

# Faith in Whiteness: Free Exercise of Religion as Racial Expression

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*ABSTRACT: Faith in whiteness is the affirmation that religion remains forceful in shaping race and racial division. It is also the observation, born from formative contestations of racial exclusion and today's rising white populism, that central to the American experience is the conditioned belief that whiteness stands at the pinnacle of social citizenship. Whereby adhering to its tenets and conforming one's identity to it, maximizes enjoyment of rights and protection from private animus. Most saliently, and per the focus of this Article, faith in whiteness is a form of strategic identity performance. It is a daily ritual whereby adherents of stigmatized religions outwardly perform their religious identities against negative racial meanings ascribed to their faiths and re-perform it in the image of whiteness.*

*Rising white populism, anti-Semitism and xenophobia have made this phenomenon particularly pervasive today, and raised its stakes for adherents of stigmatized religions. As illustrated by the murders of the three Muslim students in Chapel Hill, North Carolina, in February of 2015, and more recently, the horrific shooting at the Tree of Life Synagogue on October 27, 2018, Free Exercise of Muslim and Jewish identity clashes with populist conceptions of whiteness, and in an increasingly polarized nation, expose those who outwardly express their religious identity to suspicion, animus and violence. In turn, incentivizing adherents of stigmatized religions to outwardly underperform their faith in order to stave off stigma, and enhance perceptions that they are white—or proximate to white—in order to attain the presumptions and privileges ascribed to whiteness.*

*This Article examines the intimate interplay between race and religion during a moment of emergent white populism and religious intolerance. By building off foundational social psychology and legal literatures examining identity performance, this Article also contributes a new framework theorizing how religious identity is negotiated and performed against racism, religious*

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*animus, and threats that blur them together. It then applies this framework to six contemporary case studies, illustrating the Free Exercise tradeoffs and racial stakes of faith in whiteness in action.*

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## I. INTRODUCTION

“I am for freedom of religion, & against all maneuvers to bring about a legal ascendancy of one sect over another . . . .” -*Thomas Jefferson*<sup>1</sup>

“America is a nation that lies to itself about who and what it is. It is a nation of minorities ruled by a minority of one—it thinks and acts as if it were a nation of white Anglo-Saxon Protestants.” -*Harold Cruse*<sup>2</sup>

Whiteness, in the American experience, is *worshipped* as if a religion. Since the opening acts of American history, immigrants and settlers petitioning for citizenship were tasked with *performing* whiteness—as if their lives were on the line—in civil courtrooms.<sup>3</sup> They staged every dimension of their identity, most notably their religious expression, into forms that would win over presiding, predominantly Protestant, judges. These immigrants knew exactly what the law ordained from 1790 until 1952: that whiteness stood as the exclusive passageway to naturalized citizenship.<sup>4</sup> Citizenship was the greatest prize of them all, and whiteness unlocked the gates to the benefits and bounty of the land.

These performances of whiteness continue today. They not only unfold within courtrooms and before judges but are acted out on every stage and sphere of American life. Particularly among members of “stigmatized faiths,”

1. Letter from Thomas Jefferson to Elbridge Gerry, FOUNDERS ONLINE (Jan. 26, 1799), <https://founders.archives.gov/documents/Jefferson/01-30-02-0451> [<https://perma.cc/4VKL-EFR6>].

2. HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL: A HISTORICAL ANALYSIS OF THE FAILURE OF BLACK LEADERSHIP* 456 (1967).

3. See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (Richard Delgado & Jean Stefancic eds., 2d ed. 2006) [hereinafter LÓPEZ, *WHITE BY LAW*] (analyzing the 52 naturalization cases during the “Naturalization Era,” the period from 1790 through 1952 when the law mandated whiteness as a prerequisite for naturalized citizenship).

4. See Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795). The Naturalization Act of 1790 limited citizenship to “any alien, being a free white person.” *Id.* § 1, 1 Stat. at 103.

formally classified as white by the state,<sup>5</sup> who negotiate their religious identities into routine, real-time performances in response to legal, political or popular *stigma* that ascribe racial meaning to their faith.<sup>6</sup> These acts aim to strategically enhance public perception that they are in fact white or close enough to its sacred bounds to stave off the adverse racial meaning ascribed to their faith.

These are everyday rituals. Performed day in and day out. Akin to prayers mandated by scripture or ordained by divine code, these *religious* performances are acted out by Muslim Americans facing War on Terror perils and the rising tide of Islamophobia; Jewish Americans, marred by the memory of denied whiteness by the very same strand of anti-Semitism proliferating today; and Christians of Middle Eastern or North African origins seeking to affirm their formal whiteness for all to see.<sup>7</sup>

The prevalence, and stakes, of these religious identity performances are increasing in response to rising white populism. Demographic shifts toward a majority-minority America,<sup>8</sup> the declining population of white Christians and the country's "changing religious identity,"<sup>9</sup> and the accompanying fears of the *End of White America*,<sup>10</sup> have emboldened religious zeal and animus to

5. This Article will refer to religious traditions and groups historically and presently cast with negative stereotypes as "stigmatized religions," adopting the definition of "stigma" crafted by the social psychologist Erving Goffman: "[t]he situation of persons who are . . . [d]isqualified from full social acceptance." ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 5 (1963) [hereinafter GOFFMAN, *STIGMA*].

6. A range of scholars, and most prominently, anthropologist Saba Mahmood, have referred to this phenomenon of assigning racial meaning to expressions of faith as the "racialization of religion." Saba Mahmood, *Religious Reason and Secular Affect: An Incommensurable Divide?*, 35 *CRITICAL INQUIRY* 836, 851 (2009) (providing a contemporary analysis of the racialization of Islam).

7. By "formal," I am referring to the U.S. Census Bureau's designation of people from North Africa and the Middle East as white. See *infra* Section II.A (examining the formal classification of whiteness).

8. See William H. Frey, *The US Will Become 'Minority White' in 2045, Census Projects: Youthful Minorities Are the Engine of Future Growth*, BROOKINGS (Mar. 14, 2018), <https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects> [<https://perma.cc/TPH2-EQL2>] (citing U.S. Census population projections by the year 2045 that "confirm the importance of racial minorities as the primary demographic engine of the nation's future growth").

9. ROBERT P. JONES & DANIEL COX, PUB. RELIGION RESEARCH INST., *AMERICA'S CHANGING RELIGIOUS IDENTITY: FINDINGS FROM THE 2016 AMERICAN VALUES ATLAS* 7 (2017), available at <https://www.prrri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf> [<https://perma.cc/57DV-VMNM>] ("The American religious landscape is undergoing a dramatic transformation. White Christians, once the dominant religious group in the U.S., now account for fewer than half of all adults living in the country . . . [O]nly 43% of Americans identify as white and Christian, and only 30% as white and Protestant. In 1976, roughly eight in ten (81%) Americans identified as white and identified with a Christian denomination, and a majority (55%) were white Protestants.").

10. For a compelling article written nearly a decade ago that foreshadows the rise of white populism unfolding today, see Hua Hsu, *The End of White America?*, ATLANTIC (Jan. 2009),

frightening pitches. This zeal and accompanying racism has fed swelling white populism, propelling the likes of Donald Trump into the presidency<sup>11</sup> and pushing blatant calls for white supremacy from the margins of society into the mainstream of American politics and popular discourse.<sup>12</sup>

This proliferating white supremacy has been far more than *just talk*. This is illustrated most violently by the murders of three Muslim American students at the University of North Carolina at Chapel Hill<sup>13</sup> and the massacre of 11 Jewish Americans at the *L'Simcha* Congregation in Pittsburgh on October 27, 2018.<sup>14</sup> White populism trumpeted from the very top has authorized white supremacist violence on the ground. Indeed, these racial and white supremacist appeals are politically potent tools wielded to seize and sustain power, but their substance is deeply rooted and knitted into the very fabric of the American imagination. If whiteness is a religion ardently pursued and faithfully performed by those kept outside of its gates, then it also stands as a creed zealously defended by those clenching onto it as if it were theirs—and theirs alone. This very dialectic defines the fractured societal crossroads at which America currently finds itself. At a moment when whiteness occupies its sacred status at the crosshairs of power and privilege, disaffection and disenfranchisement are ardently pursued and protected along the blurred lines of race and religion.<sup>15</sup>

<https://www.theatlantic.com/magazine/archive/2009/01/the-end-of-white-america/307208> [https://perma.cc/LZ4X-YQ2A].

11. See Meghan Keneally, *Donald Trump Captures Presidency in Historic and Stunning Upset of Hillary Clinton*, ABC NEWS (Nov. 9, 2016, 2:41 AM), <https://abcnews.go.com/Politics/donald-trump-president-elect-clinton-concedes-historic-contest/story?id=43369466> [https://perma.cc/L2JR-NVDR].

12. The prolific rise of *Breitbart News* in recent years, for example, and openly white supremacist sites like *Stormfront*, illustrate the shift of white supremacist *news* and discourses into the mainstream. See, e.g., BREITBART NEWS, <https://www.breitbart.com> [https://perma.cc/7JPX-2K3L]; STORMFRONT, <https://www.stormfront.org/forum/index.php> [https://perma.cc/R55B-NKCY]. The rise of *Breitbart News* was most vividly illustrated by Trump appointing its head, Stephen Bannon, to serve as his chief campaign strategist during the 2016 presidential election. See Jonathan Martin et al., *Donald Trump Appoints Media Firebrand to Run Campaign*, N.Y. TIMES (Aug. 17, 2016), <https://www.nytimes.com/2016/08/18/us/politics/donald-trump-stephen-bannon-paul-manafort.html> [https://perma.cc/NW4C-2KVD] (“Mr. Trump’s decision to make Stephen K. Bannon, chairman of the Breitbart News website, his campaign’s chief executive was a defiant rejection of efforts by longtime Republican hands . . .”).

13. *Three Muslim Students Killed at North Carolina Campus*, AL JAZEERA (Feb. 11, 2015), <https://www.aljazeera.com/news/2015/02/students-murdered-university-north-carolina-campus-150211093231033.html> [https://perma.cc/LJ2Z-AMJ5].

14. Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> [https://perma.cc/6W44-MYNA].

15. Race is a social construct, made and remade in line with prevailing stimuli and interests. As defined by law scholar Ian F. Haney López, “race constitutes a socially and legally produced hierarchical system structurally embedded in U.S. society.” Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 990 (2007) [hereinafter López, *Nation of Minorities*] (footnote omitted).

With regard to religion and race, there are indeed two Americas. The aspirational America enshrined in law: extending everybody the right to freely exercise his or her faith,<sup>16</sup> and establishing formal racial classifications that are facially equal and un-stratified. On the other hand is the *American experience*: where race and religion converge and, for stigmatized communities, fiercely collide. Since their inception, and again today, political and popular discourses have cast specific expressions of religious identity as vile or violent, inassimilable or encroaching on the sanctity of whiteness. Free exercise of stigmatized faiths elicits the assignment of racial meanings inimical to whiteness, and so the harsh realities of racial stigma undo the liberty promised by law.

By theorizing how free exercise is negotiated as a means of racial identity expression, this Article zeroes in on the dissonance between the aspirational and experiential Americas for adherents of stigmatized religions. These subjects, formally classified as white by the state but simultaneously “raced” as non-white by popular or political stigma,<sup>17</sup> are pressured by stigma to express their religious identities in ways that under-perform and outwardly deemphasize their bona fide faith, and in turn, affirm their whiteness. For these individuals, religious identity is read as racial identity; presenting oneself as *not Muslim*, *not Jewish*, or Christian enables the possibility of being perceived as white. Religious performances that, as they did long before, have deep racial meaning.

This dialectic between religion and whiteness is deeply rooted in the grand American racial narrative. Under-performance of stigmatized religion during the Naturalization Era, when whiteness was a *per se* prerequisite for citizenship, maximized an immigrant’s prospect of becoming a naturalized citizen.<sup>18</sup> Today, these very performances in the real world enable adherents of stigmatized religions to garner greater access to the substantive presumptions and privileges of whiteness. Presumptions and privileges that, on a national stage where white populism is summoning the most virulent strains of anti-Semitism and Islamophobia, include mitigating suspicion, safety, and mere survival.

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16. The First Amendment religious clauses mandate that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

17. Race is the product of racial formation, commonly referred to as *racialization*. Racialization is defined “as an unstable and ‘de-centered’ complex of social meanings constantly being transformed by political struggle.” MICHAEL OMI & HOWARD WINANT, *RACIAL TRANSFORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 55 (2d ed. 1994). Racialization is a fluid and never-ending process, steered by a (changing) set of criteria that includes physical complexion, geographic origins, ancestry, biology, political or social stimuli, and variably, religion. *See id.* at 71.

18. *See generally* LÓPEZ, *WHITE BY LAW*, *supra* note 3 (analyzing the 52 naturalization cases during the “Naturalization Era,” the period from 1790 through 1952).

“Faith in Whiteness” seeks to call the dialectic between religion and whiteness into contemporary question. First, faith in whiteness is the contention that religion remains a potent catalyst in shaping race and racial classifications today. Prevailing legal literatures that examine race and religion tend to isolate the two as if they are wholly distinct ideas.

Second, faith in whiteness is the observation, spawned by analysis of American racial history and rising populism today, that central to the American experience is the conditioned belief that whiteness stands as the pinnacle of social citizenship.<sup>19</sup> Whiteness poses, and functions, as if it is a religion. It promises individuals who adhere to its tenets and conform their identity to its archetypal mold that they too can attain its greatest earthly rewards—or, otherwise, that they will face the damning stigmas imposed by being cast as non-white. Therefore, faith in whiteness is a process that stands in the way of religious liberty, and pulls adherents of stigmatized religions away from unfettered Free Exercise liberty and toward whiteness.

Therefore, and most saliently, faith in whiteness is religious identity performance. And more specifically, a daily ritual whereby adherents of stigmatized religions exercise and perform their religious identities against negative racial meanings assigned to their faith by law, political and popular discourses, and in the image of whiteness to stave off the stigma ascribed by these currents.

Beyond theory, this Article hones in on the psychological negotiations that routinely impact genuine enjoyment of Free Exercise of Religion rights. And thus, faith in whiteness, as process, broadens our understanding of legal doctrine by revealing that religious liberty, for adherents of stigmatized religions, is regulated by more than just state action. By theorizing faith in whiteness and applying it to a set of contemporary case studies, this Article illustrates that currents of stigma emitted by law, as well as by political and popular discourses, impair Free Exercise by pulling individuals away from their preferred mode of religious expression for the trade-off of staving off stigma. Through six case studies, arising from interviews and secondary sources, this Article presents how adherents of stigmatized religions negotiate their religious identities in line with the incentives extended by perceived whiteness, or opt to freely exercise their faith against currents of stigma.

This Article will proceed in four parts. Part II examines the myriad meanings of whiteness. It juxtaposes the formal definitions crafted by the Office of Management and Budget (“OMB”) with the practical definitions

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19. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 30 (2d ed. 2008) (“[P]ossession of formal citizenship status often fails to protect people from exclusion and violence directed at those perceived to be ‘foreign’ in character, habit, or appearance.”). While formal citizenship extends the “right to have rights,” social or substantive citizenship measures access to and enjoyment of the rights of formal citizenship. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (1st ed. 1951).

developed by formative political discourses and imposed by private actors today.

Part III analyzes the tension between stigma and Free Exercise. It analyzes how religious exercise is regulated by the state and *self-regulated* by the individual in response to state action, and political and popular stigma. This Part will also investigate the racialization of religion in the United States, and the formative racialization of whiteness in the image of its religious hallmark, Christianity; and *against* the image of stigmatized religion.

Part IV theorizes performance of religious identity, building off foundational social psychology and legal literatures. Next, this Part establishes a typology and nomenclature for examining how adherents of stigmatized religions negotiate, and perform, their religious identity toward and away from whiteness.

Part V applies the theory developed in Part IV to six contemporary case studies involving adherents of stigmatized religions. It examines how individuals confirm religious identity in the face of stigma, or conform, cover, or conceal their religious identity in pursuit of the safe haven extended by being perceived as white.

## II. VALUING WHITENESS

Whiteness is invaluable. It opens doors to endless opportunity, comes with a host of privileges and glittery presumptions, and ranks those who possess it at the top of the American racial caste.<sup>20</sup> It is an exclusive club coveted by those standing close to its gates and far from its bounds. Whiteness promises those admitted inside a majority of the slate of rights routinely denied or only partially extended to those kept on the outside.

More than a formal status or a legal designation, whiteness is an *experience*.<sup>21</sup> And namely, an experience measured by the realization and enjoyment of these rights. Undergirding these rights is the assurance and psychological comfort that the state exists to ensure that these rights are delivered, instead of it imposing itself in a manner that takes the rights away. In her landmark treatise, *Whiteness as Property*, law scholar Cheryl Harris argued that whiteness is a property interest that confers tangible economic, social, psychological and political benefits to those possessing it.<sup>22</sup> In other

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20. See Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 301 (2017) [hereinafter Beydoun & Wilson, *Reverse Passing*].

21. Racial philosophy scholar Linda Martín Alcoff describes whiteness as “[an] historically emergent lived experience, variegated, changing and changeable. Being white is a powerfully important element in one’s life, just as is not being white.” LINDA MARTÍN ALCOFF, *THE FUTURE OF WHITENESS* 8 (2015).

22. Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1725–26 (1993). Harris’s work is a trenchant articulation of Justice Henry Brown’s dicta in *Plessy v. Ferguson*, where he writes, “the reputation of belonging to the dominant race, in this instance the white race, is ‘property,’ in the same sense that a right of action, or of inheritance, is property.” *Plessy v.*



words, “Whiteness has been a source of value throughout our history, conferring power and privilege on the possessor.”<sup>23</sup> Being white, or perceived as such, is an invaluable status property that opens a pathway to first-class citizenship,<sup>24</sup> and the possibility of holding onto it amid the turbulent social tides and shifting racial order.

#### A. FORMAL WHITENESS

This Section examines the construction of whiteness as a formal classification. Since its creation in the eighteenth century, whiteness as a legal idea—which I label “formal whiteness”—has been defined and administered by various state actors. First, whiteness was ambiguously defined by the legislature and materially shaped by civil court judges during the racially restrictive Naturalization Era that lasted from 1790 until 1952. Today, the OMB holds authority over defining race and making racial classifications, in conjunction with another Executive Branch agency, the U.S. Census Bureau.

##### 1. Whiteness As Citizenship

In 1790, Congress broadly demarcated “free white person[s]” as the class of people that could become naturalized citizens of the fledgling nation.<sup>25</sup> The vague definition left it up to civil court judges to determine who fit—and did not fit—within the statutory definition. This “Era of Top-Down Racial Assignment,”<sup>26</sup> where civil court judges employed a range of tests to assess the racial identity of petitioners vying for citizenship, lasted until 1952.

During this period, whiteness was wholly conflated with citizenship.<sup>27</sup> It stood as a *per se* prerequisite, placing the burden on petitioners to prove to presiding judges that they were white by way of making appeals resting on geographic or ancestral origin, physical appearance, and very often, religion.<sup>28</sup> And second, the factual and legal claims made by the petitioners were accompanied by the most compelling *bodies* of evidence, their very

Ferguson, 163 U.S. 537, 549 (1896) (Brown, J., dissenting), *overruled* by *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

23. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2154 (2013) [hereinafter Leong, *Racial Capitalism*].

24. BOSNIAK, *supra* note 19, at 19–20.

25. See Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795).

26. Beydoun & Wilson, *Reverse Passing*, *supra* note 20, at 304–06.

27. African Americans were the lone exception. The Thirteenth Amendment abolished slavery and extensive formal citizenship to African Americans, despite being practically relegated into second and third-class citizens. See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude . . . shall exist within the United States . . .”).

28. See generally Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29 (2013) [hereinafter Beydoun, *Between Muslim and White*] (analyzing the ten naturalization cases involving immigrants of the Arab world, where religion stood as the most determinative factor for presiding judges assessing the whiteness of the immigrant-petitioners).

physical appearance, and the performances they staged to persuade the presiding judges that they fit within the statutory definition of whiteness.<sup>29</sup>

If the judge was convinced, the petitioner would be ruled white and thus be eligible for citizenship. However, if the judge deemed the petitioner's appearance or identity to be beyond the statutory bounds of whiteness, the petitioner would return to the purgatory of lawful residency without the prospect of citizenship.<sup>30</sup> Law scholar Hiroshi Motomora described this status as being an "American[] in waiting,"<sup>31</sup> with no imminent prospect of becoming a naturalized citizen until or unless the mandate of whiteness was dissolved. From behind the bench, judges came to their conclusions by arbitrarily referring to a motley assortment of criteria—from physical appearance to eugenics science, geographic origins to religion—to give substance to the legislature's charge of "free white persons."

More than merely assessing the whiteness of the immigrant-petitioners coming before them, judges were in fact *making race* and devising racial categories, oftentimes, arbitrarily and on the fly. In 1922, the Supreme Court presided over its first naturalization petition involving a Japanese Christian resident of California.<sup>32</sup> The Court, in *Ozawa*, and a year later in *Thind*,<sup>33</sup> adopted the "common knowledge test" to assess who fit within the statutory definition of whiteness, asking itself whether the average American, by physical assessment of the immigrant, would consider him or her white.<sup>34</sup>

## 2. Modern Racial Order

The McCarran–Walter Act, enacted on June 27, 1952,<sup>35</sup> dissolved the 162-year era whereby whiteness stood as a mandate for citizenship, and dissolved the formal authority judges held over race and racial classifications. The dissolution of the Naturalization Act of 1790 brought down the curtain

29. See generally LÓPEZ, *WHITE BY LAW*, *supra* note 3 (analyzing the 52 naturalization cases during the "Naturalization Era," the period from 1790 through 1952).

30. As noted by Nancy Leong, "nonwhiteness was used as a basis for *withholding* value by denying nonwhite people legal rights and privileges." Leong, *Racial Capitalism*, *supra* note 23, at 2155.

31. HIROSHI MOTOMORA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 123 (2006). Motomora writes that the Naturalization Act of 1790 "entailed no obligation to naturalize, though many immigrants did take that next step and became citizens." *Id.* at 115–16.

32. *Ozawa v. United States*, 260 U.S. 178, 189, 198 (1922) (rejecting Takao Ozawa's petition for citizenship, even though he "resided in the United States for 20 years," attended the University of California-Berkeley, spoke perfect English, and exhibited every hallmark of cultural assimilation).

33. See generally *United States v. Thind*, 261 U.S. 204 (1923) (denying an Indian Sikh man's petition for citizenship based on his outward expression of religious identity, complexion, and overall appearance).

34. "Under a common knowledge approach, courts justified the assignment of petitioners to one race or another by reference to common beliefs about race." LÓPEZ, *WHITE BY LAW*, *supra* note 3, at 4.

35. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

on these in-court racial performances and shifted the responsibility to define whiteness from the Judicial to the Executive Branch. Whiteness was no longer a prerequisite for citizenship, but one of five racial classifications crafted by the OMB.<sup>36</sup> The Executive Branch, through the OMB and the U.S. Census, now held the constitutive power to “make and unmake” the formal bounds of racial identity.<sup>37</sup>

Entirely disentangled from citizenship, whiteness was facially stripped of its status marking legal superiority. And on paper, reduced to a designation defined largely along lines of geography and geographic origin. In 1977, the OMB defined whiteness as: “A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.”<sup>38</sup> In addition to the white category, the OMB crafted four additional classifications: American Indian or Alaskan Native; Asian or Pacific Islander; Black; and Hispanic.<sup>39</sup> These five classifications form the prevailing formal racial order.

The new formal order enabled individuals to racially self-identify. Law scholar Camille Rich refers to this as “elective race,”<sup>40</sup> which turned the Naturalization Era order on its head and extended a degree of freedom to individuals with regard to formal racial identification. However, strictures were also spawned by OMB classifications, in terms of the limited number of options and the failure of some classifications to represent the lived experiences of groups and subgroups. Segments within groups, like Arab or Armenian Americans, contended that they could not identify with—and had no place in—the existing racial classifications.<sup>41</sup>

Therefore, racial identification was only *elective* to the extent enabled by OMB racial categories.<sup>42</sup> A large number of groups were left out of the OMB categories, or in the case of North African and Middle Eastern Americans, curiously assigned,<sup>43</sup> and had little to no footing within the new formal order.

36. OFFICE OF MGMT. & BUDGET, DIRECTIVE NO. 15: RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (1977), *available at* <https://wonder.cdc.gov/wonder/help/populations/bridged-race/Directive15.html> [<https://perma.cc/FHL3-7C8U>] [hereinafter OMB DIRECTIVE 15].

37. See Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1702 (2003).

38. OMB DIRECTIVE 15, *supra* note 36.

39. *Id.*

40. Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1505 (2014) [hereinafter Rich, *Elective Race*] (coining the term “elective race” and defining it as “a time when antidiscrimination law is being asked to attend to the dignity concerns of individuals as they attempt to control the terms on which their bodies are assigned racial meaning”).

41. See JOHN TEHRANIAN, *WHITEWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY* 3 (2009), for a leading analysis of the legal and existential difficulties spawned by the formal classification of Middle Eastern population as “white” by law.

42. See *id.* at 26–34.

43. Although efforts were made to remove North African and Middle Eastern identity from the white designation and establish it as its own classification (Middle Eastern or North African,

Elective race posed existential and practical ultimatums for groups that “occupy the margins of [established] racial categories,”<sup>44</sup> on one hand, and on the other hand possess the ability to self-identify against stigma and in line with interests.

Law scholar Mari Matsuda calls it the “racial middle.”<sup>45</sup> How individuals, and particularly communities, occupying the racial middle identify has a considerable impact on their own interests,<sup>46</sup> but also on the legitimacy of the formal racial order itself. Matsuda articulates:

The role of the racial middle is a critical one. It can reinforce white supremacy if the middle deludes itself into thinking it can be just like white if it tries hard enough. Conversely, the middle can dismantle [whiteness] if it refuses to . . . buy into racial hierarchy . . . .<sup>47</sup>

For groups firmly lodged or situationally cast within the racial middle, the most determinative racial expressions are not what box they check off on a U.S. Census survey or a job application. But rather, most determinative is the racial meaning assigned to them by external actors, and the presumptions and privileges they reap—or are denied—based on these assigned racial meanings.

“Racial categories yield racial identities.”<sup>48</sup> And individuals occupying the racial middle may steer toward new realities based on how they identify, express, and perform their racial identities. Racial liminality within the prevailing formal racial order poses a range of challenges that, within a world where racial meanings are assigned if not wholly imposed, spurs those occupying the racial middle to perpetually be moving toward whiteness. Or, by confirming their genuine and distinct identity, moving away from it.

The assignment of racial meaning ascribed to religious identities, explained above, unfolds within this broader landscape where a racial hierarchy is firmly established. In a context where white populism and religious animus are rising, the aspiration to dismantle the hierarchy is oftentimes overpowered by the necessity to seek safe haven in aspirational whiteness.<sup>49</sup> This pursuit tacitly endorses the racial hierarchy, instead of seeking to resist it from within the racial middle.

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or MENA), this formal definition still stands today. For an analysis of the MENA proposal in relation to War on Terror policy, 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).

44. Rich, *Elective Race*, *supra* note 40, at 1505.

45. Mari Matsuda, *We Will Not Be Used*, 1 UCLA ASIAN AM. PAC. ISLANDS L.J. 79, 79 (1993).

46. Certainly, ethnic or racial communities are by no means politically monolithic, and may not have consolidated or uniform interests.

47. Matsuda, *supra* note 45, at 79.

48. Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 462 (2014).

49. See Matsuda, *supra* note 45, at 79.

This Article narrows its focus onto this racial middle. More specifically, I elucidate how stigmatized individuals formally classified as white outwardly express their religious identities against racial stigma, and toward whiteness.

### B. SUBSTANTIVE WHITENESS

“The U.S. Census forces me to check the white box, but the TSA agent at the airport reminds me that I’m Arab and a Muslim.” -*Abed Ayoub*<sup>50</sup>

Formal whiteness does not always confer the privileges, presumptions, and status theoretically attendant with whiteness.<sup>51</sup> This Section theorizes the meaning of whiteness as an experience, beyond formal designations adopted by the OMB and statistical tabulations within U.S. Census figures. More precisely, it is an experience colored by access to and enjoyment of the slate of privileges and positive presumptions theoretically thought to emanate from whiteness, which I label “substantive whiteness.”

While the prevailing OMB racial order does not rank the five racial groups, whiteness retains its place at the top in virtually every sphere of American life. Therefore, I echo law scholar Ian Haney López’s observation that race is both “a socially and legally produced hierarchical system.”<sup>52</sup> As law scholar Erika Wilson and I previously noted, “[R]acial classifications—and the political and social benefits attached to them—are distributed on the basis of a white/nonwhite scale. Whiteness, of course, is situated at the highest end of the spectrum, while Blackness occupies the countervailing lower end of the spectrum.”<sup>53</sup>

Substantive whiteness is shaped by societal perceptions of an individual’s identity, followed by the assignment of “status differences [based] on perceptible differences.”<sup>54</sup> Racial meaning is assigned to expressions of identity based on perceptions shaped by law, and popular and political discourses of specific symbols of expression. Most notable to this Article, religious expression and performance shape substantive whiteness.

Therefore, in conjunction with formal definitions of whiteness crafted by the OMB and administered by the Census Bureau, popular and political actors enforce competing definitions of whiteness that determine an

50. Interview with Abed Ayoub, Legal Director of the American Arab Anti-Discrimination Committee (Nov. 1, 2018). This interview followed news that the proposed Middle Eastern or North African classification to be added to the 2020 U.S. Census was rejected by Congress. The ADC is the oldest Arab American civil rights organization in the U.S. *About Us*, AM.-ARAB ANTI-DISCRIMINATION COMM., <https://www.adc.org/about-us> [<https://perma.cc/7Y4Q-JQ2R>].

51. See Harris, *supra* note 22, at 1714, 1745–46 (referring to whiteness as a status property interest).

52. López, *Nation of Minorities*, *supra* note 15, at 990.

53. Beydoun & Wilson, *Reverse Passing*, *supra* note 20, at 300–01 (citation omitted).

54. ALCOFF, *supra* note 21, at 49.

individual's access to its substantive presumptions and privileges.<sup>55</sup> Whereas formal whiteness is uniform and undifferentiated, substantive whiteness is “not a monolithic or homogenous experience.”<sup>56</sup> It is, rather, stratified and fractured by a range of social currents, that confers a range of advantages and privileges to whites, or those perceived as white. Most potently are political and popular discourses that cast some formally white groups as different, inassimilable, and ultimately, not fully or genuinely white.<sup>57</sup>

### 1. In the Political Imagination

The scope of substantive whiteness enjoyed by an individual is contingent on how his or her specific subgroup is politically perceived and treated. Below, I will explore the gap between formal and substantive whiteness through the experience of Arab Americans in the post-9/11 context.

Arab Americans are formally classified as white by the OMB, but are part of a broader group disproportionately presumed to be “terrorists” by the state after the September 11th terrorist attacks.<sup>58</sup>

This political racialization of Arab Americans has summoned the might of counterterror policy squarely into their communities and onto their very doorsteps, levying upon them the presumption of guilt without process and evidence.<sup>59</sup> In fact, the very evidence that typically raises the presumption of terrorism is their nationality, ancestry, or ethnicity—all of which have been used as criteria for their formal designation as white.

Law scholar Leti Volpp argues that this racialization of Arab Americans as “terrorists” dis-identifies them as citizens.<sup>60</sup> This dis-identification, however,

55. Alcott refers to these political and popular perceptions of whiteness as “imaginary whiteness,” which she articulates as “the realm of mythic imagery and the relatively unconscious ways in which people have affective and dispositional attitudes about whiteness—that is, what whiteness stands for, what it means, its imagined genealogy, and how it is qualitatively distinct from other groups.” *Id.* at 78.

56. LÓPEZ, *WHITE BY LAW*, *supra* note 3, at xxi.

57. Law scholar Laura Gomez has used the phrase “off-white” to refer to populations that are liminally or situationally perceived as white. See Laura E. Gomez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 *CHICANO-LATINO L. REV.* 9, 11 (2005).

58. See Leti Volpp, *The Citizen and the Terrorist*, 49 *UCLA L. REV.* 1575, 1576 (2002) [hereinafter Volpp, *The Citizen and the Terrorist*].

59. This presumption is the very basis of Islamophobia I frame and article in my work. See KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR* 7 (2018) [hereinafter BEYDOUN, *AMERICAN ISLAMOPHOBIA*].

60. Volpp, *The Citizen and the Terrorist*, *supra* note 58, at 1576. Tying this political racialization of Arab Americans as terrorists to citizenship, and namely, perceptions of citizenship, Volpp writes:

When I say that all [Arab] Americans are in a position akin to the naturalized citizen, I mean they possess a citizenship that is always now at risk of being undone. Their identity as [Arabs]—in other words, ‘potential terrorists’—means that they are perennially suspected of having engaged in fraud or misrepresentation, with that

is not limited to perceptions of social belonging and citizenship,<sup>61</sup> but also includes race. Potent racial meaning has been assigned to Arab identity, before but particularly after the 9/11 terror attacks. Therefore, the racialization of Arab Americans as “terrorists” also dis-identifies them as white. This, in turn, erodes or categorically extinguishes the substantive presumptions and privileges attached to whiteness for individuals perceived as Arab Americans.<sup>62</sup>

Vulnerability to surveillance programs in the community, no-fly lists, and secondary searches at airports diminish the substantive whiteness of Arab Americans.<sup>63</sup> This is particularly true during the protracted War on Terror where Arab, Middle Eastern, and Muslim Americans are racially profiled as principal national security threats by the Department of Homeland Security (“DHS”), the Federal Bureau of Investigation (“FBI”), and state and city law enforcement departments.<sup>64</sup> Whereas the political racialization of Arab Americans “undoes” their citizenship in the eyes of the state,<sup>65</sup> their whiteness is also undone by War on Terror policy.

John Tehranian, a law scholar who has written extensively about this racial misalignment faced by Arab and Middle Eastern Americans,<sup>66</sup> supports

fraud or misrepresentation consisting of a pretense of loyalty or allegiance to the United States.

Leti Volpp, *Citizenship Undone*, 75 *FORDHAM L. REV.* 2579, 2583 (2007) [hereinafter Volpp, *Citizenship Undone*].

61. Volpp theorizes that “[t]errorist and citizen are oppositional terms. Thus the ‘terrorist citizen’ seems also an impossible subject. Putative terrorists are not considered deserving of the protections of citizenship.” Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 *MICH. L. REV.* 1595, 1626 (2005).

62. The perception of Arab Americans as non-white terrorists is also abetted by the conflation of Arab and Muslim identity. Although Arab Americans are predominantly Christian, Arab identity is politically and popularly conflated with Muslim identity, which makes Arab-American Christians exposed to the negative stigmas (or Islamophobia) tied to Islam. See generally Beydoun, *Between Muslim and White*, *supra* note 28, at 37–43.

63. 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. ANN. SURV. AM. L.* 295 (2002) (providing a comprehensive and thorough analysis of the counterterror policies enacted in the aftermath of the 9/11 terror attacks).

64. This very process of undoing formal whiteness was experienced by Iranian Americans following President Trump’s standoff with the Iranian government in January of 2020. Following the assassination of Iranian General Qassim Suleimani, Iran threatened retribution, which led to U.S. Customs and Border Protection (“CBP”) stopping and questioning (at least) 200 Iranian Americans at the border. Mike Baker & Caitlin Dickerson, *Iranian-Americans Questioned at the Border: ‘My Kids Shouldn’t Experience Such Things,’* *N.Y. TIMES* (Jan. 6, 2020), <https://www.nytimes.com/2020/01/06/us/border-iranians-washington-patrol.html> [<https://perma.cc/WP63-CCCD>].

65. See Volpp, *Citizenship Undone*, *supra* note 60, at 2583 (“When I say that all Muslim Americans are in a position akin to the naturalized citizen, I mean they possess a citizenship that is always now at risk of being undone.”).

66. John Tehranian, *Selective Racialization: Middle-Eastern American Identity and the Faustian Pact with Whiteness*, 40 *CONN. L. REV.* 1201, 1204 (2008) (“On one hand, [Middle Eastern

the adoption of a Middle Eastern racial classification as a solution. In *Whitewashed: America's Invisible Middle Eastern Minority*, he writes,

Through a bizarre fiction, the state has adopted the uniform and mandatory classification of all individuals of Middle Eastern descent as white. On paper, therefore, they appear no different than a blue-eyed, blond-haired individual of Northern European descent. Yet reality does not mesh with this bureaucratic position. On the street, Middle Eastern Americans suffer from the types of discrimination and racial animus endured by recognized minority groups.<sup>67</sup>

Religion—namely the suspicion of Islam as a faith that inspires terrorism—is central to the War on Terror political discourse and racialization of Arab and Middle Eastern Americans as terrorists. Counterterror programs are principally concerned with Arab or Middle Eastern Muslim communities, steered by theories that tie terrorism or “homegrown radicalization” to Islamic adherence and expression.<sup>68</sup> A range of “structural Islamophobic” programs,<sup>69</sup> most notably Countering Violent Extremism (“CVE”) policing, which tasks local law enforcement departments with developing and seeding informants in spaces where Muslims congregate,<sup>70</sup> are suspicious of conservative iterations of Islamic expression.

Americans] suffer from the types of discrimination that face minority groups. On the other hand, formally speaking, Middle Easterners are deemed white by law.”); see also 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, 695 (2016).

67. TEHRANIAN, *supra* note 41, at 6.

68. See Amna Akbar, *National Security's Broken Windows*, 62 *UCLAL. REV.* 834, 878–79 (2015) (offering a critique of radicalization theory, which ties conservative expressions of Muslim identity, critical politics, activism, and more as indicative or predictive of radicalization); see also Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 *STAN. L. REV.* 125, 145–46 (2012) (analyzing the behavioral and ideological counter-radicalization theories that inform CVE policing programs deployed by federal and local law enforcement). For an analysis of how CVE policing is theorized as a Sunni Muslim phenomenon and enforced along sectarian lines, see Khaled A. Beydoun, *Bisecting American Islam? Divide, Conquer, and Counter-Radicalization*, 69 *HASTINGS L.J.* 429, 468–76 (2018) [hereinafter Beydoun, *Bisecting American Islam?*].

69. Structural Islamophobia can be defined:

[A]s 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. These policies are built upon the presumption that Muslim identity is associated with a national security threat, and while they are usually framed in a facially neutral fashion, such policies disproportionately target Muslim [and Arab] subjects and disparately jeopardize, chill, and curtail their civil liberties.

Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 *COLUM. L. REV. ONLINE* 108, 114 (2016) [hereinafter Beydoun, *Islamophobia*].

70. Law enforcement deputized to push CVE policing initiatives have prioritized mosques, and specifically, Sunni Muslim mosques, as sites of concern. Therefore, the mosque space is where informants are recruited and strategically assigned to collect information and monitor subjects inclined toward radicalization. For a leading critique of CVE policing and counter-



Therefore, religious identity further erodes the substantive whiteness of Arab or Middle Eastern American Muslims, illustrated by state encroachment on their Free Exercise of Religion liberties, and other core First Amendment rights, including assembly and speech.

The gap existing between the formal status of Arab Americans as white and their substantive enjoyment of the privileges and presumptions of whiteness is far wider than that of,<sup>71</sup> for example, Polish Americans. Although both are formally classified as white, Polish Americans are not the subjects of counterterror suspicion and targets of War on Terror programs. Their substantive whiteness is largely left undiminished by stigmatizing political discourses and competing racial meanings assigned to their identity.

While other factors, such as educational level or class,<sup>72</sup> may mitigate the substantive whiteness enjoyed by Polish Americans (or segments of that subgroup), there exists no ominous political narrative that bludgeons their rights and endangers their safety. This is very much the case for Arab Americans—a population classified as white, but whose whiteness has been undone by the robust and relentless War on Terror policies that mobilize political discourses racializing them as presumptive terrorists.

## 2. In the Popular Imagination

*What good is being legally classified as white if nobody in society sees you as such?* This question identifies the existential dissonance between formal associations to whiteness and the popular belief that certain segments of the population are not *genuine* whites. For Arab and Middle Eastern Americans, political discourses—reified over and again by War on Terror policy and accompanying propaganda—perpetuate widely held views that they are not white, but are rather an “enemy race.”<sup>73</sup>

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radicalization theory, see generally Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809 (2013).

71. Immigration scholar Linda Bosniak theorizes this gap in relation to the discourse on citizenship, writing, “[T]here is often a gap between possession of citizenship status and the enjoyment or performance of citizenship in substantive terms.” BOSNIAK, *supra* note 19, at 31.

72. Wealth and class are circumstances that may affect substantive whiteness. In his runaway bestseller *Hillbilly Elegy*, J.D. Vance tells the story of America’s “hillbilly” communities through the story of his own family, a poor white family from the Appalachian region of the United States. Vance writes that “[t]he wealthy and the powerful aren’t just wealthy and powerful; they follow a different set of norms and mores.” J.D. VANCE, *HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS* 207 (2016). Vance sees economic standing as a source of culture distinguishing wealthy whites from poor disaffected whites. *Id.* at 203; see also MATT WRAY, *NOT QUITE WHITE: WHITE TRASH AND THE BOUNDARIES OF WHITENESS* 133–44 (2006) (providing a sociological analysis of the role poverty and disaffection plays in the development of stereotypes applied to poor whites, pejoratively called “white trash”). For an analysis of how white groups and subgroups are victimized by “minority-targeted racism,” see generally Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497 (2010).

73. Fears of subversion and disloyalty on the part of Arab and Middle Eastern Americans, particularly those that adhere to Islam, have fomented the popular framing of these groups as an

American racial history is comprised of a litany of passages whereby whiteness was denied to a host of groups on account of religion and outward expression of religious identity. Certainly, the dialectic pitting whiteness against religion has not only impacted the perceived racial identity of Arab and Middle Eastern Americans, but also members of a milieu of other faith groups, ethnic communities and cultures, including Jews and Christians of European origin.<sup>74</sup> The denial of whiteness was spurred by popular views and propaganda tying religion to discourses of allegiance and belonging, inferiority and assimilability.

For instance, the Irish were once viewed as a distinct race on account of their adherence to Catholicism and fidelity to the Pope.<sup>75</sup> Anglo-Saxon Protestant gatekeepers viewed Catholicism with derision and cast it as an illegitimate form of Christianity.<sup>76</sup> These views descended upon Irish immigrants and settlers pushed to the United States in mass numbers beginning in the 1840s, which colored how the Irish were being racially described within the media and political sphere. The racial construction of Irish Catholics within popular discourses, who hailed from the very British Isles as much as their Protestant predecessors did, was more akin to enslaved Africans than Anglo-Saxons. The Irish were caricatured as, “[*l*ow-browed and savage, grovelling and bestial, lazy and wild, simian and sensual—such were the adjectives used by many native-born Americans to describe the Catholic Irish ‘race’ in the years before the Civil War.”<sup>77</sup> Within the popular imaginations, the Irish were cast as non-white, and caricatured as a wholly distinct race, on account of their Catholicism.

Irish Catholics were ultimately rewarded nominal whiteness following the influx of non-European immigrants, but the power of these racialized narratives persisted through the early twentieth century.<sup>78</sup> Catholicism, and its routine conflation with Irish identity in American society, continued to differentiate Irish whites from Anglo-Saxon Protestants. Even when the formal bounds of whiteness expanded through the late and early twentieth centuries,

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“enemy race.” *Korematsu v. United States* 323 U.S. 214, 236 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). A labeling that resembles views of Japanese Americans during World War II, made explicit by the U.S. Commanding General’s Final Report supporting President Roosevelt’s Executive Action 9066, mandating the internment of Japanese citizens and residents on the west coast after the Pearl Harbor Attack on December 7, 1941. *See id.* at 217.

74. *See generally* LÓPEZ, *WHITE BY LAW*, *supra* note 3 (analyzing the 52 naturalization cases during the “Naturalization Era,” the period from 1790 through 1952).

75. MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 70 (1998) [hereinafter JACOBSON, *WHITENESS OF A DIFFERENT COLOR*].

76. DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 133 (Mike Davis & Michael Sprinker eds., 3d ed. 2007).

77. *Id.* (footnote omitted).

78. The intimate relationship Christianity has had with the formation of whiteness as a legal designation, in addition to popular perceptions of it, is closely analyzed in Section III.C of this Article.

Anglo-Saxon Protestants held dominion over the higher order of substantive whiteness in every sphere of American life.

Like the Irish, Jews were classified as a distinct race on account of religious difference.<sup>79</sup> Anti-Semitic narratives descended upon this difference to manufacture outlandish racial characterizations of European Jewish immigrants, commonly called “Ashkenazis,”<sup>80</sup> and cast them out from whiteness. Religious anti-Semitism quickly mutated into *racial* anti-Semitism within the American imagination, revealed through the writing of Charley Dudley Warner, who wrote:

The persons whom we are accustomed to call Jews . . . have the Assyrian features, the hook nose, dark hair and eyes, and not at all the faces of the fair-haired race from which our Saviour is supposed to have sprung.<sup>81</sup>

Not surprisingly, this description aligns with how Arabs or Middle Easterners were, and continue, to be caricatured.

Racial anti-Semitism was prominent in the early twentieth century in the minds of lay Americans and pervasive on the pages of newspapers, magazines, and political literature. It drove the institution of Jewish quotas at colleges and universities,<sup>82</sup> fears of miscegenation with Anglo-Saxon Protestant women,<sup>83</sup> and sustained the denial of substantive whiteness to Jews until the middle of the twentieth century. However, even after the Jews “became white folks” after World War II,<sup>84</sup> religious and racial anti-Semitism continued to dis-identify Jewish Americans as bona fide whites, and diminish their substantive whiteness. Therefore, formal whiteness hardly insulated Jewish Americans from the violent reminders, echoed by state and private actors, that *Jews weren't really white*.

79. Cheryl Greenberg, “I’m Not White—I’m Jewish” *The Racial Politics of American Jews*, in RACE, COLOR, IDENTITY: RETHINKING DISCOURSES ABOUT “JEWS” IN THE TWENTY-FIRST CENTURY 36–37 (Efraim Sicher ed., 2013) (“Jewish identity, or the way Jews understand themselves as a group, is complex and shifting, constituted by social and residential ties, friendships, community interests, a shared sense of history, and religious and cultural practices. But in the United States, at least, Jewish identity is also related to questions of race and color because both have been central in determining access to power.”).

80. “A member of one of the two great divisions of Jews comprising the eastern European Yiddish-speaking Jews.” *Ashkenazi*, MERRIAM-WEBSTER (2020).

81. CHARLES DUDLEY WARNER, IN THE LEVANT 62 (1907).

82. See generally JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE AND PRINCETON* (2005), for a thorough historical examination of Jewish quotas at these Ivy League institutions, and other colleges and universities across the United States.

83. JACOBSON, WHITENESS OF A DIFFERENT COLOR, *supra* note 75, at 81.

84. See generally KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS & WHAT THAT SAYS ABOUT RACE IN AMERICA* 140 (5th ed. 2004) (describing the progression of treatment of Jews in America and what it means about America that Jews have now become “white folks”).

This anti-Semitism has been emboldened today in America, as illustrated by emergent white supremacist narratives and the tragic Pittsburgh massacre. Like “private Islamophobia,”<sup>85</sup> private actors unleash anti-Semitic violence on account of their belief that Judaism is inimical with whiteness. These views, held by Neo-Nazis, a swelling “Alt-Right” movement, and disparate elements clinging on to narrowly conceived iterations of whiteness,<sup>86</sup> disavow the formal whiteness held by Jewish Americans. They also diminish their substantive whiteness through slurs, intimidation, and the looming specter of violence.

The anti-Semitic propaganda prominent during centuries past is vividly and violently resurfacing in America today, thereby undoing the substantive whiteness of Jewish Americans and signaling, as clearly seen in Squirrel Hill and the “Unite the Right” Rally in Charlottesville a year earlier,<sup>87</sup> that formal whiteness offers little to no shelter. Although legally broader than ever before, substantive whiteness is deeply stratified within the popular American imagination and fractured forcefully along lines of religious difference.

### III. RELIGION AND RACIAL STIGMA

The First Amendment “religion clauses” are the foundation of the American constitutional architecture.<sup>88</sup> Religious liberty was assigned optimal primacy because of the religious persecution endured by Puritan settlers at the hands of the English monarchy.<sup>89</sup> By explicitly restricting the establishment of any one religion or sect as the official creed of the land,<sup>90</sup> and extending the right to worship freely to anyone and everyone admitted into the polity, the Puritan settlers positioned religious liberty at the very heart of citizenship. However, who could become a citizen through the

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85. Beydoun, *Islamophobia*, *supra* note 69, at 111 (“[T]he fear, suspicion, and violent targeting of Muslims by individuals or private actors.”). This animus is generally carried forward by non-state actors’ use of religious or racial slurs, mass protests or rallies, or violence against Muslim subjects. *Id.*

86. See Jennifer Rubin, *American Anti-Semitism: It’s Getting Worse*, WASH. POST (Oct. 27, 2018, 5:00 PM), <https://www.washingtonpost.com/news/opinions/wp/2018/10/27/american-anti-semitism-its-getting-worse> [<https://perma.cc/CVK5-WJT7>].

87. For an analysis of the anti-Semitism driving the Unite the Right Rally staged in Charlottesville, Virginia on August 11 and 12, 2017, see Emma Green, *Why the Charlottesville Marchers Were Obsessed with Jews*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/nazis-racism-charlottesville/536928> [<https://perma.cc/N8TJ-5ZFP>].

88. The opening lines of the First Amendment are divided into the Establishment Clause and Free Exercise Clause. U.S. CONST. amend. I, cl. 1–2 (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .”).

89. See FRANCIS J. BREMER, *THE PURITAN EXPERIMENT: NEW ENGLAND SOCIETY FROM BRADFORD TO EDWARDS* 29–32 (Univ. Press of New England 1995) (1976) for a discussion of the religious persecution inflicted by the English monarchy on the Puritan settlers. In the early nineteenth century, Alexis de Tocqueville wrote, “[T]he Puritans sought a land so barbarous and so abandoned by the world that they might yet be permitted to live there in their manner and pray to God in freedom.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 32 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

90. See *supra* note 88 and accompanying text.

Naturalization Era oftentimes turned on religious identity, and more explicitly, proximity to Christianity, thereby converting Free Exercise of Religion from a fundamental liberty into a site of racial identity performance.

A. *BETWEEN STIGMA AND SELF*

“When an individual plays a part he implicitly requests his observers to take seriously the impression that is fostered before them.” -*Erving Goffman*<sup>91</sup>

Social psychologist Erving Goffman’s landmark research on “stigma” and “identity performance” provided a foundational theoretical framework for understanding how individuals perform their identities in response to stigma.<sup>92</sup> Identity itself is a complex phenomenon, divided into the “inner” identity,<sup>93</sup> and the “dramatic” self presented and performed to the outside world.<sup>94</sup> The presentation of self to the external world determines what political, cultural or racial meaning is assigned to that individual’s identity. In a society pervaded by racial hierarchy and division, white identities are given positive social meanings, while identities read as non-white are often met with stigma.<sup>95</sup>

Goffman’s work has had an indelible impact on contemporary legal literature. Law scholars have applied his theory of identity performance in myriad subfields and experiences. Identity performance theory has been adopted to theorize how sexual orientation is negotiated in line with professional incentives and disincentives;<sup>96</sup> how racial identity is “worked” within employment contexts;<sup>97</sup> and how racial minorities and women are

91. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 17 (1959) [hereinafter GOFFMAN, *PRESENTATION OF SELF*].

92. *Id.*

93. Law scholar Osamudia James describes one’s private identity, or in my words “inner identity,” “as a person’s internal sense of self,” while the “out identity” is “an association of that self with a particular group or groups.” See James, *supra* note 48, at 461. These associations of self are manifested through actions, expressions of identity, and relationships. See *id.* at 461–64.

94. “The self . . . is not an organic thing that has a specific location, whose fundamental fate is to be born, to mature, and to die; it is a dramatic effect arising diffusely from a scene that is presented . . . .” GOFFMAN, *PRESENTATION OF SELF*, *supra* note 91, at 252–53.

95. See *id.* at 13, 24.

96. See generally Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) (theorizing and examining how gay men conceal their sexual orientation to access professional incentives).

97. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262–67 (2000) (developing the concept and theory of “working identity”); see also Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women’s Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1, 25–29 (2014) (examining the pressures placed on Muslim women within workplace environments to under-perform and “assimilate” their religious identities).

“entrepreneurial” about how they perform their identities within a world in which belonging to an “out-group” can be selectively rewarded.<sup>98</sup>

### 1. On Stigma

Goffman’s work added rigor to the Shakespearian wisdom that “[a]ll the world’s a stage, [a]nd all the men and women are merely players.”<sup>99</sup> But most compellingly, he posited that every action that comprises these grand acts is first contemplated, then negotiated in terms of weighing trade-offs,<sup>100</sup> and finally performed and re-performed *in response* to negative or positive stigma, or stated in practical terms, incentives or disincentives.<sup>101</sup> The individual’s performance, the final product of this process, is his or her desired projection of self to the world.<sup>102</sup> It is how they desire the world, and its inhabitants, to view them.

This Article adopts the definition of stigma crafted by Goffman. He theorizes it within the hypothetical experience of a stranger observed by a general audience:

While the stranger is present before us, evidence can arise of his possessing an attribute that makes him different from others in the category of persons available for him to be, and of a less desirable kind—in the extreme, a person who is quite thoroughly bad, or dangerous, or weak. He is thus reduced in our minds from a whole and usual person to a tainted, discounted one. Such an attribute is a stigma, especially when its discrediting effect is very extensive.<sup>103</sup>

Stigma can be purely of the individual variety. Or, they can be collective, such as “tribal stigma”<sup>104</sup> whether racial, national, or, in the focus of this Article, religious.

### 2. Stigmatizing Religion

Faith traditions are common targets of stigma. A faith stigma<sup>105</sup> ascribes negative ideas or tropes about the religion to any entity, individual or

98. See Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333, 1347–51 (2016) (theorizing the process by which out-group individuals negotiate and perform their identities in line with attaining personal benefit).

99. WILLIAM SHAKESPEARE, *AS YOU LIKE IT*, act 2, sc. 7, ll. 139–40 (George Rice Carpenter ed., Longmans, Green, & Co. 7th ed. 1911).

100. GOFFMAN, *STIGMA*, *supra* note 5, at 91 (“To the extent that the individual is a discredited person, one looks for the routine cycle of restrictions he faces regarding social acceptance; to the extent that he is discreditable, for the contingencies he faces in managing information about himself.”).

101. See Carbado & Gulati, *supra* note 97, at 1266–72.

102. See GOFFMAN, *PRESENTATION OF SELF*, *supra* note 91, at 252.

103. GOFFMAN, *STIGMA*, *supra* note 5, at 2–3.

104. *Id.* at 4.

105. *Id.*

manifestation of that religion. This stigma has a collective and collateral effect, whereby the stigma associated with the religion is transmitted to anybody or anything associated with it.

However, this element of *association* is broader than we might imagine. First, adherents of the stigmatized religion are, naturally, exposed to the stigma associated with their faith. Adherents of respective religions assume or ascribe the symbols—both positive and negative—assigned to their religion. Particularly stigmatized are adherents who outwardly express their religious identity through conspicuous markers—for example, the hijab for Islam, or the yarmulke for Judaism.

Second, individuals *perceived* to be adherents of the stigmatized religion are also exposed to its attendant stigmas. For example, Arab American Christians are discursively stereotyped as Muslims on account of geographic origin or phenotype. This is also the case for Sikh American men, whose physical appearance is stereotypically likened to Islamic terrorists who similarly don turbans and grow long beards.<sup>106</sup>

Goffman aptly observes, “[P]eople are not merely passive objects shaped by society, but [also become] active and creative agents of identity.”<sup>107</sup> Stigmas assigned to specific faith groups create a dynamic whereby adherents of that faith group strategize how to express their association through outward symbols and performance.<sup>108</sup> The stakes of this strategic performance against religious stigma become greater when negative racial meaning is assigned to that faith’s racial meaning.<sup>109</sup> This pushes individuals to “realign[]” their presentations of religious identity “in a direction more favorable to them,” and in turn, “decrease the social distance . . . between themselves” and prevailing perceptions of whiteness.<sup>110</sup>

These responses to religious stigma are a mode of Free Exercise self-regulation, which I examine more closely below.

106. See BEYDOUN, AMERICAN ISLAMOPHOBIA, *supra* note 59, at 95–96 for a detailed account of the murders of Sikh men and the impact on the Muslim American community.

107. Nikki Khanna & Cathryn Johnson, *Passing as Black: Racial Identity Work Among Biracial Americans*, 73 SOC. PSYCHOL. Q. 380, 383 (2010) (citation omitted).

108. Law scholar Lauren Sudeall Lucas dubs discriminatory stigmas born from religious expression as “projective claims of religious identity,” which are “claims of religious identity [that] are directed outward, focused on operation of the law as it relates to others. In such instances, the religious objector is attempting to impose her religious identity on others or to conform the law to her own sense of religious identity.” Lauren Sudeall Lucas, *The Free Exercise of Religious Identity*, 64 UCLA L. REV. 54, 88 (2017). Sudeall Lucas distinguishes projective claims of religious identity from protective claims, which is expression “that attempt[s] to protect and preserve religious identity within the personal sphere or as directed inward.” *Id.*

109. See Khanna & Johnson, *supra* note 107, at 383–90.

110. GOFFMAN, PRESENTATION OF SELF, *supra* note 91, at 126.

B. REGULATING RELIGIOUS EXPRESSION

“According to him, human justice was nothing and divine justice was everything. I pointed out that it was the former that had condemned me.”<sup>111</sup>

This exchange between Meursault, the forlorn protagonist of Albert Camus’s *The Stranger*, and the chaplain, is a dialectic familiar to First Amendment scholars. It juxtaposes the legal dictates of religion with those enforced by governments. Oftentimes, divine dictates clash with the rules enacted by governments, as illustrated in the landmark 1990 Supreme Court decision *Employment Division v. Smith*.<sup>112</sup>

Alfred Smith and Galen Beck were members of the Native American Church, which encouraged its adherents to ingest peyote during the course of performing spiritual rituals. Smith and Beck did so, and were fired “because they ingested peyote for sacramental purposes at a ceremony of the Native American Church.”<sup>113</sup> They brought suit claiming that the Oregon law—which classified peyote as an illegal drug—violated their First Amendment Free Exercise of Religion rights.<sup>114</sup> The Supreme Court, drawing a distinction between facially discriminatory laws that single out specific religions and “neutral, generally applicable law[s],” ruled against the petitioners,<sup>115</sup> thereby upholding the Oregon law as a justifiable form of state regulation of Free Exercise.

Like Meursault, Smith and Beck were condemned by human justice,<sup>116</sup> and peyote sustained as a restricted substance regardless of the spiritual status assigned to it by the Native American Church. Moving forward, members of the Native American Church were burdened with having to choose between adhering to the divine dictates of their faith or conforming to the laws of the State of Oregon—which criminalized peyote.<sup>117</sup>

This Section examines foundational Free Exercise of Religion jurisprudence to establish the theoretical tension between the expression of stigmatized religions and whiteness. *Smith*, and preceding cases,<sup>118</sup> neatly

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111. ALBERT CAMUS, *THE STRANGER* 118 (Matthew Ward trans., Alfred A. Knopf, Inc. 1988) (1942).

112. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012).

113. *Id.* at 874.

114. *Id.*

115. *Id.* at 881.

116. See CAMUS, *supra* note 111, at 118.

117. *Smith*, 494 U.S. at 874.

118. In *United States v. Ballard*, a case involving respondents who formed their own religion and used mailing to proselytize and collect money, Justice Douglas simultaneously wrote his majority opinion with the respondents and all Americans in mind:

He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem



highlight the doctrinal distinction between religious *belief* and *action*, only the latter of which can be regulated by the state.<sup>119</sup> This doctrinal binary is of critical importance with regard to the focus of this Article, religious identity performance, which is routine religious *action* vulnerable to being regulated by: (1) the state by way of laws; (2) the state and private actors by way of political discourses; and (3) private actors by way of popular discourses.

These three sources of regulation comprise the primary currents of stigma confronted by adherents of stigmatized religions.<sup>120</sup>

### 1. By Law

The *Smith* decision, in the narrowest sense, enables government actors to regulate religious action through neutral laws of general applicability.<sup>121</sup> Federal and state laws must not single out any religion or confession in their text, or isolate a religious tradition or practice that is intimately connected to a specific faith tradition or confession.<sup>122</sup> Such regulations are constitutionally permissible, and oftentimes pose ultimatums for adherents to either observe the tenet and violate the law and assume the consequences of such violation, or violate the religious tenet in order to conform to the legal regulation. Let us examine this tension through the case of Ilhan Omar, the first Muslim American woman to don the *hijab* elected to U.S. Congress.<sup>123</sup>

Ilhan Omar, the newly elected Muslim American congresswoman from Minnesota, finds herself staring at a longstanding House of Representatives-imposed rule that restricts head coverings. The rule, enacted in 1837, holds that “Every member shall remain uncovered during the sessions of the

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incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

United States v. Ballard, 322 U.S. 78, 87 (1944).

119. *Smith* sets forth the prevailing jurisprudence on state regulation of Free Exercise, whereby neutral laws of general applicability are scrutinized by the courts using the deferential rational basis standard, and facially discriminatory laws are reviewed through strict scrutiny. *Smith*, 494 U.S. at 894 (O’Connor, J., concurring).

120. See generally GOFFMAN, STIGMA, *supra* note 5 (defining a sociological conception of religious stigma).

121. *Smith*, 494 U.S. at 879.

122. See generally Church of the Lukumi Babalu, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (striking down a city ordinance criminalizing the slaughter of animals in a religious ceremony or ritual because it was so narrowly tied to a practice performed by adherents of the Santeria faith).

123. David Smith, ‘My Choice’: Ilhan Omar Becomes First to Wear Hijab in US Congress, GUARDIAN (Jan. 3, 2019, 10:41 PM), <https://www.theguardian.com/us-news/2019/jan/03/ilhan-omar-hijab-congress-headwear> [https://perma.cc/45GD-MACW].

House,” and was envisioned as a rule against the wearing of hats that passed with “virtually no debate.”<sup>124</sup>

However, Omar’s victory and historic entry into U.S. Congress as the first federal legislator to wear the hijab gives new relevance to an otherwise uncontroversial rule. Upon learning of it, and confronted by the tension it poses with her Free Exercise rights, Omar tweeted on November 17, 2018, “No one puts a scarf on my head but me. It’s my choice—one protected by the [F]irst [A]mendment. And this is not the last ban I’m going to work to lift.”<sup>125</sup> Democrats sitting on the House of Representatives Rules Committee moved swiftly to accommodate Omar’s religious rights, proposing an exemption to “ensure religious expression” and “clarify in the [House] rules that religious headwear is permitted to be worn in the House chamber.”<sup>126</sup>

The proposal was accepted. But, upon Omar winning the congressional seat, initially posed a dilemma for the trailblazing Omar and Muslim American congresswomen following in her footsteps: the burden of having to choose between divine justice and human justice.<sup>127</sup> Particularly those having to do so without the fame or gravitas a congresswoman demands, who may feel pressured to shed a valued religious practice without the aid of the political or popular pressure that enabled Omar to push for institutional reform.

## 2. By Political Discourse

“I think Islam hates us.” -*Donald Trump*<sup>128</sup>

State *regulation* of Free Exercise must be understood beyond the means of specific laws or criminal ordinances. That is the narrowest form of regulation, whereby the state communicates its proscription of specific actions or expressions by way of legislation or executive action. However, political narratives that emanate from state action also have a regulating effect.<sup>129</sup> The War on Terror is a vivid and timely example.

124. *The Ban on Hats on the House Floor*, U.S. HOUSE REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/Historical-Highlights/1800-1850/The-debate-over-the-rule-to-ban-hats-on-the-House-Floor> [<https://perma.cc/YRP8-S4WM>].

125. Jonathan Allen, *Democrats Seek Rule Change to Formally Allow Hijabs, Yarmulkes on House Floor*, NBC NEWS (Nov. 19, 2018, 5:19 PM), <https://www.nbcnews.com/politics/congress/democrats-seek-rule-change-formally-allow-hijabs-yarmulkes-house-floor-n938056> [<https://perma.cc/5RGA-77JR>] (citing Omar’s tweet).

126. RULES COMM. DEMOCRATS, RESTORING CONGRESS FOR THE PEOPLE: DRAFT RULES PROPOSALS 11, *available at* [https://assets.documentcloud.org/documents/5130338/DRAFT\\_RULESPROPOSALNov15.pdf](https://assets.documentcloud.org/documents/5130338/DRAFT_RULESPROPOSALNov15.pdf) [<https://perma.cc/CAH6-25RJ>].

127. CAMUS, *supra* note 111, at 118.

128. Jose A. DelReal, *Trump: ‘I Think Islam Hates Us.’* WASH. POST (Mar. 9, 2016, 8:52 PM), <https://www.washingtonpost.com/news/post-politics/wp/2016/03/09/trump-i-think-islam-hates-us> [<https://perma.cc/W3BC-BBWJ>].

129. I initially theorized this as a dialectic in relation to Islamophobia. However, the process can be related to any stigmatized entity or religion, whereby the state “shapes, reshapes, and

The Bush Administration launched the War on Terror ten days after the 9/11 terror attacks.<sup>130</sup> This war was spearheaded on the domestic front by a string of policies that were facially neutral, but disproportionately enforced against Arab, Middle Eastern, and Muslim communities.<sup>131</sup> Yet, the War on Terror—now extended into its third presidential administration—is far broader than the USA PATRIOT Act or the National Security Entry-Exit Registration System (“NSEERS”), countering violent extremism (“CVE”) policing, or the travel ban.<sup>132</sup> These laws and programs are regulatory emanations of a broader epistemological campaign. A campaign that, well before 9/11, oriented Islam as “demonic” and “devastating,”<sup>133</sup> and after 9/11, a source of “terrorism” and “homegrown radicalization.”<sup>134</sup> These tropes about Islam are disseminated by way of law, punditry, and, most potently, the rhetoric of politicians, alerting members of the polity to stand on guard.

In addition to communicating to the polity the national security and “civilizational” dangers posed by Muslims,<sup>135</sup> the War on Terror discourse also has a deeply regulative effect on its targets: Muslim citizens and residents. In response to the political discourse that profiles Muslims as putative terrorists, adherents of the faith regularly engage in *self-regulating* activity to deemphasize or conceal their religious identity.<sup>136</sup> This self-regulation of Free

confirms popular views or attitudes about [stigmatized religions and its] subjects inside and outside of America’s borders” through laws, presidential rhetoric, and the statements from other government officials, policies, and other forms of state action. Beydoun, *Islamophobia*, *supra* note 69, at 119.

130. *Text of George Bush’s Speech*, GUARDIAN (Sept. 21, 2001, 11:31 AM), <https://www.theguardian.com/world/2001/sep/21/september11.usa13> [<https://perma.cc/F7XX-KSP9>] (“On September the 11th, enemies of freedom committed an act of war against our country. . . . Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”).

131. See generally Akram & Johnson, *supra* note 63 (providing a comprehensive and thorough analysis of the counterterror policies enacted in the aftermath of the 9/11 terror attacks).

132. The U.S. Supreme Court upheld the third and final version of the ban on June 26, 2018. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). Roberts delivered the majority opinion holding that it is within the President’s Article II authority to limit the entry of aliens, if admitting them “would be detrimental to the interests of the United States.” *Id.* at 2408.

133. See EDWARD W. SAID, *ORIENTALISM* 59 (1979) [hereinafter SAID, *ORIENTALISM*]. See also generally EDWARD W. SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD* (Vintage Books 1997) (1981) (providing a leading analysis of the mainstream media’s role in endorsing and disseminating damaging stereotypes about Islam).

134. See *Identifying the Enemy: Radical Islamist Terror: Hearing Before the Subcomm. on Oversight and Mgmt. Efficiency of the H. Comm. on Homeland Sec.*, 114th Cong. 15–19 (2016) (written statement of George Selim, Dir. of the DHS Office for Cmty. P’ships).

135. See generally SAMUEL P. HUNTINGTON, *CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996) [hereinafter HUNTINGTON, *CLASH OF CIVILIZATIONS*] (arguing, in one of the most cited and popular works on the subject, that “Western civilization” is at odds with, and poised to clash, with “Islamic civilization”).

136. Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1, 6 (2018) [hereinafter Beydoun, *Acting Muslim*].

Exercise is spawned by the stigma born from political discourses that brand Islam as subversive and violent, and manifested through re-performance of Muslim identity to stave off suspicion, mistreatment, or violence.<sup>137</sup>

This phenomenon of “Acting Muslim is the process by which Muslim Americans strategically negotiate and publicly perform a religious identity stigmatized by counterterror policy” and discourses.<sup>138</sup> Whereby self-regulation, and “Covering” or “Concealing Islam[ic]” expression from public view,<sup>139</sup> offers the greatest shelter from the perils of the War on Terror discourse. Here, the cause of the Free Exercise compromise is not a specific law or regulation, but a self-imposed infringement responding to anticipated threats inspired by the state’s political discourse. These are indeed Free Exercise infringements, in the philosophical sense, borne out of negotiations and trade-offs made by the individual in response to stigma.

### 3. By Popular Discourse

“Jews will not replace us! Jews will not replace us!”<sup>140</sup>

On 8:45 PM on August 11, 2017, a mob of 250 men wearing polo shirts and khaki pants convened at Nameless Field on the campus of the University of Virginia.<sup>141</sup> They were organized, neatly groomed, and comprised of white men of all ages, from various parts of the country. They were ready to march across the Charlottesville campus and emerge from the shadows, showing their faces on a national stage and introducing a new shade of white supremacy to the nation.<sup>142</sup>

These “Unite the Right” marchers, led by Richard Spencer, carried tiki torches through the campus. They also shouted “*White Lives Matter!*” and “*Blood and Soil,*” a common Nazi slogan, in front of horrified spectators and media cameras. This white supremacist rally was not staged by the Ku Klux Klan, nor was it the brainchild of Neo-Nazis. It was, rather, a convening staged by a new iteration of white supremacy, dubbed the “Alt-Right.”<sup>143</sup>

137. *See id.*

138. *Id.*

139. *Id.* at 14–15.

140. WORLD JEWISH CONG., “*Jews Will Not Replace Us*” in *Charlottesville*, YOUTUBE (Aug. 17, 2017), <https://web.archive.org/web/20190618021305/https://www.youtube.com/watch?v=n12sjwkgFBE> [<https://perma.cc/7SP3-AQCE>] (showing Unite the Right marchers chanting anti-Semitic slogans).

141. Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline> [<https://perma.cc/57P6-2FVT>].

142. *See Scenes from Charlottesville’s Violent ‘Unite the Right’ Rally*, CNBC (Aug. 14, 2017, 1:42 PM), <https://www.cnn.com/2017/08/14/scenes-from-charlottesvilles-violent-unite-the-right-rally.html> [<https://perma.cc/PCK6-NX72>], for a collection of images from the Rally, including the now infamous picture of the scowling white marcher that came to represent the Rally.

143. For a profile of Richard Spencer and the “Alt-Right” Movement he is credited with founding, see Graeme Wood, *His Kampf*, ATLANTIC (June 2017), <https://www>.

Buoyed by the Trump Administration and rebranded to resonate with young, white professionals, cosmopolitan city dwellers, and the college educated, the “Alt-Right” *looks* different from its white supremacist predecessors and contemporaries but is driven by an ideology that is one and the same. The same principles touting white supremacy and the inferiority of all those who exist beyond its narrow racial and religious bounds unite the old guard with new waves violently rising to the fore.<sup>144</sup>

Anti-Semitism, and the belief that Jews are not white, is central to Alt-Right ideology. Echoing the racial anti-Semitism of the past, Alt-Right thinkers, most notably Spencer, peddle conspiracy theories about Jewish overrepresentation within societal halls of power, nepotism, and control of the liberal establishment,<sup>145</sup> which he believes is responsible for pushing policies jeopardizing the interests of whites. These ideas have been parroted by Spencer’s growing legion of followers, as illustrated at the “Unite the Right” rally, where one marcher told a journalist, “[t]his city is run by Jewish communists and criminal [n\*\*\*\*\*].”<sup>146</sup> Yet, for a movement energized by a presidential administration that shares many of its nationalist ideas and is creeping closer to the political mainstream, the anti-Semitism shouted at marches is not aberrant, or isolated, to white supremacist rallies.

Popular discourses scapegoating Jews or tying them to conspiracies averse to white interests are now common. Historian David Nirenberg, a scholar of anti-Semitic movements, compared the emboldened anti-Semitism of today with the form that loomed in the early twentieth century:

I wouldn’t rush from all this material to thinking that this anti-Semitism is as dangerous as its early 20th-century predecessor . . . . Seeing the images of the Virginia protest, I must admit, I kind of felt otherwise. . . . It certainly made me feel that books and ideas that I had treated as very marginal in our society are not as marginal as I might have hoped.<sup>147</sup>

Nirenberg’s observation, made days after the Unite the Right rally, was confirmed by tragedy that followed. The emboldened anti-Semitic discourses authorized the kind of private violence against Jewish Americans not seen in

theatlantic.com/magazine/archive/2017/06/his-kampf/524505 [https://perma.cc/273Q-69NF].

144. See generally ANTI-DEFAMATION LEAGUE, *NEW HATE AND OLD: THE CHANGING FACE OF AMERICAN WHITE SUPREMACY*, available at <https://www.adl.org/new-hate-and-old-the-changing-face-of-american-white-supremacy-executive-summary> [https://perma.cc/ZA7M-SVPZ] (noting that there has been a resurgence of white supremacy in America in light of the Alt-Right movement).

145. Sam Kestenbaum, *Richard Spencer Touts Himself as ‘White Zionist’ in Israeli Interview*, FORWARD (Aug. 17, 2017), <https://forward.com/fast-forward/380235/richard-spencer-touts-himself-as-white-zionist-in-israeli-interview> [https://perma.cc/89S3-3WFH].

146. Green, *supra* note 87.

147. *Id.*

a long time in the United States. Anti-Semitism is rising, and manifesting itself in the most horrific scenes. The Pittsburgh shooting became known as “the deadliest attack on Jews in the history of the United States,”<sup>148</sup> serving as an ever-looming reminder that Free Exercise and outward expression of religious identity is a risky and dangerous act.

Much like the self-regulation of Free Exercise engaged by Muslims in response to War on Terror stigma, Jewish Americans face a similar circumstance where conspicuous expressions of Jewish identity can elicit violence. Therefore, during a sociopolitical moment where popular anti-Semitic discourses are rife and spurred on by a populist administration, Jewish Americans are also negotiating their Free Exercise of religion to stave off stigma, and seek cover from a new tide of white supremacy that conflates Christianity with whiteness, and stigmatizes Judaism, Islam and other religions as inferior, menacing, and most saliently, non-white.

### C. RACIALIZATION OF RELIGION

“By wrapping itself with the alleged form of Jesus, whiteness gave itself a holy face.”<sup>149</sup>

This Section analyzes the instrumental role religion played, and still plays, in marking the formal and substantive bounds of whiteness. During the Naturalization Era, the Christianity and proximity to Christianity of immigrants petitioning for citizenship often determined whether they would be ruled within, or outside, the statutory definition of whiteness. As examined above, political and popular discourses have undone the substantive whiteness of (Arab and Middle Eastern) Muslim and Jewish Americans on account of religion, racially reclassifying the former as “terrorists” and the latter as illegitimate whites or “off-white[s].”<sup>150</sup> These discourses position Christianity as central to whiteness, a view that aligned with the citizenship law that stood until 1952. However, in the popular imagination, Christianity retains an intimate tie to the highest echelons of substantive whiteness in modern America. In other words, Christianity’s salience to substantive whiteness remains stout despite the fluid remaking and redefinition of formal whiteness.

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148. Kellie B. Gormly et al., *Suspect in Pittsburgh Synagogue Shooting Charged with 29 Counts in Deaths of 11 People*, WASH. POST (Oct. 27, 2018, 9:50 PM), <https://www.washingtonpost.com/nation/2018/10/27/pittsburgh-police-responding-active-shooting-squirrel-hill-area> [<https://perma.cc/GH73-2TKB>].

149. EDWARD J. BLUM & PAUL HARVEY, *THE COLOR OF CHRIST: THE SON OF GOD AND THE SAGA OF RACE IN AMERICA* 8 (2012).

150. BRODKIN, *supra* note 84, at 60.

## 1. Christianity and Whiteness

Whiteness stood as the optimal pathway toward naturalized citizenship until 1952.<sup>151</sup> And Christianity, both narrowly and later broadly construed, often served as the most compelling demonstration of whiteness. During the earliest stages of American history, whiteness was wholly conflated with Protestantism, and then broadened to include Catholicism, Orthodox rite traditions and other Christian sects and confessions.<sup>152</sup>

*i. Protestantism as Whiteness*

Before it was an idea defined by color or European origins, *whiteness was Protestantism*. Protestant faith stood as the fundamental marker of inclusion and exclusion. In fact, the Anglo-Saxon Puritans who established what would become the United States saw their confession as the only legitimate form of Christianity, and cast other sects, such as Catholicism, as sacrilegious. Protestantism, up until the late nineteenth century and during the moment of economic downturn after it, defined the contours of Christianity.

The conflation of Protestantism and citizenship was reflected by early demographics. Ninety-eight percent of the citizenry in 1790, two years after the ratification of the Constitution,<sup>153</sup> were Protestant. Moved to maintain this Protestant homogeneity, Congress enacted the Naturalization Act of 1790 and limited citizenship to “free white person[s],”<sup>154</sup> which at that time was—in practice—synonymous with Protestant. The Framers and their contemporaries set out to shape a polity in their cultural and religious image. White supremacy, at this juncture, meant Protestant supremacy.

As a result of this sectarianism, a whole host of immigrant waves were denied formal whiteness largely on account of religious difference. Irish, again, were cast as non-white on account of their Catholicism.<sup>155</sup> Italians, who were “white enough for naturalization and for the ballot” in the late nineteenth century,<sup>156</sup> still confronted racial derision on account of their Catholic identity. Protestantism was, early on, a full-fledged prerequisite for

151. Again, immigrants could have theoretically identified as Black as a pathway toward citizenship following the enactment of the Thirteenth Amendment. However, a range of factors, most notably the per se and societal emaciation of Black citizenship during the Naturalization Era, eliminated this as a practical option for immigrants seeking naturalization. See *supra* note 27 and accompanying text.

152. Neo-Christian sects and offshoots, such as The Church of Jesus Christ of Latter-day Saints, were still viewed with suspicion and generally cast as illegitimate forms of Christianity. See generally JACOBSON, *WHITENESS OF A DIFFERENT COLOR*, *supra* note 75 (tracking historical immigrant groups and their eventual transition towards identification as Caucasian).

153. SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* 18 (2005) [hereinafter HUNTINGTON, *WHO ARE WE?*].

154. See Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795).

155. ROEDIGER, *supra* note 76, at 133.

156. JACOBSON, *WHITENESS OF A DIFFERENT COLOR*, *supra* note 75, at 57.

whiteness, and still later, a powerful measuring stick for Christian immigrants of other confessions and sects.

*ii. Christianity as a Proxy*

As the Protestant leash on citizenship loosened to include Catholics, Orthodox rite traditions, and more, the geographic bounds of whiteness broadened into southern and eastern Europe. Christianity, more broadly, became the guardian of whiteness, used to determine who could become citizens at the border and deep within the hinterland.

First, Native Americans and enslaved Africans were classed as subhuman, and thus non-citizens, through the prism of Christianity. The disparate indigenous populations were branded as “savages” and thus unfit to be part of the fledgling nation,<sup>157</sup> while the culturally heterogeneous population of Africans kidnapped from the continent and reduced to chattel property were deemed a godless people incapable of practicing religion,<sup>158</sup> let alone Christianity. Blackness was crafted to signify property and godlessness, the racial and epistemological antithesis of whiteness, which signified citizenship, Christianity, and “the dominant race in this country.”<sup>159</sup>

Whiteness and race would be made and remade as new waves of immigrants from Asia, Europe, and places in between and beyond gravitated to the country.<sup>160</sup> Once more, with specific regard to European immigrants, the bounds of whiteness were dictated fundamentally by judicial conceptions of Christian legitimacy. For immigrants from regions outside Europe, Christianity and proximity to Christianity served as compelling criterion alongside phenotype, color (and colorism), and geographic closeness to Europe. One case involving an immigrant from modern Lebanon illustrates the salience of Christianity to judicial determinations of whiteness.

George Shishim was a longtime resident of Los Angeles,<sup>161</sup> and finally decided to petition for naturalized citizenship in 1909.<sup>162</sup> He was olive-skinned, kept a black mustache and fit the phenotypic profile of Arabs hailing from the Levant. However, he was Christian, and before the presiding judge issued his ruling, Shishim stood up within the Los Angeles Superior Court and declared, “If I am a Mongolian, then so was Jesus, because we came from

157. SHARI M. HUHNDORF, *GOING NATIVE: INDIANS IN THE AMERICAN CULTURAL IMAGINATION* 6 (2001) (discussing how Puritans and settlers “envisioned Native peoples as . . . embodiments of virtues lost in the Western world” and “man-eating” savages).

158. See WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812*, at 24 (2d ed. 2012).

159. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

160. See generally LÓPEZ, *WHITE BY LAW*, *supra* note 3 (explaining how whiteness as a racial identity constantly changes with immigration).

161. RANDA A. KAYALI, *THE ARAB AMERICANS* 49 (2006).

162. See SARAH M.A. GUALTIERI, *BETWEEN ARAB AND WHITE: RACE AND ETHNICITY IN THE EARLY SYRIAN AMERICAN DIASPORA* 57–58 (2009).



the same land.”<sup>163</sup> While Shishim’s physical appearance conflicted with the portrait of a white, blue-eyed Jesus, ruling against his petition would, for Judge George H. Hutton, call into question the whiteness of Jesus—Christianity’s central figure. Shishim’s petition was approved.<sup>164</sup>

With Christianity at the center of judicial determinations of whiteness, images and portraits of a white Jesus revealed how Christianity, and Christians, were racially imagined. Representations of a white, blue-eyed Jesus were prominent during the early stages of American history, offering the fledgling nation and its citizenry a leading talisman of who they were, aspired to be, and tenaciously fought to remain. Historians Edward J. Blum and Paul Harvey echo the powerful role these representations had on the psyches of Americans, the collective imagination of the nation, and the conflation of Christianity with whiteness:

The differing and evolving rendering of white Jesus figures not only bore witness to the flexibility of racial constructions but also helped create the perception that whiteness was sacred and everlasting. With Jesus as white, Americans could feel that sacred whiteness stretched back in time thousands of years and forward in sacred space to heaven and the second coming.<sup>165</sup>

Images, portraits and figures of white Jesus were and are still ubiquitous. They are prominently displayed in churches of various denominations, hung up in offices and schools, showcased on television media,<sup>166</sup> and adorn the walls of the homes of citizens and aspiring citizens. This reified the idea that Jesus was white, and in the process, that Christianity itself is a white religion. Therefore, although Jesus hailed from the region contemporarily dubbed the “Middle East,” halls of power and their gatekeepers remade his image into a caricature that sought to represent, and maintain, the racial character and contours of the nation. Immigrants, from the Middle East and beyond, were tasked with conforming to this racial caricature—or in Shishim’s rare case, calling into it into question.<sup>167</sup>

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163. Beydoun, *Between Muslim and White*, *supra* note 28, at 32–33.

164. *Id.* at 33.

165. BLUM & HARVEY, *supra* note 149, at 8.

166. Megyn Kelly, on Fox News’ *The Kelly File*, which was one of the highest-rated television news programs while it was on air, stated “Jesus was a white man, too. It’s like we have, he’s a historical figure that’s a verifiable fact.” Hadas Gold, *Megyn Kelly: Jesus and Santa Were White*, POLITICO (Dec. 12, 2013, 12:02 PM), <https://www.politico.com/blogs/media/2013/12/megyn-kelly-jesus-and-santa-were-white-179491> [<https://perma.cc/Y5ZG-K6BM>].

167. Beydoun, *Between Muslim and White*, *supra* note 28, at 33.

## 2. Stigmatized Religions

“I BELIEVE IN Whiteness and the ways of existence . . . we are a selected people who are to bring holiness, goodness, righteousness, justice and truth to the Earth through our flesh.” -*H. Millard*<sup>168</sup>

“Protestantism in America generally involves a belief in the fundamental opposition of good and evil, right and wrong.” -*Samuel P. Huntington*<sup>169</sup>

In *Who Are We?: The Challenges to America's National Identity*, political scientist Samuel P. Huntington writes that the solution to America's racial balkanization is rediscovery of its Protestant roots.<sup>170</sup> Huntington's thesis is not an endorsement of, or nostalgia for, the religious supremacy of the Protestant founders of the nation. But rather, an argument for restoration of the ambition and work ethic, ingenuity and “responsibility of the individual.”<sup>171</sup> These Protestant ideals are what Huntington calls the “American Creed.”<sup>172</sup>

Huntington contends that this American Creed makes up the core of American identity, and the set of principles that a fracturing polity should rally around during moments of crisis.<sup>173</sup> Eight years before releasing *Who Are We?*, Huntington published his most famous and bestselling book, *The Clash of Civilizations and the Remaking of World Order*,<sup>174</sup> which gives greater clarity and intellectual context to the meaning of his American Creed. In *The Clash of Civilizations*, Huntington wrote that, “The qualities that make a society Western, in contrast, are special: the classical legacy, Christianity, the separation of church and state, the rule of law, civil society.”<sup>175</sup> For Huntington, and those that share his worldview, civilizational boundaries trace, or intimately overlap, with religion bounds. However, per the focus of this Article, a critical question remains: Could these Protestant virtues be severed from the context and culture of white supremacy, and the Manichean worldview it spawned with regard to religion?

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168. H. Millard, *The Whiteness Religion*, NAT'L VANGUARD (July 27, 2016), <https://nationalvanguard.org/2016/07/the-whiteness-religion> [<https://perma.cc/5AGX-6948>].

169. HUNTINGTON, WHO ARE WE?, *supra* note 153, at 69.

170. *Id.* at 295. Huntington makes this argument during a moment when the broader white Protestant population is rapidly declining and comprises less than half of the American people. See JONES & COX, *supra* note 9, at 7.

171. HUNTINGTON, WHO ARE WE?, *supra* note 153, at 68.

172. *Id.* at 66–69.

173. *See id.*

174. HUNTINGTON, CLASH OF CIVILIZATIONS, *supra* note 135.

175. *Id.* at 48.

More potent than his explicit overtures and belief that what set Protestantism apart is its capacity to inspire secular, liberal principles, is Huntington's subscription to binaries. And more specifically, civilizational binaries that are drawn along cultural lines, which often blur race and religion together. This framing, in and of itself, is an extension of early Protestant American thinking. A worldview that once divided the world into Christian and heathen, and according to Huntington's civilizational binary, Western civilization pitted against the Islamic civilization.<sup>176</sup> The former occupies the role of the "good," and the latter looms as the "evil" civilization bent on destroying the United States.<sup>177</sup>

The civilizational and political framing of Huntington, and scholars and pundits that adopt his binary, are deeply rooted in the American tradition. Until 1952, judges presiding over the naturalization cases of immigrants routinely conflated Christianity with whiteness, wielding the religion as both a spiritual and civilizational litmus test. Again, proximity to Christianity oftentimes determined the fate of these immigrants. Practitioners of other faiths, such as Hinduism,<sup>178</sup> Sikhism,<sup>179</sup> and specifically Islam,<sup>180</sup> carried the presumption of non-whiteness into court and faced slim to no chance of winning their petitions for naturalization.

#### *i. Islam and Orientalism*

The modern binaries that pit the "Muslim world" against the West,<sup>181</sup> or War on Terror campaigns that racialize Muslims as "terrorists" and dis-identify them as citizens,<sup>182</sup> were rolled out centuries ago within American legislative chambers, executive offices, and civil courtrooms.<sup>183</sup> During early stages of American history and the nascent stages of racial formation, Islam was perceived more along racial instead of religious lines. As a result, Muslims were generally not thought of as a racially diverse population that hailed from various countries and continents on the globe, but as a narrowly defined

176. See *id.* at 209–18.

177. HUNTINGTON, WHO ARE WE?, *supra* note 153, at 69.

178. See Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77, 129–33 (2013) for a review of the Naturalization Era cases involving Hindu and South Asian petitioners leading up to the Supreme Court decision in *Thind*.

179. See *United States v. Thind*, 261 U.S. 204, 214–15 (1923) (denying Bhagat Singh Thind, a Sikh man from India, naturalization because his appearance, religion, and culture did not comport with the judge's conception of whiteness).

180. Beydoun, *Between Muslim and White*, *supra* note 28, at 32–33.

181. HUNTINGTON, CLASH OF CIVILIZATIONS, *supra* note 135, at 209–18.

182. Volpp, *Citizenship Undone*, *supra* note 60, at 2583–84.

183. See generally ROBERT J. ALLISON, THE CRESCENT OBSCURED: THE UNITED STATES AND THE MUSLIM WORLD, 1776–1815 (1995) (providing a compelling history of how the framers, founding fathers, and early American politicians and pundits caricatured Islam, and oriented Muslim's key figures, as antithetical to the democratic vision of the United States).

“race” imagined in the form of Arabs, Ottomans, or Middle Easterners.<sup>184</sup> A manufactured race, gatekeepers believed, whose values and customs clashed so strongly with American mores and ideals that they could not be absorbed into the polity and admitted as citizens.

As examined in my work and most famously theorized by Edward Said,<sup>185</sup> Islam stood as the civilizational and epistemological foil for the West and American civilization. With blackness standing as the foil for whiteness on the domestic racial front,<sup>186</sup> Islam served that very role with regard to America’s imagining of itself as a civilization or spiritual being. American ideas around democracy, liberty, and civility were shaped against the image of Islam. Historian Robert J. Allison observed the galvanizing effect Islam had across political lines, and the dialectical role it had on the formation of foundational American ideas and institutions (or what Huntington calls the American Creed):

During the debate over the Constitution, Federalists could warn of the dangers of anarchy and instability, pointing to the Ottoman Empire, which had no control over its distant provinces, while anti-Federalists repeated the Revolutionary warnings of centralized power, pointing to the absolute tyranny of Muslim sultans. Americans of different political philosophies disagreed on the particular lessons drawn from Muslim history. But all of them, Tories and Patriots, Republicans and Federalists, agreed that Islam fostered religious and political oppression.<sup>187</sup>

Islam, and the negative symbols ascribed to it, stood as the talisman for everything undemocratic, and ultimately, un-American. The negative tropes and ideas assigned to Islam played out in dynamic fashion when Muslims—or immigrants presumed to be Muslims—appeared in court seeking to become naturalized citizens.<sup>188</sup>

184. As explained in a previous article,

[p]ropaganda 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.

Khaled A. Beydoun, *Antebellum Islam*, 58 HOW. L.J. 141, 166 (2014) (footnote omitted) (citation omitted).

185. See generally SAID, *ORIENTALISM*, *supra* note 133 (developing the theory of “Orientalism,” which positions the West, or “Occident,” as the superior opposite of the Middle Eastern, which Said dubs the “Orient”); Beydoun, *Between Muslim and White*, *supra* note 28 (analyzing the ten naturalization cases involving immigrants of the Arab world, where religion stood as the most determinative factor for presiding judges assessing the whiteness of the immigrant-petitioners).

186. Harris, *supra* note 22, at 1716–17.

187. ALLISON, *supra* note 183, at 35.

188. See Beydoun, *Between Muslim and White*, *supra* note 28, at 31–33.

Muslim immigrants like Ahmed Hassan of Yemen were entirely barred from citizenship until 1944.<sup>189</sup> Muslims were restricted from becoming citizens because Islam was deemed antithetical to American values and society: “Apart from the dark skin of the Arabs, it is well known that they are a part of the Mohammedan world and that a wide gulf separates their culture from that of the predominantly Christian peoples of Europe.”<sup>190</sup> Whereby Christianity offered a gateway to whiteness and the citizenship it brought for Christian immigrants,<sup>191</sup> Islam stood as a racial blockade.<sup>192</sup>

More than a century later, this very civilizational binary and racialization of Muslims remains prominent within prevailing political and legal discourses. Today, Islam and outward expression of Muslim identity are presumptive of terror threats.<sup>193</sup> This baseline drives the War on Terror and the accompanying racialization of Muslims as brown, and non-white, “terrorists.”<sup>194</sup> Leti Volpp argued that, “September 11 facilitated the consolidation of a new identity category that groups together persons who

189. *Id.* at 69. Hassan was a Muslim immigrant that a civil court denied naturalized citizenship on account of being Muslim and Arab. *In re Ahmed Hassan*, 48 F. Supp. 843, 845 (E.D. Mich. 1942).

190. *Id.*

191. Compare the rationale in *In re Ahmed Hassan*, 48 F. Supp. at 845, to Judge Wolverton’s opinion in *United States v. Cartozian*, 6 F.2d 919, 920 (D. Or. 1925) (a 1925 case involving an immigrant petitioner from Armenia). Judge Wolverton explained:

Although the Armenian province is within the confines of the Turkish Empire, being in Asia Minor, the people thereof have always held themselves aloof from the Turks, the kurds, and allied [Muslim] peoples, principally, it might be said, on account of their religion, though color may have had something to do with it. The Armenians, tradition has it, very early, about the fourth century, espoused the Christian religion, and have ever since consistently adhered to their belief, and practiced it.

*Cartozian*, 6 F.2d at 920; see also *In re Halladjian*, 174 F. 834, 845 (D. Mass. 1909) (granting the petitions of four Armenian immigrants for citizenship).

192. This blockade on naturalized citizenship for Arab Muslim immigrants stood until 1944. A Massachusetts court lifted it after a Saudi petitioner, Mohamed Mohriez, was granted citizenship. See *Ex parte Mohriez*, 54 F. Supp. 941, 943 (D. Mass. 1944). The ruling, I argue, was driven by American economic interests in the Arab World, and namely, the infinite supply of crude oil in Saudi Arabia, Mohriez’s country of origin:

In line with renewed post-World War II foreign policy interests in the Arab World, the naturalization of Arab Muslim immigrants promoted the broader project of enhancing the United States’ profile in the Arab World. Extending citizenship to Muslim immigrants from the Arab World, particularly those hailing from nations with considerable value, made the United States a more attractive superpower with whom governments of these countries could align during the Cold War [and postcolonial period].

Beydoun, *Between Muslim and White*, *supra* note 28, at 69–70 (footnote omitted).

193. Beydoun, *Islamophobia*, *supra* note 69, at 114.

194. Volpp, *The Citizen and the Terrorist*, *supra* note 58, at 1576.

appear ‘Middle Eastern, Arab, or Muslim,’”<sup>195</sup> a racialization that law scholar Natsu Saito also argued came into existence before 9/11.<sup>196</sup>

However, I argue that this was not a novel racialization, but is in fact a reconsolidation of a racial classification constructed centuries ago. In the wake of the War on Terror, the longstanding classification of Muslims as a people belonging to a savage and violent civilization was tweaked to fit the political designation of terrorism. Islamophobia, after all, was preceded and spawned by Orientalism,<sup>197</sup> the master discourse that isolated Muslims as a savage people, which feeds the very stereotypes that revile and racialize Muslims as terrorists today.

ii. *Judaism and Anti-Semitism*

“No—JEWS ARE NOT WHITE.”<sup>198</sup>

David Duke, the ardent white supremacist and KKK grand wizard, tweeted these words in response to a 2016 *Atlantic* article titled, “Are Jews White?”<sup>199</sup> Duke’s position, and the anti-Semitism he has openly peddled since his coming onto the national scene in 1988,<sup>200</sup> was no longer aberrant. The emergence of the Alt-Right and its unapologetic anti-Semitism echoed Duke’s position that Jews, regardless of what the OMB held or how the U.S. Census counted, were not white. Religion, for Duke and legions that subscribed to his anti-Semitism, meant race. Judaism precluded Jewish Americans from being white.

This racialization of Jewish identity exploded back onto the scene during the 2016 presidential race, energized by Trump’s populist vision to “Make American Great Again.”<sup>201</sup> Yet, the racialization of Jews as a separate race uttered by old-guard white supremacists like Duke, and new wave anti-Semites like Spencer, were neither novel in tone nor different in terms. Similar to the racialization of Islam, the view that Jews were not only a distinct race—but also

195. *Id.*

196. See Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 *ASIAN L.J.* 1, 12 (2001).

197. BEYDOUN, *AMERICAN ISLAMOPHOBIA*, *supra* note 59, at 51.

198. Emma Green, *Jews and the Social Construction of Race*, *ATLANTIC* (Dec. 6, 2016, 9:17 AM), <https://www.theatlantic.com/notes/2016/12/jews-whiteness/509606> [https://perma.cc/F88Y-GDZC] (quoting David Duke (@DrDavidDuke), *TWITTER* (Dec. 5, 2016, 12:02 PM), <https://twitter.com/drdaivduke/status/805834725726289920> [https://perma.cc/MDgE-gL2T]).

199. Emma Green, *Are Jews White?*, *ATLANTIC* (Dec. 5, 2016), <https://www.theatlantic.com/politics/archive/2016/12/are-jews-white/509453> [https://perma.cc/TM39-XLCL].

200. Duke vied for the Republican nomination for the presidency in 1988, and again in 1992, which propelled him onto the national political stage.

201. For an article investigating the tie between Trump’s campaign slogan and white populism, see Marissa Melton, *Is ‘Make America Great Again’ Racist?*, *VOA* (Aug. 31, 2017, 11:04 AM), <https://www.voanews.com/usa/make-america-great-again-racist> [https://perma.cc/5ZKY-46FB].

an inferior one—was deeply rooted in Protestant American notions of civilization, humanity, and whiteness.

Where the racialization of Islam unfolded within legislative chambers and civil courts, the racialization of Judaism unfolded on the street and in every sphere of American life. The mass influx of Jewish immigrants from Europe toward the close of the nineteenth century summoned a vile anti-Semitism to the fore. It was a symbiotic animus that fused religious derision with racial othering,<sup>202</sup> manifested most vividly through racist caricatures covering the pages of newspapers, magazines, and political posters and propaganda.

Popular images of Jews redrew the racial contours of Jewish identity into forms that exaggerated their physical features. Beady eyes, black hair, swarthy complexions, and most prominently, large bulbous noses were hallmarks of these racist caricatures.<sup>203</sup> The intent behind these recreations was clear: to disseminate representations of Jewish identity that radically veered from popular portrayals of white, Christian identity, and presented Jews as a foreign and lesser race. Jews, according to popular racialization, were not white, but “miserable darkened Hebrews.”<sup>204</sup> In Germany and in the United States, caricaturing and “categorizing Jews as an inferior race was intended to prove that they could not be part of the majority group.”<sup>205</sup> In other words, white.

The effect of these widely disseminated recreations of Jewish identity was immediate. First, they incited violence against Jewish enclaves and communities, institutions, and individuals.<sup>206</sup> This violence was emboldened

202. As Khiara Bridges explained,

arguments that Jews are a race were deployed to explain the imagined mental, moral, or ethical deficiencies that went along with their claimed physical deficiencies. As black people’s “race” explained why they were lazy, sexually aggressive and/or promiscuous, and prone to violence, Jews’ “race” explained why they were “predisposed to capitalism, and thus to certain forms of making a living that revolved around the lending of money at interest, or buying and selling for profit.”

Khiara M. Bridges, *The Intersection of Race and Religion*, in *CRITICAL RACE THEORY: A PRIMER* 290–91 (Saul Levmore et al. eds., 2019) (quoting Mitchell B. Hart, *Jews and Race: An Introductory Essay*, in *JEWIS & RACE: WRITINGS ON IDENTITY AND DIFFERENCE 1880–1940*, at xxiv (Mitchell B. Hart ed., 2011)).

203. See Josh Lambert, *Taking It on the Nose? A Fresh Look at Cartoon Jews and Anti-Semitism*, *HAARETZ* (Aug. 1, 2017), <https://www.haaretz.com/life/books/.premium.MAGAZINE-taking-it-on-the-nose-cartoon-jews-and-anti-semitism-1.5436537> [<https://perma.cc/3MX2-UVDM>] (including a sample of the Jewish caricatures widely circulated during the late nineteenth and early to mid-twentieth centuries).

204. Greenberg, *supra* note 79, at 37.

205. Doron Avraham, *The “Racialization” of Jewish Self-Identity: The Response to Exclusion in Nazi Germany, 1933–1938*, 19 *NATIONALISM & ETHNIC POL.* 354, 356 (2013).

206. The lynching of Leo Frank, a Jewish man living in Atlanta in 1913, provides a tragic illustration of the mob attacks targeting Jews during the early twentieth century. Frank was falsely accused of raping and killing a 13-year old white, Christian girl, and while imprisoned, a mob kidnapped him from prison and beat him. For more on the lynching of Leo Frank, and how this event has been deployed by contemporary anti-Semites, see Jacob Bogage, *Leo Frank Was Lynched*

by the nativist rhetoric parroted today by the like of Duke, Spencer, and Pittsburgh gunman, Robert Bowers. Citing the eugenicist Madison Grant, historian Matthew Frye Jacobson writes,

[I]n cities like New York “old stock” Americans were being “literally driven off the streets” by “swarms” of immigrants—primarily Polish Jews—who “adopt the language of the native American; they wear his clothes; they steal his name; and they are beginning to take his women, but they seldom adopt his religion or understand his ideals.”<sup>207</sup>

Second, these racist renderings of Jewish identity motivated or corroborated spreading institutional discrimination against Jews, which peaked during the 1920s. Colleges and universities adopted strict anti-Jewish quotas;<sup>208</sup> corporations ranging from public utilities companies to hospitals followed suit,<sup>209</sup> restricting the number or entirely foreclosing Jews from employment. Climaxing nativism and xenophobia during the interwar period, which in many parts of the country focused acutely on Jews, led to the enactment of the Johnson–Reed Act in 1924.<sup>210</sup> The Act was hailed as a victory for white supremacist nativism, and the strict quotas it placed on immigration slashed the number of Jewish immigrants coming into the country for decades.<sup>211</sup>

Although Jews could naturalize as citizens and were reluctantly absorbed into the formal bounds of whiteness, the racial anti-Semitism pervading every sector of American life curated a clashing reality. A badge of inferiority was assigned to Jewish bodies, particularly those that outwardly expressed their religious identity. The Jewish American confrontation with anti-Semitism, through the thick white nativism of the 1920s and its progeny today, suggests strongly that the Jewish American association with whiteness is tenuous. And perpetually vulnerable to the fluid threat of anti-Semitism, and its strategic tie to Trump’s “Make America Great Again,” Huntington’s restoration of an

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for a Murder He Didn’t Commit. Now Neo-Nazis Are Trying to Rewrite History, WASH. POST (May 22, 2017, 12:26 PM), <https://www.washingtonpost.com/news/retropolis/wp/2017/05/22/leo-frank-was-lynched-for-a-murder-he-didnt-commit-now-neo-nazis-are-trying-to-rewrite-history> [<https://perma.cc/JQ8E-NFV3>].

207. JACOBSON, WHITENESS OF A DIFFERENT COLOR, *supra* note 75, at 81 (quoting MADISON GRANT, THE PASSING OF THE GREAT RACE; OR, THE RACIAL BASIS OF EUROPEAN HISTORY 80–81 (Charles Scribner’s Sons eds., 1916)).

208. See generally KARABEL, *supra* note 82 (observing the exclusion of Jews from admissions at elite universities).

209. Barron H. Lerner, *In a Time of Quotas, A Quiet Pose in Defiance*, N.Y. TIMES (May 25, 2009), <https://www.nytimes.com/2009/05/26/health/26quot.html> [<https://perma.cc/gY35-BJ5J>].

210. Immigration Act of 1924, Pub. L. 68-139, 43 Stat. 153 (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 United States, like Muslims of any race or ethnicity, were effectively barred entirely.

211. See JACOBSON, WHITENESS OF A DIFFERENT COLOR, *supra* note 75, at 83.



“American Creed,” and what other articulations of white supremacist nostalgia and longing may come tomorrow.

#### IV. RELIGIOUS IDENTITY PERFORMANCE

Religion is an *act*. An act where rituals and dress, grooming and other outward displays of faith carry and communicate potent meaning to the public.<sup>212</sup> This is particularly true atop stages in the United States, where deeply rooted religious tropes and damaging modern stereotypes are assigned to these outward displays of worship by state actors, and even more routinely, fellow Americans. For groups of Americans formally counted as white, particularly adherents of stigmatized religions, the American imagination has a storage chest to draw from when assigning racial meanings to displays of Muslim or Jewish identity. Assignment of these racial meanings are often conscious, but is also often subconsciously assigned and ascribed. Much of this racial assignment to stigmatized religions, and their adherents, is negative and detrimental. And, during the nativist crossroads the United States currently finds itself mired in, very dangerous.<sup>213</sup> Consequently, adherents of stigmatized faiths are pushed to find cover from this danger, which is often found through reassessing and renegotiating their religious *act*.

##### A. A THEORY

This Section provides a theory of religious identity performance, building off the work of foundational scholars within social psychology and the law. Again, this Article adopts Goffman’s framework to theorize how adherents of stigmatized religions respond to assignments of negative racial meaning, from both private and state actors, and perform their religious identities in response to that stigma. While Free Exercise scholars have investigated this broader phenomenon within the corpus of First Amendment literature investigating a “chilling effect,” religious identity performance is far more damaging a process, spurring routine and recurring infringements on an

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<sup>212.</sup> Religious identity is, in great part, substantiated by outward actions and engagements. Sudeall Lucas observes:

One aspect of religious identity is participating in holidays and rituals associated with a given religion. Thus, religious identity is different from other types of identity in that it may require engagement in certain actions or practices. This is why it is critical to religious identity that a member of a given religion be able to engage in such actions under the protections provided by the Free Exercise Clause.

Sudeall Lucas, *supra* note 108, at 69.

<sup>213.</sup> According to a survey conducted by the Institute of Social Policy and Understanding (“ISPU”), Muslim and Jewish Americans reported the highest degrees of religious discrimination in 2018, at clips of 61 percent and 48 percent respectively. DALIA MOGAHED & YOUSSEF CHOUHOUD, INST. FOR SOC. POLICY & UNDERSTANDING, AMERICAN MUSLIM POLL 2018: PRIDE AND PREJUDICE 15 (2018). Most telling and germane to this Article were the figures of Muslim and Jewish Americans “[m]ost [l]ikely to [b]elieve [that] [o]thers [n]egatively [s]tereotype their [f]aith,” at 62 percent and 45 percent. *Id.* at 17.

individual's religious liberty. The two should not be conflated, and are carefully examined below.

### 1. Beyond Chilling Effect

Chilling effect and identity performance are intimately related. As articulated in Section III.A, stigma in the form of: (1) state policy; (2) political discourses; and (3) popular discourses all have varying regulatory effects on the individual. This regulation, again, may be enforced by the state, or in the case of identity performance, self-imposed and enforced through reimagined and reformed expression of religious identity.

First, chilling effect on adherents of stigmatized religions begins with the pressure created by these three currents, or conduits, of stigma. Legal literature examining stigma has predominantly focused on legal chilling effect, or suppression of First Amendment activity spurred by legislation.<sup>214</sup> The origin of the term, not surprisingly, arises from this context. In a 1952 ruling striking down an Oklahoma loyalty oath for public employees, Supreme Court Justice Felix Frankfurter wrote,

[I]nhibition of freedom of thought, and of action upon thought, in the case of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.<sup>215</sup>

Frankfurter's description of the inhibitive effect the Oklahoma loyalty oath had on "chill[ing]" the ways in which teachers crafted their lessons, or engaged with the world beyond the four corners of their classrooms, gave a name to the phenomenon.

The second component of chilling effect is suppression of stigmatized activity. The second prong spurs abstinence, thereby making the response on the part of the actor *reactive* versus *proactive*. With regard to Free Exercise of Religion, adherents of stigmatized religions reacting to the chilling effect of state regulation, may abstain from expressing their religious identities within spaces where this stigma looms large. But that is where it stops with chilling effect. There is no additional, nor *proactive*, action taken by abstinence or cessation.

### 2. Strategic Performance

Strategic performance of religious identity, on the other hand, is *proactive* and *dynamic*. It involves doing something more, and oftentimes far more, than mere abstinence from stigmatized behavior. With regard to Free

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<sup>214</sup> In addition to law, a chilling effect can be spurred by political and popular stimuli ("political" and "popular chilling effect"), per the focus of Section III.B *supra*.

<sup>215</sup> *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

Exercise of stigmatized religions, religious identity performance burdens the adherent with having to think about, assess the tradeoffs, plan, perform and re-perform one's religious identity in relation to the stigma. Thus, unlike chilling effect, religious identity performance entails action, and recurring action.

Performance of religious identity is demanding, and in short, *hard work*. This is particularly true for adherents of stigmatized religions confronting the perils posed by state policy, ominous political discourses and dangerous popular discourses, which permeate within every sector of life. For Jewish Americans, the perils posed by anti-Semitic discourses can penetrate college campuses or the workplace, street corners or synagogues, pushing negotiations of religious identity performance in ways that stave off these perils. This is also true for Muslim Americans, navigating life amid a sociopolitical landscape where War on Terror policy is enforced most acutely within the bounds of concentrated Arab, Middle Eastern and Muslim communities,<sup>216</sup> and damaging tropes about Islam are uttered from the mouth of the President.<sup>217</sup> This has the direct effect of encouraging religious identity performances that minimize the prospect of suspicion and surveillance from the state, or the threat of violent backlash from individuals.<sup>218</sup>

Religious identity performance also entails ongoing disruptions of Free Exercise. Again, these disruptions are not *per se* violations from state action, but *directly* tied to discourses crafted or endorsed by state actors, or political or popular discourses that arise from beyond the state.

### B. A TYPOLOGY

This Section provides a typology for understanding the distinct forms of religious identity performance undertaken by adherents of stigmatized religions, which enables understanding of how religious identity is navigated in relation to whiteness. Adherents of stigmatized religions negotiate and perform their religious identity in myriad ways. The mode of religious identity performance is contingent upon a range of factors, including (but not limited to): the gravity of the stigma, the degree of support, gender, racial identity, educational level or class, the region of the country in which one resides, or the personal idiosyncrasies of the individual in question. Adherents of stigmatized religions are not monolithic by any measure, and occupy a milieu

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216. See generally Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT'L SEC. J. 147 (2014), for an analysis of counter-radicalization policing programs deployed within Muslim communities in the United States.

217. See Jenna Johnson & Abigail Hauslohner, *'I Think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims*, WASH. POST (May 20, 2017, 2:16 PM), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims> [<https://perma.cc/CSP8-DT45>].

218. Beydoun, *Acting Muslim*, *supra* note 136, at 6–7.

of stations in American life, and therefore respond to stigma differently. This Section acknowledges this complexity, and seeks to provide a typology and framework theorizing the principal ways in which adherents of stigmatized religions negotiate and perform their religious identities in the face of religious bigotry or stigma.<sup>219</sup>

There are four types of religious identity performance: (1) Confirming Religion; (2) Conforming Religion; (3) Covering Religion; and (4) Concealing Religion, which I outline below.

### 1. Confirming Religion

“Confirming Religion” is an “identity affirming” expression of religious identity that comports with an adherent’s religious convictions and sense of self. In addition to affirming religious identity, Confirming Religion also encompasses activity whereby an actor enhances or amplifies his or her religious identity. A Sikh man’s decision to wear his *dastar*, or turban, despite being cognizant of the suspicion or animus it may invite,<sup>220</sup> is an example of Confirming Religion—or in this instance, Confirming Sikhism.

A more recent example, within the current political context, involves Congresswoman Rashida Tlaib of Michigan, who joins Ilhan Omar as the first Muslim American women elected to U.S. Congress, being sworn into office with a Qur’an.<sup>221</sup> Tlaib stated, “It’s important to me because a lot of Americans have this kind of feeling that Islam is somehow foreign to American history,”<sup>222</sup> confronting the political and popular stigmatization of Islam. Here, Tlaib is Confirming Islam with the country’s attention fixating squarely on her and the historic moment, affirming her Free Exercise rights and tackling religious stigma head on.

In practice, Confirming Religion prioritizes one’s Free Exercise rights over the fear of affirming negative stereotypes ascribed to stigmatized identity

219. This typology is adapted from my work on Muslim American identity performance, and broadly theorized to fit the experiences of adherents of any stigmatized faith or community. *Id.* at 11–16.

220. “Sikh men wearing turbans that look similar to the turbans worn by Osama bin Laden and the Taliban make Sikhs a visible minority group, and in the wake of the September 11th terrorist attacks, an accessible proxy” and oft targeted victims of private Islamophobic violence. Sahar F. Aziz, *Sticks and Stones, The Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y.C. L. REV. 33, 47 (2009).

221. Todd Spangler, *Detroit Congresswoman Uses Koran for Swearing-In Ceremony*, USA TODAY (Jan. 3, 2019, 6:22 PM), <https://www.usatoday.com/story/news/politics/2019/01/03/rashida-tlaib-koran-muslim-congresswoman/2473004002> [<https://perma.cc/XG6G-SM4G>] (discussing pledging upon Thomas Jefferson’s copy of Islam’s holy book). For more on Jefferson’s Qur’an and his writing on Islam, see generally Anthony Santoro, *Denise Spellberg, Thomas Jefferson’s Qur’an: Islam and the Founders*, EUR. J. AM. STUD., Sept. 2014, at 1 (book review).

222. Mehreen Kasana, *Rashida Tlaib’s Swearing-In Ceremony Will Include a Quran that Belonged to a Founding Father*, BUSTLE (Dec. 20, 2018), <https://www.bustle.com/p/rashida-tlaibs-swearing-in-ceremony-will-include-a-quran-that-belonged-to-a-founding-father-15556938> [<https://perma.cc/4FQC-V8KH>].

by state policy, political or popular discourses. Confirming Religion, in essence, is rebellious conduct, or activity that manifests disavowal of the stereotypes and stigmas endorsed by state policy, political or popular discourses. Moreover, Confirming Religion is a refusal to assimilate religious expression protected by the Free Exercise clause in exchange for the incentives of mitigating stigma, suspicion or violence.

Therefore, during a crossroads in American history where white populism, anti-Semitism, and Islamophobia loom large, adherents of stigmatized religions that Confirm Religion through outward expression may be said to voluntarily assume the perils that expression attracts. And as a result, they expose themselves to enhanced stigma from state and private actors.

## 2. Conforming Religion

“Conforming Religion” is when an adherent of a stigmatized religion alters and assimilates a disfavored religious trait, expression, or identity at large in line with positive tropes about his or her religion. Two motives drive a subject’s decision to Conform Religion: first, a desire to assimilate a disfavored trait, expression, or identity so that it mitigates or eliminates stigma from the state or private actors; or, second, a desire to assimilate a disfavored religious identity trait, expression, or identity for personal benefit.<sup>223</sup> A Muslim American woman who chooses to wear an American flag as a *hijab* is an example of Conforming Religion,<sup>224</sup> or in this instance, Conforming Islam.

Conforming Religion imputes mainstream sensibilities and prevailing stigma to reshape a specific religious expression. It is ultimately a strategic concession made to mitigate the prospect of stigma, and the risks and dangers it often elicits. Moreover, an adherent of a stigmatized religion that Conforms Religion enhances his or her prospect of being rewarded by state or private actors for assimilating expressions of stigmatized religions in line with positive or negative stereotypes. Possible rewards may be government jobs, or institutions wed to political views and discourses that subscribe to bigoted views of Muslims, Jews, or other stigmatized faiths.

In exchange for these incentives, adherents of stigmatized religions are voluntarily compromising their Free Exercise rights and endorsing negative views of their faith group. Actors who Conform Religion for personal benefit are also engaging in “identity entrepreneurship,”<sup>225</sup> reforming and restructuring their religious identity in line with (positive) stereotypes for personal gain.

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223. Leong, *supra* note 98, at 1346.

224. Beydoun, *Acting Muslim*, *supra* note 136, at 51–53.

225. Leong defines identity entrepreneurship as “circumstances in which an individual member of an identity out-group intentionally leverages her identity for personal benefit.” Leong, *supra* note 98, at 1346.

### 3. Covering Religion

“Covering Religion” is conduct whereby an adherent of a stigmatized religion voluntarily tones down a religious identity trait or expression to mitigate or eliminate the stigma associated with that trait or expression. An actor who Covers Religion prioritizes the discomfort or fear of affirming negative stereotypes ascribed to his or her faith over his or her Free Exercise rights. A Jewish American student who chooses to remove his yarmulke at a college sparsely attended by Jews is an example of Covering Religion, or in this instance, Covering Judaism.<sup>226</sup>

In practice, Covering Religion encompasses conduct that capitulates to the negative stereotypes ascribed to expressions of stigmatized religions. The looming threat of anti-Semitism following the Pittsburgh Shooting may push Jewish Americans in Squirrel Hill,<sup>227</sup> and the country at large, to cover a specific Jewish identity trait to appear inconspicuous to potential hatemongers. And, as analyzed with Conforming Religion, Covering Religion can be motivated by the personal benefits and opportunities it may present to an identity entrepreneur.<sup>228</sup>

Adherents of stigmatized religions that Cover Religion are voluntarily compromising their Free Exercise rights in exchange for diminishing stigma and/or increasing the prospect or access to personal reward. But in the process they opt into the negative meaning associated with that conduct. By doing so, they propagate negative stereotypes that could enhance the vulnerability of members of their faith group that confirm that specific religious trait or expression.

### 4. Concealing Religion

“Concealing Religion” is the process whereby an adherent of a stigmatized religion trades in his or her religious identity for another, or no

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226. To cite an example from American cinema, Brendan Fraser’s character (David Greene) in the 1992 film, *School Ties*, conceals his Jewish identity to fit into his exclusive, blueblood prep school in Massachusetts. *SCHOOL TIES* (Paramount Pictures 1992). Greene performs his prayers in private, removes his star-of-David necklace and obscures his family ties and origins to present himself as Christian throughout much of the film, scoffing off anti-Semitic statements made by his classmates until he can take no more, finally revealing his Jewish identity at the close of the film. *Id.* Greene’s concealment of Judaism and passing as a Christian teen, in the words of law scholar Randall Kennedy, was a “deception” driven by desire for social acceptance. *See generally* Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145 (2001). For more on *School Ties*, see *School Ties*, IMDB, <https://www.imdb.com/title/tt0105327> [<https://perma.cc/2NMY-KHRP>].

227. David M. Shribman, *This American Jewish Community Is ‘the Heartbeat of Squirrel Hill,’* NAT’L GEOGRAPHIC (Oct. 31, 2018), <https://www.nationalgeographic.com/culture/2018/10/pittsburgh-tree-of-life-synagogue-shooting> [<https://perma.cc/8J8F-UHCD>].

228. Leong, *supra* note 98, at 1346.

religious identity at all, within a specific setting or the public sphere at large.<sup>229</sup> Concealing Religion is synonymous with strategic “passing,” whereby an adherent of a stigmatized religion presents him or herself as a member of another religion or no religion at all, while his or her “underlying [religious] identity is not altered, but hidden.”<sup>230</sup> A Hindu woman who Anglicizes her name, and presents herself as a Christian at work in order to fend off stigma and enhance her prospects of promotion, is an example of Concealing Religion, or, Concealing Hinduism.

Concealing Religion, therefore, is a full-fledged “deception.”<sup>231</sup> Unlike Covering Religion, whereby the adherent of a stigmatized religion conceals a specific religious identity trait or expression, actors who Conceal Religion are strategically masking every aspect of their religious identity within a specific place or the public sphere at large. By privatizing their religious identity, they remove each and every indicator of their religious identity from public view. Adherents of stigmatized religions who Conceal Religion have given up the task of adhering to their faith altogether, choosing to perform another faith or no faith at all. However, an adherent of a stigmatized religion who Conceals Religion has not converted to another faith, or fully disavowed their faith, given that they still practice the faith and identity as such within the confines of private spaces.

Adherents of stigmatized religions who Conceal Religion are surrendering their Free Exercise rights in exchange for diminishing the stigma and staving off the perils it elicits. In the process, actors who Conceal Religion also capitulate to the stigmas ascribed to their faith, and propagate them.

This typology frames how members of stigmatized religions perform their religious identities against, or toward, prevailing conceptions of whiteness. Again, highlighting how religious identity performance is intimately tied to how one is racially perceived: a nexus that, as the case studies examined below, is rising in intimacy as a result of rising white supremacy and populism.

## V. WORSHIP AND WHITENESS

For members of the racial middle, religious identity performance can serve as a racial passport. During the Naturalization Era, immigrants performed whiteness as a pathway toward citizenship within the walls of courtrooms. Immigrants petitioning for citizenship were, sometimes, trying

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229. Concealing Religion is distinct and should not be conflated with or mistaken for religious conversion, whereby an individual completely disavows a faith for a new religion or no religion at all.

230. Yoshino, *supra* note 96, at 772.

231. Adopting the language of Randall Kennedy, who bases his definition of “passing” as strategic deception Blacks used during the Antebellum period and Reconstruction to fend off subordination and violence and access the benefits present in white spheres of society. *See* Kennedy, *supra* note 226, at 1145.

to “legally pass as white,”<sup>232</sup> or challenge the prevailing conceptions of whiteness.

These performances continue today, but unfold beyond the walls of any specific space and in every sphere of American life. In a context where Christianity is still intimately tethered to whiteness and stigmatized religions anchored to otherness, Free Exercise is stripped of its freedom and remade into a passageway toward safety and survival. For those interlocked between the pull of whiteness and the stigma ascribed to their faith, the negotiations of religious expression come with unseen existential costs—most notably, alienation from one’s genuine self.<sup>233</sup> In addition to this existential alienation, behavioral psychologists have theorized that physical alienation from one’s “religious social identity” has a detrimental effect on psychological well being.<sup>234</sup> On the other hand, if the adherent confirms his or her religion despite the stigma, he or she may be exposed to dangers that follow closely behind it.

This Section applies the theory of religious identity performance developed above to a series of case studies. These case studies, derived from direct interviews and secondary sources, center on adherents of stigmatized faiths and groups, and highlight how religious performance enables the actor to negotiate the racial meaning assigned to their faith. Distinct performances of religious identity strategically undertaken by an adherent have the effect of: (1) affirming their perceived whiteness; (2) retrenching their perceived whiteness; or (3) veiling their whiteness from public view.

#### A. AFFIRMING WHITENESS

Performance of religious identity can be negotiated and navigated as an affirmation of whiteness. For members of stigmatized communities formally classified as white, underperformance of stigmatized faiths or overperformance of Christianity can have the effect of presenting oneself as white to the broader public. This Section examines two case studies, the first involving a Lebanese American Muslim woman and the second an Iraqi American Catholic woman, who perform their respective faiths in ways that seek to affirm or accentuate their whiteness.

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232. Beydoun & Wilson, *Reverse Passing*, *supra* note 20, at 305.

233. “[T]he degree that the individual maintains a show before others that he himself does not believe, he can come to experience a special kind of alienation from self and a special kind of wariness of others.” GOFFMAN, *PRESENTATION OF SELF*, *supra* note 91, at 236.

234. “Also consistent with social identity theory, this study found that having a stronger religious social identity was associated with higher levels of subjective psychological well-being.” Emily A. Greenfield & Nadine F. Marks, *Religious Social Identity as an Explanatory Factor for Associations Between More Frequent Formal Religious Participation and Psychological Well-Being*, 17 INT’L. J. PSYCHOL. RELIGION 245, 253 (2007).



## 1. Uncovering Whiteness

“I just wanted to blend in and not stick out anymore.”

Zeina said this to me looking down at her cup of tea,<sup>235</sup> recounting the moment she decided to take off her *hijab* and permanently “uncover.”<sup>236</sup> She remembers the very moment when she decided to move forward with *the* decision, the emotional anguish it sparked between her and her parents, and the first moment she stepped out in the world again without the hijab on her head.<sup>237</sup> “It felt so weird,” the 20-year-old, fresh college graduate recollected, “and I worried about . . . what my friends would think . . . but it’s what I wanted.”<sup>238</sup> Her words came out of her mouth carefully, and the intermittent pauses reflected the weight on her shoulders when she finally decided to uncover.

Zeina comes from a Shia Muslim,<sup>239</sup> Lebanese American family living in metropolitan Detroit—which boasts the largest Shia community in the country.<sup>240</sup> Her appearance is often mistaken for “Italian or Spanish,” she stated with a smile.<sup>241</sup> She recollected the stares she received on campus when she wore the hijab, which became more pronounced during the 2016 presidential campaign. Some of her classmates, who felt uncomfortable with the growing attention and feared the backlash they read and heard about,<sup>242</sup> removed their headscarves. “Of course I thought about that, and also those Muslim college students murdered,”<sup>243</sup> referencing the three University of North Carolina students executed by a neighbor in Chapel Hill in February 2015.<sup>244</sup> But for her, fear was part of a more complex motive for uncovering

235. Interview with Zeina (Oct. 25, 2018). Interview with “Zeina,” whose name was changed and identity made anonymous.

236. The term is colloquial within many Muslim American communities describing the phenomenon of Muslim women removing their headscarves.

237. Interview with Zeina, *supra* note 235.

238. *Id.*

239. Shia Islam is the minority sect in Islam, and Sunni Islam the sect observed by the vast majority of Muslims in the United States and the world. Beydoun, *Bisecting American Islam?*, *supra* note 68, at 449–51.

240. As of 2015, Dearborn, Michigan—the Arab American heavy suburb of Detroit, Michigan—is home to (at least) 30,000 Shia Muslims. *Shia Muslims Population*, WORLD SHIA MUSLIMS POPULATION, <http://shianumbers.com/shia-muslims-population.html> [<https://perma.cc/65SA-HH5F>].

241. Interview with Zeina, *supra* note 235.

242. For a profile about a young Muslim American woman’s decision to permanently take off her hijab after Trump won the presidency, see Alaa Basatneh, *It’s Not Safe to Wear My Hijab Now That Trump Will Be President*, SPLINTER (Nov. 15, 2016, 8:00 AM), <https://splinternews.com/its-not-safe-to-wear-my-hijab-now-that-trump-will-be-pr-1793863762> [<https://perma.cc/RDE5-UT38>].

243. Interview with Zeina, *supra* note 235.

244. BEYDOUN, AMERICAN ISLAMOPHOBIA, *supra* note 59, at 23–28.

her Muslim identity.<sup>245</sup> Zeina wanted to “blend in,”<sup>246</sup> and not be singled out or stigmatized on account of her appearance. In other words, she wanted to be racially invisible as she walked across college campuses, sat in cafes, and boarded airplanes. “I just want to be an *American*,” she maintained.<sup>247</sup>

What Zeina was talking about was passing racially,<sup>248</sup> and specifically, passing as white. As a Lebanese American, the U.S. Census formally classified Zeina as white. Her light brown hair and fair skin enabled her to pass as white if she so chose, but her new religious identity performance was fluid and situational. “I’m still Muslim,”<sup>249</sup> she asserted, and uncovering enabled her to conform her religious identity in a way that was non-threatening,<sup>250</sup> or in line with “western” standards.<sup>251</sup> Conforming Islam, in some settings, was a means toward blending in for Zeina, and benefiting from the racial invisibility that only comes with being perceived as white. Her friends and colleagues still knew that she was a practicing Muslim, despite her removal of the headscarf.

In other contexts, particularly those where she knew nobody or could *pass* anonymously, Zeina would conceal Islam. Whereas the headscarf she previously wore screamed to everybody around her that she was a Muslim,<sup>252</sup> her new identity bore no sign or signal of her faith. “I liked the fact that I could walk into places and meet people and they not know what religion I was, and sometimes I didn’t want to tell them because it might hurt me,”<sup>253</sup> she disclosed. Concealing Islam, for Zeina, facilitated her efforts to racially pass in some settings, and enabled her to present herself as white to people as she so chose. The *hijab* she permanently removed functioned like a racial mask, and presented her to the world as a Muslim—a religious identity that is

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245. Beydoun, *Acting Muslim*, *supra* note 136, at 4–5.

246. Interview with Zeina, *supra* note 235.

247. *Id.*

248. “Passing is the phenomenon whereby nonwhites present themselves as white, while their ‘underlying identity is not altered, but hidden.” Beydoun & Wilson, *Reverse Passing*, *supra* note 20, at 284 (footnote omitted) (citing Yoshino, *supra* note 96, at 772).

249. Interview with Zeina, *supra* note 235.

250. Zeina, here, is tacitly conforming her Muslim identity in line with “good citizen” tropes imposed upon Muslims during the War on Terror, which encompasses secular or “Western” expressions of faith. For an analysis of the good versus bad framing, and how it unfolded during the direct aftermath of the 9/11 terror attacks, see Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 100–14 (2004). See generally MAHMOOD MAMDANI, *GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR* (2004) (examining the genesis of the good-bad Muslim binary and its application in War on Terror America).

251. For an opinion by a Muslim woman viewing the hijab, and other forms of Islamic covering, as inimical with Western values, see Qanta Ahmed, *As a Muslim, I Strongly Support the Right to Ban the Veil*, SPECTATOR (Mar. 18, 2017, 9:00 AM), <https://www.spectator.co.uk/2017/03/the-right-to-ban-the-veil-is-good-news-for-everybody-including-muslims> [<https://perma.cc/Y6GP-ZRW2>].

252. “The headscarf, or *hijab*, is commonly referred to as the ‘flag of Islam.” Beydoun, *Acting Muslim*, *supra* note 136, at 47.

253. Interview with Zeina, *supra* note 235.

deeply racialized, and amid a climate of rising *American Islamophobia*,<sup>254</sup> feared and reviled.

She believed that the hijab had control over her identity when she wore it, but she reclaimed that control when she removed it.<sup>255</sup> By uncovering, Zeina undressed herself of this racialized identity and the stigma and suspicion that came along with it. She could now present herself as Muslim or not, entirely on her own terms. Without the “weight” of the headscarf,<sup>256</sup> she conformed and concealed her Islam in line with achieving the racial invisibility she long coveted, saw the world differently, and was seen and *unseen* within it like never before.

## 2. Exercising Islamophobia

“We’re not Muslims, we’re Christians.”

This was a familiar cry by Chaldean Americans heard in the metropolitan Detroit area after the 9/11 terror attacks. Chaldean Americans are an ethnic minority indigenous to Iraq that migrated to the Motor City in large numbers in the 1960s.<sup>257</sup> Today, the greater Detroit area boasts the largest number of Chaldeans in the world outside of Iraq, with an estimated population of 121,000.<sup>258</sup> The metropolitan Detroit area is also home to the most concentrated Arab American populations as well, who hail from the same region and physically resemble Chaldean Americans,<sup>259</sup> but are overwhelmingly Muslim.

While Chaldean and Arab Americans live alongside one another in Detroit and its neighboring towns, political and racial differences between them almost always unfold along religious lines. Chaldean Americans are overwhelmingly Catholic, and follow Eastern Rite traditions that are tied to the Roman Catholic Church.<sup>260</sup> Catholicism is so deeply entwined with Chaldean identity that it symbolizes more than just spiritual identity, but also

254. BEYDOUN, *AMERICAN ISLAMOPHOBIA*, *supra* note 59, at 28–30.

255. Interview with Zeina, *supra* note 235.

256. *Id.*

257. See Mary C. Sengstock, *Chaldean Americans*, COUNTRIES & THEIR CULTURES, <https://www.everyculture.com/multi/Bu-Dr/Chaldean-Americans.html> [<https://perma.cc/K2SD-KAD2>].

258. The last estimates were in 2008, so this figure is likely considerably higher today. See *Community Overview*, CHALDEAN AM. CHAMBER COMMERCE, <https://www.chaldeanchamber.com/community-overview> [<https://perma.cc/6zR8-MSYF>].

259. Arabs and Chaldeans are frequently conflated as being one and the same. However, the latter group prides itself on being ethnically and culturally distinct, and oftentimes, on grounds of religious identity, reject Arab identity. For an article that manifests this position published after the 9/11 terror attacks, see Christopher J. Mattia, *Chaldeans are Not Arab Americans*, WASH. TIMES (Nov. 17, 2001), <https://www.washingtontimes.com/news/2001/nov/17/20011117-031215-6322r> [<https://perma.cc/D6GS-C8YZ>].

260. See generally RAY RAMOO, *ANCIENT AND MODERN CHALDEAN HISTORY* (1999), for a history analyzing the ancestral origins, cultural practices and common religious traditions of the Chaldean people.

culture, political outlook, and a shared narrative of persecution under intolerant Iraqi regimes of the past and terror networks today.<sup>261</sup> In the United States, adherence to and expression of Catholicism has enabled a greater degree of social assimilation into whiteness for Chaldean Americans than their Middle Eastern Muslim counterparts.<sup>262</sup>

For Chaldean Americans, like Nahren Anweya from the Detroit suburb of Sterling Heights,<sup>263</sup> confirmation of Catholic identity has a twofold effect. First, it functions as an affirmation of whiteness, and second, it grants an explicit exemption from perceived Arab or Muslim identity. For onlookers, particularly those unfamiliar with the cultural and religious heterogeneity of the Middle East, Chaldean American Catholics *look just like Arab American Muslims*. Their kindred physical appearances, therefore, lead to Chaldean Americans being read as Muslim, and assigned the racial ascription of terrorism. In response, many Chaldean Americans, like Anweya, are adamant about expressing their ethnic and spiritual differences by emphatically confirming Christianity by wearing large crucifixes, affixing a sticker of the Arabic letter “N” on their cars to indicate their religious identity to the public,<sup>264</sup> and subscribing to virulent strains of Islamophobia—like opposing the construction of a mosque in Sterling Heights.<sup>265</sup>

“Building the mosque would be insensitive to Iraqi Christians who are undergoing a ‘genocide’ at the hands of Muslims in Iraq,” Anweya stated, conflating Muslim Americans at home with Islamic State of Iraq and Syria (“ISIS”) terrorists a hemisphere away.<sup>266</sup> Anweya’s brazen Islamophobia echoes the political discourses that dis-identified Muslim Americans as citizens and cast them, categorically, as terrorists.<sup>267</sup> A discourse that became

261. See Michael Kelly, *Chaldean Archbishop: Iraqi Christians Fear Another Wave of Persecution*, CATHOLIC PHILLY (Dec. 21, 2017), <https://catholicphilly.com/2017/12/news/world-news/chaldean-archbishop-iraqi-christians-fear-another-wave-of-persecution> [https://perma.cc/X9Q7-SM59] (examining the targeted killing of Iraqi Christians by the Islamic State of Iraq and Syria (“ISIS”)).

262. See generally Kristine J. Ajrouch & Amaney Jamal, *Assimilating to a White Identity: The Case of Arab Americans*, 41 INT’L MIGRATION REV. 860 (2007) (commenting on the influence of religion regarding assimilation).

263. Ali Harb, *Detroit Suburb’s Iraqi Christians Lead Protests Against New Mosque*, MIDDLE EAST EYE (Feb. 23, 2017, 9:25 PM), <https://www.middleeasteye.net/news/detroit-suburbs-iraqi-christians-lead-protests-against-new-mosque> [https://perma.cc/8PF5-5A9F].

264. See Thomas Seymat, #ح: *How an Arabic Letter Was Reclaimed to Support Iraq’s Persecuted Christians*, EURONEWS (July 22, 2014), <https://www.euronews.com/2014/07/22/how-an-arabic-letter-was-reclaimed-to-support-iraqs-persecuted-christians-n> [https://perma.cc/4DWF-QKPY] (elaborating on how the image has also been used beyond this purpose, and in metropolitan Detroit, to indicate one’s identity as Chaldean and Catholic).

265. For a close analysis of the rise in land use discrimination against Muslim institutions, most notably mosques, and how the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) counters this discrimination, see generally Khaled A. Beydoun, *On Sacred Land* (forthcoming 2020) (on file with author).

266. Harb, *supra* note 263.

267. Volpp, *Citizenship Undone*, *supra* note 60, at 2583.

more explicit during Donald Trump's campaign for presidency,<sup>268</sup> which converged with the battle in Sterling Heights over the mosque that the American Islamic Community Center planned to build.<sup>269</sup> In Anweya's case, engaging in Islamophobia offers a platform to fervently confirm Christianity, and dis-identify herself from being perceived as Muslim on account of her Middle Eastern identity.

Anweya and Chaldean Americans opposing the construction of the mosque in Sterling Heights conformed their Christian identities along Islamophobic lines. At city meetings and protests, she performed a political identity distinguishing the Middle Eastern community she belonged to as patriotic and American, in contrast with Middle Eastern Muslims seeking to build the mosque who were explicitly cast as terrorists and foreign. This stance aligned them with white populists and, psychologically and politically, affirmed their whiteness in relation to Muslim Americans raced as non-white, un-American terrorists.

### B. RETRENCHING WHITENESS

Performances of religious identity can have the effect of diminishing perceptions of whiteness for groups formally classified as white. These perceptions may invite animus, and in the two cases examined below, anti-Semitic violence that disregards the formal whiteness of the parties—and retrenches the substantive benefits associated with it—on account of their Jewish identity.

#### 1. Not Quite White

##### “Death to the Jude”<sup>270</sup>

Jacob Teller left the board meeting at the Shaare Tefila Congregation and walked across the parking lot to his car.<sup>271</sup> It was a cool autumn evening in Silver Spring, Maryland, the satellite city just up the highway from Washington, D.C. As he approached his sedan, he saw a swastika spray-painted on the driver side. Afraid, he rushed to a payphone and called Marshall S. Levin, the Executive Director of the synagogue, who then went outside to assess if there was more vandalism or damage done to the building.

There, he found the walls of the synagogue desecrated by an ugly string of symbols and slurs.<sup>272</sup> “*Death to the Jude*” alongside “*Dead Jew*” instantly jumped

268. See generally Khaled A. Beydoun, “*Muslim Bans*” and the (Re)Making of Political Islamophobia, 2017 U. ILL. L. REV. 1733 (analyzing the anti-Muslim rhetoric and campaign strategy Trump capitalized on to resonate with voters and capture the White House).

269. Harb, *supra* note 263.

270. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 525 (4th Cir. 1986), *rev'd*, 481 U.S. 615 (1987).

271. *Id.* at 524.

272. *Id.* at 524–25.

out at Levin.<sup>273</sup> But there was more. Swastikas drawn aside Ku Klux Klan symbols and a skull crossed with bones, with the Nazi slogan, “*Toten Kampf Raband*” seared across the synagogue walls.<sup>274</sup> Levin was afraid and knew that the KKK had a presence in the greater area surrounding the synagogue. Contemplating whether to yield to fear or take action, Levin and the synagogue board decided to sue. Pursuing litigation was a communal effort to stand against anti-Semitism and in turn, a collective confirmation of Jewish identity.

Shaare Tefila brought a section 1982 of the Civil Rights Act claim against the eight white men who had desecrated the synagogue.<sup>275</sup> This section of the Act holds that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”<sup>276</sup> The facts suggested that Shaare Tefila had a strong case for racial discrimination, but the ruling would turn on how the court interpreted two matters: (1) the racial status of Jews, and, (2) the character of the bigotry. First, were Jews white? Second, was the bigotry driving the defendants’ vandalism of the synagogue religious or racial? Or, perhaps, it was both?

Levin, Teller, and the vast majority of Shaare Tefila’s congregation were Jewish Americans of European origin or ancestry. Therefore, when their case came before the federal Court of Appeals, they were formally classified as white. This made the vandalism, from a technical standpoint, *white on white* bigotry.<sup>277</sup> The Court of Appeals’ ruling affirmed that European Jews were white, and that the animus was purely religious in nature and not racial. Writing for the court, Judge Hall stated, “[b]ecause discrimination against Jews is not racial discrimination, and the Supreme Court has stated that section 1982 does not address discrimination on account of religion or national origin.”<sup>278</sup> And so Shaare Tefila was denied relief under the state.

The U.S. Supreme Court held otherwise, both in regard to the whiteness of Jews and the character of the animus inflicted on the synagogue.<sup>279</sup> By confirming their Jewish identity through spiritual adherence, social and religious gatherings, and establishing a vibrant synagogue near the nation’s capital, Silver Spring’s Jewish community elicited an entwined racial and religious bigotry. Judge Wilkinson’s dissent with the opinion in the Court of Appeals highlighted that formal whiteness does not dissolve racial and racist perceptions of Jews in America.<sup>280</sup>

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273. *Id.* at 525.

274. *Id.*

275. *Id.*

276. 42 U.S.C. § 1982 (2012).

277. *Shaare Tefila*, 785 F.2d at 527.

278. *Id.*

279. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987).

280. *Shaare Tefila*, 785 F.2d at 529 (Wilkinson, J., dissenting).

He stated “that defendants do indeed view Jews as racially distinct,” and “[t]he paintings found on the synagogue align the defendants with both the Ku Klux Klan and the Nazis, two groups infamous for their persistence in the view that Jews constitute a separate and inferior race.”<sup>281</sup> The Supreme Court echoed Wilkinson, holding that although Jews (like Arabs) were formally considered white, they were “considered [to be a] separate race” when the Civil Rights Act was enacted.<sup>282</sup> The Court affirmed “that the [statute] was ‘intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.’”<sup>283</sup> Thus, the Court acknowledged that Jews were formally white today, but ruled on the basis of the history of Jews being classified as substantively non-white.

Jewish Americans, according to the Supreme Court, *were* white today, but not quite completely white, or perhaps a different shade of white than in the late nineteenth century. Furthermore, the Court found that their confirmation of Jewish identity today, through religious, cultural, or social performances, invited an animus that was as much racial as it was religious in nature. This animus rendered them a different *shade* of white according to the enforcement of section 1982 of the Civil Rights Act, and the Court granted them relief under it.<sup>284</sup>

## 2. Ivy League Anti-Semitism

“They got me. I’m afraid.”<sup>285</sup>

Elizabeth Midlarsky, a 77-year-old Columbia University education professor, was told not to come to work.<sup>286</sup> Her office, on the fourth floor of Horace Mann Hall, was the latest site of the vile anti-Semitism sweeping through the nation. In late 2018, a month after the massacre in Pittsburgh, the walls surrounding her office door were spray-painted with swastikas and the anti-Semitic slur “Yid” smeared directly across from it.<sup>287</sup>

281. *Id.*

282. *Shaare Tefila*, 481 U.S. at 617.

283. *Id.* (quoting *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987)).

284. *Id.* at 618 (holding that “Jews are not foreclosed from stating a cause of action” under the Act).

285. Isaac Stanley-Becker, *‘They Got Me. I’m Afraid.’: Swastikas Spray-painted on a Jewish Professor’s Office at Columbia*, WASH. POST (Nov. 29, 2018), <https://www.washingtonpost.com/nation/2018/11/29/they-got-me-im-afraid-swastikas-spray-painted-jewish-professors-office-columbia/> [<https://perma.cc/XZ7S-3YW4>].

286. Augusta Anthony, *Jewish Professor Finds Swastikas Spray-Painted on Her Office Walls at Columbia’s Teachers College*, CNN (Nov. 29, 2018, 9:40 PM), <https://www.cnn.com/2018/11/29/us/swastika-vandalism-columbia-university/index.html> [<https://perma.cc/89LQ-66NN>].

287. See Michael Gold, *Jewish Professor Finds Swastikas Spray-Painted in Office at Columbia*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/2018/11/29/nyregion/columbia-swastikas.html> [<https://perma.cc/2747-NA4M>], for a description of the hate crime and an accompanying photo.

She was overwhelmed by the juxtaposition of it all. It was just another Wednesday afternoon in New York City, she thought, before she finally saw the scene for herself. But the blood-red swastikas and slurs said otherwise, and took her elsewhere. Stories she heard from her parents and grandparents as a child, about Jewish neighborhoods in interwar Europe being tattooed with the same images and words, before the Nazis rolled in, scrolled across her mind. The psychological trauma experienced by Jews who endured the Holocaust, which she closely examined in her research and scholarship, possessed her. These were no longer subjects of intellectual inquiry for Midlarsky, but after November 28, 2018, intimate personal experiences.<sup>288</sup> The anti-Semitism she closely examined hit her in the very space where she expected sanctity and safe haven.

Midlarsky confirmed Judaism through religious adherence, but most conspicuously, through her writing, research, and activism.<sup>289</sup> She was known at Columbia University as a “Jewish professor” because of her work on the Holocaust, the psychological imprint it left on Jewish survivors in the United States and Israel, and her advocacy against anti-Semitism and racism. Midlarsky shared that she “believed [that the anti-Semitic attack] was connected to her lifetime of work as a Jewish activist,”<sup>290</sup> activism inspired by her research, a commitment to anti-racism, and her own identity as a Jew.

Her Jewishness was central to her identity. And Midlarsky expressed this identity, openly and unapologetically, through spiritual expression, academic freedom, and activism. Of European Jewish origin, Midlarsky was formally classified as white by the U.S. Census and Columbia University’s employment figures. Her performance of Jewish identity on a campus that could not fend off the swelling anti-Semitism thriving beyond its boundaries, however, diminished that whiteness. For the bigots that spray-painted her walls with the most virulently anti-Semitic symbols, Midlarsky’s confirmation of Jewish identity trumped her formal designation as white. The violence of the images they left, the intimidation to abstain from her work and activism, and the trauma she is now burdened with, bludgeoned her substantive whiteness.

She now knows, moving forward, that confirming her Jewish identity may come with a cost. Freely exercising her faith or speaking publicly about the Holocaust may elicit another vandalism of her office, or worse, her home.<sup>291</sup> November 28 was a turning point. After that day, Midlarsky realized that outwardly expressing her Jewish identity, through exercises of faith, speech, and associations—core First Amendment liberties—would likely expose her to more anti-Semitism. The more Jewish she appeared and expressed, the more likely she could be subject to another attack.

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288. *See id.*

289. *See id.*

290. *See Anthony, supra* note 286.

291. *See id.*



Perhaps the attack on her office was a just a warning, Midlarsky thought, as she contemplated whether to continue to speak up and speak out against the anti-Semitism she now knows in the most intimate terms. Or whether to concede, and cover or conceal her Judaism moving ahead. Trapped between free exercise and anti-Semitism, confirming Judaism for Midlarsky could leave her exposed to another attack. This fear will stay with her moving forward, and inform how she expresses her religious identity on campus and beyond.

### C. VEILING WHITENESS

Performance of stigmatized religions can often have the effect of entirely hiding, or veiling, the racial identity of the adherent. This is especially true for conservative manifestations of Jewish and Muslim identity, such as the traditional dress of Hassidim, or the hijab, which carry with them deeply embedded and potent racial meanings. This Section examines two case studies—the first involving a young Hasidic Jewish man, and the second a Scots-Irish white man who converted to Islam as a teenager.

#### 1. I'm Not White, I'm Jewish

His black fedora, black suit and *peyot*—the black locks of hair dangling beside his ears—set him apart.<sup>292</sup> It also defined every dimension of Chaim Fishman's identity. Being a *Hasid*, or an orthodox Jew, expressed more than just his religious piety; it dictated his education, social circle, racial sense of self,<sup>293</sup> how Fishman saw the world, and how he navigated it. “[W]e believe once we start talking to other people, we will assimilate to their ways and lose our traditions,” he said, affirming his commitment to the insular Hasidic lifestyle.<sup>294</sup> His dress and grooming were an outward expression of the Judaic dictates of humility and modesty,<sup>295</sup> and a barrier from the lure of assimilating into American society and the pull of whiteness. For Fishman, and those that

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292. *Payos*, JEWISH ENGLISH LEXICON, <https://jel.jewish-languages.org/search?q=payot> [<https://perma.cc/3LVL-9QEX>].

293. The view that Jews comprise a unique and separate race is popular among Orthodox Jews, who reject whiteness and the formal racial order. “[A]ccording to Orthodox Judaism, blood relations are a central factor in defining Jewish identity. A Jew is one who is born to a Jewish mother, while the father's origin has no importance for the child's religious identity.” Avraham, *supra* note 205, at 363.

294. Elizabeth Llorente, *Hasidic Defectors Find Challenges, Isolation in Pursuing a New Life*, FOX NEWS, <https://www.foxnews.com/us/hasidic-defectors-find-challenges-isolation-in-pursuing-a-new-life> [<https://perma.cc/FR2E-RWTS>] (last updated June 14, 2018).

295. See Rabbi Jack Abramowitz, *Why Do Orthodox Jews Wear Black?*, JEW IN THE CITY (June 18, 2018), <https://jewishthecity.com/2018/06/why-do-orthodox-jews-wear-black/#.XiobkVnKjOQ> [<https://perma.cc/Q298-U5HN>] (explaining the concept of *tzniyus*, or modesty: “The Talmud in tractate Shabbos talks about modes of dress for men and it includes such details as not to be overly concerned with fashion . . . . [M]en wearing black jackets and pants is both simple and formal. . . . The message it sends is that the person wearing it is both dignified and humble.”).

embrace that religious path, Hassidic identity was an opt out from society and its constructions, including its racial order and classifications.

It also marked him as *different* and *foreign* to the outside world. Fishman's spiritual costume, much like the *hijab* for Muslim women, was itself a racial identity that concealed his state-assigned whiteness. Despite his parents hailing from Europe, and being counted as white by the U.S. Census, Fishman performed the most conspicuous form of Jewish identity, and confirmed it every day by donning his black hat, black suit, and neatly trimmed beard before stepping out into the world.

Fishman, and other Hasidic Jews staying on the *derech* (path) and away from everything beyond it,<sup>296</sup> are who anti-Semites typically imagine when racially distinguishing Jews. The bigoted caricatures of Jews that circulated through the nineteenth and early twentieth centuries predominantly focused on them,<sup>297</sup> and today's bigoted conspiracy theories about Jewish nepotism and isolation stem from stereotyped narratives of Hasidim. As the most conspicuous subset of the Jewish American population, whose confirmation of religious identity aligns with anti-Semitic images and ideas, Hasidic Jews—like the 20-year-old Fishman—are routinely singled out as non-white and targeted by bigotry violence. Fear of violence against Orthodox Jews is increasing under the Trump Administration, particularly following the Pittsburgh Shooting.<sup>298</sup>

Fishman was accustomed to the unwelcoming stares, particularly when he traveled outside of New York City. At home, Hasidim were a familiar part of the City's religious and cultural tapestry. Outside of New York, Fishman stood out. Confirming his Orthodox Judaism came with the tradeoff of eliciting unwanted attention, stares, and discomfort—stigma that typically does not come with being a white male in America, the very identity buried beneath his black hat, black suit and peyot. If he chose to no longer wear the hat and suit, cut his locks and shave his beard, Fishman would conceal (much or all) of his Jewish identity, and garner the presumptions and privileges associated with his racial identity.

That day finally came. After turning 18, Fishman, “did something utterly unthinkable to so many others in his tight-knit community. He questioned his cloistered life. By extension, that meant questioning the fundamentals of Hasidic Judaism . . . .”<sup>299</sup> He ultimately left the *yeshiva*, against the objections

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296. “Usually refers to an ethical lifestyle or the traditional, halachic [Judaic law] Jewish lifestyle.” *Derech*, JEWISH ENGLISH LEXICON, <https://jel.jewish-languages.org/words/131> [https://perma.cc/6W3U-W6UB].

297. See Lambert, *supra* note 203.

298. See Eric H. Yoffie, *Under Trump, Violence Against Jews Will Only Rise. We Must Be Prepared*, HAARETZ (Oct. 31, 2018, 2:58 PM), <https://www.haaretz.com/us-news/.premium-while-trump-is-president-violence-against-jews-will-rise-we-must-be-prepared-1.6611804> [https://perma.cc/VK44-NZUC] (providing a perspective from a Jewish rabbi and teacher).

299. Llorente, *supra* note 294.

of his mother and teachers,<sup>300</sup> and traded in his Hasidic dress for jeans, t-shirts, and a largely inconspicuous Jewish American appearance.<sup>301</sup> By conforming his religious identity to more liberal interpretations of Jewish doctrine,<sup>302</sup> the stigma and stares that once followed Fishman are no more. His racial identity as a white man in America, following his conforming of Jewish identity, was unveiled. By leaving his Hasidic identity behind, he also opted into the prevailing racial order. Thus, his formal whiteness aligned with his appearance as a white male. Which would, he hoped, last for as long as he could successfully conceal his Jewish identity.

## 2. Not Your Average Joe

“Islam can be a racial invisibility cloak.”<sup>303</sup>

Joe Milburn, a 23-year-old law student who converted to Islam as a high school tenth grader, shared these words with me.<sup>304</sup> People often think that Joe is Arab, or Middle Eastern. Particularly when he thickens his beard,<sup>305</sup> wears traditional Islamic clothes, and surrounds himself with Muslim friends of Arab, South Asian, or African origin. Confirming Islam through his dress, grooming, and the Muslim company, he conceals his Scots-Irish whiteness and supplants it with a deeply racialized Muslim identity.

As examined in Section III.C, longstanding political discourses have constructed Islam into a racial identity. As law scholar Khiara Bridges writes, “[W]e know that when we see a Muslim, we have before us a person whose values are at odds with those that the United States embraces.”<sup>306</sup> This civilizational discourse is especially profuse under the Trump

300. *Id.*

301. Fishman did not disavow Judaism or convert to another faith. For a story involving a Hasidic Jewish man who sheds his Orthodox Jewish identity and embraces atheism, see Luzer Twersky, *I Escaped Hasidic Judaism and Went From Living on the Streets to Being a Hollywood Actor*, HUFFPOST (June 15, 2015, 10:11 AM), [https://www.huffpost.com/entry/hasidic-judaism-hollywood-actor\\_b\\_7242886?guccounter=1](https://www.huffpost.com/entry/hasidic-judaism-hollywood-actor_b_7242886?guccounter=1) [<https://perma.cc/86E3-VPYR>].

302. Fishman’s performance of Jewish identity is situational. Now a student at the University of Pennsylvania, Fishman does not wear a yarmulke. However, “[w]hen he returns to his childhood community, he dons the yarmulke (skull cap) and black frock out of respect, he said.” Lorente, *supra* note 294.

303. Interview with Joe Milburn, Law Student (Sept. 9, 2018).

304. Milburn explained,

I grew up Catholic, my family is practicing. I grew up going to Mass every Sunday, I went to Catholic school from Kindergarten through the middle of high school. My dad prays the rosary every morning, attends mass in Latin when he can, and on my mom’s side, I have nuns in the family.

*Id.*

305. For Muslim men, wearing a beard is an expression of religious piety adopted from the *Sunnah* (the Prophet Muhammad’s model of living). See generally *Holt v. Hobbs*, 574 U.S. 352 (2015) (upholding a Muslim inmate’s Free Exercise right to keep his beard, even though it conflicted with prison policy).

306. Bridges, *supra* note 202, at 285.

Administration's steering of the War on Terror, which exposes Muslim Americans of all races to the dragnet that dis-identifies them as citizens,<sup>307</sup> and, through the racial reimagining of Muslim identity, dis-identifies them as white.

Milburn, an aspiring civil rights lawyer and emergent anti-Islamophobia activist, is fully aware of these tradeoffs. In fact, he knew that when he converted to Islam on February 11, 2011,<sup>308</sup> roughly a decade after the 9/11 terror attacks and amid the thick climate of surveillance within Muslim American mosques and households, that he too would be exposed to these counterterror threats. First, Milburn assumed these risks by taking the *shahada*,<sup>309</sup> the spiritual induction into Islam whereby the convert proclaims that, "There is only one God and the Prophet Muhammad is his final messenger," and he never looked back. Today, Milburn confirms his Muslim identity by praying five times a day, attending the mosque on *Jummah* (Friday, Islam's holy day),<sup>310</sup> and speaking out against Islamophobia, the War in Syria, and other matters of Muslim American concern on Facebook and on the ground.<sup>311</sup> A future lawyer, Milburn knows the potent racial and political meaning that comes with his identity and expression of Islam, stating that, "It comes with the territory, unfortunately."<sup>312</sup>

Milburn's expression of Muslim identity, strategically performed through his spiritual piety and public activism, cloaks his whiteness and retrenches many of the privileges and positive presumptions attached to it. His formal whiteness, and the substantive presumptions and privileges that come with being Scots-Irish, are supplanted with the stigmas and stereotypes ascribed to Muslim identity. Milburn lives with the racial dialectic imposed upon him after converting, and regularly has to remind people—even Muslims—that he is white.

"I'm not Arab, I'm white," Milburn replied to an older Syrian Muslim woman, who thought he was an Arab as he worshipped at the Mecca Center mosque in Chicago.<sup>313</sup> This was the mosque Milburn regularly attended on Fridays, but these questions about his racial identity were anything but

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307. Volpp, *Citizenship Undone*, *supra* note 60, at 2583.

308. Interview with Joe Milburn, *supra* note 303.

309. "There is no God but Allah, and Muhammad is his messenger." This is the basic statement of the Islamic faith: anyone who cannot recite this wholeheartedly is not a Muslim," and those who do recite it are inducted into the faith. *Shahadah: The Statement of Faith*, BBC (Aug. 23, 2009), <https://www.bbc.co.uk/religion/religions/islam/practices/shahadah.shtml> [<https://perma.cc/A4NQ-L3MQ>].

310. Parvesh Sharma, *Facts About the Day of Jummah*, SPEAKING TREE (Apr. 23, 2015, 3:27 PM), <https://www.speakingtree.in/allslides/facts-about-the-day-of-jummah> [<https://perma.cc/PC9L-3DTQ>].

311. Milburn's Facebook timeline can be viewed at Joe Milburn, FACEBOOK, <https://www.facebook.com/joe.milburn.92> [<https://perma.cc/5QG6-FFV9>].

312. Interview with Joe Milburn, *supra* note 303.

313. *Id.*

irregular. Confirming Islam, for Joe and other Muslim converts, often functions like a racial cloak that entirely conceals their bona fide racial identity to the external world.<sup>314</sup> Being Muslim could not coexist with being white, for many, while the former identity supplants the latter when outwardly performed and routinely confirmed. Again, the two are opposable identities, as civil court judges ruled<sup>315</sup> decades ago and Huntington implied through his civilizational binary,<sup>316</sup> thereby making “white Muslim” an impossible identity for many onlookers.

If not a wholly concealing cloak, performance of Muslim identity can eat into and erode one’s whiteness. “Man, I lost 45% of my white privilege when I converted to Islam,”<sup>317</sup> shared Imam Suhaib Webb, a prominent Muslim American religious leader also of Scots-Irish origin who converted to Islam in 1992. Half-joking, but poignantly revealing that whether a full-fledged racial cloak or an identity spawning confusion, confirmation of Muslim identity comes with the tradeoff of diminished whiteness from the vantage point of the public, and retrenchment of the privileges and presumptions that come along with it.

## VI. CONCLUSION

The *voice* stays with you. It lodges itself deep within. Soon enough, it becomes part of you. It speaks to you before you make any decision and devise any expression of your faith. A faith that also resides deep within, alongside that voice, each voice incessantly trying to speak over the other.

This voice reminds you most loudly after tragedy has befallen those who worship like you. To rethink, to reconsider and re-perform, that expression of faith dictated from the God that you worship. Free Exercise, for you, is only as free as the risks you are willing to assume, it tells you. And it does not grow silent until you bend to its will, and align your actions with its dictates.

The Pittsburgh Shooting unfolded during the writing of this Article. A man—so utterly subsumed by white supremacy and the irrational fear and fragility it seeded within him—massacred 11 people for no other reason than the faith they professed.<sup>318</sup> Within the sacred halls of a synagogue, no less,

314. See Cindy Carcamo, *Like an Invisibility Cloak, Latina Muslims Find the Hijab Hides Their Ethnicity—From Latinos*, L.A. TIMES (Mar. 24, 2017, 1:05 PM), <https://www.latimes.com/local/california/la-me-muslim-latinas-straddle-both-worlds-20170307-story.html> [<https://perma.cc/gYFK-BFJL>] (discussing how Latina Muslims are viewed differently when wearing a hijab).

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

316. See generally HUNTINGTON, CLASH OF CIVILIZATIONS, *supra* note 135 (theorizing about an inevitable and upcoming clash between Islam and the West).

317. Interview with Imam Suhaib Webb, in Dearborn, Mich. (Nov. 10, 2018).

318. *Pittsburgh Synagogue Gunman Suspect: Who is Robert Bowers?*, BBC NEWS (Oct. 29, 2018), <https://www.bbc.com/news/world-us-canada-46022930> [<https://perma.cc/G2Z5-M8NA>].

Robert Bowers unleashed a barrage of anti-Semitic slurs while he unloaded rounds of bullets from his AR-15 rifle.<sup>319</sup>

Racism drove the massacre now remembered as “the deadliest anti-Semitic attack in recent United States history.”<sup>320</sup> But this was 2018 not 1918. Yet the same ungodly doctrine that classified Jews as an inferior race—and a non-white race—looms heavy today, a century after what historians considered to be the climax of anti-Semitism in America. The voice reminds you that a new climax is on the horizon, foreshadowed by emboldened rhetoric and massacres, growing legions of white supremacists and the ubiquitous reappearance of swastikas.

Fresh tragedy amplifies the voice which now speaks more assertively and more authoritatively. It now has 11 names and faces to serve as reminders,<sup>321</sup> an accosted synagogue and a real town, Squirrel Hill,<sup>322</sup> once a safe haven for Jewish immigrants and, until the massacre, the “heartbeat” of the Jewish community in Pittsburgh.<sup>323</sup> It sears all of this, through its unrelenting and echoing reminders, deep in your memory.

It tells you, over and again, that the only lasting safe haven is whiteness. And to shift your outward identity and devotion toward it, and it alone. Your faith, and the Free Exercise of it, competes with whiteness, clashes with it, and stands firmly in its way. Faith in whiteness, it preaches one last time, is the only salvation from the hate that follows you at every turn.

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319. See *id.*; see also Robertson et al., *supra* note 14.

320. Laurie Goodstein, “There Is Still So Much Evil”: Growing Anti-Semitism Stuns American Jews, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/us/anti-semitism-attacks.html> [<https://perma.cc/74TY-PJLT>].

321. For a popular article adopting that title for the massacre, and providing profiles of the 11 people killed by Robert Bowers, see Emanuella Grinberg et al., *11 People Were Gunned Down at a Pittsburgh Synagogue. Here Are Their Stories*, CNN (Nov. 1, 2018, 4:09 PM), <https://www.cnn.com/2018/10/28/us/pittsburgh-synagogue-shooting-victims/index.html> [<https://perma.cc/6GRM-2UA6>].

322. Shribman, *supra* note 227.

323. See MATTHEW BOXER ET AL., BRANDEIS UNIV., STEINHARDT SOC. RESEARCH INST., THE 2017 GREATER PITTSBURGH JEWISH COMMUNITY STUDY 1 (2018), available at <https://www.brandeis.edu/ssri/pdfs/communitystudies/PittsburghJewishCommStudy.pdf> [<https://perma.cc/QAR2-DBR8>] (“Squirrel Hill has historically been the center of Jewish life in Greater Pittsburgh and remains home to 26% of all Pittsburgh-area Jewish households.”).