

Introduction

The Price of the Ticket

While on the academic job market several years ago, I received an invitation to interview for a tenure-track law professorship. Having made the school's short list, I visited the campus for a pleasant day of meetings with the faculty and received strong indications of support for my candidacy. I strove, however, to keep my expectations in check. As the son of two professors, I had been repeatedly regaled with horror stories about the whimsical and pernicious nature of department politics around hiring time. The moral to these tales was always the same: Never become a professor.

Having brazenly ignored my parents' advice on career choice, I proceeded to downplay their admonitions about the vagaries of the academic hiring process, and I remained cautiously optimistic. But, it turns out, my confidence was misplaced.

The day of decision arrived, and I did not get the job. It seemed that 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 75 percent of the faculty. I ended up one vote shy of the needed supermajority.

The following day, one of the faculty members called me to relay the results of the vote. The tenor of our discussion was unremarkable until he dropped a rather curious line. "You shouldn't take any of this personally," he said cryptically. "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."

A race issue? I asked him to repeat himself. I had heard him correctly. Nonplussed, I remember muttering in a robotic voice, "Well, it's sad to think that there might still be discrimination against minorities."

"No, no, John," he said, sounding surprised. "They objected to the fact that you're white."

I was stunned.

“White?” I said.

“Yeah. They insisted that we hire a minority candidate. They simply won’t accept another white male hire.”

Though the dissenters to my candidacy were apparently a group of progressive liberals concerned about minority representation on the faculty, they appeared blind to the irony that the full-time faculty lacked a single professor of Middle Eastern descent—a fact made more pronounced by the school’s presence in a community with a large Middle Eastern population and student body. More concerned with diversity *de jure* than *de facto*, the school counted statistical appearances over reality. 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 at some point in my professional life, but I had never thought that it would be so unabashed and that it would stem from being considered white. At wit’s end, I said the only thing that came to mind: “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, the more level-headed faculty members vigorously protested the decision on my candidacy. After consulting with the president and general counsel of the university, the dean had determined that the law school’s actions had violated numerous federal and state anti-discrimination laws.

“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.” The university had overruled the hiring decision but had not reconsidered its underlying premise: my whiteness.

Utterly perplexed, I contemplated the offer . . . and politely declined. Yet the experience was not without merit. It served as a remarkable introduction to the bizarre realities of academic hiring, especially for law faculties. The fiasco also highlighted the degeneration of the politics of race in the workplace. Most significantly, the incident forced me to confront and consider a profound but inadequately contemplated issue: the ambiguous racial status

of Middle Eastern individuals and their treatment in our legal system. This book is the result of these topical, timely, and personal contemplations.

The Middle Eastern question lies at the heart of the most pressing issues of our time—the ongoing conflicts in the region and the war on terror(ism), the delicate balancing act between preserving our national security interests and protecting our constitutional rights and civil liberties, and the debate over immigration, assimilation, and our national identity. Yet paradoxically enough, little attention is focused on our domestic Middle Eastern population and its place in American society. Unlike many other racial minorities in our country, Middle Eastern Americans have faced rising, rather than diminishing, degrees of discrimination over time—a fact highlighted by recent targeted immigration policies, racial profiling, a war on terrorism with a decided racist bent, and growing rates of job discrimination and hate crime. Strangely, however, Middle Eastern Americans are not even considered a minority in official government data, and despite extensive participation in the economic life of our country, they have remained socially and politically marginalized. Simply put, the modern civil rights movement has not done enough to advance the freedoms of those of Middle Eastern descent. Moreover, a complex web of legal, political, and social dynamics has rendered Middle Eastern Americans relatively invisible as a collective force.

The dualistic and contested ontology of the Middle Eastern racial condition therefore creates an unusual paradox. Reified as the other, Americans 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.” . . . Middle Eastern Americans do not appropriately fit into the prevailing categories of race. Rather, their ethnic/racial identity is constantly contested.¹

This book examines the antinomy of Middle Eastern racial classification and assesses the broad legal, political, and social implications of this dualistic identity. To this effect, the book interweaves personal experiences and anecdotes with jurisprudence, academic theory, and popular culture. My aim is not only to identify and assess the systemic issues facing Middle

Eastern Americans but also to launch a dialogue, both inside the academy and with the public at large, that addresses the particular civil rights issues facing our Middle Eastern population. In short, this book seeks to lift the veil shrouding America's invisible Middle Eastern minority.

In the process, this study finds itself at the intersection of three broad areas of scholarship. First, more than a quarter century has passed since the publication of Edward Said's landmark book *Orientalism*,² which deconstructed the colonial ideology afflicting scholarly and popular thinking in the West about the East, particularly the Islamic and/or Arab world. The dramatic events of the past few decades have shed new light on Said's theories. Moreover, there has been little attempt to examine the mediation of law, race, and Middle Eastern descent. This study aims to address this shortcoming.

Second, this study builds on the growing body of more general literature that examines the social construction of race and the critical role of the law in the process of mediating identity. Specifically, *Whitewashed* joins several important works on the recursive impact of stereotyping in defining legal and social relationships and rights for groups. The works of Steven Bender and Robert Chang represent two notable examples. In *Greasers and Gringos*,³ Bender examines the ways in which media-driven stereotypes about Latinos have contributed to their unfair treatment in the American legal system, as demeaning constructions have influenced and legitimated discriminatory conduct. Similarly, in *Disoriented*,⁴ Chang construes the reification of Asian American identification and its impact on the legal rights of individuals of Asian descent in the United States. By applying the insights of Bender, Chang, and others to the Middle Eastern community, I endeavor to assess the ways in which stereotyping has resulted in the community's disparate treatment before the law. This study also documents how stereotyping has triggered a vicious circle of paranoia, distrust, and shame within the Middle Eastern community and has led to the community's willful invisibility in the body politic. The study also builds on a growing body of literature examining the interplay among immigration policy, civil rights, and race.

Finally, this work adds to a growing body of literature that aims to diversify the voice of legal scholarship. In a salient moment two decades ago, Richard Delgado, one of the founders of critical race theory, famously critiqued existing tomes on civil rights as the product of an inner sanctum of a dozen white male academics.⁵ In the intervening years, scholars have responded to Delgado's critique, advancing the African American, Latino, Native American, and Asian American voices within the legal system,

especially in the academy. This study seeks to add to this body of literature by bringing a Middle Eastern American voice to the discourse on race and law at an especially critical juncture. It also seeks to advance the movement beyond the historical black/white paradigm. Like most Americans, academics have historically focused on the dichotomy between black and white and not on the broader racial issues in our nation. Although the black/white paradigm has played a profound role in our nation's history, it does not address the myriad issues related to individuals caught in blurry and gray portions of the divide.

With these goals in mind, chapter 1 begins by assessing the meaning of whiteness and its historical and continuing relevance to the exercise of social, economic, political, and legal rights in our society. Besides documenting the constructed nature of race and the concept of whiteness, I emphasize the important role of performance in the race-making process. To this effect, I focus on a series of cases from the late nineteenth and early twentieth centuries in which immigrants seeking naturalization eligibility litigated their racial status before the courts. In my exegesis of these cases, I examine the impact of law in shaping white identity and linking it to the privileges of citizenship and full participation in the Republic. As I argue, besides playing an intricate role in constructing the notion of race, the law advanced a strict assimilationist directive, especially to Middle Eastern immigrants who found themselves straddling the white/nonwhite divide. Drawing on recent identity theories, I argue that courts determined whiteness through performance. The potential for immigrants to assimilate within mainstream Anglo-American culture was put 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, a dramaturgy of whiteness emerged—courts played an instrumental role in limiting naturalization to those new immigrant groups that judges saw as most fit to carry on the values and traditions of our Republic. The courts thereby sent a clear message to immigrants: the rights enjoyed by white males could be obtained only through assimilatory behavior. White privilege became a *quid pro quo* for white performance, especially for Middle Eastern immigrants, who faced the greatest debate over their racial classification.

Chapter 2 documents the fate of Middle Easterners in these early race trials and highlights how these cases set the tone for the Middle Eastern experience in the United States—a process of incomplete assimilation that

has resulted in the relative invisibility of Middle Easterners from critical political and social institutions in our society. In making this argument, I trace the relationship of individuals of Middle Eastern descent to the construction of whiteness, while also examining the mechanisms through which a separate Middle Eastern identity began to take shape. Drawing on the history of early Middle Eastern immigration to the United States and the impact of the naturalization/whiteness cases, I chart one of the most curious aspects of Middle Eastern identity—the antinomy of Middle Eastern legal and racial classification and its attendant consequences. Middle Eastern Americans are caught in a 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 a blue-eyed, blond-haired individual of Northern European descent. Yet reality does not mesh with this bureaucratic position. On the street, Middle Eastern Americans suffer from the types of discrimination and racial animus endured by recognized minority groups. The dualistic and contested ontology of the Middle Eastern racial condition therefore creates an unusual paradox. Reified as the other, Americans 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.

Chapter 3 assesses the notable consequences of the dualist ontology of Middle Eastern racial classification. After examining the origins and development of the terms *Middle East* and *Middle Eastern*, I identify two salient mechanisms driven by the contested nature of Middle Eastern racial identification: a process that I dub *selective racialization* and a series of practices identified by Kenji Yoshino as *covering*.⁶ First, society selectively racializes Americans of Middle Eastern descent. When they conform to social norms or achieve success in American society, they are perceived as nothing more than white. When they transgress, they are racialized as Middle Eastern. As such, selective racialization helps to perpetuate and ossify stereotypes and provides a powerful panopticonian tool that encourages assimilatory activities. All the while, Middle Easterners themselves rationally adapt to discrimination and hostility by exploiting their position at the precipice of the white/nonwhite divide through strategic covering. For example, many Middle Eastern Americans Anglicize their names so as not to draw attention to themselves; those of Muslim faith refrain from prayer or the donning of head scarves; men avoid wearing facial hair; and many Middle Eastern Americans adopt alternative narratives about their family history to avoid the contagion of association with the Middle East.

Despite their short-term benefits, however, such tactics are not without profound costs and consequences, as they have exacerbated the relative invisibility of the Middle Eastern population in the body politic and in civil society and frustrated any semblance of a civil rights movement for the group. At the same time, covering and selective racialization have fueled a stereotyping feedback loop that, in combination with geopolitical conditions, has tainted public perceptions of Middle Easterners.

Building on the issue of prejudice, chapter 4 turns its attention to the role of the media in both reflecting and, more recursively, encouraging invidious stereotyping of Middle Easterners. On both the big and small screens, and in novels and advertising alike, recent years have witnessed a mostly one-sided portrayal of Middle Easterners in the mass media: the image of the Middle Easterner as a bloodthirsty terrorist, rabid religious fundamentalist, or misogynistic heathen. Chapter 4 documents this disturbing trend and then, with a particular focus on racial profiling, assesses its impact on public policy and its psychological toll on the Middle Eastern community.

Chapter 5 examines the broad assault on the civil rights of individuals of Middle Eastern descent by paying specific attention to the war on terror(ism) and its taut mediation of the relationship between Middle Easterners and American government and society. As I argue, recent years have witnessed the chilling reproblematicization of the Middle Eastern population from friendly foreigner to enemy alien, from enemy alien to enemy race—a trend accelerated by the events of 9/11. This chapter includes an analysis of the numerous policies that have led to this attack on the civil rights of individuals of Middle Eastern descent, including the promulgation of immigration regulations such as Special Registration, the passage of legislation such as the USA Patriot Act, the widespread use of racial profiling, and the indefinite detention of nonenemy combatants at Guantánamo Bay. In particular, I critique the judiciary's continuing immunization of such practices from constitutional scrutiny and discuss the ongoing threat to the civil rights of Middle Easterners in the broader context of international events.

Finally, chapter 6 focuses on concrete reforms that can address the growing assault on the civil rights of Middle Eastern Americans. As I argue, the state's bizarre racial fiction of Middle Eastern whiteness has fostered an invisibility that paradoxically 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 Americans 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. Such a tack has also shielded from public scrutiny the persistent, and rising, discrimination against Middle Eastern Americans.

Among other things, therefore, I emphasize the need to reform media portrayals of the Middle East and of Middle Easterners, foster greater political action in the Middle Eastern community via grassroots initiatives, tackle the airline industry's problematic treatment of Middle Easterners, reevaluate immigration law's plenary powers doctrine and the practice of profiling, increase enforcement efforts against both public and private discrimination against Middle Eastern Americans, raise public consciousness about the Middle Eastern American community in order to dismantle stereotypes and, finally, achieve government recognition of Middle Eastern descent as a distinct racial category. The development of the category for Middle Eastern racial status will limit the pernicious process of selective racialization and will enable Middle Eastern Americans to take control of a category already being imposed on them from without. A simple, yet crucial, observation supports this proposal: in a bureaucratic age, the only thing worse than being reduced to a statistic is not being reduced to one. I advocate this proposal cognizant of its risk in essentializing race as fact, rather than as construct. Yet, in the immediate term, such a step makes sense as the best approach to addressing the unique issues facing Middle Eastern Americans. To this end, I also emphasize the critical need to expand the Middle Eastern presence in elite American legal circles, including the academy, judiciary, and upper echelons of private practice, as a vehicle to advance recognition of issues related to the Middle Eastern population.

Upon hearing about this book project, one of my oldest childhood friends (with whom I attended high school, college, and law school) responded with a degree of uneasy bemusement: "As a Persian-Armenian-Irish Catholic-Quaker from Hawaii who lives in Utah and California," he quipped, "you are the perfect person to comment on the plight of Middle Eastern Muslims!" He then doled out some gratuitous marketing advice: "The book would probably sell more if you pulled an Alcindor and changed your first name to Haditha or something." For a second, I felt as if he were right (about my qualifications, not about the book's prospects). I do not purport (nor do I want) to represent the Middle East or Middle Eastern

Americans. In many ways, I am hardly representative of the Middle Eastern population. But upon further reflection, it became clear to me that, if anything, my life experience and personal background could not have done a better job of preparing me to write this book.

The category *Middle Eastern* immediately conjures up two ethnic and religious coordinates on a Cartesian identity graph: Arab and Muslim. I am neither Arab nor Muslim, but both of these identities are frequently imposed on me when I am perceived as being Middle Eastern. This study's embrace of a Middle Eastern identity is not meant to advance the all-too-common vision of a homogeneous or monolithic Middle Easterner—a task that our society has already performed all too well. Indeed, the goal for the organization of a Middle Eastern identity—and of its embrace by Americans of Middle Eastern descent—is to take control of the category currently being imposed from without on Middle Easterners, many of whom are, like me, neither Arab nor Muslim. The category would serve as a vehicle to highlight the shared experiences of members of the group as the Other and to provide a more unified voice to address the particular set of challenges facing the Middle Eastern population. Importantly, the category would have an opportunity to be deconstructed from within and, in an ideal world, would ultimately fade away, leaving individuals free to construct their own identities.

In my regular life, I am an entertainment and intellectual-property attorney and law professor. I handle copyright, trademark, patent, and licensing-related litigation for Hollywood studios, screenwriters, authors, artists, architects, and musicians and for publishing, new media, and high-tech companies. I teach, lecture, and write about these topics. I would prefer to be doing scholarship about the copyright's fair-use doctrine and its impact on expressive rights, the challenges facing international harmonization of innovation policy, and the effect of digital technology on the future of intellectual-property rights. But, as much as I would like to concentrate solely on intellectual-property matters, I simply cannot. As writer James Baldwin once noted, racial consciousness may be the “price of the ticket” we pay to be an American.⁷ Without exaggeration, and despite my greatest hopes, the issue of race affects me on a daily basis. In this regard, I am reminded of the words of legal scholar Robert Chang:

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.

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.⁸

Richard Delgado has recounted a similar dilemma. "When I began teaching law in the mid-1970's," he recounts, "I was told by a number of well-meaning senior colleagues to 'play things straight' in my scholarship—to establish a reputation as a scholar in some mainstream legal area and not get too caught up in civil rights or other 'ethnic' subject."⁹

Thankfully, my own academic colleagues have been nothing but supportive of my now not-so-tangential venture into race and the law, despite my own personal reluctance: as much I want to focus on other matters, reality gets in the way. Besides the personal impact of race on my quotidian existence, there is a stunning dearth of scholarship about Middle Eastern Americans. For example, during the preliminary stages of researching this book, I posed a few questions to a psychology professor of Middle Eastern descent. Contemplating the psychic anxiety wrought by the in-betweenness of Middle Eastern racial identity and reflecting on the high rates of depression and drug abuse that I had personally witnessed in the Iranian American community, I asked her to point me in the right direction within the psychological literature, especially to empirical studies, on the subject. There was a thoughtful pause before she informed me that I was unlikely to find anything. She was right. In my own field, the annals of the law-review literature are similarly lacking. But for the occasional article about Islamic law and some recent analyses of the war on terrorism, Middle Easterners are all too invisible in legal research, even in the leading critical race theory tracts. The persistent invisibility of Middle Eastern Americans damages their social, political, and legal rights and has compelled me to write this book. And I do so with hope.

As novelist Richard Bausch has argued, writing "is always an inherently optimistic act because it stems from the belief that there will be civilized others whose sensibilities you may affect if you are lucky and good enough and faithful to the task at hand."¹⁰ No country has ever been more

open and welcoming to immigrants than the United States, and no country has ever demonstrated a greater respect for civil rights and the protection of minorities. We have risen to the challenges posed by the past, and I am confident that we can do so again. However, with respect to the Middle Eastern question, there is significant work to be done. Ideally, this book represents an important first step.