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## NOTES

# PRAYER FOR RELIEF: ANTI-MUSLIM DISCRIMINATION AS RACIAL DISCRIMINATION

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### I. INTRODUCTION

*The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.*

—U.S. Department of Justice as Amicus Curiae in *Brown v. Board of Education of Topeka*<sup>1</sup>

In late 2011, the New York City Police Department (“NYPD”) made national and international headlines when its secret surveillance of Muslims across the New York City area was discovered.<sup>2</sup> Under the guise of counterterrorism, the NYPD monitored the daily lives of thousands of

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1. Brief for the United States as Amicus Curiae at 6, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (Nos. 8, 101, 191, 413, 448), 1952 U.S. S. Ct. Briefs LEXIS 29, at \*4 (arguing that racial segregation, particularly in schools, violates equal protection).

2. See, e.g., Adam Goldman, Eileen Sullivan & Matt Apuzzo, *NYPD Eyed US Citizens in Intel Effort*, ASSOCIATED PRESS (Sept. 22, 2011), <http://www.ap.org/Content/AP-In-The-News/2011/NYPD-eyed-US-citizens-in-intel-effort> (“The New York Police Department put American citizens under surveillance and scrutinized where they ate, prayed, and worked, not because of charges of wrongdoing but because of their ethnicity . . .”); *New York Police ‘Spied on’ New Jersey Muslims*, BBC (Feb. 22, 2012), <http://www.bbc.co.uk/news/world-us-canada-17133875> (noting that Muslims in Newark, New Jersey were surveilled despite having no connection to terrorism).

Muslims for about a decade,<sup>3</sup> using techniques such as taking photographs, collecting license plate numbers at mosques, and utilizing informants known as “mosque crawlers” to infiltrate Muslim organizations.<sup>4</sup> From recording sermons to monitoring businesses and grade schools, the NYPD targeted individuals not because of a reasonable suspicion that they specifically were linked to terrorism, but rather because of one common characteristic: they were or were believed to be Muslim.

As one might expect, the police surveillance program has come under fire, as it chills religious participation and casts innocent Muslims as potential terror suspects.<sup>5</sup> In mid-2012, a group of Muslim plaintiffs filed suit in federal court challenging the NYPD’s program.<sup>6</sup> Though their complaint alleged First Amendment violations, including violations of the Free Exercise and Establishment Clauses, their likelihood for success may be hampered: Recent findings indicate that Muslim plaintiffs as a class are less likely to succeed on First Amendment challenges relative to other religious groups.<sup>7</sup> Indeed, in early 2014, the case was dismissed on standing and pleading grounds,<sup>8</sup> and it was under appeal in the Third Circuit as of August 2014.

Of greater interest, however, is the plaintiffs’ additional claim for violation of the Equal Protection Clause of the Fourteenth Amendment. This claim, too, faces a doctrinal obstacle—religion is not a suspect

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3. Adam Goldman et al., *Document: NYPD Sought to Spy on Muslims*, MSNBC (Feb. 2, 2012), [http://www.msnbc.msn.com/id/46243985/ns/us\\_news-security/t/document-nypd-sought-spy-uslims](http://www.msnbc.msn.com/id/46243985/ns/us_news-security/t/document-nypd-sought-spy-uslims); Editorial, *Surveillance, Security and Civil Liberties*, N.Y. TIMES (Mar. 3, 2012), <http://www.nytimes.com/2012/03/04/opinion/sunday/surveillance-security-and-civil-liberties.html>.

4. Editorial, *The N.Y.P.D. and Muslims*, N.Y. TIMES (Mar. 8, 2012), <http://www.nytimes.com/2012/03/09/opinion/the-nypd-and-muslims.html>; *Documents Expose NYPD ‘Mosque Crawlers’*, AL JAZEERA (Feb. 24, 2012), <http://www.aljazeera.com/news/americas/2012/02/2012224193333119186.html>.

5. See Eric Lane, *On Madison, Muslims, and the New York City Police Department*, 40 HOFSTRA L. REV. 689, 711–18 (2012) (finding that even the mere inference of surveillance of Muslims in public places was enough to deter Muslims from frequenting mosques and Muslim-run businesses); Donna Lieberman, *Infringement on Civil Liberties After 9/11*, 56 N.Y.L. SCH. L. REV. 1121, 1125 (2012) (explaining that, in light of the NYPD’s surveillance practices, simply “praying while Muslim” seemed to be enough to become suspected by the NYPD of terrorist involvement); *Surveillance, Security and Civil Liberties*, *supra* note 3 (noting that, as a result of the NYPD’s surveillance, Muslims “ha[d] become reluctant to pray openly at mosques, join in faith-based groups, or frequent Muslim hangouts for fear of being watched and possibly tarred by ‘guilt by association’”).

6. Complaint, *Hassan v. City of New York*, No. 12-CV-3401 (D.N.J. June 6, 2012), 2012 WL 2019163, *appeal docketed*, 14-1688-CV (3d Cir. Mar. 24, 2014).

7. For a discussion regarding the statistics on First Amendment challenges brought by Muslim plaintiffs, see *infra* note 12 and accompanying text.

8. *Hassan v. City of New York*, No. 12-CV-3401 (D.N.J. Feb. 20, 2014), 2014 WL 654604, *appeal docketed*, 14-1688-CV (3d Cir. Mar. 24, 2014).

classification and is thus not subject to strict scrutiny. Only classifications based on race and national origin are suspect and thus warrant strict scrutiny;<sup>9</sup> by contrast, religion, more so than race or national origin, appears to be the primary, if not sole, basis for the NYPD's surveillance.

This Note, however, does not look to resolve the constitutionality of the NYPD surveillance program. Rather, it explores an idea impliedly raised by the case: the intersection of race and religion in post-9/11 America. For instance, one way the NYPD lawsuit plaintiffs might have bolstered their case would have been to frame the alleged equal protection violations in the context of race, and thus have the NYPD's actions analyzed under strict scrutiny—a historically tough burden for the government to meet.<sup>10</sup> The question then becomes whether anti-Muslim discrimination could be interpreted as a form of racial discrimination.

This Note therefore seeks to place anti-Muslim discrimination into current legal understandings of race. It argues that, in some instances, anti-Muslim discrimination should be treated as racial discrimination.<sup>11</sup> In short, because Muslims, along with Middle Easterners and South Asians, have increasingly become racialized in both the immediate and prolonged aftermath of 9/11, they now warrant additional legal protection given the various forms of discrimination they experience in both private and public contexts. Opening racial discrimination claims to them would be one way to provide such relief.

Part II of this Note provides a brief overview of various types of discrimination Muslims have faced since 9/11, demonstrating that anti-Muslim discrimination is something real and persistent even a decade after the attacks. Part III then lays out the theoretical foundation for this Note, within which Part III.A introduces a central tenet of critical race theory—race is a social construct. Part III.B then reviews how Muslim identity has been treated by courts, drawing upon naturalization cases prior to 1952. Using these cases, Part III.B argues that religion has sometimes been used as a factor for courts in classifying race. Part IV moves on to discuss more recent cases to show that courts have not only accepted race as a social construct but have also recognized that racial meanings themselves can

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9. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 687, 712 (4th ed. 2011) (enumerating several reasons why the Supreme Court has deemed strict scrutiny appropriate for race and national origin classifications, and making no mention of classification based on religion).

10. *Id.* at 687 (“Strict scrutiny is virtually always fatal to the challenged law.”).

11. To be clear, this Note does not advocate that *all* instances of anti-Muslim discrimination should be treated as racial discrimination. Instead, it limits such treatment to *some* cases, such as when an individual's physical appearance is the basis for discrimination.

change over time. This reinforces the central premise of this Note that race is a social construct. Part V then discusses the various means by which Muslims have been racialized during the decade after 9/11. Part V suggests that even though American society has not traditionally viewed Muslims as potential victims of racial discrimination, they, like other minority groups, have nonetheless been racialized through an exclusionary process that not only reiterates non-whiteness but also treats them as a distinct race-like group altogether. It then argues that, in light of increased prejudice in the U.S. toward Muslims on account of their beliefs and cultural characteristics, courts should sometimes interpret the increasingly racialized nature of anti-Muslim discrimination as a signal for the need to declare such discrimination as racially based.

Interpreting anti-Muslim discrimination as racial discrimination would provide several advantages for groups prejudiced by anti-Muslim biases. First, it would offer an alternative tool for Muslim litigants in the event of an unsuccessful First Amendment challenge, which, given recent findings, seems to be more and more likely. According to Gregory C. Sisk and Michael Heise, Muslim plaintiffs are 16 percent less likely than other religious groups to succeed on First Amendment claims.<sup>12</sup> This statistic, they assert, is the result of unconscious stereotypes and prejudices affecting the judicial system since 9/11.<sup>13</sup> Providing an alternative form of relief would be a way to combat these implicit biases and thus better effectuate justice.

Second, non-Muslims who experience discrimination due to their appearance or supposed religious beliefs would presumably benefit from such a doctrine. Middle Easterners, which include both Muslims and non-Muslims, have historically faced substantial difficulty in forwarding claims of racial discrimination, in large part due to their legal classification as white, even though they may not always be viewed as such by society.<sup>14</sup> It

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12. Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 236 (2012) (finding that, when religious groups challenge on First Amendment grounds, non-Muslim plaintiffs had a 38 percent likelihood for success, whereas Muslim plaintiffs only had a 22 percent chance). The authors determined that the likely cause of this variation was a negative attitude toward Islam in America. *Id.* at 236–37. In their analysis, which heavily relied upon statistical data from 1996 to 2005, the authors explored and rejected alternative explanations such as minority religions' inherent disadvantage, a cultural rift between traditionalism and secularism, and that Muslim plaintiffs had weaker cases on the merits. *Id.* at 259–81.

13. *Id.* at 284.

14. See generally JOHN TEHRANIAN, *WHITEWASHED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY* (2009) (arguing that contemporary legal classification of Middle Easterners as white has effectively rendered them an "invisible" minority unable to seek relief through channels available to

should be no surprise then that “Middle Eastern Americans are caught in a Catch-22,” as John Tehranian explains.<sup>15</sup> “They are branded white by law but simultaneously reified as the Other.”<sup>16</sup> They enjoy neither the fruits of remedial action nor the benefits of white privilege.<sup>17</sup>

And even though treating Muslims as victims of racial discrimination may be criticized for “essentializing” racial identity and contributing to further social exclusion,<sup>18</sup> these risks, if they exist, are outweighed by the benefits of “strategic identity” for Muslims and perceived Muslims, which would facilitate social mobilization concerning common interests.<sup>19</sup> Similarly, addressing the discrimination that Muslims and Middle Easterners face in everyday life would also negate the necessity and difficulty of determining who is Muslim or what other religious and marginalized groups can experience racial discrimination.

Moreover, in light of a substantial body of literature about Muslim racialization,<sup>20</sup> which even includes some commentary about the NYPD surveillance in particular,<sup>21</sup> this Note seeks to be among the few to address the particular issue of whether anti-Muslim discrimination could constitute

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other minority groups).

15. *Id.* at 6.

16. *Id.* at 36.

17. *Id.*

18. John Tehranian, *Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship*, 82 IND. L.J. 1, 44–46 (2007) (arguing that the potential benefits of identifying Middle Easterners as a distinct group, primarily social mobilization, outweigh the risks of “essentializing” racial identity).

19. *Id.* at 46.

20. For scholarship on Muslim racial formation, see Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1264, 1278–82 (2004) (describing “the construction of a new racial identity for Arabs, Muslims, and South Asians . . . whereby [they] are assimilated into a single category of ‘Muslim-looking’ people”); Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 AM. U. J. GENDER SOC. POL’Y & L. 411, 420–30 (2010) (arguing that the “more apt social description” of post-9/11 stereotyping and discrimination is not racialization but rather “alienation”); Neil Gotanda, *The Racialization of Islam in American Law*, 637 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 184 (2011) (arguing that “the Muslim terrorist in our popular culture should not be seen as new but within an established tradition of racializing Asian Americans”); Sunita Patel, *Performative Aspects of Race: “Arab, Muslim, and South Asian” Racial Formation After September 11*, 10 UCLA ASIAN PAC. AM. L.J. 61, 64 (2005) (examining the “choices” of Arabs, Muslims, and South Asians that “purposefully or mistakenly produce race”); David Smith, *Presumed Suspect: Post-9/11 Intelligence Gathering, Race, and the First Amendment*, 11 UCLA J. ISLAMIC & NEAR E.L. 85, 91, 109–31 (2012) (arguing that the FBI “‘racializes’ the Muslim community as a security threat, and as inherently untrustworthy and foreign”); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575 (2002) (arguing that 9/11 “facilitated the consolidation of a new identity category that groups together persons who appear ‘Middle Eastern, Arab, or Muslim,’ whereby members of this group are identified as terrorists and disidentified as citizens”).

21. See *supra* note 5.

racial discrimination. To that end, this Note looks to advance the development of Middle Eastern legal scholarship—an offshoot of critical race theory proposed by John Tehranian.<sup>22</sup> Although Muslim identity—the subject of this Note—is distinct from Middle Eastern identity, the two are connected in the sense that Muslim identity has often been confused and conflated with Middle Eastern identity, and vice versa. For example, non-Muslim Middle Easterners, such as Egyptian Coptics or Iranian Zoroastrians, may face discrimination because they are thought to be Muslim. Similarly, non-Middle Eastern Muslims, such as Bosnians or Somalis, may face prejudice if their “Islamic” appearance—as signaled by facial hair or head coverings—causes outsiders to believe that they are Middle Eastern. Thus, by raising critical discussion about how Muslims are treated in post-9/11 America and thereby exposing our understandings of race, this Note ultimately seeks to increase academic and social awareness regarding the discriminatory actions—conscious and subconscious, governmental and private—taken against Muslims and Middle Easterners in post-9/11 America.

In sum, the practical application of this framework remains admittedly underdeveloped and beyond the scope of this Note. However, by proposing that anti-Muslim discrimination can sometimes be racial discrimination, this Note seeks to enhance the discussion on discrimination at large and, in doing so, motivate other members of the legal community as well as other academic disciplines to explore the problems confronting one of our country’s largest religious minorities, and the Middle Eastern and South Asian communities. In this respect, this Note is ambitious yet cautious.

## II. ANTI-MUSLIM DISCRIMINATION

At a population of nearly 2.6 million, Muslim-Americans make up less than 1 percent of the U.S. demographic.<sup>23</sup> However, in the immediate aftermath of 9/11, Muslims encountered an unprecedented rise in discrimination through acts of both private and public prejudice,<sup>24</sup> evidenced by a reported 1600 percent increase in anti-Muslim hate crimes in 2001.<sup>25</sup> That increase, however, was not wholly unexpected, as Muslims

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22. Tehranian, *supra* note 18, at 44.

23. *The Future of the Global Muslim Population*, PEW RESEARCH CENTER’S RELIGION & PUBLIC LIFE PROJECT (Jan. 2011), <http://features.pewforum.org/muslim-population-graphic/#/United%20States>.

24. See Ahmad, *supra* note 20, at 1282–83 (noting that, while Muslim-Americans have become the targets of increased, violent and overt discrimination in post-9/11 America, they have nevertheless long suffered discrimination, dating back decades).

25. Tanya Schevitz, *FBI Sees Leap in Anti-Muslim Hate Crimes*, S.F. CHRON. (Nov. 26, 2002),

“witnessed the same thing after the Oklahoma [City] bombing, after the first terrorist attack on the World Trade Center in 1993 and after the Persian Gulf War.”<sup>26</sup> But while one would hope this was merely a temporary misstep in our country’s commitment to equality, anti-Muslim discrimination has instead established itself as a mainstay of cultural life in post-9/11 America. To illustrate this new status quo and the underlying reality lived by many Muslim citizens, this part details anti-Muslim discrimination as it has occurred in various sectors of American life.

In the decade since the attacks, researchers have examined Americans’ views toward religion, finding that Muslims are probably the most disliked religious group in the country. For example, a 2010 Gallup poll found that 43 percent of Americans feel at least “a little” prejudice toward Muslims.<sup>27</sup> That number is more than double the amount felt toward Christians (18 percent), Jews (15 percent), and Buddhists (14 percent).<sup>28</sup> The study also found Islam to be the most negatively viewed religion in the country, with 31 percent of Americans describing their view of Islam as “not favorable at all,” compared to only 9 percent having a “very favorable” opinion of the religion.<sup>29</sup> By contrast, Americans were much more likely to view other faiths “very favorably,” such as Christianity (66 percent), Judaism (25 percent), and Buddhism (20 percent).<sup>30</sup> These religions were also less likely to be viewed “not favorable at all.”<sup>31</sup>

The country, however, seems to be aware that its negative views of Islam may have adverse real-world effects, as a majority of Americans believe Muslims face heavy discrimination.<sup>32</sup> According to a 2009 Pew study, 58 percent of Americans view Muslims as facing “a lot of discrimination.”<sup>33</sup> By contrast, other religious groups were viewed as facing less discrimination.<sup>34</sup> The only group Americans viewed as facing

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<http://www.sfgate.com/news/article/FBI-sees-leap-in-anti-Muslim-hate-crimes-9-11-2750152.php>.

26. *Id.* (quoting Maha ElGenaidi, the executive director of the Islamic Network Group in San Jose, California).

27. *In U.S., Religious Prejudice Stronger Against Muslims*, GALLUP CENTER FOR MUSLIM STUDIES (Jan. 21, 2010), <http://www.gallup.com/poll/125312/religious-prejudice-stronger-against-muslims.aspx>.

28. *Id.*

29. *Id.*

30. *Id.*

31. Twenty-one percent of Americans had a “not favorable at all” opinion toward Buddhism, 15 percent toward Judaism, and 4 percent toward Christianity. *Id.*

32. *Muslims Widely Seen as Facing Discrimination*, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS (Sept. 9, 2009), <http://www.people-press.org/2009/09/09/muslims-widely-seen-as-facing-discrimination>.

33. *Id.*

34. *Id.*

more discrimination than Muslim was gays and lesbians, with 64 percent seeing them as facing “a lot of discrimination.”<sup>35</sup>

Perhaps these opinions are heavily influenced by the continued existence of violence directed at individuals who are or appear to be Muslim, even though such attacks have generally decreased in the past decade.<sup>36</sup> Among the most notable of these victims is Ahmed Sharif, a New York City cabdriver who was brutally stabbed by a patron in 2010.<sup>37</sup> The patron, Michael Enright, a twenty-one-year-old film student who had recently returned from trailing Marines in Afghanistan, began his cab ride by asking Sharif his country of origin and religion.<sup>38</sup> After learning that Sharif was Bangladeshi and Muslim, Enright allegedly began to mock the rituals of Ramadan, eventually cursing in a soldier-like tone and shouting, “This is the checkpoint . . . I have to bring you down.”<sup>39</sup> Finally, Enright took out a knife and slashed Sharif’s throat, face, arm, and thumbs, causing the victim to receive more than two dozen stitches.<sup>40</sup> Enright was subsequently charged with several offenses, including attempted murder as a hate crime.<sup>41</sup>

Two years later, New York City would witness yet another act of violence motivated by anti-Muslim bias. In December 2012, Erika Menendez pushed Sunando Sen, a Hindu man born in India, onto the tracks of a subway station, causing Sen to be killed by an oncoming train.<sup>42</sup> When questioned, Menendez reportedly told police, “I pushed a Muslim off the train tracks because I hate Hindus and Muslims ever since 2001 when they put down the twin towers I’ve been beating them up.”<sup>43</sup> She was subsequently charged with murder as a hate crime.<sup>44</sup>

Notwithstanding such violence, anti-Muslim bias in the past decade appears to have taken the form of non-violent discrimination, oftentimes in the workplace. In recent years, the Equal Employment Opportunity

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35. *Id.*

36. ANNY BAKALIAN & MEHDI BOZORGMEHR, BACKLASH 9/11: MIDDLE EASTERN AND MUSLIM AMERICANS RESPOND 125–33 (2009).

37. N. R. Kleinfeld, *Rider Asks If Cabby Is Muslim, Then Stabs Him*, N.Y. TIMES (Aug. 25, 2010), <http://www.nytimes.com/2010/08/26/nyregion/26cabby.html>.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Marc Santora, *Woman Is Charged with Murder as a Hate Crime in a Fatal Subway Push*, N.Y. TIMES (Dec. 29, 2012), <http://www.nytimes.com/2012/12/30/nyregion/woman-is-held-in-death-of-man-pushed-onto-subway-tracks-in-queens.html>.

43. *Id.*

44. *Id.*



Commission (“EEOC”) has experienced a steady increase in the amount of claims alleging anti-Muslim workplace discrimination. In 2009 the number of such claims reached a record 803, a 20 percent increase from 2008 and nearly a 60 percent increase from 2005.<sup>45</sup> For example, a typical instance of anti-Muslim workplace discrimination is when a supervisor calls a Muslim employee “terrorist,” “Taliban,” “Osama,” or “Al-Qaeda.”<sup>46</sup> The EEOC has also sued a meat packing company after several Somali and Muslim employees complained that their supervisors would throw blood, meat, and bones at them while calling them offensive names.<sup>47</sup> The meat packing company was also alleged to have permitted offensive comments to be written on facility walls, such as “F—k Muslims” and “F—k Mohammed,” and to have fired employees “when they requested that their evening break be moved so that they could break their fast and pray at sundown during the month of Ramadan.”<sup>48</sup>

But verbal abuse is not the only type of discrimination experienced by Muslims at the workplace; they are also discriminated against on account of their appearance and attire, in particular women who wear the hijab, or headscarves. For example, a Bay Area Muslim woman sued Abercrombie & Fitch, on grounds that the clothing retailer allegedly fired her after she refused to remove her hijab, which supposedly conflicted with the company’s “beachy” dress code.<sup>49</sup> Similarly, a hijab-wearing Muslim woman sued the city of Omaha, Nebraska after she was denied entry to a public pool because she refused to wear a bathing suit.<sup>50</sup> The woman, who

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45. Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, N.Y. TIMES (Sept. 23, 2010), <http://www.nytimes.com/2010/09/24/business/24muslim.html> (quoting EEOC statistics).

46. Press Release, Equal Emp’t Opportunity Comm’n, EEOC Obtains \$122,500 from Houston Constr. Co. for Religious, Race and Nat’l Origin Discrimination (Apr. 22, 2010), <http://www.eeoc.gov/eeoc/newsroom/release/4-22-10.cfm> (describing the settlement of a lawsuit brought by Mohammed Kaleemuddin, who alleged that his employer used such slurs as a form of ethnic and national origin discrimination).

47. Press Release, Equal Emp’t Opportunity Comm’n, EEOC Sues JBS Swift for Religious and Nat’l Origin Discrimination in Colo. and Neb. (Aug. 31, 2010), <http://www.eeoc.gov/eeoc/newsroom/release/8-31-10.cfm>.

48. *Id.*

49. Vivian Ho, *Abercrombie & Fitch Sued over Hijab Firing*, S.F. CHRON. (June 27, 2011), <http://www.sfgate.com/bayarea/article/Abercrombie-Fitch-sued-over-hijab-firing-2366495.php>.

50. Press Release, Am. Civil Liberties Union, ACLU Neb. Files Lawsuit on Behalf of Muslim Woman Barred from Pub. Pool Because She Refused to Wear a Swim Suit (June 9, 2004), <http://www.aclu.org/religion-belief/aclu-nebraska-files-lawsuit-behalf-muslim-woman-barred-public-pool-because-she-refus>; Press Release, Am. Civil Liberties Union, City of Omaha and ACLU of Neb. Announce Settlement in Lawsuit Over Muslim Woman Barred from Public Pool (Feb. 18, 2005), <http://www.aclu.org/religion-belief/city-omaha-and-aclu-nebraska-announce-settlement-lawsuit-over-muslim-woman-barred-pu> [hereinafter Public Pool Lawsuit] (describing the settlement reached in *Lubna Hussein v. City of Omaha*).

sought to supervise her children while they swam and did not intend to enter the pool herself, was barred even though other patrons who were also not wearing bathing suits were admitted.<sup>51</sup>

Similar suits have also arisen in the context of law enforcement: a California county amended its detention policies pursuant to a settlement agreement with a Muslim woman who had filed suit after officers forced her to remove her hijab while she was in custody for using an invalid train ticket.<sup>52</sup> A Georgia city, too, changed its security policies in the wake of a lawsuit brought by a Muslim woman who had been arrested and charged with contempt after she refused to remove her hijab while entering a courthouse.<sup>53</sup>

Although these local or private acts of discrimination may be unfamiliar to the general public, government practices have generated significant controversy.<sup>54</sup> At the forefront of this is the profiling of Muslims, Middle Easterners, and South Asians at airports, a practice embodied by the vernacular “flying while Muslim”—a spin on the term “driving while black.”<sup>55</sup> There are also well-documented incidents involving the removal of Muslim passengers from airliners solely due to their appearance, misconstrued comments, or perceived threat.<sup>56</sup> Similarly, federal and local authorities, such as the Federal Bureau of Investigation (“FBI”) and NYPD, have used undercover surveillance schemes to spy on

51. Public Pool Lawsuit, *supra* note 50.

52. Summary of *Medina v. County of San Bernardino*, AM. CIV. LIBERTIES UNION (Oct. 30, 2008), [http://www.aclu.org/religion-belief\\_womens-rights/medina-v-county-san-bernardino](http://www.aclu.org/religion-belief_womens-rights/medina-v-county-san-bernardino) (describing the lawsuit brought by Jameelah Medina, who later settled with the county upon condition that it “change its policies to accommodate the religious practices of women who wear [the] hijab”).

53. *City Pays Settlement over Headgear*, DOUGLASVILLE PATCH (Oct. 6, 2011), <http://douglasville.patch.com/articles/city-pays-settlement-over-headcovering>.

54. See BAKALIAN & BOZORGMEHR, *supra* note 36, at 138–43 (providing an overview of racial profiling of Muslims by the government and the controversies it has generated).

55. See Jessica Bennett, ‘Flying While Muslim’: Religious Profiling?, NEWSWEEK (Nov. 21, 2006), <http://www.newsweek.com/flying-while-muslim-religious-profiling-106963> (detailing instances in which Muslim-Americans have been removed from airports and airplanes simply for praying); Matthew DeLong, ‘Flying While Muslim,’ the New ‘Driving While Black’, WASH. INDEP. (Jan. 2, 2009), <http://washingtonindependent.com/23578/flying-while-muslim-the-new-driving-while-black> (same); Entry for “Flying While Muslim”, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=Flying%20While%20Muslim> (last visited May 25, 2014) (providing various common-folk interpretations of the phrase “Flying While Muslim”).

56. See BAKALIAN & BOZORGMEHR, *supra* note 36, at 138–43 (discussing the impact of profiling on Muslims at airports and aboard airplanes); Mike M. Ahlers, *AirTran Apologizes to Muslim Family Removed from Plane*, CNN (Jan. 2, 2009), <http://edition.cnn.com/2009/US/01/02/family.grounded/index.html> (discussing how an airliner removed a Muslim family from a plane after two family members, a tax attorney and an anesthesiologist, were discussing whether it was safer to sit near the wing, engine, front, or rear of an airplane).

Muslim communities in the name of national security.<sup>57</sup> Muslim litigants have had difficulty challenging these discriminatory practices as courts have resisted adjudication based on the state secrets doctrine.<sup>58</sup>

In summary, despite the decade-plus that has passed since 9/11, anti-Muslim discrimination remains an on-going phenomenon that adversely affects a wide array of individuals in real ways.

### III. DEFINING RACE

#### A. THE SOCIAL CONSTRUCTION OF RACE

From slavery<sup>59</sup> to education<sup>60</sup> to voting rights,<sup>61</sup> race has frequently determined the haves and have-nots in the United States and, in turn, has at times affected what it means to be an American.<sup>62</sup> But despite—or perhaps because of—its profound impact on society, race remains something “we know without being aware that we know it.”<sup>63</sup> As a result, we frequently fail to see how race shapes our individual and collective identities. In that blindness, asking someone the quotidian question “what race are you?” assumes that race is a given, an undeniable truth. In so doing, we miss a more fundamental question: What is race?

To be clear, race is not something biological. Contrary to common belief, race has no origin in science; it cannot be attributed to genetics or some other deductive basis.<sup>64</sup> Rather, the (mis)understanding of race as biology can largely be attributed to the works of European scientists in the late nineteenth and early twentieth centuries, who reduced the world’s human population into three so-called racial groups: Caucasoid, Negroid,

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57. See Smith, *supra* note 20, at 94–109 (describing the FBI’s use of informants in Muslim communities, as well as the “See Something, Say Something” campaign).

58. *Fazaga v. FBI*, 884 F. Supp. 2d 1022, 1048–49 (C.D. Cal. 2012) (holding that the state secrets privilege provided immunity for the FBI and its agents surveilling a Muslim community). See also Victoria Kim, *Federal Judge Throws out Lawsuit over Spying on O.C. Muslims*, L.A. TIMES (Aug. 15, 2012), <http://articles.latimes.com/2012/aug/15/local/la-me-mosque-spying-20120815>.

59. See *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding that people of African descent were not protected by the U.S. Constitution and were not citizens).

60. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495–96 (1954) (holding that racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment).

61. See *Rice v. Cayetano*, 528 U.S. 495, 524 (2000) (holding that Hawaii’s denial of voting rights in state trustee elections based on ancestry violated the Fifteenth Amendment).

62. See generally ARIELA J. GROSS, *WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2008) (arguing that race, as a social construct, has been a defining characteristic in the allocation of benefits and privileges throughout American history).

63. *Id.* at 16.

64. *Id.* at 223–25; PAUL GILROY, *AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE* 39 (2000).

and Mongoloid.<sup>65</sup> Throughout time these initial classifications would expand and fracture,<sup>66</sup> forming the distinctions society today recognizes as races.

However, race is a social construct. Best explained by Ian F. Haney López, race refers to the “historically contingent social systems of meaning that attach to elements of morphology and ancestry” and thus composes of “three interrelated levels[:] the physical, the social, and the material.”<sup>67</sup>

First, on the physical level, skin color, ethnic origin, and other physical features become markers of race, even though they alone are not indicative of race, “because society has invested [them] with racial meanings.”<sup>68</sup> Next, on the social level, “because the meanings given to certain features and ancestries denote race, it is the social processes of ascribing racialized meanings to faces and forbearers that lie at the heart of racial fabrication.”<sup>69</sup> Finally, on the material level, racial meanings, while initially ideas, “gain force as they are reproduced in the material conditions of society” through “[t]he distribution of wealth and poverty” which depends on “actors who have accepted ideas of race.”<sup>70</sup>

In other words, race is created by and contingent on social norms and attitudes. So, for example, the color of one’s skin, by itself, does not mean that that individual belongs to a particular race. Rather, it is society, not biology, which gives meaning to that skin color—white, black, brown, etc.—and that meaning is then ascribed to a racial identity. That racial identity, in turn, manifests and perpetuates itself through various social, economic, and legal institutions.

In fact, the Supreme Court has impliedly accepted that race is socially constructed. As Justice Byron White noted in *Saint Francis College v. Al-Khazraji*:

Clear-cut categories of [race] do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the “average” individuals of different races. These observations and others have led some, but not all, scientists to conclude

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65. TEHRANIAN, *supra* note 14, at 20–21.

66. GROSS, *supra* note 62, at 223.

67. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 14 (1996).

68. *Id.*

69. *Id.*

70. *Id.*

that racial classifications are for the most part sociopolitical, rather than biological, in nature.<sup>71</sup>

Given that race is a social construct, racial discrimination is therefore any adverse treatment motivated by or based on socially salient distinctions that constitute race. Or, stated differently, the central concern of racial discrimination is not the identification of races, but rather racism itself.<sup>72</sup> This is particularly relevant in the case of Muslims, who have increasingly become victims of racially motivated animus.

American history, as Ariela Gross explains, is rife with examples of individuals and groups litigating their racial identities in order to avoid discrimination and thus obtain the rights and privileges afforded to other races.<sup>73</sup> For example, persons of mixed black and white ancestry sometimes sought freedom by arguing in courts that they were “white.”<sup>74</sup> In possessing the legal power to determine when an individual is white or not, courts played an important role in inventing and reinventing racial understandings. As Gross explains, “[t]he racial categories [law] created and recreated, shaped and reshaped, now appear so natural to us that virtually every American’s identity is understood—consciously or not—as at least a function of race.”<sup>75</sup>

The following section explores Gross’s theme of “race on trial” by discussing early-to-mid-twentieth-century naturalization cases of immigrants from the Middle East and South Asia. These cases, which revolved around the central question of who was “white” and therefore entitled to naturalization, show that religion was sometimes a factor in determining an individual’s racial classification. Islam, as a result, often served as indicator of non-whiteness.

## B. RACIALIZED MUSLIM IDENTITY IN THE COURTS

To call the United States’ relationship with race “complex” would be an understatement, for race has often defined status in American society.<sup>76</sup>

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71. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987). This case is discussed in extensive detail in Section IV.A.

72. GILROY, *supra* note 64, at 32–34.

73. *See generally*, GROSS, *supra* note 62.

74. *Id.* at 104–06.

75. *Id.* at 295.

76. *See* J. Allen Douglas, *The “Priceless Possession” of Citizenship: Race, Nation and Naturalization in American Law, 1880–1930*, 43 DUQ. L. REV. 369, 380–94 (2005) (describing how courts’ characterizations of race influenced their willingness to grant citizenship); Sharona Hoffman, *Is There a Place for “Race” as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1100 (2004) (arguing that national, ethnic, and cultural identities should replace the concept of “race”); Daniel J. Sharfstein, *The*

Naturalization laws were no exception, as this part illustrates how courts have treated race as a social construct, and in doing so, used religion as a factor in determining whether Muslims were whites deserving of citizenship.

### 1. Naturalization: The Common-Knowledge Test

Prior to 1952, naturalized citizenship was available to only whites and blacks.<sup>77</sup> This resulted in litigation from various immigrants looking to gain citizenship in the United States.<sup>78</sup> These cases, which often turned on whether the applicant was “white,” shed important light on how courts treated and defined some Muslims as nonwhite.

Two notable naturalization cases are *Ozawa v. United States*<sup>79</sup> and *United States v. Thind*.<sup>80</sup> Each illustrates the social forces at play in determining race. In *Ozawa*, a Japanese immigrant applied for naturalization, arguing that his fair complexion meant that he was white.<sup>81</sup> In rejecting this argument, the Supreme Court adopted a standard that dismissed the color test, which looked at the complexion of the individual’s skin, and instead adopted a racial test that defined whiteness as being Caucasian.<sup>82</sup> Under this test, because ethnic Japanese are not Caucasian, *Ozawa* was not white and therefore was ineligible for citizenship.<sup>83</sup>

A year later in *Thind*, the Court clarified the *Ozawa* standard by declaring that Caucasian is a term defined by none other than common sense. “[F]ree white persons’ are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word ‘Caucasian’ only as that word is popularly understood.”<sup>84</sup> This created a common-knowledge test by which whiteness

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*Secret History of Race in the United States*, 112 YALE L.J. 1473, 1496–98, 1504–06 (2003) (surveying judicial treatment and imagination of race during Jim Crow).

77. Nationality Act of 1940, ch. 3, sec. 303, 54 Stat. 1140 (1940) (“The right to become a naturalized citizen under the provisions of this Act shall extend only to white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere.”).

78. See, e.g., *Wadia v. United States* 101 F.2d 7, 7–9 (S.D.N.Y. 1939) (Parsee held nonwhite); *United States v. Balsara*, 180 F. 694, 696 (S.D.N.Y. 1910) (same); *In re Fisher*, 21 F.2d 1007, 1007 (N.D. Cal. 1927) (Macanese of Portuguese and Chinese ancestry held nonwhite); *In re Alverto*, 198 F. 688, 690 (E.D. Pa. 1912) (Filipino held nonwhite).

79. *Ozawa v. United States*, 260 U.S. 178 (1922).

80. *United States v. Thind*, 261 U.S. 204 (1923).

81. *Ozawa*, 260 U.S. at 195.

82. *Id.* at 197.

83. *Id.* at 197–99.

84. *Thind*, 261 U.S. at 214–15.

became something courts knew whenever they saw it.<sup>85</sup> As applied to *Thind*, a Punjabi immigrant whose claim relied upon an ethnological classification of Indians as Aryan, he was not white because common sense said so.<sup>86</sup>

*Ozawa* and *Thind* showcase how courts preferred to use the common-knowledge test of whiteness rather than a scientific inquiry test or individualized color test.<sup>87</sup> In having the judiciary determine an individual's race, these cases also illustrate the notion that race is a social construct. In other words, race is not determined by science or ethnography but rather by our collective ideas as a society or, as the cases show, by judges. This is critical for Muslim plaintiffs, as well as other racialized groups, who would otherwise have difficulty in demonstrating that their identity constitutes a scientifically or ethnologically distinct group.

On a related note, the common-knowledge test provided courts with sufficient flexibility to determine whiteness on often unprincipled, ad hoc determinations. As the following sections trace, in the context of Middle Eastern immigrants, courts considered various factors in determining race, often including religion. This resulted in several decisions declaring Christians as white and Muslims as nonwhite.

## 2. The Armenian Cases

Shortly after *Thind*, an Armenian immigrant was granted citizenship in *United States v. Cartozian*.<sup>88</sup> The district court there emphasized the common-knowledge test, stating that whiteness is not “determined [by] the mere color of the skin of the individual” but rather relies upon a “racial” test, which is separate from ethnological or scientific research and is to be understood by the common man.<sup>89</sup> Despite that recognition, the court nonetheless conducted an in-depth ethnological overview that classified Armenians as whites of the “Alpine stock.”<sup>90</sup> It then noted that:

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85. Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 452–53 (2002) (“In other words, the Court was saying to *Thind*, ‘We know an American when we see one, and you’re not one.’ The Court endorsed a Euro-centric vision of Americanism that has endured in the psyche of much of the country. This Euro-centric vision, dominant throughout history, still pervades America, as is evidenced by the thoughts and actions behind . . . recent vigilante crimes.”).

86. *Thind*, 261 U.S. at 214–15.

87. LÓPEZ, *supra* note 67, at 7–9.

88. *United States v. Cartozian*, 6 F.2d 919, 919–22 (D. Or. 1925).

89. *Id.* at 919.

90. *Id.* at 920.

Although 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 [K]urds, and allied peoples, principally, it might be said, on account of *their religion* . . . . 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>91</sup>

As the court made clear, the Christian beliefs of Armenians and their “Alpine” descent made them different from their Muslim neighbors in a meaningful way. This religious distinction, the court explained, allowed Armenians to “readily amalgamate with the European and white races,”<sup>92</sup> which was evidenced by at least “ten or fifteen Armenians in Boston who have married American wives.”<sup>93</sup> In other words, Armenians were white because their Christian beliefs allowed them to assimilate.<sup>94</sup>

The same logic was used some years earlier to grant citizenship to four Armenians born in Turkey.<sup>95</sup> In *In re Halladjian*, the district court took a more nuanced approach, noting the difficulty of determining race given the high frequency with which Middle Easterners intermarried with different religions and ethnicities.<sup>96</sup> Nonetheless, the court remarked about the minority status of Armenians within the Ottoman Empire and elsewhere: “By reason of their Christianity, they generally ranged themselves against the Persian fire worshipers, and against the Mohammedans” (referring to Zoroastrians and Muslims, respectively).<sup>97</sup> It then explained that the Armenian belief in Christianity has “manifested” itself in empathy to Europe rather than Asia.<sup>98</sup> This, the court concluded, enabled Armenians to “become [W]esternized and readily adaptable to European standards.”<sup>99</sup>

These two cases illustrate the role that religion, directly or indirectly, played in sometimes classifying Armenians as white. By distinguishing

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91. *Id.* (emphasis added).

92. *Id.*

93. *Id.* at 921.

94. Tehranian, *supra* note 18, at 12 (“[T]he Armenian’s historical affiliation with Christianity and their impressive capacity for assimilation and intermarriage . . . enabled the court to confidently proclaim them white by law.”) (footnote omitted).

95. *In re Halladjian*, 174 F. 834, 835, 844 (D. Mass. 1909).

96. *Id.* at 840. (“Race in the present state of things is an abstract conception, a notion of continuity in discontinuity, of unity in diversity. It is the rehabilitation of a real but directly unattainable thing.”) (internal quotation marks omitted).

97. *Id.* at 841.

98. *Id.*

99. *Id.* (internal quotation marks omitted).



them on account of their Christian beliefs, the courts used religion as a factor in determining their race. In fact, the courts' approach has been characterized as a test of "performativity" that placed an "applicant's capacity to adopt the hallmarks—specifically certain cultural, religious, social and economic badges—of whiteness" on trial.<sup>100</sup> As such, for the same reasons Armenians were considered white, Muslims were considered nonwhite. This was often the result of determinations that Muslims were unable to assimilate with white American society, in large part due to their religion.

### 3. The Arab Cases

Unlike their Armenian counterparts, Arab or other Middle Eastern plaintiffs, in particular those of Muslim faith, faced comparatively more difficulty in their efforts to gain citizenship.<sup>101</sup> For example, in *In re Hassan*, a Yemeni immigrant was denied citizenship on account of his dark skin, and Arab and Muslim heritage.<sup>102</sup> The district court there invoked the *Thind* standard to refute the argument that Arabs are white on account of their ethnological classification as "remote descendants . . . of the Caucasian or white race."<sup>103</sup>

In addition, the *Hassan* court expressly identified religion as another reason for Arab non-whiteness: "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."<sup>104</sup> The court then distinguished the case from *Cartozian*, emphasizing that Armenians had "intermingled and intermarried with Europeans over a period of centuries,"<sup>105</sup> although there was no explicit reference to Armenian belief in Christianity.

In contrast, in *In re Ellis*, a Maronite Christian from Palestine was held to be white.<sup>106</sup> In a short opinion, the district court reasoned that the

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100. Tehranian, *supra* note 18, at 10.

101. See, e.g., *Wadia v. United States*, 101 F.2d 7 (2d Cir. 1939) (declaring a Parsee ineligible for citizenship); *In re Din*, 27 F.2d 568 (N.D. Cal. 1928) (declaring an Afghan ineligible for citizenship); *Ex parte Shahid*, 205 F. 812 (E.D.S.C. 1913) (holding a Syrian Christian nonwhite and ineligible for citizenship). But see *Dow v. United States*, 226 F. 145 (4th Cir. 1915) (declaring a Syrian eligible for citizenship, but without commenting on the applicant's religion); *In re Mudarri*, 176 F. 465 (D. Mass. 1910) (same); *In re Najour*, 174 F. 735 (N.D. Ga. 1909) (same); *United States v. Balsara*, 180 F. 694 (2d. Cir. 1910) (declaring a Parsee eligible for citizenship).

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

103. *Id.* at 845.

104. *Id.*

105. *Id.* at 846.

106. *In re Ellis*, 179 F. 1002, 1002, 1004 (D. Or. 1910).

applicant was Caucasian by virtue of his being of “Semitic stock, a markedly white type of the race.”<sup>107</sup> The court supplemented its analysis by noting that:

[T]he applicant is of good morals, sober and industrious, speaks and writes the English language, has a fair understanding of our institutions and form of government, and is well disposed toward the government, and possesses, without question, all the essential qualifications to entitle him to naturalization . . . . It may be said, further, that he was reared a Catholic, and is still of that faith.<sup>108</sup>

Although the court did not mention religion elsewhere in the opinion, religion nonetheless apparently carried substantial weight in determining whiteness. Based on the text’s structure, we can see that by mentioning the applicant’s Catholic faith within the same paragraph as other positive attributes, the court revealed its own value judgment: being Christian is a good thing. And although the applicant’s Christian beliefs were not a dispositive factor in the opinion, it appeared to be a “plus factor” of sorts further justifying the ruling.

But in a different case holding an Arab Muslim to be white, a district court made no reference to the applicant’s religion whatsoever. In *Ex parte Mohriez*, the court declared that a Saudi Arabian was not only ethnologically white as understood by early twentieth century racial science, but perhaps culturally white as well: “As every schoolboy knows, the Arabs have at various times inhabited parts of Europe . . . . [T]he Arab people stand as one of the chief channels by which the traditions of white Europe, especially the ancient Greek traditions, have been carried into the present.”<sup>109</sup> By doing this, the court emphasized whiteness by focusing on European culture, not religion.

The decision not to mention that Mohriez was likely Muslim was perhaps a conscious one.<sup>110</sup> If the *Ellis* decision meant that being Christian was a “plus factor,” then being Muslim would presumably be a non-factor, if not a “minus” one. Thus, by omitting Mohriez’s religion, the court preserved its ruling by eliminating a ground for possible criticism, which would have alleged that Arabs are not white because they are not Christian. The decision to exclude religion from the analysis altogether may very well have been deliberate, given that the court made an open effort to indicate the moral and political unsoundness of declaring an individual’s race in

107. *Id.* at 1003.

108. *Id.* (emphasis added).

109. *Ex parte Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944).

110. I am assuming that Mohriez was Muslim given that his first name was Mohamed. *Id.* at 941.

general.<sup>111</sup> This may have been influenced by the then-ongoing Second World War, which demonstrated the tragic consequences of unbridled racism.

Thus, the Armenian and Arab naturalization cases illustrate the important role that religion has sometimes played in determining race. In their deliberation, courts often used religion as a factor bearing on race. This allowed Christian Armenians and Arabs to be considered white, whereas Muslim Arabs were sometimes nonwhite. As will be discussed elsewhere, the issue of Muslim non-whiteness has returned in the form of anti-Muslim discrimination following 9/11.

#### IV. THE CHANGING NATURE OF RACE

Although the naturalization cases illustrate that race is a social construct and that religion was sometimes relevant in determining race, they did not clarify whether Muslim identity could serve as a primary basis for racial identity. Phrased differently, the naturalization cases only suggest that being Muslim could be a factor in declaring an individual's non-whiteness. But being nonwhite, however, is not a race. Non-whiteness is instead something defined by exclusion from, not inclusion within, a racial designation.

Despite the lack of judicial opinions determining whether Muslims can be victims of racial discrimination, there is a legal framework currently in place that would allow future courts to treat them as such. That framework not only reiterates that race is a social construct but also expands on that idea by declaring that racial meanings can change. What this means is that even though anti-Muslim discrimination may not have historically been viewed as racial discrimination, it can nonetheless be *treated* as such today, at least for legal purposes.

##### A. THE SHIFT FROM NONWHITE TO WHITE

In *Saint Francis College v. Al-Khazraji*, an Arab professor brought a 42 U.S.C. § 1981 racial discrimination claim alleging that a college denied him tenure on account of his ancestry.<sup>112</sup> The issue in the case was not whether such discrimination actually occurred, but rather whether the racial

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111. See *id.* at 943 (“And finally it may not be out of place to say that, as is shown by our recent changes in the laws respecting persons of Chinese nationality and of the yellow race, we as a country have learned that policies of rigid exclusion are not only false to our professions of democratic liberalism but repugnant to our vital interests as a world power.”).

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

discrimination prohibited by § 1981 applied only to nonwhites who were discriminated against by whites.<sup>113</sup> Thus, the college's argument was premised on the argument that Arabs were white—ironic given that only a few decades earlier Arabs were being declared nonwhite by courts in order to deny them citizenship.<sup>114</sup> Because ethnologists classify Arabs as Caucasian, the college argued, Arabs were therefore white and the statute did not apply.<sup>115</sup>

In a unanimous decision, the Supreme Court declared that § 1981 was applicable to Arabs.<sup>116</sup> However, the Court acknowledged the possibility that Arabs could be classified as white or Caucasian by today's standards.<sup>117</sup> But in doing so, the Court made a powerful point: racial understandings can change:

[The college's claim] rests on the assumption that all those who might be deemed Caucasians today were thought to be of the same race when § 1981 became law in the [nineteenth] century; and it may be that a variety of ethnic groups, including Arabs, are now considered to be within the Caucasian race. The understanding of "race" in the [nineteenth] century, however, was different. Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law.<sup>118</sup>

In other words, just because Arabs may have been thought to be white when the case was decided in 1987 does not necessarily mean that they were thought to be white when § 1981 was enacted in 1866. What this suggests is that racial meanings are flexible. The Court then stated that the racial discrimination prohibited by § 1981 does not depend on classifications of "modern scientific theory"<sup>119</sup> so long as plaintiffs can show that they belong to a group considered nonwhite by its drafters.<sup>120</sup>

113. *Id.* at 609–10; 42 U.S.C. § 1981 (2012) ("All 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 as is enjoyed by white citizens.") (emphasis added).

114. *Al-Khazraji*, 481 U.S. at 609–10.

115. *Id.* at 609.

116. *Id.* at 613.

117. *Id.* at 610 ("[I]t may be that a variety of ethnic groups, including Arabs, are now considered to be within the Caucasian race.").

118. *Id.*

119. *Id.* at 613.

120. To be clear, this Note does not advocate for an originalist interpretation similar to that practiced by the Court in *Al-Khazraji*. In fact, the Court has rejected such an interpretation in holding that groups other than blacks are protected under equal protection. *See* *Craig v. Boren*, 429 U.S. 190, 197, 210 (1976) (holding that classifications based on sex warrant heightened scrutiny). Rather, for purposes of this Note, *Al-Khazraji* illustrates that understandings of race can—and often do—change.

This was true for Arabs, and thus the case was remanded for further fact-finding.<sup>121</sup>

Although *Al-Khazraji* may seem particularly relevant because the plaintiff was Arab and perhaps Muslim, the case's underlying principle should not be ignored: racial understandings can—and often do—change. This principle would hold true even if the professor were not Arab or Muslim. Moreover, by declaring that race need not be determined by “modern scientific theory,” the Court implied that race is not traceable by DNA or physical characteristics.<sup>122</sup> Rather, race is a social construct. Therefore, just as the racial characterization of Arabs changed from nonwhite to white, racial understandings of Muslims have changed to such an extent that Muslims are now de facto victims of racial discrimination.<sup>123</sup>

Perhaps the strongest counterargument to this understanding is that Arabs are already widely accepted to be of their own ethnic group.<sup>124</sup> Therefore, the shift in conception of Arabs as white rather than nonwhite occurred within preexisting racial boundaries. However, the counterargument goes, treating Muslims as victims of racial discrimination would occur outside racial boundaries. That is, unlike Arabs or other ethnic groups, Muslims, as a religious group, are neither nonwhite nor white. Instead, they are simply a non-race. This would undermine the logic of applying *Al-Khazraji* to Muslims.

Despite its intellectual force, this counterargument does not spell the end for those seeking to allege anti-Muslim racial discrimination, for, as the next section will show, the Court's holding in *Shaare Tefila Congregation v. Cobb* impliedly declared that religious groups may bring claims of racial discrimination.<sup>125</sup>

## B. ANTI-SEMITISM AS RACIAL DISCRIMINATION

The same day it decided *Al-Khazraji*, the Supreme Court held that

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121. *Al-Khazraji*, 481 U.S. at 613.

122. *Id.*

123. The racial formation of several other minority groups has resulted from similar experiences of convergence, common experience of discrimination, and the emergence of a common culture. *See, e.g.,* Enid Trucios-Haynes, *Why “Race Matters:” LatCrit Theory and Latina/o Racial Identity*, 12 *BERKELEY LA RAZA L.J.* 1, 8–24 (2001) (exploring the racial formation of Latinos). What is fundamental to these fields is the description of a traditional “black-white” paradigm that has resulted in American courts and society treating race as a binary issue of black and white, often ignoring other marginalized groups such as Latinos, Asians, Native Americans, and Middle Easterners and Muslims.

124. *See* Smith, *supra* note 20, at 123 (“For one, *Al-Khazraji*’s narrow view of race includes ancestry and ethnic characteristics.”).

125. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987).

Jews are also entitled to bring a racial discrimination claim.<sup>126</sup> In *Shaare Tefila*, a synagogue filed suit under 42 U.S.C. § 1982—another cause of action with roots in the post-Civil War era<sup>127</sup>—after it had been defaced with anti-Semitic slogans and symbols.<sup>128</sup> The defendants moved to dismiss the claim, advancing the same argument forwarded by the defendant college in *Al-Khazraji*: because Jews, like Arabs, are today considered Caucasian, they are not entitled to bring a statutory claim of racial discrimination against other Caucasians.<sup>129</sup>

In another unanimous decision, the Court rejected that argument.<sup>130</sup> Just as in *Al-Khazraji*, which was cited as precedent, the issue was phrased as “not whether Jews are considered to be a separate race by today’s standards, but whether, at the time § 1982 was adopted, Jews constituted a group of people Congress intended to protect.”<sup>131</sup> In other words, the fact that Jews are today considered white does not bear on whether they were considered white when the law was enacted.<sup>132</sup> As a result, the Court concluded that “Jews and Arabs were among the peoples then considered to be distinct races and hence within the protection of the statute.”<sup>133</sup>

On its face, *Shaare Tefila* could be interpreted narrowly as nothing more than an affirmation of the implicit principle in *Al-Khazraji*: racial meanings can change.<sup>134</sup> However, such a reading fails to take note of something larger and deeper at play. Race can be defined by religion.<sup>135</sup> Jews can be white, Asian, or black, but regardless of their backgrounds, they can still bring forth claims of racial discrimination so long as the alleged discrimination was motivated by anti-Semitic bias—that is, their religious identity as Jews. Therefore, just as acts of racial discrimination may target Jews based on their religion, the same could hold true for acts targeting Muslims. Conversely, just as Muslims were declared nonwhite

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126. *Id.*

127. 42 U.S.C. § 1982 (2012) (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”).

128. *Shaare Tefila*, 481 U.S. at 616.

129. *Id.* at 617–18.

130. *Id.*

131. *Id.* at 617.

132. Again, this Note does not advocate for an originalist reading. See *supra* note 120.

133. *Shaare Tefila*, 481 U.S. at 617–18.

134. See Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E.L. 121, 154 (2008) (“[T]he Court recognizes that race is not fixed but ever changing and as such Jews, while now considered white, were at a particular moment in history not white and therefore a racial ‘other.’”).

135. *Id.* (elaborating that *Shaare Tefila* “expand[ed] the notion of immutability as it relates to race through recognition of Jews, a religious group, as being once a racial ‘other’”).

because of their religion, that same reasoning should allow them to occasionally be treated as victims of racial discrimination.

Admittedly, there are notable differences when analogizing Muslims to Jews. First, there is an ongoing debate as to whether Jewish identity is one of cultural, ethnic, or religious meaning,<sup>136</sup> whereas such discourse is typically absent for Muslims. Furthermore, Jews are minorities in every country besides Israel and have a global population around fourteen million.<sup>137</sup> This may increase the likelihood of homogeneity within the Jewish population and the outside perception of Jews as subject to racial discrimination, although Jewish converts are presumably still able to allege racial discrimination. By contrast, there are over 1.5 billion Muslims in the world, and they constitute dominant majorities in a multitude of countries in Africa, the Middle East, and Asia.<sup>138</sup> Thus, the population size and multinational, multicultural, and multiethnic composition of Muslims may make them less homogeneous and more diverse than groups traditionally characterized as distinct “races.”

The opinion in *Shaare Tefila*, however, did not assume the hubristic task of identifying who is a Jew and whether national origin mattered for that purpose.<sup>139</sup> Rather, its focus was directed toward the question of whether Jews could be considered victims of racial discrimination, a question the Court answered in the affirmative.<sup>140</sup> In addition, given the absence of language suggesting otherwise, it seems as if the sole motivating factor for the synagogue desecration was that it was symbol for Judaism. Thus, the national origins or ethnic backgrounds of the synagogue’s members were presumably of little to no relevance to the perpetrators. The victims’ identities as Jews presumably superseded their national or ethnic identities as Poles, Moroccans, Ethiopians, etc. Similarly, anti-Muslim actions are perpetrated on account of religion, although national origin may be more of a motivating factor there than in anti-Semitic activities. As will be discussed in Part V.C, the religious-racist animus supporting anti-Semitism resembles some aspects of Islamophobia—a religious, ethnic, and cultural prejudice against

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136. MERYL HYMAN, “WHO IS A JEW?” 1–20 (1998).

137. Aaron Kalman, *Global Jewish Population Grows by 88,000 over Past Year*, TIMES OF ISRAEL (Sept. 9, 2012), <http://www.timesofisrael.com/jewish-population-grows-by-88000-over-past-year> (citing a study estimating the global Jewish population at 13.75 million).

138. *Mapping the Global Muslim Population*, PEW RES. CENTER’S RELIGION & PUB. LIFE PROJECT (Oct. 7, 2009), <http://www.pewforum.org/2009/10/07/mapping-the-global-muslim-population>.

139. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987).

140. *Id.*

Muslims.<sup>141</sup>

*Shaare Tefila* further demonstrates how religious discrimination can transform into racial discrimination. Arguing that race should not be viewed as part of anti-Muslim biases because Muslims are not scientifically or ethnologically classified as a race “ignores both the true character of racism and the inappropriateness of restrictive judicial definitions of race.”<sup>142</sup> Furthermore, as the history of anti-Semitism shows, religious prejudice can eventually take on an overtly racial character: Muslims, much like Jews, “have experienced a history of societal discrimination, a history of political powerlessness, status as a discrete and insular minority, and characteristics of immutability based on religious differences from the dominant Christian majority.”<sup>143</sup>

Perhaps historian Bernard Lewis put it best: “In medieval times hostility to the Jew, whatever its underlying social or psychological motivations, was defined primarily in *religious terms*. From the fifteenth century onward this was no longer true, and Jew hatred was redefined, becoming at first partly, and then, at least in theory, *wholly racial*.”<sup>144</sup> As Part V argues, similar indicia of such a transformation can be seen with regard to Muslims in the aftermath of 9/11.

## V. MUSLIM RACIALIZATION POST-9/11

In the decade or so after 9/11, there has been substantial scholarship detailing the various manners by which Muslim identity has been racialized in the wake of the attacks.<sup>145</sup> To form a coherent picture of this phenomenon, this part synthesizes theoretical discourse from several sources and, in doing so, argues that Muslim racialization and Islamophobia—a form of anti-Muslim sentiment that possesses characteristics of racial and religious prejudices—share a relationship that

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141. See *infra* notes 165–66 and accompanying text.

142. Motion for Leave to File and Brief of the Anti-Defamation League of B’nai B’rith et al. as Amici Curiae at 14, *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (No. 85-2156), 1986 U.S. S. Ct. Briefs LEXIS 1196, at \*25.

143. Ibrahim, *supra* note 134, at 154–55. These factors, after all, are the Court’s articulated basis for determining whether a group qualifies as a suspect classification. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” (citations omitted)).

144. BERNARD LEWIS, *SEMITES AND ANTI-SEMITES: AN INQUIRY INTO CONFLICT AND PREJUDICE* 81 (1986) (emphasis added).

145. See *supra* note 20.



has resulted in a cycle of each phenomenon reinforcing the other. In essence, Islamophobia, which predated 9/11,<sup>146</sup> provided fertile ground for Muslims to be racialized in the aftermath of the attacks. And in return, the racialization of Muslims strengthens the call of Islamophobia as it reifies a determinate “enemy” in post-9/11 America. Thus, as a result, the growth of Islamophobia and tacit societal expectation of it evince the need to protect Muslims, Middle Easterners, and South Asians from, among other things, unwarranted discrimination. This need can be met by opening to them claims of racial discrimination.

#### A. ANTI-AMERICAN

There is no spontaneous racism; rather, racial prejudice evolves from a set of preexisting societal views against groups viewed as foreign and unwanted.<sup>147</sup> These roots constitute the breeding ground from which racism emerges following a traumatic event such as 9/11. Thus, in order to fully grasp contemporary understandings of what it means to be “Muslim” and how Muslims have been racialized, it is necessary to look at the social and political context from which the phenomenon of Islamophobia has emerged.

The American psyche has not always been concerned by an individual’s identity as Muslim. As Nagwa Ibrahim and Edward Said explain, even though Muslims can trace their presence in the United States back centuries, beginning with the arrival of the first African slaves, it has only been recently—in the past forty years—that Muslim identity has superseded the national or ethnic identities of individuals, a transformation that has largely taken place in the media.<sup>148</sup> The catalyst for this transformation was the “rise of OPEC” in 1970s and the “slow end to the Cold War.”<sup>149</sup> Inevitably Muslims were no longer identified by their national identities as Arabs, Kazakhs, Pakistanis, Indonesians, or Nigerians

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146. See Hilal Elver, *Racializing Islam Before and After 9/11: From Melting Pot to Islamophobia*, 21 *TRANSNAT’L L. & CONTEMP. PROBS.* 119, 130–37 (describing discrimination against Middle Easterners and Muslims during immigration and anti-Arab sentiment stemming from foreign affairs and the media).

147. See Ahmad, *supra* note 20, at 1282–84 (“Hate violence against Arabs, Muslims, and South Asians is a recurrent rather than a new phenomenon . . . [T]here is a genealogy of racism towards Arabs, Muslims, and South Asians that predates the terrorist attacks and that perpetrators of post-September 11 violence tapped into after September 11.”).

148. Ibrahim, *supra* note 134, at 137. See also EDWARD W. SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD* 36–79 (1981).

149. Ibrahim, *supra* note 134, at 136. OPEC refers to the Organization of the Petroleum Exporting Countries, an intergovernmental organization whose membership includes many Middle Eastern countries.

but by their religious identity as Muslims, culminating in the stereotype of the terrorist.<sup>150</sup>

However, OPEC and the Cold War do not paint a full picture of pre-9/11 Muslim racialization. Although the two undeniably contributed to the emergence of Islam in the collective American imagination, the role of the Iranian Revolution in creating a racialized Muslim identity in the United States has largely been overlooked.<sup>151</sup> Where OPEC and the Cold War captured the economic and political attention of many Americans, the Iranian Revolution captured their emotions and imagination.

The Iranian Revolution, which replaced a pro-Western monarchy with an anti-American theocracy, demarcated the first instance in which political Islam received worldwide attention.<sup>152</sup> Although the Iranian Revolution could be seen as an anti-monarchical movement, within it was a theocratic component that inevitably led to the rise of today's Islamic Republic.<sup>153</sup> It was the Islamic revolution within the Iranian Revolution that changed the way Americans think about Muslims.

Unlike OPEC or the Cold War, what the Iranian Revolution produced was a charismatic figure in the Ayatollah Khomeini who, in essence, became the "virtual face of Islam in Western popular culture."<sup>154</sup> Khomeini was not only a political leader but also a cultural icon who altered the way that Muslims were perceived outside the Middle East. Where Ataturk, Anwar Sadat, and Mohammed Reza Pahlavi were technocrats clothed in Western garments, Khomeini was a cleric whose deep religiosity was manifested in his traditional Islamic attire and appearance, notably his black garbs, turban, and facial hair.<sup>155</sup> This appearance mystified Khomeini to such an extent that foreign audiences could project Orientalist notions of Islam and the Middle East onto him.

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150. *Id.*

151. *But see* Sara Mahdavi, *Held Hostage: Identity Citizenship of Iranian Americans*, 11 TEX. J. ON C.L. & C.R. 211, 214 (2006) ("Discrimination against Iranians in America in 1979, the beginning of the Hostage Crisis, is sometimes seen as the first example of anti-Arab bias in the [United States].").

152. *How Islam Got Political: Iran*, BBC (Nov. 10, 2005), [http://news.bbc.co.uk/2/hi/uk\\_news/4424118.stm](http://news.bbc.co.uk/2/hi/uk_news/4424118.stm) ("[M]uch of the early inspiration for people to follow a more political Islam came from the Shia revolution in Iran.").

153. SAID AMIR ARJOMAND, *THE TURBAN FOR THE CROWN: THE ISLAMIC REVOLUTION IN IRAN* 106–08, 147–63 (1988) (describing opposition to the Shah as a coalition of various groups that ranged from professionals to urban migrants and communists, and discussing Islamists' consolidation of power in post-revolutionary Iran).

154. VALI NASR, *THE SHIA REVIVAL: HOW CONFLICTS WITHIN ISLAM WILL SHAPE THE FUTURE* 138 (2006).

155. *See* BAKALIAN & BOZORGMEHR, *supra* note 36, at 129.

Khomeini, however, was not just the face of the Iranian Revolution; he was also the face of the Iranian hostage crisis.<sup>156</sup> The hostage crisis, which saw the capture of fifty-two American citizens, made the Iranian Revolution relevant to Americans, if it had not been so already. Although the hostage-taking was motivated by anti-Americanism, not religion, the capture was nonetheless associated with Islam by virtue of Khomeini, who provided an identifiable enemy upon which nationalism and frustration could be placed. It is within this context that anti-Americanism and Islam—represented by the hostage crisis and Khomeini, respectively—were melded into one in the minds of many Americans, forming an ideology that equated Islam with anti-Americanism. Indeed, once images of a bearded and turbaned Osama Bin Laden were propagated across media outlets after 9/11, Sikhs would become prime targets for hate crimes due to their appearance. Basically, the Islamic appearance of Khomeini provided a tangible Muslim face for the hostage crisis and, in general, anti-Americanism. This image of Islam as anti-American provided the foundation for Muslims to be racialized after 9/11, leading to the rise of Islamophobia.

#### B. MUSLIM-LOOKING AND UN-AMERICAN

This section builds upon the theory of a new “Muslim-looking” racial identity created after 9/11 in which persons of Middle Eastern or South Asian heritage are classified as one. Using such scholarship, this section addresses the belief that Muslims are not just anti-American but also un-American—a term used to capture the feeling that Muslims are foreign, hostile, and unwelcome. Combined, these dynamics have established a sociological framework for individuals to carry out hate crimes against Muslims and Muslim-looking people in the decade following 9/11. During this period, not only have Middle Eastern Muslims been targeted, but so also have been non-Arabs, non-South Asian Muslims, and non-Muslim Arabs and South Asians, leading all three groups to be racialized into one.

As Muneer Ahmad suggests, societal and governmental reaction to 9/11 resulted in the consolidation of a new American race: “Muslim-looking.”<sup>157</sup> This new racial identity is not limited to individuals who practice Islam, but rather expands to ethnicities and other groups who may be seen by outsiders as Muslim, such as Sikhs, Hindus, Arab Christians, Muslim non-Arabs such as Indonesians and Pakistanis, and even Latinos

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156. See Tehranian, *supra* note 18, at 26 (contrasting the change in Americans’ perception of Iran in the 1950s with that in the 1970s, in reference to Khomeini’s image).

157. Ahmad, *supra* note 20, at 1278.

and blacks.<sup>158</sup> As Ahmad explains, “‘looking,’ not ‘Muslim,’ is the operative word in ‘Muslim-looking.’”<sup>159</sup>

The logic behind this new racial category plays off our collective biases stemming from the attack. The syllogism follows:

- 1) because all the 9/11 terrorists were Arab and Muslim,
- 2) because most Arabs are Muslim,
- 3) because the terrorists claim religious motivation for their actions,
- 4) therefore, all Arabs and all Muslims are likely to be terrorists.<sup>160</sup>

This step-by-step framework allows one to see how the attacks directly led to the racialization of Muslims as a political and cultural threat, with collateral damage falling upon groups often mistaken for Muslims. As a result of such racialization, Muslims are now seen as both anti-American, as described in Part V.A, and un-American, in light of some government and private actions against Muslims that have essentially treated them as non-citizens and foreign.<sup>161</sup>

The un-Americanization of Muslims manifests itself in racial profiling at airports, wiretaps, and other procedures that single out Muslims or Muslim-looking people on account of their religion or appearance. As Leti Volpp argues, racial profiling, which presumes guilt or suspicion of Muslims and Muslim-looking people, in particular identifies such people as “terrorists” and disidentifies them as “citizens.”<sup>162</sup> Furthermore, intrusive government action such as surveillance captures and reinforces the idea that Islam is a national security threat.<sup>163</sup> As Volpp aptly describes, “[c]itizenship in the form of legal status does not guarantee that [Muslims or Muslim-looking people] will be constitutive of the American body politic. In fact, quite the opposite: [t]he consolidation of American identity takes place *against* them.”<sup>164</sup> And in a deeper sense, government actions adversely affecting Muslims and treating them as noncitizens should remind us of the naturalization cases in which religion was used as a

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158. *Id.*

159. *Id.* at 1279.

160. *Id.*

161. See Volpp, *supra* note 20, at 1593 (explaining that certain communities can be positioned as objects of exclusion—as noncitizens, foreigners, enemy aliens, terrorists, etc.).

162. *Id.* at 1576–86.

163. Smith, *supra* note 20, at 94–109.

164. Volpp, *supra* note 20, at 1594.

pretext to deny Muslim immigrants citizenship.

### C. ISLAMOPHOBIA

This section argues that viewing Muslims and Muslim-looking people as anti-American and un-American has resulted in Islamophobia—a prejudice against Muslims on account of their religious beliefs and cultural characteristics.<sup>165</sup> Ultimately, Islamophobia is significant because it serves as proof that Muslims have been victims of racial discrimination. Since 9/11, Islamophobia has strengthened its hold on our collective imagination. According to the Council of American Islamic Relations (“CAIR”), “Islamophobia is close-minded prejudice against or hatred of Islam and Muslims.”<sup>166</sup>

The rise in Islamophobia can be seen in the “birther” movement questioning whether President Barack Obama is a Muslim;<sup>167</sup> the controversy behind the Cordoba Project, better known as the “Ground Zero Mosque;”<sup>168</sup> and the fear of Sharia law in the United States.<sup>169</sup> But more concerning, Islamophobia can be seen in the copious amount of hate crimes perpetrated against individuals and groups as a result of simply “looking” Muslim,<sup>170</sup> in addition to law enforcement procedures targeting Muslims as suspects.

Perhaps the most vivid examples of Islamophobia are hate crimes perpetrated not against Muslims but rather against non-Muslims who, because of their appearance, “look Muslim.”<sup>171</sup> For example, the first reported post-9/11 hate crime was the murder of Balbir Singh Sodhi, a Sikh man who was shot and killed at his Arizona gas station four days after 9/11.<sup>172</sup> After killing Sodhi, the perpetrator, Frank Roque, then proceeded to another gas station where he shot at but missed a clerk of Lebanese

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165. Elver, *supra* note 146, at 150–57.

166. *Our Vision*—CAIR, COUNCIL ON AM.-ISLAMIC RELS., <https://www.cair.com/islamophobia/our-vision.html> (last visited Aug. 7, 2014).

167. Gotanda, *supra* note 20, at 184–85; Elver, *supra* note 146, at 157–59.

168. Elver, *supra* note 146, at 159–62.

169. *Id.* at 162–66; Lee Tankle, *The Only Thing We Have to Fear Is Fear Itself: Islamophobia and the Recently Proposed Unconstitutional and Unnecessary Anti-Religion Laws*, 21 WM. & MARY BILL RTS. J. 273, 282–85 (2012) (arguing that Oklahoma’s “Save our State Amendment” prohibiting Sharia law is not only unnecessary but also unconstitutional).

170. *Challenging Islamophobia*, COUNCIL ON AM.-ISLAMIC RELS.—MINN. (July 19, 2012), <http://www.cairmn.com/civil-rights/challenging-islamophobia.html>.

171. See Ahmad, *supra* note 20, at 1266 (describing the murders of at least nineteen people in post-9/11 racial violence, in addition to attacks and vandalism targeted at mosques and businesses).

172. BAKALIAN & BOZORGMEHR, *supra* note 36, at 129.

descent, and fired shots at the home of an Afghan family.<sup>173</sup> When Roque was finally detained by authorities, he reportedly declared, “I stand for America all the way.”<sup>174</sup> Roque was convicted and is serving life in prison.<sup>175</sup> “Because of their traditional turban,” Anny Bakalian and Mehdi Bozorgmehr explain, “Sikhs have been inordinately victimized, given that they have nothing to do with Bin Laden or Al Qaeda.”<sup>176</sup>

More recently, in August 2012, six people were killed in an attack on a Sikh temple in Wisconsin.<sup>177</sup> Despite the lack of evidence suggesting that the attack was motivated by Islamophobia, many have speculated that the attack was targeted against Sikhs because they “look” Muslim. As one Sikh living in the area put it, “[e]veryone here is thinking this is a hate crime for sure . . . . People think we are Muslims.”<sup>178</sup>

Whether the attack was in fact inspired by Islamophobia does not fundamentally change its relevance for purposes of this Note. The fact remains that many, if not most, people believe that the attack was motivated by anti-Muslim sentiment. The existence of that belief, regardless of what actually transpired, shows that even a decade after 9/11, our society has been plagued with hate crimes perpetrated against Muslim-looking individuals. As a result, we have gotten so used to these types of attacks that we now expect them—in other words, the expectation of attacks against “Muslim-looking” people serves as a basis for their racialization in American society. As Reza Aslan describes, “Islamophobia has become so mainstream in this country that Americans have begun to expect violence against Muslims—not excuse it, but expect it . . . . And that[] [has] happened because you have an Islamophobia industry in this country devoted to making Americans think there[] [is] an enemy within.”<sup>179</sup>

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173. Tamar Lewin, *Sikh Owner of Gas Station is Fatally Shot in Rampage*, N.Y. TIMES (Sept. 17, 2001), <http://www.nytimes.com/2001/09/17/us/sikh-owner-of-gas-station-is-fatally-shot-in-rampage.html>.

174. *Id.*

175. Gabriel Elizondo, *No Bitterness 10 Years After Sikh Killing Over 9/11*, AL JAZEERA (Sept. 6, 2011), <http://blogs.aljazeera.com/blog/americas/no-bitterness-10-years-after-sikh-killing-over-911>.

176. BAKALIAN & BOZORGMEHR, *supra* note 35, at 129.

177. Mark Hughes, *Sikh Temple Massacre Gunman Was ‘White Supremacist’ Wade Michael Page*, TELEGRAPH (Aug. 6, 2012), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/9457007/Sikh-temple-massacre-gunman-was-white-supremacist-Wade-Michael-Page.html>.

178. Steven Yaccino, Michael Schwirtz & Marc Santora, *Gunman Kills 6 at a Sikh Temple Near Milwaukee*, N.Y. TIMES (Aug. 5, 2012), <http://www.nytimes.com/2012/08/06/us/shooting-reported-at-temple-in-wisconsin.html>.

179. Samuel G. Freedman, *If the Sikh Temple Had Been a Mosque*, N.Y. TIMES (Aug. 10, 2012), <http://www.nytimes.com/2012/08/11/us/if-the-sikh-temple-had-been-a-muslim-mosque-on-religion.html>.

In fact, the notion of Islam as a potential, if not guaranteed, enemy has gained currency elsewhere as well. Political scientist Samuel P. Huntington argued that the end of the Cold War would result in a “clash of civilizations” between Islam and the West.<sup>180</sup> The natural extension of this thesis would be to place the allegiance of Muslims living in the United States, along with any other groups with ties to the so-called enemy—or for that matter possessing a hyphenated identity—into a gray zone of foreignness and enemy. Regardless of whether Huntington’s prediction of a clash of civilizations comes to pass, the harm has already been done: Muslims and other Muslim-looking groups have experienced real discrimination and violence on account of their religious beliefs, appearance, or both.

## VI. CONCLUSION

The indeterminate length of the War on Terror<sup>181</sup> should remind us of the pressing need to protect Muslims and other groups from unjustified discrimination. Unlike traditional warfare, there will be no formal ceasefire ending hostilities, for terrorism does not involve the interests of warring states but rather the ideas of individuals or groups against the state. Assuming that terrorism is a sociopolitical reaction to American political power, it follows that terrorism will be a legitimate threat so long as the United States remains a global leader. Thus, it is reasonable to assume that our nation will be involved in counterterrorism measures for the foreseeable future.

Given that our culture has come to be characterized by an account of “Muslim-looking” people as “terrorists,” Muslims may continue to be subject to discrimination ranging from unwarranted surveillance to adverse employment actions, chilling their religious practices and damaging their self-perception. Although the need for effective counterterrorism techniques is undisputed, we must ensure that the measures adopted are narrowly tailored and do not impose undue burdens on innocent individuals.<sup>182</sup> By offering a new legal framework—anti-Muslim discrimination as racial discrimination—this Note seeks to introduce a new way of thinking for litigants, as well as others in the academy and legal

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180. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 209–18 (1996); Elver, *supra* note 146, at 152–53.

181. Michael Elliott, *Why the War on Terror Will Never End*, TIME MAG. (May 18, 2003), <http://www.time.com/time/magazine/article/0,9171,452770,00.html>.

182. In fact, the NYPD surveillance program discussed in Part I has reported no leads. David Ariosto, *Surveillance Unit Produced No Terrorism Leads, NYPD Says*, CNN (Aug. 22, 2012), <http://www.cnn.com/2012/08/21/justice/new-york-nypd-surveillance-no-leads/index.html>.

profession. Just as much, it seeks to ensure the promises guaranteed by the Constitution are fulfilled. That is, Muslim-Americans, Middle Eastern-Americans, South Asian-Americans, and other groups are afforded “equal protection of the laws.”<sup>183</sup>

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183. U.S. CONST. amend. XIV, § 1.