

University of Colorado Law School

Colorado Law Scholarly Commons

Publications

Colorado Law Faculty Scholarship

2010

Alienated: A Reworking of the Racialization Thesis After September 11

Ming H. Chen

University of Colorado Law School

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Civil Rights and Discrimination Commons](#), [Immigration Law Commons](#), [Law and Race Commons](#), and the [National Security Law Commons](#)

Citation Information

Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 AM. U. J. GENDER SOC. POL'Y & L. 411 (2010), available at <https://scholar.law.colorado.edu/faculty-articles/216>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Publications by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact rebecca.ciota@colorado.edu.

HEINONLINE

Citation: 18 Am. U. J. Gender Soc. Pol'y & L. 411 2009-2010

Provided by:

William A. Wise Law Library



Content downloaded/printed from [HeinOnline](#)

Tue Feb 28 16:29:18 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

ALIENATED: A REWORKING OF THE RACIALIZATION THESIS AFTER SEPTEMBER 11

MING H. CHEN*

I. Introduction	412
II. Racialization Thesis: Post-September 11 Responses to Arabs, Muslims, and South Asians	414
A. Processes of Racial Formation	415
B. Orientalism and the Perpetual Foreigner Motif.....	417
III. Alienation: A Reworking of the Racialization Thesis	420
A. Definition of Alienation	420
B. Specific Instances of Alienation after September 11	422
1a. Alien Profiling of LPRs and Naturalized Citizens.....	423
1b. Employment Discrimination and Hate Crimes.....	425
2. Conflating the Muslim-Looking with Undocumented Immigrants	426
3. Antiterrorism Measures: Exceeding the Boundaries of the Law	427
IV. Implications of Shifting from Racialization to Alienation	430
A. Distortions of Immigration Law	431
B. Distortions of Antidiscrimination Laws.....	434
V. Conclusion	436

* U.C. Berkeley, Jurisprudence and Social Policy Program (Ph.D anticipated 2010); J.D., New York University School of Law (2004); B.A., Harvard University (2000). Special thanks to Leti Volpp, whose writing inspired the piece, and to Angela Harris, whose encouragement sustained it. Thanks also to LatCrit discussants Robert Chang, Neil Gotanda, and Tom Romero; to Rachel Moran, Michael Omi, and Juliet Stumpf; and to U.C. Berkeley colleagues in the Asian Americans and the Law Seminar, Interdisciplinary Immigration Workshop, and the Global Migrations Seminar.

I. INTRODUCTION

At the dawn of comprehensive immigration reform and in the dusk of an ongoing war on terror, government and citizen responses continue to target Arabs, Muslims, South Asians, and others presumed to be Muslim extremists or "Arab Terrorists."¹ Eight years after the September 11 attacks, surveys show that Muslims face more discrimination inside the United States than any other major religious group and indeed more than any group other than homosexuals.² After a brief leveling-off period, concerns over extremism have resurged since the November 2009 Fort Hood killings by Maj. Nidal Malik Hasan and the attempted suicide bombing by Umar Farouk Abdulmutallab on a Northwest Airlines flight in December 2009. President Obama has announced increased security measures that include profiling of those with "Muslim-sounding names," and four U.S. representatives called for a "professional and legal backlash against Muslims" while promoting their book, *Muslim Mafia*, in 2009.³

While the prevailing description of the post-September 11 stereotyping and discrimination is that of "racialization," this article argues that a more apt social description would be to label the practice "alienation." Furthermore, this article argues that a better legal response to this practice than the use of immigration law would be to use antidiscrimination provisions which respect national origin. While the focus of this article is on Muslims and its core principles are drawn from Asian American jurisprudence, the premises here apply equally to the scapegoating of undocumented immigrants—popularly known as "illegal aliens" and

1. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002) (showing that subsequent to September 11 over twelve hundred noncitizens have been detained).

2. PEW FORUM ON RELIGION & PUB. AFFAIRS, THE PEW RESEARCH CTR., VIEWS OF RELIGIOUS SIMILARITIES AND DIFFERENCES: MUSLIMS WIDELY SEEN AS FACING DISCRIMINATION 4 (2009), <http://pewforum.org/newassets/images/reports/summer09/survey0909.pdf> (reporting results from the 2009 Annual Religion and Public Life Survey). See ASIAN LAW CAUCUS, RETURNING HOME: HOW US GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION'S DOORSTEP (April 2009), <http://www.asianlawcaucus.org/wp-content/uploads/2009/04/Returning%20Home.pdf> (finding that Muslim, South Asian, and Middle Eastern communities have come to expect harassment and discriminatory treatment); see also CARDOZO IMMIGRATION JUSTICE CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 30 (2009), http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-41/IJC_ICE-Home-Raid-Report%20Updated.pdf (documenting ICE's abuse of detainees requires more supervision); TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIV., IMMIGRATION PROSECUTIONS FOR SEPTEMBER 2009, available at <http://trac.syr.edu/tracreports/bulletins/immigration/monthlysep09/fil/> (reporting that immigration enforcement under Obama has risen since Bush-Era numbers, especially when proceedings before U.S. Magistrate Courts are included).

3. P. DAVID GAUBATZ & PAUL SPERRY, MUSLIM MAFIA: INSIDE THE SECRET UNDERWORLD THAT'S CONSPIRING TO ISLAMIZE AMERICA (2009).

widely perceived as Mexicans—and have important consequences for LatCrit and discussions of border-related immigration reform.

Part II reviews the literature proclaiming the formation of a new racial identity among Arabs, Muslims, and South Asians following September 11. Part III draws on theories of Orientalism, racial triangulation, and the perpetual foreigner motif to posit that the post-September 11 response to Arabs, Muslims, and South Asians results from the formation of an alien identity. Part IV explains the significance of the shift from the concept of racialization to alienation for lawyers, judges, and legal scholars by connecting it to the jurisprudence of national origin discrimination. Specifically, Part IV enumerates instances where the “alienating” practices of the government function not only to cause harm to their intended targets, but also to distort the legal requirements of American immigration and citizenship. Part IV.A argues that the United States’ over-reliance on immigration law as a weapon against terrorism—using a complex scheme of immigration legislation and judicial opinions in lieu of a comprehensive terrorism framework—renders immigration law and policy incoherent. Part IV.B shows that mischaracterizing suspected terrorists as noncitizens and illegal aliens, or alternatively employing the paradigm of race, imperils equality rights under federal antidiscrimination law. This article then concludes that processes of “alienation” enable the government to detain, deport, and discriminate against its citizens and legal immigrants in ways wholly inconsistent with constitutional guarantees and antidiscrimination logic. This treatment has consequences not only for Muslims, but also for Latinos and other immigrants who are the new scapegoats in the current discourse on immigration reform that has included proposals to deploy the National Guard to the Mexican border as part of the war on terror.

Three premises should be clarified from the outset. First, citizenship requirements unavoidably draw lines between those deemed “insiders” and those deemed “outsiders.”⁴ Global migrations, including but not limited to, those of citizens whose attenuated loyalties grow into anti-American sentiments, place unprecedented stress on this nation’s struggle to maintain a cohesive identity amidst an increasingly diverse polity. In recognition of this externally/internally-imposed stress, this article posits that the pressure extends outward—extraterritorially—with the “us versus them” racial dynamic of yesteryear (black versus white, north versus south), playing itself out on a globally-scaled playing field of citizens versus noncitizens, countrymen versus aliens.

4. See T. Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 *FORDHAM L. REV.* 1689, 1692 (2001) (arguing that by defining “insiders” under citizenship we define “outsiders” as well, and that by guaranteeing full and equal rights to “insiders,” we inadvertently support fewer rights for “outsiders”).

Second, this article contends that racialization, while not wholly inaccurate, is an insufficient explanation for the post-September 11 phenomenon. This article begins by recounting the problems associated with the racialization thesis in order to clear the way for a framework more closely aligned with the experiences of Arabs, Muslims, and South Asians. While the alienation thesis is meant to serve as a reworking of the racialization thesis, rather than a rejection of it, this paper presumes that maintaining an unrelenting focus on race obscures the phenomenon of alienation and elides critical distinctions between traditional minorities and so-called new immigrants, many of whom lack the opportunity to fully integrate into American society in light of their perceived or actual transnational identities as naturalized citizens.⁵

The third premise is really a clarification of terminology: the proposed term “alienation” is inspired by the use of the term “alien” as a descriptor of legal status in immigration law, as opposed to an operative term within a Marxist critique of capitalism. “Nativism” is a similar term used mostly to describe antipathy or discrimination against South European immigrants in the 1920s, but “alienation” is endorsed as a preferable alternative because it denotes the distinctly pernicious phenomenon of the citizens and the state constructing the legal status of Muslims, South Asians, and Arabs as alien outsiders, regardless of their actual legal status, after September 11.⁶

II. RACIALIZATION THESIS: POST-SEPTEMBER 11 RESPONSES TO ARABS, MUSLIMS, AND SOUTH ASIANS

In a newspaper article commemorating the fifth anniversary of the September 11 attacks, the *San Francisco Chronicle* reported, “[a]s the war on terror heads into its sixth year, a new racial stereotype is emerging in America. Brown-skinned men with beards and women with head scarves

5. See generally YEN LE ESPIRITU, HOME BOUND: FILIPINO AMERICAN LIVES ACROSS COMMUNITIES AND CULTURES (2003) (providing further discussion of the racialization of transnational communities); TOMAS JIMENEZ, REPLENISHED ETHNICITY: MEXICAN AMERICANS, IMMIGRATION AND IDENTITY (2009) (detailing the sociological perspective on migrants); NADIA Y. KIM, IMPERIAL CITIZENS: KOREANS AND RACE FROM SEOUL TO L.A. (2008).

6. See 2 Waldo E. Martin & Patricia Sullivan, eds., *Nativism, in CIVIL RIGHTS IN THE UNITED STATES* 545, 545-47 (2000) (defining and explaining the meaning of Nativism as an “antiforeign” feeling); cf. Mark Adams, *Fear of Foreigners: Nativism and Workplace Restrictions*, 74 OR. L. REV. 849, 853-63 (1995) (tracing the origins and modern causes of Nativist sentiments towards various immigrant groups, including, primarily, Asians and Latinos). See generally VICTOR ROMERO, ALIENATION: IMMIGRANT RIGHTS, CONSTITUTION, AND EQUALITY IN AMERICA 9-23 (2004) (focusing on the ambiguous legal status of foreign-born adoptees, undocumented immigrants, tourists, foreign students, and same-gender bi-national partners); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 2 ASIAN L.J. 55 (1996) (showing the effects of racial Nativism on Asians, specifically the Chinese).

are seen as ‘Muslims’—regardless of their actual faith or nationality.”⁷ While the specific terms vary, the critical race scholars’ and sociologists’ characterization of the emergent alien identity have coalesced around appearances and phenotype, as evidenced by the enduring stereotypes regarding “Muslim-looking”⁸ people and by the expression “flying while brown.”⁹ The nature of their grievance is typically that the socialization of these groups into mainstream society is accompanied by the assignment of an inferior racial identity that is subordinate to whites within a racial hierarchy. This Part reviews the legal literature describing post-September 11 responses to Arabs, Muslims, and South Asians as processes of racial formation. Part II.A describes the dominant narrative of racial formation among Arabs, Muslims, and South Asians, or “racialization;” Part II.B describes a variant stream from Asian American scholars premised on the perpetual foreigner motif.

A. Processes of Racial Formation

The paradigmatic work on racial formation is *Racial Formation in the United States: From the 1960s to the 1980s*, by U.C. Berkeley and U.C. Santa Barbara professors Michael Omi and Howard Winant.¹⁰ Their theory of racial formation describes the creation and characterization of racial categories as a variable process that has played out differently for different groups.¹¹ This process leads to different trajectories for blacks, whites, and “the other non-Whites.”¹² “Native Americans faced genocide, blacks were subjected to racial slavery, Mexicans were invaded and colonized, and Asians faced exclusions.”¹³ Moreover, the process constructs a racial hierarchy with whites on top and racial minorities, particularly African

7. See Matthai Chakko Kuruvila, *Typcasting Muslims as a Race*, S.F. CHRON. Sept. 3, 2006, at A1 (reporting examples of non-Muslim Arabs who are assumed to be, and harassed for being, Muslim).

8. See Muneer Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1263, 1278 (2004) [hereinafter *A Rage Shared by Law*] (arguing that there has been a major shift in the American racial paradigm in that Muslim, Arabs, and South Asians, after September 11, are defined as “Muslim-looking” people).

9. 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, 222 (2003) (arguing that racial profiling against men of Arab descent as an airline security precaution increased in prominence in the aftermath of the September 11 terrorist attacks).

10. See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S* (1986).

11. *Id.* at 137-44 (concluding that racial formation is largely dependent on phenotype and that a “color-blind” public policy would not be the correct method of addressing racial identities in the United States).

12. See generally Neil Gotanda, “Other Non-Whites” in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186 (1985).

13. OMI & WINANT, *supra* note 10, at 1.

Americans and Latinos, on the bottom. As Professor Winant explained in an interview with the *San Francisco Chronicle* regarding the racialization of Arabs, Muslims, and South Asians, beliefs are hard to spot on the street and stigma demands a physical image. As a result, “[w]e have to get racial, because it’s got to work through appearances.”¹⁴ Yen Le Espiritu elaborates on the significance of racial formation in pan-ethnic communities, using as his case study the forging of an Asian American identity from previously distinct, migrant communities.¹⁵ While immigrants hailing from Japan, China, Korea, Vietnam, and India may not have shared a common language, history, or culture in their native lands, they underwent a shared experience of being “raced” upon arriving in America.¹⁶ Similarly, Middle Easterners from divergent lands are consolidated into a single ethnic identity that is socially nonwhite or perhaps brown, even if the law has historically considered Middle Easterners white.¹⁷

A review of the burgeoning literature on post-September 11 responses to Arabs, Muslims, and South Asians reveals that the modern racial reality is even more complicated. While many legal scholars seem to be responding to a similar set of circumstances that includes stereotyping, discrimination, and violence toward “Muslim-looking” people, there is little agreement on the terms of this identifiable and mutually agreed-upon phenomenon.¹⁸ In the absence of a unifying theory, many scholars have settled on the

14. Kuruvila, *supra* note 7, at A1.

15. See generally YEN LE ESPIRITU, ASIAN AMERICAN PANETHNICITY 19-52 (1992) (analyzing the process by which the Chinese, Japanese, Koreans, and other “Asians” came to be identified as an Asian American community).

16. Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 57 (1997).

17. See generally John Tehranian, *Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship*, 82 IND. L.J. 1 (2007). This disjuncture between the legal and social status of Middle Easterners exemplifies the muddled thinking associated with the use of “racialization” as a term to describe all forms of identity-consolidation.

18. See, e.g., Sunita Patel, *Performative Aspects of Race: “Arab, Muslim, and South Asian” Racial Formation After September 11*, 10 ASIAN PAC. AM. L.J. 61, 87 n.11 (2005) (noting that “[w]ithout adequate theory to decipher the relationship between national origin, religion, and race, recent scholarship uses a variety of phrases to describe the victims of post-September 11 events”); see also Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 20 SOC. TEXT 72, 104 (2002) (arguing that hate crimes and racial profiling are best understood by using multiple elements of social, political, and cultural phenomena); Chandrasekhar, *supra* note 9, at 216 (showing discrimination aimed at South Asian passengers of airlines); Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E. L. 121, 136-37 (2008/2009) (arguing that film, television, media, academia, the courts, and the government have negatively affected Muslim and Islamic violence); Nancy Murray, *Profiled: Arabs, Muslims, and the Post-9/11 Hunt for the Enemy Within*, in CIVIL RIGHTS IN PERIL: THE TARGETING OF ARABS AND MUSLIMS 27, 27 (Elaine C. Hagopian ed., 2004) (discussing the various legal attacks used by the government on Muslims classified as the “enemy within”).

inherited paradigm of racial stereotyping from the civil rights era and its successor, critical race theory: “racialization.” Muslim racialization extends the black-white paradigm, but it does not necessarily alter the basic notion of a color spectrum. John Tehranian and other Middle Eastern scholars point out that in practice, the Muslim category cuts across racial groups. Moreover, Middle Easterners are actually classified by the government as white, even though they do not enjoy the privileges associated with being white.¹⁹ Consequently, the problematic treatment of Muslims stems from a confusion among racial categories. Slightly more nuanced positions are taken up by Irene Silverblatt and Devon Carbado, who suggest that this sort of “race thinking” encapsulates a broader phenomenon than racism. Silverblatt says that it actually refers to “any mode of construing or engaging social hierarchies through the lens of descent.”²⁰ Carbado disaggregates multiple dimensions of citizenship and unpacks the ways that these layers align for different racial groups. The model most closely fitting the Asian American experience diverges from the myth of naturalization by classifying Asian Americans as ineligible for citizenship.²¹ Shifting the focus from race to descent or national origin improves the analysis of identity formation, but it does not by itself clarify the confused position of Muslim identity.

Some scholars have instead sought to classify the treatment of Muslims in nonracial terms, such as religious profiling.²² While these reclassifications hue closer to the complex reality of modern profiling, their focus remains on the belief systems and behaviors of an alternative social identity within a familiar array of protected categories from antidiscrimination law—race, religion, color, sex—rather than recognizing the construction of Muslims as legal outsiders.

B. Orientalism and the Perpetual Foreigner Motif

Against the background of Omi and Winant’s influential theory of racial formation, Asian American race theorists have described a distinctive racialization process for Asian Americans which serves as a model for

19. See John Tehranian, *supra* note 17, at 2 (giving an example of Middle Easterners being caught in a racial “Catch-22”); see also IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 16 (Richard Delgado & Jean Stefancic gen. eds., N.Y. Univ. 2006) (explaining why being white is so important and concluding that whether you are white or non-white dictates your eligibility for naturalization); *supra* text accompanying note 17.

20. See Sherene Razack, *Introduction: Race Thinking and the Camp, in CASTING OUT: THE EVICTION OF MUSLIMS FROM WESTERN LAW AND POLITICS* 4, 8 (2008) (quoting Irene Silverblatt) (expressing that race thinking divides the world between those that are deserving and those that are undeserving accordingly by descent).

21. Devon Carbado, *Racial Naturalization*, 57 *AMERICAN QUARTERLY* 633 (2005).

22. See, e.g., Moustafa Bayoumi, *Racing Religion*, 6 *THE NEW CENTENNIAL REV.* 267, 275-78 (2006).

understanding the transformation of Muslims into aliens. Sucheng Chan's social history of Asian Americans, for example, describes the ongoing depiction of Asians as perpetual foreigners and attempts to explain the processes by which Asians viewed as "alien" outsiders are racialized and subordinated.²³ Claire Jean Kim posits dual processes of "civic ostracism" and "relative valorization" that work together to position a minority group.²⁴ Kim's signal insight is that these two group-centered processes of socialization do not merely run in parallel: they influence the relative position of groups and render interdependent the multiple dimensions of group identity. Collectively, Kim and Chan illuminate the anti-immigrant, as well as racist, dimensions of hostility distinctively experienced by Asian Americans. The dual nature of mainstream hostility, and the Asian American identity that emerges in response to it, bespeaks a similar tension presented in the consolidation of a post-September 11 Arab, Muslim, and South Asian identity. However, the positioning of Asian identity in relation to only blacks and whites is limiting not only because there are other colors in the rainbow, but because actual or perceived legal status also comes into play.

The distinctiveness of Asian American processes of racialization goes at least as far back as Justice Harlan's 1896 dissenting opinion in *Plessy v. Ferguson*, the foundation upon which modern civil rights laws have been built, which states: "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."²⁵

American citizenship, through the process of naturalization, aspires to challenge the immutability of racial difference by setting forth a myth that becoming a citizen bestows "insider" status on heretofore "outsiders." The reality, of course, has always been that traditional processes of racialization work to produce clear "second class citizenship" for naturalized citizens who are also racial minorities, unlike the magic that transformed European immigrants into full members of society.²⁶ Nevertheless, for blacks integrated after the fall of Jim Crow, Latinos incorporated through territorial acquisition, and Native Americans relocated to tribal reservations, the rightness of granting citizenship and other fundamental dimensions of nationality acquiesced to issues of social acceptance. This

23. See SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 45, 167-69 (1991) (discussing the tension between being part of a "model minority" while maintaining second-class citizenship).

24. Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 *POL. & SOC'Y* 105, 118-22 (1999).

25. 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

26. See Carbado, *supra* note 21.

was not true for Asian Americans.

Moreover, Asian American law scholars have excavated within the theme of the perpetual foreigner the notion of disloyalty. The Chinese Exclusion Acts that led to the plenary power doctrine were forged in response to the post-Civil War labor needs of the mid-1800s and may have fueled the opinion of Justice Harlan in *Plessy*.²⁷ As gold became harder to find and competition increased, animosity toward the Chinese and other foreigners grew. Public opinion discredited the Chinese, blamed them for white unemployment, and accused them of being unpatriotic.²⁸

The sense of Asian distinctiveness begun in the Chinese Exclusion era only heightened during the World War II internment of Japanese American citizens. Security-based justifications for internment in *Korematsu v. United States*²⁹ arose amid doubts that citizens with conflicting loyalties to two countries at war might prefer the Japanese emperor to the American president.³⁰

27. See Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 19 (2003) (arguing that agencies like INS have relied on their plenary power to detain and deport Muslims and Arabs "on the basis of secret evidence"); see also MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND ALIEN CITIZENS 8 (2005) (arguing that racial formations created "alien citizens," or native born Asian Americans and Mexican Americans who remain alien in the eyes of the nation); Leti Volpp, "Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship, 8 ASIAN L.J. 71, 75-76 (2001) (arguing that while citizenship promises the protection guaranteed by the Fourteenth Amendment, Equal Protection can be denied through the government's failure to protect the civil, political, and social rights of persons of color).

28. For more associations between Chinese Exclusion and disloyalty, see NATSU SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE (2007).

29. See *Korematsu v. United States*, 323 U.S. 214, 223-34 (1944) (upholding Executive Order 9066, directing the internment of Japanese American citizens, under a strict scrutiny framework for racial classification rather than a plenary power justification); *Hirabayashi v. United States*, 320 U.S. 81, 104 (1943) (sustaining a conviction obtained for violation of a curfew order under the 1942 Congressional Act and the same basic executive and military orders, all of which were aimed at the twin dangers of espionage and sabotage because they satisfied the War Powers requirements).

30. See Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 30 (2002) (arguing that it is unlikely the Court believed that the military had any expertise on racial issues in *Korematsu*); Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 9 ASIAN L.J. 195, 197 (2002) (citing the dissent of Justice Murphy in *Korematsu*, which stated that the majority had fallen into the "ugly abyss of racism"); Elbert Lin, *Korematsu Continued . . .*, 112 YALE L.J. 1911, 1917-18 (2003) (characterizing the legal justifications for permitting government violations of Arab and Arab Americans' civil liberties as reminiscent of those used to justify the internment of Japanese and Japanese Americans in *Korematsu*); Elbert Lin, *Identifying Asian America*, 33 SW. U. L. REV. 217, 252 (2004) (defining Asian American scholarship by the perpetual foreigner motif). See generally Natsu Taylor Saito, *Japanese American Redress and the Raging of Arab Americans as Terrorists*, 8 ASIAN L.J. 1 (2001) (showing that *Korematsu* was like other similar detainee cases in that the Court accepted the government's military necessity reasoning at face value); Volpp, *supra* note 1.

Recent scholarship on the mistrust of Muslim-looking people after September 11 most often analogizes it to the construction of Asian American “others” who were frequently and unfortunately deemed not only different, but also “disloyal.” Scholars such as Eric Yamamoto, Maggie Chon, Frank Wu, Carol Izumi, and Jerry Kang articulate the modern manifestation of such Asian distinctiveness in a remarkable casebook that utilizes the internment as a lens for understanding Asian American jurisprudence more broadly.³¹ Law professor Natsu Saito also makes explicit links between the Japanese internment experience and the post-September 11 response to Arabs, Muslims, and South Asians, stating that “[j]ust as Asian Americans have been raced as foreign, and from there as presumptively disloyal, Arab Americans and Muslims have been raced as terrorists.”³² Presumed to be enemy aliens or shadowy fifth columns, prone to using their insider status to benefit the Japanese emperor, the Japanese residing in America simply could not be trusted to abide by the magic of citizenship—whether bestowed by birth or acquired through naturalization—and its attendant ceremony of loyalty to the United States. The parallels to the experience of Muslim Americans are striking. These linkages between immigrant identity and disavowal of the law take us into the modern moment, where immigration law and criminal ideologies are intertwined.³³

III. ALIENATION: A REWORKING OF THE RACIALIZATION THESIS

As a reworking of the “racialization” hypothesis, this article argues that a more apt description for the process of identity group construction vis-à-vis post-September 11 responses to Arabs, Muslims, and South Asians is “alienation.” This Part defines alienation, drawing on theories of Orientalism and the perpetual foreigner motif to re-interpret the construction of the target group and its responses toward public and private acts of discrimination.

A. Definition of Alienation

As set out in this article, alienation is a process by which citizens and states construct an identity for a target group in opposition to those who share membership within a putatively legal community. The “process” is

31. ERIC YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001).

32. See Saito, *supra* note 30, at 12; see also Joo, *supra* note 30, at 33 (“[B]y relying on the racial presumption of disloyalty, it constructs the meaning of the ‘Oriental’ racial category to include disloyalty and legitimates the analytical relevance of such racial myths.”).

33. See generally Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

one of boundary construction, akin to what sociologists call group-making in the tradition of Weberian social closure.³⁴ The “target group” referred to here consists of the conglomerate of Arabs, Muslims, and South Asian “Muslim-looking” people who are either actually noncitizens, or perceived to be. However, the same concept could easily be extended to Mexicans and other actual or perceived immigrant groups who have been excluded from the boundaries of citizenship. The putatively legal community refers to social, cultural, political, and legal belonging within the American polity, but is defined by who it does *not* include—chiefly, and to varying degrees, naturalized citizens, legal permanent residents (“LPRs”), and undocumented immigrants. In the wake of the September 11 rhetoric about the war on terror, the criminalization of immigration law exacerbated the oppositional boundary used to separate “us” from “them,” resulting in what Juliet Stumpf calls the “crimmigration crisis.”³⁵ While the ostensible justification for the dividing line is the appropriateness of a sovereign nation state establishing its boundary of membership, the blurring of citizen/noncitizen, legal/illegal, and immigrant/criminal suggests considerable confusion.

Understanding that nation states necessarily draw their boundaries along geopolitical lines and frequently assign differing bundles of benefits and burdens to “insiders” and “outsiders,” more needs to be said about the distinctive process of alienation in the United States. As a nation comprised of high percentages of immigrants from an unusually wide array of national origins, the United States is particularly prone to displacing its foreign policy conflicts onto the members of its community who are perceived to be affiliated with, or responsible for, the external threat by virtue of their transnational identities. The United States has long internalized its threats whilst engaged in international conflicts. As a consequence, a Red Scare and foreign conflict with the Soviet Union during the Cold War were accompanied by the excesses of McCarthyism and the deportation of Eastern European immigrants, and antipathy toward Axis powers led to the harassment and internment of German Americans during World War I. Asian American scholars have similarly described threat displacement—in the form of discrimination and government-ordered internment—following the bombing of Pearl Harbor by the Japanese during World War II. In the same spirit, the post-September 11

34. In a thought-provoking response to Eduardo Bonilla-Silva, Mara Loveman suggests that increased emphasis on processes of boundary construction, maintenance, and decline and de-emphasis on structural theories of racism would improve our understanding of racial phenomena. See Mara Loveman, *Is “Race” Essential*, 64 AM. SOC. REV. 891, 891 (1999).

35. *Id.* at 893.

war on terror is attended by excessive antiterrorism efforts and undue suspicion toward Arab, Muslim, and South Asian people—regardless of their actual status as citizens or immigrants descended from the Middle East.³⁶ The perceived competition for the loyalty of Arab, Muslim, and South Asian people threatens their belonging in the American polity. Rather than merely placing these people on the margins—some naturalized citizens, some immigrants—but still within the boundaries of a legal imaginary, an oppositional identity is constructed that stigmatizes them as ambiguously ominous others: illegal aliens.

B. Specific Instances of Alienation after September 11

The unwelcome social construction of Arab, Muslim, and South Asians as alien others, regardless of actual legal status, and without regard to internal distinctions between LPRs, undocumented immigrants, and suspected terrorists, is perpetrated by both institutions and individuals. However, the focus in this article is on institutional wrongdoing. I claim that alienation precipitates the consolidation of a new identity group that is peculiarly vulnerable to invidious profiling, discrimination, and violence by citizens and the state. Furthermore, the target group is vulnerable to the elimination of legal and political protection, in the form of constitutional liberties and judicial protection, at the hands of the government. Citizenship, after all, consists of the right to have rights. Sherene Razack says in *Casting Out: The Eviction of Muslims from Western Politics*,

[c]ommunities without the right to have rights are significantly different from those who are merely discriminated against.³⁷ They are constituted as a different order of humanity altogether by virtue of having no political community willing to guarantee their rights, and whatever is meted out to the rightless becomes of no concern to others.³⁸

This Part elaborates on three instances in which the government and its

36. See Kuruvila, *supra* note 7 (stating that Professor Winant's summary is indicative of alienation even though he invokes the language of racialization: "The United States has always had this tendency to racialize its international conflicts domestically, to view international conflicts as domestic threats. As a nation of immigrants, it's the easiest place in the world to internalize its external conflicts."); *id.* (showing that Winant's logic on the Arab-Israeli conflict has helped frame stereotypes of Arabs and Muslims: "The U.S. is so heavily allied with Israel that the kind of day-in, day-out demonization of Arabs that is associated with that conflict comes home with a vengeance to the United States."). Without deflecting attention from the events of September 11 and the terrorist attacks precipitated by Al Qaeda, I note the similarity in my argument and Winant's casual observations. The difference remains that Winant's recent remarks remain insufficiently integrated into a theory of racialization or theorized into an alternate theory of socialization.

37. SHERENE RAZACK, *CASTING OUT: THE EVICTION OF MUSLIMS FROM WESTERN POLITICS* 7 (2008). A similar point is made in Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994).

38. *Id.* See also Bosniak, *supra* note 37, at 1081 (arguing that national communities can exercise their prerogative to define their communities' memberships).

polity have downgraded the citizenship status of its Arab, Muslim, and South Asian community members.

1a. Alien Profiling of LPRs and Naturalized Citizens

Within days after the terrorist attacks, and despite cautionary memoranda circulated by then-Transportation Secretary Norman Mineta, who was among those Japanese American citizens interned during World War II and who later became the first Asian American mayor and Congressional Representative of San Jose, racial profiling emerged as the government's primary weapon of choice in the newly-declared War on Terrorism.³⁹ The Bush Administration's policy guidance on ending racial profiling by federal law enforcement included an exception for "law enforcement activities involving threats to national security or the integrity of the nation's borders."⁴⁰ Moreover, the guidance authorized federal law enforcement officials, including airport screeners and personnel, to consider race and ethnicity in the course of "matters of national security, border integrity, or possible catastrophic loss of life."⁴¹ The policy guidance constructively works to ban racial profiling in counterterrorism efforts for everyone *except* Arabs, Muslims, and South Asians. As a practical matter, the profiling of these communities is almost always on the purported basis of national security, and these communities are almost always suspected of terrorism. The national security exception is particularly troubling in light of the federal government's abuses in its antiterrorism investigations and prevention activities, as documented in 2003 by the Office of the Inspector General.⁴² After the December 2009 attempted bombing by a Muslim from Nigeria, the Obama administration will likely retain, if not strengthen, these measures.⁴³

Just as troubling, according to a series of polls conducted in the aftermath of September 11, sixty percent of respondents to a national survey told researchers that authorities should single out people who look

39. See generally Laura Blumenfeld, *Norman Mineta: Shipping Out*, WASH. POST, June 29, 2006, at A25.

40. See U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 3, 2003), available at http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm [hereinafter GUIDANCE REGARDING THE USE OF RACE] (arguing that existing legal and constitutional standards provide substantial protections at every step of the investigative and judicial process).

41. *Id.*

42. See U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 195-97 (Apr. 2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf> [hereinafter DOJ/OIG REVIEW OF THE TREATMENT OF ALIENS].

43. See GUIDANCE REGARDING THE USE OF RACE, *supra* note 40.

“Middle Eastern” for security screening at locations such as airports and train stations.⁴⁴ This figure stands in contrast with the eighty percent of Americans opposed to racial profiling prior to September 11, when the term referred primarily to pretextual stops of African Americans and Latinos.⁴⁵ What, aside from the national origin of the September 11 hijackers, accounts for this change of heart? As the title of Pew Research’s 2007 study suggests, Muslim Americans are “middle class and mostly mainstream.”⁴⁶ Compared with Muslims in other Western societies, Muslim Americans are relatively well-integrated into mainstream society. Most (seventy-two percent) say their communities are good or excellent places to live, and equal numbers believe in the American dream.⁴⁷ When asked whether they think of themselves first as an American or as a Muslim, forty-seven percent of Muslims in the U.S. think of themselves first in terms of their religion, while twenty-eight percent identify themselves first as Americans and eighteen percent identify as both.⁴⁸ To put these figures in context, forty percent of Christians say they think of themselves first in terms of religion.⁴⁹ Most importantly, Muslim Americans share the concern about Islamic extremism: seventy-six percent are very or somewhat concerned about the rise of Islamic extremism around the world, compared with seventy-eight percent of the U.S. general population.⁵⁰

While racial profiling gives us a reference point for understanding post-September 11 government profiling and citizen stereotyping, it does not fully capture its effects. Whereas racial profiling is meant to link

44. See Quinipiac Univ. Research Inst., *Americans Say 9/11 Bigger than Pearl Harbor, Quinipiac University National Poll Finds; Voters Back Profiling in Security Checks, Wiretaps* (Aug. 29, 2006), available at <http://www.quinipiac.edu/x1284.xml?ReleaseID=952&What=&strArea=&strTime=120> (noting that practicality or fear outweighs political correctness and is motivating Americans to approve racial profiling).

45. See Nicole Davis, *The Slippery Slope of Racial Profiling*, COLORLINES, Winter 2001, at 2, available at <http://www.colorlines.com/prINTERfriendly.php?ID=429> (emphasizing that before September 11, 2001, racial profiling had all but disappeared in the Arab American community).

46. See THE PEW RESEARCH CTR., *MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM* (May 22, 2007), <http://pewresearch.org/assets/pdf/muslim-americans.pdf> (contrasting the views of the Muslim population as a whole with those of the U.S. general population, and with the attitudes of Muslims world-wide).

47. See *id.* at 2 (noting that many Muslims believe that Muslims coming to the United States should try to adopt American customs, rather than trying to remain distinct from society).

48. See *id.* at 31 (finding that Muslims in Western Europe and in predominantly Muslim countries are much more likely to identify themselves as Muslim first).

49. See *id.* (noting that forty-eight percent of Christians identify themselves as American first, while seven percent identify themselves as both).

50. See *id.* at 49, 53 (calculating that just five percent of Muslim Americans express even somewhat favorable opinions of al Qaeda).

marginalized groups with criminal conduct, alienation links marginalized groups with the criminal acts of a wholly different group: extremist Muslims from other countries.

*1b. Employment Discrimination and Hate Crimes*⁵¹

Discrimination against Arab, Muslim, and South Asian people has exploded since September 11, 2001. A national study released by economic researchers at the University of Illinois and similar reports from the Equal Employment Opportunity Commission ("EEOC") found that the earnings of Arab and Muslim men working in the United States dropped about ten percent in the years after the September 11, 2001 terrorist attacks.⁵² Indeed, so overwhelming was the number of complaints received by the EEOC that the agency created a new category "Z" to track acts of discrimination against Middle Eastern, Muslim, and South Asian workers after September 11.⁵³ In the fifteen months between September 11, 2001 and December 11, 2002, the EEOC received 705 such complaints.⁵⁴ Extending the time horizon to 2009, 1,021 charges alleged post-September 11 backlash.⁵⁵ In the broader category of national origin, which captures the majority of post-September 11 backlash charges, the number of charge statistics has increased steadily every year, rising from approximately 8,000 in 2001 to 11,000 in 2009 (with a notable bump in fiscal year 2002, the year immediately following the September 11 attacks).⁵⁶ With the suspicious rise of claims based on religious-based discrimination, one may

51. See *A Rage Shared by Law*, *supra* note 8 (describing the mutually reinforcing relationship between individual hate crimes and governmental racial profiling).

52. See Robert Kaestner, et al., *Labor Market Effects of September 11th on Arab and Muslim Residents of the United States*, 42 J. HUM. RESOURCES 275, 289 (2007) (discussing the effect of the September 11 terrorists attacks on employment and earnings of first- and second-generation Arab and Muslim men in the United States).

53. See EQUAL EMP. OPPORTUNITY COMM'N, EEOC PROVIDES ANSWERS ABOUT WORKPLACE RIGHTS OF MUSLIMS, ARABS, SOUTH ASIANS AND SIKHS (May 15, 2002), available at <http://www.eeoc.gov/eeoc/newsroom/release/5-15-02.cfm> (creating a "Process Type Z" to track how many charges have been filed by individuals who believe they have experienced backlash discrimination as a result of the September 11 attacks).

54. See EQUAL EMP. OPPORTUNITY COMM'N, FACT SHEET: MUSLIM/ARAB EMPLOYMENT DISCRIMINATION CHARGES SINCE SEPTEMBER 11 (Dec. 12, 2002), available at <http://www.adc.org/index.php?id=1682> (noting that only 507 charges had been resolved and that fifty-four "Z" category cases contained Title VII violations).

55. See EQUAL EMP. OPPORTUNITY COMM'N, FACT SHEET: BACKLASH EMPLOYMENT DISCRIMINATION CHARGES RELATED TO THE EVENTS OF 9/11/2001 AGAINST INDIVIDUALS WHO ARE, OR ARE PERCEIVED TO BE, MUSLIM, ARAB, AFGHANI, MIDDLE EASTERN OR SOUTH ASIAN (Sept. 11, 2009) [hereinafter EQUAL EMP. OPPORTUNITY COMM'N FACT SHEET, BACKLASH] (acknowledging that 1,017 cases have been resolved and only four are still pending).

56. See EQUAL EMP. OPPORTUNITY COMM'N, NATIONAL ORIGIN-BASED CHARGES: FY 1997 – FY 2009, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/origin.cfm> (finding that charges rose to approximately 9,000 in 2002 but dropped to approximately 8,400 in 2003).

surmise that many more incidents likely went unreported or were lumped as charges in other, more established categories, such as race or religion.⁵⁷ Needless to say, most of the Arab, Muslim, and South Asian workers had nothing to do with September 11.

In addition, Asian and Islamic communities were the targets of violent hate crimes, including nineteen murders, verbal harassment, intimidation, and physical violence including vandalism of homes, businesses, and places of worship.⁵⁸ While it is possible to view hate crimes through the lens of race alone, mitigation doctrines, which are typically reserved for crimes of passion, provide a different lens through which to view such acts. Rather than comprehending the crimes as pure expressions of racial hatred, some attackers claim to have justifiably detected danger and sought revenge from a potential terrorist.

2. *Conflating the Muslim-Looking with Undocumented Immigrants*

Just as quickly as airports were closed in New York City as a response to the September 11 attacks, discussions of a fence along the US-Mexico border began. The link between these two responses to entirely separate types of immigration control is assumed, rather than explained in rational terms. The rhetoric and policy surrounding the wall mirror the frenzy behind proposals to criminalize mere presence without documents, to deport immigrants for the slightest criminal infractions, and other confections of undocumented status with criminal activity, disloyalty to the state, and terrorist activities. While many Muslim-looking immigrants are swept into this dragnet, the primary targets in many cases—nonsensically—are Mexican immigrants assumed to be undocumented.

What perpetrates these illogical leaps in logic? Aside from sheer moral panic, it seems that this is a classic instance, linguistically, of metaphor translation from one domain (criminal) to another (immigration), which takes place by highlighting one very specific feature (entry without

57. See EQUAL EMP. OPPORTUNITY COMM'N FACT SHEET, BACKLASH, *supra* note 55 (noting that in the same time period, the EEOC received 4,970 charges of religious-based discrimination for being Muslim, whereas from 1993-2001, only 2,026 such charges were filed); see also LAURA BETH NIELSEN ET AL., EMP. DISCRIMINATION LITIG. PROJECT, CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987-2003 (2008), http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf; Wendy Parker, *Lessons in Losing: Race and National Origin Employment Discrimination Litigation in Federal District Court*, No. 05-09 Wake Forest University Legal Studies Paper (Feb. 1, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=678082.

58. See *A Rage Shared by Law*, *supra* note 8, at 1262, 1266-77 (claiming that physical violence against Arabs, Muslims, and South Asians has been accompanied by a legal and political violence that, taken together, produce psychological violence and re-racialize the targeted communities as "Muslim-looking foreigners unworthy of membership in the national polity").

authorization), and makes it the defining feature of the broader legal response. The notion of an “illegal alien,” for example, is loosely identified with the notion of one who commits illegal activity. Those illegal activities are translated as criminal activities. Since criminals commit criminal activities, the chain of logic is held complete without ever establishing the accuracy, let alone rationality, of the links. It is particularly problematic that these linguistic mistakes take place in the language of law, carrying with them hefty consequences for immigrants and for immigration law.⁵⁹

Another way of understanding this transformation of suspected terrorists into illegal aliens is to remember the project of oppositional identity construction that undergirds the alien demarcation.⁶⁰ The ramifications extend beyond the Muslim-looking, with harmful effects for undocumented immigrants and others defined as not belonging within the legal imaginary. In other words, the harms extend to all of those alienated by post-September 11 laws.

3. *Antiterrorism Measures: Exceeding the Boundaries of the Law*⁶¹

The Bush administration developed, and the Obama administration maintains, an elaborate set of practices that either directly sanction or propitiate the profiling of Arabs, Muslims, and South Asians, without regard for their citizenship status. While the practices run the gamut of law enforcement, some of the most egregious practices have been expressly authorized by national security concerns or justified by a national security exception to antidiscrimination policies. These include: a dragnet resulting in the arrest and detention of 1,200 to 2,000 Arabs, Muslims, and South Asians; FBI questioning and misleading reporting/registration requirements for these individuals through the National Security Entry/Exit Registration System (“NSEERS”); race-based immigration policies; and selective

59. I thank Jonathan Simon for the term “metaphor translation” and for these insights about the connection between immigration and criminal law enforcement. Seeds of these ideas are contained in JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

60. See *supra* text accompanying note 34.

61. See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 300 (2002) (contending that the civil rights deprivations resulting from the war on terror may have long-term, adverse impacts on the civil rights of all citizens as well as noncitizens in the United States); see also Chris K. Iijima, *Shooting Justice Jackson's Loaded Weapon at Ysar Hamdi: Judicial Abdication at the Convergence of Korematsu and McCarthy*, 54 SYRACUSE L. REV. 109, 115 (2004) (arguing that *Hamdi* legitimizes two converging and complementary forces: the necessity to define national identity in relationship to a racialized “other” and the use of that national identity to promote and justify an agenda of suppressing progressive movements, which threaten a right-wing political vision for this country’s future).

enforcement of immigration laws of general applicability.⁶² There has also been routine harassment by local law enforcement agents and intrusive questioning or searches by U.S. Customs and Border Protection (“CPB”), and later, by Immigration and Customs Enforcement (“ICE”) agents, during travel.⁶³

The Migration Policy Institute concluded from its eighteen-month study of immigration policies after September 11 that “harsh measures . . . have failed to make us safer, have violated our fundamental civil liberties, and have undermined national security.”⁶⁴ Among the findings:

- The U.S. government overemphasized the use of the immigration system.
- Immigration enforcement is of limited effectiveness as an antiterrorism measure.
- Arresting a large number of noncitizens on grounds not related to domestic security gives the nation a false sense of security.⁶⁵

These findings are bolstered by those of the Office of the Inspector General (“OIG”), the internal watchdog of the Department of Justice (“DOJ”). After reviewing the cases of 762 noncitizens detained during the first eleven months after September 11 (almost all of whom were Arab, Muslim, or South Asian), the OIG found that the FBI and the former Immigration and Naturalization Service (“INS”) “made little attempt to distinguish” between immigrants who had potential ties to terrorism and those who were merely swept up by chance in the course of the federal

62. See Akram & Johnson, *supra* note 61, at 331, 334 (observing that Zacarias Moussaoui, a noncitizen in federal custody for immigration violations on September 11, was the one and only noncitizen indicted in connection with a role in the hijackings); see also PENN. ST. UNIV. DICKINSON SCHOOL OF LAW, CTR. FOR IMMIGRANTS’ RIGHTS, NSEERS: THE CONSEQUENCES OF AMERICA’S EFFORTS TO SECURE ITS BORDERS 15 (2009), <http://www.adc.org/PDF/nseerspaper.pdf> [hereinafter NSEERS: THE CONSEQUENCES OF AMERICA’S EFFORTS TO SECURE ITS BORDERS] (describing the controversial part of NSEERS as a domestic “call-in” registration that was limited to certain males who were nationals and citizens of twenty-five countries who were admitted in, and last entered, the United States as a non-immigrant).

63. See ACLU, 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 DISCRIMINATION 32 (2009), http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf (charging that the FBI and CBP forced Muslims to either inform on their friends and relatives or risk alienating U.S. authorities and facing possible penalties and deportation).

64. See *America after 9/11: Freedom Perceived or Freedom Lost?: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 219 (2003) (statement of Muzaffar A. Chishti, Director, Migration Policy Institute at New York University School of Law) (finding that instead of focusing on the gathering, sharing, and analysis of intelligence, the government conducted roundups of individuals based on their national origin and religion).

65. See *id.* at 221-22 (recognizing that the government’s major successes in apprehending terrorists have not come from post-September 11 immigration initiatives, but from other efforts, such as international intelligence activities, law enforcement cooperation, and information provided by arrests made abroad).

investigation.⁶⁶ The OIG further found that the INS failed to serve the detainees with timely notice of the charges against them, that the DOJ improperly detained many of the detainees even after immigration judges had ordered them removed, and that many of the detainees were subjected to “unduly harsh” conditions of detention and “patterns of physical and verbal abuse.”⁶⁷

A particularly unfortunate consequence of the ill-formed government response has been the erosion of trust between Arab and Muslim communities and law enforcement. As a primary example, a special “voluntary” call-in registration program endeavored to gather information about non-immigrants present in the United States and to deport those with immigration violations.⁶⁸ These cross-purposes resulted in many non-immigrants rightly fearing that they would be detained or deported if they attempted to comply or altogether declined to register. A second example is the DOJ’s efforts to enlist state and local law enforcement agencies to enforce federal immigration law.⁶⁹ In addition to arguably violating principles of federalism, such actions undercut the trust that local law enforcement have built with immigrant communities, making immigrants less likely to report crimes, come forward as witnesses, or provide intelligence information out of fear that they or their families risk detention or deportation. As the Migration Policy Institute report states, “[t]he government’s actions against Arabs and Muslims have terrified and alienated hardworking communities across the nation.”⁷⁰ By “alienating” Arab and Muslim Americans, law enforcement lost a vital asset in the war

66. See DOJ/OIG REVIEW OF THE TREATMENT OF ALIENS, *supra* note 42, at 69-70, 196 (maintaining that the FBI should have taken more care to distinguish between aliens whom it actually suspected of having a connection to terrorism as opposed to aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism but simply were encountered in connection with an FBI lead).

67. See *id.* at 197 (declaring that many aliens characterized by the FBI as “of high interest” were detained under extremely restrictive conditions which were conducive to verbal and physical abuse).

68. See NSEERS: THE CONSEQUENCES OF AMERICA’S EFFORTS TO SECURE ITS BORDERS, *supra* note 62, at 38 (finding the call-in registration included the explicit targeting of communities for heightened scrutiny).

69. See Immigration and Nationality Act, 8 U.S.C. § 1357(g) (2006) (authorizing the federal government to enter into agreements with state and local law enforcement agencies and permitting designated officers to perform immigration law enforcement functions when properly trained and supervised, which functions include identifying, processing, and when appropriate, detaining immigration offenders they encounter during their daily activities).

70. See MIGRATION POLICY INST., AMERICA’S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11 9 (2003), <http://www.migrationpolicy.org/pubs/AmericasChallenges.pdf> (arguing that the subsequent failure of government leaders to speak out on a sustained basis against discrimination, coupled with the Justice Department’s aggressive immigration initiatives, sent a message to individuals and companies that discrimination against Arabs and Muslims was acceptable).

on terrorism. Research confirms that the government's major successes in apprehending terrorists have come from international intelligence activities, including the British government's foiling of a terrorist plot in summer 2006 (precipitated by a tip from an insider of the Arab British community), and law enforcement cooperation with oppressed communities.⁷¹ While there is not space to develop the idea in this article, antiterrorism measures that move the government into the zone of lawlessness and illegality have echoes in policies of deporting undocumented immigrants.

IV. IMPLICATIONS OF SHIFTING FROM RACIALIZATION TO ALIENATION

Alienation may be favored over racialization as a thesis for understanding the social phenomenon that plagues Arabs, Muslims, and South Asians in America for many reasons, including its rhetorical resonance. When introduced at the "Governing Beyond September 11 Conference" at Boalt Hall School of Law in 2006 and at LatCrit 2007 and 2009, several of the conference attendees remarked on the rhetorical capacity of the term "alienation" to link the specific phenomenon of post-September 11 "othering" to the construction of a social category based on a legal classification that it falls outside the reach of the law, rather than race. Some remarked on the term's ability to evoke the sense that the target group being described falls so far beyond a boundary of shared experience that they cease to be fully human in the minds of those who label them.⁷² Indeed, the invocation of the term "alienation" means to convey the notion that aliens are not only foreigners insofar as they are noncitizens; they are foreigners insofar as their beliefs, conduct, and experiences distance them from the experiences of insiders to a social group. Moreover, the social distance between the alienated and the membership renders them distant from other, more accepted civilizations, e.g. the Canadian or European noncitizen "alien."⁷³

71. More generally, since September 11, the use of secret evidence to detain and deport foreign nationals has been rationalized by arguments that noncitizens do not deserve the same due process rights as citizens. DAVID COLE, *ENEMY ALIENS* 170-74 (2003). Cole notes that "every federal court that has addressed the practice over more than a decade prior to September 11 had declared the use of secret evidence unconstitutional." *Id.* at 177 n.53. These practices are particularly troubling in light of their spread beyond immigration law.

72. See, e.g., Leti Volpp, *The Culture of Citizenship*, 8 THEO. INQUIRIES IN L. 571, 585 (2007) (arguing that for territorial, moral, or cultural reasons, the citizen can be assumed (falsely) to be absent of culture and the noncitizen emerges as an "other" who is repudiated from citizenship through total identification with an inassimilable cultural difference).

73. See Siri Agrell, *Tough U.S. Security Rules May Target Foreign-Born Canadians*, GLOBE & MAIL, Jan. 4, 2009, available at <http://karygiannismp.com/7thterm/7ththoussecurityrules.pdf> (describing a diplomatic tiff between the Canadian and U.S. governments when the United States initially refused to treat a Canadian citizen born in Saudi Arabia as a Canadian after the United States instituted heightened scrutiny of certain foreign nationals).

This Part embraces the rhetorical resonance of the term alienation to express the fate of a group marked “alien” in both common conversation and legal doctrine. However, it additionally endeavors to demonstrate that the term not only has rhetorical resonance, but it also has practical significance for legal scholars, lawyers, and judges. Part IV.A focuses on distortions of immigration law—the law of boundary maintenance and admission—that have emerged in the black hole created by a lack of terminology for alienation. Part IV.B focuses on the constrained judicial interpretations of the equality owed territorially present immigrants; while not the only manifestation, this Part emphasizes misunderstandings that flow from a sparse understanding of the national origin provisions within antidiscrimination statutes like Title VII of the Civil Rights Act.⁷⁴

A. Distortions of Immigration Law

In order to prevent future terrorist attacks, the government has committed to using “every available tool,” including immigration laws. Where citizens are involved, due process protections are stripped when suspects are (erroneously) assumed to be out of status. Where noncitizens are involved, immigration law endows the government with far greater latitude than does the criminal law in its treatment of suspects. The Supreme Court has long held that deportation is not punishment; therefore, immigration proceedings are civil rather than criminal.⁷⁵ As such, noncitizens in immigration proceedings do not enjoy many of the constitutional protections afforded criminal defendants. As Daniel Kanstroom describes, “[t]his principle reduces to the basic idea that noncitizens have no substantive claim to remain in the United States and are therefore subject to whatever rules Congress chooses to make, even if they are retroactive. They are not being punished; they are simply being regulated.”⁷⁶

Unlike criminal defendants, noncitizens in immigration proceedings do not enjoy a presumption of innocence, and silence may be used against them. There is no grand jury, no right to appointed counsel, no speedy trial

74. Some may also raise the concern that prohibited “national origin” discrimination under domestic antidiscrimination law will be equated with permissible “nationality” discrimination under immigration law, meant to deal with border control and foreign policy issues. This conflation of antidiscrimination and immigration enforcement is a perennial risk, not dissimilar to the tension between employment law and the Immigration Reform and Control Act’s employer sanction provisions.

75. See, e.g., *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

76. See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1895 (2000) (noting that although the Court views deportation as a regulation, this does not mean that every deportation law is immune from constitutional scrutiny nor does it mean that the nature of that scrutiny is immutable).

guarantee, no jury trial, and increasingly, no right to release on bond pending trial or removal.⁷⁷ The exclusionary rule does not apply, and immigration regulations may be applied retroactively, without violating the Ex Post Facto Clause.⁷⁸ Although Fifth Amendment due process rights apply in theory, the protections are minimal at best. The rules of evidence do not apply, and the government may use secret evidence against the noncitizen.⁷⁹ Moreover, the government has, in most cases, kept proceedings closed to the public and limited the access of attorneys to important documents.⁸⁰ Guantánamo attorney and law professor Muneer Ahmad observes that, in light of these strategic advantages, “it is not surprising that among the thousands of arrests that have been made as part of the war on terrorism, only a handful have involved terrorism criminal prosecutions, while hundreds, if not the majority, have been based on immigration violations.”⁸¹ Compare these to the protections that will be enjoyed by Khalid Shaikh Mohammed, self-described mastermind of the September 11 attacks, especially if he is tried in a federal district court.

The breadth of the federal immigration power derives not only from the lack of positive rights granted to noncitizens, but also from the near total deference that courts grant the political branches in the exercise of the immigration power pursuant to the plenary power doctrine. A peculiar feature of alienage law is that it occurs on two tracks, with vastly different consequences for the alien. On one track, plenary power, which provides the government with exclusive jurisdiction over the regulation of immigration, affords Congress and the White House extraordinary deference in its decisions to exclude or deny entry to outsiders, sometimes requiring even less than rational review to make these decisions. On the other track, strict scrutiny guarantees the individual maximum protection from the coercive power of the state. When a suspect classification is invoked—such as noncitizens who lack the power to vote or the right to

77. See *A Rage Shared by Law*, *supra* note 8, at 1272-73 (acknowledging that where noncitizens are involved, immigration law provides the government with far greater latitude to engage in preventive practices than does the criminal law).

78. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 593-96 (1952) (upholding retroactive application of the Alien Registration Act of 1940 because of inapplicability of the Ex Post Facto Clause in immigration proceedings).

79. See *Matter of D-*, 20 I. & N. Dec. 827, 831 (1994) (holding that the rules of evidence generally are not applicable in immigration court proceedings).

80. According to files obtained by the ACLU and the New York Times under the Freedom of Information Act, government officials obscured important details about the 107 immigrants who have died while in the custody of the Immigration and Customs Enforcement since 2003. See Nina Bernstein, *Officials Hid Truth About Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, at A1.

81. See *A Rage Shared by Law*, *supra* note 8, at 1273 (arguing that due to the strength of the plenary power doctrine, the courts have granted extraordinary deference to Congress in the regulation of immigration and have relied upon it in restricting the due process rights of noncitizens).

representation—government actions that harm the affected individuals are subject to a searching inquiry that entails the enunciation of a compelling state interest and proof that the chosen regulatory path is necessary. Because alienage may be raised on either track, the potential for confusion is great. Unfortunately, the consequences of this system are even greater.⁸²

The enemy combatant cases offer a particularly dramatic example of the U.S. government's confused efforts to use military tribunals and extraterritorial detention to circumvent the rights of those it preferred to alienate. Frustrated with its obligations to protect the procedural rights of its citizens and its desire to try its prisoners as aliens, the government argued for many years that Guantánamo was a lawless zone and that those suspected of war crimes possessed no rights, not even the right to challenge the legality of their detention. The Supreme Court decided in *Boumediene v. Bush*⁸³ and *Rasul v. Bush*⁸⁴ that suspects hold both constitutional and statutory rights through the writ of habeas corpus. However, Muneer Ahmad characterizes the invocation of rights within a zone where no rights are afforded as no more, and no less, than resistance to the attempted legal, cultural, and physical dehumanization of prisoners.⁸⁵

Among the hundreds of suspected Al Qaeda and Taliban fighters the U.S. transferred from Afghanistan to its military bases were two American citizens: Jose Padilla and Yaser Hamdi. Padilla, who was U.S.-born, was accused of helping Al Qaeda build a dirty bomb for detonation in an American city. Flying in from Pakistan, he was arrested after arriving at Chicago's O'Hare Airport and was later detained at a Navy brig in Goose Creek, South Carolina. Hamdi, also U.S.-born, was initially captured in Afghanistan and sent to Guantánamo Bay, but he was subsequently transferred to the Norfolk Naval Station once the U.S. government realized that he was a citizen.⁸⁶ Because both citizens were designated as "enemy

82. See *id.* at 1276-77 (citing specific figures that emphasize the clear trend in favor of immigration enforcement against Arabs, Muslims, and South Asians, even at a time when the total number of immigrants apprehended and deported has decreased significantly); see also Juliet Stumpf, *States of Confusion: The Domestication of Immigration Law*, 86 N.C. L. REV. 1557 (2008).

83. See 553 U.S. 723 (2008) (holding, after an extensive review of historical common law, past precedents, and a review of the sovereignty of the United States in Guantánamo Bay, that Art. I, § 9, cl. 2, of the Constitution has full effect in Guantánamo Bay, entitling detainees to the privilege of habeas corpus).

84. See 542 U.S. 466 (2004) (holding that nothing in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), or in any of the other Supreme Court cases categorically excludes aliens detained in military custody outside the United States from the ability to litigate in U.S. courts).

85. See Muneer Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1687 (2009) [hereinafter Ahmad, *Resisting Guantánamo*] (indicating that the law has been deployed to create the preconditions for the exercise of a state power so brutal as to deprive the Guantánamo prisoners of the ability to be human).

86. See Jonathan Turley, Editorial, *Camps for Citizens: Ashcroft's Hellish Vision*,

combatants," the government asserted its authority to arrest and incarcerate them indefinitely.⁸⁷ The battles between the executive branch and the judicial branch over jurisdiction, viewed in this light, are equally conceived as battles to place suspects outside the realm of rights altogether. These suspects can only be considered aliens—nonpersons incapable of holding rights—rather than merely noncitizens or citizens whose rights may be stripped under specified circumstances.⁸⁸

B. Distortions of Antidiscrimination Laws

Alienation introduces problems of legitimacy under both constitutional and statutory equality laws. The stakes are particularly high under constitutional law, wherein lower levels of scrutiny are applied to judicial review of alien (noncitizen), as opposed to citizen, discrimination claims. Were the offending characteristic instead recognized as being of race or alienage, strict scrutiny would instead be applied.⁸⁹ As the nation endeavors to strike a balance between a false dichotomy of security versus liberty, courts have gone out of their way to avoid the appearance of protecting suspected terrorists by treading on the rights of immigrants. This unfortunate trend stands at odds with *Reno v. American-Arab Anti-Discrimination Committee*, where the Supreme Court held that the First and Fourteenth Amendments were applicable to aliens, not merely citizens.⁹⁰

Conflation of immigrants' rights under civil rights law and their lack of

LA TIMES, Aug. 14, 2002, at B11 (arguing that Hamdi and Padilla are American citizens, an important fact that should trigger the full application of their constitutional rights).

87. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (detailing the government's argument that no explicit congressional authorization is required to detain because the Executive possesses inherent authority pursuant to Art. II of the Constitution); see also *Rumsfeld v. Padilla*, 542 U.S. 426, 456-57 (2004) (arguing that, consistent with U.S. law and the laws of war, Padilla was an enemy combatant and was to be detained by the Department of Defense); *Rasul*, 542 U.S. at 475 (maintaining that *Eisentrager*, which concluded that no right of habeas corpus appears for alien detainees held by the United States abroad, should apply to enemy combatants).

88. See Ahmad, *Resisting Guantánamo*, *supra* note 85, at 1687 (explaining that Guantánamo recalls Hannah Arendt's formulation of citizenship as the right to have rights, which argues that without membership in the polity, "the individual st[and]s exposed to the violence of the state, unmediated and unprotected by rights," which eventually reduces the person to a "state of bare life, or life without humanity").

89. The Supreme Court left open the level of scrutiny owed to undocumented immigrants in *Plyler v. Doe*, 457 U.S. 202, 210 (1982), whom the petitioners claimed were a suspect class on the basis of alienage. However, the Court's stringent review gave the impression that a high level of scrutiny was applied because of the vulnerability of the group, and not merely because a denial of public education threatened fundamental interests. For a similar analysis, see generally Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97).

90. See 525 U.S. 471, 491-92 (1999) (holding, however, that if an alien's continuing presence in this country is in violation of the immigration laws, he is not afforded the same constitutional protections).

rights under immigration law also stands at odds with Congress' determination that the same standards apply to prohibitions against discrimination on the basis of national origin as applied to other protected categories under federal antidiscrimination statutes. Regulatory agencies that enforce Titles VI and VII of the Civil Rights Act of 1964 recognize the claims of both citizens and noncitizens under the national origin category and have developed more nuanced policy guidance to parse the particular requirements of accommodating cultural differences associated with national origin. For this reason, it is fair to ask why it is worthwhile to risk the confusion of analogizing immigrants to national origin minorities rather than to known quantities like racial or religious minorities, if the same rigor of review would adhere to either a national origin-based claim or a race-based discrimination claim under civil rights statutes? More fine-grained charge statistics have been maintained under the national origin category, including the disaggregation of national origin claims into category Z claims for September 11-related backlash within the EEOC. Furthermore, increased efforts to reach out to communities and to provide technical assistance to schools and workplaces have been made on the basis of national origin discrimination in light of the media attention garnered by these efforts. These fine-grained distinctions lead to a more tailored response.⁹¹

Most importantly, a more robust form of equality might attach to immigrants on the basis of national origin discrimination than on the basis of race or religion alone. A stronger remedy may attach, even if the standard of liability is the same under statutory law. National origin claims under Title VI have afforded accommodations to language-minority students in public schools in the form of bilingual education, and prohibited school yard harassment of Muslim students whose religious beliefs would have been outside the reach of Title VI. These claims have also restricted workplace discrimination against Arabs, Muslims, and South Asians not only in the form of hiring and firing, but also in terms of burdensome dress codes that restrict workers from donning symbols of cultural or religious significance.

The risk of relying on the relatively less familiar protected category of "national origin" would be repaid by the recognition that the remedy for alienation resides in an accommodationist paradigm rather than an assimilationist one. Akin to the framework of the Americans with Disabilities Act, alienage would be viewed as a civic disability that impedes the incorporation and fair treatment of the targeted groups. Outside of the September 11 framework, the legislative and administrative histories of responses to limited-English speaking immigrants and

91. See *supra* note 74.

naturalized citizens in education, employment, and voting law are rife with analogies between non-English speakers—predominantly Asians and Latinos—and the disabled. Limited-English proficient students are likened to special needs students; non-English reading voters are likened to illiterate voters; and workers who speak accented English are considered otherwise “unqualified.”⁹² While perhaps not intuitive, this grounding in disability law would be preferable to grounding in a race paradigm because it is theoretically more sound. It also has the potential to be legally more favorable. At very least, since discrimination claims can be filed on multiple bases—under both national origin and religion, for example—nothing is lost in exchange for these gains by pleading national origin discrimination.

V. CONCLUSION

This article has sought to reframe the othering of Arabs, Muslims, and South Asians after September 11 as alienation, rather than racialization. It contends that such a shift would be favorable for both rhetorical and practical reasons. While it is beyond the scope of this article to delineate in great detail the legal framework that would emerge from such a reconceptualization, it would be guided by two principles:

- 1) Employing immigration law for issues of admission and citizenship associated with non-territorially present immigrants, rather than stretching criminal law or Constitutional law beyond its purposes;
- 2) Employing antidiscrimination law for issues of equality associated with immigrants’ rights, with increased usage of protections for national origin minorities where the issue is discriminatory conduct toward naturalized citizens and legal permanent residents premised on actual or perceived foreign-birth (as a matter of status or place of origin); Attending the use of national origin would be an emphasis on accommodations as remedies.

This article was originally presented as a work-in-progress at LatCrit XI, five years after September 11. Little has changed in the intervening years, except that the moral panic over immigration has spread to include more categories of undesirables such as Latinos who either are, or who are perceived to be, illegal aliens. Like the immigrants rounded up in the Palmer Raids of WWI, the Chinese excluded from Californian railroads, the Japanese citizens interned during WWII, or the “Muslim-looking” communities targeted by antiterrorism tactics after September 11, Mexican

92. See generally Ming H. Chen, *New Civil Rights Movement: Politics and Strategies of Statutory Expansion for Post-1965 Immigrants and Language Minorities*, (2010) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with the *American University Journal of Gender, Social Policy & the Law*) (including further discussion of these examples).

immigrants who mobilized in the May Days Without Immigrants marches were accused of disloyalty for displaying the Mexican flag. Invectives waged by Lou Dobbs and Glenn Beck, among others, sharpened anti-immigrant sentiment. We can only hope that immigration reform will not further “alienate” immigrants or distort the laws that protect them.

