

## Boxed In: Reclassification of Arab Americans on the U.S. Census as Progress or Peril?

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*The United States Bureau of the Census has proposed a standalone “Middle Eastern or North African” (“MENA”) box for the 2020 census. Deemed white by law since 1944, the 2020 census may afford Arab Americans the unprecedented opportunity to identify as MENA, and nonwhite—the latter standing as a per se designation that conflicts with federal and local surveillance, profiling, and policing of Arab Americans during the protracted “War on Terror.”*

*Since the 1980s, Arab American organizations have lobbied the Census Bureau to recognize Arab Americans as a distinct demographic. These efforts proved futile, until after the September 11th terrorist attacks, when progressive steps were made toward adopting a standalone racial box. This forward momentum intersects with increased government interest in collecting precise and comprehensive demographic data about Arab Americans—a population disparately linked to terrorism.*

*While perceived as a moment of racial progress, the proposed 2020 Census Reform also raises many concerns. This Article investigates the converging government interest in establishing a standalone MENA box, and then, the perils associated with the proposed reform and reclassification. These prospective perils include: first, expanded government surveillance and monitoring of Arab Americans; second, the creation of a formal binary for Arab Americans, whereby voluntarily checking the MENA box signals association with national*

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## I. INTRODUCTION

Arab Americans currently find themselves interlocked between formal classification as white, and discursive recognition as nonwhite.<sup>1</sup> The Office of Management and Budget (“OMB”), the government agency that oversees the definition, categorization, and construction of racial categories,<sup>2</sup> currently counts people from the Middle East and North Africa (“MENA”) as white.<sup>3</sup> The United States Bureau of the Census (“Census Bureau”), the agency responsible for collecting and compiling demographic data about the American people, adopts these definitions and classifications for the administration of their decennial census.<sup>4</sup>

Since the racially restrictive “Naturalization Era,”<sup>5</sup> Arab Americans

1. “Arab Americans” are citizens of the United States that trace their ancestry back to the “Arab World.” The “Arab World” presently encompasses nations in the Middle East and North and East Africa where Arabic is commonly spoken. In addition to its fluid linguistic boundaries, the “Arab World” is also a designation that refers to the twenty-three states that are members to the Arab League. For comprehensive discussion and description of the Arab League, see Krister Anderson, *Going Major: Reforming the League of Arab States*, 25 HARV. INT’L REV. 7 (2004), which examines potential reform to the League of Arab States. For a modern history of the “Arab World,” see generally HALIM BARAKAT, *THE ARAB WORLD: SOCIETY, CULTURE, AND STATE* (1993), which notes the complexity and dynamics of the “Arab World”. For a general history of Arab Americans, see generally RANDA A. KAYYALI, *THE ARAB AMERICANS* (2006), which explains that there are approximately 270 million Arab speaking people. See also GREGORY ORFALEA, *THE ARAB AMERICANS: A HISTORY* xii (2005) (noting the difficult situation facing the Arab American community); Michael W. Suleiman, *Introduction: The Arab Immigrant Experience*, in *ARABS IN AMERICA: BUILDING A NEW FUTURE* 1 (Michael W. Suleiman ed., 1999) (describing the two major waves of Arab immigration to the United States).

2. The OMB and the Census Bureau are the principal actors that “construct” per se definitions of race and racial categories. The administrative making of race illustrates how “[r]aces are not biologically differentiated groupings but rather social constructions.” IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* xiii (1996). The legal meaning of race, and indeed racial categories, fluidly shifts in line with political, economic, and social stimuli. This dynamic, in turn, makes racial categories—and the entire enterprise of administrative race-making—a dynamic, sometimes volatile, and perpetually sensitive process. See RICHARD DELGADO & JEAN STEFANIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 7 (2001) (“[R]ace and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient.”).

3. *Revisions to the Standards for the Classification of Federal Data on Race & Ethnicity*, OFF. MGMT. & BUDGET (Oct. 30, 1997), [http://www.whitehouse.gov/omb/fedreg\\_1997standards](http://www.whitehouse.gov/omb/fedreg_1997standards).

4. *About Race*, U.S. CENSUS BUREAU, <http://www.census.gov/topics/population/race/about.html> (last visited Mar. 7, 2016). The U.S. Constitution mandates that the census is administered every ten years. U.S. CONST. art. I, § 2, cl. 3.

5. The “Naturalization Era,” the period of time in which the Naturalization Act was in place, lasted from 1790 to 1952. See Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103 (“An Act to establish an uniform Rule of Naturalization”), *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 [hereinafter Naturalization Act of 1790] (“[A]ny alien, being a free white person, who shall have resided within the limits and under the jurisdiction of

have been legally classified as, and conflated with, whites—a per se designation misaligned with societal reading, recognition, and racialization of Arab American identity.<sup>6</sup> Arab Americans are part of the broader MENA milieu. Therefore, the proposed MENA box will formally shift the racial classification of Arab Americans from white to nonwhite.

Within the context of the pronounced and protracted “War on Terror,”<sup>7</sup> the OMB and the Census Bureau may be the only two government entities that still identify Arab Americans as white. Heightening state surveillance of Arab Americans, combined with rising societal animus,<sup>8</sup> manifest a shared public and private view of the population as not only nonwhites, but also others,<sup>9</sup> “terrorists”<sup>10</sup> or “terrorist sympathizers,”<sup>11</sup> “fundamentalists,”<sup>12</sup> and “radicals.”<sup>13</sup>

the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least.”).

6. Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29, 33 (2013).

7. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (holding that military tribunals created by the Bush administration violated the law); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that a U.S. citizen held as an “enemy combatant” held a right to a hearing to challenge that designation). See generally *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) (highlighting policies adopted by the Bush administration during the “War on Terror”). These cases, along with the sweeping legislation and reforms that followed 9/11, initiated the international and domestic war against terrorism, hereinafter referred to in this Article as the “War on Terror.” *Id.*

8. JOHN TEHRANIAN, *WHITEWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY 3* (2009) (“Unlike many other racial minorities in our country, Middle Eastern Americans have faced rising, rather than diminishing, degrees of discrimination over time—a fact highlighted by recent targeted immigration policies, racial profiling, a war on terrorism with a decided racialist bent, and growing rates of job discrimination and hate crime.”).

9. See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1264 (2004) (discussing increased racial violence following September 11).

10. See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 300 (2002) (“Most Americans probably feel particularly threatened because the September 11 suicide hijackers were foreign, and some may be especially fearful because they were Arabs. This fear may cause us to exaggerate the danger of future attacks in general, and of attacks by Middle Eastern terrorists in particular. As a result, we may overestimate the effect of racially specific security measures. And unfortunately, we are more willing to accept aggressive measures when they target small and politically disempowered groups, specifically racial and ethnic minorities, and foreign nationals.”).

11. ARAB DETROIT 9/11: LIFE IN THE TERROR DECADE 11 (Nabeel Abraham, Sally Howell & Andrew Shyrock eds., 2011).

12. See John Tehranian, *Selective Racialization: Middle-Eastern American Identity and the Faustian Pact with Whiteness*, 40 CONN. L. REV. 1201, 1205 (2008) (discussing the effects of

Although not a new phenomenon, the association of Arab American identity with subversion, warmongering, and terrorism intensified after the September 11th terrorist attacks.<sup>14</sup> Fifteen years later, the broadening of anti-terror policing coupled with emergent “preventative counterterrorism” capabilities, or “Countering Violent Extremism” (“CVE”) policing,<sup>15</sup> signal that suspicion of Arab American identity is still trending upward, and perhaps, yet to reach its apex.

Converging with this impasse of swelling state and societal suspicion is the Census Bureau’s proposed reform and reclassification of Arab American identity. The anticipated adoption of a standalone MENA box on the 2020 census would afford Arab Americans, and other citizens with ties to the “MENA region,”<sup>16</sup> with a long-coveted racial (or ethnic) classification that acknowledges their distinct cultures, ancestries, and places of origin.<sup>17</sup> If adopted, the MENA box would mark the first time the OMB and the Census Bureau recognize Arab Americans, and other groups of citizens from the MENA region, as a distinct racial group.<sup>18</sup>

Until 1944, the courts treated Arab identity and whiteness as legally irreconcilable.<sup>19</sup> While whiteness was built into the per se definition of

Middle-Eastern Americans developing “a Faustian pact with whiteness”); *see also* Amna Akbar & Rupal Oza, ‘*Muslim Fundamentalism*’ and *Human Rights in the Age of Terror and Empire*, in GENDER, NATIONAL SECURITY, AND COUNTER-TERRORISM: HUMAN RIGHTS PERSPECTIVES 152, 165 (Margaret L. Satterthwaite & Jayne C. Huckerby eds., 2013) (examining the good versus bad Muslim binary, which pegs the latter “fundamentalists” and thus having a propensity for terrorism).

13. Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809, 814 (2013).

14. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); *see also* Amaney Jamal, *Civil Liberties and the Otherization of Arab and Muslim Americans*, in RACE AND ARAB AMERICANS BEFORE AND AFTER 9/11: FROM INVISIBLE CITIZENS TO VISIBLE SUBJECTS 114, 117–18 (Amaney Jamal & Nadine Naber eds., 2008).

15. Akbar, *supra* note 13, at 811, 850; Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 127 (2012) (“[C]ounter-radicalization conforms to the preemptive logic of counterterrorism, which focuses on strategies that minimize the risk and intensity of future terrorist attacks.”).

16. This Article will refer to the Middle East and North Africa (“MENA”) as a single region, aligning with prevailing administrative and political baselines, though the lands encompassed by MENA are anything but homogenous along ethnic, racial, religious, or political lines.

17. 2015 *National Content Test Operations Update: Preparations for the 2020 Census*, U.S. CENSUS BUREAU (Oct. 6, 2014), [https://www.census.gov/content/dam/Census/newsroom/press-kits/2014/20141006\\_2020opbrief\\_slides.pdf](https://www.census.gov/content/dam/Census/newsroom/press-kits/2014/20141006_2020opbrief_slides.pdf) [hereinafter *2015 Census Update*].

18. Qualifying as a per se minority group, or a “disadvantaged minority” group, may require additional steps following (prospective) adoption of the proposed MENA classification.

19. Beydoun, *supra* note 6, at 34.

1) Presiding judges conflated Arab identity with Muslim identity; 2) A rule that Arab Muslims were per se non-white and therefore ineligible for citizenship was in place until 1944, only eight years before the end of the Naturalization Era; 3) Presiding

citizenship until 1952,<sup>20</sup> and immigrants from the MENA region litigated their racial bona fides as concomitant with whiteness, the courts repeatedly associated their region of origin as antithetical to American identity.<sup>21</sup> For 154 years, during the Naturalization Era, which mandated whiteness as a prerequisite for citizenship, shedding one's Arab identity was the lone portal toward whiteness for immigrants.<sup>22</sup> The proposed MENA classification, if adopted, will formally reintroduce this binary back into American law, codified into the U.S. census racial framework during a sociopolitical impasse when Arab American bodies, households, and communities are closely scrutinized by federal and local law enforcement.<sup>23</sup>

“Why now?” is a question surrounding the timing of the proposed reform. Arab Americans have lobbied for a distinct racial, or ancestral, classification since the 1980s.<sup>24</sup> Deemed “one of the grand prizes in the politics of identity,” Arab American communities, organizations, and stakeholders have long strove for the existential, political, legal, and economic benefits that a standalone box on the U.S. census form promises.<sup>25</sup> However, previous reform and reclassification efforts were met with denial and repeated reaffirmation of the administrative position that Arab Americans were white. These earlier attempts at reform indicate that, during this period, government interest in maintaining Arab Americans as “white by law” conflicted with

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judges presumed that immigrant petitioners from the Arab World (whether Christian or Muslim) were Muslims and thus non-white, as consequence of the conflation; and 4)

This presumption could only be overcome if the immigrant-petitioner could persuade the presiding judge that he was a bona fide Christian.

*Id.* Furthermore, it is my position that judges who found Syrians white by law in earlier decisions, especially *Dow v. United States*, believed that Syrian Christians were not Arabs—again, because of this conflation of Arab with Muslim identity. *Dow v. United States*, 226 F. 145 (4th Cir. 1915).

20. The Act of July 14, 1870, which followed the abolition of slavery, extended naturalization eligibility to “aliens of African nativity and to persons of African descent.” Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256 (“An Act to amend the Naturalization Laws and to punish Crime against the same, and for other Purposes”).

21. “Political propaganda that maligned the Arab Muslim Orient branded immigrants from this sphere as hostile to American ideals and society, and thus inassimilable.” Beydoun, *supra* note 6, at 46.

22. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103.

23. Census law scholar Naomi Mezey frames this binary as “the average person,” an axis synonymous with whiteness; and “its corollary, the deviant,” a classification that aligns with prevailing perceptions of Arab and MENA identity. Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1715 (2003).

24. Randa Kayyali, *US Census Classifications and Arab Americans: Contestations and Definitions of Identity Markers*, 39 J. ETHNIC & MIGRATION STUD. 1299, 1305–06 (2013).

25. Mezey, *supra* note 23, at 1748.

community efforts for reform and reclassification.<sup>26</sup>

However, closer cooperation between Arab American stakeholders and the Census Bureau in recent years signals a prospective “interest convergence” between once misaligned community and government aims.<sup>27</sup> Beginning in 2013, renewed discussions between the Census Bureau and Arab American groups gained considerable momentum, and materialized into tentative acceptance and ongoing testing of the standalone MENA category.<sup>28</sup> This momentum reflects shifting state interests that point toward the likely adoption of the MENA box on the 2020 U.S. census form.<sup>29</sup> Uncovering these interests is a principal aim of this Article.

Momentum toward Arab American racial reform and reclassification intersects with expansion of the state’s anti-terrorism surveillance, prevention,<sup>30</sup> and policing capacities. During the Obama Administration, suspicion of Arab, MENA, and Muslim Americans—communities that often but not always overlap—enhanced.<sup>31</sup> National Security Administration (“NSA”) surveillance powers were carried forward,<sup>32</sup> and pilot CVE programs extending federal policing tools to local law enforcement were launched in Boston, Minneapolis, and Los Angeles in 2014—to be followed by additional cities in the coming years.<sup>33</sup> The Suspicious Activity Reporting (“SAR”)<sup>34</sup> and CVE

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26. See generally Beydoun, *supra* note 6 (examining the Naturalization Era of Arabs Americans, which required “whiteness” for citizenship).

27. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980). Bell’s interest-convergence theory holds that discrete state political or economic interests oftentimes spur domestic civil rights progress. Therefore, civil rights progress is more a means toward advancing these ends, instead of an end in and of itself.

28. Testing and discussion about the structure, language, and scope of the proposed MENA category was still very fluid at the time of drafting this Article.

29. Jens Manuel Krogstad, *Census Bureau Explores New Middle East/North Africa Ethnic Category*, PEW RES. CTR. (Mar. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/03/24/census-bureau-explores-new-middle-east-north-africa-ethnic-category/>.

30. See Akbar, *supra* note 13, at 810 (“The preventative framework—where the government aims to prevent future terrorism—now defines counterterrorism programs at home and abroad.”).

31. More specifically, the counter-terrorism prevention models, ushered in by the counter-radicalization programming discussed in Parts III.B and C of this Article, were solidified under the Obama administration.

32. Shayana Kadidal, *NSA Surveillance: The Implications for Civil Liberties*, 10 I/S: J.L. & POL’Y FOR INFO. SOC’Y 433, 434 (2014).

33. Akbar, *supra* note 13, at 845–68 (examining closely the new radicalization policing tactics used by federal and local law enforcement). Counter-radicalization parlance and policing is almost exclusively focused on Muslim communities, which sometimes overlap and are frequently conflated with Arab American communities. “Radicalization suggests that the path from Muslim to terrorist is a predictable one produced by or correlated with religious and political cultures of

programs not only supplement NSA surveillance, but also expand the national security policing paradigm from a centralized model steered by the Department of Homeland Security (“DHS”), to a community law enforcement-based approach.<sup>35</sup>

The MENA box, if adopted, would enable the collection and compilation of precise and broader demographical data about Arab Americans—communities acutely associated with radicalization and terrorism. If availed to DHS and local law enforcement, this data would intensify and expand the functional reach of anti-terror surveillance and policing, and in turn, further erode the civil liberties of Arab Americans.

Therefore, the timing of the proposed MENA box signals that the state’s pressing national security interests—instead of Arab American and MENA organizational and grassroots efforts—may be the principal catalyst facilitating the anticipated adoption of the MENA box on the 2020 U.S. census.<sup>36</sup> Rather than adopting the MENA box as a means toward neutral demographic data collection, the proposed classification equips the state with the operational means to collect and compile more specific and comprehensive information about a community disparately linked with national security threats, terrorism, and in line with

Muslim communities. Government radicalization discourses and programs are almost entirely fixated on Islam and Muslims . . . .” *Id.* at 811; see also Shelley Murphy, *Boston to Host Anti-Extremist Pilot Program*, BOS. GLOBE (Sept. 24, 2014), <http://www.bostonglobe.com/metro/2014/09/23/boston-site-program-prevent-residents-from-joining-extremist-groups/YpEpp2cYvITZ6u8AFkbarL/story.html> (discussing pilot programs started by the Justice Department aimed at deterring citizens from joining violent extremist groups).

34. *The Nationwide SAR Initiative*, NSI, <http://nsi.ncirc.gov/?AspxAutoDetectCookieSupport=1> (last visited Mar. 7, 2016).

The Nationwide Suspicious Activity Reporting (SAR) Initiative (NSI) is a joint collaborative effort by the U.S. Department of Homeland Security, the Federal Bureau of Investigation, and state, local, tribal, and territorial law enforcement partners. This initiative provides law enforcement with another tool to help prevent terrorism and other related criminal activity by establishing a national capacity for gathering, documenting, processing, analyzing, and sharing SAR information.

*Id.*

35. The post-9/11 collaboration by the FBI, Department of Justice (“DOJ”), and New York Police Department (“NYPD”) focusing on preventing terrorism spearheaded the new surveillance and policing model. COUNTERTERRORISM SECTION, DEP’T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 11 (2006), <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.white.paper.pdf>. The NYPD’s Intelligence Division published a 2007 report, widely considered the most comprehensive report on CVE published by a police department. MITCHELL D. SILBER & ARVIN BHATT, NYPD INTELLIGENCE DIV., RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT (2007), [http://nypdshield.org/public/sitefiles/documents/nypd\\_report-radicalization\\_in\\_the\\_west.pdf](http://nypdshield.org/public/sitefiles/documents/nypd_report-radicalization_in_the_west.pdf).

36. See generally Manav Bhatnagar, Note, *Identifying the Identified: The Census, Race, and the Myth of Self-Classification*, 13 TEX. J. C.L. & C.R. 85 (2007) (arguing that the role of the census in racial data collection is far from neutral, and driven by specific policy goals).



emergent national security parlance, “radicalization.”

First, this Article argues that the state’s interest in obtaining more accurate “macro and micro demographic data” about Arab Americans is a primary factor driving the prospective adoption of the MENA box for the 2020 census.<sup>37</sup> The proposed MENA box in general, and the “darker side” of the possible reform and reclassification of Arab American identity debate specifically, are yet to be examined within legal scholarship. By illuminating the causal state interests facilitating reform and reclassification, this Article analyzes how more precise and extensive demographic data—collected and compiled with a MENA box in the U.S. census form—expands the reach of the federal and local anti-terror and counter-radicalization policing.<sup>38</sup>

Second, this Article analyzes the prospective perils that reform and reclassification of the current U.S. census framework pose to Arab Americans. While a host of existential, political, legal, and economic interests drive majority support for the MENA classification within the Arab American community, these anticipated benefits mask the imminent perils associated with the box, as analyzed within scholarly and advocacy discourses. The proposed MENA classification, if implemented would:

- (1) Broaden the functional reach of government surveillance and policing of an already “vulnerable population,”<sup>39</sup> further eroding the state of Arab American civil liberties. This danger is all the more acute, given the shift from centralized anti-terror policing to local law enforcement models;
- (2) Formally reinstitute a per se binary whereby checking the “MENA” box signals perceived association with a group linked to national security threats, while checking “White” mitigates that suspicion; and finally,
- (3) Divide the Arab American population between two per se races.

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37. See William Seltzer & Margo Anderson, *The Dark Side of Numbers: The Role of Population Data Systems in Human Rights Abuses*, 68 SOC. RES. 481 (2001) (illustrating how demographic data collected by U.S. census was used to monitor and round up groups associated with national security threat).

38. *Id.* at 485.

39. Seltzer and Anderson define “vulnerable person(s)” as a “potentially censurable or vulnerable entity.” *Id.* at 483. Census data is collected, in part, to target an entity made vulnerable as a result of its association with a national security threat or a presumed propensity for subversion—as is the case with Arab, MENA, and Muslim Americans today.

Therefore, while broadly perceived as a moment of racial progress, per se recognition of MENA identity must be examined within today's context of rising state suspicion, broadening surveillance, and emerging CVE programming.<sup>40</sup> Upon closer inspection, the degree of progress spurred by the MENA box may be mitigated by the prospective perils posed by it. In short, the MENA classification appears to be a progressive step forward with regard to acknowledging the unique racial identity of Arab American, but simultaneously,<sup>41</sup> a step backward with regard to bolstering the community surveillance, profiling, and policing front—particularly with the establishment and expansion of CVE policing.

The ramifications of this proposed reform are immense. As evidenced by the wellspring of scholarship on Arab, MENA, and Muslim American populations since 9/11, the creation of a MENA classification stands to have an acute impact on the legal literature linked to national security and anti-terrorism policing, immigration law, and civil rights—in addition to a host of distinct and corollary discourses centering on Arab, MENA, and Muslim American populations. Dovetailing off the research in these areas, this Article is the first to examine the proposed MENA box for the 2020 census and the forecasted impact it stands to have on Arab Americans. In addition, this Article contributes to the rising legal literature on CVE policing—which succeeds the USA PATRIOT Act<sup>42</sup> as the new surveillance program disproportionately targeting Arab, MENA, and Muslim Americans.

Part II outlines the present classification of Arab Americans by the OMB and the Census Bureau, followed by an analysis of the proposed MENA classification.

Part III investigates the timing of the proposed reform, uncovering how converging community and state interests influence the Census Bureau's unprecedented support of a standalone MENA box.

Part IV examines the government's three principal national security

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40. Khaled A. Beydoun, *Boxed In or Out? The Proposed Middle-Eastern American Box to the 2020 US Census*, RACE & L. PROF. BLOG (Mar. 27, 2015), <http://lawprofessors.typepad.com/racelawprof/2015/03/boxed-in-or-out-the-proposed-middle-eastern-american-box-to-the-2020-us-census.html>.

41. See generally Mezey, *supra* note 23 (discussing how census classifications have affected conceptions of race).

42. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)*, Pub. L. No. 107-56, 115 Stat. 272.

and anti-terror policing programs, highlighting the shift from federal anti-terrorism policing to a renewed model fusing centralized DHS capabilities with local law enforcement programming (CVE and SAR).

Part V identifies how adoption of the MENA classification will lead to the collection and compilation of more accurate and extensive demographic data about Arab Americans. This may, in turn, facilitate more intrusive federal national security law enforcement and local counter-radicalization policing, a development that stands to increase the vulnerability of Arab Americans during the War on Terror.

## II. RACIAL MISALIGNMENT

Arab Americans have overwhelmingly argued that their per se racial status conflicts with their lived experience.<sup>43</sup> I dub this circumstance “racial misalignment,” which is a status characterized by a marked discrepancy between a population’s “social citizenship”<sup>44</sup> and the racial classification ascribed to it by law.<sup>45</sup>

This Article analyzes this concept through the mismatched classification of Arab American identity, which the OMB and the Census Bureau define as white, but which federal and local law enforcement reads, recognizes, and racializes as pariah.<sup>46</sup> This misalignment underlies the decades-long quest by Arab Americans to claim a per se designation that acknowledges the distinct parameters of their identity,<sup>47</sup> and simultaneously reflects their “second class citizenship” in the United States today.<sup>48</sup>

The reform proposed by the Census Bureau for the 2020 census, from

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43. See Carla Murphy, *Arab-Americans Tell Census, ‘We’re Not White,’* COLORLINES (July 3, 2014, 10:08 AM), <http://www.colorlines.com/articles/arab-americans-tell-census-were-not-white> (giving a recent account documenting personal testimonies from Arab Americans).

44. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 30–31 (2006) (“[T]here is often a gap between possession of [formal] citizenship status and the enjoyment or performance of citizenship in substantive terms.”).

45. A forthcoming article, titled “Racial Misalignment,” will closely investigate the legal implications of this circumstance. Racial misalignment as a concept can be extended to illuminate, and subsequently investigate, the dissonance between the formal classification and social citizenship of another similarly situated population or community.

46. “On one hand, [Arab Americans] suffer from the types of discrimination that face minority groups. On the other hand, formally speaking, Middle Easterners [and thus, Arab Americans] are deemed white by law.” Tehrani, *supra* note 12, at 1204.

47. See generally Kayyali, *supra* note 24.

48. BOSNIAK, *supra* note 44, at 30. “[C]ertain marginalized social groups may now enjoy nominal citizenship status, but their members are, in fact, afforded less in the way of substantive citizenship than others in society, either because they suffer directly unequal treatment . . . or because the legal system treats certain social domains where de facto inequality prevails . . . as falling beyond the constraints of citizenship altogether.” *Id.*

an administrative perspective, would resolve Arab American racial misalignment.<sup>49</sup> Adoption of the contemplated MENA box would, for purposes of *per se* racial classification,<sup>50</sup> realign how Arab Americans are identified on the books with how they are profiled and policed on the ground. Section A analyzes the OMB's and the Census Bureau's current *per se* designation of Arab Americans. Section B examines the conceptual and structural character of the MENA box proposed for the 2020 U.S. census.

### A. Arab Americans Are White?

For Arab Americans, racial misalignment may mark the essence of their experience since arriving on American soil. This existential position has a double effect: intensifying the sense of being “out of place” in America,<sup>51</sup> and the concomitant longing for the homeland. *Balady*<sup>52</sup> is a standalone term frequently invoked by Arab Americans to describe a longing for more than mere place of residence, or for the rights and privileges attached to formal “citizenship.”<sup>53</sup> Further, the word signifies a metaphysical “attachment to some group, its culture or language, or perhaps its historical experience,” that newcomers aspire for after landing on American soil.<sup>54</sup>

49. Bhatnagar addresses this racial misalignment in the form of no “Middle Eastern” or “Arab” box on the census, stating, “[p]erhaps the most notable exclusion is a category for individuals of Middle Eastern or Arab descent, who are predominantly classified as ‘white’—though many commentators have suggested that the effects of 9/11 may lead to a separate category being added in the future.” Bhatnagar, *supra* note 36, at 102.

50. The U.S. Census Bureau refers to the OMB *per se* designations as “administrative race” designations. The Census Bureau’s designations are also referred to as “statistical races,” or “tools of government, with political purposes and policy consequences,” distinguished from the eugenicist and common perception standards the courts ceded to in the late nineteenth and early twentieth centuries. KENNETH PREWITT, *WHAT IS YOUR RACE? THE CENSUS AND OUR FLAWED EFFORTS TO CLASSIFY AMERICANS* 4 (2013).

51. Here I am referring to the phrase coined by Edward Said, who described his sense of being perpetually “out of place” (as a Palestinian Christian in Palestine, and a Palestinian American in the United States), as a combined status of isolation and marginalization. See generally EDWARD SAID, *OUT OF PLACE: A MEMOIR* (1999) (discussing growing up with a sense of divided identity).

52. “My country” (Arabic).

53. BOSNIAK, *supra* note 44, at 1.

The idea of citizenship is commonly invoked to convey a state of democratic belonging or inclusion, yet this inclusion is usually premised on a conception of a community that is bounded and exclusive. Citizenship as an ideal is understood to embody a commitment against subordination, but citizenship can also represent an axis of subordination itself.

*Id.*

54. PETER SKERRY, *COUNTING ON THE CENSUS? RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS* 43 (2000).

Since the first immigrants from the Arab World passed through Ellis Island in the nineteenth century<sup>55</sup> until the present day, the law has consistently drawn a sharp line between Arab and American identity. Like groups of immigrants that arrived before and after them, Arab newcomers seeking to become citizens maneuvered within a formal racial order that failed to carve out a specific place for them.<sup>56</sup> As a result, Arabs were pushed to the racial margins in search of a per se classification that fit their identity, captured their narrative, and spoke to their distinct experience in their new *balady*—the United States.

This racial quandary, or misalignment, would be legally adjusted with the adoption of the MENA box. Unsurprisingly, in the face of racially restrictive immigration and naturalization laws,<sup>57</sup> coupled with the aforementioned longstanding statutory regime that “cause[s] confusion” and poses existential, political, legal, and economic dilemmas,<sup>58</sup> Arab Americans are generally supportive of the proposed MENA box.<sup>59</sup>

Through legislation, judicial rulings, and government agency directives,<sup>60</sup> the law’s making and remaking of Arab American identity highlights the turbulence of the American race-making enterprise.<sup>61</sup> Indeed, the racial paradox that riddles Arab Americans today not only illustrates this turbulence, but also exposes the absurdity of designating

55. ORFALEA, *supra* note 1, at 5.

56. See generally LÓPEZ, *supra* note 2 (discussing racialization and the white identity).

57. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103.

58. *The 2010 Census Communication Contract: The Media Plan in Hard to Count Areas: Hearing Before the Subcomm. on Info. Policy, Census & Nat’l Archives of the H. Comm. on Oversight & Gov’t Reform*, 111th Cong. 356 (2010) (statement of Helen H. Samhan, Executive Director, Arab American Institute Foundation) [hereinafter “Samhan Testimony”] (highlighting how the prevailing designation of Arab Americans as white has “caused confusion, alienation and even anger within segments of the American population with origins in the MENA region”).

59. Although no formal survey measuring this support has been conducted, support for the MENA box is duly reflected by organizational reform for the classification. The most prominent Arab American organizations, including the Arab American Institute (“AAI”), the American Arab Anti-Discrimination Committee (“ADC”), and Arab Center for Cultural, Economic and Social Services (“ACCESS”)—the largest Arab American social services organization in the country—strongly support adoption of the MENA box. However, as I will discuss more closely later in this Article, some segments of the broader Arab American population prefer being identified as white, and presumably, will continue to identify as such if the MENA box is adopted in 2020.

60. The OMB, being the agency that oversees race and racial categories, “has the power to limit, expand, and define the field of racial categories.” Bhatnagar, *supra* note 36, at 100. This power illustrates the OMB’s considerable influence in constructing and defining racial categories, which government agencies are mandated to follow.

61. The fluid making and remaking of Arab American racial identity highlights the Critical Race Theory baseline that race is “socially constructed.” MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 68 (2d ed. 1994).

Arab Americans as white. Particularly within the context of the War on Terror, whereby state and societal actors continue to perceive Arab Americans with suspicion, and in the extreme, as presumptive terrorists.

### 1. Legally White

The OMB's designation of Arab Americans as white by law is rooted in early- to mid-twentieth-century immigration and naturalization jurisprudence.<sup>62</sup> During the racially restrictive Naturalization Era, Arab immigrants—like immigrants from other parts of the world—”performed whiteness” during civil proceedings as a means toward gaining citizenship.<sup>63</sup> Nearly 110 years after the first Arab immigrant came before a judge seeking citizenship,<sup>64</sup> Arab Americans still find themselves interlocked between an existential and legal paradox: per se classification as white, but pervasive profiling and policing as pariah.<sup>65</sup>

Two key naturalization decisions, *Dow v. United States* in 1915<sup>66</sup> and *Ex Parte Mohriez* in 1944,<sup>67</sup> which extended per se whiteness to Syrian Christians and Arab Muslims, respectively,<sup>68</sup> together established the modern designation of Arab Americans as white by law. The latter

62. Beydoun, *supra* note 6.

63. See generally John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000) (examining closely how immigrant-petitioners negotiated their native identities in ways that conformed with whiteness before judges; a mandate for citizenship before 1952); Beydoun, *supra* note 6, at 49–60 (examining the white identity); LÓPEZ, *supra* note 2, at 15 (same).

64. Beydoun, *supra* note 6, at 31–33. In 1909, “Judge George H. Hutton peered across his bench in the direction of George Shishim. Shishim, a longtime resident of California and native of the Mount Lebanon Province of the Ottoman Empire, had entered Hutton’s court to petition for American citizenship.” *Id.* at 31.

65. Being burdened by an identity paradox spawned by law, looking back and ahead, may very well be the definitive marker of the grand Arab American narrative. To be Arab American is to be confined within the never-ending crucible of racial catch-22s, whereby assigned legal status is either misaligned with social citizenship; or, if the proposed MENA category is adopted, positions Arab Americans squarely within the paradox of civil rights progress and enhanced vulnerability.

66. *Dow v. United States*, 226 F. 145, 148 (4th Cir. 1915). George Dow was a Syrian Christian immigrant, who was denied naturalization by two lower courts before successfully appealing to the Fourth Circuit.

67. *Ex parte Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944). The court found a Muslim from Saudi Arabia to be within the statutory definition of whiteness. *Id.* The decision was driven by interest to promote, “friendlier relations between the United States and other nations.” Beydoun, *supra* note 6, at 70.

68. See generally SARAH M. A. GUALTIERI, *BETWEEN ARAB AND WHITE: RACE AND ETHNICITY IN THE EARLY SYRIAN AMERICAN DIASPORA* (2009) (giving a history of the experience of the early waves of Syrian immigrants).

decision formally acknowledged “Arabs” as a distinct identity from Syrians, and, thus, as white by law. The *Dow* decision was narrow, delivering whiteness to Syrian Christians specifically. Because Arab was conflated with Muslim identity, Arab Muslim petitioners were deemed nonwhite for the twenty-nine years between *Dow* and *Mohriez*.

While largely forgotten as a dark chapter of American immigration and naturalization history, the legacy of the Naturalization Era continues to color the per se racial status of Arab Americans today.<sup>69</sup> In 1978, the OMB codified the rulings handed down in *Dow* and *Mohriez* with Statistical Directive No. 15 (“Directive No. 15”), which designated people from the MENA region as white.<sup>70</sup> One commentator called Directive No. 15 “the single event most responsible for the lines” that configure our understanding of race.<sup>71</sup> Twenty years later, the 1997 OMB directives on race and ethnicity reaffirmed that “person[s] having origins in any of the original peoples of Europe, the Middle East or North Africa” were white by law.<sup>72</sup>

The Census Bureau, mandated to follow the racial definitions and categories delineated by the OMB,<sup>73</sup> counts Arab Americans—and all persons hailing from the MENA region—as white.<sup>74</sup> Therefore, the decisions handed down one-hundred-one and seventy-two years ago in *Dow* and *Mohriez* respectively, are still *good law*, seeding the per se baseline for the modern designation of Arab Americans as white.<sup>75</sup> In turn, these cases offer a compelling rebuttal to the notion that the Naturalization Act of 1790, not Directive 15, still stands as the “most responsible [event] . . . that configure[s] our” misunderstanding of Arab

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69. Prewitt critiques prevailing conceptions of race as being based on arcane race thinking: “Twenty-first century statistics should not be governed by race thinking that is two and a half centuries out of date.” PREWITT, *supra* note 50, at 3.

70. Statistical Directive No. 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,269–70 (May 6, 1978).

71. Mezey, *supra* note 23, at 1746 (quoting DAVID A. HOLLINGER, POSTETHNIC AMERICA: BEYOND MULTICULTURALISM 33 (rev. ed. 2000)).

72. *Id.* at 1763–64.

73. “The U.S Census Bureau must adhere to the 1997 Office of Management and Budget (OMB) standards on race and ethnicity.” *About Race*, *supra* note 4.

74. Helen Hatab Samhan, *Not Quite White: Race Classification and the Arab-American Experience*, in ARABS IN AMERICA, *supra* note 1, at 209, 214. “The categories promulgated in 1978 by the OMB did draw distinctions but, unlike earlier policies, not on the basis of skin color. Known as ‘Directive 15,’ the standards identify four race categories.” The OMB defined white as including “persons originating in Europe, the Middle East, and North Africa.” *Id.*

75. See generally Beydoun, *supra* note 6 (analyzing the development of the Arab American identity).

American identity.<sup>76</sup> The judicial pronouncements that Arabs were white by law were subsequently adopted by other government agencies, which universally established this formal designation within the executive and legislative branches.

The racial classification of Arab Americans as white has considerable practical ramifications. Because Arab Americans are still designated as white, statistical data about the population is “of very dubious quality and lacks consistency.”<sup>77</sup> The OMB’s definition of Arab Americans as white has led to an undercounting of their real, numerical presence in the United States.<sup>78</sup> This undercounting is illustrated by the considerable gap between official U.S. Census Bureau figures and private pollsters. The Census Bureau currently estimates that the Arab American population is 1.5 million;<sup>79</sup> a figure regarded to be far smaller than the actual number.<sup>80</sup> However, the Arab American Institute’s (“AAI”) internal polling estimates the population of Arab Americans at 3,665,789, more than two times the size of the Census Bureau figures.<sup>81</sup> Hassan Jaber, Executive Director of the Arab Community Center for Economic and Social Services (“ACCESS”)—the premier Arab American social services organization in the United States—estimates that the “true number might be closer to almost 6 million.”<sup>82</sup>

Rising immigration from the MENA region, particularly from war-torn and turbulent states such as Egypt, Iraq, and Syria, is steadily increasing the Arab population in the United States.<sup>83</sup> Since 2000, the

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76. Mezey, *supra* note 23, at 1746.

77. Kayyali, *supra* note 24, at 1300.

78. The AAI estimates that the per se designation of white has led to a 60% undercounting of Arab Americans. ARAB AM. INST., DEMOGRAPHICS (2012), [http://b3cdn.net/aa/44b17815d8b386bf16\\_v0m6iv4b5.pdf](http://b3cdn.net/aa/44b17815d8b386bf16_v0m6iv4b5.pdf) [hereinafter AAI DEMOGRAPHICS].

79. MARYAM ASI & DANIEL BEAULIEU, U.S. CENSUS BUREAU, ARAB HOUSEHOLDS IN THE UNITED STATES: 2006-2010, at 1 (2013), <http://www.census.gov/prod/2013pubs/acsbr10-20.pdf>. The Arab Households Survey estimates that, as of 2010, the United States was home to 500,000 Arab American households. *Id.* at 2.

80. “The number of Arab households has also grown over time, increasing from 268,000 in 1990 to 427,000 in 2000. Data from the 2006-2010 [American Community Survey] 5-year estimates reveal that there were 511,000 Arab households in the United States, representing a 91.0 percent increase since 1990.” *Id.* at 1.

81. “The population who identified as having Arabic-speaking ancestry in the U.S. Census grew by more than 72% between 2000 and 2010.” AAI DEMOGRAPHICS, *supra* note 78.

82. Haya El Nasser, *Arabs, Hispanics Seeking Better US Census Recognition*, AL JAZEERA AM. (Dec. 17, 2013, 2:00 PM), <http://america.aljazeera.com/articles/2013/12/17/arabs-hispanics-seekingbetteruscensusrecognition.html>.

83. KAYYALI, *supra* note 1, at 98–100; *see also* AAI DEMOGRAPHICS, *supra* note 78 (“The population who identified as having Arabic-speaking ancestry in the U.S. Census grew by more than 72% between 2000 and 2010.”).



Arab American population has increased roughly 47%, and at an even higher rate in the five most concentrated markets: the Detroit-Dearborn area, Los Angeles, New York-New Jersey, Chicago, and Washington, D.C.<sup>84</sup> While undercounting has detrimental effects on the Arab American population, which I will discuss in Part II, accurate demographic data is also a matter of rising concern—and interest—for federal and local law enforcement during today’s ongoing War on Terror.

## 2. De Facto Pariahs

“Arab Americans are white?” This question, posed more as a demonstration of shock or surprise, highlights the cognitive dissonance between how Arab American identity and whiteness are discursively imagined and understood.<sup>85</sup> This dissonance is hardly aberrational, but reflective of a pervasive sociopolitical framing that makes Arab “synonymous” with Muslim.<sup>86</sup> Subsequently, these frequently conflated identities are routinely characterized as “alien,”<sup>87</sup> “inassimilable,”<sup>88</sup> and “subversive.”<sup>89</sup> More blatantly, the War on Terror has led to policing of Arab Americans as proxies or members of

84. Heather Brown, Emily Guskin & Amy Mitchell, *Arab-American Population Growth*, PEW RES. CTR. 1–2 (Nov. 28, 2012), <http://www.journalism.org/2012/11/28/arabamerican-population-growth>; see also ARAB AM. INST., MICHIGAN: STATE’S RANK BY ARAB AMERICAN POPULATION (2011), <https://d3n8a8pro7vhmx.cloudfront.net/aai/pages/7706/attachments/original/1431630798/Michigan.pdf?1431630798> (providing statistics about the Arab American population in Michigan, recognized as the hub of the Arab American population).

85. This dissonance was vividly revealed, on a national platform, during the 2008 presidential campaign. During a campaign town hall in Lakeville, Minnesota, an attendee referred to (then Democratic candidate) Barack Obama “as an Arab.” McCain responded, “No . . . [he’s a] decent person and a person you don’t have to be scared of as president of the United States.” Jonathan Martin & Amie Parnes, *McCain: Obama Not an Arab, Crowd Boos*, POLITICO (Oct. 10, 2008, 9:19 PM), <http://www.politico.com/story/2008/10/mccain-obama-not-an-arab-crowd-boos-014479>. In short, such sentiments conflate Arab identity with indecency and menace.

86. Adrien Katherine Wing, *Civil Rights in the Post 9/11 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 722 (2003) (“The pan-ethnicity term ‘Arab’ and the religious signifier ‘Muslim’ have been socially constructed as a synonymous ‘race’ in the United States.”).

87. Beydoun, *supra* note 6, at 32.

88. Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 75 (2004) (analyzing how Arab and MENA noncitizens and citizens are incapable of assimilation); see also Volpp, *supra* note 14, at 1594 (arguing that although Arab Americans are citizens and “theoretically entitled to formal rights . . . they do not stand in for or represent the nation. Instead, they are interpellated as antithetical to the citizen’s sense of identity.”).

89. Beydoun, *supra* note 6, at 30; see also Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E.L. 121, 125 (2008) (describing the effects of the war on terror with the racialization of Muslims).

an “enemy race.”<sup>90</sup> These caricatures, deployed regularly by politicians, pundits, and popular media,<sup>91</sup> render Arab Americans de facto nonwhites. However, amidst popular representations and particularly the still escalating War on Terror, Arab Americans remain saddled with a conflicting legal designation that veers markedly from their lived experience.<sup>92</sup>

From 1944 to 2015, the law has counted Arab Americans as white.<sup>93</sup> This classification clashes with earlier conceptions of Arab identity as inassimilable on grounds of eugenics,<sup>94</sup> phenotype,<sup>95</sup> religion,<sup>96</sup> and having origins in the “Mohammedan World”<sup>97</sup>—a constructed sphere

90. Tehranian, *supra* note 12, at 1216.

91. See generally JACK G. SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE (2001) (for a comprehensive history of cinematic and television misrepresentations of Arab, MENA, and Muslim identity); JACK G. SHAHEEN, THE TV ARAB (1984) (providing a foundational account of television misrepresentations of Arab and Arab Americans through the early 1980s); TIM JON SEMMERLING, “EVIL” ARABS IN AMERICAN POPULAR FILM: ORIENTALIST FEAR (2006) (providing a more recent accounting of caricatured portrayals of Arab characters in American cinema).

92. This is not to imply that there is a monolithic Arab American “lived experience.” As discussed in Part IV of the Article, segments of the Arab American milieu prefer the status quo, and may choose to maintain their per se status as white if the proposed reform is adopted. However, a common thread shared by Arab Americans is the conflation of Arab identity with terrorism, which is experienced disparately but nevertheless encountered by the overwhelming majority of the population.

93. *Ex parte Mohriez*, 54 F. Supp. 941 (D. Mass. 1944) extended the ruling that Arab Muslims were white by law. An earlier decision, *Dow v. United States*, 226 F. 145 (4th Cir. 1915), affirmed that Syrian Christians were white twenty-nine years earlier.

[A]lthough *Mohriez* set the precedent that a Muslim immigrant from the Arab World fit within the statutory decision of whiteness, the decision did not retroactively recognize naturalized Syrian Christians as Arabs, or formally acknowledge them as Arab Americans. The courts still viewed both as separate racial groups, bringing about a segregated view of Arab American identity that clashed with the gradually galvanizing mode of Arab identity brought forth by Pan-Arabism.

Beydoun, *supra* note 6, at 66.

94. *Ex parte Shahid*, 205 F. 812, 813 (E.D.S.C. 1913); *Ex parte Dow*, 211 F. 486 (E.D.S.C. 1914); *In re Dow*, 213 F. 355 (E.D.S.C. 1914).

95. *Shahid*, 205 F. at 814.

96. See generally Beydoun, *supra* note 6, at 29–30 (noting that courts, until 1944, found that Islam was irreconcilable with whiteness, and although a religion, a racial proxy for nonwhiteness).

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

Apart from the dark skin of Arabs, it is well known that they are part of the Mohammedan world and that a wide gulf separates their culture from that of the predominantly Christian peoples of Europe. It cannot be expected that as a class they would readily intermarry with our population and be assimilated into our civilization.

*Id.*; see also EDWARD SAID, ORIENTALISM 280 (1979); Khaled A. Beydoun, *Antebellum Islam*, 58 HOW. L.J. 141 (2014).

caricatured to be in a perpetual “state of war”<sup>98</sup> and antithetical to the democratic and liberal cornerstones of the “West.”<sup>99</sup> The Orientalist legacy of conflating “Arab” with “Middle Eastern” and “Muslim identity” triggers identification of this consolidated group as terrorists.<sup>100</sup> Such conflation, in turn, exacerbates these populations’ vulnerability to both state and societal violence, while it invariably pushes Arab Americans existentially further and further away from the whiteness bound to them by law. The MENA box, if added to the 2020 census, may formally put an end to the rigid classification of Arab Americans as white by law.

### B. *The Proposed Middle Eastern or North African Box*

Ongoing conversations and collaboration between community stakeholders and the Census Bureau foreshadows possible reform and reclassification of Arab American identity.<sup>101</sup> In October 2014, the U.S. Census Bureau introduced a redefinition and schema for MENA identity that, if adopted, could also lead to possible reform of the OMB designation.<sup>102</sup> The proposal lists the “Middle Eastern or North African (MENA) category” as one of “four key dimensions to explore.”<sup>103</sup> This exploration began with testing of the proposed MENA box, led by a series of internal meetings, focus groups, and expert forums examining the name, language, scope, and structure of the proposed designation.<sup>104</sup> Still an extremely fluid process, the proposed language of the MENA box is tentative, and very likely to be revised before (and if) the new designation is adopted for the 2020 U.S. census.<sup>105</sup>

98. Marie A. Failinger, *Islam in the Mind of American Courts: 1800 to 1960*, 32 B.C. J.L. & SOC. JUST. 18 (2012).

99. SAID, *supra* note 97, at 31–92. Said, in this chapter, examines the scope of Orientalism, and the normative dialectic between the “Occident” (the West) and the “Orient” (the East), which includes the modern MENA region. In this dialectic, the latter sphere is constructed by the former as its mirror opposite. *Id.*

100. Beydoun, *supra* note 6, at 43–44. “I would suggest that September 11 facilitated the consolidation of a new identity category that groups together persons who appear ‘Middle Eastern, Arab, or Muslim.’ This consolidation reflects a racialization wherein members of this group are identified as terrorists, and are disidentified as citizens.” Volpp, *supra* note 14, at 1576.

101. As an “expert scholar,” I have participated in both informal and formal conversations regarding the proposed MENA box.

102. *See generally 2015 Census Update*, *supra* note 17 (identifying potential framework updates). If the proposed MENA box is met with consensus from community stakeholders and the U.S. Census Bureau, the U.S. Census Bureau will then make a recommendation to the OMB to add the new category its framework.

103. *Id.* at 15.

104. *Id.* at 7.

105. *See generally id.*

### 1. Where Is the “Middle East” and “North Africa”

If adopted, the MENA box would formally introduce and construct a new racial group into the American racial discourse and taxonomy. During bygone eras, Congress and the civil courts were the chief institutions that constructed and defined racial classification. Today, the OMB, in conjunction with the Census Bureau, holds the role of “making race.”<sup>106</sup> Following in the footsteps of the “Asian American” and “Latin American” boxes, the inclusion of MENA into the 2020 census, and more broadly, the administrative racial order, would make the proposed classification the state’s most recent racial creation. In order to understand the logic and parameters of the proposed MENA box, a useful first step is investigating its sociopolitical and legal origins.

The “Middle East” and “North Africa” are regions historically, politically, and culturally disassociated from whiteness.<sup>107</sup> But for purposes of federal law, people who hail from these regions are currently classified as white. Commonly viewed as an innate ethnic or racial classification, Middle Eastern and North African identity—as either distinct or consolidated identities—are the existential byproducts of the MENA region, a “malleable geopolitical construct of relatively recent vintage.”<sup>108</sup> MENA today, however, has evolved into a commonly accepted and pervasively used term that is flexibly used to refer to a geographic region, a geopolitical sphere, and the populations they encompass. As a geographic region or geopolitical sphere, the MENA region is generally viewed to include nineteen nation-states;<sup>109</sup> however, the traditional bounds of the region are sometimes broadened to include an additional ten states located in the Mediterranean, Central Asia, and Africa.<sup>110</sup>

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106. See *supra* note 55 and accompanying text (noting that both government agencies are commissioned to define and redefine racial classifications, in addition to formulating new ones, as illustrated by the MENA box).

107. See generally ROBERT J. ALLISON, *THE CRESCENT OBSCURED: THE UNITED STATES AND THE MUSLIM WORLD, 1776–1815* (1995) (explaining the relationship between the United States and the Muslim world); TIMOTHY MARR, *THE CULTURAL ROOTS OF AMERICAN ISLAMICISM* (2006) (discussing American Islamicism); SAID, *supra* note 97 (exemplifying orientalism and modern imperialism).

108. TEHRANIAN, *supra* note 8, at 65. “The term ‘Middle East’ likely emerged in the 1850s from Britain’s India Office . . . . Thus, the designation was borne of geopolitical considerations and its construction wrought with semiotic meaning.” *Id.* at 65.

109. Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Yemen, the United Arab Emirates, Libya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Syria, and Tunisia.

110. These ten states are Armenia, Azerbaijan, Cyprus, Djibouti, Georgia, Mauritania, Somalia, Sudan, Turkey, and Western Sahara. Hisham Aidi, *Middle Eastern Americans Push Census Change*, AL JAZEERA AM. (Feb. 2, 2015), <http://america.aljazeera.com/opinions/2015/2/>

Although oriented as a monolith, the MENA region is anything but.<sup>111</sup> Rather, the region is home to a diverse array of peoples, who are distinct along ethnic, racial, and cultural lines.<sup>112</sup> In addition to Arab nations,<sup>113</sup> the MENA region is also home to other indigenous populations, including “Berbers,”<sup>114</sup> Iranians,<sup>115</sup> Kurds,<sup>116</sup> Turks, and other non-Arab communities.<sup>117</sup> Neither a continent nor a contiguous landmass, the MENA region is itself a sociopolitical construction spawned, and reified, for its expediency.

Arab immigrants were pulled to the United States, largely for economic reasons, from a geopolitically shifting MENA region. The “first wave” of Arab immigrants arrived in late nineteenth and early twentieth centuries.<sup>118</sup> This pioneering immigrant wave was

middle-eastern-americans-push-census-change.html. Proponents of the broader definition seek to include the additional ten states, particularly the African nations, which “would allow for the counting of Afro-Arab populations, which the U.S. Census has historically undercounted.” *Id.*

111. SAID, *supra* note 97, at 63.

112. See generally DANIEL G. BATES & AMAL RASSAM, PEOPLES AND CULTURES OF THE MIDDLE EAST (2000) (exemplifying the tenants of Islam and Muslim life); ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES (1992) (presenting a comprehensive history of the region and its peoples); MEHRAN KAMRAVA, THE MODERN MIDDLE EAST: A POLITICAL HISTORY SINCE THE FIRST WORLD WAR (2011) (providing a modern political history).

113. “The Arab world, or region, as it is often referred, is not to be confused with the ‘Middle East’ or the ‘Muslim World,’ which are often conflated in development studies and scholarship at large.” Khaled A. Beydoun, *Fast Tracking Women Into Parliamentary Seats in the Arab World*, 17 SW. J. INT’L L. 101, 107 n.27 (2011).

114. See generally BRUCE MADDY-WEITZMAN, THE BERBER IDENTITY MOVEMENT AND THE CHALLENGE TO NORTH AFRICAN STATES (2011) (providing a comprehensive history and the modern challenges to Berber identity in North African nation-states). The Amazigh, discursively known as the Berbers, are an ethnically distinct people indigenous to North African nations. *Id.*

115. See generally Nilou Mostofi, *Who We Are: The Perplexity of Iranian-American Identity*, 44 SOC. Q. 681 (2003) (examining the formation of Iranian-American identity, prefaced by an analysis of how distinct Iranian customs and traditions inform that process).

116. Visible elements within the Kurdish American community, “fearful of being counted as Arab,” oppose the proposed MENA box. Staff, *Kurdish-Americans Fearful of Being Counted as ‘Arab’ in US Census*, RUDAW (Mar. 30, 2015), <http://rudaw.net/english/world/04032015>.

117. Although these groups are distinct along a range of lines, including culture, history, and language, they are frequently conflated as being one in the same. This sweeping consolidation of diverse groupings of people, which is still perpetuated today, is rooted in the discursive discourses, processes, and mechanisms of “Orientalism.” According to Said, Orientalism is not an airy European fantasy about the Orient, but a created body of theory and practice in which, for many generations, there has been a considerable material investment. Continued investment made Orientalism, as a system of knowledge about the Orient, an accepted grid for filtering through the Orient into Western consciousness, just as that same investment multiplied—indeed, made truly productive—the statements proliferating out from Orientalism into the general culture. Beydoun, *supra* note 6, at 43–49 (quoting SAID, *supra* note 97, at 6).

118. Beydoun, *supra* note 6, at 49–52.

overwhelmingly Christian and “Levantine.”<sup>119</sup> Dissolution of the Naturalization Act and immigration quotas in 1965 opened the borders for a more diverse pool of immigrants from the Arab World.<sup>120</sup> This “second wave” of immigrants included a greater number of Arab Muslims,<sup>121</sup> and newcomers from states in Africa, the Gulf, and segments of the MENA region outside of the Levant.<sup>122</sup> As a result of the second and subsequent waves of immigrants from the region, Arab America is more heterogeneous today than ever before, and fluidly diversifying along phenotypic, nationality, religious, and sectarian lines.

Despite the ambiguity of MENA, and its consolidation of a distinct and diverse set of peoples, many Arab, Middle Eastern, and North African stakeholders together with the Census Bureau consider the designation a practical and palatable vehicle for classifying their identities. Thus, for Americans hailing from the MENA region, racial identity is conflated with a fluidly shifting and vastly diverse region that spans across twenty-nine states and three continents.<sup>123</sup>

## 2. Vision 2020: The MENA Box

The proposed MENA box is built upon the political and discursive constructions of “Middle Eastern” and “North African.” Yet, despite its dubious origins, the proposed classification stands to materially reform the per se classification and conception of Arab American identity. First, the proposal would redact “Middle East and North Africa” from the preexisting “White” category.<sup>124</sup>

Second, it would shift these geographic designations into a standalone MENA category, as one of eight options an applicant may

119. ALIXA NAFF, *BECOMING AMERICAN: THE EARLY ARAB IMMIGRANT EXPERIENCE* 112 (1985) (explaining that the “Levant” is the region encompassing modern day Lebanon, Syria, Jordan, Israel, and Palestine).

120. Act of May 26, 1924, ch. 190, 43 Stat. 153. This era is also referred to as the “National Quota Regime Era.”

121. Suleiman, *supra* note 1, at 1; see KAMBIZ GHANEABASSIRI, *A HISTORY OF ISLAM IN AMERICA: FROM THE NEW WORLD TO THE NEW WORLD ORDER* 303–06 (2010) (discussing how political turbulence in the Arab World spurred Arab Muslim migration, and upon arrival, shaped activism, identification, and organizing); see also *Muslim Americans: No Signs of Growth in the Alienation or Support For Extremism*, PEW RES. CTR. (Aug. 30, 2011), <http://www.people-press.org/2011/08/30/muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism> (providing a general analysis of Muslim American demographic data today, which features figures on immigration from Arab states).

122. KAYYALI, *supra* note 1, at 33 (“[B]etween 1965 and 1992, more than 400,000 Arab immigrants arrived in the United States because of the changes in the immigration law and quotas.”); see also ORFALEA, *supra* note 1 (analyzing the Arab community in a modern society).

123. Africa, Asia, and Europe (Turkey spans both Asia and Europe).

124. *2015 Census Update*, *supra* note 17, at 17.

choose while filling out the 2020 U.S. census.<sup>125</sup>

Third, the proposed MENA designation, like its seven counterparts, would be supplemented with a fillable box, allowing the applicant to “print specific ethnicities” that fall within the broader (racial or ethnic) classification.<sup>126</sup> As a result, applicants are enabled to not only identify along new ethnic or racial terms, but additionally, specify to which subgroup or nationality they belong. For instance, Arab American applicants would be able to write in “Arab American” or “Moroccan American” into the fillable box, articulating their identities in the manner they see fit, in addition to identifying broadly as MENA.

As of November 2015, the Census Bureau is still exploring whether to label the new MENA box as a race or an ethnicity.<sup>127</sup> Internal debates regarding the terminology, combined with different outlooks within the Arab American and broader MENA communities, have created differences as to how the proposed classification should be framed. This point of contention, however, is not isolated, but emblematic of a broad set of differences with regard to the overall construction of the proposed category. The fact that the MENA region “was invented from political considerations, not natural geography,”<sup>128</sup> has begged the question of whether the groups should be consolidated into one classification at all. In addition, the expanse and ambiguity of the MENA region has also been the source of debate as to what the final title of the proposed category should be. However, whether framed as ancestry, ethnicity, or race, the MENA classification would still have the functional effect of racially distinguishing “MENAs” from the *per se* White box,<sup>129</sup> and identify those who claim it as a distinct and independent racial group.

A sensitive and fluid process, the Census Bureau’s initiative and efforts around pushing the MENA box forward illustrates that reform and reclassification is likely. The classification and language currently presented may very well change,<sup>130</sup> but plans are well underway to

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125. *Id.* The other seven options would include: (1) White; (2) Hispanic, Latino, or Spanish origin; (3) Black or African American; (4) Asian; (5) American Indian or Alaska Native; (6) Native Hawaiian or Other Pacific Islander; and (7) Some other race or ethnicity. *Id.* An applicant is not limited to selecting just one box, but may select all of those that apply to his or her identity. *Id.*

126. *Id.* The current proposed language posits: “Print specific ethnicities, for example, Lebanese, Iranian, Egyptian, Syrian, Moroccan, Algerian, etc.” *Id.*

127. *Id.* at 19.

128. Tehranian, *supra* note 12, at 1211.

129. Individuals who identify as MENA.

130. *2015 Census Update*, *supra* note 17, at 17, 19.

dislodge the MENA region from the White category, and subsequently, construct a separate and standalone box in its specific name. With roughly four years before the 2020 U.S. census, the momentum toward adopting the MENA box is on par with the velocity of intensifying state surveillance and policing of Arab Americans, two previously parallel movements that, at present, are heading toward convergence.

### III. WHY NOW? CONVERGING TOWARD REFORM

Much has changed since 1952. Whiteness is no longer a prerequisite for citizenship.<sup>131</sup> The demographic composition of Arab America has diversified. The geopolitical landscape of the Arab World is dramatically different, and experiencing a new state of flux.<sup>132</sup> And, the association of Arab American identity with a national security menace, terrorism,<sup>133</sup> and “homegrown terrorism,”<sup>134</sup> is deepening. These latter stereotypes were bolstered after the 9/11 terrorist attacks,<sup>135</sup> and today, take on an added dimension with the rise of transnational terrorist networks like the Islamic State in Iraq and Syria (“ISIS”).<sup>136</sup>

While Orientalist tropes tying Arab American identity to violence

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131. The year the Naturalization Act of 1790 was dissolved, and whiteness was no longer mandated as a prerequisite for citizenship.

132. The politics of the region, particularly within the last five years, have been extremely volatile. The “Arab Spring” revolutions, which commenced in Tunisia in December 2011, spurred a number of popular revolutions throughout the Arab World. *See generally* HAMID DABASHI, *THE ARAB SPRING: THE END OF POSTCOLONIALISM* (2012) (providing a political history of the revolutions, in addition to an analysis of their impact on the nations where they unfolded, and the region at large). However, the period after the revolutions spiraled into the still ongoing phase of intensifying sectarian saber-rattling and tensions in the Arab World, best represented with the rise of ISIS, the Syrian War, the rising tension between Saudi Arabia and Iran, and the proxy wars throughout the region. *See generally* FREDERIC M. WEHREY, *SECTARIAN POLITICS IN THE GULF: FROM THE IRAQ WAR TO THE ARAB UPRISINGS* (2013) (examining rising sectarian politics and proxy wars in the Arab World).

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

The racialization of Islam intersects with the West’s encounters with enemies whose ideological identity is intimately linked to their interpretation and use of Islam. As a result, brown-skinned, non-Christian Americans become more (or less) than just an *other* within the society; they become an other who is associated with a foreign enemy.

*Id.*

134. Sahar F. Aziz, *Policing Terrorists in the Community*, 5 *HARV. NAT’L SEC. L.J.* 147, 156 (2014).

135. Volpp, *supra* note 14, at 1586.

136. ISIS was designated a terrorist group by the Department of State on December 17, 2004, but emerged as a distinct geopolitical threat roughly a decade later. *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Mar. 7, 2016).



and subversion preceded the 9/11 attacks,<sup>137</sup> the Bush administration introduced sweeping surveillance and policing reform that directed its focus on Arab, MENA, Muslim Americans,<sup>138</sup> and other communities that fit within the “Arab caricature.”<sup>139</sup> The War on Terror ushered in federal law enforcement and surveillance programs that exacerbated the “punitive treatment of Arab and Muslim noncitizens,”<sup>140</sup> built upon the baseline that linked Arab, MENA, and Muslim American identity with a propensity for terrorism. As a result of the broadening dragnet, the civil liberties of Arab Americans eroded dramatically, and their already stigmatized status spiraled even deeper.<sup>141</sup> Ultimately, these post-9/11 federal programs created even greater dissonance and distance between Arab America’s per se whiteness and de facto otherness.<sup>142</sup>

Despite community efforts beginning in the early 1980s to reconcile this racial misalignment,<sup>143</sup> the Census Bureau repeatedly stood against the reform and reclassification of Arab Americans. Arab American organizations and stakeholders fully appreciate the “critically important social, political and humanitarian functions” that the U.S. census recognition serves,<sup>144</sup> and have therefore grappled with the top-down assignment of whiteness for decades. While community efforts pushing

137. Beydoun, *supra* note 6.

138. Akram & Johnson, *supra* note 10, at 295. President George W. Bush, and members of his administration, regularly referred to the “War on Terror” as a “clash of civilizations,” “religious war,” and “crusade,” echoing the rhetoric from the provocative book *The Clash of Civilizations* by Samuel P. Huntington. See generally SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996) (emphasizing cultural identity and the shift in the balance of power among civilizations).

139. Natsu T. Saito, *Symbolism Under Siege: Japanese American Redress and the Racialing of Arab Americans as “Terrorists,”* 8 ASIAN AM. L.J. 1, 12 (2001) (“[A]rab Americans and Muslims have been ‘raced’ as ‘terrorists’: foreign, disloyal, and imminently threatening. Although Arabs trace their roots to the Middle East and claim many different religious backgrounds, and Muslims come from all over the world . . . these distinctions are blurred and negative images about either Arabs or Muslims are often attributed to both.”).

140. Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11th, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1376 (2007).

141. See Akram & Johnson, *supra* note 10 (evaluating the effect of 9/11 on the Arab community); see also Jamal, *supra* note 14, at 117–18 (stating the post-9/11 moment, marked by the enactment of USA PATRIOT Act, ushered intensified surveillance, monitoring, and suspicion of Arab American communities).

142. Alia Malek, “*Dying with the Wrong Name*”: *The Role of Racializing and Erasing Arabs in America*, 1 GEO. J.L. & MOD. CRITICAL RACE PERSP. 211, 212 (2009) (“There is a longstanding and substantial dissonance between the official classification of Arab Americans as ‘White’ and how they feel and are treated in the United States.”).

143. Kayyali, *supra* note 24, at 1305.

144. Seltzer & Anderson, *supra* note 37, at 482.

for reform and reclassification of Arab American identity have been committed and continuous, a paradigmatic shift in national security strategy may be the pivotal domino that triggers the adoption of a standalone MENA box on the 2020 census.

This Part examines key antecedents of present discussions and tentative plans for implementing the MENA box into the 2020 census. Section A articulates the existential, political, legal, and economic benefits Arab Americans stand to gain with the adoption of the MENA category. Section B explores the pressing national security aims that converge with the interests of Arab American interests, and which may be the critical catalyst pushing reform and reclassification of Arab American identity forward.

### A. Community Efforts Toward Racial Reform

Community efforts to reform the racial classification of Arab Americans from white to nonwhite began in the 1980s.<sup>145</sup> Arab American organizations launched initiatives that were driven by a desire to align the per se racial designation with the legal treatment of their constituents, and to facilitate “policy decisions, particularly for civil rights” that would afford greater legal protections to Arab Americans.<sup>146</sup> More robust interventions for reform were developed in the 1990s.<sup>147</sup> These efforts came in reaction to the first World Trade Center attack in 1993,<sup>148</sup> the Oklahoma City Bombing two years later<sup>149</sup> (which was committed by white, non-Arab culprits),<sup>150</sup> and the enactment of the

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145. Kayyali, *supra* note 24, at 1305.

146. *About Race*, *supra* note 4; see also Samhan Testimony, *supra* note 58.

147. Kayyali, *supra* note 24, at 1304–05.

148. Commonly known as the “First World Trade Center Bombing,” preceding the terrorist attacks on the same site on September 11, 2011. See GHANEABASSIRI, *supra* note 121, at 337–40 (providing a concise historical account of the first World Trade Center bombing); see also Robert T. McFadden, *Blast Hits Trade Center, Bomb Suspected; 5 Killed, Thousands Flee Smoke in Towers*, N.Y. TIMES (Feb. 27, 1993), <http://www.nytimes.com/learning/general/onthisday/big/0226.html#article>.

149. David Johnston, *Terror in Oklahoma: The Overview; Oklahoma Bombing Plotted for Months, Officials Say*, N.Y. TIMES (Apr. 25, 1995), <http://query.nytimes.com/gst/fullpage.html?res=990CE2D81238F936A15757C0A963958260>.

150. Johnson & Trujillo, *supra* note 140, at 1374 (explaining that “in response to the bombing of the federal building in Oklahoma City perpetrated by U.S. citizens . . . Congress passed two punitive immigration reform laws [in 1996] that went well beyond having anything to do with terrorism” and the subsequently enacted anti-terrorism laws that disparately targeted Arab, MENA, and Muslim Americans); see also Tung Yin, *Were Timothy McVeigh and the Unabomber the Only White Terrorists?: Race, Religion, and the Perception of Terrorism*, 4 ALA. C.R. & C.L.L. REV. 33 (2012) (providing an account of instances of domestic terrorism perpetrated by white radicals).

Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) in 1996.<sup>151</sup> These external developments, among others,<sup>152</sup> intensified societal prejudice toward Arab Americans and enhanced state suspicion and policing of both Arab noncitizens and citizens.<sup>153</sup>

To accelerate reform, the Arab American Institute, or AAI, and the American-Arab Anti-Discrimination Committee (“ADC”)—the two flagship Arab American advocacy groups—intensified their efforts to procure a standalone “Arab American” ancestry or racial box for the 2000 U.S. census.<sup>154</sup> However, the OMB rejected their proposals on several grounds, citing: (1) the complexity associated with defining the group; (2) discord among MENAs about how to frame and title the classification; (3) administrative challenges associated with assessing discrimination faced by Arab and MENAs; and (4) the Arab American population falling short of the threshold population level needed to be considered for distinct minority status.<sup>155</sup> Therefore, while the AEDPA and escalating discrimination targeting Arab Americans deepened state and societal views that the group was not white, the Census Bureau maintained the *per se* classification.

After 9/11, the racial misalignment of Arab Americans intensified. State surveillance and societal animus toward Arab Americans rose considerably, exposing the stark contradiction that the whiteness assigned to Arab Americans did not extend beyond the four corners of the U.S. census form. The USA PATRIOT Act,<sup>156</sup> enacted into law roughly a month after the terrorist attacks of 9/11, proliferated state

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151. See 28 U.S.C. §§ 2244–2266 (2012). Several years after the enactment of AEDPA, the ADC issued a know-your-rights pamphlet to its membership about the Act and its specific law-enforcement functions. See also HOUEIDA SAAD & KAMAL NAWASH, ADC RES. INST., A GUIDE TO THE LEGAL RIGHTS AND RESPONSIBILITIES OF CITIZENS, RESIDENTS AND VISITORS IN THE UNITED STATES 16–18 (1999).

152. In addition to domestic incidents, Operation Desert Storm in Iraq (1990–1991), the Palestine-Israeli Conflict, and other events in the Arab World and MENA region impacted state and societal perceptions of Arab Americans. GHANEABASSIRI, *supra* note 121, at 332–36.

153. Ahmad, *supra* note 9, at 1270–71.

154. Kayyali, *supra* note 24, at 1305–06.

155. The four explanations outlined above will hereinafter be referred to as “state justifications for maintaining Arab Americans as white by law.” TEHRANIAN, *supra* note 8, at 169.

156. See generally George W. Bush, President, Address to a Joint Session of Congress and the Nation (Sept. 20, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>. In an address to Congress and the Nation days after 9/11, Bush explained what purpose the USA PATRIOT Act would serve in the war on terror: “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. . . . We will come together to give law enforcement the additional tools it needs to track down terror here at home.” *Id.*

suspicion and surveillance of Arab, MENA, and Muslim American communities.<sup>157</sup> The 9/11 attacks also led to the creation of the Department of Homeland Security,<sup>158</sup> which oversaw immigration and emigration, and functioned as the institutional fulcrum for federal and local anti-terror surveillance and policing.

Despite past failures, community efforts seeking per se reclassification of Arab American identity persisted. The “Check it Right, You Ain’t White” campaign generated popular appeal in 2010,<sup>159</sup> and “urged people to check ‘some other race’ on the [2010 census] form and write in their ancestry.”<sup>160</sup> Three years later, an AAI-led campaign that called for “a broadly accepted definition of the MENA region,” generated unprecedented momentum toward reform and reclassification.<sup>161</sup> This proposal veered from past demands seeking a standalone “Arab American” box on the U.S. census,<sup>162</sup> and sought to overcome the government’s reasoning for maintaining Arab Americans as white by law. The intervention opened the door for the proposed MENA box, which is a broader classification that includes other groups from the MENA region in addition to Arab Americans.<sup>163</sup> Tentative

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157. See USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272; see also Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified in scattered sections of 8, 15, 18, 21, 28, and 42 U.S.C.); Sahar F. Aziz, *Caught in a Preventative Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429 (2012) (summarizing how post-9/11 laws and policies have been selectively enforced against Muslim and Arabs in the United States).

158. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 5, 6, 18, 44, and 49 U.S.C.) (describing generally what purposes and functions the Department of Homeland Security would serve, most notably in the areas of national security and immigration policy and programming).

159. Newsweek Staff, *Arab-Americans Aim to Increase Their Census Count*, NEWSWEEK (Feb. 8, 2010, 7:00 PM), <http://www.newsweek.com/arab-americans-aim-increase-their-census-count-75311>.

160. Krogstad, *supra* note 29.

161. See Letter Am. Arab Inst., et al., to Enrique Lamas, Assoc. Dir. of Demographic Programs, U.S. Bureau of the Census (July 24, 2013) [hereinafter “AAI Letter to the U.S. Census Bureau”], <http://civilrightsdocs.info/pdf/general/Arab-Institute-Letter-to-Enrique.pdf> (indicating that “[c]urrent OMB guidelines that simply classify persons from the MENA region as white by race are no longer accurate or useful” and proposing a “broadly accepted definition of the MENA region that allows data to be collected across racial lines, similar to Hispanic Origin”).

162. Kayyali, *supra* note 24, at 1305 (noting that in the mid-1980s, the AAI “explored the possibility of adding a hyphenated ‘Arab-American’ as an example of ancestry in the 1990 Census”).

163. See TEHRANIAN, *supra* note 8, at 8 (arguing that a Middle Eastern American box, would “serve as a vehicle to highlight the shared experiences of members of the group as the Other and to provide a more unified voice to address the particular set of challenges facing the Middle Eastern population”); see also John Tehranian, *Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship*, 82 IND. L.J. 1 (2007) [hereinafter Tehranian, *Compulsory Whiteness*]

acceptance of the MENA box by the Arab American community has pushed forward discussions between community stakeholders and the Census Bureau.

A range of interests drives Arab American communities and stakeholders support of the proposed MENA box. These interests can be divided in four types: (1) existential, (2) political, (3) legal, and (4) economic. Pursuit of a standalone MENA box on the U.S. census vividly illustrates Nathaniel Persily's claim that the census is fundamentally about "representation, money, and race."<sup>164</sup> Census tabulations "are used to allocate almost \$400 billion in federal funds every year,"<sup>165</sup> with a portion of those funds earmarked specifically to minority groups. These resources, if procured, would extend benefits and protections to Arab Americans, which not only recognize but also aim to mitigate their subjugated status.<sup>166</sup>

### 1. Existential Interests

Racial self-determination has long eluded Arab Americans. Since the first newcomer from the Arab World came before a court seeking to be naturalized as an American citizen,<sup>167</sup> some facet of the law—such as the immigration code, civil courts, or administrative racial designations—has driven a wedge between Arab and American identity. Racially restrictive immigration laws segregated Arab and American identity until 1944;<sup>168</sup> followed by seven decades of top-down assigned whiteness, which rendered Arab Americans formally "invisible" on one hand, but disparately profiled and policed on the other.<sup>169</sup>

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(arguing in favor of the initiation of critical legal studies which are focus in particular on the Middle East).

164. Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 *CARDOZO L. REV.* 755, 756 (2011); see also Bhatnagar, *supra* note 36, at 87–88 (characterizing the census as an effort to facilitate the distribution of funds for various social initiatives, including "[e]ducation grants, affirmative action programs, community reinvestment and development, public health programs, mortgage lending, low-income housing tax credits, voting rights, employment rights, legislative redistricting, government contracting, food stamps, and veteran benefits").

165. El Nasser, *supra* note 82.

166. BOSNIAK, *supra* note 44, at 30–31.

167. See Sarah Gualtieri, *Syrian Immigrants and Debates on Racial Belonging in Los Angeles, 1875-1945*, *SYRIAN STUD. ASS'N NEWSL.*, Winter 2009, at 1.

168. Beydoun, *supra* note 6, at 34.

169. See generally TEHRANIAN, *supra* note 8. Tehranian invokes the idea of "invisibility" to describe the U.S. census conflation of Arab and MENA as per se white, and thus, not counted as a distinct group although singled out by state policing and enforcement of post-9/11 surveillance practices. Thus, for Tehranian, formal invisibility is juxtaposed with a functional treatment of Arabs and MENAs as not only a visible group, but also one that must be closely monitored.

The proposed MENA category will, presumptively, put an end to 111 years of the state defining, and assigning, the legal parameters of Arab American identity.<sup>170</sup> The adoption of the category will afford Arab Americans unprecedented self-determination over racial identification: “The development of the category for Middle Eastern racial status will limit the pernicious process of selective racialization and will enable Middle Eastern Americans to take control of a category already being imposed on them from without.”<sup>171</sup>

Although critiqued by some as “too broad” or “limiting,” the two-part structure of the proposed MENA category affords applicants the unprecedented latitude to personalize the racial and national dimensions of their identity in line with how they subjectively view their identities.<sup>172</sup> As discussed in Part I.B, the proposed box will allow applicants to first check “MENA” and second, write “Arab American” in the following box, if they prefer a broader, ethnic classification.<sup>173</sup> On the other hand, applicants may identify along more specific nationality lines, such as “Egyptian” or “Moroccan” for instance,<sup>174</sup> or alternatively, for ethnic and religious minority groups from the region, they may write in “Coptic” or “Berber,” if such identity modalities are more favorable.<sup>175</sup>

By affording applicants the option to identify along primary racial and secondary national, ethnic, and even tribal lines, the proposed MENA box extends the existential self-determination Arab Americans have long coveted. The proposed reform and reclassification supplants state paternalism with deference to Arab American applicants, and aligns the per se designation of the group with how the vast majority of

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“Such a new category solves the problem of MENA population group data being invisible in the current racial framework.” AAI Letter to the U.S. Census Bureau, *supra* note 161, at 1.

170. The date is measured from the date of the *Shishim* case (1909) to the proposed adoption of the MENA category (2020). Gualtieri, *supra* note 68.

171. TEHRANIAN, *supra* note 8, at 8.

172. 2015 Census Update, *supra* note 17, at 17.

173. See *supra* note 121–122, and accompanying text (identifying as Arab American, instead of a specific nationality, generally manifests an affinity for a Pan-Arab identity).

174. 2015 Census Update, *supra* note 17, at 17.

175. Many indigenous populations in the Arab World and the broader MENA region, including Kurds in the Levant and Gulf, Berbers in the “Maghreb,” Copts and Nubians in Egypt and the Sudan, Jews throughout the Middle East and North Africa, and segments of the Maronite Catholic community in Lebanon, resist Arab identity because it threatened other modes of ethnic, tribal, or sectarian nationalism. In many contexts, such as Algeria or Egypt, minority communities that rejected Arab nationalism were persecuted. In addition, many of these groups also reject identifying along lines of their host nations because of this past persecution and present political tension.

the state, and society, perceives Arab Americans. The government's recognition of the group's racial (or ethnic) distinctness, coupled with the ability to specify one's identity within the broader framework of the MENA box, is of tremendous value to Arab Americans.

## 2. Political Interests

Supporters of a standalone MENA box contend that reform and reclassification will facilitate greater political visibility and influence over electoral politics.<sup>176</sup> With regard to local, state, and federal elections, per se recognition of Arab Americans will endorse and identify them as a distinct voting bloc which, in turn, will attract greater courtship from political candidates and elected officials<sup>177</sup>: "A standalone MENA box will increase the awareness of candidates and campaigns to target and tailor specific messages in areas with significant Arab American voting blocs."<sup>178</sup> By facilitating a more accurate tallying of the Arab American population, a census with the MENA box will mitigate the political costs spawned by undercounting.<sup>179</sup>

Proponents of the MENA box also argue that it will lead to enhanced Arab American political participation<sup>180</sup> and access to the ballot box. Existing laws mandate that ballots be availed in minority languages prominently spoken within a given voting district.<sup>181</sup> Therefore, in Arab American heavy districts, including Paterson, New Jersey,<sup>182</sup> Allentown, Pennsylvania,<sup>183</sup> Anaheim, California,<sup>184</sup> and Dearborn<sup>185</sup>

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176. See *U.S. Mulls Middle East-North Africa Category for 2020 Census*, N.Y. TIMES, Jan. 30, 2015, <http://www.nytimes.com/aponline/2015/01/30/us/ap-us-census-counting-arabs.html> ("Those pushing for the MENA classification say it would more fully and accurately count them, thus increasing their visibility and influence among policymakers.").

177. Persily, *supra* note 164, at 766.

178. Interview with Mohamed Maraqa, Vice President of Strategic Partnerships, Blue Labs, in Wash., D.C. (Apr. 4, 2015).

179. AAI DEMOGRAPHICS, *supra* note 78 (estimating that the per se designation of white has led to a 60% undercounting of Arab Americans).

180. In 2006, the Woodrow Wilson Center for International Scholars compiled the works of various researchers, which examined the potential for political participation of the Arab American Community. WOODROW WILSON INT'L CTR. FOR SCHOLARS, AMERICAN ARABS AND POLITICAL PARTICIPATION (Philippa Strum ed., 2006), [http://www.wilsoncenter.org/sites/default/files/DUSS\\_Arab\\_America.pdf](http://www.wilsoncenter.org/sites/default/files/DUSS_Arab_America.pdf).

181. Voting Rights Act, 42 U.S.C. § 203 (2012).

182. *QuickFacts: Paterson, New Jersey*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/34/3457000.html> (last visited Mar. 7, 2016).

183. *QuickFacts: Allentown, Pennsylvania*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/42/4202000.html> (last visited Mar. 7, 2016).

184. *QuickFacts: Anaheim, California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/>

and Hamtramck,<sup>186</sup> Michigan, a formal count of Arab Americans would compel the state to provide ballots in Arabic. Ballots translated into Arabic would increase voter turnout among Arabic speakers.<sup>187</sup> In light of a sizable number of recent Arab American immigrants, facilitating voting access for those with limited English fluency would augment Arab American political power, and in the short term, provide greater influence in local and state races.<sup>188</sup>

Proponents of the MENA box contend that enhanced political visibility and influence of Arab Americans will also spur greater matriculation of Arab Americans into electoral politics. Although there are Arab American congressmen and women, judges, and other elected or appointed officials in thirty-five states,<sup>189</sup> and seven on the federal level,<sup>190</sup> reform and reclassification of Arab American identity will engender the community empowerment necessary to increase these numbers. Finally, a MENA classification may inspire greater collaboration and cooperation between distinct subsets of the group, which will jointly and severally enhance their political influence.

### 3. Legal Interests

Per se whiteness has not extended Arab Americans access to the legal protections warranted by escalating state surveillance and societal animus.<sup>191</sup> Rather, it has enhanced the vulnerability and deepened the

qfd/states/06/0602000.html (last visited Mar. 7, 2016).

185. *QuickFacts: Dearborn, Michigan*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/26/2621000.html> (last visited Mar. 7, 2016).

186. *QuickFacts: Hamtramck, Michigan*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/26/2636280.html> (last visited Mar. 7, 2016).

187. *Arab American Roster*, ARAB AM. INST. (Dec. 19, 2012), <http://www.aaiusa.org/arab-american-roster>.

188. In addition, the MENA box will also formally proscribe discrimination against Arab Americans with regard to voter registration and public accommodations, under Titles I and II of the Civil Rights Act of 1964. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964). See generally Michael T. Morley, *Enforcing Equality: Statutory Injunctions, Equitable Balancing Under eBay, and the Civil Rights Act of 1964*, 2014 U. CHI. LEGAL F. 177 (providing a discussion of statutory injunctions against racial discrimination within the voting context).

189. The American Community Survey, in 2009, revealed that Arabic is the ninth most spoken language in the United States. *2009 American Community Survey 1-Year Estimates: Summary File*, DEP'T. OF COM., <https://catalog.data.gov/dataset/2009-american-community-survey-1-year-estimates-summary-file> (last updated Sept. 17, 2015).

190. *Id.*

191. On February 27, 2015, following a string of attacks on Arab Americans, the FBI amended its policies by introducing measures to track hate crimes against Arab Americans. See generally CRIM. JUSTICE INFO. SERVS. DIV., FBI, HATE CRIMES DATA COLLECTION GUIDELINES AND TRAINING MANUAL (2015), <http://www.fbi.gov/about-us/cjis/ucr/hate-crime-data-collection-guidelines-and-training-manual.pdf>.



injuries inflicted upon Arab Americans: “Reified as the other, Americans of Middle Eastern descent do not enjoy the benefits of white privilege. Yet, as whites under the law, they are generally denied the fruits of remedial action.”<sup>192</sup>

In *St. Francis v. Al-Khazarji*, an Iraqi professor sued St. Francis University on grounds that he was denied tenure because he was an Arab.<sup>193</sup> The Supreme Court deferred to the OMB designation that Arabs were white, but ruled that Arabs could nevertheless bring an ethnic discrimination claim under 42 U.S.C. § 1981 and Title IV.<sup>194</sup>

The *Al-Khazarji* ruling, decided in 1987, highlighted division within the state regarding how to treat and classify Arab American identity. The Supreme Court found that Arab American identity was a partly distinct, or an “off-white,”<sup>195</sup> status that warranted employment discrimination protection.<sup>196</sup> Applying a disparate impact standard to discrimination along national origin lines, *Al-Khazarji* “was a significant ruling because it became possible for Arabs to claim discrimination while being considered ‘white,’ and without being officially recognized as a minority group.”<sup>197</sup> In addition, the ruling equipped proponents of racial reform and reclassification with judicial endorsement from the highest court in the land that Arab Americans could suffer discrimination on grounds of their “nationality” or “place of origin”—proxies for race and ethnicity.<sup>198</sup>

192. See TEHRANIAN, *supra* note 8, at 3; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993), for greater discussion of the privileges attached to whiteness.

In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset that whites sought to protect and that those who passed sought to attain . . . Whites have come to expect and rely on these benefits, and over time these expectations have been affirmed, legitimated, and protected by the law.

*Id.* at 1710.

193. *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987).

194. *Id.*

195. 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).

196. See *generally* 42 U.S.C. § 1981 (2012) (establishing that all persons under the jurisdictions of the United States shall have the full and equal benefit of all laws as is enjoyed by white citizens).

197. Kayyali, *supra* note 24, at 1307. In 1997, the ADC published a pamphlet to its Arab American constituents, titled *Unmasking Job Discrimination*, which highlighted the possible legal redress and relief Arab American victims of workplace discrimination could seek. See *generally* HOUEIDA SAAD, UNMASKING JOB DISCRIMINATION: WHAT EVERY ARAB AMERICAN SHOULD KNOW ABOUT DISCRIMINATION IN THE WORKPLACE (1997).

198. *Al-Khazraji*, 481 U.S. at 613 (“If respondent [on remand] can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than

Seeking to extend the reach of *Al-Khazarji*, proponents of the MENA box contended that its adoption would expand protection against discrimination for Arab Americans. In 1993, the AAI and ADC “lobbied Congress to create a separate ‘Middle Eastern’ or ‘Arab American’ category, arguing that, by moving from the ‘Caucasian’ category, they would obtain eligibility for certain remedial programs and better protection under antidiscrimination laws.”<sup>199</sup> This is particularly true with regard to hate crimes protection, which may be “reported by religious affiliation or country of origin,” but not along Arab or MENA lines.<sup>200</sup> The surge in hate crimes against Arab Americans after 9/11 exposed the deleterious effect per se whiteness had on the group, and its inability to carry forward protective efforts against discrimination.<sup>201</sup>

Per se designation of Arab Americans as white continues to mar the group’s access to legal protection from hate crimes. Currently, hate crimes legislation counts Arab Americans as white, and in turn, does not track anti-Arab motivated violence and hate crimes. However, the string of attacks targeting Arab Americans in early 2015,<sup>202</sup> including the murder of three university students in Chapel Hill, North Carolina, on February 10, 2015,<sup>203</sup> highlights that anti-Arab bigotry in the United States is rising.<sup>204</sup> Hate crimes protection along racial lines would

solely on the place or nation of his origin or his religion, he will have made out a § 1981 case.”).

199. TEHRANIAN, *supra* note 8, at 168.

200. AAI Letter to the U.S. Census Bureau, *supra* note 161, at 3.

201. See AM.-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: THE POST SEPTEMBER 11TH BACKLASH (2003), [http://www.mbda.gov/sites/default/files/September\\_11\\_Backlash.pdf](http://www.mbda.gov/sites/default/files/September_11_Backlash.pdf). “Since 2001, the U.S. Department of Justice has investigated over 800 incidents of violence, vandalism, and arson against people the Department believed to be Muslim, Arab, or South Asian.” Carlo A. Pedrioli, *Constructing the Other: U.S. Muslims, Anti-Sharia Law, and the Constitutional Consequences of Volatile Intercultural Rhetoric*, 22 S. CAL. INTERDISC. L.J. 65, 73 (2012) (asserting the formal whiteness of Arab Americans greatly diminished the ability of state and non-state actors to collect hate crimes data linked to increased violence against the population).

202. Khaled A. Beydoun, *Many Faces of Hate: The Distinct Forms of Anti-Arab Bigotry and Violence*, NAT’L NETWORK OF ARAB-AM. COMMUNITIES WHITE PAPER SERIES (Nat’l Network of Arab-Am. Communities, Dearborn, Mich.).

203. See Jonathan M. Katz & Richard Pérez-Peña, *In Chapel Hill Shooting of 3 Muslims, A Question of Motive*, N.Y. TIMES (Jan. 11, 2015), <http://www.nytimes.com/2015/02/12/us/muslim-student-shootings-north-carolina.html>; see also Khaled A. Beydoun & Nadia El-Zein Tordova, *Why Muslim Lives Don’t Matter*, AL-JAZEERA ENGLISH (Feb. 12, 2015), <http://www.aljazeera.com/indepth/opinion/2015/02/muslim-lives-don-matter-150212052018920.html> (both articles examine the execution of three Arab American students, targeted on grounds of race or religion, or both).

204. See generally Beydoun, *supra* note 202 (highlighting the recent resurgence in anti-Arab discrimination).

enhance tracking and deterrence of race-based discrimination and violence toward Arab Americans.<sup>205</sup> Formal racial alignment by the OMB and the Census Bureau would garner enhanced protection against private and public discrimination, and spur adoption of hate crimes legislation that monitors and tracks discrimination against Arab (and MENA) Americans.

Finally, access to affirmative action is another legal interest driving support for reforming the status of Arab Americans as white. College and university affirmative action programs, although eroded by recent Supreme Court rulings<sup>206</sup> and state referenda,<sup>207</sup> do not formally consider Arab Americans a distinct minority or ethnic group.<sup>208</sup> Access to affirmative action within the context of college and university admissions is a primary interest driving reform,<sup>209</sup> framed along the prevailing jurisprudential rationales that higher rates of Arab Americans in higher education would first, enhance “campus and classroom diversity,”<sup>210</sup> and second, remedy past and present discrimination.<sup>211</sup>

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205. *Id.*

206. *See Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013); *see also Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). *See generally* Eang L. Ngov, *Following Fisher: Narrowly Tailoring Affirmative Action*, 64 CATH. U. L. REV. 1 (2014) (analyzing how the court in *Fisher* further limited the use of race for university admissions through its administration of the narrow tailoring standard).

207. *See* Khaled Ali Beydoun, *Without Color of Law: The Losing Race Against Colorblindness in Michigan*, 12 MICH. J. RACE & L. 465 (2007) (examining the Michigan Civil Rights Initiative, a citizen initiative that effectively prohibited affirmative action based on race, color, sex, or religion).

208. This is a direct consequence of the OMB’s and U.S. Census Bureau’s per se classification of people from the MENA region as white, which is the generally adopted schema on college applications. *See* Raja Abdulrahim, *Students Push UC to Expand Terms of Ethnic Identification: Middle Easterners Want Alternatives to ‘White’ and ‘Other,’* L.A. TIMES (Mar. 1, 2009), <http://articles.latimes.com/2009/mar/31/local/me-arab31> (discussing lobbying efforts by University of California MENA students towards the administration to offer additional racial alternatives beyond “white” and “other”).

209. Whether Arab Americans should have access to affirmative action, and race-conscious college and university admissions, is a debate beyond the scope of this Article. Proponents argue that past and present discrimination of Arab Americans should be the basis that justifies access to affirmative action. *See* Christine Tamer, *Arab Americans, Affirmative Action, and a Quest for Racial Identity*, 16 TEX. J. ON C.L. & C.R. 101 (2010) (arguing that universities should recognize Arab Americans as a minority for the purposes of their race-based affirmative action programs because Arab Americans contribute to the diversity rationale as set forth by the Supreme Court). In contrast, I favor the position that Arab Americans are statistically overrepresented at colleges and universities, particularly elite institutions, and thus, do not merit the underrepresented status that makes access to affirmative action compelling.

210. *Grutter*, 539 U.S. at 306; *see also* TEHRANIAN, *supra* note 8, at 166 (“Middle Easterners contribute as meaningfully as any minority group to racial and cultural diversity.”).

211. Tamer, *supra* note 209, at 102 (although remedying past and present discrimination is no longer a compelling state interest justifying consideration of race in college admissions practices).

#### 4. Economic Interests

Per se minority status would also grant Arab American businesses access to minority business contracts distributed by the government.<sup>212</sup> In January 2012, the ADC filed a petition lobbying the U.S. Department of Commerce to count Arab Americans as a “disadvantaged minority.”<sup>213</sup> The 2012 filing followed an earlier attempt by the ADC in 2006, which was denied by the Department of Commerce.<sup>214</sup> Economic interests drove both legal interventions, and namely, access to government contracts set aside for “disadvantaged, minority-owned businesses.”<sup>215</sup>

Moreover, the proposed MENA box for the 2020 U.S. census would compel the Department of Commerce to adopt the new designation and, at minimum, probe whether Arab and MENA Americans qualify as a “disadvantaged minority group” warranting access to Small Business Administration (“SBA”) funds and government contracts.<sup>216</sup> Like in other minority communities, small businesses are commonly held by, and core to the economic lifeline of, Arab Americans.<sup>217</sup> Although owners of these businesses are disproportionate targets of racism and discrimination, the per se classification of Arab Americans as white precludes them from accessing vital SBA funds, and frequently compels them to partner with members of (legally) recognized minority groups to access these funds.<sup>218</sup>

In addition to the core economic interests driving reclassification efforts, the proposed MENA box will also have a cascading impact within public and private institutions at large. The per se recognition of

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212. On May 19, the ADC filed an application to the Director of the Minority Business Development Agency (“MBDA”) of the United States, “requesting formal recognition of the Arab-American community as a minority group that is socially or economically disadvantaged,” pursuant to 15 C.F.R. § 1400. Internal Memorandum from the ADC to the MBDA (May 19, 2011) (on file with author); see also Khaled A. Beydoun, *The Business of Remaking Arab-American Identity*, AL JAZEERA (June 15, 2012), <http://www.aljazeera.com/indepth/opinion/2012/06/2012610114257813921.html>.

213. Beydoun, *supra* note 212.

214. Afzal Khan, *Arab-American Businesses Seek Government Contracts: Entrepreneurs Support Preferential Treatment for Arab-American Business*, AM.-ARAB ANTI-DISCRIMINATION COMM. (June 26, 2006), <http://www.adc.org/2006/06/Arab-American-Businesses-Seek-Government-Contracts>.

215. *Id.*

216. *Id.*

217. ARAB DETROIT 9/11, *supra* note 11, at 82–83.

218. “As small business owners, a rising number of them [Arab Americans] are selling 51% of their businesses to minority partners in order to obtain minority status with the Small Business Administration.” AAI Letter to the U.S. Census Bureau, *supra* note 161, at 3.

MENAs as a separate ethnic group will alter how public and private actors perceive Arab Americans, and in turn, classify them internally. Furthermore, administrative recognition of Arab Americans as a minority group may trigger greater inclusion of the group in formal recruitment efforts, diversity programming, ethnic and race-conscious hiring practices, and promotional strategies that capitalize on the “social and economic value” of Arab identity.<sup>219</sup> Finally, per se reform and reclassification of Arab Americans on the U.S. census may usher in a range of progressive developments with regard to healthcare policy, administration, research, and analytics.<sup>220</sup>

### B. Shifting Government Interests

The proposed MENA category will mark Arab Americans as a minority group, aligning with discursive and national security views of the population. However, for government agencies vested in monitoring the population, such as the NSA, the proposed reform and reclassification of Arab American identity will also produce precise and comprehensive demographic data about a population perceived to be a potential “fifth column.”<sup>221</sup>

This Section illustrates how the State’s national security interests—particularly following the War on Terror—facilitated the shift toward serious consideration and prospective adoption of the MENA category in the 2020 U.S. census. By offering a general survey of the State’s

219. For instance, the military using Arab Americans on their promotional literature to appeal to and draw from Arab American communities for prospective enlistees; similarly, an American law firm with considerable business interests in the Gulf positioning Arab American lawyers in key, visible positions, as strategy to enhance their resonance. See generally Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013) (examining instances of radical capitalism, where predominately white institutions use nonwhite people to acquire social and economic value).

220. The AAI argues that the following three problems created by the status quo will be resolved by the proposed MENA box:

- 1) Researchers are unable to study accurately vital data such as mortality rates, fertility rates due to lack of a reliable denominator (one with a small margin of error);
- 2) Collecting data on persons of MENA origin upon admission to hospitals and other healthcare facilities is impossible because they are aggregated under the white race. Therefore, learning more about ethnic-specific diseases such as lactose intolerance among these populations is not possible;
- 3) Obtaining research funding to study MENA origin populations in the U.S. is also difficult because none of the official government entities consider them as distinct populations.

AAI Letter to the U.S. Census Bureau, *supra* note 161, at 3. See generally MAPPING “RACE”: CRITICAL APPROACHES TO HEALTH DISPARITIES RESEARCH (Laura E. Gómez & Nancy López eds., 2013), for an excellent anthology on how firmer demographic data enhances healthcare research and analytics.

221. Joshi, *supra* note 133, at 224 n.10. “A clandestine group that is allied with a foreign enemy force.” *Id.*

rising interest in more precise and finite demographic data about Arab Americans, this Section informs the focus of Part IV.A: how coveted demographic “macro- and mesodata” enhances anti-terrorism law enforcement.<sup>222</sup>

### 1. Before the War on Terror

The government firmly opposed racial reform of Arab American identity before the 9/11 terrorist attacks.<sup>223</sup> In the mid-1990s, a number of Arab American organizations, leaders, and stakeholders convened with the Census Bureau to discuss reform. However, “[t]he OMB recommendations in the Federal Register concluded that an Arab or Middle Eastern ethnic category should not be added to the minimum standards.”<sup>224</sup> Stunting these efforts, the OMB found the definition of “Arab or Middle Eastern ethnicity [to be] problematic,” in addition to a number of other justifications,<sup>225</sup> which undergirded their negative ruling.<sup>226</sup>

Arab American efforts continued in the early 2000s. These efforts, however, shifted toward favoring a “MENA”—instead of a narrower “Arab American”—box. The Census Bureau issued a statement in 2011 illustrating again its disfavor for a standalone Arab American box.<sup>227</sup> As discussed *supra* in Part II.A, the ongoing efforts of Arab American groups were stifled time and again, and the Census Bureau justified its rejections on largely administrative grounds.<sup>228</sup>

The post-9/11 moment triggered newfound state interest in collecting more precise and accurate demographic data about Arab Americans. While some headway was made with regard to mitigating the discord regarding the title, scope, structure, and phraseology of the proposed MENA box, the State’s proffered justifications for dismissing earlier requests remained relatively unchanged. What did change, however, was internal government demand for clear and comprehensive demographic data about Arab Americans, to facilitate the recent remodeling of government anti-terrorism and national security policing

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222. Seltzer & Anderson, *supra* note 37, at 485.

223. *See supra* Part I.A.

224. RECOMMENDATIONS FROM THE INTERAGENCY COMM. FOR THE REVIEW OF THE RACIAL AND ETHNIC STANDARDS TO THE OFFICE OF MGMT. AND BUDGET CONCERNING CHANGES TO THE STANDARDS FOR THE CLASSIFICATION OF FEDERAL DATA ON RACE AND ETHNICITY, 62:131 FED. REGISTER 36874, 36940 (July 9, 1997).

225. *See supra* note 122 and accompanying text.

226. Kayyali, *supra* note 24, at 1300.

227. *Id.*

228. TEHRANIAN, *supra* note 8, at 169.

from a federal to a decentralized law enforcement model that emphasized “prevention” and centered “counter-radicalization” as the anti-terror strategy *du jour*.<sup>229</sup>

## 2. After the War on Terror

The War on Terror, formally declared nine days after 9/11 and enacted through the USA PATRIOT Act,<sup>230</sup> proliferated state suspicion and surveillance of Arab, MENA, and Muslim American communities.<sup>231</sup> The terrorist attacks also led to the creation of the DHS,<sup>232</sup> which brought forth radical reforms to the State’s immigration, national security, and anti-terrorism policing programs.<sup>233</sup> This comprehensive restructuring of the State’s national security strategy and structures was, in short, spurred by State policy that linked people of apparent Arab ancestry to terrorism.<sup>234</sup> The unprecedented anti-terrorism policing powers held by the State would be indiscriminately exercised against both foreign elements *and* citizens that fit within the racial and religious profile of “terrorists.”<sup>235</sup>

Consequently, Arab Americans were disproportionately targeted by NSA surveillance and profiling.<sup>236</sup> Per se classification as white did not insulate Arab Americans from broad sweeping surveillance and policing, or extend any privileges that curbed state suspicion. As a result, the “racial catch-22” that perplexed Arab Americans became more pronounced. Following 9/11, more than any period before it, Arab America found itself betwixt statutory whiteness and sociopolitical pariah<sup>237</sup>—the latter status pushing Arab Americans

229. Akbar, *supra* note 13, at 810.

230. *See supra* note 150 and accompanying text.

231. *See* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272.

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

233. *See* Johnson & Trujillo, *supra* note 140.

234. Akram & Johnson, *supra* note 10, at 352.

235. Bush, *supra* note 156.

236. Akram & Johnson, *supra* note 10, at 327–30.

237. Tehranian, *Compulsory Whiteness*, *supra* note 163, at 3.

Individuals of Middle Eastern descent are caught in a racial catch-22. 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 the blue-eyed, blonde-haired individual of Scandinavian descent. . . .

All the while, reality does not mesh with the bureaucratic characterizations of Middle Eastern individuals as white. On the street, individuals of Middle Eastern descent suffer from the types of discrimination and racial animus endured by recognized minority groups. Middle Eastern individuals have endured increasing levels of vilification and demonization in recent years, especially in the wake of the

further away from the formal designation assigned by the OMB and the Census Bureau, while simultaneously closer towards the presumptive association with terrorism and radicalization. In short, DHS directives mandating heightened surveillance of Arab Americans functioned as an internal designation that the population was nonwhite or, in other words, a demographic on which the State had to keep close tabs because of its perceived nexus to terrorism.

Concomitantly, the OMB's designation of Arab Americans as white also compromises the efficacy of anti-terrorism surveillance and policing. Since Arab Americans are per se white, their precise numbers, concentrations, and whereabouts are unclear. Although the Census Bureau previously shared demographic data about Arab Americans with the DHS,<sup>238</sup> the MENA box would facilitate compilation and collection of more clear, comprehensive, and precise demographic data.<sup>239</sup> Surely, the State's interest in accurate and finite demographic data about Arab Americans increased considerably after the commencement of the War on Terror, particularly with the recent paradigm shift from centralized national security policing to local anti-terror law enforcement.<sup>240</sup>

Emergent counter-terrorism programming emphasizes "proactive intelligence gathering and 'forward leaning' prevention prosecutions,"<sup>241</sup> capabilities that would be markedly enhanced with the availability of Arab American demographic macro- and mesodata. CVE policing, discussed closely in the coming Part, is built upon the philosophy of prevention, and stands as the next phase of national security policing.

### C. *Converging State and Community Interests*

In *Brown v. Board of Education and the Interest Convergence Dilemma*, Derrick Bell observes how broader state interests may materially drive moments of ostensible racial progress.<sup>242</sup> Bell argues that the landmark ruling in *Brown v. Board of Education*,<sup>243</sup> the

war on terrorism and the 9/11 attacks.

*Id.*

238. Press Release, Am.-Arab Anti-Discrimination Comm., ADC Presses Customs Border Patrol (CBP) on Census Date (Aug. 13, 2004), <http://adc.org/index.php?id=2303>.

239. "[U]ltimate decisions on [census] questions reflect priorities concerning the desirability of those policies and programs that eventually use census data." Persily, *supra* note 164, at 758; *see also* Seltzer & Anderson, *supra* note 37, at 485.

240. *See infra* Part III.

241. Akbar, *supra* note 13, at 812.

242. Bell, *supra* note 27, at 525.

243. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).



“Supreme Court’s most important statement on the principle of racial equality,”<sup>244</sup> was delivered as a “timely assertion” to advance American foreign policy interests against its (then) rival hegemon, the Soviet Union.<sup>245</sup> The ruling in *Brown*, which converged with intensifying American geopolitical competition with the Soviet Union over Third World territories populated by black and brown people,<sup>246</sup> functioned as the “self-interest leverage” to carry forward the American foreign policy agenda.<sup>247</sup> Therefore, according to Bell, the declaration in *Brown* was as much—if not more—about American hegemonic expansion as it was about domestic racial integration.<sup>248</sup>

Converging state interests, both international and domestic, have historically triggered or facilitated moments of apparent racial progress.<sup>249</sup> While popularly perceived as a marker and moment of racial progress for Arab Americans, the adoption of the MENA category would furnish federal and local law enforcement with currently unavailable demographic data about the closely scrutinized population. Much like the *Brown* ruling, extending a MENA box on the 2020 U.S. census would appear to be a civil rights stride. While partly accurate, this stride—upon closer investigation—may also signal state interests converging with Arab American interests,<sup>250</sup> by positioning the

244. Bell, *supra* note 27, at 525.

245. *Id.* at 524 (“[I]n many countries, where U.S. prestige and leadership have been damaged by the fact of U.S. segregation, it will come as a timely reassertion of the basic American principle that “all men are created equal.”” (quoting Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 12 n.31 (1976))).

246. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (“In the years following World War II, racial discrimination in the United States received increasing attention from other countries. Newspapers throughout the world carried stories about discrimination against non-white visiting foreign dignitaries, as well as against American blacks. At a time when the U.S. hoped to reshape the postwar world in its own image, the international attention given to racial segregation was troublesome and embarrassing. The focus of American foreign policy at this point was to promote democracy and to ‘contain’ communism.”).

247. Bell, *supra* note 27, at 525.

248. *Id.*

249. Dudziak, *supra* note 246, at 68.

250. Bell, *supra* note 27, at 525; *see also* Beydoun, *supra* note 6, at 69–70 (examining the alignment of state and Arab interests). An “interest convergence” moment also triggered the ruling in *Mohriez*.

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 grants 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. [Judge Charles Wyanski’s] plea for better relations between the United States and other nations

standalone box as the self-interest leverage to extend the reach and enhance the capacity of War on Terror surveillance and policing.<sup>251</sup>

Adoption of the MENA box on the 2020 census has the markings and makings of an interest convergence moment. As outlined in Part II.A, adoption of the MENA box in 2020 would advance numerous interests for Arab Americans. However, the demographic macro- and mesodata collected by a 2020 census that includes the MENA category, if availed to the DHS and local law enforcement, could be perilous to the state of Arab American civil liberties—First, Fifth, and Sixth Amendment concerns in particular.<sup>252</sup> These detriments must be weighed against the existential, political, legal, and economic benefits Arab Americans are poised to gain if the MENA box, or another iteration of the proposed category, is adopted in 2020.<sup>253</sup>

#### IV. DEMOGRAPHIC THREATS: CENSUS AND SURVEILLANCE

Nearly fifteen years after the 9/11 terrorist attacks, national security strategists in Washington, D.C. are thinking locally when it comes to anti-terror policing. This emerging shift from centralized anti-terrorism programming to community-oriented enforcement is in large part driven by rising commitment to the countering violent extremism, or CVE, model.<sup>254</sup> This approach seeks to equip and empower local police departments with the capability to monitor elements suspected of “radicalization,” and during the protracted War on Terror, specifically the radicalization of Arab, MENA, and Muslim American populations.<sup>255</sup>

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suggests that a reversal of *Hassan*, and an unprecedented expansion of whiteness to include Arab Muslims, would facilitate stronger ties with newly independent Arab countries.

Beydoun, *supra* note 6, at 69–70 (referring to the presiding judge in *Ex parte Mohriez*, 54 F. Supp. 941 (D. Mass 1944)).

251. Aziz, *supra* note 157, at 151.

252. Mesodata provides “statistical results presented at such a fine level of geographic disaggregation, whether in tabular or graphic form, that the results may be used in conducting field operations at the local level.” Seltzer & Anderson, *supra* note 37, at 485–86.

253. See *supra* Part II.A.

254. See Akbar, *supra* note 13, at 814 (“There is no singular, official, government-wide understanding of radicalization. Indeed, more often than not, government officials and documents refer to ‘radicalization,’ ‘radical’ and ‘radicalized’ Muslims, ‘radical Islam,’ ‘violent extremists,’ and so on, without explanation of what precisely these terms mean. Importantly, however, these references assume causal connections between radicalism, extremism, Islam and terrorism.”).

255. *Id.*; see also SEC’Y OF STATE FOR THE HOME DEP’T, PREVENT STRATEGY (2011), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97976/prevent-strategy-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97976/prevent-strategy-review.pdf) [hereinafter PREVENT STRATEGY]. The United Kingdom was the first to institute a formal counter-radicalization program, which it currently calls “CONTEST.” The

In line with this philosophical swing from Capitol to community-based anti-terror programming, the DHS has established new initiatives that broaden its capacity to monitor subjects suspected of terrorism. In conjunction with NSA surveillance, the CVE and SAR Programs add robust local law enforcement dimensions to already expansive federal policing capacities, effectively coupling the long arm of the police state with an ever-present and emergent hand in community policing.<sup>256</sup> This anti-terrorism policing paradigm would be enhanced with access to more accurate demographic data about Arab Americans, who are conflated with Muslims<sup>257</sup> and routinely linked with and suspected of terrorism.<sup>258</sup>

This Part examines the principal federal and local anti-terrorism policing programs that disproportionately target Arab, MENA, and Muslim American communities. Section A examines NSA surveillance powers, while Sections B and C analyze the emergent local policing programs, CVE and SAR, respectively. Scrutiny of these three programs will highlight how access to precise demographic macro- and mesodata about the whereabouts of Arab Americans will expand their reach and further erode the civil liberties of an already vulnerable population.

Program was first developed in 2003 by the Home Office Department of the British Government, and is looked to as a model for CVE programming in the US and other European nations. *See generally* PREVENT STRATEGY, *supra*.

256. *See* AAI Letter to the U.S. Census Bureau, *supra* note 161, at 3 (“This population [Arab Americans] remains concerned about civil liberties violations especially with increased infiltration by some federal and state security agents into community institutions.”); *see also* Amna A. Akbar, *National Security’s Broken Windows*, 62 UCLA L. REV. 834 (2015) (analyzing how CVE adopts the strategy of community policing).

257. Beydoun, *supra* note 6, at 37–38 (“There is little doubt today that many Americans still conflate Arab American and Muslim American identity. The stereotype that ‘all Arabs [are] Muslims—[and] all Muslims [are] Arabs,’ is a pervasive one in the United States today. ‘[D]espite deep demographic, religious, and other differences between the two groups, both Arabs and Muslims have become the target of popular suspicion, resulting in the “Arabification” of Muslims, and the “Muslimification” of Arabs.’ 9/11 intensified this conflation, and converted Muslim American identity into a racial classification understood in the narrow image of Arab Americans.” (alterations in original) (quoting Debra Merskin, *The Construction of Arabs as Enemies: Post-September 11 Discourse of George W. Bush*, 7 MASS COMM. & SOC’Y 157, 165 (2004); and Reem Bahdi, *No Exit: Racial Profiling and Canada’s War Against Terrorism*, 41 OSGOODE HALL L.J. 293, 296 (2003))); *see also* Merskin, *supra*.

258. Ahmad, *supra* note 9, at 1278 (“The logic of governmental profiling is only slightly more nuanced: (1) because all of the September 11 terrorists were Arab and Muslim; (2) because most Arabs are Muslims; and (3) because the terrorists claim religious motivation for their actions; (4) all Arabs and all Muslims are likely to be terrorists.”).

A. *National Security Agency (“NSA”) Surveillance*

NSA surveillance forms the monitoring foundation of the State’s anti-terror and counter-radicalization strategies. Among the marked reforms that followed 9/11 was reformation of the Foreign Intelligence and Surveillance Act (“FISA”), which was enacted in 1978 to equip the state with the authority to collect “foreign intelligence information” between “foreign powers” and their domestic “agents.”<sup>259</sup> Before the USA PATRIOT Act amended FISA in 2001,<sup>260</sup> FISA required a government agent to receive a warrant from a specialized “FISA Court” before a wiretap was legally issued.<sup>261</sup> Through broad exercise of his executive powers, President George W. Bush overhauled FISA’s legal framework, with dissolution of the FISA Court standing as the most drastic, and critiqued, reform.<sup>262</sup>

The post-9/11 FISA amendments spawned the Terrorist Surveillance Program (“TSP”). The TSP equipped the NSA with the means to intercept “communications between individuals on American soil and individuals abroad, without judicial approval.”<sup>263</sup> By sidestepping the FISA Court, the TSP eliminated the lone buffer between NSA agents and their targets. Following reform, the NSA currently holds wide and almost unchecked authority to use wiretaps on subjects it suspects of terrorism.<sup>264</sup> In addition to monitoring targets, a “data mining component” of the TSP offers agents with the capability to monitor the private communications of not only the target, but also the communications of third parties.<sup>265</sup> Therefore, the TSP not only threatens the civil liberties of the target—particularly core First and Fourth Amendment speech and privacy rights—but those of individuals in collateral proximity to the target.

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259. Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §§ 1801–1885(c) (2012).

260. *See* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272.

261. The specialized FISA Court is dubbed the Foreign Intelligence Surveillance Court (“FISC”), which extended (or denied) the issuance of wiretaps permitting surveillance of a target’s communications.

262. U.S. CONST. art. II, § 2 (“Commander in Chief Clause”). A broad host of critics, including civil rights advocates, politicians, and law scholars, critiqued President Bush’s exercise of the Commander in Chief Clause as strident, and in many instances, illegal.

263. Katherine L. Wong, *The NSA Terrorist Surveillance Program*, 43 HARV. J. ON LEGIS. 517, 517 (2006).

264. *Id.* at 519 (“Unlike targets of surveillance conducted under FISA, the targets of the terrorist surveillance program may be chosen by the ‘operational work force’ at the NSA and approved by a shift supervisor.”).

265. Kadidal, *supra* note 32, at 4.

Furthermore, the TSP effectively dissolved the legal distinction between international and domestic communications. FISA, in its original form, mandated that wiretapping capture only communications between a foreign power and a domestic agent.<sup>266</sup> Under the TSP, “neither government assurances nor a requirement that the calls be international in nature has prevented the terrorist surveillance program from capturing purely domestic conversations.”<sup>267</sup> This amendment to FISA has proven extremely dangerous to U.S. citizens, specifically Arab, MENA, and Muslim Americans, because the State links these groups to terrorism.

TSP surveillance disproportionately targets Arab, MENA, and Muslim Americans: “A complex matrix of ‘otherness’ based on race, national origin, religion, culture, and political ideology may contribute to the ferocity of the U.S. government’s attacks on the civil rights of Arabs and Muslims.”<sup>268</sup> The State’s “ferocious” targeting of Arab and Muslim Americans was, in part, facilitated by vague definitions of “terrorism.”<sup>269</sup> The ambiguity and “excessively overbroad” definitions of terrorism furnish the DHS with wide discretion over what activities could be framed as potential terrorist enterprises.<sup>270</sup> Oftentimes, merely being Arab or Muslim American justifies surveillance. While the efficacy of the TSP, and post-9/11 racial profiling strategies at large, have been subjects of heated debate within and outside of legal scholarship,<sup>271</sup> disparate surveillance of Arab, MENA, and Muslim American communities still stands as a cornerstone of anti-terror policing.

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266. FISA, 50 U.S.C. §§ 1801–1885(c) (2012).

267. Wong, *supra* note 263, at 519.

268. Akram & Johnson, *supra* note 10, at 299.

269. Immigration & Nationality Act of 1965, 8 U.S.C. § 1182(a)(3)(B) (2012) (outlining the definition of distinct terrorist activities); *see also* 18 U.S.C. § 2331 (5) (2012) (defining “domestic terrorism” as activities that: “involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States”).

270. Johnson & Trujillo, *supra* note 140, at 1385.

271. *See generally* Deborah A. Ramirez, Jennifer Hoopes & Tara L. Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195 (2003) (contending that post-9/11 racial profiling is ineffective because it curbs focus on more pressing areas of national security and criminal investigation). For an opposing view, see Stephen J. Ellmann, *Racial Profiling and Terrorism*, 19 N.Y.L. SCH. J. INT’L & COMP. L. 305, 337, 343 (2003), which highlights the national security benefits of a racial profiling-oriented anti-terror policing regime.

### B. Countering Violent Extremism (“CVE”)

“Countering-Violent Extremism,” “Counter-Radicalization,”<sup>272</sup> and “Counterterrorism Community Policing”<sup>273</sup>: these phrases not only characterize the emergent anti-terrorism parlance in the U.S., but also define the new paradigm and strategy of national security policing. CVE, modeled after the British “CONTEST” anti-radicalization program installed in 2003,<sup>274</sup> centers its approach on identifying individuals with a propensity for terrorism, and preventing them from committing an act of terror.

Information gathering and sharing is a central component of CVE policing. In addition to equipping local police departments with broad surveillance powers previously held by only the DHS, CVE also, “promote[s] information sharing and collaboration between Federal, State, Local, Territorial, Tribal, Private, Civilian and International entities working to counter the threat of violent extremism.”<sup>275</sup> Coupled with a strategic shift in policing, CVE specifically targets domestic terrorists, namely, American citizens: “The turn to counter-radicalization reflects an appreciation that the contemporary terrorist threat includes a ‘homegrown’ dimension, which in turn necessitates a domestic preventive approach.”<sup>276</sup> President Obama affirmed that the success of CVE hinges on Muslim American support, stating, “Muslim leaders need to do more to discredit the notion that our nations are determined to suppress Islam,” suggesting that Muslim Americans must also be part of the campaign of identifying and preventing terrorism.<sup>277</sup>

The meaning and scope of CVE or counter-radicalization, synonyms both used by the state, are still ambiguous and underdeveloped. Law

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272. Although this article adopts CVE as the title of choice, many names have been used for the policing program. In *National Security’s Broken Windows*, Akbar states, “[r]adicalization and counterradicalization have become the language of prevention in national security law,” highlighting the program’s several titles within law enforcement and policy discourse. Akbar, *supra* note 256, at 849.

273. Aziz, *supra* note 157, at 151 (“[C]ounterterrorism community policing (‘CCP’), is not, nor is it intended to be, the same as community policing in the traditional criminal context. Rather than fundamentally changing relations between law enforcement and communities into a partnership, CCP perpetuates preventative counterterrorism strategies that prioritize surveillance, investigation, prosecution, and conviction of Muslims.”).

274. See PREVENT STRATEGY, *supra* note 255.

275. *Countering Violent Extremism*, DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/topic/countering-violent-extremism> (last updated Oct. 14, 2015).

276. Rascoff, *supra* note 15, at 128–29.

277. Julia Edwards, *Obama: Countering Violent Extremism Depends on Muslim Support*, REUTERS (Feb. 18, 2015), <http://www.reuters.com/article/2015/02/18/us-usa-security-obama-idUSKBN0LM2B920150218>.

scholar Samuel J. Rascoff observes:

Unlike “counterterrorism” or “counterinsurgency,” which have rich (if not entirely satisfying) conceptual foundations, “counter-radicalization” remains almost completely undertheorized. To its proponents, counterradicalization begins with the uncontroversial proposition that manifestations of violent extremism are rooted in ideas and social-behavioral processes. Understanding and addressing those ideas and processes will help prevent future attacks and thus should play an important role in American counterterrorism policy. But these basic assumptions give rise to a wide range of theoretical possibilities about what counter-radicalization is, how it should be conducted, and how the government can best devote its resources to address the contemporary security threat.<sup>278</sup>

CVE is, per its name, committed to identifying “violent extremists,” defined as “individuals who support or commit ideologically motivated violence to further political goals.”<sup>279</sup> Extending the reach of NSA surveillance powers, CVE operates in the communities considered havens for “Homegrown Violent Extremists,” or HVEs.<sup>280</sup> Despite its conceptual and structural ambiguity, the DHS,<sup>281</sup> Congress,<sup>282</sup> and the White House have been unambiguous in their support for CVE.<sup>283</sup>

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278. Rascoff, *supra* note 15, at 137.

279. *Countering Violent Extremism*, *supra* note 275.

280. *Id.* (defining an HVE as: “A person of any citizenship who has lived or operated primarily in the United States or its territories who advocates, is engaged in, or is preparing to engage in ideologically-motivated terrorist activities (including providing material support to terrorism) in furtherance of political or social objectives promoted by a terrorist organization, but who is acting independently of direction by a terrorist organization.”).

281. U.S. SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, A TICKING TIME BOMB: COUNTERTERRORISM LESSONS FROM THE U.S. GOVERNMENT’S FAILURE TO PREVENT THE FORT HOOD ATTACK 17 (2011).

282. Akbar, *supra* note 13, at 821 (“In Congress, for example, both the House and Senate Homeland Security Committees have devoted considerable resources to the development of the radicalization discourse, emphasizing the need for the government to monitor and respond to radicalization.”).

283. EXEC. OFFICE OF THE PRESIDENT, EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES (2011). An Executive Order established the Countering Violent Extremism Working Group, comprised of government personnel and stakeholders. The White House held a “CVE Summit in February 2015,” which was opposed by nine major civil rights and advocacy organizations, including ADC and the Arab American Association of New York. See Arab-Am. Anti-Discrimination Comm., et al., Joint Statement Regarding Upcoming Summit on Countering Violent Extremism (Feb. 17, 2015), [http://www.adc.org/fileadmin/ADC/Pdfs/Joint\\_Statement\\_Regarding\\_Summit\\_on\\_Countering\\_Violent\\_Extremism\\_CVE\\_.pdf](http://www.adc.org/fileadmin/ADC/Pdfs/Joint_Statement_Regarding_Summit_on_Countering_Violent_Extremism_CVE_.pdf). But see also Ali Jakvani, *On the Ground in LA and as a Delegate to CVE*, ISLAMIC MONTHLY (Mar. 11, 2015), <http://theislamicmonthly.com/on-the-ground-in-la-and-as-a-delegate-to-cve/> (supporting CVE, from a Muslim American delegate who attended the CVE Summit at the White House).

CVE, which dedicates much of its resources to Muslims,<sup>284</sup> and disproportionately targets indigent and working class Muslim Americans in concentrated, urban enclaves,<sup>285</sup> is “cloaked in expertise about the process by which Muslims become terrorists.”<sup>286</sup> An FBI Intelligence Assessment, *The Radicalization Process: From Conversion to Jihad*, frames the current CVE structure<sup>287</sup>: “[A] predictable process by which a Muslim becomes a terrorist,” broken down into four stages: “‘preradicalization,’ ‘identification,’ ‘indoctrination,’ and ‘action.’”<sup>288</sup>

Linking radicalization to a range of factors, including Islamic identity, degree of religiosity, and political viewpoints, CVE is acutely and disparately threatening to observant Muslim Americans,<sup>289</sup> particularly those transitioning from secular to devout lifestyles or members of the community holding “critical politics.”<sup>290</sup> Therefore, the potential impact on the First Amendment free exercise, speech, and assembly rights of Muslim Americans are considerable. In addition, CVE exposes Arab Americans at large, whether Muslim or Christian, to CVE surveillance, as Arab identity is conflated with, and sometimes believed to be synonymous with, Muslim identity.

Collaborating with entities having established community ties in Arab, MENA, and Muslim American communities is core to the CVE strategy.<sup>291</sup> In addition to tapping individual informants, building

284. Akbar, *supra* note 13, at 819–20 (“Radicalization and counter-radicalization programs are primarily if not almost exclusively concerned with Muslim communities.”); *see also* Junaid Sulahry, *Countering Violent Extremism*, MUSLIM ADVOCATES (Mar. 9, 2015), <http://www.muslimadvocates.org/cve-countering-violent-extremism/> (stating, in a formal position from one of the leading Muslim American civil rights and legal defense organizations in the United States, that CVE creates “the false perception [that] sends a dangerous signal to members of the public that their Muslim neighbors are a threat, worsening the environment of anti-Muslim bigotry and hate crimes”).

285. See generally Khaled A. Beydoun, *Between Indigence, Islamophobia and Erasure: Poor and Muslim in “War on Terror” America*, 104 CALIF. L. REV. (forthcoming 2016), for an analysis of CVE policing’s strategic deployment in concentrated urban enclaves, which are hubs for indigent and working-class Muslim American communities, and the intensified impact CVE has on these communities’ First and Fourth Amendment rights.

286. Akbar, *supra* note 13, at 817.

287. FBI COUNTERTERRORISM DIV., *THE RADICALIZATION PROCESS: FROM CONVERSION TO JIHAD 1–2* (2006), <http://cryptome.org/fbi-jihad.pdf> (confidential report leaked to the public).

288. Akbar, *supra* note 13, at 820.

289. “Muslim religious practice—core First Amendment activity, unconnected to any suspicion of criminal activity—becomes a predictor for criminality.” *Id.* at 835.

290. “Radicalization’s concern is predicated on a false belief in the theological character of Islam—that if Muslim communities witness conservative religious practice and critical politics, they will view such currents as acceptable and gravitate toward radicalism.” Akbar, *supra* note 256, at 877.

291. “Support Local Communities—Bolster efforts to catalyze and support community-based



strategic alliances with advocacy, cultural, and religious organizations is core to the Department of Justice's ("DOJ") furtherance of CVE strategy.<sup>292</sup> These community elements equip law enforcement with on-the-ground allies and watchdogs, but more importantly, the legitimacy that only native informants can provide.<sup>293</sup> CVE community engagement centers on "mosques, community institutions, and youth in Muslim communities,"<sup>294</sup> with a disproportionate focus on concentrated, indigent, and working-class Muslim American enclaves.<sup>295</sup>

In Los Angeles, one of CVE's three pilot cities,<sup>296</sup> the Los Angeles Police Department ("LAPD") works closely with the Muslim Public Affairs Council ("MPAC"). To promote CVE aims, MPAC launched the "Safe Spaces Program," which encourages its employees and community partners to take on the role of identifying "radicals" within the Muslim American community. In addition, MPAC provides the LAPD with access to other civil society organizations within the Arab, MENA, and Muslim American community, including "Muslim student groups and mosques."<sup>297</sup>

More precise and comprehensive data about Arab, MENA, and Muslim Americans would bolster CVE strategy. As a first step, the MENA box facilitates the gathering of macrodata that specifically outlines the precise whereabouts of MENA individuals and families. In

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programs, and strengthen relationships with communities that may be targeted for recruitment by violent extremists." *Countering Violent Extremism*, *supra* note 275.

292. "DOJ engages in extensive community engagement efforts through many of its offices and divisions. DOJ's community engagement efforts have included its Community Relations Service (CRS), Civil Rights Division, U.S. Attorneys' offices, and Office of Justice Programs." Akbar, *supra* note 256, at 859.

293. "The way the Los Angeles Police Department's counterterrorism head Michael Downing sees it, American Muslims could be the city's most effective tool in guarding against homeland threats by the violent extremist group known as the Islamic State." Brenda Gazzar, *Los Angeles Picked for Pilot Program to Counter Homegrown Jihadists*, L.A. DAILY NEWS (Sept. 23, 2014), <http://www.dailynews.com/general-news/20140923/los-angeles-picked-for-pilot-program-to-counter-homegrown-jihadists>.

294. Akbar, *supra* note 256, at 843.

295. See Beydoun, *supra* note 285.

296. Brian Bennett, Joel Rubin & Victoria Kim, *L.A. Chosen for Pilot Program on Dissuading Militant Recruits*, L.A. TIMES (Sept. 22, 2014), <http://www.latimes.com/local/la-me-terror-jihad-program-20140923-story.html>. Boston and Minneapolis were the other two cities chosen by the White House to launch pilot CVE programs. See also Samantha Masunaga, *Homeland Security Head Aims to Build Trust in L.A. Muslim Community*, L.A. TIMES (Nov. 12, 2014), <http://www.latimes.com/local/california/la-me-1114-mosque-visit-20141114-story.html>.

297. Staff, *MPAC Joins LAPD in Answering Community Questions*, MUSLIM PUB. AFF. COUNCIL (Apr. 7, 2014), <http://www.mpac.org/programs/government-relations/mpac-joins-lapd-in-answering-community-questions.php>.

addition, the structure of the proposed designation will also lead to the production of mesodata, based on an algorithm that takes into consideration surname, nationality, geographic designation, socio-economic status, and the faith and religious sect of the individual, thereby furnishing police departments carrying forward CVE strategy with the ability to hone their focus on specific subsets of the Arab American population they deem disposed to radicalization or terrorism. Although CVE has garnered some support from civil society elements, most notably MPAC, many Arab, MENA, and Muslim Americans “fear it is profiling disguised as prevention and worry it could compromise civil liberties and religious freedoms.”<sup>298</sup>

### C. Suspicious Activity Reporting (“SAR”)

Suspicious Activity Reporting, or SAR, is another facet of the State’s broader War on Terror capabilities. The model, which was made into a formal law enforcement program known as the Nationwide Suspicion Initiative (“NSI”), is:

[A] joint collaborative effort by the U.S. Department of Homeland Security, the Federal Bureau of Investigation, and state, local, tribal, and territorial law enforcement partners. This initiative provides law enforcement with another tool to help prevent terrorism and other related criminal activity by establishing a national capacity for gathering, documenting, processing, analyzing, and sharing SAR information.<sup>299</sup>

Following the structural and strategic modeling of CVE, NSI combines the policing powers of federal policing agencies (DHS and FBI) with the law enforcement capabilities and community ties of local police departments.

NSI also relies heavily on the proactive reporting of private citizens. Federal and local law enforcement rely upon private citizens to report “[s]uspicious activities that can help prevent violent crimes or terrorists attacks.”<sup>300</sup> In reporting suspicious activity and subjects, the DHS

298. Tami Abdollah & Philip Marcelo, “*It Sets People Off*”: Some Muslims See Profiling in U.S. Anti-Terror Program, NBC L.A. (Apr. 20, 2015), <http://www.nbclosangeles.com/news/local/Obama-Muslims-Countering-Violent-Extremism-SoCal-civil-liberties-300678641.html>; see also Margari A. Hill, *Logging it All: CVE and Schisms in the Muslim American Community*, ISLAMIC MONTHLY (Mar. 4, 2015), <http://theislamicmonthly.com/logging-it-all-cve-and-schisms-in-the-muslim-community> (highlighting the debates and divisions with the Muslim American population regarding CVE).

299. *The Nationwide SAR Initiative*, *supra* note 34.

300. *Report Suspicious Activity*, U.S. DEP’T OF HOMELAND SECURITY (“If you see suspicious activity, please report it to your local police department. Local law enforcement officers can respond quickly. Once they assess the situation, they can obtain additional support [inferring that

issues broad directives to prospective parties reporting the activity, which includes: “a brief description of the activity; [d]ate, time, and location of the activity; [p]hysical identifiers of anyone you observed, [d]escriptions of Vehicles; and [i]nformation about where people involved in suspicious activities may have gone.”<sup>301</sup>

NSI functions in tandem with CVE. Although a precursor program, NSI can be viewed as the private arm of CVE, equipping citizens and civil society elements with the capacity to report suspicious behavior. More than a reactive program, SAR, combined with CVE strategy, also functions proactively. Police departments with CVE programs, such as those in Boston, Minneapolis, and Los Angeles, can tap private informants to function as perpetual watchdogs in Arab, MENA, and Muslim American communities. In addition to individual informants, police departments will also designate organizations as institutional informants. Again, the LAPD’s relationship with MPAC is a staple example of the institutional informant role.<sup>302</sup>

## V. THE DARK SIDE OF CENSUS REFORM

The public discourse surrounding the proposed MENA box to the 2020 U.S. census has been overwhelmingly celebratory.<sup>303</sup> Based on past and present community mobilization for reform and reclassification, the proposed MENA box would be “well received by the majority of the Arab American community.”<sup>304</sup> As the Census Bureau and community stakeholders continue to discuss the title, parameters, and language of the proposed classification, the State’s post-9/11 pivot toward reform and reclassification of Arab American identity is, in and of itself, regarded as a moment of racial progress. Abed Ayoub, Legal Director of the ADC in Washington, D.C., captured the general sentiment held by community leaders and stakeholders working toward reclassification: “The proposed box, and recent meetings, foreshadows a genuine commitment by the Census Bureau to

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DHS and FBI personnel can be called upon].”).

301. *Id.*

302. Gazzar, *supra* note 293.

303. Tanzina Vega, *Census Considers How to Measure a More Diverse America*, N.Y. TIMES (July 1, 2014), <http://www.nytimes.com/2014/07/02/us/census-bureau-arabs-hispanics-diversity.html>; see also Teresa Wiltz, *Lobbying For a ‘MENA’ Category on U.S. Census*, USA TODAY (Oct. 7, 2014), <http://www.usatoday.com/story/news/nation/2014/08/13/stateline-census-mena-africa-mideast/13999239>.

304. Samer Hijazi, *U.S. Census Sets Goals to Expand on Ethnic Categories, Including Arabs*, ARAB AM. NEWS (Aug. 17, 2012), [http://www.arabamericannews.com/news/news/id\\_5891/U-S-Census-sets-goals-to-expand-on-ethnic-categories,-including-Arabs-.html](http://www.arabamericannews.com/news/news/id_5891/U-S-Census-sets-goals-to-expand-on-ethnic-categories,-including-Arabs-.html).

resolve the longstanding Arab American racial dilemma. A considerable change from decades of denial and dismissal.”<sup>305</sup>

This moment of converging community and state interests intersects with broadening state surveillance and suspicion of Arab, MENA, and Muslim American communities. As discussed in Part II.C, modern civil rights history reveals that marked shifts in state policy are driven more by majoritarian interests than minority demands.<sup>306</sup> Viewed within the context of the expanding police state and the sharing of federal national security policing powers with local law enforcement, closer scrutiny of this perceived moment of Arab American racial progress reveals a host of underlying perils.<sup>307</sup>

This Part analyzes the most concerning ramifications that the proposed reform poses to Arab Americans. Section A examines how the proposed MENA box will facilitate War on Terror policing, particularly CVE strategy, which, in turn, will chill constitutionally protected activity and further curb the civil liberties of Arab Americans. Section B analyzes how identifying as white or MENA during the War on Terror also functions as a mode of political speech that exposes those who choose the latter with enhanced vulnerability to state surveillance, profiling, and policing. Finally, Section C highlights how divergent modes of identification within the Arab American community will result in a population divided between two racial groups—MENA and white.

### *A. Augmenting Anti-Terror Surveillance and Policing*

#### 1. MENA Demographic Data

In the *Dark Side of Numbers: The Role of Population Data Systems and Human Rights Abuses*, William Seltzer and Margo Anderson conclude, “[p]opulation data systems also permit the identification of vulnerable subpopulations within the larger population, or even the definition of entire populations as ‘outcast’ and a threat to the overall health of the state.”<sup>308</sup> Therefore, while the census’s core functions include determining the scope of its polity for military conscription,

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305. Interview of Abed Ayoub, Legal & Policy Dir., Arab Am. Anti-Discrimination Comm., in Wash., D.C. (Apr. 3, 2015).

306. Bell, *supra* note 27, at 525.

307. For a brief synopsis of the surveillance perils the MENA box, if adopted, will facilitate for Arab and Muslim Americans, 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).

308. Seltzer & Anderson, *supra* note 37, at 482.

voting, distribution of resources, and taxation purposes,<sup>309</sup> Seltzer and Anderson unveil the State's past record and its propensity to identify and isolate subsets of the polity deemed threatening to national security.<sup>310</sup> In short, the Census Bureau has previously shared demographic data, which it was commissioned to collect and compile for politically neutral ends, for policing and punitive aims.

While a racial profile linking Arab identity to national security threats preceded 9/11,<sup>311</sup> the terrorist attacks of that day ushered in sweeping legislation and ignited societal animus that targeted Arab Americans, markedly enhancing the vulnerability of Arab Americans to both "private" and "public" violence:

Two forms of racial violence swept across the United States in the aftermath of September 11. The first involved what traditionally would be classified as private violence: violence enacted by one (or more) private actor upon another, without direct state participation. The thousands of physical attacks carried out by individuals against Arabs, Muslims, and South Asians after the terrorist attacks typify this. The second form of violence is traditionally deemed public, because of the direct involvement of state actors. After September 11, this took the form of a broad range of governmental policies that targeted "Muslim-looking" people.<sup>312</sup>

Nearly a decade and a half after 9/11, "private" and "public" violence toward Arab Americans continues to escalate.<sup>313</sup> Embedded "American Orientalism"<sup>314</sup> and the rising tide of "Islamophobia"<sup>315</sup> exposes Arab,

309. U.S. CONST. art. I, § 9.

310. Seltzer & Anderson, *supra* note 37, at 482; *see also* Steven A. Holmes, *Report Says Census Bureau Helped Relocate Japanese*, N.Y. TIMES (Mar. 17, 2000), <http://www.nytimes.com/2000/03/17/us/report-says-census-bureau-helped-relocate-japanese.html?pagewanted=print> ("[T]he Census Bureau was deeply involved in the roundup and internment of Japanese-Americans at the onset of American entry into World War II.").

311. Ahmad, *supra* note 9, at 1271 n.36; Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51 (1999).

312. Ahmad, *supra* note 9, at 1265.

313. *See generally* Beydoun, *supra* note 202.

314. Here, I use "American Orientalism" to refer to the distinctly American view of Islam and the "Muslim World" that began to take shape in the eighteenth century. This is not to be mistaken with how the term has been deployed more recently by other scholars, most notably Douglas Little, who uses "American Orientalism" as a governmental view of the Middle East that began to take shape after 1945. *See generally* DOUGLAS LITTLE, *AMERICAN ORIENTALISM: THE UNITED STATES AND THE MIDDLE EAST SINCE 1945* (3rd ed. 2008).

315. I define "Islamophobia" as animus toward Islam, Muslims, and individuals stereotyped as Muslims. *See also* CARL W. ERNST, *ISLAMOPHOBIA IN AMERICA: THE ANATOMY OF INTOLERANCE* 2 (2013) (defining "Islamophobia"); HAMID DABASHI, *BROWN SKIN, WHITE*

MENA, and Muslim Americans, and communities linked to these groups,<sup>316</sup> to greater danger. Moreover, enhanced NSA surveillance and the emergence of CVE and SAR policing further subject Arab American bodies—citizens and communities alike—to more exacting state scrutiny.<sup>317</sup> Therefore, Arab Americans are a subset of the American polity that Seltzer and Anderson would identify as “vulnerable” to the extra-legal use of demographic data collected by the U.S. census.

The adoption of the MENA box in 2020 would lead to the collection and compilation of more accurate and nuanced demographic data on Arab Americans. In addition to “macrodata,”<sup>318</sup> which is made publicly available, the MENA box will produce an unprecedented stock of precise and detailed “mesodata.”<sup>319</sup>

Mesodata provides “statistical results presented at such a fine level of geographic disaggregation, whether in tabular or graphic form, that the results may be used in conducting field operations at the local level.”<sup>320</sup> Aligning with the structural and strategic character of CVE and SAR, which are anti-terrorism “field operations at the local level,”<sup>321</sup> law enforcement that procures MENA-focused mesodata stands to threaten applicants that check MENA in tightly concentrated Arab American communities, like Detroit or New York City,<sup>322</sup> as well as areas of the

MASKS 9–12 (2010) (analyzing the “making of Islamophobia” in an interdisciplinary setting). See generally EDWARD W. SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD* (1981) (analyzing how the media and political actors manufacture misrepresentations of Islam, Muslims, and the Muslim World, in what is widely considered the landmark analysis).

316. Wajahat Ali identifies groups phenotypically associated with Muslim identity as looking “Muslim-y,” such as Arab American Christians, Iranian Jews and Sikh Americans. Wajahat Ali, *Wade Michael Paige: Islamophobia Unleashed*, SALON (Aug. 7, 2012), [http://www.salon.com/2012/08/07/wade\\_michael\\_page\\_islamophobia\\_unleashed](http://www.salon.com/2012/08/07/wade_michael_page_islamophobia_unleashed).

317. “Radicalization has transformed the project of counterterrorism intelligence gathering into one squarely focused on gathering as much information as possible about Muslim life in the United States, with a particular emphasis on political and religious cultures of Muslim [and Arab American] communities.” Akbar, *supra* note 13, at 845.

318. Seltzer & Anderson, *supra* note 37, at 485 (“Macrodata refer[s] to statistical tabulations, or related graphics, for countries, provinces or states, counties or *governments*, and moderate to large urban agglomerations. Such tabulations, while important for policymaking, propaganda, and general administrative purposes, usually have limited value in planning or carrying out the operation aspects of a major human [or civil] rights abuse.”).

319. *Id.*

320. *Id.* “Thus the line between macrodata and mesodata will depend in part on the size of the geographic units, the distribution of the target population among these units, and the intended operational uses.” *Id.*

321. *Id.*

322. Brown et al., *supra* note 84, at 1.

country where the population of Arab Americans is sparse. Although demographic mesodata is highly confidential, private companies—for instance, Lockheed Martin after the 2010 census—have contracted with the government to assist in data processing of this information.<sup>323</sup> Indicating that private actors, subcontracted to process the data, therefore, have access to the underlying statistics compiled by the U.S. census. This access creates the possibility of confidential demographic data being viewed, and possibly used, by other government agencies and, potentially, non-state actors.

A standalone census box that includes Arab Americans would facilitate more exacting CVE surveillance and monitoring. The U.S. Census Bureau proposal encourages applicants to write in their “ethnicity or nationality.”<sup>324</sup> This additional component of the proposed MENA box will furnish state agencies, including the DHS and local law enforcement departments, with more specific demographical data about different subsets of the broader MENA population.

For instance, if the DHS considers Iraqi Americans to be a subgroup of greater national security concern, the proposed MENA category may provide the DHS with previously unavailable macro- and mesodata on this subgroup. This data would bolster DHS strategy by, first, furnishing it with clearer targets, and, second, giving it the ability to prudently commit resources to CVE programming in American cities and communities with concentrated subgroups disparately suspected of terrorism and linked to radicalization. From the vantage point of the State, more accurate and nuanced information of both Arab Americans at large and subgroups of interest would markedly expand and increase the efficiency of federal and local anti-terrorism efforts.

## 2. Sharpening Counter-Terrorism Tactics

The availability of Arab American demographic macro- and mesodata would enhance CVE policing strategy and tactics. First, it carries “mapping” strategy forward. Mapping is the process by which law enforcement “prepare[s] maps identifying neighborhoods where certain immigrants [or ethnic groups] predominate.”<sup>325</sup> More accurate and comprehensive demographic data about Arab Americans would equip federal and local law enforcement to pinpoint not only broader

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323. Bhatnagar, *supra* note 36, at 86 (describing a \$500 million contract that Lockheed Martin signed with the Census Bureau in 2010 because the government agency was “unable to bear the burden of conducting the census alone”).

324. *2015 Census Update*, *supra* note 17, at 17.

325. Akbar, *supra* note 13, at 855 n.176.

cities, but even map communities, neighborhoods, blocks, and households with ties to a terror or radical suspect.

Second, enhanced demographic data produced by the MENA box narrows the pool of Arab Americans who may be called on for “voluntary interviews”—another core tactic of CVE policing. Again, Arab Americans who identify along political or religious terms on the census may be called in for a voluntary interview,<sup>326</sup> also known as “knock and talks.”<sup>327</sup> Agents may approach subjects of interest at their homes, mosques, places of employment, community centers, or even on the street. Further, DHS officers may be able to decipher the religious or sectarian identity of a subject based on his or her last name or responses to other questions on the U.S. census form, which provide contextual data.

Third, more finite demographic data will guide the use of government informants. Although not standard practice, the DHS and local police sometimes use coercive tactics compelling individuals—particularly those indigenous to the very communities they are asked to monitor—to assume the role as an informant. Through an integrated CVE and NSI policing strategy, police departments will tap both institutional and individual informants in strategic communities to function as de facto counter-radicalization police. This strategy is already taking place in Los Angeles, as illustrated by the formal collaboration between the LAPD and MPAC.<sup>328</sup>

Fourth, macro- and mesodata availed by the MENA box will deepen the outreach and engagement tentacles of CVE community engagement. As discussed in Part III.B, collaborating with Arab, MENA, and Muslim American civil society actors is central to CVE’s success. Community engagement has become a cornerstone of national security policing and specifically of counter-radicalization efforts.<sup>329</sup> More accurate and comprehensive demographic data will enable federal and local law enforcement to share names of interest with community partners, who may then be commissioned to serve as CVE informants. “Put simply, community policing co-opts Muslim community leaders into gathering and sharing intelligence on Muslims’ political beliefs, religious practices, and other information otherwise unavailable to law

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326. *Id.* at 859.

327. *See generally* Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. 41 (2011) (analyzing the due process and free speech encroachments posed by knock-and-talk interviews).

328. Gazzar, *supra* note 293.

329. *See* Akbar, *supra* note 256.



enforcement due to constitutional constraints.”<sup>330</sup>

Fifth, surveillance of Internet communication becomes more expansive and intrusive with the availability of precise MENA-related demographic data. The more precise and comprehensive demographic data availed by the MENA box, particularly the finite mesodata, will furnish federal and local law enforcement with zip code and household specific information. Therefore, law enforcement can wire and monitor the private Internet communication of individuals suspected of radicalization, or in the process of being radicalized.

### 3. Pernicious Precedents

Precedent establishes that the Census Bureau is likely to share statistical data with other government agencies, including the DHS.<sup>331</sup> This is particularly true during times of national security crisis. The most vivid example of the Census Bureau’s interagency data sharing was the sharing of demographic data on Japanese Americans on the West Coast with the U.S. military, following Japan’s bombing of Pearl Harbor on December 7, 1941.<sup>332</sup> To carry forward the forced migration and internment of Japanese Americans, the Census Bureau shared both macro- and mesodata with the military:

The Census Bureau also gave direct assistance to the military authorities on the West Coast by: providing tract-level tabulations of Japanese Americans from the 1940 Census in January 1942 . . . making available census-block maps showing the number of Japanese American enumerated as residing in each block . . .<sup>333</sup>

In addition to the fear of “[t]he precedent and prospect of internment,” the intergovernmental sharing of census data—particularly following the prospective adoption of the MENA category—poses a range of immediate civil liberties concerns for Arab Americans. This is especially true after moments of national crisis, where national security

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330. Aziz, *supra* note 134, at 150.

331. Kayyali, *supra* note 24, at 1313 (“The CB [Census Bureau] became implicated in this racial profiling when it was revealed that the Department of Homeland Security (DHS) requested, and was given, tabulations of publicly available census data on Arab Americans by ZIP code.”).

332. *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (affirming an order excluding and interning persons of Japanese ancestry from parts of the West Coast); see also ROGER DANIELS, CONCENTRATION CAMPS NORTH AMERICA: JAPANESE IN THE UNITED STATES AND CANADA DURING WORLD WAR II (1993); Saito, *supra* note 139; Seltzer & Anderson, *supra* note 37, at 492.

333. Seltzer & Anderson, *supra* note 37, at 492 (“The [B]ureau has denied the charge and no definitive evidence to the contrary has emerged. Nevertheless, there now seems to be general agreement that the provision of mesodata and professional expertise violated the spirit, if not the letter, of the promises embodied in the census confidentiality laws.”).

concerns and the Executive's war power will set aside legal restrictions against disclosure of confidential data.<sup>334</sup>

A more recent precedent involving Arab Americans also foreshadows potential misuse of demographic data collected through the MENA box. In July 30, 2004, the *New York Times* revealed that the Census Bureau “[p]rovided specially tabulated population statistics on Arab-Americans to the Department of Homeland Security, including detailed information on how many people of Arab backgrounds live in certain ZIP codes.”<sup>335</sup> Census Bureau officials shared this data with U.S. Customs and Border Protection (“CBP”), the agency responsible for monitoring the U.S.’s border checkpoints.<sup>336</sup> The first tabulation outlined the specific number of Arab Americans in 159 American cities with “1,000 or more persons of Arab ancestry.”<sup>337</sup>

In addition to the first file, the Census Bureau also disclosed a second file with more nuanced data. The second table broke down the Arab American population in over 500 zip codes by seven nationalities (Egyptian, Iraqi, Jordanian, Lebanese, Moroccan, Palestinian, and Syrian) and two general categories (“Arab/Arabic” and “Other Arab”).<sup>338</sup> “File 3,”<sup>339</sup> the name of the second more specific tabulation, highlights the type of macrodata that would be compiled—in even more accurate and multilayered form—by the proposed MENA classification. Civil rights advocates viewed the interagency sharing of this data with great suspicion, linking the DHS’s possession of the internal U.S.

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334. U.S. CONST. art. I, § 8.

335. Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, N.Y. TIMES (June 30, 2004), <http://www.nytimes.com/2004/07/30/us/homeland-security-given-data-on-arab-americans.html>.

336. *Department of Homeland Security Obtained on Arab Americans From Census Bureau*, ELEC. PRIVACY INFO. CTR. (EPIC), <https://epic.org/privacy/census/foia/> (last visited Mar. 7, 2016) [hereinafter EPIC Report] (“The heavily redacted documents show that in April 2004, a Census Bureau analyst e-mailed a department of Homeland Security official and said, ‘You got a file of Arab ancestry information by Zip Code Tabulation Area from me last December (2003). My superiors are now asking about the usage of that data, given the sensitivity of different data requests we have receive about the Arab population.’”); see also Eric Lipton, *Panel Says Census Move on Arab-Americans Recalls World War II Internments*, N.Y. TIMES (Nov. 10, 2004), <http://www.nytimes.com/2004/11/10/politics/10census.html?pagewanted=print&position> (discussing the U.S. Census Bureau’s sharing of internal Arab American demographic data with the DHS in 2004).

337. CENSUS 2000 DEMOGRAPHICS PROFILE tbl.DP-2 (2000), [https://epic.org/privacy/census/foia/tab\\_1.pdf](https://epic.org/privacy/census/foia/tab_1.pdf) (“Places With 10,000 or More Population and With 1,000 or More Persons of Arab Ancestry: 2000”).

338. CENSUS 2000 SUMMARY FILE 3, tbls.PCT16 & PCT17, [https://epic.org/privacy/census/foia/tab\\_2.pdf](https://epic.org/privacy/census/foia/tab_2.pdf) (“People of Arab Ancestry by Zip Code Tabulation Area: 2000”).

339. *Id.*

census figures with the rounding up and deportation of Arab Americans.<sup>340</sup>

Christiana Halsey, a spokeswoman for the CBP, denied claims that the demographic data was being used for surveillance purposes.<sup>341</sup> More tellingly, Hermann Habermann, then Deputy Director of the Census Bureau, voiced concern: “We do worry about how information will be used. However, we have not been given the authority to determine which organization gets which information.”<sup>342</sup> Habermann’s admission indicates the Census Bureau itself may be opposed to interagency sharing of the demographic data. But as a consequence of extra-agency need or compulsion,<sup>343</sup> particularly for data branded sensitive or essential for carrying forward national security interests, the Census Bureau itself may be politically pressured to hand over the data it collects. Both historic and contemporary precedent highlight the probable sharing and misuse of privileged demographic data that would be collected and compiled through the proposed MENA box.

### B. MENA Identity as Political Expression

“Middle East” and “North Africa” are sharply politicized terms. The mere mention of these geographic destinations triggers images of war, unchecked violence, anarchy and anti-Americanism.<sup>344</sup> In addition, the MENA region—as a conveniently constructed monolith—is bound closely with the “Muslim World,” an imagined sphere characterized in almost identical fashion.<sup>345</sup> Thus, while the MENA classification is, in its narrowest sense, a per se box that may appear on the 2020 U.S.

340. Lipton, *supra* note 336.

341. “‘The information is not in any way being used for law enforcement purposes,’ she said. ‘It’s being used to educate the traveler. We’re simply using basic demographic information to help us communicate U.S. laws and regulations to the traveling public.’” Clemetson, *supra* note 335; *see also* EPIC Report, *supra* note 336.

342. Clemetson, *supra* note 335.

343. *See* Carrie Pixler, *Setting the Boundaries of the Census Clause: Normative and Legal Concerns Regarding the American Community Survey*, 18 WM. & MARY BILL RTS. J. 1097, 1124 (2010)

[The Deputy Director of the U.S. Census Bureau] also admitted concern about how Homeland Security would use the data, but stated the Census Bureau did not maintain the “authority to determine which organization gets which information. . . . The only way we can guarantee that no one will ever be harmed by our information is to release nothing . . . .”

*Id.* (quoting Clemetson, *supra* note 335).

344. *Beydoun, supra* note 97 at 168–71.

345. *Id.*

census, it can be more expansively interpreted as a suspect classification that binds those who check it to the embedded tropes and misrepresentations attached to MENA identity.

Selecting a racial box on the U.S. census is far more than merely an act of ethnic or racial identification—it is also political speech. Racial identification is an express manifestation of membership within a state-recognized ethnic group or racial community. Thus, racial classification is also a mode of political speech protected by the First Amendment. This is especially true for Arab Americans, whose identity is acutely politicized because of entrenched historical stereotypes and images linked to turbulent events in the Arab World.

With the expansion of CVE programming, which “target[s] political and religious speech,”<sup>346</sup> an Arab American that checks off “MENA” and identifies as “Arab” on the secondary box may be exposed to enhanced surveillance. James Zogby, President of the Arab American Institute, cautions, “[h]ow can you get people to comply when they believe that by complying they put at risk their personal and family security?”<sup>347</sup> Indeed, opting to check MENA on the Census is, by and large, an assumption of the de jure and de facto risks associated with that identity.

Arab or MENA identity during the War on Terror may be interpreted as a proxy for a specific political perspective or disposition. Therefore, checking off MENA on the 2020 U.S. census, and then subsequently filling in “Palestinian” or “Arab American” on the secondary box,<sup>348</sup> may signal affiliation with a negative stereotype or feared entity. Furthermore, although the Census Act does not directly ask applicants about their religious affiliation,<sup>349</sup> analysts examining demographic data about Arab Americans will be able to determine the religious and sectarian associations of individuals of interests based on a formula that includes surname, nationality, residence in or proximity to a concentrated community (i.e., Iraqi Shiite Americans in East Dearborn and Detroit, Michigan), and even date of arrival to the United States.

### C. *A People Divided*

Arab Americans are a people that trace their ancestry back to the Arab World.<sup>350</sup> A fluidly shifting social construction itself,<sup>351</sup> Arab

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346. Akbar, *supra* note 13, at 828.

347. Clemetson, *supra* note 335, at 2330.

348. *2015 Census Update*, *supra* note 17, at 17.

349. 13 U.S.C. § 221(c) (2012).

350. A heterogeneous population along lines of nationality, religion, phenotype, and political

identity was divided along religious lines during the Naturalization Era. The courts found Arab Christians to be white by law in 1915,<sup>352</sup> while Arab Muslims were not ruled to be white until 1944.<sup>353</sup> The *Mohriez* ruling commenced a seventy-one-year period of legal consensus regarding the racial designation of Arab Americans as white,<sup>354</sup> which will come to a close if the proposed MENA box is added to the 2020 U.S. census.

Even if the MENA box is adopted in 2020, a subset of Arab Americans will continue to select the White box on the U.S. Census. On the other hand, the benefits outlined in Part II.A will motivate others to check the proposed MENA box. This Section examines the many factors that shape competing and conflicting modalities of Arab American racial identification, which is certain to continue even with the per se reform and reclassification of Arab American identity.

### 1. Arab Americans as Per Se White

Closer surveying of MENA communities at large, and Arab Americans in particular, reveals that certain elements within both are opposed to reform and reclassification. In other words, many Arab Americans are content—and embrace the benefits associated—with being classified as white.<sup>355</sup> Other segments of the Arab American population have effectively assimilated into the broader white milieu, disassociating and disconnecting themselves from Arab identity.<sup>356</sup> These subsets of the general Arab American population, which tend to

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perspective, Arab American identity is built upon a shared language, customs, and history. Perhaps most saliently today, “the modern contours of Arab American identity” are based on “Pan-Arabism”—a secular framing of Arab identity built upon the vision of a trans-national Arab nation or community. See YOUSSEF M. CHOUEIRI, *ARAB NATIONALISM: A HISTORY: NATION AND STATE IN THE ARAB WORLD* 82–92 (2000), for a comprehensive description of Pan-Arabism, which establish the modern contours of Arab American identity.

351. DELGADO & STEFANCIC, *supra* note 2, at 7.

352. *Dow v. United States*, 226 F. 145, 148 (4th Cir. 1915) (holding reversed earlier decisions, and ruled that Syrian Christians were white by law, and thus, could be naturalized as American citizens).

353. *Ex parte Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944) (holding that Arab Muslim immigrants could be naturalized as American citizens).

354. *Id.*

355. See generally Michelle Khalife, *Not Quite White: The Diary of a Lebanese American*, 1 *CRITICAL STUD. J.* 191, 193–95 (2008) (providing for a Lebanese American woman’s account of the social and psychological benefits associated with seeking to pass as white).

356. See Tehranian, *supra* note 12, at 1222, where John Tehranian defines (racial) “conversion” as “the act of trying to be something one is not.” Tehranian distinguishes conversion from “passing,” a related act, whereby “one acknowledges one identity but nevertheless attempts to hide that identity.” *Id.*

oppose the proposed MENA box, will likely continue to identify as white even after the box's prospective adoption in the 2020 U.S. census.

Arab Americans that have multigenerational roots in the United States and have attained a specific degree of assimilation may likely continue to identify as white on the U.S. census.<sup>357</sup> Sizeable segments of the Syrian and Lebanese American communities—who comprised the overwhelming majority of the initial immigrant waves in the late nineteenth and early twentieth centuries—have comparatively attained the greatest degree of assimilation within the broader Arab American population.<sup>358</sup>

Therefore, older generation Arab Americans tend to favor identifying as white,<sup>359</sup> while recent immigrants favor minority or MENA identity. “Whereas descendants of the first and second generations of Lebanese and Syrian immigrants valued the ‘white’ status that their parents’ or grandparents’ had fought for, the new immigrants were less likely to see themselves as ‘white’.”<sup>360</sup> This generational divide also intersects with phenotypic, nationality, and religious difference. Older generation immigrants who largely identify as white are overwhelmingly Levantine and Christians,<sup>361</sup> while subsequent and modern immigrant waves hail from all over the Arab World and are primarily Muslims.<sup>362</sup>

Second, Arab American Christians that fear the possible conflation of

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357. This assimilation is reflected in the relatively greater homeownership and median household income rates for Syrian and Lebanese Americans, which far exceed the figures for newer Arab American groups (such as Moroccan and Iraqi Americans) and even the national averages. See ASI & BEAULIEU, *supra* note 79, at 3 (“The homeownership rate was 66.6% for the nation, compared with 59.6% for Arab owner-occupied housing units. The homeownership rate for Lebanese and Syrians was above the national level at 71.6% and 69.2%, respectively.”). Economic upward mobility, for multi-generational Syrian and Lebanese Americans, has in part strengthened identification as white. *Id.* at 5 (“The median household income for all households in the United States in 2010 dollars was \$51,914 . . . . Lebanese households had the highest median income (\$67,264) . . . .”). And very well, may motivate segments of these communities to prefer the white designation over the proposed MENA box. *Id.* at 3–5.

358. NAFF, *supra* note 119, at 15.

359. *Id.* at 9. Here, Naff discusses how early Syrian immigrants, and their progeny, “willingly acquiesced to Americanization and . . . to the benefits of becoming American.” Naff deploys American as a proxy for white, both in terms of a culture and a race—the latter because the letter of the law, until 1952, mandated whiteness as a prerequisite for naturalization. Thus, as argued by John Tehranian, the *per se* requirement that an immigrant be ruled white also moved immigrants to “perform whiteness,” both inside and outside of the courtroom. Tehranian, *supra* note 63, at 817. “‘I’m not for it. . . . I feel I’m a Mayflower American,’ said Eide Alawan, a 74-year-old son of a Syrian immigrant whose roots are mostly Arab.” *U.S. Mulls Middle-East North Africa Category for 2020 Census*, *supra* note 176.

360. Kayyali, *supra* note 24, at 1303.

361. NAFF, *supra* note 119, at 12.

362. Suleiman, *supra* note 1, at 1.

the MENA box with Muslim identity,<sup>363</sup> an entrenched and pervasive stereotype,<sup>364</sup> may continue to check off White.<sup>365</sup> Because of the discursive association of the Middle East and North Africa with Islam, MENA identity will be viewed as a proxy and placeholder for Muslim American, which is linked to terror and radicalization suspicion. Therefore, an aversion to being identified or linked to Muslim identity has driven a segment of the Arab American Christian population to oppose the MENA box.

Third, fear of pronounced surveillance and policing may motivate many Arab Americans to continue to select the White box on the census.<sup>366</sup> Although many applicants may favor identifying as Arab American and selecting the MENA box, this fear will spur many people to identify against their existential inclination or preference, and in turn, diminish the aggregate count of Arabs and MENAs on the 2020 U.S. census.<sup>367</sup> Thus, undercounting will be born out of chilled racial identification, instead of the per se negation of Arab American identity that presently exists. Or, stated simply, the conflation of MENA with terrorism will persuade many Arab Americans to “hide under the white race label,”<sup>368</sup> and use the per se classification as a “covering” device.<sup>369</sup>

Together, because of selective identification as white and the chilled identification of MENA for fear of state surveillance and private discrimination, a considerable percentage of the roughly 4 million Arab Americans will remain within the white classification.<sup>370</sup> The proposed MENA category may even embolden the attachment to per se whiteness by subsets of the Arab American population, who may already or eventually informally disidentify as Arab American or seek (or continue) to “pass” as white.<sup>371</sup> Therefore, even if the MENA box is

363. Joshi, *supra* note 133, at 212. “[A] phenomenon wherein the fact of an individual’s *race* creates a presumption as to her *religious* identity . . . whereby a specific religion becomes identified by a direct or indirect reference to a real or imagined ethnic/racial characteristic.” *Id.* at 212, 216 (emphasis in original).

364. *See supra* note 257 and accompanying text.

365. The number of Arab American Christians that check off White may be quite high, given that 63% of Arab Americans today identify as Christian. Beydoun, *supra* note 6, at 40.

366. Kayyali, *supra* note 24, at 1313.

367. If the proposed MENA box is in fact adopted in 2020.

368. *Id.*

369. Tehranian, *supra* note 12, at 1218, 1222.

370. The real population is expected to be larger in 2020. *See* AAI DEMOGRAPHICS, *supra* note 78.

371. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002). Yoshino defines passing as “[an attempt] to change or hide her identity” and the latter as strategic concealment of stigmatized

adopted in 2020, a sizeable percentage of the broader Arab American population will continue to check off the White box. Consequently, while the MENA box may diminish undercounting, invisibility and other associated concerns, its adoption will not entirely solve them—at least, not in the short term.

## 2. Arab Americans as Per Se MENA

The existential, political, legal, and economic interests mobilizing Arab American support for the MENA box indicates that a slanted majority of the population will check the box if it is added to the 2020 census form. As outlined in Part II.A, these interests, jointly and severally, would bring forth a range of immediate benefits. In addition, the MENA box will also drive long-term gains in establishing a greater foothold in almost every sphere of American life and society. Therefore, for many Arab Americans driven by these interests, the MENA box functions as a means toward claiming a range of benefits.

In addition to the pursuit of interests, the erosion of Arab American civil liberties—particularly after 9/11—has “raised the ethnic consciousness” of significant segments of the Arab American population.<sup>372</sup> This is particularly the case for Arab American Muslims, who face increased stigmatization on religious and ethnic identity grounds—especially after 9/11: “[t]he demonization of Islam and its conflation with terrorism, in particular, has enhanced the sense of minority status” among Arab American Muslims.<sup>373</sup> While covering or passing is more accessible to Arab American Christians,<sup>374</sup> these hiding devices are less accessible to Arab American Muslims, who are discriminated along ethnic (Arab), religious (Muslim) and “intersectional” lines.<sup>375</sup> Certainly, Arab Americans who are also Muslim are exposed to both racial and religious animus, particularly those who conspicuously express their religion.

This experience is particularly true for Arab American Muslims who outwardly express their religious identities, against “increased pressure to perform a mainstream American identity.”<sup>376</sup> Conspicuous

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aspects of identity. *Id.* at 772, 780.

372. Kayyali, *supra* note 24, at 1300.

373. Beydoun, *supra* note 40.

374. Tehranian, *supra* note 12, at 1222.

375. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1282–83 (1991) (framing “intersectionality” to highlight and illustrate the compounded discrimination endured by individuals who belong to two or more marginalized groups).

376. DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN “POST-



expressions of religious identity—such as Muslim men who don the beard,<sup>377</sup> Muslim women who wear the *hijab*<sup>378</sup> or entire households that fast during the month of Ramadan—enhance the “likelihood that one is imagined as a terrorist or terrorist sympathizer.”<sup>379</sup> Anti-Muslim bigotry and converging racial and religious animus targeting Arab American Muslims<sup>380</sup> have intensified their sense of marginalization, and in turn, their consciousness and identification as “people of color.”<sup>381</sup> As a consequence of converging racial and religious animus, Arab American Muslims are more likely than their Christian counterparts to identify as racial minorities—and check off MENA—if the box is adopted in 2020.

Arab American organizations, as discussed in Part II.A, are highly invested in the implementation and preservation of a MENA box. Therefore, leading Arab American groups, including AAI, ADC<sup>382</sup> and ACCESS,<sup>383</sup> will continue to mobilize their constituents to check off MENA, and, very likely, encourage them to fill in “Arab American” in the secondary box.<sup>384</sup> Greater identification along these lines enhances access for these organizations to public and private halls of power, foundation and government grants, the ears of politicians, and a rising base of supporters duly counted by the census.

Thus, beyond merely supporting the adoption of the MENA box on the 2020 census, Arab American organizations will continue to look to

RACIAL” AMERICA 168 (2013).

377. “For Muslim men . . . donning a beard demonstrates piety, and emulation of Islam’s final and foremost messenger, Mohammed.” Khaled A. Beydoun, *Islam Incarcerated: Religious Accommodation of Muslim Prisoner before Holt v. Hobbs* 1 (Feb. 7, 2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2561845](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561845).

378. Headscarf (Arabic).

379. CARBADO & GULATI, *supra* note 376, at 168.

380. Crenshaw, *supra* note 375, at 1282–83.

381. George Hunter & Mark Hicks, *Police, Arab Group At Odds Over Kroger Attack*, DET. NEWS (Feb. 20, 2015), <http://www.detroitnews.com/story/news/local/wayne-county/2015/02/20/police-dispute-racial-motive-dearborn-supermarket-attack/23758641/> (following an attack on an Arab man in a grocery store, the head of the ADC-Michigan chapter referred to the victim and Arab Americans at large as “people of color”).

382. Press Release, American-Arab Anti-Discrimination Committee, *Action Alert: Support the MENA Category on the U.S. Census* (Jan. 8, 2015), <http://www.adc.org/2015/01/action-alert-support-the-mena-category-on-the-u-s-census/>.

383. ACCESS, the leading Arab American direct services organization in the United States, considers Arab Americans a “community of color.” Kayyali, *supra* note 24, at 1300. In line with this position, ACCESS’ leadership has long pursued minority status both locally and nationally. *Id.*

384. *2015 Census Update*, *supra* note 17, at 17.

drum up their constituents' numbers on subsequent censuses.<sup>385</sup> In the process, these organizations will seek to ensure that Arab American demographical figures will continue to rise along actual immigration trends and increased canvassing efforts to convince Arab Americans to identify as MENA instead of white on the census. Organizational muscle invested in mobilizing per se identification as MENA will, presumptively, spur more and more community buy-in after its prospective adoption, and subsequently, establish the category as a permanent fixture on the U.S. census application. This organizational commitment, even after adoption of the proposed MENA box, ensures that Arab Americans will be counted—instead of undercounted—by the census for better and for worse.

## VI. CONCLUSION

Deemed white by law since 1944,<sup>386</sup> the 2020 U.S. census may afford Arab Americans with the unprecedented opportunity to identify as MENA, and thus, nonwhite. This Article is the first scholarly intervention examining this proposed reform, the converging government interests spurring this moment of “racial progress,” and the civil liberties concerns it raises for Arab Americans.

The Census Bureau currently classifies people from the MENA region as white. However, the agency has proposed a standalone MENA box for the decennial census of 2020.<sup>387</sup> This proposed racial category, if adopted, would provide Arab Americans with an opportunity to identify as MENA and, in turn, nonwhite—a formal designation that realigns with enhanced government surveillance and promotion of local CVE policing of Arab, MENA, and Muslim Americans. Policing of these communities will only grow more acute with every domestic attack committed by an Arab or Muslim, which oftentimes brings about collateral and collective guilt along perceived religious and racial lines.<sup>388</sup>

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385. The decades-long work of Arab American organizations, particularly AAI, ADC, and ACCESS evidences continued support of the MENA box, even after its adoption.

386. Beydoun, *supra* note 6, at 66.

387. *2015 Census Update*, *supra* note 17, at 17.

388. The most recent violent attack involving Muslim gunmen took place on December 2, 2015, in San Bernardino, California. Paloma Esquivel, Joseph Tanfani, Louis Sahagun & Sarah Parvini, *Obama: “This Was an Act of Terrorism Designed to Kill Innocent People,”* L.A. TIMES (Dec. 6, 2015), <http://www.latimes.com/local/lanow/la-me-ln-san-bernardino-terror-probe-widens-as-obama-set-to-speak-20151206-story.html>. The shootings, which involved two shooters who were (at least nominally) Muslim, unfolded at Inland Regional Center, and left fourteen dead and twenty-one injured. *Id.*

While touted as a moment of racial progress, the timing of the proposed 2020 census reform also raises many concerns. This Article unveils the converging government interests in establishing a standalone MENA box, which if implemented will: first, augment the precision of government surveillance and monitoring programs; second, create a formal binary for Arab Americans whereby voluntarily checking the “MENA” box signals association with national security suspicion, while checking “White” mitigates that suspicion; and third, divide Arab Americans into two per se races.

These perils, weighed in conjunction with an enticing lot of existential, political, legal, and economic interests, beg the question: should Arab Americans check off on the proposed MENA box for the 2020 U.S. census? With less than five years before its prospective adoption, should citizens and civil society actors continue to support the proposed reclassification? Forging ahead means enhancing vulnerability to pronounced suspicion and surveillance, while opposing the MENA box is tantamount to capitulating to the status quo—precisely the present paradox that has perplexed Arab Americans for nearly seventy-one years.

The benefits that will derive from the MENA box are plenty. But so are the perils. If history is to repeat itself, the decision will not be one reserved for Arab Americans to make, but rather a judgment to be made, and handed down, by the State.