

## “MUSLIM BANS” AND THE (RE)MAKING OF POLITICAL ISLAMOPHOBIA

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*Fear and suspicion of Islam, or “Islamophobia,” occupied center stage on the 2016 presidential campaign. Republican presidential candidates, most notably Donald Trump, upped the ante on the rhetoric targeting Islam and Muslims, during an impasse when fears of terrorism and “homegrown radicalization” are at a climax. Calls for “Muslim immigration bans” and “making the desert glow” manifest the intense political Islamophobia which gripped the 2016 presidential campaign. Although the blatant fear and animus has spiraled to new lows, a close examination of American legal history reveals that this rhetoric is neither aberrant nor novel—but rather an outgrowth of formative law and current policy.*

*This Article argues that the emergence of political Islamophobia is first facilitated by legal and political baselines—deeply embedded in American legal, media, and political institutions—that frame Islam as un-American, and Muslims as presumptive national-security threats. Second, it is enabled by the expansion of modern law and policy that marks Islam as an extremist ideology that spawns “radicalization.”*

*Furthermore, this Article examines how the dialectic between state policy and political rhetoric targeting Muslims is a synergistic and symbiotic one, whereby the former endorses and emboldens the latter. Framing the Islamophobic rhetoric that emanated from the 2016 presidential campaign as an outgrowth of preexisting law and policy, instead of outlier speech, renders a better understanding of that rhetoric’s purpose, impact, and interplay with standing policies that target Muslims Americans.*

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## I. INTRODUCTION

“[I]t is well known that [Arabs] are a part of the Mohammedan world and that a wide gulf separates their culture from that of the . . . Christian people[] . . .”

–Judge Arthur J. Tuttle, December 15, 1942<sup>1</sup>

“[I call for] a total and complete shutdown of Muslims entering the United States.”

–Donald Trump, December 7th, 2015<sup>2</sup>

Then-Republican presidential frontrunner Donald Trump’s proposal to “ban Muslims” marked a new highpoint in America’s fear of Muslims. This proposal was echoed over and over again, and even “expan[ded]” after the Republican National Convention in Cleveland,

1. *In re Ahmed Hassan* 48 F. Supp. 843, 845 (E.D. Mich. 1942) (finding that a Muslim immigrant from Yemen was nonwhite, and thus, ineligible for naturalization under prevailing naturalization law).

2. Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States,’* WASH. POST (Dec. 7, 2015), [https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm\\_term=.e7027f9e3dcd](https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.e7027f9e3dcd).

Ohio.<sup>3</sup> On August 15, 2016, Trump broadened the ban even further, calling for “extreme vetting” of all Muslim immigrants coming into the United States.<sup>4</sup> Far more than a fringe or aberrant policy position, Trump’s Muslim ban proposal helped deliver him the Republican nomination, and it developed into a cornerstone of his campaign for the White House.

“[R]oundly condemned” by a broad gamut of critics,<sup>5</sup> Trump’s ban targeting Muslim immigrants was framed as politically deviant, “a relatively new phenomenon,”<sup>6</sup> or an ideological break from “everything we [Americans] stand for and believe in.”<sup>7</sup> Closer examination of American legal history, however, reveals otherwise.

Trump’s “Muslim ban” is not unprecedented; rather, it harkens back to a 154-year period (from 1790 through 1944) when immigration law banned the naturalization of Muslim immigrants.<sup>8</sup> This period, referred to by legal historians as the “Naturalization Era,” links the anti-Muslim rhetoric of today with foundational American immigration policy. This policy preceded the blatant anti-Muslim fear and animus that gripped the 2016 presidential campaign, and more deeply, the latent suspicion of Islam that guides prevailing counterterrorism policy.

“The 2016 presidential election campaign . . . delivered [sic] heaping doses of anti-Muslim rhetoric,”<sup>9</sup> as well as punitive policy proposals directed at Islam, Muslim immigrants, and Muslim Americans. The anti-Muslim rhetoric ringing from the campaign trail may be specifically tailored to focus on contemporary threats, such as the Islamic State of Iraq and Syria (“ISIS”) abroad or fear of “domestic Muslim radicalization” or “homegrown terrorists,”<sup>10</sup> which intensified after the recent string of at-

3. Jeremy Diamond, *Trump on Latest Iteration of Muslim Ban: ‘You Could Say It’s an Expansion’*, CNN (July 24, 2016, 11:45 AM), <http://www.cnn.com/2016/07/24/politics/donald-trump-muslim-ban-election-2016/>.

4. 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?hpid=hp\\_name\\_opinion-card-a%3Ahomepage%2Fstory&utm\\_term=.30a37ce5da5d](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?hpid=hp_name_opinion-card-a%3Ahomepage%2Fstory&utm_term=.30a37ce5da5d); see also Lauren Said-Moorhouse & Ryan Browne, *Donald Trump Wants ‘Extreme Vetting’ of Immigrants. What is the US Doing Now?*, CNN (Aug. 16, 2016), <http://www.cnn.com/2016/08/16/politics/how-us-vets-immigrants-donald-trump-extreme-vetting/>.

5. *Donald Trump’s Muslim US Ban Call Roundly Condemned*, BBC (Dec. 8, 2015), <http://www.bbc.com/news/world-us-canada-35037701>.

6. *Islamophobia in the 2016 Elections*, GEO. U.: BRIDGE INITIATIVE (Apr. 25, 2015, 3:08 PM), <http://bridge.georgetown.edu/islamophobia-and-the-2016-elections/#> [hereinafter *Islamophobia in the 2016 Elections*]

7. For a reaction of former Vice-President Dick Cheney, who condemned Trump’s proposed Muslim ban, see Vincent Warren, *Anti-Muslim Hate Is a Continuation, Not an Aberration*, HUFFINGTON POST (Dec. 11, 2015, 12:49 PM), [http://www.huffingtonpost.com/vincent-warren/anti-muslim-hate-is-a-con\\_b\\_8785782.html](http://www.huffingtonpost.com/vincent-warren/anti-muslim-hate-is-a-con_b_8785782.html).

8. See generally Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. OF AM. L. 29, 29, 34 (2013), [hereinafter *Between Muslim and White*] (investigating the ten “Arab Naturalization Cases” and arguing that Muslim identity—or suspected Muslim identity—lead to courts banning the naturalization of Muslims and petitioners feared to be Muslim).

9. *Islamophobia in the 2016 Elections*, *supra* note 6.

10. See generally Khaled A. Beydoun, *A Demographic Threat? Proposed Reclassification of Arab Americans on the 2020 Census*, 114 MICH. L. REV. FIRST IMPRESSIONS 1 (2015) [hereinafter *A De-*

tacks in Europe and stateside in Orlando, Florida.<sup>11</sup> However, the essential *Islamophobic* message underlying the bombast of Trump, or the rhetoric of Ted Cruz,<sup>12</sup> are rooted in earlier, significant, and distinctly *American* legal and political pronouncements. The Islamophobia rising to the fore during the 2016 presidential campaign was not created by the candidates; rather, it was embedded in established American law, policies, and political rhetoric. Furthermore, this Islamophobia was emboldened by the fear and animus of Muslims driving modern counterterrorism programs.

Broadly defined, Islamophobia is “the presumption that Islam is inherently violent, alien, and unassimilable . . . and the belief that expressions of Muslim identity are correlative with a propensity for terrorism.”<sup>13</sup> Rooted in established tropes and mischaracterizations of Muslims and Islam, Islamophobia is undergirded by the theory of “Orientalism,”<sup>14</sup> a master discourse that positions Islam—as a faith, people, and imagined geographic sphere—as the civilizational foil of the West.<sup>15</sup> These bodies of misrepresentations and mischaracterizations feed the images, ideas, and ideologies about Islam and Muslims, thereby feeding the blatant Islamophobia that rose to the fore during the 2016 presidential campaign.

Islamophobia, which began to take form as a recognizable phrase and distinct form of bigotry following the terrorist attacks of 9/11, was materially driven by the discursive, political, and legal “redeployment of . . . Orientalist tropes” that followed.<sup>16</sup> Thus, while “Islamophobia” became prominent in political discourse after 9/11,<sup>17</sup> it is firmly rooted in

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*mographic Threat*] (providing a critical examination of the proposed reform to Arab American legal identity via the proposed Middle Eastern or North African boxes to the 2020 Census); Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 127 (2012) (whereby author provides a description of counter-radicalization and analyzes its problematic First Amendment establishment and free-exercise implications).

11. The mass shooting at the Pulse Nightclub in Orlando, Florida, on June 12, 2016, which involved a Muslim American shooter of Afghan descent (Omar Mateen) who executed forty-nine people and wounded fifty-three, is considered the “deadliest [terror] attack on U.S. soil” since 9/11. See Barney Henderson et al., *Omar Mateen: Everything We Know So Far About Orlando Gunman*, TELEGRAPH (June 15, 2016, 10:24 AM), <http://www.telegraph.co.uk/news/2016/06/12/omar-mateen-everything-we-know-so-far-about-orlando-gunman/>; Ana Swanson, *The Orlando Attack Could Transform the Picture of Post-9/11 Terrorism in America*, WASH. POST: WONKBLOG (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/>.

12. See generally Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 COLUMN. L. REV. ONLINE 108 (2016) [hereinafter *Toward a Legal Definition and Framework*] (providing a theoretical definition and framework for understanding Islamophobia as both a process and a private and structural animus).

13. *Id.* at 111.

14. See generally EDWARD W. SAID, *ORIENTALISM* (Vintage Books ed. 1979) (coining and framing the theory of Orientalism, which positions the West, or “Occident,” as the superior counterpoint and antithesis of the inferior Middle East, or “Orient”).

15. Islam is viewed as both religion and race through the Orientalist and Islamophobic lens, understood in the narrow image of Arabs. See generally Beydoun, *Between Muslim and White*, *supra* note 8.

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

17. An influential study published by the Center for American Progress in 2011 mainstreamed the term in media, scholarly, and political circles. WAJAHAT ALI ET AL., *CTR. FOR AM. PROGRESS*,

the images, ideas, and epistemology of its precedent system, Orientalism.<sup>18</sup>

Extending the Orientalism framework, Islamophobia is based upon the beliefs that Islam is a hostile faith, and that Muslims—even while citizens—are a foreign, violent, and unassimilable people.<sup>19</sup> In addition, Islamophobia undermines the normalization of Muslims and disables the perception of them as anything more than inherently suspicious or threatening.<sup>20</sup> These ideas, seeded by formative laws and judicial rulings and later endorsed by modern state policy, intensely rose to the fore of American society after 9/11, and are still here today:

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.”<sup>21</sup>

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FEAR INC.: THE ROOTS OF THE ISLAMOPHOBIA NETWORK IN AMERICA 9–10 (2011), <https://www.americanprogress.org/issues/religion/report/2011/08/26/10165/fear-inc/>. This study defined Islamophobia as, “exaggerated fear, hatred, and hostility toward Islam and Muslims . . . perpetuated by negative stereotypes resulting in bias, discrimination, and the marginalization and exclusion of Muslims from America’s social, political, and civil life.” *Id.* at 9.

18. In an influential study, Islamophobia was deconstructed accordingly: 1) “Islam [is] seen as a single monolithic bloc, static and unresponsive to new realities[;]” 2) “Islam [is] seen as separate and other—(a) not having any aims or values in common with other cultures (b) not affected by them (c) not influencing them[;]” 3) “Islam [is] seen as inferior to the West—barbaric, irrational, primitive, sexist[;]” 4) “Islam [is] seen as violent, aggressive, threatening, supportive of terrorism, engaged in ‘a clash of civilisations’[;]” 5) “Islam [is] seen as a political ideology, used for political or military advantage[;]” 6) “Criticisms made by Islam of ‘the West’ rejected out of hand[;]” 7) “Hostility towards Islam used to justify discriminatory practices towards Muslims and exclusion of Muslims from mainstream society[;]” and 8) “Anti-Muslim hostility accepted as natural and ‘normal.’” *COMM’N ON BRITISH MUSLIMS & ISLAMOPHOBIA, RUNNYMEDE TR., ISLAMOPHOBIA: A CHALLENGE FOR US ALL* (Robin Richardson ed., 1997) [hereinafter *RUNNYMEDE TRUST*]; see also *ISLAMOPHOBIA IN AMERICA: THE ANATOMY OF INTOLERANCE 2* (Carl L. Ernst ed., 2013) (providing several definitions of “Islamophobia”); see also *CARL L. ERNST, ISLAMOPHOBIA IN AMERICA: THE ANATOMY OF INTOLERANCE 2* (2013) (providing several definitions of “Islamophobia.”)

19. “[In addition to its expansion], Islamophobia is legally fluid and adaptive . . . [Thus,] its structural and ideological contours are molded by its host country and context. . . . American culture, politics[,] and legal systems are distinct from their British [and] French counterparts, . . . [which renders] American Islamophobia different from its British and French analogs.” Khaled A. Beydoun, *Between Indigence, Islamophobia, and Erasure: Poor and Muslim in “War on Terror” America*, 104 CALIF. L. REV. 1463, 1483 (2016) [hereinafter *Between Indigence, Islamophobia, and Erasure*] (footnotes omitted).

20. Islamophobia’s most resilient quality, perhaps, is the systematic redeployment of the Muslim villain image and erasure of the Muslim victim. See, e.g., Khaled A. Beydoun, *Muslims in the News Only When They’re Behind the Gun*, AL JAZEERA (Jan. 9, 2015), <http://www.aljazeera.com/indepth/opinion/2015/01/muslims-france-charlie-hebdo-me-201518121649556792.html> (focusing on the murder of Ahmed Merabat, a policeman on site of the Charlie Hebdo attack). This dialectic plays out perpetually today, as evidenced by both national and international crises that involve a Muslim culprit or are swiftly presumed to involve one. See *id.*

21. Volpp, *supra* note 16, at 1586 (footnote omitted).

Thus, Islamophobia collectively and collaterally affects all Muslims—as well as non-Muslims.<sup>22</sup> As illustrated by the brash rhetoric evident in the 2016 presidential campaign, it also acutely impacts and stigmatizes America's eight million Muslim citizens,<sup>23</sup> particularly Muslims living in concentrated and cognizable “Muslim American” communities.<sup>24</sup>

Like other forms of bigotry, “Islamophobia is not fixed or static.” Rather, “Islamophobia is a fluid and dynamic system whereby lay actors and law enforcement target Muslim Americans based on irrational fear and hatred.”<sup>25</sup> Islamophobia is, on one hand, formal law and policy. It is also, however, political language, campaign platforms, get-out-the-vote tactics, and strategically deployed media sound-bites from presidential candidates. In line with this articulation of Islamophobia, this Article argues that:

First, Islamophobia is facilitated by formative legal and political baselines—deeply embedded in American legal, media, and political in-

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22. *Toward a Legal Definition and Framework*, *supra* note 12, at 123 (“For instance, Sikh American men are typically perceived to be Muslims by private Islamophobes, and consequently, among the most vulnerable and targeted victims of private Islamophobia. Turbaned, bearded, and brown-skinned, Sikh men fit the stereotypical caricature of the ‘Muslim terrorist’ more closely than the majority of Muslim men, which has led to profiling, hate crimes, and targeted killings of this grouping after terror attacks. In addition, the phenotypic appearance of non-Muslim South Asian, [Latina/o], Black, and biracial men and women are often conflated with Muslim identity.”)

23. *Islamophobia in the 2016 Elections*, *supra* note 6. The official estimate of the Muslim American population may be grossly underestimated. Part of this potential underestimation stems from the formal designation of Arab Americans as white, in addition to the phenomenon of Arab Americans dis-identifying themselves as Arab following 9/11. See Gregory Korte, *White House Wants to Add New Racial Category for Middle Eastern People*, USA TODAY (Sept. 30, 2016, 5:44 PM), <https://www.usatoday.com/story/news/politics/2016/09/30/white-house-wants-add-new-racial-category-middle-eastern-people/91322064/>; see also Besheer Mohamed, *A New Estimate of the U.S. Muslim Population*, PEW RES. CTR. (Jan. 6, 2016), <http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/> (“About one-in-five American Muslim adults were raised in a different faith or none at all. At the same time, a similar number of people who were raised Muslim no longer identify with the faith. About as many Americans become Muslim as leave Islam.”). The Pew Research Center places the Muslim American population at 2.75 million. PEW RESEARCH CTR., *MUSLIM AMERICANS: NO SIGNS OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM 20* (2011), <http://www.people-press.org/files/legacy-pdf/Muslim%20American%20Report%2010-02-12%20fix.pdf> [hereinafter PEW STUDY]. The highest estimates are around nine to ten million Muslim people living in the U.S. Amaney Jamal & Liali Albana, *Demographics, Political Participation, and Representation*, in *THE CAMBRIDGE COMPANION TO AMERICAN ISLAM* 98 (Juliane Hammer & Omid Safi eds., 2013). However, other accounts place the population as high as 8 million. Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 9 *ASIAN L.J.* 195, 197 (2002). For a discussion on the ethnic and cultural diversity of the Muslim American population, see Hilal Elver, *Racializing Islam Before and After 9/11: From Melting Pot to Islamophobia*, 21 *TRANSNAT'L L. & CONTEMP. PROBS.* 119, 124 (2012) (“The [American] Muslim minority comes from diverse national origins and cultural backgrounds comprising as many as sixty-five countries. ‘They speak a wide variety of languages and represent a range of cultural, economic, educational, sectarian, and ideological positions.’”) (footnote omitted).

24. I use “Muslim American” as the preferred designation for the population of American citizens that identify as Muslim, instead of other modalities, most notably “American Muslim.” See Paul Galloway, *Muslim-American or American Muslims? Here Is Why It Matters...*, *MUSLIM MATTERS* (Apr. 19, 2011), <http://muslimmatters.org/2011/04/19/muslim-american-or-american-muslims-here-is-why-it-matters/>.

25. *Id.* at 1479. See generally WAJAHAT ALI ET AL., *supra* note 17 (outlining the complex systems that form, facilitate, and dispense anti-Muslim bigotry in the U.S.).

stitutions—that frame Islam as un-American and oppositional, and Muslims as suspicious and unassimilable;<sup>26</sup> and,

Second, Islamophobia is intensified by the expansion of current policies that view Islam as an extremist ideology that spurs radicalization, which endorses and emboldens the Islamophobic “rhetoric” saturating the 2016 presidential campaign.<sup>27</sup>

In practice, the law and politics of Islamophobia do not unfold on separate tracks. Rather, the dialectic between law and political rhetoric is a synergistic and symbiotic one, whereby the former endorses and emboldens the latter. The expansion of *per se*, or “structural,”<sup>28</sup> Islamophobia spurs anti-Muslim political rhetoric and incites “private” animus or violence.<sup>29</sup>

Further, this Article argues that political rhetoric is itself, first, an expression of prevailing law, and, second, an aspirational expression of laws candidates vying for the presidency are poised to implement. Therefore, I conclude that the brazen disparaging of Islam and Muslims on the campaign trail is far more than “mere rhetoric”<sup>30</sup>: it is an expression of law. It is also a narration of American Islamophobia, “a central organizing idea or story line” retold through a modern, “unfolding strip of events.”<sup>31</sup> The prevailing storyline justifies Islamophobia by framing it as a necessary step toward countering radicalization, defeating ISIS, or “protecting American values.”<sup>32</sup>

This Article makes several notable contributions to the legal literature. First, it solidifies a definition of and theory for Islamophobia—instrumental to emergent legal discourses on national security, anti-terrorism, and civil liberties amid the protracting “War on Terror.” Sec-

26. See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 75 (2004) (analyzing how Arab and Muslim noncitizens and citizens are incapable of assimilation).

27. This Article employs a definition of “rhetoric” prominent with political science, which views political rhetoric in conjunction with “coercion.” Ronald R. Krebs & Patrick Thaddeus Jackson, *Twisting Tongues and Twisting Arms: The Power of Political Rhetoric*, 13 EUR. J. INT’L REL. 35, 36–37 (2007). Thus, political rhetoric is, “[D]eploy[ed] . . . in the hope that they will eventually persuade, their more immediate task is, through skillful framing, to leave their opponents without access to the rhetorical materials needed to craft a socially sustainable rebuttal.” *Id.* at 36. Within the scope of this Article, and the 2016 presidential campaign, the “opponents” are the voting public.

28. “[T]he fear and suspicion of Muslims on the part of institutions—most notably, government agencies—that is manifested through the enactment and advancement of policies.” *Toward a Legal Definition and Framework*, *supra* note 12, at 114.

29. “[F]ear, suspicion, and violent targeting of Muslims . . . by individuals [or] private actors. . . . This animus is generally carried forward by nonstate actors’ use of religious or racial slurs, mass protests or rallies, or violence against Muslim subjects.” *Id.* at 111.

30. “Most scholars of international and comparative politics disparage rhetoric as epiphenomenal. The very phrase ‘mere rhetoric’ captures the view that what counts is not the language people use but the material power resources upon which they can draw.” Krebs & Jackson, *supra* note 27, at 37.

31. W.A. Gamson & A. Modigliani, *The Changing Culture of Affirmative Action*, in RESEARCH IN POLITICAL SOCIOLOGY 137–77 (1987).

32. This language, for example, is central to Ted Cruz’s platform on immigration—and more narrowly, his stance against absorbing more Syrian refugees fleeing civil war in their native country. See CRUZ IMMIGRATION PLAN, <https://www.tedcruz.org/cruz-immigration-plan/> (last visited Aug. 8, 2017).

ond, it analyzes the intimate dialectic between formative legal rulings, state policy, and political rhetoric, which converge to facilitate today's proliferating fear of and animus towards Islam and Muslims. Third, it highlights that the unfolding Islamophobia displayed in the 2016 presidential campaign on the ground, and also wielded by the state, are not novel phenomena, but rather are steeped in and enabled by old and established law and policy. Finally, and beyond the 2016 presidential campaign, this Article illustrates the political incentives and disincentives attendant with employing "political Islamophobia" as a campaign strategy,<sup>33</sup> particularly as the U.S. becomes a "majority minority nation,"<sup>34</sup> and Muslim Americans—followers of the second-largest and fastest-growing faith in the U.S.<sup>35</sup>—mature in terms of size, diversity, and political influence.

The Article proceeds accordingly. Part II investigates the Naturalization Era—the racially restrictive period from 1790 through 1952—when Muslim immigrants were, for nearly the entire period, banned from becoming naturalized citizens. Part III analyzes the modern law of American Islamophobia, investigating post-9/11 and current policies guided by fear and suspicion of Islam and Muslims. Part IV examines the blatant and latent forms of political Islamophobia, centering on the rhetoric and perspectives permeating political campaigns, media discourses, and formal state policy. Part V argues that the Islamophobia coming from the presidential campaign trail emboldens the "private Islamophobia" coming from American citizens.<sup>36</sup> Hateful rhetoric is more than merely language, but words that lead to real wounds inflicted on Muslim American citizens and communities.

## II. AMERICA'S FIRST "MUSLIM BAN"

More than two centuries before a "Muslim ban" headlined the *New York Times* or was breaking news on *Fox News*, Muslims were statutorily barred from becoming American citizens. From 1790 through 1944, Muslims were deemed alien, inassimilable, and threatening to American society,<sup>37</sup> and were banned from becoming naturalized. The Naturalization Act of 1790, which mandated that naturalized citizens be ordained "free

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33. The deployment of Islamophobia as a political tactic.

34. The aggregate minority population, in 2050, is anticipated to be bigger than the white population. See Jeffrey S. Passel and D'Vera Cohn, *U.S. Population Projections: 2005-2050*, PEW RES. CTR. (Feb. 11, 2008), <http://www.pewhispanic.org/2008/02/11/us-population-projections-2005-2050/>.

35. For a recent study on the growth of the Muslim American population, see *The Future of World Religions: Population Growth Projections, 2010-2050*, PEW FORUM (Apr. 2, 2015), <http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/>. The study forecasts that the Muslim population will double by 2050. *Id.*

36. "[T]he fear, suspicion, and violent targeting of Muslims by individuals or private actors. This animus is generally carried forward by nonstate actors' use of religious or racial slurs, mass protests or rallies, or violence against Muslim subjects." *Toward a Legal Definition and Framework*, *supra* note 12, at 111.

37. See *In re Ahmed Hassan*, 48 F. Supp. 843, 846 (E.D. Mich. 1942).



white persons” by a civil court,<sup>38</sup> functioned as a *per se* ban on Muslims immigrants long before 9/11, and well before Trump’s proposed Muslim ban.

The statutory and jurisprudential foundations that enabled the “first Muslim ban” are discussed below. Section A provides an overview of the Naturalization Act of 1790, the statutory cornerstone of the racially restrictive Naturalization Era. Section B closely examines the primary naturalization cases involving immigrant-petitioners from the Arab world, which cases set forth the longstanding precedent that Islam was not reconcilable with whiteness, thereby making Muslims ineligible for naturalized citizenship.

#### A. *The Naturalization Act of 1790*

For the majority of America’s existence as a sovereign nation, whiteness and citizenship were legally conflated. In other words, one had to be white to become a naturalized citizen. The Naturalization Act of 1790 codified whiteness as a prerequisite for naturalized citizenship, thereby marking it as the *per se* dividing line between inclusion and exclusion, and also access to a range of privileges and benefits associated with formal citizenship.<sup>39</sup>

Enacted on March 26, 1790, the Naturalization Act defined the legal and racial parameters for naturalization as an American citizen:

That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record in any one of the States wherein he shall have resided for the term of one year at least . . . .<sup>40</sup>

The Act limited citizenship to immigrants who could convince a court that they fit within the statutory definition of “free white persons.”<sup>41</sup> Second, an immigrant could only apply after meeting the two-year residency requirement.<sup>42</sup> The Act was reformed in 1795 and 1798, most notably, extending the residency requirement from two to five years.<sup>43</sup>

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38. Naturalization Act of 1790, Act of Mar. 26, 1790, ch. 3, 1 Stat. 103. “The Naturalization Act of 1790 limited naturalization to ‘Whites,’ which restricted citizenship to immigrants who fit within the racial parameters of Muslim identity.” Khaled A. Beydoun, *Antebellum Islam*, 58 HOWARD L.J. 141, 147 (2015) [hereinafter *Antebellum Islam*].

39. For a landmark work on the property value attached to whiteness, see generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1717 (1993).

40. Naturalization Act of 1790, Act of Mar. 26, 1790, ch. 3, 1 Stat. 103.

41. *Id.*

42. *Id.*

43. The law was reformed in 1795 and again in 1798 in an effort to “[e]stablish a uniform rule of Naturalization” and extended the qualifying residency period from two to five years, then fourteen years, respectively. Naturalization Act of 1795, Act of Jan. 29, 1795, ch. 20, 1 Stat. 414; Naturalization Act of 1798, Act of June 18, 1798, ch. 54 § 1. The Act of 1798 mandated a “declaration of intent,” to be filed five years before naturalization, which placed additional obstacles for immigrant naturalization. Aliens that completed the declaration of intent received better treatment and were afforded more

Immigration law scholar Hiroshi Motomura observes that the Naturalization Act “entailed no obligation to naturalize, though many immigrants did take that next step and became citizens.”<sup>44</sup> Fearing a negative ruling, many settlers opted not to take this step toward citizenship.<sup>45</sup> This was especially true for settlers from East and South Asia, the Middle East, North Africa, and other parts beyond Europe.<sup>46</sup> For these immigrants, living as noncitizen residents, or “Americans in waiting,”<sup>47</sup> and flying under the radar until the whiteness mandate was lifted, was preferable to receiving a negative naturalization judgment by a court.

Again, the civil courts were burdened with the task of interpreting the statutory meaning of whiteness. Employing a number of rotating “racial,” tests some judges emphasized the importance of physical appearance, framers’ intent, the common sense understanding of whiteness, and in the case of immigrants from the Muslim world, religion.<sup>48</sup> Again, whiteness was not merely a race during the Naturalization Era, but a “material concept imbued with rights and privileges.”<sup>49</sup> The greatest right, citizenship, was inscribed into it, which, considering the deeply embedded narrative of a rivalry between Orient and Occident, Muslims and Christians,<sup>50</sup> brought forth the functional enactment of a Muslim naturalization ban that stood in place for 164 years.<sup>51</sup>

### B. *Trumping Up “Muslim Threat”*

For the majority of the U.S.’s existence, Muslims were banned from becoming naturalized citizens.<sup>52</sup> The Naturalization Act’s mandate of “whiteness” as a prerequisite for citizenship compelled Muslims—and immigrants presumed to be Muslims because of their place of origin—to persuade judges that they fit within the statutory definition of white-

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privileges. The racial barrier codified in the Naturalization Act of 1795, however, restricted who could complete a declaration of intent and “who could take advantage of these ideas and the sort of welcome they implied.” HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 123 (2006).

44. MOTOMURA, *supra* note 43, at 115–16.

45. *Between Muslim and White*, *supra* note 8, at 57 n.141.

46. *Id.* at 56–57.

47. *Id.*

48. For a comprehensive discussion of the different judicial tests used to assess an immigrant-petitioner’s whiteness in the set of 53 “prerequisite cases,” see IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 49–77 (1996).

49. JOHN TEHRANIAN, *WHITEWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY* 15 (2009).

50. *Antebellum Islam*, *supra* note 38, at 167–68.

51. The first Muslim immigrant naturalized as an American citizen was Mohammed Mohriez, a native of Yemen, who successfully petitioned for citizenship in 1944. *Between Muslim and White*, *supra* note 8, at 63–64.

52. My scholarship highlights how the first population of Muslims in the U.S. were enslaved Africans. “Social scientists estimate that 15 to 30 percent of the Africans enslaved in the Antebellum South practiced Islam. Research indicates that the Muslim slave population could have been as high as 1.2 million.” Slave codes and slavery criminalized Islam, and ultimately extinguished it from existence among the slave population. See generally *Antebellum Islam*, *supra* note 38.

ness.<sup>53</sup> In line with Orientalist baselines, which framed Islam as a race, culture, and civilization,<sup>54</sup> more so than a religion,<sup>55</sup> an immigrant's faith often served as a proxy for whiteness (or "otherness"),<sup>56</sup> with Christianity functioning as the proxy for the former, and Islam the proxy for the latter.

If Islam conflicted with whiteness, then Christianity functioned as a gateway toward citizenship for immigrants from Muslim-majority states. During the first naturalization case involving a petitioner from the "Muslim World,"<sup>57</sup> George Shishim declared before Judge Hutton of the Los Angeles Superior Court that: "If I am Mongolian, then so was Jesus, because we come from the same land."<sup>58</sup> Thus, Shishim not only invoked that his Christian identity merited a finding of whiteness, but also that his hailing from the very same land as Jesus—Christianity's seminal figure and Son of God<sup>59</sup>—compelled such a finding.

During the proceeding, it appeared that Hutton was skeptical of Shishim's Christian *bona fides* because of his Lebanese, or Middle Eastern, origins. Shishim's appeal tying his geographic origins to that of Jesus,

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53. In line with the position that race is a social construction, "Being white is not a monolithic or homogenous experience, either in terms of race, other social identities, space or time. Instead, Whiteness is contingent, changeable, partial, inconstant, and ultimately social." HANEY LOPEZ, *supra* note 48, at xiv. Whiteness, during the Naturalization era, vacillated between narrow and broader constructions, whereby judges subjectively drew upon a range of criteria—eugenics, physical appearance, language, geographic origin, religion, and other factors—to find an immigrant petitioner within or beyond the statutory definition of whiteness. A popular position by courts, illustrated in *Ozawa v. United States*, held that whiteness was synonymous with Caucasian and confined to persons of the "Caucasian race," but the court used other measures besides ancestry and etymology to define the basis and bounds of whiteness. *Ozawa v. United States*, 260 U.S. 178, 198 (1922).

54. *Antebellum Islam*, *supra* note 38, at 163–68 (analyzing the construction of Muslim identity from a religion into a political and ethnic identity). "Propaganda arising from the Barbary Wars, combined with Orientalist baselines, cemented the idea that Arab and Muslim identity were one in the same. In other words, Islam—as a religious identity—was converted into a narrow ethno-racial identity that excluded any group that was not believed to be Arabs or Turks. This 'disorientation of Muslim identity,' shaped how American halls of power and society viewed Muslim identity beginning in the late 18th Century and onward." *Id.* at 166; see also Nagwa Ibrahim, Comment, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E.L. 121, 125 (2008).

55. The view of Islam as a civilization is not antiquated, but continues to resonate within scholarly and political halls of power. See generally SAMUEL P. HUNTINGTON, CLASH OF CIVILIZATION: REMAKING OF WORLD ORDER (1996) (for the most cited and popular work arguing that "Western civilization" is at odds with, and poised to clash, with "Islamic civilization"). For a critique of Huntington, which focuses specifically on deconstructing his "Islamic civilization" construct, see Khaled A. Beydoun, *Dar al-Islam Meets "Islam as Civilization": An Alignment of Politico-Theoretical Fundamentalisms and the Geopolitical Realism of this Worldview*, 4 UCLA J. ISLAMIC & NEAR E.L. 143, 144 (2005).

56. Volpp, *supra* note 16, at 1586.

57. Ten of the fifty-three naturalization cases involved a petitioner from the "Muslim World," a broad and decentralized sphere that encompasses regions home to significant Muslim populations. While a critic of the monolithic construction of Muslim states and populations, I use this term for purposes of brevity.

58. *Between Muslim and White*, *supra* note 8, at 33, (quoting George Shishim v. United States, Los Angeles Superior Court (1909) (no court transcripts available)); Sarah Gualtieri, *Syrian Immigrants and Debates on Racial Belonging in Los Angeles, 1875-1945*, 15:1 SYRIAN STUD. ASS'N NEWS. 1 (2009).

59. EDWARD J. BLUM & PAUL HARVEY, THE COLOR OF CHRIST: THE SON OF GOD AND THE SAGA OF RACE IN AMERICA 9 (2012) ("Whiteness became a crucial symbol of national identity and citizenship.").

however, rebutted that presumption, leading Hutton to rule that Shishim fit within the statutory definition of whiteness, because he was able to overcome the presumption (or suspicion) that he was Muslim by persuasively demonstrating that he was in fact *racially and religiously* Christian.<sup>60</sup> Thus, Shishim's twofold demonstration of Christianity (as religion and race) functioned as his pathway toward whiteness and citizenship, thereby enabling him to circumvent the standing Muslim naturalization ban.

For subsequent immigrant petitioners from the Muslim world, *Shishim* established the precedent that "performing" Christianity within the court was the optimal pathway toward whiteness and citizenship.<sup>61</sup> One year later, Costa George Najour overcame the Muslim naturalization ban by demonstrating to a Georgia court that he too was Christian.<sup>62</sup> Subsequently, both a Massachusetts and Oregon court also found a Syrian Christian and Lebanese Christian white by law.<sup>63</sup> In both instances, the presumption of Muslim identity, based on the geographic origins of the petitioners, was overridden by their in-court performance of Christianity, which again was often interpreted by Naturalization Era judges as a hallmark and harbinger of whiteness.<sup>64</sup>

However, not every Christian petitioner from the Muslim world overcame the Muslim naturalization ban. One case involving an immigrant petitioner from modern-day Lebanon, *Ex parte Shahid*,<sup>65</sup> illustrates how Muslim identity was acutely racialized during the Naturalization Era. Shahid asserted his Christian faith to rebut the presumption that he was a Muslim.<sup>66</sup> Judge Smith of the South Carolina court, however, viewed his dark skin as evidence of miscegenation with Muslims.<sup>67</sup> Smith described the immigrant petitioner to be "about [the color] of a walnut, or somewhat darker than is the usual mulatto of one-half mixed blood between the white and the negro races."<sup>68</sup>

60. *Between Muslim and White*, *supra* note 8, at 33.

61. The Naturalization Law of 1790, immediately upon arrival, compelled immigrants from the Arab World to shed their pre-migration identities, strategize how they fit within this matrix, and "perform whiteness" within American courts. Here, I borrow the language of law scholar John Tehranian, who argues that, "time and again, the privileges of whiteness have been doled out to those who best perform whiteness." TERHRANIAN, *supra* note 49, at 26. John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 839 (2000) (for an examination of how immigrants were tasked with performing whiteness, and persuading judges that they fit within the statutory scheme, to be legally naturalized as American citizens).

62. *In re Najour*, 174 F. 735 (N.D. Ga. 1909). Najour was a Lebanese Maronite residing in Georgia.

63. *In re Mudarri*, 176 F. 465, 466 (C.C.D. Mass. 1910); *In re Ellis*, 179 F. 1002, 1003 (D. Or. 1910).

64. *Between Muslim and White*, *supra* note 8, at 33.

65. *Ex parte Shahid*, 205 F. 812, 812 (E.D.S.C. 1913).

66. *Id.* at 813.

67. Foreshadowing the rationale in *Thind v. United States*, a landmark Supreme Court cases involving a Sikh Indian immigrant petitioner, the Shahid court interpreted race as phenotype to deny the immigrant naturalization. *See id.* at 812; *Thind v. United States*, 261 U.S. 204 (1923) (denying Thind naturalization because his appearance, religion, and culture did not comport with the judge's conception of whiteness).

68. *Shadid*, 205 F. at 813.

Persuaded more by his physical appearance than his faith, Smith denied Shahid's petition for naturalization. Again, like in *Shishim* and a notable prerequisite case involving an Armenian petitioner,<sup>69</sup> the court framed religion as much along racial terms as it did faith, pushing Smith to opine:

What is the race or color of the modern inhabitant of Syria it is impossible to say. No geographical area of the world has been more mixed since history began. Originally of Hittite or non-Semitic races . . . then again followed by another Semitic conquest in the shape of the Arabian Mahometan [Muslim] eruption.<sup>70</sup>

Smith's framing of Ottoman rule as the "Mahometan eruption" illustrates an aversion to Islam, which today would be characterized as an example of structural Islamophobia. More than a century before the Muslim identity of Syrian refugees fleeing civil war and persecution from ISIS, the South Carolina court viewed Islam with the very same suspicion and fear gripping immigration officials, politicians, and pundits today.<sup>71</sup> Fear of Muslims, both in 1913 and 2016, shares a common thread and kindred *orientation* of Islam as emblematic of a national-security threat.

The Muslim naturalization ban continued until 1944.<sup>72</sup> While a 1915 Fourth Circuit decision narrowly established that Syrian Christians "were to be classed as white people,"<sup>73</sup> *bona fide* Muslim immigrants were still categorically barred from naturalization.<sup>74</sup> This had the effect of suppressing Muslim migration into the U.S., encouraging religious conversion on the part of many who did,<sup>75</sup> and branding Islam with the seals of foreignness and fear for those who practiced it stateside.

Muslim immigrants who maintained their religious identity and sought naturalization, like Ahmed Hassan of Yemen, were denied naturalization.<sup>76</sup> In Hassan's case, adjudicated in Michigan, Judge Tuttle's

69. *United States v. Cartozian*, 6 F.2d 919, 920 (D. Or. 1925) (explaining that because Armenians were almost all Christians, and their neighbor states Muslim or heterogeneous, that they were a distinct race. *Cartozian* illustrates how religion was used as a proxy for race); *see also* *George Shishim v. United States*, Los Angeles Superior Court (1909) (no court transcripts available).

70. *Shadid*, 205 F. at 816

71. For an examination of how political figures, like Trump, conflate Syrian refugees with ISIS, see F. Brinley Bruton, Katy Tur, & Molly Roecker, *Trump Tells Rally Syria Refugees 'Probably' ISIS as Muslim Protester Removed*, NBC NEWS (Jan. 9, 2016, 11:00 AM), <http://www.nbcnews.com/politics/2016-election/trump-tells-rally-syria-refugees-probably-isis-muslim-protester-removed-n493316>.

72. 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-aus-law-from-the-1700s/2016/08/18/6da7b486-6585-11e6-8b27-bb8ba39497a2\\_story.html?utm\\_term=.87a7420b9de4](https://www.washingtonpost.com/opinions/trumps-anti-muslim-stance-echoes-aus-law-from-the-1700s/2016/08/18/6da7b486-6585-11e6-8b27-bb8ba39497a2_story.html?utm_term=.87a7420b9de4).

73. *Dow v. United States*, 226 F. 145, 148 (4th. Cir. 1915). *See generally* SARAH M. A. GUALTIERI, *BETWEEN ARAB AND WHITE: RACE AND ETHNICITY IN THE EARLY SYRIAN AMERICAN DIASPORA* (2009) (providing a history of the experience of the early waves of Syrian immigrants).

74. *Between Muslim and White*, *supra* note 8, at 57.

75. One Mohammed Asa Abu-Howah, who emigrated from Syria to New York in 1903, changed his name to A. Joseph Howar, because "people [he] met on the boat told [him he'd] better change [his] name. They said it labeled [him] as a Muslim, and no immigration officer would allow a Muslim to enter the United States." KAMBIZ GHANEABASSIRI, *A HISTORY OF ISLAM IN AMERICA: FROM THE NEW WORLD TO THE NEW WORLD ORDER* 141 (2010).

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

opinion centered on the belief that Muslims “as a class would [not] readily intermarry with our population and be assimilated into our civilization.”<sup>77</sup> Intermarriage was far more than a proxy for assimilation for the *Hassan* court; moreover, failure to do so evidenced the prevailing belief that Muslims were a clashing civilization bent on undermining American values and threatening “Christian culture.”<sup>78</sup>

Echoing Ben Carson’s claim that “Islam is inconsistent with the Constitution,”<sup>79</sup> or Bobby Jindal’s position that “Muslim immigration is part on [*sic*] an invasion with the goal of colonization,”<sup>80</sup> the *Hassan* court’s framing of Islam as threatening to American civilization carried the Muslim naturalization ban forward for several more years. Indeed, the very stereotypes instrumental to the court’s understanding of Islam have been echoed, in virtually identical terms, by today’s politicians.<sup>81</sup>

The Muslim naturalization ban lasted until American geopolitical interests in the Muslim World shifted, specifically when the need for Saudi oil facilitated its judicial dissolution in 1944.<sup>82</sup> Even after its dissolution, however, the Immigration Act of 1924 instituted immigration quotas against African, Asian, and Arab regions—home to significant Muslim populations.<sup>83</sup> Dissolved in 1965, the Act effectively extended the Muslim naturalization ban by prohibiting the entry of Muslim immigrants for an additional twenty-one years.<sup>84</sup>

Therefore, the Muslim naturalization ban persisted for at minimum 162 years, and at maximum, 183 years. By either measure, a longstanding Muslim naturalization ban was firmly in place decades before Trump’s December 7, 2015 “Muslim ban,”<sup>85</sup> thereby illustrating that Trump’s proposal was neither novel nor unprecedented. Moreover, and conflicting with the assessments of alarmed pundits and politicians, it was consistent with American legal tradition.

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77. *Id.* at 846.

78. *Id.* at 843.

79. *US Republican Hopeful Ben Carson: No Muslims as President*, BBC NEWS (Sept. 21, 2015), <http://www.bbc.com/news/world-us-canada-34308716>.

80. BRIDGE, *supra* note 6.

81. *See id.*

82. Mohammed Mohriez, a native of Saudi Arabia, was the first Muslim immigrant petitioner granted citizenship. *See Ex parte Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944); Beydoun, *Between Muslim and White*, *supra* note 8, at 66. The *Mohriez* decision, and the delivery of naturalization to Muslim petitioners from the Arab World, was in part driven to facilitate “American foreign policy interests in Saudi Arabia, and the Arab World at large.” *Id.*; *see also* Beydoun, *Between Muslim and White*, *supra* note 8, at 68.

83. Immigration Act of 1924, Pub. L. 68-139, 43 Stat. 153 (1924) (the Act was also called the “Johnson-Reed Act”). The Immigration Act of 1924 based its quotas on the U.S. Census of 1890. Thus, groups with minimal or scarce populations in the U.S., like Muslims of any race or ethnicity, were effectively barred entirely.

84. One scholar referred to the Immigration Act of 1924 as “[p]erhaps the most damaging to Muslim immigration,” considering the sparse presence of Muslims in 1890—the Census used for instituting the 3% quota. Marie A. Failinger, *Islam in the Mind of American Courts: 1800 to 1960*, 32 B.C. J.L. & SOC. JUST. 1, 9 (2012).

85. Johnson, *supra* note 2.

### III. THE MODERN LAW OF AMERICAN ISLAMOPHOBIA

Prohibitions against the citizenship of Muslims during the “Naturalization Era” root modern law and policy that similarly profile Muslims as inassimilable and threatening.<sup>86</sup> Indeed, a close examination of the “Arab Naturalization Cases” examined above reveals,<sup>87</sup> in lurid and vivid fashion, that the polemical and bellicose rhetoric emanating from the 2016 presidential campaign is substantively identical to the pronouncements of judges presiding over cases involving immigrant-petitioners from the Muslim world.

Contemporary laws, particularly policy and programming rolled out after 9/11, restricted Muslim immigrants beyond American borders and closely monitored Muslim citizens and communities with them. Both fronts were prompted by structural Islamophobia—“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.”<sup>88</sup>

Certainly, whenever a domestic terrorist attack takes place in America, many quickly turn to tropes of an “Islamic menace,” “violent foreigner,” or homegrown terrorist.<sup>89</sup> While these tropes have taken on new forms and frames, they are conceptually and substantively based on formative stereotypes.<sup>90</sup> These very stereotypes underlie the state suspicion of Muslims and Islam that steers modern state counterterror policy.<sup>91</sup>

Fear of Islam and Muslims took on prolific proportions after 9/11. Sweeping legislation centering on religious and racial “profiling,”<sup>92</sup> combined with structural reform of the government to deal with the height-

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86. The name of the 162-year period when whiteness was a prerequisite to become a naturalized citizen. For a comprehensive examination of the Naturalization Era and each and every prerequisite case, see generally HANEY LOPEZ, *supra* note 48.

87. The ten Naturalization Era cases involving an immigrant-petitioner from the Arab/Muslim world are commonly referred to as the “Arab-Naturalization Cases.” See Beydoun, *Between Muslim and White*, *supra* note 8, at 75–76 (compiling a table of these cases).

88. *Toward a Legal Definition and Framework*, *supra* note 12, at 114.

89. Khaled A. Beydoun, *Boston Explosions: ‘Please Don’t Be Arabs or Muslims,’* AL JAZEERA ENGLISH (Apr. 16, 2013), <http://www.aljazeera.com/indepth/opinion/2013/04/201341681629153634.html> (addressing the immediate fears Arab or Muslim Americans have when a terrorist attack is unfolding that reflect the broader societal presumption that the culprits are Arab or Muslim before they are identified).

90. Khaled A. Beydoun, *Viewpoint: Islamophobia Has a Long History in the US*, BBC NEWS (Sept. 29, 2015), <http://www.bbc.com/news/magazine-34385051> [hereinafter *Islamophobia Has a Long History*].

91. “[M]odern Islamophobia finds its epistemological roots in systems of Orientalism that predate the creation of the United States itself . . . Seeded deep, these systems reemerge during moments of crisis, and drive modern conceptions of Muslim suspicion and threat.” *Between Indigence, Islamophobia, and Erasure*, *supra* note 19, at 1481–83.

92. “[P]rofilng involves separating a subsection of the population from the larger whole on the basis of specific criteria that purportedly correlates to risk and subjecting the subgroup to special scrutiny for the purposes of preventing violence, crime, or some other undesirable activity.” Reem Bahdi, *No Exit: Racial Profiling and Canada’s War Against Terrorism*, 41 OSGOODE HALL L.J. 293, 295 (2003).

ened national-security threat, were instituted after the 9/11 terror attacks. The “War on Terror” unleashed after 9/11 continues today,<sup>93</sup> with important statutory and strategic tweaks.

Section A investigates post-9/11 law and policy. Subsequently, Section B analyzes the two most prominent forms of legal American Islamophobia that followed the post-9/11 era: anti-Sharia legislation and “Countering Violent Extremism” (“CVE”) Policing.

#### A. *Post 9/11 Policy*

State suspicion and systematic surveillance of Muslim Americans commenced well before 9/11.<sup>94</sup> However, because the terrorists were Muslims,<sup>95</sup> the state centered its expanded counterterror programming in the directions of Muslim foreign nationals and citizens. With the creation of the Department of Homeland Security (“DHS”) on November 25, 2002,<sup>96</sup> electronic surveillance became the strategic cornerstone of the domestic counterterror strategy following the deadliest terror attack in U.S. history.<sup>97</sup>

In addition to expanded surveillance capacities, the Bush Administration structurally overhauled the state’s immigration and national-security functions around the heightened fear of Muslim threat. The newly minted DHS swallowed up the state’s previously standalone immigration, customs, and emergency-management functions; “DHS consolidated the state’s immigration and emigration regimes, and functioned as

93. For a comprehensive and detailed examination of post-9/11 domestic policing and immigration measures, see generally Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U ANNUAL SURV. OF AMER. L. 295 (2002).

94. “The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) was the beginning of policing of Muslim subjects and communities. One part of this legislation led to the disparate investigation of Muslim American political and social activity, while another led to the deportation of Muslims with links - real or fictive - to terrorist activity.” *Islamophobia Has a Long History in the US*, *supra* note 90 (referencing Pub. L. No. 104-132, 110 Stat. 1214 (1996)). Some contend that, given the large number of African American Muslims monitored under COINTELPRO (Counter INTELligence PROgram) in the 1950 and 60s, that this program marked the beginning of Muslim American surveillance.” Khaled A. Beydoun, *Why Ferguson is Our Issue: A Letter to Muslim America*, 31 HARV. J. ON RACIAL & ETHNIC JUST. 1, 4 (2015).

95. Akram & Johnson, *supra* note 93, at 300. “Most Americans probably feel particularly threatened because the September 11 suicide hijackers were foreign, and some may be especially fearful because they were Arabs. This fear may cause us to exaggerate the danger of future attacks in general, and of attacks by Middle Eastern terrorists in particular. As a result, we may overestimate the effect of racially specific security measures. *And unfortunately, we are more willing to accept aggressive measures when they target small and politically disempowered groups, specifically racial and ethnic minorities, and foreign nationals.*” *Id.*

96. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified in scattered sections of 5, 6, 18, 44, and 49 U.S.C.).

97. AJ Vicens, Dave Gilson & Alex Park, *How We Got From 9/11 to Massive NSA Spying on Americans: A Timeline* (Sept. 11, 2013, 6:00 AM), <http://www.motherjones.com/politics/2013/09/nsa-timeline-surveillance>.



the institutional fulcrum for the sweeping federal and local anti-terror surveillance and policing sanctioned by the USA PATRIOT Act.<sup>98</sup>

In the name of national security, The USA PATRIOT Act circumvented the Fourth Amendment to advance the Bush Administration's unprecedented surveillance and religious-profiling programs.<sup>99</sup> In the process, it severely diminished the First and Fourth Amendment rights of Muslim Americans.<sup>100</sup> For the state, monitoring Muslim subjects and spaces, such as mosques or community centers, was an acceptable collateral cost needed to achieve stated national security aims.<sup>101</sup> Yet, DHS's perception of Islam as threatening and Muslims as menacing formed the foundation of the state's War on Terror strategy, extending the Orientalist tropes of the Naturalization Era into the Post-9/11 Era.

In addition to two wars fought abroad,<sup>102</sup> and broadly expanded domestic surveillance and policing at home, the post-9/11 moment witnessed the enactment of a second policy that bore many parallels to the Muslim ban put in place during the Naturalization Era. In June 2002, Attorney General John Ashcroft instituted the National Security Entry Exit Registration System ("NSEERS"), a sweeping immigration tracking program that almost exclusively targeted Muslim immigrants, non-immigrants, and permanent residents.<sup>103</sup> The "Special Registration" provision of NSEERS:

Required all male teens and adult nationals of 25 different countries to allow themselves to be fingerprinted and registered by the federal government or be subject to immediate to their home countries. With the sole exception of North Korea, every single one of the 25 countries on the Special Registration bulletin was either a Muslim or Arab nation.<sup>104</sup>

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98. *Between Indigence, Islamophobia, and Erasure*, *supra* note 19, at 1484, (citing Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001)); *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.).

99. U.S. CONST. amend. IV.

100. For a close examination of the civil liberties infractions suffered by Muslims and Muslim Americans in the immediate wake of 9/11, *see generally* Akram & Johnson, *supra* note 93.

101. "Focus on the Other [becomes] the central issue in thinking about civil liberties in wartime" and indeed, eroding those rights is framed as vital to securing the broader interests of the state. Mark V. Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 298.

102. "[T]he government launched two costly wars in Afghanistan and Iraq. Relying on the legitimate uncertainty at the time, lawmakers and media pundits directed the nation's fear of another attack toward Muslims—and those who had physical 'Muslim' characteristics—to convince the public that such measures were both valid and necessary to prevent another terrorist attack." Yaser Ali, *Shariah and Citizenship—How Islamophobia is Creating a Second-Class Citizenry in America*, 100 CAL. L. REV. 1027, 1042–43 (2012).

103. *Id.* at 1043–44, 1047.

104. Arsalan Iftikhar, *Arab Americans, in ANTI-IMMIGRATION IN THE UNITED STATES: A HISTORICAL ENCYCLOPEDIA* 43 (Kathleen R. Arnold, ed., 2011).

While dissolved in 2011,<sup>105</sup> NSEERS explicitly reintegrated the Orientalist baseline that Muslims were presumptive national-security threats. Geographic origins, in addition to race and religion, signaled likelihood of national-security threat.

Again, the Islamophobic laws enacted after 9/11 harvested rife anti-Muslim hatred and hysteria on the ground. If government agencies and laws, such as DHS and the PATRIOT Act, deemed Muslim Americans a dangerous “fifth column,”<sup>106</sup> then it is only logical that private citizens would follow suit and mimic that violence against a subset of the polity designated as an enemy group.<sup>107</sup>

Discrimination and violence toward Muslim Americans, and those stereotyped as such, skyrocketed after 9/11. In the immediate wake of 9/11:

The FBI reported a 1500% increase in hate crimes against “people of Middle Eastern descent, Muslims, and South Asian Sikhs, who are often mistaken for Muslim” from 27 in 2000 to 481 in 2001 . . . The American-Arab Anti-Discrimination Committee (“ADC”) reported over 700 violent incidents targeting [the same demographic].<sup>108</sup>

In addition, “as many as 19 people,”<sup>109</sup> Muslim or “Muslim looking,”<sup>110</sup> were killed during the immediate aftermath of 9/11. Many of them were Sikh, stereotypically believed to be Muslims because Sikh men don beards and “wear turbans that look similar to the turbans worn by Osama Bin Laden and the Taliban.”<sup>111</sup>

Violence toward Muslims, and those suspected to be Muslims, continued after 9/11. “In 2007, CAIR [The Council on American Islamic Relations] reported receiving about 1,900 complaints of abuse and noted that anti-Muslim physical violence increased by 52% between 2003 and 2004.”<sup>112</sup> As investigated more closely in Part V, the private animus and violence facilitated by laws that profiled Muslim Americans as presumptive national-security threats, and that also fenced Muslim immigrants outside of America’s borders, continues to spike upward today.

105. Chris Rickerd, *Homeland Security Suspends Ineffective, Discriminatory Immigration Program*, ACLU (May 6, 2011, 11:30 AM), <https://www.aclu.org/blog/speakeasy/homeland-security-suspends-ineffective-discriminatory-immigration-program>.

106. Khyati Y. Joshi, *The Racialization of Hinduism, Islam and Sikhism in the United States*, 39 EQUITY AND EXCELLENCE IN EDUC. 211, 217 (2006).

107. See generally Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259 (2004).

108. Sahar F. Aziz, *Sticks and Stones, The Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 CUNY L. REV. 33, 33–34 (2009) [hereinafter *Sticks and Stones*].

109. Ahmad, *supra* note 107, at 1266.

110. *Id.* at 1265. See also Wajahat Ali, *Wade Michael Paige: Islamophobia Unleashed*, SALON (Aug. 7, 2012, 2:12 PM), (identifying groups phenotypically associated with Muslim identity as looking “Muslim-y” such as “Arab American Christians, Iranian Jews and Sikh Americans”).

111. *Sticks and Stones, supra* note 108, at 47.

112. Ashley Moore, *American Muslim Minorities: The New Human Rights Struggle*, HUM. RTS. & HUM. WELFARE 91, 92–93 (2010).

### B. *Beyond the Post-9/11 Police State*

It was widely believed that Islamophobia would decline after 9/11's immediate aftermath;<sup>113</sup> recent events, state policy, and bigoted political rhetoric, however, indicate otherwise. This climbing Islamophobia, which has reached climactic proportions during the 2016 presidential campaign, did not rise within a vacuum. Rather, it was in great part spurred and stoked by the structural Islamophobia that continued beyond the policies enacted after 9/11.

This Section examines the two most prominent forms of structural Islamophobia that emerged after the post-9/11 era. The anti-Sharia legislation brought forth in many states will be examined first, followed by the state's growing fear of Muslim radicalization, manifested by its expanded commitment to CVE Policing.<sup>114</sup>

#### 1. *Anti-Sharia Legislation*

The post-9/11 moment spawned new actors and empowered existing elements of the "Islamophobia cottage industry."<sup>115</sup> This small group of individuals and institutions wield considerable influence over "national and international perceptions of Muslims."<sup>116</sup> Emboldened by sweeping counterterror measures and a rising culture of anti-Muslim fear and suspicion, these actors turned their organizing efforts against Islam to state legislatures.<sup>117</sup> Specifically, they lobbied state legislatures to enact "anti-Sharia laws" as a means to deepen the scrutiny of Muslim Americans and enshrine the notion that Islam was inherently un-American into state constitutions.<sup>118</sup>

Proponents of anti-Sharia legislation defined Sharia Law as, "[a] 'totalitarian ideology' and 'legal-political-military doctrine,' committed to annihilating Western civilization as we know it today."<sup>119</sup> Relying on principal Islamophobic baselines, which frames Islam as a competing po-

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113. *But see* Dean Obeidallah, *13 Years After 9/11, Anti-Muslim Bigotry is Worse than Ever*, DAILY BEAST (Sept. 11, 2014, 4:45 AM), <http://www.thedailybeast.com/articles/2014/09/11/13-years-after-9-11-anti-muslim-bigotry-is-worse-than-ever.html>.

114. For a close examination of the structure and strategy of CVE Policing, see Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT'L SECURITY L.J. 147, 164 (2014); *see also* Rascoff, *supra* note 10 (examining CVE Policing and examines its tensions with the First Amendment Establishment and Free Exercise Clauses).

115. Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST. AMEND. L. REV. 363, 364 (2012).

116. *Id.* at 363.

117. For a profile of the principal figure behind the anti-Sharia movement, David Yerushalmi, see Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES (July 30, 2011), <http://www.nytimes.com/2011/07/31/us/31shariah.html>. "A confluence of factors has fueled the anti-Shariah movement, most notably the controversy over the proposed Islamic center near ground zero in New York, concerns about homegrown terrorism and the rise of the Tea Party." *Id.*

118. *See generally id.* (examining the Anti-Sharia bills carried forward in multiple states, driven by the fear that Islam and Islamic Law was encroaching on American values to the extent of overtaking it).

119. Uddin & Pantzer, *supra* note 115, at 365.

litical ideology (sometimes referred to as “Islamofascism”),<sup>120</sup> as much as it does religious scripture,<sup>121</sup> Sharia Law abolitionists authored a model statute that “[w]ould prohibit state judges from considering foreign laws or rulings that violate constitutional rights in the United States.”<sup>122</sup> The model statute, titled “American Laws for American Courts,”<sup>123</sup> was passed onto allied lawmakers within state legislatures, and subsequently rewritten into bill form.

Anti-Sharia bills became prominent items of discussion in state legislatures across the country. “As of June, 2011, there were forty-seven bills in twenty-one states that were seeking to ban the use of Sharia and/or any category of international law.”<sup>124</sup> Spearheaded by the Louisiana and Tennessee legislatures, nearly half of the country’s states entertained the idea of banning Islamic Law.<sup>125</sup>

One state, Wyoming, even engaged with the idea of “prohibit[ing] [its] judiciary from citing other states that may permit the use of Sharia law.”<sup>126</sup> In addition to crippling the ability of judges and juries to engage the religious and cultural dimensions of Muslim subjects coming before the court,<sup>127</sup> anti-Sharia legislation conflicts with the spirit of the Establishment Clause and its primary aim of disabling laws from endorsing (or castigating) a religion, and perhaps more acutely, the Free Exercise of Religion First Amendment rights of Muslim Americans.<sup>128</sup>

Anti-Sharia bills were passed in Arizona and Oklahoma.<sup>129</sup> While the anti-Sharia legislation movement has been stalled, it certainly has not been entirely suspended. Blatant Islamophobic rhetoric exhibited on the 2016 presidential-campaign trail, closely examined in Section III.A, illustrated that if a sympathetic candidate was elected, the anti-Sharia legislation movement would be the recipient of considerable momentum and likely presidential support. Certainly, with American Islamophobia far more than just “still alive,”<sup>130</sup> the possibility of the anti-Sharia movement

120. HISHAM D. AIDI, *REBEL MUSIC: RACE, EMPIRE, AND THE NEW MUSLIM YOUTH CULTURE* 177 (2014). For a careful examination of the neologism, which compares modern Islam terrorism and terror networks with mid-20th Century European fascist movements, particularly Nazi Germany, see William Safire, *Islamofascism*, N.Y. TIMES (Oct. 1, 2006), [http://www.nytimes.com/2006/10/01/magazine/01wwln\\_safire.html?\\_r=0](http://www.nytimes.com/2006/10/01/magazine/01wwln_safire.html?_r=0).

121. “Islam seen as a political ideology, used for political or military advantage.” RUNNYMEDE TRUST, *supra* note 18.

122. Uddin & Pantzer, *supra* note 115, at 367 (citing Andrea Elliott, *supra* note 117).

123. To read the model statutes, see *American Laws for American Courts*, AMERICAN PUBLIC POLICY ALLIANCE, <http://publicpolicyalliance.org/legislation/american-laws-for-american-courts/> (last visited Aug. 8, 2017).

124. Uddin & Pantzer, *supra* note 115, at 370.

125. *Id.* at 370–71.

126. *Id.* at 372.

127. *Id.* at 405–06.

128. U.S. CONST. amend. I.

129. For closer examination of the passage of these bills and the legal challenges that followed, see Uddin & Pantzer, *supra* note 115, at 370–77.

130. Dina Samir Shehata, *Anti-Sharia Bill Dead, but Sentiment Alive*, AUSTIN CHRONICLE (May 22, 2015), <http://www.austinchronicle.com/news/2015-05-22/anti-sharia-bill-dead-but-sentiment-alive/print/> (focusing on the suspension of a Texas anti-Sharia bill, but observes that strong Islamophobic sentiment can quickly revive it).

being revitalized in the imminent future is very likely, particularly with the election of Donald Trump and the momentum his administration generated.

## 2. *Imagining, Caricaturing, and Countering Radicalization*

While anti-Sharia bills circulated through state legislatures, the federal government was busy retooling and shoring up its counterterror strategy to respond to rising Muslim “radicalization”—“the process by which an individual adopts an extremist ideology that is linked to terrorist activity.”<sup>131</sup> Although not explicitly associated with Islam, the term has been discursively and politically linked to Muslims,<sup>132</sup> who are believed to subscribe to Sharia and are subsequently mobilized to carry forward a “clash of civilizations” with the U.S.<sup>133</sup> Thus, very clearly illustrating the kindred Islamophobic thread that links anti-Sharia legislation with CVE Policing.

In practice, CVE Policing links radicalization—or propensity for radicalization—with Muslim identity. CVE is specifically focused on monitoring observant Muslim Americans,<sup>134</sup> particularly those transitioning from secular to devout lifestyles, members of the community holding “critical politics,”<sup>135</sup> or individuals who express their faith conspicuously.<sup>136</sup> In *Policing “Radicalization,”* Amna Akbar observes:

Radicalization suggests that the path from Muslim to terrorist is a predictable one produced by or correlated with religious and politi-

131. See Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809, 818 (2013) [hereinafter Akbar, *Policing “Radicalization”*]. Although not explicitly associated with Islam, the term has been linked to Muslims, and counter-radicalization efforts are primarily focused on Muslim communities. *Id.* at 811.

132. Amna Akbar, *National Security’s Broken Windows*, 62 UCLA L. REV. 844, 877 (2015) [hereinafter *National Security’s Broken Windows*] (“Radicalization’s concern is predicated on a false belief in the teleological character of Islam—that if Muslim communities witness conservative religious practice and critical politics, they will view such currents as acceptable and gravitate toward radicalism . . .”).

133. RUNNEYMEDE TRUST, *supra* note 18, at 5.

134. “Muslim religious practice—core First Amendment activity, unconnected to any suspicion of criminal activity—becomes a predictor for criminality.” Akbar, *Policing “Radicalization,”* *supra* note 131, at 835.

135. See *National Security’s Broken Windows*, *supra* note 132, at 877.

136. Furthermore, since conspicuous expressions of religiosity tend to be more pronounced among indigent and immigrant Muslim communities, CVE disparately endangers indigent Muslim Americans whether within urban or suburban spaces.

A 2011 study by the Pew Research Center (Pew Study) found that 45 percent of the Muslim American households reported household income of less than \$30,000 per year, compared to 36 percent for the general American public. It is staggering that 45 percent of the Muslim American population lives at or below the legal poverty line while only fourteen percent of Muslim Americans boast of annual household incomes greater than \$100,000 and only 8 percent of Muslim Americans boast annual household incomes of between \$75,000 and \$99,999. Thus, Muslim Americans—as a standalone faith group—are comparatively poorer than the broader American polity and, according to available data, poorer than any other American faith group.

*Between Indigence, Islamophobia, and Erasure*, *supra* note 19, at 1470–71 (citing *Muslim Americans: No Signs of Growth in Alienation or Support for Extremism*, PEW RES. CTR. 43 (Aug. 30, 2011), <http://www.people-press.org/2011/08/30/muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism>).

cal cultures of Muslim communities. Government radicalization discourses and programs are almost entirely fixated on Islam and Muslims.<sup>137</sup>

CVE Policing is not, in practice, concerned with other forms of radicalization or violent extremism. Rather, radicalization is functionally framed by DHS as a purely Muslim phenomenon<sup>138</sup> adding CVE Policing to the corpus of state surveillance and policing programs dedicated entirely to preventing and punishing Muslim threats—real and imagined.

CVE Policing enlists local law enforcement to work closely with Muslim communities to prevent the formation of radicalization among subjects, and if that fails, to preempt terrorist attacks.<sup>139</sup> Through recruitment of local Muslim informants and interlocutors from within the community,<sup>140</sup> counter-radicalization logic asserts that a prospective radical can be preempted with early intervention, and if not, prevented from taking action after a subject has been radicalized.<sup>141</sup>

In line with formative radicalization and counter-radicalization theory, CVE Policing frames radicalization, which it defines as “an identifiable and predictable process by which a Muslim becomes a terrorist,” as being broken down into four stages: “[1] preradicalization,’ [2] identification,’ [3] indoctrination’ and [4] action.”<sup>142</sup> Therefore, the earlier the intervention by law enforcement and their proxies, CVE theory posits, the stronger the likelihood of curbing conspiracies to commit terror acts.<sup>143</sup>

Thus, the definition of radicalization, though racially and religiously neutral, is disproportionately (if not exclusively) deployed against Muslim subjects. In 2014, pilot CVE programs extending federal policing tools to local law enforcement were implemented in Boston, Minneapolis, and Los Angeles.<sup>144</sup> These three cities are not only home to large Muslim American populations, but more specifically, indigent Muslim

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137. Akbar, *Policing “Radicalization,”* *supra* note 131, at 811.

138. *Id.* at 827.

139. *Id.* at 833–34.

140. *Id.* at 861–62. In addition, informants also add legitimacy to CVE Policing by either express or tacit endorsement. If a respected figure, such as an Imam, takes on responsibility as interlocutor or informant, he not only sources law enforcement with invaluable and otherwise inaccessible information about a prospective target, but also stamps the policy with a seal of approval from an esteemed community figure.

141. *Id.* at 814–15.

142. *Id.* at 820.

143. *Id.* at 812. During the first, second, and third stages, suspicion of radicalization is linked mainly to religious expression, political activity, or both, which law enforcement suspects to be linked with radical activity. Here, no action has taken place, and constitutionally protected activity is being linked to (prospective) terrorism, and being chilled. *Id.* at 826–27.

144. *Id.* at 845–68 (examining the new radicalization policing tactics used by federal and local law enforcement). Counter-radicalization parlance and policing is almost exclusively focused on Muslim communities, which sometimes overlap and are frequently conflated with Arab American communities. *See id.* at 811; *Between Indigence, Islamophobia, and Erasure,* *supra* note 19, at 1473.

American communities.<sup>145</sup> These pilot cities illustrate the embryonic stages of a policing program the state seeks to expand nationally.<sup>146</sup>

Plans are underway to expand CVE Policing into more cities.<sup>147</sup> However, Muslim American opposition against CVE is gradually mounting, particularly as the program steeps itself further in pilot cities and steers its expansion into new ones—including Dearborn,<sup>148</sup> Detroit, where state surveillance to “fight terrorism” is an established practice,<sup>149</sup> and New York City.<sup>150</sup> Increasing opposition, spearheaded both by advocacy groups and grassroots efforts, is gradually beginning to address the distinct and grave civil liberties perils faced within poor Muslim American communities.<sup>151</sup>

Like the Naturalization Era ban on Muslims, AEDPA in 1996, or the PATRIOT Act, CVE Policing facilitates Islamophobia on the ground and, for many political candidates, creates political incentives for fear-mongering, which “endorses and emboldens the Islamophobic rhetoric among presidential hopefuls.”<sup>152</sup> This illustrated very vividly, for the American and international audiences closely following the 2016 presidential campaign, the intimate nexus between the law and politics of American Islamophobia.

#### IV. THE POLITICS OF ISLAMOPHOBIA

The positioning of Islam as alien, and Muslims as foreigners, facilitates the *seeing* of Muslims as national-security threats and the *unseeing* of Muslim Americans as *bona fide* citizens.<sup>153</sup> Again, the relationship between state policies and political rhetoric is a synergistic and symbiotic

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145. See generally *Between Indigence, Islamophobia, and Erasure*, *supra* note 19 (contending that because CVE Policing is predominantly deployed in urban, indigent and working class spaces, that its disproportionate victims are largely poor and working class Muslim Americans).

146. *Id.* at 1489–90.

147. *Id.* at 1486–87.

148. “Dearborn, Michigan is home to the most concentrated Arab and Muslim-American community in the country. The eastside of the city is home to concentrated indigent and working-class groups.” *Id.* at 1489 n.179 (citing Nicole Crowder, *Starting over in Dearborn, Michigan: The Arab Capital of North America*, WASH. POST (Mar. 15, 2015), [https://www.washingtonpost.com/news/insight/wp/2015/03/05/starting-over-in-dearborn-michigan-the-arab-capital-of-north-america/utm\\_term=.fe6236ffe7ba7](https://www.washingtonpost.com/news/insight/wp/2015/03/05/starting-over-in-dearborn-michigan-the-arab-capital-of-north-america/utm_term=.fe6236ffe7ba7)).

149. Joel Kurth, *Michigan State Police Using Cell Snooping Devices*, DETROIT NEWS (Oct. 22, 2015, 11:32 PM), <http://www.detroitnews.com/story/news/local/michigan/2015/10/22/stingray/74438668/> (“For nearly a decade, the Michigan State Police has had secretive cellphone tracking devices that were bought to fight terrorism but instead are used to solve everyday crimes, internal documents show. More than 250 pages of emails, invoices and other documents show the state police in 2006 acquired cellphone simulator technology, which lets police collect large amounts of data including the location of users. The equipment was upgraded in 2013 and an internal memo indicates it was used last year on 128 cases ranging from homicide to burglary and fraud, but not terrorism.”).

150. *21 Groups Opposed “Strong Cities” CVE Initiative in New York, Citing Civil Liberties Concerns*, BRENNAN CTR. FOR JUSTICE (Sep. 21, 2015), <https://www.brennancenter.org/analysis/21-groups-oppose-strong-cities-cve-initiative-new-york-citing-civil-liberties-concerns>.

151. *Between Indigence, Islamophobia, and Erasure*, *supra* note 19, at 1490.

152. *Islamophobia Has a Long History.*, *supra* note 90.

153. See generally Engle, *supra* note 26.

one, whereby the former endorses and emboldens the latter.<sup>154</sup> Indeed, the laws that have long framed Muslims as pariahs, to be excluded, policed, and punished, form the foundation of the political rhetoric espoused by the likes of Trump, Cruz, and Ben Carson, and also of the new brand of political Islamophobia spreading furiously within a growing segment of the American polity.

The political rhetoric of today's presidential candidates was also shared by many of America's founding political figures. The embryonic stages of American nationhood were riddled with deep political hostilities to Islam, Muslim states, and Muslim populations. Founding Fathers and prominent statesmen, like Thomas Jefferson, wrote about the "unbridled despotism of the Muslim world" and the importance of a young American state in "preventing it."<sup>155</sup> The research of several historians, most notably Robert Allison and Thomas Kidd,<sup>156</sup> trenchantly unearths the early suspicion and fear of Islam held by American presidents, statesmen, key thinkers, and pundits. Indeed, these opinions were far more than merely political views. They were broad ideological frames spawned from the underlying and indelible system of Orientalism.<sup>157</sup>

Narrowly identified as explicit bigotry, political Islamophobia is manifested both blatantly and latently. It can be detected easily from the bigoted and bellicose rhetoric, or unveiled by the political stimuli that push decisions or policy disparately targeting Muslims and Islam or disengaging from Muslim communities entirely. Section A examines the most vivid forms of blatant political Islamophobia, while Section B uncovers and investigates notable incidents that exhibit latent forms.

#### A. *Blatant Political Animus*

Framing Islam as a rival faith was a staple message coming from leading Republican presidential candidates.<sup>158</sup> Part and parcel of that baseline was the branding of Muslims as a suspicious, violent, and alien

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154. Islamophobia is also a systemic, fluid and deeply politicized dialectic between the state and its polity: a dialectic whereby the former shapes, reshapes, and confirms popular views or attitudes about Islam and Muslim subjects inside and outside of America's borders. Therefore, the third [in addition to private and structural] dimension of Islamophobia focuses on "dialectical Islamophobia," which is the process by which state policies legitimize prevailing misconceptions, misrepresentations and tropes widely held by private citizens. *Toward A Legal Definition and Framework*, *supra* note 12, 119.

155. ROBERT ALLISON, *THE CRESCENT OBSCURED: THE UNITED STATES AND THE MUSLIM WORLD 1776-1815* 46 (1995).

156. *See id.*; *see also* THOMAS S. KIDD, *AMERICAN CHRISTIANS AND ISLAM: EVANGELICAL CULTURE AND MUSLIMS FROM THE COLONIAL PERIOD TO THE AGE OF TERRORISM* (2009).

157. SAID, *supra* note 14, at 6.

158. Many candidates used the proxy phrase, "Shari'a Law," which simply means Islamic Law (Arabic), to condemn Islam. Or more specifically, warn against (or rebuff) the encroaching threat of a "Muslim takeover." For a timely example involving former presidential candidate Marco Rubio, see Phillip Bump, *How Sharia Law Became Embedded in Our Political Debate*, WASH. POST (July 15, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/01/08/how-sharia-law-became-embedded-in-our-politics/?utm\\_term=.fab5ba0bc633](https://www.washingtonpost.com/news/the-fix/wp/2016/01/08/how-sharia-law-became-embedded-in-our-politics/?utm_term=.fab5ba0bc633).



monolith.<sup>159</sup> In turn, these stereotypes led to the casual conflation of Muslim-American citizens with foreign nationals, and the 1.57 billion followers of the faith with an extremist few. In 2015, anti-Muslim sound bites from Republican candidates seemed like a routine occurrence and were the subject of daily news.<sup>160</sup>

On December 7, 2015, Donald Trump infamously called for “a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.”<sup>161</sup> Trump’s proposal set off an immediate media firestorm and simultaneously galvanized his base of supporters who subscribed to the framing of Muslim immigrants as presumptive national security threats.<sup>162</sup> Trump’s “Muslim ban,” as it would come to be known following his proposal, was deemed contrary to American customs and values,<sup>163</sup> although the precedents analyzed above indicate that it was not. Trump’s Muslim ban, which he expanded following July’s Republican National Convention,<sup>164</sup> was only the tip of the Islamophobia iceberg mounted during the 2016 presidential campaign.

Months before Trump’s proposed ban, Republican presidential candidate Ben Carson stated on *Meet the Press* that he would “not advocate that we put a Muslim in charge of this nation” in response to a question about whether “he considered Islam to be consistent [with the Constitution].”<sup>165</sup> Carson’s response echoed formative Orientalist beliefs that Islam was antithetical to core American values,<sup>166</sup> and furthermore, that entrusting a Muslim with the presidency would presumptively endanger the nation’s democratic identity.<sup>167</sup>

Carson’s statements juxtaposing Islam with American values aligned with the views of many his fellow Republican candidates. Discussions focusing on Islam were linked to the alleged religious identity of President Obama, Syrian refugees and the threat absorbing them into the country would invite,<sup>168</sup> domestic national-security and counter-

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159. Caricatures of Muslim Americans as aliens or immigrants are belied by statistics, which hold that 81% of Muslim Americans are citizens. PEW STUDY, *supra* note 23, at 8.

160. See *Islamophobia in the 2016 Elections*, *supra* note 6.

161. Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015, 4:18 AM), <http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/>.

162. See Michael Tesler, *How Hostile are Trump Supporters to Muslims? This New Poll Will Tell You*, WASH. POST (Dec. 8, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/12/08/how-hostile-are-trump-supporters-toward-muslims-this-new-poll-will-tell-you/> (presenting poll evidence suggesting how Trump’s Muslim ban strongly resonates with a considerable percentage of Trump supporters; and indeed, creates political incentives for him to carry forward and amplify that message).

163. Warren, *supra* note 7.

164. See Diamond, *supra* note 3.

165. *US Republican Hopeful Ben Carson: No Muslims as President*, BBC NEWS (Sept. 21, 2015), <http://www.bbc.com/news/world-us-canada-34308716>.

166. ALLISON, *supra* note 155, at 45–48.

167. *Id.*

168. Anthony Zurcher, *Trump Leads Republican Bandwagon Against Syrian Refugees*, BBC NEWS (Nov. 20, 2015), <http://www.bbc.com/news/world-us-canada-34884544> (Trump’s ban on Syrian

radicalization programs,<sup>169</sup> and the threat of ISIS and other terror networks.<sup>170</sup> Islam was at the center of political debates around national security, whether to admit or deny Syrian refugees, and most notably, radicalization. For Muslim Americans, “Islamophobia [itself was] an election issue,”<sup>171</sup> an election issue that led to the discursive “disidentif[ication of] [Muslim Americans] as citizens,”<sup>172</sup> which consequently exposed them to increased bigotry and violence from private actors.

Amid an upward spike of mosque arsons,<sup>173</sup> Trump stated, “we’re going to have no choice” but to close some mosques.<sup>174</sup> Days later, he stood by his position that Muslims coming into the country should do far more than submit themselves to a registry, stating that “[t]here should be a lot of systems, beyond databases.”<sup>175</sup> In essence, he was advocating for a broader tracking system than the NSEERS Program enacted after 9/11, which was ultimately suspended in April 2011. Trump justified his proposal by invoking 9/11, stating that “[i]t wasn’t people from Sweden that blew up the World Trade Center.”<sup>176</sup> Mirroring the unoriginality of underlying trope, Trump’s statement itself was taken from Richard Cohen, who said the very same words one month after 9/11.<sup>177</sup>

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refugees is based on the belief that many of them have, or may have, ISIS ties, a position echoed by other Republican candidates for President).

169. See *supra* Subsection III.B.2.

170. Ted Cruz famously “Promis[ed] to carpet bomb [ISIS] ‘til the desert glows.” Chris Megerian, *Ted Cruz Wants to ‘Carpet Bomb’ Islamic State, but with Some Limits*, L.A. TIMES (Dec. 15, 2015, 9:25 PM), <http://www.latimes.com/politics/la-pol-sac-ted-cruz-carpet-bomb-20151215-htlstory.html>.

171. Mike O’Sullivan, *American Muslims See Islamophobia as Election Issue*, VOA NEWS (Jan. 29, 2016, 1:09 PM), <http://www.voanews.com/a/american-muslims-see-islamophobia-election-issue/3168516.html>.

172. Volpp, *supra* note 16, at 1576.

173. “There were 78 instances where mosques were targeted—counting vandalism, arson, and other destruction—in 2015, according to the report compiled by the Council on American-Islamic Relations. Thirty-four of the incidents from 2015 came in November and December. There were twenty total in 2014, the group counted.” Talal Ansari, *There Was a Huge Increase in Attacks on Mosques Last Year*, BUZZFEED NEWS (June 20, 2016, 10:02 AM), [https://www.buzzfeed.com/talalansari/there-was-a-huge-increase-in-attacks-on-mosques-last-year?utm\\_term=.pajjd9mOgd#.huGdvPkJZv](https://www.buzzfeed.com/talalansari/there-was-a-huge-increase-in-attacks-on-mosques-last-year?utm_term=.pajjd9mOgd#.huGdvPkJZv). For accounts of individual arsons, see Phil Helsel, *Houston Mosque Fire Was Intentionally Set, Fire Department Says*, NBC NEWS (Dec. 26, 2015, 6:58 PM ET), <http://www.nbcnews.com/news/us-news/houston-mosque-fire-was-intentionally-set-fire-department-says-n486251>. Days after the San Bernardino shooting, a California man burned down a mosque in nearby Palm Desert, California. See Phil Helsel, *California Mosque Arsonist Pleads Guilty, Agrees to 6-Year Term*, NBC NEWS (Feb. 4, 2016, 3:16 PM ET), <http://www.nbcnews.com/news/us-news/california-mosque-arsonist-pleads-guilty-agrees-6-year-term-n510721>.

174. Nick Gass, *Trump: ‘Absolutely No Choice’ But to Close Mosques*, POLITICO (Nov. 18, 2005, 6:45 AM EST), <http://www.politico.com/story/2015/11/trump-close-mosques-216008>.

175. Vaughn Hillyard, *Donald Trump’s Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC NEWS (Nov. 20, 2015, 6:45 AM EST), <http://www.politico.com/story/2015/11/trump-close-mosques-216008>.

176. David A. Graham, *America’s Autumn of Islamophobia*, ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/politics/archive/2015/09/americas-autumn-of-islamophobia/406399/>.

177. “One hundred percent of the terrorists involved in the Sept. 11 mass murder were Arabs. Their accomplices, if any, were probably Arabs, too—at least Muslims. Ethnicity and religion are the very basis of their movement. It hardly makes sense, therefore, to ignore that fact and, say, give Swedish au pair girls heading to the United States the same scrutiny as Arab men coming from the Middle East.” Richard Cohen, *Profiles in Evasiveness* WASH. POST (Oct. 11, 2001), <https://www.washington>

While mainstream media fixated on Trump's campaign against Islam and Muslims, he was hardly the lone candidate that castigated the faith and its followers as a means for political gain. Following the July 15, 2015 shooting in Chattanooga, Tennessee, which involved a Muslim gunman, Rand Paul stated: "I'm very concerned about immigration to this country from countries that have hotbeds of jihadism and hotbeds of . . . Islamism."<sup>178</sup> While not as explicit as Trump, Paul's statement echoed the polarizing businessman's idea of halting immigration from "hotbeds of jihadism and . . . Islamism,"<sup>179</sup> synonyms for Muslim-majority states.

Ben Carson, doubling down on his firm opposition of a Muslim American becoming president, stated that he would only appoint a Muslim to the U.S. Supreme Court if they rejected "the lifestyle . . . which incorporates Sharia."<sup>180</sup> Extending the trope that Muslim and American identity are antithetical, and thus irreconcilable, Carson stated that Muslim Americans must be "schizophrenic," because "[y]ou have two different philosophies warring which are in constant distinction from each other."<sup>181</sup> Lindsey Graham, a Republican Senator from South Carolina who vied for his party's nomination, issued arguably the most Islamophobic statement of the 2016 presidential campaign. Graham stated: "Everything that starts with 'Al' in the Middle East is bad news."<sup>182</sup> It was a statement that associates Muslim names, or Muslim sounding names, with "bad news." "Bad news" is a phrase, which upon closer inspection, is likely code for terror suspicion, or more narrowly within today's geopolitical landscape, purported ISIS links. Even Chris Christie, who has a "history of outreach to New Jersey Muslims,"<sup>183</sup> strategically "backed away from those ties . . . during the campaign" to align himself closer to Trump.<sup>184</sup>

The blatant political American Islamophobia rose from seemingly every corner of the Republican side of the 2016 presidential campaign. Following Trump's lead, candidates behind him employed anti-Muslim rhetoric to compete with the eventual Republican Party nominee and strategically capitalize on the Islamophobic views of growing segments of

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post.com/archive/opinions/2001/10/11/profiles-in-evasiveness/155db8b9-c415-4474-bd3d-2354bf51c118/?utm\_term=.cbf7d19b5a00.

178. Matthew Boyle, *Exclusive—Rand Paul on Tennessee Terror: Restrict Immigration from Muslim Nations*, BREITBART NEWS (July 17, 2015), <http://www.breitbart.com/big-government/2015/07/17/exclusive-rand-paul-on-tennessee-terror-restrict-immigration-from-muslim-nations/>.

179. *Id.*

180. *Islamophobia in the 2016 Elections*, *supra* note 6.

181. Mark Hensch, *Carson: Only 'Schizophrenic' Muslims Practice Sharia, Believe in Democracy*, HILL (Feb. 16, 2016, 3:08 PM), <http://thehill.com/blogs/ballot-box/presidential-races/269562-carson-only-schizophrenic-muslims-practice-sharia>.

182. *Senator Lindsey Graham: Everything That Starts with 'Al' in the Mideast is Bad News*, HAARETZ (May 5, 2015, 7:09 PM), <http://www.haaretz.com/israel-news/1.655115>.

183. David A. Graham, *How Many Muslims Will Vote for Donald Trump?*, ATLANTIC (Feb. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/02/muslim-voters-2016/458691/>.

184. *Id.*

the electorate.<sup>185</sup> Although more conspicuous among Republican presidential hopefuls, political Islamophobia was not exclusive to the Republican Party, but also a frequent theme in the explicit and latent messages of established democrats in office and on the campaign trail.

*B. Un-Mosquing Islamophobia: Latent Political Animus*

“America and Islam are not exclusive, and need not be in competition. Instead, they overlap, and share common principles . . . .”

President Obama, Cairo, Egypt (June 4, 2009)<sup>186</sup>

“Muslims . . . have a responsibility to reject extremist ideologies. Those voices are there, we just have to amplify them more.”

President Obama, Baltimore, Maryland (Feb. 3, 2016)<sup>187</sup>

On February 3, 2015, President Obama finally visited an American mosque.<sup>188</sup> His stop at the Islamic Society of Baltimore came seven years into his presidency. A span that encompassed the rise and fall of “Arab Spring” revolutions,<sup>189</sup> escalating bigotry toward Muslims, and a protracted war on terror that collaterally impacts America’s eight million Muslim citizens.<sup>190</sup> The length of his avoidance of American mosques is made even more glaring when juxtaposed with his famous speech at Cairo’s Al Azhar University, a global center of Islamic education and thought, delivered a year into his first term.<sup>191</sup>

In Cairo, Obama openly challenged the “clash of civilizations” rhetoric and policies advanced by the Bush Administration.<sup>192</sup> His words helped mend the deep wounds inflicted by the War on Terror “crusade” on Muslims both stateside and abroad.<sup>193</sup> Following his Cairo speech,

185. *Islamophobia in the 2016 Elections*, *supra* note 6.

186. *Text: Obama’s Speech in Cairo*, N.Y. TIMES (June 4, 2009), <http://www.nytimes.com/2009/06/04/us/politics/04obama.text.html> (the historic address, dubbed the “speech to the Muslim World,” was delivered at the Al Azhar University, one of the leading institutions of Islamic thought and the world’s flagship center of Sunni Islamic thought).

187. Jack Jenkins, *Obama on Rise of Islamophobia: ‘An Attack On One Faith is an Attack On All Our Faiths’*, THINKPROGRESS (Feb. 3, 2016), <https://thinkprogress.org/obama-on-rise-of-islamophobia-an-attack-on-one-faith-is-an-attack-on-all-our-faiths-4181f5c02cb6>.

188. Michelle Boorstein & Juliet Eilperin, *Obama to Make First Visit of His Presidency to a U.S. Mosque Next Week*, WASH. POST (Jan. 30, 2016), [https://www.washingtonpost.com/news/acts-of-faith/wp/2016/01/30/obama-to-make-first-visit-of-his-presidency-to-a-u-s-mosque-next-week/?utm\\_term=.5e2c7853b201](https://www.washingtonpost.com/news/acts-of-faith/wp/2016/01/30/obama-to-make-first-visit-of-his-presidency-to-a-u-s-mosque-next-week/?utm_term=.5e2c7853b201).

189. See generally Sahar F. Aziz, *Bringing Down an Uprising: Egypt’s Stillborn Revolution*, 30 CONN. J. INT’L L. 1 (2014) (examining the rise and fall of the most recognizable “Arab Spring” Revolution). For a comprehensive analysis of every Arab Spring revolution, their aftermaths, and protracted contestations, see generally LIN NOUEIHED & ALEX WARREN, *THE BATTLE FOR THE ARAB SPRING: REVOLUTION, COUNTER-REVOLUTION AND THE MAKING OF A NEW ERA* (2012).

190. *Between Indigence, Islamophobia, and Erasure*, *supra* note 19, at 1463.

191. Scott Wilson, *Obama Calls for a ‘New Beginning’ with US*, WASH. POST (June 5, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/04/AR2009060401024.html>.

192. See Akram & Johnson, *supra* note 93, at 295.

193. Ron Suskind, *Faith, Certainty, and the Presidency of George W. Bush*, N.Y. TIMES MAG. (Oct. 17, 2004), <http://www.nytimes.com/2004/10/17/magazine/faith-certainty-and-the-presidency-of-george-w-bush.html>. President George W. Bush, and members of his administration, regularly referred

Obama was celebrated by Muslims and Muslim Americans as a transformative leader who could undo the damage wrought by previous administrations and, in turn, reconcile tensions between Muslims and the United States.<sup>194</sup> However, the seven years between Obama's historic Cairo speech and his address to Muslim Americans in Baltimore witnessed the expansion of structural Islamophobia (with the formal establishment of CVE Policing) within his administration and the growing opposition it caused among Muslim Americans.

Critiqued by many Muslim Americans as long overdue,<sup>195</sup> President Obama's first presidential visit to an American mosque was highlighted by a speech that condemned Islamophobia.<sup>196</sup> But behind the words, a political mission drove it forward. Mirroring his own relationship with Islam and Islamophobia, defined primarily by allegations that he himself was an undercover Muslim, President Obama's engagement of the faith can be best characterized as strategic and intentionally distant.<sup>197</sup>

President Obama was feared to be a Muslim while campaigning for the presidency. Opponents, most notably Trump, called Obama a Muslim as a means to undermine his campaign, and deepen perceptions that he was a foreigner.<sup>198</sup> Perceptions that Obama is a Muslim continued into Obama's second term, illustrating that years-old allegations developed into widely held beliefs.<sup>199</sup> These beliefs had a considerable impact on Obama and confined his outreach and engagement with the Muslim American community. Specifically, they influenced him to keep political distance in order to retrench perception that he was a Muslim.<sup>200</sup>

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to the "War on Terror" as a "clash of civilizations," "religious war," and "crusade," echoing the rhetoric from the provocative book *THE CLASH OF CIVILIZATIONS* by SAMUEL P. HUNTINGTON (1996). 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, 717 n.138 (2016).

194. Maati Monjib, *Reactions to President Obama's Speech to the Muslim World*, Brookings (June 4, 2009), <https://www.brookings.edu/opinions/reactions-to-president-obamas-speech-to-the-muslim-world/>.

195. "American Muslim community leaders have been asking President Obama for years to visit an American mosque," said Ibrahim Hooper of the Council on American-Islamic Relations ("CAIR"). Khorri Atkinson, *President Obama to Visit Mosque, Hold Talks with Muslim Leaders*, MSNBC (Jan. 30, 2016, 3:16 PM), <http://www.msnbc.com/msnbc/president-obama-visit-mosque-hold-talks-muslim-leaders>.

196. "As demonstrated before and during his speech in Baltimore, Obama understands the roots of Muslim bigotry, recognises its effects on Muslim Americans and, as a victim of Islamophobia himself, can empathise with its injuries. Therefore, steering clear from American mosques for seven years was not driven by explicit Islamophobia." Khaled A. Beydoun, *Un-Mosquing Obama's First US Mosque Visit*, *AL-JAZEERA ENGLISH* (Feb. 4, 2016), <http://www.aljazeera.com/indepth/opinion/2016/02/mosquing-obama-mosque-visit-160204094052554.html>.

197. *Id.*

198. See Chris Moody & Kristen Holmes, *Donald Trump's History of Suggesting Obama is a Muslim*, CNN (Sept. 18, 2015, 9:04 PM), <http://www.cnn.com/2015/09/18/politics/trump-obama-muslim-birther/>.

199. *Trump Supporter Calls Obama a Muslim During Rally*, WASH. POST (Jan. 5, 2016), [https://www.washingtonpost.com/video/politics/trump-supporter-calls-obama-a-muslim-during-rally/2016/01/05/c43d4eca-b421-11e5-8abc-d09392edc612\\_video.html](https://www.washingtonpost.com/video/politics/trump-supporter-calls-obama-a-muslim-during-rally/2016/01/05/c43d4eca-b421-11e5-8abc-d09392edc612_video.html) (although Trump did not expressly call Obama a Muslim on this occasion, he did not deny his supporter's claim).

200. For Obama, steering clear from American mosques for the first seven years of his presidency was not driven by fear and animus of Muslim or Islam, but rather, fear of the political cost of interfac-

Political aversion to mosques, in President Obama's case, exhibits a less conspicuous brand of Islamophobia.<sup>201</sup> However, what circumstances prompted Obama—during the final quarter of his second term—to finally enter a mosque and speak to its congregation? The fact his visit took place during his second term, and at the close of his administration, meant that the political stakes were far lower.

The expansion of CVE Policing in the aftermath of the San Bernardino and Paris attacks,<sup>202</sup> which is sure to become more intense after the Orlando massacre, strongly suggests another motive, namely, the state's interest in enlisting Muslim Americans as strategic supporters of expanding counter-radicalization programming and CVE Policing.<sup>203</sup> Consequently, this fuses the latent political Islamophobia of President Obama's decision to stay clear of a mosque with the anti-Muslim underpinnings of his cornerstone anti-terror policy: CVE Policing.

While “celebrat[ing] the contributions of Muslim Americans” was the motive issued to the media and the public,<sup>204</sup> enlisting Muslim Americans as CVE Policing interlocutors and informants was the likely political interest prompting the visit. In line with this aim, Obama made “[a] direct appeal to America's Muslim youth and asking Muslim communities to be ‘partners’ in state and federal campaigns [CVE Policing] to combat militant groups that try to recruit young followers of Islam.”<sup>205</sup> In a speech (and visit) that likely would not have been issued if not for the San Bernardino shooting, President Obama called for closer collaboration with Muslim Americans to combat and counter radicalization.<sup>206</sup>

Mobilizing Muslim American support for CVE Policing certainly would be bolstered by the symbolic force of President Obama speaking inside of an American mosque, while also tapping into the unprecedented Muslim American support for a presidential candidate, which after controversial foreign-policy decisions and expansion of Muslim American surveillance, gradually eroded since 2012.<sup>207</sup> President Obama condemned the “inexcusable rhetoric” from Republican candidates and im-

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ing with Muslim Americans, on their terrain, what it would incur on his re-electability during the first term, and well-founded perceptions that he was a Muslim before, during, and beyond it.

201. Particularly since Muslim Americans voted for Obama at a staggering 85% margin in 2012. O'Sullivan, *supra* note 171, at 1.

202. See generally Khaled A. Beydoun, *Beyond the Paris Attacks: Unveiling the War Within French Counterterrorism Policy*, 65 AM. U. L. REV. 1273 (forthcoming 2016) (examining the expansion of CVE policing programs in France after the Paris attacks, and their structural and strategic tension with precedent counterterrorism philosophies that focused on assimilating French Muslims).

203. Muslim communities equip law enforcement with on-the-ground informants, interlocutors, and watchdogs, but more importantly, the programmatic legitimacy only native informants and respected community figures can bestow upon state counterterrorism interventions.

204. Boorstein & Eilperin, *supra* note 188.

205. Jenkins, *supra* note 187.

206. Tanya Somander, *President Obama on the Shooting in San Bernardino*, WHITE HOUSE (Dec. 5, 2015), <https://obamawhitehouse.archives.gov/blog/2015/12/02/president-obama-shooting-san-bernardino>.

207. Namira Islam & Khaled A. Beydoun, *The Obama Legacy: Transformative Yet Typical*, NEW ARAB (Jan. 20, 2016), <https://www.alaraby.co.uk/english/comment/2016/1/20/the-obama-legacy-transformative-yet-typical>.

plored that “[w]e can’t suggest that Islam is the root of the problem.”<sup>208</sup> However, in direct conflict with these words was the primary political objective of his historic address,<sup>209</sup> to promote a counterterror program that suggests Islam is the root of radicalization<sup>210</sup> and Muslims the lone demographic vulnerable to it.

Whereas speaking at a mosque would have symbolized President Obama’s affiliation with Islam before the Paris attacks and San Bernardino shootings, speaking within its confines signals an alarm for expanded CVE Policing following these tragedies. What appears to be official acknowledgment of Islam, investigated within the context of the state interest to expand CVE Policing and enlist Muslim American support for domestic CVE Policing programs,<sup>211</sup> reveals that the February 3, 2015 visit to the Baltimore mosque was a materially calculated presidential maneuver driven by fear. This time, instead of fearing the reputational or political damage a mosque visit would incur, President Obama pivoted—seven years later—to carry forward counterterror policies exclusively focused on Muslim American bodies and communities, policies rooted in a fear as old as the nation itself.

While the Republican Party, particularly with Trump’s ascent, became the party of blatant and explicit political Islamophobia, the Democratic Party, under President Obama, stood as the party of expanding structural Islamophobic policy and programming. The latter of these parties mirrored Obama’s masterful speech at the mosque in Baltimore and used benign and gracious language toward Muslims as a means to enlist them in programming that invites great dangers into Muslim American communities.

### 1. *Latent Islamophobia in the Presidential Campaign*

While blatant Islamophobia pervaded the Republican race for the party nomination, and structural Islamophobia dictated the counterterror strategy of the Obama Administration, underlying suspicion of Islam percolated among the Democratic candidates. Suspicion of Islam has undergirded Hillary Clinton’s foreign and domestic policy. As Secretary of State under President Obama, Clinton’s engagement with Islam and

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208. *Remarks by the President at Islamic Society of Baltimore*, WHITE HOUSE (Feb. 3, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/03/remarks-president-islamic-society-baltimore>.

209. The Baltimore speech, at its essence, witnessed the “president struggling to appeal to two different audiences, seeking to affirm Muslim Americans and assuage the fears of non-Muslims who view Islam as a potential threat.” Jenkins, *supra* note 187.

210. Akbar, *Policing “Radicalization,” supra* note 131, at 813 (arguing that CVE Policing is exclusively concerned with policing only Muslim extremism, and not other religious or ideological forms of radicalization).

211. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (in line with Bell’s thesis, that outwardly progressive state policies are materially driven by discrete interests, the motive to mainstream CVE Policing appears to be a salient driver of his decision to finally visit an American mosque).

Muslims largely focused on dealings with foreign states.<sup>212</sup> However, as a presidential candidate, her hiring of Wesley Clark as a campaign consultant raised concerns of latent Islamophobia.<sup>213</sup>

In July 2015, during an interview with MSNBC, Clark virtually called for internment of “disloyal Americans,” implicitly focusing on Muslim Americans as illustrated by his focus on radicalization.<sup>214</sup> A ripe and pervasive fear held by Muslim Americans,<sup>215</sup> Clark made a case for internment more than seventy years after Japanese-American internment,<sup>216</sup> stating:

If these people are radicalized and they don’t support the United States and they are disloyal to the United States as a matter of principle, fine. It’s their right and it’s our right and obligation to segregate them from the normal community for the duration of the conflict [the War on Terror].<sup>217</sup>

Clark’s assertion of the “their” versus “our” binary, although talking about American citizens in the case of Muslim Americans, manifests the clash of civilizations trope that undergirds American Islamophobia.<sup>218</sup> It is an emanation of the *us versus them* logic, or “with us or against us” rhetoric,<sup>219</sup> that characterized the War on Terror and the policies and programs that came to define it.

After Clark’s statements, however, the Clinton campaign did not publicly admonish them or release him from his “campaign surrogate” post.<sup>220</sup> As a result, this led many to believe that Clinton’s nonfeasance amounted to tacit endorsement, or at minimum, a calculation that publicly condemning the idea of Muslim American internment would garner minimal political points but expose her to increased attack from Republican candidates.<sup>221</sup>

212. Khaled A Beydoun, *Muslim Voters Between Hillary Clinton and a Hard Place*, AL JAZEERA ENGLISH (July 25, 2016), <http://www.aljazeera.com/indepth/opinion/2016/07/muslim-voters-hillary-clinton-hard-place-160725094634857.html>.

213. Scot Eric Kaufman, *Wesley Clark: “Disloyal” Americans Should Be Tossed in Internment Camps For the “Duration of the War on Terror,”* SALON (July 20, 2015), [http://www.salon.com/2015/07/20/wesley\\_clark\\_disloyal\\_americans\\_should\\_be\\_tossed\\_in\\_internment\\_camps\\_for\\_the\\_duration\\_of\\_the\\_war\\_on\\_terror/](http://www.salon.com/2015/07/20/wesley_clark_disloyal_americans_should_be_tossed_in_internment_camps_for_the_duration_of_the_war_on_terror/).

214. *Id.*

215. “[T]he precedent and prospect of internment looms strong’ in the minds of Arab [and Muslim] Americans still today.” *A Demographic Threat*, *supra* note 10, at 469.

216. *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944) (“[W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.”).

217. Kaufman, *supra* note 213.

218. RUNNEYMEDE TRUST, *supra* note 18.

219. George Bush issued this declaration after the 9/11 terror attacks to carry forward his War on Terror program. *See You Are Either with Us or Against Us*, CNN (Nov. 6, 2001, 10:13 PM), <http://edition.cnn.com/2001/US/11/06/gen.attack.on.terror/>.

220. Sarah Lazare, *Hillary Clinton Called Out for Hypocrisy on Islamophobia*, COMMON DREAMS (Dec. 10, 2015), <http://www.commondreams.org/news/2015/12/10/hillary-clinton-called-out-hypocrisy-islamophobia>.

221. While she neither reprimanded Clark publicly, nor released him, Clinton has condemned the blatant Islamophobic rhetoric used by Republican candidates. Stating that it has been “one of the most distressing part of this campaign.” Casey Tolan, *Hillary Clinton Calls Islamophobia One of the “Most*



Latent Islamophobic sentiment was also expressed by the most prominent voices within the Democratic Party, including former president Bill Clinton. On the second day of the Democratic National Convention in Philadelphia, Clinton presented an ultimatum to Muslim Americans to either participate in the fight against terrorism, or else leave: “If you’re a Muslim and you love America and freedom and you hate terror, stay here and help us win and make a future together, we want you.”<sup>222</sup>

Peter Beinart of *The Atlantic* observed: “Whether Clinton meant to or not, he lapsed into Trumpism: the implication that Muslims are a class apart, deserving of special scrutiny and surveillance, guilty of terrorist sympathies until proven innocent.”<sup>223</sup> This, in turn, illustrates that the line separating Trumpian views on Islam and the Democratic Party are most saliently divided along lines of rhetoric.

Bill’s overtures, however, were not a major departure from the message to Muslim Americans continually delivered by his wife, Hillary. A staunch proponent of CVE Policing, Hillary Clinton’s framing of Muslims as either good or bad is a staple of her national-security vision. This good versus bad Muslim binary was on full display after Clinton functionally sealed the Democratic Party nomination in late April:

After winning four presidential primaries on April 26, Hillary Clinton drew a line between “hard working, terror hating Muslims” and (Muslim) terrorists. In front of a raucous audience of supporters in Philadelphia, Clinton . . . only made mention of Muslims in relation to terrorism, and reaffirmed the mythic “good versus bad” Muslim paradigm. Within the broader context of counter-radicalization policing . . . Clinton’s rhetoric presented Muslim Americans with an already familiar, yet never more threatening, ultimatum: choose the moderate brand of “terror-hating” Muslim identity sanctioned by the state, or be branded with the suspicion that invites its scrutiny, surveillance, and civil liberties infractions.<sup>224</sup>

As observed by law scholar Samuel Rascoff, the good-versus-bad Muslim framework posited by Bill and Hillary Clinton, a theoretical cornerstone of CVE Policing and the civilizational binary that preceded it, “puts the government in the position, *vis-à-vis* Islam, of serving as a kind of official theologian, taking positions on the meaning of inevitably contested religious concepts and weighing in on one side of debates that rage within a particular faith tradition,” which raises Establishment Clause concerns in addition to encroachment on free exercise.<sup>225</sup>

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*Distressing” Parts of the Campaign*, SPLINTER (Jan. 26, 2016), <http://splinternews.com/hillary-clinton-calls-islamophobia-one-of-most-distress-1793854289>.

222. Peter Beinart, *Bill Clinton Lapses into Trumpism*, ATLANTIC (July 27, 2016), <https://www.theatlantic.com/politics/archive/2016/07/bill-clintons-lapse-into-trumpism/493175/>.

223. *Id.*

224. Khaled A. Beydoun, *The Myth of the ‘Moderate Muslim,’* AL JAZEERA ENGLISH (May 20, 2016), <http://www.aljazeera.com/indepth/opinion/2016/05/myth-moderate-muslim-160511085819521.html>.

225. Rascoff, *supra* note 10, at 162.

## 2. *Opposing Islamophobia*

Despite the prominence of (latent) Islamophobic messaging emanating from the Democratic Party, its most trenchant critiques and staunchest opponents also rose from the left. Martin O'Malley, the former Governor of Maryland who dropped out of the 2016 presidential race after a poor showing in the Iowa primary,<sup>226</sup> made a statement that articulates the indelibility of American Islamophobia today. He stated: "Sometimes this Islamophobia and xenophobia seeps into the mainstream. I wish it weren't so. But this is the great work of our times that we need to be involved in healing."<sup>227</sup>

Bernie Sanders, deemed the most liberal in the Democratic Party who vied for the presidency, echoed O'Malley, shouting: "We will not allow ourselves to be divided and succumb to Islamophobia."<sup>228</sup> Sanders, whose historic campaign challenged Clinton for the Democratic nomination, ultimately became the presidential race's anti-Islamophobia champion and, in turn, earned strong support among Muslim Americans.<sup>229</sup> Donna Auston and Zareena Grewal, two Muslim American scholars and activists, observed:

Sanders has consistently condemned the bigoted, anti-Muslim rhetoric that has become a staple of this presidential campaign season. Black and brown Muslims know only too well how Islamophobia compounds other forms of prejudice and discrimination - especially in the areas of racial and religious profiling by law enforcement, and protection from bias incidents and hate crimes.<sup>230</sup>

Sanders's support among Muslim Americans, particularly younger demographics,<sup>231</sup> helped him compete in key contests within prominent Muslim American communities, and most memorably, pull the "historic upset" in Michigan—home to the most concentrated Muslim American communities.<sup>232</sup> In the Arab American Muslim enclave of Dearborn, for instance,<sup>233</sup> Sanders won 60% of the vote, which led to a stream of media

226. John Wagner, *O'Malley Suspends Presidential Bid After a Dismal Showing in Iowa*, WASH. POST, (Feb. 1, 2016), [https://www.washingtonpost.com/politics/omalley-to-suspend-his-campaign-according-to-campaign-adviser/2016/02/01/4e1a4572-c77c-11e5-a4aa-f25866ba0dc6\\_story.html?utm\\_term=.6da9bd3aa060](https://www.washingtonpost.com/politics/omalley-to-suspend-his-campaign-according-to-campaign-adviser/2016/02/01/4e1a4572-c77c-11e5-a4aa-f25866ba0dc6_story.html?utm_term=.6da9bd3aa060) ("O'Malley registered support from less than 1 percent of caucus-goers.")

227. *Islamophobia in the 2016 Elections*, *supra* note 6.

228. Tom LoBianco, *Sanders on ISIS: "US Needs To Be Tough, Not Stupid,"* CNN (Nov. 16, 2015), <http://www.cnn.com/2015/11/16/politics/bernie-sanders-cleveland-isis/index.html?>

229. Zareena Grewal & Donna Auston, *Why Muslim Americans Should Vote for Bernie Sanders*, AL JAZEERA ENGLISH (Feb. 29, 2016), <http://www.aljazeera.com/indepth/opinion/2016/02/muslim-americans-vote-bernie-sanders-160229081006593.html>.

230. *Id.*

231. Niraj Warikoo, *Young Arab-American Muslim Voters Fuel Sanders' Win in Michigan*, DETROIT FREE PRESS (Mar. 9, 2016), <http://www.freep.com/story/news/politics/2016/03/08/spotlight-arab-american-muslim-voters-engage-issues/81486692/>.

232. Jareen Imam, *Why Bernie Sanders Being Jewish isn't an Issue for Muslim Americans*, CNN (Mar. 11, 2016, 10:29 AM), <http://www.cnn.com/2016/03/11/politics/muslim-american-voters-bernie-sanders-irpt/>.

233. SUMMARY REP., CITY OF DEARBORN PRESIDENTIAL PRIMARY RETURNS (Mar. 8, 2016), <http://cityofdearborn.org/images/DbnHgtResults/EL45.pdf>.

headlines about “Muslims voting for a Jew” the morning after the upset,<sup>234</sup> reinforcing the stereotype that Muslims are inherently at odds with Jews, and vice-versa.<sup>235</sup> Therefore, while Trump benefitted tremendously from delivering an Islamophobic message, Sanders’ opposition to it also bore political fruit, garnering him votes and visible Muslim American leadership within his campaign.<sup>236</sup>

Indeed, rising fear of Islamophobia—coming from the left and most profusely from the right—pushed Muslim Americans to the polls in record numbers.<sup>237</sup> “Growing Islamophobia in America was ranked as the most important issue for Muslim voters,”<sup>238</sup> and fear of continued and exacerbated injury, all too regular and familiar after 9/11, created the sense of urgency for an unprecedented degree of political involvement.

Skepticism of Clinton, and outright fear of Trump, remained prominent throughout the 2016 presidential election—particularly as the two emerged as the representatives of their respective parties—indicating that Muslim voters were forced to choose between the expansion of CVE Policing and ancillary programs with the Democratic nominee, and the possibility of bans and blatantly discriminatory surveillance programs under Trump.<sup>239</sup>

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234. Kate Abbey-Lambertz, *Yes, Muslims Voted for a Jewish Candidate. No, Pundits Shouldn't Be Surprised*, HUFFINGTON POST (Mar. 10, 2016), [http://www.huffingtonpost.com/entry/dearborn-muslims-arab-americans-bernie-sanders\\_us\\_56e16b5ae4b0860f99d7ea1f](http://www.huffingtonpost.com/entry/dearborn-muslims-arab-americans-bernie-sanders_us_56e16b5ae4b0860f99d7ea1f).

235. See Khaled A. Beydoun, *Between Islamophobia and Anti-Semitism: Bernie Sanders and the 'Muslim Vote'*, NEWSWEEK MIDDLE EAST (Mar. 13, 2016), <http://newsweekme.com/between-islamophobia-and-anti-semitism-bernie-sanders-and-the-muslim-vote/>.

236. A number of Muslim Americans were visible in the Sanders campaign, most notably Linda Sarsour, a prominent Palestinian and Muslim American civil rights leader. See Taly Krupin, *The Arab Americans Behind Bernie Sanders in New York*, HAARETZ (Apr. 1, 2016), <http://www.haaretz.com/world-news/u-s-election-2016/premium-1.711834>.

237. *CAIR Releases Results of Muslim Voter Survey Ahead of Primary Elections*, CAIR (Feb. 9, 2016), <https://www.cair.com/press-center/press-releases/13365-cair-releases-results-of-muslim-voter-survey-ahead-of-primary-elections.html>. “The Council on American-Islamic Relations (CAIR), the nation’s largest Muslim civil rights and advocacy organization, today released the results of a six-state survey indicating that 73 percent of registered Muslim voters say they will go to the polls in upcoming primary elections and that 67 percent will vote for Democratic Party candidates.” *Id.*

238. *Id.*

239. “The blatant Islamophobia embodied by Trump is, indeed, countered by a structural Islamophobia wielded by Clinton, making the 2016 presidential options more of a ‘lesser of two evils’ ultimatum. The evil looming on the right is louder and clearer with his Islamophobia, while the dangers associated with a Clinton presidency spell broader surveillance of Muslim Americans stateside, continuing the legacy of Obama - but a far more hawkish posture in Muslim-majority states in the Middle East.” Beydoun, *Muslim Voters Between Hillary Clinton and a Hard Place*, *supra* note 212.

## V. HOW ISLAMOPHOBIA IMPACTS MUSLIM AMERICANS

“Words, like sticks and stones, can assault; they can injure; they can exclude.”<sup>240</sup>

Muslim Americans are caught between an intensifying Islamophobic climate and state expansion of counterterror strategies that disproportionately focus on them.<sup>241</sup> Fifteen years after 9/11, the extending tentacles of American Islamophobia are, perhaps like never before, “haunt[ing] their ability to enjoy citizenship as a matter of rights.”<sup>242</sup> Systematically framed as inassimilable, foreign, and threatening by politicians, and monolithically classified as criminally suspicious by the state, Muslim America ranks among the most misrepresented and maligned segments of the American polity.<sup>243</sup> This discursive ignorance, coupled with the escalating fear drummed up by political rhetoric and state policy, facilitates the hate crimes and violence inflicted on Muslim American subjects today.

Indeed, the blatant Islamophobia freely wielded by President Trump has emboldened a frightening degree of private Islamophobia in the U.S. Thus, political Islamophobia is in part a strategy to garner votes, particularly among disaffected segments of the electorate who take to bigoted and xenophobic messaging.<sup>244</sup> Whether intended or unintended, the hateful rhetoric emanating from the Republican Party, and even the latent fearmongering delivered by Democrats, has the effect of endorsing private Islamophobia and facilitating the spike in hate crimes against Muslim Americans unfolding today.

The convergence of structural and private Islamophobia inflicts enhanced injury upon Muslim American bodies, communities and geographies. Section A provides a snapshot of these injuries, while Section B assesses how injury and growing Muslim American concern impacted the 2016 presidential campaign, specifically in terms of mobilizing Muslim

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240. See generally MARI J. MATSUDA, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (NEW PERSPECTIVES ON LAW, CULTURE, & SOCIETY) (1993) (examining how hate speech and bigotry can incite and embolden violence).

241. Ahmad, *supra* note 107, at 1265 (author refers to this convergence public and private of Islamophobic hostility as a “rage shared by law”).

242. Volpp, *supra* note 16, at 1595.

243. “Muslim America is diverse along racial, ethnic and nationality lines. In fact, Muslim Americans hail from ‘80 nationalities and cultural backgrounds,’ moving some to brand it ‘a ‘microcosm’ of the Muslim world.’ In addition to its racial breadth, generational diversity, multiculturalism, and linguistic breadth, Muslim Americans are also disparately situated along economic lines. Yet, unlike rising research and scholarship examining the racial and cultural diversity of Muslim America, the attention on indigent segments of the population has been virtually non-existent. This is particularly true within legal scholarship, where scrutiny of Muslim American communities and bodies is rising; but genuine understanding of the existential distinctions and diversity within the population remains shallow.” *Between Indigence, Islamophobia, and Erasure*, *supra* note 19, at 1469.

244. Waleed Shahid, *Donald Trump and the Disaffected, White, Working Class Voter*, COLORLINES (Dec. 9, 2015), <http://www.colorlines.com/articles/donald-trump-and-disaffected-white-working-class-voter>.

Americans to vote at a higher clip and against the candidates leading the political Islamophobic charge.

#### A. *Words that Wound*

Mirroring the post-9/11 moment, Islamophobia has “cast [Muslims] as disloyal outsiders and noncitizens.”<sup>245</sup> While citizens, the demonization of Islam and political and legal suspicion of Muslims has enabled the subordination of Muslim Americans. In turn, this deepens the second-class citizenship of Muslim Americans, denying the “enjoyment of rights” that flow from “social membership.”<sup>246</sup> As articulated by leading immigration law scholar Linda Bosniak,

[Muslim Americans] may now enjoy nominal citizenship status, but their members are, in fact, afforded less in the way of substantive citizenship than others in society.<sup>247</sup>

This denial, or diminishment, of “substantive citizenship” rights is enabled by the convergence of the legal and political Islamophobia illustrated above,<sup>248</sup> which sows the seeds for the rising incidence of hate and violence taking place on-the-ground today in America.

A number of recent events illustrate the frightening uptick in Islamophobic violence in America. For instance, the February 2015 attack on the Islamic School of Rhode Island,<sup>249</sup> the targeted arson of a Houston mosque days later,<sup>250</sup> the murder of three Muslim American students in Chapel Hill,<sup>251</sup> and the frightening range of armed and unarmed anti-Muslim rallies,<sup>252</sup> are all evidence that Islamophobia is trumping the degree of anti-Muslim bigotry immediately after 9/11. While other forms of racial and religious animus continue to decline, according to FBI statistics, 2011 and the following years witnessed an “intensification of anti-Muslim rhetoric” and violence.<sup>253</sup> Yet, “aside from lofty rhetoric and a long-awaited visit to a US mosque, [President Obama has not institut-

245. Ali, *supra* note 102, at 1045.

246. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 30–31 (2008).

247. *Id.* at 30.

248. “There is often a gap between possession of citizenship status and the enjoyment or performance of citizenship in substantive terms.” *Id.* at 31.

249. Jennifer Bogdan, *Islamic School of Rhode Island Vandalized*, PROVIDENCE JOURNAL (Feb. 15, 2015, 5:30 PM), <http://www.providencejournal.com/article/20150215/News/150219457>.

250. Wilson Dizard, *Arson Eyed in Houston-Area Mosque Fire*, AL-JAZEERA AMERICA (Feb. 13, 2015, 3:19 PM), <http://america.aljazeera.com/articles/2015/2/13/arson-eyed-in-houston-area-mosque-torching.html>.

251. Terrence McCoy, *Chapel Hill Killings: Why Hate Crimes Are So Hard to Prove*, WASH. POST (Feb. 12, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/02/12/chapel-hill-murders-why-hate-crimes-are-so-hard-to-prove/>.

252. Halima Kazem & Tom Dart, *US Muslim Leaders Brace for Protests with Potentially Armed Demonstrators*, GUARDIAN (Oct. 9, 2015), <http://www.theguardian.com/world/2015/oct/09/us-muslim-community-phoenix-oklahoma-city-protests-mosques>.

253. *Id.*

ed] formal programming to prevent [violence against] Muslim Americans amid an intensifying climate of Islamophobic violence.”<sup>254</sup>

The rising Islamophobia, particularly the blatant political messages trumpeted by Trump and other Republicans, has armed bigoted elements on the ground to openly target Muslim communities.<sup>255</sup> In October 2015, anti-Muslim organizers staged a wave of national protests across the country.<sup>256</sup> The protests, many of them flanked by armed men, took place in major cities, including Detroit, Phoenix, and Dallas.<sup>257</sup> The anti-Muslim rallies, which attracted thousands, illustrated that the culture of Islamophobia was indeed spreading beyond merely the margins. In addition, 2015 witnessed the highest number of mosque arsons and attacks—seventy-eight in total, up from twenty in 2014.<sup>258</sup> Not surprisingly, as outlined in Section III.A, 2015 was the year Republican candidates turned their attention to Islam as a tool to resonate with voters, and in the process, turned up their political Islamophobic messaging.

Several Republican candidates, most notably Marco Rubio, downplayed discrimination against Muslim Americans and critiqued the legitimacy of Islamophobia (as a viable form of bigotry). In response to President Obama’s first U.S. mosque visit, Rubio stated:

I’m tired of being divided against each other for political reasons like this president’s done. Always pitting people against each other. Always! Look at today: He gave a speech at a mosque. Oh, you know, implying that America is discriminating against Muslims.<sup>259</sup>

Rubio went on to justify discrimination of Muslims by qualifying that, “the bigger issue is radical Islam.”<sup>260</sup> He therefore justified public discrimination (profiling) of Muslim Americans, asserting the “national security exception” to safeguarding the civil liberties of citizens.<sup>261</sup>

254. Asha Mohammed Nour & Khaled A. Beydoun, *Remembering Chapel Hill One Year On*, AL JAZEERA ENGLISH (Feb. 10, 2016), <http://www.aljazeera.com/indepth/opinion/2016/02/remembering-chapel-hill-year-160210052945062.html>.

255. For a comprehensive examination of the distinct forms of animus faced by Arab and Muslim American communities, see generally Khaled A. Beydoun, *Many Faces of Hate: The Distinct Forms of Anti-Arab Bigotry and Violence*, ACCESS-TAKE ON HATE INITIATIVE (Apr. 20, 2015), [http://www.takeonhate.org/many\\_faces\\_of\\_hate\\_the\\_distinct\\_forms\\_of\\_anti\\_arab\\_bigotry\\_and\\_violence](http://www.takeonhate.org/many_faces_of_hate_the_distinct_forms_of_anti_arab_bigotry_and_violence).

256. Catherine Thompson, *Armed Anti-Muslim Activists Plan Mosque Protests in 20 Cities This Week*, TPM (Oct. 8, 2015), <http://talkingpointsmemo.com/muckraker/anti-muslim-global-rally-john-ritzheimer>.

257. Justin Wm. Moyer, *Armed Anti-Muslim Protesters Stage ‘Strange’ Protest Outside Mosque in Clock Kid’s Hometown*, WASH. POST (Nov. 23, 2015), [https://www.washingtonpost.com/news/morning-mix/wp/2015/11/23/armed-anti-muslim-protesters-stage-strange-protest-outside-mosque-in-clock-kids-hometown/?utm\\_term=.fb985c91cfb2](https://www.washingtonpost.com/news/morning-mix/wp/2015/11/23/armed-anti-muslim-protesters-stage-strange-protest-outside-mosque-in-clock-kids-hometown/?utm_term=.fb985c91cfb2).

258. See Ansari, *supra* note 173.

259. Igor Babic, *Marco Rubio Slams Obama’s Speech on Fighting Islamophobia*, HUFFINGTON POST (Feb. 3, 2016, 11:19 PM), [http://www.huffingtonpost.com/entry/marco-rubio-obama-muslims\\_us\\_56b2bf8ae4b04f9b57d879d5](http://www.huffingtonpost.com/entry/marco-rubio-obama-muslims_us_56b2bf8ae4b04f9b57d879d5). Rubio’s words manifest the notion that, “hate violence against Arabs, Muslims and South Asians is understood as a passing, or past, phenomenon.” Ahmad, *supra* note 107, at 1263.

260. *Id.*

261. Ahmad, *supra* note 107, at 1268 (the idea that part and parcel of advancing the national-security interests of the state requires encroachment upon the civil liberties of citizens who are racially or religiously viewed with suspicion).

Thus, in addition to wielding political Islamophobia as a campaign strategy, many Republican candidates sought to discredit its legitimacy. Capitalizing on the strategy of opposing “political correctness,” Republican presidential hopefuls, including Rubio, Cruz, and the strategy’s staunchest proponent, Trump, use that argument to excuse the antagonistic language that has come to define many of their campaigns. Indeed, “Trump has proven speech can be dangerous, especially when it appeals to the kinds of historical forces that have too often led to real acts of oppression and violence.”<sup>262</sup> This violence has, for Muslim Americans in 2015, reached more frightening levels than the days after the 9/11 terror attacks.

### B. *Voting Against Islamophobia*

The rising tide of Islamophobia, stoked by rhetoric from the 2016 presidential campaign trail, drove Muslim Americans to vote in record numbers.<sup>263</sup> Islamophobia, again, has become a wedge issue during the 2016 presidential campaign. A February 2016 survey of Muslim American voters showed that “growing Islamophobia [is] the most important issue” of the presidential campaign.<sup>264</sup>

While many Republican candidates have employed Islamophobia as a strategy to resonate with specific segments of the polity, the trade-off not only includes the alienation of Muslim American voters; it pushes them to vote for opposing candidates. It additionally is spurring a virtual Muslim American mass exodus to the Democratic Party. Consequently, “73% of Muslim voters in the US say that they will go to the primary elections and that 67% will vote for Democratic Party candidates.”<sup>265</sup>

Overwhelming Muslim American support for Democratic candidates illustrates how blatantly Islamophobic law and political rhetoric has bludgeoned support for Republicans.<sup>266</sup> Less than fifteen years after Muslim Americans, by a healthy margin, supported George W. Bush and were “natural supporters” of the Republican Party,<sup>267</sup> John Zogby, a prominent political pollster, observed:

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262. Ben Branstetter, *Donald Trump’s War on Political Correctness is Just an Excuse to Spew His Nonstop Hate Speech*, SALON (Dec. 13, 2015, 1:30), [http://www.salon.com/2015/12/13/donald\\_trumps\\_war\\_on\\_political\\_correctness\\_is\\_just\\_an\\_excuse\\_to\\_spew\\_his\\_nonstop\\_hate\\_speech/](http://www.salon.com/2015/12/13/donald_trumps_war_on_political_correctness_is_just_an_excuse_to_spew_his_nonstop_hate_speech/).

263. Tashkeel Ahmed Farooqi, *Islamophobia Driving American Muslims to Polling Booths in 2016*, The Express Tribune (Feb. 4, 2016), <https://tribune.com.pk/story/1040147/islamophobia-driving-american-muslims-to-polling-booths-in-2016/>.

264. CAIR, *supra* note 237.

265. Farooqi, *supra* note 263.

266. See Maya Rhodan, *Islamophobia Driving American Muslims to Vote in 2016*, TIME (Feb. 1, 2016), <http://time.com/4202673/muslim-voters-trump/>.

267. David A. Graham, *How Republicans Won and Then Lost the Muslim Vote*, ATLANTIC (Dec. 9, 2015), <http://www.theatlantic.com/politics/archive/2015/12/republicans-muslim-vote-george-w-bush-donald-trump/419481/>.

The shift by American Muslims away from . . . the Republicans—is dramatic, and the truest example of a backlash we’ve seen. This is virtually unprecedented.”<sup>268</sup>

This political sea-change among Muslim American voters evidences how the marked rise in legal and political Islamophobia since 9/11 has triggered a commensurate shift in the voting allegiance of Muslim Americans. As illustrated above, endorsement of Islamophobic ideas or framings are hardly the exclusive dominion of Republicans. Surveillance of Muslim Americans has been expanded under President Obama, dubbed by many as “the most liberal president ever,”<sup>269</sup> and counterterrorism programs are infiltrating local Muslim American geographies in unprecedented ways.

However, delivery is the primary distinction between the Islamophobia advanced by Republican and Democratic figures, the latter of which disguise programs built upon the fear and suspicion of Muslims with the rhetoric of tolerance and inclusion. The former, as luridly exhibited by the bellicosity of Trump and the polemical framings of Cruz, rely on in-your-face bigotry. As past polls and surveys consistently demonstrate,<sup>270</sup> the cloaked form of Democratic Islamophobia is far more preferable to Muslim Americans than the brazen chorus pushing Muslim bans or disavowing the possibility of a Muslim president coming from the right.

Writing in the *Washington Post*, Petula Dvorak rang the alarm against the intensifying climate of American Islamophobia:

The tone is actually worse than it was after the Sept. 11 attacks on our own soil. Registration by religion? Sounds like Nazi Germany, not a country with a First Amendment that enshrines freedom of religion . . . . The rhetoric dominating our nation right now is anything but civil. It’s time for all of us to put a stop to it.<sup>271</sup>

The call signals an emerging mainstream, non-Muslim front against Islamophobia which normalizes Muslim Americans as *Americans*, citizens deserving of constitutional protection, and indeed, as voters, whose political clout is expected to rise as the population steadily grows. Perhaps an influential and organized Muslim American political presence, more than any other mechanism, is the best line of defense against bombastic rhetoric, structural Islamophobia and escalating private violence.

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268. *Id.*

269. Chris Cillizza, *Is Barack Obama the Most Liberal President Ever?*, WASH. POST (Feb. 4, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/02/04/is-barack-obama-the-most-liberal-president-ever/?utm\\_term=.f76e4ab117ef](https://www.washingtonpost.com/news/the-fix/wp/2014/02/04/is-barack-obama-the-most-liberal-president-ever/?utm_term=.f76e4ab117ef).

270. Petula Dvorak, *Attacks on American Muslims are Growing Uglier by the Day. It Must Stop.*, WASH. POST (Nov. 23, 2015), [https://www.washingtonpost.com/local/attacks-on-american-muslims-are-growing-uglier-by-the-day-it-must-stop/2015/11/23/a55d99d8-91e9-11e5-b5e4-279b4501e8a6\\_story.html?utm\\_term=.4ca3504aa7c7](https://www.washingtonpost.com/local/attacks-on-american-muslims-are-growing-uglier-by-the-day-it-must-stop/2015/11/23/a55d99d8-91e9-11e5-b5e4-279b4501e8a6_story.html?utm_term=.4ca3504aa7c7).

271. *Id.*



## V. CONCLUSION

“The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affect[s] all their intercourse.”

Ross v. McIntyre, U.S Supreme Court (1891)<sup>272</sup>

“Sharia is a mortal threat to the survival of freedom in the United States.”

Herman Cain<sup>273</sup>

Islamophobia occupied center stage in the 2016 presidential race, and reasserted itself firmly within present-day, national-security policy and programs. On the Republican Party side, bellicose rhetoric against Islam and Muslims has been front-and-center in candidate debates, television interviews, and voter rallies, “explicitly challeng[ing] the notion that American Muslims deserve the same liberal notion of rights that other citizens enjoy.”<sup>274</sup> Indeed, the brazen Islamophobia emanating from the campaign is emblematic of rising fear of Islam, and animus of Muslims. But it is not unfolding within a historical, legal, or political vacuum.

Neither new in form nor novel in substance, the fearmongering mobilized by Donald Trump and the collective suspicion of Muslims driving CVE Policing are extensions of old and embedded tropes, which root the American Islamophobia on display today.<sup>275</sup> They are modern emanations of an ideological campaign that prohibited Muslims from becoming naturalized citizens from 1790 through 1944, and political pronouncements that flatly viewed Islam as a “warmongering faith” bent on decimating American democracy.<sup>276</sup> These are views that have withstood the test of time and that are incessantly deployed to reestablish the trope that Islam is inherently antithetical to American democracy, and Muslims presumptively subversive and suspicious.

Islamophobia is neither political rhetoric nor law alone. Rather, it is a cogent system and dialectic whereby the popular and political bigotry espoused by reactionary figures is informed, endorsed, and emboldened by judicial rulings and state policy. It is comprised of a coherent set of tropes about Islam and Muslims, which framed and still frame how the

272. 140 U.S. 453, 463 (1891) (addressing the applicability of U.S. law to foreign sailors on U.S. ships while in the territory of another country, and namely, regions where American sailors engaged with Muslims).

273. Peter Beinart, *The GOP's Embrace of Anti-Islamic Bigotry*, ATLANTIC (May 25, 2015), <http://www.theatlantic.com/politics/archive/2015/05/lindsey-graham-republican-islamophobia-2016/394070/>.

274. Ali, *supra* note 102, at 1050. Furthermore, demonization of Muslim Americans diminishes their “right to belong to some kind of organized community,” or part of the greater societal collectives, which diminishes their access to the substantive rights attendant with formal citizenship. Leti Volpp, *Citizenship Undone*, 75 FORDHAM L. REV. 2579, 2582 (2007).

275. SAID, *supra* note 14, at 7–19.

276. President John Quincy Adams contrasted the Christian view of the state of nature as “a state of peace” with the view that the “Mahometan law of nations . . . considered the state of nature as a state of war.” Reid v. Covert, 354 U.S. 1, 58 (1957).

state perceives the faith, polices Muslims beyond and within state bounds, and responds to the threat—either real or imagined—with the violent rhetoric of politicians jockeying for the highest seat in the land and the might of the state’s national-security arms.

While the hateful campaigning of politicians often trumps the less detectable suspicion of Islam and Muslims displayed on the left in terms of media coverage, both are forms of American Islamophobia that extend from legal and political roots planted centuries ago. Thus, unfolding American Islamophobia should not be framed as a break from American values and tradition.<sup>277</sup> Instead, it is a natural outgrowth of the fear and animus deeply rooted in a formative legal and political campaign, which seeded the pronounced Islamophobic imagination and religious profiling measures that prevail today.

Therefore, while the 2016 presidential race is broadly viewed as a moment marking the emergence of blatant and political Islamophobia, a more precise view is that it witnessed its full-fledged revelation and capitalization as an effective political tool. Islamophobia is a legacy that pervades American history, and as the 2016 presidential race becomes part of that history, it will surely continue within the American political arena.

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277. *Islamophobia Has a Long History*, *supra* note 90.