

Acting Muslim

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ABSTRACT

The election of Donald Trump as the forty-fifth President of the United States ushered in an era of heightened state and popular suspicion of Muslim Americans. Trump’s hardline rhetoric, policy proposals and executive orders—most notably the so-called “Muslim Ban”—enhanced the presumption that Islam is tied to terrorism. In rapid time, the Trump Era intensified a national climate that pressures Muslim Americans to perform their religious identity in ways that make them less identifiable as Muslims, and resultantly, less vulnerable to the suspicion of the state and the backlash of private actors.

This Article defines this identity performance as “Acting Muslim”—the process whereby Muslim Americans strategically negotiate and publicly perform a religious identity stigmatized by counterterror policy. By holding specific expressions of Muslim identity to be presumptive of terror threat, prevailing counterterror policies incentivize expressions of Muslim identity deemed unsuspectious and non-threatening by the state. Muslim Americans that confirm their religious identity through outward expression attract counterterror suspicion, and therefore, are more likely to experience Free Exercise violations. On the other hand, actors that conform, downplay or entirely conceal their Muslim identity voluntarily choose to diminish their Free Exercise rights in exchange for insulation from state suspicion, surveillance and punitive action.

By developing a theoretical and conceptual framework of Acting Muslim, this Article equips scholars with the analytical tools to analyze Free Exercise controversies involving Muslim Americans during the Trump Administration, and a war on terror that will most certainly be carried forward beyond his tenure. After framing a theory of Acting Muslim, this Article investigates its attendant four forms—Confirming, Conforming, Covering, and Concealing Islam—through case law and case studies.

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INTRODUCTION

"In the path of Allah, do not fear any one who mocks you or discourages you."

—The Prophet Muhammad¹

"Immediately after Donald Trump was elected president, I decided to stop wearing my hijab."

¹ MAHDI HADAVI TEHRANI, FAITH AND REASON 9 (2014) (citing *Bihar al-Anwar*, Volume 71, at 360 (collection of traditions of the Prophet Muhammad compiled in 1694 through 1698 A.D.)).

—Alaa Basatneh²

Nora stared blankly at the television screen as the final election results rolled in. Her body and face were frozen in utter shock hours into the morning on November 9, 2016.³ Donald Trump swept virtually every battleground state in the 2016 presidential election, including Florida, Ohio, and Nora's home state of Michigan.⁴ Against the projections of pollsters and the forecasts of prognosticators, Trump pulled off a "historic and stunning upset" over Hillary Clinton.⁵

The candidate who declared that "Islam hates us"⁶ and proposed to ban Muslims while on the campaign trail would soon be the president of the United States.⁷ Like most of the estimated eight million Muslim Americans across the country,⁸ Nora feared the polarized nation that awaited her outside of the door of the building where she watched the election returns.

² Alaa Basatneh, *It's Not Safe to Wear My Hijab Now That Trump Will Be President*, FUSION (Nov. 15, 2016), <http://splinternews.com/its-not-safe-to-wear-my-hijab-now-that-trump-will-be-pr-1793863762> [<http://perma.cc/Q7P4-G6TH>]; see also Julie Mazzotta, *Some Muslim Women Say They're 'Scared to Wear the Hijab' After Trump's Win*, PEOPLE (Nov. 9, 2016), <http://people.com/bodies/muslim-women-scared-wear-hijab-trump-win/> [<https://perma.cc/JJD3-4M9Z>] (discussing firsthand accounts from Muslim American women citing fear of wearing the headscarf immediately after Trump won the election).

³ Nora, who requested that her last name remain anonymous, attended the election watch party at the Arab American National Museum Annex in Dearborn, Michigan.

⁴ Meghan Keneally, *Donald Trump Captures Presidency in Historic and Stunning Upset of Hillary Clinton*, ABC NEWS (Nov. 9, 2016), <http://abcnews.go.com/Politics/donald-trump-president-elect-clinton-concedes-historic-contest/story?id=43369466> [<https://perma.cc/ANT9-YXYR>].

⁵ *Id.* See also Shane Goldmacher and Ben Schreckinger, *Trump Pulls Off Biggest Upset in U.S. History*, POLITICO (Nov. 9, 2016), <http://www.politico.com/story/2016/11/election-results-2016-clinton-trump-231070> [<https://perma.cc/889L-GNKZ>].

⁶ Jose A. DeReal, *Trump: 'I Think Islam Hates Us.'* WASH. POST (Mar. 9, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/03/09/trump-i-think-islam-hates-us/?utm_term=.2f7333d08c5d [<http://perma.cc/PT62-V8G3>].

⁷ See Khaled A. Beydoun, "*Muslim Bans*" and the (Re)Making of Political Islamophobia, 2017 U. OF ILL. L. REV. 1237 (2017) [hereinafter *Remaking of Political Islamophobia*] (analyzing how Islamophobia was crafted and deployed by a number of presidential candidates, most notably Trump, as full-fledged campaign strategy). President Trump enacted an executive order on January 27, 2017, which restricted the entry of refugees and visa holders from seven Muslim-majority countries (Iraq, Iran, Libya, Somalia, Sudan, Syria and Yemen) and put a halt on incoming refugees. For the full text of the order, see *Full Executive Order Text: Trump's Action Limiting Refugees Into the U.S.*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/refugee-muslim-executive-order-trump.html> [<https://perma.cc/J4BK-L6CC>].

⁸ A January 2016 estimate by the Pew Research Center counts the Muslim American population at 3.3 million people. Besheer Mohamed, *A New Estimate of the U.S. Muslim Population*, PEW RESEARCH CENTER (Jan. 6, 2016), <http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/> [<http://perma.cc/64BG-7GUB>]. However, underreporting linked to fear and strategic dis-identification suggests that this estimate is far too low. Other estimates figure the Muslim American population to be as high as 8 million. See Khaled A. Beydoun, *Between Indigence, Islamophobia and Erasure: Poor and Muslim in "War on Terror" America*, 104 CAL. L. REV. 1463 (2016) [hereinafter *Between Indigence, Erasure and Islamophobia*] (analyzing how counter-radicalization policing disproportionately targets, and compromises the First Amendment rights of, indigent and working class Muslim Americans).

Like thousands of women in her hometown, Nora wore the headscarf, or the *hijab*.⁹ For the twenty-two year old, the article of cloth she diligently wrapped around her head every morning was central to her identity. The hijab was both an expression of religious devotion, and a symbol of solidarity with a disproportionately maligned segment of the Muslim American community. Yet, within two weeks of Trump's victory, Nora followed in the footsteps of Alaa Basatneh, and scores of other Muslim American women who covered, and removed her headscarf.¹⁰ Her decision was spurred by the fear of backlash, and even more so, the mounting suspicion the state marshaled toward Muslims under President Trump.

By *unveiling*, Nora "covered" her Muslim identity.¹¹ In turn, she relieved herself of the great anxiety and fear caused by the stares of strangers and the horrific accounts of Muslim American women assailed by hatemongers.¹² Nora believed appearing less Muslim, or being religiously invisible to the public, would free her from the intensified counter-radicalization that Trump may usher in,¹³ the possibility of having to enlist in a "Muslim Registry,"¹⁴ and the emboldened violence targeting Muslim American women that wear the headscarf.

These concerns, shared by Muslim American women and men across the country, cut into the religious protections afforded to citizens by the United States Constitution. The text of the First Amendment guarantees citizens and residents the right to freely exercise their religion.¹⁵ Free Exercise of religion was of utmost concern to the Founding Fathers, particularly Thomas Jefferson, who wrote that, "All men are equally entitled to the free exercise of religion, according to the dictates of conscience."¹⁶ The Free Exercise Clause encompasses religious belief and conduct,¹⁷ which the state can only inhibit in the least restrictive means to achieve a compelling state

⁹ Mazziotta, *supra* note 2. The headscarf is called the *hijab* in Arabic.

¹⁰ Basatneh, *supra* note 2.

¹¹ See Kenji Yoshino, *Covering*, 111 YALE L. J. 769, 780 (2002).

¹² See Amanda Sakuma, *Muslim Women Wearing Hijabs Assaulted Just Hours After Trump Win*, NBC NEWS (Nov. 10, 2016), <https://www.nbcnews.com/politics/2016-election/muslim-women-wearing-hijabs-assaulted-just-hours-after-trump-win-n681936> [<https://perma.cc/XSZ6-BX3P>].

¹³ See Khaled Beydoun, *Trump's Counterterrorism Programme*, AL JAZEERA ENGLISH (Jan. 25, 2017), <http://www.aljazeera.com/indepth/opinion/2017/01/trump-counterterrorism-programme-muslim-americans-170125103202700.html> [<https://perma.cc/3KJ5-XPC9>].

¹⁴ See Dara Lind, *Donald Trump's Proposed "Muslim Registry," Explained*, VOX (Nov. 16, 2016), <https://www.vox.com/policy-and-politics/2016/11/16/13649764/trump-muslim-registry-database> [<https://perma.cc/FU3F-PPWD>].

¹⁵ The Free Exercise Clause holds that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

¹⁶ Virginia Declaration of Rights §16 (1776).

¹⁷ The free exercise right to hold a specific religious belief (versus expressing religious conduct) is unfettered. Courts can only assess whether it is a "sincerely held belief" by its adherent, and are restricted from judging the veracity of the religious view or the religion *in toto*. See *United States v. Ballard*, 322 U.S. 78, 86–88 (1944).

aim.¹⁸ Performance of Islam, through outward expression and conduct, such as the *hijab* Nora wore, is central to exercise of the faith. This Article focuses squarely on the Free Exercise Clause as a foundational constitutional value, and examines the phenomenon of Acting Muslim in relation to this value—not prevailing Free Exercise jurisprudence—which this Article hopes to inspire and guide moving forward.

Since America's founding, the Free Exercise Clause has been applied differently to Islam, a faith routinely characterized as a rival religion, political system, and civilization.¹⁹ The state's historic and modern positioning of Islam as a principal enemy burdened the rights of Muslim Americans to freely exercise their religion.²⁰ State policing of Islam, initially by way of citizenship laws and today through counterterrorism policy,²¹ materially impacts how Muslim Americans observe their faith and outwardly express their religious identity.

American "identity [has always been] formed through performance."²² Expressions of American identity the state encouraged, and sometimes mandated, are articulated in opposition to how Muslims express their religious identity. For instance, Muslim men and women that expressed their Muslim identity through conspicuous markers, whether it be a headscarf, a beard, or traditional clothing, the more foreign these individuals appeared. In short, the *more* an individual appeared to be Muslim, the *less* he or she was perceived to be American. State suspicion and fear of Islam, therefore, confined the Free Exercise rights of Muslim citizens, and additionally, burdened Muslim Americans with the paradox of acting American while observing Islam.

This balance became especially challenging after the U.S. launched its "war on terror" following 9/11,²³ whereby national security policing tethers

¹⁸ Policies that explicitly discriminate against a religion, or specific religious conduct, must survive the most exacting form of judicial review ("strict scrutiny") in order to be upheld. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). However, the Supreme Court ruled that laws of general applicability to all religions should be reviewed using the deferential "general applicability test," which deems "incidental effects" of free exercise of religious infringements as constitutional. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 889–90 (1990).

¹⁹ See generally EDWARD SAID, *ORIENTALISM* (1979) (outlining the master discourse and binary that theorized Islam as the antithesis of the West, which encompasses Europe and the United States).

²⁰ This Article defines Muslim Americans as any citizen that identifies as a Muslim.

²¹ See generally Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29 (2013) [hereinafter *Between Muslim and White*] (analyzing the ten Naturalization Cases involving immigrant petitioners from Muslim-majority regions, and arguing that the court's barring of petitioners from naturalization reflected a view that Muslim identity conflicted with prevailing constructions of whiteness). See also JOHN TEHRANIAN, *WHITWASHED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY* 35–63 (2009).

²² Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 166 (1998).

²³ This Article defines the "war on terror" as the domestic and global campaign commenced by President George W. Bush on September 20, 2001, nine days after the 9/11 terror attacks. Bush declared, before Congress, that, "Our war on terror begins with al Qaeda, but it

Muslim identity to the presumption of terrorism.²⁴ For Muslim citizens in war-on-terror America, fear of being profiled as suspicious is not confined to the mosque, political or social gatherings, or one's household. But rather, it is a possibility that looms over Muslim Americans in the workplace, school or college, their Internet activity, and private and public places at large. In a national context where "Islamophobia" is pervasive, Muslim Americans are increasingly vulnerable to the collateral suspicion of colleagues and supervisors, classmates and acquaintances, and the broader population of people they interact with on a daily basis.²⁵

The result is that Muslim Americans are motivated to diminish the prospect of being identified as a Muslim by downplaying or concealing their Muslim identity. And in turn, they are motivated to engage in alternative expressions of Muslim identity that the government deems patriotic and law abiding, unsuspecting and "moderate."²⁶ As explored more closely in Part II, the state creates incentives for Muslim Americans to condemn acts of terror, work as informants in Muslim communities, and through public expression, endorse the war on terror and its efforts at home and abroad. Every Muslim American has engaged in or at least contemplated this negotiation of Muslim identity during the war on terror, which is becoming more common as suspicion and backlash toward Muslims swells to unprecedented degrees under the Trump Administration.

This Article introduces "Acting Muslim" as a new concept and theory within legal literature, at a moment when the stakes of Muslim identity performance have never been higher. Acting Muslim is the process by which Muslim Americans strategically negotiate and publicly perform a religious identity stigmatized by counterterror policy. By holding Muslim identity to be presumptive of terror threat,²⁷ prevailing counterterror law and policy incentivizes expression of Muslim identity sanctioned as unsuspecting and

does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated." President George W. Bush, Address to a Joint Session of Congress and the American People, (Sep. 20, 2001) [hereinafter War on Terror Declaration], <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> [<https://perma.cc/5Q5U-DMCZ>].

²⁴ See generally Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 COLUM. L. REV. ONLINE 108 (2016) [hereinafter *Islamophobia*] (providing a legal definition and framework for understanding Islamophobia).

²⁵ Islamophobia is "the presumption that Islam is inherently violent, alien, inassimilable[; tied to the belief] that expression of Muslim identity is correlative with a propensity for terrorism." *Id.* at 111. This presumption, carried out by state and government actors emboldened by counterterror policies enacted during the war on terror, *id.* at 114–19, is what motivates the distinct forms of Acting Muslim. Islamophobia, as a system of anti-Islamic animus, is examined more closely in Section II(A)(2).

²⁶ A "moderate Muslim" is an adherent of the faith that subscribes to interpretations of Islam deemed to be passive and peaceful, as interpreted by the state. In addition to religious contours, moderate Islam is also defined through political expression that aligns with state interests. For example, supporting the war on terror abroad and domestically, waving the flag after 9/11, disavowing terrorism after a terror attack, and more. This Article investigates the "moderate Muslim" more closely in Part III(B)(2).

²⁷ *Islamophobia*, *supra* note 24, at 111.

non-threatening by the state. And by way of surveillance, prosecution, and criminal penalty, the state sanctions and punishes Muslim identity expression perceived as suspicious.

Acting Muslim spawns both “macro-” and “micro-infringements” on the Free Exercise clause. Muslim Americans face a dilemma of identity expression, whereby “confirming” core Islamic expression exposes them to surveillance from the state, and “conforming,” “covering” or “concealing” Islam also infringes on their Free Exercise rights.²⁸ A Muslim actor that confirms his or her Muslim identity through outward expression will be exposed to the macro Free Exercise infringements that expression invites, in the form of surveillance, “knock and talk interviews,”²⁹ arrest, or prosecution.³⁰

However, employing any of the latter three forms of Acting Muslim (conforming, covering, and concealing Islam)—modes of performance coined and introduced by this Article—gives rise to micro-infringements on the Free Exercise of Religion rights of Muslim Americans.³¹ This Article argues that the making over of religious identity, compelled by counterterror law and the fear of appearing to be Muslim, is tantamount to an undetectable but recurring form of Free Exercise injury.

Furthermore, this Article investigates Acting Muslim within the broader war on terror context. Although George W. Bush coined and initiated the war after the terror attacks of 9/11, this campaign was carried forward by President Barack Obama, and was ushered into a third presidential administration by President Trump. Each administration shaped and executed distinct counterterror strategies, illustrating the fluidity of counterterror law and strategy.³² However, although fluid, War on Terror strategy has been consistent with regard to profiling Muslims as the primary perpetrators of terrorism, and thus, Muslim identity as predictive of terrorism.

²⁸ These four Muslim identity negotiations and expressions comprise the four types of Acting Muslim outlined in Part I of the Article.

²⁹ Interviews whereby law enforcement visit a subject-of-interest’s residence, “with or without probable cause, and knock on the door to obtain plain views of the interior of the house, to question the residents, to seek consent to search, and/or to arrest without a warrant, often based on what they discover during the ‘knock and talk.’ When combined with such other exceptions to the warrant requirement as ‘plain view,’ consent, and search incident to arrest, ‘knock and talk’ is a powerful investigative technique.” Craig M. Bradley, “*Knock and Talk*” and the Fourth Amendment, 84 IND. L.J. 1099 (2009); see also Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. 41 (2011) (analyzing the due process and free speech concerns posed by law enforcement interviews of U.S. Muslims).

³⁰ Is it important to note that counterterror and collateral suspicion also implicates non-Muslims discursively profiled as Muslims, including Latino, South Asian, and Sikh Americans. See Vinay Harpalani, *DesCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. OF AM. L. 77, 162 (2015).

³¹ Encumbrances on an individual’s free exercise of religion rights that are born out of religious identity compromises, which do not rise to the level of actionable violations.

³² In line with the distinct strategies of the Bush, Obama and Trump administrations, this Article divides the War on Terror into three phases: the “Bush Era,” the “Obama Era,” and the “Trump Era,” and examines cases of Acting Muslim within each Era.

By introducing the concept of Acting Muslim into the legal literature, this Article contributes to the body of scholarship examining identity performance theory. Several legal scholars, most notably Kenji Yoshino,³³ Devon Carbado and Mitu Gulati,³⁴ Nancy Leong,³⁵ John Tehranian,³⁶ and others,³⁷ have made significant contributions to the legal literature on performance theory. While this body of scholarship has examined identity performance with regard to race, gender, and sexual orientation, this Article is the first to closely examine the pliability of religious identity within the War on Terror context. Moreover, it analyzes the pressures administered by the counterterrorism arms of the state, collaterally enforced by private and public institutions throughout the country, to express Muslim identity in ways that confirm, mitigate or eliminate suspicion.

In addition to the literature examining identity performance, this Article also fills a void within the body of scholarship examining the dialectic between Muslims and the state. Virtually the whole of this work, which proliferated after 9/11, has focused on the response of the state, and how this response—in the form of policy, profiling, and discrimination—infringes upon the rights of Muslim Americans. This Article pivots to the other side of the ledger, investigating how Muslim Americans have responded and continue to respond to state action during the War on Terror. It also furnishes scholars writing within the national security and civil rights spaces with an operative framework and nomenclature to carry forward analyses of the turbulent relationship between Muslims and the state that are certain to continue under President Trump.

This Article will proceed in four parts. Part I builds on the foundational body of identity performance scholarship to establish a theoretical and conceptual framework for Acting Muslim.

³³ See generally Yoshino, *supra* note 11 (investigating how individuals from subordinate groups, particularly homosexuals, negotiate their identities, and strategically conceal stigmatized aspects of their identities). See also Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 TENN. L. REV. 575 (2017) (examining how sexual orientation stereotyping may give rise to claims of discrimination, and how this stereotyping conflicts with complex expressions of sexual orientation identity).

³⁴ See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1266 (2000) (crafting the concept and theory of working identity, which is the process by which minorities negotiate performance of their racial identities in line with employment incentives in the workplace).

³⁵ See generally Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333 (2016) (describing the process by which out-group individuals—minorities, women, and so on—negotiate their identities in order to attain personal benefit).

³⁶ See generally John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 839–40 (2000) [hereinafter *Performing Whiteness*] (examining how immigrants were tasked with performing whiteness and persuading judges that they fit within the statutory scheme to be legally naturalized as American citizens).

³⁷ See generally Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282 (2016) (analyzing how current affirmative action jurisprudence creates situational value in non-whiteness, incentivizing whites to reverse-pass as non-white in order to obtain access to opportunities in education, employment, and beyond).

Part II examines two systems, Orientalism and Islamophobia, which drive state suspicion of Islam and seed the prevailing stereotypes ascribed to Muslims. Part III proceeds by examining the counterterror programs implemented during the three administrations of the War on Terror to police Muslims. And subsequently, how these programs generally impacted expression of Muslim identity during their respective eras.

Finally, Part IV applies the theory and framework articulated in Part I, analyzing the four forms of Acting Muslim through actual legal disputes and cases from the three eras of the War on Terror.

I. A THEORY OF ACTING MUSLIM

In everyday usage, *Acting Muslim* refers to the ways in which a Muslim observes his or her faith. It may denote the measure of one's piety, living up to the standards of one's family or community, or the simple profession that one chooses an Islamic lifestyle over a secular one. However, this Article's investigation of this phrase hones in on how a Muslim American chooses to express, or perform, their religious identity in the face of War on Terror law and policy. This Part of the Article theorizes Acting Muslim as a form of strategic identity negotiation and expression that Muslim Americans engage in every day while living in War on Terror America. Section A articulates the meaning of Acting Muslim, and the tension this performance has with the First Amendment Free Exercise Clause. Section B outlines the four distinct forms of Acting Muslim coined and introduced in this Article: (1) "Confirming Islam;" (2) "Conforming Islam;" (3) "Covering Islam;" and (4) "Concealing Islam."

A. *The Concept*

Muslim Americans must endure the suspicion that even benign expressions of religious identity may incur during the War on Terror. Muslim Americans are generally well aware of the negative stigmas and stereotypes ascribed to their faith by counterterror law and policies. And amid an escalating War on Terror, many Muslim Americans "make a great effort to keep the stigma from looming large,"³⁸ or more generally, remove any conspicuous symbols of Muslim identity. "The stronger this conflict, the harder the [Muslim American] will have to work to overcome the negative assumptions by employing stereotype-negating strategies."³⁹ Negating these assumptions requires hard work, focused primarily on diminishing or negating expressions of Muslim identity that are tied to suspicion, and more specifically, tethered to terrorism.

³⁸ ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 103–04 (1963).

³⁹ Carbado & Gulati, *supra* note 34, at 1269.

Negotiation and performance of identity to avoid negative treatment, and garner positive treatment, is hardly unique to Muslim Americans. With regard to racial stigmas in the workplace, Devon Carbado and Mitu Gulati refer to this process as “working identity,” which is strategic performance of “identity-affirming conduct that comports with [one’s] sense of identity, and identity-negating conduct that runs afoul of the [individual’s] sense of self.”⁴⁰ As law scholars Carbado and Gulati explain, “everyone works identity,”⁴¹ whether within the workplace or other societal contexts. This Article adopts this framing of identity negotiation to examine the religious identity performance of Muslim Americans within every sphere of public life during the War on Terror, and coins the process as “Acting Muslim.”

Acting Muslim is the process by which Muslim Americans strategically negotiate and outwardly perform a religious identity stigmatized by War on Terror policy. This performance is driven by the tension between counterterrorism policy, which deems conspicuous expression of Muslim identity as presumptive of terror threat, and the Free Exercise rights of Muslim Americans to freely express their Muslim identity in ways that align with their religious views. Acting Muslim is hard work, and a daily routine that compels Muslim Americans to choose between their religious convictions and their personal safety.

There are four forms of Acting Muslim. Expression that affirms Muslim identity, or “Confirming Islam;” expression that conforms a Muslim identity trait, belief, or practice, to one that is palatable or endorsed by the state, or “Conforming Islam;” performance that downplays a stigmatized Muslim trait or expression, or “Covering Islam;” and the process of entirely concealing one’s Muslim identity in specific contexts or the public sphere at large, or “Concealing Islam.” As illustrated in its four forms, Acting Muslim can either be “positive” or “negative,” meaning that conduct can either affirm Muslim identity, or in the case of the latter three forms, partially or entirely negate it.

Affirming or negating Muslim identity has distinct implications on the free exercise of religion. Actors that confirm their Muslim identity through outward expression expose themselves to a greater degree of state suspicion, which enhances the likelihood of their Free Exercise rights being violated (or chilled) by counterterrorism policing. By contrast, actors that conform, cover, or conceal their Muslim identity may experience undetectable forms of Free Exercise infringements for sacrificing forms of preferred religious expression to stave off suspicion from the state.

⁴⁰ *Id.* at 1266.

⁴¹ *Id.* at 1263. “Working identity is constituted by a range of racially associated ways of being, including how one dresses, speaks, styles one’s hair; one’s professional and social affiliations; who one marries or dates; one’s politics and views about race; where one lives; and so on and so forth.” DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN POST-RACIAL AMERICA* 1 (2013).

This Article construes “conduct” and “expression” broadly. These terms encompass outward expressions of Muslim identity expressed through dress, grooming, actions including prayer, verbal cues (such as speaking Arabic, Urdu, Farsi, Somali, or other languages associated with Islam), cultural, spiritual and political associations, and personal relationships. While it is the third of the Abrahamic faith traditions, following Judaism and Christianity,⁴² Islam has assumed extra-religious significance and meaning in War on Terror America.⁴³ Therefore, because counterterror policy and enforcement interprets Muslim identity in social, cultural, political, religious and overlapping terms, expression or conduct germane to Acting Muslim goes beyond expression of strictly religious activity.⁴⁴ It also includes cultural and ethnic expression, political views and activity, and more.

B. The Types

1. Confirming Islam

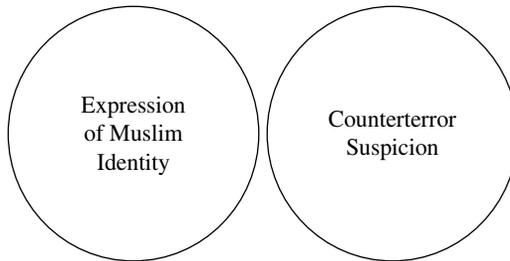


FIGURE 1 – CONFIRMING ISLAM – THE FORM OF ACTING MUSLIM WHEREBY THE STEREOTYPES AND SUSPICION ASSIGNED BY COUNTERTERROR POLICY DO NOT INFLUENCE THE MUSLIM AMERICAN’S EXPRESSION OF MUSLIM IDENTITY. THE TWO REMAIN SEPARATE.

⁴² For a popular and concise history of Islam, see generally KAREN ARMSTRONG, *ISLAM: A SHORT HISTORY* (2002).

⁴³ Islam is routinely discussed in terms of a civilization, a political ideology, and in some respects, a monolithic race. This framing delegitimizes it as a bona fide religion, as illustrated by the rhetoric of elected officials and politicians, which is mirrored by opinions prevailing in society. See Michael Schulson, *Why Do So Many Americans Believe that Islam is a Political Ideology, Not a Religion?*, WASH. POST (Feb. 3, 2017), <https://www.washingtonpost.com/news/acts-of-faith/wp/2017/02/03/why-do-so-many-americans-believe-that-islam-is-a-political-ideology-not-a-religion/> [https://perma.cc/Z34H-SD9R].

⁴⁴ I examine this religious and non-religious conduct more closely in Part II(B), while examining stereotypes most commonly ascribed to Muslim Americans during the war on terror.

“Confirming Islam” is an “identity-affirming” expression of Muslim identity that comports with a Muslim American actor’s religious convictions and sense of self.⁴⁵ In addition to affirming Muslim identity, Confirming Islam also encompasses activity whereby an actor enhances or amplifies his or her religious identity. An actor’s decision to perform his or her Islamic prayers at a public park, despite being cognizant of the suspicion or animus it may invite, is an example of Confirming Islam.

In practice, Confirming Islam prioritizes one’s Free Exercise rights over the fear of affirming negative stereotypes ascribed to Muslim identity by counterterror policy. Confirming Islam, in essence, is rebellious conduct, or activity that manifests disavowal of the stereotypes and stigmas endorsed by counterterror policy. Moreover, Confirming Islam is a refusal to assimilate religious expression protected by the Free Exercise clause in exchange for the incentives of mitigating state suspicion, surveillance, or punitive action.

Therefore, during the War on Terror, Muslim Americans that Confirm Islam through identity expression may be said to voluntarily assume the counterterror risks that expression attracts. And consequently, they expose themselves to greater suspicion from the state as well as the attendant policing and punitive action. Expressions that Confirm Islam highlight the tension between the Free Exercise clause and the presumption of terror suspicion assigned by counterterror policy.

2. *Conforming Islam*

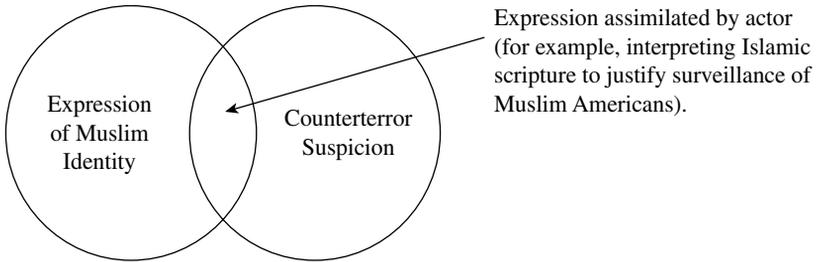


FIGURE 2 - CONFIRMING ISLAM – THE FORM OF ACTING MUSLIM WHEREBY THE MUSLIM AMERICAN ACTOR SEEKS TO ASSIMILATE SPECIFIC RELIGIOUS CONDUCT IN LINE WITH MAINSTREAM SENSIBILITIES, IN ORDER TO MITIGATE OR ELIMINATE STATE SUSPICION. THE OVERLAPPING AREA INDICATES THE SPECIFIC FORM OF MUSLIM EXPRESSION THE ACTOR CHOOSES TO CONFORM.

⁴⁵ Carbado & Gulati, *supra* note 34, at 1266.

“Conforming Islam” is when a Muslim American actor alters and assimilates a disfavored Muslim trait, expression, or one’s identity at large in line with positive counterterror stereotypes. Two motives drive a subject’s decision to Conform Islam: first, a desire to assimilate a disfavored trait, expression, or identity so that it mitigates or eliminates suspicion from the state, or second, a desire to assimilate a disfavored Muslim trait, expression, or identity for personal benefit.⁴⁶ A Muslim American woman that chooses to wear an American flag as a headscarf, as examined in Part IV, is an example of Conforming Islam.

Conforming Islam imputes mainstream sensibilities and prevailing suspicion to reshape a specific Islamic belief or expression. It is ultimately a strategic concession made to diminish the prospect of counterterror suspicion and the policing it spurs. Furthermore, an actor that Conforms Islam enhances his or her possibility of being rewarded by the state for assimilating expressions of Muslim identity in line with positive stereotypes sanctioned by counterterror strategy. Possible rewards might be a position with a state agency that actively works on advancing the war on terror (DHS, for example), or a government subcontract to carry forward counter-radicalization programming in a Muslim community.

Therefore, in exchange for these incentives, Muslim Americans that Conform Islam are voluntarily compromising their Free Exercise rights and collaterally endangering these rights for Muslim Americans at large. By endorsing War on Terror programming, these actors expose Muslim communities, particularly those made more vulnerable along lines of poverty, recent immigrant status, and more, to the trappings of surveillance. Actors that Conform Islam for personal benefit are also engaging in “identity entrepreneurship,”⁴⁷ reforming and restructuring their Muslim identity in line with counterterror stereotypes and policy goals in exchange for personal gain. The symbiosis between Muslim identity entrepreneurs, or “native informants,”⁴⁸

⁴⁶ Assimilation denotes bringing an identity, belief, or practice into conformity with prevailing customs. Or, as Kenji Yoshino defines it, “Assimilation is the magic in the American Dream. Just as in our actual dreams, magic permits us to transform into better, more beautiful creatures, so too in the American Dream, assimilation permits us to become not only Americans, but the kind of American we seek to be . . . This vision of assimilation is so profoundly seductive and is, at some level, not just American but human.” Yoshino, *supra* note 11, at 771.

⁴⁷ Nancy Leong defines identity entrepreneurship as “circumstances in which an individual of an identity out-group intentionally leverages her identity for personal benefit.” Leong, *supra* note 35, at 1346.

⁴⁸ Native informants are men and women who leverage their Muslim identities as expertise to speak on behalf of Islam and Muslims. Native informants may also be former Muslims who package past experience as specialized knowledge of the faith and its adherents. For a critique of Muslim native informants, including identification of the most prominent figures, see WAJAHAT ALI, ELI CLIFTON, MATTHEW DUSS, LEE FANG, SCOTT KEYES, & FAIZ SHAKIR, CTR. FOR AM. PROGRESS, FEAR INC.: THE ROOT OF THE ISLAMOPHOBIA NETWORK IN AMERICA 59 (2011) [hereinafter FEAR, INC.]. Furthermore, there are great material benefits in the form of “star status, honoraria, book grants, and grants to people of color who are willing to attack their own.” MARI J. MATSUDA, WHERE IS YOUR BODY?: AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW 119, 122–23 (1996).

and the state enables the propagation of the war on terror, and its fluid re-shaping from one administration to the next.

3. *Covering Islam*

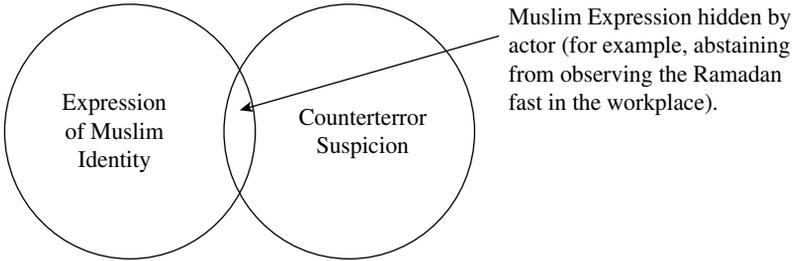


FIGURE 3 – COVERING ISLAM – THE FORM OF ACTING MUSLIM WHEREBY THE MUSLIM AMERICAN ACTOR TONES DOWN OR HIDES SPECIFIC MUSLIM IDENTITY TRAITS OR EXPRESSIONS CLASSIFIED AS SUSPICIOUS BY THE STATE.

“Covering Islam” is conduct whereby a Muslim American actor voluntarily hides or tones down a Muslim identity trait or expression in order to mitigate or eliminate the stigma associated with that specific mode of expression.⁴⁹ An actor who Covers Islam prioritizes the fear of affirming negative stereotypes ascribed to Islam by counterterror policy over his or her Free Exercise rights. A Muslim American male that chooses to shave his beard, for fear of being perceived as an extremist or profiled as a radical, for example, is Covering Islam.

In practice, Covering Islam encompasses conduct that capitulates to the negative stereotypes and stigmas the state ascribes to specific expressions of Muslim identity. Diminished counterterror suspicion may incentivize a Muslim American actor to cover a Muslim identity trait or expression. Or as analyzed with Conforming Islam, sometimes Covering Islam is motivated by the personal benefits and opportunities it may present a Muslim identity entrepreneur.⁵⁰

Muslim Americans that Cover Islam are voluntarily compromising their Free Exercise rights in exchange for diminishing state suspicion and/or facilitating personal reward. But in the process they opt into the negative meaning associated with that conduct. And by doing so, propagate counterterror stereotypes that enhance the vulnerability of Muslim Americans that confirm that specific Muslim trait.

⁴⁹ KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS ix (2006).

⁵⁰ Leong, *supra* note 35, at 1346.

4. *Concealing Islam*

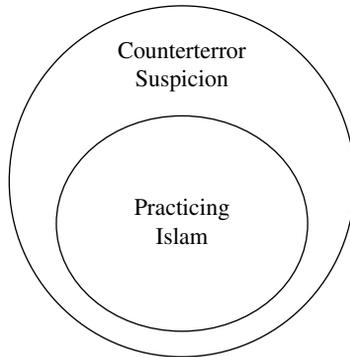


FIGURE 4 – CONCEALING ISLAM – OR RELIGIOUS PASSING, IS THE MODE OF ACTING MUSLIM WHEREBY THE MUSLIM AMERICAN ACTOR HOLDS HIMSELF OR HERSELF OUT TO BE NON-MUSLIM WITHIN A SPECIFIC SETTING, OR THE PUBLIC SPHERE AT LARGE.

“Concealing Islam” is the process whereby a Muslim American actor trades in his or her Muslim identity for a non-Muslim identity within a specific setting, or the public sphere at large.⁵¹ Concealing Islam is synonymous with strategic “passing,” whereby Muslim Americans present themselves as non-Muslim in desired contexts, while their “underlying [religious] identity is not altered, but hidden.”⁵² Part IV examines two cases of Concealing Islam, both of which were undertaken by the Muslim American actor to blend into their respective surroundings as non-Muslim.

Concealing Islam, therefore, is a full-fledged “deception.”⁵³ Unlike Covering Islam, whereby the actor strategically conceals a specific Muslim identity trait or expression, Muslim Americans that Conceal Islam are strategically masking every aspect of their Muslim identity within a specific place or the public sphere. By privatizing their Muslim identity, they remove each and every indicator of their Muslim identity from public detection. Muslim Americans that Conceal Islam have given up the task of Acting Muslim altogether, choosing to act non-Muslim instead. However, a subject that Conceals Islam has not converted to another faith, or fully disavowed Islam,

⁵¹ Concealing Islam is distinct from full-fledged “conversion,” whereby an actor completely disavows a faith for a new religion or a non-religious, agnostic, or atheistic perspective.

⁵² Yoshino, *supra* note 11, at 772.

⁵³ Using the language of Randall Kennedy, who bases his definition of “passing” as strategic deception Blacks used during the Antebellum period and Reconstruction to fend off subordination and violence and access the benefits present in white spheres of society. See Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145 (2001).

given that they still practice the faith and identity as such within the confines of private spaces, while choosing to identify as non-Muslim beyond them.⁵⁴

Muslim Americans that Conceal Islam are surrendering their Free Exercise rights in exchange for diminished counterterror suspicion and personal safety. In the process, actors that Conceal Islam also capitulate to the counterterror baseline that Muslim identity is presumptive of terror threat.⁵⁵ As a result, the process of and participation in Concealing Islam propagates counterterror policies that undermine their own Free Exercise rights, and the Free Exercise Rights of Muslim Americans at large.

Following an analysis of state vilification of Muslims and the counterterror policing programs enacted during the War on Terror in Parts II and III, respectively, this Article closely examines the four forms of Acting Muslim through actual case studies in Part IV.

II. VILIFYING MUSLIMS

The four forms of Acting Muslim frame how Muslim Americans negotiate their religious identity in response to counterterror policies enacted during the War on Terror. This counterterror campaign, although formally launched after the 9/11 terror attacks,⁵⁶ is informed by modern systems of animus that construct Islam as a civilizational nemesis,⁵⁷ and profile Muslims as presumptive terror threats. This Part examines those systems of animus and the stereotypes they produce.

A. *Constructing Threat*

As explained below, the overlapping systems of “Orientalism” and “Islamophobia” work together to construct the perceived threat posed by Islam.

1. *Orientalism*

“Orientalism” is a system whereby scholars, politicians, and lawmakers in the West construct the identity and institutions of their sphere in direct opposition to the East and actors within it.⁵⁸ Through this dialectic, an Orientalist defines an actor in the East, or “Orient,” in direct contrast to

⁵⁴ Some Muslims may choose to disavow Islam and convert to another faith, particularly when facing the social, psychological, or legal pressures and perils posed by the War on Terror. However, conversion is beyond the theoretical framework of Acting Muslim, given that the subject is no longer performing Muslim identity by choosing to no longer be part of that religious community.

⁵⁵ *Islamophobia*, *supra* note 24, at 109.

⁵⁶ War on Terror Declaration, *supra* note 23, at 2.

⁵⁷ In the same way “race is a social construction,” religious identity is also constructed, and in the case of Islam, vilified. *Performing Whiteness*, *supra* note 36, at 848.

⁵⁸ See generally EDWARD SAID, *ORIENTALISM* (1979) [hereinafter *ORIENTALISM*] (referring to the West as the “Occident” and the East, the subject of study and definition, as the “Orient”).

the attributes assigned to the West, or “Occident.”⁵⁹ For example, if the West is characterized as progressive, peaceful, and industrious, then the East is defined as static, war-torn, and languid.

Edward Said created Orientalism theory to scrutinize the West’s relationship with Islam. More specifically, Orientalism enabled the scrutiny of outsider constructions of the Muslim and Arab Worlds by 18th and 19th century European scholars.⁶⁰ In *Covering Islam*, Said explicates the Orientalist dialectic with Islam, as a religion and imagined geographic sphere:

[T]he West is modern, greater than the sum of its parts, full of enriching contradictions and yet always “Western” in its cultural identity; the world of Islam, on the other hand, is no more than “Islam,” reducible to a small number of unchanging characteristics despite the appearance of contradictions and experiences of variety that seem on the surface to be as plentiful as those of the West.⁶¹

The anchor Orientalist characterization of the West as fluid and dynamic, and Islam as static and austere, enables the manufacturing of additional misrepresentations and stereotypes assigned to Islam. This drives the misrepresentation and stereotyping of Islam’s population of 1.6 billion adherents around the world, who subscribe to a broad range of sects and schools of thought.⁶²

Orientalist discourses have shaped American state policy since independence. The view that, “Islam [is] the antithesis of the ‘true’ faith of Protestant Christianity”⁶³ was pervasive and influenced early American policy. Moreover, Republicans and Federalists cautioned against threats to liberty and “unbridled despotism” by using Islam and its most important prophet, the Prophet Muhammad, as a counterexample for developing American government institutions.⁶⁴ While the Framers debated the breadth of Free Exercise, fear and opposition of Islam was no wedge issue: “Both Republicans like Mathew Lyon and Thomas Jefferson, who welcomed the progressive

⁵⁹ *Id.* at 7.

⁶⁰ ORIENTALISM, *supra* note 58 (identifying a host of scholars classified as traditional Orientalists, including Rudyard Kipling and Joseph Conrad, while also leaving room for classifying modern thinkers that study Islam and Muslims, most notably Bernard Lewis, Samuel P. Huntington, and Fouad Ajami, as contemporary Orientalists).

⁶¹ EDWARD SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD* 10 (1981).

⁶² Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RESEARCH GROUP (Jul. 22, 2016), <http://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/> [<https://perma.cc/4U6Y-XEHP>].

⁶³ DENISE A. SPELLBERG, *THOMAS JEFFERSON’S QUR’AN, ISLAM AND THE FOUNDERS* 6 (2013).

⁶⁴ ROBERT ALLISON, *THE CRESCENT OBSCURED: THE UNITED STATES AND THE MUSLIM WORLD* 45–46 (1995). “Americans regarded Muhammad as a dangerous false prophet and as the creator of an evil and religious political system. . . . Islam, as the Americans saw it, was against liberty, and being against liberty, it stopped progress.” *Id.*

libertarianism of the French Revolution, and Federalists like John Adams, who feared the consequences of unchecked democracy, agreed that liberty and human progress were good things and that the unbridled despotism of the Muslim world was a bad thing for preventing it.”⁶⁵ Thus, the Framers routinely looked to Islam as an entity the fledgling nation should construct itself in opposition to, and more broadly, a cautionary tale and talisman.

In addition to influencing how the Framers envisioned their fledgling government, Orientalist constructions of Islam penetrated the judiciary.⁶⁶ Most notably, American courts refused to naturalize Muslim immigrants as citizens from 1790 through 1944, maintaining that “it cannot be expected that as a class [Muslims] would readily intermarry with our population and be assimilated into our civilization.”⁶⁷ The judicial rulings that prohibited the naturalization of Muslim immigrants emanated directly from the Orientalist understanding of Islam as inassimilable with American identity—a view affirmed by the Supreme Court and many of its inferior courts.⁶⁸

Therefore, more than merely a “master discourse” of academic theory,⁶⁹ Orientalism was institutionalized and enforced at the highest levels of American government to police Islam and prevent Muslims from becoming part of the American citizenry. Indeed, formative American law “banned Muslims long before Donald Trump” proposed it on the presidential campaign trail,⁷⁰ and the anti-sharia legislation passed and proposed by states across the country highlight that Orientalism is still pronounced in the United States.⁷¹ In addition to political rhetoric and legislation, Orientalism is redeployed today within the philosophy and strategy of counterterrorism policy, examined in Part III of this Article, and conjoined by the modern distortions of Islam and Muslim identity delivered by its progeny system, Islamophobia.

⁶⁵ *Id.* at 46.

⁶⁶ For a general review of how both state and federal courts perceived Islam and Muslims, see generally Marie A. Failinger, *Islam in the Mind of American Courts: 1800 to 1960*, 32 B.C. J.L. & Soc. JUST. 1 (2012).

⁶⁷ *In re Hassan*, 48 F. Supp. 843, 845 (1942). For a comparative analysis of how formative immigration law and civil court rulings conflated Arab with Muslim identity in the U.S. from 1790-1944, and deemed Muslim identity irreconcilable with citizenship, see generally *Between Muslim and White*, *supra* note 21. For the landmark work on the period spanning 1790 through 1954 when the law mandated whiteness as a prerequisite for naturalized citizenship, see generally IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

⁶⁸ The Supreme Court, in *In re Ross*, highlighted what it perceived to be “[t]he intense hostility of the people of Moslem faith [toward Christian civilization],” in a case addressing the applicability of American maritime law over foreign sailors on U.S.-flagged ships where the U.S. had jurisdiction. 140 U.S. 453, 463 (1891).

⁶⁹ Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1586 (2002).

⁷⁰ Khaled A. Beydoun, *America Banned Muslims Long Before Donald Trump*, WASH. POST (Aug. 18, 2016), https://www.washingtonpost.com/opinions/trumps-anti-muslim-stance-echoes-a-us-law-from-the-1700s/2016/08/18/6da7b486-6585-11e6-8b27-bb8ba39497a2_story.html?utm_term=.08db9aa2fb27 [<https://perma.cc/F6WT-DTPP>].

⁷¹ See generally Bradford J. Kelley, *Bad Moon Rising: The Sharia Law Bans*, 73 LA. L. REV. 601 (2013) (outlining the states that restricted sharia law by legislation, proposed bills seeking to do so, and the broader movement pushing for this legislation).

2. *Islamophobia*

Islamophobia is “the presumption that Islam is inherently violent, alien, and inassimilable,” which drives the belief that “expressions of Muslim identity are correlative with a propensity for terrorism.”⁷² The modern successor of Orientalism, Islamophobia is “rooted in understandings of Islam as civilization’s antithesis, and perpetuated by government structures and private citizens.”⁷³ Counterterror policy framing of the threat of Muslim terrorism, which ties suspicion of terrorism with Muslim identity, intensified the fear of Muslims on the ground in the U.S. “Islamophobia” is the operative term for this rising form of fear and animus. The term, in short time, has become popular and resilient,⁷⁴ deployed by activists, advocates, and academics to condemn the animus directed at Muslim subjects.

Formal state policies that designate Muslims as presumptive terrorists, most notably counterterror policy, are an overlooked and under-theorized form of Islamophobia. This Article classifies formal counterterror policies, discussed more closely in Part III(A), as “structural Islamophobia,” defined as, “the fear and suspicion of Muslims on the part of institutions—most notably government agencies—that is manifested through the enactment and advancement of policies,”⁷⁵ most notably the Department of Homeland Security, or “DHS.”

Islamophobia is broader than merely “fear and dislike” of Muslims by private individuals.⁷⁶ It is more complex than simply the strategic rhetoric peddled by politicians maligning Islam for political gain.⁷⁷ In line with the focus of this Article, the most potent forms of Islamophobia are counterterror policies enforced by the state, which “legitimize prevailing misconceptions, misrepresentations, and tropes widely held by private citizens.”⁷⁸

Whereby Orientalism is a dialectic that pits the West against Islam—as a subject of study, definition, and policing—Islamophobia is a dialectic between state policy and the American people. The latter includes Muslims and non-Muslims.⁷⁹ Therefore, Islamophobia has a twofold effect. First, for non-

⁷² *Islamophobia*, *supra* note 24, at 111.

⁷³ *Id.*

⁷⁴ *Id.* at 108–09.

⁷⁵ *Id.* at 114.

⁷⁶ See generally Bridge Initiative Team, *Islamophobia: The Right Word for a Real Problem*, BRIDGE INITIATIVE (Apr. 26, 2015), <http://bridge.georgetown.edu/islamophobia-the-right-word-for-a-real-problem/> [https://perma.cc/GJY9-YNB8].

⁷⁷ See generally Khaled A. Beydoun, “Muslims Bans” and the (Re)Making of Political Islamophobia, U. ILL. L. REV. (forthcoming 2017) (analyzing how Donald Trump and other presidential candidates deployed Islamophobic framing and rhetoric to resonate with voters). See also Bridge Initiative Team, *Islamophobia in the 2016 Elections*, BRIDGE INITIATIVE (Apr. 25, 2015) (providing compilation of Islamophobic rhetoric and proposals made by presidential candidates during the 2016 election cycle).

⁷⁸ *Islamophobia*, *supra* note 24, at 119.

⁷⁹ In his book *Islamophobia and Racism*, Erik Love argues that Islamophobia targets and impacts anybody who “looks Middle Eastern,” which includes non-Muslim groups like Sikhs, Arab Christians, Latinx communities, South Asian Hindus, and more. ERIK LOVE, IS-

Muslim Americans, Islamophobic policy endorses stereotypes of Islam, emboldening privately held animus and violence.⁸⁰

Second, for Muslim Americans, Islamophobic policy triggers the process of Acting Muslim in ways that either confirm one's Muslim identity in line with the Free Exercise Clause or negate it to diminish counterterrorism suspicion. Section B examines the stereotypes produced by Orientalism and Islamophobia, which are systematically ascribed to Muslim Americans by state policy to frame them as foreign, subversive, and terrorists.

B. Profiling Muslims

Orientalism and Islamophobia produce stereotypes that systematically frame Muslim Americans as foreigners, subversives, and terrorists. These tropes adopted by War on Terror policies drive the process of Acting Muslim on the part of Muslim Americans.

1. As Foreigners

The Orientalist rivalry that positions Islam as the antithesis of the U.S. spawned an accompanying trope: the Muslim occupying the role of the perpetual outsider. Since Islam was characterized as a foreign faith, to be fought and fended off, Muslims were thus a rival class to be fenced out of the country. The Framers debate the absorption of Muslims into the American polity,⁸¹ and U.S. courts ultimately restricted the naturalization of Muslim newcomers until 1944.⁸² Additionally, enslaved Muslims toiled on American plantations until slavery was abolished.⁸³ The enslavement of African Muslims stripped them of their status as human beings and reduced them to property.⁸⁴ Such enslavement, in turn, prevented the state and society from perceiving them as beings capable of adhering to Islam, or any faith for that matter.⁸⁵ Although millions of Muslims practiced Islam while in bondage,

LAMOPHOBIA AND RACISM 10 (2017). This definition of Islamophobia, which comports with my definition of private Islamophobia, focuses on the racialization of Muslim identity. *Islamophobia*, *supra* note 24, at 111.

⁸⁰ "The law can serve 'at times [as] an expression of popular will,' executing the punitive measures an enraged populace calls for during times of crisis." *Islamophobia*, *supra* note 24, at 120 (citing Muneer I. Ahmad, *A Rage Shared By Law: Post-September Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1318 (2004) [hereinafter *A Rage Shared By Law*]).

⁸¹ This was a matter of debate among the Framers, and Thomas Jefferson used Islam, and Muslims, as a reference point to expand Free Exercise and religious pluralism. SPELLBERG, *supra* note 63, at 3–6.

⁸² *Between Muslim and White*, *supra* note 21, at 65–67.

⁸³ For a landmark historical study of enslaved Africans in the Americas, including the United States, see generally Sylvaine A. Diouf, *Servants of Allah: African Muslims Enslaved in the Americas* (1998).

⁸⁴ See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715–1720 (1993) (examining the process of constructing Blackness through the legal legitimation of slavery).

⁸⁵ Khaled A. Beydoun, *Antebellum Islam*, 58 HOW. L. J. 141, 146–47 (2015).

the state envisioned Muslims as a foreign threat, imagined in the narrow racial form of Arab and Middle Eastern.⁸⁶

The caricaturing of Muslims as foreign, Arab, and Middle Eastern continues to pervade state framing. After the 9/11 terror attacks, the racial caricature of Muslims was repositioned as the very archetype of foreignness. In the immediate aftermath of 9/11, law scholar Leti Volpp observed:

We are witnessing the redeployment of old Orientalist tropes. Historically, Asia and the Middle East have functioned as phantasmic sites on which the U.S. nation projects a series of anxieties regarding internal and external threats to the coherence of the national body. The national identity of the United States has been constructed in opposition to those categorized as “foreigners,” “aliens,” and “others.”⁸⁷

Expressions of Muslim identity, after the War on Terror, were not only presumptive of otherness, but also perceived to be in direct conflict with American identity.⁸⁸ Muslims were not imagined to be part of the American polity, but a foreign flock that subscribe to a foreign faith, who believed in religious ideas and figures that conflicted the American Christo-Judaic foundation. Being Muslim disqualified one from being American, and the archetypal imagining of American identity preempted adherence to Islam.

Coupled with the narrow “racialization” of Muslims as Arab and Middle Eastern foreigners, courts echoed the accompanying view that Islam—as a religion—was also inassimilable.⁸⁹ In 1875, “Judge Bradley, speaking for the Supreme Court in *Dainese v. Hale*, intimated that Islam was a ‘pagan faith.’”⁹⁰ Outward expressions of Islam, through dress, grooming, prayer, or more, branded the actor as “part of the Mohammedan world,”⁹¹ and there-

⁸⁶ “Muslim identity was converted from a religious into a racial classification during the Antebellum Era. The political struggles with the Barbary States and the Ottoman Empire led the state to construct Muslim identity in the exclusive image of Arab and Turkish identity.” *Id.* at 147; see also Adrien Katherine Wing, *Civil Rights in the Post 9/11 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 722 (2003) (“The pan-ethnicity term ‘Arab’ and the religious signifier ‘Muslim’ have been socially constructed as a synonymous ‘race’ in the United States.”).

⁸⁷ Volpp, *supra* note 69, at 1586.

⁸⁸ *Id.*

⁸⁹ “Racial Construction” or “Racialization” is defined as “an unstable and de-centered complex of social meanings constantly being transformed by political struggle.” MICHAEL OMI AND HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1990s* 55 (1994); see also Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). For an analysis of the legal origins of Muslim racialization in the U.S., see generally Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E.L. 121 (2008).

⁹⁰ *Between Muslim and White*, *supra* note 21, at 47, citing *Dainese v. Hale*, 91 U.S. 13, 15 (1875).

⁹¹ *In re Ahmed Hassan*, 48 F. Supp. 843 (1942) (a citizenship proceeding whereby an immigration-petitioner from Yemen was denied naturalization, and found to be non-white on grounds of his Muslim identity).

fore, “others” to be excluded from an American polity whereby Christianity remained a pivotal gateway.⁹² In 2015, the Third Circuit Court of Appeals formally acknowledged the “history of religious discrimination” that caricatured Islam as a racially monolithic, alien religion, and Muslims as outsiders, outlining how that characterization continues to drive counterterrorism policing of Muslim American communities in the present day.⁹³

The process whereby outward expression of Muslim identity prompts dis-identification as citizen continues today. For instance, Muslim men that don traditional Islamic dress, such as a *thobe* or a *kufi*, are routinely stereotyped as immigrants.⁹⁴ Outward expressions of Muslim American masculinity, as examined in Part IV, mark the Muslim male as an outsider, which gives rise to suspicion of terrorism. Still today, the indelible stereotype of the terrorist embedded in the collective American imagination is one of a brown, bearded man donning conservative Islamic garb.⁹⁵ Indeed, this is the very caricature that drives counterterrorism policy today.

The stereotypes assigned to Muslim identity take on distinct meaning when applied to Muslim women. Perhaps more intensely than any other garment, the headscarf worn by Muslim women is frequently conflated with foreignness. The Muslim American woman wearing the headscarf may be born in the U.S. or from a multi-generational American family. However, the headscarf communicates a radically different identity, marking the Muslim American woman as an immigrant because of the headscarf’s association with a faith caricatured as foreign.⁹⁶

Moreover, performance of Muslim womanhood, by way of the headscarf or more conservative iterations of covering,⁹⁷ renders readings of the actor as non-citizen. This stereotype fuels the common tropes that Muslim women are “oppressed” by Muslim men and Islam is a “tyrannical faith.”⁹⁸

⁹² “A long-standing and still much-favored mode of indicating difference is through metonymy; Muslim women wear the hijab, and men appear bearded, praying, or both. In each case, dress, beards, and acts stand in for the whole person, denoting cultural orientation, religious commitment, and thus, to secular society, Otherness.” PETER MOREY & AMINA YAQIN, *FRAMING MUSLIMS: STEREOTYPING AND REPRESENTATION AFTER 9/11* 115 (2011).

⁹³ *Hassan v. City of New York*, 804 F.3d 277, 303 (2015) (citing *Between Muslim and White*, *supra* note 21, at 33).

⁹⁴ Arabic for the long traditional robe worn by Muslim men, and the brimless and rounded cap, respectively.

⁹⁵ See EVELYN ALSULTANY, *ARABS AND MUSLIMS IN THE MEDIA: RACE AND REPRESENTATION AFTER 9/11* (2012), for a critical examination of the most prominent stereotypes of Muslim men and women after the 9/11 terror attacks, including the common trope of the brown, bearded Muslim man.

⁹⁶ Abdullahi Ahmed An-Na’im illustrates this through the story of Zaynab: “She shares that she was born and raised in America and maintains ‘American values,’ but ‘some people are nervous around me because they don’t understand why I do things like wear hijab or pray five times a day.’” *WHAT IS AN AMERICAN MUSLIM? EMBRACING FAITH AND CITIZENSHIP* 81 (2014).

⁹⁷ The *niqab* is a face-covering, conservative Muslim women wear. It covers the entire face except the eyes.

⁹⁸ Asra Nomani, *Wearing the Hijab in Solidarity Perpetuates Oppression*, N.Y. TIMES (Jan. 6, 2016), <https://www.nytimes.com/roomfordebate/2016/01/06/do-non-muslims-help-or>

These stereotypes have been increasingly accompanied by stereotypes of the headscarf as a proxy for religious extremism, as illustrated by the U.S. Military's classification of the headscarf as a form of "passive terrorism."⁹⁹ In addition, the "stereotype of Muslim women as terrorists, co-conspirators, or aiders and abettors to their male terrorist family members,"¹⁰⁰ has eroded the preexisting stereotype that terrorism was the exclusive terrain of Muslim men. For example, on the day of the 2016 presidential election in Washington, DC, a cab driver called a prominent Muslim American legislator "ISIS," and "threatened to remove [her] hijab."¹⁰¹ Outward expression of Muslim identity actively negates the "substantive" citizenship of Muslim Americans.¹⁰²

2. *As Subversives*

The perpetual foreignness ascribed to Muslim identity gives rise to the view that Muslim Americans are presumptively subversive. In other words, if Islam is cast as a rival faith, and Muslims are deemed to be foreign and inassimilable, then Muslims who exclusively pledge their "allegiance" to Islam are presumptively conspiring against the interests of the U.S.¹⁰³ This stereotype was pervasive in the rhetoric of the Framers,¹⁰⁴ influential in formative naturalization proceedings involving Muslim immigrant petition-

hurt-women-by-wearing-hijabs/wearing-the-hijab-in-solidarity-perpetuates-oppression [https://perma.cc/KB2J-6N88]. For a critique of the stereotype that Muslim women are oppressed and relegated, see generally Juliane Hammer, *Center Stage: Gendered Islamophobia and Muslim Women*, in ISLAMOPHOBIA IN AMERICA: THE ANATOMY OF INTOLERANCE 107 (Carl W. Ernst ed., 2013).

⁹⁹ "In turn, the proliferation of militant Salafism and the *hijab* contribute to the idea of passive terrorism, which occurs when moderate segments of the population decline to speak against or actively resist terrorism." Tawfik Hamid, *A Strategic Plan to Defeat Radical Islam*, in COUNTERING VIOLENT EXTREMISM: SCIENTIFIC METHODS AND STRATEGIES, AIR FORCE RESEARCH LABORATORY 72 (L. Fenstermacher ed., 2015).

¹⁰⁰ Sahar F. Aziz, *Coercing Assimilation: The Case of Muslim Women of Color*, 24 TRANS-NAT'L. & CONTEMP. PROBS. 341, 342 (2015) [hereinafter *The Case of Muslim Women of Color*].

¹⁰¹ See Kenzi Abou-Sabe, *Somali-American Legislator Says DC Taxi Driver Called Her ISIS*, NBC NEWS (Dec. 8, 2016), <https://www.nbcnews.com/news/nbcblk/somali-american-legislator-says-dc-taxi-driver-called-her-isis-n693681> [https://perma.cc/W6JQ-74Y9] (The incident involved Ilhan Omar, the first Somali American woman elected to the Minnesota House of Representatives.).

¹⁰² "Possession of formal citizenship status often fails to protect people from exclusion and violence directed at those perceived to be 'foreign' in character, habit, or appearance." LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 30 (2008). While formal citizenship extends the "right to have rights," substantive citizenship is a measure of access to and enjoyment of the rights of formal citizenship. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (1973).

¹⁰³ Formal citizenship is distinct from allegiance, the former being legal and the latter represented by one's identity and conduct. However, symbolic citizenship is demonstrated through expressions of allegiance, an "affair of the heart" manifesting where one's true loyalties lie. Leti Volpp, *Citizenship Undone*, 75 FORDHAM L. REV. 2579, 2580 (2007) [hereinafter *Citizenship Undone*].

¹⁰⁴ ALLISON, *supra* note 64, at 45–46.

ers,¹⁰⁵ and as examined in Part III, common in contemporary political rhetoric and counterterror policy.

Therefore, although they are bona fide citizens, Muslim Americans' religious identity induces scrutiny of their citizenship status, patriotism, and belonging.¹⁰⁶ This scrutiny is strongest after moments of national crisis and in the direct aftermath of a terror attack committed by a Muslim culprit.¹⁰⁷ 9/11 functioned as the great modern impasse that "increase[d] awareness of Muslim culture and practice" in the U.S.,¹⁰⁸ ushering in intensified popular and state suspicion of Muslim Americans. This suspicion presumed that by virtue of their faith, Muslim Americans prioritize their allegiance to Islam over their country. Such a presumption compels Muslim Americans, induced by the state, to outwardly perform allegiance to the U.S. through vivid, recurring, and over-compensatory acts of patriotism or else be exposed to the "shared rage" of state and societal suspicion and violence.¹⁰⁹

For Muslim Americans, suspicion of subversion can only be diminished (or disproven) through performance of patriotism. Moreover, because Muslim and American identities are constructed as opposed, performance of Americanness requires downplaying Muslim identity. Carbado and Gulati list some examples of Muslim American expressions of patriotism as, [a man] shaving before taking a plane trip. Or for a woman it might mean refraining from wearing a headscarf. For the family, it might mean placing an American flag outside the home. It also might mean refraining from doing the traditional Muslim prayers at work.¹¹⁰ Through the prism of the "good versus bad" Muslim binary, law scholar Karen Engle observes that those who forsake their Free Exercise rights in exchange for demonstrations of American patriotism are deemed "good Muslims" by the state.¹¹¹ But

¹⁰⁵ *Between Muslim and White*, *supra* note 21, at 49–68.

¹⁰⁶ The stereotype prompts questions like, "[C]an Muslims be assimilated"? particularly after a terror attack or a populist political campaign, like Trump's, which raises questions about Islam's compatibility with U.S. interests. See Reihan Salam, *Can Muslims Be Americans*, SLATE (Jun. 16, 2016), http://www.slate.com/articles/news_and_politics/politics/2016/06/muslim_assimilation_is_challenging_and_fraught_donald_trump_is_making_it.html [https://perma.cc/U3AW-U95Z] (written in the aftermath of the Orlando Shooting on June 12).

¹⁰⁷ "[A]fter September 11, the imagined community of the American nation, constituted of loyal citizens, invoked differences from the Muslim terrorist to fuse its citizenry at a moment of crisis." Leti Volpp, *The Boston Bombers*, 82 *FORDHAM L. REV.* 2209, 2213 (2014) [hereinafter *Boston Bombers*].

¹⁰⁸ MOREY & YAQIN, *supra* note 92, at 208.

¹⁰⁹ See generally *A Rage Shared By Law*, *supra* note 80 (investigates the symbiotic relationship between post-9/11 state profiling and policing with the "vigilante" violence inflicted on Arab and Muslim Americans by private citizens).

¹¹⁰ DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN "POST-RACIAL" AMERICA* 168 (2013).

¹¹¹ Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 *U. COLO. L. REV.* 59 (2004). Principal among "good Muslim" expressions are "denouncing terrorism, supporting the war on terror, and waving the American flag." *Id.* at 62–63; see also MAHMOOD MAMDANI, *GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR* (2004) (examining the genesis of the good-bad Muslim binary and its global application).

those Muslim Americans who refuse to make the trade-offs demanded by counterterror policy are branded “bad Muslims,”¹¹² whose expression of Islam signals subversion and warrants suspicion of terrorism.

The stereotyped subversion of Muslim Americans signals fear of a purported ideology, but during the “with us or against us” climate of the War on Terror,¹¹³ a corollary of imagining Muslim Americans as subversive is presuming that their allegiance lies with a foreign actor bent on harming the U.S., and in particular, allegiance to transnational terror networks like Al-Qaeda—the orchestrator of the 9/11 terror attacks—or ISIS, the emergent terrorist organization DHS holds culpable for “inspiring” homegrown radicalization and acts of terror.¹¹⁴

3. *As Terrorists*

For the state, terrorism is the sum of all fears present in Muslim bodies, whether citizens or foreign nationals. It is the threat that looms from Muslim Americans stereotyped as foreign and subversive; who express their fidelity to a foreign rival in the most violent methods imaginable.¹¹⁵ It is the most potent driver of societal fear, and state policing, of Muslim Americans and Muslim communities. Terrorism is, at once, the quintessential and most damaging stereotype assigned to Muslim Americans—a stereotype “institutionalized” by War on Terror policy,¹¹⁶ which also summons the bigotry and violence of private citizens that coexists with the perpetual scrutiny of the state.¹¹⁷

¹¹² MAMDANI, *supra* note 111, at 15. (“[U]nless proven to be ‘good,’ every Muslim was presumed to be ‘bad.’ All Muslims were now obligated to prove their credentials by joining in a war against ‘bad Muslims.’”)

¹¹³ “The war on terrorism clearly draws the lines—if you are not with us, you are against us. Thus, aliens and citizens alike, although particularly Muslims or those who might be identified as Muslim, must demonstrate their loyalty.” Engle, *supra* note 111, at 100.

¹¹⁴ *Written Testimony of DHS Office for Community Partnerships Director George Selim for a House Committee on Homeland Security, Subcommittee on Oversight and Management Efficiency hearing titled, “Identifying the Enemy: Radical Islamist Terror,”* DEP’T OF HOMELAND SECURITY (Sept. 22, 2016), <https://www.dhs.gov/news/2016/09/22/written-testimony-dhs-office-community-partnerships-house-homeland-security> [<https://perma.cc/V8KC-HSHP>] [hereinafter *Identifying the Enemy*].

¹¹⁵ Proponents of the stereotype that Islam is inherently violent rely on a narrow interpretation of *jihad* (struggle) as terrorism. However, the word is complex, and has a myriad of meanings. “To Muslims, the term *jihad* connotes honor and sacrifice for others. Thus, to use *jihad* interchangeably with terrorism is not only inaccurate, but also counterproductive. . . . Among Muslims globally, the concept of *jihad* is considerably more nuanced than the single sense in which Western commentators invariably invoke the term.” JOHN L. ESPOSITO & DALIA MOGAHED, WHO SPEAKS FOR ISLAM: WHAT A BILLION MUSLIMS REALLY THINK 75 (2007).

¹¹⁶ Institutional animus, Ian F. Haney López argues, encompasses both intentional and non-intentional behaviors within organizations. See generally *Institutional Racism*, 109 YALE L.J. 1717 (2000).

¹¹⁷ Islamophobia, *supra* note 24, at 109–10.

Though the stereotype was rampant before 9/11,¹¹⁸ the terror attacks of that day and the transformative counterterror responses that followed positioned the Muslim terrorist as the principal enemy of the state. The state enacted policy in line with the Orientalist binary that envisioned Islam and its adherents as the “civilizational nemesis” of the U.S. and its people.¹¹⁹ The Bush Administration entirely overhauled the national security apparatus, creating the Department of Homeland Security, and shortly after, enacting the PATRIOT Act¹²⁰ and other policies regulating the entry and exit of Muslim immigrants. As a result, the “Muslim terrorist” stereotype became ubiquitous after 9/11, saturating the rhetoric of politicians, prominently featured on movie and television screens, and echoed on local and national news.¹²¹ In addition, the internalization of this stereotype by Muslim Americans highlights how deeply penetrating this stereotype became after 9/11, illustrated by the ritual prayer, “Please do not let the culprit be Muslim,” performed by Muslim Americans after every mass shooting or terror attack that takes place.¹²²

Although the 9/11 terror attacks were executed by a handful of individuals adhering to a fringe interpretation of Sunni Islam, “Wahhabism,”¹²³ the Orientalist view that Islam is a spiritual monolith produces “generalized

¹¹⁸ See John Tehranian, *The Last Minstrel Show? Racial Profiling, the War on Terrorism and the Mass Media*, 41 CONN. L. REV. 781, 788–93 (2009) [hereinafter *The Last Minstrel Show*].

¹¹⁹ See, e.g., SAMUEL P. HUNTINGTON, CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 4 (1998) (“The fundamental problem for the West is not Islamic fundamentalism. It is Islam, a different civilization whose people are convinced of the superiority of their culture and are obsessed with the inferiority of their power.”). Huntington’s theory, dubbed the “clash of civilizations,” did not narrowly pit the U.S. against “Islamic fundamentalism,” but the whole of Islam; see also Samuel P. Huntington, *The Clash of Civilizations?* 72 FOREIGN AFF. 22 (1993) [hereinafter *Clash of Civilizations*]. This essay preceded Huntington’s landmark book and had considerable influence over the neoconservative foreign and domestic policies of the Bush administration.

¹²⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 8, 12, 15, 18, 20, 31, 42, 47, 49, and 50 U.S.C.); see also Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified in scattered sections of 8, 15, 18, 21, 28, and 42 U.S.C.).

¹²¹ Sahar Aziz, *Sticks and Stones, the Words that Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 37–42 (2009). For a comprehensive review of Hollywood productions that propagate negative stereotypes of Arabs and Muslims, including the trope of the Muslim terrorist, see generally JACK G. SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE (2001). See also *The Last Minstrel Show*, *supra* note 113, at 800–08.

¹²² Khaled A. Beydoun, *Boston Explosions: ‘Please Don’t Be Arabs or Muslims,’* AL JAZEERA ENGLISH, Apr. 16, 2013, www.aljazeera.com/indepth/opinion/2013/04/201341681629153634.html [https://perma.cc/YDN8-T77N].

¹²³ This textual and fundamentalist interpretation of Sunni Islam established by the 18th Century Arabia Scholar Muhammad ‘Abd al-Wahhab preaches a return of the form of Islam practiced during the era of the Prophet Muhammad. Saudi Arabia enshrines Wahhabism, and the tradition drives the violent ideology and civilizational worldview of Al-Qaeda and ISIS. For an excellent overview of the history, theology, and modern day relevance of Wahhabism, see generally HAMID ALGAR, WAHHABISM: A CRITICAL ESSAY (2002).

hostility toward entire communities of Arabs and Muslims in the United States.”¹²⁴ The terrorist stereotype flattens Muslims, eliminating understanding of the faith group as both religiously and racially diverse.¹²⁵ The stereotype also fixes them as static and irredeemable figures guided by a faith that makes the threat of terrorism an ever-looming possibility.

The terrorist stereotype is the most potent driver of the “dis-identification” of Muslim Americans as citizens.¹²⁶ Those who subscribe to the terrorist stereotype tend to see an unresolvable divide between “Muslim” and “American.” For them, Muslim American is a contradictory or “impossible” identity.¹²⁷ Consequently, the terrorist stereotype places Muslim Americans in the most precarious position during the War on Terror, as articulated by law scholar Leti Volpp:

[A]ll Muslim Americans are in a position akin to the naturalized citizen, I mean they possess a citizenship that is always now at risk of being undone. Their identity as Muslims—in other words, “potential terrorists”—means that they are perennially suspected of having engaged in fraud or misrepresentation, with that fraud or misrepresentation consisting of a pretense of loyalty or allegiance to the United States.¹²⁸

Thus, with terrorism functioning as a de facto proxy for Muslim, the terrorist stereotype endorses and emboldens private violence against Muslim Americans imagined to be plotting against the U.S and its people, such as the spike in arsons and vandalisms of American mosques in 2015,¹²⁹ or the

¹²⁴ Susan Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. OF AM. L. 295, 312 (2002).

¹²⁵ Natsu Taylor Saito, *Symbolism Under Siege, Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 ASIAN AM. L.J. 1, 12 (2001). Furthermore, Cyra Choudhury analogizes the racialization of Muslims as terrorists to the racialization of “Blacks as criminals” or “Mexicans as illegal,” arguing, “Terrorists, like drug dealers and smugglers, are raced quintessentially as ‘colored’ Muslims with strange names and weird accents.” *Terrorists and Muslims: The Construction, Performance, and Regulation of Muslim Identities*, 7 RUTGERS J. OF L. & REL. 21 (2006).

¹²⁶ Volpp, *supra* note 69, at 1575. “If these alien citizens are considered terrorists, we might think about the tension between the terms alien, citizen, and terrorist. Both terrorist and alien constitute opposites to the idea of the citizen.” Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1626 (2004) [hereinafter *Impossible Subjects*]. Many legal scholars, including David Cole, Natsu Taylor Saito, Leti Volpp, among others, have likened the current treatment of Muslim Americans to Japanese Americans during World War II, analogizing the internment of Japanese Americans and legal residents to the counterterror policing and dragnets deployed against Muslim Americans en masse. See *Korematsu v. United States*, 323 U.S. 21 (1944) (landmark Supreme Court decision upholding an Executive Action ordering the internment of at least 100 Japanese citizens and residents under the pretense of it being a compelling national security interest).

¹²⁷ *Impossible Subjects, supra* note 126, at 1626.

¹²⁸ *Citizenship Undone, supra* note 103, at 2583.

¹²⁹ See Sarah Rathod, *2015 Saw A Record Number of Attacks on US Mosques*, MOTHER JONES (June 20, 2016), <http://www.motherjones.com/politics/2016/06/islamophobia-rise-new-report-says/> [https://perma.cc/C89Z-4AT4].

murder of three Muslim American students in Chapel Hill in February of 2015.¹³⁰ This violence against Muslim Americans was just as frequent in 2015 as it was in the immediate wake of 9/11.¹³¹

This private Islamophobic violence is legitimized by the strident counterterror policies formulated with the “Muslim terrorist” caricature in mind. The institutionalization of the presumption that Muslim Americans are engaged in terror classifies them as a segment of the polity that requires special policing, which then justifies the emaciation of Muslim Americans’ Free Exercise rights.¹³² With each successive administration carrying the War on Terror forward, these policies make Confirming Islam more perilous for Muslim Americans, incentivizing forms of Acting Muslim that negate or altogether conceal their Muslim identity.

III. POLICING MUSLIMS

The systems developed to vilify Islam and the stereotypes assigned to Muslims during the war on terror, have driven the state’s policing of Muslim Americans. The presumption that Muslim identity correlates with a propensity for terrorism formed the foundation of War on Terror counterterror policy,¹³³ marking the institutionalization of a de facto war against Islam on foreign and domestic fronts. The latter of which targeted Muslim Americans, and diminished their Free Exercise rights. Therefore, on the home front, the domestic War on Terror targeting “a fringe form of Islamic extremism” became a war on Muslims at large, thereby exposing every Muslim American to the threat of counterterror suspicion and surveillance.¹³⁴

This Part of the Article analyzes the signature counterterror policies deployed against Muslim Americans during the three phases of the War on Terror and how each of these counterterror programs narrowed the scope of Muslim American Free Exercise and identity expression. Section A examines the “Bush Era” (from 9/11 through 2008), Section B the “Obama Era” (2009 through December 2016), and Section C the “Trump Era” (January 2017 onward).

¹³⁰ *Three Muslim Students Killed at North Carolina Campus*, AL JAZEERA ENGLISH (Feb. 11, 2015), <http://www.aljazeera.com/news/2015/02/students-murdered-university-north-carolina-campus-150211093231033.html> [https://perma.cc/B2WN-7K87].

¹³¹ See Matt Zapotosky, *Hate Crimes Against Muslims Hits Highest Mark Since 2001*, WASH. POST (Nov. 14, 2016), https://www.washingtonpost.com/world/national-security/hate-crimes-against-muslims-hit-highest-mark-since-2001/2016/11/14/7d8218e2-aa95-11e6-977a-1030f822fc35_story.html?utm_term=.aa7ab9798b85 [https://perma.cc/VL2N-VF9B] (citing *FBI Releases 2015 Hate Crime Statistics*, FBI, Nov. 14, 2016, <https://www.fbi.gov/news/stories/2015-hate-crime-statistics-released> [https://perma.cc/BN4U-2478] (257 hate crimes were reported in 2015, a 67% increase from 2014.)).

¹³² “Terrorist and citizen are oppositional terms. Thus the ‘terrorist citizen’ seems also an impossible subject. Putative terrorists are not considered deserving of the protections of citizenship.” *Impossible Subjects*, *supra* note 126, at 1626.

¹³³ See *Islamophobia*, *supra* note 24, at 111.

¹³⁴ War on Terror Declaration, *supra* note 23, at 1348.

A. *The Bush Era*

The 9/11 terror attacks took place nine months after George W. Bush was inaugurated as president. The attacks brought forth major structural and strategic overhaul of the state's national security program, and spurred the modern War on Terror.

1. *Federal Surveillance*

9/11 triggered the structural overhaul of the state's national security apparatus. The Bush administration's fixation on "Islamic extremism" led to its creation of DHS. Within DHS, the Bush Administration centralized the state's national security, immigration, and border patrol responsibilities, all of which were rejiggered to combat the threat of terrorism that followed the "biggest attack on American soil."¹³⁵ The Bush Administration relegated the Free Exercise rights of Muslim Americans and fully instituted a "zero tolerance [policy] and a demand for justice."¹³⁶

The newly minted DHS's primary counterterror mandate was executing the US PATRIOT Act—swiftly enacted into law by Congress on October 21, 2001.¹³⁷ Although President Bush declared that "Islam is peace" six days after 9/11,¹³⁸ his administration pivoted the structures and suspicion of the state squarely toward its Muslim citizenry.¹³⁹ The PATRIOT Act dissolved boundaries between the state's principal law enforcement and intelligence agencies—the Central Intelligence Agency (CIA), the Department of Justice (DOJ), and the National Security Agency (NSA). Both jointly and severally, these investigative and policing agencies marshaled their resources and attention onto Muslim American subjects, institutions, and geographies, driven by the institutionalized presumption that tied Muslim identity to terrorism.¹⁴⁰

Federal electronic surveillance was the backbone of the Bush administration's counterterror program. Section 217 of the PATRIOT Act broadened

¹³⁵ David E. Sanger, *Threats and Responses: News Analysis; When Goals Meet Reality*, N.Y. TIMES, Mar. 31, 2004, at A1. For a thorough analysis of the range of counterterror policies enacted after 9/11, with close focus on US PATRIOT Act and its impact on citizens and noncitizens, see generally Akram & Johnson, *supra* note 124.

¹³⁶ MAMDANI, *supra* note 111, at 256.

¹³⁷ USA PATRIOT Act §§ 412, 201–25, 115 Stat. 272, 350–52, 278–96.

¹³⁸ President George W. Bush, "Islam is Peace," Says President, WHITE HOUSE (Sept. 17, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html> [<https://perma.cc/D42J-42TS>].

¹³⁹ See *Islamophobia*, *supra* note 24, at 116–18; see also Rebecca Copeland, *War on Terrorism or War on Constitutional Rights? Blurring the Lines of Intelligence Gathering in Post-September 11 America*, 35 TEX. TECH. L. REV. 1, 2 (2004) ("A mere glimpse at the official webpages of the Federal Bureau of Investigation, the Department of Defense, the White House, the Department of Justice, and the State Department shows that our government is launching full force into its war against terrorism with all its available resources.")

¹⁴⁰ See *Islamophobia*, *supra* note 24, at 114–15.

the state's surveillance power,¹⁴¹ enabling DHS to monitor the private communication between a citizen and a foreign actor with alleged terrorism ties.¹⁴² Furthermore, the PATRIOT Act permitted the electronic surveillance of citizens without a court order,¹⁴³ extending almost unilateral authority to the Executive Branch to carry forward terror investigations of its citizens.

This new federal surveillance power often devolved into baseless witch-hunts driven by stereotypes. First, the FBI turned its attention onto Muslim Americans on the grounds that their religious identity and conduct were inherently suspicious. As described in Part II(B), the state perceived the expression of Muslim identity as correlative of foreignness, subversion, or terrorism. After 9/11, *being* Muslim raised the presumption of acting as an "agent of a foreign power" or terror group.¹⁴⁴

Second, benign private communication with actors in Muslim-majority countries, especially the Middle East, invited the scrutiny of the FBI. For example, sending remittances back to family or friends,¹⁴⁵ trips or vacations, study abroad programs, completing the religious pilgrimage to Saudi Arabia,¹⁴⁶ or email and phone call communications with individuals in Muslim-majority countries,¹⁴⁷ gave rise to suspicion of terror activity that led to wire-tapping of a Muslim American subject. In some instances, this activity triggered suspicion that the subject-of-interest was an agent of a terror group or acting as an accessory in furtherance of a terror plot.¹⁴⁸ Thus, Muslim identity itself was a proxy for standalone suspicion or suspicion of conspiring with a terror group—most notably, Al-Qaeda, the culprit of the 9/11 terror attack.¹⁴⁹

¹⁴¹ The Foreign Intelligence Surveillance Act (FISA) was expanded by the US PATRIOT Act to enable domestic surveillance of communication between citizens and foreign powers. See 50 U.S.C. §1801 (2000).

¹⁴² USA PATRIOT Act § 207.

¹⁴³ *Id.*

¹⁴⁴ See 50 U.S.C. §1801(b)(1)(A)-(B).

¹⁴⁵ See *U.S. Companies Block Money Transfers Involving Individuals with Arab Names*, FOX NEWS (July 6, 2006), <http://www.foxnews.com/story/2006/07/06/us-companies-block-money-transfers-involving-individuals-with-arab-names.html> [<https://perma.cc/UE6U-SH6M>].

¹⁴⁶ "Just as Muslims are united five times each day as they face Mecca in worship, so too each year, more than 2 million believers travel from all over the world to the city where the Prophet Muhammad was born and first received God's revelation." ESPOSITO & MOGAHEB, *supra* note 115, at 16.

¹⁴⁷ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), <http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html> [<https://perma.cc/9N7F-TRVV>].

¹⁴⁸ "Any person who (1) knowingly engages in clandestine intelligence gathering activities[,] (2) knowingly engages in sabotage or international terrorism[,] (3) knowingly uses a false identity to enter the United States or assumes such identity while in the United States at the direction of a foreign power, or (4) aids or abets or conspires in any of the above activities qualifies as an agent of a foreign power." 50 U.S.C. §1801(b)(2)(A)-(E).

¹⁴⁹ For a thorough examination of al-Qaeda's structure, and its regional network in the Muslim world, see generally ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR* (2002), published a year after the 9/11 terror attacks.

While the “Bush administration made great efforts in explaining that the PATRIOT Act was not focused on Muslims,”¹⁵⁰ the disproportionate focus and impact on Muslim Americans revealed otherwise. The clash of civilizations worldview guiding the Bush Administration demonstrated that the Executive Branch viewed Islam as inherently suspicious.¹⁵¹ Muslim Americans, for whom citizenship extended little protection from warrantless surveillance,¹⁵² were viewed as presumptive aiders or abettors of terrorism. The PATRIOT Act’s dramatic expansion of the state’s surveillance power, combined with these presumptions of suspicion, enabled a federal dragnet that dramatically confined Muslim Americans’ ability to freely exercise and express their faith during the Bush Era.

2. *Criminalizing Expression*

In addition to warrantless investigations and precarious prosecutions, the US PATRIOT Act endorsed the popular perception that conflated Islam with terrorism. Muslim Americans heeded this message, which was transmitted through the letter of law, political rhetoric, and investigative dragnets, by rethinking how they outwardly expressed their Muslim identity.

Muslim Americans manifested the culling effect of the PATRIOT Act by narrowing and obscuring their expressions of Muslim identity. Therefore, although the PATRIOT Act included a provision stating that Muslim Americans were not the targets of the War on Terror, and defined “terrorism” neutrally,¹⁵³ the execution of the state’s expanded federal surveillance power said otherwise. Muslim Americans were the disproportionate targets of federal wiretaps, terrorism prosecutions, and community surveillance. This vividly revealed to Muslim Americans that the PATRIOT Act’s profiling of terrorism included them in the dragnet on grounds of their faith.

The Bush administration’s monolithic conception of Islam, and Islamic threat, suppressed benign expressions of Muslim identity. The neoconservative baseline that there is an embedded fault line between Western and Islamic civilizations, steered enforcement of the PATRIOT Act,¹⁵⁴ and left

¹⁵⁰ Shafiqah Ahmadi, *The Erosion of Civil Rights: Exploring the Effects of the Patriot Act on Muslims in Higher Education*, 12 RUTGERS RACE & L. REV. 1, 39 (2011).

¹⁵¹ See generally HUNTINGTON, *supra* note 119.

¹⁵² See Sharon H. Rackow, Comment, *How the PATRIOT Act Will Permit Government Infringement Upon the Privacy of Americans in the Name of “Intelligence” Investigations*, 150 U. PA. L. REV. 1651 (2002) (analyzing how the traditional protections of citizenship were pierced by post-9/11 federal surveillance strategy and enforcement).

¹⁵³ The Homeland Security Act defines “terrorism” as an activity that: “(A) involves an act that—(i) is dangerous to human life or potentially destructive of critical infrastructure or key resources; and (ii) is a violation of the criminal laws of the United States or any State or other subdivision of the United States; and (B) appears to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.” 6 U.S.C. §101(18)(2016).

¹⁵⁴ *Clash of Civilizations*, *supra* note 119, at 31; see also Kristol Balls, *Neoconservative Visions of Islam and the Middle East*, 45:2 INT’L POLICY 182 (2008) (analyzing the ideological

millions of Muslim Americans potentially vulnerable to electronic surveillance. Fear of surveillance incentivized Muslim Americans to tone down or *privatize* their religious identities. Headscarves and beards, carrying prayer mats or wearing the *kaffiyeh*,¹⁵⁵ among other outward expressions of Muslim identity, signaled extremism to the state, and therefore were avoided by many Muslim Americans for fear of attracting state surveillance.¹⁵⁶

Muslims of all sects and schools of thought were viewed with suspicion by the state. Although the culprits of the 9/11 terror attacks were Sunni Muslims,¹⁵⁷ and more specifically, Wahhabis, the Bush Administration did not differentiate them from Shia Muslims (a group reviled and persecuted by Al-Qaeda and Wahhabis),¹⁵⁸ Sufi Muslims,¹⁵⁹ and adherents of other sects and sub-sects.¹⁶⁰ This flattened understanding of Islamic spirituality marked all forms of Islamic expression as grounds for state suspicion. The clash of civilizations binary adopted by the Bush Administration, enforced through strident counterterror policing and federal surveillance, saw Muslims of all spiritual stripes as suspicious and interpreted their activity through the presumption of subversion.

nuances among neoconservatives with regard to foreign policy engagement of Islam and the Middle East).

¹⁵⁵ A traditional Arab kerchief worn as a headdress or around the neck and shoulders.

¹⁵⁶ See Khaled A. Beydoun, *Being a Muslim Under Trump is Risky. That's Why Many Are Hiding Their Identity*, THE GUARDIAN (Mar. 30, 2017), <https://www.theguardian.com/commentisfree/2017/mar/30/being-muslim-under-trump-risky-many-hiding-identity> [https://perma.cc/RN2L-YL4E].

¹⁵⁷ Sunni Islam is the most widely practiced Islamic sect, observed by 87 to 90% of its 1.6 billion global adherents. *Mapping the Global Muslim population*, PEW RESEARCH CENTER, (Oct. 7, 2009), <http://www.pewforum.org/2009/10/07/mapping-the-global-muslim-population/> [https://perma.cc/2B33-2QFS]. Sunni Islam is comprised of four primary legal schools of thought, "The Hanafi, Maliki, Shafi'i, and Hanbali" traditions. WAEL B. HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 31 (2009). Fifty-five percent of Muslim Americans identify as Sunni Muslims. Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RESEARCH CENTER 3 (Aug. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/> [https://perma.cc/9F6K-23D7].

¹⁵⁸ "There are three major branches of Shi'ism: the Zaydis, the Isma'ilis, and the Twelvers. The vast majority of Shi'is are Twelvers." Laith Al-Saud, *Islamic Political Theology*, in AN INTRODUCTION TO ISLAM IN THE 21ST CENTURY 85, 95 (Aminah Beverly McCloud, Scott W. Hubbard & Laith Al-Saud eds. 2013). Shia Islam is the minority tradition practiced by roughly 10 to 13% of Muslims globally and by 11% of Muslim Americans. Lipka, *supra* note 157, at 3.

¹⁵⁹ Sufism is a tradition of Sunni Islam that emphasizes ritualism and mysticism. It is comprised of distinct orders, or congregations, led by a spiritual master. Sufis are routinely targeted, and persecuted, by Wahhabi-inspired terror networks, including Al-Qaeda and ISIS, who view their rituals, shrines, and reverence of Islamic saints as sacrilege. For a recent example of Wahhabi persecution of Sufis, see Ted Thornhill, *ISIS Reduces Sufi Shrines in Libya to Rubble in Latest Act of Destruction*, DAILY MAIL (Mar. 10, 2015), <http://www.dailymail.co.uk/news/article-2987800/ISIS-continues-desecration-Middle-East-Islamic-State-reduces-Sufi-shrines-Libya-rubble-latest-act-mindless-destruction.html> [https://perma.cc/8T5M-MEAT].

¹⁶⁰ See Akbar Ahmed, *Bush Still Doesn't Get It*, WASH. POST (July 22, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001805.html> [https://perma.cc/H8QH-4CYQ] ("Instead of seriously explaining Muslim societies that are profoundly split in complex ways, Bush's aides have offered a fatally flawed stereotype of Islam as monolithic and violent.").

B. *The Obama Era*

Barack Obama's landmark presidency toned down state rhetoric against Islam and Muslims. It also retrenched the unchecked federal surveillance authority that hallmarked the Bush Era counterterror program, but ushered in a paradigm that shifted the eyes of the state from the federal to the local level.

1. *Community Policing*

Fewer than six months into his first term, President Obama issued an address marking "A New Beginning" with the Muslim World. Delivered inside of Cairo's Al-Azhar University, "Egypt's 1,000-year-old center for Islamic learning,"¹⁶¹ Obama's speech aimed to mend the wounds inflicted by the Bush administration and forge toward reconciliation between the Muslim World and the U.S.¹⁶² Before an audience of hundreds of Muslims, with millions more watching and listening from afar, President Obama stated:

I've come here to Cairo to seek a new beginning between the United States and Muslims around the world, one based on mutual interest and mutual respect, and one based upon the truth that America and Islam are not exclusive and need not be in competition. . . . I am convinced that in order to move forward, we must say openly to each other the things we hold in our hearts and that too often are said only behind closed doors. There must be a sustained effort to listen to each other; to learn from each other; to respect one another; and to seek common ground.¹⁶³

Within six months of taking office, President Obama launched a vigorous effort to undo the institutionalization of the clash of civilizations worldview that steered the Bush Administration's engagement with Islam. President Obama devoted much effort to creating the perception, both globally and on the home front, that his administration was keen on working with Muslims. This rapprochement with Muslims was a vital first step toward implementing his signature counterterror program—Countering Violent Extremism ("CVE").¹⁶⁴

¹⁶¹ Mahmoud Mourad & Yara Bayoumy, *Special Report: Egypt Deploys Scholars to Teach Moderate Islam, But Skepticism Abounds*, REUTERS (June 5, 2015), <https://www.reuters.com/article/us-egypt-islam-azhar-special-report/special-report-egypt-deploys-scholars-to-teach-moderate-islam-but-skepticism-abounds-idUSKBN0OG07T20150531> [<https://perma.cc/6Y4D-4EB7>].

¹⁶² *Remarks By the President at Cairo University, 6-04-09*, WHITE HOUSE (June 4, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-cairo-university-6-04-09> [<https://perma.cc/DV44-NLSE>].

¹⁶³ *Id.*

¹⁶⁴ See Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 127 (2012) ("The arrival of counter-radicalization on the domestic scene—it has been part of American foreign policy for a decade—represents a

Two years after his speech in Cairo, President Obama formally rolled out the CVE Program.¹⁶⁵ The memo outlining the Program identified the threat as Muslim Americans, “inspired or directed by al-Qaeda, and its affiliates and adherents,” in addition to neo-Nazis, hate groups, white supremacists, and “international and domestic terrorist groups” generally.¹⁶⁶ However, in light of the resources dedicated to track and assassinate Osama Bin Laden,¹⁶⁷ the threat posed by Al-Qaeda and its sympathizers, and the administration’s fear of Al-Qaeda “lur[ing] Americans to terrorism in order to create support networks and facilitate attack planning” from inside the U.S.,¹⁶⁸ it is likely that CVE was specifically concerned with policing and prosecuting homegrown Muslim “radicalization.”¹⁶⁹

President Obama’s signature counterterrorism program framed radicalization as a distinctly Muslim American phenomenon. Unlike the PATRIOT Act, which identified foreign-based Muslim terrorists as the primary national security threat, CVE cast foreign terrorists and foreign terror networks as the conspirators that “inspire radicalization” and “recruit” Muslim Americans.¹⁷⁰ The DHS Director of the Office of Community Partnerships, the desk in charge of carrying forward CVE under President Obama, stated, “DHS recognizes that the types of attacks we have seen at home and abroad are not just terrorist-directed attacks, but also terrorist-inspired attacks. These attacks are conducted by those who live among us in the homeland and become inspired and radicalized to violence by terrorist propaganda.”¹⁷¹ In order to prevent radicalization among Muslims “liv[ing] among us,” DHS was tasked with cultivating strategic partnerships within Muslim American communities. CVE could not succeed without robust and active

significant, if unheralded, development in American counter-terrorism. . . . [It] represents the signature counterterrorism policy of the Obama Administration.”)

¹⁶⁵ See generally *Empowering Local Partners to Prevent Violent Extremism in the United States*, WHITE HOUSE (Aug. 2011), https://www.dhs.gov/sites/default/files/publications/empowering_local_partners.pdf [<https://perma.cc/TP38-LL2U>] [hereinafter *2011 CVE Program*].

¹⁶⁶ *Id.* at 1.

¹⁶⁷ See Stephen Gandel, *How Much Has Bin Laden Cost the US*, TIME (May 3, 2011), <http://business.time.com/2011/05/03/how-much-has-osama-bin-laden-cost-the-us/> [<https://perma.cc/93GC-FSXF>].

¹⁶⁸ *2011 CVE Program*, *supra* note 165, at 2.

¹⁶⁹ “Radicalization [theory] suggests that the path from Muslim to terrorist is a predictable one Amna Akbar, *Policing “Radicalization”*, 3 U.C. IRVINE L. REV. 809, 811 (2013). [The path constructs] “an observable and, to some extent, predictable process by which Muslims become terrorists,” *id.* at 814, broken down into four stages: “[1] preradicalization,” “[2] identification,” “[3] indoctrination” and “[4] action,” *id.* at 820. “The authors of ‘radicalization’ literature attempt to construct a descriptive taxonomy of terrorist motivations and interactions to enable prediction of future acts of violence. ‘Radicalization’ so defined appears to be a new object of state scrutiny and epistemological investment.” Aziz Z. Huq, *Modeling Terrorist Radicalization*, 2 DUKE F. L. & SOC. CHANGE 39, 41 (2010).

¹⁷⁰ *Identifying the Enemy*, *supra* note 114, at 2–3.

¹⁷¹ *Id.* at 1–2.

Muslim American “engagement,”¹⁷² and specifically, community informants and stakeholders.

Partnerships with individuals and institutions within Muslim American communities are vital for advancing CVE. This caused DHS to pivot from electronic surveillance to deputized, on-the-ground watchdogs. DHS strategically “maps,” and then taps informants within mosques,¹⁷³ student organizations such as Muslim Student Associations (“MSAs”) on college campuses, community centers, and other “places for religious and political discussion and gathering.”¹⁷⁴ In addition to monitoring subjects of interest through deputized informants, CVE also assigns FBI and law enforcement agents to “monitor Internet activity as part of their counterterrorism efforts,”¹⁷⁵ in response to ISIS’s online recruitment efforts.¹⁷⁶

In October 2016, with only two months remaining in his administration, President Obama introduced key reforms to the CVE Program.¹⁷⁷ These reforms sought to broaden CVE, with the confidence that Hillary Clinton would succeed President Obama and carry forward his signature counterterror program. Indeed, Clinton’s overtures confirmed her full intention on carrying CVE forward.¹⁷⁸ However, Clinton ultimately lost the presidential election to Trump, who has instituted a more hardline counterterror strategy to police, prevent, and prosecute radicalization.

¹⁷² 2011 CVE Program, *supra* note 165, at 5. “Engagement is essential for supporting community-based efforts to prevent violent extremism because it allows government and communities to share information, concerns, and potential solutions. Our aims in engaging with communities to discuss violent extremism are to (1) share sound, meaningful, and timely information about the threat of radicalization to violence with a wide range of community groups and organizations, particularly those involved in public safety issues; (2) respond to community concerns about government policies and actions; and (3) better understand how we can effectively support community-based solutions.” *Id.*

¹⁷³ Rascoff, *supra* note 164, at 159.

¹⁷⁴ Akbar, *supra* note 169, at 855 (describing mapping, or identifying geographies where radicalization is most likely to take form, as a “key tactic of preventative policing”). See also Sahar Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT’L SEC. J. 147, 196–202 (2014), for analysis of “deputizing community leaders to gather intelligence on Muslim[]” Americans.

¹⁷⁵ Akbar, *supra* note 169, at 865.

¹⁷⁶ For an analysis of ISIS’s online recruiting efforts and strategy, see J.M. Berger, *How Terrorists Recruit Online (And How to Stop It)*, BROOKINGS (Nov. 9, 2015), <https://www.brookings.edu/blog/markaz/2015/11/09/how-terrorists-recruit-online-and-how-to-stop-it/> [<https://perma.cc/A6GV-JEA8>].

¹⁷⁷ See *Strategic Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States*, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES (Oct. 19, 2016), https://www.dhs.gov/sites/default/files/publications/2016_strategic_implementation_plan_empowering_local_partners_prev.pdf [<https://perma.cc/U8AQ-K9YP>] [hereinafter 2016 DHS Counter-Radicalization Reforms].

¹⁷⁸ See *Transcript of the Second Presidential Debate*, N.Y. TIMES (Oct. 10, 2016), https://www.nytimes.com/2016/10/10/us/politics/transcript-second-debate.html?_r=1&mcubz=1 [perma.cc/3W9R-9ATT] (“We need American Muslims to be part of our eyes and ears on our frontlines.”).

2. *Moderate/Radical Islam*

Counter-radicalization theory, and CVE policing, establishes an intra-Muslim binary that pits radicalization against “moderate Islam.” National security law scholar Samuel Rascoff states, “It is clear from its policy documents that the government intends not only to strengthen moderate Islam, but to help portray certain moderate variants as the true doctrinal interpretation.”¹⁷⁹ CVE’s endorsement of moderate Islam created, “pressure on Muslim communities to perform their Americanness—without meaningful openings for Muslim communities to communicate, collaborate, and contest the relationship, its modalities, and its outputs.”¹⁸⁰

Building off of the observations of law scholars Amna Akbar and Samuel Rascoff, CVE’s conception of moderate Islam is both ideological and sectarian in nature. Muslim Americans that conformed and covered their Sunni Muslim identities were ideally situated to serve as interlocutors between DHS and Muslim American communities. Shiite Muslim Americans, who were spiritually and ideologically predisposed to oppose the Wahhabi-inspired terror networks that inspire radicalization or Sunni schools of Islam at large, were well suited to serve as CVE interlocutors. One example was the Shiite Lebanese American-led group, the Lebanese American Heritage Club (LAHC) of Dearborn, Michigan—which houses a large Shiite Muslim population. In January of 2017, the LAHC received a grant of five hundred thousand dollars to carry forward CVE programming in the metropolitan Detroit area, largely on account of its status as a Shiite Muslim group, which could facilitate surveillance against the area’s Sunni Muslim American community.¹⁸¹ Days later, community activists pushed LAHC to renounce the funds, largely based on grounds that it would be carrying forward War on Terror programing under the Trump Administration.¹⁸² Despite their declining of the grant, LAHC being awarded a sizable CVE grant evidences DHS’s strong desire to exploit sectarian tension to further War on Terror policing in the heart of Muslim communities.

Therefore, Muslim Americans that followed conservative Sunni traditions, and performed that identity through dress, worship, religious or political involvement, spurred state suspicion of radicalization during the Obama Era. This created a landscape that incentivized Acting Muslim in ways that

¹⁷⁹ Rascoff, *supra* note 164, at 161 (citing David Stevens, In Extremis: A Self-Defeating Element in the “Preventing Violent Extremism” Strategy, 80 POL. Q. 517, 520 (2009)).

¹⁸⁰ Amna Akbar, *National Security’s Broken Windows*, 61 UCLA L. REV. 1, 12 (2015).

¹⁸¹ Niraj Warikoo, *Dearborn Group Gets \$500,000 from DHS to Counter Extremism*, DETROIT FREE PRESS (Jan. 19, 2017), <http://www.freep.com/story/news/local/michigan/wayne/2017/01/19/lebanese-american-grant-extremism/96789812/> [https://perma.cc/8B9E-CV4R].

¹⁸² *LAHC Declines CVE Grant*, ARAB AMERICAN NEWS (Jan. 29, 2017), <http://www.arabamericanews.com/2017/01/29/lahc-declines-cve-grant/> [https://perma.cc/3Z5A-U88F].

deviated from DHS's prevailing caricature of the Muslim radical, and in line with the moderate Muslim archetype cultivated by the state.¹⁸³

In 2014, DHS announced that Boston, Los Angeles, and Minneapolis would be the first cities assigned with "Countering Violent Extremism" (CVE) policing programs. Boston was prioritized because of the 2013 Boston Marathon Bombings committed by the Tsarnaev brothers.¹⁸⁴ Los Angeles was chosen because of its proximity to the Mexican border and because California housed the largest population of Muslims in the country.¹⁸⁵ Finally, Minneapolis is home to a concentrated and large Somali population, which is largely a recent-immigrant and refugee community with strong ties to their homeland.¹⁸⁶

While distinct events motivated DHS to prioritize Boston, Los Angeles, and Minneapolis as CVE pilot cities, the three cities' Muslim communities were overwhelmingly Sunni and presumptively connected and vulnerable to transnational terror networks, principally Al-Qaeda, ISIS, and al-Shabaab.¹⁸⁷ Although DHS leadership routinely denied any conflation of "violent extremism with an entire religion such as the Muslim religion,"¹⁸⁸ the primary order outlining CVE expressly indicated its focus on Sunni extremists.¹⁸⁹

¹⁸³ Samuel Rascoff observed that, by endorsing a favored interpretation of Islam and anointing Muslim American voices that subscribe to moderate interpretations, CVE "efforts generate friction with the [First Amendment] Establishment Clause." Rascoff, *supra* note 164, at 162. The Establishment Clause prohibits the state from making any law, "respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

¹⁸⁴ Tamerlan and Dzhokar Tsarnaev, who are of Chechen origin and Sunnis, carried out the "Boston bombings" on April 15, 2013, killing three people and injuring 264. Tamerlan was killed in the aftermath of the attack, while Dzhokar was imprisoned and sentenced to death. See Nina Burleigh, *The Brothers Who Became the Boston Marathon Bombers*, NEWSWEEK (April 6, 2015), <http://www.newsweek.com/brothers-who-became-boston-marathon-bombers-319822> [<https://perma.cc/T2F6-A3XS>]. For a critique of the "casual racism launched at Chechens" after the Boston Bombings, see Sarah Kendzior, *The Wrong Kind of Caucasian*, AL JAZEERA ENGLISH (Apr. 21, 2013), <http://www.aljazeera.com/indepth/opinion/2013/04/2013421145859380504.html> [<https://perma.cc/95RC-HBMB>]. See also *Boston Bombers*, *supra* note 107.

¹⁸⁵ "California is cited as having the largest Muslim community in the United States, an estimated 1% of the total population of the state. It is also estimated that a majority of the Muslim population resides in Southern California." *California Mosque List*, USC CENTER FOR RELIGION AND CIVIC CULTURE (Apr. 5, 2014).

¹⁸⁶ See *Between Indigence, Erasure, and Islamophobia*, *supra* note 8, at 1494.

¹⁸⁷ Al-Shabaab is a terror network, with connections to Al Qaeda, centralized in Somalia that operates throughout East Africa. During his campaign, Trump also linked the Somali community in Minnesota with ISIS, and his assessment of the group's propensity to radicalization to also be evidence of "faulty refugee vetting" under President Obama. See Jenna Johnson and Sean Sullivan, *Why Trump Warned About 'Somali Refugees'—and Why It Could Backfire*, WASH. POST (Nov. 7, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/11/07/why-trump-warned-about-somali-refugees-and-why-it-could-backfire/?utm_term=.cd24af4b70de [<https://perma.cc/B4VZ-GF8M>].

¹⁸⁸ *The Threat of Islamist Radicalism to the Homeland: Hearing Before S. Comm. On Homeland Sec. and Gov't Affairs*, 110th Cong. 12 (2007) (written testimony of DHS Secretary Michael Chertoff).

¹⁸⁹ *2011 CVE Program*, *supra* note 165, at 1.

Consequently, DHS profiled radicalization as a distinctly Sunni phenomenon, inspired by Sunni extremist terror networks.¹⁹⁰

Through its enforcement, CVE marks radicalization as an identity crime assigned to Sunni Muslim Americans. Therefore, DHS and local law enforcement prioritized developing and implementing CVE programs in Sunni Muslim communities, although only a fraction of Sunni Muslim Americans observe the rigid (Sunni) Wahhabi tradition that drives radicalization.¹⁹¹ Furthermore, CVE deescalates the association of threat with Shiite Muslim Americans, a group victimized by the terror networks—principally ISIS—that inspire homegrown radicalization.¹⁹² DHS capitalizes on sectarian division between Sunni and Shiite Muslims to enlist adherents of the latter to help monitor suspicious elements of Sunni Muslim Americans.¹⁹³

C. *The Trump Era*

The Trump Era began on the presidential campaign trail, where he leveraged Islamophobia as a cornerstone of his message. This remained consistent during the earliest stages of his administration, which began on January 20, 2017.

1. *Hardline Policing*

Donald Trump converted Islamophobia into a campaign strategy that helped deliver him the presidency.¹⁹⁴ In addition to capitalizing on the robust post-9/11 fear and suspicion of Muslims propagated by news and film me-

¹⁹⁰ On September 22, 2016, the Director of the DHS Office for Community Partnerships, the office commissioned with steering counter-radicalization policing, said “Al Qaeda and ISIL continue to target Muslim American communities in our country to recruit and inspire individuals to commit acts of violence,” highlighting, in very specific terms, that the brand of “Radical Islamist Threat” DHS is concerned with is of the Sunni variety, and more specifically, Wahhabism. See *Identifying the Enemy*, *supra* note 114, at 2.

¹⁹¹ While the majority of Muslim Americans subscribe to Sunni Islam, only 1 to 3% worship at a Salafi mosque. Ihsan Bagby, *The American Mosque 2011: Report Number 1 from the US Mosque Study 2011*, 19 (2011).

¹⁹² Abu Musab al-Zarqawi, the figure widely regarded as the “godfather of ISIS,” was noted to be a “sectarian psychopath who harbored a genocidal worldview against the Shia.” FAWAZ GERGES, *ISIS: A HISTORY* 81 (2016).

¹⁹³ The threat of ISIS facilitates strategic rapprochement, and partnerships, between DHS and Shias in the U.S. Shias may be driven to collaborate with CVE policing programs on grounds of sectarian tension and strife. Shias are marginalized in Saudi Arabia, and beyond the bounds the Kingdom, they are regular targets and disproportionate victims of systemic ISIS brutality in the Mideast. Sunnis inspired by ISIS subscribe to the notion that Shias are apostates and justifiable targets of violence.

These terror networks also hold the same view of Sufi Muslims. Which has, in part, motivated some Sufi American Muslim leaders to partner with the Obama administration by launching CVE programming against Wahhabi-inspired terror networks like ISIS. For an example, see generally Dr. Hedieh Mirahmadi and Mehreen Farooq, *A Community Based Approach to Countering Radicalization: A Partnership for America*, WORLD ORGANIZATION FOR RESOURCE DEVELOPMENT AND EDUCATION (WORDE) (Dec. 2010).

¹⁹⁴ See generally *Remaking of Political Islamophobia*, *supra* note 7.

dia,¹⁹⁵ Trump tapped into the hostility to Islam deeply rooted in the American imagination. Trump's adoption of the Orientalist baseline view that America is at war with Islam is illustrated most vividly in his statement that "Islam hates us."¹⁹⁶ Trump clearly rejected the conciliatory "Islam is peace" rhetoric adopted by President Bush.¹⁹⁷ Instead, he orchestrated a populist movement whereby vehement rhetoric toward Islam foreshadowed the hardline philosophy of his counterterror engagement with Muslims.¹⁹⁸ Supplanting coded racial and religious appeals¹⁹⁹ with unabashed scapegoating, President Trump's polarizing campaign emboldened private violence against Muslims, and brazenly explicated the conflation between Muslim and terrorist.

On the campaign trail, Trump incessantly critiqued President Obama's collaborative counterterror philosophy. Following the Orlando shooting on June 12, 2016,²⁰⁰ Trump stated, "He doesn't get it or he gets it better than anybody understands. It's one or the other,"²⁰¹ simultaneously slamming the efficacy of President Obama's counterterror strategy and insinuating that he may in fact be a "closet Muslim."²⁰² Much of Trump's base shared these views,²⁰³ and in line with his broader campaign against Islam and Mus-

¹⁹⁵ See generally ALSULTANY, *supra* note 95.

¹⁹⁶ DelReal, *supra* note 6, at 1.

¹⁹⁷ Bush, *supra* note 138, at 2.

¹⁹⁸ Reza Aslan argues that Trump's divisive political messaging was not merely rhetoric, but political language forecasting the ideology of his cabinet members. Reza Aslan, *Opinion, Team Trump Reflects Divisive Campaign Rhetoric*, CNN (Nov. 21, 2016), <http://www.cnn.com/2016/11/21/opinions/team-trump-reflects-ugly-campaign-rhetoric-aslan/index.html> [https://perma.cc/GYH7-Q548].

¹⁹⁹ See generally IAN HANEY LOPEZ, *DOG WHITE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014) (examining how politicians deploy coded messaging against nonwhites to further their objectives or campaigns).

²⁰⁰ The mass shooting, which occurred at the Pulse nightclub in Orlando, Florida, on June 12, 2016, is considered the "deadliest [terror] attack" since 9/11. The shooter, a Muslim American of Afghan descent (Omar Mateen), executed forty-nine people and wounded fifty-three. See Ana Swanson, *The Orlando Attack Could Transform the Picture of Post-9/11 Terrorism in America*, WASH. POST (June 12, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/12/the-orlando-attack-could-transform-the-picture-of-post-911-terrorism-in-america/?utm_term=.8fc1af66c212 [https://perma.cc/28L7-27EE].

²⁰¹ Jenna Johnson, *Donald Trump Seems to Connect President Obama to Orlando Shooting*, WASH. POST (June 13, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/06/13/donald-trump-suggests-president-obama-was-involved-with-orlando-shooting/?utm_term=.C155411af863 [https://perma.cc/74HX-LRMP].

²⁰² For an account of Trump's recurring allegations that President Obama may be an undercover, or closet, Muslim, see Chris Moody and Kristen Holmes, *Trump's History of Suggesting Obama is a Muslim*, CNN (Sept. 18, 2015), <http://www.cnn.com/2015/09/18/politics/trump-obama-muslim-birther/index.html> [https://perma.cc/HF5W-EF8Y].

²⁰³ A Public Policy Poll (PPP) found that 66% of Trump supporters believed that Obama is a foreign-born Muslim. Trump Supporters Think Obama is a Muslim Born in Another Country, Public Policy Polling (Sept. 1, 2015), <http://www.publicpolicypolling.com/main/2015/08/trump-supporters-think-obama-is-a-muslim-born-in-another-country.html> [https://perma.cc/4WFS-3F3U].

lims,²⁰⁴ he positioned himself as the hardline alternative to Obama's "soft" stance toward Islam and Muslims.²⁰⁵

Trump's counterterrorism vision meshes the global campaign to "defeat the ideology of radical Islamic terrorism" with the domestic objective of countering radicalization.²⁰⁶ While underdeveloped and vague, the two cornerstones of Trump's national security program are clear: first, the underlying ideology of a clash of civilizations that pits "radical Islamic terrorism" against the U.S.,²⁰⁷ and second, the counter-radicalization national security model installed by President Obama in 2011, with key reforms including the establishment of a "Commission on Radical Islam."²⁰⁸

The virtual absence of any Muslim American involvement in the Trump presidential campaign, or transition team, foreshadowed what was to come with the Trump administration—a virtual absence of Muslim American collaboration with his counter-radicalization program.²⁰⁹ Therefore, without the robust involvement of Muslim actors to facilitate counter-radicalization policing within Muslim American communities, the Trump administration is considering dispatching, "plainclothes detectives into Muslim neighborhoods to eavesdrop on conversations and build detailed files on where people ate, prayed and shopped."²¹⁰ This is a strategy that was implemented by

²⁰⁴ See generally *Remaking of Political Islamophobia*, *supra* note 7.

²⁰⁵ See generally Daniel Henninger, Opinion, *Are Democrats Soft on Terror?*, WALL STREET JOURNAL (June 15, 2016), <https://www.wsj.com/articles/are-democrats-soft-on-terror-1466029974> [https://perma.cc/UF5A-V4AK] (analyzing Trump's position that President Obama and Hillary Clinton's refusal to say "radical Islamic terrorism" in the wake of the Orlando shooting manifested a soft approach on counterterrorism).

²⁰⁶ Peter D. Fever and Hal Brands, *Trump and Terrorism: U.S. Strategy After Isis*, FOREIGN AFFAIRS (March/April 2017), <https://www.foreignaffairs.com/articles/2017-02-13/trump-and-terrorism> [https://perma.cc/5B8D-83XK] [hereinafter *Trump and Terrorism*].

²⁰⁷ Trump's commitment to the clash of civilizations binary is affirmed, and echoed, by his pick to head the NSA, General Michael Flynn, "There is no escape from this war. Our enemies will not permit that." MICHAEL T. FLYNN AND MICHAEL LEDEEN, *THE FIELD OF FIGHT* 115 (2016) [hereinafter *FIELD OF FIGHT*].

²⁰⁸ "Establish a Commission on Radical Islam to identify and explain to the American public the core convictions and beliefs of Radical Islam, to identify the warning signs of radicalization, and to expose the networks in our society that support radicalization." Trump and Terrorism, *supra* note 206. See generally Khaled A. Beydoun, *Beyond the Paris Attacks: Unveiling the War Within French Counterterrorism Policy*, 65 AM. U. L. REV. 1273 (2016) (comparing the hardline counter-radicalization approach employed by France before the Paris attacks on December 13, 2015).

²⁰⁹ The only visible Muslim American who actively supported the Trump campaign was Sajid Tarar, who led the Muslim prayer at the Republican National Convention and appeared in a series of television interviews voicing support for the Republican nominee. See Abigail Hauslohner, *Meet the Muslim Guy Who Took the Convention Stage and Prayed for Trump*, WASH. POST (July 19, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/07/19/meet-the-muslim-with-an-unusual-record-praying-in-arabic-at-the-rcn-tonight/?utm_term=.30b5f0471d2e [https://perma.cc/Z2D9-B3LU].

²¹⁰ Mehdi Hassan, Opinion, *Peter King's Really Bad Idea*, N.Y. TIMES (Dec. 20, 2016), <https://www.nytimes.com/2016/12/20/opinion/peter-kings-really-bad-idea.html> [https://perma.cc/R6HT-5A8Q].

the New York Police Department as early as 2003 and deemed unconstitutional by the Third Circuit Court of Appeals in January 2015.²¹¹

President Trump's counter-radicalization program will seek to "expose the networks in our society that support radicalization."²¹² Therefore, President Trump subscribes to the core of radicalization theory. But unlike the Obama Administration, President Trump conjoins radicalization theory with a clash of civilizations worldview, which spawns counterterrorism policy that heightens the presumption that Muslim identity is correlative with terrorism; intensifies the culture of mistrust within Muslim American communities; and breeds greater fear within these communities to freely exercise their faith and express their identity. Shelving the (CVE) title used by the Obama Administration, Trump's counter-radicalization program is, "likely to be renamed Countering Radical Islam or Countering Violent Jihad."²¹³

President Trump has enlisted a corps of likeminded cabinet appointees to carry forward his hardline counter-radicalization program. He appointed Michael Flynn, a retired U.S. Army lieutenant general, to serve as head of the NSA. A self-proclaimed "maverick,"²¹⁴ Flynn's adherence to a clash of civilizations worldview pitted the whole of Islam against the West. In his book, *Field of Fight*, Flynn writes, "The [Muslim] countries and movements that are trying to destroy us have worldviews that may seem to be in violent conflict with one another. But they are united by their hatred of the democratic West and their conviction that dictatorship is superior."²¹⁵ Flynn viewed Islam as a political and civilizational monolith, and his view echoed that of the president that appointed him to office.²¹⁶

Jeff Sessions, the former senator from Alabama, was chosen as Attorney General. Trump also selected Mike Pompeo to the role of Director of the Central Intelligence Agency (CIA). During the Bush Era, Sessions "defended Mr. Bush's authority to conduct wiretapping [of Muslim Americans] without a warrant after the Sept. 11 attacks."²¹⁷ He also referred to Islam as a "toxic ideology," a "malignant cancer," and tweeted on February 2015 that "Fear of Muslims is RATIONAL."²¹⁸

²¹¹ Hassan v. City of New York, 804 F.3d 277, 307 (2015).

²¹² See Trump and Terrorism, *supra* note 206.

²¹³ Michael Crowley, *Trump's Terror-Fighting Team Yet to Take Shape*, POLITICO (Dec. 20, 2016).

²¹⁴ FIELD OF FIGHT, *supra* note 207, at 3.

²¹⁵ *Id.* at 103.

²¹⁶ Flynn was later compelled to resign on February 13, 2017 due to alleged relations with Russia. Maggie Haberman, Matthew Rosenberg, Matt Apuzzo, and Glenn Thrush, *Michael Flynn Resigns as National Security Adviser*, N.Y. TIMES (Feb. 13, 2017), <https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html> [https://perma.cc/9G8Q-HC7Y].

²¹⁷ Matt Apuzzo and Mark Landler, *With National Security Choices, Trump Builds Team to Bulldoze Status Quo*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/19/us/politics/flynn-sessions-trump-administration.html> [https://perma.cc/GK9Z-D7EV].

²¹⁸ *Id.*

Pompeo, who shares the view that Islam itself is inherently violent, stated that Muslim American organizations that do not explicitly denounce acts of terror (both in the U.S. and beyond) are “potentially complicit.”²¹⁹ Rounding out his team, Trump appointed another former military general, John F. Kelly, to head DHS.²²⁰ Kelly, who likewise subscribes to a civilizational War on Terror worldview, has stated that the U.S. is interlocked with a “savage enemy” inside and outside of the U.S. On January 28, 2017, President Trump made an unprecedented structural reform to the National Security Council (NSC), creating a permanent seat for Stephen Bannon, the White House Chief Strategist.²²¹ Trump’s shakeup of the NSC was met with immediate criticism, given that it was previously reserved for military generals.²²² By adding Bannon, who was later removed from the Council, Trump simultaneously exhibited a cavalier dismissal for tradition and a keen priority on ideology.

This group of cabinet appointees, many of them military men, indicates the militarized makeup and aggressive counterterror strategy of the Trump Era. Which, like President Trump, has a track record of scapegoating Muslims to carry forward strident counterterror policy.

2. *Scapegoating Muslims*

On January 27, 2017, President Trump’s anti-Muslim rhetoric was packaged into law. Trump, only one week into his first term, enacted an Executive Order widely dubbed the “Muslim Ban.”²²³ The order restricted the entry of immigrants from seven Muslim-majority countries, halted the entry of refugees for 120 days, and indefinitely barred the admission of Syrian refugees.²²⁴ National protests erupted at American airports after the order

²¹⁹ Greg Miller, *Trump’s CIA Pick is Seen As Both A Fierce Partisan and Serious Student of National Security Issues*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/world/national-security/trumps-cia-pick-is-seen-as-both-a-fierce-partisan-and-serious-student-of-national-security-issues/2016/11/18/5b089f0e-ad9a-11e6-8b45-f8e493f06fcd_story.html?utm_term=.08625655cadd [https://perma.cc/3QZ3-WD32].

²²⁰ Jerry Markon and Dan Lamothe, *Retired Marine General John F. Kelly Picked to Head Department of Homeland Security*, WASH. POST (Dec. 7, 2016), https://www.washingtonpost.com/world/national-security/retired-marine-gen-john-f-kelly-picked-to-head-department-of-homeland-security/2016/12/07/165472f2-bbe6-11e6-94ac-3d324840106c_story.html?utm_term=.508ee4d78566 [https://perma.cc/U8RP-9VK8].

²²¹ See Zeke Miller, *Donald Trump Ups Stephen Bannon to National Security Role*, TIME (Jan. 29, 2017), <http://time.com/4652842/donald-trump-national-security-stephen-bannon/> [https://perma.cc/7GX7-A3UH].

²²² See Glenn Thrash and Maggie Haberman, *Bannon is Given Security Role Usually Held for Generals*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/stephen-bannon-donald-trump-national-security-council.html> [https://perma.cc/DCQ6-3VNC].

²²³ See Full Executive Order Text, *supra* note 7.

²²⁴ Michael D. Shear and Helene Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html> [https://perma.cc/8EH2-69WK].

was signed into law.²²⁵ Within the Muslim community, the order delivered a lurid message that the Trump Administration would scrutinize their religious identity with an unprecedented degree of suspicion and heavy-handed policy.

Muslim Americans began to negate and conceal their outward expression of Islam even before Trump took office. In anticipation of Trump's administration and the policies he proposed on the campaign trail, several Muslim women donning the headscarf reported that fear of the oncoming administration spurred their desire to remove the conspicuous marker of Muslim identity.²²⁶ Muslim American men donning a beard, a marker of religious piety, were also considering shaving it off for fear of backlash. One Muslim American man "worried about Trump's newly galvanized white nationalist supporters,"²²⁷ while another man removed his beard days after Trump was elected for "fear of the surveillance to come."²²⁸ This highlights that Muslim Americans are at an impasse in the U.S. when the stakes of Acting Muslim have never been higher, or more perilous.

A study by the California State University-San Bernardino's Center for the Study of Hate and Extremism noted a 78% increase in "anti-Islam" incidents in 2015.²²⁹ The study observed, "Last year's increase was so precipitous, that even if no other anti-Muslim hate crimes are recorded in the remaining unanalyzed states [twenty states were reported], 2015's partial numerical total would still be the highest since 2001 and the second highest on record."²³⁰ The author of the study, Brian Levin, stated, "I don't think we can dismiss contentions that rhetoric is one of the significant variables that can contribute to hate crimes."²³¹

²²⁵ April M. Short, *Protests Erupt Nationwide Against Trump's Muslim Ban For Second Day*, ALTERNET (Jan. 29, 2017), <https://www.alternet.org/activism/protests-against-trumps-muslim-ban-continue-day-2-us-intl-airports-and-across-country> [https://perma.cc/62HP-K8TL].

²²⁶ See Mahmoud Bondok, *Muslim Women Removing Headscarves in Wake of Trump Win*, MIDDLE EAST EYE (Nov. 10, 2016), <http://www.middleeasteye.net/news/dont-wear-hijab-please-trumps-victory-leaves-muslim-women-fear-1422731698> [https://perma.cc/Z56P-YB26]; see also Slma Shelbayah, *Opinion, Wearing Hijab in Trump's America*, CNN (Nov. 16, 2016), <http://www.cnn.com/2016/11/15/opinions/hijab-post-trump-america-opinion-trnd/index.html> [https://perma.cc/2CWY-GHJJ] (providing an account from a Muslim American mother contemplating whether she, and her daughters, should remove their headscarves for security reasons during the Trump Era).

²²⁷ Ayman Ismail, *I'm Muslim, and I'm Afraid, and I Can't Afford to Show It*, SLATE (Nov. 9, 2016), http://www.slate.com/articles/news_and_politics/politics/2016/11/a_muslim_in_trump_s_america_i_m_not_shaving_my_beard.html [https://perma.cc/YM6H-A84L].

²²⁸ Telephone Interview with Mohammad Bazzi, of Dearborn, Mich. (Nov. 14, 2016).

²²⁹ Brian Levin, CSUSB CENTER FOR THE STUDY OF HATE AND EXTREMISM, SPECIAL STATUS REPORT: HATE CRIMES IN THE UNITED STATES, 5 (Kevin Grisham, ed. 2016).

²³⁰ *Id.* at 15.

²³¹ Clare Foran, *Donald Trump, Anti-Muslim Hate Crimes, and Islamophobia*, THE ATLANTIC (Sept. 22, 2016), <https://www.theatlantic.com/politics/archive/2016/09/trump-muslims-is-lamophobia-hate-crime/500840/> [http://perma.cc/5NU2-XJP6].

President Trump's rhetoric and counterterrorism policy vision sowed a climate where outward expression of Muslim identity was never more dangerous. For example, a Muslim American New York City transit worker wearing a headscarf was called a "terrorist" and pushed down the stairs;²³² a Muslim American schoolteacher in Georgia received an anonymous note after Trump's victory stating her "headscarf isn't allowed anymore" and to "hang yourself with it;"²³³ and a California woman shouted "Your God is Satan" and "the Koran is evil" while two Muslim men were praying at a public park near San Francisco.²³⁴ These incidents illustrate that attacks on conspicuous Muslim expression were hardly confined to one part of the country, or in rural instead of urban centers.

Furthermore, the current administration's view that the whole of Islam is inherently violent will further diminish outward expressions of Muslim identity during the Trump Era. Departing from the Obama Era view that moderate expressions of Islam are presumptively exempt from counter-radicalization suspicion,²³⁵ President Trump's monolithic understanding of Islam will likely drive counterterrorism enforcement that conflates the most benign forms of Muslim identity expression with "radical Islam."²³⁶ Dissident views from Muslim Americans, purely political and without a religious character, may spur state suspicion and surveillance under President Trump.²³⁷

In addition, Trump and his counterterrorism leadership see no distinctions between Sunni and Shiite Islam with regard to terrorism and radicalization. Despite bloody proxy wars fought across sectarian lines in the Middle East, the Trump Administration considers both the rival sects to be aligned against the U.S.²³⁸ These confluences, many Muslim Americans fear, will become far

²³² *Muslim Woman Was Pushed Down NYC Stairs, Called "Terrorist,"* CBS NEWS (Dec. 5, 2016), <https://www.cbsnews.com/news/muslim-woman-new-york-city-pushed-down-stairs-subway-called-terrorist/> [http://perma.cc/3Y84-X2A9].

²³³ Kristin Guerra, *A Muslim Teacher Received Anonymous Note About Her Headscarf: "Hang Yourself With it,"* WASH. POST (Nov. 12, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/11/12/a-muslim-teacher-receives-an-anonymous-note-about-her-headscarf-hang-yourself-with-it/> [http://perma.cc/H7GH-FF57].

²³⁴ *Woman Accused of Attacking Muslim Men in East Bay Park Pleads Not Guilty,* ABC7 NEWS (Jan. 7, 2016), <http://abc7news.com/news/woman-accused-of-attacking-muslims-praying-in-east-bay-park-pleads-not-guilty/1150442/> [http://perma.cc/Q4WM-9QY3].

²³⁵ Rascoff, *supra* note 164, at 161.

²³⁶ A term Trump routinely uses in relation to conservative expressions of Islam, and sometimes, the faith in general. See David E. Sanger and Maggie Haberman, *Donald Trump's Terrorism Plan Mixes Cold War Concepts and Limits on Immigrants*, N.Y. TIMES (Aug. 15, 2016), https://www.nytimes.com/2016/08/16/us/politics/donald-trump-terrorism.html?_r=0 [http://perma.cc/K93E-QXY7].

²³⁷ Rashid Dar, *Why It Could Be Incredibly Difficult to be Muslim and Political in the Age of Donald Trump*, WASH. POST (Nov. 22, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/11/22/why-it-could-be-incredibly-difficult-to-be-muslim-and-political-in-the-age-of-donald-trump/?utm_term=.685e13608b5e [https://perma.cc/2D49-A9H6].

²³⁸ NSA Director Flynn argues, "[T]hey are united by their hatred of the democratic West. . . There is a direct relationship between the fanaticism of the Islamic radicals [Sunni groups Al Qaeda and ISIS] and the Iranian [Shiite] regime." FIELD OF FIGHT, *supra* note 207, at 103, 128.

stronger if there is a future attack, when counterterror crackdowns on expression of Muslim identity are expected to be less discriminating, sharper and more frequent.

IV. THE PRAXIS OF ACTING MUSLIM

All three counterterror programs employed during the War on Terror link Islam to national security threat. However, the strategic distinctions and scale of each of the three counterterror programs distinctly impacted how Muslim Americans expressed their religious identity.

Through actual case studies, this Part of the Article investigates the praxis of Acting Muslim. In line with the racial diversity of the Muslim American community,²³⁹ and the salience of gender on Muslim identity expression, the Sections below analyze four forms of Acting Muslim—Confirming, Conforming, Covering and Concealing Islam—through cases that reflect how Muslim identity is negotiated and expressed during the three eras of the war on terror.

A. *Confirming Islam*

“Confirming Islam” is when “identity-affirming” expression of Muslim identity aligns with one’s religious convictions. The following three cases illustrate how Confirming Islam is performed across gender lines, in distinct contexts, and during different eras of the War on Terror.

1. *Praying in Public*

Islam mandates its adherents to pray “five times each day.”²⁴⁰ Most commonly, prayer is to be completed within private confines, such as one’s home, or a mosque. However, given that Muslims are obligated to meet the daily prayer requirements—with the dawn (*subuh*), noon (*dhur*), and midday (*‘asir*) prayers overlapping with the nine-to-five work schedule—many Muslim American workers face the conflict of whether to pray on the job, or

²³⁹ For a demographic profile of the Muslim American population, see PEW RESEARCH CENTER, MUSLIM AMERICANS: NO SIGNS OF ALIENATION OR SUPPORT FOR EXTREMISM, 14 (Aug. 30, 2011) (classifying the faith group as 30% White, 23% African American, 21% Asian, 19% Other/Mixed, and 6% Hispanic). The number of “White” Muslim Americans is, in large part, attributed to the formal classification of Arab and Middle Eastern Americans as white by the U.S. Census, which may be altered in 2020. See generally Khaled A. Beydoun, *Boxed In: Reclassification of Arab Americans on the U.S. Census as Progress or Peril?* 47 LOY. U. CHI. L.J. 693 (2016).

²⁴⁰ “Prayer (*salat*) is a central and frequent practice for many of the world’s Muslims. Five times each day, from the early morning hours until evening.” ESPOSITO AND MOGAHED, *supra* note 115, at 12.

forsake this core Islamic mandate to avoid undue attention or suspicion at work.²⁴¹

Mohamed Benhassine, a cab driver in Orlando, chose the former. His employer, Star Taxi, maintained a strict “anti-prayer policy for Muslims.”²⁴² Furthermore, Star Taxi instructed its employees to take a picture of any colleague that violated the policy, and then submit it to a manager.²⁴³ In addition to the anti-prayer policy, “drivers [were] prohibited from taking their Star Taxi to Mosques” and were “prohibited from reading their Koran in their vehicle.”²⁴⁴ Star Taxi effectively maintained a rigid policy that restricted its Muslim employees from all forms of prayer on the job—whether inside the vehicle, within the confines of a building, such as a mosque, or in public. Employees that violated the policy were reprimanded, or terminated.²⁴⁵ The prayer ban was exclusive to Muslims.

Star Taxi justified its policy by claiming that it, “Doesn’t look good for [Star]” for their employees to be praying with “their rugs.”²⁴⁶ Operating in Orlando, the seat of Disney World and a global tourism hub, Star Taxi admitted that, “customers may not feel comfortable with Drivers from certain ethnic backgrounds” and “to avoid this stigma, [Drivers] were coached by [Star Taxi] to present themselves in a positive manner.”²⁴⁷ “Positive,” in Benhassine’s case, meant appearing less Muslim, or not Muslim at all, an image Star Taxi promoted through its anti-Muslim prayer policy.

Benhassine, a “devout Muslim,” was forced to choose between the daily obligation of prayer and his employer’s anti-prayer policy.²⁴⁸ Following the conduct code would cause him to miss at least three of the five daily prayers, while meeting the mandates of his faith would result in reprimand, or termination. On January 8, 2012, Benhassine parked his vehicle next to a dumpster within the campus of the Orlando Premium Outlets. A colleague took a picture of Benhassine praying in between chartered rides, and submitted it to his manager.²⁴⁹

Benhassine’s decision to pray on the job, and Confirm Islam, spurred both individual and collective punishment. He was terminated immediately,

²⁴¹ (Arabic). For specific prayer times coordinated to location, see Salah.com, <http://salah.com> [<https://perma.cc/5THC-CY28>] (last visited Jan. 15, 2017).

²⁴² Plaintiffs’ Statement of Undisputed Facts, Dispositive Motion for Summary Judgment, and Incorporated Memorandum of Law at 15, Benhassine v. Star Taxi, No. 6:12CV1508-ORL-37GJK (M.D. Fla. Oct. 18, 2013) [hereinafter Benhassine’s Statement of Facts]. Benhassine was joined by eight other Muslim plaintiffs who challenged the policy on the theory that it violated their Title VII and 42 U.S.C. §1981 rights, on grounds of racial discrimination.

²⁴³ *Id.* at 12–13.

²⁴⁴ *Id.* at 13.

²⁴⁵ *Id.* at 15.

²⁴⁶ *Id.* at 14.

²⁴⁷ *Id.* at 10.

²⁴⁸ *Id.* at 13. “Star Taxi propagated bigotry and intolerance against Islam by forcing its Muslim employees to choose between their religion and employment.” Plaintiff’s Response Memorandum in Opposition to Defendant’s Motion to Dismiss at 3, Benhassine v. Star Taxi, No. 6:12CV1508-ORL-37GJK (M.D. Fla. Dec. 7, 2012) [hereinafter Benhassine’s Response].

²⁴⁹ Benhassine’s Statement of Facts, *supra* note 242, at 15.

and the next day, Star Taxi, “began retaliating against the remaining [Muslim drivers] by not providing timely access to their taxis.”²⁵⁰ The other Muslim drivers joined Benhassine in suing Star Taxi for discrimination. Star Taxi’s strict anti-prayer policy, and its corporate mandate of making Muslim drivers appear less Muslim, illustrated a suspicion of Islam that adopted counterterrorism stereotypes. In fact, the counterterrorism baseline that expression of Muslim identity, most notably prayer, was tied to terrorism, was codified into Star Taxi’s code of employee conduct.

By Confirming Islam in the face of strict anti-prayer codes, Benhassine maintained his Free Exercise rights, but incurred the suspicion of Star Taxi, which resulted in his termination and the termination of four other Muslim American drivers. This case illustrates that Free Exercise of Islam, through the central expression of Muslim identity in between pickups and drives, conjured up fear of terrorism for Star Taxi. For Benhassine, confirming Islam resulted in his employer, Star Taxi, suppressing his Free Exercise rights.

2. *Looking the Part*

The headscarf, or *hijab*, is commonly referred to as the “flag of Islam.”²⁵¹ It is perceived by many to be a quintessential symbol of Islam, which in turn conjures up stereotypes of Muslim women as subordinate, passive, and oppressed.²⁵² These tropes conflict with the images of women promoted by American clothing retailers like Abercrombie and Fitch, which center on western notions of femininity and independence.²⁵³

Samantha Elauf, a seventeen-year old resident of Tulsa, Oklahoma, was interested in working for the Abercrombie and Fitch store at the nearby Woodlands Hills Mall.²⁵⁴ A Muslim American of Arab origin, Elauf wore a headscarf and was unsure whether that expression of Muslim identity disqualified or compromised her prospects of employment. Before applying, she asked a friend that worked for the store, who advised that she should proceed with an application because she previously worked with an employee “who wore a white yarmulke.”²⁵⁵ This relieved Elauf, who really wanted the job, but was unwilling to remove her headscarf to get it.

²⁵⁰ Order at 2, *Benhassine v. Star Taxi*, No. 6:12CV1508-ORL-37GJK (M.D. Fla. June 17, 2013), 2013 WL 3070871, at *1 [hereinafter *Benhassine Order*] (denying Star Taxi’s Motion to Dismiss).

²⁵¹ Julie Anne Taylor, Sanaa Ayoub, & Fatima Moussa, *The Hijab in Public Schools*, 41 RELIGION & EDUC. 16, 26 (2013).

²⁵² See Katherine Surko, *The “Oppressed” Muslim Woman*, WASHINGTON UNIVERSITY POLITICAL REVIEW (Mar. 26, 2015), <http://www.wupr.org/2015/03/26/the-oppressed-muslim-woman/> [<https://perma.cc/9YVX-SZLC>].

²⁵³ See generally ABERCROMBIE AND FITCH, <https://www.abercrombie.com/shop/us> (last visited Sept. 23, 2017) [<https://perma.cc/8BFV-D36H>].

²⁵⁴ Petition for Writ of Certiorari at 3, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 3 (2014) (No. 14-86) [hereinafter *Petition*].

²⁵⁵ *Id.* at 4.

Elauf was granted an interview, where she learned about the specific image and lifestyle Abercrombie marketed. Catering specifically to a suburban, middle class and affluent demographic, Abercrombie “exemplifies a classic East Coast collegiate style of clothing,”²⁵⁶ and sought to hire sales employees, which it called “models,” that embody that image.²⁵⁷ Elauf, who “loved movies, shopping, sushi, and the mall,”²⁵⁸ seemed to fit the image Abercrombie promoted.

Elauf, who wore a black headscarf and conservative professional dress that expressed her adherence to Islam, also learned about Abercrombie’s specific Look Policy during the interview:

Consistent with the image Abercrombie seeks to project for each store, the company imposes a Look Policy that governs its employees’ dress. The Look Policy prohibits “caps”—a term the Policy does not define—as too informal for Abercrombie’s desired image.²⁵⁹

Although Elauf scored above the required threshold to merit the job, Abercrombie’s district manager ruled that Elauf’s “headscarf was not permitted under [the] Look Policy”²⁶⁰ and decided not to hire Elauf.

Instead of choosing to conform to Abercrombie’s Look Policy and shore up the job, Elauf confirmed her Islam and filed an action that ultimately went before the Supreme Court. Elauf argued that Abercrombie made no efforts to accommodate her religious views.²⁶¹ Instead, Abercrombie expected her to accommodate their inflexible Look Policy, which in practice, entirely excluded the class of Muslim American women that wear headscarves from becoming sales associates.²⁶²

In an eight to one decision, the Supreme Court ruled in favor of Elauf. Writing for the Court, Antonin Scalia observed that “an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.”²⁶³ With Elauf, who wore a headscarf at the interview that con-

²⁵⁶ *Id.* at 3.

²⁵⁷ *Id.* at 3.

²⁵⁸ Adam Liptak, *Muslim Women Denied Job Over Head Scarf Wins in Supreme Court*, N.Y. TIMES (June 1, 2015), https://www.nytimes.com/2015/06/02/us/supreme-court-rules-in-samantha-elauf-abercrombie-fitch-case.html?_r=0 [<https://perma.cc/7BHW-D8Y8>].

²⁵⁹ EEOC v. Abercrombie & Fitch, Inc., 135 S. Ct. 2028, 2031 (2015).

²⁶⁰ Petition, *supra* note 254, at 5.

²⁶¹ EEOC v. Abercrombie & Fitch, Inc., 731 F.3d 1106, 1143–44 (Ebel, J., dissenting) (“Abercrombie refused to hire Elauf, without ever informing her that wearing a hijab conflicted with Abercrombie’s Look Policy, in order to avoid having to discuss the possibility of reasonably accommodating Elauf’s religious practice.”)

²⁶² See generally Brief for Am. Arab Anti-Discrimination Comm. (ADC) as Amici Curiae Supporting Petitioner, EEOC v. Abercrombie & Fitch, Inc., 135 S. Ct. 3 (2014) (No. 14-86) (explaining that Abercrombie’s Look Policy discriminates against Muslim-Americans).

²⁶³ EEOC v. Abercrombie & Fitch, Inc., 135 S. Ct. 2028, 2033 (2015).

firmed her Muslim identity, Abercrombie's refusal to accommodate her Free Exercise right met the statutory definition of discrimination.

"Observance of my faith should not prevent me from getting a job," Elauf affirmed on the day of the Supreme Court's decision.²⁶⁴ Confirming Islam, instead of accommodating it to meet Abercrombie's Look Policy, cost her the job she always wanted, but it set a critical precedent that disables corporations from discriminating against Muslim American women donning the headscarf moving forward.

3. *Keeping the Faith/Beard*

For Muslim men, wearing a beard is a marker of piety.²⁶⁵ More than merely a matter of personal grooming, donning a beard is an act that emulates the model of the Prophet Muhammad (*sunna*).²⁶⁶ Keeping a beard is the closest male equivalent of wearing a headscarf for women, marking a man's identity as not only a Muslim, but also a pious or conservative Muslim. However, we live in a time when the most prominently showcased bearded Muslims on mainstream media are terrorists or suspected terrorists.²⁶⁷ Therefore, during the war on terror, a beard (worn by a Muslim man) has become an intimate proxy for terrorism, and more specifically, terror networks like Al-Qaeda or ISIS.

Following the election of Donald Trump, Aymann Ismail—an Egyptian American editor and video producer for *Slate Magazine*—contemplated whether to keep or shave off his beard.²⁶⁸ A resident of New York, Ismail feared what his brown skin and beard communicated to strangers in the city, some of them emboldened by the election of President Trump as illustrated

²⁶⁴ Simran Jeet Singh, Opinion, *A Muslim Woman Beat Abercrombie & Fitch. Why Her Supreme Court Victory is a Win For All Americans*, WASH. POST (June 1, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/06/01/a-muslim-woman-beat-abercrombie-fitch-why-her-supreme-court-victory-is-a-win-for-all-americans/?utm_term=.ae3392e95c87 [<https://perma.cc/Z5RP-EWBG>].

²⁶⁵ See *Holt v. Hobbs*, 574 U.S. 853, 853 (2015) (upholding a Muslim inmate's Free Exercise right to keep his beard, even though it conflicted with prison policy, because requiring him to shave his beard substantially burdened the inmate's exercise of his religion); see also Jonathan Stempel, *EEOC Sues UPS for Religious Bias Against Bearded Men*, REUTERS (July 15, 2015), <https://www.reuters.com/article/ups-eoc-discrimination-lawsuit/eoc-sues-ups-for-religious-bias-against-bearded-men-idUSL2N0ZV1PC20150715>, [<https://perma.cc/3XTP-57KG>] (analyzing a Title VII suit against the United Parcel Service for compelling a Muslim American employee to remove his beard).

²⁶⁶ See *Are Beards Obligatory for Muslim Men*, BBC News (Jun. 27, 2010), <http://www.bbc.com/news/10369726> [<https://perma.cc/CK7N-GQMD>] ("the Prophet Muhammad is believed to have had a beard and those who insist that devout Muslims grow beards argue that they are doing no more than asking the faithful to emulate the Prophet's actions.").

²⁶⁷ For an example of how beards are tied to terrorism, and terrorist groups like ISIS, see John Hayward, *ISIS Orders Male Population of Mosul to Grow Beards*, BREITBART (Apr. 30, 2015), <http://www.breitbart.com/national-security/2015/04/30/isis-orders-male-population-of-mosul-to-grow-beards/> [<https://perma.cc/8PKH-57X4>].

²⁶⁸ Aymann Ismail biography page, http://www.slate.com/authors/aymann_ismail.html (last viewed on January 10, 2016) [<https://perma.cc/Y2UX-V3XB>].

by the wave of hate crimes against Muslims that preceded and followed election day.²⁶⁹ On the morning after Trump won the election, Ismail wrote,

The train ride into Manhattan gave me that same feeling every Muslim got in post-9/11 New York. Looking out for anyone who didn't share my complexion. Not putting on headphones, lest I make myself vulnerable. Keeping my eyes on the ground, wanting to be invisible.²⁷⁰

Like many Muslims of color, Ismail could not conceal his brown (or black) skin. However, fearing backlash and the hardline counter-radicalization program proposed by Trump, which tightened the nexus between outward expressions of male Muslim identity (such as beards) and ISIS,²⁷¹ Ismail could become less visibly Muslim by removing his beard. Many Muslim American “men are shaving their beards,” Ismail observed after Trump’s win, debating whether to follow in the footsteps of their fear or confirm his Muslim identity by not removing his beard.²⁷²

“Well, I’m keeping mine,” Ismail affirmed.²⁷³ Defying the suspicious glares routinely directed his way on the subway and on the streets of Manhattan, and the more rigid counterterrorism policy developed by the Trump Administration, Ismail did not waver. Assuming the risks associated with practicing his Free Exercise rights as he saw fit, during a moment of rising hostility toward Muslims, Ismail observed that Muslims, “live in a suspended state between opposition and assimilation, and this requires a kind of toughness and adaptability.”²⁷⁴

By choosing to Confirm Islam—particularly during the turbulent early stages of the Trump Era—Ismail’s beard will be certain to invite suspicion and perhaps even backlash from hatemongers and suspicion from the state. However, for Ismail, free exercise of his faith and unabashed expression of his chosen mode of outward identity *trumped* fear of the suspicion and stares that came his way on the streets of New York City, and beyond.

B. *Conforming Islam*

Conforming Islam is conduct whereby a Muslim American actor manipulates a disfavored expression of Muslim identity so that it coalesces with mainstream societal sensibilities or political norms. The two cases be-

²⁶⁹ Southern Poverty Law Center Staff, Update: 1,094 Bias-Related Incidents in the Month Following the Election, Southern Poverty Law Center (Dec. 16, 2016), <https://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election> [<https://perma.cc/MCY5-5XZF>].

²⁷⁰ Ismail, *supra* note 227.

²⁷¹ Trump and Terrorism, *supra* note 206.

²⁷² Ismail, *supra* note 227.

²⁷³ *Id.* at 3.

²⁷⁴ *Id.*

low illustrate Conforming Islam in action. The first manifests it through the strategic conforming of a singular expression of Muslim identity, and the second illustrates it through comprehensive assimilation of political conduct.

1. *Star-Spangled Headscarf*

The most conspicuous adherents of Islam are women that don the headscarf. On the other hand, waving the American flag is the quintessential demonstration of patriotism and belonging. After 9/11, Muslim Americans prominently featured American flags on their cars, homes and businesses to stave off backlash, and perform the “good Muslim” act to an impassioned public.²⁷⁵ By deciding to *wear* the American flag as a headscarf, one Muslim American woman found a creative way to exercise Islam as she saw fit and prominently express her love for country during the height of the Trump campaign.

Saba Ahmed, a Pakistani American lawyer and conservative political commentator,²⁷⁶ conformed her Islam by wearing an American flag as a headscarf. As the founder of the Republican Muslim Coalition, which seeks to “bring the voice of conservative Muslims to American politics,”²⁷⁷ Ahmed became a regular media commentator during the 2016 presidential election. She was frequently on conservative media, like Fox News, where she appeared on November 18, 2015, donning the American flag as her headscarf.²⁷⁸

Opposite Megyn Kelly, Ahmed discussed the “rising anti-Muslim sentiment” sweeping through the U.S.²⁷⁹ “The message we were trying to portray was that we are Americans, we are Muslims, we are Republicans. We need to be accommodated and accepted,”²⁸⁰ Ahmed implored. However, for the millions of viewers tuning in, Ahmed’s red, white and blue headscarf resonated far more than her commentary did.

Supplementing her words, Ahmed’s conforming of her headscarf affirmed the acceptance she called for on screen. In addition, her headscarf sought to persuade viewers that it was not tied to oppression, subversion and terrorism. Ahmed was both Muslim and American, and her star-spangled headscarf vividly communicated coexisting love for faith and country.²⁸¹ Ah-

²⁷⁵ Engle, *supra* note 111, at 101.

²⁷⁶ See SABA AHMED [official website], <http://www.sabaahmed.com> (last visited Sept. 23, 2017) [<https://perma.cc/KGF6-TQWG>].

²⁷⁷ REPUBLICAN MUSLIM COALITION [official website], <http://www.republicanmuslimcoalition.com> (last visited Sept. 23, 2017) [[HTTPS://PERMA.CC/GDN8-DUR5](https://perma.cc/GDN8-DUR5)].

²⁷⁸ *Meet the Woman in the American Flag Hijab*, BBC NEWS (Nov. 18, 2015), <http://www.bbc.com/news/blogs-trending-34852817> [<https://perma.cc/XJH7-8BQ3>].

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See Stephy Chung, ‘*Hope*’ Artist Shepard Fairey Reveals New Posters to Protest Trump, CNN (Jan. 19, 2017), <http://www.cnn.com/style/article/shepard-fairey-trump-inauguration-posters-trnd/index.html> [<https://perma.cc/77E8-AWQG>], which features a poster of a Muslim woman wearing an American flag as a headscarf. This poster was prominently fea-

med sought to turn the prevailing perception of the headscarf on its head—converting it into from an acute expression of Islamic piety into a lurid performance of American patriotism.

Ahmed's conforming of the headscarf had mixed results for non-Muslim American viewers. Some lauded her expression of Muslim American identity, while others opposed it. One viewer wrote, "I'm offended that you would wear a American flag as a hijab. The American flag is to be flown not used as a towel on one's head," coupling critique with a common anti-Muslim slur.²⁸² Another viewer wrote, "Good grief. American soldiers died for that flag. It's not a freaking hijab."²⁸³

Ahmed's conforming of the headscarf worked on some viewers, who affirmed that the flag of Islam could coexist with the U.S. flag.²⁸⁴ One viewer praised her act of patriotism, "An American flag hijab is the most American thing I've ever seen."²⁸⁵ While another wrote that, "The woman who wore an American flag as a hijab on Fox News wins all the awards."²⁸⁶

Certainly, Ahmed appreciated that dismantling stereotypes attached to the headscarf was a long-term campaign. However, her conforming of the headscarf was driven by a more immediate, less ambitious aim:

I just wanted to show that Muslim Americans celebrate our patriotism, too. So I went on the show wearing the flag to show that we're proud Americans. We want to live in peace. And what ISIS is doing doesn't represent our religion, and we shouldn't be targeted because of a few bad people.²⁸⁷

By Conforming Islam, on the greatest conservative media stage, Ahmed became the quintessential embodiment of the moderate Muslim. In addition to carrying her message about conservative Muslim Americans forward, Ahmed's appearance comforted the anxieties of a sizable audience that subscribes to Islamophobia and allayed the fears of those that ascribe suspicion of terrorism to the headscarf.

tured at the Women's Marches held throughout the U.S. on January 21, 2017, one day after President Trump's inauguration. For more about the Women's marches, see Perry Stein et al., Women's Marches: More than One Million Protesters Vow to Resist President Trump, Wash. Post (Jan. 22, 2017), https://www.washingtonpost.com/local/womens-march-on-washington-a-sea-of-pink-hatted-protesters-vow-to-resist-donald-trump/2017/01/21/ae4def62-dfdf-11e6-acdf-14da832ae861_story.html?utm_term=.9ceca36489ff [<https://perma.cc/A8FK-3RSW>].

²⁸² Radhika Sanghani, *This Woman Wore an American Flag Hijab on Fox News*, TELEGRAPH (Nov. 19, 2015) (comment from Rebecca Boudreaux on Twitter), <http://www.telegraph.co.uk/women/life/this-woman-wore-an-american-flag-hijab-on-fox-news/> [<https://perma.cc/42G4-U227>].

²⁸³ *Meet the Woman in the American Flag Hijab*, *supra* note 278, at 2.

²⁸⁴ Cf. Julie Anne Taylor et al., *The Hijab in Public Schools*, 41 RELIGION IN EDUC. 16, 26 (2013).

²⁸⁵ See *supra* note 283, at 2.

²⁸⁶ *Id.*

²⁸⁷ Sanghani, *supra* note 282, at 3.

2. *The Islamic Reformer*

Amid a war on terror that associates Muslim identity with terrorism, becoming a “good Muslim” before the eyes of the state is best expressed through clear and continuous disavowal of acts of terrorism and terrorist groups.²⁸⁸ Some Muslim Americans, following a domestic or international terror attack involving a Muslim culprit choose to condemn “Islamic extremism” on behalf of the faith group at large, assuming the un-appointed role of the faith’s group’s spokesperson. “Islam Reformers,” like Dr. Zuhdi Jasser, a Muslim American physician that has assumed the role of reforming Islam in America,²⁸⁹ have taken this role of speaking on behalf of Muslim Americans to the extreme. He argues that disavowal of terrorism is not enough, and that Islam, at large, must be reformed and conformed in alignment with American values.²⁹⁰

For Jasser, reforming Islam is an expression of political and religious conformity. Using the clash of civilizations binary to frame his mission, Jasser argues, “We are in a global struggle of a magnitude we have not seen since the end of the Cold War—and this time we are fighting an enemy whose natural constituency includes almost one-fourth of the world’s population.”²⁹¹ From this foundation, Jasser subscribes to the counterterror presumption that ties Muslim identity to terrorism and radicalization, and expounds that the problem with Islam is not a fringe or deviant faction of Muslim actors, but the entire religion. Echoing the clash of civilizations “crusade” launched by the Bush Administration,²⁹² Jasser calls for the “struggle for the very soul of Muslims,”²⁹³ supported by a list of Muslim American reformers of which his name stands atop.²⁹⁴

Jasser’s reformist strategy coopts the ideas and concepts of the War on Terror, and aims to reconstruct and Conform Islam in line with its objectives.

²⁸⁸ See Engle, *supra* note 111, at 62–63.

²⁸⁹ For more about Jasser, see his biography at <http://www.mzuhdijasser.com/about> [<https://perma.cc/E48C-WU7G>].

²⁹⁰ See Ayaan Hirsi Ali, *The Islam Reformers vs. The Muslim Zealots*, WASH. POST (Mar. 27, 2015), https://www.washingtonpost.com/opinions/the-islam-reformers-vs-the-muslim-zealots/2015/03/27/acf6de6c-d3ed-11e4-ab77-9646eea6a4c7_story.html?utm_term=.C9c9da4a7c5e [<https://perma.cc/QU2G-AEL9>] (describing primary actors, and ideology of the Islam Reformers).

²⁹¹ Zuhdi Jasser, *Fighting for Victory Against Islamism*, NAT’L REV. ONLINE (Dec. 16, 2015), <http://www.nationalreview.com/article/428571/muslim-reform-movement-fighting-islamism> [<https://perma.cc/PN57-RVLZ>].

²⁹² See MAMDANI, *supra* note 111, at 15.

²⁹³ Zuhdi Jasser, *An Americans Muslim’s View—Why Our Community Needs the King Hearings on Radical Islam*, FOX NEWS (Mar. 9, 2011), <http://www.foxnews.com/opinion/2011/03/09/american-muslims-view-community-needs-king-hearings-radical-islam.html> [<https://perma.cc/BN9W-Z8SW>].

²⁹⁴ “As devout Muslims who are anti-Islamist we feel that Muslims have to lead the war of ideas against political Islam (Islamism) from within.” Zuhdi Jasser, *My Fellow Muslims, We Must Wake Up!*, FOX NEWS (May 7, 2010), <http://www.foxnews.com/opinion/2010/05/07/m-zuhdi-jasser-times-square-muslims-homegrown-islamist-terror-hasan-faisal.html> [<https://perma.cc/2US7-PG39>].

In his writing and presentations, he regularly conflates “political Islam” and “Islamism” with benign expressions of faith.²⁹⁵ In addition, he compares the War on Terror to the Cold War, and subscribes to the presumption that radicalization is specifically and singularly a Muslim phenomenon.²⁹⁶ Jasser endorses the counterterror presumption that extremism is rooted in Islam, and echoes the clash of civilizations rhetoric and framing of the Bush and Trump Eras.

For Jasser, Islam must be reconstructed in the image of its host nation. This mission seeks to conform the doctrine of a faith, roughly fourteen hundred years old, to the secular principles and values of the U.S. In short, Jasser believes that Islam should be remade to fit American values and norms. Jasser argues, “Taking the side of reform-minded Muslims who champion liberty and eschew Islamism must be the centerpiece of the strategy.”²⁹⁷ A strategy whereby Jasser’s “liberty doctrine,” a manifesto that co-opts staple human rights and civil liberties principles, propagates the good versus bad Islam binary,²⁹⁸ dismisses Islamophobia as “victim-mongering,”²⁹⁹ and most dangerously, arms his supporters to condemn anybody that opposes his views as “blasphemers,”³⁰⁰ or “bad Muslims” seeking to cause harm to the U.S.³⁰¹

A strategic symbiosis benefits both Jasser and the staunchest proponents of the War on Terror. An “identity entrepreneur,” Jasser’s mission to conform the whole of Islam equips DHS, conservative politicians and think tanks with, “the credibility that comes with the inclusion of outsiders [Muslims].”³⁰² Muslims like Jasser not only bring credibility by endorsing War on Terror policy, but are also bona fide Muslims the state can showcase while promoting its counterterror work in Muslim communities. Jasser, who routinely touts his identity as a “devout Muslim” in his writing and commentary,³⁰³ legitimizes and advances hardline War on Terror programing, and other campaigns vilifying Islam.³⁰⁴ Jasser also benefits from his conformity,

²⁹⁵ *Id.* at 1.

²⁹⁶ *Id.* at 1.

²⁹⁷ See *Fighting For Victory Against Islamism*, *supra* note 291, at 1; see also Zuhdi Jasser, *Sept. 11 Terrorist Attacks Awakened Us to a “Battle for the Soul of Islam”*, WASH. POST (Sept. 18, 2012), <http://www.mzuhdiasser.com/12297/battle-for-the-soul-of-islam> [<https://perma.cc/G9HF-A2MA>] [hereinafter *Battle For the Soul of Islam*].

²⁹⁸ Jasser divides Muslim Americans as “Freedom loving” and “Islamists,” with no in-between groups. *Cf.* *Fighting For Victory Against Islamism*, *supra* note 291, at 2.

²⁹⁹ *My Fellow Muslims*, *supra* note 294, at 2.

³⁰⁰ *Fighting For Victory Against Islamism*, *supra* note 291, at 4.

³⁰¹ MAMDANI, *supra* note 111, at 15.

³⁰² Leong, *supra* note 35, at 12.

³⁰³ Jasser typically prefaces his arguments with language such as, “Enjoying a deep love of God and the role which Islam plays in my own soul and conscience.” *Battle For the Soul of Islam*, *supra* note 297, at 1.

³⁰⁴ See *Battle For the Soul of Islam*, *supra* note 297. Jasser applies Leong’s thesis to show that a system of religious capitalism also exists in which non-Muslim individuals and predominantly non-Muslim institutions gain political and counterterror value from strategically empowering Muslims to advance their aim.

with regular features on Fox News, book deals,³⁰⁵ honoraria and speech fees,³⁰⁶ and access to government. For Jasser, and other reform-minded native informants,³⁰⁷ endorsing War on Terror tropes and strident counterterror programs is a Muslim act of conformity that may garner personal benefit, but one that erodes the Free Exercise rights of Muslim Americans immensely.

C. *Covering Islam*

Covering Islam is conduct whereby a Muslim American voluntarily tones down or hides a disfavored Muslim identity trait in order to mitigate or eliminate the stigma associated with that specific mode of expression. The two cases analyzed below examine Covering Islam through the masking of two stigmatized identity traits: first, a Muslim name, and second, the Arabic language.

1. *What's In a Name?*

Since 9/11, Muslim Americans have faced escalating animus by colleagues and supervisors within the workplace. An Equal Employment and Opportunity Commission (EEOC) attorney observed, “[A] level of hatred and animosity that is shocking” during the Bush and Obama Eras.³⁰⁸ Islamophobia in the workplace also extends into the pre-employment phase, when employers are recruiting and interviewing job applicants. Many Muslim (and non-Muslim) American job candidates believe that their applications were set aside because they had Muslim sounding names.³⁰⁹

Shahida Muhammad, a Black Muslim American woman, was made well aware of this Islamophobia in the workplace while applying for jobs after college. Muhammad applied to a number of job opportunities, “going through the job struggle” with no success.³¹⁰ Employers, Muhammad began to realize, were “culturally profiling” her as Muslim because of her name.³¹¹ Muhammad recounted,

³⁰⁵ Jasser’s first book was published in 2012. See ZUHDI M. JASSER, *A BATTLE FOR THE SOUL OF ISLAM: AN AMERICAN MUSLIM PATRIOT’S RIGHT TO SAVE HIS FAITH* (2012).

³⁰⁶ Jasser requests five to ten thousand dollars per appearance, as discussed with his agency, All American Speakers, official website at <https://www.allamericanspeakers.com/booking-request.php?SpName=ZUhdi-Jasser> [<https://perma.cc/QSK8-TCTH>].

³⁰⁷ FEAR, INC., *supra* note 48, at 39–62.

³⁰⁸ Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, N.Y. TIMES (Sept. 23, 2010), <http://www.nytimes.com/2010/09/24/business/24muslim.html> [<https://perma.cc/8HP9-QD54>].

³⁰⁹ Shahida Muhammad, *That Time I Changed My Muslim Name, and Jobs Started Calling*, OOGEEWOOGEE (Sept. 5, 2014), <http://oogeewoogee.com/that-time-i-changed-my-muslim-name-and-jobs-started-calling> [<https://perma.cc/YZ9X-UYK5>].

³¹⁰ *Id.*

³¹¹ Laura Morgan Roberts and Daryl D. Roberts explain these discriminatory hiring practices as “cultural profiling,” the process whereby applicants that do not fit within an institution’s culture are not recruited or later terminated if they fail to conform. *Testing the Limits of*

I was in no way oblivious to stereotypes associated with Muslims—heightened greatly by post 9/11 paranoia—but as a Black woman from Philadelphia, to me, my race shaped my social experiences more so than my faith. And at the time I didn’t wear a head covering.³¹²

However, Muhammad did not simply have a Muslim sounding surname but *the* quintessential Muslim name—that of the Prophet Muhammad, the “messenger of God” according to Islamic scripture.³¹³ While her first name was ambiguously Muslim,³¹⁴ her last name screamed Muslim.

In need of a job and fully cognizant that her surname revealed her to be a Muslim, Muhammad commenced the process of Covering Islam by changing her name. First, she dropped Muhammad for her middle name, “Sade.”³¹⁵ Shahida Sade sounded “ethnic,”³¹⁶ perhaps Black, but far less Muslim than Shahida Muhammad. By mitigating the suspicion of prospective employers by covering her explicitly Muslim name, Muhammad’s partial name change proved successful. “In less than two hours of shooting out emails, I received an email response and a call.”³¹⁷

But the partial name change was not the end of Muhammad’s covering act. “You need to use a regular Black name, like Johnson—or a name that sounds white,” Muhammad’s cousin encouraged her.³¹⁸ Still unemployed with “nothing but time” and frustration on her hands, Muhammad concealed every possible signal of Muslim identity by adopting an Anglicized moniker, “Stacy Jackson,” on her resume.³¹⁹ Stacy Jackson could be read as a Black name or a name associated with a white candidate.³²⁰ Muhammad’s new name supplanted the stigma of her Muslim name with the familiarity of a “regular” American name.³²¹ Motivated by her new name, “Stacy Jackson” applied to more jobs, including employers that previously ignored or rejected her.

The results of her complete name change were staggering. “After a morning of applying, I had at least three email responses and two phone

Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work, 14 DUKE J. GENDER L. & POL’Y 369 (2007).

³¹² Muhammad, *supra* note 310, at 1.

³¹³ LESLIE HAZLETON, AFTER THE PROPHET: THE EPIC STORY OF THE SHIA-SUNNI SPLIT IN ISLAM 12 (2010).

³¹⁴ Shahida stems from the root word *shahid*, which means witness in Arabic.

³¹⁵ Nigerian, short for Falasade.

³¹⁶ The term “ethnic” is used to generally refer to a racial identity as not white, but failing to identify the specific race or ethnicity of the individual.

³¹⁷ Muhammad, *supra* note 310.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ Sahar Aziz would classify this name change as “coercive assimilation,” the process whereby corporate culture compels a job applicant or employee to conform their identities and behavior to the dominant institutional culture (focusing on Muslim women). *Coercive Assimilationism: The Perils of Muslim Women’s Identity Performance in the Workplace* 20 MICH. J. OF RACE & L 1 (2014).

³²¹ Muhammad, *supra* note 310, at 1.

calls. I purposely reapplied to a few of the places I had already applied to under my real name.”³²² Furthermore, if Muhammad used her new name to construct a non-Muslim identity during the interview, and on the job, her Muslim act would have transitioned from Covering to Concealing Islam.

By Covering Islam on her resume and job applications by removing her Muslim name for a mainstream alias, Muhammad strategically circumscribed her Free Exercise but garnered the consideration of employers that previously overlooked her. In War on Terror America, there is considerable weight and meaning attached to a name, particularly a Muslim sounding name.

2. *No Arabic Onboard*

Like a headscarf or a name, the Arabic language is also a proxy for Islam, and during the War on Terror, for terrorism. The fear of terrorism associated with Muslim bodies is perhaps no greater than within the cabin of an airplane. Muslims that speak Arabic—or another language that sounds like Arabic—are exposed to the uncomfortable stares of passengers, discriminatory treatment from airline personnel, and in many instances, ejection from the airplane.³²³ Instead of accommodating the victim of irrational fear or bigotry, airliners consistently execute the wishes of passengers that link the Arabic language to the threat of terrorism.³²⁴ Therefore, in War on Terror America, Muslim “[r]emovals are no longer isolated incidents but have become a discriminatory pattern and common practice on American commercial airliners.”³²⁵

Following the ejection of a University of California-Berkeley student from a Southwest flight for saying the word “Insha’Allah” while on board,³²⁶ Deanna Othman contemplated whether to speak Arabic on her flight on the

³²² *Id.*

³²³ For a case whereby a Muslim American Internet personality was removed from a Delta airliner because he spoke Arabic on the telephone with his mother, see Ciara McCarthy and Will Coldwell, *YouTube Star Allegedly Kicked Off Delta Flight ‘for Speaking Arabic’ is Known for Pranks*, THE GUARDIAN (Dec. 21, 2016), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/12/21/youtube-star-known-for-pranks-claims-he-was-kicked-off-delta-flight-for-speaking-arabic/?utm_term=.3cf6c9906314 [<https://perma.cc/9W3J-QUBE>].

³²⁴ See Michael Hiltzik, *It’s Time For Airlines to Stop Ejecting Passengers for Looking or Acting Muslim*, LA TIMES (Apr. 18, 2016), <http://www.latimes.com/business/hiltzik/la-fi-airlines-muslims-20160417-snap-htlmlstory.html> [<https://perma.cc/P5H7-QJTM>] (arguing that airlines are appeasing the bigoted views of passengers by baselessly ejecting Muslim passengers).

³²⁵ Khaled A. Beydoun, *Speaking Arabic While Flying*, AL JAZEERA ENGLISH (Apr. 20, 2016), <http://www.aljazeera.com/indepth/opinion/2016/04/speaking-arabic-flying-160420051548323.html> [<http://perma.cc/R8XY-R848>] [hereinafter *Speaking Arabic While Flying*].

³²⁶ A common expression expressed by Muslims that means “God willing” in Arabic. “On April 9, Khairuldeen Makhzoomi was removed from a Southwest airline flight [chartered from New York to San Francisco] minutes before take-off. The University of California-Berkeley student, and Iraqi American, chose to call his uncle in Baghdad to discuss the United Nations event he just attended in New York.” *Id.* at 2.

same airline. The Muslim American freelance journalist based out of Chicago, Illinois, who wore the hijab, followed a pre-flight ritual every time she boarded a plane. “My first act after getting comfortable in my seat on a plane is to utter a brief prayer, asking God for protection on my journey.”³²⁷ In addition to praying in Arabic, she oftentimes spoke to her husband, also Muslim American, in her native tongue while onboard. “There was nothing wrong with speaking Arabic and I had no reason to feel there was,”³²⁸ she maintained, until after the incident involving Makhzoomi, the student removed from the Southwest flight for saying “God willing” in Arabic.

Othman feared that performing her prayer ritual onboard, or speaking Arabic to her husband or to another family member on the phone, would trigger the suspicion of Southwest personnel. Moreover, speaking Arabic, combined with her headscarf, compounded the threat posed by her Muslim identity.³²⁹ While unwilling to remove her headscarf, Othman covered one aspect of her Muslim identity by choosing to fully “code switch” from Arabic to English onboard a flight.³³⁰ In the process, she reduced the level of suspicion by airline personnel. Othman could have continued speaking Arabic onboard the flight, and exposed herself to the possibility of ejection or the extended discomfort of suspicious stares, anxiety, and possible questioning on arrival.

For Othman, Covering Islam by ceasing her Arabic prayer ritual and exclusively speaking English onboard clashed with her Free Exercise rights but augmented her sense of ease while flying. Particularly because of her conspicuous Muslim appearance, the act of speaking English toned down and countered the stereotypes of foreignness and extremism ascribed to the headscarf. The high incidence of plane ejections during each era of the War on Terror has made “code switching fully into English. . . a common phenomenon for Arab and Muslim airline passengers.”³³¹

In a context where suspicion of Muslim Americans is perhaps at its highest, and tolerance for the Arabic language is at its lowest, airline passengers like Othman routinely cover their Islam by silencing their Arabic speech onboard an airplane, an example of the broad and diverse modes of Covering Islam being expressed on the ground.

³²⁷ Deanna Othman, *I’m Afraid to Speak Arabic on Southwest Airlines*, HUFFINGTON POST (Apr. 19, 2016), http://www.huffingtonpost.com/deanna-othman/on-southwest-airlines-im-afraid-to-speak-arabic_b_9729690.html [https://perma.cc/7FQ6-VN26].

³²⁸ *Id.* at 2.

³²⁹ *Id.* at 2–3.

³³⁰ Code switching is when a multilingual speaker switches between two or more languages during a conversation.

³³¹ *Speaking Arabic While Flying*, *supra* note 325; see also Lydia Willgress, *Arabic-Speaking Passenger is Stopped From Boarding Flight Because Another Traveler COMPLAINED About Flying with Him*, DAILY MAIL (Nov. 20, 2015), <http://www.dailymail.co.uk/news/article-3326909/If-person-doesn-t-feel-safe-let-bus-Passenger-calls-police-stopped-boarding-flight-traveler-said-scared-fly-hearing-speaking-Arabic-friend.html> [https://perma.cc/6AHK-WRXC] (involving a Muslim American man asked to deplane from an out-bound Chicago flight because he spoke Arabic).

D. *Concealing Islam*

Concealing Islam is the attempt by a Muslim American to entirely hide his or her Muslim identity within the public sphere. This Muslim Act is identical to the phenomenon of passing. The two case studies below investigate attempts to Conceal Islam and pass as non-Muslim as a means to avert suspicion, isolation, and gain acceptance.

The very nature of concealing Islam itself makes it difficult to uncover actual narratives about the process of passing from Muslim to non-Muslim. This subsection examines two case studies: the first involving a young Muslim American student that chose to pass as non-Muslim and “ethnic” after 9/11, and the second examining the case of a Somali American Muslim woman that Concealed Islam and passed as a non-Muslim Black woman for fifteen years.

1. *Passing as “Ethnic”*

Sarah Hamdaoui lived in Schaumburg, Illinois, a predominantly white middle-income suburb of Chicago. As a youth, she would often travel to the nearby Muslim American enclave of Bridgeview, where she would shop with her mother, visit family friends, or tag along with her father, who taught martial arts at the community mosque.³³²

While only thirty miles apart, Bridgeview was worlds away from Sarah’s hometown of Schaumburg. Business signs with Arabic script were a common sight, Middle Eastern restaurants were ubiquitous, and young and old women wearing headscarves walked freely up and down Harlem Avenue without fear or pause. Being Muslim was not *an issue* in Bridgeview, and was the norm in the enclave many referred to as “Little Palestine.”³³³

Being and acting Muslim in Schaumburg, on the other hand, was a burden for Sarah. It made it difficult for her to fit in with her predominantly white and Christian friends at school. This burden proved far too demanding after 9/11, spurring young Sarah to conceal her Muslim identity and pass as a non-Muslim girl during 9/11’s turbulent aftermath.³³⁴

As a young Muslim American of Japanese and Moroccan descent, Sarah was accustomed to standing out and feeling “out of place.”³³⁵ However, the severity of the anti-Muslim climate and violent backlash made being Muslim entirely different. While her mixed ethnicity was viewed as exotic, her religious identity following 9/11 was widely perceived as the very em-

³³² Interview with Sarah Harvard (Dec. 10, 2013).

³³³ See Max Herman, *They Call It Little Palestine*, THE CHICAGO REPORTER (Aug. 7, 2015).

³³⁴ Sarah Harvard, *Confessions of a Secret Muslim*, SALON (Mar. 22, 2014), <https://www.salon.com/2014/03/23/confessions-of-a-secret-muslim> [https://perma.cc/73LM-DEQG].

³³⁵ See generally EDWARD SAID, *OUT OF PLACE: A MEMOIR* (1999) (describing the existential circumstance of “being out of place” as feeling like an outsider in all contexts).

bodiment of terrorism. “You’re a terrorist!” Sarah’s best friend shouted at her days after 9/11 in the school hallways.³³⁶ The immediate aftermath “was hell” for Sarah, and scorn from classmates and teachers was an everyday reality.³³⁷ The cumulative pain endured, and the mounting desire to escape it triggered a decision that would be the “start of a new life for me.”³³⁸

At the age of nine, and with the help of her parents, Sarah began to construct a new identity. She changed her Islamic surname “Hamdaoui” to “Harvard,” a name she chose because it represents a “slice of Americana.”³³⁹ However, Sarah kept her first name, a trans-religious name that coupled with Harvard concealed any sign of Muslim identity, and in turn, solidified her American bona fides to her classmates.

When she reached the sixth grade, three years after 9/11, Sarah’s family moved to Plainfield, Illinois, another predominantly white Chicago suburb. While disappointed that her family did not relocate to the familiar confines of Bridgeview,³⁴⁰ a new town and school provided Sarah with the ideal opportunity to live out her new, non-Muslim identity. “I completely disregarded my faith publicly as a Muslim—and my real life undercover began,” she wrote, reflecting on the circumstances that prompted her decision to Conceal Islam.³⁴¹

Sarah emulated the styles of her predominantly white classmates, only spoke English while at school,³⁴² and when asked about the identity of her religion, ambiguously revealed that she was “seeking the truth.”³⁴³ Her friends presumed that she was just “ethnic” and Christian, assuming that nobody named “Sarah Harvard” could be a Muslim. In addition, Sarah did not wear a headscarf and did not fit the stereotype of Muslim girls held by her new classmates. Things may have been different if her family moved to Bridgeview, where she could have paused the deception and been Sarah Hamdoui again, a young Muslim American girl, no different from the scores of young girls residing in Bridgeview.

Fitting in and acceptance incentivized Sarah to “liv[e] as a fraud” until her junior year in college in 2013.³⁴⁴ For more than a decade, Sarah concealed her Muslim identity and carried forward the deception that she was not a Muslim. She entirely privatized her faith, concealing any evidence of

³³⁶ *Id.* at 2.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ Interview with Sarah Harvard, *supra* note 332.

³⁴¹ Harvard, *supra* note 334, at 3.

³⁴² Aziz provides a general illustration of the performance of Muslim American women that conceal their Muslim identities in *Coercing Assimilation*, *supra* note 100, at 346, “She may not disclose her travels to her country [or countries] of origin, so as to not trigger suspicions of divided national loyalties. Her social and professional dress is western and liberal, such that nothing about her appearance discloses her Muslim identity.”

³⁴³ Harvard, *supra* note 334, at 3.

³⁴⁴ *Id.*

her Muslim identity through junior high school, high school, and her first three years at American University in Washington, DC.

But the costs of hiding,³⁴⁵ and the fatigue of acting non-Muslim day in and day out, began to outweigh the incentives of Concealing Islam. “Living as a fraud is exhausting. It’s exhausting to your mind, body and soul.”³⁴⁶ There were no temporary outlets or escapes from her non-Muslim act while Sarah was in college in Washington, DC, far from home and further from Bridgeview. Fatigued and fully confined by the identity she constructed, and a burgeoning career as a journalist during the Obama Era, Sarah came out of hiding. She revealed that she was Muslim to her colleagues and friends, ending an act of non-Muslim identity that lasted for roughly half of her life and spanned the Bush and Obama Administrations.³⁴⁷

2. *Passing as Black*

Elhan fled war-torn Somalia in August 2001 for a country on the brink of War on Terror hatemongering and counterterror policy.³⁴⁸ For several weeks, Elhan was a Somali Muslim immigrant adjusting to life in Washington, DC, a city once affectionately named “chocolate city” for its sizable African American population.³⁴⁹ However, the grueling experience of being a refugee in an unfamiliar country was compounded by the events of 9/11, which made her very her status as Muslim and immigrant the very profile DHS tied to terrorism. Standing at that vulnerable “intersection,”³⁵⁰ whereby “Muslim” became a dirty word and immigrant prompted perceptions of subversion, Elhan became “Amy”³⁵¹ and concealed her Muslim identity in exchange for an American one.

By concealing her Muslim identity, Elhan also hid her status as a refugee. As a high school freshman, living in a multicultural city, Elhan carefully constructed a public identity that enabled her to lead a life as a “normal

³⁴⁵ “But hiding like this comes at a great cost. I didn’t have close friends, because I feared discovery and didn’t think anyone could ever understand. Elementary school had taught me the cost of exposure. I could not trust anyone with my deepest, darkest secret.” *Id.* at 3.

³⁴⁶ *Id.* at 3.

³⁴⁷ *Id.* at 4.

³⁴⁸ Christopher Mathias, *The Woman Who Hid That She’s Muslim For 15 Years*, HUFFINGTON POST (May 11, 2016), http://www.huffingtonpost.com/entry/woman-hides-being-muslim-15-years_us_5730c1cde4b016f37896746b [https://perma.cc/C9EF-4CHT].

³⁴⁹ See Natalie Hopkinson, *Farewell to Chocolate City*, N.Y. TIMES (June 23, 2012), <http://www.nytimes.com/2012/06/24/opinion/sunday/farewell-to-chocolate-city.html> [https://perma.cc/4P8N-374Q].

³⁵⁰ See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (coining the term “intersectional” to illustrate the victimization of individuals possessing two or more stigmatized identities).

³⁵¹ Marisa Kabas, *This Woman Hid Her Muslim Identity For 15 Years. Here’s Why She Finally ‘Came Out,’* WARDHEER NEWS (May 20, 2016), <http://www.wardheernews.com/this-woman-hid-her-muslim-identity-for-15-years-heres-why-she-finally-came-out/> [https://perma.cc/6Q6B-34P6].

American teenager.”³⁵² While 9/11 ushered in a *new normal* throughout the country, Elhan exclusively spoke English at school, traded in her traditional African dress for American wears, and “decided to never wear a hijab to school.”³⁵³

In line with this promise, “She’d wear her hijab and Muslim garments out of the house, but change out of them before she got to the bus stop,”³⁵⁴ following this routine five days every week. She would perform a parallel custom before heading home from school, keeping her family ignorant of her double life. “Amy would don her hijab and modest garb and transform back into Elhan.”³⁵⁵ This was hard work for Elhan, but an act she performed day in and day out to stave off suspicion and maintain the acceptance of her peers.

In addition to “fooling insiders into believing” that she was not Muslim,³⁵⁶ Elhan’s concealment negated the impression that she was an immigrant. She was Elhan the Somali refugee at home and at her community mosque, but at school, just African American Amy. Negating her Muslim and Somali identity at school and extracurricular contexts remade Elhan into a non-Muslim African American. Just being black in America opened Elhan’s eyes to a new set of racial and civil liberties challenges, but the fear of being Muslim after 9/11 and during the Bush Era were more ominous:

My whole adult life, I’ve been living in fear. Fear of rejection from society. Fear of being labeled as a terrorist. Fear that someone might hurt me because I’m Muslim. That fear is still there.³⁵⁷

Her public performance as Amy, the African American non-Muslim that “partied with friends” and “loved Starbucks,”³⁵⁸ neared its end when Trump called for a “total and complete shutdown of Muslims entering the United States.”³⁵⁹ While the aftermath of 9/11 and the rolling out of the war on terror caused teenage Elhan to Conceal Islam, the brazen rhetoric and strident proposals of the Trump Era inspired Elhan to consider coming out as a Muslim in public.

Trapped between fear and Free Exercise, Elhan finally ended her non-Muslim act after President Obama’s first visit to an American mosque in February of 2016.³⁶⁰ Despite the personal costs of Concealing Islam, Elhan’s

³⁵² *Id.* at 1.

³⁵³ Mathias, *supra* note 348, at 2.

³⁵⁴ *Id.*

³⁵⁵ Britni Danielle, *Religious Intolerance Drove A Woman to Lead A Double Life for 15 Years*, TAKEPART (May 19, 2016), <http://www.takepart.com/article/2016/05/19/secret-lives-of-americans-elhan/> [<https://perma.cc/3WD6-2ULU>].

³⁵⁶ *Working Identity*, *supra* note 34, at 1300.

³⁵⁷ Kabas, *supra* note 351, at 2.

³⁵⁸ *Id.* at 1, 2.

³⁵⁹ *Id.* at 3.

³⁶⁰ *Remarks By the President at Islamic Society of Baltimore*, WHITE HOUSE (Feb. 3, 2016).

public passage as an African American woman helped develop her consciousness as a Black woman in the U.S. Therefore, hearing the first Black president rebut Trump's proposed Muslim Ban by claiming, "Do not believe them. . . you fit in right here,"³⁶¹ within a mosque no less, inspired her to come out as not only a Muslim woman—but a Black, Somali, Muslim American woman—integrated and all at once.

Elhan proudly wrapped her hijab around her head, spoke Somali in public, and pulled out the traditional colors of her African homeland buried deep in her closet. She decided to fully come out, as an unapologetic Muslim American. She then stored Amy away in the closet where Elhan remained hidden for fifteen years—for good.

CONCLUSION

"To thine own self be true."

—Polonius, *The Tragedy of Hamlet*³⁶²

*"It's not about making you uncomfortable.
It's about making me comfortable."*

—Nayyirah Waheed³⁶³

This Article theorizes Acting Muslim as the process by which Muslim Americans strategically negotiate and publicly perform a religious identity stigmatized by counterterror policy. Beginning with the inception of the war on terror in the wake of 9/11, through the election of Donald Trump on "11/9,"³⁶⁴ Muslims have been profiled as state pariahs and Islam as a religion that inspires or incites terrorism. As a result, eight million Muslim citizens are compelled to negotiate their expression of Muslim identity in line with the stereotypes and suspicions of the state. Between fear and Free Exercise, Muslim Americans expressed their religious identity in ways that invited suspicion of the state, allayed its fear, or made them unidentifiable as Muslims.

Acting Muslim moves toward a third era with the election of Trump. And, as illustrated by Trump's brazen rhetoric and strident counterterror program, it is a precarious phase where even the most benign expressions of Muslim identity may trigger the counterterror scrutiny of the state and invite

³⁶¹ *Id.*

³⁶² WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 1, sc. 3, l.78 (1994).

³⁶³ NAYYIRAH WAHEED, *SALT* 213 (2013).

³⁶⁴ Trump was formally declared winner of the 2016 presidential election on November 9, 2016, moving critics that likened his election to 9/11 to tab that day as 11/9. See Chauncey De Vega, *From 9/11 to 11/9: Is Donald Trump's Election Collateral Damage from the "War on Terror,"* SALON (Nov. 16, 2016), <https://www.salon.com/2016/11/16/from-9-to-11-9-is-donald-trumps-election-collateral-damage-from-the-war-on-terror> [https://perma.cc/DTK9-J862].

the heavy hand of surveillance. This makes for an impasse of the war on terror that is more restrictive of Muslim identity expression than the previous two eras.³⁶⁵

While an expression of religious devotion, Acting Muslim is also a performance of survival, carefully and cautiously choreographed on the third and most dangerous stage of the War on Terror, the Trump Administration.³⁶⁶ It is an administration that *trumpets* fear mongering and scapegoating of Muslim Americans from the highest office in the land.

In addition to examining actual case studies that highlight Acting Muslim in practice, this Article is also forward looking. It aims to equip scholars with the theoretical framework and operative language to examine the responses and negotiations Muslim Americans will make during the Trump Era and, very likely, beyond his administration. Indeed, few Muslim Americans “moved to Canada” after Trump defied projections and won the presidential election.³⁶⁷ However, a large number *moved* stigmatized traits of their Muslim identities inward, while others completely relocated their Muslim identities into the private sphere.

The others, who prioritize their *comfort* over that of the state’s, and Confirm Islam through praying in public, donning the headscarf, keeping their beard, or speaking on board of an airplane, will be exposed to a degree of state scrutiny that tries the bounds of their Free Exercise. And indeed, tests the depth of their faith.

³⁶⁵ See Khaled A. Beydoun, *In Trump’s America, ‘acting Muslim’ is more dangerous than ever*, WASH. POST (Jan. 11, 2018), <https://www.washingtonpost.com/posteverything/wp/2018/01/11/in-trumps-america-acting-muslim-is-more-dangerous-than-ever/?utm-term=.46cd3fbc34c4> [https://perma.cc/G833-VEQS].

³⁶⁶ See Peter Baker and Michael D. Shear, *Donald Trump is Down in as President, Caping His Swift Ascent*, N.Y. TIMES (Jan. 20, 2017), <https://www.nytimes.com/2017/01/20/us/politics/trump-inauguration-day.html> [https://perma.cc/F9MM-E2T9].

³⁶⁷ “I’m moving to Canada” was a popular response by many Americans fearing a Trump presidency. See Rajdeep Sandhu, *A Trump Presidency Has Americans Looking North*, BBC NEWS (May 17, 2016), <https://www.bbc.com/news/world-us-canada-36260099> [https://perma.cc/NMA9-H5VT].