

## Sticks and Stones, the Words that Hurt: Entrenched Stereotypes Eight Years after 9/11

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**Citation to Publisher** Aziz, Sahar. (2009). Sticks and Stones, the Words that Hurt: Entrenched Stereotypes Eight Years after 9/11. *City University of New York Law Review* 13(1), 33-72. <https://dx.doi.org/10.31641/clr130102>.

**Citation to *this* Version:** Aziz, Sahar. (2009). Sticks and Stones, the Words that Hurt: Entrenched Stereotypes Eight Years after 9/11. *City University of New York Law Review* 13(1), 33-72. Retrieved from <http://dx.doi.org/doi:10.7282/T37S7SBV>.

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Volume 13 | Issue 1

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Winter 2009

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## Recommended Citation

Sahar F. Aziz, *Sticks and Stones, The Words That Hurt: Entrenched Stereotypes Eight Years after 9/11*, 13 N.Y. City L. Rev. 33 (2009).  
Available at: [10.31641/clr130102](https://academicworks.cuny.edu/clr/10.31641/clr130102)

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## STICKS AND STONES, THE WORDS THAT HURT: ENTRENCHED STEREOTYPES EIGHT YEARS AFTER 9/11

*Sahar F. Aziz\**

In the realm of adults, name-calling is often a fact of life that one simply brushes off like water rolls off a duck's back. At some point, however, racial slurs and ethnic epithets hurled at employees constitute actionable discrimination rooted in palpable and entrenched stereotypes. In the case of Muslims, Arabs, and South Asians, the September 11, 2001 terrorist attacks not only caused an upsurge in hatred, violence, and discrimination, but also entrenched preexisting negative stereotypes. Targeted law enforcement efforts and media images stereotyping dark-skinned, bearded males with Arabic-sounding names as representing the primary threat to the national security of the United States contribute to racial, national origin, and religious harassment in the workplace.

In the years immediately following the September 11th terrorist attacks, hate crimes and other forms of discrimination against these communities were on the rise at a troubling rate. For the last months of 2001, the FBI reported a 1500% increase in hate crimes against "people of Middle Eastern descent, Muslims, and South Asian Sikhs, who are often mistaken for Muslim" from 28 in 2000 to 481 in 2001.<sup>1</sup> The New York City Police Department received 117 reports of hate crimes against Arab- and Muslim-Americans in the first six months after the attacks, compared to an average of seven hate crime reports per year before 2001.<sup>2</sup> The American-Arab Anti-Discrimination Committee ("ADC") reported over 700 violent incidents targeting Arab Americans, Muslims, and South Asians or those perceived as such in the first nine weeks following

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<sup>1</sup> Darryl Fears, *Hate Crimes Against Arabs Surge, FBI Finds*, WASH. POST, Nov. 26, 2002, at A02.

<sup>2</sup> Susan Sachs, *A Nation Challenged: Relations; For Many American Muslims, Complaints of Quiet but Persistent Bias*, N.Y. TIMES, Apr. 25, 2002, at A16.

the September 11th terrorist attacks. ADC also documented several murders, 165 violent incidents from January 1, 2002 to October 11, 2002, over eighty cases of illegal and discriminatory removal of passengers from aircrafts based on the passenger's perceived ethnicity, and over 800 cases of employment discrimination against Arab Americans from September 11, 2001 to October 11, 2002.<sup>3</sup> Similarly, the Council on American-Islamic Relations reported 1717 complaints of discrimination by Muslims in the first six months after September 11.<sup>4</sup>

Notwithstanding the passage of eight years, "post-9/11 discrimination" persists, most profoundly in the workplace. While the volume of cases has seemingly decreased, negative stereotypes of Muslims and Arabs have become entrenched into popular culture and consequently more prevalent in the workplace.<sup>5</sup> One need only recall the 2008 presidential elections where allegations that Barack Obama was a Muslim or Arab were in effect racial slurs and ethnic epithets.<sup>6</sup> Months after Barack Obama's inauguration, anti-Muslim sentiment continues in the form of the growing "Birther" movement challenging the validity of President Obama's Hawaiian birth certificate, and ultimately the legitimacy of his presidency, on grounds that he is a closeted Muslim born in a Muslim country.<sup>7</sup> Despite the spuriousness of the allegations, the popularity of the Birther movement suggests that suspicion and distrust of Muslims in America will continue for years to come.

Litigation of civil rights employment claims, both under Title VII and 42 U.S.C. § 1981 *et seq.*, offers an effective means of countering entrenched bias in the workplace. In addition to providing remedies to plaintiffs harmed by employment discrimination, such

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<sup>3</sup> AMERICAN-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: THE POST-SEPTEMBER 11 BACKLASH, SEPTEMBER 11, 2001 – OCTOBER 11, 2002 7 (2003), <http://www.adc.org/PDF/hcr02.pdf>.

<sup>4</sup> COUNCIL ON AMERICAN-ISLAMIC RELATIONS, American Muslims: One Year After 9/11, available at <http://web.archive.org/web/20041020010807/www.cair-net.org/911report/> (last visited Nov. 25, 2009).

<sup>5</sup> See, e.g., COUNCIL ON AMERICAN-ISLAMIC RELATIONS, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 8 (2007), <http://www.cair-net.org/pdf/2007-Civil-Rights-Report.pdf> (documenting 2,467 civil rights complaints in 2006, and finding that, of the 2,467 total reports, the second most common place of occurrence for civil rights violations was the workplace).

<sup>6</sup> See Isabel Macdonald & Steve Rendall, 'Secret Muslims,' *Open Bigotry: Islamophobia in the 2008 Presidential Campaign*, EXTRA!, Nov./Dec. 2008, available at <http://www.fair.org/index.php?page=3649>; Elisabeth Bumiller, *McCain Draws Line on Attacks as Crowds Cry 'Fight Back'*, N.Y. TIMES, Oct. 10, 2008, at A12 (responding to suspicions that Obama is an Arab with "no ma'am, he's a decent family man").

<sup>7</sup> Amy Hollyfield, *Obama's birth certificate: Final chapter*, June 27, 2008, <http://www.politifact.com/truth-o-meter/article/2008/jun/27/obamas-birth-certificate-part-ii/>.

cases offer a powerful disincentive to employers who permit their workplace to become infested with insidious stereotypes against Muslims, Arabs, or South Asians.

Accordingly, this Article provides the legal framework for pursuing such claims. Part I lays out the theoretical backdrop of how immigrants and racial minorities have historically been targeted as a result of a misguided Eurocentric definition of “American.” Though Arabs, Muslims, and South Asians have historically experienced the adverse effects of such narrow and exclusive definitions of citizenship, the terrorist attacks directed long-standing nativist bias to these groups and permanently racialized them. Part II discusses how governmental racial profiling and targeted law enforcement action legitimizes private bias that is ultimately manifested as workplace harassment. To highlight the misconceptions and fallacies perpetuated by the racial slurs, Part III offers a general introduction to the Arab, Muslim, Middle Eastern, Sikh, and South Asian communities in the United States. Part IV discusses the availability of national origin and ethnic origin as a basis of liability under Title VII. Part V explains the theories of liability under which a plaintiff may pursue a hostile work environment claim on the basis of national origin or ethnic origin. Included is an analysis of the myriad of cases filed since September 11, 2001 that involve allegations of discrimination against Arabs, Muslims, Middle Easterners, Sikhs, or South Asians. Finally, the Article concludes by arguing that national or ethnic origin harassment expressed through accusations of being a terrorist, ethnic slurs about an employee’s Arab heritage, and allegations of condoning violence based on a profession of the Islamic faith are all results of the racialization of Arabs, Muslims, and South Asians as the “terrorist other” and the entrenchment of stereotypes that have surpassed being merely backlash.

#### I. RACIALIZATION OF MUSLIMS, ARABS, AND SOUTH ASIANS

Since the nation’s inception, the American psyche has struggled with its conflicted relationship with immigrants. On the one hand, the nation has welcomed—and in the case of African Americans coercively appropriated—the labor of people from every continent. On the other hand, the Eurocentric vision of Americanism has tenaciously dominated the definition of the “American.”<sup>8</sup> As race and citizenship become proxies for (dis)loyalty to the nation,

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<sup>8</sup> Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 452-54 (2002).

people of color and immigrants are viewed as potentially dangerous and presumptively suspect.<sup>9</sup> Such bias is most glaring in the American criminal justice system where police are conditioned to view these groups with suspicion, thereby resulting in whites receiving warnings and second chances while blacks are arrested and imprisoned at the first instance of wrongdoing.<sup>10</sup> The September 11th attacks redirected preexisting nativist biases against all people of color to Muslims, Arabs, and South Asians as they became subject to a concerted de-Americanization process.

As Leti Volpp has stated, the September 11th terrorist attacks facilitated the construction of a new identity category that groups together persons who appear Middle Eastern, Arab, or Muslim and identifies them as terrorists while dis-identifying them as citizens.<sup>11</sup> I would further add South Asians to this category. These individuals are categorized to be identified as terrorists and dis-identified as citizens. Notwithstanding an individual's status as United States citizen, members of this group are forever foreign.<sup>12</sup> The discriminators are often ignorant of the difference between these different racial and/or ethnic groups. Nor do they know whether being a Muslim is a religious or racial identity. The result is a conflation of the racial Arab or South Asian with the religious category of Muslim coupled with the misperception that Islam is a radical and violent religion. Muslim-looking people are targeted in what can be characterized as "religiously-driven racial discrimination."<sup>13</sup>

#### A. *Negative Stereotypes Predated the September 11th Terrorist Attacks*

Stereotypical ethnic epithets disparaging employees of Arab and South Asian descent predated the September 11th terrorist attacks. Derogatory slurs such as "camel jockeys," "sand nigger," and "Scum Arab," have been the basis of numerous national origin har-

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<sup>9</sup> See Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871 (2003).

<sup>10</sup> *Id.* at 874 (citing studies conducted by sociologist Jessica Mitford wherein she concludes that the "criminal type" is "a social creation, etched by the dominant class and ethnic prejudices of a given society"); see ACLU & THE RIGHTS WORKING GROUP, THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES: A FOLLOW-UP REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL PROFILING 9 (2009), [http://www.aclu.org/pdfs/humanrights/cerd\\_finalreport.pdf](http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf) (highlighting "[r]acial profiling by law enforcement, and the correlate criminalization of people of color").

<sup>11</sup> See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

<sup>12</sup> Hing, *supra* note 8, at 442-44 (describing the de-Americanization of Muslims, Arabs, and South Asians after 9/11).

<sup>13</sup> Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215, 216 (2005).

assessment claims brought by Arab employees.<sup>14</sup> In *Amirmokri v. Baltimore Gas and Electric Co.*, an Iranian immigrant testified at trial that during a six-month period, his supervisor and co-workers “made almost daily derogatory references to his Iranian national origin, calling him ‘the local terrorist,’ a ‘camel jockey,’ ‘the Ayatollah,’ and ‘the Emir of Waldorf,’” which is the town where he resided.<sup>15</sup> In *Al-Salem v. Bucks County Water & Sewer Authority*, the plaintiff was a United States citizen who emigrated from Libya and alleged that his employer subjected him to a hostile work environment because of, among other things, his national origin.<sup>16</sup> He alleged that his supervisor’s supervisor had called him a “camel jockey” and a “sand nigger” repeatedly during a six-month period.<sup>17</sup> These cases, among others, demonstrate how negative stereotypes against Muslims, Arabs, and South Asians predated the September 11th terrorist attacks. After September 11, the stereotypes and public bias became more ubiquitous and further entrenched.

#### B. Stereotypes Became Entrenched After September 11

The term “terrorist” has now become a racialized construct in which persons, especially men, perceived as Arab or South Asian are classified as “terrorist others.” This racialized construct is repeatedly reflected in the racial slurs and epithets directed at employees that are or perceived to be Arab, South Asian, and/or Muslim. While deplorable on their face, such racist stereotypes are often accepted by judges as a regrettable, but expected response to the September 11th terrorist attacks.<sup>18</sup> When state action involves national security policies and practices that apply exclusively to Muslims, Arabs, and South Asians, it is no surprise that judges misinterpret racial slurs and epithets as protected political viewpoints.<sup>19</sup> Moreover, such inflammatory stereotypes are reflected in

<sup>14</sup> *Nader v. Brunalli Constr. Co.*, No. 98-2085, 2002 WL 724597, at \*1-3 (D. Conn. Mar. 26, 2002) (calling plaintiff a “Scum Arab” and telling him to “go back where [he] came from”); *Boutros v. Canton Reg’l Transit Auth.*, 997 F.2d 198, 201 (6th Cir. 1993) (calling the plaintiff a “camel jockey,” a “camel rider,” a “rich Arab,” and telling him to “go back” to Syria); *Yasin v. Cook County Sheriff’s Dep’t*, No. 07 C 1266, 2009 WL 1210620, at \*4 (N.D. Ill. May 4, 2009) (calling plaintiff a “sand nigger”).

<sup>15</sup> 60 F.3d 1126, 1128-29 (4th Cir. 1995).

<sup>16</sup> No. 97-6843, 1999 WL 167729, at \*1 (E.D. Pa. Mar. 25, 1999).

<sup>17</sup> *Id.* at \*2.

<sup>18</sup> See Muneer I. Ahmed, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1262 (2004) (analogizing hate crimes against Muslims, Arabs, and South Asians to crimes of passion, in which the racial violence needs little explanation in light of the severity of the terrorist attacks and the government’s consequent collective punishment of these communities).

<sup>19</sup> *Hussain v. Highgate Hotels, Inc.*, 2005 FED App. 0199N, 258 (6th Cir.) (holding

polls taken as recently as 2009 where 53% of Americans have a “not too favorable” view of Islam.<sup>20</sup> Similarly, in a 2006 poll, 44% of Americans believe Muslims are too extreme in their religious beliefs, 22% of Americans would not want a Muslim as a neighbor, and less than half of Americans believe American Muslims are loyal to the United States.<sup>21</sup>

Many years after the terrorist attacks, such xenophobic sentiments manifest themselves in the mistreatment of Muslims in the workplace as well as the public sphere. In 2006, Muslim Iraqi plaintiffs in *Ridha v. Texas A&M University System* alleged that defendants humiliated them and ridiculed their Muslim faith by throwing animal urine and feces at plaintiffs’ holy prayer rugs and on chairs and desks in their offices.<sup>22</sup> Similarly, an Arab Muslim correctional officer was allegedly subjected to ongoing remarks, as well as postings of newspaper articles and pictures and graffiti, insulting his ancestry and national origin at least one hundred times over a one-year period from 2004 to 2005.<sup>23</sup> The plaintiff was repeatedly called “sand nigga,” “terrorist,” “camel jockey,” “Yasin bin Laden,” and other derogatory terms.<sup>24</sup> Co-workers discussed hog-tying Muslims in Iraq in front of the plaintiff.<sup>25</sup> Earlier this year, on January 3, 2009, a Muslim family of Indian origin was removed from an airplane after two teenage passengers interpreted the family’s discussion of plane safety, coupled with their Muslim headscarves and long beards, as a terrorist plot.<sup>26</sup> As recently as September 2009, a Sikh cab driver was beaten so badly that he suffered a broken tooth, bruises and stitches to his face as he was called a terrorist and Taliban.<sup>27</sup>

The stereotypes underlying such acts of violence and discrimi-

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that “because of surrounding work events, a reasonable person would not view such a statement as a remark directed as a threat against his or her person, but rather a statement of a political/military opinion.”).

<sup>20</sup> Gallup, Muslim West Facts Project, *Religious Perceptions in America: With an In-Depth Analysis of U.S. Attitudes Toward Muslims and Islam* 4 (2009), available at <http://www.muslimwestfacts.com/mwf/125315/Religious-Perceptions-America.aspx> (follow hyperlink to download Adobe’s portable document format).

<sup>21</sup> JOHN L. ESPOSITO & DALIA MOGAHED, WHO SPEAKS FOR ISLAM? WHAT A BILLION MUSLIMS REALLY THINK 155 (2007).

<sup>22</sup> No. CIV.A. 4:08-CV-2814, 2009 WL 1406355, at \*1 (S.D. Tex. May 15, 2009).

<sup>23</sup> *Yasin v. Cook County Sheriff’s Dep’t*, No. 07 C 1266, 2009 WL 1210620, at \*4 (N.D. Ill. May 4, 2009) (denying defendant’s motion for summary judgment).

<sup>24</sup> *Id.* at 2-5.

<sup>25</sup> *Id.* at 2.

<sup>26</sup> Cynthia Dizikes, *Muslim Families Removed From AirTran Flight Get Apology*, L.A. TIMES, Jan. 3, 2009, at A10.

<sup>27</sup> Sunita Sohrabji, *Cabdriver Attack May Not Be Hate Crime, Say Police*, INDIA WEST, Sept. 10, 2009, available at <http://www.indiawest.com/readmore.aspx?id=1442>.



nation are often perpetuated in the media. The following section highlights the role of the media and governmental profiling in sanctioning private acts of discrimination.

## II. NEGATIVE MEDIA DEPICTIONS COUPLED WITH GOVERNMENTAL PROFILING LEGITIMIZES PRIVATE BIAS AGAINST MUSLIMS, ARABS, AND SOUTH ASIANS

Such blatant bias against an entire religion and ethnic groups is to a large extent caused by the deluge of images and descriptions in mainstream media of angry-looking, dark-skinned males with beards and Arabic names as representing the primary threat to the safety and national security of Americans.<sup>28</sup> Prior to the September 11th terrorist attacks, media depictions of Arabs, Muslims, and people from the Middle East were rife with negative and racist stereotypes of Arab-Americans as the barbarians, the villains, the seducers of women, and the passive backdrops to European or American adventures. A post-9/11 review of the United States film industry evinces the entrenchment of such stereotypes, as Arabs and Muslims are almost exclusively portrayed as terrorists or other negative characters rather than as everyday people with families and friends.<sup>29</sup> A September 2009 Pew Research poll found that 65% of non-Muslims regard Islam as very different or somewhat different from their own religion.<sup>30</sup> Because perceived similarity with a religious group is associated with favorable views of that group, such

<sup>28</sup> Cf. *Rikabi v. Nicholson*, No. 07-60041, 2008 U.S. App. LEXIS 1305 (5th Cir. Jan. 23, 2008) (for one example of how negative stereotypes of Muslims have permeated into the workplace, citing defendant's open reference to Muslims as a threat to the United States and his dislike of Muslims and how Muslims live).

<sup>29</sup> See generally, HELEN HATAB SAMHAN, ARAB AMERICAN INSTITUTE FOUNDATION, NOTES ON ANTI-ARAB RACISM (1998), [http://www.aaiusa.org/page/file/a5773324892438c0e7\\_la7bmvqgt.pdf/NotesonAntiArabRacism.pdf](http://www.aaiusa.org/page/file/a5773324892438c0e7_la7bmvqgt.pdf/NotesonAntiArabRacism.pdf). (discussing media typecasting of Arabs in villain roles); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After Sept. 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002) (discussing how a review of U.S. films offers convincing evidence of the vilification of Arabs and Muslims by the movie industry). See JACK SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE 9, 34-35 (2001). See also AMER-ARAB AFFAIRS COUNCIL, SPLIT VISION: THE PORTRAYALS OF ARABS IN THE AMERICAN MEDIA (EDMUND GHAREEB ed., 1983), MELANI McALISTER, EPIC ENCOUNTERS: CULTURE, MEDIA, AND U.S. INTERESTS IN THE MIDDLE EAST, 1945-2000 (2001) (providing examples of cinema stereotypes); JACK SHAHEEN, THE TV ARAB (1994); James J. Zogby, *Are Arab Americans 'People Like Us'?*, FOREIGN SERVICE J., (2000), available at <http://www.afsa.org/fsj/may00/zogby.cfm> (in a study of the portrayal of Arab and Muslim characters on three major television networks conducted by James Zogby, President of the Arab American Institute, concluding there were no positive Arab or Muslim characters to be found.).

<sup>30</sup> THE PEW FORUM ON RELIGION & PUBLIC LIFE, THE PEW RES. CENTER, VIEWS OF RELIGIOUS SIMILARITIES AND DIFFERENCES: MUSLIMS WIDELY SEEN AS FACING DISCRIMINA-

perceived differences contribute to negative stereotypes against Muslims. Consequently, 58% of Americans believe Muslims face more discrimination in the United States after the September 11th terrorist attacks. Such harmful racial stereotyping of Arabs and Muslims in the media and popular culture influences private misconduct and contributes to tangible discrimination in the workplace.

Concurrently, governmental racial profiling and preventative law enforcement practices carried out in the form of airport profiling, secret arrests, race-based immigration policies, and selective enforcement of immigration laws of general applicability legitimize private biases against Muslims, Arabs, and South Asians.<sup>31</sup> In the first two months after the attacks, more than 1,200 citizens and noncitizens were detained for interrogation most of whom were from South Asia, the Middle East, and North Africa.<sup>32</sup> Since then, numerous individuals have reported being stopped at gunpoint, detained for hours, questioned about terrorist connections where there was no valid suspicion of terrorist activities, and parents have reported being separated from their small children.<sup>33</sup> Meanwhile, a poll conducted in the fall of 2001 reported that 57% of all Americans sanctioned government profiling on the basis of race, gender, and age in airport searches.<sup>34</sup>

Governmental racial profiling has continued years after the September 11th terrorist attacks. In May 2004, the Federal Bureau of Investigations ("FBI") launched a campaign wherein it sought to interview approximately 5,000 Muslim individuals to obtain leads on suspected terrorist attacks.<sup>35</sup> Muslims were questioned at their

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TION 1 (2009), <http://pewforum.org/newassets/images/reports/summer09/survey0909.pdf>.

<sup>31</sup> See Muneer I. Ahmed, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1269 (2004). See also DAVID COLES & JULES LABEL, *LESS FREE, LESS SAFE* 102-28 (2007) (providing additional examples of policies proven ineffective in promoting national security while also reinforcing racial bias.).

<sup>32</sup> Muneer, *supra* note 31, at 1270.

<sup>33</sup> RIGHTS WORKING GROUP, *EQUAL TREATMENT DENIED: U. S. IMMIGRATION ENFORCEMENT POLICIES, A SHADOW REPORT. TO THE U.N. COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION* 21-23, (2008), [http://65.36.162.162/files/RWG\\_ICERDShadowReport\\_2008.pdf](http://65.36.162.162/files/RWG_ICERDShadowReport_2008.pdf) (detailing a number of cases involving harassment and detention of South Asian, Arab, and Muslim travelers at U.S. borders).

<sup>34</sup> Press Release, *Time/CNN Poll by Harris Interactive, Americans Ready For Military Action Against Terrorism* (Sept. 18, 2001), available at <http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=357> (describing TIME/CNN poll in which 57% deemed "acceptable" the use of "profiling by age, race and gender to identify potentially suspicious passengers").

<sup>35</sup> See Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Conse-*

workplaces by the FBI,<sup>36</sup> which is not only humiliating, but also subjects the Muslim workers to discriminatory harassment by co-workers and supervisors. As recent as January 2010, the Transportation Security Administration issued a policy requiring enhanced screening for persons from and traveling through thirteen Arab and Muslim countries and Cuba.<sup>37</sup>

Moreover, advocacy groups have expressed concerns about dubious and coercive tactics used to recruit Muslims to serve as informants.<sup>38</sup> Some individuals who refused to become informants were threatened by or faced retaliation from law enforcement.<sup>39</sup> Muslim, Arab, and South Asian travelers reported in 2009 that they were questioned by Customs and Border Patrol about their faith, friends and family, and political opinions.<sup>40</sup> Effective at the time of the writing of this article, government policies on the use of race and ethnicity in law enforcement activity have proven to be inadequate and ineffective as they (1) do not cover religious or national origin profiling; (2) do not apply to state or local law enforcement agencies; (3) are merely advisory and thus not legally binding; and (4) contain a broad exception for national security, thereby permitting racial profiling of Arabs, Muslims, and South Asians under the guise of national security.<sup>41</sup>

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*quences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?*, 38 U.C. DAVIS L. REV. 609, 636 (2004-2005).

<sup>36</sup> *Id.*

<sup>37</sup> Mike Ahlers, TSA, *Enhanced Screening for People Flying to U.S. from Certain Nations*, CNN, Jan. 3, 2010, <http://www.cnn.com/2010/TRAVEL/01/03/tsa.measures/index.html> (listing Sudan, Syria, Iran, Afghanistan, Algeria, Iraq, Lebanon, Libya, Nigeria, Pakistan, Saudi Arabia, Somalia, Yemen, and Cuba).

<sup>38</sup> See ACLU & THE RIGHTS WORKING GROUP, *supra* note 10, at 32; see also Gillian Flaccus, *Bail OK'd For Alleged in-Law of Al-Qaida Official*, SAN DIEGO UNION-TRIBUNE, Feb. 24, 2009, available at <http://www3.signonsandiego.com/stories/2009/feb/24/afghan-arrested-022409>.

<sup>39</sup> ACLU & THE RIGHTS WORKING GROUP, *supra* note 10, at 33 (documenting specific cases of retaliation against Muslim individuals who refused to serve as informants).

<sup>40</sup> See *id.* at 32 (citing Jennifer Turner, ACLU, *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the "War on Terrorism Financing"* (2009)); see also ASIAN LAW CAUCUS STAFF & STANFORD LAW SCHOOL IMMIGRANT RIGHTS CLINIC, *RETURNING HOME: HOW U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION'S DOORSTEP* (2009), <http://www.asianlawcaucus.org/wp-content/uploads/2009/04/Returning%20Home.pdf>.

<sup>41</sup> See ASIAN LAW CAUCUS STAFF & STANFORD LAW SCHOOL IMMIGRANT RIGHTS CLINIC, *supra* note 40, at 14. Cf. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIVISION, *GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES* (June, 2003), [http://www.usdoj.gov/crt/split/documents/guidance\\_on\\_race.php](http://www.usdoj.gov/crt/split/documents/guidance_on_race.php); U.S. DEP'T OF HOMELAND SECURITY, *THE DEPARTMENT OF HOMELAND SECURITY'S COMMITMENT TO RACE NEUTRALITY IN LAW ENFORCEMENT ACTIVITIES* (June 1, 2004), [http://www.dhs.gov/xlibrary/assets/CRCL\\_MemoCommitmentRaceNeutrality\\_June04.pdf](http://www.dhs.gov/xlibrary/assets/CRCL_MemoCommitmentRaceNeutrality_June04.pdf).

Immigration policies, in particular, have been used to target particular groups perceived to be a threat to national security, thereby reinforcing negative stereotypes and public bias against these groups.<sup>42</sup> The United States government adopted the National Security Entry-Exit Registration System (“NSEERS”) that until the present day requires immigrants from primarily Middle Eastern and North African countries to participate in a special registration program.<sup>43</sup> To declare victory in its purported “war on terror,” the government systematically miscategorized detentions and deportations of detainees guilty of minor immigration violations as terrorism cases.<sup>44</sup> The government’s counter-terrorism practices and policies have thus institutionalized a policy of discrimination against immigrants perceived to be Muslim, Arab, Middle Eastern, or South Asian on the basis of their name, race, religion, ethnicity, or national origin.<sup>45</sup> The government’s deliberate use of racial and nationality-based distinctions following the September 11th terrorist attacks has contributed to a climate in which employment discrimination against Arabs, South Asians, and Muslims in America is condoned.<sup>46</sup>

Not only are the racial slurs and epithets addressed herein in-

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<sup>42</sup> See, e.g., Letter from Kareem W. Shora, National Executive Director, American-Arab Anti-Discrimination Committee, to Timothy J. Keefer, Acting Officer, U.S. Department of Homeland Security (February 26, 2009), available at <http://www.adc.org/PDF/frontlinecomplaint.pdf>.

<sup>43</sup> ACLU & THE RIGHTS WORKING GROUP, *supra* note 10, at 29.

<sup>44</sup> U.S. DEPARTMENT OF JUSTICE, THE DEPARTMENT OF JUSTICE’S INTERNAL CONTROLS OVER TERRORISM REPORTING (2007), [www.usdoj.gov/oig/reports/plus/a0720/final.pdf](http://www.usdoj.gov/oig/reports/plus/a0720/final.pdf); see Dan Eggen, *Justice Dept. Statistics on Terrorism Faulted*, WASH. POST, Feb. 21, 2007, at A8.

<sup>45</sup> See, e.g., the New York City Police Department’s report on jihadi radicalization where it states: The subtle and non-criminal nature of the behaviors involved in the process of radicalization makes it difficult to identify or even monitor from a law enforcement standpoint. Taken in isolation, individual behaviors can be seen as innocuous; however, when seen as part of the continuum of the radicalization process, their significance becomes more important. Considering the sequencing of these behaviors and the need to identify those entering this process at the earliest possible stage makes intelligence the critical tool in helping to thwart an attack or even prevent the planning of future plots. MITCHELL D. SILBER AND ARVIN BHATT, NEW YORK POLICE DEPARTMENT INTELLIGENCE DIVISION, RADICALIZATION IN THE WEST: THE HOME-GROWN THREAT 10 (2007), [http://www.nyc.gov/html/nypd/downloads/pdf/public\\_information/NYPD\\_Report-Radicalization\\_in\\_the\\_West.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/public_information/NYPD_Report-Radicalization_in_the_West.pdf). Such language unambiguously supports surveillance and profiling of practicing Muslims who adopt an orthodox interpretation of Islam that is oft generalized as “jihadist,” with no distinction between a conservative interpretation of orthodox Islam and a more extreme interpretation wherein unlawful violence is encouraged.

<sup>46</sup> See Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 449-50 (2002) (proffering that official acts of de-Americanization profiling condone private vigilante action against non-European Americans).

herently offensive, but they often reflect a profound ignorance of the differences between the Arab and South Asian race, the Sikh and Muslim religions, and the diversity of national origins of those who adhere to the Islamic faith. Part III is a humble attempt to provide some context to the racial, religious, and national origins definitions cited in this paper. Due to the complexity of the issues at hand, it is highly recommended that readers, and especially employment law practitioners, conduct in depth research on the cultures, heritage, and religious practices at issue.

### III. AN INTRODUCTION TO THE ARAB, MUSLIM, MIDDLE EASTERN, SIKH AND SOUTH ASIAN COMMUNITIES IN THE UNITED STATES

#### A. *Arab Americans and Middle Easterners*

“Arab” is a cultural and linguistic term used to refer to persons who speak Arabic as their first language.<sup>47</sup> The “Arab World” consists of countries which include Lebanon, Iraq, Morocco, Palestine, Jordan, Egypt, Algeria, Tunisia, Libya, Syria, Qatar, Bahrain, Saudi Arabia, Kuwait, Oman, the United Arab Emirates, and Yemen.<sup>48</sup> Notably, persons from Iran and Turkey are not Arabs and identify themselves as Persians and Turks, respectively.<sup>49</sup> Individuals who identify themselves as Arabs often also identify themselves as having a specific national origin that is not in conflict with being Arab. For example, a person whose family originates from Jordan may identify herself as both an Arab and Jordanian American.

The term “Middle Easterner” is used to describe persons whose national or ethnic origin derives from a country in North Africa or the Middle East, including Iran and Turkey.<sup>50</sup> Persons originating from Afghanistan are often mistakenly categorized as Middle Easterner or Arab, although Dari, a dialect of Farsi, is the national language.<sup>51</sup> Individuals that properly qualify as Middle Easterners do not normally identify themselves as Middle Easterners, but rather as Arab, Persian, Iranian, or Turkish juxtaposed

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<sup>47</sup> THE AMERICAN-ARAB ANTIDISCRIMINATION COMMITTEE, *Facts About Arabs and the Arab World*, <http://www.adc.org/index.php?id=248> (last visited Nov. 17, 2009).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (defining Middle East as territory that includes the Arab countries from Egypt east to the Persian Gulf, plus Israel and Iran. Turkey is sometimes considered part of Europe as well).

<sup>51</sup> Afghanistan Online, *Languages Spoken in Afghanistan*, <http://www.afghanweb.com/language> (last visited Nov. 17, 2009).

with American (i.e. Arab American or Egyptian American, Persian or Iranian American, or Turkish American).

The Supreme Court in *Saint Francis College v. Al-Khazraji* held that Arab descent qualifies as a “race” under The Civil Rights Act, 42 U.S.C. § 1981 *et seq.* (1991).<sup>52</sup> However, the U.S. Census Bureau classifies persons originating from Europe, the Middle East, and North Africa as “White,” which has proven to be an obstacle to tracking discrimination against Arabs and Middle Easterners.<sup>53</sup> As a result, the EEOC adopted a new mechanism, entitled “Code Z” to monitor and track the filing of “backlash” cases comprising charges brought by individuals who are or are perceived to be Muslim, Arab, Middle Eastern, or South Asian.<sup>54</sup>

Arab immigrants began arriving in sizable numbers during the 1880s and approximately 3.5 million Americans trace their roots to an Arab country.<sup>55</sup> The majority of Arab Americans are native-born.<sup>56</sup> More than 80% percent of Arab Americans are U.S. citizens.<sup>57</sup> Arab Americans are employed in all major occupation groups; however 72% work in managerial, professional, technical, sales, or administrative jobs.<sup>58</sup> Eighty-five percent of Arab Americans have a high school diploma, more than 40% have a bachelor’s degree or higher, and 17% have post-graduate degrees.<sup>59</sup> The metropolitan areas with the largest concentration of Arab Americans are Los Angeles, Detroit, New York City, northeastern New Jersey, Chicago, and the Washington, D.C. metro area.<sup>60</sup> Contrary to public perceptions and media portrayals, the majority of Arab Americans are Christian, a group comprised of Roman/Eastern

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<sup>52</sup> 481 U.S. 604, 613 (1987).

<sup>53</sup> See Helen Hatab Samhan, *Not Quite White: Race Classification and the Arab American Experience*, in *ARABS IN AMERICA: BUILDING A NEW FUTURE* 209 (Michael W. Suleiman ed., Temple Univ. Press 1999) (providing a useful historical analysis of how immigration law impacted the categorization of persons from the Middle East and North Africa as whites by the U.S. Census Bureau).

<sup>54</sup> Press Release, EEOC, *EEOC Provides Answers about Workplace Rights of Muslims, Arabs, South Asians and Sikhs* (May 15, 2002), available at <http://www.eeoc.gov/press/5-15-02.html>; see also S. Mitra Kalita, *Job Fair Caters to Muslim Immigrants; Years after 9/11 Attacks, Bias is Still Perceived*, WASH. POST, Mar. 26, 2005, at D12.

<sup>55</sup> ARAB AMERICAN INSTITUTE, *QUICK FACTS ABOUT ARAB AMERICANS*, available at [http://www.aaiusa.org/page/file/8e66571f3a79e30c6\\_g7m6bx9hs.pdf/quickfacts.pdf](http://www.aaiusa.org/page/file/8e66571f3a79e30c6_g7m6bx9hs.pdf/quickfacts.pdf).

<sup>56</sup> Samhan, *supra* note 53.

<sup>57</sup> ARAB AMERICAN INSTITUTE, *supra* note 55.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> ARAB AMERICAN INSTITUTE, *ARAB AMERICAN POPULATION HIGHLIGHTS*, [http://www.aaiusa.org/page/file/9298c231f3a79e30c6\\_g7m6bx9hs.pdf/population\\_highlights.pdf](http://www.aaiusa.org/page/file/9298c231f3a79e30c6_g7m6bx9hs.pdf/population_highlights.pdf) (last visited Feb. 19, 2010).

Catholics, Eastern Orthodox, or Protestants.<sup>61</sup> Approximately 24% of Arab Americans are Muslims.

### B. Muslims

The world's 1.3 billion Muslims come from diverse nationalities, ethnic and tribal groups and cultures, speak many languages, and practice distinct customs. The majority of the world's Muslims live in Asia and Africa, with the largest Muslim communities in Indonesia, Bangladesh, Pakistan, India, and Nigeria.<sup>62</sup> Eighty-five percent of Muslims worldwide are Sunni. The other 15% are Shia and reside predominantly in Iran, Iraq, and Bahrain.<sup>63</sup> The five tenets of Islam are the confession of faith, the pilgrimage to Mecca, charitable giving, prayer five times a day, and fasting for one month each year from sunrise to sunset.<sup>64</sup> The religious requirement of daily prayer and fasting cause many Muslim employees to seek religious accommodation in the workplace.<sup>65</sup>

In the United States, Islam is the fourth largest religion.<sup>66</sup> It is estimated that two to six million Muslims live in America and originate from countries all over the world.<sup>67</sup> The ethnic origins of the

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<sup>61</sup> ARAB AMERICAN INSTITUTE, RELIGIOUS AFFILIATION OF ARAB AMERICANS (2002), [http://www.aaiusa.org/page/file/b8bad613905570ea97\\_mghwmvb2d.pdf/ancestry.pdf](http://www.aaiusa.org/page/file/b8bad613905570ea97_mghwmvb2d.pdf/ancestry.pdf) (showing that 35% of Arab Americans are Roman/Eastern Catholic, 18% are Eastern Orthodox which includes Antiochian, Syrian, Greek, and Coptic rites; 10% are Protestant, and 13% have no religious affiliation).

<sup>62</sup> JOHN L. ESPOSITO & DALIA MOGAHED, WHO SPEAKS FOR ISLAM? WHAT A BILLION MUSLIMS REALLY THINK 2 (2007).

<sup>63</sup> *Id.*

<sup>64</sup> *See generally id.* at 7-16.

<sup>65</sup> The noon and afternoon daily prayers occur during regular business hours and each prayer requires approximately 15 minutes to complete, preferably in a quiet area such as a private office or empty conference room. On the years when the month of Ramadan occurs in the winter, breaking fast may occur during regular business hours. Accordingly, employees who are fasting require a break from work to eat their first meal of the day. Furthermore, Muslims in some Muslim countries close their businesses, employees in offices adjourn to a prayer room, and professionals and laborers simply stop what they are doing and pray. *Id.* at 12.

<sup>66</sup> THE PEW FORUM ON RELIGION AND PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY, RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC 10 (2008), <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf>.

<sup>67</sup> *See* PEW RESEARCH CENTER, MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 13 (May 22, 2007), <http://pewresearch.org/assets/pdf/muslim-americans.pdf> (estimating 2.35 million Muslims in the United States); IHSAN BAGBY ET AL., COUNCIL ON AMERICAN-ISLAMIC RELATIONS, THE MOSQUE IN AMERICA: A NATIONAL PORTRAIT 3 (2001) (estimating 6-7 million Muslims in America is a reasonable figure in light of the study); *see also* COUNCIL ON ISLAMIC EDUCATION, TEACHING ABOUT ISLAM AND MUSLIMS IN THE PUBLIC SCHOOL CLASSROOM 2 (1995), [http://aai.3cdn.net/ceecfb6bf1ff4950a\\_fjm6bebc1.pdf](http://aai.3cdn.net/ceecfb6bf1ff4950a_fjm6bebc1.pdf). (stating that over 1.2 billion people throughout the world are adherents to Islam).

Muslim population in America are as follow: 42% are African American, 24.4% are South Asian, 12.4% are Arab, 5.2% are African, 3.6% are Iranian, 2.4% are Turkish, 2% are Southeast Asian, 1.6% are Caucasian, and 5.6% are undetermined.<sup>68</sup> Approximately 65% of Muslims in America are foreign-born and 61% of foreign-born Muslims immigrated to the United States in the 1990s or later, thereby making them a relatively new immigrant community.<sup>69</sup> Muslim Americans are younger than the non-Muslim population with 56% of adult Muslims between the ages of 18 and 39 in comparison to 40% in the general public.<sup>70</sup> Approximately one quarter of Muslim Americans have a college degree, including 10% who have completed graduate study, which mirrors the United States general public.<sup>71</sup> Similarly, family income among Muslim Americans is comparable with that of the United States' population as a whole, with 41% of Muslim households earning \$50,000 or more annually, compared to 44% of the general public.<sup>72</sup>

A 2007 study of Muslim Americans reported that 53% of Muslim Americans have found it more difficult to be a Muslim in the United States since the September 11th terrorist attacks.<sup>73</sup> Twenty-five percent of Muslim Americans say they have been the victim of discrimination in the United States. Within the 25% far more native-born Muslims than Muslim immigrants say they have been a victim of discrimination.<sup>74</sup>

### C. *South Asians and Sikhs*

South Asians include persons from Pakistan, Bangladesh, India, Sri Lanka, Nepal, and the Maldives.<sup>75</sup> The majority of South Asian Muslims are from Pakistan, Bangladesh, and the Maldives. The percentage of the Muslim population in these nations is as follows: 97% in Pakistan, 88.3% in Bangladesh, 100% in the

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<sup>68</sup> COUNCIL ON ISLAMIC EDUCATION, TEACHING ABOUT ISLAM AND MUSLIMS IN THE PUBLIC SCHOOL CLASSROOM 5 (1995), [http://aai.3cdn.net/ceeecfb6bf1ff4950a\\_fjm6bebc1.pdf](http://aai.3cdn.net/ceeecfb6bf1ff4950a_fjm6bebc1.pdf).

<sup>69</sup> PEW RESEARCH CENTER, MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 15 (2007), <http://pewresearch.org/assets/pdf/muslim-americans.pdf>.

<sup>70</sup> *Id.* at 18.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 2.

<sup>74</sup> *Id.* at 4.

<sup>75</sup> See generally THE WORLD BANK, THE WORLD BANK ANNUAL REPORT: YEAR IN REVIEW (2008), [http://siteresources.worldbank.org/EXTANNREP2K8/Resources/YR07\\_CH2\\_RP04\\_SAR.pdf](http://siteresources.worldbank.org/EXTANNREP2K8/Resources/YR07_CH2_RP04_SAR.pdf).



Maldives, 12.4% in India, 7% in Sri Lanka, and 4% in Nepal.<sup>76</sup> Although there are a number of different ethnic groups and numerous dialects spoken in South Asia, persons unfamiliar with the region may not easily be able to identify whether a person is of Pakistani origin, Indian origin, a Muslim, a Hindu, or a Sikh. Ubiquitous images in the media of dark skinned men with foreign sounding names, donning beards and turbans portrayed as the “typical” terrorist, caused many South Asians, including those that are not Muslim, to be caught in the dragnet of post-9/11 discrimination, notwithstanding that such a notion is erroneous.

Sikh men wearing turbans that look similar to the turbans worn by Osama bin Laden and the Taliban make Sikhs a visible minority group, and in the wake of the September 11th terrorist attacks, an accessible proxy for Osama bin Laden, Al-Qaeda, and the Taliban.<sup>77</sup> This occurred despite the separate doctrinal views, different geographical homeland, different native languages, and distinct turban styles of Sikhs from those suspected of committing the terrorist attacks. As a result, Sikhs have suffered verbal harassment and have been denounced as terrorists, “bin Laden,” “raghead,” or “towelhead.” They have been subjected to detention by law enforcement, racial violence, denial of entry into public spaces, airport profiling, and employment discrimination.<sup>78</sup> As xenophobia has increased against Muslims, Arabs, and persons perceived as such, the conspicuous Muslim veil and Sikh turban are perceived as marks of separation and proof of a refusal to assimilate into mainstream society.<sup>79</sup>

Sikhism originated in the Punjab, a region that is now split between present-day northwest India and Eastern Pakistan; however, most Sikh Americans are of Indian national origin.<sup>80</sup> Sikhs are not permitted to cut their hair, and male Sikhs are mandated by their faith to wear turbans, which they consider to be an out-

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<sup>76</sup> U.S. Dep’t of State, <http://www.state.gov/> (last visited Oct. 11, 2009) (clicking on the “country” link allows the selection of a particular country, next click on the link indicating the country that was selected, finally click on “background notes” to view the country’s Muslim population).

<sup>77</sup> See generally Neha Singh Gohil & Dawinder S. Sidhu, *The Sikh Turban: Post-9/11 Challenges to this Article of Faith*, 9.2 RUTGERS J. L. & RELIGION 1 (2008).

<sup>78</sup> See Charu A. Chandrasekhar, *Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians*, 10 ASIAN L. J. 215, 216 n.5, 248-52 (2003).

<sup>79</sup> D.C., MD., & VA. ADVISORY COMMITTEES TO THE U.S. COMM’N ON CIVIL RIGHTS, CIVIL RIGHTS, CONCERNS IN THE METROPOLITAN WASHINGTON, D.C., AREA IN THE AFTERMATH OF THE SEPTEMBER 11, 2001 TRAGEDIES (2003).

<sup>80</sup> See generally Gohil & Sidhu, *supra* note 77, at 1, 40-42.

ward manifestation of their devotion to God and adherence to strictures of their religion.<sup>81</sup> Although Sikh women can wear turbans, most choose not to and instead may wear a thin chiffon scarf.<sup>82</sup> Sikh boys start wearing turbans in their teenage years and until then, they wear a smaller under-turban similar to a large bandana wrapped around the boy's hair.<sup>83</sup> The Sikh religion mandates all of its members to keep five articles of faith: unshorn hair, a small comb to keep the hair neat, a steel bracelet, a ceremonial dagger or sword, and long underwear.<sup>84</sup>

The experiences of discrimination by Sikhs have mirrored those of Arabs and Muslims, evincing the American public's conflation of terrorism with anyone who is or perceived to be Muslim, Arab, Afghan, Middle Eastern, or South Asian on the basis of their name, race, religion, ethnicity, or national origin.

#### IV. ETHNIC ORIGIN AND NATIONAL ORIGIN DISCRIMINATION UNDER TITLE VII

Title VII prohibits harassment on the basis of ethnic or national origin.<sup>85</sup> Such harassment is manifested when an employer fails to maintain a workplace free of unlawful discrimination. Denial of equal employment opportunity constitutes national origin discrimination when it is based on an individual's physical, cultural, or linguistic characteristics of a national origin group, or because of the individual's ancestral origin.<sup>86</sup> The Supreme Court defined "national origin" as "the country where a person was born, or, more broadly, the country from which his or her ancestors came."<sup>87</sup> In contrast, discrimination on the basis of citizenship does not qualify as national origin discrimination.<sup>88</sup>

Title VII national origin discrimination claims may be based on theories alleging disparate treatment, disparate impact, or hostile work environment. National origin discrimination suits may be brought by individuals of any national origin who believe they have been victims of discrimination.<sup>89</sup> Title VII also protects those who

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 15.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 12.

<sup>85</sup> *Hafford v. Seidner*, 183 F.3d 506, 513 (6th Cir. 1999).

<sup>86</sup> 29 C.F.R. § 1606.1 (2009).

<sup>87</sup> *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973).

<sup>88</sup> *See id.* at 95.

<sup>89</sup> *See, e.g., Mohr v. Dustrol, Inc.*, 306 F.3d 636 (8th Cir. 2002) (finding that "Hispanic supervisor's alleged derogatory comments about the workplace capabilities of women and non-Hispanics were 'direct evidence' of discrimination, for purposes of

encounter discrimination based on association with individuals of a protected class.<sup>90</sup> The EEOC enumerates the following types of association with a protected class on which a claim of national origin discrimination may be based: “(a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; (d) because an individual’s name or spouse’s name is associated with a national origin group.”<sup>91</sup>

One of the most common claims raised in national origin charges, which are filed with the EEOC, is harassment.<sup>92</sup> Harassment based on national origin “can take many forms, including ethnic slurs, workplace graffiti, or other offensive conduct directed towards an individual’s birthplace, ethnicity, culture, or foreign accent.”<sup>93</sup> Ethnic origin is based on commonly recognized ethnic distinctions, thereby including persons that may not be related to a particular country or region.<sup>94</sup>

The EEOC issued regulations specifically dealing with sexual and national origin harassment.<sup>95</sup> The EEOC’s sexual harassment guidelines apply equally to racial and ethnic or national origin discrimination.<sup>96</sup> Correspondingly, courts have demonstrated agreement in applying a uniform approach in evaluating hostile work environment claims regardless whether they are based on national origin, ethnic origin, race, or sex.<sup>97</sup> Plaintiffs must show pervasive

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summary judgment motion on white female employee’s Title VII claims alleging that employer failed to rehire her based on her gender, race, and national origin”), *abrogated by* *Dessert Place, Inc. v. Costa*, 539 U.S. 90 (2003); *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

<sup>90</sup> *See, e.g.*, *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 574 (6th Cir. 2000) (holding that plaintiff, a terminated university vice president who advocated on behalf of minorities and women, did not need to be a member of a protected class to state a claim under Title VII but only needed to allege that he was discriminated against on the basis of his association of a protected class).

<sup>91</sup> 29 C.F.R. § 1606.1 (2009).

<sup>92</sup> EEOC COMPLIANCE MANUAL § 13-IV (2002).

<sup>93</sup> *Id.*

<sup>94</sup> *See, e.g.*, *Janko v. Ill. State Toll Highway Auth.*, 704 F. Supp. 1531 (N.D. Ill. 1989) (holding that a Gypsy may be entitled to protection against national origin discrimination by virtue of being a member of an ethnic group not originally in the United States and different from the majority).

<sup>95</sup> 29 C.F.R. § 1604.11 (2009); 29 C.F.R. § 1606.8 (2009).

<sup>96</sup> § 1604.11(a), 198 n.1.

<sup>97</sup> *See Crawford v. Medina General Hosp.*, 96 F.3d 830, 834 (6th Cir. 1996) (stating that the elements and burden of proof for “hostile environment” are the same regardless of the discrimination context in which the claim is brought).

or severe harassment, an employer's responsibility for harassment of coworkers, and an employer's failure to take corrective action in response to complaints of harassment.<sup>98</sup>

#### V. THEORIES OF LIABILITY FOR HOSTILE WORK ENVIRONMENT CLAIMS

Much of the post-9/11 discrimination that manifested itself in hostile work environments is expressed through racial slurs, ethnic epithets, and other forms of verbal abuse. The U.S. Supreme Court held that "when a workplace is permeated with discriminatory intimidation, ridicule, and insults that is sufficiently severe or pervasive as to alter conditions of the victim's employment and create an abusive working environment, Title VII is violated."<sup>99</sup> In determining whether harassment is sufficiently severe to create a hostile work environment, the employer's conduct as a whole is evaluated in the context of all the relevant circumstances.<sup>100</sup> In a race-based, religion-based, or national-origin-based hostile work environment, courts have required the plaintiff to demonstrate that: 1) the plaintiff is a member of a protected class; 2) the plaintiff was subjected to verbal or physical conduct based on racial, religious, or ethnic origin; 3) the conduct was unwelcome; 4) the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment; and 5) the existence of employer liability.<sup>101</sup> A plaintiff may establish a cause of action under Title VII notwithstanding the defendant's mistaken belief that the plaintiff's ethnic characteristics are those of a protected class; therefore, plaintiffs do not lose the protection of discrimination laws because they are discriminated against for the wrong reasons.<sup>102</sup>

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<sup>98</sup> See *Newman v. Federal Exp. Corp.*, 266 F.3d 401, 405 (6th Cir. 2001).

<sup>99</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1989) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)).

<sup>100</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 73 (1993) (stating "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.").

<sup>101</sup> *Newman*, 266 F.3d at 405; *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (demonstrating the application of Title VII's hostile environment).

<sup>102</sup> See, e.g., *Estate of Amos v. City of Page*, 257 F.3d 1086, 1094 (9th Cir. 2001) (white plaintiff mistakenly believed to be a member of a protected class); see *LaRocca v. Precision Motorcars, Inc.*, 45 F. Supp. 2d 762, 770 (D. Neb. 1999) (saying terms that would be derogatory to a Mexican person against an Italian plaintiff); 29 C.F.R. § 1606.1 (2009) (illustrating that national origin discrimination includes acts undertaken "because an individual has the physical, cultural, or linguistic characteristics of a national origin group.").

The objectionable environment must be both objectively and subjectively offensive such that a reasonable person would find it hostile or abusive, and the victim in fact perceives the environment as such.<sup>103</sup> In determining whether a hostile work environment exists, courts look at all the circumstances, including the frequency of the discriminatory conduct, the severity of the discriminatory conduct, whether the conduct was threatening, whether the conduct was physically humiliating or a mere utterance, and whether the conduct unreasonably interfered with an employee's work performance.<sup>104</sup> Courts assess the cumulative quantity, frequency, and severity of those slurs to obtain a realistic view of the work environment. The level of severity or seriousness required to give rise to a claim under Title VII varies inversely with the pervasiveness or frequency of the objectionable conduct.<sup>105</sup> Moreover, the derogatory comments do not have to be made in the presence of the employee in order to render the comments relevant to a Title VII hostile work environment claim.<sup>106</sup> In determining employer liability, the employee must show that the employer knew or should have known of the harassment and failed to take prompt reasonable action against the harassing employee.<sup>107</sup>

Hostile work environment claims are generally difficult for plaintiffs to win because courts accept the premise that Title VII is not a "general civility code," and thus only egregious conduct is found to alter the conditions of employment.<sup>108</sup> Conduct that is deplorable, off-color, or offensive to our most basic values of according respect and dignity to every person is not always actionable.

While ethnic jokes and derogatory remarks are a common basis for national origin harassment claims, derogatory remarks alone may not be sufficient proof in the absence of any ethnic content to the remarks. Where discriminatory conduct consists solely of de-

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<sup>103</sup> *Faragher*, 524 U.S. at 787.

<sup>104</sup> *Harris*, 510 U.S. at 23.

<sup>105</sup> *Elison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

<sup>106</sup> *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668 (7th Cir. 1993) (indicating no single act can more quickly "alter the condition of employment and create an abusive working environment," than the use of an unambiguously racial epithet such as "nigger" by a supervisor in the presence of his or her subordinates).

<sup>107</sup> *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989), *reh'g denied*, 874 F.2d 821 (11th Cir. 1989) (discussing corporate liability).

<sup>108</sup> *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); *see also Faragher*, 524 U.S. at 788; BARBARA T. LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 175 (1992).

rogatory comments that are “sporadic or part of casual conversation,” courts decline to find that an employee suffered severe or pervasive discrimination.<sup>109</sup> For example, in *Kahn v. Pepsi Cola Bottling Group*, the Court found that a single incident in which a supervisor called an Indian plaintiff an obscene name was unrelated to the plaintiff’s national origin and thus did not support a claim of discrimination based on national origin.<sup>110</sup> Similarly, in *Torres v. County of Oakland*, the Court held that a supervisor’s reference to the plaintiff as an “ass” or “asshole” in a single incident could not support a national origin harassment charge because those terms are not racially or ethnically charged and the single incident was not sufficiently pervasive to create an abusive working environment.<sup>111</sup> The use of an ethnic or racial epithet that engenders offensive feelings in an employee may be insufficient to create a hostile work environment.<sup>112</sup> Likewise, “racial slurs allegedly spoken by co-workers ha[ve] to be so ‘commonplace, overt and denigrating that they create[ ] an atmosphere charged with racial hostility.’”<sup>113</sup>

Evidence of derogatory remarks based on membership in a protected class combined with pranks and other harassing behavior may constitute harassment based on national origin.<sup>114</sup> In a case where a Hispanic plaintiff was subjected to frequent derogatory comments about Hispanics and rude behavior, the Eighth Circuit held that not all instances of harassment need be overt discrimination to be relevant to a Title VII claim if they are part of a course of conduct which is tied to evidence of discriminatory animus.<sup>115</sup> Thus, the behavior should be analyzed in its entirety to assess the degree of harassment and, while infrequent rude behavior

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<sup>109</sup> *Al-Salem v. Bucks County Water & Sewer Auth.*, No. 97-6843, 1999 WL 167729, at \*5 (E.D. Pa. Mar. 25, 1999) (quoting *McCray v. DPC Industries, Inc.*, 942 F. Supp. 288 (E.D. Tex. 1996)).

<sup>110</sup> 547 F. Supp. 736, 739 (E.D.N.Y. 1982).

<sup>111</sup> 758 F.2d 147, 152 (6th Cir. 1985).

<sup>112</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (citing *Rogers v. EEOC*, 406 U.S. 957 (1972)); *Elmahdi v. Marriott Hotel Serv. Inc.*, 339 F.3d 645, 653 (8th Cir. 2003).

<sup>113</sup> *Edwards v. Wallace Cmty. Coll.*, 49 F.3d 1517, 1521 (11th Cir. 1995) (quoting *EEOC v. Beverage Canners, Inc.*, 897 F.2d 1067, 1068 (11th Cir. 1990)).

<sup>114</sup> *Lagunovich v. Findlay City School Sys.*, 181 F. Supp. 2d 753, 766 (N.D. Oh. 2001) (analogizing a national origin discrimination claim with a sexual harassment claim in *Williams v. General Motors Corp.*, 187 F.3d 533 (6th Cir. 1999) and stating that “plaintiff only has to show that but for their national origin, they would not have been harassed.”).

<sup>115</sup> *Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 799-800 (8th Cir. 2003) (citing *Carter v. Chrysler Corp.*, 173 F.3d 693, 701 (8th Cir. 1999)).

does not create a hostile work environment, the cumulative effect of such behavior might support the claim.<sup>116</sup> Adopting this reasoning, the Seventh Circuit in *Cerros v. Steel Technologies Inc.* stated “[w]hile there is no ‘magic number’ of slurs that indicate a hostile work environment, we have recognized before that an unambiguously racial epithet falls on the ‘more severe’ end of the spectrum.”<sup>117</sup>

Consequently, employers often argue that the alleged conduct is a form of “simple teasing, offhand comments, and isolated incidents” that are not actionable.<sup>118</sup> Moreover, when an employer employs others of the same national origin as the plaintiff, ethnic remarks made during a casual conversation may be used to show a lack of intent necessary to establish national origin discrimination.<sup>119</sup> A showing of the ethnic diversity of the employer’s work force has also been considered as proof that ethnic remarks were not motivated by national origin bias.<sup>120</sup>

A. *Stereotypes Conflating Arabs and Muslims with Terrorism Shape Harassment in the Workplace*

Claims filed in connection with post-9/11 discrimination allege discrimination on account of race, national origin, and religion. Because hostile work environment claims often involve the verbalization of stereotypes and prejudices, such claims offer valuable insight into the extent to which the September 11th terrorist attacks has aggravated public bias against Muslims, Arabs, and South Asians. The passage of the USA PATRIOT Act further aggravated such discrimination by requiring employers to investigate their employees.<sup>121</sup> Consequently, harassment in the workplace has

<sup>116</sup> *Id.* at 800 (consisting of rude noises, laughter, and statements calling plaintiff “stupid,” such as “Hispanics are stupid” and “Hispanics should scavenge for beans on the floor.”).

<sup>117</sup> *Cerros v. Steel Tech., Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002).

<sup>118</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1999) and *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)). *See, e.g.*, *Kosereis v. Rhode Island*, 331 F.3d 207, 209-10, 216 (1st Cir. 2003) (illustrating that Turkish-born Muslim employed as a vocational school instructor claimed residents of school called him “turkey,” and teased him about the food he brought for lunch; name-calling and teasing failed to rise to the level of severe or pervasive conduct); 42 U.S.C. §§ 2000e—2000e-17 (2009).

<sup>119</sup> *See Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977).

<sup>120</sup> *See Fekete v. U.S. Steel Corp.*, 353 F. Supp. 1177, 1186 (W.D. Pa. 1973).

<sup>121</sup> Martin Carrigan, Theodore Alex & Chris Ward, *The U.S. Patriot Act Deconstruction*, *Civil Liberties and Patriotism*, 6 J. BUS. & ECON. RES. 3, 25 (2008) (illustrating the effect of the U.S. PATRIOT Act on businesses and their employees). *See also* Maryann James & Christopher Latham, *Security Issues at Work; Applicants Face More Scrutiny*,

become an act of patriotism for those Americans that associate individuals perceived as Arabs or Muslims with terrorists.<sup>122</sup>

A review of employment discrimination cases involving plaintiffs from these communities shows how negative media depictions and targeted government policies, which predated September 11 and were amplified post-9/11, shaped Americans' views of individuals having any connection with Islam and/or the Middle East. Many, if not all, of the ethnic slurs and epithets directed at the employees have some connection to the stereotyping terminology used in the media in connection with the September 11th terrorist attacks and the indefinite "War on Terror."<sup>123</sup>

As the cases show, the stereotypical portrayals of terrorism shaped by the media have permeated the workplace.<sup>124</sup> These cases also show the courts' general unwillingness to recognize the injurious impact such negative stereotypes have on Muslim, Arab, and South Asian workers.

1. National Origin or Ethnic Origin Harassment Are Often Dismissed on Summary Judgment Because Courts Fail to Recognize Severity of Post-9/11 Ethnic Slurs

Plaintiffs from Muslim, Arab, and South Asian communities face the same challenges in surviving summary judgment as do other plaintiffs alleging hostile work environment claims. However, the factual allegations in the cases below highlight two key points: 1) negative stereotypes conflating Muslims, Arabs, and South Asians with terrorism have become more entrenched with time and permeate the workplace; and 2) absent an immediate physical threat to their safety, plaintiffs facing discrimination in the form of ethnic slurs and epithets may find little relief through the courts. Attorneys, therefore, should provide adequate historical and cul-

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NEWSDAY, Aug. 6, 2004, at A52 (describing employers' increased scrutiny of employees).

<sup>122</sup> See Ass'n of Trial Lawyers of America, *The Post 9/11 Backlash: American Treatment of a Vulnerable Minority in the Workplace*, 2 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 1807 (2004).

<sup>123</sup> See David A. Bosworth, *American Crusade: The Religious Roots of the War on Terror*, 7 BARRY L. REV. 65 (2006) (arguing that the rhetoric of "War on Terror" attracts Americans from all views, from the religious to the liberal, by obscuring the underlying political choices and simplifying the war to one of good against evil, and that people know little about the religion apart from what is disseminated through the media).

<sup>124</sup> See Liaquat Ali Khan, *The Essential Terrorist*, 45 WASHBURN L. J. 47, 48 (2005) (describing in detail the highly influential negative images of Muslims as produced and published in media and literature).



tural context to persuade the courts to analyze the discrimination through the post-9/11 context.

The following cases exemplify the failure of the courts to appreciate the hostility and prejudice associated with accusations of terrorism, disloyalty to the nation, and backwardness of Arab or Middle Eastern individuals.

In *Uddin v. Universal Avionics Systems Corp.*, a co-worker looked at the plaintiff on September 11, 2001 and stated “I am going to buy a gun” at least three times that day.<sup>125</sup> During the war in Afghanistan that same year, a co-worker stated “What’s going on with your cousin in Afghanistan” notwithstanding that the plaintiff was of Indian descent.<sup>126</sup> When the plaintiff’s watch alarm went off, a co-worker jumped and commented she thought it was a “bomb alarm.”<sup>127</sup> Despite the offensiveness of these comments, the court dismissed the plaintiff’s claims on summary judgment because the court found the comments were infrequent and not sufficiently offensive in comparison to other cases where the offensive comments were made 18 times in two and a half weeks and 15 times in a four month period.<sup>128</sup> Rather than focusing on the hostility of the derogatory remarks and prejudice espoused against the Afghan national origin, the court misguidedly limited its analysis to a comparison of the volume of the remarks with an atypical case involving an unusually high volume of slurs.

In *Delfani v. U.S. Capitol Guide Board*, an Iranian and Muslim female employee faced continuous insults and derogatory statements about Muslims and individuals of Middle Eastern descent.<sup>129</sup> The plaintiff’s supervisor made racist comments and jokes during the span of a year after the September 11th terrorist attacks.<sup>130</sup> He chastised the plaintiff more than once as being “heartless” for failing to call him and her co-workers to apologize for the tragic events of September 11, 2001.<sup>131</sup> Although the court dismissed the

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<sup>125</sup> *Uddin v. Universal Avionics Sys. Corp.*, No. CIV.A.1:05-1115(TWT), 2006 WL 1835291, at \*1 (N.D. Ga. June 30, 2006).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at \*2.

<sup>128</sup> *Id.* at \*4-5 (comparing *Hulsey v. Pride Rest., L.L.C.*, 367 F.3d 1238, 1248 (11th Cir. 2004) which involved indirect propositions for sex, following plaintiff to the restroom, attempting to touch plaintiff’s breasts, and placing hands down plaintiff’s pants and *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 509 (11th Cir. 2000)).

<sup>129</sup> No. 03-0949(RWR), 2005 WL 736644, at \*1 (D. D.C. Mar. 31, 2005).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

plaintiff's claims on procedural grounds<sup>132</sup> and thus did not address the merits of her case, the facts alleged in this case further corroborate how the September 11th terrorist attacks have shaped anti-Muslim and anti-Middle Eastern prejudices in the workplace.

In *Hussein v. Highgate Hotels, Inc.*, a co-worker told a Pakistani Muslim that he "did not understand why the United States did not just drop an atomic bomb on Afghanistan."<sup>133</sup> The plaintiff was called "Taliban" on a nearly daily basis and told that he should dress like Osama bin Laden for Halloween.<sup>134</sup> The court's dismissal of the plaintiff's claims on summary judgment because of "surrounding world events" meant that "a reasonable person would not view such a statement as a remark directed as a threat against his or her person, but rather a statement of a political/military opinion."<sup>135</sup> The court here mischaracterizes what is clearly national origin bias as actionable political opinion. Misconstruing ethnic slurs as mere political opinion and as justified by current events undermines the remedial objectives of Title VII and, in effect, provides an exception to national origin and racial discrimination when the derogatory remarks touch upon U.S. foreign policy and military operations. Just as discrimination against persons of Vietnamese origin was not justified, much less legal, during the Vietnamese war, discrimination against Iraqis, Afghans, and other Middle Easterners during the indefinite "War on Terror," focused on primarily Middle Eastern nations, not be tolerated by the courts.

In *Sabra v. Shafer*, a Muslim Arab of Egyptian nationality was asked if he "supported Al-Qaeda," called "Sadam" [sic], and told that "immigration is looking for you" in front of his coworkers.<sup>136</sup> While co-workers were watching a television report on an attempt to shoot the New York City Mayor, a supervisor said, "Sabra here?" implying that he should be considered a suspect due to his Arab origin. The Court deemed the comments merely inappropriate

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<sup>132</sup> *Id.* at \*6.

<sup>133</sup> No. #03-2373, #2005 WL 627964, at \*268 (6th Cir. Mar. 18, 2005).

<sup>134</sup> *Id.* But see Jeanne Meserve & Mike M. Ahlers, *DHS Employee Put on Leave After Wearing "Offensive" Costume*, CNN, Nov. 6, 2007, available at <http://www.cnn.com/2007/US/11/06/ice.costume/> (reporting DHS' decision to suspend employee, who wore striped prison outfit, dreadlocks, and darkened skin make-up to a Halloween fundraiser party, and to conduct an inquiry, after other employees' complaints of offensiveness).

<sup>135</sup> *Delfani v. U.S. Capitol Guide Bd.*, No. 03-0949(RWR), 2005 WL 736644, at \*268-70 (D. D.C. Mar. 31, 2005) (affirming the District Court's granting of summary judgment because plaintiff complained to the harasser but not to the harasser's supervisor or human resources and thus failed to establish respondeat superior liability).

<sup>136</sup> No. 04 Civ. 2759 (LTS) (KNF), 2008 WL 2787964, at \*1-2 (S.D.N.Y. Jul. 17, 2008).

and held that the alleged derogatory comments did not “rise to the requisite level of discriminatory intimidation, ridicule, or insult” to sufficiently support a viable hostile work environment claim.<sup>137</sup>

Notably absent from these courts’ analyses is a recognition of the serious implications that such comments have insofar as imposing guilt by association, questioning the right of these plaintiffs to be in the United States, and accusing them of affiliation with enemies of the state based on his national origin and religion.

2. To Counteract the Court’s Failure to Appreciate the Severity of Post-9/11 Discrimination, Plaintiffs Must Show a High Frequency of Harassment to Survive Summary Judgment

For plaintiffs to survive summary judgment, the racial slurs and ethnic epithets must occur frequently for an extended period of time and/or the plaintiff must face a threat of physical harm. Ultimately, courts hold plaintiffs to a high standard for showing that the objectionable behavior was sufficiently severe and pervasive notwithstanding that the offensive and humiliating ethnic slurs and epithets are based on racist stereotypes. With the exception of the Fourth Circuit in *Sunbelt Rentals*, few courts put the discriminatory conduct in the post-9/11 context in which it took place, and thus fail to realize the degree to which the workplace has been infected with the conflation of Arabs, Muslims, and South Asians with terrorism.

In *Yasin v. Cook County Sheriff’s Department*, a male Arab Muslim was subjected during a one-year period to over one hundred incidents involving racial slurs about his ancestry and national origin and racist graffiti on his locker.<sup>138</sup> The plaintiff received telephone calls and calls over the radio calling him a “sand nigga,” “terrorist,” “camel jockey,” “shoe bomber,” and “Yasin Bin Laden.”<sup>139</sup> Co-workers posted a newspaper article regarding terrorism in America on the plaintiff’s locker. Co-workers also remarked that the plaintiff should “go back to his country” and “get out of America.” In early

<sup>137</sup> *Id.* at \*9-10. See also *Lahrchi v. Lumera Corp.*, No. CO4-2124C, 2006 WL 521659, at \*17 (W.D. Wash. Mar. 2, 2006) (referring to ethnic epithets against an Arab American and a practicing Muslim of Moroccan descent as “stupid” and the speaker as possibly being “insensitive,” but finding the epithets insufficient to establish unlawful discrimination by the defendant employer).

<sup>138</sup> No. 07 C1266, 2009 WL 1210620, at \*4 (N.D. Ill., May 4, 2009) (denying defendants’ motion for summary judgment on grounds that the harassment met the severe or pervasive standard, (citing *Shanoff v. Illinois Dep’t of Human Servs.*, 258 F.3d 696, 704 (7th Cir. 2001)).

<sup>139</sup> *Id.*

2005, a co-worker called the plaintiff on the radio and when he did not respond, another co-worker commented that “he’s making a bomb.” In denying defendants’ motion for summary judgment, the court agreed with the plaintiff that such conduct was more than merely objectionable and “the incessant remarks targeting Yasin—such as ‘terrorist,’ ‘Hussein,’ ‘sand nigger,’ bin Laden,’ ‘shoe bomber,’ and ‘camel jockey’—were discriminatory, insulting, and humiliating.”<sup>140</sup>

In *EEOC v. Sunbelt Rentals, Inc.*, a male Muslim African-American was often called “Taliban” and “towel head” by his coworkers.<sup>141</sup> Plaintiff was asked “are you on our side or are you on the Taliban’s side,” and if “you don’t like America or where we stand, you can just leave.”<sup>142</sup> Furthermore, co-workers frequently made fun of the plaintiff’s appearance, challenged his allegiance to the United States, suggested he was a terrorist, and made comments associating all Muslims with senseless violence.<sup>143</sup> The plaintiff was also the victim of several religiously charged incidents: the first of which involved a co-worker who held a metal detector to the plaintiff’s head and after the detector did not go off, called the plaintiff a “fake ass Muslim want-to-be turban wearing ass.”<sup>144</sup> In a second incident, the same co-worker showed the plaintiff a stapler and said “if anyone upsets you pretend this stapler is a model airplane [and] just toss it in the air, just repeatedly catch it, [and] don’t say anything,”<sup>145</sup> implying that the plaintiff was a terrorist because he was a Muslim. A third incident involved a cartoon which was posted in the public area depicting persons dressed in Islamic or Muslim attire as suicide bombers. In response to the plaintiff’s complaints and after an investigation, his supervisor advised the plaintiff not to “take things so personal” and to maintain a positive attitude so that these issues would “roll right off his shoulder and [he] could leave work with the same positive attitude.”<sup>146</sup> Similarly, a Muslim customer was subject to a litany of other derogatory names such as “Bin Laden,” “Hezbollah,” “Ayatollah,” “Kadaffi,” “Saddam Hussein,” “terrorist,” and “sun nigger.”<sup>147</sup>

In finding that the plaintiff had suffered religious harassment

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<sup>140</sup> *Id.* (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

<sup>141</sup> 521 F.3d 306, 310 (4th Cir. 2008).

<sup>142</sup> *Id.* at 316.

<sup>143</sup> *Id.* at 310.

<sup>144</sup> *Id.* at 311.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 312.

<sup>147</sup> *Id.* at 317.

that was “persistent, demeaning, unrelenting, and widespread,”<sup>148</sup> the Fourth Circuit aptly noted “[i]t is impossible as an initial matter to ignore the context in which the harassment took place. In the time immediately following September 11th, religious tensions ran higher in much of the country, and Muslims were at times viewed through the prism of 9/11, rather than as the individuals they were.”<sup>149</sup> To its credit, the Fourth Circuit noted what few other courts regrettably have overlooked—that the government’s law enforcement efforts targeted against Muslims, Arabs, and South Asians coupled with negative media portrayals contribute to palatable private bias that was expressed in the workplace.<sup>150</sup> Ultimately, the defendant’s habitual use of racial and ethnic epithets and the cumulative effect of such resulted in a reversal of summary judgment and a remand for the case to proceed to trial.<sup>151</sup>

### 3. Intersection of Religion and National Origin – Religious and Ethnic Slurs Evince Conflation of Arabs and Muslims with Terrorism

The number of religion-based charges filed with the EEOC increased by 107% between 1992 and 2007 and were a record high in 2009.<sup>152</sup> National origin discrimination charges also increased during the same time period.<sup>153</sup> A significant source of this increase was caused by post-9/11 discrimination against individuals who are or are perceived to be Muslim, Arab, South Asian, or Sikh.<sup>154</sup> The plaintiffs often suffered from a barrage of ethnic epithets and religious slurs that mirror glaring stereotypes in a post-9/11 security-obsessed political environment in which persons having any association with Islam are automatically suspect.

<sup>148</sup> *Id.* at 316 (quoting *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 984 (4th Cir. 1997)).

<sup>149</sup> *Id.* See also *Olibrices v. State of Fla.*, 929 So. 2d 1176, 1180 (Fla. Dist. Ct. App. 2006) (“in the wake of September 11, 2001, and the ensuing War on Terror against enemies who are thought fanatically Muslim and Arab or Persian in origin, the possibility of group-based, invidious discrimination against Pakistanis in this country is not fanciful but real.”).

<sup>150</sup> See *Hing*, *supra* note 8, at 449 (discussing how racial profiling by the government and flawed reporting by the media has led Chinese American scientists to feel uncomfortable at work or pressured to quit).

<sup>151</sup> *EEOC v. Sunbelt Rentals, Inc.*, 521 F. 3d 306, 321 (4th Cir. 2008).

<sup>152</sup> Naomi C. Earp, *Forty-Three and Counting: EEOC’S Challenges and Successes and Emerging Trends in the Employment Arena*, 25 HOFSTRA LAB. & EMP. L.J. 133, 138 (Fall 2007); Tresa Baldas, *EEPC: 2009 Discrimination Complaints Neared Record High*, THE NAT’L L. J. (Jan. 22, 2010), available at <http://www.law.com/jsp/article.jsp?id=1202437752762>.

<sup>153</sup> Earp, *supra* note 152, at 138; Baldas, *supra* note 152.

<sup>154</sup> Earp, *supra* note 152, at 138.

In one case, an Egyptian Muslim employee was frequently called “Mrs. Osama bin Laden” and subjected to anti-Arab remarks, including comments that Arabs and Muslims were “stupid” and “crazy.”<sup>155</sup> The employee, who had twenty years of company tenure, complained to no avail and was ultimately terminated for reporting the harassment.<sup>156</sup> Another case involved a class of Muslim, Arab, and South Asian employees who were subjected to offensive comments about their religion and/or national origin, were called “terrorist,” “Osama,” “Al Qaeda,” “Taliban,” and “dumb Muslim,” and were cursed and accused of destroying the World Trade Center and the country.<sup>157</sup> Managers also wrote “Osama,” “Binladin,” “Alkادا,” and “Taliban” instead of the employee’s names on work-related documents.<sup>158</sup> Similarly, an East Indian Muslim employee was repeatedly referred to as “Taliban” by employees and two managers and asked “[w]hy don’t you go back to where you came from?”<sup>159</sup> When the employee complained about the harassment to management, they reportedly responded, “[d]on’t let it bother you” and labeled him “a Muslim extremist” shortly before firing him.<sup>160</sup> These cases along with a volume of others demonstrate the pervasiveness of stereotypes conflating Arabs and Muslims with terrorism. The implications are profound because the employee’s loyalty to the country, and by extension to the employer, is called into question, thereby treating him as a fifth column<sup>161</sup> deserving of suspicion and surveillance.

In *Alhalabi v. Missouri Department of Natural Resources*, an Arab American won a favorable jury verdict for his claims of national origin harassment based on ethnicity and religion.<sup>162</sup> Plaintiff started receiving harassing treatment very soon after he started in

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<sup>155</sup> EEOC Litigation Settlement Report, Litigation Settlements (July 2004), available at <http://archive.eeoc.gov/litigation/settlements/settlement07-04.html>.

<sup>156</sup> Press Release, EEOC, Poggenpohl U.S. to Pay \$162,500 to Settle National Origin and Religious Discrimination Lawsuit (June 29, 2004) (on file with author).

<sup>157</sup> Press Release, EEOC, The Plaza Hotel to Pay \$525,000 for Post-9/11 Backlash Discrimination Against Employees (June 8, 2005), available at <http://www.eeoc.gov/press/6-8-05.html>.

<sup>158</sup> *Id.*

<sup>159</sup> Press Release, EEOC, EEOC Sues Houston-Area Car Dealership for Post-9/11 Backlash Discrimination (Aug. 25, 2004) (on file with author).

<sup>160</sup> *Id.*

<sup>161</sup> Merriam-Webster defines “fifth column” as: “a group of secret sympathizers or supporters of an enemy that engage in espionage or sabotage within defense lines or national border.” Merriam Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/fifth%20column>, (last visited Dec. 1, 2009).

<sup>162</sup> *Former employee proves hostile work environment*, Mo. Lawyers Wkly. (Mo. Lawyers Media, St. Louis, Mo.) Sept. 1, 2008.

1991, and the harassment worsened after September 11.<sup>163</sup> The harassment included posting jokes about Arabs and Muslims and repeated postings of inflammatory articles about the Iraq war.<sup>164</sup> The plaintiff also received anonymous notes and flyers in his mailbox accusing him of being a terrorist and telling him that “his kind” was not wanted in the office.<sup>165</sup>

In *EEOC v. WC&M Enterprises, Inc.*, a Muslim salesman of Indian origin suffered a barrage of hostile behavior from co-workers and supervisors.<sup>166</sup> When the plaintiff arrived for his afternoon shift on September 11, 2001, his co-workers and supervisors mockingly asked him where he had been, implying that he had participated in the terrorist attacks against the United States.<sup>167</sup> Subsequently, he faced mocking comments about his dietary restrictions and prayer rituals.<sup>168</sup> His co-workers called him “Taliban” multiple times per day despite the plaintiff’s objections and complaints to his supervisors.<sup>169</sup> The plaintiff’s supervisor issued a written warning that the plaintiff was acting like a “Muslim extremist” and that he could not work with him because of his “militant stance.”<sup>170</sup> In response to the plaintiff’s request not to attend a meeting with the United Way that had no connection with his job, the supervisor stated, “This is America. That’s the way things work over here. This is not the Islamic country where you came from.”<sup>171</sup> A co-worker asked the plaintiff “Why don’t you go back where you came from since you believe what you believe?”<sup>172</sup> The plaintiff also heard numerous comments suggesting that he was involved in the September 11th terrorist attacks and that he was a member of the Taliban because he, like members of the Taliban, was a Muslim.<sup>173</sup> Although the plaintiff had not lost sales as a result of the alleged harassment, the Fifth Circuit noted that Title VII’s prohibition “is not limited to ‘economic’ or ‘tangible’ discrimination”.<sup>174</sup> In contrast to other cases alleging hostile work environment based on

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See BNA, EMPLOYMENT DISCRIMINATION REPORT, Vol. 31 No. 07, ARAB AMERICAN SUPERVISOR WINS \$337,000 FOR HOSTILE ENVIRONMENT IN STATE WORKPLACE (Aug. 13, 2008).

<sup>166</sup> *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393 (5th Cir. 2007).

<sup>167</sup> *Id.* at 396.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* 396-97.

<sup>170</sup> *Id.* at 397.

<sup>171</sup> *Id.* at 396.

<sup>172</sup> *Id.* at 397.

<sup>173</sup> *Id.* at 401.

<sup>174</sup> *Id.* at 399 (quoting *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

similar harassing conduct, the Fifth Circuit reversed summary judgment and remanded the case for trial.<sup>175</sup>

In *Khan v. United Recovery Systems, Inc.*, a female Pakistani Muslim alleged she was harassed and discriminated against because of her sex, religion, and national origin.<sup>176</sup> Shortly after the September 11th terrorist attacks, a co-worker told the plaintiff “all Muslims should be killed because they are f—ing terrorists, that he wished all these Muslims were wiped off of the face of the earth, and that when he entered a convenience store and saw a Middle Eastern store clerk he wanted to shoot the bastard.”<sup>177</sup> The co-worker made fun of Muslim male names and brought a binder to work displaying pictures of Arabic men that he defaced with a black marker. He warned the plaintiff that she should remove her necklace displaying the word “Allah” because she “might just get shot if she kept wearing it.”<sup>178</sup> He made these hostile and vicious comments, while standing extremely close to the plaintiff, pointing his finger directly at her face, and raising his voice.<sup>179</sup> When the plaintiff attempted to appease the co-worker, he responded that “he was racist and proud of it and that it was his God-given right as an American.”<sup>180</sup> Another co-worker harassed the plaintiff as he repeatedly gave the plaintiff newspaper articles regarding mosques in Afghanistan that taught terrorism, attached a note telling her to explain such activity, and demanded that she tell him what she was being taught at the mosque she attended in Houston, implying that it too was teaching terrorism.<sup>181</sup>

Despite the plaintiff’s repeated complaints over months, she was told to stop complaining and focus on her job because all the complaining was making her look bad.<sup>182</sup> The Court denied defendant’s motion for summary judgment and found the remarks to the plaintiff to be malicious, vitriolic, and pervasive, thus meeting the severe and pervasive standard.<sup>183</sup> The Court acknowledged the plaintiff’s fear for her personal safety and the anxiety attacks she suffered as a result of the hostile work environment.<sup>184</sup> For purposes of the plaintiff’s § 1981 claim, the court accepted Pakistani

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<sup>175</sup> *Id.* at 402.

<sup>176</sup> No. CIV. H-03-2292, 2005 WL 469603, at \*1 (S.D. Tex. Feb. 28, 2005).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at \*2.

<sup>182</sup> *Id.* at \*3.

<sup>183</sup> *Id.* at \*18.

<sup>184</sup> *Id.* at \*16-17.



origin as a proxy for race and stated “[w]hen a plaintiff asserts that he has suffered discrimination based on membership in a group that is commonly perceived as ‘racial’ because it is ethnically and physiognomically distinct, we will treat the case as asserting a claim under § 1981 whether he labels that discrimination as based on ‘national origin’ or on ‘race.’”<sup>185</sup>

In *Salem v. Heritage Square, Inc.*, a female Jordanian American alleged discrimination on account of her ethnicity and purported religion.<sup>186</sup> Although she was Christian, her Arab heritage caused her colleagues to believe she was Muslim and they harassed her accordingly.<sup>187</sup> Co-workers asked the plaintiff whether she knew how people could engage in the September 11th terrorist attacks and commented that she might have appeared in news of the attacks.<sup>188</sup> The plaintiff was made to feel “less American” as her language skills and ability to read were repeatedly questioned merely because she was fluent in Arabic.<sup>189</sup> Because a foreign accent falls within the EEOC definition of a “linguistic characteristic of national origin group,” proof that a plaintiff is discriminated against because of a foreign accent establishes a prima facie case of national origin discrimination.<sup>190</sup> Plaintiffs’ colleagues questioned her loyalty to the United States by accusing her of being unable to assimilate into American culture.<sup>191</sup> The plaintiff was also instructed not to speak Arabic with customers as this was deemed unprofessional and inappropriate.<sup>192</sup> The Court considered the totality of the circumstances and denied the defendant’s motion for summary judgment.<sup>193</sup>

In *Hafford v. Seidner*, the Court granted summary judgment for the employer on a religious harassment claim despite evidence that a supervisor had accused the plaintiff of preparing for a “holy war,” mocked the Muslim greeting, and commented that the Muslim religion taught its followers to hate white people.<sup>194</sup> The court held

<sup>185</sup> *Id.* at \*19 (quoting *Jatoi v. Hurst-Eules-Bedford Hosp. Auth.*, 807 F.2d 1214 (5th Cir. 1987)).

<sup>186</sup> No. CIV.A.06-4691 (WHA), 2007 WL 2555513, at \*1 (N.D. Cal. Sept. 4, 2007).

<sup>187</sup> *Id.* at \*3.

<sup>188</sup> *Id.* at \*4.

<sup>189</sup> *Id.* at \*9.

<sup>190</sup> *Bell v. Home Life Ins. Co.*, 596 F. Supp. 1549, 1553 (M.D.N.C. 1984); *see also Carino v. Univ. of Okla. Bd. of Regents*, 750 F.2d 815, 816 (10th Cir. 1984) (holding that discrimination based on a foreign accent may be probative of an intent to discriminate on the basis of national origin).

<sup>191</sup> *Salem*, 2007 WL 2555513, at \*3.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at \*12.

<sup>194</sup> 183 F.3d 506, 514 (6th Cir. 1999).

that such behavior was insufficient to show a hostile work environment.<sup>195</sup>

In *Hyath v. City of Decatur*, a co-worker repeatedly referred to the Muslim plaintiff by the nickname of “Taliban” and “Al Qaeda” and teased the plaintiff about how Muslims dress and the plaintiff’s dietary restrictions.<sup>196</sup> During a routine police training session in which new recruits, including the plaintiff, were exposed to pepper spray, a co-worker stated “[t]hat’s what you get for bombing us you damn Taliban.”<sup>197</sup> Another co-worker then superimposed the plaintiff’s photo onto an FBI poster seeking information about a suspected Islamic terrorist and posted it in the office.<sup>198</sup> In response to the employee’s belated complaints, the employer conducted an internal investigation and concluded that the comments were merely a form of inappropriate joking and not meant to be malicious.<sup>199</sup> The Court agreed and granted the defendant summary judgment.<sup>200</sup> The court opined that even though the plaintiff was offended, the comments occurred in the context of pervasive “nicknames, joking, and teasing” within the police department as opposed to an atmosphere “[c]harged with racial hostility.”<sup>201</sup> The court unduly relied on *Baker v. Alabama Department of Public Safety*, wherein the court found that a computer image depicting the plaintiff as an Arab terrorist was not sufficiently severe to create a hostile work environment.<sup>202</sup>

The Court in *Hyath* emphasized the difference between intimidation and merely offensive utterances or teasing.<sup>203</sup> The Court concluded that the racial epithets in *Hyath* were more akin to racial symbols and slurs including the presence of rebel flags, the letters “KKK” in the workplace, and comments referring to an African American employee as “nigger” or “boy,” which despite their offensiveness did not constitute sufficiently severe or pervasive harassment to alter the conditions of employment.<sup>204</sup> When compared to

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<sup>195</sup> *Id.*

<sup>196</sup> No. CIV.A.1:04-1135 (JEC), 2006 WL 825779, at \*1 (N.D. Ga. Mar. 28, 2006).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at \*2.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at \*20.

<sup>201</sup> *Id.* at \*6.

<sup>202</sup> *Baker v. Ala. Dep’t of Pub. Safety*, 296 F. Supp. 2d 1299, 1309 (M.D. Ala. 2003).

<sup>203</sup> *Hyath v. Decatur*, No. CIV.A.1:04-1135 (JEC), 2006 WL 825779, at \*7-13 (N.D. Ga. Mar. 28, 2006).

<sup>204</sup> *Id.* at \*8 (comparing the facts to *Barrow v. Georgia Pacific Corp.*, No. 04-10937, 2005 WL 1926420 (11th Cir. Aug. 12, 2005)); *but see Zebari v. Pepsi Bottling Co.*, No. 05-CV-72924, 2007 WL 1041199 (E.D. Mich. Apr. 5, 2007) (finding plaintiff’s expres-

*Miller v. Kenworth of Dothan*, where the Eleventh Circuit found sufficient evidence that racial epithets were severe when plaintiff's foreman called him a "spic," "wetback," and "Mexican motherfucker" in an intimidating manner while arguing with plaintiff or berating him for his job performance,<sup>205</sup> the Court focused more on whether the environment was physically hostile as opposed to the degree of offensiveness of the racial epithets.<sup>206</sup>

As shown in the cases discussed above, national origin harassment against Arabs and South Asians often occurs in conjunction with religious harassment. The harassers conflate the ethnic Arab or South Asian with the religious identity of Muslim, resulting in religiously driven racial discrimination. Not only can such actions be a basis for national origin discrimination pursuant to Title VII, but are also actionable under 42 U.S.C. § 1981.

#### B. *Claims of Ethnic or National Origin Harassment Under Section 1981*

The Civil Rights Act of 1866, codified as 42 U.S.C. § 1981 *et seq.*, assures all persons in this country the same right "as is enjoyed by white citizens" to make and enforce contracts.<sup>207</sup> Section 1981 of this Act provides a federal remedy for private acts of racial discrimination in employment as an alternative to remedies available under Title VII.<sup>208</sup> Section 1981 provides a number of advantages in litigating racial harassment claims. For claims brought under § 1981, the statute of limitations may be the four-year-catchall enacted under 28 U.S.C. § 1658 or the most analogous statute of limitations period applied by the state in which the federal court sits.<sup>209</sup> This is considerably less restrictive for plaintiffs when compared to the 300-day maximum time period to submit a charge under Title VII.<sup>210</sup> Since there is no EEOC charge filing requirement, it provides an important basis for redress where the employee has not

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sion of satisfaction with his work during the same period he suffered from ethnic epithets undermined his harassment claims).

<sup>205</sup> *Miller v. Kenworth of Dothan*, 277 F.3d 1269, 1273 (11th Cir. 2002).

<sup>206</sup> *Hyath*, 2006 WL 825779, at \*8.

<sup>207</sup> Civil Rights Act of 1866, 42 U.S.C. § 1981(a) (2006).

<sup>208</sup> *See, e.g.*, *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *see also Danco, Inc., v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1998) (evidencing an instance in which § 1981 gave an independent contractor a racial harassment claim, and by extension a national origin claim, based on the theory behind a hostile work environment claim available to an employee under an ordinary employment contract).

<sup>209</sup> *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004).

<sup>210</sup> 42 U.S.C. § 2000e-5 (e)(1) (2006).

filed a charge within the 180 to 300 day charge filing period, or when there are charge filing deficiencies, which may not become apparent until discovery is conducted in the case. Further, there are no caps on punitive and compensatory damages, as compared to Title VII, which caps such damages at a maximum of \$300,000, depending on the size of the employer.<sup>211</sup> Additionally, § 1981 covers employers regardless of the number of employees, compared to Title VII's coverage of private employers, which requires fifteen or more employees.<sup>212</sup>

Race has been defined broadly to cover immigrant ethnic groups even though national origin discrimination is not within the scope of § 1981.<sup>213</sup> “The concept of race under § 1981 is broad. It extends to matters of ancestry which are normally associated with nationality, not race in a biological sense.”<sup>214</sup> Title VII does not contain a definition of “race,” nor has the EEOC adopted one.<sup>215</sup> Courts have recognized that race is a social construct rather than a fixed and biologically defined group.<sup>216</sup> Title VII prohibits discrimination not just because of one protected trait, such as race, but also because of the “intersection of two or more protected bases” such as race and national origin. The Ninth Circuit noted “where two bases for discrimination exist, they cannot be neatly reduced to distinct components,” because to do so “often distorts or ignores the particular nature of the [plaintiffs’] experiences.”<sup>217</sup> The Second Circuit has recognized that “[a]lthough there may be fundamental conceptual differences between race and national origin discrimination ‘prejudice is as irrational as is the selection of groups against whom it is directed,’ thus we cannot simply assume that employment discrimination invariably fits into neat, clearly distinct legal categories.”<sup>218</sup>

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<sup>211</sup> 42 U.S.C. § 1981a (b)(3) (2006).

<sup>212</sup> 42 U.S.C. § 2000e (b) (2006).

<sup>213</sup> *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 850 (9th Cir. 2004).

<sup>214</sup> *Daemi v. Church’s Fried Chicken, Inc.*, 931 F.2d 1379, 1387 n.7 (10th Cir. 1991).

<sup>215</sup> EEOC Compliance Manual § 15-II (2006).

<sup>216</sup> *See, e.g., Saint Francis Coll. v. Al-Khazrahi*, 481 U.S. 604, 610 n.4 (1987) (discussing scientific and anthropological authorities arguing that “race” is a social construct); *United States v. Nelson*, 277 F.3d 164, 177 n.12 (2d Cir. 2002) (stating that “the modern usage [of race] may well itself be a fiction, in the sense that it groups people into what are no more than socially constructed categories.”).

<sup>217</sup> *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1561-62 (9th Cir. 1994) (claim alleging discrimination based on race and sex are not “distinct elements amenable to almost mathematical treatment.”).

<sup>218</sup> *Deravin v. Kerik*, 335 F.3d 195, 202 n.5 (2d Cir. 2003) (citations omitted) (quoting *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979)).

The U.S. Census Bureau for decades has classified persons originating from Europe, the Middle East, and North Africa as White.<sup>219</sup> For purposes of collection of federal data on race and ethnicity, the Office of Management and Budget now uses five racial categories: American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White; and one ethnicity category, Hispanic or Latino.<sup>220</sup> The OMB has made clear that these “social-political constructs . . . should not be interpreted as being genetic, biological, or anthropological in nature.”<sup>221</sup> The census and its complicated history illustrate the inconsistent and evolving treatment of “racial” categories, as the Census has utilized “racial” categories that have been based on a mixture of concepts including color (White or Black), national origin (e.g., Korean) and state of origin (e.g., Hawaiian).<sup>222</sup> As negative stereotypes and biases post-9/11 are often directed at a person’s race and national origin at the same time, an appreciation for the nature of this prejudice as well as the historical or cultural background of such prejudice is critical to acknowledging the severity of the discrimination.

While the Supreme Court has not ruled directly on whether employment discrimination claims based on national origin can be brought pursuant to § 1981, Justice Brennan, in his concurring opinion in *Saint Francis College v. Al-Khazraji*, highlighted that the distinction between discrimination based on ancestry or ethnic characteristics and that based on place of birth is difficult to make.<sup>223</sup> Nevertheless, some lower federal courts have established a general rule that matters of racial discrimination are the only matters encompassed within § 1981, and they lack jurisdiction to consider suits under that statute based solely on national origin

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<sup>219</sup> EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, PROVISIONAL GUIDANCE ON THE IMPLEMENTATION OF THE 1997 STANDARDS FOR FEDERAL DATA ON RACE AND ETHNICITY 6-7 (Dec. 15, 2000), <http://www.ofm.wa.gov/pop/race/omb.pdf>.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> See Sharona Hoffman, *Is There A Place For “Race” As a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1132-1133 (2004), which observes that since 1900, the census has utilized at least 26 different “race”-related terms to categorize the population. In 1977, the basic categories were: Black, Hispanic, White, American Indian or Alaskan Native, and Asian or Pacific Islander. These categories were criticized as flawed and inconsistent. For example, “Black” was the only group defined by reference to “race,” whereas “Hispanic” was defined by reference to national origin. “Asian or Pacific Islander” and “White” were characterized by geographic origin, while “American Indian or Alaskan Native” was only for those with a cultural identification with the community.

<sup>223</sup> *Saint Francis Coll. v. Al-Khazrahi*, 481 U.S. 604, 613 (1987).

discrimination claims.<sup>224</sup> Other courts, however, take a common-sense approach based on the factual practicalities indicating racial bias against certain groups of distinct national origin.<sup>225</sup> All relevant factors in determining whether members of their national origin group are “discriminated against because they are somehow different as compared to ‘white citizens’” are considered.<sup>226</sup> Courts acknowledge there is “a degree of identity between claims of national origin or ethnic background discrimination and racial discrimination,”<sup>227</sup> thereby rejecting fixed and rigid racial classifications based on quantitative criteria such as “educational achievements, mean earnings, or anthropological racial classifications.”<sup>228</sup> Hence allegations of discrimination based on ancestry coupled with a racial harassment claim are sufficient to properly bring the complaint within the ambit of § 1981.<sup>229</sup>

Discrimination based on color qualifies as racial discrimination under § 1981, and as a result numerous cases have held that Mexican-Americans, Puerto Ricans, or East Indians can sue under § 1981.<sup>230</sup> Persons of South Asian descent may also pursue racial harassment claims under § 1981. Hispanics are likely covered because they are frequently identified as “non-whites.”<sup>231</sup> In 1987, the Supreme Court recognized Arab descent as a “race” for purposes

<sup>224</sup> See, e.g., *Ohemeng v. Del. State Coll.*, 676 F. Supp. 65 (D. Del. 1988); *Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731 (5th Cir. 1986); *Nieto v. United Auto Workers Local 598*, 672 F.Supp. 987 (E.D. Mich. 1987); *Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467 (7th Cir. 1993).

<sup>225</sup> *Sokolski v. Corning Glass Works*, No. 77-35, 1977 WL 15487 (W.D. Pa. Mar. 10, 1977) (stating “[t]he terms ‘race’ and ‘racial discrimination’ may be of such doubtful sociological validity as to be scientifically meaningless, but these terms nonetheless are subject to a commonly-accepted, albeit sometimes vague, understanding” and rejecting Slavic, Italian, or Jewish origin as an actionable basis under § 1981).

<sup>226</sup> *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979).

<sup>227</sup> *Aponte v. Nat'l Steel Serv. Ctr.*, 500 F. Supp. 198, 202 (N.D. Ill. 1980) (citing *Garcia v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 80 F.R.D. 254, 263 (N.D. Ill. 1978)).

<sup>228</sup> *Banker v. Time Chemical, Inc.*, 579 F. Supp. 1183, 1186 (N.D. Ill. 1983); see also *Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977).

<sup>229</sup> *Budinsky*, 425 F. Supp. at 788.

<sup>230</sup> *Van Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977) (holding that Mexican-Americans of brown race or color can sue under § 1981), *vacated on other grounds*, 440 U.S. 625 (1979); *Hernandez v. Erlenbusch*, 368 F. Supp. 752 (D. Or. 1973); *Sabala v. Western Gillette, Inc.*, 362 F. Supp. 1142 (S.D. Tex. 1973), *aff'd in part and remanded in part on other grounds*, 516 F.2d 1251 (5th Cir. 1975); *Banker v. Time Chemical, Inc.*, 579 F. Supp. 1183, 1186 nn.2-3 (N.D. Ill. 1983) (citing cases holding that East Indians qualified as a race for purposes of § 1981 and rejecting reliance on educational backgrounds or financial affluence as factors to consider in defining race).

<sup>231</sup> *Banker*, 579 F. Supp. at 1184. *But see* *Davis v. Boyle-Midway, Inc.*, 615 F. Supp. 560 (D.C. Ga. 1985) (rejecting that all Hispanics, as a group, are subject to racial discrimination).

of § 1981.<sup>232</sup> Because of the courts' inconsistent treatment of national origin harassment, it is imperative that an Arab plaintiff allege harassment on account of race if seeking relief under § 1981, even if the harassment was verbalized in the form of national origin discrimination.<sup>233</sup>

A 2005 case before the Ninth Circuit<sup>234</sup> addressed a racial harassment claim brought under § 1981 by a plaintiff of Arab ancestry.<sup>235</sup> In *El-Hakem v. BJY, Inc.*, the Court affirmed the finding that the CEO's refusal to call Mamdouh El-Hakem by his name and insistence on calling him "Manny" or "Hank" at least once a week in meetings and twice a month for a year created a racially hostile environment in violation of § 1981.<sup>236</sup> Despite the plaintiff's strenuous and repeated objections, the CEO insisted on calling the Egyptian Muslim male employee by a non-Arabic name because a "Western" name would increase the plaintiff's chances of success in the company and would be more acceptable to the company's clientele.<sup>237</sup> The Court noted that "a distinctive physiognomy is not essential to qualify for § 1981 protection,"<sup>238</sup> thereby protecting "persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."<sup>239</sup> Further evincing that names are often a proxy for race and ethnicity, plaintiff testified, "[m]y name is Mamdouh and it's pronounced Mamdouh, and I want you to call me Mamdouh. My name means things to me. It is part of my *identity*. It is part of my *personality*. It is my name. I carry it for forty-four [sic] years. And it's part of *my religion*, and I need to be used and called by the name Mamdouh, which is the name I'm given by my parents."<sup>240</sup>

In another case in 2007, an Afghan woman was subjected to

<sup>232</sup> See *Saint Francis Coll. v. Al Khazraji*, 48 U.S. 604, 613 (1987).

<sup>233</sup> See *El-Zabet v. Nissan N. Am., Inc.*, 2006 FED App. 0929N (6th Cir.) (Jordanian American alleged harassment based on national origin and made no mention of racial harassment, resulting in dismissal of § 1981 claim).

<sup>234</sup> *El-Hakem v. BJY, Inc.*, 415 F.3d 1068 (9th Cir. 2005).

<sup>235</sup> See *Saint Francis Coll.*, 481 U.S. 604 (demonstrating that although persons from the Arab Middle East and North Africa are categorized as Caucasian by the U.S. Census Bureau and in standard Equal Employment Opportunity forms, Arab descent qualifies as a "race" for purposes of 42 U.S.C. § 1981).

<sup>236</sup> *El-Hakem*, 415 F.3d at 1074. See also *Mihoubi v. Caribou Coffee Co., No. CIV.A.1:05-CV-2441(TWT)*, 2007 WL 2331061 (N.D. Ga. Aug. 10, 2007) (although accepting Algerian Muslim plaintiff as a protected class under § 1981, rejecting hostile work environment claim due to plaintiff's failure to complain or indicate disapproval of ethnic slurs and engaging in self-deprecating jokes about being Algerian).

<sup>237</sup> *El-Hakem*, 415 F.3d at 1071.

<sup>238</sup> *Id.* at 1073 (citing *Saint Francis Coll.* 481 U.S. at 613).

<sup>239</sup> *Id.*

<sup>240</sup> Andrew M. Milz, *But Names Will Never Hurt Me?: El-Hakem v. BJY, Inc. and Title VII*

unwelcome and offensive intimidation, ridicule, and insults because of her Afghan origin.<sup>241</sup> The plaintiff worked as a role-player in simulations with U.S. servicemen prior to their deployment to Afghanistan.<sup>242</sup> During her employment, she was forced to reside in barracks infested with cockroaches and rodents and lacking air conditioning in dangerously hot conditions.<sup>243</sup> When she complained about the inhumane conditions, her supervisor yelled at her and physically attacked her.<sup>244</sup> He told her to shut up and stated that if women did not speak English they did not deserve better.<sup>245</sup> She was told to be thankful for having food and a roof over her head because people in Afghanistan did not even have that.<sup>246</sup> Although Afghans are not Arabs, the court conflated Arabs and Afghans in applying the *Al-Khazraji* standard, and found that racial discrimination was present.<sup>247</sup> In addition to demonstrating the cruel harassment faced by some Muslim, Arab, or South Asian employees, this case exemplifies the courts' general ignorance of the difference between someone of Arab, Persian, Afghan, Indian, or Pakistani origin, which more often than not is disadvantageous to the plaintiffs' claims. Therefore, when developing a case strategy, lawyers should take this general lack of knowledge into account and ensure the court is adequately educated on the context in which the national origin harassment is taking place.

## VI. CONCLUSION

The cases discussed in this Article show that accusations of being a terrorist, ethnic slurs about the plaintiff's Arab heritage, or allegations of condoning violence based on a profession of the Islamic faith have become a pernicious staple in some workplaces. The purported parody behind the "jokes" reflects a deep-seated distrust and suspicion of the worker based solely on her religion, ethnic origin, and race. In the post-9/11 context, the harassment questions an employee's loyalty, both to the employer and to the nation, thereby causing co-workers to feel justified in their mistreatment of the plaintiff. In effect a de-Americanization process,

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*Liability For Race Discrimination Based on an Employee's Name*, 16 TEMP. POL. & CIV. RTS. L. REV. 283, 285 (2006).

<sup>241</sup> *Rafiq v. SMI Global Mission Support, Inc.*, No. 2:06CV1332, 2007 WL 433163, at \*2 (W.D. La. Feb. 2, 2007).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at \*3.

<sup>247</sup> *Id.* at \*5.



the Muslim, Arab, or South Asian employee's right to be in the United States and by extension in that particular workplace becomes suspect. She is treated like a fifth column in the workplace worthy of derision and suspicion. This private misconduct is reinforced by, if not a direct result of, governmental racial profiling, watchlisting, and targeted law enforcement initiatives that continue well into 2009. Eight years after the attacks, polls reflect continued misunderstanding of Islam and Arabs that further contributes to negative stereotypes.<sup>248</sup> Fifty-three percent of Americans, for example, express a "not too favorable" or "not favorable at all" opinion about Islam.<sup>249</sup> Cumulatively, this translates into feelings of second-class citizenship and powerlessness in the face of pervasive public bias, interposed into the workplace, against communities plagued by entrenched post-9/11 stereotypes.

The aforementioned cases also raise questions regarding whether courts are too quick to dismiss the harassment as stray remarks because of what judges deem to be excusable ignorance or protected political viewpoints about Arab cultures, Islam, and the Middle East, as opposed to actionable harassment based on malicious discriminatory intent. The "blame the victim" approach often taken by employers, such as in *Sunbelt Rentals* and *Khan* where the employee's responses are characterized as oversensitive and exaggerated, should be rejected by the courts. Although Title VII is not meant to police every offensive comment that occurs in the workplace, the courts should recognize that racial slurs, ethnic epithets, and other forms of discrimination directed at Muslims, Arabs, Middle Easterners, and South Asians are often based on racist stereotypes, as well as implicit biases,<sup>250</sup> that impede equal opportunity in the workplace. Unlike other minority groups in the United States, there are few positive depictions of Arabs, Muslims, Middle Easterners, and South Asians to offset the plethora of negative stereotypes perpetuated through the media and in government policies. As a result, an individual employee is faced with the insurmounta-

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<sup>248</sup> See PEW RESEARCH CENTER, MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 36 (May 22, 2007), <http://pewresearch.org/assets/pdf/muslim-americans.pdf>.

<sup>249</sup> Gallup, *supra* note 20.

<sup>250</sup> Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 N.Y.U. REV. L. & SOC. CHANGE 131, 148 (2006) (stating that in the Implicit Association Test developed by scientists Brian Nosek, Mahzarin Banaji, and Tony Greenwald at Harvard University, over two-thirds of non-Arab, non-Muslim test-takers showed biases against Arab Muslims).

ble burden of convincing co-workers inundated with such stereotypes that he or she is an exception and thus deserving of equal opportunity in the workplace.