

# ISLAM IN THE MIND OF AMERICAN STATE COURTS: 1960 TO 2001

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The standard story about Islam and America is that September 11, 2001 marked a watershed in relations between the United States and its Muslim citizens; indeed, for Muslims all over the Western world.<sup>1</sup> Whether it has, as Professor Mary Dudziak has posed, “changed everything”<sup>2</sup> depends on what “everything” means. Certainly, since 2001, American Muslims have experienced continuing distrust in some of their communities and among some non-Muslim citizens,<sup>3</sup> as well as waves of support from non-Muslims who understand their plight. Historians tell us that narratives are important for how we understand the world:

[Historians] want to believe (although we also often deny or repress this) that the past was ordered in some discernible way that we can discover and describe. . . . [However,] coherence is not out there, in the past, buried with the artifacts of other times and capable of being dug up; instead, we impose our desire for coherence, our refusal and inability to live without it, on the past as we construct in our studies, and we accomplish this transformation through the power and instruments of narrative.<sup>4</sup>

Reviewing the historical work on Muslims in America, there appear to be at least two “storylines” on them and non-Muslim Americans’ perceptions of them; both stretch back to before the American founding. One storyline about Islam in America focuses on the contribution of Muslims, like other immigrant groups, to creating the contemporary American melting pot. This storyline recognizes the exploits of Muslim explorers and pioneers like Esevanico Dorantes, who came to America in 1527, and Anthony Jansen van Salee, who settled in New Netherlands.<sup>5</sup>

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<sup>1</sup> Christine Ludowise, Review of *September 11 in History: A Watershed Moment?* by Mary L. Dudziak (Editor), 14 LAW & POL. BOOK REV. (Feb. 2004), <http://www.lawcourts.org/LPBR/reviews/Dudziak204.htm>.

<sup>2</sup> *Id.*; see also Abstract, Mary L. Dudziak, *September 11 In History: A Watershed Moment?* (2003), [https://works.bepress.com/mary\\_dudziak/7/](https://works.bepress.com/mary_dudziak/7/) (last visited July 27, 2018).

<sup>3</sup> See, e.g., Mucalit Balici, *Being Targeted, Being Recognized; The Impact of 9/11 on Arab and Muslim Americans*, 40 CONTEMP. SOC. 133 (2011) (discussing targeting of Arabs and Muslims as a “suspect population” after 9/11). This suspicion predated the events of September 11, however. See, e.g., Patrice Brodeur, *The Changing Nature of Islamic Studies and American Religious History (Part 1)*, 91 MUSLIM WORLD 71 (2001).

<sup>4</sup> Brodeur, *supra* note 3, at 71 (quoting Robert A. Orsi, “Sex, Pain and Death, and the American Protestant Establishment, Some Comments on William R. Hutchison, ed., *Between the Times: The Protestant Establishment in America, 1900–1960*” 1).

<sup>5</sup> See Race Capet, *Created Equal: Slavery and America’s Muslim Heritage*, 60 CROSSCURRENTS 549, 549–551 (2010); KAMBIZ GHANEABASSIRI, *A HISTORY OF ISLAM IN AMERICA: FROM THE NEW WORLD TO THE NEW WORLD ORDER* 10–12 (1st ed. 2010); Marie A. Failinger, *Islam in the*

Similarly, it acknowledges the influence of educated and influential African Muslim imported slaves like Job Ben Solomon, whose celebrated life as an educated Maryland slave led to celebrity in London and freedom in Gambia.<sup>6</sup> In this storyline, we hear the resonance of the immigration of other Americans, from Puritans and Germans to Vietnamese and, in the case of Syrian Muslims immigrating from modern-day Lebanon, escaping economic and political oppression in the Ottoman Empire.<sup>7</sup> We can follow early twentieth-century Muslims, like Europeans before them, as they move to populate the Midwest in places like Detroit, Michigan; Cedar Rapids, Iowa; and Ross, North Dakota.<sup>8</sup>

In this first storyline, we hear of the influence that Islam had on non-Muslim Americans, like Thomas Jefferson, and perhaps other Framers who were paying attention to the work of Muslim jurists and governors as they considered the framework for the U.S. Constitution.<sup>9</sup> We learn that other American intellectuals—Ralph Waldo Emerson among them—were similarly influenced by Islamic sources.<sup>10</sup> And we acknowledge that, just as African slaves and other Muslims were being converted to Christianity,<sup>11</sup> so

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*Mind of American Courts: 1800 to 1960*, 32 B.C. J. L. & SOC. JUST. 1, 4–6 (2012). Capet notes that some of these Muslims were Moriscos, Muslims apparently converted to Christianity; however, it is often not clear whether they were actual converts or only appeared to convert. Capet cites the example of Giorgio Zapata, who became rich from Peru's silver mines, but returned to Istanbul, and his former name and religion. Capet, *supra* note 5, at 550.

<sup>6</sup> See Capet, *supra* note 5, at 556 (also describing four slaves who successfully presented a petition to the South Carolina House of Representatives to free them, since they had been made prisoners of war, who were supposed to be freed by an English captain).

<sup>7</sup> Failing, *supra* note 5, at 8.

<sup>8</sup> Richard Freeland, *The Treatment of Muslims in American Courts*, 12 ISLAM & CHRISTIAN-MUSLIM RELATIONS 449, 451 (noting that the first building built specifically as a mosque was built in Cedar Rapids in the 1920s); Failing, *supra* note 5, at 8.

<sup>9</sup> See generally Kevin J. Hayes, *How Thomas Jefferson Read the Qur'an*, 39 EARLY AM. LITERATURE 247 (2004); Azizah Y. al-Hibri, *Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing?*, 1 U. PA. J. CONST. L. 493, 494–95 (1999); see also Peter Manseau, *Why Thomas Jefferson Owned a Quran*, SMITHSONIAN (Jan. 31, 2018), <https://www.smithsonianmag.com/smithsonian-institution/why-thomas-jefferson-owned-qur-1-180967997/>.

<sup>10</sup> Suzan Jameel Fakahani, *Islamic Influences on Emerson's Thought: The Fascination of a Nineteenth Century America Writer*, 18 J. MUSLIM MINORITY AFF. 291, 291, 298 (1998) (noting that a number of American writers, including Emerson, made a "pilgrimage" to Palestine and Egypt, and Emerson in particular was much influenced by Islam and Muslim culture and values, "[particularly] Islamic social values such as hospitality, personal nobility, and regard for women.").

<sup>11</sup> The Smithsonian Institution has captured the stories of slaves such as Omar ibn Said, captured in Senegal, sold in Charleston in 1807, arrested after an attempt to escape, and touted as a Christian convert who "wore no bonds but those of slavery" through articles in Boston and Philadelphia newspapers. The story notes that his Arabic writings on the walls of his prison make it clear that his "conversion" was purely for practical reasons. Before all the things he valued in life had been taken from him, Said said he had prayed as a Muslim, but now he would say the Lord's Prayer,

too were white and black Americans—like Methodist missionary Reverend Norman and Manila consul Alexander Russell Webb—being converted to Islam.<sup>12</sup>

The other storyline, which also stretches back to before the founding, is the story of Muslims as outsiders and always alien, as exotic or menacing, and as social and political, even theological threats to “the real America.”<sup>13</sup>

Due to the influence of late 17th and early 18th century European distortions of Islam, Muslims were branded by many Americans as “infidels” whose “combined use of false religion and military could subdue” America.<sup>14</sup> Prominent anti-slavery Americans like Benjamin Franklin used distortions of North African Islam to make their point.<sup>15</sup> Like the modern-day Somali pirates that have frightened and angered the Western world,<sup>16</sup> Americans during the founding were steeped in tales told since the 12th and 13th century crusades about Barbary pirates who would enslave Christians.<sup>17</sup> These lurid stories were taken up by prominent theologians like the American preacher Cotton Mather to illustrate the “oppressing” of the “Mahometan Tempters,” the “fierce monsters of Africa.”<sup>18</sup> Historian Patrice Brodeur notes, quoting history professor Robert J. Allison:

Americans at the time saw these episodes as part of a contest between Christians and Muslims, between Europeans and Turks or Moors, and ultimately, between what came to be called civilization and what the newly civilized world would define as barbarism. Americans inherited this understanding of the Muslim world and pursued this enemy more relentlessly than the Europeans

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he revealed in his writings. But he also peppered his text with prophetic declarations of divine wrath directed at the country that deprived him of his freedom. “‘O people of America, O people of North Carolina,’ he wrote. ‘Do you have a good generation that fears Allah? Are you confident that He who is in heaven will not cause the earth to cave in beneath you, so that it will shake to pieces and overwhelm you?’”; see Manseau, *supra* note 9.

<sup>12</sup> Freeland, *supra* note 8, at 451 (noting that the revival of interest in Islam by the African American community can be traced back to lectures by Edward Wilmot Blyden in the 1870s and 1880s, and the Black Muslim movement can be traced back to 1913 with the establishment of the Newark-based Moorish-American Science Temple by Noble Drew Ali).

<sup>13</sup> See, e.g., al-Hibri, *supra* note 9, at 493 (noting that immigrant Muslims are seen as “alien to our system of democracy and human rights, and hence somewhat suspect.”).

<sup>14</sup> *Id.* at 494.

<sup>15</sup> Thomas S. Kidd, “*Is it Worse to Follow Mahomet than the Devil?*” *Early American Uses of Islam*, 72 AM. SOC’Y CHURCH HIST. 766, 766, 786 (2003).

<sup>16</sup> See, e.g., Jeffrey Gettleman, *Lessons from the Barbary Pirate Wars*, N.Y. TIMES (Apr. 19, 2009), <https://www.nytimes.com/2009/04/12/weekinreview/12gettleman.html>.

<sup>17</sup> Brodeur, *supra* note 3, at 75–76.

<sup>18</sup> Mukhtar Ali Islani, *Cotton Mather and the Orient*, 43 NEW ENG. Q. 46, 51–52 (1970).

had done.<sup>19</sup>

In this alternative story, Muslims were portrayed as imposters who had created a religious “[m]edley made up of Judaism, the several Heresies of the Christians then in the East, and the Old Pagan Rites of the Arabs, with an indulgence to all Sensual Delights.”<sup>20</sup> American colonists often associated Muslims, as with Catholics, with the Anti-Christ.<sup>21</sup> Well-known religious leaders, such as Roger Williams, as well as prominent political leaders like Jonathan Edwards’ son-in-law, Aaron Burr, contributed to this storyline.<sup>22</sup>

Vices widely attributed to Muslims at the turn of the 18th century were cunning and fraud, carnality, wickedness, and the indiscriminate use of violence to gain power over non-Muslims.<sup>23</sup> Perhaps most important in the treatment of Muslims in early American law, medieval and later scholars portrayed Islamic culture as “static-shaped, organized and regulated by unchanging religious prescription . . . oppressive and sensual at the same time, both covering up women and exposing them to the exploitation of men and the slavery of the harem.”<sup>24</sup>

The state-reinforced racialization of Muslims in the early 20th century arose from and further embellished and hardened the storyline that Muslims were foreigners, like Asian aliens who could never be domesticated.<sup>25</sup> Muslims were excluded from the United States through several Congressional acts from 1882–1917 that barred Asians from entering the country.<sup>26</sup> They were also discouraged by bans of “polygamists[] or persons who admit their belief in the practice of polygamy” in 1891; literacy requirements for immigrants imposed in 1917; and country immigration quotas that favored immigrants from northern and western Europe.<sup>27</sup>

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<sup>19</sup> ROBERT J. ALLISON, *THE CRESCENT OBSCURED: THE UNITED STATES AND THE MUSLIM WORLD, 1776-1815*, xv (1995); Brodeur, *supra* note 3, at 76.

<sup>20</sup> Kidd, *supra* note 15, at 774 (quoting HUMPHREY PRIDEAUX, *THE TRUE NATURE OF IMPOSTURE DISPLAYED IN THE LIFE OF MAHOMET* 13 (3d ed. 1698)).

<sup>21</sup> PRIDEAUX, *supra* note 20, at 7; Kidd, *supra* note 15, at 774.

<sup>22</sup> Kidd, *supra* note 15, at 779–80.

<sup>23</sup> *Id.* at 771–75.

<sup>24</sup> See Christina Michelmore, *Old Pictures in New Frames: Images of Islam and Muslims in Post World War II American Political Cartoons*, 23 J. AM. & COMP. CULTURES 37, 43 (2000).

<sup>25</sup> Failing, *supra* note 5, at 14. For a discussion of the treatment of other immigrant groups as “other,” see Marie A. Failing, *Recovering the Face-to-Face in American Immigration Law*, 16 S. CAL. REV. L. & SOC. JUST. 319, 329–34 (1999).

<sup>26</sup> Failing, *supra* note 5, at 9.

<sup>27</sup> The Asiatic Barred Zone, promulgated in 1917, excluded admissions of anyone on the content of Asia except from those islands already in U.S. possession; and the Immigration Act of 1924 reduced immigration quotas from most other Muslim-dominated nations to about 100 persons per year. *Id.* at 9 (citing GHANEABASSIRI, *supra* note 5, at 151). While the 1952 McCarran-Walter

This second storyline about Muslims was reinforced in the popular mind in the 20th century, as evidenced in Christina Michelmore's study of American political cartoons after World War II.<sup>28</sup> Beginning with the founding of Israel in 1948, these cartoons portrayed Arabs (equated with Muslims) as bullies, as "robed shayks, befezed gentlemen, scantily clad dancing girls, and . . . overly clad harem girls."<sup>29</sup> Once again, after the 1970s oil crises, these "malevolent, alien, rodent-like Arabs" were portrayed in the popular press as "leering, capricious, [and] irresponsible" persons who wielded power over America's presumed right to access to oil; these cartoons suggested that their "greed illegitimately threaten[ed] the American way of life."<sup>30</sup> Then, after the Iranian revolution in 1979, the Ayatollah Khomeini "cast a long shadow . . . ;" his images in cartoons were consistently "unrelievedly evil and universally harrowing."<sup>31</sup> In these images and words, he was portrayed as "a fanatical, threatening figure—an evil Aladdin who calls forth the genie of violence and anarchy . . . the intolerant and intolerable agent of the devil, the grim reaper, a satanic force at work in the world."<sup>32</sup>

If we are to uncover lingering implicit biases against Muslims that may inhibit their attempts to find equal justice in American state courts, as well as in political and social life generally, it is instructive to consider how these courts responded to this popular view of Muslims as evil and threatening outsiders, full of trickery and potentially violent. On one hand, American judges are products of their own communities; they read the same papers, watch the same TV or Twitter feeds, and have the same discussions about politics with friends and family that other Americans do. On the other hand, judges are an unusually well-educated group of Americans: in 2018, American lawyers represented less than 0.4% of the American populace,<sup>33</sup> and the trial and appellate judges who manage and decide these cases are a small and especially well-seasoned fraction of that number. Given that American judges are expected to be impartial and look for irrelevancies and illegitimate bias, one might expect—or at least hope—that their treatment

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Act lifted racial quotas, it retained significantly small country quotas for these nations. *Id.* at 9 (citing Freeland, *supra* note 8, at 452).

<sup>28</sup> Michelmore, *supra* note 24, at 39–40.

<sup>29</sup> *Id.* at 38–40.

<sup>30</sup> *Id.* at 41.

<sup>31</sup> *Id.* at 41–42.

<sup>32</sup> *Id.* at 42.

<sup>33</sup> There were an estimated 326.9 million people living in the U.S. in 2018, *U.S. Population*, WORLDOMETERS, <http://www.worldometers.info/world-population/us-population/> (last visited July 27, 2018) and there were an estimated 1.34 million lawyers. *Number of Lawyers in the U.S. from 2007 to 2018*, STATISTA <https://www.statista.com/statistics/740222/number-of-lawyers-us/> (last visited July 27, 2018).

of Muslims would emphasize religious commitments only where they are extremely relevant to the case at hand, not reflecting either explicit or implicit bias against these faiths; and expect prosecutors, lawyers, and juries to do the same. One would also hope that American judges' opinions would reflect respect for the differences between Islam and the Christian Western tradition that are worthy of respect, and, where there is an unavoidable conflict between American values and Islamic law, articulate fully and convincingly why American mores and law must prevail.

In an earlier study, I looked at how American courts portrayed Islam and Muslims in cases from 1800 to 1960.<sup>34</sup> This project continues that review in American state courts from 1960 until September 11, 2001.<sup>35</sup> The purpose of this project is not to construct some overarching theoretical framework to explain American social and legal views of Islam and Muslims, though I will necessarily interpret what the cases say to some extent. Given the lengthy time period involved, the number of cases in which Muslims or Islam are referenced, and the fact that these cases come from many states,<sup>36</sup> it seemed prudent to defer to others who have

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<sup>34</sup> See Failing *supra* note 5.

<sup>35</sup> I have limited this review to state court cases because of the sheer volume of cases in which Muslims or Islam were mentioned in Westlaw searches. Moreover, because cases involving prisoner complaints predominate in both federal and state courts during this period, and because American courts tend to be naturally suspicious of prisoner complaints—which might skew consideration of cases in which non-incarcerated Muslims appear—I have eliminated these cases from review as well. Federal court cases are well worthy of study if only to consider whether the selection criteria for, and lifetime appointments of, federal judges have made any difference in the ways that they perceive their role when Muslim litigants are involved.

<sup>36</sup> Nor can I promise that this review has captured every such case; my Westlaw search was limited to the 575 or so cases that were flagged with the terms “Islam,” “Muslim,” “Moslem,” “Qur’an,” or “Koran” because these are, in my experience, the most common cases in which Islam is actually discussed. In some cases, these terms came up because, for example, a litigant or witness was named “Islam,” or “Muhammad.” These are excluded from my discussion, as were most of the cases in which courts referred to Islam as part of a string of other religions, such as in challenges to holiday displays. *See, e.g.*, *Conrad v. City of Denver*, 724 P.2d 1309, 1311 (Colo. 1986) (in which a witness testified that the county Christmas Nativity scene was idolatry contrary to the Koran); *see also Perumal v. Saddleback Valley Unified Sch. Dist.*, 243 Cal. Rptr. 545, 564 (Ct. App. 1988) (Crosby, J., dissenting), *overruled by Van Schoick v. Saddleback Valley Unified Sch. Dist.*, 104 Cal. Rptr. 2d 562 (Ct. App. 2001) (in a student free speech case, mentioning the Koran as part of a series of holy books that might be distributed at school); *State v. T.B.D.*, 656 So. 2d 479, 482 (Fla. 1995) (cross-burning statute applied to juvenile “plays no favorites—it protects equally the Baptist, Catholic, Jew, Muslim, the Communist, Bircher, Democrat, Nazi, Republican, Socialist; the African-American, Caucasian, Haitian, Hispanic, [N]ative American, Vietnamese. . .”); *Foster v. State*, 748 S.W.2d 903, 908 (Mo. Ct. App. 1988) (death penalty case in which the prosecutor argued in closing, “[t]he Christians have the Golden Rule ‘Do unto others what you would have them do unto you.’ Muslims reversed this process, and the Koran says, ‘Do not do unto others what you would have him do unto you [sic]. . . .’”); *State v. Cribbs*, 967 S.W.2d 773, 783 (Tenn. 1998) (challenge to prosecutor’s mentioning holy books, including the Bible and the “Koran” in support of the death penalty); *Lawrence v. State*, 41 S.W.3d 349, 361 n.34 (Tex. App. 2001), *overruled by* 539 U.S. 558 (2003) (where the “Koran” is cited for the proposition that the

constructed critiques of the way American law as a whole has treated Muslims. Nor will I attempt to put these cases in the historical contexts in which they arose, including the actions and views of the political branches when these cases were decided. But I hope that a survey of these cases will be instructive as to the ways in which implicit biases can affect the quality of justice and illuminate the ways in which courts both reflected and overcame these biases.<sup>37</sup>

### I. ISLAM IN THE MIND OF AMERICAN COURTS: THEN AND NOW

In my previous survey of American references to Islam and Muslims, covering many of the 19th and early 20th century cases, I noted that American judges essentially followed the two storylines about Muslims described above, though certainly not with the exacerbated rhetoric used by cartoonists or influence-makers I have briefly recited.<sup>38</sup> In one storyline, Muslims are just as sincere and worthy of respect as Americans of other traditions, and Islamic law is a valuable research tool for determining how judges should interpret cases at least in some areas, such as usury.<sup>39</sup> Following the first storyline, courts sometimes commented favorably on the adherence of Muslims to Qur'anic principles.<sup>40</sup> They also declared, often, the equality of religions that the Bill of Rights protected.<sup>41</sup>

In the other storyline, judges accepted the stereotype that Islam is a primitive and autocratic religion that subjugates women, among other things.<sup>42</sup> In some references from 1800 to 1960, judges seem, to some extent, to accept the trope of the conquering “hordes” wielding “the Koran in one hand and a scimitar in the other.”<sup>43</sup> For example, some courts quoted President Adams’ view that the law of nations for Muslims conceived of “the state of nature as a state of war.”<sup>44</sup> They also portrayed the Qur’an

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three major religions—Christianity, Judaism, and Islam—disapprove of homosexual intimate behavior).

<sup>37</sup> For a discussion of the effect of implicit racial bias in the criminal system, *see generally* Robert Smith & Justin Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 25 SEATTLE U. L. REV. 795 (2012).

<sup>38</sup> *See generally* Failing, *supra* note 5.

<sup>39</sup> *Id.* at 19–21.

<sup>40</sup> *Id.* at 19.

<sup>41</sup> *Id.* at 24–27.

<sup>42</sup> *Id.* at 22.

<sup>43</sup> *Sw. Wash. Prod. Credit Ass’n v. Fender*, 150 P.2d 983, 994 (Wash. 1944); Failing, *supra* note 5, at 14.

<sup>44</sup> Failing, *supra* note 5, at 18 (citing *Reid v. Covert*, 354 U.S. 1, 58 n.8 (1957) (Frankfurter, J., concurring)).



(usually spelled Koran) as impractical and Islamic law as far removed from the law of Christian nations.<sup>45</sup>

As we move into the modern period, the references to Muslim and Islam tend to be less gratuitous and stereotypical, and it is rarer to find judges reaching for Muslims or Islam as an analogy to an unrelated case. The direct references describing Islam as a primitive, autocratic, or violent religion become harder to find. When the references arise, they are often particular to the specific legal subject at the heart of the case, which is how this article will be organized—into criminal law, family law, and other civil cases.

It is, however, interesting to see how often the courts mention that one of the parties or witnesses in the case is Muslim without any seeming relevance to the actual legal problem at issue. It is also unclear in many cases whether the courts mention these individuals' religious tradition simply because it fills in the legal narrative more fully, or because it serves to explain something about the character of the Muslim litigant or witness, for good or ill, or simply because the court finds it an interesting, perhaps exotic, fact about the participants.

It also appears that, for the most part, American judges seem insensitive to the fact that identification of one of the parties as Muslim may become a decisive factor in decision-making, given the social context in this period, especially in close cases. While the judges are willing to call out prosecutors and other attorneys who are clearly playing the religion card, in other cases where these identifications seem isolated or merely ignorant, some of these judges tended to shrug and declare the equivalent of harmless error.

In general, the criminal law cases present the most consistent examples of explicit or implicit bias against Muslims, often as prosecutors attempt to influence juries.<sup>46</sup> However, these biases are sometimes found in comments by not only the prosecutors but also the judges and defense counsel.<sup>47</sup> Black Muslims figure most prominently in these biased comments, and in the most notorious cases.<sup>48</sup> Sometimes, however, criminal courts are required to consider whether practices specific to Muslims—or claimed to be required by Islamic law—including dress, food, prayer and even the relationship of men and women—require any different treatment.<sup>49</sup> In most cases, courts decline to accommodate Muslims in these cases even when there are

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<sup>45</sup> *Id.* at 15–19.

<sup>46</sup> *See infra* Part II.

<sup>47</sup> *See infra* notes 138–40, 159.

<sup>48</sup> *See infra* Section A.

<sup>49</sup> *See infra* Part II.

implicit suggestions of links between Black Muslims and terrorism.<sup>50</sup> One issue worth further consideration is to ask why some of these courts even inject the litigants' religion into the case when it appears to have no direct relevance to either the legal issue or the relevant facts.

By contrast, in the family law cases during this period, there appear to be fewer clearly derogatory comments by judges or lawyers and more comments underscoring the importance of treating Muslim adherents like any other Americans.<sup>51</sup> However, the courts still struggle with questions about the reception of Islamic law or the law of majority-Muslim countries and whether practices that litigants claim are required by Islamic law should be deferred to or rejected on public policy grounds, particularly as they touch on gender issues.

The other civil law cases are smaller in number, but substantively cover a large number of areas. Most prominent, though few, are the employment discrimination cases, where courts not only have to make traditional factual determinations about whether employers or fellow employees have harassed or otherwise discriminated against Muslims on religious grounds—they also must decide whether non-discrimination statutes require accommodations for Muslims on prayer, dress, and food.<sup>52</sup> In the smattering of other cases, however, we do occasionally see resonances of the issues that are prominent in the criminal cases, from the treatment of Black Muslims to the gratuitous references to Muslims' faith as their cases are adjudicated.<sup>53</sup>

## II. CRIMINAL CASES

In the criminal cases from 1960 to September 11, 2001, some recurring themes emerge despite the small sample size. First, the most prominent and consistent negative references to Muslims involve members of the Nation of Islam (often called Black Muslims), both in notorious cases and in themes that black Muslims are subversive, violent, inherently criminal and dishonest. Many of these cases involve prosecutorial misconduct, procedural errors, or claims of incompetent representation involving jury selection, questioning witnesses, and closing arguments. One particular difficulty—which the courts mostly punt on—is determining how Muslim practices in dress, in witness swearing, in prayer, or other religious obligations may bias the jury or other decision-makers in the cases. Another

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<sup>50</sup> See *infra* Part II.

<sup>51</sup> See *infra* Part III.

<sup>52</sup> See *infra* Part IV.

<sup>53</sup> Compare *infra* Part IV with *infra* Part II.

is the question of the courts' obligations when defendants are the ones who raise Islam or their Muslim faith in court, whether they are attempting to distance themselves from Islam or suggesting that their faith is a sign of good character, given social prejudices that may accompany references to Islam. Furthermore, one question that the cases consistently raise is why judges even mention the religious faith of Muslim litigants when it is not seemingly relevant to the law or facts of the case.

#### A. BLACK MUSLIMS: SUBVERSIVE, VIOLENT, UNTRUSTWORTHY

As noted, "the Black Muslim" figures prominently in American state criminal cases in the period from 1960 to 2001. Two sensational state criminal cases involving Black Muslims cast long shadows on the criminal justice system.<sup>54</sup> These and other cases suggest that "Black Muslims" are subversive, violent, and untrustworthy.

The Nation of Islam, headed from 1934 to 1975 by Elijah Muhammad and made famous by the work of Malcolm X until their rift in 1963,<sup>55</sup> is only one of several Islamic American sects which appealed to black Americans starting in the early 20th century. Among the earliest prominent sects were the Moorish Science Temple of America (founded by Timothy Drew, who took the name Noble Drew Ali, in Newark in 1913)<sup>56</sup> and the Addeynu Allehe Universal Arabic Association (founded by a disciple of Drew Ali, James Lomax Bey, who took the name Muhammad Ezaldeen, in Detroit in 1941).<sup>57</sup> In the 1920s, Muhammad Sadiq's Ahmadi movement also drew African Americans because of its focus on racism and worked in tandem with Marcus Garvey's Universal Negro Improvement Association.<sup>58</sup> In the cases, however, the courts generally call members of any of these groups "Black Muslims," so it is difficult to know whether they

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<sup>54</sup> See *infra* Part II(A)(1).

<sup>55</sup> Freeland, *supra* note 8, at 452.

<sup>56</sup> The Moorish Science Temple of America, founded by Drew Ali, taught that African Americans descended from Moroccans called Moors and therefore they should follow Islamic ethics. It focused on combining African Christian elements with Islam to create an African American community that is "a productive, self-reliant and law-abiding people as opposed to a lazy, dependent or rebellious people." Jamie J. Wilson, *Islam among Urban Blacks: Muslims in Newark, New Jersey, A Social History*, 95 J. AFR. AM. HIST. 460, 460–61 (2007) (book review).

<sup>57</sup> Ezaldeen founded AAUAA as a breakaway group in 1941; it was "very likely the first black Sunni organization in Newark." Tracing his people's roots to Ham in the Old Testament, this sect "strictly adhered to the 'five pillars of Islam,'" only to splinter into two groups at Ezaldeen's death in 1957. Michael Nash, the historian chronicling this period, notes that the split in Ezaldeen's sect coincided with the rise of the Nation of Islam." Wilson, *supra* note 56, at 460–61.

<sup>58</sup> Historian Edward Curtis attributes the establishment of the Nation of Islam in 1930 to Wallace D. Fard, whose successors were Elijah Poole and then Elijah Muhammad. See EDWARD E. CURTIS IV, *MUSLIMS IN AMERICA: A SHORT HISTORY* 31–32, 36–37 (2009).

are speaking about the Nation of Islam or one of these other branches of American Islam.

Taken as a whole, the way in which courts describe cases involving “Black Muslims” conveys the sense that the combination of “Black” and “Muslim” is more threatening to the community than either of those identifications alone. Courts appear to accept the characterization of the “Black Muslim” sect as a particularly intimidating, theologically rigid, and potentially violent form of Islam. A dissenting judge in *State v. Cade* paints an unusually explicit and disapproving picture of these assumptions about Black Muslims:

The Muslim cult, also known as Islam, of which [defendant Cade] is the “Minister” in Monroe is a militant Negro group organized on a national basis holding meetings where its members expound the supremacy of the Negro race. White people are referred to in their doctrine as “devils.” They are strong believers in the separation of the races and consider the integration of the races to be contrary to the laws of nature and the laws of their God. They are strongly antichristian and feel that Christianity and the government of the United States have been in part responsible for the slavery, hardships and suffering they have endured. The Muslim leaders advocate a program whereby they expect the Federal Government to “turn over” to them enough land within the United States to accommodate [sic] the 20,000,000 Negroes of this country in order that they might live separate and apart from the whites as a “nation within a nation.” This territory, it is preached, is due the Negroes because they have lived in this country as slaves for 310 years “without a pay day” and that should be payment enough for the lands they feel they are entitled to.<sup>59</sup>

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<sup>59</sup> *State v. Cade*, 153 So. 2d 382, 394 (La. 1963) (Summers, J., dissenting). The majority in *State v. Cade* attempts to provide a more neutral (if clearly flawed) history or description of “the Black Muslims,” explaining, “[i]nsofar as the record shows, Islam is a religion. It has been practiced in the United States for 32 years. Temples, or mosques, have been established in a number of cities. The sect worships one god, called Allah, and believes that Elijah Muhammad, leader of the sect, is his messenger. The faith and practice of the sect embrace an afterlife, prayer, charity, and fasting. Physical fitness is encouraged. The sect is opposed to integration of the races. In fact, it advocates a complete racial separation. To accomplish this purpose, it seeks land from the United States government for the settlement of negroes.” *Id.* at 388.

### 1. Legends: The Black Muslim Riots and Khaalis Assassinations

Two notorious case studies—one from Louisiana and one from Washington, D.C.—illustrate the power and reach of these assumptions about African American Muslims. The first—a group of cases which came to be known as the “Black Muslim riots”—became almost iconic in later Louisiana criminal cases.

On January 10, 1972, African Americans, variously described as “Muslims” or “Black Muslim militants,” blocked North Boulevard in downtown Baton Rouge’s African American district by parking their cars across the street.<sup>60</sup> When the police began to try to “disperse ‘Muslim’ demonstrators blocking the street” (as the Louisiana Supreme Court termed them), five individuals were killed—including two deputy sheriffs and “three of the defendants’ alleged co-conspirators”—and a TV reporter was “severely beaten” into unconsciousness.<sup>61</sup>

According to news reports, the Baton Rouge confrontation may have started as a fistfight; a police captain apparently fired the first shot after witnessing a militant pull a pistol from his jacket, and the victim was “cut down by a barrage of police buckshot.”<sup>62</sup> The militants returned fire, resulting in the deaths and alleged wounding of four other police officers and 27 civilians.<sup>63</sup> As the court describes it, “[t]his outbreak of violence had significant effects upon the community which were the subject of extensive national and local publicity,”<sup>64</sup> and resulted in a city curfew and National

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<sup>60</sup> *State v. Beavers*, 394 So. 2d 1218, 1221 (La. 1981).

<sup>61</sup> Although there is a discrepancy in reports about the number of deaths, the cases seem to use this number. *See, e.g.*, *State v. West*, 491 So. 2d 868, 871 (Miss. 1982); *Beavers*, 394 So. 2d at 1224; *State v. Bell*, 315 So. 2d 307, 308 (La. 1975).

<sup>62</sup> *See* Jon Nordheimer, *Racial Tension Rises in Baton Rouge as Versions of Shootout that Killed Four Vary*, N.Y. TIMES (Jan. 12, 1972), <https://www.nytimes.com/1972/01/12/archives/racial-tension-rises-in-baton-rouge-as-versions-of-shootout-that.html>.

<sup>63</sup> *Id.*

<sup>64</sup> *Bell*, 315 So.2d at 308. In *State v. Beavers*, the court told more about the confrontation in the process of rejecting defendants’ hearsay objections:

Maurice Cockerham, a television news editor, testified that he heard [Muslim leader] Upton speaking to a gathering crowd from the roof of a Cadillac which had been used to block North Boulevard. According to this witness, Upton referred to whites as white devils and as serpents and made several references to killing whites which Upton said was required by their teachings. Upton also told the crowd, “We have come here today to meet the white devil and kill him.” He then turned and pointed to Cockerham and two other newsmen (including [reporter Bob] Johnson) saying, “There are three of the white devils here today, but there will be more later.” In Cockerham’s account, these remarks were made at approximately 12:30 P.M. Shortly thereafter . . . they were set upon by the crowd, and Johnson, who was unable to escape, was severely beaten. After departing the scene, Cockerham

Guard troops standing by after racial tensions rose.<sup>65</sup>

What is most striking about this case is not the riot itself, but the fact that the Louisiana courts, sifting through the various legal cases generated by this incident, persisted in describing this as a “Black Muslim” riot. In *State v. Bell*, a criminal case arising from this confrontation, the Louisiana Supreme Court confronted the defendants’ argument that references to their religion inflamed the jury against them.<sup>66</sup> In seeking a change of venue, defendants alleged “that government officials had commented publicly at the time of the riot that they were satisfied the defendants were guilty of the crime charged [and] should be severely punished.”<sup>67</sup> The Louisiana Supreme Court determined that defendants were eligible for a change of venue if they could prove that a fair and impartial trial “could not be obtained in the parish”<sup>68</sup> in light of official comments at the time of the riot, such as the warning that should the defendants not be convicted, “the citizenry was ready and waiting should other [B]lack [M]uslims come to Baton Rouge.”<sup>69</sup>

Keeping the legend of the riot going, *Bell* was followed by two different appeals in *State v. Beavers*. The first appeal regarding the inconsistency in the jury verdict was successful, while the second appeal alleging that Beavers’ retrial placed him in double jeopardy was unsuccessful.<sup>70</sup> The Louisiana Supreme Court in both *Beavers* cases continued to describe each case as “[o]ne of the so-called ‘Black Muslim cases’ which have been reviewed by this Court,” even though the defendant, an admitted “Black Muslim,” testified that he had left after the police dispersal order and was not involved when the shooting started.<sup>71</sup> In the *Beavers* cases, the court did not express concern over the possible bias created by the defendant’s identification as a “Black Muslim” or its own characterization of these cases as the “so-called ‘Black Muslim cases,’” despite its acknowledgement of the notoriety of these cases.<sup>72</sup>

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contacted the police whose arrival minutes later led to the violent confrontation which resulted in five deaths.

*Beavers*, 394 So. 2d at 1227.

<sup>65</sup> Jon Nordheimer, *4 in Baton Rouge are Slain in Clash*, N.Y. TIMES (Jan. 11, 1972), <https://www.nytimes.com/1972/01/11/archives/4-in-baton-rouge-are-slain-in-clash-2-deputies-and-2-blacks-die-and.html>.

<sup>66</sup> *Bell*, 315 So. 2d at 311–13.

<sup>67</sup> *Id.* at 311.

<sup>68</sup> *Id.* at 313.

<sup>69</sup> *Id.* at 311.

<sup>70</sup> *State v. Beavers*, 364 So. 2d 1004, 1010 (La. 1978) [hereinafter *Beavers I*]; *State v. Beavers*, 394 So. 2d 1218, 1224 (La. 1981) [hereinafter *Beavers II*].

<sup>71</sup> *Beavers I*, 364 So. 2d at 1004–1005; *Beavers II*, 394 So. 2d at 1221.

<sup>72</sup> *Beavers II*, 394 So. 2d at 1221.

Even the dissenting justices in *State v. Eames*, a 1978 case against one of the rioters, who strongly claimed that defendants' constitutional rights were violated, characterized the case as follows:

This criminal appeal raises the question of whether a black defendant, charged with inciting to riot during a Black Muslim street demonstration, was denied his rights to individual dignity and equal protection of the laws guaranteed by the Louisiana Constitution when the prosecuting attorney admittedly used the State's peremptory challenges to remove blacks from the petit jury because he believed the fact of their race indicated they were likely to be partial due to their susceptibility of intimidation by radical elements of the black community. This prosecution is one of the Baton Rouge "Black Muslim cases," as denominated in defendant's brief and in popular parlance.<sup>73</sup>

In 1982, this legend persisted in the perjury prosecution of a defense witness for changing his testimony about whether the defendants were using bullhorns prior to the riot; the court continued to call these "the so-called 'Black Muslim' trials" and the confrontation as between the police and "Black Muslim demonstrators."<sup>74</sup> The legend followed to *State v. Collier*, where the impartiality of a witness in a completely unrelated case was questioned because "his older brother was a deputy sheriff who was killed during the Black Muslim riot in January, 1972."<sup>75</sup> Despite this connection, the court concluded "that [the witness] Wilder could be fair and impartial to defendant [who was black, but not a Muslim], who was only about eight years old at the time of his brother's death."<sup>76</sup>

The story of the riots even followed to an unrelated 1983 case involving a black man who asked for a change of venue because of "articles published in the Shreveport Times and the Sabine Index newspapers which

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<sup>73</sup> *State v. Eames*, 365 So. 2d 1361, 1364 (La. 1978), *reh'g denied* (1979). The Louisiana court also heard the case of *State v. Chenier*, 343 So. 2d 177 (La. 1977), a thief unlucky enough to have stolen from a man with the same name (Bob Johnson) as the brain-damaged reporter in the Baton Rouge "Black Muslim" riots, a fact introduced in his trial. *Id.* at 179. He argued that naming the victim would prejudice his case because the jury would connect the two cases, even though they were several years apart. *Id.* The court concluded that the name was so common that there was no reason to think the jurors would see a connection. *Id.*

<sup>74</sup> *State v. West*, 419 So. 2d 868, 871-72 (La. 1982).

<sup>75</sup> *State v. Collier*, 522 So. 2d 584, 588 (La. 1988), *rev'd on other grounds*, 533 So.2d 815 (La. 1989).

<sup>76</sup> *Id.*

identified the defendants as ‘Black Muslim’ murder suspects.”<sup>77</sup> One defendant, Vivian Kahey, testified that he believed white people were “‘devils,’ but that he was not a Black Muslim.”<sup>78</sup> Despite the headline that falsely identified him as such, accompanied by an article that “explained the tenets of the Black Muslim faith, including the belief that ‘Christianity was a white man’s religion, and the white man was a devil,’” the Court held that the trial was not “utterly corrupted” by these stories which ran over a year before the beginning of the trial.<sup>79</sup> It cited, among other things, the testimony of the publishers of the newspapers that they had not heard about any prejudice in the community as a result of these stories.<sup>80</sup>

A second notorious case, *Christian v. United States*,<sup>81</sup> was a mass murder that still reverberates in American courts, ostensibly because of the Muslim sect rivalry involving a former secretary of the Nation of Islam who had founded his own temple, which was financed in part by follower and basketball legend Lew Alcindor (a.k.a. Kareem Abdul-Jabbar).<sup>82</sup> The court described the case as follows:

[A]pproximately eight armed men entered a house at 7700 16th Street, N.W., and proceeded to rob, shoot, or drown every person present. Seven persons, including five children, were brutally murdered; two others were

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<sup>77</sup> *State v. Kahey*, 436 So. 2d 475, 480 (La. 1983).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 482.

<sup>80</sup> *Id.* at 482–83 (noting also that the trial court did not find prejudice in *State v. Bell*, even though “the massive publicity which had been given to the Black Muslim riots in Baton Rouge several years before the trial resulted in difficulty in selecting a jury.”). See *State v. Hills*, 377 So. 2d 1218, 1219 (La. 1979) (in which an African American rape defendant unsuccessfully argued that the police had falsely arrested him because they were prejudiced against all blacks by a recent encounter with a group of Black Muslims); *Commonwealth v. Colon*, 299 A.2d 326, 327 (Pa. Super. Ct. 1972) (demonstrating the assumption that black Muslims and the police have a longstanding violent relationship where the question was whether the police commissioner should have been allowed to sit on a case involving the attempted murder of a police officer. The court noted that “[t]he problem is claimed to be accentuated by the circumstance that one of the appellants was a Black Muslim.”); see also *Fentis v. State*, 528 S.W.2d 590 (Tex. 1975) (appeal on the unrelated question of whether defendant’s alleged shooting of police officers previously was relevant to prove that he shot the victim police officer in question). The dissent, which determined that there was no harmful error in asking about the previous shootings since they elicited no testimony against the defendant, felt the need to state: “Also, in the present record there was some evidence that appellant was a [B]lack [M]uslim. There was an attempt to show that [M]uslims hated police officers. Evidence of the other shooting, if the State could have developed it, would have been admissible to show bias and hatred toward a class—police officers.” *Id.* at 594.

<sup>81</sup> *Christian v. United States*, 394 A.2d 1 (D.C. 1978).

<sup>82</sup> For Alcindor’s own story of his conversion and later break with his teacher, Hammas Abdul-Khaalis, see Kareem Abdul-Jabbar, *Why I Converted to Islam*, AL JAZEERA (March 29, 2015, 2:00 AM), <http://america.aljazeera.com/opinions/2015/3/why-i-converted-to-islam.html>.



seriously wounded. The home was the residence of Calipha Hamaas Abdul Khaalis and the headquarters of the Orthodox Hanafi Muslims. The government's theory at trial was that the murders were the culmination of a conspiracy by members of the "Nation of Islam," the so-called "Black Muslims," to seek revenge against Hamaas Khaalis for his criticism of Elijah Muhammad, then leader of the Nation of Islam. Khaalis had voiced his disapproval of Elijah Muhammad in two letters sent to Nation of Islam mosques throughout the United States.<sup>83</sup>

The trial court also found that the assailants must be Black Muslims, for the name on the assassination note, "Brother Lieutenant John 38X . . . is of the type received by one who has joined the Nation of Islam."<sup>84</sup>

This mass murder, which came to be popularly known as the 1973

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<sup>83</sup> *Christian*, 394 A.2d at 9.

<sup>84</sup> *Id.* The court also refused to declare a mistrial after Khaalis' testimony as follows:

By the prosecutor:

Q: Now, Mister Khaalis, what is your profession, at the house?

A: The Masheer.

Q: And, what does "Masheer" mean?

A: The guide, the director, spiritual advisor. The man who defends the faith. The man who knows tricksters and murders and gangsters that deviate on Islam.

Q: I'll ask you sir, now if you will direct your attention back to January 18th.

*Mr. Khaalis:* You don't have to smile, Mister. [Khaalis was apparently referring to one of the defense lawyers.]

*The Court:* Wait a moment, Mister Khaalis.

*Mr. Khaalis:* I don't want him smiling and smirking.

*The Court:* Mister Khaalis, please. Mister Khaalis, just listen to the questions and respond to the questions. Look at Mister Evans and listen to his questions carefully and respond to the questions.

*Mr. Khaalis:* I will respond to the questions, Your Honor.

At this point, a bench conference was requested. While counsel were approaching the bench and the witness was stepping down from the stand, the record reflects the following:

[Mr. Khaalis stepped down from the witness stand.]

*Mr. Khaalis:* It's over. It's over.

*The Court:* Mister Khaalis.

*Mr. Khaalis:* You killed my babies.

*The Court:* Mister Khaalis. Mister Jones [the marshal], would you please escort Mister Khaalis to the witness room during the bench conference.

*Mr. Khaalis:* You killed my babies. And shot my women.

*The Court:* Now, Mister Khaalis, please.

*Mr. Khaalis:* They killed them.

*The Court:* Mister Khaalis, control yourself and please leave the courtroom. Leave the courtroom.

*Id.* at 21-22. See *Khallis v. United States*, 408 A.2d 313, 320-21 (1979).

Hanafi Muslim Massacre,<sup>85</sup> was met by a truly frightening response by victim Khaalis in March 1977 that became known as the Hanafi Siege.<sup>86</sup> Khaalis created three armed hostage situations, involving as many as 160 hostages, at the B'nai B'rith headquarters in Washington, D.C, an Islamic cultural center, and the District Building where the Washington, D.C. mayor and city council had offices.<sup>87</sup> Khaalis demanded that the movie "Mohammad, Messenger of God" not be shown in New York or elsewhere in the United States (a demand complied with when the movie was withdrawn from circulation), and that the convicted murderers of Khaalis' family and those convicted of murdering Malcolm X be turned over to the Khaalis group.<sup>88</sup> Purporting to achieve Islamic justice, Khaalis explained, "We will fight to the death . . . The situation is one that Allah is in command . . . Listen to me clearly throughout the country, it can get worse! Are you listening? Throughout the country, it could get worse!"<sup>89</sup>

*Commonwealth v. Brown*<sup>90</sup> involved the alleged murder of a police informant in the Hanafi mass murder case. The court extended the connection between the homicides and Islam, remarking on the defendant's affiliation with "a religious sect commonly known as the Black Muslims," and the defendant's place as a "Lieutenant" in the military-like structure of the organization with "responsibility for the enforcement of its tenets."<sup>91</sup> The implicit assumption of a relationship between the tenets and structure of the Nation of Islam and the mass murder of its rivals lingers in the *Brown* court's conclusion that "[t]here was a similarity in motive in that both crimes were in retaliation for the victims' actions that displeased the Black Muslims."<sup>92</sup>

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<sup>85</sup> See, e.g., Wikipedia entry for "1973 Hanafi Muslim Massacre," [https://en.wikipedia.org/wiki/1973\\_Hanafi\\_Muslim\\_massacre](https://en.wikipedia.org/wiki/1973_Hanafi_Muslim_massacre) (last visited July 25, 2018).

<sup>86</sup> See Frank Jackman et al., *Hanafi Siege: Gunmen Raid D.C. Buildings in 1977, Killing One and Wounding at Least 12*, N.Y. DAILY NEWS (Mar. 10, 1977), <http://www.nydailynews.com/news/world/hanafi-siege-gunmen-raid-buildings-1977-article-1.2994339>.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*; Khaalis v. United States, 408 A.2d 313, 320–21 (D.C. 1979). Khaalis told some of the hostages, "he had asked Allah for a hundred hostages and Allah had presented him with one hundred and three" and that "this was a 'holy war.' He said, 'Be prepared to die because many of you will die and heads will be blown, brains will be blown out and heads will roll! . . . In a holy war there are no innocent victims. Men, women and children die in holy wars, and if you have any sense you will pray to your God and be prepared to die.' . . . Khaalis blamed the Jews for the fact that the murderers of his family were not dead, because the Jews controlled the banks, the newspapers, and the media." *Khaalis*, 408 A.2d at 323.

<sup>89</sup> Jackman, *supra* note 86.

<sup>90</sup> *Commonwealth v. Brown*, 393 A.2d 414 (Pa. 1978).

<sup>91</sup> *Id.* at 416.

<sup>92</sup> *Id.*

The defendants in the Hanafi Siege also resurface in *United States v. Hamid*, in which the prisoner claimed duress from the Khaalis prison network not to allocute to his crime or seek a sentence reduction.<sup>93</sup> His attorney, whose family was threatened along with Hamid's, claimed that asking for a separate hearing on a sentence reduction would have made Khaalis "aware that [Hamid] disobeyed his orders and would have sought to kill him. . . . Hanafi Muslims are strong in their faith and are 'very close knit in both the Federal [prison] system and the District of Columbia and other state [prison] systems.'"<sup>94</sup> For example, he claimed, probably correctly, that Khaalis was "dictating orders, by telephone to the Hanafi Muslims within the prison system."<sup>95</sup>

## 2. Black Muslims as Subversive, Violent, or Criminal

These two notorious cases, discussed *supra* in Part II(A)(1), are not the only cases in which there are statements or inferences that Black Muslims are violent, criminal, or subversive.<sup>96</sup> For example, in *State v. Cade*, the Louisiana Supreme Court heard the appeal of an African American Muslim sentenced to six years in prison for criminal anarchy.<sup>97</sup> He was punished for teaching that:

[T]he Negro under our system of government 'gets nothing but slavery, hell and death' and that a separate and new nation and government must be established by the Negro people and that this nation and government shall be within the United States, and that this Negro nation is entitled to the State of Louisiana and other southern states because 'we feel that 310 years of slave labor that our parents have undergone in America should be enough pay', and that the owners of such land today have no rights or interest, and that such new nation and government must be established whether by violence or any other unlawful means within the boundary of the United States.<sup>98</sup>

Cade's conviction was also premised on the finding that his religious

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<sup>93</sup> *United States v. Hamid*, 531 A.2d 628, 641–42 (D.C. 1987).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 642.

<sup>96</sup> *See, e.g., State v. Burton*, 490 P.2d 1189, 1191 (Ariz. Ct. App. 1971), for a decision in which the court rejected defendant's claim that he plead guilty under duress because, among other things, it was unpleasant for him to be placed in a cell next to the Black Muslims while he was held without bail.

<sup>97</sup> *State v. Cade*, 153 So. 2d 382, 384 (La. 1963).

<sup>98</sup> *Id.*

sect, “being known as Muslims or Islam,” was a subversive organization and, thus, that his teaching and leadership of these ideas in his religious community was a crime.<sup>99</sup> Indeed, it appears that prior to this incident, the police chief was surveilling and investigating the “Black Muslims” for subversive activity.<sup>100</sup> A key piece of evidence in the crime was a blackboard from which the defendant taught:

As one faces the board, a flag of the United States appears on the left side. Underneath the flag is the inscription, “Christianity”, and a cross. Immediately under the cross are the words, “Slavery Hell Death”. To the right of these words is a tree from which a black person is suspended by a rope over a fire. On the right of the board is depicted the flag of Islam. Under it is the inscription, “Freedom Justice Equality”. In the center of the board is the question: “Which one will survive the war of Armageddon?”<sup>101</sup>

The appellate court, attempting to pull back from the prosecutor’s implication that this board demonstrated that an armed insurrection was likely, noted that the battle of Armageddon that Cade referred to was also a story accepted by Christians, and that, “[n]eedless to say, it has no reference to civil strife, unless it is employed in a special, or extraordinary, sense.”<sup>102</sup> The dissent, however, disagreed with this characterization, remarking:

It is my opinion that it is subject to the interpretation that opposition to the government by unlawful means is a tenet of the Muslim group. Otherwise, why is the question asked: Will the United States (represented by the United States flag) or Islam (represented by the other flag) survive the final conflict between these two ideals—the War of Armageddon (an unlawful means)? There seems to be no doubt that the designers of the board sought to instill into those who viewed the board a desire for “Islam” to

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<sup>99</sup> *Id.*

<sup>100</sup> In a debate over whether the blackboard on which defendant had made some of these claimed subversive comments should be excluded from evidence because of lack of a warrant, the Court noted that “the Chief of Police, who was investigating the sect for subversive activities, had gone to the temple in response to an invitation to the public to attend a meeting. While there, he and his officers were attacked by the defendant and other Muslims. During the course of making arrests for battery, the Chief of Police took possession of the blackboard, which was on display in the building. The evidence of record does not establish that the blackboard is the property of the defendant. Under these circumstances, we cannot perceive how the action of the Chief of Police constitutes a search and seizure as to the defendant.” *Id.* at 388.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

survive; for beneath that flag are listed “Freedom Justice Equality”, whereas beneath the United States flag are listed “Slavery Hell Death, etc.” The inference to be gained is that the government represented by the United States flag should not survive, that is, it should be destroyed and a final conflict (War of Armageddon) will be the means of accomplishing that end.<sup>103</sup>

The *Cade* prosecutor also attempted to get a 13-year-old witness to testify to his Islamic mentor’s subversive teachings about alleged overthrow of the state of Louisiana and confiscation of state land.<sup>104</sup> The prosecutor persisted in questioning him, despite the witness’s repeated avowals that neither the defendant nor anyone else at his mosque had made such arguments, nor had they advocated creating a new government for “the negro race” or that Muslims should prefer the flag of Islam to the flag of the United States.<sup>105</sup> Indeed, another witness testified:

Our leader has never advocated [taking government land by force], in fact he couldn’t advocate that. This is contrary to the religion that he teaches and furthermore we have nothing with which to take any land from anyone. We are forbidden to carry arms on our person, to have them in our temples or even in our homes. No Muslim carries arms, so I don’t know how this could even be thought of, that we would seek to take something by force of arms. We don’t have the means to do such a thing and we don’t advocate it any how [sic].<sup>106</sup>

Though the trial court permitted a conviction despite these witness statements, the appellate court reversed *Cade*’s conviction, somewhat ambivalently distinguishing between religious belief and subversive advocacy, declaring:

The state asserts, however, that the teachings of this sect foster racial hatred. That the doctrinal content may arouse racial prejudice cannot be gainsaid. However, teachings of this nature are not denounced as a crime by the instant statute. The danger sought to be averted is the overthrow of organized government by violence or other unlawful means. The free exercise of religion, whether it be in the

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<sup>103</sup> *Id.* at 394 (Summers, J., dissenting).

<sup>104</sup> *Id.* at 388.

<sup>105</sup> *Id.* at 388–89.

<sup>106</sup> *Id.* at 390.

Judeo-Christian tradition or not, has been wisely accorded constitutional protection under our system of government. Religious freedom is deeply ingrained [sic] in our social, religious, and governmental institutions. As fundamental as religious freedom may be, however, it creates no immunity for crime committed under the guise of religious dogma. The advocacy of any doctrine, although denominated religious, which contemplates the overthrow of established government by violence or terrorism falls under the proscription of law. Having found no evidence in the record to establish that violence or other unlawful means have been advocated by the defendant or his organization, we conclude that an error of law has been committed.<sup>107</sup>

The *Cade* prosecutor's implication of impending insurrection by black Muslims is not an isolated case. A Texas appellate court affirmed and then reversed the capital conviction of a defendant identified in testimony as a Black Muslim in *Joyner v. State*.<sup>108</sup> In his closing statement, the prosecutor referred to recent riots in the African American community in Detroit: "If any of you people read newspapers or have ears, you know what's going on in this community, or in the United States . . . we are on the verge of anarchy in this country."<sup>109</sup>

References to terrorism or war by Muslims abroad have similarly been permitted in completely unrelated cases involving American Muslims. In *Ahmad v. State*, a 1992 child abuse prosecution of a father who beat his son and tied him to a bedpost with duct tape, the prosecutor analogized the child to a hostage or a prisoner of war in his closing argument.<sup>110</sup> Defendant argued that, given that he was Muslim, the allusions were used to inflame the jury against him, by bringing to mind some Muslim-majority countries, like Lebanon, where Americans had been taken hostage and tortured.<sup>111</sup> The appellate court decided that this link would be unlikely given that the metaphor "is not name-calling or a label on Abdusabr Ahmad's overall character. The State did not state *per se* that Abdusabr Ahmad was an Arab captor. The State did not even compare Abdusabr Ahmad to Arab captors.

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<sup>107</sup> *Id.* at 391.

<sup>108</sup> *Joyner v. State*, 436 S.W.2d 141, 143–44 (Tex. 1968).

<sup>109</sup> *Id.* at 144 (in the original opinion, this comment was called "in poor taste" but not reversible error).

<sup>110</sup> *Ahmad v. State*, 603 So. 2d 843, 846 (Miss. 1992) ("You know, we get incensed when we hear that our soldiers are treated a particular way when they're captured and made prisoners of war, when people in our embassies are captured by people and abused. There's no hesitation on us to see that for what it is—torture, beatings. And the same thing happened to this child.").

<sup>111</sup> *Id.*

The State simply compared [the child]’s emotions to that of a prisoner of war or hostage.”<sup>112</sup>

In *State v. Robinson*, a trial judge tried to explain the heightened courtroom security in a criminal trial of a Muslim, referencing the need for such security during the Gulf War.<sup>113</sup> The judge attempted to correct this misstep by saying, “I want to be absolutely certain that you understand that any reference I make to security or the war has absolutely nothing to do with this case.”<sup>114</sup> Because the appellate court did not believe that the jury would draw a connection to the war or even that the jury knew that the defendant was a Muslim, the court held that the defendant did not suffer prejudice.<sup>115</sup>

In a similar reference in a stalking case, *State v. Mehralian*, a prosecutor attempted to influence prospective jurors by asking one whether he had heard of the Koran, “the bible of the Muslim faith,” and the phrase “[d]eath to the infidel.”<sup>116</sup> He also asked the victim’s father about the Koran and what it meant to him.<sup>117</sup> The victim’s father replied that one of the teachings was “the complete rejection of anything non-Islamic.”<sup>118</sup> When questioned by the court about his line of questioning, the prosecutor claimed that its purpose was to explain the motive of the defendant in breaking into his girlfriend’s home.<sup>119</sup> The North Dakota Supreme Court overturned the conviction on the basis of this questioning, stating:

These questions by the assistant state’s attorney were improper. They tended to incite anger against Mehralian, who was an Iranian citizen in this country on a visa during the time following the unlawful and unprecedented takeover of the American Embassy in Tehran by Iranian militants. The references to the Koran, to Mehralian’s visa status, to his statement to Mr. Swett, and finally to other wrongs he may have committed (which were not

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<sup>112</sup> *Id.*

<sup>113</sup> *State v. Robinson*, 662 A.2d 1295, 1298–99 (Conn. App. Ct. 1995), *rev’d*, 676 A.2d 384 (1996).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1299; *State v. Calloway*, Nos. 65431, 65432, 65433, 1994 WL 236226, at \*21 (Ohio Ct. App. May 26, 1994) (where the court decided against defendant based on his counsel’s failure to object, the prosecutor claimed that “[m]osque leaders who were responsible for discipline at the [m]osque sought to cover up the situation by attempting to place the blame for the crimes on persons who are not presently affiliated with the [m]osque.”).

<sup>116</sup> *State v. Mehralian*, 301 N.W.2d 409, 413 (N.D. 1981).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

established at trial) were highly prejudicial.<sup>120</sup>

The implication of a relationship between the “Black Muslim” faith and lower-level violent crime surfaces as well in cases in this period. Some courts tell stories of physical altercations involving “Black Muslims” that seem to analogize the Nation of Islam to a violent military unit. One such case is *State v. Calloway*, in which two men alleged that after they stole leather coats from members of the Nation of Islam, those members kidnapped them and subjected them to intensive interrogation and abuse.<sup>121</sup> The appellate court dismissed defendants’ claim that a prosecutor’s cross-examination was grounds for overturning the jury verdict despite the many prejudicial questions asked: for example, whether the witness’s name was given to him by controversial Nation of Islam leader Louis Farrakhan, who called Judaism a gutter religion; whether the Nation was organized into military ranks and did military drills; whether the Nation was Orthodox Islam; and whether it taught (like Orthodox Islam) that thieves must have their hands cut off.<sup>122</sup> The appellate court noted: “We fail to see how the exchange [about whether the mosque expected an assault] negatively affected the overall fairness of the trial, particularly where the prosecution, in its closing argument, stated that [the Nation of Islam] was not on trial.”<sup>123</sup> Another such case implying the violent militarization of the Nation of Islam is *State v. Nur*, in which three young men allegedly encountered a group of “ten black male Muslims . . . all wearing robes and skull caps” who came out of “a building owned by Muslims” to punch and stab the complainants after they urinated behind the building, even though they had already apologized to the first person who saw and confronted them.<sup>124</sup> The court did not seem to notice any possibility for prejudice in this description.<sup>125</sup>

In *Commonwealth v. Hoskins*, we see a prosecutor’s attempt to link Islam with drug trafficking.<sup>126</sup> In *Hoskins*, the prosecutor persisted in asking two witnesses questions linking Islam with crime.<sup>127</sup> A female witness was questioned about:

whether her mother was presently selling drugs; whether

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<sup>120</sup> *Id.* at 418.

<sup>121</sup> *Calloway*, 1994 WL 236226, at \*1

<sup>122</sup> *Id.* at \*7–\*8. The witness answered “yes” to all but the question about hands being cut off, although the judge sustained an objection to a reference to Judaism. *Id.*

<sup>123</sup> *Id.* at \*8. The prosecutor also established that the Nation of Islam was paying the defendants’ attorney fees. *Id.* at \*8.

<sup>124</sup> *State v. Nur*, No. 57132, 1990 WL 84288, at \*1 (Ohio Ct. App. June 21, 1990).

<sup>125</sup> *Id.* at \*5 (rejecting defendants’ allegations of prosecutorial misconduct).

<sup>126</sup> *Commonwealth v. Hoskins*, 403 A.2d 521, 526–28. (Pa. 1979).

<sup>127</sup> *Id.* at 526.



the victim told her the “Muslims” were looking for him; whether the victim sold drugs from his house; whether the victim wore a bullet-proof vest; whether she belonged to the “Muslims” as did the victim; and, whether the victim was in fact a “Muslim.”<sup>128</sup>

A male witness was questioned about whether he was involved with “the ‘Muslim’ religion” despite the fact, as the court acknowledges, that the relevant parties’ religious affiliations were not alleged to be relevant by the prosecutor.<sup>129</sup> The appellate court concluded that commingling testimony about defendant’s and his witnesses’ drug trafficking with “the suggestion that [they] were all associated with a religion which has a reputation for criminal activity” was “clearly improper and inflammatory.”<sup>130</sup> In another drug case, *Commonwealth v. Ashley*, the court dismissed the defendant’s ineffective assistance of counsel claims, made on the basis that the lawyer had failed to object to three references by a state trooper to the defendant’s religion.<sup>131</sup> One of them was the trooper’s statement that the probable cause information was “that drugs were coming from Philadelphia, Muslim drug traffic was coming from Philadelphia to that residence.”<sup>132</sup> The court justified its ruling against the defendant by explaining: “In our view, these isolated statements concerning the Muslims in relation to the circumstances giving rise to appellant’s arrest cannot be considered the equivalent of a statement that appellant was a Black Muslim or was associated with that group.”<sup>133</sup> The court apparently would have concluded that a direct statement that defendant was a Black Muslim was prejudicial, presumably on the theory that Black Muslims were feared or loathed by the jury more than other Muslims.<sup>134</sup>

On rare occasions, appellate judges will acknowledge why this link between Islam and crime or violence is problematic. In her dissent in *State*

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 527–28.

<sup>130</sup> *Id.* at 528. *See also* *People v. Lowrance*, 377 N.Y.S.2d 484, 484 (App. Div. 1975), in which the court held that a prosecutor attempted to racially prejudice the jury by asking the defendant’s ex-wife questions about “‘Black Muslims’ which were not material to the issues,” as well as “what does the X stand for in a person’s name” in order to establish the defendant’s “membership in the Black Muslims,” in violation of his right to a fair trial. *Id.* at 485. In *State v. Allen*, 429 S.W.2d 697, 698–99 (Mo. 1968), the court accepted the defendant’s claim that the prosecutor’s reference to him as a black Muslim was prejudicial—especially since it was not true—but held that it was cured by the judge’s instruction to the jury: “Members of the jury, you will disregard the statement made by the Officer in regard to membership in the Black Moslem.”

<sup>131</sup> *Commonwealth v. Ashley*, 419 A.2d 775, 776 (Pa. Super. Ct. 1980).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 777.

<sup>134</sup> *See id.*

*v. Smith*—despite her suggestion that defendant may have opened the door to the jury’s consideration of his faith—Justice Lundberg Stratton was forthright about the effect of this testimony on defendant’s ability to get a fair trial:

Some people believe, rightly or wrongly, that the tenets of the Nation of Islam urge militant violence, a powerful image that could have infected the jury’s deliberation. Without a careful rooting out of any potential juror who harbored prejudicial racial or religious views, or who had formed preconceived prejudices about . . . the Islamic movement, there is no way to be sure that the jurors who deliberated were truly fair and impartial.<sup>135</sup>

### 3. Muslims as Untruthful

In the cases in this period, appellate courts grappled with prosecutorial attempts to introduce Islam to suggest that witnesses or defendants were untruthful, or that they would lie to save members of their faith. Sometimes prosecutors used a defendant’s adherence to Islam to impeach the defendant’s credibility, on the theory that if the defendant testified to being a Muslim but then violated one of its precepts, it could evidence dishonesty and suggest that the defendant is lying about other things more relevant to the case. Under this standard, of course, any person who claimed allegiance to a faith and then violated one of its tenets would presumably be lying about faith commitments, which would make most people liars since religious people do fall short of their religion’s teachings.

In *Commonwealth v. Brown*, the prosecutor engaged in an extended colloquy with the witness to impeach the defendant’s and witness’s credibility.<sup>136</sup> The appellate court’s description of the trial record is set out here at length to illustrate the persistence of the prosecutor in trying to establish—apparently successfully for the jury—that these Muslims were untrustworthy liars because they had breached tenets of their faith as the prosecutor understood them:

Q. [by Assistant District Attorney] When you say ‘brother’, what do you mean by ‘brother’?  
 [Defense counsel]: Objection.  
 THE COURT: Overruled.

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<sup>135</sup> *State v. Smith*, 731 N.E.2d 645, 662 (Ohio 2000) (Lundberg Stratton, J., dissenting).

<sup>136</sup> *Commonwealth v. Brown*, 372 A.2d 887, 890 (Pa. Super. Ct. 1977).

[Assistant District Attorney]:

Q. What do you mean by that?

A. More or less like my religion, we call each other brother, that is what I mean.

Q. Any relation-you're a Muslim; is that correct?

[Defense counsel]: Yes.

THE COURT: Overruled.

THE WITNESS: Yes, I'm a Muslim.

[Assistant District Attorney]:

Q. THAT is why you refer to him as brother. That is why you affirm and now swear; is that correct?

[Defense counsel]: Objection.

THE COURT: Overruled.

THE WITNESS: That is correct.

[Assistant District Attorney]:

Q. Is it part of your religion, do you have an X in your middle name; is that correct?

[Defense counsel]: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, sir.

[Assistant District Attorney]:

Q. Does that mean that you're actually full fledged Muslim?

[Defense counsel]: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, sir.

[Assistant District Attorney]:

Q. You're a full brother in the Muslim Mosque, I take it?

A. Yes, sir.

Q. And yet, what is the significance of the X?

[Defense counsel]: Objection.

THE COURT: I don't know how relevant all this is.

[Assistant District Attorney]: I think it is, Your Honor, I will get to it shortly.

THE COURT: All right, overruled.

[Assistant District Attorney]:

Q. What is the significance of the X?

A. What is the significance of the X?

[Defense counsel]: Your Honor, I have a standing objection to any of this line.

THE COURT: We have heard it, . . .

[Defense counsel]: Regarding religion, Your Honor.

THE COURT: All right.

[Assistant District Attorney]:

Q. What is the significance?

A. Like I am X, considered X-smoker, X-drinker, X-anything X.

Q. It signifies that you have been purified, in other words?

A. In other words, changed in my ways.

Q. As a result of your religion, you're not allowed to go into bars, are you?

A. I am. I can go in bars, as far as sitting down and drinking, no, sir.

Q. Aren't you disallowed from even going into a place that sells alcohol, under your religion?

A. No, sir, long as I don't get involved with it myself.

Q. You can go in there as long as-

A. Yes, sir.

Q. As a matter of fact, I believe in your religion, one of the basic tenets is that the law of the city and county does not apply to the brothers; is that correct?

A. Sir?

THE COURT: I am going to sustain that objection.

Subsequently, the prosecutor asked the witness if he knew any other people in the bar that night. When the witness replied that he knew one person, the prosecutor asked if this person was also a Muslim. The witness responded affirmatively. The prosecutor then asked if this person had an 'X' in his middle name and what this person was doing in the bar. The witness answered that his acquaintance did not have an 'X' in his name and that he was selling jewelry. Finally, the prosecutor asked the witness if appellant were a 'brother'. The lower court once again overruled defense counsel's objection and the witness gave an affirmative reply. The prosecutor asked if the Muslim religion prohibited appellant's presence in the bar unless he was doing business. Over objection, the witness stated that this was correct. The witness also said

that he did not know if appellant had been doing business in the bar. . . .

On cross-examination, the prosecutor asked [another] witness if he belonged to a Muslim sect and if his faith prohibited his presence in a bar. Defense counsel objected to both questions; the lower court overruled his objections and the witness gave affirmative answers. The prosecutor then asked three times if the presence of the witness in the bar meant that he was willing to bend his religious principles. After the witness answered the first question affirmatively, the lower court sustained objections to the second and third questions.

Subsequently, the prosecutor returned to the subject of the Muslim faith of the witness. He asked the witness if he had seen a couple of ‘brothers’ enter the bar. The witness said yes. The prosecutor then asked if the witness got into trouble because these two other ‘brothers’ visited the bar; the witness said no. Finally, the prosecutor asked: ‘I take it this isn’t one of the strongest principles of your religion?’ The lower court sustained defense counsel’s objection.<sup>137</sup>

Similarly, in *Commonwealth v. Mimms*, the prosecutor in a capital murder trial cross-examined a defense witness about whether he and the defendant were both Muslims, implying that the witness was partial to the defendant because of their religious relationship.<sup>138</sup> Noting that the defendant took advantage of this line of questioning to establish that Islam required witnesses to testify truthfully, the intermediate appellate court upheld the conviction.<sup>139</sup> The Pennsylvania Supreme Court overturned the conviction, in part because of the trial court’s questioning:

The Commonwealth contends that the questioning was merely intended to show the friendly relationship between

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<sup>137</sup> *Id.* at 890–91; *see also* *Ibn-Tamas v. United States*, 407 A.2d 626, 629 n.3 (1979), in which the prosecutor attempted to discredit an alleged battered wife who shot her husband on the basis that her husband—an Islamic convert—would not have battered because it was against his religion. The prosecutor also introduced evidence that he had separated from his first wife because of her refusal to “embrace the Koran.” *Id.* at 629 n.5.

<sup>138</sup> *Commonwealth v. Mimms*, 335 A.2d 516, 518 (Pa. Super. Ct. 1975), *rev’d on other grounds*, 370 A.2d 1157 (Pa. 1977), *rev’d*, 434 U.S. 106 (1977), *remanded to* 385 A.2d 334 (Pa. 1978).

<sup>139</sup> *Id.* at 519. Judge Hoffman, in dissent, noted: “The blatant means by which the religious affiliation of appellant and his witness have been injected into this case bring to mind the words of former Chief Justice Maxey . . . : ‘This is the first time the writer ever heard of any attorney injecting into a case the religious affiliations of either a litigant or a witness. . . . If a witness’ religious belief cannot properly be injected into a judicial proceeding, a litigant’s religious belief certainly cannot be.’” *Id.* at 520–21.

Morrison and Mimms and was not intended to capitalize upon the notoriety of the Muslim faith which obtains locally. The statute is, however, expressly worded to prevent the use of religious profession for the purpose of affecting credibility. If, as the Commonwealth argues, the questioning sought only to establish the friendship of the two men, there were numerous other ways, equally effective, to establish such a relationship without touching upon religion.<sup>140</sup>

Similarly, in *State v. Williams*, the defendant's attorney unsuccessfully objected to prosecutorial inquiries of a witness' association with defendant Williams, whether Williams was the leader "of a black Muslim Group," and whether the witness was testifying for Williams because Williams "told him to testify," implying that their religious relationship was the reason that the witness was willing to perjure himself for Williams.<sup>141</sup>

In *Commonwealth v. Lee*, the court rejected the defense's argument that the prosecutor had improperly asked the defendant questions about Islam, implying that there was a question of whether the defendant understood his obligation to tell the truth.<sup>142</sup> The court suggested that the prosecutor's questions "were simply designed to determine the effect of Lee's religious beliefs on the oath he had taken as a witness."<sup>143</sup>

In *State v. Roper*, another rioting case, the defendant objected to the introduction of evidence that he was associated with Muslims, claiming that the prosecutor portrayed them as "a supposedly bad group of people who started and controlled much of the riot."<sup>144</sup> The court, however, accepted the prosecution's argument that linking defendant with Muslims who allegedly started the riot evidenced his motive in assaulting the victims, rather than his credibility; in the court's view, there was "no inference by the evidence offered that Muslims as a group were dishonest," only that they had planned and controlled the riot.<sup>145</sup> Similarly, in *People v. Hagan*, the appellate court

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<sup>140</sup> *Commonwealth v. Mimms*, 385 A.2d 334, 335 (1978).

<sup>141</sup> *State v. Williams*, 364 N.E.2d 1364, 1368 (Ohio 1977), *vacated in part*, 438 U.S. 911 (1978). *But see* *State v. Hobbs*, No. I-75-06-0892, I-75-06-0895, I-75-06-0900, I-75-06-0905, 1978 WL 185314, at \*1 (Del. Super. Ct. Jan. 18, 1978), in which a witness explained his recantation on the basis that he blamed one man rather than the actual man responsible because the first man was not a Muslim brother and the second man was.

<sup>142</sup> *Commonwealth v. Lee*, 475 N.E.2d 363, 370 (Mass. 1985).

<sup>143</sup> *Id.* The court once again seemed to justify the questioning by suggesting that the defendants had left themselves open to questioning because "throughout the trial Shaw and Lee conspicuously manifested their Muslim beliefs." *Id.* Ultimately, the court's decision rested on defense counsel's failure to preserve the issue for review by objecting. *Id.*

<sup>144</sup> *State v. Roper*, No. 94CA34, 1996 WL 140250, at \*3 (Ohio Ct. App. Mar. 22, 1996).

<sup>145</sup> *Id.*

held that reference to animosity between the defendant's sect of Islam and Malcolm X was relevant if it went to prove that the murder for which the defendant was connected grew out of hostility created by this religious conflict.<sup>146</sup>

#### B. JURY PREJUDICES ABOUT DISTINCTIVE MUSLIM PRACTICES

State courts have also struggled with whether to probe jury prejudices about defendants' or witnesses' religious exercise, especially if they wore distinctive clothing common to Muslims, refused to appear in court during Friday prayers, or insisted on affirming the truth of their testimony rather than being sworn in on a Bible or the Qur'an. Jury prejudices about Islam's treatment of women have also factored into some decisions.

Remarks made or questions asked about "Muslim dress" elicited conflicting decisions. In *Commonwealth v. Bond*, the appellate court had no issue with a prosecutor's inquiry of a witness who was wearing a turban: whether she was a "follower of a particular religious belief," which elicited testimony that she was a Sunni Muslim.<sup>147</sup> The court strongly disagreed that this line of questioning was prejudicial and irrelevant, holding that it was simply "an attempt to furnish an explanation for the witness's distinctive headdress."<sup>148</sup> By contrast, in *People v. Mallory*, the court found it prejudicial to introduce 18 photographs of a defendant "in Muslim garb" and sometimes carrying a weapon when it was unrelated to the case.<sup>149</sup>

Questions about striking a juror because of a presumed association with Islam have also come up. In *Card v. United States*, the court dismissed an equal protection claim objecting to the exclusion of young black jurors.<sup>150</sup> The dissent noted that both the prosecutor and the trial court

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<sup>146</sup> *People v. Hagan*, 248 N.E.2d 588, 591 (N.Y. 1996).

<sup>147</sup> *Commonwealth v. Bond*, 458 N.E.2d 1198, 1201 (Mass. App. Ct. 1984).

<sup>148</sup> *Id.*

<sup>149</sup> *People v. Mallory*, No. 45736, 1983 WL 5596, at \*4 (Ohio Ct. App. July 28, 1983). In *Ferrell v. State*, 536 A.2d 99, 109 (Md. Ct. Spec. App. 1988), *rev'd on other grounds*, 567 A.2d 937 (Md. 1990), while a trial judge's aggressive questioning gave rise to a successful appeal, only one reference was made to Islam. The judge's first interruption of the defendant's testimony was to ask, when the defendant mentioned a Kuti, "You mean a [M]uslim type thing?" apparently in response to other testimony that the defendant was wearing a "[M]uslim type of head covering."

<sup>150</sup> *Card v. United States*, 776 A.2d 581, 595 (D.C. 2001), *rev'd and vacated*, 863 A.2d 821 (D.C. 2004). Similarly, in *People v. Anderson*, 118 Cal. Rptr. 918, 921 (1975), the court permitted the prosecutor to voir dire the jury on their attitudes toward Black Muslims. In the appellate court's view, this was permissible because "[t]here was evidence that the offenses . . . were based upon defendant's dislike of members of the white race. To the extent that Black Muslims as a group or individually harbor similar views, the district attorney was entitled to interpose questions to elicit such information" from prospective jurors. *Id.* at 921 n.5. It was also permissible as a converse of the prosecutor's question to the jury about whether they found the black race to be inferior—the

assumed that because one juror had close-cropped hair and wore a white shirt and bow tie, he must be a Muslim and a follower of Louis Farrakhan.<sup>151</sup> The trial court allowed the strike of that juror as based on a “gut feeling,”<sup>152</sup> which the appellate court affirmed as related to a “genuine race-neutral concern regarding the potential juror’s desire to hamstring any possible conviction.”<sup>153</sup>

In the few cases in which Muslims asked for court delays to perform religious obligations, courts were generally not sympathetic. *People v. Monroe* is an exception: in this case, after missing a day of trial because of an epileptic seizure, a Muslim defendant did not appear at his trial the next day—a Friday—because of his religious obligations, which upset a juror who was dismissed for the day.<sup>154</sup> Even though the juror was directed not to make any negative inferences about the defendant’s guilt from this delay, she “expressed her impatience” and said “I personally feel I can’t help but draw inferences from it. It’s not one day of emergency, it’s two days. It makes no sense.”<sup>155</sup> When the trial resumed the next Monday, the juror told the judge, “‘I am still angry about it’ . . . ‘Although I am angry, I don’t think it would effect [sic] my ability. I certainly have cooled off a lot.’”<sup>156</sup> The judge, noting empathetically that the juror was frustrated about the delay, suggested, however, “you don’t have enough evidence to indicate to be angry at the defendant,” and refused to replace the juror.<sup>157</sup> The appellate court overruled the trial judge’s decision because of his failure to probe whether the juror was “racially or otherwise invidiously biased against the defendant” after her statement.<sup>158</sup>

In *Commonwealth v. Mimms*, a prosecutor attempted to influence the

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court reasoned if the prosecutor could ask the former question, he could ask the question about Black Muslims. *Id.* at 921.

<sup>151</sup> *Card*, 776 A.2d at 610 (Ruiz, J., dissenting).

<sup>152</sup> *Id.* at 589.

<sup>153</sup> *Id.* at 595. Where, however, a court cured the problem by accepting a defendant’s *Batson* challenge to the exclusion of a Pakistani Muslim, the appellate court found no prejudice, even though it held that prosecutors could exercise peremptory challenges based on religion. *Perea Velasco v. State*, No. 01-96-01075-CR, 1999 WL 12792, at \*2 (Tex. App. Jan. 14, 1999).

<sup>154</sup> *People v. Monroe*, 620 N.Y.S.2d 390, 391 (App. Div. 1995); *see also* *People v. Morgan*, 697 N.Y.S.2d 259, 260 (App. Div. 1999), in which the trial court held that a defendant waived his right to be present at the jury verdict when he requested a three-day delay in jury deliberations so that he could attend Friday services at his mosque. In the appellate court’s view, the fact that the trial court had “made arrangements for the defendant to pray on Friday” adequately served his religious needs. *Id.* The appellate court found a “compelling interest” in a fair trial to justify the refusal to extend the jury’s deliberations. *Id.*

<sup>155</sup> *Monroe*, 620 N.Y.S.2d at 391.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*



jury by pointing out that a Muslim witness refused to swear, insisting on affirming.<sup>159</sup> The problem with this attempt to single out Muslims for affirming rather than swearing was explained in *United States v. Kalaydjian*, in which a government witness asked to affirm his testimony rather than swearing on the Qur'an, and defense counsel asked to cross-examine him on why he refused to swear in order to cast doubt upon his credibility.<sup>160</sup> Rejecting the argument that Federal Rule of Evidence 610 permits evidence on witnesses' religious beliefs for purposes of impeaching their truthfulness, the court held that the defense's attempt to brand a witness as a liar because he refused to swear on his own sacred text was prohibited.<sup>161</sup> The court held, in part, that testing the veracity of a witness by pointing out his refusal to swear on a holy book would not make sense unless it were proven that the witness was a devout Muslim "who believed deeply in the Koran," which was clearly impermissible under the rule.<sup>162</sup>

In other cases involving religious claims that may have seemed unusual or even manufactured to majority judges, the courts similarly made short work of a defendant's claims. In *Graham v. State*, the defendant requested that he be appointed a Muslim lawyer, or he would represent himself.<sup>163</sup> The judge denied the request for a Muslim lawyer, while appointing him a standby public defender.<sup>164</sup> There is no evidence that the judge asked why the defendant wanted a Muslim lawyer; but the appellate court treated the case as if the defendant had tried to make a personal selection of an attorney he liked, rather than a religious issue.<sup>165</sup>

References to Muslims' treatment of women have also surfaced in

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<sup>159</sup> *Commonwealth v. Mimms*, 335 A.2d 516, 518 (Pa. Super. Ct. 1975), *rev'd on other grounds*, 370 A.2d 1157 (Pa. 1977), *rev'd*, 434 U.S. 106 (1977), *remanded to* 385 A.2d 334 (Pa. 1978). See *State v. Rodriguez-Garcia*, 937 P.2d 446, 451–52 (Kan. Ct. App. 1997) (though not a case involving Muslims, it discusses the problems of swearing and affirming in *Kalaydjian*, *infra* note 160). The court in *Commonwealth v. Brown*, 372 A.2d 887, 892 (Pa. Super. Ct. 1977), pointed this out as an example of the prejudicial behavior of the prosecutor in *Mimms*.

<sup>160</sup> *United States v. Kalaydjian*, 784 F.2d 53, 55 (2d Cir. 1986).

<sup>161</sup> *Id.* at 56–57.

<sup>162</sup> *Id.* In *Majid v. State*, 713 S.W.2d 405, 413 (Tex. App. 1986), the court rejected defendant's claim that references to his religion prejudiced his case on the basis that the prosecution had never sought to make any arguments based on defendant's "Shiite Moslem religion . . . or contemporary world terrorist events;" they all came out in witness testimony that was not objected to, so defendant waived these objections as a ground for appeal. One can see the dilemma of defense counsel: If defense counsel does not object, defendant will waive his right to raise prejudicial testimony or cross-examination as grounds for appeal; if defense counsel does object, defense counsel may simply draw more attention to the defendant's status as a Muslim or imply that there is something about being a Muslim that the jury should not know.

<sup>163</sup> *Graham v. State*, 324 S.E.2d 518, 520 (Ga. Ct. App. 1984).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

defendants' trials. In *People v. Jones*, the appellate court began the opinion dramatically, noting: "Defendant took three wives. They wed into the Islamic faith. Defendant believed that the teachings of the Holy Koran empowered him to beat his wives. So he beat all three of them. Only two survived."<sup>166</sup> The defense counsel was unable to procure an Islamic law expert who would explain why the defendant's faith might in some way justify or mitigate his beating one of his wives to death.<sup>167</sup> But the court turned aside any notion that defendant could have any defense based on Islam:

We seriously doubt that anyone knowledgeable on Islamic teachings would have proved helpful to this defense. Had such an expert been found, had he explained the righteousness of defendant's conduct or merely explained how defendant may have believed that his actions conformed to religious teachings, the expert would not have changed the outcome. The sovereign State of Illinois has a longstanding rule of law that prohibits the engaged-in conduct. This society will not abide defendant's actions regardless of the religious beliefs that may have motivated them. If a religion sanctions conduct that can form the basis for murder, and a practitioner engages in such conduct and kills someone, that practitioner need be prepared to speak to God from prison.<sup>168</sup>

In *Rahman v. State*, the court considered whether a cross-examination of the defendant's wife about his Muslim faith and the role of women in Muslim countries prejudiced his trial in violation of his constitutional rights.<sup>169</sup> While the court opined that "the gratuitous injection of irrelevant and potentially prejudicial ethnic and religious stereotypes at trial is never appropriate, particularly when the State is the offender," the court held that the defendant's failure to object at trial waived his right to complain.<sup>170</sup>

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<sup>166</sup> *People v. Jones*, 697 N.E. 2d 457, 459 (Ill. App. Ct. 1998).

<sup>167</sup> *Id.* at 460.

<sup>168</sup> *Id.* The court therefore rejected the defendant's ineffective assistance of counsel argument based on counsel's failure to produce an imam or other Islamic expert to testify that he was within his rights under Islamic law to beat his wife. *Id.*

<sup>169</sup> *Rahman v. State*, 469 S.E.2d 450, 451 (Ga. Ct. App. 1996).

<sup>170</sup> *Id.* The court held that this error did not amount to "plain error," sufficient to overcome the failure to object. *Id.* at 451-52. Similarly, in *People v. Mohammed*, 542 N.Y.S.2d 82, 83 (App. Div. 1989), in which the court agreed that the prosecutor made "a number of inflammatory and irrelevant remarks, particularly in reference to defendant's Moslem culture and status as an alien" that were "patently improper," the defendant's failure to object and his success on the objections he did make waived any claim to have the verdict overturned.

## C. JUDGES' AND LAWYERS' PREJUDICE

The following cases demonstrate that it is not only juries who may harbor exploitable biases against Muslims: their defense counsel, the prosecutors, and judges themselves may make such remarks. In *Barrett v. State*, involving the question of whether a possibly mentally ill Vietnam veteran voluntarily waived his right to trial and pleaded guilty, the court heard evidence from his second public defender about whether the defendant had been sufficiently counseled about his rights.<sup>171</sup> The public defender's testimony established that he had made a special effort to be thorough with the defendant because:

quite a few of the people used the X [in their name as did the appellant], and it stood for-the X was the unknown name that they had been robbed of when slavery was instituted. And usually it meant a Muslim. And we went over those very carefully, because they were prone to file writs and motions and that sort of thing. And so we knew to cover it very carefully.<sup>172</sup>

In *Ex parte Pink*, in which a defense attorney appealed a contempt citation issued for an unrelated reason,<sup>173</sup> both the prosecutor and defense attorney expressed bias towards Muslims. In describing the courtroom battle between the defense attorney and prosecutor, the court noted that “[the defense attorney] testified that when ‘black folk’ walked into the courtroom dressed in Muslim robes and caps, ‘like Arabians’ that [the prosecutor] remarked, ‘Look at those clowns. This must be a circus.’”<sup>174</sup>

Even judges are not immune from prejudice. In *State v. Allen*, a trial judge became impatient with a Muslim defense witness who was called to refute a charge against his wife for allegedly receiving a refund for a power tool for which she had not paid.<sup>175</sup> Because he would not remove his prayer cap, the trial judge refused to let him testify, believing that he was violating a state rule that required all persons attending court to be “dressed so as not

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<sup>171</sup> *Barrett v. State*, No. 02-C-01-9307-CR-00154, 1994 WL 25826, at \*2 (Tenn. Crim. App. Jan. 26, 1994).

<sup>172</sup> *Id.* In *People v. Johnson*, 450 P.2d 265 (Cal. 1969), we see a rare recognition that police can also harbor these prejudices. There, the defendant testified that during his police interrogation, “they ‘brought up this malice again and asked me, you know, was I a Muslim or something like that; since there wasn’t nothing taken it might have been I just went in and shot a white man down for nothing.’” *Id.* at 269.

<sup>173</sup> *Ex parte Pink*, 746 S.W.2d 758 (Tex. Crim. App. 1988).

<sup>174</sup> *Id.* at 759 n.2.

<sup>175</sup> *State v. Allen*, 832 P.2d 1248, 1249 (Or. Ct. App. 1992). The husband planned to testify that he had purchased the tool and given it to his wife to return and seek a refund. *Id.*

to detract from the dignity of the court.”<sup>176</sup>

Perhaps surprisingly given other clothing cases, the appellate court in *Allen* overturned the conviction based on the judge’s refusal to accept an offer of proof that the witness had a religious conviction requiring him to wear the prayer cap.<sup>177</sup> The court held that a trial judge’s “desire simply to maintain a general dress code cannot justify an infringement of a criminal defendant’s right to present an exculpatory witness, unless the attire worn by the witness would be disruptive or would create an atmosphere of unfairness.”<sup>178</sup> Although the appellate court directly rejected the defendant’s claim that her religious freedom was implicated by the refusal to let the witness testify, it indirectly accepted the premise of the *Sherbert v. Verner* test<sup>179</sup> as a practical matter, holding that this balance had to be struck for the defendant unless the witness’s reasons for wearing the cap are “not substantial or are based on a belief asserted but not sincerely held,” which the offer of proof would have established.<sup>180</sup>

#### D. WHEN DEFENDANTS INTRODUCED EVIDENCE ABOUT ISLAM

Some defendants attempted to disassociate themselves from Islam or even blame Islam for their crimes, especially the Nation of Islam, apparently because they understood the possible prejudice they could encounter in that association. In *People v. Smith*, the defendant made a lengthy speech about the fact that he was not a Black Muslim in his request to represent himself pro se.<sup>181</sup> In *Mills v. State*, the defendant, who was convicted of first-degree murder and sentenced to death, made claims against both the judge and his defense counsel, contending that the state “tried him for being a bad person, a [M]uslim, a white hater, and a criminal.”<sup>182</sup>

In *State v. Shamsid-Deen*, a family rape case, a defendant similarly fought back against a prosecutorial attempt to associate him with Nation of Islam stereotypes.<sup>183</sup> The prosecutor interrogated the defendant at length

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1249–50.

<sup>178</sup> *Id.* at 1249.

<sup>179</sup> See *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (holding that any burden on an individual’s free exercise of religion must be narrowly tailored to achieve a compelling state interest).

<sup>180</sup> *Allen*, 832 P.2d at 1249–50.

<sup>181</sup> *People v. Smith*, 497 N.E.2d 689, 691 (N.Y. 1986) (Kaye, J., dissenting) (“I want to make it absolutely clear that I am not a Black Muslim or a member of any Black Activist Groups, such as the BLA; but on the contrary, I am a firm believer in the Constitution of the United States and the laws of this country, but I believe that I am being railroaded here and that I am not receiving the equal protection of the laws, nor am I receiving due process of law.”) (internal quotations omitted).

<sup>182</sup> *Mills v. State*, 507 So. 2d 602, 603 (Fla. 1987).

<sup>183</sup> *State v. Shamsid-Deen*, 379 S.E.2d 842, 849 (N.C. 1989).

about supposed Islamic beliefs that fathers were absolute authorities in their households whom girls had to obey, that girls were forbidden to have premarital sex except with their fathers, and that the defendant taught his girls, with a sword in his hand, that they would have their heads cut off if they lied.<sup>184</sup> The father denied each of these claims and in exasperation replied: “You keep saying black Muslims. There's no such thing as black Muslims. We are Muslims, but we are not black Muslims. We are members of the Islamic faith, who are Muslims nationwide. There's no such thing as a black Muslim.”<sup>185</sup>

Courts tend to be quite unsympathetic to claims of unfairness or prejudice when defendants voluntarily identify themselves as Muslim.<sup>186</sup> For example, despite the prosecutor's badgering, the appellate court in *Shamsid-Deen* found no prejudice against the defendant, noting that the defendant had opened the door to this questioning by asking the victim whether she was Muslim and stating that the question about fathers having sex with their daughters “can in no way be construed as an insult to the Islamic religion . . . because the context makes clear that Muslim doctrine forbids premarital sex.”<sup>187</sup>

Similarly, in *State v. Brooks*, the defendant testified that he was a member of the Nation of Islam and was at a meeting at the temple when his minister invited him to come to the minister's house, yet this fact was not deemed prejudicial to the defendant's case or something the court should have warned the jury to disregard or treat cautiously.<sup>188</sup> And in *State v. Lee*, defendant unsuccessfully sought to exclude his statement to the police as he was resisting arrest;<sup>189</sup> the police testified that the defendant “informed

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> A curious case is *State v. Townes*, 522 S.W.2d 22, 24 (Mo. Ct. App. 1974), in which a defendant asked, over his counsel's disagreement, to voir dire the jury on whether their decision would be affected by the fact that he was a Muslim and thought that white people were devils. After some discussion with the court, Townes told the prospective jurors, “I'm saying that you are [devils]. I would like to know if there is anyone here that believes he is not a Devil.” *Id.* While the court attempted to make him sit down, the defendant and the jurors got into an interesting colloquy about whether they had raised their hands to agree that they were devils, and apparently whether they could be fair to his case if they were essentially agreeing that they were devils. *Id.* at 24–25.

<sup>187</sup> *Shamsid-Deen*, 379 S.E.2d at 850.

<sup>188</sup> *State v. Brooks*, 566 P.2d 147, 148 (Okla. Crim. App. 1977). This affiliation was particularly damning because, in this death penalty case, the allegation was that Brooks was following orders of his Nation of Islam minister, who allegedly kidnapped and robbed two girls, forced them to disrobe, drove them out of town, and shot them as they were following orders to walk into the woods. *Id.* at 147. Brooks also objected to the prosecution's attempt to paint him as a liar, apparently to shore up the credibility of one of the survivors who suggested that Brooks was the shooter. *Id.* at 148.

<sup>189</sup> *State v. Lee*, 440 P.2d 562, 564–65 (Kan. 1968).

[them] he was going to have [their] jobs, as he was a member of the Black Muslims, and his people would not let [them] put him under arrest, and he demanded to leave the scene, and kept informing [them] that [they] were all going to lose [their] jobs.”<sup>190</sup>

In *State v. Smith*, dissenting Justice Lundberg Stratton similarly implied that the defendant brought prejudice on himself by wearing a prayer cap during trial and testifying to issues regarding Islam during the mitigation phase of the trial.<sup>191</sup> Defendant testified that he had foresworn the violent aspects of the Nation of Islam highlighted in the movie “Malcolm X.”<sup>192</sup> Even so, Justice Lundberg Stratton understood the consequences of making this connection for the jury, and would have reversed on the basis of ineffective assistance of counsel for counsel’s failure to prevent this kind of testimony.<sup>193</sup> She reasoned that:

[T]hese topics, involving highly charged and controversial racial and religious issues, could evoke strong emotional reactions in a jury. . . . Some people believe, rightly or wrongly, that the tenets of the Nation of Islam urge militant violence, a powerful image that could have infected the jury’s deliberation. Without a careful rooting out of any potential juror who harbored prejudicial racial or religious views, or who had formed preconceived prejudices about either of the movies or the Islamic movement, there is no way to be sure that the jurors who deliberated were truly fair and impartial.<sup>194</sup>

Some Muslims have attempted to introduce evidence of their faith to suggest that they have turned over a new leaf and no longer are the violent criminals they used to be. Some courts have permitted such evidence. In *Smith*, dissenting Justice Lundberg Stratton dismissively suggested that “defense counsel’s tactic of eliciting his religious testimony was an attempt to evoke the sympathy of the jurors by showing that defendant’s religious

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<sup>190</sup> *Id.* at 564. The Court in *Wilson v. State*, 459 S.W.2d 298, 301 (Mo. 1970) seemed similarly unconcerned about admitting evidence in a rape case that the person committing the crime “bragged about being a black Muslim,” perhaps because the accused pled guilty to the rape.

<sup>191</sup> See *State v. Smith*, 731 N.E.2d 645, 661 (Ohio 2000) (Lundberg Stratton, J., dissenting) (“Throughout the trial and mitigation phase, the defendant, a follower of the Islamic faith, wore a prayer cap. Counsel attempted to make the jury aware that defendant no longer subscribed to the ideology of the Nation of Islam movement [described earlier as a “hatred doctrine of blacks being Gods and whites being devils”] . . . but rather the peaceful tenets of the Islamic religion.”).

<sup>192</sup> *Id.* (Lundberg Stratton, J., dissenting).

<sup>193</sup> *Id.* at 662 (Lundberg Stratton, J., dissenting).

<sup>194</sup> *Id.* (Lundberg Stratton, J., dissenting).

conversion made him a gentler, more peaceful man today.”<sup>195</sup>

However, in *Commonwealth v. Reid*, a 20-year-old murder defendant in the death penalty phase of his trial was prohibited from introducing evidence that he had left the gang he had been working with at the time of the drug-related murder, converted to Islam, and become a different person.<sup>196</sup> The trial court believed that this would violate a state rule prohibiting the introduction of religious beliefs or opinions, and might in fact prejudice the jury against the defendant instead of for him.<sup>197</sup> Even though the appellate court disagreed with the trial court’s conclusion on the impermissibility of the evidence, the appellate court concluded that the defendant was not prejudiced by the failure to introduce the evidence.<sup>198</sup>

Indeed, at least one appellate court found that the sentencing judge’s willingness to consider defendant’s attempts to reform himself by becoming a Muslim, albeit not sufficient to keep him out of jail, was proof of the judge’s willingness to considering lenity for the defendant. In *Commonwealth v. Black*, which involved an armed robbery, the appellate court decided:

We believe the record amply demonstrates that [the sentencing judge] did take all these factors into account; in addition, the judge considered appellant’s recent embracement of the Moslem faith, and the salubrious effect this could be expected to work on appellant’s rehabilitation. However, [the sentencing judge] was more impressed with the violent and precarious nature of the crime committed.<sup>199</sup>

The defendant’s decision to emphasize the positives in religious conversion has sometimes backfired, however, because it can encourage the jury to think that any misstep away from the defendant’s religion suggests that the defendant is either insincere about religious faith or is lying about religious conversion. For example, in *Imani v. Commonwealth*, a defendant attempted to refute a claim of drug dealing by noting that his religion, Islam,

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<sup>195</sup> *Id.* at 661 (Lundberg Stratton, J., dissenting).

<sup>196</sup> *Commonwealth v. Reid*, 642 A.2d 453, 459 (Pa. 1994).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 461. *See also* *Hassan v. State*, 500 S.E.2d 644, 645–46 (Ga. Ct. App. 1998), in which a defendant attempted to impeach the government witness who accused him of cursing by saying that he did not curse, “that he was a Muslim, that he had never been convicted of a felony, and that he had a good reputation in the community.” Defendant alleged that his counsel was ineffective by introducing this character evidence, because it was rebutted by an officer who heard him curse in a different situation. *Id.* at 645.

<sup>199</sup> *Commonwealth v. Black*, 467 A.2d 884, 885 (Pa. Super. Ct. 1983).

prohibited drug use.<sup>200</sup> The prosecutor then impeached him by showing that he had been convicted of not only drug crimes but also auto tampering and interference with a police officer while he was a practicing Muslim.<sup>201</sup>

Some courts have also been unsympathetic to defense counsel's attempts to play "the Muslim card." In *People v. Fenner*, the court held that there were no grounds for the defendant to appeal his attorney's decision to emphasize the Muslim garb that defendant was wearing to court as evidence that a witness' identification of him was mistaken (presumably because the perpetrator wore different clothes).<sup>202</sup>

Conversely, at least one defendant attempted to influence the jury *against* Muslims in order to mount a defense. In *People v. Brisbon*, a capital murder case, defendant claimed ineffective assistance of counsel and jury prejudice because his counsel failed to introduce sufficient evidence that the Nation of Islam had brainwashed him to hate white people as an explanation for the homicide.<sup>203</sup> One of his character witnesses testified that "the [Nation of Islam] school that she and the defendant attended taught that the 'white man was the devil, and the black man was the leader'" and that "[i]f a Nation of Islam man murdered two white men . . . he would receive an honor pendant to wear upon his lapel."<sup>204</sup> His claim was unsuccessful because of

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<sup>200</sup> *Imani v. Commonwealth*, No. 0280-92-2, 1993 WL 173690, at \*1 (Va. Ct. App. May 25, 1993).

<sup>201</sup> *Id.* As the appellate court determined, while the prior drug offense certainly might have impeached his own testimony that as a Muslim he would not engage in drug dealing, the two other charges were not salient to the drug crime he was charged with. *Id.* See also *State v. Roche*, 878 P.2d 497, 499 (Wash. Ct. App. 1994), where one defense attorney attempted to shore up the defense witness's credibility on a statement that he had never used cocaine with co-defendant Roche by having him testify that this use was contrary to his Muslim religion; *State v. Johnson*, No. 34287, 1975 WL 183023, at \*3 (Ohio Ct. App. Dec. 11, 1975), in which defendant attempted to place blame for high school drug sales on someone else, claiming that defendant was a Sunni Muslim and thus opposed the use of drugs and alcohol.

<sup>202</sup> *People v. Fenner*, 551 N.Y.S.2d 305, 307 (App. Div. 1990); see also *State v. Rahman*, No. CA-2210, 1984 WL 7547, at \*4 (Ohio Ct. App. Oct. 25, 1984), *rev'd on other grounds*, 492 N.E.2d 401 (Ohio 1986), in which the appellate court refused to overturn a conviction on the basis of the prosecutor's comments on the appellant's religion, noting:

Appellant was the first to raise the issue of his religion, his employment, and his character. He did this during his direct examination. Also, in the final argument, counsel for appellant was the first one to raise religion. The prosecutor certainly had a right to respond . . . : "Here's a man that he testified is different from all of us anyway in the fact that he's black and different from a lot of blacks because he both attempted to understand the religion of Islam and the Bahai faith."

<sup>203</sup> *People v. Brisbon*, 647 N.E.2d 935, 939-40 (Ill. 1995).

<sup>204</sup> *Id.* at 940. Defendant introduced a physician's affidavit that "defendant's exposure to those beliefs as a child was akin to child abuse and could potentially warp an individual's development. He had also been informed that the defendant had received two or three serious head injuries during his formative years. [The physician] opined that an individual who has suffered head trauma may have organic brain damage that could affect his cognitive and affective



the introduction of the character witnesses; the court held that “any further testimony in this regard would have been cumulative.”<sup>205</sup> The court also held that the defendant was not poorly represented due to the attorney’s failure to object trial court instructions that the jury could not consider the defendant’s race or religion in mitigation of his crime for death penalty purposes.<sup>206</sup>

#### E. THE RELEVANCE OF A CRIMINAL DEFENDANT’S MUSLIM FAITH TO THE UNDERLYING CRIME

One of the questions that arises in many criminal cases involving Muslims is why the judges involved believe and feel the need to mention that the defendant’s or witness’s faith is relevant to the crime the defendant is charged with. It is also somewhat of a mystery that judges do not seem conscious of the fact that simply mentioning the defendant’s faith might influence how people perceive the case.<sup>207</sup> In *Trammell v. State*, for

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functioning. Therefore, the defendant may be more susceptible to religious indoctrination.” *Id.* at 941. The court held that the defense counsel’s failure to follow up on this affidavit was not ineffective assistance of counsel. *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 943–44. In *Robinson v. State*, 335 So.2d 420, 421 (Ala. Crim. Ct. 1976), a defendant similarly attempted to mitigate his involvement in a riot by claiming that he had been indoctrinated by the Muslims he was living with into the belief that he needed to be armed to defend himself. He claimed that the homeowner, Arthur X, “taught them that God would come to judge the people and that people would be fighting and dying; that he had people he could contact who would support or fight for him; that he had enemies and they could not be trusted and that he had rather see his enemies [mostly white people] dead.” *Id.* He also counseled his group that when they went downtown to take donations for a NOL hospital and school that “‘if anyone hassled us about it, we were to fight them,’ [and] that his instructions about fighting were ‘to disable someone and to maim them.’” *Id.*

<sup>207</sup> Other cases in which the fact of a defendant’s Islamic commitments were mentioned without apparent relevance to the underlying crime include *State v. Aqu-Simmons*, No. 70035, 1997 WL 209166, at \*11 (Ohio Ct. App. Apr. 24, 1994) (in an aggravated murder case, the court brushed off a number of references to Islam: “The testimony about Simmons’ marijuana use does not include a statement that he was ‘not a good Muslim.’ . . . Officer Farid Allah Alim testified that, when he arrived at the mosque on E. 99th street, Simmons was up against the wall and surrounded by five Muslims. However, he did not describe them as ‘vigilantes.’ Alim did attempt to present hearsay testimony that the men said Simmons killed a Muslim . . .”) (internal citations omitted); *Hayes v. State*, 449 S.E.2d 663, 665 (Ga. Ct. App. 1994) (where the court describes the contents of a backpack carried by one of the car burglars as “tapes, a Koran, and three screwdrivers . . .”); *State v. Pratt*, 544 A.2d 392, 394 (N.J. Super. Ct. App. Div. 1988) (in which a witness explained at trial that the 15-year-old defendant’s comment that he was going to “serve” someone with a gun “was a Muslim expression meaning that the person ‘served’ would ‘not survive the day.’”); *Parris v. State*, 421 S.E.2d 137, 138 (Ga. Ct. App. 1992) (in which a confidential informant identifying a suspect driving a Pontiac Grand Prix described him as “a Muslim looking fellow with [a] physically deformed forehead.”) (internal quotations omitted); *Clark v. United States*, 412 A.2d 21, 23 (D.C. 1980) (in which a witness described a suspect in a struggle as having “that very clean Muslim look”) (internal quotations omitted); *State v. Gross*, 577 A.2d 814, 816 (N.J. 1990) (in

example, involving an armed robbery that occurred during a purported door-to-door canvas by the defendants, the court noted that the defendants purported to be “giving out literature having to do with the organization commonly known as the Black Muslims and accepting whatever contributions which might be made to this cause.”<sup>208</sup> The robbery occurred after the victim offered to pay fifty cents for the literature.<sup>209</sup> It is not clear that it was important for the appellate court to mention that this canvas was for “the Black Muslims.”<sup>210</sup> In other words, it is unclear whether the court was simply trying to tell a full story, or whether the appellate judges believed that the defendants’ fraud was particularly devious or threatening because it was an attempt to solicit for a Muslim organization.

*Commonwealth v. Adams*<sup>211</sup> poses a similar ambiguity. In that case, the defendant was an abusive African-American husband who killed his estranged Caucasian wife’s parents, with whom she was living.<sup>212</sup> The appellate court felt compelled twice to mention that the defendant was a Muslim—once in discussing his conversion and once his name change to Iknaton Rhajik Ikmalala Nzaddi—meanwhile refuting the notion that race or religion were inappropriate issues to introduce into the trial.<sup>213</sup> The court

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which the court described a robbery in a “Muslim pork-free sandwich shop.”); *State v. Hatten*, 561 S.W.2d 706, 710 (Mo. Ct. App. 1978) (in which the defendant’s presence in a Cadillac was explained by the fact that he and the car owner “were engaged . . . in selling Black Muslim newspapers in the Kansas City area.”); *Woods v. State*, 160 S.E.2d 922, 924 (Ga. Ct. App. 1968) (involving a racial discrimination challenge to the grand and traverse juries in defendant’s case, in which the court describes the appellants as “Negroes and adherents of the Black Muslim or Islam faith.”).

<sup>208</sup> *Trammell v. State*, 283 So.2d 620, 621 (Ala. Crim. App. 1973).

<sup>209</sup> *Id.*

<sup>210</sup> *See id.*

<sup>211</sup> *Commonwealth v. Adams*, 753 N.E. 105 (Mass. 2001).

<sup>212</sup> *Id.* at 108–109.

<sup>213</sup> *Id.* at 108, 114. The court ultimately held:

The subjects of Adams’s race and his religion were not irrelevant to the issues at trial. A review of the record reveals that both parties referred to them many times. Indeed, the defense put Adams’s race, his religious beliefs, and his concerns about prejudice against him before the jury in its opening statement, and introduced extensive evidence on these issues throughout the trial, as important background for his insanity defense. In this context, questions by the prosecution about Adam’s race and, to a lesser extent, his religious activities were not inappropriate. They were advanced to provide a more complete and balanced picture of Adams and his conduct, and not to inflame juror prejudice. It was precisely because Adams’s race and religion were inevitably going to emerge as issues at trial—at a minimum because of the interracial nature of the murders and Adams’s marriage—that the judge conducted an intensive and meticulous four-day jury selection process.

*Id.* at 114–15.

then repeated Adams' new Muslim name, but said that it was nonetheless going to use his original name because "[a]s is our custom we recite the defendant's name as it first appears on the indictments."<sup>214</sup> It is hard not to wonder why the court itself felt the need to stress the race and religion of this defendant.

In *Perry v. State*, in which the issue was the identity of the rapist of a mentally disabled teenager, the trial court questioned the witness and allowed testimony that the victim's "family is from Iran and they are Moslem. She is not allowed to date or talk to boys on the telephone."<sup>215</sup> The court nowhere links this allusion to any aspect of the crime, but the reference does appear to reinforce the stereotype of the deeply shrouded and confined Muslim woman.

In *People v. Howk*, the court permitted the defendant's faith and his terrorist-like comments to be introduced in a domestic homicide case.<sup>216</sup> Howk was charged with murdering his girlfriend Sonja after a lengthy abusive relationship in which he threatened several times to kill her, threatened suicide, or threatened apparent rival suitors.<sup>217</sup> Both the prosecutor and the defense introduced evidence as to the defendant's religious beliefs.<sup>218</sup> The prosecution described his conversion to Islam, Sonja's interest in him because of their common interest in Islamic history and philosophy, and her criticism of him for violating tenets of his religion, such as bans against smoking and drinking.<sup>219</sup> In the penalty phase, the prosecution was also allowed to produce diary entries which detailed the defendant's rage against "enemies of Allah":

I have been in a rage for several years now, and my temper is growing shorter. I frequently feel like brutalizing every infidel with whom I have the misfortune to come into contact. May Allah destroy the enemies of Islam! May Allah make us, his faithful slaves, the instrument with which he annihilates [sic] the enemies of the faith! . . . I want to kill. I don't care whom I kill as long as I can kill someone who is an enemy of my God.<sup>220</sup>

These entries in Howk's diaries made no mention of killing Sonja; in fact, one suggested that he might be calmed down by Sonja from his desire

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<sup>214</sup> *Id.* at 108 n.1.

<sup>215</sup> *Perry v. State*, 776 So.2d 1102, 1103 (Fla. Dist. Ct. App. 2001).

<sup>216</sup> *People v. Howk*, 365 P.2d 426, 428-29 (Cal. 1972).

<sup>217</sup> *Id.* at 428.

<sup>218</sup> *Id.* at 430.

<sup>219</sup> *Id.* at 428.

<sup>220</sup> *Id.* at 430 (internal quotations omitted).

to kill.<sup>221</sup> The trial court permitted these entries, despite the fact that there were a number of statements he made about his urge to kill that did not mention Islam.<sup>222</sup> It is not clear why the trial court believed that these entries were relevant to his obsession with his girlfriend, or why the court did not exclude these entries as prejudicial to his case.

Of course, the defense counsel in this case also attempted to rehabilitate the defendant by introducing evidence that he “was active in the Moslem church in San Francisco, that he gave talks on religious subjects there, and conducted a Sunday school class for small children.”<sup>223</sup> It may be that the defense attorney felt compelled to try to counteract this picture of the defendant as a Muslim terrorist, but this leaves open the question of whether the jury should have heard any evidence relevant to his faith or his threats to kill infidels.

Another case involving a forcible rape, in which the mention of the defendant’s religion seems gratuitous, is *State v. Elyel*.<sup>224</sup> In this case, the defendant allegedly got into the victim’s apartment by engaging her in a religious conversation.<sup>225</sup> The appellate court reported their first encounter as follows:

The victim, one Cassandra Nichols, described as a four foot, ten inch black woman in her early 20’s, and an adherent of the Jehovah Witness sect, initially met the defendant, a 23 year old black Muslim, at a bus stop where both were waiting for and ultimately took the same bus. Ms. Nichols, according to her testimony, engaged in casual conversation with the defendant, sufficient, in any event, to identify one another’s religious affiliations, and Ms. Nichol’s [sic] address.<sup>226</sup>

Defendant came to the victim’s apartment a few nights later, and the court went on, “[a]fter preliminaries, they began to discuss their religious beliefs, Ms. Nichols securing a bible for each. This discussion continued for about one hour until the defendant mentioned that he had been in a gang and had raped four women.”<sup>227</sup>

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<sup>221</sup> *See id.* (“[The defendant] expressed the hope that he would meet Sonja the next day because she was gentle and would quiet him.”).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *State v. Elyel*, No. C-830403, 1984 WL 14107, at \*1 (Ohio Ct. App. Mar. 21, 1984).

<sup>225</sup> *Id.* at \*5.

<sup>226</sup> *Id.* (internal citations omitted).

<sup>227</sup> *Id.*

This conversation was followed by the rape.<sup>228</sup> Since no further mention of either person's religious tradition occurs in the narrative, it is not clear why the religious affiliations of both defendant and victims were established: was it to paint the victim, a Jehovah's Witness, as essentially good and trusting, or the defendant as especially cunning in using the victim's interest in proselytizing him as a Muslim as a basis for gaining her trust? Even if the court's sole purpose was to simply flesh out the details of the story, once again, the court's report of the case paints "the Black Muslim" as a violent and untrustworthy character.

Another good example of gratuitous discussion of the defendant's religion is *Commonwealth v. Riggins*, a case from Philadelphia, which has a sizeable Muslim population.<sup>229</sup> In *Riggins*, the court allowed evidence that defendants were Muslims apparently just because the victim, in a dying declaration, accused her assailants of being Muslims.<sup>230</sup> Despite defendant's claim that both his trial and appellate counsel were ineffective for failing to object to "the element of racial prejudice" in the trial, the court cited to other cases where a defendant identification as "Muslim" was permitted and noted that "the appellant's being a Muslim was a relevant fact in view of the victim's dying declaration," even though that would not seem to narrow the universe of defendants very much at all."<sup>231</sup>

Perhaps cases that might better justify the relevance of religious information are those in which prosecutors used defendants' statements to establish their motive for the crime. One such case to consider is *State v. Marshall*, involving a handgun assault by one friend against another after they quarreled.<sup>232</sup> The apparent subject of the quarrel was the defendant's attempt to engage the victim in a conversation about Black Muslims.<sup>233</sup>

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<sup>228</sup> *Id.*

<sup>229</sup> Philadelphia has been known as "Muslim Town" for its thriving Muslim culture, which suggests that "being Muslim" does not narrow the list of suspects very precisely, so it is not clear why the court found this to be a relevant identifying fact. Abigail Hauslohner, 'Muslim Town': A Look Inside Philadelphia's Thriving Muslim Culture, WASH. POST (July 21, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/07/21/muslim-town-how-one-american-city-embraced-a-muslim-community-in-decline/?noredirect=on&utm\\_term=.22e62808c7e6](https://www.washingtonpost.com/news/post-nation/wp/2017/07/21/muslim-town-how-one-american-city-embraced-a-muslim-community-in-decline/?noredirect=on&utm_term=.22e62808c7e6).

<sup>230</sup> *Commonwealth v. Riggins*, 542 A.2d 1004, 1007 (1988).

<sup>231</sup> *Id.* The two citations provide at best minimal support for the evidentiary decision: the court cites "*Commonwealth v. Rainey*, 412 A.2d 1106, 1108–1109 ([Pa. Super. Ct.] 1979) (police officer's testimony concerning witness' reference to a Muslim meeting was proper since it concerned a legitimate response to a valid question asked by police during their investigation); *Commonwealth v. Griffin*, 412 A.2d 897, 902 ([Pa. Super. Ct.] 1979) (references to the Muslim religion were properly admitted to demonstrate existence of strong common bond among appellant, his co-defendants, decedent and witnesses)." *Id.* (parallel citations omitted).

<sup>232</sup> *State v. Marshall*, 168 S.E.2d 487, 488 (N.C. Ct. App. 1969).

<sup>233</sup> *Id.*

According to the case report, when the victim replied that “he was not interested in that subject,” he was called outside by the defendant and shot.<sup>234</sup> While the evidence might be relevant to show how the quarrel started, thereby establishing the level of mens rea or defenses that the defendant might have, the court sheds little light on why a conversation about Black Muslims would result in an almost deadly quarrel or why it was important to explain that the unwanted conversation was about Black Muslims at all.

Even when a defendant’s motive is connected to Islam, there appears to be no apparent attempt by courts to refute or question defendants’ own sometimes outrageous claims about what Islamic law actually permits. In *People v. Strong*, a stabbing homicide involving a “Sudan Muslim[’s]” attempt to demonstrate the power of mind over matter (a religious tenet of his Muslim sect), the defendant attempted to introduce evidence that he had successfully stopped several believers’ hearts and plunged knives into their chests without ill effect.<sup>235</sup> In *State v. Townsend*, the prosecutor successfully used a defendant’s post-arrest admission to shooting the victim “because the victim had insulted the defendant’s wife. The defendant stated that he was a Muslim, and Muslim law permitted him to kill any person who insulted his wife.”<sup>236</sup> In *People v. Green*, an inebriated defendant was charged with murder and attempted murder for shooting two men with whom he was drinking beer.<sup>237</sup> The court opined that his apparent motive was his confession that the three of them had misappropriated funds “which had been donated by area numbers runners to upgrade the community centers used by the Muslim sect of which they were members.”<sup>238</sup> Again, since it is difficult to understand how the beneficiary of their misappropriation is relevant to the defendant’s outrage, it is also hard to understand why the court felt the need to mention it.

#### F. FREE EXERCISE CLAIMS BY MUSLIMS IN CRIMINAL CASES

In some criminal cases, defendants mounted substantive First Amendment claims or defenses relating to their faith. Some of these cases recognized a Free Exercise claim for a Muslim to wear religious attire in court. In *In re Palmer*, a trial court’s ejection of a Muslim requesting a name change because he refused to take off his takia, or prayer cap, was

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<sup>234</sup> *Id.*

<sup>235</sup> *People v. Strong*, 338 N.E.2d 602, 604 (N.Y. 1975).

<sup>236</sup> *State v. Townsend*, 558 A.2d 669, 670 (Conn. 1989).

<sup>237</sup> *People v. Green*, 430 N.Y.S. 2d 150, 151 (App. Div. 1980).

<sup>238</sup> *Id.*

overturned on Free Exercise grounds.<sup>239</sup> The court applied the *Sherbert v. Verner* test,<sup>240</sup> which required the trial judge to demonstrate that the prayer cap would harm the decorum of the proceedings.<sup>241</sup> The *Palmer* court cited *McMillan v. State*, where a defendant who refused to remove his prayer cap in court was cited for criminal contempt;<sup>242</sup> the *McMillan* court overturned the contempt conviction based on the trial court's failure to apply the *Sherbert* analysis before punishing the defendant.<sup>243</sup>

In other cases, however, courts made short shrift of procedural claims or defenses by witnesses that were ostensibly based on their faith, foregoing any First Amendment analysis of whether they were entitled to exemptions. This is especially notable since most of these cases arose between *Sherbert v. Verner* and *Employment Division v. Smith*,<sup>244</sup> when any law that substantially burdened an individual's free exercise of religion received strict scrutiny.<sup>245</sup>

Other challenges to courtroom procedures based on defendants' claims about their duties under Islamic law have similarly been rejected without any significant Free Exercise analysis.<sup>246</sup> In *State v. Bing*, a Muslim witness was convicted of contempt of court for refusing to testify against a member of his religion.<sup>247</sup> The South Carolina Supreme Court rejected his appeal without any Free Exercise analysis, noting that his religious beliefs did not relieve him of his responsibility as a citizen to testify.<sup>248</sup> In *State v. Casteel*, the Wisconsin Court of Appeals rejected a defendant's argument that his swearing-in violated his Free Exercise rights because it was not

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<sup>239</sup> *In re Palmer*, 386 A.2d 1112, 1113–14 (R.I. 1978).

<sup>240</sup> *See supra* note 179.

<sup>241</sup> *Palmer*, 386 A.2d at 1115–16.

<sup>242</sup> *Id.* (citing *McMillan v. State*, 265 A.2d 453 (Md. 1970)).

<sup>243</sup> *McMillan*, 265 A.2d at 455–46. *Palmer* and *McMillan* were cited in *State v. Hodges*, 695 S.W.2d 171, 171–72 (Tenn. 1985), in which the defendant came to court dressed up like a chicken, which he claimed was his spiritual attire. Although the court was unsympathetic towards his claim, it held that the defendant should have been given the chance to develop a record on this point before being charged with contempt. *Id.* at 173–74.

<sup>244</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963); *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

<sup>245</sup> *Sherbert*, 374 U.S. at 403.

<sup>246</sup> *See, e.g., People v. Johnson*, 497 N.Y.S.2d 539, 539 (App. Div. 1985), a second-degree murder case involving a man who stabbed his wife to death. The defendant attempted to quash grand jury subpoenas to members of his mosque, arguing the priest-penitent privilege. *Id.* While the court acknowledged the possibility of privilege for conversations “between a Muslim brother acting as a spiritual advisor,” the court held that the defendant's mosque interrogation was initiated by mosque members to determine whether defendant was dangerous and needed to be removed, rather than for the purpose of giving “religious counsel, advice, solace, absolution or ministrations.” *Id.* (internal quotations omitted).

<sup>247</sup> *State v. Bing*, 253 S.E.2d 101, 102 (S.C. 1979).

<sup>248</sup> *Id.*

administered by a Muslim cleric chosen by him.<sup>249</sup> Ignoring the claim that the defendant was forced to violate his beliefs, the court held that the trial court had complied with statutory requirements regarding oaths and affirmations.<sup>250</sup>

A substantive religious freedom defense was used in a trespass case in *Darab v. United States*, in which a religious leader and his followers were arrested for trespass after interrupting a rival Muslim worship service at an Islamic Center, at which they claimed to have the right to be present.<sup>251</sup> The ousted leader based his claim of right on a fatwa<sup>252</sup> obtained from Al-Azhar University in Cairo, where the most authoritative interpreters of Islamic law sat.<sup>253</sup> Noting that this fatwa held that no person or group owned or had the right to control admission to the Islamic Center or prayers in it, the rival cleric remarked: “My belief was that the services . . . the prayer services at the Islamic Center and the Islamic Center, itself, was a place of worship for all Muslims. And that no one, no group of people whatever their characterization might be, had the right to interfere in the religious services designated for this place of worship . . .”<sup>254</sup>

In *Darab*, the court invoked *Employment Division v. Smith*<sup>255</sup> and even *Reynolds v. United States*<sup>256</sup> to reject appellants’ claim that under the Free Exercise Clause, the charges against them required the jury to make Islamic

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<sup>249</sup> State v. Casteel, No. 85-2248-CR, 1987 WL 267457, at \*3 (Wis. Ct. App. Feb. 10, 1987).

<sup>250</sup> *Id.*

<sup>251</sup> *Darab v. United States*, 623 A.2d 127, 129–31 (D.C. 1993). A similar incident arose in a civil case. In *Masjid Al-Ihsaan Inc. v. Ouda*, 553 S.E.2d 331, 332 (Ga. Ct. App. 2001) one of the trustees of a mosque ousted a fifth trustee, and then had him arrested for criminal trespass after he attempted to form a rival corporation. Because he kept leading prayers and proselytizing (allegedly in violation of the Holy Quran and the teachings of the Prophet Mohammed) on the property of the Masjid Al-Ihsaan, the first board filed a civil case to enjoin any further trespass. *Id.* The mosque also attempted to restrain two other members who were leading prayers, proselytizing and bringing weapons onto the premises. *Id.* at 332–33.

<sup>252</sup> A fatwa is “an Islamic legal pronouncement, issued by an expert in religious law . . . pertaining to a specific issue, usually at the request of an individual or judge to resolve an issue where Islamic jurisprudence . . . is unclear.” *What is a Fatwa?*, ISLAMIC SUPREME COUNCIL AM., <http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/44-what-is-a-fatwa.html> (last visited Feb. 10, 2019). According to the defendant in *Darab*, “fatwas are considered the cornerstone . . . the opinionating quarters of the Muslim world. In other words, if there were an equivalent in Islam to a Vatican . . . that would be it.” *Darab*, 623 A.2d at 132 n.17.

<sup>253</sup> *Darab*, 623 A.2d at 132.

<sup>254</sup> *Id.*

<sup>255</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (holding that employees who were terminated from their jobs for ingesting a drug as part of a religious ritual were not, under the Free Exercise Clause of the First Amendment, exempt from a state law banning the use of that drug).

<sup>256</sup> *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (holding that Mormons whose sincere religious beliefs led them to practice polygamy were not exempt from statutes banning the practice).



law judgments about who owned the mosque.<sup>257</sup> As the court explained, the trespass statute was a “neutral and generally applicable law” that regulated conduct only, not belief.<sup>258</sup> The “unlawful” requirement of the statute was based on evidence about “a deed to the property, evidence of a disturbance, and evidence of defenses,” and the jury was “asked to determine whether a crime had occurred, not to choose sides.”<sup>259</sup> The arrested cleric and his followers could not prevail simply by reciting their belief in the fatwa and Koran without showing that their belief in their right to stay was “reasonable,” as evidence that they were aware that there was a request to leave overcame their bona fide belief that they were entitled to stay.<sup>260</sup>

### G. CULTURAL DEFENSES

In some cases involving purported religious beliefs, the relationship between religion and culture is so intertwined that it is difficult to distinguish these claims. Nevertheless, in the few cases in which immigrant defendants made claims grounded more in culture than in theology, the defendants lost.

In *State v. Haque*, the defendant unsuccessfully attempted to get an adequate provocation manslaughter instruction for the killing of his former girlfriend on the basis of his cultural expectations about their relationship, which was finally terminated by the girlfriend.<sup>261</sup> He unsuccessfully tried to introduce evidence by a cultural anthropologist, who claimed that according to the defendant’s traditional Muslim Indian upbringing, intimate relationships were expected to last for life, and the pattern of dating and “on again off again quality of their relationship,” coupled with his immigrant experience, would have been “extremely difficult [for the defendant] to manage.”<sup>262</sup>

A Virginia court similarly rejected a Somali man’s attempted cultural defense that his smuggling of khat into the United States was not illegal because he lacked mens rea for the crime.<sup>263</sup> The defendant claimed that smoking khat was an expected custom at Somali weddings, where he was headed, and that it was often used by Muslims to stay up late to read the Koran, though there was some evidence that he might have been aware that

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<sup>257</sup> *Darab*, 623 A.2d at 132–33.

<sup>258</sup> *Id.* at 133.

<sup>259</sup> *Id.* at 134.

<sup>260</sup> *Id.* at 135–38.

<sup>261</sup> *State v. Haque*, 726 A.2d 205, 206–209 (Me. 1999).

<sup>262</sup> *Id.* at 207.

<sup>263</sup> *Commonwealth v. Siad*, No. CRIM 9463, 1997 WL 33421320, at \*2–\*3 (Va. Cir. Ct. Mar. 6, 1997).

some states prohibited khat.<sup>264</sup>

To summarize, American criminal cases involving Muslims often repeated the stereotype of Muslims, particularly “Black Muslims,” as untrustworthy, not credible, sometimes subversive and ultimately threatening violence to the larger community, as well as oppressors of women. These references were particularly dramatic in prosecutorial attempts to influence juries, but transcript references suggested that not only juries, but also judges, prosecutors, and even defense counsel harbored stereotypes about Muslims. Courts also struggled with questions of improper jury prejudice in cases where Muslims wore distinctive clothing, asked for time off for Friday prayers, or asked to be sworn in on the Qur’an. Some defendants referred to their faith as a means of suggesting that they were unlikely to have committed the alleged crimes or that they had reformed, which courts did not hold to have prejudicial effect. Still other defendants seemed to understand that decisionmakers held prejudices about Islam, sometimes attempting to distance themselves from Islam or blaming pressure from Muslim brothers for their crimes. In many cases, courts allowed references to defendants’ faith that seem irrelevant to guilt or innocence. And finally, Muslims were successful in a few cases, but unsuccessful in many others, in raising First Amendment religious defenses or cultural defenses to their crimes.

### III. FAMILY LAW CASES

In significant contrast to the criminal law cases decided between 1960 and 2001, most of the family law court cases involving Muslims or Islamic law generally suggest that courts earnestly attempted to respect the different cultural beliefs of Muslims and the laws of the countries from which they came. However, occasional court biases did come through. In general, there seemed to be fewer conflicts between courts and litigants regarding the fairness of procedures in family law cases, but more disagreements over the law to be applied or the facts.<sup>265</sup>

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<sup>264</sup> *Id.* However, because the statute under which he was prosecuted banned only the active hallucinogenic ingredient in khat and not khat itself, the court overturned his conviction based on the state’s failure to prove that the defendant’s action was illegal. *Id.* at \*4.

<sup>265</sup> *But see* Shike v. Shike, No. 14-97-00888-CV, 2000 WL 490696, at \*1–\*2 (Tex. App. Apr. 27, 2000). Although the trial judge made an inappropriate comment about a Pakistani adoption document introduced at trial, the appellate court concluded that the defendant’s own behavior and comments were much more damaging than the judge’s comment. For example, the defendant’s wife introduced evidence

that Mr. Shike wanted to videotape the proceedings so he could send the tape to Pakistan to have an Islamic death warrant issued against Mrs. Shike. He considered the issuance of such a warrant appropriate since he

The most common disputes involving Muslims were custody battles involving either parents from other countries or parents who converted to Islam. Often, these disputes arose because a Muslim parent and a non-Muslim parent disagreed about the child's upbringing in the Muslim faith or a foreign culture.<sup>266</sup> Another common dispute arose over the question of whether Islamic marriages and talaq divorces (effected by the husband stating "I divorce you" three times) were valid for purposes such as second marriages.<sup>267</sup>

Very few courts in these divorce and custody cases attempted to make a lengthy description of the requirements of Islamic law. One exception is *In re Marriage of Shaban*, in which a California court rejected a husband's attempt to use terms in a marriage contract referring to Islamic law's understanding of separate property in order to avoid California's community property regime.<sup>268</sup> In a footnote, the *Shaban* court went into an unusually extended discussion explaining the complexity of Islamic law:

Indeed, even the term "Islamic law" is relatively uncertain. There are at least four schools of interpretation of Islamic law: the Shafi'i, Hanafi, Maliki, and Hanbali. The legal system in various Islamic countries will often be influenced by one school or the other. Egypt, for example, has been influenced by both the Hanafi and Maliki schools. Indeed, one commentator has observed that England has rejected any attempt to give effect to Islamic "personal law" because of the varieties of competing schools within Islam . . . Here, not only would the expert have had

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was a Muslim. He refused to refrain from making side-bar comments despite the courts [sic] instructions and admonitions. He repeatedly violated court orders and criticized opposing counsel, other witnesses, and Mrs. Shike. He misrepresented the truth in several instances during the trial. The evidence also showed that he stalked his wife, threatened to kidnap her children, assaulted her, and assaulted her son.

*Id.* at \*2.

<sup>266</sup> See, e.g., *Sidi M.C. v. Bouchra T.*, No. CN95-09295, 1998 WL 665518, at \*1 (Del. Fam. Ct. May 15, 1998), in which a well-educated father in a custody dispute claimed that an uneducated mother "has failed to teach Sami anything about the Muslim or Arabian cultures" and felt "strongly that his son should learn about the Arabian culture, so that he can communicate with Father's family when Father brings the child with him to Morocco."

<sup>267</sup> See, e.g., *Seth v. Seth*, 694 S.W.2d 459, 462-64 (Tex. App. 1985) (disregarding a talaq divorce and applying American law instead to hold that a husband's first marriage was still valid); *Maklad v. Maklad*, No. FA000443796S, 2001 WL 51662, at \*3 (Conn. Super. Ct. Jan. 3, 2001) (refusing to recognize a talaq divorce that was conducted in Connecticut and affirmed by an Egyptian court due to defects in due process and consent).

<sup>268</sup> *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865-68 (Ct. App. 2001) (discussing also the purpose of a dowry in Islamic law).

to opine, based primarily on one phrase in the document and his own knowledge of Egyptian society and law in the early 1970s, whether the parties agreed to have their marriage governed by a school of doctrine disembodied from any system of national law (general “Islamic law” as distinct from codified Egyptian law or the law of some other nation state), but if he concluded that it was the former, he would have had to opine what particular school of Islamic law was to govern the contract.<sup>269</sup>

#### A. CUSTODY DISPUTES

Common issues in custody disputes involving Muslims from 1960 to 2001 included concerns that one parent has fled or would flee to another jurisdiction with the child where the other parent would not be able to retrieve the child,<sup>270</sup> and conflicts over the religious and/or cultural upbringing of the child.<sup>271</sup> The courts in this period also dealt with problems that come up in contemporary disputes of this nature regardless of the parent’s religious affiliation, such as the application of the Uniform Child Custody Jurisdiction Act (“UCCJA”),<sup>272</sup> the “best interests” standard for child custody problems with relocation of one parent,<sup>273</sup> and alienation of affections cases.<sup>274</sup>

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<sup>269</sup> *Id.* at 868 n.4 (internal citations omitted).

<sup>270</sup> *See, e.g.*, Al-Silham v. Al-Silham, No. 94-A-0048, 1995 WL 803808, at \*1, \*4–\*5 (Ohio Ct. App. Nov. 24, 1995), *infra* pp. 75–76; Marzouki v. Marzouki, No. 96-3604, 1997 WL 716133, at \*2–\*3 (Wis. Ct. App. 1997) (upholding a father’s supervised visitation of his young child, whom the mother feared he would abduct to his homeland in Tunisia, on the basis of factors other than the feared abduction. However, the court noted that the trial court order in part “was made to accommodate Elizabeth’s anxiety regarding that risk. Reasonable accommodations to the wishes of the sole legal custodian of the child are appropriate, particularly here where threats were made against the custodial parent. Indeed, Jamel himself recognized the need to make Elizabeth feel secure and he offered to surrender his passport and air travel tickets when exercising periods of physical placement with the child.”).

<sup>271</sup> *See, e.g.*, Arain v. Arain, 619 N.Y.S.2d 591, 591–92 (App. Div. 1994), in which a father sought a change of custody, alleging that the mother had failed to bring her child up in the Muslim faith as she agreed to in the divorce custody agreement. The court noted that courts will enforce agreements regarding religious upbringing but held that there was no evidence in this case that the mother had violated the agreement.

<sup>272</sup> *See infra* note 284.

<sup>273</sup> *See infra* note 284.

<sup>274</sup> *See infra* p. 77; *see also, e.g.*, Dincer v. Dincer, 701 A.2d 210, 214–15 (Pa. 1997) (applying the UCCJA to divest Pennsylvania courts of jurisdiction in favor of Belgium, where the children had the strongest contacts, despite concerns about the father’s interest in returning them to Turkey because the father had become a more observant Muslim, read to his children from the Koran, and required the family to speak only Turkish and watch mostly Turkish television); Ali v. Ali, 652

A complex example of a case at the intersection of concerns about discrimination against Muslims and a possible “kidnapping” of a custodial child is *Al-Silham v. Al-Silham*, involving a custody and visitation dispute between a Saudi father and a Caucasian mother of a child who was in her mother’s custody from the ages of one to four.<sup>275</sup> The father, tired of long trips to see his daughter, attempted to lift the supervision of the visitation granted to him.<sup>276</sup> The mother objected because of her concern that the father might kidnap their daughter and flee to Saudi Arabia, pointing out that the father continued to be a Saudi citizen, was unemployed and finishing a master’s degree while his parents supported him, and had only intermittent income from car sales.<sup>277</sup>

In *Al-Silham*, the mother substantiated her fears that her ex-husband would abscond with the child through evidence that the father had repeatedly threatened her with statements, such as that she would “lose her baby and never see her again,” that their daughter Layla “would either be Muslim or she would be a whore,” and that if “Layla was not raised Muslim, she would be better off dead.”<sup>278</sup> A witness also testified that the father told his daughter that he was taking her to see her grandparents in Saudi Arabia and she should “[f]orget about [her] mommy.”<sup>279</sup> The father had also had passport photos taken of the child, who was designated to travel on his passport; he had an open plane ticket to Saudi Arabia; and he had access to large amounts of cash.<sup>280</sup> The evidence also showed that the father’s divorced brother had absconded to Saudi Arabia with his child during his divorce, and that the father had demonstrated disrespect for American law enforcement.<sup>281</sup> Ultimately, the court upheld the supervised visitation, noting that “[a]ny parent, regardless of race or religion who had exhibited the same behavior would undoubtedly be subjected to a similar restriction of supervised visitation, at least until such concerns were addressed to the satisfaction of the court.”<sup>282</sup> However, the court restricted the supervisor to one person to prevent the supervision from being “a barrier

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A.2d 253, 257–59 (N.J. 1994) (declining to recognize a custody award from a Gazan court because the father did not provide a decree with “best interest findings.”).

<sup>275</sup> *Al-Silham* 1995 WL 803808, at \*1.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at \*4.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* (also noting that he specifically told his daughter that they were going to see her grandfather and grandmother in another country).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

to a free exchange of love and affection between a parent and child.”<sup>283</sup>

In these custody disputes, most of the courts considering cases involving Muslims appeared to apply the same legal principles they would have applied in non-Muslim cases, such as under the Uniform Child Custody Jurisdiction Act (“UCCJA”) and the best interests of the child standard.<sup>284</sup> For example, in *Dincer v. Dincer*, the court applied the jurisdictional requirements of the UCCJA to surrender American jurisdiction to other countries with stronger contacts to the children whose custody was being contested.<sup>285</sup> Conversely, in *Tataragasi v. Tataragasi*, American courts refused to surrender jurisdiction where the contesting jurisdiction failed to apply UCCJA standards, such as the best interests of the child custody standard.<sup>286</sup>

In another case, *Lazarevic v. Fogelquist*, the court applied a fairly standard relocation analysis<sup>287</sup> to determine that a divorced and remarried mother could relocate her children to the Aramco compound in Saudi Arabia, where she would work.<sup>288</sup> The father objected to this relocation, citing the possibility of harm to the children because of terrorism, the

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<sup>283</sup> *Id.* at \*4–\*5.

<sup>284</sup> See *In re Custody of R.*, 947 P.2d 745 (Wash. Ct. App. 1997), which involved a Pakistani custody dispute where the mother had custody under a Pakistani civil court judgment and the father had custody under a later Sharia court judgment, after which the mother fled to the United States. The Uniform Child Custody Jurisdiction Act (“UCCJA”), adopted with some modifications by all states, explains how jurisdiction for child custody should be determined when two parents have obtained or are trying to obtain custody in different jurisdictions, whether national or international. *Id.* at 752–53. The “best interests of the child” standard is contemplated by the UCCJA and is the most common standard in the U.S. for determining custody in contests. *Id.* As the court notes, some jurisdictions also expect foreign jurisdictions to apply the best-interests standards in order to have their custody determinations respected. *Id.*

<sup>285</sup> See *Dincer v. Dincer*, 791 A.2d 210, 213 (Pa. 1997) (applying the UCCJA to divest Pennsylvania courts of jurisdiction in favor of Belgium, where the children had the strongest contacts, despite concerns about the father’s interest in returning them to Turkey, given evidence that the father had become a more observant Muslim, who read to his children from the Koran, and required the family to speak only Turkish and watch mostly Turkish television).

<sup>286</sup> See *Tataragasi v. Tataragasi*, 477 S.E.2d 239, 246 (N.C. Ct. App. 1996) (holding that the Turkish courts would not have jurisdiction over custody of children whose mother fled Turkey because of the abuse the father inflicted on both them and their mother, and because the Turkish court did not apply the best-interests standard required by the UCCJA but “instead talked about defendant’s position and status in the community, the importance of Islam, circumcision and defendant’s place in society.”); see also *Ali v. Ali*, 652 A.2d 253, 257–58 (N.J. Super. Ct. Ch. Div. 1994) (declining to recognize a custody award from a Gazan court because the father did not provide a decree with “best interest findings”); *In re Brennan*, 134 N.W.2d 126, 131–32 (Minn. 1965) (applying Minnesota law to a custody dispute involving an unmarried Muslim father and Christian mother who wished to place her child for adoption).

<sup>287</sup> See, e.g., IRA ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 719–24 (5th ed. 2010) (discussing various court approaches to motions to modify custody or visitation based on the custodial parent’s plan to relocate to a distant city).

<sup>288</sup> *Lazarevic v. Fogelquist*, 668 N.Y.S.2d 320, 321–22 (Sup. Ct. 1997).

uncertain quality of schools in the compound, and lack of intellectual stimulation for the children.<sup>289</sup> Although the mother won the right to relocate to Saudi Arabia,<sup>290</sup> the court nevertheless permitted some stereotyping about the Muslim culture by including a lengthy quote from the Law Guardian's arguments:

*Schools:* This is simply one great big unknown. What are the schools in the compound like? There has been no evidence or testimony in admissible form to show what the schools are like. What are the academic statistics, the curriculum, etc.? Does the government imposed [sic] censorship extend into the classrooms? Is the curriculum regulated by what the government believes the children should learn? Is particular emphasis on the *Muslim* culture taught? Do the children learn about topics, places and events which the Saudi Government might feel threatened by such as Judaism, Israel, etc.<sup>291</sup>

Similarly, in *Pathan v. Pathan*, the court applied commonplace family law rules from so-called "alienation of affections" cases involving parents who try to poison the child's relationship with the other parent in order to change custody<sup>292</sup> from a non-Muslim mother to a Muslim father, who was in this case a respected physician.<sup>293</sup> The court noted as evidence that the mother attempted to convert her daughter from Islam to Christianity and that she used the threat of Muslim terrorism to make her afraid of her father's family, such as by having her watch a TV show about a foreign-born father kidnapping his child from his American mother.<sup>294</sup>

American courts also applied traditional U.S. rules about removal of children from their homes and termination of parental rights in cases

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<sup>289</sup> *Id.* at 324–26.

<sup>290</sup> *Id.* at 327–28.

<sup>291</sup> *Id.* at 324 (emphasis added). While the court acknowledged that the children "may sacrifice the more expansive freedom of speech, freedom of assembly and freedom of dress which would otherwise be afforded to him here in America," and that they "will not have the pleasure of participating in the many varied cultural activities available in New York City," the court notes "that this fact is true for many Americans not living in or near a large metropolitan area—solely because this kind of culture is not something that interests them or because they do not have the means to travel and participate in these activities." *Id.* at 326.

<sup>292</sup> Though the court does not refer to these cases, the court's actions typify court behavior in these alienation of affections cases. *See, e.g.,* ELLMAN ET. AL, *supra* note 287, at 663–64 (discussing courts' decisions to transfer custody due to the parent's attempts to alienate the child's affections from the other parent, and "parental alienation syndrome.").

<sup>293</sup> *See* *Pathan v. Pathan*, Nos. 18254, 96 OS 1, 2000 WL 129529, at \*6 (Ohio Ct. App. Sept. 15, 2000).

<sup>294</sup> *Id.* at \*5.

involving Muslims.<sup>295</sup> For example, in *In re A.B.E.*, the court refused to terminate parental rights of a Muslim father who was charged with child abuse and who placed his learning-disabled child in the foster care of his mosque, where the child was allegedly “beaten with a belt buckle and injured when an adult walked across his back.”<sup>296</sup> Despite these facts, the appellate court overturned the trial court’s termination of the father’s parental rights because it could find no value in terminating parental rights when there was no “substantial good” to be gained.<sup>297</sup> Similarly, in *In re Welfare of M.A.*, the Minnesota Court of Appeals followed a common pattern in terminating parental rights of a Muslim parent, requiring a stringent standard of proof for the state: that “evidence relating to termination must address conditions that exist at the time of the hearing, . . . and that it must appear that the present conditions of neglect will continue for a prolonged, indeterminate period.”<sup>298</sup> The court concluded that children were properly removed from abusive Oromo Muslim parents after “extensive services designed to rehabilitate this family, such as: a parenting program, which included in-home instruction; a domestic abuse program; individual therapy; an anger management program; and regular visits” with the child, as well as help from the Oromo doctor who reported the child’s injuries and a supportive Oromo social worker.<sup>299</sup> Rejecting the parents’ argument that the state’s standards “imposed ‘white Anglo-Saxon Christian’ parenting skills on them,” the court found that the case plan for the family was “culturally appropriate” and suggested “that protecting and taking care of one’s small children is not a characteristic that any one race or ethnic group claims for its own. Rather, taking care of one’s children is the universal culture of all parents.”<sup>300</sup>

In other termination cases, the courts’ analyses similarly proceed along grounds similar to those that would likely be employed in cases not involving Muslims. For example, in *In re Custody of Sloan*, the court applied Virginia precedent, in line with many of these cases, to conclude that there is a presumption in favor of awarding custody to the natural parent, which can “only be rebutted by clear and convincing evidence of parental unfitness.”<sup>301</sup> The court terminated a Muslim father’s custody after

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<sup>295</sup> See generally ELLMAN ET. AL, *supra* note 287, at 1212–23, 1268–75.

<sup>296</sup> *In re A.B.E.*, 564 A.2d 751, 753 (D.C. 1989).

<sup>297</sup> *Id.* at 757–58.

<sup>298</sup> See *In re Welfare of M.A.*, No. CX-01-98, 2001 WL 881642, at \*6 (Minn. Ct. App. Aug. 7, 2001 (citing *In re Welfare of Chosa*, 290 N.W.2d 766, 769 (Minn. 1980)).

<sup>299</sup> *Id.* at \*7.

<sup>300</sup> *Id.* at \*7–\*8.

<sup>301</sup> See, e.g., *In re Custody of Sloan*, 1991 WL 11030250, at \*2–\*3 (Va. Cir. Ct. Oct. 3, 1991); for a discussion of typical standards for termination cases, see ELLMAN ET. AL, *supra* note 287, at



a finding of unfitness based on his “lifestyle, attitude, behavior, instability, living circumstances, personal habits, and emotional status” on facts that included the father’s kidnapping of the infant from her mother, putting her with a foster family for over two years, taking her to a foreign country for several months, and then returning her to the foster family.<sup>302</sup> Perhaps the only arguably prejudicial comment that reflected on the father’s Muslim faith was the court’s view that Sloan’s marriage to two and perhaps three women, all of whom were residing with him, proved that he was immoral and unfit for custody.<sup>303</sup>

Along the same lines, in *In re Logan*, a Nebraska court terminated the parental rights of a mother who argued that she was rehabilitated because she had converted to Islam as well as becoming employed, going to college and completing drug counseling.<sup>304</sup> The court rejected her claim that she had reformed, noting that at the very same time she did these things, “she was arrested numerous times, convicted of two or more felonies, cohabited with known criminals, was incarcerated in both Denver and Colorado Spring” and received a suspended sentence for possessing narcotics.<sup>305</sup> Applying the statutory standard that “reasonable efforts, under the direction of the court, have failed to correct conditions leading to the determination,” the court ordered her rights terminated.<sup>306</sup> Family law courts often tried to respect the different views and circumstances of parties from other countries.<sup>307</sup> However, claims of religious or ethnic bias by Muslim noncitizens were sometimes rejected by courts. For example, in *Marzouki v. Marzouki*, the Wisconsin appellate court rejected a Muslim father’s claim that the trial court was biased against him in a visitation dispute because of

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742–43 (noting that many states apply a presumption for the parent unless “the parent is shown to be unfit or to have abandoned his or her rights.”).

<sup>302</sup> *Custody of Sloan*, 1991 WL 11030250, at \*1–\*2, \*4.

<sup>303</sup> *Id.* at \*4.

<sup>304</sup> See *In re Logan*, 281 N.W.2d 753, 754 (Neb. 1979).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 754–55. One unusual case, involving an adoption after a termination of rights that was never completed, is *Geramifar v. Geramifar*, 688 A.2d 475 (Md. Ct. Spec. App. 1997). An adopting couple who sought to adopt a child from Iran (the husband’s home country) sought a divorce after they became guardians of an Iranian child placed with them for adoption. *Id.* at 478. The adopting father abandoned his quest for adoption or custody after previously insisting that his child learn Farsi and be raised in a Muslim household. *Id.* at 476–77. The court determined that the adopting father had become the “equitable father” and imposed a duty of support on the adopting father. *Id.* at 477–78.

<sup>307</sup> See, e.g., *In re Custody of R.*, 947 P.2d 745, 753–54 (Wash. Ct. App. 1997). The court tried to apply appropriate choice of law rules objectively, and the judge’s only negative remark was aimed at the mother for running away to the United States with her child. *Id.* The court chose the civil court judgment based on the lack of jurisdiction of the Shari’a court and deference to the Pakistani civil court’s judgment that Muslim law would have not recognized the father’s paternity because the child was born out of wedlock. *Id.*

his religion and ethnicity.<sup>308</sup> The court noted that there were ample reasons for refusing custody to the father and granting him supervised visitation other than the mother's fear that he might kidnap the child and go to Tunisia, which is not a signatory to the Hague Convention.<sup>309</sup> The court pointed out that the child was very young and there was little evidence that the father knew how to care for him, the parties lived long distances from each other, and the parties were not able to cooperate in caring for the child, not even to the point of agreeing on a name for him.<sup>310</sup>

One example of a case where the court attempted to ensure even-handed enforcement of parental rights for a Muslim father is *Hosain v. Malik*, in which a Pakistani wife living in the United States challenged a Pakistani court decision to grant her husband custody of their children, while refusing to appear in a Pakistani court to provide evidence of her allegations.<sup>311</sup> The wife alleged that American law should apply because the Pakistani court failed to apply the best interests standard in awarding custody, as evidenced in part by the fact that the court awarded the husband custody in Pakistan.<sup>312</sup> The American court strenuously disagreed with the wife, finding that the Pakistani court properly considered the children's lifestyle in Pakistan as the appropriate standard for determining best interests.<sup>313</sup>

Similarly, in *In re Brennan*, involving a Muslim law student who had a nonmarital child with a Christian mother who wanted to give the child up for adoption, the court discussed at length the propriety of letting the unwed father have custody of his child, noting that his family "are longtime and well respected members of the community, economically comfortable and of good moral character."<sup>314</sup> The court went on to discuss educational and professional credentials of family members who would support the father while he finished law school, and their suitability as guardians.<sup>315</sup>

A particularly good example of the courts' willingness to treat Muslim parents on a par with other parents is *Long v. Ardestani*, in which an American mother asked for an order preventing her Iranian ex-husband from taking their children to Iran because of her fears that he would not return them and that she could not get an enforceable Iranian court order to

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<sup>308</sup> See, e.g., *Marzouki v. Marzouki*, No. 96-3604, 1997 WL 716133, at \*1-4 (Wis. Ct. App. Nov. 19, 1997).

<sup>309</sup> *Id.* at \*3.

<sup>310</sup> *Id.* at \*2-3.

<sup>311</sup> *Hosain v. Malik*, 671 A.2d 988, 990 (Md. Ct. Spec. App. 1996).

<sup>312</sup> *Id.* at 996, 998-99.

<sup>313</sup> *Id.* at 998-1000.

<sup>314</sup> *In re Brennan*, 134 N.W.2d 126, 129 (Minn. 1963).

<sup>315</sup> *Id.*

return them.<sup>316</sup> The mother testified that in past years, the father had threatened to take the children to Iran and not return them, and she expressed her fear that Iran might force her preteen sons to stay in the country so they could serve in the military.<sup>317</sup> Despite these concerns, the court held that the best interests of the child standard weighed in favor of allowing the father to take his children to Iran, and the court deferred to findings that the father was unlikely to stay in Iran, given all of his familial ties and economic investment in the United States.<sup>318</sup>

In fact, in some cases, appellate courts were also willing to overturn custody decisions against Muslim parents where there was no rational explanation for awarding custody to the non-Muslim parent. In *Ayyash v. Ayyash*, a non-Muslim mother had absconded with her children for six years, in violation of her original custody order.<sup>319</sup> When she was found, she asked the court to modify custody to award her the children.<sup>320</sup> When the trial court gave her custody, the father appealed, suggesting that the trial court had found against him because of racial stereotyping (he was a Palestinian Muslim), as the trial court had acknowledged that he was a responsible and fit parent.<sup>321</sup> The appellate court recognized that there was no valid ground for a change of custody based on witness testimony that the father wanted his children to be raised “in a real society with a real religion” according to his traditions and heritage, and the court rejected testimony that “Palestinian men considered their wives and children to be possessions.”<sup>322</sup> Acknowledging the trial court did not rely on either of these statements in granting the mother custody, the appellate court noted: “Indeed, for the trial judge to prefer one religion over another in deciding custody—in a society as diverse as ours—would be most inappropriate. And to suggest that it is a bad thing to expose the children to the traditions and the heritage of either parent is insupportable by this record.”<sup>323</sup>

Some courts also show sensitivity about the need for Muslim children to grow up in an environment consistent with their faith tradition. For example, in *In re Kafia M*, a court took pains to recognize that a Muslim foster family would have been better for a child placed out of her home, but

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<sup>316</sup> Long v. Ardestani, 624 N.W.2d 405, 408 (Wis. 2001). The mother pointed out that Iran is not a party to the Hague Convention, which would have obliged Iranian courts to aid in enforcing such an order. *Id.*

<sup>317</sup> *Id.* at 408–11.

<sup>318</sup> *Id.* at 417–18.

<sup>319</sup> Ayyash v. Ayyash, 700 So.2d 752, 752–53 (Fla. Dist. Ct. App. 1997).

<sup>320</sup> *Id.* at 753.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 756–57.

<sup>323</sup> *Id.* at 757.

that none was available.<sup>324</sup> In *In re Marriage of Malak*, an appellate court overturned a decision that awarded custody to a Lebanese mother who left her family home in Lebanon for the United States.<sup>325</sup> The U.S. court recognized that the Lebanese court had made appropriate findings as to the children's best interests under the UCCJA and ordered that the Lebanese decree be enforced.<sup>326</sup> Similarly, in *Iqbal v. Iqbal*, a court affirmed a trial court order giving the Muslim father visitation rights on Friday afternoons so he could take his daughter to the mosque.<sup>327</sup>

American courts in this period had a difficult time accepting conservative gender norms in majority Islamic countries or sects and sometimes employed modern Western assumptions about girls and women in Muslim countries. In *People v. Benu*, a Muslim father was convicted of endangering the welfare of his child for arranging the marriage of his 13-year-old daughter to a 17-year-old male in a ceremony that allegedly conformed to Muslim religious law.<sup>328</sup> There was conflicting testimony about whether the girl was indeed interested in the young man and the father was trying to prevent her from having non-marital relations, or if the daughter was being pressured into a marriage that her father wanted.<sup>329</sup>

The appellate court expressed some ambivalence about this attempted violation of American social norms, but ultimately sided with the American view, quoting an Ohio opinion:

[N]either the physiology of man nor some of his more basic instincts have changed much since he first became identifiable as 'homo sapiens.' It is unquestioned that the 'mating instinct' per se is and has been throughout the centuries one of such basic instincts, and that throughout the centuries male and female persons have been physically capable of realizing and fulfilling such instinct at an age

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<sup>324</sup> *In re Kafia M.*, 742 A.2d 919, 925–26 (Me. 1999).

<sup>325</sup> *In re Marriage of Malak*, 227 Cal. Rptr. 841, 846, 848 (Ct. App. 1986).

<sup>326</sup> *Id.* at 848. These findings included the fact that the children "have many friends, neighbours and relatives in Lebanon and they are tied up to their country . . . with lots of environmental [sic], traditional, social habits, heritage, moral and cultural links," that their original language was Arabic and they were brought up as Muslims and would have difficulty continuing their religious education, and the court wished to "avoid their exposure to shredding, loss, spiritual and physical deficiency resulting from the radical change which will take place" if the children were transferred to the United States without friends or relatives. *Id.* at 848 n.1. The court also considered the economic circumstances of the parents, finding that the mother was unemployed and moved a lot, while the father had a significant number of properties and businesses that the children could inherit. *Id.*

<sup>327</sup> *Iqbal v. Iqbal*, 625 N.Y.S.2d 605, 606 (App. Div. 1995).

<sup>328</sup> *People v. Benu*, 385 N.Y.S.2d 222, 223–24 (Crim. Ct. 1976).

<sup>329</sup> *Id.* at 223, 225.

earlier than . . . the minimum age at which two persons may 'be joined in marriage.'

It is a matter of historic fact, however, that until a comparatively recent date the primary role played in 'marriages' all over the world by the female person was solely that of consort and childbearer. Here again it is evident that a woman may well be capable of these activities prior to reaching the age of 16. It is also a matter of fact that in many countries of the world today these traditions still persist. It is noted, however, that, as a general rule, whenever and wherever the scope of a 'wife's' activity is limited by custom, tradition or law merely to consortium and childbearing, she is looked upon as nothing much more than a chattel—a piece of personal property to be treated and dealt with as such.<sup>330</sup>

In *Ali v. Ali*, a court rejected a Muslim father's request to award him custody when he argued that under Sharia law, the father is automatically entitled to custody when a boy is seven years old, or nine years old upon application by the mother.<sup>331</sup> According to the court, "such presumptions in law cannot be said by any stretch of the imagination to comport with the law of New Jersey whereby custody determinations are made based upon the 'best interests' of the child and not some mechanical formula."<sup>332</sup>

In occasional cases involving claimed gender norm differences, American courts expressed skepticism towards the litigant's claims about Islamic law—some being simply incredible. In a criminal case involving a Muslim father who had sexual intercourse with his 11-year-old stepdaughter, arguing that Muslim practice permitted him to take a young girl as his wife, the court discounted this claim, particularly in light of expert testimony that Islam explicitly prohibits marriage with one's stepdaughter.<sup>333</sup>

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<sup>330</sup> *Id.* at 227 (quoting *State v. Gans*, 151 N.E.2d 709, 713 (Ohio 1958)); see also *Ashanti v. State*, No. 05-96-01920-CR, 1999 WL 39041, at \*1, \*3 (Tex. App. 1999), in which a father, convicted of sexual abuse of his stepdaughter, claimed that she made it up because he was a Muslim and because his stepdaughter was rebelling against the requirement to follow the strict rules of his faith about dress, including a scarf and long dress. The court apparently did not accept this explanation for the allegation of abuse.

<sup>331</sup> *Ali v. Ali*, 652 A.2d 253, 259 (N.J. Super. Ct. Ch. Div. 1994).

<sup>332</sup> *Id.*

<sup>333</sup> *Accomack Cty. Dept. of Soc. Servs. v. Muslimani*, 403 S.E.2d 1, 2 (Va. Ct. App. 1991). The case itself was the father's challenge to a decision that his natural daughters be placed in the custody of their mother rather than in his, due to concerns about whether he would abuse them as he had done his two stepdaughters. See also *Ibrahim v. Ibrahim*, 825 S.W.2d 391, 393–94, 397 (Mo. Ct. App. 1992), in which a father appealed a trial court decision awarding custody of the

Perhaps the most direct and extended example of a judge expressing strong disagreement with the defendant's religion can be found in *Muhammad v. Muhammad*, in which a Black Muslim was interrogated about his beliefs about white people and admitted that he planned to teach his children that white people are devils, as taught by his religion.<sup>334</sup> The trial judge's interaction with the appellant husband's spiritual counselor during a preliminary proceeding was, to say the least, unusual:

MARVIN MUHAMMAD: For four hundred years we have been over here being mistreated by you.

THE COURT: By [Mr. Blalock]?

MARVIN MUHAMMAD: Not you in particular.

MR. BLALOCK [counsel for the wife]: Am I a devil?

MARVIN MUHAMMAD: If you had been in the days of your forefathers —

[ALL SPEAK AT ONCE; UNINTELLIGIBLE]

THE COURT: Wait a minute, that's so tired, that's such a tired argument. Please don't bore me with that.

MARVIN MUHAMMAD: Well, he brought it up, Your Honor.

THE COURT: I don't care if he brings it up. I'm telling you that that's the tiredest argument that there has ever been. Please don't give me that. . . .

MARVIN MUHAMMAD: You wanted the truth, didn't you?

THE COURT: Yeah, and that ain't the truth. That's a bunch of bull as far I'm concerned. It's no worse than a man coming in here and wearing a white robe and talking about how no good blacks are because they are black.

MARVIN MUHAMMAD: No, I didn't enslave you all for four hundred years; you all did that to us.

THE COURT: And I didn't enslave you. I didn't enslave anybody.

MARVIN MUHAMMAD: So I'm not going to make an apology to you for your mistreatment of me.

THE COURT: Wait a minute, whoa. I've mistreated you?

MARVIN MUHAMMAD: You as a people have

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parties' child to the wife after years of abuse, threats, and the father's absconding with their child. Defendant alleged bias by the trial court due to the fact that the trial was conducted just before the United States declared war on Iraq after the invasion of Kuwait, where his parents lived, and because the judge referred to the husband's "Arab and Moslem" status. *Id.* at 397. The appellate court described these claims as "prattle" and rejected the claim of bias. *Id.*

<sup>334</sup> *Muhammad v. Muhammad*, 622 So.2d 1239, 1244 (Miss. 1993).

mistreated us as a people.

THE COURT: Oh, that's a bunch of bull. I have not done anything to you, and it—of course, we have a difference of philosophies, but I will tell you this: I don't treat and teach my children to hate anybody because of the color of their skin. In fact, I say you should never do that. But you want equality on one side and you want it back on the other. It don't work that way.

MARVIN MUHAMMAD: Allah has revealed what I just said, that the Caucasian is the devil. So, I'm not going to deny that simply for advantage, for some kind of advantage from you.

THE COURT: I guess a guy that's in a Ku Klux Klan could say the same thing, that Jesus Christ came to him in a dream and told him that black people were devils.

MARVIN MUHAMMAD: Well, they've inflicted enough hatred and murder on my people, so they obviously felt something about us that was unjustified, but I didn't come to Europe and steal white people from their land and enslave them; y'all came to Africa and stole us, so don't try to put that jacket me.

THE COURT: I've never been to Africa in my life. I've never been to Africa in my life.<sup>335</sup>

Following testimony from the wife that she would raise her children to respect everyone, the trial judge in *Muhammad* replied:

THE COURT: Well, of course I'm white so I guess I'm sensitive somewhat to somebody calling me a devil or whatever. I don't feel very devilish . . . ; or teaching people that I'm a devil because of what happened in the past—which is fine; that's his thing. But I have a different philosophy in raising my children; that is, I don't tell them, you know, you're in this particular situation because maybe blacks did so-and-so or Indians did so-and-so or Chinese or tall people or anything else. Our children are raised—we don't make a big distinction about race. It's just not a big point in our house, not a point at all. But if you had the children, what would your posture be on that type of thing?<sup>336</sup>

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<sup>335</sup> *Id.* at 1244–45.

<sup>336</sup> *Id.* at 1245.

After further testimony that Marvin Muhammad would want to live in a separate territory and refuse participation in American politics, the judge continued:

THE COURT [TO ROBERT MUHAMMAD]: There a lot of things you say I completely one hundred percent agree with. I don't like being called a devil but on the other hand—

ROBERT MUHAMMAD: My children would never come up and call you that.

THE COURT: No, but you did, but nonetheless, that makes no difference.

ROBERT MUHAMMAD: Okay, but as far as what we teach our children, I—

THE COURT: That's what you choose to believe or teach them, and that's fine.

ROBERT MUHAMMAD: Yes, sir. Because the Christians teach their children to believe in Santa Claus, but you know, that's totally unfounded and unheard of. So I can't sit up and debate with you because it would be endless. You know, you have your opinion and you would probably stick to it, and I'd have mine.

THE COURT: That's right. And I'm saying that is your religion and that's—that is not going to have anything to do with this decision.

ROBERT MUHAMMAD: Yes, sir.

THE COURT: There are white people who would sit up there and tell you that blacks are parasites on society, and you say that whites are devils. I think all of y'all are wrong, but nonetheless, that's your opinion. So that hasn't got anything to do with anything. . . .

THE COURT: Thank you. Let me first go to the issue of the business of your religion. At one point Mr. Muhammad and Mrs. Muhammad came to my office and brought an *ex parte* order, and we had a discussion about that. I'd like to have a copy of my Opinion-any of you have that? [court is tendered copy of his opinion.] Now what I said was:

“This opinion has dealt with the tenets and practices of the Islamic Religion for a specific reason. The folkways and mores of the followers of Islam are different from mainstream America. *Being different does not infer being wrong, but it does pose distinct problems in the*



*adjudication of this case.*<sup>337</sup>

In remanding the *Mohammad* case for review on other grounds, the appellate court concluded, “[a]lthough the chancellor did make some undoubtedly inappropriate statements of personal opinion, it does not appear that the chancellor’s decisions were the result of any bias and they are supported by the evidence.”<sup>338</sup>

However, in explaining why Mrs. Muhammad was entitled to get a divorce for extreme cruelty, the appellate court could not resist commenting on the Islamic sect in which the Muhammads had chosen to live:

Virtually every aspect of life of the University is impacted by religious doctrine. The social and family structure is strongly paternal. Men are viewed as the maintainers of their wives and children. Women are required to submit to their husbands. The role of the woman is viewed primarily as being the helpmate of her husband. Child care is one of her chief responsibilities. Women make no decisions. They cannot leave the confines of the community without the permission of their husband. Members of the faith are not allowed to ingest alcohol, tobacco, drugs or other intoxicating substances. Neither are they allowed to eat red meat. Although the food supply is adequate in quantity, the diet at the University is fairly limited to beans, broccoli, fish, bread, cauliflower, and sometimes corn. Meals are restricted to one per day for adults. Fasting from these meals periodically occurs. Women are required to breastfeed their children. At least some of the milk and juices received by women through the Women, Infants and Children (WIC) program go to the operation of a bakery. Mail is subject to being censored.<sup>339</sup>

## B. MUSLIMS IN MARRIAGE AND DIVORCE CASES

Most cases involving the legitimacy of marriages and divorces became complicated for Muslims when the parties underwent Muslim marriage ceremonies either before or as a substitute for civil marriages.<sup>340</sup> Some cases

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<sup>337</sup> *Id.* at 1246–47 (emphasis in original).

<sup>338</sup> *Id.* at 1251.

<sup>339</sup> *Id.* at 1242.

<sup>340</sup> *See* Salah v. Awes, 629 N.W.2d 99, 102 (Minn. Ct. App. 2001), in which the parties to a Hague Convention custody dispute involving Minnesota and Canada agreed that they underwent only an Islamic marriage and not a civil marriage. The child’s mother, who moved to Minnesota, allegedly

involving Muslim spouses stand at the intersection of nation-state marriage requirements and Islamic law requirements for recognizing a valid marriage or divorce. But these cases do not seem to elicit as many stereotypical remarks about Islam as in other cases, and the facts often do pose concerns that might legitimately be raised about the intersection of secular and religious laws in the United States, a country that recognizes the separation of church and state.

In cases during this period, judges sometimes stated that they could acknowledge Islamic law but that they could not recognize it as law if not emanating from a court recognized by a secular country. For example, in *Farah v. Farah*, a Virginia woman sued her claimed husband for divorce.<sup>341</sup> The husband claimed that their marriage was void under English law because they had entered a proxy marriage by signing a marriage contract (“Nikah”) and having a ceremony performed by an imam, with proxies standing in for them in England.<sup>342</sup> The husband argued that this marriage did not comply with English law, which had a fifteen day residency requirement for marriage as well as requirements for a license and a state certificate of the marriage.<sup>343</sup> The wife argued that the proxy wedding, recognized in her Islamic sect, had been affirmed as valid in Pakistan through a special ceremony there.<sup>344</sup> However, the Virginia court applied English law and held that the parties were not married.<sup>345</sup>

Similarly, in *In re Marriage of Vryonis*, the California court refused to recognize as a putative wife a woman who subjectively believed that she had been married through of a private ceremony, which she alleged was valid as a “Muta” marriage authorized by her Muslim sect.<sup>346</sup> The court held

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because of spousal abuse, thus argued that she could not return to Canada because she would be deported after her “husband” cancelled his support affidavit for her. *Cf. Gazipura v. Gazipura*, 652 So.2d 266, 267–68 (Ala. Civ. App. 1994) (detailing a wife’s conversion from Islam to Jehovah’s Witness after marrying her husband, leading to marital problems. This case, however, concerned payment of support and not any custody or divorce disputes).

<sup>341</sup> *Farah v. Farah*, 429 S.E.2d 626, 627 (Va. Ct. App. 1993).

<sup>342</sup> *Id.* (explaining that some sects in Islam, including the Ahmadiyya sect to which the wife belonged, permit men and women to be married through a ceremony in which a proxy attends in place of one or more of the parties—as in this case, where neither party was in England).

<sup>343</sup> *Id.* at 628.

<sup>344</sup> *Id.* at 628–29.

<sup>345</sup> *Id.* at 629–30. Moreover, the court concluded that the wedding in Pakistan was merely ceremonial and did not constitute the act of marriage under Islamic law. *Id.* However, the court noted, “[U]nder the tradition of the wife’s Islamic sect, the ‘Rukhsati’ symbolizes the sending away of the bride with her husband.” *Id.*

<sup>346</sup> *In re Marriage of Vryonis*, 248 Cal. Rptr. 807, 809 (Ct. App. 1988). Although the Civil Code section at issue has since been repealed, the Court understood a putative marriage to exist if either of both parties believe, in good faith, that the marriage was valid but receive a determination that the marriage is void or voidable. *Id.* at 811 (quoting CAL. CIV. CODE § 4452 (repealed 1994)).

that, although the woman was ignorant about marriage laws in the United States and that her claimed husband assured her that they were married, her good-faith belief in the legitimacy of their marriage had to be about its legitimacy under California state law, not under Islamic law.<sup>347</sup> Because the parties did not engage in any of the indicia of marriage—such as living together or commingling finances—the court found no basis for holding that the putative wife had a good-faith, objectively reasonable belief that the couple had met state law requirements for marriage.<sup>348</sup>

Furthermore, in *Seth v. Seth*, while a trial court permitted expert testimony about talaq, the court ultimately applied Texas law, ignored the talaq divorce, and ruled that the husband's first marriage was still valid.<sup>349</sup> It based its decision, in part, on the fact that “there was no factual showing that any official state body in either India or Kuwait had actually executed or confirmed the divorce and marriage.”<sup>350</sup>

Despite these examples of courts applying laws of U.S. states, some courts during this period recognized marriages where the parties' performance was recognized by Islamic law, despite some of the formal procedures required by under state law either being missing or accomplished out of order. For example, in *Shike v. Shike*, after the parties married in an Islamic law ceremony in Pakistan, the husband came to the United States and applied for a marriage license, asked for the statutory 72-hour waiting period to be waived, and then took the license to his local imam for a marriage ceremony.<sup>351</sup> Because the ceremony (“Nikkha”) had already been conducted in Pakistan, the imam refused to perform a marriage ceremony again, but he did sign the license.<sup>352</sup> The Texas court held that failure to conduct a second ceremony did not invalidate the marriage:

Prior to trial, the court found that a ceremony was not performed on April 2, 1992. The evidence at trial also showed that a ceremony was not performed on that date. The validity of the marriage license, however, was not affected by this mistake. . . . Both parties had previously

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<sup>347</sup> *Id.* at 812–13.

<sup>348</sup> *Id.* at 813–15; *but see* *Aldainy v. Aldainy*, No. C2-97-784, 1997 WL 561267, at \*2 (Minn. Ct. App. Sept. 9, 1997) (determining that a second “wife”—who had a marriage license in South Dakota, where proof of divorce was not required, and who was married in a Muslim ceremony at the Islamic Center of Minnesota—could claim the status of putative spouse where it was determined that her husband was not legally divorced from his first wife, whom he had married in Saudi Arabia).

<sup>349</sup> *Seth v. Seth*, 694 S.W.2d 459, 462–64 (Tex. App. 1985).

<sup>350</sup> *Id.* at 463.

<sup>351</sup> *Shike v. Shike*, No. 14-97-00888-CV, 2000 WL 490696, at \*1 (Tex. App. Apr. 27, 2000).

<sup>352</sup> *Id.* at \*3.

entered into marriage in Pakistan through the performance of a Muslim marriage ceremony. They followed the proper procedures to obtain a marriage license in Texas. After the parties were informed that a Nikkha was a recognized marriage ceremony, they continued forward with the process and did not object to [the imam] signing the license. Therefore, we find [the imam]’s signing of the license without performing a ceremony did not affect the validity of the already existent marriage between John and Saba Shike; it merely confirmed it in accordance with Texas law.<sup>353</sup>

Some courts also deferred to Islamic law and authority where it could be determined and was not in conflict with laws in the United States.<sup>354</sup> For example, in *Aghili v. Saadatnejadi*, a husband filed suit to invalidate a marriage conducted by a congregational member who was not the official imam of their mosque, although he did carry out some of an imam’s duties.<sup>355</sup> The court, however, looked to an Islamic law expert, who stated in his affidavit:

Islamic law stipulates quite precisely that anyone with the requisite knowledge of Islamic law is competent to perform religious ceremonies, including marriage. One is not required to have an official position in a religious institution such as a mosque (masjid) in order to be qualified to perform such ceremonies. From the vantage point of Islamic jurisprudence, the question of his right to bear the title imam is irrelevant. His competence before Islamic law to perform Muslim ceremonies is determined solely by his knowledge of that legal corpus. It is quite clear that Mr. Tarahian does possess such knowledge and that he is recognized by members of the Muslim community as possession [sic] the competence to perform religious (and civil) ceremonies.<sup>356</sup>

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<sup>353</sup> *Id.*

<sup>354</sup> *See. e.g.*, *M.H. v. M.G.*, 658 N.Y.S.2d 551, 555 (Fam. Ct. 1996) (recognizing the validity of an Egyptian support order based on similar principles to New York’s: “The Egyptian Court stated that the Father has an obligation from the Koran and Egyptian civil law to support his child ‘appropriate to the Father’s financial state’. . . and that obligation does not disappear simply because the Father does. New York also imposes an obligation on the parents to provide support for their child based on the combined income of both parents.”).

<sup>355</sup> *Aghili v. Saadatnejadi*, 958 S.W.2d 784, 788 (Tenn. Ct. App. 1997).

<sup>356</sup> *Id.* at 788; *see also* *Shamsee v. Shamsee*, 381 N.Y.S.2d 127, 127 (App. Div. 1976) (rejecting a husband’s claim in a divorce action that his marriage twenty years previously was invalid

On the other hand, just as states may refuse to recognize the marriage and divorce laws in other jurisdictions that violate the recognizing state's public policy,<sup>357</sup> some courts in this period refused to recognize Islamic marriage or divorce procedures that violated that state's public policy, even if permitted under laws of other countries. For example, in *Maklad v. Maklad*, the Connecticut Supreme Court refused to recognize a talaq divorce conducted in Connecticut, even though it was affirmed as valid in an Egyptian court.<sup>358</sup> The Connecticut court reasoned that the wife had received neither notice nor other due process in the Egyptian court, and she had not been given an opportunity to consent in the Connecticut talaq divorce.<sup>359</sup>

Muslim divorce customs trouble U.S. courts in particular both because of the concern for potentially vulnerable wives and because the customs violate other public policy concerns in the given state.<sup>360</sup> In *In re Marriage of Dajani*, a wife in a divorce proceeding attempted to enforce her marital contract dowry (mahr), which granted her the bulk of her dowry upon divorce, as is customary.<sup>361</sup> The husband defended by using an expert who testified that a dowry is forfeited if a wife initiates a divorce, although the wife argued that the expert was not qualified to make a judgment based on Islamic law.<sup>362</sup> The California court used a much different approach, finding that the agreement was essentially an antenuptial agreement which encouraged divorce, in violation of California public policy, and ruled it void.<sup>363</sup>

Similarly, in *Seth v. Seth*, an alleged second wife introduced testimony that her husband converted to Islam and divorced his first wife through talaq, then married her.<sup>364</sup> The husband and his first wife claimed that the purpose of his conversion to Islam was only to take advantage of talaq

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because the Islamic judge ("qadi"), who performed the ceremony was not registered with the New York City clerk, as required by New York law).

<sup>357</sup> See, e.g., *People v. Ezeonu*, 558 N.Y.S.2d 116, 117 (Sup. Ct. 1992) ("Generally, a marriage is recognized in New York if it is valid where consummated. However, it is well established that this general rule does not apply where recognition of a marriage is repugnant to public policy.") (internal citations omitted); *but see Ahmed v. Ahmed*, 689 N.Y.S.2d 357 (Sup. Ct. 1999) (rejecting the defendant's argument that the parties' wedding ceremony was a "purely religious marriage" without any intended legal consequences, on the basis that the parties had "participated in a valid marriage ceremony" which satisfied New York law).

<sup>358</sup> *Maklad v. Makland*, No. FA000443796S, 2001 WL 51662, at \*3 (Conn. Jan. 3, 2001).

<sup>359</sup> *Id.*

<sup>360</sup> E.g., *In re Marriage of Dajani*, 251 Cal. Rptr. 871, 872 (Ct. App. 1988) (refusing to validate a prenuptial agreement it considered as "designed to facilitate divorce.").

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Seth v. Seth*, 694 S.W.2d 459, 461 (Tex. App. 1985).

divorce, such that their divorce was not valid under Islamic law.<sup>365</sup> While the court permitted competing expert testimony about whether talaq was valid under Islamic law if a person converted only to utilize talaq, the court refused to apply Islamic law.<sup>366</sup> Instead, the court held that even if Islamic law validated the talaq, “the harshness of such a result to the non-Muslim divorced wife runs so counter to our notions of good morals and natural justice that we hold that Islamic law in this situation need not be applied.”<sup>367</sup>

During this period, different American courts came to different conclusions in deciding whether to enforce a traditional Islamic marriage contract when it did not meet the statutory requirements of secular antenuptial contracts. In *Habibi-Fahnrich v. Fahnrich*, a court refused to enforce a sadaq, an Islamic marriage contract, which the non-Muslim husband claimed he had been pressured into signing without any explanation of its validity and without any counsel.<sup>368</sup> In this particular case, although the court recognized the validity of sadaqs generally, it refused to enforce the sadaq in question because it did not meet the statute of frauds requirements.<sup>369</sup>

By contrast, in *Mehtar v. Mehtar*, the court held that an Islamic marriage contract entered into when the parties married in South Africa could be enforced as an antenuptial contract to effectuate the religious intentions of the parties, despite not meeting Connecticut’s procedural requirement that the parties make financial disclosures to each other before

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<sup>365</sup> *Id.* at 463.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*; but see *Hosain v. Malik*, 671 A.2d 988, 1006 (Md. Ct. Spec. App. 1996)

(in response to a wife’s claim that returning to Pakistan might result in her being stoned for adultery, citing an extensive colloquy between the husband and his attorney that established that no woman had been stoned for adultery in Pakistan for fifty years because of the Islamic requirement that at least four witnesses attest that they witnessed the adultery before a woman can be convicted).

<sup>368</sup> *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388, at \*1 (N.Y. Sup. Ct. 1995) (“[T]he SADAQ is the Islamic marriage contract. It is a document which defines the precepts of the Moslem marriage by providing for financial compensation to a woman for the loss of her status and value in the community if the marriage ends in a divorce. This court has previously determined in this case that a SADAQ may be enforceable in this court.”).

<sup>369</sup> *Id.* at \*1–\*2; cf. *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 866–67 (Ct. App. 2001) (concluding that the parties’ marriage contract did not provide sufficient reference to specific Islamic law property division rules to permit the husband to keep all of the property he earned as separate property, rather than community property as required by California law. The husband had only relied on two vague provisions of the contract to establish that his wife had agreed to be bound by this property rule: “The above legal marriage has been concluded in Accordance with his Almighty God’s Holy Book and the Rules of his Prophet to whom all God’s prayers and blessings be, by legal offer and acceptance from the two contracting parties”; and the “two parties [have] taken cognizance of the legal implications.”).

the contract is signed.<sup>370</sup> The court reasoned:

The protection of the justified expectations of the parties should take precedence over the imposition of Connecticut law on a marriage negotiated and entered into under a South African law allowing for recognition of religious principles. While Connecticut has an interest because the parties live here and the marriage, while short existed here, that interest does not, in this case, outweigh the interest in the parties in their jointly held expectations, certainty, and predictability. This is especially so because of the short duration of the marriage, and the purpose of the antenuptial agreement.<sup>371</sup>

In *Derakhshan v. Derakhshan*, a husband argued before a Virginia court that his Iranian Islamic marriage contract was not enforceable because part of the consideration for it was the wife's agreement to engage in sexual relations,<sup>372</sup> an argument that has been successful in several states, including Virginia, when women in nonmarital situations attempted to enforce oral contracts to support them.<sup>373</sup> However, the Virginia court refuted this argument and held that this contract was not against public policy, because

sexual intercourse between a married couple is not illicit or morally reprehensible. In fact, sexual intercourse is a necessary act to consummate any marriage. The parties' marriage contract is not based on future illicit sexual relations because a promise to marry is automatically coupled with an intention to perform sexual relations. Without such an intent, the marriage would be a nullity.<sup>374</sup>

Thus, the court held that, because this agreement was treated as a valid contract under Iranian law, and it was not unusual in amount, the contract for "one holy Qur'an, a piece of flower, plus twenty million Rials (Iranian currency), with no further conditions" was enforceable and would be treated

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<sup>370</sup> *Mehtar v. Mehtar*, No. FA 960080007S, 1997 WL 576540, at \*2 (Conn. Super. Ct. Sept. 5, 1997); see also *Akileh v. Eschehal*, 666 So. 2d 246, 249 (Fla. Dist. Ct. App. 1996) (holding that an Islamic marriage contract was sufficiently specific to enforce as an antenuptial agreement).

<sup>371</sup> *Mehtar*, 1997 WL 576540, at \*2. Despite its holding, the court still ordered rehabilitative alimony for the wife under Connecticut law, since she was not able to support herself as she could have in South Africa. *Id.*

<sup>372</sup> *Derakhshan v. Derakhshan*, Chancery No. 142811, 1997 WL 1070620, at \*1 (Va. Cir. Ct. June 16, 1997).

<sup>373</sup> *Id.* (citing *Burke v. Shaver*, 23 S.E. 749, 749 (Va. 1895)); see also *Marvin v. Marvin*, 557 P.2d 106, 112 (Cal. 1976) (holding that non-marital contracts could be enforced *except* to the extent that they relied on meretricious services).

<sup>374</sup> *Derakhshan*, 1997 WL 1070620, at \*1.

as the wife's separate property in the divorce.<sup>375</sup>

On the other hand, as with criminal cases, courts have been less sympathetic towards parties they suspect are raising Islamic law as an excuse to avoid legal obligations under American law. For example, in *Haynes v. Almuttar*, an ex-wife appealed a trial court's finding that there was a change in circumstances now permitting her to go to work, which would reduce the ex-husband's child support and spousal maintenance.<sup>376</sup> She argued that, under Islamic law, parents have a responsibility to closely supervise their children, so she had to stay home and not work outside of the home.<sup>377</sup> The court did not find her claim that she needed to be home under Islamic law credible, especially in light of evidence that Islam had become less important to her since the divorce, and that she was going out to exercise at a gym several nights a week.<sup>378</sup>

As previously noted, family law cases involving Muslims in this period generally evinced fewer stereotypes about Muslims and Islam, and more often applied standard family law principles to cases involving Muslims from divorce cases to custody and termination of parental rights cases. However, the facts in these cases often made for more difficult decisions because, for example, parents fighting over custody or visitation were of different faiths, or one parent had ties to a Muslim-majority country, raising concerns about kidnapping or other custodial concerns. While few courts applied Islamic law on issues such as marriage and divorce, custody, and visitation unless confirmed by a secular national court, occasionally courts did at least review Islamic law on issues such as property division and the relevance of Muslim marriage and divorce practices in establishing valid American marriages and divorces. A few courts attempted to counter stereotypes that seemed to infect lower court decisions, *e.g.*, about Muslim parents' ability to be good custodians of their children, while others had a more difficult time accepting conservative gender norms of litigants from Muslim-majority countries, or even stereotyped Islamic attitudes toward women. Yet, the courts showed a consistent concern for protecting women's rights, especially in marriage and divorce cases.

#### IV. CIVIL CASES

Beyond criminal and family law cases, there are a small number of cases in civil areas that involved some reference to Islam or the Muslim

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<sup>375</sup> *Id.*

<sup>376</sup> *Haynes v. Almuttar*, 25 S.W.3d 667, 671 (Mo. Ct. App. 2000).

<sup>377</sup> *Id.* at 672.

<sup>378</sup> *Id.*



affiliation of a party from 1960 to September 11, 2001. The majority of these cases involve employment or public accommodations discrimination, some occasionally referencing anxiety about Black Muslims and other concerns.<sup>379</sup>

The most common difficulty that arose in the discrimination cases during this period, as with many cases today, was how to treat Muslims' complaints about maltreatment because of differences in their dress or religious practices, such as prayer. The complaints could be treated either as legitimate claims of discrimination, or as requests for special accommodations, which employers or others would be free to grant or refuse.

The most vociferously debated response to this issue comes in *Bilal v. Northwest Airlines*, when Renae Bilal, the spouse of a Northwest Airlines employee, was turned away from a flight because she did not follow the dress code mandated for air travel by employees when they were not on duty.<sup>380</sup> A Northwest customer service supervisor, Barb Patrick, stopped Bilal on her way to her seat because Bilal was dressed in typical Middle Eastern dress—a headscarf, tunic, dress pants, and sandals without socks.<sup>381</sup> While technically only her bare feet violated the dress code, Patrick insisted that Bilal's clothing was "inappropriate" and that she should dress "as though she were going to church."<sup>382</sup> Ultimately, Bilal was told by Patrick and the manager, who supported Patrick's position, that she could board the plane.<sup>383</sup> Nevertheless, Ms. Bilal filed a state civil rights suit because of the anxiety and humiliation she had suffered through the incident.<sup>384</sup>

A majority of the Minnesota Court of Appeals upheld the trial court's determination that Bilal had suffered discrimination because of her treatment for her clothing, and because Patrick told Bilal that she should have dressed "like [she was] going to church."<sup>385</sup> In discussing whether the supervisor was aware that Bilal was a Muslim when she made that remark, Patrick testified that she knew the difference between "Muslims" and "Moslems," and that she knew how adherents to Islam appeared from books and TV, that is, "they wear dark-colored clothes and have their heads covered."<sup>386</sup> She claimed that she made the remark about dressing for

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<sup>379</sup> See *supra* Part II.

<sup>380</sup> *Bilal v. Nw. Airlines*, No. C4-94-416, 1994 WL 593939, at \*1 (Minn. Ct. App. Nov. 1, 1994), *rev'd*, 537 N.W.2d 614 (Minn. 1995).

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* at \*6.

<sup>385</sup> *Id.* at \*4.

<sup>386</sup> *Id.* at \*3.

church since she and Bilal were both African American and Bilal would therefore know what that meant.<sup>387</sup> Even though Bilal explained to Patrick and the manager that she was dressed properly for prayer in her religion, Patrick had continued to give her trouble about boarding the plane.<sup>388</sup> The majority of the appellate court thus concluded:

the statement that she should dress as if going to church[]indicates inferentially that religion played at least some role as a motivating factor in Patrick's decision to question Bilal, and in her comments regarding Bilal's attire. . . . Patrick's comment acted to stigmatize and isolate Ms. Bilal as a Muslim and supports the Court's finding of unlawful public accommodation discrimination based on religion.<sup>389</sup>

Minnesota Court of Appeals Judge James Randall filed a lengthy and strongly worded dissent arguing that the supervisor's comments, especially the comment about church, amounted to insufficient evidence of public accommodations discrimination.<sup>390</sup> He pointed out that Bilal *had* violated the dress code, if only because of her bare, sandaled feet.<sup>391</sup> He further objected to the assumption that anyone should have known that Bilal was a Muslim, as opposed to merely a foreign traveler in a diverse crowd of air passengers, simply because of her dress.<sup>392</sup> Finally, he went on a lengthy discourse about the way in which "church" is used in a generic way to mean a place of worship, rather than a specific reference to a Christian structure

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<sup>387</sup> *Id.* at \*4.

<sup>388</sup> *Bilal v. Nw. Airlines*, 537 N.W.2d 614, 619 (Minn. 1995).

<sup>389</sup> *Bilal*, 1994 WL 593939, at \*3–4. The court concluded, however, that no damages were due to Bilal's husband, who was not there, because he could not show any tangible harm due to his wife's denial of "full and equal enjoyment of NWA's services." *Id.* at \*7.

<sup>390</sup> *Id.* at \*9 (Randall, J., dissenting) ("I accept plaintiffs' claim that Patrick's reference to the word 'church' could be offensive to them. What I do not accept is plaintiffs' theory that the mere word 'church,' even if taken in the narrow literal sense of a Christian church, is actionable on its face when spoken in the presence of a person practicing a religion other than christianity.").

<sup>391</sup> *Id.* (Randall, J., dissenting); *but see* *Wazeerud-Din v. Goodwill Home and Missions*, 737 A.2d 683, 687–90 (N.J. Super. Ct. App. Div. 1999) (concluding that a Muslim applicant could not sue a religious society for being rejected by its "discipleship program," a residential program using religious instruction to help addicts beat their addictions. The court held that such a religious program was expressly excepted from the state's discrimination statute, as a place of public accommodation, because it was an educational facility operated by a religious institution. The institution noted that it would admit non-Christians who were open to considering conversion, but that other non-Christians would not be supportive to those who were trying to beat their addictions, and thus might disrupt the progress of the others in the program).

<sup>392</sup> *Bilal*, 1994 WL 593939, at \*10 (Randall, J., dissenting).

or gathering.<sup>393</sup> On these final points, the Minnesota Supreme Court agreed with him.<sup>394</sup>

One issue that arose in several cases in this period, and challenges courts even today, is whether employers are required to accommodate Muslim employees' grooming and dress differences; food prohibitions, such as the proscription against handling pork or alcohol for some; and their daily prayer obligations. A few of the cases in this period, however, also involved pervasive workplace harassment of Muslim employees.

In *In re Eastern Greyhound Lines*, an employee complained of religious discrimination when he was denied a job because he would not shave his beard, as would have been required for him to conform to the company grooming policy that men "must be clean-shaven."<sup>395</sup> In this case, the New York Court of Appeals found no violation because there was no evidence that the grooming policy was motivated by religious discrimination.<sup>396</sup> The court rejected the argument that the Human Rights Law required the employer to accommodate the plaintiff's beliefs about his obligation to grow a beard.<sup>397</sup> New York courts reached a similar conclusion in *Abdush-Shahid v. New York State Narcotics Addiction Control Commission*, when the Narcotics Addiction Control Commission enforced its dress code against an orthodox Sunni Muslim.<sup>398</sup> Abdush-Shahid had

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<sup>393</sup> *Id.* at \*12–15 (Randall, J., dissenting). Judge Randall discussed the secular way in which Christmas is treated by the state; the possible offense to white supremacists of the Martin Luther King, Jr., holiday; to the followers of Elijah Muhammad and black Muslims of the holiday for George Washington and other Founders who were slaveholders; and to Native peoples of the recognition of Christopher Columbus. *Id.* at \*13–\*14 (Randall, J., dissenting). He concluded that while many Americans may take legitimate offense at such actions, the offense was not necessarily actionable, especially given the protections of the First Amendment. *Id.* at \*17–19 (Randall, J., dissenting). For Randall, actionable discrimination would require something like a separate dress code for Christians and non-Christians, or lower boarding priority for Muslims, or refusal to let a Muslim board simply because she was a Muslim and not for her dress. *Id.* at \*20 (Randall, J., dissenting). Randall suggested that minorities would be the ones to suffer from this kind of argument, since they would not be able to use analogous words in their own speech. *Id.* at \*21 (Randall, J., dissenting).

<sup>394</sup> *Bilal*, 537 N.W.2d at 619.

<sup>395</sup> *E. Greyhound Lines Div. of Greyhound Lines, Inc. v. N.Y. State Div. of Human Rights*, 265 N.E.2d 745, 746 (N.Y. 1970).

<sup>396</sup> *Id.* at 746–47.

<sup>397</sup> *Id.* at 747; *see also* *Phoebe v. State Div. of Human Rights*, 418 N.Y.S.2d 55, 56 (N.Y. App. Div. 1979) (holding that a supervisor's decision to enforce a dress code against a Muslim employee was evidence of an act of retaliation for her complaint with the state anti-discrimination agency, filed eight days earlier. The court noted that on the day of her reprimand, she was wearing an ankle-length skirt, in keeping with her religious tradition, instead of regulation slacks or a knee-exposing skirt because her uniform was not yet dry, while another employee was allowed to wear non-regulation slacks without punishment).

<sup>398</sup> *Abdush-Shahid v. N.Y. State Narcotics Addiction Control Comm'n*, No. 1586/72, 1972 WL 20370, at \*1 (N.Y. Sup. Ct. Jun. 8, 1972).

converted two months after his employment commenced; he began to wear “‘Sunni dress’ including a Biadlia, or long kafkan, and a skull cap” to work instead of the business suit, tie, and jacket required by the dress code.<sup>399</sup> However, the court saw no reason to allow him an exemption from the dress code.<sup>400</sup>

In *Moore v. Dimars*, a food accommodation case, a prisoner filed a civil action for an accommodation, objecting to his work detail based on being required to handle pork products that were placed into bags for the kitchen, as well as its interference with his prayer obligation at noon, when he was scheduled to be working.<sup>401</sup> While he was initially given an accommodation on both issues, one of his supervisors refused to accommodate him because he did not trust the sincerity of the prisoner’s beliefs.<sup>402</sup> Instead of disciplining him for failure to follow instructions, the prisoner was simply taken out of his work assignment and given a new one two months later.<sup>403</sup> The court praised the staff for accommodating rather than disciplining the prisoner:

Where an accommodation requested is generously given, it is commendable. Where it is refused or expected, it becomes a problem . . . there was plenty of other work which did not need such accommodation which would not conflict with the petitioner’s religious beliefs. This was done without singling petitioner out in a discriminatory way.<sup>404</sup>

This sits in stark contrast to *Abdush-Shahid*, in which the court saw no reason that the plaintiff should be allowed an exemption from the dress code when it was reasonable and did not violate his constitutional rights.

Regrettably, some of the cases during this period in which Muslim litigants appeared were cases of serious religious harassment, mirroring the kind of Muslim-bashing that Americans have seen since September 11, 2001. In *Rasheed v. Chrysler Motors Corporation*, a Chrysler employee and Muslim convert alleged that he was subjected to daily harassment based on his faith after he transferred to a different Chrysler plant.<sup>405</sup> His supervisor expressed his dislike for Muslims and rejected the plaintiff’s request for an

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<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *Moore v. Dimars*, No. CV 980578839, 1999 WL 235783, at \*1 (Conn. Super. Ct. Apr. 9, 1999).

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> *Rasheed v. Chrysler Corp.*, 517 N.W.2d 19, 23 (Mich. 1994).

accommodation of his 8:00 P.M. meal break so that he could observe Ramadan.<sup>406</sup> The plaintiff was suspended for unrelated disobedience, such as tossing some cylinder heads into a divider, which dented them, although he alleged that other employees had done the same thing without punishment.<sup>407</sup> The court upheld a jury verdict, determining that the claims of disobedience were pretext for religious discrimination.<sup>408</sup>

In another case, *Serafini v. Superior Court*, an employee sued the company's owners and his supervisor for religious harassment.<sup>409</sup> The employee claimed:

They continually yelled, swore at, and used vulgar language directed to [plaintiff] Khadir. On several different occasions, they berated him for being a practicing Muslim; they yelled and swore at Khadir for praying on Friday . . . and said he was stupid and abnormal for not praying on Sunday. They made remarks . . . [that] all Muslims or people of Khadir's race were terrorists, that after the Oklahoma bombing many people would be seeking vindication against Muslims, that Khadir should "watch out" and "run for his life."<sup>410</sup>

Similarly, in *Chaudhary v. Taco Bell*, a Pakistani employee of Taco Bell claimed his managers subjected him to physical and verbal abuse.<sup>411</sup> One, Mukhtar Mohemmad, abused and hit Chaudhary because he was Pakistani, and the other "mocked Chaudhary's religious beliefs and regularly referred to Chaudhary as 'Muslim dog.'"<sup>412</sup> When he was denied work modifications after suffering a heart attack on the job from the stress of this treatment, he sued Taco Bell for religious, national origin, and disability discrimination.<sup>413</sup> However, the court held that it did not have jurisdiction to hear the case.<sup>414</sup>

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<sup>406</sup> *Id.*; cf. *Coffin v. Atracchi*, No. 00-156, 2000 WL 898748, at \*1 (Mont. July 6, 2000). In a civil trial between the original owners of a property and a person who bought it at a delinquent tax sale, the original owners asked for the trial date to be continued for the entire month of Ramadan (Dec. 8, 1999–Jan. 8, 2000), and because they also had a pretrial hearing in another case in February. The district court denied this motion and the appellate court held that the owners had not demonstrated sufficient prejudice. *Id.*

<sup>407</sup> *Rasheed*, 517 N.W.2d at 23.

<sup>408</sup> *Id.* at 33.

<sup>409</sup> *Serafini v. Superior Court*, 80 Cal. Rptr. 2d 159, 160–61 (Ct. App. 1998).

<sup>410</sup> *Id.* at 161.

<sup>411</sup> *Chaudhary v. Taco Bell Corp.*, No. 952093, 1995 WL 1312539, at \*1 (Mass. Super. Ct. 1995).

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

Islam became a referent in some employment discrimination cases as well, with courts following standard patterns in affirming or rejecting claims typical of cases not involving Muslim litigants. In *Rhode Island Department of Corrections v. Rhode Island Commission for Human Rights*, a Black Muslim convert was denied a correctional officer job despite his strong scores on training and testing prior to job interviews.<sup>415</sup> Because the interviewers who gave him low job interview scores were unable to remember or articulate why they did so, the court affirmed the decision of the Human Rights Commission, which found a violation of the state's race and gender discrimination statutes.<sup>416</sup> In *Nealon v. City of Cleveland*, an applicant for a city law department position unsuccessfully sued for discrimination based on a comment his initial interviewer made, that "someone may have a problem with his having been a priest and because he once represented the Nation of Islam in a [criminal case.]"<sup>417</sup> The court ultimately determined that the state had proffered a legitimate reason for the choice, namely that the applicant lacked relevant experience.<sup>418</sup>

As in the criminal cases, the Nation of Islam was a target for lawyers attempting to sway jurors to their side. For example, in *Reese v. Security National Insurance Company*, a workers' compensation case involving an employee who hurt his back while lifting heavy steel rods went to a jury trial.<sup>419</sup> The employer's attorney not only referred to the employee's "black Muslim activities" in his opening statement, but was also permitted by the trial court to introduce testimony relating to those activities, which the employer alleged was the basis for the employee's transfer to another department.<sup>420</sup> The appellate court was not sympathetic to the employee's claim of prejudice, given that the trial judge had instructed the jury not to consider the employee's religious activities in their decision.<sup>421</sup>

References to Black Muslims or Islam in violent situations also

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<sup>415</sup> R.I. Dep't of Corr. v. R.I. Comm'n for Human Rights, No. C.A. 80-3086, 1984 WL 559221, at \*1 (R.I. Super. Ct. Oct. 4, 1984) ("During the six week training course at the Training Academy, complainant received an average of 81 on seven tests administered to Correctional Officer Trainees from October 13, to October 27, 1978. Complainant received 220 out of 250 points in firearms. He received a 90% rating on defenses from physical attacks.").

<sup>416</sup> *Id.* at \*2-\*4. The court noted that the state, which may have had no Muslim correctional officers according to the evidence, did not meet its burden under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972) of providing a legitimate reason for its decision, although the plaintiff had met his initial burden. *Id.* at \*3-\*5.

<sup>417</sup> *Nealon v. City of Cleveland*, 746 N.E.2d 694, 696, 700-701 (Ohio Ct. App. 2000).

<sup>418</sup> *Id.* at 701.

<sup>419</sup> *Reese v. Sec. Nat'l Ins. Co.*, 445 S.W.2d 811, 812 (Tex. Civ. App. 1967).

<sup>420</sup> *Id.* at 812-13.

<sup>421</sup> *Id.* at 813-14.

cropped up in very odd ways in civil cases during this period.<sup>422</sup> For example, in an unemployment misconduct case, the president of a fruit company quite unexpectedly saw one of his trucks parked on the highway while he was driving with his family, so he stopped to see why.<sup>423</sup> The truck driver, who had been urinating, jumped in the truck, started honking and reversed as if to ram the car, but then pulled out and left quickly.<sup>424</sup> The truck driver's explanation for his actions was that his friends, whom he claimed had stopped to see if he was okay shortly before the company president showed up, "were Muslims who hated white people and that he jumped into the cab and drove away to protect [the company president] from getting 'jumped on.'"<sup>425</sup>

In another unusual case of violence involving Black Muslims, *Kelly v. New York City Transit Authority*, a New York workers' compensation board denied death benefits to a family of a Black Muslim man who had been killed by his former co-worker, also a Black Muslim, based on the killer's testimony that once he left the religion, the victim and other Black Muslims had been harassing and blackmailing him to get him to rejoin.<sup>426</sup>

However, some of the unique cases discussing Muslims or Islam during this period involved conflicts among members of the Nation of Islam, or between their leaders and non-Muslims. For example, Minister Louis Farrakhan filed a \$4 billion libel lawsuit against the New York Post for publishing Dr. Betty Shabazz's claims that Farrakhan was involved in

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<sup>422</sup> See, e.g., *id.*

<sup>423</sup> *Thompson v. Everett*, E 82-345, 1983 WL 756, at \*1 (Ark. Ct. App. July 6, 1983).

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> *Kelly v. N.Y.C. Transit Auth.*, 333 N.Y.S.2d 764, 765-66 (App. Div. 1972). The killer died in a hospital for the criminally insane, but the basis for the worker's compensation decision was that this testimony about the reason for the killing was hearsay and had insufficient corroboration. See also *Hartford Accident & Indem. Co. v. Abdullah*, 156 Cal. Rptr. 254, 257-58, 260 (Ct. App. 1979) (A man tried to test-drive a used car a second time after he had damaged it. The driver persisted in asking for another test drive, claiming that the owner was refusing because he was a Black Muslim and thus was engaging in racial discrimination. After some further words with the employee and owner of the car lot, the dealer allowed the man to drive the car, resulting in a fatal accident. The insurance company refused to pay, suggesting that the dealer had negligently entrusted the car to the driver, knowing he had been arrested on traffic warrants); *George v. Fabri*, 548 S.E.2d 868, 870 (S.C. 2001) (detailing a city council candidate who sued another candidate for defamation based on her claim that a racist, whose remarks included "Screw the Buddhists and kill the Muslims," had endorsed the plaintiff candidate).

the assassination of Malcolm X.<sup>427</sup> Additionally, among other litigation, the Attorney General of Illinois sued the Nation of Islam to recover donations given to the Nation that were funneled into a corporation controlled by the leader Elijah Muhammad, who then used the funds for personal needs.<sup>428</sup>

As in the criminal cases, there were also civil disputes about which faction of a Muslim sect held the right to its property. For example, in *People ex rel. Muhammad vs. Muhammad Rahman*, the court held that “neutral principles of law” based on corporate bylaws could be used to decide whether a director of a mosque could be removed from office without determining whether any of the disputing parties was a “good Muslim.”<sup>429</sup>

In these cases, the occasional gratuitous, sometimes apparently humorous, references to Muslims mimic, in a somewhat more sophisticated way, similar references made by courts in the pre-1960 period.<sup>430</sup> For example, *Piatti v. Jewish Community Centers of Greater Boston* was a religious discrimination case brought by a non-Jewish plaintiff against a

<sup>427</sup> *Farrakhan v. N.Y.P. Holdings, Inc.*, 640 N.Y.S.2d 80, 80–81 (App. Div. 1996) The reported case related to the request of Farrakhan to be deposed in Chicago instead of New York for reasons of his safety, which defendant’s counsel, who was Jewish, objected to because it might be dangerous or at least intimidating to depose Farrakhan at his headquarters. The court rejected Farrakhan’s request, noting that Farrakhan had recently traveled to New York City and other places, and he would not be exposed publicly in the city. *Id.* at 81–82.

<sup>428</sup> *People ex rel. Burris v. Progressive Land Developers, Inc.*, 602 N.E.2d 820, 821–23 (Ill. 1992). There are additional lawsuits involving the financial dealings of Elijah Muhammad both during and after his life. *See, e.g.*, *Midway Tech. Inst. v. Muhammad*, 291 N.E.2d 8 (Ill. App. Ct. 1972) (breach of purchase contract); *People ex rel. Hartigan v. Progressive Land Developers, Inc.*, 576 N.E.2d 214 (Ill. App. Ct. 1991) (one of several suits to prevent charitable contributions from being funneled to Muhammad’s private businesses); *Farrakhan v. First Pac. Bank (In re Estate of Muhammad)*, 463 N.E.2d 732 (Ill. App. Ct. 1984); and *In re Estate of Muhammad*, 520 N.E.2d 795 (Ill. App. Ct. 1987) (both suits to determine whether Muhammad’s heirs or the public should be the beneficiaries of Muhammad’s holdings that were accumulated by charitable gifts).

<sup>429</sup> *See People ex rel. Muhammad v. Muhammad-Rahmah*, 682 N.E.2d 336, 339–40 (Ill. App. Ct. 1997) The provision in question read, “If the President and any member of the Board breaks any of the rules that have been thus far been [sic] mentioned; and if [the] President and the members of the Board is [sic] found to be in violation of the rules of the Muhammad Islamic Foundation which are based upon the Holy Qur’an and the Sunnah of Prophet Muhammad (SAW) or if he is found trying to lead the Foundation and Corporation on an [sic] non-Islamic path-then any member of the Board or Corporation shall be allowed to call for the termination of his position as President or as a member of the Board.” *See also El Bey v. Moorish Sci. Temple of Am.*, 765 A.2d 132, 141 (Md. 2001). The court denied a permanent injunction to the Moorish Science Temple against a Muslim who was representing himself as a director of the corporation and, the temple claimed, soliciting money in its name. *Id.* The court held that there was no irreparable injury from the mere representation because the temple had to explain under Islamic law why he was not authorized as part of the temple. *Id.* The case includes a good, short history of the Moorish Science Temple. *Id.* at 133.

<sup>430</sup> *See, e.g.*, *Failingler, supra* note 5, at 15–16 (discussing the use of Islam as an exaggerated analogy or to illustrate a clear non sequitur).



Jewish youth center for hiring only Jewish counselors.<sup>431</sup> Although the facts of this case made no mention of Muslims, the court chose to cite as an analogy a case in which a non-Muslim pilot sued a private company that required helicopter pilots guarding pilgrims as they marched toward Mecca to convert to Islam.<sup>432</sup> According to the judge, perhaps attempting to be ironic, this was a classic case of a bona fide occupational qualification (“BFOQ”) for these pilots, since non-Muslim pilots flying into Mecca were subject to beheading.<sup>433</sup> Similarly, the court in *James v. Hubbard* attempted to make light of a dispute about whether a trial judge’s statement that he was going to grant a divorce between non-Muslims was effective, noting that the talaq requires the husband to say, “I divorce thee” three times, and commenting, “we do not require such clarity by the trial court.”<sup>434</sup>

Finally, there are a few civil cases in this period in which courts engaged in a more extended discussion comparing Islamic law (or national law that incorporates Islamic law) and American law. In *Blackstone v. Aramco Services Company*, an employee was fired for allegedly giving kickbacks and approving improper invoices for subcontractors on water well maintenance projects in Saudi Arabia.<sup>435</sup> In this choice of laws case, determining that U.S. law would apply because of public policy concerns, the court noted a number of ways in which Saudi law, based on Islamic law, differed from U.S. tort law.<sup>436</sup> For example, the court noted that the Shari’a permits damages for actual physical injury through physical contact by the tortfeasor, which provides preset values for each part of the body injured.<sup>437</sup> Under Saudi law, a tort action may result in both damages and criminal punishment, while non-physical injuries, not subject to tort recovery, may

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<sup>431</sup> *Piatti v. Jewish Cmty. Ctrs. of Greater Bos.*, No. 91-5198-F, 1993 WL 562347, at \*1 (Mass. Super. Ct. Dec. 14, 1993).

<sup>432</sup> *Id.* at \*1 n.15.

<sup>433</sup> *Id.*

<sup>434</sup> *James v. Hubbard*, 21 S.W.3d 558, 559 n.1 (Tex. App. 2000); *see also* *Home Sav. & Loan Ass’n v. Superior Court*, 126 Cal. Rptr. 511, 514 (Ct. App. 1976) (in a case against a home loan association unrelated to Muslims or Islam, the court opined, “As was said with respect to the need for glossaries on the text of the Koran: if the opinion of the superior court agrees with that of the Supreme Court, it is superfluous; if it is disagrees, it is mischievous; in neither event is it useful.”); *cf.* *Rivera Ilarraza v. Municipality of Fajardo*, 3 P.R. Offic. Trans. 461, 465–68 (P.R. 1975) (discussing at length the Catholic re-conquest of Muslim lands to explain the Puerto Rican requirement that a property may not be sold at auction if the seller was not physically possessing the property).

<sup>435</sup> *Blackstone v. Aramaco Servs. Co.*, No. 01-89-00203-CV, 1991 WL 63630, at \*1 (Tex. App. Apr. 25, 1991).

<sup>436</sup> *Id.* at \*1–\*2.

<sup>437</sup> *Id.*

be punished by ta'zir: "incarceration or lashing by the State."<sup>438</sup>

Similarly, in *Rhodes v. ITT Sheraton Corporation*, the court determined that it would accept jurisdiction for a personal injury case regarding a diving injury that occurred in Saudi Arabia, after evaluating Saudi law based on Islamic law.<sup>439</sup> The court heard testimony of Islamic expert and Harvard professor Frank Vogel before holding that jurisdiction in Saudi Arabia would be problematic for a number of reasons.<sup>440</sup> First, the plaintiff would be unable to testify, as parties cannot testify in favor of themselves in Saudi Arabia.<sup>441</sup> Second, the Saudi courts give more weight to oral testimony, which would be problematical for the plaintiff because of her severe injuries.<sup>442</sup> Finally, the plaintiff would be required to prove her case with two male witnesses or one male and two female witnesses.<sup>443</sup> The lack of any procedural rules and limited cross-examination would further disadvantage the plaintiff, as would the lack of binding precedent or case law.<sup>444</sup> But perhaps most importantly, the court held that "the existence of biases against women and non-Muslims in Saudi Arabia would impose additional disadvantages on plaintiff."<sup>445</sup>

Since there are so few of these civil cases involving specific references to Islam or Muslims' religious practices, it is more difficult to generalize what we might learn about courts' assumptions during this period from 1960 to September 11, 2001. One does see the occasional reference to Black Muslims that mimics the concerns in the criminal cases. Moreover, cases such as *Bilal* demonstrate that it is often difficult for American courts to

<sup>438</sup> *Id.* at \*1, \*3. See also *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893, 902–904 (Tex. App. 2000) (discussing extensively Russian and Islamic-based Afghani law in a tortious interference suit by one oil and gas developer against another).

<sup>439</sup> *Rhodes v. ITT Sheraton Corp.*, No. CIV.A. 97-4530-B, 1999 WL 26874, at \*3–\*4 (Mass. Super. Ct. Jan. 15, 1999).

<sup>440</sup> *Id.* at \*2.

<sup>441</sup> *Id.*

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> *Id.* at \*3.

<sup>445</sup> *Id.* Some civil cases involving Muslims cannot be easily characterized: see *Khalifa v. Muslim Students' Ass'n of U.S. and Can., Inc.*, 641 P.2d 242, 242–43 (Az. Ct. App. 1981), in which a reviewer of the plaintiff's translation of the Qur'an called him a "charlatan" and "mentally imbalanced" because of some of his translations, and opined that he did not deserve to be awarded a Ph.D. based on the poor translation. The court upheld a motion for summary judgment for the defendants based on no finding of "actual malice" required by the Arizona statute. *Id.* at 243. See also *Abukhadra v. Anoka Cty.*, No. B-45943, 1982 WL 1108, at \*2, \*3, \*6–\*7 (Minn. T.C. Sept. 9, 1982) in which the court rejected the claims of devout Muslims, who were Saudi nationals, to a religious exemption from taxation for a parcel they purchased for the Islamic Center of Minnesota to hold worship services. While the court conceded that this property would be properly tax-exempt if the entity owning it were a religious organization, the fact that the private owners planned to use it for religious purposes did not make it tax-exempt. *Id.*

separate assumptions about Muslims' religious beliefs from their national affiliations and cultural expectations that differ from majority Caucasian norms. Sometimes those differences result in courts' attempting to be humorous at Muslims' expense. Although some cases of religious harassment are quite blatant, in other cases, this difficulty in sorting which of these issues is at play makes hard work for courts adjudicating religious freedom claims as much as international tort claims.

#### V. CONCLUSION

While it is hard to dispositively characterize American state courts' references to Muslims and Islam in the period 1960 to September 11, 2001 due to the small number of cases in any one jurisdiction, a number of themes stand out. Perhaps most prominently, "Black Muslims" were portrayed as dangerous, violent, and untrustworthy in the criminal cases; additionally, in both criminal and civil cases, Muslims were portrayed as having beliefs about women and family that are beyond what American courts could accept as permissible. This portrayal tracks how Muslims were portrayed in film during this time period. For example, Omer Mozaffar's study of American movies suggests:

The 1960s and 1970s witnessed the appearance of two related but distinct depictions of Muslims—Black Muslim and Middle Eastern Muslims—and both were militant. In addition to the normal problem of stereotyping, the first problem is that these negative images became the default for their perspective [sic] groups. The second problem is that American domestic or foreign policy were made exempt in feeding into the formation of these groups. All along, Muslims get associated with violence.<sup>446</sup>

It is hard to know whether portrayals of Muslims in newspapers, movies, and other popular media outlets influenced these court depictions, or whether notorious cases, such as the Hanafi Muslim Massacre and the Louisiana Black Muslim riots, influenced the popular culture.

Similarly, while criminal courts were willing to overturn convictions where repeated and blatant "Muslim-baiting" tactics are used by prosecutors to inflame the jury, they often forgave isolated or less blatant references to Muslims or Islam, even in murder cases where the consequences of unconscious prejudice on juries can be extreme, and even

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<sup>446</sup> Omer M. Mozaffar, *Islam in Western Cinema, Part 2 - The Violent, Militant Muslim*, ROGER EBERT'S FAR FLUNG CORRESPONDENTS (Aug. 15, 2016), <https://www.rogerebert.com/far-flung-correspondents/islam-in-western-cinema-part-2---the-violent-militant-muslim>.

deadly, for defendants. Moreover, while some courts seemed aware of the implications that would follow Muslim litigants' own actions—such as wearing dress or expecting to engage in Friday prayers—that might wrongly prejudice juries, other courts seemed to put the burden on Muslims to hide their differences if they did not want to be treated unfairly by juries. And, in some cases, prosecutors, judges, and even defense counsel displayed their own prejudices or ignorance about the Muslim identity of litigants before them.

Second, these stereotypes of violence are much more prominent in the criminal cases than in family law or civil cases, perhaps for obvious reasons. In the family law cases, the courts seem much more willing to treat Islamic law or secular national law based on Islamic law as worthy of equal respect as a parallel system of government, although they tend not to rely on Islamic law alone if it is not embedded in a nation's secular law, and they freely reject it when it is in conflict with their state's public policy.

Third, as in the former period chronicled by this author from 1800–1960,<sup>447</sup> there remains an undercurrent of suspicion about Islamic law's treatment of women, especially in marriage and divorce. While, once again, the courts cast aside extreme—and blatantly false—claims that Islamic law permits men to beat their wives severely or allows incest, they did tend to protect women whose rights to property or support might be diminished if Islamic law rules were applied, at least as the courts understood them. Although the courts tended to apply secular state rules in marriage and divorce cases, on occasion they bent minor rules in order to effectuate justice for women.

Finally, courts did not hesitate to mention that litigants were Muslim in many cases where it would seem superfluous, and possibly prejudicial, to their case. And, at least a few courts were willing to use Islamic law as a jest, just as courts did in the earlier period.

A common problem for judges who do not fully understand a culture, as with anyone, is whether it is more respectful to acknowledge minority citizens' differences, and risk getting those differences completely wrong, or to ignore those differences and thereby erase them. This study suggests that courts should be very careful about the way in which they portray Muslims and Islamic law, because it is too easy to fall back on negative stereotyping present in culture already, in violation of the courts' obligation to provide equal treatment under law. The consequences of cursory inspection or superficial knowledge can be very severe, in both criminal and civil cases. Only when courts are willing and able to make the time and effort to understand Islamic law and Muslim culture in a deep way are they

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<sup>447</sup> See Failinger, *supra* note 5.

likely to be able to engage Muslims and Islamic law in a way that conveys respect for differences as well as commonalities.