must be prepared to eventually deconstruct a racial identity and disassemble it. As Robert Chang has argued, once a racial categorization has been used as an effective organizing tool to counterbalance years of oppression by a dominant group, we must be prepared to deconstruct it.<sup>245</sup> In the end, therefore, poststructural narratives eventually dismantle the notion of race, and people become free to choose their own individual identities: “Only when we are free of [racial categories] can we be free to give ourselves our own identity. Only in this way can we be free to embrace our identity rather than having our identity thrust upon us from the outside.”<sup>246</sup> I hope that someday individuals of Middle Eastern descent living in the United States will enjoy this basic right.

#### CONCLUSION

One day during my third year in law school, I had a meeting with a group of newly admitted students who were visiting Yale to determine if they would matriculate. While several of us were immersed in banter, one of the newly admitted students appeared to be staring at me with a confused glare. When she could finally seize upon a break in the conversation, she turned to me and asked, “What are you?”

After ascertaining what she meant (she wanted to know my ethnic background), I told her that I was Persian, Armenian, and Irish. She came from mixed European descent.

“Yeah, I thought you looked Iranian,” she replied. Then she said something rather curious. “So, what’s it like, you know, studying our law. It must be strange, huh?” I looked at her perplexed, shocked that she would ask such a question.

“What do you mean?”

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242. *Id.*

243. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 610–12 (1990) (arguing that we must not rationalize all racial or gender experiences as unique as that eliminates the ability to generalize and coalesce interests strategically).

244. Carbado, *supra* note 215, at 1295; *see also* Anthony Paul Farley, *All Flesh Shall See It Together*, 19 CHICANO-LATINO L. REV. 163, 167 (1998) (“Blacks, like Latinos/as or Asian Pacific Americans, are neither an ‘ethnicity’ nor a ‘race.’ We too may opt to consider ourselves an amalgamation of national origins—a ‘conflation’ of national origins. We, especially, have been forcibly thcmatized as an amalgamation of national origins.”).

245. Chang, *supra* note 11, at 1321–22.

246. *Id.* at 1321 (citation omitted).

“Being Iranian and all. It must be weird and so different to study American law.” Although there was no rational basis for her to surmise that I was not American (or even native born, for that matter), the internal calculus in her mind was irrepensible: being of Middle Eastern descent meant that I could not be American.

I explained to her that I had grown up in the United States and that I was an American citizen. I was, therefore, studying my law. But the natural conception of the Middle Easterner as “the Other” is so indelibly and widely imprinted in the American mind that even the best and brightest young adults in our country are victim to it.

In the span of a generation, Middle Easterners have become the quintessential “Other” in American society. The problematization of Middle Eastern classification has, of course, afflicted our racial hierarchy for years. But in a bygone era, Middle Easterners were viewed more as friendly strangers, inextricably tied to the cultural and philosophical roots of the West and from an ambiguous, but likely white, status. As the associations with Islam and terrorism have strengthened in recent years and cast further doubt on their assimilability, Middle Easterners have grown considerably less white in the American imagination. Reconceptualized, they have gone from friendly foreigner to enemy alien, enemy alien to enemy race. As the subject of both increasing levels of government-condoned discrimination and prejudice in the private sector, they now represent one of the most hated groups in the United States. All the while, however, the law has not caught up with these harsh realities as the government, and many Middle Easterners themselves, continue to insist on categorizing Middle Easterners as white. This Article takes the first step in addressing this disconnect between law and reality facing Middle Easterners; ideally, it represents only the beginning of a wave of critical race theory on the subject.

