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## Racecraft and Identity in the Emergence of Islam as a Race

Cyra Akila Choudhury

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RACECRAFT AND IDENTITY  
IN THE EMERGENCE OF ISLAM AS A RACE

Cyra Akila Choudhury\*

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Racecraft is . . . the process by which racism becomes race . . . . You don't start with the perception of people being different and then out of that grows racism. You start with racism; you start with the double standard, which is a practice and also an ideology, and out of that race emerges. You learn to recognize people as belonging to a race because you have been in the rituals of racism with them.<sup>1</sup>

Take up the White Man's burden—  
 Send forth the best ye breed—  
 Go bind your sons to exile  
 To serve your captives' need;  
 To wait in heavy harness,  
 On fluttered folk and wild—  
 Your new-caught, sullen peoples,  
 Half devil and half child.<sup>2</sup>

#### INTRODUCTION

Can a religion, over time and through its social and legal resignification, come to be a race? This article answers in the affirmative; in the context of North America and Europe where racial hierarchies have been most pronounced, practitioners of the religion of Islam have come to be perceived as belonging to a race called “Muslim.” While there is a large literature on the racialization of Muslims and Islamophobia, scholars have nevertheless been reluctant to declare Islam or Muslims as a race. This article now makes that claim. In the last twenty years, Islam has come to function as a race socially and in the law. It began with the increasingly specific targeting of Muslims/Islamicized people, through which Islamophobia has developed as a distinct form of racism. Through reiterative subjection of the group whose shared characteristic is their connection to Islam, the “Muslim” coalesced into a racial identity. And finally, through the racecraft of Islamophobia and the dialectical resistance to it by Muslims/Islamicized people, Islam emerged as a race.<sup>3</sup>

To justify this original claim, this article starts with the theoretical literature on race and racial identity in *Part I: The Myth of Race and Reality of Fluid Racial Identities*. Taking seriously critical race theorists' arguments that race is constructed, it follows that new races should

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1. The Graduate Center, CUNY, *Racecraft: Barbara Fields & Ta-Nehisi Coates in Conversation*, YOUTUBE, at 39:50 (Mar. 14, 2013), <https://www.youtube.com/watch?v=gFPwkOwaweo>.

2. RUDYARD KIPLING, *THE WHITE MAN'S BURDEN* (1899) (written in response to the imperial occupation of the Philippines after the Spanish-American War).

3. In this paper, I theorize “Islam-as-race” and not an Islamic race, which, in my mind, implies an actual belief in and/or practice of Islam as a religion. Islam-as-race is a construction which posits that Islam has multiple meanings that range from the religious to the cultural and now to the racial.

emerge, while old races change or fade. For decades, Critical Race Theory (“CRT”) and Latina & Latino Critical Legal Theory (“LatCrit”) scholars have debated the construction of race and the operations of racism in the United States. This article uses this rich literature as well as the work of historians Cedric Robinson and Barbara J. Fields and sociologist Karen E. Fields to argue that race is a specter or a myth and that we should take its unreality much more seriously than we do. In other words, although racism exists, race itself is not real, it is not a fact, and it is not immutable. Furthermore, this article argues, along with Robinson, that racism produces not only the specter of race but fluid identities as it addresses itself to specific and identifiable groups of people. If we accept these theories regarding racism, race, and racial identities, then Muslim as a racial category and Islam-as-race become far more intelligible.

Having made the theoretical claim that new races and new fluid racial identities can and have emerged over time, these racial formations have a historical substratum of beliefs and racial rituals that give rise to race. In *Part II: A Genealogy of Islam-as-Race*, this article traces a genealogy of Islam-as-race consisting of three constituent strands: (1) the historical construction of Islam as a Black/brown religion, (2) an American Orientalism that alienates Islam from the West, and (3) the profiling of Muslims and Islamicized people after the Oklahoma City bombings and 9/11 and then the resignification of Islam into a terrorist ideology by its antagonists. These three strands weave together to help produce Islam-as-race; not just a religious identity but a non-white, racial one that renders anyone Islamicized into a racial Other.

Racism relies on racecraft, a set of tools that racism deploys to subordinate groups.<sup>4</sup> In the United States, those tools have been developed and perfected against Black Americans and Native Americans to be later tailored for use against new groups like Muslims. Then, through an iterative process of increasingly particularized racism, the subject population’s identity becomes more defined and ultimately may result in the emergence of a race. From the genealogy of Islam-as-race in Part I, this article turns to the practices and techniques of racism in *Part III: The Racecraft of Anti-Blackness and Islamophobia* in which it demonstrates racism’s discursive techniques in producing whiteness’s Other and the material effects of this production. In the first section of Part III, this article focuses on deconstructing racism’s discursive strategies that it deploys against racial groups, tailoring them to suit its

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4. I use racism, rather than racists as actors, because it is well-understood that racism as part of the structure of politics and law may continue to have effects and maintain the racial status quo even with seemingly neutral or sympathetic human actors. See, e.g., EDWARD BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA (2004).

needs. Based on Critical Discourse Studies, it describes eight discursive strategies that are used to produce common racist tropes. It then uses Professor I. Bennett Capers' work *Reading Back, Reading Black* to "read" these distilled and abstracted tropes back into specific texts: the transcripts of a hearing for a motion to enjoin the opening of a mosque during the anti-sharia law panic<sup>5</sup> and an anti-CRT opinion published by the panic's chief architect, Christopher Rufo. The point is to show that racecraft and the techniques of racism are the same when used against Muslims in the anti-sharia panic as they are when used against Blacks and in the anti-CRT panics. Racists learn how to retool their strategies from one group to the next.<sup>6</sup> Islamicization or the racialization of Muslims (and those assumed to be Muslims or the Islamicized) overlaps with the subordination of other groups. In sum, they are part of the racial hierarchy: the Islamicized are subject to the same racist strategies as other groups.

Justificatory discourses and racist logics form the armature of the material practices of racism, among which social violence and spatial discrimination are examples of racecraft in reinscribing racial difference.<sup>7</sup> In the second section of Part III, the article provides examples of the overlapping experiences of racial exclusion and violence against Blacks

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5. The anti-sharia law panic, which periodically flares up, posits that Muslims are seeking to enshrine Islamic law into the U.S. legal system and are attempting to overthrow and dominate the country to make it an Islamic state.

6. While there have been many definitions of Islamophobia, I agree with Stephen Sheehi that Islamophobia (like all other racisms) is an ideology, a body of everyday knowledge and beliefs, that justifies the regulation of Muslims like it does other races. Racism in the form of Islamophobia and Anti-Blackness includes not just individual discrimination but structural expropriation and exploitation. See STEPHEN SHEEHI, *ISLAMOPHOBIA: THE IDEOLOGICAL CAMPAIGN AGAINST MUSLIMS* (2004). I differ from Professor Beydoun, the chief proponent of his popular theory in the legal literature that Islamophobia is a dialectic. This misunderstands how a dialectic works, as I note in the "Introduction" to *Islamophobia and the Law*. Islamophobia is not produced dialectically because there is no tension or aporia between two forces that are then synthesized to result in it per the philosophical concept. The more accurate description might be that it is the result of a negative dialectic: racism perpetrated by the dominant group and the resistance from the members of the group (Muslims and Islamicized) resulting in the creation of the race. But it is not Islamophobia or the racism that results—that is one half of the dialectic. It cannot be both the cause and the effect. Further, in this paper, I suggest that a definition of Islamophobia that restricts it to a set of specific negative beliefs can miss benevolent Islamophobia like that of the U.S. Institute of Peace as well as the well-meaning patriarchal forms that seek to protect Muslim women. The ideology is far more complex than a simple hatred or belief in the violent nature of Islam or Muslims. Moreover, the framework provided does not provide a convincing analytical framework but more of a description of which people and institutions engage in Islamophobia (private, structural, dialectical—the last being most puzzling). This definition may be a starting point but is partial at best and largely inadequate. Cf. Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 COLUM. L. REV. 208 (2016), <https://columbialawreview.org/content/islamophobia-toward-a-legal-definition-and-framework>. The framework for understanding Islamophobia both structurally and ideologically is in the context of racism in general and not as distinct formation. Importantly, as the Fieldses and Robinson note, racism cannot be understood without accounting for the rise of capitalism.

7. See *infra* notes 26 and accompanying text.

and Muslims in the context of property.<sup>8</sup> The purpose of juxtaposing Muslims/Islamicized people and Black Americans is not to equate their experiences but to demonstrate how the maintenance of the racial hierarchy is effectuated using common, well-established methods. Islamophobia and its institutional havens, its modes of regulation, and its techniques of subordination do not operate in isolation from other racisms; therefore, they must be undone at the same time as other racisms, sharing the same goal: to dismantle the racial hierarchy entirely.

## I. THE MYTH OF RACE AND THE REALITY OF FLUID RACIAL IDENTITIES

To fully understand Islam-as-race, we must first return to the foundational arguments of critical race theory. One of those precepts is that race is not a fact but is constructed and, therefore, mutable. If we accept that race is unfixed and racial identities are fluid, then we must accept that new races may come into being and new racial identities can form in response to racism. These racial formations never arise fully formed like Athena from Zeus's forehead; rather, they evolve over time. Even as scholars of race refuse any suggestion that race is a biological fact, many continue to take race as such a fact without much interrogation. Far more important than race itself is racism (an ideology that justifies the subordination of people based on ancestry) and racists (those who carry out racism).<sup>9</sup>

### 1. *The Myth of Race*

Karen E. Fields and Barbara J. Fields argue in *Racecraft: The Soul of Inequality in American Life* that racism produces the myth of race.<sup>10</sup> Racism is real, but race is not.<sup>11</sup> Race is an idea, not a material fact. However, increasingly, even those who challenge racism have come to treat race as a reality whose borders are not only fixed and unchanging but also require policing. Race seems real. But this is an effect of racecraft. Take, for instance, their example of two statements of causation:

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8. Unfortunately, public housing advocates have not been able to avail themselves of a law as strong as the Religious Land Use and Institutionalized Persons Act to succeed in having public housing built in majority-white suburbs. *See generally*, DAVID M.P. FREUND, *COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA* (2010).

9. *See generally* ROBERT WALD SUSSMAN, *THE MYTH OF RACE: THE TROUBLING PERSISTENCE OF AN UNSCIENTIFIC IDEA* (2014).

10. KAREN E. FIELDS & BARBARA J. FIELDS, *RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE* 2–7, 16–18 (2012).

11. The Graduate Center, CUNY, *supra* note 1, at 16:00.

1. The crops failed because of witchcraft.
2. Blacks were segregated in the South because of their race.<sup>12</sup>

In both these sentences, race and witchcraft cause something to happen—segregation and crop failure. However, neither can cause the effect attributed to it. In order to convince people of the causation, both race and witchcraft must be made to seem real rather than as socially constructed and contingent. According to the Fieldses, racecraft is the set of tools and techniques by which racism makes race appear as a fact. Blacks were segregated in the South because of racism.<sup>13</sup> Race cannot and does not appear a priori to racism, but repeatedly, we accept statements of causation as though race comes first, and that the double standards and differential treatment are based on race rather than being an effect of a racist ideology. As the Fieldses argue, race is no more real than witchcraft.<sup>14</sup>

Cedric Robinson's *Black Marxism* traces the development of race from racial capitalism. It provides a careful historiography of the evolution of different groups of Africans — Fulani, Fon, Wolof, Igbo, Yoruba, and others — into Negroes because of the economic imperatives of Europe as they colonized and enslaved Black and Brown peoples. Robinson argues that Europeans already had “race” handy as a concept that was applied to Slavs, Jews, the Irish, the Mongols, and later Arabs, Indians, and Africans. He then argues that Black radical tradition was an African response to European domination. Quoting Walter Rodney, who noted this de-Africanizing and the attempted dehumanizing that had to take place to produce the “slave,” “[H]e faced his new situation as an African, a worker and a man. At this level of perception, it is quite irrelevant to enquire from which tribe or region a particular African originated.”<sup>15</sup> Robinson goes on to say: “As we shall see, in slave society such a signification of African culture was accessible for practical and ideological reasons only in a most grotesque form, that is, racism. *Racist ideologists observed that all Blacks were identical and supplied the*

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12. *Id.* at 40:40.

13. *Id.* at 39:50.

Racecraft is . . . the process by which racism becomes race . . . You don't start with the perception of the people being different and then out of that grows racism. You start with racism; you start with the double standard, which is the practice and also an ideology, and out of that race emerges. You learn to recognize people as belonging to a race because you have been in the rituals of racism with them.

*Id.*

14. See Appendix A, Figure 1: *The Production of Racial Identity and Race*.

15. See CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF BLACK RADICAL TRADITION* 73 (2000).



*content of that identity.*<sup>16</sup> It is important to underscore here that it is racism that produces *different* races, and that racism is not only anti-Blackness which develops later; racism is a preexisting feature of European history in connection to other groups.<sup>17</sup> The form that it took against Africans during the slave trade and in the colonies during the rise of capitalism is anti-Blackness as we understand it today. Part of the construction of race was to homogenize Africans and strip them entirely of their history and particularity.<sup>18</sup>

Robinson's work is a magisterial exploration of race, its evolution from pre-capitalist to capitalist eras, and the Black radical tradition. As noted above, he theorizes that racism applied specifically to Africans produced anti-Black racism to extract labor much as it produced anti-Indian racism in the so-called "jewel in the crown" from which it extracted several trillion dollars.<sup>19</sup> The point is that races reflect the ideological needs of the racist. As such, it stands to reason that new races will coalesce and emerge as part of a complex interaction between racism and a subject population based on a history of being set apart from whiteness. This is what has happened with Islam. The practice of racism, particularized against Muslims as Islamophobia, has given rise to the identity of Muslims as a racial group and Islam as a race. Furthermore, one of the reasons scholars have preferred to refer to Muslims as *racialized* rather than as members of a race is because the group is heterogenous; many in it already have other ethnic characteristics. Yet surely "Muslim" can be a racial identity because identities based on race are always an amalgam and assemblage of constituent parts for any group.

One of the most important contributions of Critical Race Theory is the critique of essentialism in the forms of the race "science" that sought neutral, fixed, and natural explanations for socially fabricated differences, and then later, the tendency to essentialize some shared attributes like sex or gender.<sup>20</sup> Anti-essentialism was developed as a counter to both these arguing they problematically ignored or simply disavowed the effects of race and class difference.<sup>21</sup> The social construction thesis repudiated both

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16. *Id.* (emphasis added).

17. *Id.*

18. *Id.* at 74–75

19. *How Much Money Did Britain Take Away from India? About \$45 Trillion in 173 Years, Says Top Economist*, BUSINESS TODAY.IN (Nov. 19, 2018), <https://www.businesstoday.in/latest/economy-politics/story/this-economist-says-britain-took-away-usd-45-trillion-from-india-in-173-years-111689-2018-11-19>. In addition, over the period of colonization, some have estimated that the deprivation of resources led to 1.8 billion deaths, which dwarves the numbers killed in the slave trade or in wars against indigenous peoples. *See also* Maddie Beitler, *Colonial India: A Legacy of Neglect*, ARCGIS STORYMAPS (Sept. 26, 2020), <https://storymaps.arcgis.com/stories/1bfc6b6b88c846f99e05ab7831669757/print>.

20. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN L. REV. 581, 588 (1990).

21. Darren L. Hutchinson has argued that even anti-essentialists have not been internally consistent

the pseudoscience justifying an intentionally created architecture of racial subordination and those theories that assumed, in a white dominated context, the experience of whites was universal. The argument suggested that race was not permanent and unchangeable, and it was not irrelevant, particularly when it came to other axes of difference like gender and class.<sup>22</sup> Race had to be accounted for, it had to be explained rather than assumed, and racism had to be surfaced, made visible in a society in which racial difference was historically foundational and in which it remains one of the most salient forces shaping life opportunities and outcomes.<sup>23</sup>

Professor Athena Mutua offers one way of acknowledging the multiplicity of subordinations within a racial hierarchy.<sup>24</sup> She critiques Professor Juan Perea's articulation of the Black/white racial binary that obscures the racial subordination of those who are not Black.<sup>25</sup> But her critique reads into Perea's work a power relation that is not, in fact, explicit in the text or necessary to its central argument. A binary does not have to exist on the same plane but may be vertically differentiated. In her critique, Mutua articulates a fixed position of white always on top, Black always on the bottom, and the rest somewhere in the middle, which

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because while they have critiqued race and gender essentialism, many have failed to include sexual orientation in the analysis. Of course, he also notes that gay and lesbian equality advocates have adopted an essentialist stance, as well, where sexual orientation is never a choice but an immutable attribute of people "born this way." Darren L. Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination"* 6 MICH. J. RACE & L. 285, 290–98 (2001).

22. See Kenneth B. Nunn, "Essentially Black": *Legal Theory and the Morality of Conscious Racial Identity*, 97 NEB. L. REV. 287, 296-303 (2018).

23. *Id.*

24. See Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177 (1999). Moreover, some commentators in the United States have often treated American borders as concrete barriers. Globalization (and colonialism before it) calls this assumption into question. How, for example, are we to understand the devastation of Asian and Middle Eastern lands sending refugees to America and effecting Muslim, Asian, and Arab populations here in the context of a racial hierarchy that often meets these actions with silences? A worse development would be to globalize understandings of race based on the particular experience of the U.S. Returning to Mutua's critique, she seems to suggest that power flows only from whites downward. Foucault's assertion that power is diffuse is useful here. See generally MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME I* (1990). While there may be an entrenched institutional power structure that places whites at the top and Blacks at the bottom, the discursive and epistemological power that Perea critiques is recognizable in how Latinx, Native, and Asian communities continue to be footnotes twenty years after his writing. An example of this that it was only in 2021, after the murder of six Asian women, that mainstream Americans began to discuss violence against Asians and the history of Asians in this country. That history starts with the arrival of Filipino seamen with Spanish conquistadors in 1587 AD. See 1587: The First Filipino Landing (illustration) in *Timeline of Filipino Immigration to the United States*, PORTLAND.GOV, <https://www.portlandoregon.gov/article/593821> (last visited Oct. 2, 2021). Another example is the popular term "BIPOC," in which Blacks and Indigenous people are recognized while the rest are obscured in a blanket term of "people of color" meriting no differentiation or recognition. See Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. 115 (2021).

25. Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

reinforces the problematic nature of the *racial* binary that focuses on the extremes. In other words, the rearticulation that once again primarily recognizes whites and Blacks but inserts a spatial middle ground based on other forms of subordination does nothing to unseat the binary when it comes specifically to race. It simply makes room for other forms of discrimination which might suggest another hierarchy based on another identity marker. For instance, Mutua notes that when we are talking about a colorized racial hierarchy in the context of the United States, Blacks are almost always at the bottom.<sup>26</sup> In the context of language, Latinx Spanish speakers are at the bottom of the language hierarchy where white English speakers are at the top.<sup>27</sup> Of course, this leaves out speakers of Native languages, Asian languages, and Haitian Creole which may very well appear at the bottom. Similarly, one could argue that when it comes to hierarchies based on assumed terror threats, Muslims are at the bottom.<sup>28</sup> But all of these are still part of the *racial hierarchy* regardless of other axes of discrimination. It is not simply that color always places Blacks at the bottom. Phenotype, color, and language or religious practice place different groups at the bottom in different contexts.

## 2. *Fluid Identities and Multiple Subordinations*

Race does not operate in a vacuum without the influence of other identity categories. Often, with the existence of multiple axes of subordination, having multiple subordinated identities results in a combination in which they become force multipliers and result in subordinations that are greater than the sum of their parts. To address this reality, most people have adopted an intersectionality approach first theorized in the context of law by Professor Kimberlé Crenshaw.<sup>29</sup> In her first article on intersectionality, Professor Crenshaw demonstrated that when a plaintiff in an employment discrimination suit has the two identities of “Black” and “woman,” she seemingly disappears from legal visibility if she has Black men and white women coworkers who are not discriminated against. The Black woman plaintiff cannot make a gender claim because the employer promotes white women and cannot make a race claim because the employer promotes Black men.<sup>30</sup> It is only by

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26. See Mutua, *supra* note 24

27. *Id.*

28. See generally ARUN KUNDNANI, *THE MUSLIMS ARE COMING!: ISLAMOPHOBIA, EXTREMISM, AND THE DOMESTIC WAR ON TERROR* (2014).

29. 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; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

30. *Id.*

acknowledging that both these racial and gender identities result in a person who cannot be reduced to either, that justice for the Black woman can be achieved.

As other theorists have noted, intersectionality assumes stable categories of race and gender it is not anti-essentialist per se.<sup>31</sup> Moreover, the theory remains moored to a spatiality, a solidity or materiality that doesn't change, a hierarchy that doesn't quite get at the dynamic interaction of different subordinations that continues to produce different forms of inequality and oppression. Color and race are not interchangeable, and that very fact vexes their conflation in any theory of race. Anti-Black racism cannot be reduced to colorism which affects South Asians who can and have passed for Black but escape anti-Blackness.<sup>32</sup> Light-skinned Blacks who can pass for white may escape colorism but not anti-Blackness depending on their ascriptive identity and whether they hold themselves out as Black.<sup>33</sup> In some parts of the United States like South Florida, Spanish speakers are not at the bottom of the hierarchy even if they may be in other parts of the country. But if they are Afro-Latinx, they may very well be at the bottom, or close to it. If intersectionality posits that these multiple identities are not additive, then separating them out and not accounting for the interplay among them that creates a sum greater than its part is a problem.<sup>34</sup> Intersectionality is most effective as a framework for uncovering discrimination that is a result of multiple identities coming together in a structural context like law. It does not work well with fluid identity. Yet, it has become a descriptor of identity itself and of approaches to other liberation projects.

Consider Peter Kwan's theory of cosynthesis. Rather than relying on static notions of identity, Kwan suggests a more fluid conception.<sup>35</sup> While recognizing that intersectionality theory isn't additive, Kwan critiques the theory for its reliance on individual identity categories that remain stable and autonomous. Recall the problem with fixed attributes of identity. Kwan raises the problem with assuming fixed identities that operate

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31. See also, Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mappin the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory* 132 HARV. L. REV. 2193, 2199-22-5 (2019).

32. For a discussion of the racial ambiguity of South Asians, see Ann Morning, *The Racial Self-Identification of South Asians in the United States*, 27 J. ETHNIC MIGRATION STUDS. 61 (2001).

33. ALLYSON HOBBS, *A CHOSEN EXILE: A HISTORY OF RACIAL PASSING IN AMERICAN LIFE* (2014).

34. See JENNIFER NASH, *BLACK FEMINISM REIMAGINED: AFTER INTERSECTIONALITY* 50–55 (2019) (discussing the need of some Black feminists to protect intersectionality against critique and the attacks of Jasbir Puar). See also Jasbir Puar, *'I Would Rather Be a Cyborg Than a Goddess': Becoming-Intersectional in Assemblage Theory*, 2 PHILOSOPHIA 49 (2012), <https://transversal.at/transversal/0811/puar/en>.

35. See, Peter Kwan, *Complicity and Complexity: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673 (2000);

autonomously from other identities.<sup>36</sup> While the multiplier effect may be acknowledged, the dynamism and change within concepts of race, gender, sexuality, and class is not as well captured. In the place of intersectionality, Kwan theorizes “cosynthesis:”

Cosynthesis insists that identity categories are sometimes themselves constructed or synthesized out of and relies [sic] upon other categorical notions. Therefore, this mutually defining, synergistic, and complicit relationship between identity categories is a dynamic model of multiple subordinating gestures. It denies the priority of the deconstructive concerns of class over race, of race over gender, or of gender over sexual orientation, of anything over anything else.<sup>37</sup>

Furthermore, cosynthesis is a way of looking at identity that allows for situational and shifting power within categories. Most importantly, cosynthesis requires us to confront the complexity and the hybridity of subordinations in which *identities are co-creating each other*.

An example of co-creation comes from the changing standards used in determining Native tribal membership and identity. Native American identity has been determined differently during the history of settler colonialism in the Americas. Self-identification on the census, externally-imposed standards like blood quantum that renders anyone with mixed white and the requisite amount of Native ancestry a Native, and internal tribal recognition or non-recognition, are all means by which the question has been settled.<sup>38</sup> And some tribes refuse to recognize African and Native descended peoples as Native, resulting in the denial of tribal membership.<sup>39</sup> In *Santa Clara Pueblo v. Martinez*, the tribe decided to exclude the Ms. Martinez’s daughter from inclusion in the tribe because she married a Navajo man. Male members of the tribe were not similarly excluded.<sup>40</sup> Ms. Martinez and her daughter sued but lost. Yet parentage is

36. *Id.*, at 688.

37. *Id.*; see also Frank Valdez’s work on LatCrit. Stuart Hall makes a similar point when he says that “race is the modality in which class is lived.” STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* 394 (1978). Hall’s point—well before the advent of these theories of race—was that for Black Britons, class relations were lived through race. In other words, class could operate as race in that context for working class Blacks. As anthropologist John L. Jackson, Jr., notes, “[h]e was arguing, amongst other things, against the neatly reified distinctions scholars traditionally policed between class-based analyses and racial ones.” See John L. Jackson, Jr., *In Medias Race (and Class): Post-Jim Crow Ethnographies of Black Middleclassdom*, 7 *DUBOIS REV.* 35, 35 (2010). A similar point is being made by Kwan. Race theorizing in the law tends to reify identities in a way that obscures their dynamism, as race is lived and experienced both ascriptively and prescriptively.

38. Paul Spruhan, *Warren, Trump, and the Question of Native American Identity*, *HARV. L. REV. BLOG* (Feb. 27, 2018), <https://blog.harvardlawreview.org/warren-trump-and-the-question-of-native-american-identity>. In other words, an admixture of whiteness does not negate Native identity, but Blackness does.

39. *Id.*

40. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Court held for the tribe in favor of tribal self-government denying Ms. Martinez and her daughter membership. From the decision:

not a uniform standard for exclusion or inclusion in many Native nations in North America. Ascertaining who is a Native American is not necessarily based on phenotype, color, or blood quantum but on societal recognition from the tribe, marital status, gender, and other factors.

In *Becoming Free, Becoming Black: Race, Freedom, and Law in Cuba, Virginia, and Louisiana*, Alejandro de la Fuente and Ariela Gross document how Blackness is tied to slavery, but Black identity shifts both over time and across locations in response to the social and political priorities of whites.<sup>41</sup> In 1992, Judith Butler published *Gender Trouble* arguing that gender was a performance without a fixed identity requiring representation, and over time, there has been an evolution of gender expression and identity from performative within recognizable categories (like the gender binary) to fluid.<sup>42</sup> But that has not been the case with race even as people identify more with multiple races.

If we accept that races are not biological but social, then they can be nothing but amalgams of different identities and practices including practices of gender and sexuality, geography, ethnicity, and linguistic identity, as well as the social recognition by other members of the race. Even if we often use proxies for race such as phenotype, color, class, or cultural markers, these can be deceptive. Rachel Dolezal, after all, was able to pass for Black with surprising ease even though she was once a white child. Her performance of race and inhabitation of Blackness was so convincing that she was appointed the director of the Spokane chapter of the NAACP, only stepping down when her “real” identity was revealed.<sup>43</sup> Her identification with African Americans was strong enough to invest significant energy in becoming Black, working for Black civil rights, and teaching in the Africana Studies department of Eastern Washington University.<sup>44</sup> She dubiously claimed that she was transracial, similar to transgender.<sup>45</sup> While this was generally rejected by most race

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Respondents, a female member of the Santa Clara Pueblo and her daughter, brought this action for declaratory and injunctive relief against petitioners, the Pueblo and its Governor, alleging that a Pueblo ordinance that denies tribal membership to the children of female members who marry outside the tribe, but not to similarly situated children of men of that tribe, violates Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1303, which, in relevant part, provides that “[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws.”

41. ALEJANDRO DE LA FUENTE & ARIELA J. GROSS, *BECOMING FREE, BECOMING BLACK: RACE, FREEDOM, AND LAW IN CUBA, VIRGINIA, AND LOUISIANA* (2020).

42. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1992).

43. Jenée Desmond-Harris, *How to Make Sense of Rachel Dolezal, the NAACP Official Accused of Passing For Black*, VOX (June 12, 2015), <https://www.vox.com/2015/6/12/8770273/rachel-dolezal-white-black-naacp>.

44. *Id.*

45. Rebecca Tuvel, *In Defense of Transracialism*, 32 HYPATIA 263 (2017).

scholars and also Black Americans, at least one theorist took her transracial claim seriously, comparing it to being transgender and raising the question of what it means (and what it takes) to be Black, or to recognize oneself as a different race than the one understood at birth.<sup>46</sup> Certainly, until Dolezal's past and her parentage were revealed, she was accepted at her word. She was raised with Black siblings and has Black children.<sup>47</sup> If we later found out that one of her parents had black ancestry, would this change her position and our view of her? If yes, then we are boiling it down to biology, are we not?<sup>48</sup> Similarly, those who passed for white during Jim Crow erased all the markers of race and were visually indistinct from white people. The revelation of their blackness, particularly during the Jim Crow era, could have serious consequences.<sup>49</sup>

Racial identity is more than a mere performance of culture, more than the fact of skin color, and more than phenotype. It is also shared history, an ancestry, and community connection, a bricolage of internal and external practices, and subjectivation. It is dynamically co-created by the practices of gender, sexuality, and class. Kwan's concept of cosynthesis captures the missing dynamism of the categories themselves. Thus to be a queer Muslim woman is to have one's sexuality, gender and race constantly created in relation to each other—one could say that one's sexuality is Muslim, one's gender is Muslim, one's Muslimness is queer and gendered. Identity in general, racial or otherwise, is not a fixed *thing*.

### 3. Muslim/Islamicized Identities as Cosynthetic Identities

Scholars have been grappling with the problem of how to treat

46. *Id.*

47. See Desmond-Harris *supra* note 46.

48. Kareem Abdul-Jabbar, *Let Rachel Dolezal Be as Black as She Wants to Be*, TIME (June 15, 2015), <https://time.com/3921404/rachel-dolezal-naacp-race-kareem-abdul-jabbar>. Making an argument based on the myth of race, Abdul-Jabbar notes that:

The thing about race is that, scientifically, there is no such thing. As far back as 1950, the United Nations Educational, Scientific and Cultural Organization (UNESCO) released the conclusions of an international group of anthropologists, geneticists, sociologists, and psychologists that stated that the concept of race was not a scientific entity but a myth. Since then, one scientific group after another has issued similar conclusions. What we use to determine race is really nothing more than some haphazard physical characteristics, cultural histories, and social conventions that distinguish one group from another. But, for the sake of communication, we will continue to misuse the word, myself included, in order to discuss our social issues so everyone understands them. As far as Dolezal is concerned, technically, since there is no such thing as race, she's merely selected a cultural preference of which cultural group she most identifies with. Who can blame her? Anyone who listens to the Isaac Hayes song, "Shaft," wants to be black—for a little while anyway (#who'sthecatwhowon'tcopout).

*Id.*

49. See *e.g.*, ALLYSON HOBBS, A CHOSEN EXILE: A HISTORY OF RACIAL PASSING IN AMERICAN LIFE (2014).

“racialized Muslims” for at least two decades: do Muslims face racial discrimination or religious discrimination? If religious, how do we account for the use of racist strategies like profiling? How do we account for the targeting of people once they are revealed as Muslims, but not before? Some scholars have argued that Islamophobia has “racialized” Islam and Muslims, but they stop short of declaring the emergence of a race.<sup>50</sup> Others have theorized that Islamophobia has possibly created a new “Arab and Muslim” or “Middle Eastern” race.<sup>51</sup> There is significant conceptual confusion in trying to accommodate both race (based on visual difference) and religion and their interconnections in a theory of difference. One way to cut through the confusion is to first recognize a theory of the formation of a subject identity through the operation of racism and racecraft. Religious markers, gender and class, and the appearance of difference from whiteness, such as a turban, name, or skin color, come together to create this subordinated cosynthetic identity. However, not all these factors need to be present. Like all racial identities, there will be individual variation, but the theory captures the internal dynamism of the identity.

Therefore, anyone with markers of Islam—dress, skin color, physical features, name, paraphernalia like books in Arabic, and behavior—even if they are misrecognized, renders the marked individual a Muslim in the eyes of the observer: a constructive Muslim. They have been Islamicized regardless of whether they are “real” Muslims or not. A turban-wearing Sikh like Balbir Singh Sodhi, a hijab-wearing white woman, or a white man named Ahmed are Islamicized and conscripted into the Islam-as-race, even as someone like model Bella Hadid may not be *until* she assumes the race by self-revelation as a Palestinian Muslim, much as white-passing Black and Latinx Americans have done.<sup>52</sup> These are examples of cosynthetic identities produced by the racecraft directed at anyone linked with Islam.

Recognizing the effects of racism in the production of this identity, we can then delve into the specific form of racism. As noted above, scholars have argued that Muslims have been racialized and they have written

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50. Nasar Meer, *Returning to Islamophobia as the Racialization of Islam and Muslims*, MAYDAN (Dec. 6, 2017), <https://themaydan.com/2017/12/returning-islamophobia-racialization-islam-muslims>. See KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR* 16–22 (2018). See also STEPHEN SHEEHI, *ISLAMOPHOBIA: THE IDEOLOGICAL CAMPAIGN AGAINST MUSLIMS* (2011); DEEPA KUMAR, *ISLAMOPHOBIA AND THE POLITICS OF EMPIRE* (2012); NAZITA LAJEVARDI, *OUTSIDERS AT HOME: THE POLITICS OF AMERICAN ISLAMOPHOBIA* (2020).

51. ERIC LOVE, *ISLAMOPHOBIA AND RACISM IN AMERICA* 5–10 (2017) (arguing that the “Middle Eastern” racial category is the “least bad”).

52. To be clear, this argument does not rest on the view that Muslims and Blacks have been separated into distinct and mutually exclusive racial groups that then prevent society and the law from seeing Blacks as Muslims. The law can easily conflate the two, as it has done with Arabs, if it serves a political purpose.



about Islamophobia in conjunction with racism, but they have not claimed that Islam itself is a race. It is time to take the step that others have been reluctant to take and recognize that the racecraft of Islamophobia *has produced Muslims and the Islamicized as a racial class or group and Islam as a race*. Both Islamophobia and Islam-as-race are the result of the dialectal relations between racism and a subject of racialized Muslims/Islamicized.<sup>53</sup> Analogizing Islam to existing races but stopping short of viewing it as a race is no longer sufficient in the context of white-dominant societies in North America and Europe.<sup>54</sup> To claim that Muslims are just racialized — or sometimes treated like a racial group — does not go far enough.

Islam is now more than a religious identity but the race that Islamophobic racecraft has produced. It is not a race based solely on a geographical affiliation (unlike Asians, who are emerging as such in the United States). The proponents of a “Middle Eastern race”<sup>55</sup> fail to capture the key fact that it is the peoples’ connection to Islam, not to a geography, that determines their inclusion in the racial group of Islam.<sup>55</sup> Christian Arabs have passed into whiteness with relative ease.<sup>56</sup> Moreover, because of the reliance on underlying phenotypical difference—the existence of another racial group—some proponents of racialization cannot explain how white Muslims are also racialized. In other words, such positions struggle to explain how people who both look and don’t look Middle Eastern or Black/brown or are white,<sup>57</sup> who are and are not Muslims,<sup>58</sup> who practice and do not practice Islam<sup>59</sup> have been targeted for Islamophobic treatment. It is not anti-Blackness, or anti-Latinx, or anti-Arab/brownness that is producing the racial category of Muslims and

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53. See *supra* note 6 on the discussion of the definition of Islamophobia.

54. See, e.g., SAHER SELOD, *FOREVER SUSPECT: RACIALIZED SURVEILLANCE OF MUSLIM AMERICANS IN THE WAR ON TERROR* 130 (2018). Selod notes that Muslims’ racial identities are complex and that “we are not defined by just one identity but by our multiple intersecting identities and the racial hierarchy is not static.” *Id.* But she also argues that Muslims are not a race. I disagree with her focus on South Asian and Arabs who are Muslims as the subjects of racialization, which fails again to capture those who are Islamicized and belong to none of these categories. Furthermore, the reliance on fixed identities in an intersectionality framework fails to capture the dynamism of identity, as I argue in this Article.

55. See LOVE, *supra* note 51

56. See Tehranian *infra* note 105

57. For instance, Jermaine Jackson, Cat Stevens, Dave Chapelle, Gigi Hadid, and Riz Ahmed span the color spectrum from dark-skinned to light-skinned. Throughout this Article, I will use Black for the same reasons articulated by Angela Harris. See Angela P. Harris, *Race and Essentialism in Feminist Theory*, 43 STAN. L. REV. 581, 586 n.20 (1990).

58. Think Muhammad Ali, as opposed to Barack Obama.

59. People who are secular Muslims may consider themselves Muslims but not practice. See Mustafa Akyol, *A New Secularism is Appearing in Islam*, N.Y. TIMES (Dec. 23, 2019), <https://www.nytimes.com/2019/12/23/opinion/islam-religion.html>. To be sure, there have always been non-normative strains of Islam and movements to secularize, like that of Kemal Atatürk.

Islamicized people, it is the particularized racism of Islamophobia and the connection to Islam. However, the key contribution being made here is that once the racial group has coalesced, Islam-as-race emerges.

In sum, the argument for Islam-as-race rests on the work of all the critical race theorists who have argued that race is socially constructed, fluid, mutable, and inessential.<sup>60</sup> The argument also rests on the work of scholars like Robinson who have theorized a broader history of European racism in the context of the development of capitalism that took a particularly barbaric form at the start of the Atlantic slave trade, a racism which had to homogenize Africans into Blacks and to dehumanize them into chattel. The purpose of racism and the techniques and methods of racism is to maintain a hierarchy regardless of who is at the bottom or in the middle. To do so, racism uses the same tools. The concept of race as a social apparition and its fluidity can easily accommodate Islam into the racial framework and recognize that racism against all subgroups within that framework borrows, overlaps, and shares many attributes.<sup>61</sup> Racial identity is the result of an assemblage of practices, processes, and ideologies dependent on social relations among groups and is highly contextual and recognizable.<sup>62</sup> When these beliefs and practices cohere and are reified over time, they put forth a recognizable identity group and a race emerges.<sup>63</sup> Just as racism produced anti-Blackness, which then produced Blacks as a racial group and Black as a race, racism produced Islamophobia, which then produced the Muslim as a racial group and Islam as a race.

For Islam to emerge as a race in the present, the differences between Muslims and Europeans, and the purported Islamic world and Europe, had to be made meaningful and clear as a precursor. This is where the history of Europe and America's encounter with Islam becomes important. Differentiating Muslims and Islam is one of the colonial and capitalist racial practices that has formed the substratum of modern Islamophobia and Islam-as-race. The following Part elaborates a

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60. 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, 140; Devon W. Carbado, *Critical What What?* 43 CONN. L. REV. 1595, 1614–15 (2011).

61. See Mutua, *supra* note 24

62. GILLES DELEUZE AND FELIX GUATTARI, *A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA* (1988).

63. See *supra* note 10. Methodologically, this Article is an interdisciplinary venture into legal history, political theory, and literary criticism that interprets law as text. I contend that to understand the full ramifications of Islam-as-race, it impossible to quarantine the inquiry to a strictly legal one. How, why, and when racialization happens are largely determined by the cultural and political exigencies of the time. Law is an indispensable structural mechanism maintaining racism, but it does not operate in a vacuum. Rather, it follows a political logic. Thus, while law can be itself generative of subordination, this does not happen disconnected from a political imperative and agenda. As such, interdisciplinary work is indispensable to uncover the full story.

genealogy that shows how Islam was religiously and racially set apart from Europe and, later, America.

## II. A GENEALOGY OF ISLAM-AS-RACE

Islam has been, and continues to be, seen as inherently non-white, alien, threatening, and opposed to the West and Judeo-Christian tradition. The genealogy offered in this part consists of three strands that weave together to produce Islam-as-race. First, Islam has been historically linked with Black and Brown peoples from slavery to the rise of Black radical Islam in urban communities. Second, from the 1960s onwards, as the United States became increasingly embroiled in the Middle East,<sup>64</sup> a particular form of American Orientalism arose that constructed Islam as antithetical to the West. Islam was alienated from Europe and Muslims were similarly seen as categorically different from Europeans. Third, from the post-Oklahoma City bombing period to the present, Islam itself has become a target for regulation. While law enforcement and lawmakers in the first fifteen years after the Oklahoma attack focused on specific Muslim communities resulting in racial profiling based on visual attributes of the profiled, in the 2010s, Islam itself became the subject of scrutiny and expulsion. For the past decade, forty-three states have attempted to introduce anti-sharia bills that resignify<sup>65</sup> Islam from a religion to an ideology and a terrorist identity.<sup>66</sup> Islam itself is the problem tainting and homogenizing all who are linked with it whether they are believers or not. These three strands come together and overlap each other, braided together in the formation of Islam-as-race.

### *1. Thread 1: Connecting Black Islam from Slavery to Anti-Islam Immigration Laws and the Civil Rights Movement*

Muslims have been in the Americas since the time of the Spanish conquistadors and the arrival of West African enslaved peoples brought to the “new world” by British colonists and European slave traders<sup>67</sup> Yet,

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64. The term “Middle East” is itself problematic, as the region described is in Western Asia and not in the middle of the East. But, rather than using Western Asia, I will use the more familiar misnomer.

65. By “resignify” I mean to change its meaning from the original to something new. If words are signs, it would be to change the thing to which the sign points and to cause that sign to mean the new thing to which it is pointing.

66. See *infra* notes 180-222 and accompanying text.

67. See Annette Gordon-Reed, *Black America’s Neglected Origin Stories*, ATLANTIC (May 4, 2021), <https://www.theatlantic.com/magazine/archive/2021/06/estebanico-first-africans-america/618714>. In this article, historian Annette Gordon-Reed discusses the history of Estebanico, a North African Muslim slave who accompanied the Spanish expedition of Andres Dorantes and Alvar Nunez Cabeza de Vaca from Florida to Texas. Estebanico was forced to convert to Catholicism and join the

when most people think about Muslims and Islam, this long history is obscured in favor of a much more recent story of immigration from the East. This erasure has had at least two unfortunate consequences. First is the view, held by non-Muslims, both white and non-white, that Islam is a newcomer to these shores and, therefore, there is a real concern about its compatibility with the Anglo-American liberal character of society.<sup>68</sup> Second, there has been a lack of engagement with race and anti-Blackness on the part of Arab and South Asian immigrants who have often viewed Black Muslims as merely “recent converts” with separate racial issues than their own. The common denominator here is the misperception of the recency of Islam and Muslims in America, regardless of who they are and the failure to connect Islam and race historically in any meaningful way.

This section suggests that the presence of Islam from before the founding of the British colonies and the United States,<sup>69</sup> the conflation of Islam with non-whiteness in early 1900s immigration, and the reclamation of Islam in the 1920s onwards by Black Americans<sup>70</sup> can help us understand the way in which Islam itself has come to be linked to Black and brown peoples in the United States. This connection then helps to explain how people came to be racially othered because of Islam. It is well beyond the scope of this article to offer a comprehensive account of

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company in the train of his owner. He was valuable because of his gift with languages and soon became the translator between Native tribes and the Spaniards. It is a fascinating history that places the arrival of Muslims on these shores in the early 1500s—1520 to be precise. In her article, Reed *assumes* that Estebanico is Black, but we cannot know for sure. As others have noted, he was referred to as a moor—which could be a dark-skinned Arab or a Black man—by his enslavers. As a North African, his race is unsettled and cannot be assumed to be Black in the sense of our modern American usage. It should be noted that colonial authorities across the colonized world referred to several different colonized groups as “black” which does not necessarily suggest they were Africans. In the context of India, Indians were described as such. David Washbrook writes about an Englishwoman correspondent:

Julia Maitland, the wife of a British magistrate writing in the 1830s, might disparage the ‘Blackies’ who cringe ‘to us English as if they were dirt under our feet ‘and despair of another Englishman living with a ‘half-caste wife and sickly n\*\*r-looking child’. But she found ‘the rudeness and contempt’ with which some British army officers ‘treat[ed] the natives quite painful to witness’ and, when introduced into high society, she was awe-struck by ‘the upper classes [who] are exceedingly well bred and many are the descendants of native princes.’

David Washbrook, *South India 1770-1840: The Colonial Transition*, 38 MOD. ASIAN STUDS. 478, 485 (2004). For a fictionalized account of the ill-fated expedition from the viewpoint of Estebanico, see LAILA LALAMI, *THE MOOR’S ACCOUNT* (2014).

68. See, e.g., OIVIER ROY, *GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH* (2002). See also Bernard Lewis, *Islam and Liberal Democracy*, ATLANTIC (Feb. 1993), <https://www.theatlantic.com/magazine/archive/1993/02/islam-and-liberal-democracy/308509>. Lewis is a well-known skeptic regarding the ability of Muslims to assimilate and Muslim societies to succeed at democracy.

69. See Reed, *supra* note 67.

70. See *infra* notes 114 and accompanying text.

this relational history of Islam in the United States over the last four hundred years. Instead, it offers three important snapshots in history to show how Islam itself was conflated and commingled with race throughout U.S. history, and how it came to be a racial category.

i. Black Islam/Islam as Blackness  
and the Construction of Racial Difference

Recent scholarship has unearthed the previously unknown or under researched history of Muslims in the United States. These works have gone back to the archives and demonstrated that among the Africans brought to these shores were a significant number of Muslims.<sup>71</sup> As Kambiz GhaneaBassiri's research shows, Muslims were not wholly unfamiliar to Europeans, who had first encountered them in the Crusades and then been in contact with Ottomans and North Africans in their attempts to dominate the Atlantic trade routes.<sup>72</sup> Even if their knowledge was superficial and biased, Europeans were aware that Muslims followed a religion that was not entirely alien to Christianity.<sup>73</sup> While Islam was already considered a false religion, some Europeans saw it as a civilizing force among Africans. Muslims themselves were then regarded as a semi-civilized group that could aid in "civilizing" other pagan Africans.<sup>74</sup> The goal, however, was to Christianize all Africans regardless of their original creed.<sup>75</sup> Islam was merely a waystation on the journey. Islam's benefits in "civilizing" Africans were noted in 19<sup>th</sup> century travelogues:

Christian travelers, with every wish to think otherwise, have remarked that the negro who accepts Mohammedanism (sic) acquires at once a sense of the dignity of human nature not commonly found even among those who have been brought to accept Christianity. It is also pertinent to observe here, that such progress as any large part of the Negro race has hitherto made is in exact proportion to the time that has elapsed since their conversion, or to the degree of fervour with which they originally embraced, or have since clung to, Islam.<sup>76</sup>

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71. See Reed, *supra* note 67. See also SILVIANE A. DIOUF, *SERVANTS OF ALLAH: AFRICAN MUSLIMS ENSLAVED IN THE AMERICAS* 48 (1998); KAMBIZ GHANEABASSIRI, *A HISTORY OF ISLAM IN AMERICA* 9–13 (2010). For stories of individual Muslim enslaved men, see ALLEN AUSTIN, *AFRICAN MUSLIMS IN ANTEBELLUM AMERICA: TRANSATLANTIC STORIES AND SPIRITUAL STRUGGLES* (1997). See also OMAR IBN SAID, *A MUSLIM AMERICAN SLAVE: THE LIFE OF OMAR IBN SAID* (2011); MUNAWAR ALI KARIM, *LIBERTY'S JIHAD: AFRICAN MUSLIM SLAVES AND THE MEANING OF AMERICA* (2019).

72. See GHANEABASSIRI, *supra* note 71 at 9–13.

73. *Id.* at 51. See also MALCOLM, *infra* note 102.

74. See GHANEABASSIRI, *supra* note 71 at 51.

75. *Id.*

76. *Id.* at 51 (quoting R. Bosworth Smith, *Lecture I, in* MOHAMMED AND MOHAMMEDANISM 32

Although Islam was recognized as a civilizing force, Christianity remained the *sine qua non* of civilization itself and full assimilation into the status of “civilized” required conversion to Christianity.<sup>77</sup> As is to be expected, in the recently uncovered histories of Muslims in antebellum United States, there are stories of Muslim conversions to secure greater freedoms and benefits in a brutal slave system.<sup>78</sup> Thus, from the very early days of European history in the Americas, European settlers, having yoked together Christianity and civilization, demanded assimilation through conversion. Put differently, to be part of civilized society with even meagre rights and freedoms, one had to shed the barbarisms of any prior religious faith, to leave Islam behind. An example of this view comes from the recommendation for a Muslim slave to the American Colonization Society as a missionary:

I cannot persuade myself but that you will seize with avidity an instrument that appears so completely adapted to your wants. Is it impossible — is it improbable that ‘Abdul Rahahman may become the chief pioneer of civilization to unenlightened Africa—that, armed with the Bible, he may be the foremost of that band of pilgrims who shall roll back the mighty waves of darkness and superstition, and plant the cross of the Redeemer upon the furthestmost mountains of Kong!<sup>79</sup>

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(2d ed. 1875).

77. *Id.* See also Tomoko Masuzawa, *The Invention of World Religions: Or, How European Universalism Was Preserved in the Language of Pluralism*, 301 (2005).

78. We can infer this from the immigration cases that allow Arab Christians to immigrate but not Arab Muslims, *see infra* notes 46–62 and accompanying text. Khaled Beydoun argues that Africans were de-Islamized in the process of becoming Black slaves, but he does not include in his account the mediating role of Islam between African paganism and the route to Christian civilization. That view of Islam as a waystation to Christianity crops up in other parts of the world, like the Indian subcontinent. The possibility that the practice of Islam made otherwise pagan Blacks more civilized is an alternative explanation for their being treated better and categorized differently than just Black. Of course, in the later stages of slavery, when Africans began to convert to Christianity, this was no longer a basis for viewing them as civilized enough to free. See Khaled A. Beydoun, *Antebellum Islam*, 58 *HOW. L.J.* 141 (2014). See also DIOUF, *supra* note 71, on which Beydoun relies. Further, it was not just Muslims who were stripped of their individual and group identities but all captives. To turn a heterogenous group into a single slave identity required the removal of particularities, and this was not limited to Muslims. While Beydoun suggests that slave codes did this work, historians like Rediker argue that this process began well before the arrival of the African captives at their final destination. The homogenization of heterogenous people into “slave commodities” began on the slave ship. See generally MARCUS REDIKER, *THE SLAVE SHIP: A HUMAN HISTORY* (2007). Finally, the conflation of Arab and Turk with Muslim and vice versa was not so neat. Beydoun writes that Christian Arabs were allowed to immigrate in large numbers in the 1800s, which implies that legally the distinction was not so much race-based (Arabs and Turks becoming a Muslim race) as religion-based (Arabs Muslims becoming different from Arab Christians) and geographic per the Asian Barred Zone. As GhaneaBassiri notes, African Muslims were de-Negroified to justify their freedom from slavery but were also de-Islamicized in order to properly render them slaves. See GHANEABASSIRI, *supra* note 71. This is a liminal existence between two identities. In this account, Muslims move between different racial identities but remain non-white. Whites who become Muslim are also rendered race traitors and racially marked. How this happens is the puzzle I seek to address.

79. GHANEABASSIRI *supra* note 71, at 33–34 (quoting Cyrus Griffin, *The Unfortunate Moor*, in

From the earliest colonial encounters, Muslims were a liminal presence caught between the purported savagery of paganism and the supposed civilization of Christianity. According to GhanaBassiri, this liminal status became important in the post-emancipation era as Islam came to be seen as an original African religion that some enslaved people were deprived of along with their languages, cultures, and communities. Others, like Omar Ibn Said who was captured at the age of 37 and Yarrow Mahmoud, remained Muslims. They were literate, wrote in Arabic, left documentation, and were known to others as Muslims.<sup>80</sup>

Despite African Muslims being de-Islamicized or having their religious identity erased in antebellum America,<sup>81</sup> it does not follow that Islam itself was deracialized.<sup>82</sup> In fact, it was deeply racialized. This becomes apparent in the context of the Mormon polygamy and the demands from the federal government that it be banned. In early polygamy jurisprudence, legal historian Sarah Barringer Gordon points out that the practice was considered unsuitable for whites.<sup>83</sup> While not specifically linked with Islam in the cases, learned people of that time were aware of the Orientalist literature of Arabian Nights, sultans, harems, and languid odalisques reflecting the lascivious nature of those they commonly called “Mohametans.” As Martha Ertman argues, polygamy was considered “race treason,” with detractors specifically linking the practice to Islam, and a barrier to Christianity.<sup>84</sup> In *United States v. Reynolds*, the Supreme Court expresses this disgust with the practice in overtly racial tones. As Professors Ristroph and Murray note in their discussion of the case:

Moreover, if monogamous marriage was the foundation “[u]pon [which] society may be said to be built,” children raised in polygamy would be dangerously ignorant of the “social relations and social obligations and duties” associated with monogamy. Their understanding of the “family,” that critical unit of society and democracy, *would be shaped by the norms and values more familiar to “Asiatic and . . . African people.”*<sup>85</sup>

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AFRICAN MUSLIMS IN ANTEBELLUM AMERICA 136 (Allan D. Austin, ed., 1984) (emphasis omitted).

80. *Id.* There is an extensive literature of African American writing that seeks to unearth and revitalize the links between Islam and African Americans in a similar vein. *See supra* note 71.

81. *See* discussion *supra* note 71 regarding the history of Muslim slaves and the erasure of their religious identity.

82. *Id.*

83. *See* SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 1 (2002).

84. *See, e.g.,* JOAN DELPLATO, *MULTIPLE WIVES, MULTIPLE PLEASURES: REPRESENTING THE HAREM 1800-1875* (2002). This book is a study of British and French Orientalist paintings depicting the harem as imagined by painters. It should be noted that, like much other Orientalist art, the artist most likely never set foot inside the harem, given its requirements of seclusion and the impermissibility of strangers entering that sphere. *See also* Martha M. Ertman, *Race Treason: The Untold Story of America’s Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 326 (2010).

85. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1261–63

In *Mormon Church v. United States*, a similar sentiment is expressed in dicta, reinforcing the notion that civilization consisted of the two indispensable ingredients of Christianity and Whiteness/Europeanness:

The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. *It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the western world.* The question, therefore, is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself, and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore, to the detriment of the true interests of civil society.<sup>86</sup>

As a result of relentless legal action against polygamy by the federal government, the Mormon Church eventually abolished plural marriages.<sup>87</sup> The public campaign against it was replete with the kind of racist caricaturing one would expect depicting polygamists as foreign, woman-enslaving, dark-skinned barbarians.<sup>88</sup> Most definitely not respectable, enlightened Europeans with a paternal duty of care to one wife.

The view of Islam as a religion of Africans and Asians has been commonplace since the American Revolution. It was never a European religion, and not a religion practiced by white people. From the early history of the United States, with Islam being practiced by slaves, Islam itself has been raced. That racialization is rooted in racial capitalism, in the slave trade, in colonialism, and in the discourses of civilization that set white Europeans apart from all others.<sup>89</sup> The coupling of Islam with race began in early slavery in the United States and colonization in the Middle East, Asia, and Africa, and continued into the twentieth century in the immigration context. From the late 1800s to the early 1900s onwards, along with the wave of European immigrants came Arabs and people from the Indian subcontinent.<sup>90</sup> They were confronted with a racial

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(2010) (emphasis added) (footnotes omitted) (quoting *United States v. Reynolds*, 98 U.S. 145, 164–66 (1879)).

86. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890) (emphasis added).

87. See GORDON, *supra* note 83.

88. See GORDON, *supra* note 83, at 142.

89. See CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF BLACK RADICAL TRADITION* (2000); CEDRIC J. ROBINSON, *ON RACIAL CAPITALISM, BLACK INTERNATIONALISM, AND CULTURES OF RESISTANCE* (H. L. T. Quan, ed., 2019); Robert Knox, *Valuing Race? Stretched Marxism and the Logic of Imperialism*, 4 LONDON REV. INT'L L. 81, 84 (2016). See also LISA LOWE, *THE INTIMACIES OF FOUR CONTINENTS* (2015).

90. See generally Suzanne Enzerink, *The 1917 Immigration Act That Presaged Trump's Muslim Ban*, JSTOR DAILY (Apr. 12, 2017), <https://daily.jstor.org/1917-immigration-law-presaged-trumps-muslim-ban>.



prerequisite to citizenship: proving their whiteness. All applicants had to show that they were either white or Black.<sup>91</sup> In his review of the prerequisite cases, Ian Haney López argues that whiteness was determined by two prevailing methods: science and common knowledge.<sup>92</sup> This resulted in conflicting decisions about who was white depending on which method the courts relied on. Regardless of the definition of white in the cases, Islam rendered a person non-white most of the time.

ii. Muslim Immigration in the early to mid-1900s:  
Between the Racial Binary in the Courts

The Immigration Act of 1917 (“Act”) established the Asiatic Barred Zone—a geographic zone stretching from the Western Asia to East Asia including the Indian subcontinent.<sup>93</sup> Pursuant to the Act, no one from the designated barred countries was allowed citizenship in the United States.<sup>94</sup> It was only when the Act was repealed in 1946 after World War II and the at the start of the Cold War that Asians began to immigrate in appreciable numbers.<sup>95</sup> Even once the Act was lifted, however, the burden was on Muslim immigrants to persuade the courts that they were white and thus worthy of entry.<sup>96</sup> In this endeavor, the results varied. As has been noted by other scholars, petitioners for citizenship whose Islamic religious identity was centralized and made prominent often failed. Christianity was used to whitewash applicants from the same regions in which unsuccessful Muslim applicants came. In other words, Christianity was an important element of whiteness. In *In re Hassan*, for instance, the District Court of the Eastern District of Michigan found:

The court is of the opinion that when one seeking citizenship is in fact clearly not white of skin a strong burden of proof devolves upon him to establish that he is a white person within the meaning of the act. It would appear that petitioner's skin is of somewhat darker complexion than that of

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91. See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006). See also SARAH M.A. GUALTIERI, *BETWEEN ARAB AND WHITE: RACE AND ETHNICITY IN THE EARLY SYRIAN AMERICAN DIASPORA* (2009).

92. *Id.*

93. 8 U.S.C §§ 204c–219 (repealed June 27, 1952). See Enzerink, *supra* note 90.

94. *Id.* At the height of the eugenics movement in the United States, a time when racial purity was a concern for legislators and academics alike, Congress passed this legislation to reinforce the Chinese Exclusion Act and the prevent the immigration of lesser Asian races into the country. See Lorraine Boissoneault, *Literacy Tests and Asian Exclusion Were the Hallmarks of the 1917 Immigration Act*, THE SMITHSONIAN MAGAZINE (Feb. 6, 2017) available at <https://www.smithsonianmag.com/history/how-america-grappled-immigration-100-years-ago-180962058/>

95. *Id.* Bayoumi notes that the competition with the U.S.S.R. and criticism of U.S. racism from the Soviets created the geopolitical conditions of possibility for the repeal of the bar against Asian immigration. See *infra* note 106 and accompanying text.

96. See HANEY LÓPEZ, *supra* note 91.

many Arabs. However, this court does not rest its decision on that ground, but rather upon the ground that Arabs as a class are not white and therefore not eligible for citizenship. In view of the evident intent of Congress, as interpreted by the Supreme Court in the *Thind* case, *supra*, the court should be presented with a convincing case before it holds a person of Asiatic stock to be white. *Apart from the dark skin of the Arabs, it is well known that they are a part of the Mohammedan world and that a wide gulf separates their culture from that of the predominately Christian peoples of Europe. It cannot be expected that as a class they would readily intermarry with our population and be assimilated into our civilization.*<sup>97</sup>

Thus, in *Hassan*, the court concluded that Islam was the factor that rendered the petitioner a person of color. It was more than skin color. Skin color, ethnic background, and a religion long understood as alien (and specifically non-Christian) combined to render Hassan non-white and incapable of assimilating with American whiteness. In comparison, the District Court of the Eastern District of Michigan gave Christians the benefit of the doubt in claiming white status:

It is recognized that in *United States v. Cartozian*, . . . decided subsequent to the *Thind* case, the District Court held an Armenian from Asia Minor eligible to citizenship as a white person. *The court there found, however, that the Armenians are a Christian people living in an area close to the European border, who have intermingled and intermarried with Europeans over a period of centuries.* Evidence was also presented in that case of a considerable amount of intermarriage of Armenian immigrants to the United States with other racial strains in our population. These facts serve to distinguish the case of the Armenians from that of the Arabians.<sup>98</sup>

Even so, in *Ex Parte Mohriez*, the United States District Court for the District of Massachusetts found that Mr. Mohriez, the Muslim Arab petitioner, was, in fact, a white person.<sup>99</sup> The court spoke approvingly of

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97. *In re Hassan*, 48 F. Supp. 843 (E.D. Mich. 1942) (emphasis added). In *United States v. Ali*, 7 F.2d 728 (E.D. Mich. 1925), the court opined that:

I am unable to follow the argument thus sought to be made. No reason has been suggested, and I can discover none, why the mere fact that the early ancestors of the defendant came to India from Arabia, where they had been called Arabians, renders the defendant a white person. His skin is certainly not white, but unmistakably dark, like that of the other members of his race. He is a native of the continent of Asia, specifically of the country of India, and more specifically of the province of Punjab, the place of the nativity of the alien held, in the case of *United States v. Bhagat Singh Thind*, *supra*, not to be a white person. Clearly, all of the conclusions of the Supreme Court in that case, as well as the reasons on which they are based, are equally applicable to this defendant. He admits that his ancestry, like that of other races residing in India, originally sprang from Caspian Mediterranean stock. It would seem that the most that could be claimed by him, by reason of Arabian ancestry, would be membership in the Caucasian race. This, however, manifestly would avail him nothing, under this decision of the Supreme Court.

98. *In re Hassan*, 48 F. Supp. at 845 (emphasis added) (citation omitted).

99. *Ex Parte Mohriez*, 54 F. Supp. 941 (1944).

Arab culture and its scientific contributions in algebra and medicine.<sup>100</sup> The court also analogized Arabs to Jews and concluded that because the latter have integrated with white society and have been treated sympathetically with regard to immigration, so should Arabs.<sup>101</sup> Very importantly, the court made no mention of Islam or the religious difference that was unsurmountable to the Michigan court.

It is important to remember that the experiences of Muslims trying to immigrate were not all bad.<sup>102</sup> Some Muslims were admitted as white in precisely the same way that Mr. Mohriez was, by downplaying or covering their religious affiliation and centering their cultural ties to Europe and Judeo-Christianity.<sup>103</sup> That is to say, some assimilated and passed into whiteness (however that was conceived at the given time and

100. *Id.* at 942. In *Mohriez*, Judge O'Sullivan writes magnanimously:

In the understanding of the common man the Arab people belong to that division of the white race speaking the Semitic languages. Both the learned and the unlearned would compare the Arabs with the Jews towards whose naturalization every American Congress since the first has been avowedly sympathetic.

As every schoolboy knows, the Arabs have at various times inhabited parts of Europe, lived along the Mediterranean, been contiguous to European nations and been assimilated culturally and otherwise, by them. From the Battle of Tours to the capitulation of Granada, history records the wars waged in Europe by the Arabs. The names of Avicenna and Averroes, the sciences of algebra and medicine, the population and the architecture of Spain and of Sicily, the very words of the English language, remind us as they would have reminded the Founding Fathers of the action and interaction of Arabic and non-Arabic elements of our culture. Indeed, to earlier centuries as to the twentieth century, the Arab people stand as one of the chief channels by which the traditions of white Europe, especially the ancient Greek traditions, have been carried into the present. It follows that even by the narrow criteria which were adopted in the opinions of Mr. Justice Sutherland the Arab passes muster as a white person.

*Id.* (citations omitted). However, Judge O'Sullivan is careful to make a distinction between those within the Asiatic Barred Zone and those outside it. Almost all Muslims were in the Asiatic Barred Zone, stretching from the Arabian Peninsula to the Indonesian archipelago. People from the U.S. colony of the Philippines were exempted because of the need for cheap labor in Hawaii. See Enzerink, *supra* note 90. Also, this case was decided before the establishment of the State of Israel in the British mandate of Palestine. After the establishment of that state and the influx of Europeans and displacement of Palestinians, the distinctions between Jews and Arabs in Ottoman lands—which were not so pronounced before—began to harden. For an exploration of the historiography of the founding of Israel, see Charles Glass, *Balfour, Weizman, and the Creation of Israel*, LONDON REV. BOOKS (June 7, 2001), <https://www.lrb.co.uk/the-paper/v23/n11/charles-glass/balfour-weizmann-and-the-creation-of-israel>.

101. *Mohriez* at 942.

102. NOEL MALCOLM, *USEFUL ENEMIES: THE OTTOMAN EMPIRE IN WESTERN POLITICAL THOUGHT 1450-1750* (2019) (discussing the historical understanding of Islam as alien yet comprehensible by scholars in the Middle Ages and its positive treatment).

103. See Stacy D. Farenthold, *Arab Labor Migration in the Americas, 1880–1930*, OXFORD RSCH. ENCYC. AM. HIST. (May 23, 2019), <https://oxfordre.com/americanhistorical/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-598>. There was very significant labor migration from the Ottoman-controlled Levant into the United States from 1880 through the early 1900s, as historian Stacy Farenthold demonstrates.

in the given court). Syrians, Turks, and other light-skinned Muslims were successful in gaining citizenship, establishing themselves in ethnic enclaves in New York, Michigan, and other metropolitan areas even while others were not successful.<sup>104</sup> One of the hallmarks of the immigration cases during this period are the inconsistent holdings from different courts regarding the whiteness of petitioners, the consequence of which was the absurdity that people who were essentially from the same ethnic background could be white in one court and not in another.<sup>105</sup>

It is not just happenstance or law's indeterminacy that explains the inconsistency; it is also the political context. Moustafa Bayoumi notes that the judge in *Mohriez* explicitly remarked upon the geopolitical position of the United States during WWII which also brought changes to the United States stance towards Chinese immigrants even as it interned its Japanese citizens.<sup>106</sup> The *Mohriez* case was decided as the civil rights movement was gearing up domestically and communist critics internationally were pointing out the racist treatment of colored peoples in the United States.<sup>107</sup> Americans could hardly point out the mote of repression in the communist eye while ignoring the Jim Crow beam in their own. This political context explains the more expansive view taken by the judge in *Mohriez*.

Whiteness was not the only avenue by which applicants could gain access to citizenship. In recent scholarship, it has been noted that Bengalis tried to fit themselves into the binary color framework as Black.<sup>108</sup> Once they were in the United States, they passed as Black and intermarried into the Black and Puerto Rican communities.<sup>109</sup> After the Supreme Court decision in *Thind* made it clear that Indians were not white,<sup>110</sup> this was the only other avenue left to Bengalis who sought a place in the United States, even if it meant taking on the burdens of a profound and

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104. *See id.*

105. *See generally* HANEY LÓPEZ, *supra* note 91. *See also* John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000).

106. Moustafa Bayoumi, *Racing Religion*, 6 NEW CENTENNIAL REV. 267 (2006).

107. Julia Joffe, *The History of Russian Involvement in America's Race Wars*, ATLANTIC (Oct. 21, 2017), <https://www.theatlantic.com/international/archive/2017/10/russia-facebook-race/542796>; THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* 239–40 (2001).

108. *See* VIVEK BALD, *BENGALI HARLEM AND THE LOST HISTORIES OF SOUTH ASIAN AMERICA* 1–11 (2015).

109. *Id.* at 49–93. While this is a fictional account, the show *Pigeonhole: The Life and Times of Bobby Alam* explores this history to show the complex ways in which South Asians assimilated into the United States. Not all attempted to become white or aspired to it. *See Pigeonhole Looks at Bengalis Who Passed as Black to Survive*, WNYC (June 2019), <https://www.wnyc.org/story/unknown-story-bengali-people-who-passed-black-americans-art-form>. There are also examples of Black Americans who passed as Indian, like jazz musician Korla Pandit.

110. *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923).

brutalizing anti-Black racism.

Among the Indian Muslims who arrived in the early twentieth century was Dr. Mufti Muhammad Sadiq, an Ahmaddiya Muslim missionary.<sup>111</sup> It is not clear whether he claimed to be white or Black, but he did eventually clear immigration, possibly because he was immigrating from Liverpool rather than directly from the British colony in India.<sup>112</sup> Arriving in February 1920, he was placed in detention and denied entry because his religion permitted polygamy. He spent nearly two months incarcerated and was released because he promised not to practice plural marriage.<sup>113</sup> While in detention, he converted several fellow prisoners to his sect of Islam. Once out of detention, Sadiq went on to convert Marcus Garvey, the leader of the United Negro Improvement Association (“UNIA”), and to influence the renaissance of a more public Islam among Black Americans.<sup>114</sup> There was also a reforged link between Islam and Black identity.

### iii. Civil Rights and the Re-emergence of Islam

The UNIA, with its thousands of followers globally, was one channel by which Islam re-emerged among Black American communities.<sup>115</sup> The Nation of Islam was another. As Marie Failinger writes:

Timothy Drew established the Moorish Science Temple in Chicago in 1925, claiming that African-Americans were of Moorish (Moroccan) and Asiatic descent, and that Islam was the original religion of his people. . . . Wallace D. Fard established the Nation of Islam in 1930, recruiting . . . Elijah Muhammed . . . as his successor.<sup>116</sup>

The Nation of Islam (“NOI”) also taught that enslaved people and their

111. GHULAM MISBAH, *RETRACING HAZRAT MUFTI MUHAMMAD SADIQ'S TRAVELS IN AMERICA*, AL HAKAM (APR. 20, 2020), <https://www.alhakam.org/retracing-hazrat-mufti-muhammad-sadiqs-travels-in-america>.

112. *Id.*

113. *Id.* This association of Muslims with polygamy has deep historical roots in prejudices against “Asiatics” and “Africans.” In the mid-1800s, the Supreme Court opined in *Reynolds v. United States* that “[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.” 98 U.S. 145, 164 (1879). Eschewing polygamy remains a requisite to obtaining U.S. citizenship. *See e.g.*, *United States v. Ali*, 557 F.3d 715 (6th Cir. 2009).

114. *See* Robert Dannin, *Islam and Black Emancipation*, MARGINALIA REV. BOOKS (May 25, 2018), <https://themarginaliareview.com/the-ontology-of-black-emancipation> (reviewing PATRICK D. BOWEN, *A HISTORY OF CONVERSION TO ISLAM IN THE UNITED STATES, VOL. 2: THE AFRICAN AMERICAN ISLAMIC RENAISSANCE, 1920-1975* (2017)). Even now, there are prominent Black American Ahmedi Muslims like Mahershala Ali.

115. *Id.*

116. Marie A. Failinger, *Islam in the Mind of American Courts: 1800 to 1960*, 32 B.C. J. L. & SOC. JUST. 1, 6–7 (2012).

descendants were deprived of Islam by white Christian slaveholders, a claim that has, in fact, been borne out by history even if not for most enslaved people.<sup>117</sup>

The NOI's most galvanizing and well-known preacher, Malcolm X, needs little introduction. His evolution from a fiery spokesman for the Nation, the breach with Elijah Muhammad, his conversion to mainstream Sunni Islam, and his relentless civil rights activism are all very well known.<sup>118</sup> Malcolm X, more than any other person or event, with perhaps the exception of Muhammad Ali, brought Islam to the forefront of the public's attention in the 1960s civil rights era.<sup>119</sup> While his early speeches followed the teachings of Elijah Muhammad, after Malcom X's silencing by the NOI and subsequent departure in 1964, his theological foundation shifted.<sup>120</sup> He embraced orthodox Sunnism and eventually softened his stance against white people as a race, bringing himself in line with more mainstream Islam that eschews racial distinctions as a matter of theology.<sup>121</sup> Malcolm X's fiery speeches were perhaps the first instance

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117. See Abdin Chande, *Islam in the African American Community: Negotiating Between Black Nationalism and Historical Islam*, 47 ISLAMIC STUDIES 221, 222–24 (2008). See generally ELIJAH MUHAMMAD, MESSAGE TO THE BLACK MAN IN AMERICA (2012). See Alaina Morgan, *Reclaiming Blackness and Muslim Identity*, AAIHS (Jan. 2018), <https://www.aaihs.org/reclaiming-blackness-and-islamic-identity> (reiterating the tendency of Muslim immigrants to argue for a white identity). Morgan points out that:

Yet we do not see any cases in which there is an immigrant who spends his time, money, and resources to argue that he is Black even, as in the case of Hassan, when it would have been an easier burden. These petitioners would rather make complex and sometimes contradictory legal arguments to argue for whiteness. As a matter of practicality, however, who could blame these petitioners for attempting to position themselves with every advantage possible? If immigrants did not know about the position of African-Americans before immigrating to the United States, they certainly made these observations once they were in the country.

More historical research needs to be done to unearth how some Asians passed as Black, as mentioned above. In addition, we have the odd story of African Americans who passed as Indians, such as Korla Pandit, a famous jazz musician. Morgan goes on to opine about the realities of taking on the burdens of Blackness. While the critique of Asians and Arabs identifying with whiteness is apt, it should be noted that Blacks themselves passing into whiteness was not an uncommon occurrence. The pressure to assimilate into whiteness and gain its advantages acted on all racialized groups.

118. See MALCOLM X & ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X (2015); MANNING MARABLE, MALCOLM X: A LIFE OF REINVENTION (2011).

119. The relationship between Muhammad Ali and Malcolm X was recently revisited in film. See, e.g., Meilan Solly, *The True History Behind 'One Night in Miami'*, in SMITHSONIAN MAG. (Jan. 15, 2021), <https://www.smithsonianmag.com/history/true-history-behind-one-night-miami-180976768>.

120. See MARABLE, *supra* note 118, at 297–320.

121. Asma Afsaruddin, *Islam's Anti-Racist Message from the 7th Century Still Resonates Today*, CONVERSATION (July 6, 2020), <https://theconversation.com/islams-anti-racist-message-from-the-7th-century-still-resonates-today-141575>. In the last speech given to Muslims by the Prophet before his death, he said: "All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over black nor a black has any superiority over white except by piety (taqwa) and good action." *The Last Sermon of the Prophet* THE ARAB NEWS

of the state security agencies linking Islam with radicalism and even violence.<sup>122</sup> While Martin Luther King, Jr. was also surveilled, his avowed non-violence and mainstream Christianity was much easier to understand and easier for many whites to support. As Malcolm X pointed out, Islam was not a religion that advocated turning the other cheek, a demand for forbearance and forgiveness that even now is an expected response to racial violence. Rather, he said:

There's nothing in our book, the Quran — you call it “Ko-ran” — that teaches us to suffer peacefully. Our religion teaches us to be intelligent. Be peaceful, be courteous, obey the law, respect everyone; but if someone puts his hand on you, send him to the cemetery. That's a good religion. In fact, that's that old-time religion. That's the one that Ma and Pa used to talk about: an eye for an eye, and a tooth for a tooth, and a head for a head, and a life for a life[.] That's a good religion. And doesn't nobody resent that kind of religion being taught but a wolf, who intends to make you his meal.<sup>123</sup>

This is the sort of incendiary speech Malcolm X had been making for a decade. His prerequisite for reconciliation with whites was equality, justice, and human rights.<sup>124</sup> He did not think that any of these could be achieved with a strict program of nonviolence, and he criticized Dr. King Jr. for what he perceived as failures.<sup>125</sup>

Even after his assassination in 1965 and until the 1970s, Malcolm X and the NOI were the most visible faces of Islam in the United States.<sup>126</sup> The conversion and prominence of Black activists like Imam Jamil Abdullah Al-Amin (H. Rap Brown), who was a chairman of Student Nonviolent Coordinating Committee, also linked Islam to Black radical politics. That

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*available at* <https://www.arabnews.com/news/467364>. While Muslim communities differ in how they experience racism, and there are many criticisms of anti-Blackness and anti-South Asian prejudice, the theological understanding is one of equality. As Afsaruddin intimates, this teaching requires Muslims to not only confront their own racism but to work in solidarity to dismantle all forms of racial subordination.

122. Diouf makes an interesting link between Muslims and slave rebellions. While no unbroken link in Black Islam in America can be made, this coupling of Islam and rebellion in the 20th century may have a distant echo in the 18th and 19th centuries. *See* Diouf, *supra* note 71. FBI files on Malcolm X can be found at *FBI Records: The Vault*, FBI.GOV, <https://vault.fbi.gov/malcolm-little-malcolm-x>; (last visited June 28, 2021). FBI files on Dr. King Jr., can be found at *FBI Records: The Vault*, FBI.GOV, <https://vault.fbi.gov/Martin%20Luther%20King%2C%20Jr./Martin%20Luther%20King%2C%20Jr.%20Part%201%20of%202/view> (last visited June 28, 2021).

123. Malcolm X, *Message to the Grassroots*, BLACKPAST (Dec. 10, 1963), <https://www.blackpast.org/african-american-history/speeches-african-american-history/1963-malcolm-x-message-grassroots>.

124. *See generally* MALCOLM X, FEBRUARY 1965: THE FINAL SPEECHES (1992).

125. MICHAEL E. SAWYER, BLACK MINDED: THE POLITICAL PHILOSOPHY OF MALCOLM X, 18–19 (2020). Of course, Dr. King, Jr., had searing critiques of American economic and race policy as well as its involvement in Vietnam. *See* DR. MARTIN LUTHER KING, JR., THE RADICAL KING (Cornel West, ed., 2016).

126. *See* Failing, *supra* note 116, at 39–46.

link, though not as prominent in the mainstream now, continues to the present through the artistry of Black Muslim rappers like Q-Tip, Talib Kweli, Yasin Bey/Mos Def, Raekwon of The Wu-Tang Clan, Ice Cube, Busta Rhymes, Questlove and Black Thought of The Roots, Miss Undastood, Sakinah and Zakiyya Rahman of Aint Afraid.<sup>127</sup> Aina Khan writes, “As Harry Allen from Public Enemy once remarked, ‘If hip-hop has an official religion, it is Islam.’<sup>128</sup> And in the words of Method Man:

The street life is the only life I know  
I live by the code style—it’s mad—P.L.O.  
Iranian thoughts and cover like an Arabian  
Grab the n[\*\*\*\*] on the spot and put a nine to his cranium<sup>129</sup>

Conversions by prominent celebrities like Muhammad Ali and Kareem Abdul Jabbar also spotlighted Islam as a Black religion. Even as immigration from Asia brought other Muslims to the United States, it would be over a decade before Islam returned to the spotlight in a sustained way during the Iranian revolution.<sup>130</sup> In the decades between the Iranian revolution and the war on terror, in the popular imagination, Islam was linked to the NOI at home and to decolonial violence abroad. Others have argued that Islam has been on these shores for centuries, that the presence of African Muslims negates the claim that Islam is a new religion in America, and that Black identity is rarely seen as Muslim identity.<sup>131</sup> This article’s argument is categorically different; it is about the understanding of Islam itself as a non-white religion. There is ample evidence that Europeans saw it as a Black religion. One only has to read *Othello*. From the late nineteenth century to the mid-1900s, a shift began to take place in American perceptions of the racial character of Muslims and Islam.

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127. See Sidney Madden, *22 Rappers Who Are Muslim*, XXL MAG. (June 13, 2016), <https://www.xxlmag.com/muslim-rappers>. See also Aina Khan, *Meet the New Generation of Black, Female, Muslim Emcees*, VOGUE (Mar. 27, 2021), <https://en.vogue.me/culture/black-female-muslim-emcees>. Among hip hop and rap artists, Islamic references are common. For example, in the opening line of Lauryn Hill’s “Doo Wop (That Thing),” she sings, “Yo, my men and my women; Don’t forget about the deen, Sirat al-Mustaqim, Yo, it’s about a thing.” The “deen” is the faith and the “Sirat al-Mustaqim” is the straight path of the religion that Muslims are required to follow. Black Muslim rappers have offered a scathing political critique of police violence, mass incarceration, and the war on terror. For instance, Hisham Aidi notes the fear of the spread of Islam among Black Americans. Hisham Aidi, *Jihadis in the Hood: Race, Urban Islam and the War on Terror*, 224 MERIP (Fall 2002), <https://merip.org/2002/09/jihadis-in-the-hood>. “For over a century, African-American thinkers — Muslim and non-Muslim — have attempted to harness the black struggle to global Islam, while leaders in the Islamic world have tried to yoke their political causes to African-American liberation.” See also SU’AD ABDUL KHABEER, *MUSLIM COOL: RACE, RELIGION, AND HIP HOP IN THE UNITED STATES* (2016).

128. See Khan, *supra* note 127.

129. METHOD MAN, P.L.O. STYLE (Def Jam Recordings 1994).

130. See EDWARD SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD*, 95–110 (1997).

131. See Morgan, *supra* note 117.



## 2. Thread 2: Mid-Century American Orientalism and Alienating Islam

The second strand of the genealogy of Islam-as-race is a particular brand of Orientalism that developed in the United States in early twentieth century.<sup>132</sup> American Orientalism is based on Edward Said's seminal work on Europe's relationship with the Middle East, *Orientalism*,<sup>133</sup> and then on later works like *Covering Islam* and *Culture and Imperialism* which cover the United States' encounter with that part of the world in the twentieth century.<sup>134</sup> As it pertains to Islam-as-race, American Orientalism builds on the European historical episteme of Islam's alienness and couples it with its own significant political and cultural production of Islam and Arabs as stereotypes of backward, lascivious, venal others.<sup>135</sup> The political ideologies of superiority are exemplified by the "clash of civilizations" thesis advanced by Bernard Lewis and Samuel Huntington.<sup>136</sup> In this strand, both the cultural and the political production of Islam and the difference of Muslims are important.

Before discussing American Orientalism, it is important to review the concept of Orientalism as it was originally theorized by Edward Said. Said defines Orientalism in several ways. First, he defines Orientalism as the study of "the Orient," – by which he means the Middle East – by the scholars and state agents engaged with governing the region and peoples.<sup>137</sup> More relevant to the argument are his second and third definitions. The second, more general meaning Said describes is: "Orientalism is a style of thought based upon an ontological and epistemological distinction made between 'the Orient' and (most of the

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132. DOUGLAS LITTLE, AMERICAN ORIENTALISM: THE UNITED STATES AND THE MIDDLE EAST SINCE 1945 (2008).

133. EDWARD SAID, ORIENTALISM (1979). See also SAID, *supra* note 130.

134. EDWARD SAID, CULTURE AND IMPERIALISM (1994).

135. *Id.*

136. See Huntington, *infra* note 173. See also Bernard Lewis, *The Roots of Muslim Rage*, ATLANTIC (Sept. 1990), <https://www.theatlantic.com/magazine/archive/1990/09/the-roots-of-muslim-rage/304643>. But see Edward Said, *A Clash of Ignorance*, NATION (Oct. 2001), <https://www.thenation.com/article/archive/clash-ignorance>. Said trenchantly notes about both Huntington's and Lewis's articles:

In both articles, the personification of enormous entities called "the West" and "Islam" is recklessly affirmed, as if hugely complicated matters like identity and culture existed in a cartoonlike world where Popeye and Bluto bash each other mercilessly, with one always more virtuous pugilist getting the upper hand over his adversary. Certainly neither Huntington nor Lewis has much time to spare for the internal dynamics and plurality of every civilization, or for the fact that the major contest in most modern cultures concerns the definition or interpretation of each culture, or for the unattractive possibility that a great deal of demagoguery and downright ignorance is involved in presuming to speak for a whole religion or civilization. No, the West is the West, and Islam Islam.

137. See SAID, *supra* note 131, at 2.

time) “the Occident.”<sup>138</sup> In the third, more historical and material definition, Said states:

Orientalism can be discussed and analyzed as a corporate institution for dealing with the Orient—dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it: in short, *Orientalism as a Western style for dominating, restructuring, and having authority over the Orient*. . . . My contention is that without examining Orientalism as a discourse one cannot possibly understand the enormously systematic discipline with which European culture was able to manage—and even produce—the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period.<sup>139</sup>

Even though the United States’ historical experience with the “Orient” that is the Middle East and South Asia is shallower than that of Europe, what American scholars and experts *know* about Islam and Muslims is deeply influenced by European Orientalism, particularly the perspectives of British imperialists.<sup>140</sup> Islam-as-race is based on an “ontological and epistemological distinction” between Islam and Judeo-Christianity.<sup>141</sup> Islamicized peoples and Islam are produced through cultural, political, and legal statements, studies, depictions, and redefinitions as different than the white American and European inheritors of secular Enlightenment civilization.

#### i. American Orientalism and Social Constructions of Muslims

Historian Douglas Little discusses American Orientalism in his book, *American Orientalism*.<sup>142</sup> Tracing the history of American knowledge of the Orient and the Muslim world, Little notes that in the 1800s, the little white Americans knew about the religion, the peoples, and the lands came from the Bible, *A Thousand and One Nights*, and Mark Twain’s *Innocents Abroad*.<sup>143</sup> The popular opinion was that the Muslim world was a barbaric backwater beset by despotism and debauchery. Sensationalist accounts of white people enslaved by Turks helped propagate these disparaging, though titillating, views. Conflict between the Ottoman Empire and Europe was framed as part of an ongoing crusade of Christians against

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138. *Id.* (emphasis added).

139. *Id.* at 3.

140. See LITTLE, *supra* note 132, at 10; John B. Judis, *Bush’s Neo-Imperialist War*, AM. PROSPECT (Oct. 19, 2007), <https://prospect.org/features/bush-s-neo-imperialist-war>.

141. See ORIENTALISM *supra* note 133 at 3.

142. See *id.* See also Vivek Bald, *American Orientalism*, DISSENT MAG. (Spring 2015), <https://www.dissentmagazine.org/article/american-orientalism>.

143. See LITTLE, *supra* note 132, at 11–14.

the “Mohammedans.” During these times, the racial hierarchy placed Muslims and Jews near the bottom.<sup>144</sup> But at the start of the twentieth century, with the activism for a Jewish homeland and the increasing acceptance of European Jews as European, Jews were no longer automatically included with Muslims.<sup>145</sup> This decoupling of Jews and Muslims in the modern formulation of Judeo-Christianity is further discussed below.<sup>146</sup>

In addition, during this time, Hollywood films like *The Thief of Baghdad* and literature like Leon Uris’s *Exodus* and *The Haj*, as well as James Michener’s *The Source*, continued to reinscribe these racist views about Arabs and Islam.<sup>147</sup> Little notes that it was *The National Geographic*, more than any other popular media, that really did the heavy lifting in terms of not-so-subtly imparting anti-Arab and anti-Muslim racism through its travel journalism.<sup>148</sup> Its reporting over decades depicted the Arab world as hopelessly backwards, derelict, superstitious, and irrational.<sup>149</sup> In *Reel Bad Arabs*, Jack Shaheen exposes how popular media has continued to use these American-made anti-Arab stereotypes to sell box office tickets world-wide.<sup>150</sup> An example of this was the appalling original lyrics to the Disney film *Aladdin*, set in a pre-modern Arabia fictionalized into Agrabah, “where they cut off your ear if they don’t like your face; it’s barbaric, but hey, it’s home.”<sup>151</sup>

It is important to remember that one of Said’s key insights is that Orientalism has less to do with the realities of colonized lands and peoples and their subjective experience than with a reflection of the fears, the imagination, and the political exigencies of the producers of such stereotypes.<sup>152</sup> In that sense, it is very much like the creation of Blackness and race as a projection of the fears of white America.

144. *Id.* at 11, 12.

145. *Id.* at 14–17.

146. *See infra* notes 104–14 and accompanying text.

147. *See* LITTLE, *supra* note 132, at 17–26.

148. *Id.*

149. *Id.* at 18. Little writes that in the 1920-30s:

*National Geographic* published nearly a dozen articles highlighting the widening political and cultural gap between Occident and Orient in the Middle East. A December 1927 article titled ‘East of Suez to the Mount of the Decalogue,’ for example, focused on the ‘fatalistic and irresponsible Arabs’ who wandered the Sinai Desert as childlike camel jockeys, shunning Western technology and embracing Mohammedan superstition.

*Id.* at 18.

150. JACK SHAHEEN, *REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE* (2012).

151. John Evan Froom, ‘*Aladdin*’ Lyrics Altered, *VARIETY* (July 12, 1993), <https://variety.com/1993/film/news/aladdin-lyrics-altered-108628>.

152. *See* Said, *supra* note 130, for an analysis of the politics.

Anti-Indian animus also played into American Orientalism. Vivek Bald reminds us that from the late 1800s until the enactment of the Asiatic Barred Zone, west coast Americans argued vigorously against Indian immigration, worrying about the “dusky peril” and beturbaned hordes taking over their lands.<sup>153</sup> Paradoxically, while Americans were attempting to exclude or expel Indians, they were also consuming Indian goods from textiles to Eastern spirituality.<sup>154</sup> Owning Indian products became a marker of modernity and exotic luxury reminiscent of dancing girls and rajahs.<sup>155</sup> Yet the disconnect between reality and fantasy remains at the heart of Orientalism.<sup>156</sup> In other words, American understanding of Muslims, Islam, and the places they inhabit bears a disregard for real Muslims. It is a thin, prejudice-laden misunderstanding of a constructed monolithic Islam, and an ignorance of countries ranging from the Middle East to the Indonesian Archipelago to North, East, and West Africa. The knowledge produced by European and American corporate institutions is, however, always considered more objective and valid than anything the “natives” say about themselves. Thus, those natives cannot even refute the inaccuracies because of their ignorance at best, or mendacity at worst.<sup>157</sup>

## ii. The West and the Rest:

### An Alien Despotic Islam as Judeo-Christian Democracy’s Other

The United States has been deeply involved in the Middle East since World War II. From the investments in oil,<sup>158</sup> the founding of Israel,<sup>159</sup> and more recently, the military interventions across the region,<sup>160</sup> the

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153. See Bald, *supra* note 142.

154. *Id.* See also JONATHAN EACOTT, *SELLING EMPIRE: INDIA IN THE MAKING OF BRITAIN AND AMERICA, 1600-1830* (2016) (discussing the textile and cotton trade among Britain, British India, and colonial America).

155. See, e.g., DELPLATO, *supra* note 84.

156. See Ali Behdad, *Orientalist Desire, Desire of the Orient*, 15 *FRENCH F.* 37, 46–49 (1990).

157. See, e.g., Aymann Ismail & Jeffrey Bloomer, *Why the Far Right Believes Every Muslim—Including Me—Is a Liar*, *SLATE* (May 18, 2018), <https://slate.com/news-and-politics/2018/05/why-conservatives-think-taqiyya-means-all-muslims-are-lying.html>; Reem Bahdi, “*All Arabs are Liars*”: *Arab and Muslim Stereotypes in Canadian Human Right Law*, 31 *J. L. & SOC. POL’Y.* 5, 114–15 (2019) (examining stereotypes in human rights cases).

158. See LITTLE, *supra* note 132, at 43–75 (on the establishment of oil interests in the Middle East).

159. See *id.* at 77–115 (discussing America’s special relationship with Israel).

160. See JEREMY SALT, *THE UNMAKING OF THE MIDDLE EAST: A HISTORY OF WESTERN DISORDER IN ARAB LANDS* (2009); RASHID KHALIDI, *RESURRECTING EMPIRE: WESTERN FOOTPRINTS AND AMERICA’S PERILOUS PATH IN THE MIDDLE EAST* (2005); Cyra Akila Choudhury, *Comprehending “Our” Violence: Reflections on the Liberal Universalist Tradition, National Identity and the War on Iraq*, 3 *MUSLIM WORLD J. HUM. RTS.* 1 (2006). For the role of Orientalism in international law, see, e.g., Richard Falk, *Orientalism and International Law: A Matter of Contemporary Urgency* 7 *ARAB WORLD GEOGRAPHER* 103 (2004).

United States has relied on precisely the kind of corporate institutional knowledge for portraying the Orient as a problem and then justifying the intervention that Said had in mind.<sup>161</sup> In the post 9/11 era, so-called experts have proliferated, claiming specialized knowledge that they then disseminate across the country in law enforcement agencies, the military, and every strata of state and local government. These experts recast old political American Orientalist shibboleths that divorce Islam from an invented tradition called Judeo-Christianity and render Islam in opposition to democracy to suit their needs.<sup>162</sup> In doing so, they keep current the view of Islam and Muslims as an invasive threat.

It is impossible to understand the Orientalist component of Islam-as-race in the United States without examining the construction of ‘Judeo-Christianity’ in opposition to Islam.<sup>163</sup> Unlike the positioning of Christianity as the religion of civilization discussed above, this coupling of Jewish and Christian traditions is a later product that is much more visible and operative from shortly before the start of World War II onwards. In this formation of a singular, contiguous, religious tradition, the long history of persecution and racial othering of Jews by Christians is neatly obscured.<sup>164</sup> Also obscured, in favor of a European history, is the longstanding historical co-existence of Jews, Christians, and Muslims and their shared histories in the Near East and the Indian subcontinent.<sup>165</sup> Finally, Islam’s foundational contributions to Western civilization in science, architecture, philosophy, and mathematics, without which there would simply be no Enlightenment, is entirely erased in the process of expelling Islam from the West.<sup>166</sup>

[I]t was this new alliance between liberal Protestants and Jews, and “some Catholics in tow,” that produced the new configuration in the early 1940s of Christianity and Judaism being “religions of democracy” against the tide of secularism, Soviet Communism, and Nazism. With the increasing American deployment of Muslims and “Islam” as a “threat” to the American “way of life,” including American “freedoms,” and

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161. See KHALIDI, *supra* note 160, at vi–viii.

162. TOMOKO MUSAZAWA, *THE INVENTION OF WORLD RELIGIONS* 301 (2005). *SEE GENERALLY* LOUIS FINKELSTEIN ET AL., *THE RELIGIONS OF DEMOCRACY* (1941).

163. See MUSAZAWA, *supra* note 162, at 301–02.

164. See JOSEPH A. MASSAD, *ISLAM IN LIBERALISM* 29 (2015).

165. *Id.*; *The Amazing Muslim Caretakers of Calcutta’s Remaining Synagogues*, *JEWISH STANDARD* (Nov. 6, 2016), <https://jewishstandard.timesofisrael.com/the-amazing-muslim-caretakers-of-calcuttas-remaining-synagogues>.

166. There are now dozens of books about Islamic philosophy, science, medicine and art. For example, AHMED RAGAB, *THE MEDIEVAL ISLAMIC HOSPITAL: MEDICINE, RELIGION, AND CHARITY* (2018); KHALED EL-ROUAYHEB, *ISLAMIC INTELLECTUAL HISTORY IN THE SEVENTEENTH CENTURY: SCHOLARLY CURRENTS IN THE OTTOMAN EMPIRE AND THE MAGHREB* (2015); HENRY CORBIN, *A HISTORY OF ISLAMIC PHILOSOPHY* (2014); JIM AL-KHALILI, *THE HOUSE OF WISDOM: HOW ARABIC SCIENCE SAVED ANCIENT KNOWLEDGE AND GAVE US THE RENAISSANCE* (2012).

“democracy,” which was earnestly deployed in the wake of the Iranian Revolution, this discourse would be affirmed with renewed strength in the wake of 9/11, giving rise to what is now identified as Islamophobia.<sup>167</sup>

While it is beyond the scope of this article to provide a detailed account of these shifts, suffice it to say that the construction of a singular Judeo-Christian tradition and the erasure of the history of non-European Jews also deftly accomplished the conscription of European Jews into “whiteness.” That sleight of hand becomes visible and raises questions each time white supremacist antisemitism rears its head.<sup>168</sup>

In this self-making, the modern American iteration of Orientalism can be read as a Manichean divide in which America, peace, democracy, and human rights exist on one side while the Orient, Oriental despotism or authoritarianism, violence, and barbarism exists on the other.<sup>169</sup> The former is justified in administering therapeutic violence to the latter in order to civilize it or keep it at bay. Thus, the production of Orientalist institutions in the United States advances the justificatory discourse of violent intervention in ways reminiscent of the *mission civilisatrice* of European colonialism.<sup>170</sup> It is of no small import that a theorist as respected as Alexis de Tocqueville could on one hand decry the treatment of Native Americans in the New World and justify the razzias that killed thousands of Berbers and Arabs in Algeria as necessary.<sup>171</sup> In political theory as well as French literature, the Arab remains faceless and has nothing of the “noble savage”<sup>172</sup> about him, he is simply a savage. In such a worldview, violence is required to make the Arab into a civilized human.

Even though the views about Islam and Arabs were not uniformly negative, Orientalism is a key ingredient of the present-day construct of a non-white Islam-as-race and any historical solicitude towards Islam has faded with the imperial ambitions of the twentieth century.<sup>172</sup> After the fall of communism, America no longer needed to demonstrate that it was welcoming of people of color as it did during World War II. During that period, many Muslim populations in Asia and Africa were struggling for

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167. See MASSAD, *supra* note 164, at 29.

168. See KATHLEEN BELEW, *BRING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA* 6–10 (2019).

169. It should be noted that Said’s point here is that Orientalism produces not just the “Orient” but also the “Occident.” Unlike some theorists who misread Said as producing the “West” himself by essentializing, Said is pointing us to the ways in which Orientalism is “self-making.” To charge him with producing an “ideal type” and an essential “West” or “Western culture” misunderstands his purpose in critiquing the colonial expertise produced, sometimes divorced from actual experience (for example, J.S. Mill on India) from a defensive posture.

170. See Choudhury, *supra* note 160.

171. *Id.* See Hassane Sobhi, *Tocqueville and Colonialism in Algeria*, 45 *REV. MIDDLE EAST STUDS.* 50 (2011).

172. See MALCOLM, *supra* note 102.

independence and found the U.S.S.R. more appealing than the United States. The struggle for dominance and spheres of influence led to the United States being sensitive to criticism about its internal racial injustice by decolonial movements in Asia and Africa. Furthermore arguments by the U.S.S.R. that the Americans were hypocrites and cared nothing for peoples in the Global South were also cause for embarrassment. In the waning days of the Cold War, once it had been defeated in Eastern Europe, a triumphant liberal democracy found Islam as a viable replacement for communism as a global threat.

The theory that Islam is incompatible with democracy, Enlightenment liberalism, and the West in general was encapsulated in Bernard Lewis's work and then taken up by Samuel Huntington in his famous "clash of civilizations" thesis.<sup>173</sup> As is well known by now, that thesis posits that Islam and the West are two separate civilizations that are opposed to each other, often violently. Huntington's essentialist and reductive approach makes no distinction between violence that is engaged on equal footing, violence that is perpetrated by dominant Muslim powers, and violence that is done to subordinated Muslims, including to Muslim women and children:

In Eurasia the great historic fault lines between civilizations are once more aflame. This is particularly true along the boundaries of the crescent shaped Islamic block of nations from the bulge of Africa to [C]entral Asia. Violence also occurs between Muslims, on the one hand, and Orthodox Serbs in the Balkans, Jews in Israel, Hindus in India, Buddhists in Burma and Catholics in the Philippines. Islam has bloody borders.<sup>174</sup>

This argument that replaces communism with Islam as the global bogeyman has enormous attraction for those already predisposed to Islamophobia. Reflecting this essentialist perspective, in the pursuit of empire, recent American invasions often include the view that Muslims in invaded lands are racially different than those who invade. The racist stereotypes used to describe the "natives" in the Muslim world are the same ones used in the United States to alienate immigrant Muslims, to render them separate and unassimilable even though they are already a highly assimilated immigrant population.<sup>175</sup> In the aftermath of political violence abroad, every administration in the United States—Republican

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173. See, Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFFS., 21 (1993).

174. *Id.* In this list, almost every example is one where Muslims have faced genocidal violence from others, but this construction appears to render them perpetrators and not victims, which is a classic Orientalizing move.

175. *Id.* See also John Sides & Kimberly Gross, *Stereotypes of Muslims and Support for the War on Terror*, 75 J. POL. 583 (2013). One third of Muslims in the United States are born in this country, a substantial percentage are professionals, educated, and speak English. See generally, "American Muslims 101," IPSU available at <https://www.ispu.org/american-muslims-101/>

and Democrat—has used surveillance and registration of Muslims to manage the perceived internal threat. As Abed Ayoub argues, starting with Operation Boulder in the Nixon administration to the National Security Entry and Exist Registration System in the post 9/11 era, the far enemy of the Islamist terrorist is feared to be the near enemy at home.<sup>176</sup> For the past fifty years, Muslims have been subject to scrutiny, arrest, incarceration, and deportation based on terrorism charges even when they have committed no violent acts.<sup>177</sup>

American Orientalism weaves in the particularities of Islam into the shifting definitions of race as applied to Arabs at different times. Thus, alienating Islam and Muslims is achieved not only by constructing them only as racially different but also rendering their religion as part of that difference just as the *Reynolds* Court recognized over a century ago.<sup>178</sup> Islam is, once again, the racializing means, the religion and identity of non-white people. With the resumption of immigration from majority Muslim lands, Islam once again becomes a religion of Brown and Black aliens who must be assimilated and not just of U.S. born, inner-city Black radicals.

Before discussing the final thread of the genealogy, it is worth noting that Orientalism, as expounded by Said, was focused on the Middle East primarily, but its reach extended to all of Asia. Africa, with the exception of North Africa, has been left out of the Orient. However, the same practices were used in sub-Saharan Africa by colonial authorities tasked with managing a subject population. The same so-called knowledge about the barbarism, the primitiveness, and the backwardness of Africa and Africans was used to justify their domination. The white man's burden was to civilize the entire non-European world.

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176. Abed A. Ayoub, *A Muslim Registry: A Look at Past Practices and What May Come Next*, in *ISLAMOPHOBIA AND THE LAW* 153–68 (Choudhury & Beydoun., eds., 2020).

177. See Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429, 466–69 (2011); *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions*, HUM. RTS. WATCH (July 21, 2014), <https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions>; Charles Kurzman, *Muslim-American Involvement with Violent Extremism, 2001-2020*, DUKE SANFORD TRIANGLE CTR. ON TERRORISM & HOMELAND SEC. (Jan. 14, 2021), <https://duke.app.box.com/s/eddzx4rh6gtga4b636npmhv7by0jksce>.

Muslim-American extremists caused no fatalities in 2020. The total number of fatalities in the United States from Muslim-American violent extremism since 9/11 remained at 141. Over this same period, there have been more than 309,000 murders in the United States. In other words, the number of fatalities caused by acts of violent extremism by Muslim-Americans in 19 years is about the same as the number of murders that take place every three days in the United States. In 2020 alone, 179 Americans were killed in mass killings, according to the federal definition of mass killing as incidents involving three or more fatalities.

*Id.* at 2.

178. See *supra* notes 85 and accompanying text.



*3. Thread 3: Combatting Terrorism with Racism:  
Islam-as-Race and the Visible Muslim*

The final thread of this genealogy brings us to the present. Established practices of racism—forged in colonialism and slavery—act against a new subject population, and the developing identity of the Islamicized begins to cohere and indicate the formation of a race. In this third thread of the genealogy, the continuity that Islam is a non-white religion is underscored by tightening the nexus between it and the identities of its practitioners from Black to Arab and now to an amalgam of Others including people who seem white but are raced as non-white increasingly homogenized on the basis of Islam. The discussion below shows how Islam as a Black and Brown religion, one that is categorically opposed to Western values, continues its journey into becoming a terrorist ideology and identity. The intersectional cosynthetic identity and an emergent Islam-as-race co-produce each other. Here we see how the practices of racism concentrate on people with a shared link to Islam to create a racial group. Once Islam itself has become the problem, Muslims cannot assimilate. They become a permanent subordinated group like other races while Islamicization sweeps in those even those Muslims who do not, and do not have to, practice the religion of Islam.

i. From the Oklahoma City Bombing to the Present:  
Protecting the Homeland

In the 1980s, the United States government began to increasingly worry about terrorism in the wake of the Iranian revolution and the hostage crisis. As noted above, this fear resulted in every administration from Nixon onwards establishing surveillance and registration programs directed primarily at Iranians and Arabs but also Muslims from other parts of the world.<sup>179</sup> The first World Trade Center bombing in 1993 exposed that we had, in fact, given asylum to terrorists.<sup>180</sup> But despite being a small fraction of the people committing terrorism in America,<sup>181</sup> through popular depictions and political fearmongering, Arabs became the stereotypical terrorists: the Hollywood stereotype of the hook-nosed, unshaven, keffiyeh wearing, Yasir Arafat look-alike.<sup>182</sup>

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179. See *supra* note 176 and accompanying text.

180. *World Trade Center Bombing 1993*, History, FBI, available at <https://www.fbi.gov/history/famous-cases/world-trade-center-bombing-1993>

181. See also *Muslim Americans: No Signs of Growth in Alienation or Support for Extremism*, PEW RSCH. CTR. (Aug. 30, 2011), <https://www.pewresearch.org/politics/2011/08/30/section-1-a-demographic-portrait-of-muslim-americans>.

182. Holly M. Jackson, Preprint, *The New York Times Distorts the Palestinian Struggle: A Case Study of Anti-Palestinian Bias in American News Coverage of the First and Second Palestinian Intifadas*

In fact, that association was so strong that witnesses claimed to have seen “Middle Eastern looking” men fleeing from the site of the 1995 Oklahoma City bombing.<sup>183</sup> Even after it was discovered to be the act of homegrown, white male terrorists, violence was directed at Arab communities. The Clinton administration’s legal reaction was further stigmatizing: it passed immigration reforms as though the attack had, in fact, come from immigrants. The Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act resulted in the massive dragnet operation and roundup of Latino and Middle Eastern men who then faced immigration detention and deportation.<sup>184</sup> To underscore the absurdity: a terrorist attack that killed over 160 people perpetrated by an American white man resulted in the targeting and deportation of immigrant Latino and Muslim men through immigration law. Muslim immigrants, who had worked to quietly

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(May 19, 2021), [https://web.mit.edu/hjackson/www/The\\_NYT\\_Distorts\\_the\\_Palestinian\\_Struggle.pdf](https://web.mit.edu/hjackson/www/The_NYT_Distorts_the_Palestinian_Struggle.pdf).

183. Larry B. Stammer & Carla Hall, *Terror in Oklahoma City: American Muslims Feel Sting of Accusations in Bombing’s Wake: Reaction: Talk of Middle East Link Led to Epithets Against Ethnic Community. The Arrest of a Midwesterner Has Spurred a Collective Sigh of Relief.*, L.A. TIMES (Apr. 22, 1995), <https://www.latimes.com/archives/la-xpm-1995-04-22-mn-57460-story.html>; Laurie Goodstein & Marylou Tousignant, *Muslims’ Burden of Blame Lifts*, WASH. POST (Apr. 22, 1995), <https://www.washingtonpost.com/archive/politics/1995/04/22/muslims-burden-of-blame-lifts/29d45b49-c106-46d5-bd82-94eed4adc538>; Melinda Henneberger, *Terror Attacks in Oklahoma: Bias Attacks: Muslims Continue to Feel Apprehensive*, N.Y. TIMES § B at 10 (Apr. 24, 1995), <https://www.nytimes.com/1995/04/24/us/terror-in-oklahoma-bias-attacks-muslims-continue-to-feel-apprehensive.html>.

184. See *US: 20 Years of Immigrant Abuses: Under 1996 Laws, Arbitrary Detention, Fast-Deportation, Family Separation*, HUM. RTS. WATCH (Apr. 25, 2016), <https://www.hrw.org/news/2016/04/25/us-20-years-immigrant-abuses>.

President Bill Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996, known as AEDPA, on April 24, 1996. The legislation, passed in the aftermath of the 1995 Oklahoma City bombing, greatly expanded the grounds for detaining and deporting immigrants, including long-term legal residents. It was the first US law to authorize certain now-widely-used fast-track deportation procedures.

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), signed in September 1996, made further sweeping changes to immigration laws. It eliminated key defenses against deportation and subjected many more immigrants, including legal permanent residents, to detention and deportation. IIRIRA defined a greatly expanded range of criminal convictions – including relatively minor, nonviolent ones – for which legal permanent residents could be automatically deported. IIRIRA also made it much more difficult for people fleeing persecution to apply for asylum.

A large scholarly literature about immigration and terrorism produced in the aftermath of the September 11 attacks recounts this earlier history. See generally Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1586 (2002); Susan Akram & Kevin Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1430 (2002) (emphasis added).

assimilate throughout the twentieth century, found that the Oklahoma City bombing was a harbinger of things to come. Oklahoma demonstrated the vulnerability of Latino and Muslim communities based on their immigrant identity. Regardless of how law abiding they were, their alienness became a basis for their repression.<sup>185</sup>

In the period after the Oklahoma City Bombing until 2010, Muslims were targeted for profiling on the assumption that they were a visibly alien presence in society. South Asian, Arab, and those Islamicized because of their underlying racial features or dress were surveilled, detained, deported, and subject to both state and vigilante violence.<sup>186</sup> A decade after 9/11, lawmakers and activists turned their attention to Islam itself. Islam was redefined to mean a political ideology incompatible with the Constitution, a threat to the homeland that justified increased surveillance and racial profiling of anyone who claimed it as their religion.<sup>187</sup> While in the early 2000s it was assumed that one could tell Muslims apart, as the War on Terror progressed, the worry was that stealth jihad and indeed stealth Muslims like the main characters in *Homeland* or *Sleeper Cell*—white or Black Muslims who pass as “regular” Americans would challenge the professed values of our nation.<sup>188</sup> Once again, Islam was depicted as alien and incompatible with American values and was used to Islamicize people and subject them to both social and legal violence.

The bombings of 9/11 were a watershed moment. While it may not have resulted in a complete rupture from the time before, this event was the single most important disruption of the history of Muslims in the United States. The attack brought down the full force of state repression and its police powers against Muslims in the name of national security, now rendered “homeland security.” The same racial strategies used against the Black and Latinx communities during the Civil Rights movement in the 1960s and 1970s and the War on Drugs were used against Muslims in the new War on Terror.<sup>189</sup> The methods of the Counterintelligence Program (more commonly known as COINTELPRO), the surveillance of civil rights activists, the use of

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185. See Akram & Johnson, *supra* note 184.

186. Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834 (2015); Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004).

187. See Ahmad *supra* note 191.

188. Evelyn Alsultany, *Arabs and Muslims in the Media after 9/11: Representational Strategies for a “Postrace” Era*, 65 AM. Q. 161–69 (2013). See also Lorraine Ali, *Exploiting Fear of Muslims? The Far Right Has Nothing on Liberal Hollywood*, BALTIMORE SUN (Jan. 7, 2017), <https://www.baltimoresun.com/maryland/carroll/la-et-hollywood-values-updates-how-hollywood-s-muslim-portrayals-1483650479-htmlstory.html>.

189. See Muneer I. Ahmad, *Homeland Insecurities: Racial Profiling the Day After 9/11*, 20 SOC. TEXT 101 (2001); MIGRATION POLICY INSTITUTE-NYU IMMIGRANT RIGHTS CLINIC, THE ROLE OF ETHNIC PROFILING IN LAW ENFORCEMENT AFTER SEPTEMBER 11TH I.

informants and plants, the surveillance of immigrant and Black inner-city mosques, the use of no-fly lists, and the procedure of racial profiling were directed at Islamic organizations and groups.<sup>190</sup> At the time, scholars warned about the limitations of these strategies:

September 11 suicide hijackers were foreign, and some may be especially fearful because they were Arabs. This fear may cause us to exaggerate the danger of future attacks in general, and of attacks by Middle Eastern terrorists in particular. As a result, we may overestimate the effect of racially specific security measures. And unfortunately, we are more willing to accept aggressive measures when they target small and politically disempowered groups, specifically racial and ethnic minorities, and foreign nationals.<sup>191</sup>

Muslims and those who were Islamicized were then arrested and detained *en masse* and sometimes held without charge for months, tortured, and then deported.<sup>192</sup> As noted above, one of the correlations from the War on Terror period is the increased surveillance and pursuit of immigrants and communities of color.<sup>193</sup> The last twenty years have seen a massive increase in deportations under both Republican and Democratic administrations, along with surveillance, immigration raids, and racial profiling.<sup>194</sup> The Patriot Act, enacted hastily within forty-five days of the 9/11 attacks, was directed at keeping the United States secure by expanding law enforcement authority against those inside or at the borders.<sup>195</sup> The legislation also mandated the sharing of data across state and federal law enforcement agencies, sparking a boom in surveillance tech.<sup>196</sup> Furthermore, United States counterterrorism and counter-insurgency strategies used abroad in the Global War on Terror have been reimported back into the homeland to be deployed against domestic

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190. See ARUN KUNDNANI, *THE MUSLIMS ARE COMING: ISLAMOPHOBIA, EXTREMISM, AND THE DOMESTIC WAR ON TERROR* (2015).

191. See Gross & Livingston, *supra* note 184, at 1430.

192. IRUM SHAIKH, ED., *DETAINED WITHOUT CAUSE: MUSLIMS' STORIES OF DETENTION AND DEPORTATION IN AMERICA AFTER 9/11* (2011); Shirin Sinnar, *The Untold Story of Iqbal*, in *ISLAMOPHOBIA AND THE LAW* (Choudhury & Beydoun, eds., 2020).

193. KUNDNANI, *supra* note 190.

194. Alex Nowrasteh, *Deportation Rates in Historical Perspective*, CATO LIBERTY (Sept. 16, 2019), <https://www.cato.org/blog/deportation-rates-historical-perspective>; John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed Under Trump*, PEW RSCH. CTR. (Mar. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump>. It is of interest that, beginning with the Clinton administration, Democratic presidents have deported more people than their Republican counterparts.

195. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107- 56, 115 Stat. 272 (2001); 18 U.S.C.A. § 1 (2008); *Surveillance Under the Patriot Act*, ACLU, <https://www.aclu.org/issues/national-security/privacy-and-surveillance/surveillance-under-patriot-act> (last visited Oct 8, 2021).

196. *Id.*

populations, particularly urban populations of color, most recently against the Black Lives Matter movement.<sup>197</sup>

The first ten years or so after the attacks brought about increased racial profiling of individual Muslims and their communities based on the assumption that they could be visibly distinguished from non-Muslims. The 2010s brought a resignification of *Islam itself*. Distinct from the targeting of people, laws like the Save Our State amendment to the Oklahoma Constitution, which was replicated by several other states, attempted to ban “sharia law” from being enforced in courts.<sup>198</sup> Politicians and activists began to raise concerns of “creeping sharia” and “civilizational jihad,” citing very ordinary use of the courts by Muslims as examples of how sharia law was replacing secular law<sup>199</sup> and a full-scale invasion from outside was underway.<sup>200</sup>

The following section describes the use of state legislation to promote the idea that Islam is a political ideology and a global conspiracy to overthrow the West, the United States, and democracy, and that Muslims are the foot soldiers of said conspiracy. The proponents of this view then claim that legislation and criminalization is needed to not only stop this pernicious and foreign ideology but also to stop the foreign enemy from spreading this ideology in society.

## ii. Defending Against Creeping Sharia and Civilizational Jihad<sup>201</sup>

In February 2011, Senator Bill Ketron of Murfreesboro, Tennessee

197. See ACLU, *supra* note 195.

198. See Cyra Akila Choudhury, *Shari’ah Law as National Security Threat*, 46 AKRON L. REV. 49 (2013); Faisal Kutty, “Islamic Law” in *US Courts: Judicial Jihad or Constitutional Imperative*, in ISLAMOPHOBIA AND THE LAW 132 (Choudhury & Beydoun., eds. 2020).

199. See Choudhury, *supra* note 198. The sharia law moral panic was orchestrated by a group of wealthy right-wing actors who used their network and the media to frame Islam as a religion that stood for nothing more than unremitting violence against the West and non-Muslims. The only way to combat what they called “sharia creep” was through legislation that made it impossible for anything based on Islamic religious law to be enforced through the courts. The American Legislative Exchange Council (ALEC) promoted a draft law to be adopted by various states that forbade courts from applying sharia. What this meant is that wills, private contracts, and marriage contracts that involved religious law were nonjusticiable. These quotidian concerns of ordinary people are the examples provided by the proponents of these anti-sharia measures as examples of stealth jihad and the overthrow of the constitutional order. For example, a will that is executed according to sharia principles similarly would not be enforceable. Because this Article discusses the litigation against the Islamic Center of Murfreesboro (ICM) as an example of Islamophobia-as-racism, below I discuss the anti-sharia bill that was introduced in the period while this controversy was being resolved.

200. Wajahat Ali et al., *Fear, Inc.: The Roots of the Islamophobia Network in America*, CTR. FOR AM. PROGRESS (2011), <https://www.americanprogress.org/article/fear-inc>.

201. This section of the Article borrows heavily from *Shari’ah Law as National Security Threat*, 46 AKRON L. REV. 49 (2013). In that article, I examine how family law becomes the main area of law that anti-sharia law advocates use to justify support for the bill. It also provides background for these bills, as has been well documented in *Fear Inc.*, *supra* note 200. For an explanation of the meaning of sharia, see

introduced a bill in the Tennessee Senate to prevent support for “sharia organizations.” The bill, SB 1028 entitled the *Material Support to Designated Entities Act of 2011* was introduced at the start of the anti-sharia panic with a proposed enactment date of July 1, 2011.<sup>202</sup> The original bill was amended several times<sup>203</sup> to eliminate the specific references to sharia, but the original text reveals the true intent and motivations behind it and similar measures in other states.<sup>204</sup> Section I of the original bill claims that Islamist terrorism

is primarily the result of a legal-political-military doctrine and system adhered to, or *minimally advocated by, tens of millions if not hundreds of millions of its followers around the world.* This legal-political-military doctrine and system is known as sharia to its adherents, authoritative leaders, and scholars.<sup>205</sup>

Sharia is, thus, reduced from a complex and heterogenous body of religious principles that governs prayer, diet, family relations, and property rights, among other things into a political/military doctrine with the force of law behind it.<sup>206</sup> The bill states that “[s]haria as a political doctrine” *requires* its adherents to overthrow the secular order and establish a state governed by sharia.<sup>207</sup> The bill further makes a number of false assertions including: that jihad is an intrinsic and central feature of sharia and that sharia *requires* jihad in order to establish itself through violent and criminal means including terrorism and “immigration-fed population growth”<sup>208</sup> and adherence to sharia constitutes “a conspiracy to further the legal, political and military doctrine” that results in terrorism.<sup>209</sup> The bill then criminalizes Islam by making knowing adherence to sharia “prima facie evidence of an act to overthrow the

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*infra* note 206. The original bill can be found at <https://www.capitol.tn.gov/Bills/107/Bill/SB1028.pdf>.

202. Tenn. S.B. 1028 § (I)(39-13-902)(2) (2011).

203. For amendments, see *Bill Information on SB1028*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1028&ga=107> (last visited Jan. 10, 2012). The text of the new bill makes no mention of shari’ah at all.

204. *Id.* The bill was amended to be superfluous and preempted by federal law because, as written, it would be a clear violation of the First Amendment—as several courts have held. But the intent of the bills is clear.

205. Tenn. S.B. 1028 § (I)(39-13-902)(2) (2011).

206. It should be noted that in order to be a practicing Muslim, or even a cultural and indifferent one, one must adhere to aspects of sharia, which simply means “the way.” It is a general term to denote not only Islamic law but precepts about everyday living that do not have much to do with law as we understand it. For instance, it includes dietary laws similar to Jewish law with regard to the prohibition on pork, etc. There is no one thing that can be boiled down to sharia, as it includes multiple—sometimes conflicting—viewpoints and interpretations of the central texts of Islam by jurists from several Sunni and Shi’a schools of thought and jurisprudence. Take for example a term like jihad, which is translated as struggle by some, war by others, and is contextual. Its definition is contested.

207. Tenn. S.B. 1028 § (I)(39-13-902)(4), (5) (2011).

208. *Id.* § (I)(39-13-902)(6), (10); see also note 206, *supra*, on the indefinite meaning of “jihad.”

209. *Id.* § (I)(39-13-902)(11).

United States.”<sup>210</sup>

The original bill allowed the attorney general to designate groups as sharia organizations if they consisted of “two or more persons acting in concert in support of, sharia or imposition of sharia” and they committed a terrorist act.<sup>211</sup> Material support for terrorists is included in the list of acts that qualifies as terrorism.<sup>212</sup> A person found knowingly supporting a sharia organization would be guilty of a criminal offense punishable by fifteen years in prison.<sup>213</sup> In effect, the original bill banned Islam and made its practice a criminal offense. Attending a “sharia-adherent” mosque — which is every mosque — could carry a fifteen-year jail term. This version of the bill was amended in such a way as to excise all mention of sharia because of the obvious First Amendment violation. The resulting enacted bill simply restates laws already in place. Although the scrubbed bill is superfluous, the intent of the original bill to redefine Islam from a religion to an alien and violent political ideology is clear.<sup>214</sup>

The drive to outlaw sharia was supported widely by many lawmakers. In 2011, Republican Tennessee state legislator Rick Wormick opined that any Muslim who is devout and follows the Qur’an and Sunnah is at war with the United States and required to kill non-Muslims. Therefore, they should be categorically barred from serving in the military.<sup>215</sup> In 2016, the Tennessee Republican Party invited controversial anti-Islam activist Geert Wilders to the Republican National Convention. *The Tennessean* reported:

Ketrone [the sponsor of SB 1028] said the controversial figure, who has been an outspoken critic of Islam and has called it the “ideology of a retarded culture,” is his friend.

*“Muslims are not necessarily my problem, but Islam is. Islam and freedom are not compatible,”* Wilders told *The Tennessean* at a Monday morning

210. *Id.* § (I)(39-13-902)(13).

211. *Id.* §§ (I)(39-13-904)(2), § (I)(39-13-905)(a)(1)(B).

212. Tenn. Code Ann. § 39-13-803(7).

“Material support or resources” . . . [m]eans . . . currency or monetary instruments or financial securities, financial services, lodging, training, . . . safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, transportation, and personnel; and . . . [d]oes not include medicine or religious materials.

*Id.*

213. Tenn. S.B. 1028 § (I)(39-13-906)(a)(1)(A), (B).

214. 2011 Tenn. Pub. Acts, H.B. 1353.

215. Letter from Deepa Iyer, Esq., Executive Director, South Asian Americans Living Together (“SAALT”), to Representative Rick Wormick (Nov. 12, 2011), <https://saalt.org/wp-content/uploads/2012/09/SAALTs-Letter-Regarding-Tennessee-State-Representative-Rick-Womicks-Comments-Regarding-Muslims-in-the-Military-November-2011.pdf>

Tennessee delegation brunch, hosted by Gov. Bill Haslam and U.S. Sens. Lamar Alexander and Bob Corker.<sup>216</sup>

The argument followed that because we cannot tell Muslims from non-Muslims or sharia-compliant Muslims from antinomian Muslims, it is simply better to criminalize Islam itself.

Upon the election of Donald J. Trump as President, twenty-three states introduced anti-sharia legislation.<sup>217</sup> As *The Tennessean* once again notes, the bills are alike because they are based on a model bill. It should surprise no one that “[t]he legislation was developed by the Center for Security Policy, which was founded by Frank Gaffney, a Reagan-era acting assistant secretary of defense, who pushes conspiracy theories alleging radical Muslims have infiltrated the government.”<sup>218</sup>

The sharia bans were followed by the Trump-era Muslim bans, barring citizens of several predominantly Muslim countries from entering the United States. Having fabricated the threat of invasion from a violent horde, all that remained was to prevent them from entering the county. The Trump administration’s executive orders were justified on national security grounds, but in practice what they meant was a five-year separation of families – leaving people unable to see their loved ones during important moments, such as weddings, births, and deaths.<sup>219</sup> The arsenal of laws used against Islam, Muslims, and Islamicized groups continues to expand, but they are never developed in isolation.<sup>220</sup> Keeping out unwanted aliens by closing the borders has disproportionately impacted Middle Eastern refugees, Haitians, and Latinx peoples as well as Muslims who were subject to the Muslim bans.<sup>221</sup>

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216. Joel Ebert & Dave Boucher, *Anti-Islam Dutch Politician a Tennessee Guest at GOP Convention*, TENNESSEAN (July 18, 2016) (emphasis added), <https://www.tennessean.com/story/news/politics/2016/07/18/anti-islam-dutch-politician-tennessee-guest-gop-convention/87250680>.

217. Ed Pilkington, *Anti-sharia laws proliferate as Trump strikes hostile tone towards Muslims*, THE GUARDIAN (Dec. 30, 2017) available at <https://www.theguardian.com/us-news/2017/dec/30/anti-sharia-laws-trump-muslims>

218. *Dozen (sic) of State Legislators Pushed Copycat Anti-Sharia Bills. Murfreesboro’s Bill Ketron Was One of Them.*, TENNESSEAN (July 19, 2019), <https://www.tennessean.com/story/news/2019/07/19/tennessee-bill-ketron-copycat-anti-sharia-law/1767805001>.

219. Leila Rafei and Ashoka Mukpo, *The Enduring Harms of Trump’s Muslim Ban*, ACLU (Jan. 19, 2021) available at <https://www.aclu.org/news/immigrants-rights/the-enduring-harms-of-trumps-muslim-ban>

220. Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475. See also Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669 (2007).

221. *Id.*



### iii. Muslim Assimilation When Islam is the Problem

For Islamicized peoples who are not in fact Muslims, the ability to escape regulation may be as simple as disavowing Islam or as difficult as having to educate people about the difference between Sikhism and Islam.<sup>222</sup> But what is required of Muslims upon whom demands for assimilation are made when the problem is Islam? That is to say, how can one become an *assimilated Muslim* when the very thing that makes one a Muslim is rendered the problem to be excised from the person?<sup>223</sup>

From the public discourse about this issue, a spectrum of possibilities is evident. At one end, assimilation translates to the public adherence to American norms of a private religious belief; that is to say, a public secularism with religion to be practiced in the private sphere. At the other end, assimilation requires Muslims to shed Islam altogether. For those like the significant number of lawmakers who have made Islam the problem, nothing short of leaving Islam is acceptable.<sup>224</sup> The space for a public role for non-Christian religions is vanishingly small, if there is one at all. Thus, hijabs and beards become examples of not just the failure to adequately assimilate, but a marker of a stubborn clinging to foreign-ness and a rejection of all that America stands for (in their view).

Assimilation signifies being a good Muslim, if at all, only on the terms imposed by the people advancing anti-sharia bills.<sup>225</sup> The proponents of banning Islam recognize that there are good, law-abiding Muslims, but by their definition, those Muslims do not practice Islam at all. They are the secular patriots who do not criticize the politics of the American empire, who do not question the American dream, and who do not object to the

222. Even so, they are often met with violence before they can explain anything. Meenal Rana, Desiree B. Qin, & Carmina Vital-Gonzalez, *Mistaken Identities: The Media and Parental Ethno-Religious Socialization in a Midwestern Sikh Community*, 10 RELIGIONS 571, 1–2 (2019) (noting that Sikhs face Islamophobic stigmatization and bullying).

223. See *supra* notes 93-114 and accompanying text. No longer required to demonstrate Whiteness or Blackness to obtain U.S. citizenship, Muslims coming in from the post-colonies with their racial characteristics intact were faced with the demands of “fitting in” and becoming “American” as defined normatively by white society. Can they assimilate? No longer a formal legal question, it remains a social anxiety to be debated throughout European and North American lands. Once Muslims began crossing borders into the center of Empire particularly after decolonization, the demands for assimilation and renouncement of particularities were immediate and ongoing. In the United States, the immigration of South Asian, Arab, and African Muslims occurred mostly in the latter half of the 20th Century. Arriving in small numbers, these groups did set up some ethnic enclaves, like that of Dearborn, Michigan, or areas of the borough of Queens in New York. However, in most other states and cities, Muslims from Asia and Africa had to assimilate to make a life. But as numbers grew and a second and third generation was born and raised in the United States, questions of assimilation became much more complicated. In the post-9/11 era, visible Muslims who wore headscarves or prayer caps were subject to heightened scrutiny. Beards and kufis (or Islamic caps), like headscarves, became markers of difference and sources of controversy.

224. See *Fear Inc.*, *supra* note 200.

225. See *infra* notes 257-277 and accompanying text.

violence done to other “bad” Muslims or to their countries of origin – even while American bombs drop on family members abroad.

Adherence to Islam by abiding by dietary laws, celebrating religious holidays, or having any outward physical or behavioral markers render their assimilation incomplete. Islam being incompatible with democracy, liberalism, and founded on radical and violent ideas—according to the views of those who have problematized Islam—anyone believing or following such a faith cannot fully become part of the culture and politics of the West. Their presence is dangerous.<sup>226</sup> Their proclamations that they are American *and* Muslim without conflict, is suspect at best and possibly mendacious.<sup>227</sup>

For more enlightened liberals, at least theoretically, there may be no conflict among Islam, democracy, and liberal citizenship as long as the form Islam takes is a liberal, democratic one.<sup>228</sup> Hence, we get the state-sponsored vision of a more palatable Islam, one that has undergone a reformation.<sup>229</sup> But that tolerance has been far less politically appealing to many Americans than the nativist position that demands the end of Islam. After all, Islam, for most Muslims, cannot be differentiated from sharia which is its code of living. Thus, if sharia is the problem, then being Muslim is a problem.

In the context of France, Sara Farris argues that, like the earlier debates on the “Jewish Question” between Marx and Bruno Bauer, the “Muslim

226. *See id.* *See also* MAHMOOD MAMDANI, *GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR* (2005).

227. *See* Ismail & Bloomer, *supra* note 157.

At a protest the night before Donald Trump’s inauguration last year, a woman accused me of “taqiyya” on the street. I didn’t know it at the time, but she was telling me I’m a liar because I’m Muslim.

I’ve since learned that the concept of “taqiyya” has taken hold in anti-Muslim circles to mean deception—that any Muslim can lie to non-Muslims if it means advancing some hypothetical Islamic global conquest. The term is often deployed to refute anything a Muslim tries to say. After that night, I wanted to know where this conspiracy theory came from, and whether anyone would even believe me if I tried to prove it wrong.

The author herself has been confronted with demands to explain *taqiyya*. It is practice allowed in Shi’a Islam which allows the Muslim to dissemble about their religious faith in times of danger. It is by no means a blanket *requirement* to lie to all non-believers.

228. U.S. Institute for Peace, *Ijtihad: Reinterpreting Islamic Principles for the Twenty-first Century*, Special Report, August 13, 2004. The USIP brought together Muslim and non-Muslim scholars to discuss the role of and reinvigoration of “Ijtihad,” or independent legal reasoning. The point of this exercise was to reinterpret Islam to make it modern. Similar attempts have been undertaken by European countries such as France.

229. *See id.* For decades, post-colonial Muslim states have controlled mosques and the clergy in an effort to curb independent thinking of the sort that gives rise to rebellions.

Question” can only be resolved through a similar shedding of religion.<sup>230</sup> Specifically, she notes that the alienness of Muslims can be remedied through the disavowal and repudiation of religion in order to assimilate into the universal polity of equal citizens. This political belonging through assimilation then results in emancipation.<sup>231</sup> The translation to the United States is not quite exact, but the argument is largely the same. Furthermore, the rhetoric of demographic threat or replacement theory applied to Muslims in Europe mirrors the rhetoric of the browning of America, the increase of Latinx population not only via immigration, but also as a result of a higher birthrate. The concern about anchor babies, large families, and the unwillingness to assimilate are hauntingly familiar to Muslims in the context of Europe.<sup>232</sup> That concern of jihad through replacement, or “immigration-fed population growth,” was also raised by Bill Ketron in support of his anti-sharia bill.<sup>233</sup>

In sum, the problem is that it is impossible for Muslims *as Muslims* to assimilate into a culture and a political community that has defined itself in opposition to Islam. Moreover, particularly over the last four years, and certainly since 9/11, the suspicion of Muslims as a group, as a community demanding recognition distinct from that of mainstream Americans, has grown. Overt markers of difference have become focal points of attack and none more so than the symbol of the Muslim community: the mosque.

#### *4. Interlude: Braiding the Strands from Islam-as-Race to Islamophobia-as-Racism*

Thus far, this article has argued that Islam should be seen as a race in the specific contexts in which it operates as such most manifestly in Europe and North America. In these contexts, people are Islamicized and discriminated against in contradistinction to a powerful Christian white majority population. That racism or differential treatment is based on the understanding that Islam is categorically different from and often opposed to Christian European civilization. The genealogy of this difference is the bedrock upon which Muslims are racialized and Islam-as-race is produced. The genealogy weaves together first, a historical coupling of Islam in America with Black and brownness from slavery to the rise of Black radical Islam; second, an American Orientalism produced by

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230. Sara R. Farris, *From the Jewish Question to the Muslim Question. Republican Rigorism, Culturalist Differentialism and Antinomies of Enforced Emancipation*, 21.1 CONSTELLATIONS 296 (2014).

231. *Id.*, See also, Karl Marx, *On the Jewish Question*, DEUTSCH-FRANZÖSISCHE JAHRBÜCHER (Feb. 1844) <https://www.marxists.org/archive/marx/works/1844/jewish-question/>

232. Sarah Bracke & Luis Manuel Hernandez Aguilar, “*They Love Death as We Love Life*”: The “Muslim Question” and the Biopolitics of Replacement, 71 BR. J. SOCIO. 680 (2020).

233. See *supra* note 218. The bill proposed by Ketron listed population growth as a form of jihad.

scholars and politicians that alienates Islam and constructs it in opposition to the West; and third, and the recent practices of profiling based on visible difference and redefining Islam to be an ideology of terror, rendering Muslims terrorists based on their religious identity. By the 2010s, the underlying racial or religious identity of a person was no longer central to their Islamicization. Islamicized people do not have to be practicing Muslims, nor do they have to be Black or brown. For example, a turban-wearing Sikh man who is profiled, is not profiled because he is Sikh. He is profiled because he has been Islamicized, even though he is not a believer of Islam. Whereas a Muslim woman who does not wear hijab and bears no outward marker of Islam might evade profiling, but becomes a target when she outs herself as a Muslim. Similarly, a white woman in hijab becomes raced through Islam. In this context, if we claim that a white convert is racialized, it is because of *Islam* and nothing else.

It may be asked: why not simply call all of these experiences religious discrimination, without regard to race? As explained previously, race is intimately related to Islam in the United States. To cabin these various discriminations of Muslims and non-Muslims alike into religious discrimination alone misses a great deal. Scholars over the last two decades have noted the *racial and racialized* discrimination against Muslims and people perceived to be Muslims.<sup>234</sup> The strategies used against these populations cannot be captured by religious discrimination operating in a racial vacuum. In the early immigration cases, for instance, petitioners were not asked to demonstrate their Christianity but to demonstrate their whiteness because of the social, political, and legal racial context of the United States.<sup>235</sup> Islam's coding as racially non-white is what kept people out.<sup>236</sup> Moreover, as noted above, race is an assemblage of practices, social relations, and ascriptive and prescriptive attributes and beliefs. Different elements come together to mark a raced person; it is not always physical attributes or visible features. Just as Blackness or Latin-ness does not reduce to merely color, Islam-as-race does not reduce to just religion. Rather than trying to force race into religion, race is the more capacious concept and better relays the crux of the matter in the context of America and Europe. Most importantly, it is not primarily a religious hierarchy that is being maintained and policed, —though religion factors into it—but a racial one.

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234. See *supra* note 54 and accompanying text.

235. See *supra* notes 93-114 and accompanying text.

236. *Id.*

III. RACECRAFT IN THE FORMATION OF ISLAMOPHOBIA  
AND ANTI-BLACKNESS: FROM THE DISCOURSE OF LEGITIMATION  
TO MATERIAL DISCRIMINATION

The main argument of the first two parts of this article is that racism first produces racial identities and then the appearance of real races through racecraft – neither the identities, nor the races, are fixed or unchanging.<sup>237</sup> As a result, it is entirely possible to conceive of the creation of Muslims as a racially subordinated group through Islamophobia and the emergence of Islam as a race. This article has also suggested that for racism and racecraft to operate, differences among groups of people must be given a racial meaning. Thus, African ancestry becomes racially meaningful in the creation of Blacks as separate from whites. Islam, as a religion of color, is made racially meaningful against a white European Christianity. That meaning-making and race-making is racecraft. While the Fields’ articulation that racecraft is akin to witchcraft concentrates on ideology, it is worth underscoring that both racecraft and witchcraft were practices not just ideologies. Hence, *craft*. Racecraft plays a part in hiding racism. Rather than race as the cause for the segregation of Blacks in the South, the segregation itself is also part of the racecraft. As Barbara Fields suggests, race produces evidence of itself.<sup>238</sup> The crop failure is the evidence of witchcraft. The segregation is the evidence of Blackness as a race. Racism has taken on a specific form against those linked to Islam, and that racism is Islamophobia.<sup>239</sup> This Part of the article examines the discursive racecraft that makes Islamophobia seem logical, normal, and rational against a race and identity that is defined as alien and dangerous.

To clarify the common underlying racecraft, this article begins with outlining the two theoretical methods that can be used to deconstruct the discourses of legitimation used to prop up Islamophobia and anti-Blackness. The first draws on Critical Discourse Theory to excavate eight discursive strategies in their unspecified form before they have been applied to a racial group. The second method is Professor I. Bennett Capers’ “reading back,” which is a method used here to show how these discursive strategies, the racecraft used, appear in their specific forms as Islamophobia and anti-Blackness.

The two texts that will be used to read back the discursive strategies

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237. See generally Carbadó, *supra* note 60. Arun Saldanha, *Assemblage, Materiality, Race, Capital*, 2 DIALOGUES HUM. GEOGRAPHY 194 (2012); ALEXANDER G. WEHELIYE, *HABEAS VISCUS: RACIALIZING ASSEMBLAGES, BIOPOLITICS, AND BLACK FEMINIST THEORIES OF THE HUMAN* (2014).

238. See *supra* note 1.

239. See, e.g., Cyra Akila Choudhury & Khaled Beydoun, *Introduction*, in ISLAMOPHOBIA AND THE LAW (2020).

are taken from the transcripts of a motion to enjoin the opening of the Islamic Center of Murfreesboro (“ICM”) in Tennessee and the opinion writing of Christopher Rufo, the architect of the anti-CRT panic. The community action to enjoin the mosque was undertaken in the early 2010s during the start of the anti-sharia panic. While it was unfolding, the Tennessee anti-sharia bill discussed above was proposed. This article demonstrates how the anti-sharia panic foreshadowed the current anti-CRT panic using the same racecraft.

Moreover, racecraft is not just about discourse. As pointed out above, segregation was racecraft itself, providing evidence of the existence of race (the action is purportedly prompted by race). As such, racecraft has material dimensions. The final section describes the discrimination against Black Americans and Muslims in the context of residential property and larger property projects in predominantly white suburbs to show the commonalities. The same material racecraft that was invented as anti-Blackness has been repurposed and directed at Muslims. Many have already written about the use of racial profiling as one such example; this article offers the example of property discrimination.

*1. Theoretical Methods in Uncovering Racecraft: Critical Discourse Theory and “Reading Back” in Deconstructing Racist Commonsense*

In this section, the article lays out the two theoretical methods — the distillation of racist tropes and “reading back” — to uncover racecraft. The purpose of using these methods is to get under the surface of racist discourse to expose the common strategies that produce different forms of racist knowledge. These then enter the mainstream as stereotypes and commonsense making discrimination based on race seem logical or even inevitable.

i. The Discursive Tropes of Commonsense Racism

Developed by critical linguists, Critical Discourse Analysis (“CDA”) is a framework for studying the role of language in social phenomenon.<sup>240</sup> Rather than studying the ideology or culture as it appears on the surface, CDA delves deeper into “the more hidden and latent type of everyday beliefs, which often appear disguised as conceptual metaphors and analogies.”<sup>241</sup> In the same vein of Critical Race Theory, CDA also challenges the neutral appearance of dominant “assumptions that stay

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240. RUTH WODAK & MICHAEL MEYER, *METHODS OF CRITICAL DISCOURSE STUDIES* 8 (2016)

241. *Id.*

largely unchallenged.”<sup>242</sup> As Ruth Wodak, one of the founders of the framework, notes:

Organizations that strive for power will try to influence the ideology of a society to become closer to what they want it to be. When most people in a society think alike about certain matters, or even forget that there are alternatives to the status quo, we arrive at the Gramscian concept of hegemony. With regard to this key concept of ideology, Van Dijk . . . sees ideologies as the ‘worldviews’ that constitute ‘social cognition’: ‘schematically organized complexes of representations and attitudes with regard to certain aspects of the social world’ . . .<sup>243</sup>

Wodak identifies the following five discursive strategies (“DS”), which more or less map onto the ones extracted from the legal texts below:

- Referential strategy or strategy of nomination, where the linguistic devices of interest are membership categorization, metaphors and metonymies<sup>244</sup> and synecdoches.<sup>245</sup> [DS 5].
- Strategies of predication which appear in stereotypical, evaluative attributions of positive or negative traits and implicit or explicit predicates. [DS 1, 3, 7].
- Strategies of argumentation which are reflected in certain topoi<sup>246</sup> used to justify political inclusion or exclusion. [DS 3, 7].
- Strategies of perspectivization, framing or discourse representation use means of reporting, description, narration or quotation of events and utterances. [DS 6, 8].
- Strategies of intensification and mitigation try to intensify or mitigate the illocutionary<sup>247</sup> force of utterances. [DS 6].<sup>248</sup>

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242. *Id.*

243. *Id.*, (emphasis omitted).

244. “Metonymy” is “a figure of speech consisting of the use of the name of one thing for that of another of which it is an attribute or with which it is associated,” such as *crown* for *lands belonging to the crown*. Readers may be more familiar with the use of “dough” for money. *Metonymy*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/metonymy> (Last visited Oct. 10, 2022).

245. “Synecdoche” is “a figure of speech by which a part is put for the whole (such as *fifty sail* for *fifty ships*), the whole for a part (such as *society* for *high society*), the species for the genus (such as *cutthroat* for *assassin*), the genus for the species (such as *a creature* for *a man*), or the name of the material for the thing made (such as *boards* for *stage*).”

246. “Topoi” is the plural of *topos*, meaning a conventional or traditional literary or rhetorical theme.

247. “Illocutionary force” means that the utterance may have the effect of a command. In law, we might understand this as a speech act.

248. See WODAK & MEYER, *supra* note 240.

The transcripts from the ICM injunction hearing illustrate these strategies.<sup>249</sup> The text is full of racecraft from the plaintiffs' attorney, in his opening statement, and the expert witness.<sup>250</sup> The court transcripts of the proceedings provide critical insights into the ways in which the law's institutions and practices are used by the plaintiffs to disseminate a raft of racist ideas about Muslims and Islam, to tie Islam and Muslims to terrorism, to appropriate the power to construct the narrative about Islam, and to resignify its very terms to further their cause.<sup>251</sup> All this is part of a broader nationwide anti-sharia law panic which resulted in bans legislated in several states.

An analysis of the hearing transcripts allows us to extract the discursive strategies that, in their abstract form, are familiar in the (re)production of tropes legitimating the subordination of racial groups. To make this more apparent, below each discursive strategy there is an example of how it might be applied to other subordinated groups.

**DS 1:** Use of false equivalences, all or nothing categories, dichotomies, binaries, and specious comparisons.  
*(Immigrants can either support the United States or go back to where they came from).*

**DS 2:** Anachronism and civilizational discourse/using modern standards to judge the events of the past. Using the past as though it was present.  
*(Africa has produced almost no Nobel prize winners compared to Europe. Slaves benefited from being brought to America, their descendants are now better off than Africans).*

**DS 3:** Deploying racialized sexism.

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249. *Id.* As all lawyers know, in order to obtain a temporary injunction, the plaintiff must show: “(1) the plaintiff’s likelihood of prevailing on the merits; (2) a showing of irreparable injury to plaintiff if relief is not granted; (3) the threatened injury to the movant is demonstrated to outweigh whatever damage the proposed injunction may cause the opposing party; and (4) the balancing of equities.” Using the elements, the plaintiffs argue that the irreparable harm that would result if the injunction were not issued is the fomenting of jihad in the community. If that spectacular claim is given credence, it is impossible to argue that the harm to the opposing party, which is merely delay, additional economic costs, and loss of reputation, is greater. After all, what could possibly be more grievous than Islamist terrorism in a community?

250. The plaintiffs—who had been trying to have the ICM enjoined because they claimed that the Rutherford County zoning commission had not given adequate notice—claimed that Islam and Muslims are such a serious threat that the ordinary forms of notice given to the public were insufficient and that the public had a right to aerate their concerns. They brought suit even though the zoning commission had used the exact same means of notice as they had for other zoning matters.

251. WODAK & MEYER, *supra* note 240, at 9. *See also, supra* note 65.



*(Black women are more sexual. Asian women are compliant and submissive. Men of color are prone to violence against women).*

**DS 4:** Negatives stereotyping, generalizations, and essentialism.  
*(Black criminality. Asians as model minority myth).*

**DS 5:** Guilt by association/linking unrelated people or events to instill fear of the group and to justify collective punishment.  
*(Visiting a gang member or their house makes a person a gang member).*

**DS 6:** Resignification or redefinition terminology to denote a threat, a negative meaning and the use of the newly defined term to prove racist claims.  
*(Critical Race Theory is racism. CRT teaches children to hate the United States CRT claims all white people are racists. Resignification of terms like “woke”).*

**DS 7:** Exceptionalizing the Other/blaming the victim.  
*(Black victim should have done \_\_\_ and he would not have been shot).*

**DS 8:** Outright fabrication of facts to justify racism.  
*(“Illegal Aliens” commit more crime. The Americas were vast and unsettled lands or terra nullius until the Europeans came).*

These discursive strategies, which overlap and interact with each other, are critical to the production of racist tropes that then circulate in society and become assumptions and commonsense.<sup>252</sup> Through their repeated use, they become common knowledge and remarkably difficult to dislodge. They are used to justify greater governance of suspect populations.

Before discussing specific contexts of the anti-sharia and anti-CRT panics, it is important to understand what is meant by “reading back” as a hermeneutic method.

## ii. The Hermeneutic of Reading Back

In his important article *Reading Back, Reading Black*,<sup>253</sup> Professor

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252. *Id.* at 30.

253. I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9 (2006).

Bennett Capers begins with this opening statement:

Allow me a critical gesture. More specifically, taking to heart the offer to put forth an Idea, allow me to suggest a way of reading the law. I am not suggesting a reading that is exclusivist. However, I am suggesting a reading that reveals sites of contestation, a reading that is oppositional. What I am suggesting is a way of reading, a reading practice if you will, that attends to the way judicial opinions function as cultural productions that create and recreate race.<sup>254</sup>

This method is not only one of interpretation. It requires a prior critical intervention of deconstruction. Moreover, all texts are open to such critical readings: judicial opinions that may have more direct effects on law, briefs, testimony, and evidence that becomes textual. The methods of deconstruction and “reading back” reveal sites of contestation more clearly. They also show how certain ideas that were once contested become assumptions and taken-for-granted background facts that then go unchallenged. Once this happens, these ideas become normalized and commonsensical. These deconstructive methods show the sites and ideas that *should* be contested but may not be by revealing unarticulated notions that operate like phantoms haunting the text in the background. Professor Capers further argues that:

I employ the term “read back” because I find it particularly useful as a concept. It suggests the practice of jurors asking for a “read back” of testimony not just so that they can rehear what has already been said, but rehear it within the context of having heard and seen all of the evidence, armed with the tools to ascertain not only what was said, but what was not said. Put differently, *I use the term here to suggest a rereading that reads not only contextually, but also critically, sensitive to the stated and the unstated, the revealed and the concealed, and the meaning to be gleaned from both.* Equally useful is the term “reading black.” It suggests a reading practice that is not only critical, but particularly attuned to the frequencies and registers of race. Already, I need to make a few clarifications. First, although I deploy the term “reading black,” I do not mean to suggest any racial litmus test for the reader. More specifically, one does not have to be black to read black. Nor does being black necessarily equip one with the skills or desire to read black. Justice Thurgood Marshall, I believe, read black. So did Justice William Brennan. Justice Clarence Thomas, with one or two notable exceptions, generally does not. Second, by invoking the term “reading black,” I do not mean to privilege this form of reading over other forms of reading, such as reading feminist, or reading classist, or reading gay. My use of the term “reading black” owes more to Manichean assumptions, and the fact that black continues to be the ultimate trope of

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254. *Id.* at 9.

difference.<sup>255</sup>

Here, Professor Capers suggests that within texts there are underlying assumptions and reliance on commonsense anti-Black ideas. Because they are commonsense, everyone knows them, and they do not have to be stated. The problem for raced groups is that these assumptions make the law's complicity in their subordination seem entirely logical. What Professor Capers terms "reading Black" is a particular deconstructive move that, in this article, is analogous to distilling the racist tropes and discursive strategies from the text. It is the practice of reading for the underlying armature of inequality, subordination, racism, and racial sexism, homophobia, and more. "Reading Black" renders the anti-Blackness or the erasure of race in the legal text more visible; this article's method renders any specific racism more visible by showing the similarities in the abstract.

## *2. The Shared Racecraft of the Anti-Sharia Law and the Anti-CRT Panics<sup>256</sup>*

In this section, the article applies the two methods discussed above to the specific contexts of the anti-sharia and anti-CRT panics. This application demonstrates the power of these deconstructive methods and their ability to reveal the common strategies of racecraft that works in producing various forms of racism like anti-Blackness, anti-Muslim racism, anti-Asian hate and others.

### i. Reading the Tropes Back: The Anti-Sharia Law Panic

In the opening statement of *Estes v. Rutherford County Regional Planning Commission*, the plaintiff's attorney sets up the imminent injury his clients seek to demonstrate in their motion for an injunction.<sup>257</sup> The crux of the claim is that the mosque will become a site that breeds terrorism and that the mosque leaders are already tied to terrorist groups and illegal activities that are national security threats. The purpose of the opening statement and expert testimony was to clearly draw a connection between the mosque, the Muslims, and terrorism. Below are excerpts from the hearing with the discursive strategies demarcated. The specific tropes they produce are bolded in the text itself.

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255. *Id.* (emphasis added).

256. See, e.g., Charles M. Blow, *The G.O.P. Is Making 'Critical Race Theory' the New 'Shariah Law'*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2022/01/05/opinion/critical-race-theory-gop.html>.

257. *Estes v. Rutherford Cnty. Reg'l Plan. Comm'n*, No. 10-cv-1443 (Chancery Ct. for Rutherford County, Sept. 27, 2010).

**[Plaintiff's Attorney (PA):]**

[I]f we follow the Constitution, do we allow there to be two sets of laws governing the behavior of individuals practicing religion in America? It must be clear that **any practice of Islam** in a free society, the United States, **cannot and must not include the practice of Sharia law. Sharia law** is a set of codes which are **a declaration of subordination for anyone who is not a Muslim**, and it's a violation of human rights for those who are. Why would we extend to any religion the **right to cancel out the Constitution** for which we're founded upon, for which gives us the ability to come in here in this courtroom and make an argument to this Court.<sup>258</sup>

[**DS 1, 2, 4, 6:** Anachronism; using false dichotomies and binaries, negative stereotyping. Here, using modern standards to judge an ancient legal system. Constructing Islam as categorically opposite to the United States Constitution and human rights and equality among different groups.]

**Sharia law supports and dictates the beating and physical abuse of women with a whip.** You're to hang **a whip** up in your house, and if **your wife or your girlfriend does not submit** to an order, what you tell her to do, you're to use the whip against her. Sharia law **supports and dictates honor killings.** There are **death edicts** from the **imam, from the mosque.** It supports the **killing of homosexuals.**<sup>259</sup>

[**DS 3, 4, 6, 8:** Deploying sexism; negative stereotyping; outright fabrications that women and sexual minorities are discriminated against by the group.]

My wife and I went to Minnesota last Friday, and we had a trial on an Indian reservation. Their law prevails there. They have a right to their somewhat constitution-free zones because they formed a treaty with the United States in the 17- and 1800s. That's what this is. **If this Court does not do something to stop this, constitution-free zones under sharia law will be governing.**<sup>260</sup>

[**DS 8:** Fabricating facts that Islam requires constitution-free zones.]

[Having asked if they would have no claim if the planning commission approved a permit for bin Laden, this follows.] Go back to if they **approved a site for Osama bin Laden** — which is not far off, once again — would they still argue that the plaintiffs have waited too long? Why? Ask why does our local government not want these issues addressed?<sup>261</sup>

[**DS 4:** Guilt by Association by linking US Muslims to external

258. *Id.* at Tr. Trans. 6:80–21:00.

259. *Id.* at 8:23–9:50.

260. *Id.* at 11:90–16:00.

261. *Id.* at 12:10.

groups like the Hamas, Muslim Brotherhood, Al Qaeda, or Daesh without regard to the differences in the ideology of the groups.]

The government next argues in their memo — and this is a quote. “The public interest is not adversely affected if the Court does not grant an injunction.” The proof will show that the public interest is not only at stake, but it’s on the line. **Sharia law is Jihad.** Sharia law is cited on the Islamic Center of Murfreesboro's website. The ICM reading that's posted on the website shows a **direct connection** to the **Islamic Center of Murfreesboro** and the **Muslim Brotherhood.**

One might ask, **What is Jihad?** And what I'd like to do is set the stage. **Jihad** is when right before September 11th of 2001, several individuals rented cars out of Murfreesboro, Tennessee, to get them to the airport so they could board planes. It's the morning that we turned on the TV while we were all going to work and people in New York are going to work and all of the sudden we see **huge planes striking the World Trade Center and the towers in New York. And that's what jihad is.**<sup>262</sup>

[**DS 4, 5, 6:** Resignifying or redefining Islamic religious terminology to denote negatives then use it to prove Islamophobic claims. Conflate different terms. Sharia is Jihad is bombing NY, therefore, Sharia is bombing NY.]

**Sharia law is pure sedition. Sharia law basically says the United States Constitution is suitable for toilet paper.**<sup>263</sup>

[**DS 6, 8:** Redefine terms to something false. Redefinition of sharia.]

The opening statement from the plaintiffs’ counsel in the hearing on the injunction introduces the Islamophobic tropes propagated within the structure of the hearing. These tropes are then repeated by the plaintiffs’ expert, Frank Gaffney, at every opportunity. The hearing provides the plaintiffs with an almost unfettered public hearing and forum in which to introduce a raft of anti-Islamic ideas into an official record. The expert testimony record can then be found by others undertaking similar actions. The so-called expertise recognized and legitimated by the court as such becomes a text within a formal legal process, even though the actual assertions are false. Below are the tropes used by the expert witness:

**[Expert Frank Gaffney (FG)]:**

The principal conclusion, I think, is that **sharia is the enemy threat doctrine** we face today. We use that term because we believe it is possible by talking about that **totalitarian political ideology** to differentiate between the practice of Islam in a lot of places, including in this country,

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262. *Id.* at 18:10–19:40.

263. *Id.* at 19:16–19:18.

by **Muslims who are tolerant and peaceable and law-abiding and patriotic** here from **those who have a truly seditious purpose in mind, namely, replacing our form of government, our freedoms, our way of life with those required by sharia.**<sup>264</sup>

[DS 1, 2: False dichotomies and all or nothing categories; civilizational discourse.]

The second principal finding, I think, is that **sharia obligates its adherents to engage in jihad**. That is important, obviously because to the extent that it **involves violence, as we saw on 9/11, it can involve mass murder and great destruction.**<sup>265</sup>

[DS 8: Fabrication of facts about religious obligations.]

As important — and I think a real contribution to this study was to delve into the phenomenon known as **civilization jihad, which is a stealthy form of seeking the same objectives** but doing so without violence, at least for a moment.<sup>266</sup>

[DS 2, 4, 8: civilizational discourse; negative stereotyping; fabrication of facts.]

There is an organization that is the preeminent practitioner of **civilization jihad**, in fact it's a term in coin, **Muslim Brotherhood**. And many organizations, both in this country and elsewhere, that are, we believe, as dangerous as the **Al-Qaeda** and the others involved in **violent jihad are practicing this more stealthy technique of civilization jihad.**<sup>267</sup>

[DS 2, 5, 6: civilizational discourse; guilt by association; resignifying the term jihad.]

Upon cross examination by the Rutherford County attorney (“RCA”), expert Gaffney continued:

The problem is not confined to active violent terrorism; it is also the **stealth or civilizational jihad**, which is very **worrying** and I think **seditious.**<sup>268</sup>

[DS 2, 6: civilizational discourse; repeated use of resignified term, jihad.]

**RCA:** And when you say “very worrying,” can you cite us to any particular federal, state, or local law that has been violated as a result of what you describe as seditious behavior?<sup>269</sup>

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264. *Id.* at 57:14–57:23.

265. *Id.* at 57:24–58:30.

266. *Id.* at 58:40–58:08.

267. *Id.* at 58:08–58:15.

268. *Id.* at 92:24–93:02.

269. *Id.* at 93:03–93:06.

**Gaffney:** Well, **material support** for terror is a perennial problem in the form of the **tithing known as Zakat**, requires that — as one of the eight approved activities under Zakat is directly **supportive of jihad**. By some people's count, there are three others that can be used. For example, to **support the families of terrorists or jihadists, suicide bombers**, that is a permitted activity. That does fall afoul of our laws against material support for terror and has been so demonstrated in the **Holy Land Foundation** trial.<sup>270</sup>

[DS 2, 5, 6, 8: civilizational discourse; generalizations resignifying term zakat; fabrication of facts.]

The county attorney continues the questioning. Gaffney, the expert, is not able answer a question about which sharia principles conflict with the Constitution because he does not know much about the vast jurisprudential literature that is collectively called the sharia.<sup>271</sup> He cannot give an example of this conflict and he cannot so much as explain the differences in Islamic sects which, even a decade ago, could be found on Wikipedia.

The following exchange encapsulates the entire “expertise” of Frank Gaffney.

**RCA:** Can you explain to us the principles of sharia law and the conflict with the Constitution as you've seen it practiced? I'm not asking you a legal question. As you've seen these practices.<sup>272</sup>

**Gaffney:** No.<sup>273</sup>

To be sure, there are other moves and fallacies that are present, however, the point here is not to be comprehensive or exhaustive. Rather, this is an example of the kind of deconstruction, mapping, and “reading back” that must be done to recognize the trade routes and traffic in the racecraft of discursive strategies that normalize stereotypes about racially subordinated groups into commonsense. In other words, racecraft is what makes racism against Muslims and Blacks seem rational and justified.

Racecraft's underlying purpose which is to maintain the racial order becomes visible when the mask slips. For instance, during the ICM hearing, in one telling and Kafkaesque exchange, the plaintiff's attorney, having received an admission from the county commissioner that he did not support sharia law and was uncomfortable with the mosque, asked whether the community should support terrorist organizations like the Klu

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270. *Id.* at 93:06–93:16.

271. *Id.* at 117:05.

272. *Id.* at 116:24–117:04.

273. *Id.* at 117:05.

Klux Klan (“KKK”).<sup>274</sup> The commissioner then responded remarkably that he did not know if the KKK is a terrorist organization.<sup>275</sup> Both the people defending the decision to permit the ICM and its opponents equated the mosque with the KKK without questioning that false equivalence.<sup>276</sup> The implication was that if an Islamic house of worship was permitted, then a historically violent white supremacist organization should also be sanctioned. Yet no one seems to have appreciated the irony that in the context of Tennessee, the KKK has not only been tolerated, but has indeed been celebrated and institutionalized in the past.<sup>277</sup>

Indeed, the same strategies are on exhibit in the anti-CRT panic and results in the exact peculiar sense of reversal where the victims are now the historical perpetrators of racism and where *teaching about race* has become the racism that is the problem. The following section uses the same methods to deconstruct and excavate the discursive strategies and the resulting tropes used in the anti-CRT narratives.

## ii. The Anti-CRT Panic

The anti-CRT panic originated in the mind of a once-obscure journalist and filmmaker, Christopher Rufo. According to a *New Yorker* profile, Rufo had become troubled by the anti-racism and diversity work going on across the country in employment trainings.<sup>278</sup> He had noticed the repeated appearance of the works of Ibram X. Kendi and Robin DiAngelo in these trainings, which led him to dig deeper. The footnotes in DiAngelo and Kendi’s books led Rufo to the work of Kimberlé Crenshaw and Derrick Bell, both of whom are key theorists of Critical Race Theory.<sup>279</sup> As legal scholars, Bell, Crenshaw, and other early theorists of CRT argued that the law was structurally unfair and that racism was not primarily a matter of individual beliefs or actions but of social construction.<sup>280</sup> Crenshaw explained this problem very clearly in her theory of intersectionality which she formulated in response to the erasure

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274. *Id.* at 59:22–61:15

275. *Id.*

276. *Id.*

277. *Bust of Former KKK Leader Removed from Tennessee Capitol Building*, ASSOCIATED PRESS (July 23, 2021), <https://www.nbcnews.com/news/us-news/bust-former-kkk-leader-removed-tennessee-capitol-building-n1274845>.

278. Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>.

279. *Id.*

280. *See, e.g.*, KIMBERLÉ CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT INFORMED THE MOVEMENT* (1995).



of Black women in anti-discrimination law.<sup>281</sup> Rufo claims that he saw in their works the seeds of Marxism and Critical Theory. In his selective reading, he linked CRT directly to a Marxist lineage.<sup>282</sup> He hit upon CRT as a replacement term for political correctness and a language around which he could rally conservative, right-wing allies who had had enough of diversity training and anti-racism.<sup>283</sup> Political correctness was outdated. CRT was better suited for the tasks of the Trump-era because it allowed Rufo to clearly fabricate a link among anti-racism and scholars of race, Marxism, socialism, and most importantly, the downfall of the United States. From there, he took the show on the road to *Fox News*, the *City Journal*, and other venues in which he repeatedly claimed that CRT had pervaded every aspect of the federal government and action had to be taken.<sup>284</sup>

Rufo was soon joined by conservative politicians, activists, and parents who took the fight to local schools and corporations demanding that CRT be abolished from the curriculum and discarded in diversity trainings.<sup>285</sup> When Benjamin Wallace-Wells, the *New Yorker* reporter, asked Rufo what he wanted to achieve:

He mentioned two objectives, the first of which was “to politicize the bureaucracy.” Rufo said that the bureaucracy had been dominated by liberals, and he thought that the debates over critical race theory offered a way for conservatives to “take some of these essentially corrupted state agencies and then contest them, and then create rival power centers within them.” I thought of the bills that Rufo had helped draft, which restricted how social-studies teachers could describe current events to millions of public-school children, and the open letter a Kansas Republican legislator had sent to the leaders of public universities in the state, demanding to know which faculty members were teaching critical race theory.<sup>286</sup>

Indeed, the backlash to the anti-racism activism and protests organized by Black Lives Matter that followed the murder of George Floyd and Breonna Taylor was met with this anti-CRT backlash which has really been about power in the same way that the anti-sharia law panic was about power; both were great propaganda tools to further a conservative ideology and to maintain the racial hierarchy.

To make apparent the racecraft—here the use of discursive

281. See Wallace-Wells, *supra* note 278. See Crenshaw, *supra* note 280

282. Christopher F. Rufo, *What Critical Race Theory is Really About*, N.Y. POST (May 6, 2021), <https://www.manhattan-institute.org/what-critical-race-theory-is-really-about>.

283. *Id.*

284. *Id.*

285. *Id.*

286. Christopher F. Rufo, *Critical Race Theory Is About to Segregate America Like an Open-Air Prison Yard*, N.Y. POST (Feb. 4, 2022), <https://nypost.com/2022/02/04/critical-race-theory-is-about-to-segregate-america-like-an-open-air-prison-yard>.

strategies by the proponents of the anti-CRT panic—we can deconstruct and read back in the texts produced in that movement. Below are excerpts from Rufo’s opinion piece in the *New York Post*, followed by the discursive strategies used.<sup>287</sup> Rufo first describes his documentary film and how prisons are segregated into racial gangs.<sup>288</sup> He then goes on to claim:

[Rufo]: A few years after making the film, I began studying critical race theory and the racist ideologies that are becoming entrenched in American schools. Though the **comparison is provocative, frightening parallels exist between the racist logic of the prison yard and the racist pedagogy of many public schools.**

[DS 1: specious comparison, false equivalence.]

First, schools that have adopted **critical race theory reject individualism and colorblindness; to achieve an authentic identity and gain collective power, individuals must identify first and foremost with their racial group.**

[DS 6, 8: resignification of terminology. Outright fabrication of facts. CRT does not instruct that individuals place identity with a racial group “foremost” or indeed in any particular hierarchical relation to other forms of identity.]

Second, as in the prison yard, some public schools have **begun segregating teachers and students for training sessions, classroom exercises, field trips and even playground activities.**

[DS 2: anachronism.]

Third, many **schools that have adopted critical race theory explicitly teach that children belong to categories of “oppressor” or “oppressed” based on a racial hierarchy, and then tell students that they must tear down society in order to “decolonize” the land, settle racial scores and direct the spoils to their compatriots.**

[DS 1, 4, 5, 8: false dichotomies; negative generalizations; linking unrelated events to instill fear; outright fabrication of facts.]

This development might not come as a total surprise. **Critical race theory draws heavily from black-nationalist ideology, such as that of the Black Panther Party, which came to fruition in California prisons in the 1960s.** The new iteration of this ideology might have abandoned the militant rhetoric of the Panthers in favor of the therapeutic language of the school psychologist, but it **nevertheless threatens to replicate the destructive features of prison-gang politics in the “outside world.”**

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287. See *supra* note 244-248 and accompanying text for the full list of discursive strategies.

288. See Rufo *supra* note 282.

[DS 4, 5: negative racial stereotyping; guilt by association.]

**If American institutions succumb to this ideology, they can expect a brutal future: the suspension of individualism in favor of racial collectivism; a nihilistic, zero-sum vision of society; and endemic racial conflict as a baseline condition.**

[DS 2, 6, 7: civilizational discourse; resignification of terminology; exceptionalizing the Other, blaming the other for future catastrophe.]

To avoid this fate, Americans of all racial backgrounds must work together to defeat this ideology, down to its roots. Despite the success of critical race theory in prestige institutions, **American voters still prefer individualism, colorblindness and equal protection under the law. The challenge is to turn this public preference into public action. Americans must act to prevent the country from becoming the equivalent of a sprawling, open-air prison yard.**

[DS 1, 5: false comparison; linking unrelated events/facts to lead to catastrophic future and instill fear of the Other.]<sup>289</sup>

Deconstructing for discursive strategies and reading them back in shows how the anti-CRT panic becomes more about stirring anger in people based on made up facts and fabricated threats. The purpose in schools, for instance, is to prevent the teaching of history of social studies in any manner that challenges white supremacy because, according to the purveyors of the panic, there is no white supremacy to challenge.

### iii. Using Racial Panics to Maintain Hierarchy

The racecraft against subordinated groups is often hauntingly familiar. The methods, the trajectory, and the purpose are shared. There are remarkable similarities in the anti-sharia panic of the 2010s and the anti-CRT panic of the 2020s. Both began as social outrage fanned by activists and politicians through public media, news, and public protest.<sup>290</sup> Activists took the terms “sharia” and “Critical Race Theory” and distorted them into words that now have precisely the negative meaning that is needed to inflame people that are susceptible to Islamophobia and anti-Blackness.<sup>291</sup> These newly resignified terms are then used at every

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289. *Id.*

290. *Against Critical Theory's Onslaught: Reclaiming Education and the American Dream*, ALEC (Dec. 8, 2020), <https://www.alec.org/article/reclaiming-education-and-the-american-dream-against-critical-theorys-onslaught>.

291. Sarah Schwartz, *Who's Really Driving Critical Race Theory Legislation? An Investigation*, EDWEEK (July 19, 2021), <https://www.edweek.org/policy-politics/whos-really-driving-critical-race-theory-legislation-an-investigation/2021/07> (identifying Christopher Rufo of The Manhattan Institute as resignifying CRT to cover diversity training and race education). The Manhattan Institute's model bill

opportunity and venue, repeated to reinscribe the term and make the new meaning stick. Based on this, the cry goes up that something must be done! Sharia and Critical Race Theory both became the subjects of intense efforts to pass legislation that prohibited them. Model bills continue to circulate and are often taken up by lawmakers.<sup>292</sup> As of September 2021, twenty-seven states have introduced anti-CRT legislation.<sup>293</sup> In the meanwhile, Muslims and CRT scholars watch these events unfold with bewilderment. The debates about sharia and CRT take place on entirely new discursive ground. Muslims and CRT scholars are faced with having to first re-capture the very words they use to describe Islam or CRT.<sup>294</sup> But the struggle is made nearly impossible because part of the political strategy is to impute the nefarious agenda of overthrowing the United States and the Constitution to any who resist such misappropriation of the terms. For example, for Muslims, the resignification of *taqiyya* a practice in Shi'a Islam that sanctions one to hide their religious identity when under threat into a religiously required mendacity for all Muslims in normal interactions with nonbelievers simply solidifies their malintent and suspiciousness.

Having ascribed the agenda of the overthrow and political domination of the United States to proponents of sharia and CRT, the opponents a priori disqualify any countermeasures or defense of either Islam or anti-racism.<sup>295</sup> Now, literally nothing Muslims, anti-racists, or CRT scholars

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can be viewed at <https://www.manhattan-institute.org/copland-critical-race-theory-model-legislation>.

292. *Id.*

293. *Map: Where Critical Race Theory Is Under Attack*, EDWEEK (June 11, 2021), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06>.

294. Gary Peller, *I've Been a Critical Race Theorist for 30 Years. Our Opponents Are Just Proving Our Point For Us*, POLITICO (June 30, 2021), <https://www.politico.com/news/magazine/2021/06/30/critical-race-theory-lightning-rod-opinion-497046>.

Professor Kimberlé Crenshaw has been vociferously speaking out about the appropriation of CRT. See, e.g., Jon Wiener, *The Predictable Backlash to Critical Race Theory: A Q&A With Kimberlé Crenshaw*, NATION (July 5, 2021), <https://www.thenation.com/article/politics/critical-race-kimberle-crenshaw>. There are a number of anthologies of Critical Race Theory and Critical Race Feminism that show the incredible variety of scholarship produced by those who consider themselves critical race theorists. These include KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* (2019); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2017); FRANCISCO VALDES, JEROME MCCRISTAL CULP & ANGELA P. HARRIS, *CROSSROADS, NEW DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (2002); RICHARD DELGADO, *CRITICAL RACE THEORY: THE CUTTING EDGE* (1995); KIMBERLE CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT INFORMED THE MOVEMENT* (1995).

295. See Weiner, *supra* note 227, in which Crenshaw notes:

They don't care about what the ideas are. They can take the name, fill it with meaning, and create this hysteria, and that can be a winning issue when they really don't have any other agendas to push. Obviously they don't get that one of the main points of critical race theory is that to understand racism in our history only as a matter of prejudice or bias—as a matter of individuals who are morally bankrupt—is not to understand the history of race in America. The whole point of critical race theory was to repudiate the idea that we can talk about racism only as a quality of

say makes a difference because it is all part of the plot to overthrow the society. Begging the question of the definition of sharia and CRT, the anti-sharia and anti-CRT activists leave their opponents with no option but to agree with them. Specifically, if we must accept these resignified words, then we must also necessarily be against what they stand for.<sup>296</sup> So, every exchange must begin with defining terms and trying to persuade the other side of what the terms meant originally. Obviously, this underscores the political motivation behind the panics, as noted above. The language and strategies of racecraft not only have the purpose of disseminating these ideas into the bloodstream of society to circulate throughout the system but also to facilitate the active maintenance of the racial hierarchy and the governance of racially suspect and subordinated groups.

From this textual exercise, two things should be clear. First, the ideology of racism uses the same racecraft or tools against all subordinated minorities which then seem to be “naturally” at the bottom. Strategies such as generalizing from the particular to the whole, constructing essentialist attributes of an out-group member, resignifying terminology, ventriloquizing, and constructing mutual exclusivity have been used against non-white communities to vilify them for centuries. In these two cases, the discourse in the anti-sharia and anti-CRT panics find their antecedents in the legitimation of slavery and Jim Crow and the justifications for colonialism.<sup>297</sup> In the present, we see the racecraft tailored to suit Muslims and primarily Blacks in these panics though they have been in use for centuries in different forms.

Second, it follows that when the discursive strategies are deployed, the purpose is to vilify and suppress the practice of Islam and the dissemination of anti-racist theory and its practice. A good Muslim by the

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individuals rather than as a structured reality that's embedded in institutions.

296. See, e.g., *Policy: Brief: A Comprehensive Overview of Critical Race Theory in American*, CENTER FOR RENEWING AM. (May 18, 2021), <https://americarenewing.com/issues/policy-brief-a-comprehensive-overview-of-critical-race-theory-in-america>.

Ultimately, the goal of CRT is to utilize militant identity politics and ahistorical narratives to destroy the American idea that all men are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness. This cultural revolution poses an existential threat to the American way of life. Americans must identify, resist, and defeat CRT wherever it rears its head.

297. See e.g., David Olusoga, *The Roots of European Racism Lie in the Slave Trade, Colonialism, and Edward Long*, GUARDIAN (Sept. 8, 2015), <https://www.theguardian.com/commentisfree/2015/sep/08/european-racism-africa-slavery>; Victoria M. Massie, *Why Are People Still Defending Slavery in America? 5 Common Excuses, Debunked*, VOX (Sept. 10, 2016), <https://www.vox.com/2016/8/20/12556820/slavery-history-excuses>.

Islamophobic definition is a nonpracticing Muslim or a non-Muslim. A good Black or racial minority is one who is colorblind, does not see structural racism, who understands that they have earned or failed to earn their positions through neutral applications of a merit standard,<sup>298</sup> and who believes that race has nothing to do with anything now that we have dismantled slavery and Jim Crow.

The discursive strategies make racism justifiable, logical, normal, and commonsensical. In other words, they are used to make racism hegemonic in the Gramscian sense where the subordinated consent to their subordination because of the naturalization of the hierarchy.<sup>299</sup> Moreover, racecraft makes it appear as though racial groups exist in nature and are real. But as noted above, while race is not real, the practices of racecraft and the ideology of racism are very real. The discursive strategies have material effects in controlling behavior, opportunity, and even life and death. The final part of this article turns to the material racecraft in the context of property discrimination to show how the practices of racism, like discourse, are retooled for use against different groups. This is not to suggest that the experiences among groups are the same but rather to demonstrate how *the racecraft is the same* and has the same purpose.

### 3. *Material Racecraft in Anti-Black and Islamophobic Property Discrimination*

What white Americans have never fully understood but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society

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298. The most recent linguistic resignification of equity into a term that reflects either inequality based on whiteness or favoritism based on Black/brownness is just the most recent discursive strategy now being deployed.

299. Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515, (2000).

Any long-lasting social control requires power at both of these levels [physical force and consent], which Gramsci elsewhere describes as “force and . . . consent, authority and hegemony, violence and civilisation.” The first type of domination is commonly associated with coercive state action by the courts, the police, the army, and the national guard. The second type of control (“hegemony” proper) is more insidious and complicated to achieve. It involves subduing and co-opting dissenting voices through subtle dissemination of the dominant group’s perspective as universal and natural, to the point where the dominant beliefs and practices become an intractable component of common sense. In a hegemonic regime, an unjust social arrangement is internalized and endlessly reinforced in schools, churches, institutions, scholarly exchanges, museums, and popular culture. Gramsci’s work on hegemony provides a useful starting point for legal scholars who understand that domination is often subtle, invisible, and consensual.

*Id.* at 519.

condones it.<sup>300</sup>

The experience of spatial segregation of Black communities even in states and localities in which Jim Crow was not the law is well known. What is less well understood is that other groups, including Muslims, face similar discrimination with regard to property: being restricted from suburban spaces, housing, and community gatherings. This Part of the article offers two property examples of similar spatial racecraft and property lawfare used against both Black Americans and Muslims: housing discrimination and the activism against public housing and mosques. The first shared experience is that of being denied integration into majority white suburbs and facing violence when such attempts are made. The second shared experience is the prohibition against congregating. Even if some minorities move into white-dominant neighborhoods, those neighborhoods may not welcome visible, physical structures that represent the existence of minorities in appreciable numbers—structures like public housing and mosques.<sup>301</sup> Muslims and Blacks have experienced social violence and segregation in residential housing, and both public housing and mosques have been met with vociferous community resistance and NIMBYism (where “NIMBY” is short for “Not in My Back Yard”). The racecraft that was developed and perfected against Black Americans in the context of property forms the template of the racecraft used against Muslims and other groups.

#### i. Residential Housing Violence and Resistance Against Blacks and Muslims

The United States remains highly segregated in residential neighborhoods with racial stratification remaining entrenched throughout the country.<sup>302</sup> Even with the formal end of Jim Crow, the federal

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300. NAT’L ADVISORY COMM’N ON CIV. DISORDERS, REPORT OF THE COMMISSION ON CIVIL DISORDERS 1-29 (1968); Whet Moser, *How White Housing Riots Shaped Chicago*, CHI. MAG. (Apr. 29, 2015), <https://www.chicagomag.com/city-life/april-2015/how-white-housing-riots-shaped-chicago>.

301. Anti-mosque litigation rarely occurs in inner cities that are primarily populated by minorities. Instead, the conflicts arise when the mosque construction occurs in majority-white suburbs. Unlike in the past, the mosques built from 2000 to 2016 have built-in suburbs following the expansion of Muslim populations outside the major metropolitan areas. Ihsan Bagby, *The American Mosque 2020: Growing and Evolving*, IPSU available at <https://www.ispu.org/report-1-mosque-survey-2020/>. Murfreesboro, Tennessee, is 72% white. The next largest ethnic group is Black coming in at 19%. It has remained highly unequal in racial composition and while it has been diversifying, there are pockets of racial concentration particularly in public housing. *Quick Facts: Murfreesboro, Tennessee*, CENSUS.GOV, <https://www.census.gov/quickfacts/murfreesborocitytennessee> (last visited Oct. 4, 2021).

302. A. Mechele Dickerson, *Systemic Racism and Housing*, 70 EMORY L.J. 1535, 1538–44 (2021); Heather A. Abraham, *Fair Housing’s Third Act: American Tragedy or Triumph?* 39 YALE L. & POL’Y REV. 1, 48–50 (2020). Abraham writes that:

government maintained segregation policies throughout the twentieth century until the mid-70s—the effects of which are palpable in the present.<sup>303</sup> A number of these formal governmental and informal social policies were implemented to force Black Americans out of their homes and to protect predominantly white suburbs from Black and brown families. For example, the Federal Housing Authority, which underwrote mortgages, refused to lend to Black Americans and refused to insure any mixed housing projects forcing developers to build segregated developments like the Levittowns—housing developments built by Levitt and Sons in the post-World War II period.<sup>304</sup> Excluded from traditional mortgages, Black homeowners were forced to seek private mortgages at much higher rates or buy on contract. Contract sales with their high interest rates punished late payments with calling the entire loan.<sup>305</sup> If the homeowner was unable to pay, the mortgagor would foreclose, and the homeowner would lose all the equity in the house. Even so, some families were able to buy in white neighborhoods. But these “pioneers” were immediately subjected to vigilante terror while the police and state officials looked the other way.<sup>306</sup>

Richard Rothstein describes two incidents as examples of this violence. In 1954, the Wade family purchased a house in an all-white community, Shively in Louisville, Kentucky.<sup>307</sup> Once it became apparent that the house had been sold to a Black family, the move-in violence ensued. A crowd gathered in front of their house on their move-in date, burned a cross, and threw a rock with a message “N— Get Out” through

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There can be no doubt that segregation persists despite the enactment of fair housing laws. At least twenty-one metropolitan areas remain hypersegregated. By one estimate, approximately ninety percent of all Black metropolitan residents live in “high” or “very high” segregation while only ten percent live in “moderate” segregation and almost none live in “low” segregation.

*Id.* See RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 168–86 (2013)

303. CHARLES M. LAMB, *HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS* 165–203 (2005).

304. DAVID M. P. FREUND, *COLORS PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA* 13–20, 155–75 (2010).

305. MECHELE DICKERSON, *HOMEOWNERSHIP AND AMERICA’S FINANCIAL UNDERCLASS: FLAWED PREMISES, BROKEN PROMISES, NEW PRESCRIPTIONS* 157–58 (2014).

306. David B. Bittan, *Ordeal in Levittown*, in *REPORTING CIVIL RIGHTS: AMERICAN JOURNALISM 1941-1963*, 406–09 (2003); *Levittown History*, LEVITTOWN PUB. LIBR., <http://www.levittownpl.org/research-history> (last visited Feb. 1, 2021). See *infra* notes 307-313 and accompanying text.

307. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 182 (2017). The only people to be arrested were Andrew Wade and a friend for “breach of the peace.” The Bradens, who had sold the house to the Wades, were indicted by a grand jury for sedition. Carl served seven months before the law was repealed.



their picture window.<sup>308</sup> As Rothstein writes:

Later that night, ten rifle shots were fired through their kitchen door. Under the watch of the police, the crowds demonstrated for a month until the house was dynamited. The police officially noticed nothing. None of the firebombers or vigilantes were arrested, let alone prosecuted, even though they were known to the authorities.<sup>309</sup>

In 1957, the Myers obtained a private mortgage from a Black philanthropist and bought a house in the development Levittown, Pennsylvania.<sup>310</sup> A few days after moving in with their children, the harassment started. A mob of 600 people attacked the house with rocks after a mail carrier went about announcing that a Black family had moved into the neighborhood. White neighbors set up a clubhouse next door to the Myers and subjected them to incessant harassment including prominently displaying of the Confederate flag and KKK symbols, blaring music, and burning crosses.<sup>311</sup> Rocks continued to be thrown, smashing windows in the Myers' home.<sup>312</sup> The police were unwilling or unable to stop the terrorism. Eventually, after four years of this treatment, the Myers moved back to their African American neighborhood.<sup>313</sup>

As has been argued throughout this article, racism repurposes its racecraft and tailors it to specific groups. As a result, we see commonalities in the racism experienced by these groups. The attempts to maintain residential segregation continues with Blacks and Muslims routinely steered away from white neighborhoods. Move-in violence continues, as does racial harassment.<sup>314</sup> Hundreds of incidents are reported each year to civil rights and state agencies. Violence directed at Muslims is familiar and can also be spectacular and extreme. In 2015, three Muslims were shot to death in Chapel Hill, North Carolina by their

308. *Id.*

309. *Id.*

310. *Id.* There are many such stories. In Chicago, from 1917 to 1921 there were 58 fire bombings of houses bought by African Americans in border areas where whites lived. In the first five years after World War II, there were 357 incidents reported against African Americans trying to buy or rent in white areas. In Philadelphia in the first six months of 1955, there were 213 violent incidents against African Americans seeking to move out of the ghetto. In Los Angeles, there were fire bombings, dynamiting, vandalism, and the murder of an entire family who had moved into a white neighborhood from a dynamite explosion. More recently, in Louisville, Kentucky, in 1985, a black family bought a house in the all-white suburb of Sylvania. The first night, their house was firebombed. A month later, the house was destroyed in an arson attack. *See* Rothstein, *supra* note 307, at 141-47.

311. *Id.* at 141-47.

312. *Id.*

313. *Id.*

314. *Anti-Muslim Activities in the United States 2012-2018*, NEW AMERICA, <https://www.newamerica.org/in-depth/anti-muslim-activity> (last visited Sept. 23, 2021); Kathleen Foody, *Denver Landlord Who Refused to Rent to Muslim Men Settles Lawsuit for \$675,000*, DENVER POST (May 3, 2019), <https://www.denverpost.com/2019/05/03/denver-landlord-muslim-discrimination-settlement>.

white neighbor who previously threatened people of color in his community with violence.<sup>315</sup> In 2018, a Muslim family in Dundalk, Maryland reported seven months of harassment including objects thrown through windows and racial slurs.<sup>316</sup> Also in 2018, in Tampa, Florida, a man threatened a Muslim family, calling them derogatory names based on their faith and threatened that he would “break all of your f—ing windows and ... burn your f—ing house down!”<sup>317</sup> The man pled guilty to threatening the family with a weapon and discriminating on the basis of race or religion.<sup>318</sup> The family canceled their purchase of a neighboring house based on his remarks.<sup>319</sup> In 2020, a Senegalese Muslim family of five, including children, were murdered in an arson attack in Denver.<sup>320</sup>

A recent study on housing conducted in Philadelphia that focuses on Muslims specifically, shows that Muslims face more housing discrimination than any other group in the city, and Black Muslims are doubly subordinated compared to their non-Muslim Black counterparts.<sup>321</sup> The study finds:

Both *black and nonblack* Muslims are significantly more likely than their non-Muslim counterparts, respectively, to live in neighborhoods with lower shares of whites, greater representations of blacks, higher levels of poverty, and lower median income, and they are less likely to be in suburbs. Our multivariate analyses show that among blacks and nonblacks, significant Muslim–non-Muslim differences persist in the neighborhood percentages white and black; among blacks, Muslims and non-Muslims differ significantly in access to suburbs. However, the Muslim–non-Muslim disparities in neighborhood poverty and median income are not significant.<sup>322</sup>

To reiterate: Both Black and nonblack Muslims in Philadelphia face the high levels of housing discrimination cutting against the common perception that immigrant Muslims are all middle-class professionals

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315. Bill Chappell, *N.C. Man Pleads Guilty to Killing 3 Muslim College Students; Video is Played in Court*, NPR (June 12, 2019), <https://www.npr.org/2019/06/12/731981858/n-c-man-pleads-guilty-to-murdering-3-muslim-college-students>.

316. Ava-Joye Burnett, *Muslim Family Alleges Hate Crimes, Harassment at Dundalk Home*, BALT. CBS LOC. (July 3, 2013), <https://baltimore.cbslocal.com/2018/07/03/muslim-family-harrassed-undalk>.

317. Jessica Campisi & Tina Burnside, *His Potential New Neighbors Were Muslim. So He Threatened to Burn Down the House They Wanted*, CNN (June 13, 2018), <https://www.cnn.com/2018/06/13/us/florida-man-muslim-threats-trnd/index.html>.

318. *Id.*

319. *Id.*

320. *Three Teens Charged with Murder in Denver Fire That Killed 5 Senegalese Immigrants*, USA TODAY (Feb. 2, 2021), <https://www.usnews.com/news/us/articles/2021-02-02/three-teens-charged-with-murder-in-denver-fire-that-killed-5-senegalese-immigrants>.

321. Samantha Friedman et al., *Muslim–Non-Muslim Locational Attainment in Philadelphia: A New Fault Line in Residential Inequality?* 56 DEMOGRAPHY 1327 (2019).

322. *Id.* at 1343.

residing in the suburbs. Friedman et al. suggest that this is because Muslims have become a racial group.<sup>323</sup>

Black Americans and Muslims who find themselves in places they “don’t belong” like white neighborhoods can be murdered by racist vigilantes, as happened to Trayvon Martin, Ahmaud Arbery, and Deah Barakat and Yusor and Razan Mohammad Abu-Salha.<sup>324</sup> The boundaries of the neighborhood are violently enforced against the threat of invasion from Black and brown bodies.<sup>325</sup> It is violence people justify by blaming the victims—for jogging, driving, walking their dog, and just ordinarily living in these spaces.

## ii. Resistance to Public Housing and Mosques and the Visible Presence of Racial Groups

In addition to residential discrimination, there are also some interesting parallels between opposition to public housing projects in the suburbs and anti-mosques activism. Since the Nixon administration, public housing opponents have linked crime and poverty with race.<sup>326</sup> Public housing in the suburbs has been construed as outposts of the inner cities bringing all their problems to the pristine lawns and white-picket-fenced houses of middle-class Americans. There is a significant body of literature that shows how the Nixon administration undermined housing access and stalled any gains in housing equity that might have desegregated neighborhoods.<sup>327</sup> Over the years, subsequent administrations have either

323. *Id.* at 1343–44.

324. Joseph Neff & Shaila Dewan, *He Killed 3 Muslim Students. But Did He Commit a Hate Crime?*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/us/hate-crime-muslim-students.html>; Max Fisher, *3 Killed in Mysterious “Execution-Style” Murders in Indiana*, VOX (Feb. 27, 2016), <https://www.vox.com/2016/2/27/11126096/muslim-fort-wayne-execution-murders>; Amal Ahmed, *A Black Muslim Teen Was Hung From a Tree & No One Notices*, CHI. MONITOR (Mar. 3, 2017), <https://chicagomonitor.com/2017/03/black-muslim-teen-hung-from-tree-washington>.

325. *See* ROTHSTEIN, *supra* note 307, at 163.

326. *See* LAMB, *supra* note 303. *See also* FREUND, *supra* note 304, at 188–90 (describing the eventual abandoning of public housing in Detroit justified by free market factors like risk). Freund writes:

But even ensuring apartments, the FHA’s market analyst insisted, had its risk’s because the “problem of integration” was that “most critical marketability question posed by the redevelopment project. In an area which is about to be rebuilt from the ground, with the constant glare of communitywide publicity attending every step of the process, an analyst cannot avoid attempting to assess effects upon marketability of deliberate efforts to attain integrated occupancy.” If the redevelopment area “were uncomplicated” by this issue, the report continued, the agency could ensure construction of at least 500 residential units. “However, the facts of the situation must be recognized and afforded realistic consideration,” leading the analyst to conclude that these problems introduce risk factors which in the aggregate constitute a high degree of risk.”

*Id.* at 188–89.

327. *See* ROTHSTEIN, *supra* note 307, at 37.

continued to stonewall or failed to effectively advance housing justice for poor people of all races. The Trump administration is just the latest to reinforce the tropes of crime, property devaluation, and degeneration with desegregation in the form of affordable housing.<sup>328</sup> In an op-ed co-written with Ben Carson, his Secretary of Housing and Urban Development, Donald Trump claimed:

The *crime and chaos* in Democrat-run cities have gotten so bad that liberals are even getting out of Manhattan's Upper West Side. Rather than rethink their destructive policies, the left wants to make sure *there is no escape*. The plan is to remake the suburbs in their image so they resemble *the dysfunctional cities* they now govern. As usual, anyone who dares tell the truth about what the left is doing is smeared as a racist.

We reversed an Obama-Biden regulation that would have empowered the Department of Housing and Urban Development to *abolish single-family zoning, compel the construction of high-density "stack and pack" apartment buildings in residential neighborhoods*, and forcibly transform neighborhoods across America so they look and feel the way far-left ideologues and technocratic bureaucrats think they should.<sup>329</sup>

From outright fabrications to dog whistles about inner cities and crime, Trump raised the bogeyman of a black and brown urban horde invading the safe, crime-free, suburbs. The fear is directed at suburban women.

The "suburban housewife" will be voting for me. They want safety & are thrilled that I ended the long running program where low income housing would invade their neighborhood. Biden would reinstall it, in a bigger form, with Corey Booker in charge!<sup>330</sup>

Most mosques these days are being built in predominantly white neighborhoods rather than integrated ones, giving rise to racial hostility.<sup>331</sup> Had Trump decided to opine on these constructions, one can

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328. Danielle Kurtzleben, *Seeking Suburban Vote Trump to Repeal Rule Combatting Racial Bias in Housing*, NPR (July 21, 2020), <https://www.npr.org/2020/07/21/893471887/seeking-suburban-votes-trump-targets-rule-to-combat-racial-bias-in-housing>.

329. Donald J. Trump & Ben Carson, *We'll Protect America's Suburbs*, WALL ST. J. (Aug. 16, 2020), <https://www.wsj.com/articles/well-protect-americas-suburbs-11597608133>.

330. Sylvan Lane, *Trump Pitches Fair Housing Repeal to 'Suburban Housewife' with Racist Tropes*, HILL (Aug. 12, 2021)(quoting a Trump tweet dated August 12, 2020), <https://thehill.com/policy/finance/511650-trump-pitches-fair-housing-repeal-to-suburban-housewife-with-racist-tropes>.

331. The demographics of the locations in which the mosques are being built reveal a lack of diversity. Murfreesboro, where the ICM is located, is 75% white, largely middle class, and largely born in the state, with very few foreign-born residents. The Dar al-Farooq mosque in Bloomington, Minnesota, was bombed with an improvised explosive device (IED) before prayers, damaging the building but luckily not causing any human injury. It is similarly located in a 79% white neighborhood in which no other race exceeds 7%. Nancy De Gennaro, *Murfreesboro Mosque Defaced with Graffiti, Bacon*, USA TODAY (July 10, 2017), <https://www.usatoday.com/story/news/nation-now/2017/07/10/murfreesboro-mosque->

surmise from this op-ed, in conjunction with his fear of Muslim invasion and the bans, what that opinion would contain.

Mosques have faced similar resistance as described above. The American Civil Liberties Union reports that nearly every state has ongoing anti-mosque activities.<sup>332</sup> The NIMBYism against mosques includes repeated complaints of code violations as experienced by Dar al-Farooq mosque in Minnesota as well as property lawfare using the zoning process as in the case of the ICM in Tennessee.<sup>333</sup> In addition to the use of the law, subordinated communities also face similar forms of extrajudicial physical violence.

Mosques, like public housing projects, present the threat of spatial invasion into white spaces just as Black and brown families do. The kinds of violence used against mosques are the same as those used historically against Black families moving into white neighborhoods. These include large mobs protesting outside the building, rocks and projectiles being thrown through windows, gun shots being fired into the building, defacing the building with racial graffiti, arson,<sup>334</sup> repeated phone calls and messaging with threats and profanity, and the harassment of people in the building, including bodily harm and murder.

In 2010, the Islamic Center of Murfreesboro placed a sign on its property that read “Future Home of the ICM.” Shortly after, a spray-painted message appeared over it that read: “Not Welcome.”<sup>335</sup> Several hundred people rallied in Murfreesboro against the mosque, holding signs that read: “Mosque leaders support killing converts.” Construction vehicles were set on fire and construction companies refused to work with the mosque because of the controversy.<sup>336</sup> Dozens of profanity-laden messages were left by phone.<sup>337</sup> In July 2017, the mosque was spray-painted, and bacon was left at the center.<sup>338</sup> The Dar-al-Farooq mosque in

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defaced-graffiti-bacon/466122001.

332. Tom Dart, *Protesters Decry Islam Outside Phoenix Mosque: “They Want to Take Over”*, GUARDIAN (Oct. 10, 2015), <https://www.theguardian.com/us-news/2015/oct/10/anti-islam-protest-phoenix-islamic-community-center>; *Nationwide Anti-Mosque Activity*, ACLU (May 2021), <https://www.aclu.org/issues/national-security/discriminatory-profiling/nationwide-anti-mosque-activity>.

333. See Cyra Akila Choudhury *Property Lawfare: Historical Racism and Present Islamophobia in Anti-Mosque Activism*, ISLAMOPHOBIA AND THE LAW, 219 (Choudhury & Beydoun, eds., 2020). Others have drawn heavily on this foundational work making similar arguments see e.g., Khaled A. Beydoun *On Sacred Land* 105 MINN L. REV. 1803 (2021).at.

334. *Id.* See also Brittney MacNamara, *Four U.S. Mosques Have Burned Down in the Past Seven Weeks*, TEEN VOGUE (Mar. 1, 2017), <https://www.teenvogue.com/story/four-us-mosques-have-burned-down-in-the-past-seven-weeks>.

335. See Property Lawfare *supra* note 333 at 225

336. *Id.*, at 227.

337. Robbie Brown, *Incident at Mosque in Tennessee Spreads Fear*, N.Y. TIMES (Aug. 30, 2010), <https://www.nytimes.com/2010/08/31/us/31mosque.html>.

338. See Property Lawfare *supra* note 333 at 225-226.

Minnesota similarly began receiving phone calls and threatening messages from the moment it opened, and in July 2017, it was bombed with an IED just before morning prayers.<sup>339</sup> Note that this is a mosque that includes services for families and children. Across the United States, there have been armed protests at mosques, Qur'an burnings, people followed and attacked, people shot and stabbed near mosques, hijab-wearing women have experienced violence, shots have been fired through mosques, rocks thrown through windows, fire-bombings, arson, graffiti, pigs heads, bacon thrown in mosques, violent messages left on mosque phones, and harassment of religious leaders.<sup>340</sup> Of course, the authorities have not reacted the way they did in the 1950s and the legal landscape has changed, however, it is the similarity in the racecraft and violence that is noteworthy here.

Anti-mosque activities should be read as part of the history of property lawfare and community activism, even violence, in which white majorities have excluded minorities from their neighborhoods claiming that they would bring blight, violence, reduce property values, cause interracial marriages, and a host of other social ills. Through denial of access to property, the racial order and purity of these neighborhoods was historically maintained and has resulted in highly segregated communities in 2021 even in states and cities that did not have Jim Crow laws. While Muslims have been accused of creating mythical no-go zones in Europe and the United States, some communities are *in fact* anti-Black, anti-Latinx, and anti-Muslim “no-go zones.”<sup>341</sup>

Muslim, Black, and Latinx people may now be able to purchase property in white suburbs, but when they become a visible proportion of that suburb, it may still provoke white flight.<sup>342</sup> Moreover, visible

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339. Kristine Phillips, *He Wanted to Build Trump's Border Wall. He Was Just Charged in the Bombing of a Minnesota Mosque.*, WASH. POST (Mar. 14, 2018), [https://washingtonpost.com/news/post-nation/wp/2018/03/14/he-wanted-to-build-trumps-border-wall-he-was-just-charged-in-the-bombing-of-a-minnesota-mosque/?utm\\_term=.bc2f3a6e4802](https://washingtonpost.com/news/post-nation/wp/2018/03/14/he-wanted-to-build-trumps-border-wall-he-was-just-charged-in-the-bombing-of-a-minnesota-mosque/?utm_term=.bc2f3a6e4802).

340. Jason Le Miere, *Bomb Explodes During Morning Prayers at Minnesota Mosque; FBI's Terrorism Task Force Investigating*, NEWSWEEK (Aug. 5, 2017), <https://newsweek.com/bloomington-mosque-bomb-muslim-attack-minnesota-646974>; Matt Stevens, *3 Suspects in Bombing of Minnesota Mosque Face Weapons Charges*, N.Y. TIMES (Mar. 13, 2018), <https://www.nytimes.com/2018/03/13/us/minnesota-mosque-bombing-suspects.html>.

341. David A. Graham, *Why the Muslim 'No-Go Zone' Myth Won't Die*, ATLANTIC (Jan. 20, 2015), <https://www.theatlantic.com/international/archive/2015/01/paris-mayor-to-sue-fox-over-no-go-zone-comments/384656>.

342. Whites tend to prefer predominantly white neighborhoods, while Black and Latinx Americans prefer greater integration. Esther Havekes, Michael Brader, & Maria Krysan, *Realizing Racial and Ethnic Neighborhood Preferences? Exploring Mismatches Between What People Want, Where They Search, and Where They Live*, 35 POPULATION RSCH. & POL'Y REV. 101 (2016); ANDREW WIESE, PLACES OF THEIR OWN: AFRICAN AMERICAN SUBURBANIZATION IN THE TWENTIETH CENTURY 247–48 (2004) (describing white flight from a neighborhood into which Black families had moved, leaving only those whites too poor to leave).

presence provokes resistance whether it is profiling and violence against a Black jogger or a woman wearing a hijab shopping for a house, vociferous resistance to public or low-income housing, or the building of a mosque. Blacks, browns, and Muslims may eventually assimilate and integrate into white communities, but they may not congregate: the communal strength of their presence provokes fear and sometimes lethal violence.

#### CONCLUSION

This article began with a question regarding whether a religion can become a race over time and through a process of resignification. In the specific context of Europe and the United States, it is not only possible, but Islam has, in fact, come to operate as a race. If we start with the assumption, as discussed in Part I, that race is not real, is not a fact, that there is no biological basis for it as most critical race scholars have come to understand, then race is a fiction and a specter that only *appears* to exist, but is a product of racism. The ideology of racism uses racecraft—a set of tools and practices—to justify the treatment of a group of people as different and subordinated based on some shared difference. The difference is given meaning by racism. It does not exist prior to racism. For Africans brought to the United States, their differences as Wolof, Fulani, Mandinka, Yoruba, Fon, as so on were erased in a process that dehumanized and homogenized them first into slaves and then “Black” so that their mistreatment based on shared African ancestry could be justified. For the Islamicized/Muslims, ethnic differences are similarly being erased in a process that renders the connection to Islam the most meaningful marker of difference, a difference from non-Muslims and a difference from whiteness. In other words, the connection to Islam is the means by which people come to be Islamicized into a race. While historically, racing Muslims depended on their already existing racial identity, as the War on Terror has progressed, Muslim-ness has become less tightly anchored to color or ethnicity and more entwined with markers of Islam which incorporate these but does not require them. As such, white or white-passing individuals who might evade racial regulation become subject to it as soon as they are Islamicized, regardless of whether they believe in Islam as a religion or not. The racism against Black Americans is anti-Blackness; the racism against Muslims is Islamophobia.

But just as the substratum of anti-Blackness requires some ground of difference, such as shared African ancestry in which Africa itself means something specific, Islamophobia depends on the shared connection to

Islam and its specific meanings.<sup>343</sup> Part II of this article offered a genealogy consisting of three strands that weave together to produce Islam-as-race in the United States. This is the substratum of Islam-as-race. The first strand is the historical linkage in which Islam is understood as a non-white, non-European religion practiced by Black and brown people from slavery to the rise of Black radical Islam in the 1960s.<sup>344</sup> The second strand is the operation of American Orientalism that alienates Islam as categorically antithetical to the West as a civilization.<sup>345</sup> The third strand is the evolution from the racial profiling of Muslims in the post-Oklahoma City bombing and post-9/11 era to focus on Islam itself and the resignification of sharia as a terror ideology rather than a religion.<sup>346</sup> Having constructed Islam-as-race as non-white, alien, and dangerous, Muslims can only become part of society by meeting impossible demands for assimilation.

To convince society that the double standards used to subordinate groups are based on race (something that seems to exist) and not racism (a very real ideology) requires racecraft (a set of tools that make the treatment appear logical). Part III of this article turned to two deconstructive methods to reveal the underlying racecraft of anti-Blackness and Islamophobia. First, using a method derived from critical discourse studies and Critical Race Theory, it excavated eight discursive strategies that undergird the legitimation of racism, before then reading these strategies back into the court transcripts from the Islamic Center of Murfreesboro case in the anti-sharia panic and the narratives produced by the proponents of the anti-CRT panic.<sup>347</sup> The discursive racecraft used to legitimate both panics is very much the same. Reading these texts, one understands that the racecraft shifts the focus to make Islam and anti-racism the “real problem” not the racism that Muslims and Blacks face.

In the last section of Part III, the article turned to the material racecraft in housing and property that keeps these groups in their proper place. Juxtaposing anti-Blackness and Islamophobia showed that both communities face significant housing disadvantages and remain ghettoized. Both groups face hurdles moving into predominantly white suburbs and often face social rejection and violence when they succeed. In addition, projects that are recognizable visual markers of the presence of subordinated groups in significant numbers, like public housing and mosques, face NIMBYism and the use of both property lawfare (such as

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343. *See supra* note 6 and accompanying text.

344. *See supra* notes 67-131 and accompanying text.

345. *See supra* notes 132-178 and accompanying text.

346. *See supra* notes 179-233 and accompanying text.

347. *See supra* notes 240-255 and accompanying text.



rezoning and injunctions), and also social rejection and violence.<sup>348</sup> The material racecraft reinforces the belief that these groups are racially different and deserve different treatment.

In summary, racism deployed against a discernible group based on some shared difference creates a racial identity. The reiterative process of racial differentiation into an identity through the rituals of racism eventually gives rise to a race. Even if that race is fictitious and spectral, it appears to exist. Racial identity is complex given the variations within racialized groups. Muslims do not look phenotypically any particular way. Neither do Latinx people and neither do Black Americans. It behooves us to remember that Homer Plessy was not visibly Black but chosen specifically because he could pass for white.<sup>349</sup> In order to violate the Jim Crow laws segregating train cars, he had to reveal himself to the train conductor as a Black man, thereby triggering his arrest. White segregationists could not always tell a Black person by looking at them, and Plessy might have just passed into Whiteness sitting in the whites-only car but for the self-revelation of his Black racial identity.<sup>350</sup> Similarly, Muslims cannot always be seen. Conversely, someone who is seen as Muslim may not be Muslim. A person can be ascribed as Muslim and Islamicized even while vociferously refusing that identification as did Barack Obama who considered being called a Muslim a slur.<sup>351</sup> Others become Islamicized when they “come out.”

This article has argued that the racialization of Muslims has been well recognized by scholars but the racialization of Islam itself is at the root of this process.<sup>352</sup> To try to accommodate the interplay of Muslims’ racialization with religion, some have referred to Muslim as a “religio-racial” identity.<sup>353</sup> Others have stopped short of calling Muslims and Islam a race, preferring the more conservative racialization idea. In spite of the hesitation to name it so, Islam is now race in every meaningful way within the racial hierarchy of United States and Europe. Race as a concept is capacious enough to contain the ethnic, religious, gender, and other

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348. See *supra* notes 300-342 and accompanying text.

349. See STEVE LUXENBERG, *SEPARATE: THE STORY OF PLESSY V. FERGUSON AND AMERICA’S JOURNEY FROM SLAVERY TO SEGREGATION* (2020).

350. *Id.*

351. Cyra Akila Choudhury, *Collateral Damage: The Ghettoization of Muslims in the Race for the White House*, in *RACE 2008: CRITICAL REFLECTIONS ON AN HISTORICAL CAMPAIGN* (Myra Mendible, ed., 2010).

352. See generally, SAHAR F. AZIZ, *THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM* (2021) (arguing that the intersection of race and religion produces the “racial Muslim.”).

353. See Sunera Thobani, *Racial Violence and the Politics of National Belonging: The Wisconsin Shootings, Islamophobia and the War on Terrorized Bodies* 8 *Sikh Formations: Religion, Culture, Theory* 281 (2013) (“This religio-racial casting of those who ‘look’ like Muslims as threats to the ‘civilized’ nation’s values and beliefs thus enables other racialized populations to claim proximity to the nation on the grounds of their religious affinity.” *Id.*, at 285).

identities of all those who have been Islamicized. It accommodates the Islamicization of Sikhs and those who are mistaken for Muslims without regard to religious belief, of people with Islamic names like Barack Hussein Obama who is not Muslim, and white men in kufis and white women wearing hijab who are, in fact, Muslims. As such, we should now recognize that Islamophobia is the racism, Muslims are a racial group, and Islam is their race.