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40th Annual Symposium Articles

On Islamophobia, Immigration, and the “Muslims Bans”

KHALED A. BEYDOUN*

Anticipating that Hillary Clinton would win the Presidency, I had planned on giving an entirely different lecture based on my research investigating counterterrorism, which focused on national security programming that the Obama Administration implemented in the name of counter-radicalization. However, a different series of events has unfolded. Donald Trump won the Presidency, which shifted the focus of this lecture, and shifted the focus of much of my scholarship moving forward.

Therefore, I am going to talk about the Muslim ban, and specifically, these executive orders on immigration. Providing a broader kind of epistemological and legal context in which these bans emanate will essentially put us all on the same footing. It will enable us, I hope, to understand this culture of anti-Muslim animus that has existed in this country for quite some time.

My first couple of articles focused on the “Naturalization Era”—when immigrants from a wide range of different places across the world came to the United States and essentially had to persuade courts to grant them citizenship by performing “whiteness.”¹ “Whiteness” was a prerequisite for naturalized citizenship until 1952.² Thus, we are now seeing a reemergence of these standards in some regards, though not in a full-fledged per se fashion, but in a de facto fashion. Therefore, my discussion here is going to

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1. See Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 COLUM. L. REV. ONLINE 108, 122 n. 73 (2016).

2. See *id.*

grapple with the discursive understandings of what Islamophobia is, focusing on the general idea, as well as the general conceptions of Islamophobia across the country and in the media space obviously, where it has proliferated in terms of attention and recognition.

I am going to begin by examining my article published in the *Columbia Law Review*³ last year, which forwards or advances a legal definition and framework for understanding Islamophobia. Before the election of Donald Trump, legal literature and legal advocacy at large, was very cogent. There was a very organized structure in which we, as lawyers and law scholars, could understand Islamophobia in terms of its relationship with government institutions, policies, and programs. First, I want to talk about the ideological origins of Islamophobia. Islamophobia is typically, and incorrectly, framed as a novel form of animus, kind of a new form of violence that has just emerged with the success of the Trump campaign.⁴ However, if you really excavate and investigate American legal history, you will find this is not the case. Next, I will succinctly examine this history and link it with what is unfolding in the country today, with the election of Trump and the Islamophobic policies his administration is pushing forward.

I will then proceed with a discussion of the immigration orders: the Muslim ban specifically, as well as some of the other policies from the Trump Administration and previous administrations. I will finish with a snapshot of my current work, which focuses less on policies, laws, and programs coming from the state, shifting the focus onto Muslim-American and Muslim communities. I am investigating how these communities—which are more vulnerable under the current administration—are responding to the policies that are coming to the fore with the new administration.

To start off, Islamophobia is typically understood and reported to be a deviant and aberrational activity.⁵ However, this is hardly the case. Islamophobia is articulated to be irrational in the sense that it is performed solely by individuals who tend to be hatemongers, bigots, and violent culprits.⁶ This is the way that media and a bulk of the legal literature have

3. *See id.* at 111.

4. *See e.g.*, Rula Jebreal, *America's Embrace of Islamophobia is New—but Not Surprising*, THE GUARDIAN (Oct. 16, 2015), <https://www.theguardian.com/commentisfree/2015/oct/16/america-islamophobia-republicans-politics-trump-carson> (discussing how “[c]onservative rhetoric wasn’t always this Islamophobic . . .” in the context of the Ben Carson and Donald Trump campaigns).

5. *See* Wajahat Ali et al., *Fear Inc.: The Roots of the Islamophobia Network in America* 9, CTR. FOR AM. PROGRESS (Aug. 26, 2011), <https://cdn.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf> (describing the term “Islamophobia” to mean “an exaggerated fear, hatred, and hostility toward Islam and Muslims that is perpetuated by negative stereotypes resulting in bias, discrimination, and the marginalization and exclusion of Muslims from America’s social, political, and civic life.”).

6. *Id.* at 2, 9.

tended to frame it, up until recent time. Moreover, it is framed as activity by individuals that is not viewed as emblematic of activity that institutions at large—specifically, the government—take or advance.⁷ Do we not tend to sever Islamophobia from activity, policies, or stances taken by state actors? We tend to frame Islamophobic activities, behaviors, and perspectives as being tied and tethered to individuals—specifically, private actors.

Many definitions of Islamophobia have come to the fore, but have also been propagated by media, academics, and activists. So that if you read the broader academic literature, in addition to legal literature, you will find definitions that frame Islamophobia in this fashion. I tend to identify these definitions as being flat in nature, because, again, Islamophobia is perceived as an activity that is undertaken by private individuals entirely unlinked from the activity or policies of the state.⁸

Webster’s defines Islamophobia as, “irrational fear of, or aversion to, or discrimination against Islam or people who practice Islam.”⁹ Google defines it as, “dislike of or prejudice against Islam or Muslims.”¹⁰ A very popular definition is from the book *The Islamophobia Industry*, written by Nathan Lean.¹¹ Lean describes Islamophobia as a network of institutions, politicians, and pundits who work collectively to advance specific tropes of Muslims and of Islam to facilitate the successful enactment of policies that will favor specific political interests and agenda.¹² So, when I began writing this piece, I found that there was no consensus on a definition for Islamophobia.¹³ There was rigorous definition of Islamophobia that tied in how state actors, especially after 9/11—when we see a real emergence and a real structural shift in the way the national security state deals with Islam as a religion—shaped the broader attitudes of private actors and impacted their views or behaviors in relation to Islam.¹⁴ Moreover, there was no cogent, well-thought-out, rigorous definition for Islamophobia, even though you see a real proliferation of attention to Islamophobia in the legal literature.

7. Beydoun, *supra* note 1, at 112.

8. *Id.*

9. *Islamophobia*, MERRIAM-WEBSTER,

<https://www.merriamwebster.com/dictionary/Islamophobia> (last visited Aug. 21, 2017).

10. GOOGLE,

<https://www.google.com/search?q=google+definition+of+islamophobia&oq=google+definition+of+islamophobia&aqs=chrome..69i57j69i64.107740j0j4&sourceid=chrome&ie=UTF-8> (last visited July 6, 2017).

11. *See generally* NATHAN LEAN, *THE ISLAMOPHOBIA INDUSTRY: HOW THE RIGHT MANUFACTURES FEAR OF MUSLIMS* (2012) (explaining Islamophobia as a full-fledged industry, motivated by economic interests whereby individuals, media, think tanks, and other actors peddle fear and suspicion of Islam for monetary gain).

12. *See id.* at 183-84.

13. *See id.*; *see also* MERRIAM WEBSTER, *supra* note 9; *see also* GOOGLE, *supra* note 10.

14. Beydoun, *supra* note 1, at 112-14.

For instance, since August of 2017, the word “Islamophobia” is mentioned 351 times in law review articles, which demonstrates that there is serious interest.¹⁵ There is real intellectual curiosity and fixation on this term, and this phenomenon has been skyrocketing in recent times as a consequence of anti-Sharia legislations resulting from the Ground Zero mosque debate in 2011 and mostly as a consequence of the Trump campaign.¹⁶ Islamophobia has become a mainstream, household name as a consequence of the brazen, explicit rhetoric Trump and other candidates on the campaign trail were freely deploying in an attempt to resonate with voters and mobilize individuals—who had that specific understanding of Islam and Muslim.¹⁷ And still, there is no cognizable, well-structured definition. So it is my objective to define “Islamophobia” in relation to the law, and more so, how the law interacts with private actors in society.

So, I offer this definition in the piece: Islamophobia is, “the presumption that Islam is inherently violent, alien and inassimilable. . . . [driven by the belief] that expressions of Muslim identity are correlative with a propensity for terrorism.”¹⁸ Other scholars, Leti Volpp for instance, who wrote a really prominent piece after 9/11 called *The Citizen and the Terrorist*,¹⁹ talk about the redeployment of Orientalist tropes—Orientalism as a precursor for Islamophobia is forthcoming in this discussion. Volpp’s understanding and framing of Islamophobia, in the aforementioned article, really focuses on the idea that Muslims are this subset of individuals—both citizens and immigrants—that cannot be assimilated.²⁰ I take from that definition, but also extend it to give it greater relevance to what is happening today in the way we understand Islamophobia.

Above is my foundational definition. But, my definition also encompasses three different components: private Islamophobia, structural Islamophobia, and Islamophobia as a dialectic between private actors and state actors, which I call “dialectical Islamophobia.”²¹ I will discuss these more closely in a bit, but first I want to talk about the precursor for

15. A search of the term “Islamophobia” on Westlaw produced 351 law review and journal articles in which the term appeared at least once. Search for the term “Islamophobia”, WESTLAW, <https://1.next.westlaw.com>.

16. See Steve Rose, *Since 9/11, Racism and Islamophobia Remain Intertwined*, HUFFINGTON POST (Dec. 9, 2013), http://www.huffingtonpost.co.uk/steve-rose/911-racism-islamophobia_b_3908411.html (discussing how 9/11 has spurred a new wave of nationalism focusing on anti-Muslim rhetoric and hate crimes across the United States and Europe); see also Jabreal, *supra* note 4 (discussing the rise of Islamophobia as a result of Trump’s campaign rhetoric).

17. Beydoun, *supra* note 1, at 112-14.

18. *Id.* at 111.

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

20. See *id.* at 1594-95.

21. Beydoun, *supra* note 1, at 111.

Islamophobia: this system called, “Orientalism.” In his landmark book, published in 1979,²² Edward Said investigated a range of literature in the social sciences, humanities, the arts, etc., really grappling with the way Islam, specifically, is being framed and caricatured by intellectuals, artists, thinkers, scholars, and journalists from the West. Said names this system “Orientalism,” and he essentially divides the world into two broader spheres.²³ First is the Orient, meaning anything but the West.²⁴ The Muslim world is one of the core dimensions, as well as one of the more menacing dimensions of the Orient.²⁵ Second is the Occident, which stood for the West, specifically Europe and the United States.²⁶

Orientalism, as a theory, is a master discourse in understanding how Islam and Muslims are being understood and portrayed in prominent spaces, halls of power, and even the courts, here in the United States. In a previous article, *Between Muslim and White*,²⁷ I investigated how Orientalism was actually influencing how judges saw Arab and Muslim immigrants, who were coming to the United States during the Naturalization Era and petitioning for naturalized citizenship. For example, one of the prerequisites for becoming a naturalized citizen was to persuade the presiding judge that you were white.²⁸ Therefore, one of the presumptions that immigrants from this era immediately had, whether they were Muslim or not, was the idea that judges presumed immigrants were Muslim simply because they had come from the “Orient.”²⁹ It did not matter if you were a Christian, or if you belonged to a different minority faith—the immediate presumption was that any immigrant that came from the Middle East was Muslim, which was racialized, and the burden fell on these immigrants to persuade the court that they were not—in order to become naturalized.³⁰

22. EDWARD SAID, *ORIENTALISM* (1979).

23. *See id.* at 3. Specifically, Said stated:

Orientalism can be discussed and analyzed as the corporate institution for dealing with the Orient—dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it: in short, Orientalism as a Western style for dominating, restructuring, and having authority over the Orient.

Id.

24. *See id.* at 96 (“Orientalism assumed an unchanging Orient, absolutely different (the reasons change from epoch to epoch) from the West.”).

25. *See id.* at 60 (“The point is that what remained current about Islam was some necessarily diminished version of those great dangerous forces that it symbolized for Europe.”).

26. *See SAID, supra* note 22, at 4 (describing the Occident as being “British, French, or American” and having comparatively greater strength).

27. Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab-American Identity*, 69 N.Y.U. ANN. SUR. AM. L. 29, 35 (2014).

28. *See Beydoun, supra* note 1, at 122 n. 73.

29. *See Beydoun, supra* note 27, at 35.

30. *Id.* at 47-48.

So we see that early on in the Naturalization Era, from 1790 until 1942, that Islam was being both racialized and viewed as an identity characteristic that was antithetical to constructions of whiteness required for citizenship.³¹ Orientalism entrenched these ideas of Islam and Muslims as being inassimilable, violent, and warmongering—all these tropes really come to the fore again in the modern context of Islamophobia. The structural Islamophobic policies enacted after 9/11 and, namely, the PATRIOT Act,³² reenacted or extended by the Trump Administration rely on these tropes and these stereotypes to justify the strident actions they are taking against the Muslim communities—not only against immigrants, but also against citizens.³³

A law scholar by the name of Linda Bosniak writes about different dimensions of citizenship.³⁴ One dimension is symbolic citizenship: the idea that even though you hold formal citizenship status, perceptions of racial or religious identity can negate that status for specific communities, like the Muslim community.³⁵

To start off, there is private Islamophobia, the form of Islamophobia upon which scholars, journalists, and broad popular discussions of the term tend to focus.³⁶ Fear, suspicion, and violent targeting of Muslims, by individuals or private actors, is characterized as being irrational, deviant, and not symbolic of the broader culture of the country.³⁷ We can see this when individuals vandalize and burn mosques—the number of these incidences has skyrocketed recently.³⁸ The targeting of individuals who are conspicuously Muslim is another demonstration. Consider women who wear the hijab, for instance, or men who wear a beard and traditional Islamic garb. For instance, when I go to mosque, I typically wear what is called a thobe—a traditional Islamic dress—which might signify to the

31. *Id.* at 29-30, 44-45.

32. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.).

33. The presumption, even with Muslim Americans, is that Muslim identity essentially negates symbolic citizenship. See Tariq Modood, *Multiculturalism, Citizenship and National Identity*, OPENDEMOCRACY (May 17, 2007), https://www.opendemocracy.net/faith-europe_islam/multiculturalism_4627.jsp (discussing the obstacles faced by Muslims in Britain and around the world in the context of national identity and multiculturalism).

34. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 29-31 (2006).

35. *See id.* at 31.

36. Beydoun, *supra* note 1, at 111.

37. *See id.*; see also Ali, *supra* note 5, at 9.

38. Daniel Burke, *Threats, Harassment, Vandalism at Mosques Reach Record High*, CNN (Dec. 11, 2015), <http://www.cnn.com/2015/12/10/living/mosques-attack-study-2015/index.html>. This was the highest number since the Council on American-Islamic Relations began keeping track of such incidents in 2009. *See id.*

public that I am a Muslim, even though somebody like myself is ethnically and racially ambiguous when not wearing that kind of dress.

Private Islamophobia, therefore, exposes conspicuous Muslims (and non-Muslims, such as Sikh men) to animus and violence.³⁹ We saw this back in 2015, when three students at the University of North Carolina Chapel Hill were very brutally killed by an individual who held some strong anti-Muslim views and sentiments.⁴⁰

But, private Islamophobia, is only one dimension of the definition I advanced in my research. The second and most neglected form is structural Islamophobia. People have no idea that the state is actually partaking in Islamophobic activity—by way of the programs and policies it advances—because legal scholars and the media seldom, if ever, frame it as such.⁴¹ After 9/11, there has been a lot of focus in legal literature on the PATRIOT Act,⁴² specifically Countering Violent Extremism (CVE), but the analysis has not considered the Islamophobic nature of these policies.⁴³ However, in my definition, I include these policies as part and parcel of the broader campaign against Islam and define it as, “the fear and suspicion of Muslims on the part of institutions—most notably, government agencies—that is manifested through the enactment and advancement of policies.”⁴⁴

So, even though I am focusing mainly on the Trump Administration, Islamophobic policies were formally enacted, most acutely, through the War on Terror—the formal declaration of the War on Terror under President George W. Bush.⁴⁵ Islamophobia became more robust throughout the Bush administration with the creation of the Department of Homeland Security (DHS), which is the national security apparatus that still stands today.⁴⁶ The Department of Homeland Security centralized immigration.⁴⁷ It restructured and rejiggered immigration in response to the perceived Islamic

39. Beydoun, *supra* note 1, at 111-12.

40. Saeed Ahmed & Catherine E. Shoicet, *3 Students Shot to Death in Apartment Near UNC Chapel Hill*, CNN (Feb. 11, 2015, 11:30 PM), <http://www.cnn.com/2015/02/11/us/chapel-hill-shooting/index.html>.

41. Beydoun, *supra* note 1, at 114.

42. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.).

43. Beydoun, *supra* note 1, at 115-16.

44. *Id.* at 114.

45. See Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001) (granting the President the authority to do what is necessary to deter future terrorist attacks); see also *The Global War on Terrorism: The First 100 Days*, U.S. DEPT. OF THE STATE, ARCHIVE, <https://2001-2009.state.gov/s/ct/rls/wh/6947.htm> (last visited July, 18, 2017).

46. See generally 6 U.S.C. § 111 (2012) (establishing the executive Department of Homeland Security).

47. See *id.*; see also *DHS Rulemaking*, HOMELAND SECURITY, <https://www.dhs.gov/dhs-rulemaking#> (last visited July 18, 2017) [hereinafter *DHS Rulemaking*].

terror threat.⁴⁸ Islamophobia was strengthened again through the PATRIOT Act, which was obviously passed in the wake of 9/11.⁴⁹ The PATRIOT Act enabled surveillance of Muslim immigrants, Muslim Americans, Muslim religious institutions, and civic and community centers.⁵⁰

We see structural Islamophobia develop under the Obama Administration. Obama was championed as being a President who was more welcoming and more understanding in terms of his relationship with Muslim states and Muslim actors.⁵¹ Many of you may remember the speech he gave at the University in Cairo in 2009, six months after he was inaugurated as the forty-fourth President of the United States.⁵² He said really wonderful, laudatory things about Islam. For instance, he talked about how it was high time for the United States to mend the wounds of the Bush Administration, and that we were approaching this period of coexistence with the Muslim world and so on.⁵³ So, the rhetoric from Obama was great, right? Even though the rhetoric was great, a lot of Obama's policies were problematic and destructive to Muslim communities in the United States. He extended the National Security Entry Exit Registration System (NSEERS)—which has been identified as a precedent to the national Muslim registry that Trump has talked about, and made counter-radicalization his signature counterterrorism program.⁵⁴

You see Obama's destruction to Muslim communities shows most specifically in the program he enacted called "Countering Violent Extremism," which was the focus of much of my scholarship, before Trump's election.⁵⁵ Essentially, it is a national security strategy and surveillance program focusing on Muslim and Muslim-American communities as susceptible to being radicalized by terror networks like Al

48. See *DHS Rulemaking*, *supra* note 47.

49. See generally USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.); see also Beydoun, *supra* note 1, at 116.

50. See USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered section of U.S.C.).

51. See Gardiner Harris, *Obama, in Mosque Visit, Denounces Anti-Muslim Bias*, NY TIMES (Feb. 3, 2016), <https://www.nytimes.com/2016/02/04/us/politics/obama-muslims-baltimore-mosque.html?mcubz=0>.

52. *Text: Obama's Speech in Cairo*, NY TIMES (June 4, 2009), <http://www.nytimes.com/2009/06/04/us/politics/04obama.text.html>.

53. See *id.*

54. See Beydoun, *supra* note 1, at 117-18. Although officially dissolved in 2011, the regulations underlying NSEERS were dismantled by President Obama in 2016, partly as a result of Candidate Trump's promises of a "Muslim ban" based largely on NSEERS. See *id.*; see also Josh Gerstein, *Obama Pulls Regs that could have Fueled 'Muslim Registry' Under Trump*, POLITICO (Dec. 22, 2016), <http://www.politico.com/story/2016/12/obama-nseers-muslim-registry-trump-232916>.

55. See Beydoun, *supra* note 1, at 113; see also Khaled A. Beydoun, *Between Indigence, Islamophobia, and Erasure: Poor and Muslim in "War on Terror" America*, 104 CAL. L. REV. 1463, 1485-90 (2016) [hereinafter Beydoun, *Between Indigence*].

Qaeda or ISIS.⁵⁶ The program has been formally piloted in Boston, Los Angeles, and Minneapolis, but also in place—to some degree—in New York City, Maryland, and more.⁵⁷ In these cities the federal government, DHS, and other agencies, work closely with law enforcement to keep, and develop, relationships with institutions and individuals on the ground to monitor and gather data.⁵⁸ These agencies are essentially keeping tabs on individuals suspected of radicalization.

Then, the Trump Administration took office in January, and Trump has capitalized on what I call a full-fledged campaign strategy of Islamophobia. He talked about the Muslim ban freely; it was a cornerstone of his campaign.⁵⁹ The Muslim ban was one of his more prominent selling points that really resonated strongly with voters, so he made it the centerpiece of many of his speeches while he was speaking across the country.⁶⁰ I actually attended a couple of his rallies, in Michigan, just out of curiosity, and one thing that really struck me was that every time he talked about the Muslim ban, it would cause raucous applause—this uproar from the crowd. For me, this signaled that he was actually being strategic, deploying not only the rhetoric of Islamophobia, but also policy proposals like the Muslim ban as a way to win over voters. This strategy proved successful. In addition to the Muslim ban and the registry, Trump has also talked about expanding “Countering Violent Extremism,” which he plans on dubbing “Countering Islamic Extremism.”⁶¹ Trumps plans on implementing a more hardline approach to counter-radicalization than we saw under the Obama Administration.

The third dimension of my definition is “dialectical Islamophobia,” which focuses on the synergy between private actors on the ground and the state.⁶² What responsibility do these policies, these programs, and these laws have on endorsing tropes and stereotypes held by people on the ground? They shape them, in some respects, reshape them, and, during times of crisis, embolden the kind of hate and anti-Muslim violence we see

56. Beydoun, *Between Indigence*, *supra* note 55, at 1486-87.

57. See Jahnabi Barooah, *Most and Least Muslim States in America (Photos)*, HUFFINGTON POST (June 27, 2012), http://www.huffingtonpost.com/2012/06/27/most-and-least-muslim-states_n_1626144.html; see also Shelley Murphy, *Boston to Host Anti-Extremist Pilot Program*, BOSTON GLOBE (Sept. 24, 2014), <https://www.bostonglobe.com/metro/2014/09/23/boston-site-program-prevent-residents-from-joining-extremist-groups/YpEpq2cYvITZ6u8AFkbarL/story.html>.

58. See Murphy, *supra* note 57.

59. See Associated Press, *How Trump’s Plan to Ban Muslims Has Evolved*, FORTUNE (June 28, 2016), <http://fortune.com/2016/06/28/donald-trump-muslim-ban/>.

60. See *id.*

61. Mounir Al-Mawri, *Trump to Adopt ‘Countering Islamic Extremism’ Instead of Anti-Violence Program*, ASHARQ AL-AWSAT (Feb. 3 2017), <https://english.aawsat.com/mounir-al-mawri/world-news/trump-adopt-countering-islamic-extremism-instead-anti-violence-program>.

62. Beydoun, *supra* note 1, at 119.

unfolding specifically after times of crisis. It is visible when there is an attack committed by a nominal Muslim, like in the Orlando nightclub, or in the San Bernardino attacks.⁶³ But there is also a backlash when the culprit is not Muslim. It goes as far back as the Oklahoma City bombing in 1995, which involved a white male (Timothy McVeigh), and continues with the more recent attacks that have involved white males.⁶⁴ There is still this notion that the responsibility for all terrorist attacks is a burden that all Muslims must carry.

Islamophobia is a dialectic that the state uses to shape, reshape, and confirm popular views and stereotypes about Islam. Through the dialectical dimension we see how the revamped policies and the intensifying rhetoric of Islamophobia, in recent times, have led to a frightening uptick in hate crimes against Muslims and Muslim institutions. In 2015, there were sixty-three incidents of anti-Muslim bigotry and violence directed at mosques around the United States.⁶⁵ There was a seventy-eight percent increase in hate incidents in 2016—the highest number since the immediate wake of 9/11.⁶⁶ Further, there is an uptick in the number of anti-Sharia law protests and rallies happening in communities like Detroit, Orange County, Patterson, New Jersey, Astoria, and so on—anywhere there is a sizeable Muslim community.⁶⁷ So, these protests and rallies have to be viewed, in large part, as a consequence of the policies and laws that have come into play, along with the rhetoric coming from high-ranking statesmen—and stateswomen as well.

Finally, Islamophobia is a global phenomenon. It is not a phenomenon to be understood specifically in American terms and from the specific or narrow criticism of American politics. Islamophobia is unfolding globally, and it is something that is intensifying as a consequence of the xenophobic populism we see in many countries. Look at France, look at England.

63. See Lizette Alvarez & Richard Pérez-Peña, *Orlando Gunman Attacks Gay Nightclub, Leaving 50 Dead*, NY TIMES (June 12, 2016), <https://www.nytimes.com/2016/06/13/us/orlando-nightclub-shooting.html>; see also Michael S. Schmidt & Richard Pérez-Peña, *F.B.I. Treating San Bernardino Attack as Terrorism Case*, NY TIMES (Dec. 4, 2015), <https://www.nytimes.com/2015/12/05/us/tashfeen-malik-islamic-state.html>.

64. *Oklahoma City Bombing*, HISTORY, <http://www.history.com/topics/oklahoma-city-bombing> (last visited July 18, 2017).

65. See Burke, *supra* note 38.

66. Laura Pitter, *Hate Crimes Against Muslims in US Continue to Rise in 2016*, HUMAN RIGHTS WATCH (May 11, 2017 6:27 PM), <https://www.hrw.org/news/2017/05/11/hate-crimes-against-muslims-us-continue-rise-2016>.

67. See Beth Dalbey, *Anti-Sharia Rallies Met by Counter-Protestors Across US (UPDATES)*, DETROIT PATCH (June 11, 2017), <https://patch.com/michigan/detroit/anti-sharia-rallies-muslim-leaders-across-u-s-brace-conflict> (discussing anti-Sharia protests occurring across twenty states including New York, Illinois, Minnesota, Michigan, Pennsylvania, Florida, and California, among others).

Islamophobia helped fueled Brexit.⁶⁸ You also see it in Canada in many respects.⁶⁹ Many countries that have sizeable Muslim communities use scapegoating, fear-mongering and the language of Islamophobia to mobilize voters, to advance political movements, and to claim governmental seats with political influence.

France is an interesting case study, because in France, there was full-ledged prohibition of specific expressions of Muslim identity. There was the headscarf ban in 2004,⁷⁰ the niqab ban in 2010,⁷¹ and so on. France does not have the same constitutional protections as the United States. There is no free exercise of religion safeguard, for instance. The French have this general idea or principle called “laïcité,” which means that the state essentially enshrines secularism and does not have the responsibility to accommodate specific expressions of religious identity.⁷² Laïcité enables the more strident, per se restrictions against Muslim identity that are, theoretically, not likely here in the United States.⁷³

That brings us to discussion of the specific policies Trump may push forward, or has already advanced.⁷⁴ The Trump Administration has proposed and has contemplated additional policies, including the Muslim Brotherhood bill, which would essentially classify the Muslim Brotherhood as a terrorist organization.⁷⁵ This classification could have serious effects on Muslim-American civic and political activity here in the United States because of perceived relationships with the Muslim Brotherhood abroad. Then, there is the Muslim registry that Trump has also discussed along with

68. Miqdaad Versi, *Brexit has Given Voice to Racism—and Too Many are Complicit*, THE GUARDIAN (June 27, 2016), <https://www.theguardian.com/commentisfree/2016/jun/27/brexit-racism-eu-referendum-racist-incidents-politicians-media>.

69. “Since the election of Donald Trump in November [of 2016], many have accused the U.S. president of inciting hatred and fear in Canada But Islamophobia has been an issue here in Canada, long before Donald Trump.” See Adrienne Martin, *Wake Up Canada, Islamophobia is Not New to this Country*, HUFFINGTON POST (Feb. 21, 2017), http://www.huffingtonpost.ca/adrienne-martin/islamophobia-motion-canada_b_14893324.html.

70. See Caroline Wyatt, *French Headscarf Ban Opens Rift*, BBC NEWS (Feb 11, 2004 10:26 AM), <http://news.bbc.co.uk/2/hi/europe/3478895.stm>.

71. *French niqab ban: Beneath the veil*, THE GUARDIAN (July 14, 2010 7:06 PM), <https://www.theguardian.com/commentisfree/2010/jul/15/france-niqab-veil-ban-law>.

72. Audie Cornish, *French Law ‘Laicite’ Restricts Muslim Religious Expression*, NPR (March 4, 2015 4:26 PM), <http://www.npr.org/2015/03/04/390757722/french-law-laicite-restricts-muslim-religious-expression>.

73. See *id.*

74. See Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017), *revoked by* Exec. Order No. 13780, 82 Fed. Reg. 13209 (March 6, 2017); see also Exec. Order No. 13780, 82 Fed. Reg. 13209 (March 6, 2017).

75. Muslim Brotherhood Terrorist Designation Act of 2017, H.R. 377, 115th Congress (2017-2018).

the skyrocketing climate of hate crimes.⁷⁶ This increase in hate crimes is a consequence of the rhetoric we see coming from the White House.⁷⁷

The first Muslim ban, which was signed into law January 27, 2017, restricted travelers from seven countries from entering the United States.⁷⁸ Remember that this ban, although intended to prohibit the entry of visa holders from these states, also led to the denial of entry of green card holders.⁷⁹ So, there were a couple of days where this ban detrimentally impacted lawful permanent residents and green card holders.⁸⁰ And then, remember that there was a serious challenge to this ban on grounds that it violated the Establishment Clause by specifically targeting Muslim countries.⁸¹ The resulting debate was whether it could really be called a Muslim ban or not. The seven states that were listed in the ban were predominantly Muslim majority countries.⁸² The initial order had an exception for individuals, from these countries, who could persuade the United States that they were, in fact, not Muslim.⁸³

Rather than appealing to the Supreme Court after the Ninth Circuit issued a national stay on the first ban, Trump re-sketched the travel ban and came up with the second iteration—which is more clever in the way it is framed.⁸⁴ The second ban focuses less on religious identification, and more on national identification.⁸⁵ One major reform, with the second iteration, is a description of the six states.⁸⁶ Iraq was dropped from the original list of

76. Abby Phillip & Abigail Hauslohner, *Trump on the Future of Proposed Muslim Ban, Registry: 'You know my plans'*, WASH. POST (Dec. 22, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/?utm_term=.93c5a7019817.

77. “Since Trump entered the White House, mosques have been vandalized and even set on fire, a prominent Muslim civil rights leader has been threatened with physical assault, and Muslim university students have been targeted with racist fliers and propaganda.” Carol Kuruvilla, *Anti-Muslim Hate Crimes Are Spiking in the U.S. Donald Trump Won't Speak Up*, HUFFINGTON POST (Feb. 27, 2017), http://www.huffingtonpost.com/entry/trump-islamophobia-anti-semitism_us_58b08debe4b0780bac2938b4.

78. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017), *revoked by* Exec. Order No. 13780, 82 Fed. Reg. 13209 (March 6, 2017).

79. “The US government will not automatically allow green card holders who traveled to countries placed under a temporary travel ban back into the United States . . .” Pamela Brown & Eli Watkins, *Green Card Holders from Trump-Restricted Countries May Not be Allowed into US*, CNN (Jan. 29, 2017), <http://www.cnn.com/2017/01/28/politics/green-card-donald-trump-travel-ban/index.html>.

80. See Charlotte Alter, *'We Don't Want to Risk It.' Some Green-Card Holders Fear Leaving the U.S. Under Trump's Travel Ban*, TIME (Feb. 02, 2017), <http://time.com/4657029/donald-trump-immigration-ban-green-card-travel/>.

81. *Hawaii v. Trump*, 859 F.3d 741, 755 (9th Cir. 2017).

82. See Exec. Order No. 13780, 82 Fed. Reg. 13209 (March 6, 2017).

83. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017), *revoked by* Exec. Order No. 13780, 82 Fed. Reg. 13209 (March 6, 2017).

84. See Exec. Order No. 13780, 82 Fed. Reg. 13209 (March 6, 2017).

85. See *id.*

86. See *id.*

seven.⁸⁷ There is now a description of each state and the specific political threat each state poses, which, according to the Trump Administration, would circumvent or weaken the Establishment Clause challenges against the order, but again, a Hawaii federal court put a restraining order on the second ban as well.⁸⁸

So how do these orders, these bans, this surveillance, and so on, specifically impact Muslims and Muslim-American communities? My article, *Acting Muslim*, which will be published in the next volume of the *Harvard Civil Rights and Civil Liberties Law Review*,⁸⁹ engages identity performance theory to frame and analyze how Muslims in the U.S. are responding to this heightened structural Islamophobia emanating from the state. *Acting Muslim* builds on the scholarship of individuals like Kenji Yoshino, who wrote a really influential piece called *Covering*,⁹⁰ Devon Carbado and Mitu Gulati, authors of *Working Identity*,⁹¹ and Nancy Leong, author of *Identity Entrepreneurship*.⁹² In *Acting Muslim*, I try to extend the focus of this body of scholarship by showing how Muslim Americans are responding to the suspicion of being a threat to the state.⁹³ Muslims are negotiating how they express their religious identity today because conspicuous expressions raise suspicion of being perceived as a threat to the state.⁹⁴ In doing this, Muslim Americans are trying to diminish the collateral backlash from private actors and the prospect of surveillance and suspicion from the state.⁹⁵ So, I define “Acting Muslim” as “the process by which Muslim Americans strategically negotiate and publicly perform a religious identity stigmatized by counterterrorism policy.”⁹⁶

Part of this project was constructing a framework, a typology, to understand how Muslim-Americans were responding to the animus from the state, as well as the backlash from private actors.⁹⁷ There are four principal forms of acting Muslim:⁹⁸ confirming Islam, conforming Islam, covering

87. *See id.*

88. *See id.*

89. Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. (forthcoming 2017) (manuscript at 1) (on file with the Harvard Civil Rights and Civil Liberties Law Review).

90. *See generally* Kenji Yoshino, *Covering*, 111 YALE L. J. 769 (2002).

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

92. *See generally* Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333, 1334 (2016) (discussing the process by which out-group individuals (minorities, women, and so on) negotiate their identities in order to attain personal benefit).

93. Beydoun, *supra* note 89, at 5-6.

94. *See id.* at 5.

95. *See id.* at 5-6.

96. *Id.* at 5.

97. *See id.* at 7.

98. Beydoun, *supra* note 89, at 40.

Islam, and concealing Islam.⁹⁹ These are the four primary modalities by which Muslim-Americans are responding to the state suspicion and the private backlash escalating in the country.¹⁰⁰

Confirming Islam is the identity-affirming expression of Muslim identity that comports with the Muslim-American actors' religious convictions and sense of self.¹⁰¹ An individual who chooses to confirm Islam is essentially saying, "I'm aware of what's going on. I know that, by virtue of me wearing a beard, by virtue of me praying in public, that suspicion is going to come my way. However, my decision is to affirm, confirm my religious identity, and freely exercise my faith in line with the First Amendment. I am going to freely exercise my religion, despite the kind of animus, despite the kind of backlash we're seeing happen in the country today."

And so, I analyze several case studies in the Article illustrating how a Muslim actor confirms his or her Islam. One case study focuses on praying in public, where an individual was fired by Star Taxi, in Orlando, as a consequence of a policy the company had in place—that if other cab drivers saw them praying while in public, they were obligated to report them.¹⁰² The employee was aware of the policy in question, that if he prayed in public he would likely be fired.¹⁰³ He, however, chose to confirm his faith and expose himself to termination.¹⁰⁴ This case is really interesting, because we see here how private actors, specifically corporations, essentially adopt the stereotypes and tropes we see from laws like the PATRIOT Act, CVE, and so on into their employment handbooks. As a collateral effect of these laws, corporations and private institutions are adopting the same baselines that we see in these anti-terror policies and laws.

The second type of acting Muslim I examine is conforming Islam.¹⁰⁵ This is when a Muslim-American actor reforms and assimilates a disfavored Muslim trait, expression, or one's identity at large in line with positive counter-terror stereotypes.¹⁰⁶ A really prominent piece, written by law scholar Karen Engle, published in the *University of Colorado Law Review*,¹⁰⁷ talks about the good versus bad Muslim binary, and how, after

99. *Id.*

100. *See id.*

101. *Id.* at 41.

102. *Id.*

103. Beydoun, *supra* note 89, at 42.

104. *See id.*

105. *Id.* at 45.

106. *Id.*

107. Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 61-62 (2004).

9/11, there was this responsibility that the state assigned to Muslims to effectively be good Americans and good Muslims. This “loyalty discourse” and pressure on behavior was driven by policy, political rhetoric, and the general burdens placed on Muslim Americans by the War on Terror. One way that many Muslims were doing so was by putting flags on their porches and businesses, and by under-performing or negating specific expressions of Muslim identity that people perceived as threatening, or suspicious.¹⁰⁸

In the piece, I focus on one Muslim American media personality, Saba Ahmed.¹⁰⁹ She is a conservative Muslim speaker who generally appears on conservative media outlets, like Fox News.¹¹⁰ Her strategy for conforming Islam was to transform her headscarf, which obviously carries with it a lot of negative stereotypes in the broader American imagination—specifically about Muslim women being subordinate, being powerless, idle, and so forth—into an article of clothing that would be perceived as patriotic by viewers.¹¹¹ So, she started wearing an American flag as a hijab, not only when she appeared on Fox News and other prominent media platforms, but also when she spoke in the community, when she came to conferences, when she went to mosque, and so forth.¹¹² This is a demonstration of how somebody would conform their Muslim identity—or conform Islam.

The third type, covering Islam, is conduct whereby a Muslim-American actor voluntarily tones down or hides a disfavored Muslim identity trait in order to mitigate or eliminate the stigma associated with that trait or expression.¹¹³ This is essentially a re-articulation of Yoshino’s covering.¹¹⁴ This modality here is when a Muslim is specifically looking to hide, diminish, or mitigate the threat attached with a specific expression of Muslim identity.¹¹⁵ A common form of covering Islam is actually to uncover. So, on the night of the election, when everybody realized that Trump was going to win, a young community activist began to contemplate the possibility of removing her headscarf.¹¹⁶ She was really frightened.¹¹⁷ She heard stories about her friends across the country. She has a lot of family in New York, and one of her cousins was attacked when she was walking into the subway because she wore a headscarf.¹¹⁸ Noura was a

108. *Id.* at 62-63.

109. Beydoun, *supra* note 89, at 46.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 49.

114. See Yoshino, *supra* note 90, at 780.

115. Beydoun, *supra* note 89, at 49.

116. *Id.* at 2-3.

117. *Id.*

118. *Id.* at 3.

young girl in the community who was really well-known. She was an activist and really pious. She decided a couple weeks after the election of Trump that she was going to remove her headscarf.¹¹⁹ She feared the possibility of that violence and that aggression coming her way.¹²⁰ So, covering Islam, for her, was to negate the one marker, the one kind of symbol that outed her to the public as being a Muslim.

And finally, concealing Islam, is a process whereby a Muslim-American actor trades in his or her Muslim identity for a non-Muslim identity within a specific setting, or the public sphere at large.¹²¹ Concealing Islam is synonymous with passing.¹²² Most people, as well as the passing literature, focus almost exclusively on racial passing. We hear about the historic accounts of African-Americans who phenotypically were able to pass—passing for access to jobs, passing for access to survival, passing for access to broad-based acceptance in society—because blackness was deemed inferior, or in some respects tied to chattel property. This phenomenon is also relevant to expression, or non-expression, of Muslim identity. Muslims will negate every conspicuous trait of Muslim identity and adopt a new identity, whether it be by the clothing they wear, or by the names they choose. It is quite common now for Muslims to actually change their names—from “Mohammed,” to “Michael,” for instance, on resumes. In *Acting Muslim*, I talk about an African-American Muslim woman who applied for job as Shaheeda Mohammed, but was not getting called back for interviews.¹²³ She changed her name, and in the span of a week was getting not only opportunities to interview, but also job offers.¹²⁴ So, deploying concealing Islam opens access a range of incentives.

Two more case studies in the piece are about two individuals—Sarah Hamdaoui, who changed her name to Sarah Harvard—“Harvard” being a surname that is very American in many regards—and Elhan—a Somali refugee who came to the United States after 9/11, who changed her name to Amy.¹²⁵ Amy essentially passes as an African-American woman in D.C.¹²⁶ These are some of the ways in which Muslims, both immigrants and Americans, are responding to the structural Islamophobia, and the private Islamophobia, that is rising to the fore at a really frightening clip under the Trump Administration.

119. *Id.*

120. Beydoun, *supra* note 89, at 3.

121. *Id.* at 53.

122. *Id.*

123. *Id.* at 51.

124. *Id.*

125. Beydoun, *supra* note 89, at 54, 56.

126. *Id.* at 56.