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Unveiling: The Law of Gendered Islamophobia

Khaled A. Beydoun* and Nura A. Sedique**

For far too long, “unveiling” has been the subject of imperial fetish and Muslim women the expedients for western war. This Article reclaims the term and serves the liberatory mission of reimagining how Islamophobia distinctly impacts Muslim women. By crafting a theory of gendered Islamophobia centering Muslim women rooted in law, this Article disrupts legal discourses that presume that its principal subjects—and victims—are Muslim men. In turn, this approach lifts Muslim women from the margins to the marrow of scholarly analysis.

Gendered Islamophobia theory holds that state and societal tropes ascribed to Muslim women are oppositional to those assigned to Muslim men. It elucidates how prevailing ideas of “submissiveness” and “subordination” attached to Muslim womanhood, and the grand aim of “liberating Muslim women” that follows, are rooted in an imperial epistemology that caricatures Muslim men as “violent,” “oppressive,” and “tyrannical.” This discourse of “masculine Islamophobia” drives War on Terror rhetoric and policy, and shapes how scholars imagine and then examine subjects of Islamophobia. This scholarly fixation on Muslim masculinity first, isolates Muslim men as the presumptive targets of Islamophobia; second, overlooks the distinct ideas that drive “feminine Islamophobia” and the specific injuries it levies upon Muslim women; and third, perpetuates the erasure of female experiences with systems of Islamophobia from scholarly view.

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Beyond unveiling theory, this Article also contributes original empirical data highlighting how Islamophobia differentially unfolds along gender lines. Finally, to illustrate the law's role in producing gendered Islamophobia, this Article examines six cases within three areas of critical concern: first, hijab bans and state regulation of Muslim women's bodies; second, terrorism prosecution; and third, immigration and asylum adjudication.

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INTRODUCTION

“The so-called modesty of Arab women is in fact a war tactic.”

— Fatima Mernissi, *Scheherazade Goes West*¹

“Let’s win over the women and the rest will follow.”

— Franz Fanon, *ALGERIA UNVEILED*²

A swelling crowd of boys and men raced toward the jet wheeling across the runway. It would be the American plane’s last time rolling atop that Kabul tarmac.³ And the final time the soldiers within it would step foot in Afghanistan—a nation ravaged by twenty years of American war and military occupation.

A different fate, however, awaited the Afghan boys and men scurrying behind. They, too, dreamt of an escape. Then, upon announcement of the American military’s exit, they scrambled to flee the marching reign of the Taliban.⁴ They ran, and ran faster, as the plane bearing the American flag made its way toward liftoff.

Moving in sync with the plane, television cameras honed in on the faces of men clad with traditional turbans and Afghan dress. Some men donned beards, a symbol of Islamic piety, converted into a marker of terrorism since the beginning of the “War on Terror” and its first campaign in Afghanistan.⁵ Boys born into war wore looks of frenzy in place of beards as they followed the footsteps of their male elders.

Many in the crowd clung onto the hope that their desperation would invite rescue. They prayed that the “western savior” that descended into Kabul two decades earlier to save their sisters and daughters, aunts and mothers would also return for them.⁶ In contrast, those familiar with the sobering truth that *only*

1. FATIMA MERNISSI, *SCHEHERAZADE GOES WEST: DIFFERENT CULTURES, DIFFERENT HAREMS* 11 (2001).

2. Franz Fanon, *Algeria Unveiled*, in *DECOLONIZATION: PERSPECTIVES FROM NOW AND THEN* 44 (Prasenjit Duara ed., 2003).

3. *Afghans Run Alongside, Cling onto U.S. Military Plane at Kabul Airport*, NBC NEWS (Aug. 16, 2021), <https://www.nbcnews.com/video/afghans-run-alongside-cling-onto-u-s-military-plane-at-kabul-airport-118772805821> [<https://perma.cc/M7FW-37B5>].

4. Sheena McKenzie, *The Taliban Have Seized Control of Afghanistan. What Does That Mean for Women and Girls?*, CNN (Aug. 22, 2021), <https://www.cnn.com/2021/08/22/asia/life-for-women-girls-under-taliban-cmd-intl/index.html> [<https://perma.cc/8LE4-YZKH>].

5. The U.S. invaded Afghanistan on October 7, 2001, beginning a war dubbed “Operation Enduring Freedom.” For an account of the War and its “one-year accomplishments,” see *Operation Enduring Freedom One Year of Accomplishments*, WHITE HOUSE (Oct. 7, 2002), <https://georgewbush-whitehouse.archives.gov/infocus/defense/enduringfreedom.html>.

6. “A common view in the West is that Muslim women are oppressed by Islamic culture and therefore in need of liberation from it,” and the men who preside over that culture. Maha AbdelAzim, *Saving Muslim Women*, CAIRO REV. GLOB. AFFS. MIDAN (Feb. 7, 2016),

Muslim women get saved clenched onto the landing gear hatches of Air Force Plane 1109 to save themselves.

Seventeen-year-old Zaki Anwari was one of the young men that took matters into his own hands.⁷ Five weeks earlier, President Biden had announced immediate plans for the U.S. military evacuation from Afghanistan.⁸ Five minutes later, the young man with dreams of soccer stardom and green American fields held tightly onto the plane as it ripped through the clouds. He held and held, until he could hold no more.⁹

Zaki fell.¹⁰ His body plunged from the sky toward the soil he desperately sought to flee. A soil that summoned a War on Terror that targeted him on account of his Muslim masculinity; an identity that invited the global crusade's harshest indictment.¹¹ There was no rescue from that cardinal charge of "terrorism," and no planes to evacuate Muslim men and boys like Zaki.

The Afghan girls landed safely in Mexico City. It was their first time setting foot in the North American nation. However, one would have never guessed that based on the celebrity reception awaiting them.

As members of the celebrated "Afghan Girls Robotics Team," the five young women were met with hot camera flashes and the warmth of Mexican state dignitaries, who presented the famous evacuees with praise and accommodations.¹² In the days before, the Afghan girls were courted by western

<https://www.thecairoreview.com/midan/saving-muslim-women/> [https://perma.cc/RP7R-TVHH]; For a leading critique of the War on Terror charge to "liberat[e] Muslim women," see generally Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others*, 104 AM. ANTHROPOLOGIST 785 (2002).

7. See NBC NEWS, *supra* note 3; Ruth Michaelson & Sayed Tariq Majidi, "He Saw the Panic": The Afghan Men Who Fell from the US Jet (Sept. 16, 2021), <https://www.theguardian.com/global-development/2021/sep/16/he-saw-the-panic-the-afghan-men-who-fell-from-the-us-jet> [https://perma.cc/K4AG-34S4].

8. Zeke Miller & Aamer Mahdani, "Overdue": Biden Sets Aug. 31 for US Exit from Afghanistan, AP NEWS (July 8, 2021), <https://apnews.com/article/joe-biden-afghanistan-government-and-politics-86f939c746c7bc56bb9f11f095a95366> [https://perma.cc/LV4S-9JY5].

9. Joe Parkinson, Ava Sasani & Drew Hinshaw, *Afghanistan's Falling Man: The Seventeen-Year-Old Soccer Star Who Plunged from a U.S. Military Jet*, WALL ST. J. (Aug. 24, 2021), <https://www.wsj.com/articles/afghanistans-falling-man-the-17-year-old-soccer-star-who-plunged-from-a-u-s-military-jet-11629834591> [https://perma.cc/94R9-SURU].

10. See *id.*

11. President George W. Bush gave the amorphous campaign its formal name nine days after the 9/11 terror attacks, when he lobbied Congress to support full-scale war against the Taliban. *Text: President Bush Addresses the Nation*, WASH. POST (Sep. 20, 2001).

12. Megan Specia, *Five Women on a Famed Afghan Robotics Team Arrive in Mexico*, N.Y. TIMES (Aug. 25, 2021), <https://www.nytimes.com/2021/08/25/world/asia/five-women-on-a-famed-afghan-robotics-team-arrive-in-mexico.html> [https://perma.cc/5SWQ-4ETF].

governments and White American women.¹³ They all stepped in to save the girls for the very same reasons that the Taliban sought to punish them.¹⁴

The girls were honored residents of Mexico, asylees-in-waiting in the United States, and refugees met with red carpets wherever they went. But most profoundly, they were “victims.”¹⁵ Or so the headlines announced, printed alongside images of their faces veiled by facemasks and draped with loose-fitting *hijabs* revealing the hair above their foreheads.¹⁶

Victims, the conjoined popular and political discourse echoed, of a revived Taliban bent on reimposing the burqa and the “barbaric” oppression of women that it—and more potently *they*—embody.¹⁷ The threat of terror was inextricably tied to the Taliban’s Muslim masculinity, and the markings of savagery and sexism, patriarchy and rage ascribed to their brown bodies. These charges made them—and any Muslim male that fits the description—villains that warrant war, not victims worth saving.

Saving Muslim women, however, was no altruistic mission. While masquerading as a humanitarian or feminist campaign, winning over Muslim girls and women is that ideological tenet of Islamophobia built upon a gendered dialectic of masculine violence and feminine subordination. A gendered binary of victimhood and oppression that positions Muslim women as the former and men as the ominous latter. This potent dialectic reproduces our imagining of Afghan men and boys, like Zaki, as putative terrorists. And, on the other end, spurs our envisioning of Muslim women and girls—like the Afghan Girls Robotics Team—as victims of a masculine Muslim terror, compelling our rescue.

Villains and victims, terrorists and the terrorized are strategic tropes ascribed to Muslims bodies exclusively along gendered lines. These tropes define Western public discourse surrounding Muslims’ lives and form the foundation of a narrative used to justify the War on Terror—a narrative which imposed distinct indictments upon the heads of Muslim women and men. More than twenty years after the beginning of this War, this Article interrogates the gendered anatomy *intrinsic* to Islamophobia and its attendant discourses. Drawing on critical and feminist theory, this Article then contributes a theory of gendered Islamophobia rooted in law missing from legal scholarship.

13. See Tom McKay, *Afghan Girls Robotics Team Asks White Lady to Stop Claiming She Rescued Them from the Taliban*, GIZMODO (Aug. 27, 2021), <https://gizmodo.com/afghan-girls-robotics-team-asks-white-lady-to-stop-clai-1847573365> [https://perma.cc/SV59-FG3F].

14. See Remarks on the End of United States Military Operations in Afghanistan, 2021 DAILY COMP. PRES. DOC. 1–6 (Aug. 31, 2021).

15. See Kait Hanson, *10 Girls on Afghanistan’s Robotics Team Rescued*, TODAY (Aug. 19, 2021), <https://www.today.com/parents/girls-afghanistans-robotics-team-rescued-t228683> [https://perma.cc/8FK5-QKL4].

16. Islamic head covering, or headscarves, worn by women (Arabic).

17. See McKenzie, *supra* note 4, at 4.

Much legal scholarship has examined Muslim women's experiences over the past two decades within "intersectional" theoretical frameworks.¹⁸ Scholars have used intersectional lenses to analyze foreign policy, counterterrorism, employment discrimination, and other matters of law to bring the experiences of Muslim women into existence. While intersectional approaches generally focus on the convergent spaces of two or more subordinate identities, this Article directly interrogates the gendered dialectic *built into* standing Islamophobia discourses.¹⁹ This dialectic has been obscured by scholarly fixations on terrorism and resulting theoretical frameworks that distort and erase the genuine experiences of Muslim women.²⁰

In response, this Article introduces "gendered Islamophobia" and its attendant concepts into the legal literature.²¹ It develops the framework as an analytical tool to examine how potent normative judgments, which spur high stakes legal consequences, are produced squarely from *within* a cogent discourse objectifying the Muslim female and male bodies. Across law, politics, and academia, this discourse selectively orients the Muslim female and male body along shifting and oppositional situational interests. The discourse is most saliently characterized by a "masculine Islamophobia" which casts Muslim men as the protagonists of terrorism, and a "feminine Islamophobia" which frames Muslim women as their obedient accessories, submissive underlings, and most consequentially, their immediate victims.²²

By centering Muslim women in the analytical framework, this Article disrupts the male-centric presumptions drawn from foundational Islamophobia theory. It looks within the discursive contours of Islamophobia itself, then

18. See, e.g., Sahar Aziz, *From the Oppressed to the Terrorist: Muslim American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191, 191 (2012); see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241–45 (1991) (providing an overview of the theoretical core of the intersectional approach).

19. See Crenshaw, *supra* note 18, at 1241–45.

20. The consequence of "erasure" is a focal concern of critical scholars, most notably Critical Race Studies scholars, who interrogate how hegemonic productions of knowledge and law eliminate the existence—and experiences—of subaltern groups from the process of crafting theory, writing history, or making law. See generally K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062 (2022) (examining how foundational property law texts erase the conquest of Native Americans and the enslavement of Africans from their analyses of legal history and jurisprudence).

21. Sociologist Jasmine Zine theorized gendered Islamophobia as "ethno-religious" and "racialized discrimination" targeting Muslim women that "proceed from historically contextualized negative stereotypes that inform individual and systemic forms of oppression" applied within the context of private Islamic schools in Canada. This Article's definition, presented in Part I(B), is rooted in law and part of a theoretical framework that, in part, builds on Zine's definition. See Jasmine Zine, *Unveiled Sentiments: Gendered Islamophobia and Experiences of Veiling Among Muslim Girls in a Canadian Islamic School*, 39 EQUITY & EXCELLENCE EDUC. 239, 240 (2006).

22. "Masculine" and "feminine" Islamophobia are the distinct forms of societal and state animus targeting Muslim subjects, driven by ideas and images ascribed to the Muslim subject—or perceived Muslim subject—on account of their perceived gender. Both concepts are developed in line with the core theory of gendered Islamophobia in Part II.

unveils the relational dialectic that fluidly produces and reproduces how societal and state actors:

- (1) Position Muslim masculinity as oppositional and antagonistic to Muslim womanhood;
- (2) Ascribe unique political meaning to Muslim male and female bodies, and normative value to identity markers associated with their respective gender expression; and
- (3) Enforce law distinctly across gender lines, particularly within the areas of religious exercise, counterterror policing, and immigration—legal realms where Islamophobia is pervasive and pronounced.

A gendered Islamophobia theory unveils the layered and distinct experiences of Muslim women confronting societal and state-sponsored Islamophobia. Further, to reveal how feminine Islamophobia is shaped by the deeply heterogeneous identities of Muslim women, this Article presents original empirical data derived from a 1,300-subject survey and case analysis that adds flesh to our theory.²³ After all, our gendered Islamophobia theory is rooted in law, and analysis of high stakes cases illustrates the courts' production and reproduction of it.

In *Algeria Unveiled*, Franz Fanon offered the trenchant yet sobering observation that “it is . . . the plans of the occupier that determine the centres of resistance around which a people’s will to survive becomes organized.”²⁴ These predetermined “centres of resistance” are both physical and intellectual, illustrated by the first and subsequent waves of Islamophobia theory that centered Muslim men as the presumptive victims of state and societal violence.²⁵ This Article builds on formative postcolonial theory, feminist theory, and contemporary Critical Race Theory, and by reclaiming *Unveiling* in our very title, it confronts the imperial literatures that have caricatured the hijab as oppressive and the women who don it as victims of Muslim men. By positioning Muslim women at the center of this new language of resistance, *Unveiling* contests Islamophobia at the very imperial roots that gave rise to bygone conquests and modern culture wars.

This Article will proceed in three parts. Part I surveys standing theories of Islamophobia within and beyond the legal literature. It then proceeds to outline “gendered Islamophobia,” a novel theoretical framework that centers Muslim women within legal literature. Part II presents empirical data focusing on the public imagining of Muslim manhood and womanhood. It contributes original data sets that measure the gendered dimensions of private Islamophobia and

23. As law scholar Cyra Choudhury affirms, “[r]eal Muslims are far more hybrid and multiplicitous, and therefore, much harder to neatly categorize.” Cyra Akila Choudhury, *Terrorists & Muslims: The Construction, Performance, and Regulation of Muslim Identities in the Post 9/11 United States*, 7 RUTGERS J.L. & RELIGION 357, 358 (2006).

24. Fanon, *supra* note 2, at 50.

25. *Id.*

distill how Muslim female and male identity are publicly imagined and understood. Part III turns its attention to the law. It examines how legislation and court decisions distinctly impact Muslim women in three areas of critical Muslim concern: hijab bans and policing of religious freedom, terrorism prosecution, and immigration and asylum adjudication.

I.

THEORIZING GENDERED ISLAMOPHOBIA

“The imagined terrorist isn’t me,” the veiled Muslim audience member stated. She then pointed to the young man seated to her right, *“It’s my son, and the [Muslim] men that we live with.”*²⁶ The woman’s son looked downward as the room’s collective eyes caved inward, simulating the theatre of suspicion surrounding Muslim men and boys everywhere the War on Terror left an imprint.²⁷

That presumption of terrorism, his mother emphatically revealed, was not assigned to her—a middle-aged Muslim mother of two, who donned the headscarf and spoke impeccable English. Rather, it was a gendered presumption specifically tied to masculine Muslim identity. Muslim women, like the woman standing before us inside the Columbia Theological Seminary in Decatur, Georgia, stood at the margins of how society, and perhaps the state, imagined the corporal form of the terrorist. In response to this imagining, standing Islamophobia theory reproduced frameworks presuming Muslim male violence in line with the audience member’s revelation, and critical scholars challenging the terrorist caricature tended to privilege Muslim male victimhood.²⁸ By centering the Muslim male and masculinity on both ends, standing Islamophobia theory created inflexible frameworks that marginalized and erased the genuine experiences of Muslim women and, oftentimes, confused and conflated them with the experiences of their sons and brothers, husbands and fathers.²⁹

This Section interrogates these Muslim male-centered theories on Islamophobia. It then builds upon them—and the postcolonial, feminist, and critical race theory theoretical traditions that orbit them—by contributing a gendered Islamophobia theory into legal and interdisciplinary literatures.

26. Khaled A. Beydoun, Keynote Plenary on American Islamophobia at the Columbia Theological Seminary Conference on Immigration in the United States (Feb. 9, 2019) (on file with authors).

27. For a widely read account of the impact of the War on Terror in Muslim American communities, see generally KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR* (2019).

28. For a widely cited text that illustrated the masculine embodiment of Muslim terror threat, authored by a former Central Intelligence Agency (CIA) Operations Officer, see generally MARC SAGEMAN, *UNDERSTANDING TERROR NETWORKS* (2004).

29. See Aziz, *supra* note 18, at 191–92 (discussing this gap in prior Islamophobia scholarship).

A. *Formative Theories*

A critical point of departure is to acknowledge that formative Islamophobia theories, which exclude gender from their analytical structure, remain functionally gendered. Omitting an explicit gendered analysis assumes that the standard is the male experience, regardless of whether the subject in question is racism, the reasonable prudent person standard, or in this case, Islamophobia.

1. *Reorienting Islamophobia Theory*

Standing Islamophobia theories, which isolate the Muslim subject as the imagined purveyor of terror threat, marshalled longstanding Orientalist tropes assigned to Muslim men. As Edward Said's master discourse established, the "Orient"—or the Muslim world—is imagined as wicked and war-torn, backwards and bereft of civility.³⁰ This essence of violence is most intimately tied to an innate patriarchy, where Muslim men are enforcers of a *domestic* and *trans-civilizational* violence.³¹ The latter, manifested by modern threats of terrorism, is reserved for Western nations and actors, while the former is reserved for their immediate targets of subordination, Muslim women.

These longstanding Orientalist tropes centering this double-pronged violence are narrowly tailored to the imagining of Muslim male threat. Women, in the Orientalist imagination, are seldom understood as standalone subjects of threat or violence.³² Rather, they are targets of masculine Muslim violence. Despite this gendered Orientalism and its epistemological "redeployment" during the War on Terror, formative theorizing of Islamophobia built upon uniquely masculine Muslim tropes of threat and violence, broadly applied across gender lines.³³ Consequently, male-centric conclusions were imposed upon women and girls, who experienced Islamophobia in dramatically distinct ways from their male counterparts. This was true on a domestic level, but also transnationally as Islamophobia expanded and adapted as a fully global phenomenon.³⁴

30. See generally EDWARD SAID, *ORIENTALISM* (1979).

31. The starkest example of this trans-national masculine Muslim violence, or impending "clash of civilizations" pitting Islam against the West, is detailed in Samuel P. Huntington's influential book *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

32. For a recent media illustration in line with modern terror networks, see Simon Cottee & Mia Bloom, *The Myth of the ISIS Female Suicide Bomber*, ATLANTIC (Sept. 8, 2017), <https://www.theatlantic.com/international/archive/2017/09/isis-female-suicide-bomber/539172/> [https://perma.cc/B47F-KGRB].

33. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1586 (2002), who writes in the wake of the 9/11 terror attacks, that "[w]e are witnessing the redeployment of old Orientalist tropes. Historically, Asia and the Middle East have functioned as phantasmic sites on which the U.S. nation projects a series of anxieties regarding internal and external threats to the coherence of the national body."

34. See generally KHALED A. BEYDOUN, *THE NEW CRUSADES: ISLAMOPHOBIA AND THE GLOBAL WAR ON MUSLIMS* (2023), which examines how the American War on Terror was exported to enable and intensify state persecution of Muslim populations by national governments across the world.

Feminine Orientalist tropes assigned to Muslim women were largely ignored.³⁵ In turn, Muslim women were unaccounted for in the formative Islamophobia theories preoccupied with terrorism and the imagined Muslim male terrorist. This masculine crafting of Islamophobia theory pervades scholarship across disciplines, and most intensely within the law.

2. Legal Theory

Within legal scholarship, early literature on the “racialization” of Muslims during the War on Terror centered terrorism as the locus of Islamophobia.³⁶ In the widely cited piece *The Citizen and the Terrorist*, law scholar Leti Volpp concluded that “September 11 facilitated the consolidation of a new identity category that groups together persons who appear ‘Middle Eastern, Arab, or Muslim.’ This consolidation reflects a racialization wherein members of this group are identified as terrorists and disidentified as citizens.”³⁷

The racialization of Muslims thesis, and accompanying theory, pervaded critical legal scholarship that proliferated in the wake of 9/11. Analogizing Muslims to the interned Japanese population circa World War II, law scholar Natsu Saito echoed Volpp: “Just as Asian Americans have been ‘raced’ as foreign, and from there as presumptively disloyal . . . Muslims have been ‘raced’ as ‘terrorists’: foreign, disloyal, and imminently threatening.”³⁸

Through a Critical Race Theory lens, Volpp and Saito initiated a vital canon on the racial reimagining of terror threat during the earliest stages of the War on Terror.³⁹ This racialization of terror threat, oriented as oppositional to citizenship and whiteness, reflected the state and societal fears centrally associated with Muslim men.⁴⁰ As police dragnets interrogated droves of Muslim male subjects and Guantanamo evolved into an all-male prison, the American war to “liberate Muslim women” simultaneously raged onward in Afghanistan, Iraq, and deep within Muslim American communities.⁴¹ This “first wave” War on Terror scholarship captured how law forcefully shaped the racialization of terror threat

35. See MERNISSI, *supra* note 1, at 15.

36. “Racialization” is defined as “an unstable and de-centered complex of social meanings constantly being transformed by political struggle” assigned to identifies in society. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 55 (1994).

37. Volpp, *supra* note 33, at 1576.

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

39. See generally SAHAR AZIZ, *THE RACIAL MUSLIM* (2021), which analyzes how the converging racial construction and religious demonization of Muslims in the United States, since the formative stages of American sovereignty, has driven contemporary political and legal understanding of the faith group.

40. See Leti Volpp, *Citizenship Undone*, 75 *FORDHAM L. REV.* 2579, 2580 (2007), which describes how expression of Muslim identity is cast as antithetical to substantive citizenship.

41. See Abu-Lughod, *supra* note 6, at 783.

and gave form to the phenomenon of Islamophobia.⁴² Critical Race Theory, which centers race as the locus of inequality and focus of state violence, proved a natural vehicle for formative theorizing on Islamophobia as the War on Terror took form.

The subsequent wave of scholarship introduced new frameworks to challenge state and societal animus toward Muslims. Law scholar Sahar Aziz's work filled voids in the War on Terror canon by making the distinct experiences of Muslim women visible.⁴³ Aziz observed, roughly a decade into the War on Terror, that "most of the discussion focuses on the experiences of Muslim men or analyzes law and policy through a male gendered paradigm."⁴⁴

Building in part on Aziz's work, and focusing on terrorism as a theoretical crux, law scholar Khaled A. Beydoun offered an analytical model that isolated "private" Islamophobia—that is, private modes of anti-Muslims behaviors—from "structural" Islamophobia, the propagation of anti-Muslim policies and outcomes by the state.⁴⁵ This new framework, which theorized the fluid and often violent "dialectic" between state law and societal violence against Muslims (and perceived Muslims), situated the law as the principal spearhead of Islamophobia.⁴⁶

While most scholars look beyond the analytical contours of Islamophobia by applying frameworks such as feminist theory and intersectionality in their work, this Article looks *within* standing Islamophobia theory itself to consolidate a theoretical framework where gender, and womanhood, is central to the law's reproduction of it.⁴⁷ This Article's gendered Islamophobia theory does not seek to supplant existing analytical models that prioritize race and racialization or distinguish state-sponsored from private forms of Islamophobia. Rather, it builds upon them and engages directly with frameworks that distinguish how state and private actors perpetuate Islamophobia.

Subsequent legal theories build upon a model which racializes Muslims, and in turn, perpetuate the presumption of Muslim masculinity. Law scholar Caroline Mala Corbin, for example, oriented this racialization of terrorism against the exculpatory power of whiteness, observing how "terrorists are always

42. The corpus of legal scholarship produced in the immediate years after 9/11 examined how state counterterror policy directly and disproportionately impacted targeted communities (Arab, Middle Eastern, and Muslim populations).

43. See generally Aziz, *supra* note 18.

44. *Id.* at 191–92.

45. Khaled A. Beydoun, *Islamophobia: Toward A Legal Definition and Framework*, 116 COLUM. L. REV. ONLINE 108, 111 (2016). Beydoun defines "private Islamophobia" as anti-Muslim animus or violence inflicted by individual bigots or actors not tied to the state; and "structural Islamophobia" as law, policy, and action taken by a state agency or actor. *Id.* at 111–19.

46. *Id.* at 119.

47. See Choudhury, *supra* note 23; Adrian Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, U.C. DAVIS L. REV. 743, 747 (2006).

Muslim but never white.”⁴⁸ The lack of a central definition of terrorism enforces it upon those (Muslim men) who fit the imagined profile, and subverts application to culprits racially disconnected from it (White men).⁴⁹ These trenchant critiques are vital to challenging the indemnifying effects of whiteness and the presumptions of guilt that comes with being raced Muslim. In addition, the interrogation of Islamophobia in relation to whiteness connects contemporary discourses to formative periods of American history when whiteness stood as a prerequisite for naturalized citizenship and Islam oriented as inimical to it.⁵⁰ The orientation of Islam as antithetical to whiteness extended Orientalist understandings of Muslim identity into the War on Terror context.⁵¹ This framing also redeployed masculine narratives that relegate Muslim women to secondary or invisible victims, while also overlooking how they uniquely experience the injury that arises from within the inherent contours of Islamophobia.⁵²

3. *Islamophobia and Empire*

The theoretical presumption of Muslim masculinity pervades theoretical projects on Islamophobia beyond the law. In *Islamophobia and Racism in America*, sociologist Erik Love adopted the racialization framing pioneered by law scholars Saito and Volpp, writing, “[a]nyone who racially ‘looks Muslim’ is similarly vulnerable to Islamophobia. Many South Asian Americans are Muslim, but many others are Hindu, Sikh, Christian, Buddhist, or have no religion at all.”⁵³ Love continues to define Islamophobia as the progeny of American racism, rooting it in white supremacy and situating it within “the full scope of American race and racism.”⁵⁴

Love’s theoretical pivots are instructive on two fronts. First, his definitional scope is limited to the United States and the cultural and political reach of

48. Caroline Mala Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455, 455 (2017).

49. See generally Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes and Double Standards*, 112 NW. U. L. REV. 1213 (2018).

50. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996), for a leading analysis of the racially restrictive “Naturalization Era.” See Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29 (2013), for an examination of how civil courts presiding over the naturalization claims of Arab immigrants cast Islam as non-White until 1944.

51. See Beydoun, *supra* note 45.

52. Crenshaw, *supra* note 18, at 139.

53. ERIK LOVE, *ISLAMOPHOBIA AND RACISM IN AMERICA* 3 (2017); see also Muneer I. Ahmed, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1261, 1265 (2004) (classifying public crimes of passion as those targeting populations within the U.S. that are perceived as Muslim on account of phenotype).

54. LOVE, *supra* note 53, at 4.

American racism and policy.⁵⁵ Second, despite this confined scope, Love provides a rich racial analysis that dislodges Islamophobia from a dominant terrorism framing. While central to his treatment, terrorism stands as one of many prisms in which Muslim identity is racially imagined, stigmatized, profiled, and policed. Terrorism is salient, but not solitary.

Gender, and specifically the experiences of Muslim women, are not explicitly built into Love's Islamophobia framing. However, its dislodging of terrorism as the theoretical marrow enables an interrogation of gendered Islamophobia without the weight of privileging masculine Muslim tropes. As Love's theory conveys, Islamophobia assumes explicit racialized forms when performed through private Islamophobic acts. This framework not only centers the experiences of Muslim women but also mobilizes academic and empirical interventions toward an imperial framing where gender is foundational.⁵⁶

Media scholar Deepa Kumar's theorizing of imperial Islamophobia returns it back to its Orientalist roots. She writes that Islamophobia "is best understood, in its myriad and ever-changing manifestations, as rooted in empire. Thus, Muslims' inclusion within an imperial system that presides over war, genocide, and tortures does little to dent racism."⁵⁷ Rooted in European and American empire, the modern War on Terror remakes and pronounces Islamophobia to ominous proportions.

By interrogating Islamophobia beyond American boundaries, both geographic and legal, Kumar's *Islamophobia and the Politics of Empire* traces her analysis back to the postcolonial period.⁵⁸ This point of commencement is critical on four fronts. First, it reconciles Islamophobia, and the understanding of it, with the very gendered ideas, images, and narratives of its maker: Orientalism. Orientalism, after all, is the mother of Islamophobia, and any analysis of the latter must be prefaced with discussion of the former. Orientalism was an imperial project, and Islamophobia a pointedly "neocolonial" American project propagated by its War on Terror.⁵⁹

55. Rooting the racialization of Muslim identity inextricably to the American experience also raises pitfalls, central of which is the imposition of American constructions of race (and racial categories) into contexts where they do not fit.

56. See, for example, NAZITA LAJEVARDI, *OUTSIDERS AT HOME: THE POLITICS OF AMERICAN ISLAMOPHOBIA* (2020), for a political analysis of societal attitudes of Muslim Americans in the post-9/11 era.

57. DEEPA KUMAR, *ISLAMOPHOBIA AND THE POLITICS OF EMPIRE* 8 (2021).

58. *Id.* at 18–66.

59. This Article adopts international law scholar E. Tendayi Achiume's framing of imperialism and its modern progeny, neocolonialism. Achiume writes, "[T]he present era is defined by neocolonial imperialism, even if former colonial imperialism has been outlawed. Imperialism may be defined as the practice of empire: the projection of political and economic power beyond the territorial borders of the power-wielding community . . . The term 'neocolonial imperialism' distinguishes the unique forms of imperialism that results from the legacy, and continues the logic, of formal European colonialism." Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV., 1509, 1541 (2019).

Second, by returning to its epistemological roots, Kumar removes the War on Terror as the focal prism anchoring Islamophobia theory, and frees the imagining of Muslim subjects, principally women, through the masculine prism of terrorism.⁶⁰

Third, Kumar draws on foundational feminist texts, particularly those writing within the humanities and social science spheres, to craft her imperial framing of Islamophobia. These literatures, as landmark Muslim feminist Fatima Mernissi observed, dislodge the trope that reduce Muslim women into flatly submissive beings lacking agency and individuality.⁶¹

Fourth, Kumar's work affirms the centrality of media studies to this area of inquiry. Edward Said himself followed the discourse's foundational text, *Orientalism*, with *Covering Islam*, an indictment of the mainstream media's lead role in producing and disseminating misrepresentations of Muslims.⁶² By doing so, Kumar highlights the "Islamophobic dialectic" tying media stereotype-production with state action.⁶³ This observation is echoed by media scholar Evelyn Alsultany and political scientist Nazita Lajevardi, who find that "newspaper coverage over 35 years reveals that stereotypes as a cultural threat have been consistently perpetuated by tying together themes of Muslim women and gender inequality."⁶⁴

Moreover, an imperial framing of Islamophobia crystallizes how European and American empires imposed rigid gender binaries (and accompanying ethnocentric narratives) upon Muslim-majority populations. Many Muslim-majority societies envisaged gender along nuanced, complex lines, and represented gender roles in forms that conflicted with the Orientalist reimagining of Muslim womanhood. Reflecting on this latter point with regard to European media, Mernissi observed, "In both miniatures and literature, Muslim men represent women as active participants, while Westerners such as Matisse, Ingres, and Picasso show them as nude and passive. Muslim painters imagine harem women as riding fast horses, armed with bows and arrows, and dressed in heavy coats . . . But Westerners, I have come to realize, see the harem as a peaceful pleasure garden where omnipotent men reign supreme over obedient women."⁶⁵

Framing Islamophobia as an imperial project flips analytical scrutiny from the Muslim subject toward the colonial actor, or in the modern context, the state. The advancement of empire, in former colonial campaigns and the neocolonial

60. KUMAR, *supra* note 57, at 8.

61. See generally MERNISSI, *supra* note 1.

62. EDWARD SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD* 42 (1981).

63. Beydoun, *supra* note 45, at 119.

64. See LAJEVARDI, *supra* note 56, at 89. See generally EVELYN ALSULTANY, *ARABS AND MUSLIMS IN THE MEDIA: RACE AND REPRESENTATION AFTER 9/11* (2012), for a critical examination of the most prominent stereotypes of Muslim men and women after the 9/11 terror attacks.

65. MERNISSI, *supra* note 1, at 15–16.

aims of the War on Terror today, shifts analysis onto the state and its weaponization of race and racism, sect, and, most violently, gender.⁶⁶ All were tools wielded to demonize, divide then conquer Muslim men, then subsequently “save” Muslim women from a Muslim masculinity menacing women at home and Western “civilization” from afar.⁶⁷

The War on Terror, far from being the starting point, is the modern manifestation of that venerable campaign to discipline and destroy Muslim-majority societies. Islamophobia theory, as Kumar, Hamid Dabashi, Beydoun, and others contend, must interrogate the epistemological crusade against Muslims seeded centuries before Islamophobia was given its modern name.⁶⁸ By contributing a cogent theory of gendered Islamophobia into the legal literature, this Article builds on these works and the postcolonial pioneers that laid the intellectual foundation to combat Orientalism, Islamophobia, and their collateral forms and fronts.

B. Gendered Islamophobia

The War on Terror thrust the term “Islamophobia” into popular and political parlance. But it did not spawn the phenomenon of anti-Muslim violence. Likewise, the modern terrorist caricature exists as the contemporary embodiment of longstanding anti-Muslim “othering,”⁶⁹ or what the postcolonial scholar Aimé Césaire called “thingification.”⁷⁰ Yet, understanding this masculine manifestation of Muslim demonization requires retheorizing at the very root of Islamophobic empire and its attendant forms of othering. These roots, not coincidentally, are pointedly patriarchal in motive and mandate.

Dissecting the anatomy of the French colonial mission in Algeria and the Francophone *Maghreb* at large, Fanon observed,

66. Achiueme, *supra* note 59, at 1541. The United States, today, stands as the “‘very citadel’ of neocolonial empire, through not only its economic force but its political oppression of colonial peoples.” *Id.* at 1542 (citing KWAME NKRUMAH, *NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM* ix (1965)).

67. See Samuel P. Huntington, *The Clash of Civilizations?*, 72 *FOREIGN AFFS.* 22 (1993), for the article that launched the “civilizational threat” framing that implicates Muslim men as the most ominous threat to western civilization.

68. See HAMID DABASHI, *BROWN SKIN, WHITE MASKS* 11–23 (2011).

69. Othering is the legal and discursive project of casting a people as societal outliers, or inimical to its conceptions of citizenship. See ELSADIG ELSHEIKH, BASIMA SISEMORE & NATALIA RAMIREZ LEE, HAAS INST., *LEGAL OTHERING: THE UNITED STATES OF ISLAMOPHOBIA* (2017), https://belonging.berkeley.edu/sites/default/files/haas_institute_legalizing_othering_the_united_states_of_islamophobia.pdf [<https://perma.cc/YML3-7DSF>], for an empirical study assessing how Muslims are cast as outliers during the War on Terror; see also Leti Volpp, *Citizenship Undone*, 75 *FORDHAM L. REV.* 2579, 2584 (2007), for a theoretical analysis of how Muslim identity, racially reconstructed after 9/11, clashed with political conceptions of citizenship reified by the state.

70. AIMÉ CÉSAIRE, *DISCOURSE ON COLONIALISM* 42 (Joan Pinkham trans., Monthly Review Press 1972) (1955). Thingification, according to Césaire, is the reduction of human beings into objects, and namely, expedients. He explains, “Between colonizer and colonized there is room only for forced labor, intimidation, pressure, the police, taxation, theft, rape, compulsory crops, contempt, mistrust, arrogance, self-complacency, swinishness, brainless elites, degraded masses.” *Id.*

In the colonialist programme, it was the women who was given the historic mission of shaking up the Algerian man. Converting the woman, winning her over to the foreign values, wrenching her free from her status, was at the same time achieving a real power over the man and attaining a practical, effective means of de-structuring Algerian culture.⁷¹

Islamophobia, in its initial Orientalist makeup, did not center the Muslim man as the principal figure of conquest. Rather, it—and its most violent past and present campaigns—isolated the Muslim woman as the focal subject of profiling and policing, conversion and conquest. Liberating Muslim women, after all, would create avenues for dispatching her sons, brothers, fathers, husbands, and ultimately, conquering the land.⁷² Or, as Kumar notes, this mode of feminist “liberalism in service to empire became a shield behind which racism was hidden,” and wars were legitimized.⁷³

In line with these origins, this Section builds on standing Islamophobia theory by unveiling a gendered framework that not only centers Muslim womanhood, but situates it as the very heart of a novel framework and language to interrogate Islamophobia moving forward.

1. *A Theory*

Gendered Islamophobia is the strategic orientation of Muslim women as both the object of imperial saving and the subject of Muslim male violence. It is a relational dynamic and dialectic, whereby the contours of Muslim womanhood are shaped in opposition to the construction of Muslim masculinity. The imagining of Muslim men as tyrannical, violent, and terroristic produces the image of Muslim women as oppressed, powerless, and submissive and, consequently, the immediate victims of masculine Muslim violence. This form of violence, in the gendered Islamophobic imagination, spurs the rhetoric of “saving Muslim women” that beats the drums for war and fuels the punitive state action examined in Part III.

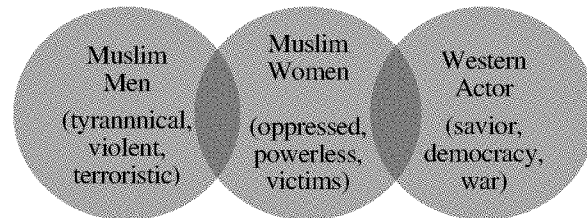
This characterization situates the Muslim female body at the crosshairs of convergent aggression. Further, gendered Islamophobia places the Muslim woman at the intersection of Muslim male violence and western savior campaigns, denying her agency and purporting that freedom can only be attained through its laws, intervention, or war.

71. Fanon, *supra* note 2, at 45.

72. *Id.*

73. KUMAR, *supra* note 57, at 6.

Figure 1 | These overlapping circles illustrate the imagining of Muslim women, interlocked between masculine Muslim violence and the western rescue campaign.



By centering Muslim women, a gendered Islamophobia theory distills the distinct tropes assigned to Muslim women and men by state and private actors. Subsequently, it unveils the theoretical fixation on masculine Muslim terrorism gripping existing Islamophobia theory and legal scholarship.

Applying a legal framing of Islamophobia, this Article echoes that law functions as the most potent catalyst of gendered Islamophobia. Here, we frame the law broadly as executive action, judicial ruling, legislation, and other forms of state action, including war.⁷⁴ We delineate “private feminine Islamophobia” and “private masculine Islamophobia” as the “fear, suspicion, and violent targeting of Muslim [women and men, respectively] by individuals or private actors,” such as bigots or hate groups.⁷⁵ The state, as Part III reveals, is the spearhead of Islamophobia. With that, this Article adopts “structural feminine Islamophobia” and “structural masculine Islamophobia.”⁷⁶ These forms of animus are defined as “the fear and suspicion of Muslim [women and men] on the part of institutions—most notably, government agencies—that is manifested through the enactment and advancement of policy and law,” such as hijab bans, travel bans, and surveillance programs.⁷⁷

Gendered forms of Islamophobia, inflicted by private and government actors, are fused together by an ongoing “dialectic.”⁷⁸ State actions, most notably policies that explicitly associate Muslims with terrorism, have a discursive effect of materially shaping popular views.⁷⁹ Through original survey data, Part II unveils how the discursive effect of this War on Terror dialectic splinters along gendered lines.

74. Khaled A. Beydoun & Cyra Akila Choudhury, *Introduction*, in *ISLAMOPHOBIA AND THE LAW* 1, 7–11 (Cyra Akila Choudhury & Khaled A. Beydoun eds., 2020).

75. Beydoun, *supra* note 45, at 111.

76. *Id.* at 114.

77. *Id.*

78. *Id.* at 120–21.

79. Naomi Mezey, *Law as Culture*, 13 *YALE J.L. & HUMAN.* 35, 43 (2001).

2. *Between "Liberation" and Subordination*

Islamophobia, if anything, is an imperial tool wielded to legitimize violence. This end does not play out monolithically but is determined by the gendered identity of the specific targets of violence. The global and domestic theaters of the War on Terror speak to this shifting form of Islamophobic violence, particularly with regard to the most fetishized marker of Muslim identity: womanhood.⁸⁰

The shapeshifting character of Islamophobia was on full display in Afghanistan after the 9/11 terror attacks. Two months after President George W. Bush formally announced the global war on terrorism, first lady Laura Bush presided over another performance of that war.⁸¹ During a globally telecasted radio address, Laura Bush lobbied,

Only the terrorists and the Taliban forbid education to women. Only the terrorists and the Taliban threaten to pull out women's fingernails for wearing nail polish . . . Civilized people throughout the world are speaking out in horror, not only because our hearts break for the women and children in Afghanistan but also because, in Afghanistan, we see the world the terrorists would like to impose on the rest of us.⁸²

The War on Terror, during its infancy, also became a crusade to *save Muslim women*. In Laura Bush's words, "the fight against terrorism is also a fight for the rights and dignity of women."⁸³ This was a moral imperative for war, buoyed by a feminist mandate, no less.⁸⁴

80. In the same fashion, Critical Race theorists characterize racism as a "political construction." Islamophobia is also a political device that fluidly adapts to prevailing contexts and subjects. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 5 (1984).

81. Nine days after the 9/11 terror attacks, President George W. Bush stated in front of a joint session of Congress, "Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated . . . Either you are with us or you are with the terrorists." *Text: President Bush Addresses the Nation*, WASH. POST (Sept. 20, 2001), https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html [<https://perma.cc/VVQ6-EZF6>].

82. *Text: Laura Bush on Taliban Oppression of Women (Radio Address)*, WASH. POST (Nov. 17, 2001), https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/laurabushtext_111701.html [<https://perma.cc/97NX-Z26D>].

83. *Id.* President Bush echoed his wife's claim, stating, "The central goal of the terrorists is the brutal oppression of women." Megan K. Stack, *The Inconsistency of American Feminism in the Muslim World*, NEW YORKER (Oct. 7, 2021), <https://www.newyorker.com/news/news-desk/the-inconsistency-of-american-feminism-in-the-muslim-world> [<https://perma.cc/M2NS-QMU4>].

84. In addition to executive messaging, Congress passed the Afghan Women and Children Relief Act in 2001 to formally endorse the "save Muslim women" heuristic of the War on Terror. See Afghan Women and Children Relief Act of 2001, Pub. L. No. 107-81, 115 Stat 811 (2001). Prominent media outlets also fell in line, most notably *The New York Times*. See Smeeta Mishra, "Saving" Muslim Women and Fighting Muslim Men: Analysis of Representations in the New York Times, GLOB. MEDIA J. (2007), <https://www.globalmediajournal.com/open-access/saving-muslim-women-and-fighting-muslim-menanalysis-of-representations-in-the-new-york-times.php?aid=35266> [<https://perma.cc/GF4Z-XXM9>].

But who were these Muslim women being saved from? This gendered Orientalist binary, reproduced by executive rhetoric, isolated Muslim men as purveyors of violence and a terrorism that threatened western civilization, security, and Muslim women.⁸⁵ The War oriented Muslim women as both the common target of Muslim men and as a means of disarming critics to galvanize support where male terrorists threaten Muslim women: Afghanistan, Iraq, and spaces both American and foreign.⁸⁶ Feminist scholar Gayatri Spivak's characterization of imperial patriarchy captures the gendered and racial essence of the War as "white men [joined by white women] saving brown women from brown men."⁸⁷ Spivak, much earlier, exposed the propaganda campaign driving gendered Islamophobia. Namely, that Muslim women needed saving from their most intimate partners and countrymen.

Adapting Spivak's insertion of race and racism, the campaign to save Muslim women served as a western feminist campaign, outwardly led by White women but functionally spearheaded by White men. Liberal feminism and its cadre of famous women advocates provided a Trojan Horse for Halliburton,⁸⁸ Huntingtonian "civilizational clash,"⁸⁹ and the overwhelmingly male neoconservative brain-trust that plotted a new order of hypermasculine American empire.

85. Islamic scholar Leila Ahmed identifies the colonial roots of this gendered binary, writing "It was here and in the combining of the languages of colonialism and feminism that the fusion between the issues of women and culture was created. More exactly, what was created was the fusion between the issues of women, their oppression, and the cultures of other men. The idea that other men, men in colonized societies or societies beyond the borders of the civilized West, oppressed women was to be used, in the rhetoric of colonialism, to render morally justifiable its project of undermining or eradicating the cultures of colonized peoples." LEILA AHMED, *WOMEN AND GENDER IN ISLAM* 151 (1992).

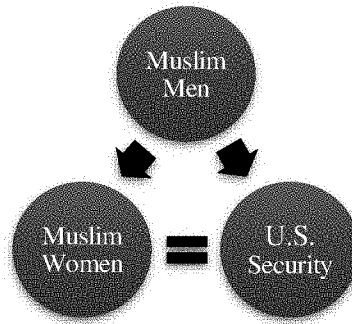
86. KUMAR, *supra* note 57, at 6.

87. Gayatri Spivak, *Can the Subaltern Speak? Speculations on Widow Sacrifice*, 7 *WEDGE* 93 (1985).

88. Halliburton is a private government subcontractor with direct links to the Bush Administration. For an article written during the early stages of the War on Terror that documents its financial gains, see Katherine Griffiths, *Oh What a Lovely War on Terror It's Been for Halliburton*, *INDEPENDENT* (Mar. 27, 2005), <https://www.independent.co.uk/news/business/analysis-and-features/oh-what-a-lovely-war-on-terror-it-s-been-for-halliburton-530025.html> [<https://perma.cc/AGT6-8EX2>].

89. Here, we are referring to Huntington's thesis of a "Clash of Civilizations," a thesis that heavily informed the strategy and lexicon of the War on Terror commenced by the neoconservative Bush Administration. See Huntington, *supra* note 67.

Figure 2 | Muslim women and American national security are oriented as the common victims of masculine male terrorism. The arrows represent the purported violence inflicted by Muslim men, while the equal sign represents its common targets.



Moreover, the crusade to save Muslim women not only legitimized distant wars but also enabled surveillance within the most intimate realms of Muslim life.⁹⁰ Because the War on Terror branded husbands, brothers, sons, and uncles as putative terrorists, the preemptive and punitive reach of the War on Terror extended into living rooms and bedrooms, homes and mosques, and, even more piercingly, the woman's corporal body.⁹¹ Further, as Muslim men were rounded up for security interviews in the United States or gunned down on foreign battlefields, the Muslim woman's body—the object of rescue—functioned as the battleground between Muslim men and Western men.

A gendered theory unveils how this mandate of “saving Muslim women” is built upon an intricately gendered Islamophobic dialectic. First, the three-word crusade is carved from the masculine Muslim tropes of violence, patriarchy, and tyranny. These tropes not only characterize the posture of Muslim men toward their wives, mothers, sisters, and daughters, but far more deeply, they define the very culture of the lands that they come from. There was no War on Terror charge to save Muslim boys or elders, who, despite age or innocence, were still seen through the masculine prism of terrorism.

Second, saving Muslim women strips them of their agency and perpetuates the entrenched tropes of dependence, passivity, and powerlessness. The gendered Islamophobic gaze observes Muslim women through the prism of masculine male violence, incessantly vulnerable to his violence and forever bonded to his tyranny.

Third, because the Muslim woman is circumstantially or intrinsically incapable of freeing herself, according to the Islamophobe, the American or

90. Susan Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 312 (2002).

91. Part III.A examines the policing of the Muslim woman's body through infringements on religious exercise and expression. Most centrally litigated are the global headscarf bans.

foreign actor is left with no choice but to intervene. This Islamophobic savior complex, rooted deep in Orientalist and colonial discourses, drives prominent state figures, like Laura Bush and Cherie Blair, and private organizations, such as the American Feminist Majority Foundation, to flank themselves alongside their militarized, male counterparts and beat the drums for war.⁹²

Saving Muslim women, thus, is the gendered Islamophobic bridge justifying the global and domestic tentacles of the War. Again, as scholars within and beyond the law have observed, this is a foundationally racialized discourse.⁹³ The reification of Muslim men as the culprits of terrorism and Muslim women as the direct victims of that terror is an intensely gendered discourse. Through its blanket “threat of terrorism” framing, standing Islamophobia theory, independent of a gendered dimension, cannot unveil the distinct caricaturing and violence it inflicts on Muslim women.

Saving Muslim women is uniquely, yet unmistakably, violent. This violence is driven by Islamophobic myths coloring Muslim men as prone to terrorism and western warmongers as innately democratic and altruistic. However, the bombs dropped in Afghanistan and Iraq and the drone attacks in Yemen and Somalia do not distinguish between the gender of their targets. Further, even if military violence wrought by counterterror campaigns were disproportionately inflicted upon Muslim men, widowed wives and fatherless daughters would still be left to endure collateral forms of violence shattering their lives. They would face poverty, foreign occupation, sexual violence, and, perhaps the most penetrating form of feminine Islamophobia, the ongoing regulation of their bodies via headscarf bans and free exercise of religion restrictions disproportionately burdening Muslim women. The western crusade to save Muslim women veils a reality where they were being indirectly and distinctly punished.

After all, the War in Afghanistan and the broader War on Terror neither saved nor liberated Muslim women en masse. Despite the token rescue of exceptional Muslim women, the American war and occupation claimed more lives of Afghan women and girls than the Taliban—the very group that pulled the American military into Afghanistan, and twenty years later, sent them packing.⁹⁴

92. Janine Rich, “*Saving*” *Muslim Women: Feminism, U.S. Policy and the War on Terror*, INT’L AFFS. REV. (2014), https://web.archive.org/web/20211030211042/https://www.usfca.edu/sites/default/files/arts_and_sciences/international_studies/saving_muslim_women-_feminism_u.s_policy_and_the_war_on_terror_-_university_of_san_francisco_usf.pdf.

93. Volpp, *supra* note 33, at 1586.

94. See *Fear Spreads in Kabul as Taliban Take Charge*, N.Y. TIMES (Aug. 16, 2021), <https://www.nytimes.com/live/2021/08/16/world/taliban-afghanistan-news> [<https://perma.cc/8YAF-RFH>].

3. *Unveiling Tropes and Truths*

Through patriarchal discourses, womanhood is materially shaped through an understanding of men. As such, *men make women* and how they are perceived by the world. This is particularly true when the subjects are Muslim women who have been fluidly reimagined and reconstructed through the lens of imperial masculine handlers, through art, political narrative, literature, and law.⁹⁵

Orientalists and their Islamophobic progeny color “Islamic culture” as unbendingly patriarchal.⁹⁶ When Trump proclaims, “I think Islam hates us,” the public imagines Islam in a menacing male form, who directs their distant ire on the American “homeland” and the Muslim women within arms’ reach.⁹⁷ These Muslim women, in the public Islamophobic imagination, are controlled by men and perpetually vulnerable to their violence. Bent on making women in their imperial image, these imperial discourses are themselves guilty of reconstructing Islam as innately patriarchal.⁹⁸

Islamophobic policy continues as a principally male-led enterprise today. Its principal thinkers, led by the likes of Bernard Lewis and Samuel Huntington, are predominantly men. Its governmental and geopolitical stewards —Donald Trump, Emmanuel Macron, and Narendra Modi—are also overwhelmingly men. Its most influential propagandists and pundits, such as Sam Harris or Eric Zemmour in France, are overwhelming men. While women like Laura Bush and Marine Le Pen drive damaging Islamophobic policy and talking heads like Ayaan Hirsi Ali and Pamela Geller peddle harmful propaganda, these women are novel abettors of a crusade made and helmed by men, specifically White men.⁹⁹ This is especially true for the law, where White men dominate federal judgeships and preside over cases that determine the lives of Muslim women.¹⁰⁰

95. Mernissi emphatically challenges this western male construction of Muslim women by protesting the work of French artist Jean Auguste Dominique Ingres: “All the harem women that Ingres fantasized about and painted nonstop for fifty years were idle, helplessly passive, and always pictured indoors, reclining on sofas in an embarrassingly vulnerable nudity. Yet this fantasy of passive harem women does not exist in the Orient!” MERNISSI, *supra* note 1, at 164. These stereotypes of Muslim female passivity and dependence are powerfully remade and redeployed by law.

96. *Id.*

97. Theodore Schleifer, *Donald Trump: “I Think Islam Hates Us,”* CNN (Mar. 10, 2016), <https://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us> [https://perma.cc/H9PW-CM2L].

98. See MERNISSI, *supra* note 1, at 164.

99. Political scientist Rochelle Terman observes how “these individuals explicitly endorsed the War on Terror on feminist grounds and faced well-deserved scrutiny by critical scholars for propagating the falsehood that patriarchy in Muslim communities is especially potent, intractable, or dangerous.” Rochelle Terman, *Islamophobia, Feminism and the Politics of Critique*, 33 THEORY, CULTURE & SOC’Y 77, 87 (2016).

100. See *infra* Part III for a discussion on the legal system’s impact on Muslim women. As of 2019, 80% of federal judges in the United States were White and 73% male. DANIELLE ROOT, JAKE FALESCHINI & GRACE OYENUBI, CTR. FOR AM. PROGRESS, BUILDING A MORE INCLUSIVE JUDICIARY 6 (2019), <https://www.americanprogress.org/wp-content/uploads/sites/2/2019/10/JudicialDiversity-report-3.pdf> [https://perma.cc/TG3B-THUJ].

What effect does this patriarchal making of Islamophobia have on the construction of Muslim men, and women in particular? Scholars and pundits have written extensively about the categorical objectification of Muslim women as victims.¹⁰¹ Victims that, as articulated above, are in dire need of rescue from the very Muslim male terror that threatens western security and civilization.

This objectification, however, is twofold. Beyond this heuristic stands the reciprocal veiling of Muslim women as a deeply diverse population that worship, look, and live differently. This flattening, as the gendered Islamophobic dialectic reveals, is not unique to Muslim women. Prevailing Islamophobia theory tethered to terrorism speaks to the gendered suspicion assigned to Muslim men and over the last decade has inspired critical rebuttals that challenge the terror tropes assigned to Muslim men and boys. Yet, these theories stifle cognition of how Muslim women who deviate from the “master terrorist caricature” distinctly experience private and state-sponsored Islamophobia. Moreover, the masculine terrorism framing is frequently wed to religious conservatism or “Islamic extremism,” which reproduces the flattening of Muslim women as the target and the oppressed—imprisoned by her male lord and his veil.¹⁰²

4. *Not All Muslim Women Veil*

In the mind of the Islamophobe, the Muslim female object is always veiled. She expresses her identity through some form of veiling—hijab, niqab, chador, and, most in line with the feminine trope of subordination, burqa.¹⁰³ In the eyes of the Islamophobe, these iterations of Islamic covering determine the degree of subordination and gravity of oppression. As Fanon describes the Islamophobic gaze vis-à-vis the veil, “With the veil, things become well defined and ordered. The Algerian woman, in the eyes of the observer, is unmistakably ‘she who hides behind a veil.’”¹⁰⁴ Unveiling, in its imperial form, is that process of revealing the individual behind the article not for her own liberty, but for the sexual or political conquest of the western male who removes it.

101. Bookstores are full of popular selections focusing on the victimization of Muslim women at the hands of Muslim men, such select titles often play on the subordinating role of the “veil.” See, e.g., ROBERT SPENCER, *ISLAM UNVEILED: DISTURBING QUESTIONS ABOUT THE WORLD’S FASTEST GROWING FAITH* (2003).

102. The phrase “Islamic extremism,” popularized by modern Orientalists like Bernard Lewis and Fouad Ajami, equates religious piety with a propensity for violence. This logic, bigoted in its formulation, is reproduced by War on Terror policies. Most notably, “counter-radicalization” policing programs, which measure the prospect of becoming radicalized with a range of metrics, chief of which is religious piety. See Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809, 811–16. (2013).

103. “Veiling became an ideological issue as much as a political or military one. The Afghan [Muslim] women came to represent a visual manifestation of a society deemed to be the antithesis of everything Western culture holds dear, with a particularly intense and almost fetishistic focus on the burqa/chadri.” Rich, *supra* note 92.

104. Fanon, *supra* note 2, at 43.

While Muslim men are viewed for their propensity for violence, Muslim women are judged by their relationship with the veil. This latter link is inextricably tied to masculine Muslim domination, given that Muslim men are viewed as the imposers of the veil. Muslim women are understood, made, and remade through the single-axis epistemic of veiling. After all, “[c]olonialism wants everything to come from it,” and the Islamophobic reproduction of the Muslim woman and man subject achieves that very aim.¹⁰⁵ While violence and terror are the principal makers of Muslim masculinity, the veil and its accompanying dialectic of subordination make it the feminine analog.

This gendered dialectic generates the unique modalities in which Muslim men and Muslim women are imagined, are politically understood, and experience the law. While lands, borders, and physical spaces in between are the sites of masculine Muslim policing and violence, the female body is the battleground for feminine Islamophobia. Veiling is the most lucid vestige of masculine Muslim tyranny and terror imposed on the Muslim woman and, as explained above, the vehicle that the opportunistic Islamophobe operates to justify violence. The prominence of the veil signifies the reign of terror in the minds of the Islamophobe, while its absence or en masse removal, spurred by the war, represents winning hearts and minds.¹⁰⁶ Unveiling, through the colonial and modern courses of aggression in Muslim-majority cases, is as violent as any act of war.

Like the Orientalist, the Islamophobe fails to recognize a cardinal reality: *not all Muslim women veil*. Even more, not all Muslim women express their religious identity through the veil’s myriad iterations. This is particularly true in Muslim-majority countries, such as Turkey and Tunisia, and in western nations, like the United States and France, where the War on Terror drives policy. Through a gendered Islamophobic discourse, Muslim women who do not cover are viewed as liberated or independent, western, and assimilable. These views are complicated, if not undermined, by a gendered Islamophobia inextricably constructing Muslim women through their relation to veiling.

The veil, however, is not merely a marker of subordination and other normative judgments. It is also a signifier of connectivity to Islam, Muslim societies, and Muslim men: the imagined purveyors of terrorism. Unveiling represents emancipation from the Muslim man and his dominion, which, in line with virtues of assimilability and modernity, makes the Muslim woman palatable to the Islamophobe. In some respects, as she succeeds in distancing herself from the Muslim male, the tyrant and terrorist in the minds of the Islamophobe, she becomes an asset. She can only be trusted if she unveils, and in doing so,

105. *Id.* at 54.

106. “The occupier’s aggressiveness, and hence his hopes, multiplied tenfold each time a new face was uncovered . . . Every veil that fell, every body that became liberated from the traditional embrace of the *haik*, every face that offered itself to the bold and impatient glance of the occupier” marked victory. *Id.* at 47.

becomes exempt from the class of Muslim women signifying a threat. In mutating her appearance according to western norms, the unveiled Muslim woman becomes a useful expedient to the broader campaign of antiterrorism against Muslim men.¹⁰⁷

Despite being subordinated and disempowered, the veiled Muslim woman may still serve as a collateral terror threat. As the Islamophobe characterizes her as needing saving to justify war, the fear of the veiled Muslim woman as an accessory to terrorism by the Muslim male remains a looming concern.¹⁰⁸ This woman, despite her suppression, comforts the male terrorist, harbors him, and, if he compels her to do so, tacitly partakes in the enterprise of terrorism. The very presence of the veil therefore ties Muslim women to Muslim men, to their Islam, and to their looming threat of terror.

The Islamophobic dogma tied to the veil strips Muslim women of agency and, vis-à-vis the article of clothing, forecloses the expanse of Muslim feminine individuality and the endless expanse of feminine expression. Many are worth mentioning.

“[T]he headscarf has no unitary meaning.”¹⁰⁹ In response to rising Islamophobia in France and the United States, many Muslim women who previously did not veil did so as an act of political resistance. For some, either spirituality or politics, or a combination of both, spurred this pivot.¹¹⁰ In the case of Algerian women fighting for independence against the French, the hijab and the niqab were converted into instruments for liberation, through which armed revolutionaries safely passed military checkpoints under their anonymizing shields.¹¹¹ For others, donning the hijab is an expression of rejecting western “normative standards of femininity” in exchange for subaltern alternatives.¹¹²

As Mernissi notes, “[v]eiling is a political statement.”¹¹³ Its origins, however, are not. Hijab itself, as a form of women’s covering, is a practice found across Abrahamic faiths. For Muslim women, wearing hijab is rooted in the Quran’s details on how Muslim women and men should cover. The politicization

107. See *id.* at 45 (“Converting the woman, winning her over to the foreign values, wrenching her free from her status, was at the same time achieving a real power over the [Algerian] man . . .”).

108. See AZIZ, *supra* note 39, at 193 (“Whether guilty by association through her marriage to a presumed terrorist husband, or an active accomplice in secret plots to terrorize Americans, some headscarved Muslim women are perceived as individuals incapable of developing their own beliefs and protestations.”).

109. Wing & Smith, *supra* note 47, at 746.

110. For an account of the political motives to don the veil, see Elham Manea, *The Veil as a Political Act*, E-INT’L RELS. (Feb. 7, 2018), <https://www.e-ir.info/pdf/72618> [<https://perma.cc/4DEJ-7JRS>]. See Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1 (2018), for a theoretical analysis of how Muslim men and women outwardly perform their identities in line with suspicion and stigma.

111. See *THE BATTLE OF ALGIERS* (Igor Film & Casbah Film 1966).

112. Zine, *supra* note 21, at 248.

113. MERNISSI, *supra* note 1, at 114.

of hijab is an effect of imperialism, and its generative nomos isolates the article as a marker of mystery, mastery, dependence, and difference.

Muslim women who do not veil, again in line with gendered Islamophobe tropes, are perceived as less pious, secular, or even non-Muslim. Yet, the lived realities of Muslim women powerfully belie these myths. Correlating piety with veiling, or abstaining from it, veers from the truths of spiritual Muslims who see faith as a metaphysics, not material garments. Anthropologist Lila Abu-Lughod, a scholar of gender and Islamic societies, observes how “[Muslim] women’s embrace of the hijab” may also be a “public assertion of morality,” divorced from (religious) piety and in line with personal sensibilities.¹¹⁴ To bring this dynamism of the veil to the fore and to dislodge it from a unitary narrative of dependence and subordination requires a gendered Islamophobic analysis.

More than theoretical discourse, this Islamophobic fixation on veiling and unveiling is a focal matter of law. It shapes the legal movements to restrict myriad forms of covering within the public spheres in places like Quebec and France, sites of Hijab Ban legislation.¹¹⁵ It drives the normative judgments assigned to Muslim women who express their outward identities beyond the rigid tropes reproduced by Islamophobic propaganda and policy. Donning a symbol indelibly connected to the Orient and disconnected from the West, it brands Muslim women as forever foreign, eternal immigrants, and utterly inassimilable.¹¹⁶ And thus, as examined in Part III(A), it sits at the very heart of phantasmic culture wars that situate Muslim women at their core, while prevailing theory sweeps them to the margins.

Before transitioning from theory to the empirical and legal analyses in Parts II and III, Crenshaw’s imperative to craft theory “demarginalizing” Black women is apropos for our proposed theory. Adhering to the movement she pioneered more than three decades ago, this Article likewise demarginalizes Muslim women and their lived realities. Adapting Crenshaw’s call,

“[We] center [Muslim] women in this analysis in order to contrast the multidimensionality of [Muslim] women’s experience with the single-axis [bound to veiling] that distorts these experiences . . . [T]his juxtaposition reveal[s] how [Muslim] women are theoretically erased.”¹¹⁷

Let us be clear, a gendered Islamophobia theory seeks to do more than just demystify the longstanding tropes that veil scholarly acknowledgement of the rich and multidimensional forms of Muslim womanhood, and collaterally,

114. Lila Abu-Lughod, *Seductions of the “Honor Crime,”* 22 DIFFERENCES 17, 50 (2011).

115. See *infra* Part III.A.1.

116. As Zine theorizes in relation to the veil within Canadian schools, “[political] meanings are mapped onto the body as it is presented and packaged for public consumption and spectacle.” See Zine, *supra* note 21, at 242.

117. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139 (1989).

Muslim men. This Article's goals are far grander and aim to equip scholars and advocates with the tools to fight back within the gates of societal, intellectual, and state power.

II.

MEASURING GENDERED ISLAMOPHOBIA

The public's imagining of Muslim womanhood, in juxtaposition to Muslim manhood, is central to gendered Islamophobia theory. Public opinion remains a critical component of private Islamophobia and public conceptualizations of women dictate how the law treats them.¹¹⁸ In order to understand how the public's perceptions reify gendered Islamophobia and manifest the dialectic with state action, this Part offers original empirical evidence to the legal literature.

The original empirical evidence is drawn from a survey conducted on a multi-racial sample of Americans from across the United States. This survey provides a unique investigation of the gendered dynamics in the public's imagery of Muslims. Examining public opinion provides additional understanding of the private manifestations of Islamophobia and specifically how Muslim women are viewed via distinct stereotypes compared to men. This provides meaningful evidence demonstrating how Islamophobic tropes are intrinsically gendered.

The survey findings showcase the gendered dimensions of private Islamophobia as an integral part of maintaining notions of gendered Islamophobia at large. This Part first explains the methodology, moves into the process of creating and deploying our survey instrument, and then discusses key findings from the analysis. The survey results highlight the specific racialized attributes attached to Muslims, particularly how Muslim women are consistently seen as submissive and Muslim men are viewed as dominant and violent.¹¹⁹ The public's support of specific policies underscores the sociopolitical consequences of holding stereotypical views of Muslims and how potent normative judgments of Muslims are, as Part III's examination of case law articulates. Finally, the system of structural racism that is endemic within the United States influences the types of beliefs individuals hold, such as White respondents being more likely to treat Muslims with greater suspicion in comparison to non-Whites.¹²⁰

A. Survey Methodology

To measure the dynamics of gendered Islamophobia, we collected original survey data on 1,230 Americans aged 18 and older during November and

118. See generally KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR* (2019).

119. Volpp, *supra* note 33, at 1586–88.

120. See Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOCIO. REV. 465, 469–74 (1990).

December of 2021 using an online panel survey.¹²¹ The value of our original data collection is that it provides a timely and contemporary understanding of how Islamophobia exists.

Our survey included originally designed questions focused on the gendered dynamics of Islamophobia. Furthermore, our analysis assessed opinions about Muslim men and Muslim women to determine whether opinions on stereotypes or policies shift if, within the survey experiments, we specify the subject's gender in addition to their Muslim identity. Prior surveys have typically focused on the public's opinion of Muslims at large, whereas our survey provided more granular questions. Such questions helped uncover differences in opinions and perceptions of Muslim women versus Muslim men. These findings illuminate how Muslim women are publicly imagined and understood and how they are perceived in relation to Muslim men.

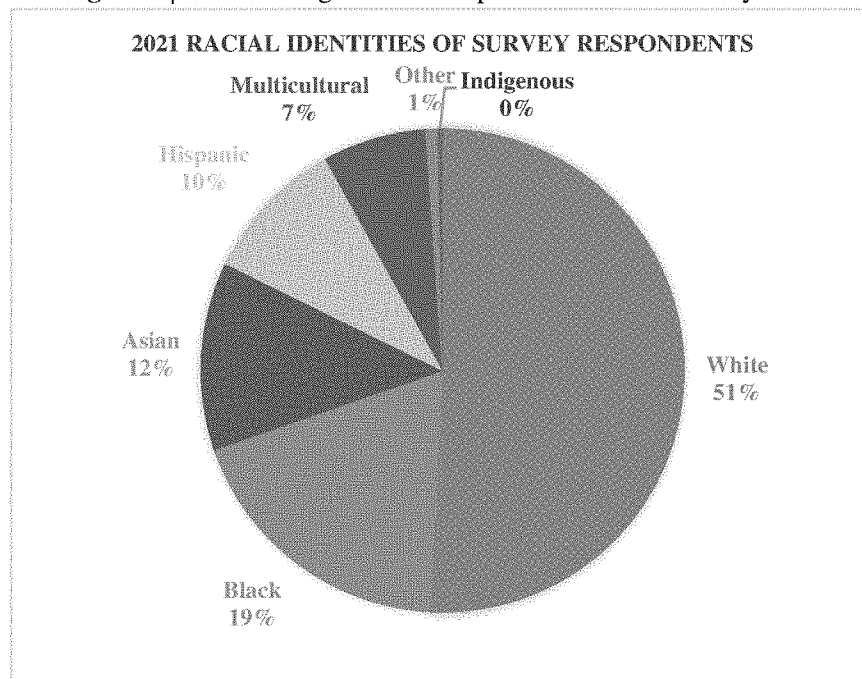
Our survey also engaged with widely cited data on Muslim Americans. It integrated questions that draw on additional attitudes, such as political participation questions from the American National Election Study of 2020 and Nazita Lajevardi's Muslim American resentment scale, a ten-question survey scale that measures Americans' general animus towards Muslims.¹²²

Figure 3 highlights the distribution of respondents by racial background in the analysis. Fifty-one percent of respondents identify as White, 19% as Black, 12% as Asian, and 10% as Hispanic. The racial diversity within the sample helps us understand what divergences there are in the understanding of Muslims by racial background, if any. The racial diversity of the respondent sample is important as attitudes towards minority groups in the United States typically vary by racial background and we may see a similar racial divide in perceptions towards Muslims.¹²³

121. This survey was implemented by the Cint Survey Firm. We utilized the demographics of race, gender, age, socio-economic status, and region from the U.S. Census to gather a sample of residents in the United States that can be considered generally representative of the profile of residents in the United States.

122. For the full Muslim American Resentment scale and the rationale of the scale's development, see generally LAJEVARDI, *supra* note 56.

123. The body of work within the field of race and public opinion highlights how racial cleavages on public policy remain a central feature of American political discourse, wherein Black Americans are more likely to support specific types of government policies, like support for social policy, than Whites. For further explanation of how this emerges for other racial groups, see Vincent L. Hutchings & Nicholas A. Valentino, *The Centrality of Race in American Politics*, 7 ANN. REV. POL. SCI. 383, 389 (2004).

Figure 3 | Racial Background of Respondents in 2021 Survey

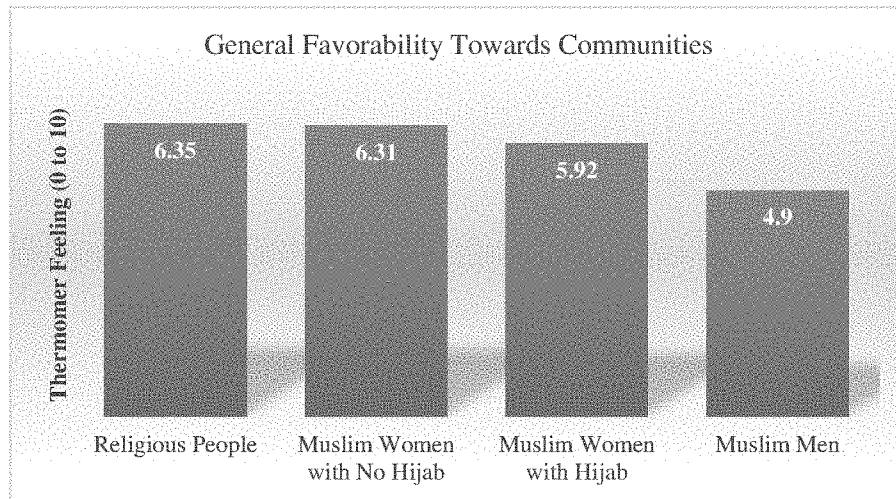
B. General Public Favorability

Our framing of gendered Islamophobia orients Muslim women as the simultaneous subjects of imperial saving while Muslim male violence deepens and complicates prevailing understandings of Muslim Americans. As Figure 4 illustrates, Muslim women—on average—are perceived in a more favorable light than Muslim men. Respondents were given a “feeling thermometer,” whereby they were asked about their general feelings towards certain communities in the United States. A rating of 5 or higher out of 10 indicated they felt favorable and warm towards the individual. Ratings below 5 indicated they did not feel favorable towards the individual. Our survey asked them about 4 groups of persons: Religious People (as the control group), Muslim Women with No Hijab, Muslim Women with Hijab, and Muslim Men. As Figure 4 highlights, Muslim men were the least liked in the group and the only one that, on average, received a thermometer score of less than 5: 4.9. The rest of the groups scored a rating of 5 or higher, including Muslim Women with or without Hijab. The variation in the impression between Muslim women and Muslim men highlights how they are perceived distinctively.

As gendered Islamophobia theory emphasizes, individuals with Islamophobic tendencies perceive Muslim females who are veiled in negative ways. Our findings corroborate this perspective. For the American public, favorability varies between Muslim women who wear the hijab and those who do not. Muslim women who do not wear hijab were perceived as more favorable

than those who do wear hijab. Muslim women with hijab were given an average favorability score of 5.92 out of 10, whereas Muslim women without hijab were given a higher score of 6.31. Even among Muslim women, there are differences in how they are perceived based on their appearance and proximity to Islam (*vis-à-vis* the hijab). This distinction is important, as it reveals that the public may welcome certain kinds of Muslim women more than others.

Figure 4 | Favorability Thermometer in 2021 Survey



C. *The Gendered “Racing” of Muslims*

Specific stereotypes that are consistently used to describe Muslim women in juxtaposition to Muslim men are dominant factors in reifying gender Islamophobia. This relational dialectic, where Muslim womanhood is shaped against the construction of Muslim masculinity, is important to measure. Muslim men’s violent characterization engenders the Islamophobic notion of Muslim women being submissive. By placing men as the active agent in the narrative, women are cast as meek and passive actors. We measured these two stereotypes, violent and submissive, as distinctive questions to understand whether respondents do note any variation in the stereotype or whether they paint Muslim men and women with the same stereotypical brush.

1. *Muslim Men as “Violent”*

Since Muslim women’s agency is constantly compared to men’s agency, we first examined associations with the stereotype of being violent. The first question asked individuals to place groups of people onto a scale from 0 to 100. The 0 side of the scale included the attribute of “peaceful,” while the 100 side of the scale was designated for “violent.” If respondents selected 50% for a group, this indicated general ambivalence. This scale offers a contrast between peaceful

and violent sentiments and asks respondents to gauge where subgroups of people fall on the scale. We specifically asked about Muslim men and Muslim women, and Asian Americans and Black Americans as comparison groups.¹²⁴ Responses were analyzed based on the respondent's racial identity.

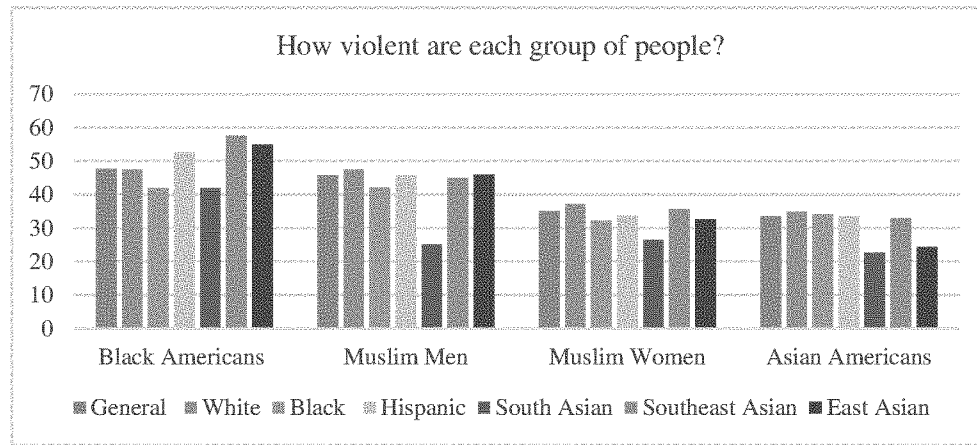
Figure 5 illustrates a gendered and racialized perception of violence that neatly maps into the subgroups assessed. On average and across all racial groups of respondents, Muslim women and Asian Americans were seen as most peaceful. This is telling as it highlights how, in the public imagery, Muslim women do not convey the same "violent tendencies" as their male counterparts. Conversely, Muslim men and Black Americans were perceived to be more violent than peaceful. This is consistent with results when looking at the general population's average and even when responses are split and examined by racial subgroups. There is a drastic decline in perceptions of violence when we move away from the example of Black Americans and Muslim men. The conceptualization of the pervasive stereotype that Black men are violent has been as endemic in the racialization of Black Americans as it has been for Muslim men.¹²⁵ On the other hand, Asian Americans have been placed in a role as a "model minority," which depicts them as smarter and more likely to be orderly.¹²⁶

Importantly, the difference in Muslim women being perceived as less violent reifies how Muslim women are perceived distinctly from Muslim men.

124. These two racial groups were selected on account of rising anti-Black and anti-Asian racism; these longstanding forms of bigotry spiked in line with the Black Lives Matter (BLM) Movement and the Coronavirus pandemic, respectively.

125. Racism, in its manifestations in the United States, has both explicit and implicit judgements that the public maintains. Certain stereotypes are engendered in an implicit and subliminal manner. One of the most powerful examples of how Black men are associated with violence was the use of Willie Horton, a former felon, and his story in George H.W. Bush's 1988 campaign against Michael Dukakis. For further explication of how these dynamics are engendered subliminally within political psychology, see TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* 20–21, 111–28 (2017).

126. See CLAIRE JEAN KIM, *BITTER FRUIT: THE POLITICS OF BLACK-KOREAN CONFLICT IN NEW YORK CITY* 19–20 (2000).

Figure 5 | Perceptions of Violence by Group Identity in 2021 Survey

The respondents' written comments provide further insight into these findings. The final survey question is open-ended, allowing respondents to write whatever comes to mind when they think of Muslim men and Muslim women, distinctly. One respondent shared,

I grew up in California near San Bernardino. I now live in Texas. But, I have extended family in [California]. A few years ago when the terrorist attack happened in San Bernardino, I had cousins living and working in Loma Linda and San Bernardino right around where the attack happened. One cousin worked for the county but in a different department than the male terrorist. I was glued to my phone texting people to make sure they were safe. Now, even though I know that most Muslims are not violent or dangerous, I can't stop myself from having a little suspicion until I know a specific individual is a good person.

The suspicion with which this respondent approached Muslim men offers a more intimate picture of what events or ideas produce these perceptions in their minds. This respondent specifically referenced the San Bernardino case when asked about stereotypes associated with Muslim men.¹²⁷ This allusion was not referenced in other open-ended answers related to Muslim women.

This anecdote is consistent with descriptors regarding how Muslim men were commonly perceived. What is meaningful in this respondent's answer is their confession that, "they cannot stop themselves from having a little suspicion" about the violent tendency of Muslim men. This signifies how, for this respondent, Muslims are guilty until they are presumed innocent; a form of heightened alarm is activated when the subjects of scrutiny are Muslim men.

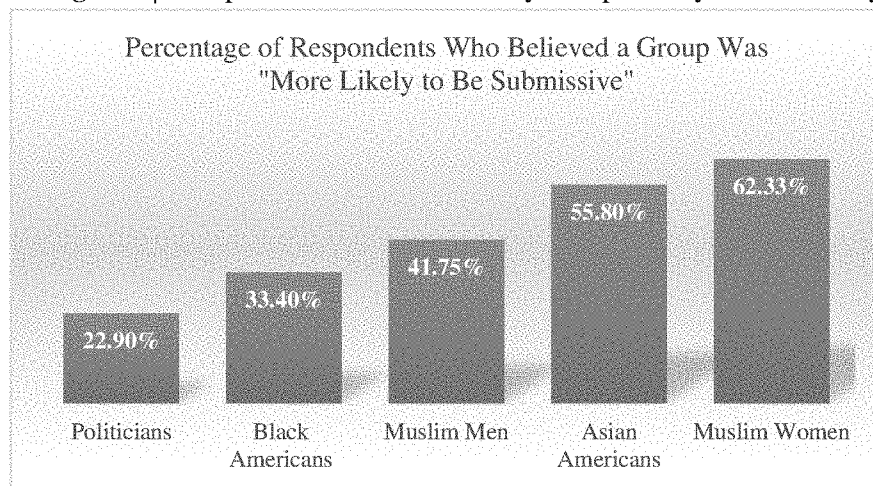
127. The case is the subject of Part III.B.2.

2. *Muslim Women as “Submissive”*

If Muslim men are violent, where does that leave Muslim women in the public’s imagery? The second side of this notion of gendered Islamophobia is how Muslim womanhood is shaped to configure Muslim women as submissive. The second question asked respondents, on the stereotype scale, to measure the degree of outspokenness or submissiveness of the five subgroups featured in Figure 6: Politicians, Black Americans, Muslim Men, Asian Americans, and Muslim Women.

As Figure 6 highlights, Muslim women are perceived to be the most submissive, followed by Asian Americans. Among the five subgroups, Muslim women were graded an average of 62.33% more likely to be submissive than outspoken. They are seen as the most likely to be submissive, even when compared to other groups beyond Muslim men. On the opposite side of the spectrum, respondents were asked about politicians as a control group. They were graded as having a 22.9% chance of being submissive. With an average of 41.75%, Muslim men were seen as drastically less submissive and more outspoken than Muslim women with an average of 62.33%. The entrenchment of these associations in the public mind are stark. These linkages not only demonstrate how distinctive the stereotypes associated with Muslim women are but also highlight how passive and submissive Muslim women are perceived to be.

Figure 6 | Perceptions of Submissiveness by Group Identity in 2021 Survey



The respondents’ written comments provided color to the findings. In the open-ended section of the survey, one respondent shared that Muslim women were, “Submissive, quiet, scared, shy . . . Submissive to male family members . . . submissive to their fathers and husbands.” Another respondent noted more directly, “I think of women who run the home and are often stay-at-

home moms who are servants to their husband, though I hope this is changing.” Over 120 out of 1,230 respondents utilized the term “submissive” directly in their open commentary about Muslim women. “Submissive,” “passive,” and similar gendered adjectives were pervasive across the open-ended commentary.

Conversely, respondents did not use any blanket term as a heuristic when asked about Muslim men. In some ways, this not only highlights how pervasive this stereotype of Muslim women is, but also how simplistic people’s notions of Muslim women are. Muslim men are painted in more complex terms, whereas the characterization of Muslim women was monolithic and flattened.

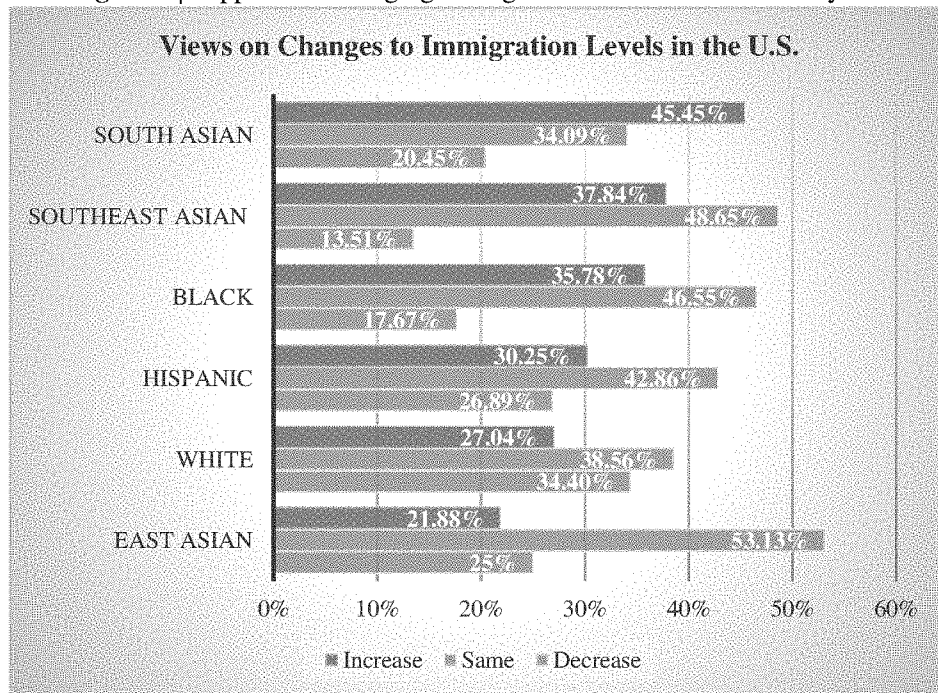
D. Policy Implications

These findings align with the theory articulated in Part I and illustrate deeply gendered public perceptions of Muslims. These perceptions have indelible policy and legal implications. The implications of the differences in opinions by racial groups is particularly meaningful when examining support for policies. We found there is variation on who is more hesitant at the reception of new immigrants, varying by the respondent’s racial background.

1. Support for Immigration in the United States

Former President Donald Trump’s “Muslim ban” introduced extreme immigration measures targeting Muslim majority countries. Immigration remains a salient component of discourse surrounding Muslims in the United States. Respondents were asked whether to increase, decrease, or maintain the level of immigration in the United States.¹²⁸ Figure 7 highlights how people’s views on immigration levels vary by their ethno-racial background. Results are broken down by the ethno-racial background of survey respondents. Support for decreasing immigration varied by respondents’ ethno-racial background. Whites constituted the group with the highest desire to decrease immigration, with 34.4% wanting to decrease immigration levels. On the other hand, only 17.7% of Black respondents chose to decrease immigration levels. Conversely, other ethno-racial groups were more supportive of increasing immigration levels. 35.78% of Black Americans wanted to increase immigration. South Asians constituted the group most supportive of increasing immigration, as 45.45% of respondents wanted to increase immigration levels. On the other hand, only 21.88% of East Asian respondents chose to increase immigration levels.

128. Respondents were asked about immigration in general without specifying a specific immigrant background.

Figure 7 | Support for Changing Immigration Levels in 2021 Survey

Moving beyond general support for immigration policy, we asked respondents specifically about their views on hypothetical immigration asylum cases. The survey measured support for asylum by focusing on the country of origin of the immigrant in question. Respondents were asked about three immigrants: (1) Patrick from Ireland; (2) Fatima, a Muslim woman from Afghanistan; (3) Ahmad, a Muslim man from Afghanistan.

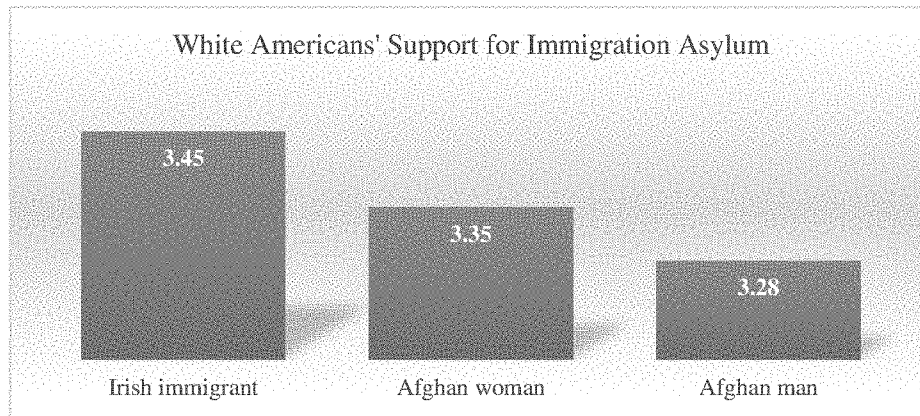
White respondents were more favorable toward admitting an Irish immigrant than admitting a Muslim one, regardless of gender.¹²⁹ This variation in support was not found among non-Whites; it existed only among White respondents. The evidence here indicates that for White Americans, the racial and religious identity of the immigrant is most salient in influencing their decision to support the immigrant's entry into the country.

A linear regression analysis of the question further unpacked this finding. The regression analysis helps control for additional factors beyond race. We

129. Within the survey, respondents were asked this specific question, "With the rapidly changing events of the world, environmental and humanitarian crises have displaced many people. Patrick O'Leary is a young man part of a group of families seeking asylum from rural Ireland to the United States. Would you be in favor of permitting Patrick, and families like Patrick's, to resettle in the United States?" In the case of the Afghan immigrants, they were provided a respondent with a traditionally Muslim and Afghan name, with the exact same text, and the only variation being the name of the immigrant and the location change from rural Ireland to rural Afghanistan.

found that even when controlling for education, class, age, and ideology, White respondents were more supportive than non-Whites of Irish immigrants, the difference being statistically significant.¹³⁰

Figure 8 | Support for Asylum by White Respondents in 2021 Survey

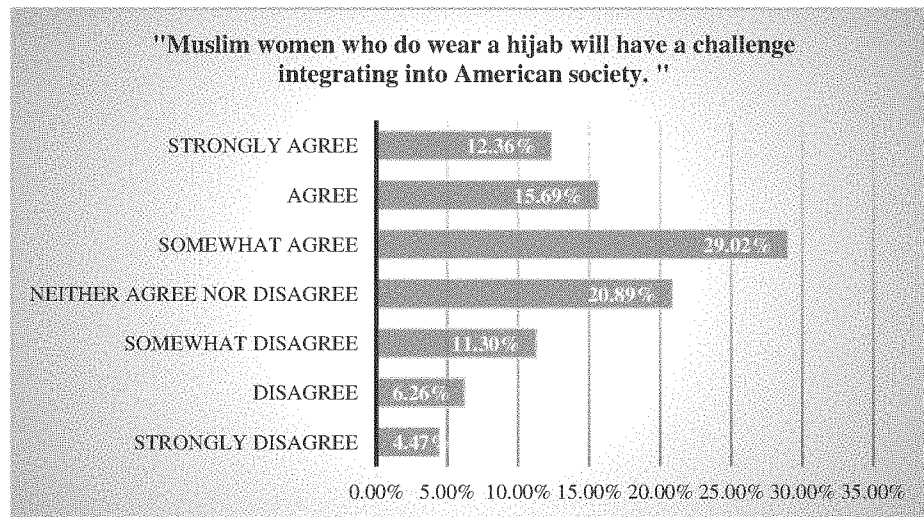


2. *Support for Hijab Ban Policy*

As Figure 4 previously illustrated, Muslim women with hijab were perceived less favorably than Muslim women without hijab. Extending on this question, respondents were asked about whether women who wore hijab would have trouble assimilating in the United States. Concern over the hijab was robust among the respondents. As shown in Figure 9, individuals were asked whether they believed that Muslim women who *do* wear a hijab will face a challenge integrating into American society; a staggering 57% agreed that they would.¹³¹

130. An ordinary least squares (OLS) regression model was run to predict support for immigration asylum. Support for immigration asylum was the dependent variable within the OLS model and race was included as an independent variable, with White and non-White included as a binary variable. Ideology, age, gender, income, and education were included within the model as control variables. The regression results show that Whites, in comparison to non-Whites, were more likely to support the immigration of the Irish immigrant, and that this difference is statistically significant ($p\text{-value} = 0.02$).

131. Categories included were strongly agree, agree, and somewhat agree to total 57%.

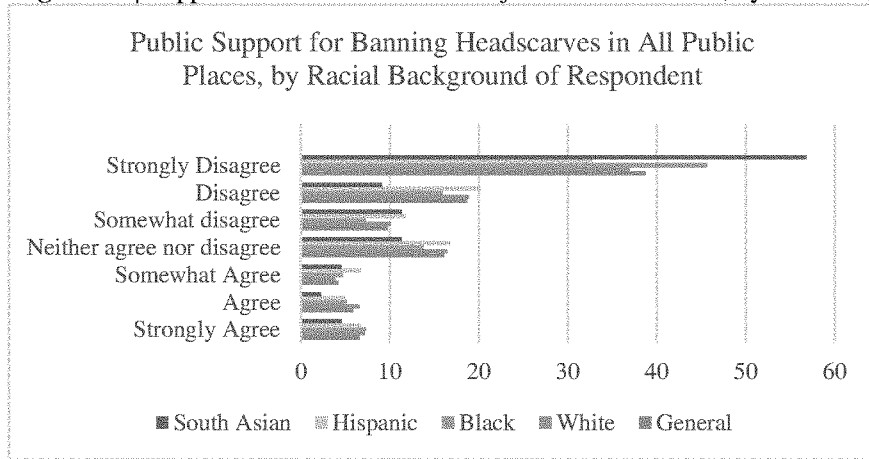
Figure 9 | Perceptions of Muslim Women Wearing Hijab in 2021 Survey

Interestingly, while concerns emanate over hijab, there is less support to completely ban hijab from public life. Figure 10 highlights the general disagreement with the statement, “wearing headscarves should be banned in all public places,” which distinguishes American sentiment regarding hijab bans from France and Quebec.¹³² The x-axis highlights the percentage of support for each answer category. The highest levels of support to keep hijab in public came from South Asian and Black respondents, with 77.27% and 68.97% respectively, and decrease by sub-group thereafter.

Finally, in a linear regression trying to predict support, we found that rather than racial background, ideology informs the likelihood to support a hijab ban. Ideologically conservative respondents were more likely to support a hijab ban than others and, again, this difference is statistically significant.¹³³

132. See *infra* Part III.A.1.

133. An OLS regression was run with the dependent variable being support for the hijab ban. Race, ideology, age, gender, income, and education were included within the model as independent variables. The regression results show that people who were more ideologically conservative were more likely to support the ban than less ideologically conservative respondents, and that this difference is statistically significant.

Figure 10 | Support for Women to Wear Hijab in Public Places, by Percentage

The empirical findings described here provide a detailed account of how perceptions of Muslims vary by gender. Muslim women are overwhelmingly perceived as submissive, quiet actors that cower to the will of Muslim men. The variation of favorability is distinctive between Muslim women, whereby Muslim women with hijab are perceived less favorably than women who do not wear hijab. This result is consistent with how narratives within gendered Islamophobia discourse are crafted.

The policy implications for these perceptions are also meaningful. For White Americans, the type of immigrant in question matters when supporting their asylum. They are more favorable to permitting non-Muslim immigrants than immigrants from Afghanistan. Muslim immigrants, particularly men, remain closely associated with inassimilability, at best, and terrorism, at worst. This illustrates that Islam remains deeply racialized in the minds of respondents, particularly White respondents, and when paired with gender determines who is—and is not—a direct security threat. The policy implications of public opinion provide vital nuance as we deliberate the structural implications of the American public's imagining of Muslims, and the project of unveiling the law of gendered Islamophobia.

III.

THE LAW OF GENDERED ISLAMOPHOBIA

Case law involving Muslim women offers a third portal of insight into the gendered dimensions of Islamophobia. While Part I framed the theory of gendered Islamophobia and Part II introduces new empirical evidence into the literature, this Part of the Article analyzes leading cases implicating Muslim womanhood, and consequently, reveals how Islamophobia manifests distinctly along gendered lines. These cases, and this Part's reframing of them, unveils the "dominant" legal narratives about Muslims, and specifically Muslim women,

authored by predominantly male White judges in the areas of (1) hijabs bans; (2) counterterrorism prosecution; and (3) immigration and asylum adjudication.

A. *Hijab Bans*

The policing of Muslim women's bodies, by way of legislation and other forms of state action, is the starkest manifestation of feminine Islamophobia. While prevailing Islamophobia discourse fixates on terrorism (or the threat of it) as the quintessential locus of legislative and judicial regulation, a gendered lens reveals this is not the case for Muslim women.

This Section analyzes two leading hijab ban cases: (1) the Hijab Ban in Quebec, Canada, enacted by the provincial National Assembly on June 16, 2019; and (2) a "situational Hijab Ban" enforced by the Philadelphia Police Department against a Black Muslim female police officer, Kimberlie Webb.¹³⁴ Together, these cases illustrate a gendered Islamophobic motive to regulate the bodies of Muslim women beyond the immediate scope of terrorism and counterterrorism.

1. *Lies, Laïcité, and the Law: Quebec's Hijab Ban*

The French "Hijab Ban" stands as the structural harbinger of feminine Islamophobia.¹³⁵ The measure, enacted in 2004, was once viewed as a distinct spawn of the French commitment to *laïcité*—a debated principle enshrined today as secularism.¹³⁶ Scholars have argued that *laïcité* is the "equivalent of a religion" and effectively serves as the de facto faith of the modern French state.¹³⁷

Fifteen years later, in June of 2019, Quebec enacted a copycat measure. In doing so, the province divested from the Canadian mandate of "multiculturalism" in favor of modern French policy.¹³⁸ Quebec's provincial

134. This Article defines "situational Hijab Bans" as prohibitions enforced by specific state or private actors. While the First Amendment Free Exercise of Religion and Establishment Clauses inhibit the prospect of federal or state legislation prohibiting the hijab within the public sphere, private and public institutions have imposed narrow measures restricting it as a term of employment or inclusion. See U.S. CONST. amend. I.

135. See Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law No. 2004-228 of March 15, 2004, Concerning, in Application of the Principle of Secularism, the Wearing of Signs or Clothing Manifesting a Religious Affiliation in Public Primary and Secondary Schools], 65 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE] 5190 (Mar. 17, 2004).

136. See Khaled A. Beydoun, *Laïcité, Liberalism, and the Headscarf*, 10 J. ISLAMIC L. & CULTURE 188, 188 (2008); see also JOHN R. BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE 32 (2006) ("Laïcité remains one of those 'essentially contested concepts' that is politically useful precisely because it has no agreed-on definition").

137. BOWEN, *supra* note 136, at 29.

138. Karim H. Karim, *Crescent Dawn in the Great White North: Muslim Participation in the Canadian Public Sphere*, in MUSLIMS IN THE WEST: FROM SOJOURNERS TO CITIZENS 262, 268 (Yvonne Yazbeck Haddad ed., 2002) ("Canada was the first country to institute an official policy of multiculturalism and is the only one to have a law recognizing the cultural diversity of its population[.]")

legislature adopted the mandate of policing Muslim women's bodies through its own hijab ban, steered by the very gendered discourse espoused in France, its past colonial master and modern muse.¹³⁹

Like its French predecessor, Bill 21 is designed to police Muslim life through direct regulation of Muslim women's bodies. Titled "An Act Respecting the Laicity of the State," the measure mandates (1) the separation of State and religions; (2) the religious neutrality of the State; (3) the equality of all citizens; and (4) freedom of conscience and freedom of religion."¹⁴⁰ The first two structural prongs form the state enshrinement of secularism, which, when enforced, disproportionately targets members of faith groups who express their faith through "wearing religious symbols," such as the Jewish yarmulke, Sikh turban, or *hijab*.¹⁴¹ The guarantees of the third and fourth prongs—*equality* and *freedom of conscience and religion* respectively—are materially eroded for Muslim women in public spaces such as government, courts, and schools.¹⁴² Bill 21 erodes the religious freedom of women and targets the veil as the principal symbol of cultural difference within Quebec.

More than just legislation, Bill 21 is an expression of popular Islamophobia in the province. Introduced by the Coalition Avenir Quebec (CAQ), the nativist party that pushes anti-Muslim rhetoric as part of its political platform, Bill 21 passed with a vote of 73–35 in June of 2019.¹⁴³ Legislators with the CAQ-controlled provincial government testified that Muslim men imposed the hijab on their wives and daughters and that the hijab stood as an affront to the Quebecois tradition of separation between religion and state.¹⁴⁴

a national commitment that clashes with Quebec's allegiance to its French heritage.) This enshrined commitment to multiculturalism, however, did not stifle the state profiling measures established during the War on Terror, which had the effect of pronouncing Islamophobic panic in Quebec. For an analysis of these federal profiling policies, see Reem Bahdi, *No Exit: Racial Profiling and Canada's War Against Terrorism*, 41 OSGOODE HALL L.J. 293 (2003).

139. The Stasi Commission, the body convened by the French government to investigate the hijab in France, concluded, "[A]s symbols of the traditional subordination of women in the Islamic world, they impede the development of girls as autonomous persons. The command to wear headscarves in public ensues from the traditional ideal of female chastity that puts women under lifelong control of men." Cees Maris, *Laïcité in the Low Countries? On Headscarves in a Neutral State* 6 (N.Y.U. Sch. of L. Jean Monnet Working Paper No. 14/07, 2007).

140. *An Act Respecting the Laicity of the State*, C.Q.L.R., c L-0.3 (Can. Que. 2019).

141. *Id.* § 6.

142. *Id.* § 2. The enshrinement of secularism erodes the French principle of *communautarisme*, central to the conception of *égalité* (equality) in France and Quebec. See ANDREW HUSSEY, THE FRENCH INTIFADA: THE LONG WAR BETWEEN FRANCE AND ITS ARABS 8–9 (2014).

143. Verity Stevenson, *Quebec Government Adopts Controversial Religious Symbols Bill*, CBC NEWS (June 16, 2019), <https://www.cbc.ca/news/canada/montreal/quebec-government-adopts-controversial-religious-symbols-bill-1.5177587> [<https://perma.cc/WJN9-F4UK>].

144. See generally 45 JOURNAL DES DÉBATS DE LA COMMISSION DES INSTITUTIONS [JOURNAL OF DEBATES OF THE COMMITTEE ON INSTITUTIONS], no. 44 (May 9, 2019), <https://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/ci-42-1/journal-debats/CI-190604.html?appellant=MC%20> [<https://perma.cc/M6MG-LQDW>] (including such testimony from legislators).

The legislative history of the bill makes its Islamophobic purpose clear. During the public hearings, Senator Hervieux-Payette made links “between the veil, excision, genital mutilation, [and] forced marriage.”¹⁴⁵ Christiane Pelchat, an advocate of Bill 21, stated that it was “difficult to reconcile the wearing of the Islamic headscarf with the message of tolerance, respect for others, and above all gender equality.”¹⁴⁶ Despite its facially neutral design, the gendered dynamic of Muslim male dominance stripping Muslim women of existential self-determination saturated the intent of its framers as well as the popular and political rhetoric driving it.¹⁴⁷

The public’s support for Bill 21 unveils another dimension of how gendered Islamophobia plays out in the law. Legislators championing the measure, amid the controversy that arose in its wake, defended it on grounds of “popular support” among Quebec’s constituents.¹⁴⁸ While only 41% of Canadians outside of Quebec support Bill 21, a 2019 Forum Research Survey showed it maintained a strong majority of support (64%) in the province.¹⁴⁹ This private expression of feminine Islamophobia fused with the legislative will to enshrine it manifests how dialectical Islamophobia is more pronounced in Quebec versus the remainder of Canada, who oppose the Bill—and what it represents—at a far higher clip.¹⁵⁰ As Canadian culture scholar Peter Behrens notes,

Islamophobic hysteria in France has been appropriated by some Quebecois who are by no means backwoodsmen, but friends of a global *Francophonie* and educated apologists for all things French: the same people who teach, write, run for office—and pass laws like Bill 21.¹⁵¹

Quebec’s legal and normative divergence from the remainder of the country is buoyed by its ties to French culture and legally, its distinct color of nativism,

145. *Id.* at 6 (statement of Member of the National Assembly H       David) (characterizing Member of the National Assembly C       Hervieux-Payette’s rhetoric and advocacy for the bill).

146. *Id.* at 22 (statement of Christiane Pelchat).

147. Simon Jolin-Barrette, a leading member of the CAQ who served as immigration minister of the province from 2018-2020, authored the bill. He is lauded by elements on the right for cutting down immigration from non-European countries while presiding as immigration minister and championing the nationalist and nativist mission of the CAQ. *See Architect of Quebec’s Secularism Bill Addresses Quebecers Concerns*, CBC NEWS (Mar. 29, 2019), <https://www.cbc.ca/news/canada/montreal/quebec-s-secularism-bill-answers-questions-quebecers-are-asking-1.5078192> [https://perma.cc/E7QM-FMA6].

148. Toul     Drimonis, *Fatemah Anvari Is Collateral Damage in the Quebec Quest for Homogeneity*, CULT MTL (Dec. 14, 2021), <https://cultmtl.com/2021/12/chelsea-teacher-fatemeh-anvari-is-collateral-damage-in-the-quebec-quest-for-homogeneity-bill-21/> [https://perma.cc/8EA8-38G9].

149. Fifty-nine percent of Canadians outside of Quebec openly oppose Bill 21, compared to 35% in Quebec. Philip Authier, *Majority of Canadians Disapprove of Bill 21, but Quebecers Are in Favor: Poll*, MONTREAL GAZETTE (Aug. 6, 2019), <https://montrealgazette.com/news/quebec/majority-of-canadians-disapprove-of-bill-21-but-quebecers-are-in-favour-poll> [https://perma.cc/9E2V-37GD].

150. *Id.*

151. Peter Behrens, *Quebec’s France Problem*, WASH. SPECTATOR (Feb. 12, 2020), <https://washingtonspectator.org/quebecs-france-problem/> [https://perma.cc/84WS-3PJR].

racism, and religious animus. Anything but neutral when the targets are Muslims, *laïcité*—in its prototypical French and Quebecois forms—arms the state with the legal basis to strip Muslim women of the very self-determination it charges Muslim men of seizing.

Bill 21, like its predecessor, aims to step between oppressive Muslim men imposing the hijab and Muslim women.¹⁵² By purporting to liberate women, its fundamental purpose is to retrench the spread of Muslim life and culture by policing Muslim women within public spaces. In short, the law polices the spread of Islam in Quebec through the regulation of the Muslim female body and punishes those who resist the mandate of unveiling in the public sphere.

Cases like that of Fatameh Anvari, a third-grade teacher in Chelsea, Quebec, who was “banned from teaching because she wears a hijab” proliferated after Bill 21’s enactment.¹⁵³ The legislation imposed an ultimatum on Muslim women like Anvari to choose between their career and faith, eliminating “equality” and “freedom of religion” for Muslim women like Anvari.¹⁵⁴ Yet, Muslim male teachers or elected male officials, lawyers and public administrators, and members of the majority Christian traditions in Quebec did not face this experience nor the undue hardship it sowed. Enforcement of Bill 21 disproportionately fixated on Muslim women donning the hijab in public spaces. Students, colleagues, and strategically planted informants in government buildings, courthouses, and most prominently, Quebec’s public schools, became the “secularism police” to execute the Bill’s fixation.¹⁵⁵

Thus, the named plaintiff challenging Bill 21 in court being a Muslim woman who wears the hijab came as no surprise. Ichrak Norel Hak, an undergraduate at the University of Montreal preparing for a career in teaching, sued the province on grounds that “[Bill 21] is forcing her to choose between [her] dream and the preservation of [her] identity.”¹⁵⁶ Moroccan by origin and having lived in Montreal since 1994, Hak sees teaching as a calling. She says her plans to teach French to newly arrived immigrants are thwarted by the fact that as a practicing Muslim who wears the hijab out of personal choice, she will not be able to teach without having to remove her veil. This not only shocks and hurts her, but also injures her due process, free exercise of religion, and

152. Supporters of Hijab Bans “argue that girls who are being forced to wear the headscarf need to be protected. Since the government cannot personally go into each and every [Muslim] home to determine the reason behind the choice to wear the headscarf, the ban will help reverse the headscarf as a symbol of the inferior status of women.” Wing & Smith, *supra* note 47, at 773 (citing *Viewpoints: Europe and the Headscarf*, BBC NEWS (Feb. 10, 2004), <http://news.bbc.co.uk/2/hi/europe/3459963.stm> [<https://perma.cc/5495-5PSU>]).

153. Drimonis, *supra* note 148.

154. *An Act Respecting the Laicity of the State*, C.Q.L.R., c L-0.3, at 5–6 (Can. Que. 2019).

155. Stevenson, *supra* note 143.

156. *Hak v. Attorney General of Québec (Hak I)*, 2019 QCCA 2145, para. 13 (Can. Que.).

dignity.¹⁵⁷ Hak stood as a poignant archetype for the class of Muslim women unduly burdened by the ban.

The petitioners in *Hak* noted how the Bill weaponized “religious neutrality” to coerce Muslim women to conform, compromise, and surrender their religious freedom.¹⁵⁸ Through powerful testimony, Hak affirmed how the decision to wear the hijab is “her personal choice,” challenging the gendered Islamophobia underlying Bill 21 that the article is imposed upon Muslim women by the men in their lives.¹⁵⁹ Further, as law scholar Marsi Matsuda notes that “speech also positions people socially,” Hak’s accent-free French speech and strident independence shattered Bill 21’s feminine Islamophobic tropes.¹⁶⁰

Despite Hak’s challenge and resounding opposition from Muslim women within and beyond the court, the Quebec Superior Court upheld the constitutional Bill 21’s validity. Writing for the court, Justice Marc-Andre Blanchard cited its facial “neutrality” as the basis of his opinion.¹⁶¹ Emulating the National Assembly of Quebec, the Quebec Superior Court decision deferred to the gendered Islamophobia pervasive within the province. The anti-Muslim sentiment driving support for Bill 21 in Quebec, marking Muslim women as “foreign,” “threatening,” and “isolated,” proved more salient to the Court than the religious freedom and dignity of Muslim women.¹⁶²

Hak filed an appeal in the Supreme Court of Canada seeking a neutral venue beyond the politically charged landscape in Quebec. However, in a decision likely driven by the motive to prevent inflaming political tensions between the federal Canadian government and its provincial counterpart in Quebec, the Supreme Court dismissed the case.¹⁶³ This ruling by Canada’s highest court, despite a national split along popular and legal lines regarding the Hijab Ban, deferred to its provincial outlier. The victims of this legal vanguard of gendered Islamophobia in North America, enshrined in Quebec, are the Francophone province’s Muslim women—forced to endure a second-wave Hijab Ban *head on*.

157. *Hak v. Attorney General of Québec (Hak II)*, 2021 QCCS 1466, paras. 5–8 (Can. Que.).

158. *See id.* at paras. 5–44. Religious freedom, however, is perceived as a Muslim Trojan Horse by the CAQ and Hijab Ban advocates, who believe that “Muslims will use religious freedom to ‘destroy’ and ‘take over’” Quebec. ASMA T. UDDIN, WHEN ISLAM IS NOT A RELIGION 10 (2019).

159. *Hak II*, 2021 QCCS, at paras. 5–6.

160. Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1352 (1991).

161. *Hak II*, 2021 QCCS, at paras. 795–800.

162. Jason Vermes, *Anti-Muslim Rhetoric Has Become ‘Mainstream’ in Canadian Culture and Politics, Says Expert*, CBC NEWS (June 13, 2021), <https://www.cbc.ca/radio/checkup/anti-muslim-rhetoric-has-become-mainstream-in-canadian-culture-politics-says-expert-1.6063942> [<https://perma.cc/MJ8H-RHTV>] (focusing on the testimony of Canadian sociologist Jasmine Zine).

163. *Hak v. Attorney General of Quebec (Hak III)*, 2020 CarswellQue 2575, 2575 (2020) (Can.) (WL).

2. *Policing the Veil: Webb v. City of Philadelphia*

Instead of the federal or provincial headscarf bans enshrined in France or Quebec, American institutions have latitude to institute situational hijab bans. Within the U.S., the structural elements of gendered Islamophobia that affect women's dress unfold in a calculated manner, particularly with whether the hijab is permitted to be worn within the workplace. With no national legislation, local jurisdictions have weighed in, through various ways, on the acceptability of the hijab within the workplace. Decentralized laws and policies typically run the risk of perpetuating inequities for minorities in the U.S., and policies on the hijab are no exception.¹⁶⁴

The City of Philadelphia, despite its large, vibrant, and historically active Muslim community, was notably the site of one such policy.¹⁶⁵ The Philadelphia Police Department's strong stance on the hijab emerged with the case of Kimberlie Webb, a police officer within the unit and a practicing member of Philadelphia's Black Muslim-American community. Eight years into her tenure as a police officer, Webb requested a religious accommodation so that she could wear the hijab with her police uniform. She wrote a memo to her commanding officer stating that her religious requirements entailed covering her hair. Webb described in detail how she could successfully incorporate the hijab in her uniform, and how she would wear the hijab tucked in her police shirt and don the police hat on her hijab. Instead, the city argued that Philadelphia Police Department Directive 78, which prescribes the police uniform requirements and which does not authorize adorning religious symbols on uniforms, precluded her request.¹⁶⁶ Accommodating the hijab, the city argued, would undo the neutrality of the policy.¹⁶⁷ This focus on neutrality is an important legal line to consider, as neutrality is fused with subjectivity and repeatedly administered to stifle the distinct rights of racial and religious minorities.

Webb subsequently filed a religious discrimination complaint with the Equal Employment Opportunity Commission.¹⁶⁸ Pending the decision, Webb directly advocated for herself and began wearing the hijab with her uniform.¹⁶⁹ Upon seeing her with the hijab, the Police Department asked her to remove the hijab.¹⁷⁰ Responding to the order, Webb refused to back down and continued to

164. See Jamila Michener, *Policy Feedback in a Racialized Polity*, 47 POL'Y STUD. J. 423, 432 (2019).

165. *Webb v. City of Philadelphia (Webb II)*, 562 F.3d 256, 258 n.1 (3d Cir. 2009). See also 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/> [<https://perma.cc/NS6L-PLUR>] (discussing the Philadelphia Muslim community's robust history and position within the broader history of the city).

166. Aziz, *supra* note 18, at 239 n.204.

167. *Webb II*, 562 F.3d at 261.

168. *Id.* at 258.

169. *Id.*

170. *Id.*

wear the hijab to work. As a result, Webb was sent home for three days in a row.¹⁷¹ Following these events, Webb had to decide between her commitment to her religious beliefs or retaining her job on the police force.¹⁷²

Webb returned to her position without her hijab on. Adding insult to injury, upon her return, she was given disciplinary charges for “insubordination and neglect of duty . . . and for refusing to obey the order of her commanding officer.”¹⁷³ She was scheduled for a disciplinary hearing and the police board of inquiry found Webb guilty of said charges. The acting Philadelphia Police Commissioner at the time, Sylvester Johnson, subsequently suspended Webb for thirteen days.¹⁷⁴

In 2005, Webb moved forward with a religious discrimination suit against the City of Philadelphia, under Title VII of the Civil Rights Act of 1966.¹⁷⁵ The case, *Webb v. City of Philadelphia*, was first argued at the district court.¹⁷⁶ The district court upheld the City’s decision, agreeing the City would face undue hardship “if forced to permit Webb and other officers to wear religious clothing.”¹⁷⁷

Webb appealed the decision based on her religious and sex discrimination claims. On April 7, 2009, the Court of Appeals for the Third Circuit upheld the district court’s ruling supporting the police department’s stance that they cannot accommodate the hijab in Officer Webb’s uniform.¹⁷⁸ The appeals court dismissed new material from the ACLU, which provided extensive evidence on how other police organizations have made religious accommodations within their force.¹⁷⁹

The court’s dismissal highlights stark realities of how gendered Islamophobia functions. The three presiding judges on the appellate court were all men.¹⁸⁰ An all-male court deciding on an inherently gendered case, such as one about the hijab, itself makes the situation an uphill battle. The interesting

171. *Id.*

172. Jamaal Abdul-Alim, *Kimberlie Webb Believes She Can Work as a Police Officer and Observe Her Religion at the Same Time. Not Everyone Agrees*, PHILA. WKLY. (Sept. 17, 2008), <https://web.archive.org/web/20080918172515/http://www.philadelphiaweekly.com/articles/17660/news>.

173. *Webb v. City of Philadelphia (Webb I)*, No. 05-5238, 2007 WL 1866763, at *1 (E.D. Pa. June 27, 2007).

174. *Id.*

175. 42 U.S.C. § 2000e.

176. *See Webb I*, 2007 WL 1866763, at *1. She also included a sex discrimination claim, but the district court determined that this was not relevant to her religious discrimination claim. It is important to note that Webb did not include a racial discrimination claim in her case.

177. *Webb II*, 562 F.3d at 258.

178. *Id.*

179. *See* Brief In Support of Reversal of Amici Curiae Am. Civ. Liberties Union of Pa. et al. at 13–32, *Webb II*, 562 F.3d 256.

180. Anthony J. Scirica was the presiding judge, sitting with Theodore McKee and D. Brooks Smith. McKee is African American, whereas Scirica and Smooth are both identifiably White male judges.

pivot in the case was the focus on “burden.” The court reiterated how accommodating Webb’s religious attire was a burden for the police department with no regard to the injurious impact on Muslim women. Specifically, this is a gendered burden, not directed at all Muslims, but specifically towards Muslim women.

The court’s decision relied heavily upon the testimony of Police Commissioner Sylvester Johnson. Johnson reiterated,

[T]he police force is a para-military organization in which personal preferences must be subordinated to the overall policing mission which requires the utmost cooperation among all officers. The uniform promotes that cooperation, fosters esprit de corps, emphasizes the hierarchical nature of the police force, and portrays a sense of authority to the public. The wearing of religious symbols or clothing would undermine these purposes and has the potential for interfering with effective law enforcement and even for causing harm to officers in a diverse community such as Philadelphia.¹⁸¹

The court opinion relied on the Commissioner’s advocacy that “it is essential that the police maintain political and religious neutrality as they carry out their duties and must be seen by the public as not favoring one group or faith over another.”¹⁸² Religious accommodation was construed as “favoritism” by the Commissioner, and he offered no evidence that tied the wearing of the hijab to ineffective law enforcement.¹⁸³ Particularly in Philadelphia, multiple forms of veiling are ubiquitous and familiar to the City’s residents.

It is important to note that Johnson himself is a Black American Muslim man. Twice in the district court opinion, the judges reiterated that, “As noted above, Commissioner Sylvester Johnson himself is a Muslim.”¹⁸⁴ The court cites his proximity to Webb’s identity as a Muslim to invalidate the claim of religious discrimination. Having a male Muslim invalidate her religious responsibility only reifies the question of when Muslim women are permitted to speak for themselves and when their voice is seen as secondary. The court’s dismissal of Webb’s claims and prioritization of Johnson’s views highlights how the state’s interest defines Islamophobia. What underlies Islamophobia theory at large is the victimization and vilification of Muslim subjects, always pursued to promote a specific state interest. In this case, the imagining of Muslim women as subordinate to Muslim men is used to justify and enforce Philadelphia P.D.’s uniform policy.

Moreover, Webb’s intersectional identity as a Muslim Black woman is meaningful. Black women have a history of having their testimony and

181. *Webb I*, 2007 WL 1866763, at *2.

182. *Id.*

183. *Id.*

184. *Id.* at *7.

grievances taken less seriously when compared to other victims.¹⁸⁵ Black women's experiences in the court system are distinctive when compared to other women and could also influence the perception of the judges. It is difficult to untangle whether the court case would have included additional judgements and prioritized Johnson's testimony if Webb were White or part of another ethno-racial group. What is also meaningful is that wearing the hijab is particularly challenging for Black American women because it shifts how their identity is perceived within the public sphere. The hijab, in particular, may have made Webb's Muslim identity salient above her racial identity, which illuminates an additional feature of Islamophobia. Even with such a complex identity, the role of hijab itself has re-imagined her identity to the public. As new research from Sedique (2022) highlights, Black women that are Muslim have suggested that their hijab can "erase their blackness."¹⁸⁶ Moreover, this research suggests that barriers for Black women escalate since they have to deal with the brunt of anti-Blackness and Islamophobia collectively. The marginalization they face may be heightened because of the complex types of stereotypes associated with Black Muslim women.

Webb is a case where Muslim men's voices are privileged over Muslim women when they echo or enforce a policy consistent with state interests. The court itself neglects how a Muslim woman's experience could be different, how gender and religion here intertwine. The dismissal of the gendered perspective is vital to the case of Islamophobia, as gender is intrinsic to Islamophobia; Webb's case demonstrates how women are acutely subordinated and marginalized in the case discourse.

This further highlights the judges' negligence to fully account for Webb's background. The case judgement was removed from the social realities of the Philadelphia police department's actions. Again, Philadelphia is not only a historically Black city, but a Black Muslim "Mecca of the West."¹⁸⁷ Omitting full consideration of these elements emphasizes how Black Muslim women are silenced and marginalized in the context of Islamophobia and gendered Islamophobia, and how anti-Blackness can permeate the judges' analysis as well. Beyond silenced, Black women are often the most direct targets of the negative

185. See Allyson Hobbes, *One Year of #MeToo: The Legacy of Black Women's Testimonies*, NEW YORKER (Oct. 10, 2018), <https://www.newyorker.com/culture/personal-history/one-year-of-metoo-the-legacy-of-black-womens-testimonies> [<https://perma.cc/VWD2-33M9>].

186. Interviews with women who wear hijab across racial backgrounds suggest that their intersectional identity is important. Black Muslim women face additional hurdles because they have to confront anti-Blackness in addition to Islamophobia. Their social legitimacy as American citizens is taken away when they wear hijab publicly. These findings are featured in a new article by Nura Sedique, *Muslim Women in the United States and Experiences with Discrimination*, in *DISTINCT IDENTITIES* (Nadia E. Brown & Sarah Allen Gershon eds., 2d ed. forthcoming June 2023).

187. See Mark Dent, *What It's Like for Muslims in Philly, "Mecca of the West,"* BILLYPENN (Jan. 29, 2016), <https://billypenn.com/2016/01/29/what-its-like-for-muslims-in-philly-mecca-of-the-west/> [<https://perma.cc/4NM6-Y5LJ>].

impacts of gendered Islamophobia.¹⁸⁸ As Part II reveals, Black Americans are more negatively perceived than Muslims. If we take Blackness, Muslimness, and womanhood into consideration, this intersectionality makes the manifestation of gendered Islamophobia for Black Muslim women particularly pernicious.

The court's failure to account for Webb's religious commitment, in a city that has such a strong Black Muslim history, reiterates the inconsistency of the city's policy. There are other city police forces, such as the New York City Police Department, the Chicago Police Department, and the Las Vegas Police Department, that have made religious accommodations for Muslim women.¹⁸⁹ Without national legislation protecting religious freedom of expression, structural Islamophobia remains a useful vehicle for localities to control the expression of Islam that Muslim women are allowed to bring into the public sphere. As Webb's case shows, even when Muslim women move beyond the tropes of being passive actors and assume roles as active agents advocating for their freedoms, their voices and experiences are dismissed and ignored; only the views that best align with state interests are viable. This manifestation of gendered Islamophobia demonstrates how it seeks to place Muslim women as passive actors, reifying the trope that Islamophobes place blame upon Muslim men for.

B. *Terrorism Prosecution*

Prevailing legal literature and theories of Islamophobia fixate predominantly on terrorism and counterterrorism. This fixation isolates and elevates the Muslim male as the principal figure of concern, and in turn, relegates Muslim women as marginal or invisible. Muslim women are largely framed as accessories or incidental to the terror *threat*, deepening the gendered trope that renders them as mere objects of male control.

Case law in the realm of counterterrorism reflects and recreates this gendered representation. Two leading cases, involving the Orlando shooting and San Bernardino murders, illustrate the gendered Islamophobic presumption reproduced by law: that Muslim women tied to male culprits of violence are often caricatured as accomplices or underlings stripped of agency.

188. Empirical evidence from our 2021 multi-racial survey of Americans highlights how Black Americans are the group least trusted, after which Muslims follow. Black Muslim women fall within this intersection in such a way that many have argued they have the most challenges with barriers they face being marginalized both within Black and Muslim spaces as Black Muslim women. *See supra* Part II.

189. Casey Tolan, *These Are the American Cities Where Police Officers Can Wear Hijabs*, SPLINTER NEWS (Aug. 30, 2016), <https://splinternews.com/these-are-the-american-cities-where-police-officers-can-1793861494> [<https://perma.cc/5XW3-UUVZ>].

1. *Terror Accomplice or Victim?* U.S. v. Noor Salman

Noor Salman was instantly presumed guilty. Immediately after her husband Omar Mateen murdered forty-nine people inside of the Pulse Nightclub in Orlando, Florida, the F.B.I. and local police shifted their scrutiny onto his wife.

Within hours and without evidence, they labeled Salman an “accomplice” to an incident classified as a terrorist attack.¹⁹⁰ Salman’s relationship with the “radicalized” Mateen overpowered the absence of evidence substantiating the charge.¹⁹¹ The rising media narrative further underscored this, painting her as a knowing participant who helped concoct the plan, or by other accounts, a subservient accessory who did her husband’s bidding.¹⁹² The gendered Islamophobic dynamic of the violent Muslim husband imposing his will on his subordinate wife informed the case against the thirty-one year old Salman.

More than a counterterror accomplice case, *United States v. Salman* stood as theater showcasing the color and complexity of gendered Islamophobia. The prosecution painted Salman as a knowing accomplice, while the defense capitalized on the customary tropes of subordination, victimization, and subservience ascribed to Muslim wives of Muslim men.¹⁹³ In short, the litigation of distinct dimensions of feminine Islamophobia was on full display in *Salman*:

190. “Count I charges Defendant with aiding and abetting the attempted provision and provision of material support to a foreign terrorist organization . . . Count II charges Defendant with obstruction of justice . . . The Indictment alleges that Defendant aided and abetted her husband, Omar Mateen, in his attempt to provide material support or resources to the Islamic State of Iraq and the Levant (hereinafter referred to as ‘ISIL’ or the ‘Islamic State’), culminating in the mass murder of forty-nine civilians and the injury of fifty-three civilians in the Pulse Nightclub in Orlando, Florida, on June 12, 2016.” *United States v. Salman*, No. 6:17-cr-18-Orl-40KRS, 2017 WL 6041967, at *1 (M.D. Fla. Dec. 6, 2017).

191. Then-President Barack Obama, hours after the shooting, labeled Mateen “an angry, disturbed, unstable young man who became radicalized,” in turn, perpetuating the masculine Islamophobic tropes wed to terrorism that drove the Obama Administration’s Countering Violent Extremism (CVE) Program. Adam Goldman, Mark Berman & Matt Zapotosky, *Orlando Shooter’s Wife Facing Intense Scrutiny from the FBI*, WASH. POST (June 14, 2016), https://www.washingtonpost.com/world/national-security/orlando-shooters-wife-facing-intense-scrutiny-from-the-fbi/2016/06/14/02e08b2e-3244-11e6-8758-d58e76e11b12_story.html [https://perma.cc/JK8L-UBYS]. Law scholar Samuel Rascoff dubs CVE “the signature counterterrorism policy of the Obama Administration.” Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 127 (2012).

192. Orlando Police Chief John Mina made several statements to local and national media, and on social media, incriminating Salman as an accomplice in the immediate wake of the attacks and leading up to case. In an interview with the *Orlando Political Observer*, he stated, “[I] would say that based on the information that I have, that I have received from the FBI, that [Ms. Salman] certainly could have, could know [sic] about it and could have done something to prevent that, so I, my belief that she needs to be held accountable for those 49 deaths and for all those people that were injured.” *Salman*, 2017 WL 6041967, at *3.

193. “To prosecutors, [Salman] was a willing accomplice who gave her husband a ‘green light’ to carry out the attack. To the defense, she was a simple-minded person, susceptible to manipulation.” Krista Torralva & Gal Tziperman Lotan, *Noor Salman Verdict: Omar Mateen’s Widow Not Guilty of All Charges in Pulse Massacre*, ORLANDO SENTINEL (Mar. 30, 2018), <https://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/os-noor-salman-pulse-trial-verdict-not-guilty-20180327-story.html> [https://perma.cc/W7DB-EFRF].

with the state arguing that she was radicalized, and a knowing participant in the mass shooting; while the defense rebutted that Salman was a battered wife, a female subordinate kept in the dark by her plotting, radicalized husband.¹⁹⁴

While legal teams on both sides curated feminine Islamophobic caricatures to drive their strategies, Salman herself was an individual whose idiosyncrasies complicated both narratives. She did not wear the hijab; rather she dressed in western clothing, and witnesses testified more about her penchant for talking about “lip gloss or the Hello Kitty T-shirt she bought.”¹⁹⁵ She was unveiled and *American*, or whatever the jury perceived that label to mean.¹⁹⁶ In line with presentation and performance, Salman did not neatly fit the caricatures of the “radicalized wife” peddled by the state nor the “oppressed Muslim wife” concocted by the defense. Salman was, visibly, an assimilated Muslim woman raised in California, embodying an in-court identity that aligned with prevailing notions of “moderate” or “good” Muslim womanhood.¹⁹⁷

Despite its strategic undoing, Salman’s presentation tilted in favor of the defense. If Salman wore the hijab and traditional Islamic dress, and appeared in court as such, the jury would have been presented with an archetype of the “obedient Muslim wife,” the “radicalized co-conspirator,” or a combination of the two. Instead, the majority White jury observed an unveiled defendant with flowing black hair, dressed smartly in a button-up shirt, a trendy blazer, and neat trousers. The impact of this performance of “western” Muslim womanhood, or “conformed Muslim” identity, on the jury cannot be discounted.¹⁹⁸

As such, Salman was a sympathetic figure to the jury on two salient fronts: first, her presentation of Muslim womanhood aligned with western, White

194. Goldman, Berman & Zapotosky, *supra* note 191; Huma Yasin, *Noor Salman Should Never Have Been Prosecuted in the First Place*, WASH. POST (Mar. 30, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/03/30/noor-salman-should-never-have-been-prosecuted-in-the-first-place/> [https://perma.cc/E4XZ-BSGX].

195. Emilee Speck, *Defense Paints Childlike Picture of Noor Salman, Reveals Pulse Gunman’s Deception*, CLICK ORLANDO (Mar. 26, 2018), <https://www.clickorlando.com/news/2018/03/26/defense-paints-childlike-picture-of-noor-salman-reveals-pulse-gunmans-deception/> [https://perma.cc/DU78-PCAK].

196. “Who is the ‘us’ in the U.S.,” particularly in relation to a Muslim subject, is defined along racial (White) and religious (Christian) lines. Volpp, *supra* note 33, at 1599 (Volpp observes that citizenship was discursively perceived, and reimagined more staunchly, along White and Judeo-Christian lines, while the caricatured presentation of Muslim identity occupied the image of the foreign other).

197. See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 62–63 (2004). Principal among “good Muslim” women expressions are not donning the hijab, dressing in a western style, and claiming independence from “oppressive” Muslim males. See also MAHMOOD MAMDANI, *GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR* (2004) (examining the genesis of the good-bad Muslim binary and its global application).

198. “‘Conforming Islam’ is when a Muslim American actor alters and assimilates a disfavored Muslim trait, expression, or one’s identity at large in line with positive counterterrorism stereotypes.” Beydoun, *supra* note 110, at 13.

sensibilities;¹⁹⁹ and second, the defense's character construction of Salman summoned the gendered Islamophobic dynamics of Muslim male domination and Muslim female subjugation. The defense narrative painted Salman as oblivious and helpless: "a 'simple young mother' with a low IQ."²⁰⁰ Conversely, the defense constructed Mateen as the culprit of terror—inside and outside of his household—by highlighting his history of severe domestic violence toward Salman.²⁰¹ These two factors were influential in securing the not guilty verdict of the jury.²⁰²

The clash of feminine Islamophobic tropes in *Salman* highlights the complexity of gendered Islamophobia within counterterrorism cases. One might assume that the case would have turned differently if Salman fit the head-scarved and traditional image of Tashfeen Malik, one of the culprits of the San Bernardino shooting analyzed below. Rather than rebutting the accessory charge on grounds of no evidence or arguing Salman's Fifth Amendment right to due process and Sixth Amendment right to a fair trial on the merits, the defense led with a case familiar to American criminal and civil courts: the embattled Muslim wife victimized and violated by her Muslim male overlord. This is powerful legal testimony on the part of the defense, revealing a damning admission: the optimal strategy for securing a not guilty verdict is a defense laden with the feminine Islamophobic tropes familiar to jurors. Instead of directly challenging the guilt by Muslim marriage association made by the state, the defense itself functioned as an intentional accessory to the structural Islamophobia unfolding in the U.S. federal courthouse in Oakland, California.

Beyond Salman's Muslim identity, her womanhood was equally material to the legal presumption of "subordinate affiliation" with Mateen's terror attack. While existing discourses focus singularly on faith, the role of feminine Islamophobia looms heavy in *Salman*. Compare Salman to Marilou Danley, the

199. "Whiteness [or adjacency to it] was determined through performance. The potential . . . to assimilate within mainstream Anglo-American culture was put on trial" historically in the U.S., as law scholar John Tehranian notes in relation the racially restrictive Naturalization Era (1790–1952), but also still today, as Salman's in-court performance of Muslim identity was assessed and scrutinized by the jury. John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 820 (2000).

200. Eric Levenson & Daniel Shepherd, *Pulse Shooter's Wife to FBI: "I Wish I Had Been More Truthful,"* CNN (Mar. 9, 2018), <https://www.cnn.com/2018/03/19/us/noor-salman-trial/index.html> [<https://perma.cc/WXV7-J9ST>].

201. Rachel Louise Snyder, *Was the Wife of the Pulse Shooter a Victim or an Accomplice?*, NEW YORKER (Mar. 14, 2018), <https://www.newyorker.com/news/news-desk/the-wife-of-the-pulse-night-club-shooter-goes-on-trial> [<https://perma.cc/L6P4-SUNV>].

202. While the jury found Salman not guilty on all charges, the foreman released a public statement that qualified, "A verdict of not guilty did not mean that we thought Noor Salman was unaware of what Omar Mateen was planning to do. On the contrary we were convinced she did know. . . . The bottom line is that, based on the letter of the law, and the detailed instructions provided by the court, we were presented with no option but to return a verdict of not guilty." *Salman Jury Foreman: We Were Convinced She Did Know*, WESH 2 (Mar. 28, 2018), <https://www.wesh.com/article/noor-salman-found-not-guilty/19619550> [<https://perma.cc/8ZSR-U2NG>].

girlfriend of Las Vegas mass shooter Stephen Paddock, who faced no charges in the wake of the October 1, 2017 shooting, despite law enforcement finding that “her fingerprints were on the ammunition used” to kill sixty people.²⁰³ Paddock’s White masculinity rendered him a “lone wolf” in the eyes of law enforcement, while Danley’s White femininity carried the overpowering presumption of innocence well known to American courts.²⁰⁴ In addition, western feminist conceptions of womanhood are deeply entwined with individuality, agency, and emancipation, all disconnecting Danley from the acts of her partner *even though* evidence established a prima facie case of involvement with his murderous act.

Conversely, in *Salman*, charges were immediately made despite the lack of direct evidence. The only corpus of evidence available to the state, and the media charge that preceded and pronounced it, was the gendered Islamophobic dynamic that tied Salman—the “dependent” Muslim wife—to the terroristic acts of her alleged overlord, oppressor, and husband. This dynamic, and the indelible tropes that arose from it, were sufficient to eclipse the lack of evidence and drive forward a prosecution that should have never existed.

2. *Radical “Stay-at-Home Wife”*

Clad in a traditional hijab wrapping her hair and neck, a sullen expression on a caramel-complexioned face, Tashfeen Malik’s photo and face became ubiquitous across media. After the 2015 terror attack in San Bernardino, California, Malik’s face sat at the center of newspapers and newscasts, digital timelines, and morning shows.

On December 2, 2015, Tashfeen Malik and her husband Syed Farooq entered the Inland Regional Center and killed fourteen people, leaving behind at least 21 additional victims.²⁰⁵ Malik’s photographed imagery after the attack is the prototypical veiled Muslim woman that the public imagery conjures when thinking about a Muslim woman. There are no photos that depict her looking anything but sullen and meek—rather she was covered, non-White, and emotionally passive. These are some of the trademark descriptors of gendered Islamophobia, and as Part II’s empirical data illustrates, how American public opinion currently conceptualizes Muslim women. The pervasiveness of the term “submissive” is highlighted in how Malik is discussed exclusively in relation to her husband, the co-conspirator in these attacks. Malik embodies a gendered Islamophobia in showcasing a visual of a conservative Muslim woman, engaging in a violent act not from her own agency, but influenced by her violent and radicalized Muslim husband.

203. Yasin, *supra* note 194.

204. Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes, and Double Standards*, 112 NW. U. L. REV. 1213, 1234–35 (2018).

205. Camila Domonoske, *San Bernardino Shootings: What We Know, One Day After*, NAT’L PUB. RADIO (Dec. 3, 2015), <https://www.npr.org/sections/thetwo-way/2015/12/03/458277103/san-bernardino-shootings-what-we-know-one-day-after> [https://perma.cc/J422-4DVA].

News reports had three images of Malik next to each other, all juxtaposed with each other but honed in on her hijab, brown complexion, and foreignness.²⁰⁶ The presentation of Muslim womanhood, in traditional garb, starkly contrasts with Noor Salman, who presents more like an everyday woman in the U.S. Malik's imagery offers a profile more satiable to the stereotypes that the general American public believes about Muslim women.²⁰⁷ Because of the notion that Muslim women are passive and submissive, there was initial surprise for many in the public to witness a Muslim woman actively part of a terrorist plot.²⁰⁸ Initial skepticism emerged, as one journalist wrote, "Profilers said that it was highly unusual for a woman—and especially a new mother—to engage in a form of visceral, predatory violence that the clinical literature associates almost exclusively with men."²⁰⁹

While masculine Islamophobia makes it is easy to conceptualize a Muslim man engaging in terrorist activities, Malik shows how intrinsically gendered Islamophobia is as her involvement disrupted notions of submissiveness. While Malik's imagery fits the stereotypical Muslim woman, her being the active agent participating in such violent acts was hard for experts and journalists alike to grasp. Malik was also a recent mother to a 6-month-old infant. While there was no discussion in emerging reports on Syed's role as a father, Malik being a mother was part of the gendered discourse and added to the confusion regarding her actions. The presumption held that a woman, specifically a mother, would be incapable of being so actively part of such a violent political plot.

Malik was denied full active agency or responsibility in the case, even when evidence showed she had directly been in touch with members of extremist groups herself. The fact that a woman would be motivated to participate in an act devoid of male influence would disrupt normative tropes of gendered Islamophobia. Therefore, the gendered Islamophobic lens continued to persist, and Malik's story in public discourse situates primarily in relation to her husband.

Malik was born in Pakistan and raised in Saudi Arabia and Pakistan.²¹⁰ She entered the U.S. on a fiancé visa to join her partner, Syed Farook, whom she had

206. Pat St. Claire, Greg Botelho & Ralph Ellis, *San Bernardino Shooter Tashfeen Malik: Who Was She?*, CNN (Dec. 8, 2015), <https://www.cnn.com/2015/12/06/us/san-bernardino-shooter-tashfeen-malik> [<https://perma.cc/D4KS-T883>].

207. *Id.*

208. See Laura Sjoberg & Caron E. Gentry, *It's Complicated: Looking Closely at Women in Violent Extremism*, 17 GEO. J. INT'L AFFS. 23, 24 (2016).

209. Jessica Glenza & Tashfeen Malik, *Who Was the 'Shy Housewife' Turned San Bernardino Killer?*, GUARDIAN (Jan. 27, 2016), <https://www.theguardian.com/us-news/2015/dec/06/tashfeen-malik-who-was-the-shy-housewife-turned-san-bernardino-killer> [<https://perma.cc/5Q6A-P6AG>].

210. David Greene, *Did Religious School Play a Role in Tashfeen Malik Becoming Radicalized?*, NAT'L PUB. RADIO (Dec. 10, 2015), <https://www.npr.org/2015/12/10/459169777/did-religious-school-play-a-role-in-tashfeen-malik-becoming-radicalized> [<https://perma.cc/W6N2-SHN2>].

met online.²¹¹ Extensive news stories focused purely on her marriage, her role as a wife, and how she met Syed. Her foreignness was described in relation to her marriage to Syed. This diminished her active role as the lens of her husband filtered and positioned her actions as influenced by her husband's choices.

Media reports spent considerable time discussing Malik's life before and after marriage, drawing on interviews from college professors discussing her past open-mindedness.²¹² Media profiles examining Malik's background focused immediately on the question of her religiosity. CNN, for example, discussed whether Malik was "[more] religious than other students" in two interviews with people who knew her at university in Pakistan.²¹³ This particular attention to Malik's religious adherence, rather than her political ideology, highlights the inherent Islamophobic nature of the focus. To be religious is to be a threat, is the undertone emphasized in this discourse.

Journalists credit Malik's increased religiosity to her marriage and husband's influence. BBC News reported that, "[I]n the leadup to her marriage, and afterward, she had become more and more conservative. Malik did not drive and did not interact with male members of the family."²¹⁴ Malik's decision to not drive, and her disengaging from men, became a cornerstone of this report and fed into classic notions of gendered Islamophobia: women are passive agents unable to engage in the public sphere. Further, Malik's withdrawal from the men in her family reifies the notion of Muslim women as hidden. The most telling moment is when, within this specific BBC News report, discussing her conservative background, the journalist transitions to speaking about Malik's deadly assault.²¹⁵ The connection made here is clear and intentional: her being conservative, and marrying a conservative man who led her religiosity, were the roots that led to her involvement in committing these acts of violence. The journalist's assumption was explicitly gendered, and Malik had changed not from her own will, but because of her husband's decisions.

211. See Christopher Goffard, *They Met Online, Built a Life in San Bernardino—And Silently Planned a Massacre*, L.A. TIMES (Dec. 5, 2015), <https://graphics.latimes.com/san-bernardino-syed-farook-tashfeen-malik/> [<https://perma.cc/BMZ9-D9P5>].

212. See Tim Craig, Abby Phillip & Joel Achenbach, *From Pharmacy Student to Suspected San Bernardino Terrorist: The Baffling Case of Tashfeen Malik*, WASH. POST (Dec. 5, 2015), https://www.washingtonpost.com/world/national-security/san-bernardino-investigation-looks-at-the-assailants-relationship-and-their-path-to-terrorism/2015/12/05/c14a4b6e-9b80-11e5-94f0-9eeaff906ef3_story.html [<https://perma.cc/8LJS-T3JK>].

213. See St. Claire, Botelho & Ellis, *supra* note 206; see also Saima Mohsin, *What Did Tashfeen Malik Learn at Ultra-Orthodox School?*, CNN (Dec. 8, 2015), <http://www.cnn.com/TRANSCRIPTS/1512/08/es.04.html> [<https://perma.cc/S3XH-32Z8>] (where a CNN reporter repeatedly questioned one of Malik's former teachers about any "warning signs" she may have shown at school).

214. Reged Ahmad, *San Bernardino Shooting: What Do We Know About Tashfeen Malik?*, BBC (Dec. 6, 2015), <https://www.bbc.com/news/world-us-canada-34993344> [<https://perma.cc/2KC3-EMSV>].

215. See *id.*

Malik's case highlights the prototypical vision of what the American public imagines a Muslim woman to be and how her active involvement confused the public's notion of Muslim women. Her position in a traditional role was emphasized as a stay-at-home mother, and her involvement in a traditional family structure was discussed, suggesting a sense of submissiveness to the needs and priorities of her husband.²¹⁶ This is corroborated with the findings in Part II, rendering Muslim women subservient to the Muslim men in their lives. One respondent discussed the San Bernardino case of terrorism *only* in reference to the discussion of Muslim men. When it came to women and terrorism, another respondent noted, "They (Muslim women) are normally preyed on by Muslim men, but few are actually terrorists, the ones that are have normally been forced." No agency or choice is left for Muslim women, and the blame is placed squarely upon the Muslim male subject.

As much as Malik was a co-conspirator in these violent actions, the public memory gives primary agency to her husband, relegating Malik as a woman influenced by his actions. This is significant because while Malik is a public face, she is still perceived passively in the situation. This conceptualization of Muslims is couched deeply within gendered Islamophobia, reflecting that these gendered perspectives are not well incorporated in discourse around terrorism and radicalization. Malik's case highlights that even with a situation as deeply entrenched with stereotypes of Muslims as is the case with terrorism, the myth of subordination overpowers the reality that Muslim women themselves can be the lead and unattached purveyors of violence.²¹⁷

C. Immigration and Asylum

The immigration and asylum contexts are also significant to the law of gendered Islamophobia.²¹⁸ As the Article's opening vignettes illustrate, the terror threat ascribed to Muslim men and boys renders them less desirable than Muslim women and girls as entrants. This Section examines cases addressing honor killings and female genital mutilation (FGM), the most violent forms of stereotyped Muslim male violence inflicted upon Muslim women that vindicate their asylum claims. This section is not intended as a critique of the outcomes of these cases or the merits of the asylees' respective claims. Rather, its purpose is to highlight the rhetoric that these decisions employ and asylum courts' particular role in constructing and amplifying the narratives of public gendered Islamophobia.

216. See St. Claire, Botelho & Ellis, *supra* note 206.

217. See Cotte & Bloom, *supra* note 32.

218. The immigration context is an especially potent realm of discursive and legal consequence for Muslim Americans. See generally Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379 (2017) (discussing how post-9/11 Islamophobia and plaintiff's immigration status affected the Supreme Court's decision in the landmark case *Ashcroft v. Iqbal*).

1. *Litigating Honor Killings: Sarhan v. Holder*

Violence against women is tightly conflated with Islam. There is perhaps no expression of it more lucid in the gendered Islamophobic imagination than the *honor killing*.

Law scholar and Arab feminist Lama Abu-Odeh defines the practice as, “the killing of a woman by her father or brother for engaging in, or being suspected of engaging in, sexual practices before or outside of marriage.”²¹⁹ Further, acts such as premarital sex or adultery are said to bring dishonor to the entire family unit, and thus, mandate male members of the family to restore that honor by murdering the female transgressor.²²⁰ This relic of colonial rule is misrepresented as an innately Islamic expression of masculine patriarchy and female objectification. This dialectic unfolds through phantasmic displays of gendered Islamophobia in American courts presiding over the asylum and immigration of Muslim women.²²¹

Like war, courts presiding over asylum claims of Muslim women are another venue whereby the state mobilizes to liberate female victims from hyperviolent Muslim men. *Sarhan v. Holder*, a Seventh Circuit decision that opposed the removal of a Muslim woman to Jordan on grounds that she would fall victim to an honor killing upon her return, depicts that legal charge to liberate Muslim woman.²²² While the court formally presided over the “withholding of removal” appeal filed by Sarah Sarhan Disi, a married Jordanian national who relocated to Chicago with her husband and children, its focus centered on her brother, Besem.

The petitioner, Disi, claimed that her brother waited for her return to exact an honor killing.²²³ The court observed, “Besem is convinced that Disi has committed adultery and has ruined the family’s reputation.”²²⁴ Further,

219. Lama Abu-Odeh, *Honor Killings and the Construction of Gender in Arab Societies*, 58 AM. J. COMPAR. L. 911, 911 (2010).

220. *See id.* at 916–18.

221. Abu-Odeh articulates how modern honor killing laws, enshrined in the criminal codes of Arab and Muslim-majority states, carried over from Ottoman and French domination in the Middle East and North Africa. While conflated with Islam, honor killing laws, in many instances—including Jordan, where the petitioner in *Sarhan v. Holder* hails from—were enacted by secular Arab governments. *See id.* at 913–16.

222. 658 F.3d 649, 662 (7th Cir. 2011) (“[Sarah] Disi has shown that it is more likely than not that she will be murdered by her brother if she is returned to Jordan because she is part of this social group [women tied to dishonorable sexual relations, such as her charge of adultery]. The Jordanian government can or will do nothing to help her, and she cannot reasonably be expected to relocate, because Besem [her brother] will track her down no matter where she is within Jordan.”).

223. *See id.* at 651.

224. *Id.* “While men who catch their wives or female family members committing fornication or even illegally being with men, and react by killing them, are entitled to sentences lighter than for murder under circumstances, the reverse is not true for a woman who finds her husband in such a situation and reacts in the same way.” Laurie Brand, *Women and the State in Jordan: Inclusion of Exclusion?*, in ISLAM, GENDER, AND SOCIAL CHANGE 100, 108 (Yvonne Yazbeck Haddad & John L. Esposito eds., 1998).

“Sarhan’s parents told Disi during their visit [to Chicago] that Besem planned to kill her when she returned to Jordan in order to restore the family’s honor.”²²⁵ With the sexualized “honor/shame” focal to the case, the court in *Sarhan* adjudicated the gendered Islamophobic orientation of Muslim male villain/Muslim female victim more closely than the political asylum claim before it.²²⁶

The court positioned Besem, the brother dedicated to exacting the honor killing, as the embodiment of masculine Islamic violence. Ascribing him the pointedly masculine Islamophobic tropes of “irrationality” and “patriarchal zeal,” the court’s constructs Besem accordingly:

Besem has long been obsessed with family honor, as defined by religious and social norms in Jordan, and he cannot be deterred from murdering his sister in response to the rumors [of Disi’s adultery] . . . The social code that Besem follows has anointed him (or another of Disi’s male relatives) as the person with the right to kill the woman who dishonored the family.²²⁷

The court’s caricaturing of Besem is layered. Beyond painting him as a monster irreversibly wed to killing his sister, and likening him to a “neo-Nazi who burns down the house of an African American family,” the court positions the Muslim male subject as the embodiment of the Islamic “social code” sanctioning honor killings.²²⁸ Here, Besem serves as the in-court talisman of unbridled Islamic patriarchy and male violence, construed as a hallmark of Islam since the inception of the nation and again in *Sarhan*.²²⁹ Further, the court opinion is driven by the immediate conclusion that Besem must murder the very object that determines his own honor: his sister. Disi, who in the very same opinion is reduced to an object, determines masculine and familial honor, or more crudely, masculine and familial property mandating “protection.”²³⁰

The court’s construction of Besem is enabled by its tacit acceptance of the honor killing as a practice sanctioned by Islam. With no meaningful interrogation of the faith’s bona fide stance on the practice, the Seventh Circuit hastily

225. *Sarhan*, 658 F.3d at 651.

226. *See* Abu-Odeh, *supra* note 219, at 917.

227. *Sarhan*, 658 F.3d at 651, 656.

228. *Id.* at 656–57.

229. For a legal treatise examining how state and federal courts perceived Islam as a body of faith and culture from the early to modern periods, see Marie A. Failing, *Islam in the Mind of American Courts: 1800 to 1960*, 32 B.C. J.L. & SOC. JUST. 1 (2012).

230. *See* Brand, *supra* note 224, at 108. The objectification of women as sexualized property, linked to conceptions of honor tied to White men and women, are hardly unique to Muslim societies. But as law scholar Ariela Gross notes, formative to the American experience: “‘Honor’ meant very different things for men and for women in Southern society. Most obviously, a White woman’s honor lay in the purity of her sexuality . . . A White man’s honor resided in the public sphere—in his statesmanlike behavior towards his superiors and inferiors, his adherence to the gentleman’s code of conduct,” and his defense of White women from the (imagined) threat of Black male violence (the most potent of which was sexual violence). Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L.J. 109, 157 (1998).

endorses the stereotype that honor killings are innately Islamic. This view, however, clashes with the text of the Qur'an, which defies the unilateral design of existing state laws that only punish women. It states that "[t]he adulteress and adulterer should be flogged a hundred lashes each."²³¹

Thus, Islam's foundational law diverges from the modern laws on honor killing in two dramatic ways: first, both women and men face an equal form of punishment; and second, lashes—not murder—is the mandated form of punishment. This echoes Abu-Odeh's contention that modern honor killing laws are colonial relics enshrined by the "post-colonial Arab nationalist elites" governments that came into being in the early and mid-twentieth centuries.²³² Existing honor killing laws, thus, are modern adaptations of colonial code and cultural practices that are at best tenuously tied to Islam or, likely, not at all.

Jordan, aggrieved Disi's homeland and where her brother Besem awaited her return, is one of the governments with a readapted honor killing law in place.²³³ Against its customary practice of investigating comparative law or original sources, the Seventh Circuit perceived Article 340 of the Jordanian Penal Code through the lens of masculine Islamic violence.²³⁴ The decision is rife with characterizations of Besem that reify the masculine tropes of violence and tyranny saturating prevailing scholarship with the terrorist stereotype; the parties all wed to a land—an Islamic land—that authorizes men to carry out a form of femicide deeply embedded in the minds of American Islamophobes, particularly during the War on Terror.²³⁵ And as exhibited by *Sarhan*, further entrenched by its principal courts.²³⁶

Moreover, the Seventh Circuit dedicated far more text to caricaturing the Muslim male culprit of the honor killing, on the other side of the planet, than its alleged female target standing before it. In turn, it activates and endorses the threat of the masculine Muslim stereotype within the courtroom. This renders

231. QUR'AN 24:2 (Ahmed Ali trans.). For a detailed description of the Islamic stance on honor killings, see Jonathan Brown, *Islam Is Not the Cause of Honor Killings. It's Part of the Solution*, YAQEEN INST. (Oct. 25, 2016), <https://yaqeeninstitute.org/read/paper/islam-is-not-the-cause-of-honor-killings-its-part-of-the-solution> [<https://perma.cc/R4AC-3CZS>].

232. Abu-Odeh, *supra* note 219, at 932.

233. The Jordanian state is a secular monarchy that gained independence from Great Britain in 1946. Like many Arab governments, it looks to Islamic interpretations of law for guidance, but faith does not formally or structurally steer its governance.

234. "He who catches his wife, or one of his female un-lawfuls committing adultery with another, and he kills, wounds, or injures one or both of them, is exempt from any penalty." Jordanian Penal Code No. 16, art. 340 (1960).

235. As Volpp notes, "September 11 gave this discourse" of masculine Muslim violence "new currency in relation to what are depicted as the barbaric regions of the world that spawn terror." Volpp, *supra* note 33, at 1587.

236. While Jordan roughly accounts for 25 of the 5000 honor killings that occur each year, "Jordan has received worldwide attention for this issue" because of its status as an Arab government and Muslim-majority society. Molly Lower, *Honor Crimes in Jordan*, MEDIUM (Aug. 27, 2018), <https://medium.com/the-wvoice/honor-crimes-in-jordan-a5a004f1eb1f> [<https://perma.cc/YQW5-2WQL>].

Disi, the Muslim female petitioner, a side character despite her being central to the litigation itself. With this gendered dynamic at play, the court's favorable ruling can be viewed as much as an indictment of the masculine Muslim threat and vindication of its role in liberating the female Muslim subject as a victory for Disi.

To be clear, we are not challenging the merits of Disi's asylum claim and her well-founded fear of retribution. *Sarhan's* lucid expression of gendered Islamophobia does not turn on its result. Rather, it turns on the dicta, description, and detail by which it constructs Besem—and through him—the government of Jordan.²³⁷ The facts indicate that Besem may have responded violently if Disi had returned to Jordan.²³⁸ However, the court perpetuates gendered Islamophobic narratives with haste and without careful scrutiny. Instead of noting the “patriarchal hijacking of Islam” by governments like Jordan, which is parallel to American state and federal state actors co-opting evangelical Christianity to drive patriarchal abortion policy, the court reifies the misrepresentation that roots the honor killing in the soil of Muslim societies and in the hands of its male enforcers.²³⁹

Honor killings, as represented by the court, are authorized by masculine “Muslim” law, and executed by Muslim fathers and brothers. This requires the U.S. to step in and save Muslim women through the launch of war, or in *Sarhan*, the rule of law.

2. *Refuge from FGM: Gonzales v. Mohamed*

“[I]ncensed, traumatized, shattered, and living in an illusion.”²⁴⁰

Ayaan Hirsi Ali is one of the most well-known architects of private Islamophobia, and her cryptic depiction of Muslim women brings an emotionally stirring perspective to the view of Muslim women that predominates the public imaginary. Ali contends that Muslim women are scarred at the hands of other Muslims. In that vein, one of the primary examples she draws when emphasizing this stereotype of Muslim women is the practice of female genital mutilation.

FGM is a cultural practice that is found in various areas, such as sub-Saharan Africa, the Middle East, and Asia. Contrary to popular distortion, it is not a practice common among all Muslim-majority populations and is a practice

237. The favorable result for Disi does, in part, turn on the gendered character of the case. In *Khalili v. Holder*, a male fearing that he might be murdered because of marital misconduct if he was deported to Jordan was denied relief by the Sixth Circuit. See 557 F.3d 429, 431 (6th Cir. 2009).

238. See *Sarhan v. Holder*, 658 F.3d 649, 656–59 (7th Cir. 2011).

239. See Brand, *supra* note 224, at 110.

240. AYAAN HIRSI ALI, *THE CAGED VIRGIN: AN EMANCIPATION PROCLAMATION FOR WOMEN AND ISLAM* 27 (2006).

that persists in communities with varying faith orientations.²⁴¹ There is a heightened conflation that FGM is a practice prescribed by Islam that has pervaded Islamophobic imaginary. This false association builds a compelling argument that in fact any Muslim woman from a Muslim-majority country requires the protection of Western intervention. Ali is not only one of the most well-known architects of Islamophobia but also one of the most influential state “experts” on Islam in the U.S. and Europe.²⁴² Her conflation between her lived experience to represent Somali culture writ large, and application to Muslims across countries, has gained popular traction among Islamophobes. Ali recounts being five years old when she endured FGM.²⁴³ Ali’s descriptions set the stage for what the public may think of when it comes to Somali women specifically, and Muslim women more broadly. Her experience looms in the public imagery when Somali women engage with the court system, and in the case of everyday Somali women, the discourse that permeates within the immigration system. Somalia, in many ways, is not simply an east African country, but a Muslim country. To think of Somalia is to think of a prime example of what living in a Muslim country looks like.²⁴⁴

In *Mohamed v. Gonzales*, Khadija Ahmed Mohamed, a young Muslim woman residing in Oakland, California, and a native of Somalia, appealed her asylum case.²⁴⁵ She had a motion to be deported she wanted re-examined, with the hope of having her asylum case heard again. She did so specifically by citing her fear of being persecuted in Somalia, citing the issue of FGM.²⁴⁶ The Ninth Circuit reviewed and accepted Mohamed’s motion. The issue of FGM and general notions of Somalia perpetuating gender inequality played a central role in Mohamed’s favor.

In the appellate court’s decision, the opening line of the judges’ opinion does not summarize her case overall, but rather directly begins by describing

241. See *Female Genital Mutilation*, WORLD HEALTH ORG. (Jan. 21, 2022), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> [https://perma.cc/4UWA-Y24S].

242. See Wardah Khalid, *The Ayaan Hirsi Ali Problem: Why Do Anti-Muslim Experts Keep Getting Promoted as “Experts,”* VOX (Mar. 1, 2016), <https://www.vox.com/2016/3/1/11139272/muslim-pseudo-experts> [https://perma.cc/Q9ZP-Z4J2].

243. See *Ayan Hirsi Ali*, ASPEN INST., <https://www.aspeninstitute.org/our-people/ayaan-hirsi-ali/> [https://perma.cc/S9XX-2GJD].

244. The conflation of Somalia with Islam is perhaps no better pronounced than when considering the case of Minnesota Congresswoman Ilhan Omar. Omar is a first-generation Somali American and her inauguration into office was primarily seen from the lens of Omar being from a Muslim-majority country. Islamophobes focused on Omar’s background of being Somali as synonymous with being Muslim. See Emmanuel Mauléon, *Black Twice: Policing Black Muslim Identities*, 65 UCLA L. REV. 1326, 1334–35 (2018).

245. *Mohammed v. Gonzales*, 400 F.3d 785, 789 (9th Cir. 2005) (surname misspelled in reporter).

246. *Id.*

what FGM entails.²⁴⁷ FGM, from the beginning of the appeal's decision, is center-stage to the court granting Mohamed's appeal to reopen her immigration. Mohamed sought to reopen her asylum based on this fear and on Convention Against Torture (CAT) claims made emerging from FGM. She argued that her prior counsel had failed to discuss FGM, and that based on her past persecution, her motion merited reconsideration.²⁴⁸ The court decided in favor of her case on two grounds: one, by stating that she was previously persecuted; and second, by considering that she was susceptible to future persecution if she were deported back to Somalia.²⁴⁹

With respect to past persecution, the court did not speak of FGM just as a discourse on persecution, but directly discussed Mohamed's gender. It noted, "there is little question that genital mutilation occurs to a particular individual *because* she is a female. That is, possession of the immutable trait of being female is a motivating factor-if not a but-for cause-of the persecution."²⁵⁰ Mohamed being a woman in Somalia was a sufficient threshold, according to the Ninth Circuit, to sustain her appeal.

In discussing the prospect of continued harm, the court's opinion not only commented upon gender, but drew in discourse about her Somali identity, stating, "[w]e conclude that Mohamed's claim that she was persecuted 'on account of' her membership in a social group, whether it be defined as the social group comprised of Somali females, or a more narrowly circumscribed group, such as young girls in the Benadiri clan, not only reflects a plausible construction of our asylum law, but the only plausible construction."²⁵¹ Somali culture, in general, is depicted as one inherently harmful towards women. While it does not specify a particular man, the implication is that the male-dominant Muslim society engenders these dangers for Somali women.

Mohamed had advocated that her inclusion as part of a minority tribe placed her at risk. The court discourse here further reiterates that they believe she would be at harm, just by virtue of being a female in Somalia. While it does not explicitly discuss Islam as associated, the subliminal text in their justification builds that extension, much in the same way Ayaan Hirsi Ali's commentary conflating the two dynamics does.

247. The opening commentary is, "Female genital mutilation involves the cutting and removal of all or some of girl or a woman's external genitalia. Often performed under unsanitary conditions with rudimentary instruments, the procedure is 'extremely painful' and 'permanently disfigures the female genitalia . . . expos[ing] the girl or woman to the risk of serious, potentially life-threatening complications.'" *Id.*

248. *See id.* at 798.

249. *Id.* The court's discussion of vulnerability to continued harm is complex—primarily, the court held that FGM was an intrinsically continuous harm, stating that it "like forced sterilization, is a 'permanent and continuing' act of persecution, which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear." The opinion goes onto discuss the possibility of future discrete acts of persecution as an alternative path to the same disposition. *Id.* at 800.

250. *Id.*

251. *Id.* at 789.

The case was overseen by one female and two male judges, and they issued this opinion in a 3-0 decision, granting Mohamed's immigration asylum petition for review and issuing a motion to reopen her asylum case. Their opinion not only touched on FGM's continued harm but explicitly centered on language stating that, "[w]omen are subordinated systematically in the country's overwhelmingly patriarchal culture."²⁵² Their decision is firmly embedded in liberating Mohamed from further harm; a harm they classify as endemic to Somalia and its people.

Further, the court indicts Islamic patriarchy as the cause of F.G.M and the broader forms of violence that target women. The Ninth Circuit depicts Somali culture as violent by its very nature. Further, it implies that any woman living in Somalia is in danger of harm just by virtue of being a woman in the Muslim-majority land. It was Mohamed herself who advocated for her safety, built a life for herself, and reopened the case. The court's analysis does not frame her as a proactive agent in her own asylum petition. Rather, it incessantly profiles her as a victim who, if left to live in Somalia, will continue to be victimized.

Within the realm of political asylum, saving Muslim women becomes the key frame and force in Mohamed's petition. Unaddressed in her victory, however, is the continued framing of Muslim women as helpless subjects incapable of claiming their own safety without Western rescue. An assumption laden within this framework is that Somali culture is inherently violent, reifying Islamophobic tropes. Instead of simply providing an evacuation plan for Mohamed to attain the freedom she advocated for, the court takes on a role as a savior.

CONCLUSION

"If I didn't define myself for myself, I would be crunched into other people's fantasies for me and eaten alive."

— Audre Lorde, *SISTER OUTSIDER*²⁵³

"They said, 'You are a savage and dangerous woman.'
I am speaking the truth. And the truth is savage and dangerous."

— Nawal El Saadawi, *WOMAN AT POINT ZERO*²⁵⁴

Western constructions of Muslim womanhood pervade imperial histories and modern narratives. Feminists including Lorde, Saadawi, and the milieu of Muslim female scholars cited throughout this Article have spilled ink and blood struggling to claim self-definition and wrestle self-determination away from a War on Terror that denies them both. By contributing a theory of Islamophobia

252. *Id.* at 800.

253. AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 137 (1984).

254. NAWAL EL SAADAWI, *WOMAN AT POINT ZERO* 110 (1975).

that centers Muslim women, this Article ushers this struggle into the legal literature.

Unveiling a gendered Islamophobia theory, and the original empirics and legal analyses that manifest it, is only the first front of a longer struggle. This Article aims to inspire a new reckoning of Islamophobia, and specifically, to spur analyses that delve into the complexity of gender and womanhood. While the corpus of standing literature fixates on terrorism and the privileging of masculinity that accompanies it, the experiences of Muslim women have been rendered marginal at best, and too often, “eaten alive.”²⁵⁵

Reimagining the effects of Islamophobia on Muslim women highlights the law’s production of gendered Islamophobia. During a War on Terror impasse when speaking the truth is as dangerous as ever, Muslim women continue to fight to be “wom[e]n who [don’t have to] apologize for being a Muslim and [don’t have to] apologize for being a woman.”²⁵⁶

In order to emancipate Muslim women from the imperial fetishes and fantasies that continue to confine them, a gendered Islamophobia theory must not only be *unveiled*, but boldly applied.

255. LORDE, *supra* note 253, at 137.

256. Tayyibah Taylor, founder of *Azizah Magazine*, crafted this statement as the central mission of her magazine that focused on centering the experience of Muslim women.