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ISLAMAPHOBIA, NEO-ORIENTALISM, AND THE SPECTER OF JIHAD: PROBLEMS FACING MUSLIM LITIGANTS IN U.S. COURTS

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INTRODUCTION

Islam is one of the fastest growing religions in the United States. Although estimates of the number of Muslims living in the United States vary, many scholars believe that Islam will soon surpass Judaism as the second largest religion in the country, if it has not already.[1] Muslims have primarily immigrated to America from the Middle East, Africa, and Asia. Groups of these immigrants started arriving in the United States as early as the 1870s, and the number of Muslim immigrants has increased significantly since 1960, when Congress adjusted immigration laws concerning national quotas.[2] The significant proportion of African-Americans and native-born Muslims who are first-generation, second-generation, or third-generation Americans augment the American Muslim immigrant community.

Muslims have long played an active role in Western imagination. Since as early as the Crusades and the Moorish rule of Spain, Christian Europe has seen Muslims as foreign, exotic, and potentially dangerous to Christian society. From Bernard Lewis' work to Edward Said's, there is no dearth of scholarship devoted to the perceived dichotomy of the Islamic East and the Judeo-Christian West.[3] Muslims living in North America and Western Europe are, of course, not immune to such generalizations about their faith, which have affected the ways in which Muslim communities function in these countries and their relationships with their Christian, Jewish, or other compatriots.[4]

Since the end of the Cold War, Islam has been increasingly seen as the "new enemy" (or the revived old enemy) of the West.[5] Terrorist attacks, such as the 1993 bombing at the World

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1 KATHLEEN M. MOORE, AL-MUGHTARIBUN: AMERICAN LAW AND THE TRANSFORMATION OF MUSLIM LIFE IN THE UNITED STATES 2 (1995).

2 *Id.* at 7-8.

3 *See, e.g.,* BERNARD LEWIS, ISLAM AND THE WEST (1993); EDWARD SAID, ORIENTALISM (2003).

4 Media skepticsm of the intentions of Muslims affects Muslims and non-Muslims alike. Asra Nomani, a Muslim author, characterized this as a social problem in a recent interview on National Public Radio concerning the station's firing of a journalist for admitting that people wearing Islamic clothing on airplanes made him nervous. "I am Muslim. . . . What [the journalist] expressed, I believe, is the sentiment of many people, including Muslims. Muslims profile each other all the time. When you walk into a mosque and you see other Muslims you say, 'Oh, look. He looks like a jihadi.' or 'That's a niqabi,' a woman who wears a full-face veil." *Tell Me More: NPR Fires Juan Williams, Journalists React* (National Public Radio Oct. 22, 2010) (downloaded using iTunes).

5 *See, e.g.,* Daniel Pipes, *The Muslims are Coming! The Muslims are Coming!*, NAT'L REV., Nov. 19, 1990, at 28 (outlining both historical and contemporary Muslimphobia and asserting that it may not be an unfounded concern); Oliver Revell, *Protecting America: Law Enforcement Views Radical Islam*, MIDDLE E. Q., March 1995, at 3, *available at* http://www.meforum.org/article/235 (urging Americans to face the threat of Islamic extremists particularly in light of the 1993 World Trade Center bombing).

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Trade Center, the attacks on the U.S. Embassies in Kenya and Tanzania, and, in particular, the September 11, 2001 ("September 11") attacks exacerbated these fears and brought the image of a radical Islam in opposition to American values to the national forefront. Muslims, especially Arab Muslims, have been demonized through laws, foreign policy, and popular media. As Susan Akram and Kevin Johnson point out, "[s]ince at least the 1970s, U.S. laws and policies have been founded on the assumption that Arab and Muslim noncitizens are potential terrorists and have targeted them for special treatment under the law."[6] This special treatment has fostered an environment in which Muslims, or those who are thought to be Muslims (like Sikhs), have become the targets for hate crimes and race-based discrimination.[7] Furthermore, private harassment and discriminatory treatment against Muslims is on the rise. The Council on American-Islamic Relations (CAIR), which helps Muslims manage civil rights complaints, has seen an increase in the number of complaints it receives every year since it began tracking them in 1995.[8] The increase has been dramatic, from eighty reported complaints in 1995-1996 to 2,652 in 2007.[9]

Judicial opinions concerning Muslim parties often rely on and reinforce popular stereotypes. There may be ways in which this is unavoidable. Lawyers must function in a world of concrete answers. Opinions that contemplate nuanced understandings of complicated relationships, such as those between Muslims and Christians or among Muslims in various communities, would set precedents that might be difficult or impossible for subsequent courts to follow. As anthropologist Anthony Good points out, "legal proceedings must produce definite outcomes . . . within quite short time spans. Judges do not enjoy the same luxury as scholars of being able to refine their views on particular matters throughout lifetimes of research and scholarship, and existential doubt is incompatible with the need to decide there and then."[10] Judges and advocates end up relying on a mix of expert opinion—as presented in court—and generalizations about foreign concepts. This is often intensified by the legal fiction that juries can and should make their own conclusions about evidence without the aid of cultural contextualization.[11] Nonetheless, the reinforcement of particularly negative generalizations about Muslim litigants is not inevitable. Even if judges and advocates must present arguments pragmatically, one need not assume that the representations of Muslims and Islam need to take the form that they do in many court cases.

Attorneys representing Muslim clients might find it useful to investigate the ways in which judicial language and legal action perpetuate negative stereotypes about Muslims. A better understanding of how courts employ negative views about Islam could help lawyers advocating for Muslim clients frame their arguments in ways that seek to counteract, rather than reinforce, misperceptions about Islam and Muslims. This article will consider post-September 11 court

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6 Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 302 (2001-2003).

7 *Id*. at 295-96.

8 In 2003, after a sharp increase in complaints following September 11, the number of claims that CAIR received did drop, but then rose quickly every year since. COUNCIL ON AMERICAN-ISLAMIC RELATIONS, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 2008 8 (2008), *available at* http://www.cair.com/Portals/0/pdf/civilrights2008.pdf.

9 *Id*.

10 Anthony Good, *Cultural Evidence in Courts of Law*, 14 J. ROYAL ANTHROPOLOGICAL INST. S47, S57 (2008).

11 *See id*. at S55-56.

cases in four areas of law—immigration, criminal, family, and civil rights—with the purpose of highlighting how the language of the courts sustains popular misconceptions about Islam and often negatively affects Muslims parties in U.S. courts.

I. ISLAM AS INTOLERANT: OBSTACLES FACED BY ASYLUM SEEKERS

In order to qualify for asylum under U.S. law, an applicant must show that he or she has a genuine fear of persecution based on his or her religious or political beliefs, race, national origin, or membership in a particular social group.[12] In order to assert a successful affirmative claim for asylum, an applicant is first interviewed by an asylum officer, who is a federal employee.[13] If the officer feels that the applicant has shown a genuine fear of persecution because of a particular belief or membership in a particular group, the applicant is granted asylum and receives legal residency status based on asylum.[14] If the asylum officer feels that the applicant has not met the legal burden for asylum, the officer refers the applicant to an immigration judge, who schedules a hearing and comes to a conclusion based on the same criteria.[15]

If the immigration judge is also not convinced, the applicant will usually be put into removal proceedings.[16] The applicant can appeal the decision of the immigration judge to the Board of Immigration Appeals (BIA) and further to a federal circuit court.[17] This final step rarely occurs, but it is the only widely available source for asylee opinions. The decisions of immigration courts and the BIA are rarely, if ever, published and are persuasive, but not binding, on other tribunals. Moreover, by the time the decision reaches a federal circuit court (or even more extraordinarily the United States Supreme Court), the issues on appeal have been very narrowly tailored. These court opinions do not examine every detail of the case, which may have been discussed at length at other points in the judicial process.

Consequently, available opinions deciding many asylum claims from Muslims based on religious persecution often lack in-depth discussions of religious beliefs because the courts did not reach the merits due to procedural or other reasons. Nevertheless, a survey of some recent asylum cases may help illuminate the ways in which U.S. immigration courts perpetuate a monolithic image of Islam that is generally fanatical, foreign, and intolerant, and simultaneously deny asylum seekers the opportunity to escape persecution associated with a government or a populace that adopts or tacitly accepts a violent interpretation of the Islamic faith.

A. *Ramadan v. Gonzales*[18]

Neama El Sayed Ramadan, an Egyptian native, sought asylum based on her non-conformist Islamic beliefs, which, according to Ramadan, led to beatings by her male relatives, harassment from "other Islamic men," and phone threats from Muslim groups while she was

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[12] 8 U.S.C.A. § 1158(b)(1)(A)-(b)(1)(B)(i) (2006).

[13] *Obtaining Asylum in the United States: Two Paths*, UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid= e3f2613 8f898d010VgnVCM10000048f3d6a1RCRD (last visited Dec. 1, 2010).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Ramadan v. Gonzales, 427 F.3d 1218 (9th Cir. 2005).

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living in Alexandria.[19] Although she reported an incident to the local police, the police did not pursue an investigation.[20] Ramadan testified that in 1999, a group of individuals threatened to kidnap her children because of the way that she talked and dressed.[21] At this point, Ramadan decided to flee to the United States, where her other children were living, and to remain there.[22] She received a phone call from relatives in Egypt who had been threatened after Ramadan had had a conversation at a friend's house in San Francisco about the role of women in Egypt. In June 2001, Ramadan applied for asylum. [23]

The court described Ramadan as dressing "in western attire, such as mini-skirts" and as someone who "believed 'a woman should have her own opinion and should have her own way of living.'"[24] Ramadan's views and mode of dress are presented as non-conforming with Islamic custom.[25] Islamic custom, the court's opinion implies, is implicit in the behavior of the men who beat and harassed Ramadan and who believed that she should behave more like a "typical Muslim woman," who, apparently, should not have her own opinion or own way of living.[26] The court did not investigate Ramadan's own religious beliefs and faith. Ramadan never denies being Muslim, but the court seems to assume that a woman who does not wear the *hijab*[27] and has adopted other Western ideas could not possibly be a *true* Muslim. By presenting Ramadan's views as non-conformist, the court implies that there is one, true interpretation of Islam, a religion that is inherently violent and intolerant of alternate beliefs. By not investigating her beliefs, the court paints a picture of Egypt in which the fanatical (Muslim) majority preys on the liberalized (Western) minority, corresponding with widespread generalizations and popular notions about Islamic fundamentalists.

In spite of the court's suggestion that Ramadan's Egyptian harassers are religious fanatics and its de-emphasis of Ramadan's own religious opinions, Ramadan's asylum case was ultimately dismissed because she failed to submit her asylum application within one year of her arrival in the United States. On appeal, she requested Withholding of Removal.[28] The requirements for Withholding of Removal are essentially the same as those for asylum, except the applicant must show that there is a greater than fifty percent chance that she will face persecution if she returns to her home country (as opposed to an asylee, who only needs to show a significant, usually about one in ten, chance that he or she will face persecution).[29] Again, the Ninth Circuit denied Ramadan's Withholding of Removal request because the court did not feel that Ramadan met the burden of showing that she would "more likely than not" face persecution if returned to Egypt, irrespective of the evidence of threats, beatings, and harassment Ramadan presented at

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[19] *Id*. at 1220.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Id*. at 1220-21.

[24] Ramadan, 427 F.3d at 1220.

[25] *Id*. at 1223.

[26] *Id*. at 1220.

[27] The *hijab* is a headdress worn by some Muslim women. The term often refers to many different styles of hair and face covering, but is most commonly understood to be a scarf or veil worn around the head, covering a woman's hair, but leaving her face uncovered. *See infra* Part IV.

[28] *Ramadan*, 427 F.3d at 1221.

[29] *See* 8 C.F.R. § 208.16(a); *Ramadan*, 427 F.3d at 1222.

https://scholarship.law.upenn.edu/jlasc/vol14/iss1/5

trial.[30]

B. *Kane v. Gonzales*[31]

Like Ramadan, Nafissatou Kane sought asylum based on her status as a "westernized woman."[32] Kane's fear of persecution was based on the persecution she had faced previously when she underwent female genital cutting as an infant in her native Mali.[33] Although the immigration judge was convinced that Kane deserved asylum, the BIA overturned the lower court's decision, claiming that Kane's circumcision could not have been *on account of* her membership in the group of "westernized women" opposed to the practice, since she was only one or two weeks old at the time of the ceremony.[34]

Also, like Ramadan, the court's opinion evidently does not consider Kane Muslim. The court describes her father, on the other hand, as a "religiously fanatical" Imam, who arranged her marriage at the age of eleven to a man three decades her senior.[35] Although Kane eventually escaped her marriage and fled to Saudi Arabia, she often returned to Mali, where, according to the court, her community and family shunned her because of "her inability to accept the traditional, oppressed role of a *Muslim* woman in a *Muslim* society."[36] This statement suggests that a Muslim woman's role in a Muslim society is unquestionably subjugated. Women in Muslim society are oppressed because Islamic custom dictates it. However, the court's description is not accurate. Kane's religious beliefs conflict with the allegedly radical Islam of her father, but that conflict does not make her beliefs any less Islamic. The Third Circuit, like the Ninth in Ramadan's case, sees Islam as inherently oppressive of women, rather than seeing the women's subordination in Mali and elsewhere as the result of these societies' patriarchal interpretations of religion, culture, and history. Ironically, the court's interpretation is not enough to constitute persecution in either *Ramadan* or *Kane*. This interpretation separates Ramadan's and Kane's struggles from a religious conflict and casts Ramadan and Kane as the victims of a particular culture, increasing the difficulty of finding relief through the asylum process.

A close reading of the two cases presents a picture of Islam that is inherently opposed to the liberal values that are treasured in America, specifically, and in the West, more generally. If the courts' interpretations are to be taken seriously, women in Islamic societies will, by definition, face oppression and live in subordinated positions to men. "True" Muslims will be apt to react violently when the West threatens their values. Ironically, although the courts have painted such a grim future for Ramadan and Kane, they, nevertheless, deny them relief.

C. *Mohammed v. Keisler*[37]

The interpretation of Islam as violent and monolithic is not limited to Islam's treatment

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30 *Ramadan*, 427 F.3d at 1223.

31 Kane v. Gonzales, 123 Fed. App'x 518 (3d Cir. 2005).

32 *Id*. at 519.

33 *Id*.

34 *Id*.

35 *Id*.

36 *Id*. (emphasis added).

37 Mohammed v. Keisler, 507 F.3d 369 (6th Cir. 2007).

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of women. A Shia Muslim from Pakistan, Aftab Mohammed, sought asylum based on his religious beliefs after a group of men at a Sunni mosque beat him.[38] After the beating, the local police incarcerated Mohammed, and released him only after receiving a bribe, whereupon they confiscated his passport.[39] The immigration judge and the Sixth Circuit on appeal weighed affidavits, which two experts wrote on Mohammed's behalf and a report from the United Kingdom Home Office, which the government presented as evidence.[40] The British report found that "Shias do not face systematic discrimination, are found at all levels of society, and have their own social, political, and cultural organizations."[41]

Although Mohammed had only been targeted and attacked at the mosque after he had been identified as Shia, the appellate court felt that since "Mohammed voluntarily walked into a Sunni mosque, it is impossible to say he was targeted for abuse."[42] The court also pointed to the conclusion in the U.K. report that "Shias are generally protected by the government."[43] It is not clear that the court had a solid understanding of the differences between Sunni and Shia Muslims, nor that it was interested in one. The court initially accepted Mohammed's testimony that he was beaten *because* he was Shia, then stated in its analysis that he could not have been targeted for his religious beliefs: "During a visit to his sister in Pakistan in 1992, [Mohammed] entered a Sunni Mosque, prayed there, and when recognized as a Shia, he was beaten and chased out of the mosque."[44] This conclusion is truly baffling. The only way to really understand the court's deduction is to assume that no real differences exist between Muslim groups in Pakistan (or perhaps in general) and that Mohammed must have *personally* riled the group of Sunnis as well as the local police. The court's lack of concern about the roots of the group's violent behavior is not surprising if Islam itself *is* violent and its people irrational, as many Americans understand it to be.

D. *Akhtar v. Attorney General of the United States of America*[45]

Like Ramadan and Kane, Syed Atif Akhtar sought asylum in the United States from persecution based on his "liberal, pro-American" beliefs.[46] Akhtar was from Pakistan and practiced a minority religion, Sufism, in a country he described as "increasingly fundamentalist and intolerant since the attacks of September 11, 2001."[47] Akhtar's primary evidence consisted of threats made to him and his family members and several robberies of his parents' house. Akhtar also supported his claims with statements of various witnesses about general country conditions in Pakistan.[48] However, the Third Circuit found this evidence unpersuasive.

The court ignored any analysis of the differences or tensions between Sunni-Wahhabi

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38 *Id*. at 370
39 *Id*.
40 *Id*.
41 *Id*.
42 *Id*. at 371.
43 Mohammed v. Keisler, 507 F.3d 369, 371 (6th Cir. 2007).
44 *Id*. at 370.
45 Akhtar v. Att'y Gen., 138 Fed. App'x 481 (3d Cir. 2005).
46 *Id*. at 482.
47 *Id*.
48 *Id*. at 482-83.

Muslims and Sufis in Pakistan. Likening Akhtar's case to a 2005 case concerning an ethnic Chinese Christian seeking asylum from Indonesia, the court suggested that general economic (or perhaps even ethnic) tensions, and not religious differences, led to the robberies.[49] Therefore, the persecution that Akhtar suffered could not constitute persecution *on account of* his Sufi beliefs or practices.[50] However, the court offered no discussion of what Akhtar's religious differences might be or how those differences could be regarded as threatening to the Pakistani majority elite.

Following the themes present in *Ramadan* and *Kane*, the courts seem to make the same assumption in both Akhtar's and Mohammed's cases. There are no real differences between Muslim groups, so there must have been another reason (economic, ethnic) that led to the harassment of the two men. The fear that all Muslims are potential terrorists is only possible in a world in which difference between Muslim ideas cannot exist. If, by chance, a Muslim does disagree with the established version of Islam, the court represents him or her as westernized or pro-American. The individual has ceased to be Muslim in the understanding of the socio-legal imagination.

Through the decisions of these asylum courts, one may conclude that Islam is represented most accurately and most innately by the most repressive regimes. Judges, who, after all, are not immune to social prejudices, reinforce widespread American stereotypes about Muslims. By framing many claims in terms of membership in "pro-liberal" or "westernized" groups, advocates for asylum applicants do little to help dispel the same myths about Islam. Instead, they bolster Americans' underlying fear about Muslims: "they" hate "us" because of our freedoms, because of our values, because "they" are primitive and bigoted and "we" are tolerant and enlightened.

In her discussion of asylum and refugee claims that took place in the 1990s, Susan Akram refers to this phenomenon as "neo-Orientalism," alluding to Edward Said's seminal work.[51] Akram explains how advocates perpetuate Western stereotypes about Muslim and Middle Eastern society, in particular, the belief that there "are still such things as *an* Islamic society, *an* Arab mind, *an* Oriental psyche."[52] Moreover, the identified "sources of persecution," according to neo-Orientalist critics, are "Islamic law" and "Muslim mores."[53] Many of the themes that Akram identifies have continued in the asylum cases of the last decade. Courts now cite the same cases she criticized, using the same interpretations of Muslim conditions she identified as problematic.[54] While the events of September 11 do not seem to have worsened the stereotyping that courts employ, neither have those events diminished it. The asylum system depends on extremely subjective judicial interpretations. It seems that Muslims seeking relief based on their religious views will continue to encounter these generalizations, which distort the image of their home societies.

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[49] *Id*. at 483 (citing Lie v. Ashcroft, 396 F.3d 530 (3d Cir.2005)).

[50] *Id*.

[51] Susan Musarrat Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 INT'L J. REFUGEE L. 7, 7 (2000).

[52] *Id*. (emphasis in original).

[53] *Id*. at 18.

[54] *See*, *e.g*., Yadegar-Sargis v. INS, 297 F.3d 596, 603 (7th Cir. 2002) (citing Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993) and Safaie v. INS, 25 F.3d 636 (8th Cir. 1994), two of the cases Akram finds particularly problematic).

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II. DISTINGUISHING MUSLIM CRIMINALS FROM RADICAL TERRORISTS

One of the most widely discussed topics in American media over the last decade is the link between radical Islam and terrorism. Although many groups work tirelessly to expel the idea that all Muslims are terrorists, there is a general sense in American culture that so-called Islamic fundamentalists (or perhaps Islamo-fascists) are incessantly conspiring to harm "us." Criminal courts often must determine whether to admit evidence concerning radical Islam and its links to terrorism. Courts seem to recognize the risk that defense lawyers could try to present a violent interpretation of Islam as a "cultural defense" against serious crimes. This form of defense, which immigrant and ethnic minority defendants are using more frequently, posits that courts should apply leniency to defendants whose cultures do not recognize actions as crimes in the same manner as the adjudicating culture.[55]

Cultural defense is controversial for many reasons. Courts are concerned that criminals could be exculpated for crimes they intended to commit. Others fear that proposing "culture" as an excuse, or at least a mitigating circumstance, might lead some to believe that certain criminal behavior is inevitable within individual cultural groups.[56] Some judges are hesitant to admit any contextualization of a defendant's culture to avoid risking the consequences of a cultural defense. However, the risk is equally great that without any context in which to understand a party's motivations, juries will associate *all* Muslims who are indicted for crimes with radical Islamic terrorists, especially considering the popular propaganda against Muslims and general misunderstandings of Islam.

A. *United States v. Amawi*[57]

In the spring of 2008, Mohammed Zaki Amawi, Marwan El-Hindi, and Wassim Mazloum were put on trial for conspiring to kill United States service personnel in Iraq and providing material support for terrorism.[58] During the trial, the defense proffered several expert witnesses whom they intended, inter alia, to explain to the jury the cultural context for the defendants' beliefs and, in particular, the roots of the modern jihad movement.[59] The United States District Court for the Northern District of Ohio rejected the defense's motion to include these testimonies and wrote an opinion explicating the decision of the court.

The court first pointed out that the government had also proffered an expert witness, Evan Kohlmann, to speak about the defendants' use of the internet, as well as international terrorist organizations' use of the internet more generally. The court first considered Kohlmann's testimony too expansive and granted the defense's motion to exclude the testimony.[60] However,

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55 *See generally* Good, *supra* note 10 (providing an in-depth analysis of the growing use of cultural defense, particularly in British courts). *See also* Kathleen M. Moore, *Representation of Islam in the Language of Law: Some Recent U.S. Cases*, *in* MUSLIMS IN THE WEST: FROM SOJOURNERS TO CITIZENS 187, 196 (Yvonne Yazbeck Haddad ed., 2002) (discussing the use of the cultural defense in U.S. courts); Richard Freeland, *The Treatment of Muslims in American Courts*, 12 ISLAM & CHRISTIAN RELATIONS 449, 457-58 (2001) (noting that American courts do not recognize a formal cultural defense but admit evidence of culture as background information).

56 *See* Good, *supra* note 10, at S53-S56.

57 United States v. Amawi, 552 F. Supp. 2d 669 (N.D. Ohio 2008).

58 *Id*. at 671.

59 *Id*. at 673, 675.

60 *Id*. at 671.

Kohlmann was later allowed to testify on a more limited list of topics.[61]

The court was correct in recognizing that allowing Kohlmann's testimony regarding terrorist and insurgent groups active in the Middle East, with whom the defendants had no interaction "would invariably suggest to the jury that somehow they did."[62] Nevertheless, the court did not specify in its opinion what precisely it would exclude from Kohlmann's testimony to prevent this from happening in response to his more limited testimony.

The first expert the defense proposed was Reza Aslan, a doctoral student at the University of California at Santa Barbara and an expert on the roots of jihad as a social movement.[63] Aslan was to explain both the foundation of jihad as a "global social movement" and how intense engagement by the leaders of the movement transforms its members from "free riders" into "active participants."[64] The defense emphasized the importance of contextualizing the jihad movement for the jury and explaining the process through which one goes from expressing certain religious and political beliefs to advocating and participating in violent action.[65] The defense did not intend to present this argument to justify criminal actions, as in a cultural defense, but to show that although the defendants may have expressed ideological beliefs similar to recognized terrorist groups, that expression did not necessarily mean that they intended to participate in violent actions against the American state or its people.

The court, however, was not convinced. Aslan's testimony was considered too general to be included in the jury trial.[66] Somehow, the trial judge concluded that a case in which the defendants were charged with providing material support to terrorism and conspiring to commit terrorist acts in Iraq "is not a case about Islam, jihadist movements or Terrorism. This is a case about whether specific acts violated federal criminal laws."[67] Aslan's testimony was subsequently excluded.

The court argued that such contextualization for the jury would conflict with the efforts made during the jury selection process to ensure that the religious beliefs of either the defendants or of the jurors would not affect the jury's deliberations.[68] The court appears to be either ignorant of or apathetic to the negative stereotypes about Muslims that are prevalent in American society. Although Kohlmann's testimony about the defendants' allegedly illicit use of computer documents and internet websites was permissible, Aslan's explanation of what these documents *meant* to the defendants, who also happen to be devout Muslims, was not.

The second defense expert whose testimony the court excluded was Jon B. Alterman, the Director of the Center for Strategic and International Studies in Washington, D.C.[69] Like Aslan, Alterman intended to present a nuanced perspective of Middle Eastern attitudes about America and the meanings attached to those attitudes, like the function of jihadist videos downloaded from the web, for example.[70] Again the court claimed that Alterman's testimony would primarily

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[61] *Id*. at 672 n.2.

[62] *Id*. at 672.

[63] Amawi, 552 F. Supp. at 672.

[64] *Id*. at 673.

[65] *Id*.

[66] *Id*. at 674.

[67] *Id*. at 674.

[68] *Id*.

[69] Amawi, 552 F. Supp. 2d at 674.

[70] *Id*. at 674-75.

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"confuse the issues."[71] To the court, the videos were self-explanatory. The jury did not need to hear how the understanding of the confiscated videos might differ completely based on alternate religious or cultural backgrounds. The court excluded all of the defense's attempts to "demystify" their clients' beliefs.[72] The jury was left on its own to determine the meaning of the defendants' statements and actions, which would certainly be subject to general American fears and distrust of Muslims.

B. *United States v. Benkahla*[73]

In 2003, Sabri Benkahla and ten other men associated with the Dar al-Arqam Islamic Center in Falls Church, VA were arrested and indicted for conspiracy and providing material support to terrorism.[74] Benkahla was acquitted after a bench trial in 2004, but within a short period of time, he was subpoenaed and compelled to testify at several grand juries in exchange for immunity.[75] During these testimonies, Benkahla was asked if he had attended "jihadist training camps" during a trip to Pakistan and Afghanistan in 1999. Benkahla denied attending any camps, which was one of the accusations of which he had been acquitted during his previous criminal trial.[76] In 2006, Benkahla was again indicted, this time for making false material declarations during his testimonies to the grand juries.[77]

While trying Benkahla for perjury, the government presented expert testimony from Evan Kohlmann (by coincidence, the same expert the government used in *Amawi*) concerning background information about terrorism and violent jihad.[78] After his conviction Benkahla appealed, claiming, inter alia, that Kohlmann's testimony was unduly prejudicial and irrelevant.[79] Kohlmann's testimony focused entirely on radical Islam and jihad in general, rather than on Benkahla specifically.[80] Among other issues, Kohlmann iterated the notion that so-called radical Islamists hate us: "Kohlmann remarked that, for Osama bin Laden and al Qaeda, 'Americans, no matter where they are on earth, whether they're civilian or military, are considered to be a target. There are no innocent civilians.'"[81]

Despite the fact that Benkahla was not accused of committing terrorist acts, both the trial and appellate courts considered this background essential. The Fourth Circuit, showing deference to the trial court, found that Kohlmann's testimony assisted the jury in understanding the evidence from a "broader frame of reference."[82]

A side-by-side comparison of Bankahla's and Amawi's cases reveals a frightening approach to terrorist prosecutions. While juries must rely on their own judgment when

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71 *Id*. at 675.

72 *Id*.

73 United States v. Benkahla, 530 F.3d 300 (4th Cir. 2008).

74 *Id*. at 303-04.

75 *Id*. at 304.

76 *Id*.

77 *Id*. at 305.

78 *Id*.

79 Benkahla, 530 F.3d at 308.

80 *Id*.

81 *Id*. at 308-09.

82 *Id*. at 309-10.

https://scholarship.law.upenn.edu/jlasc/vol14/iss1/5

interpreting evidence of an alleged terrorist plot, cultural evidence regarding the motivations of international radical Muslim terrorists is permissible against a defendant accused of lying under oath. In other words, these two courts allowed expert testimony that confirmed already widespread fears about Islamic fanaticism in furtherance of the government's prosecution. However, the court excluded testimony intended to challenge these stereotypes in support of the defense.

III. FAMILY LAW AND PUBLIC POLICY: *MAHR* AND PROPERTY IN DIVORCE PROCEEDINGS

The Islamic word *mahr* most closely translates into English as dowry or dower, although this translation is not entirely accurate. In an Islamic marriage contract, *mahr* is a sum of money or other valuables that the husband owes his wife.[83] Without *mahr*, an Islamic marriage is not considered valid. Usually, the husband immediately pays some of the *mahr* to the bride at the initiation of the contract.[84] This initial payment can range from a token amount, such as one dollar or one piece of gold, to the total amount. The rest of the *mahr* is "postponed" or "deferred." The balance is payable to the wife upon divorce or the death of her spouse.[85] Traditionally, Islamic law recognized the wife's right to the *mahr* regardless of the circumstances prompting the divorce, unless the marriage had not been consummated. Even in this case, the husband may have been required to pay half the *mahr* to the wife.[86]

American courts have not reached a consensus on whether or not (and under which circumstances) to enforce a *mahr* agreement. Muslim couples seem to increasingly access the courts in order to enforce their Islamic marriage contracts, and there is no shortage of recent cases dealing with the *mahr* in the context of divorce.[87] When confronted with these cases, courts often make broad assumptions about the nature of the *mahr* and its purpose in an Islamic context. These assumptions again perpetuate stereotypes about Muslims in general, especially those from the Middle East and South Asia.

A. *Zawahiri v. Alwattar*[88]

Mohammed Zawahiri filed for divorce from his wife, Raghad Zahar Alwattar, in February 2007 after only a year of marriage.[89] During the divorce trial, the couple testified that Zawahiri had approached Alwattar's mother in January 2006, expressing his desire to marry her

83 *See generally* O. Spies, *Mahr*, *in* 6 ENCYCLOPAEDIA OF ISLAM 78 (C.E. Bosworth , E. van Donzel, B. Lewis, & Ch. Pellat eds., 2d ed. 1991).

84 *Id*.

85 *Id*.

86 *Id*.

87 *See* Pascale Fournier, *The Erasure of Islamic Difference in Canadian and American Family Law Adjudication*, 10 J.L. & POL'Y 51 (2001-2002) (investigating the Muslim utilization of U.S. courts to enforce Islamic marriage agreements); Saminaz Zaman, *Amrikan Shari'a: The Reconstruction of Islamic Family Law in the United States*, 28 S. ASIA RES. 185 (2008); Sylvia Whitman, *Whose Place to Decide? Islamic Family Law Issues in American Courtrooms*, *presented at* AMSS 34TH ANNUAL CONFERENCE (Temple University, Philadelphia, PA September 30-October 2, 2005), *available at* www.amss.org/pdfs/34/finalpapers/SylviaChoateWhitman.pdf.

88 Zawahiri v. Alwattar, No. 07AP-925, 2008 WL 2698679 (Ohio Ct. App. 2008).

89 *Id*. at *1.

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daughter. The wedding took place one month later.[90] The couple had an Islamic marriage ceremony overseen by an imam.[91] Shortly before the ceremony began, the couple completed a marriage contract that the imam presented to them.[92] The pre-printed form contained a blank space on which to write the amount of the *mahr*. The groom and the bride's father began negotiating the *mahr* amount, which they had not previously discussed.[93] They eventually decided that the advanced portion of the *mahr* would be a ring and some gold that Zawahiri had already given Alwattar and the balance would be $25,000.[94] All parties agreed to the terms and signed the contract.

Both the trial court and the appellate court found the *mahr* unenforceable as a pre-nuptial agreement. According to the Ohio Court of Appeals, in order to enforce a contract as a prenuptial agreement, the contract must satisfy three criteria: "(1) the parties entered into it freely without fraud, duress, coercion, or overreaching; (2) there was full disclosure, or full knowledge and understanding of the nature, value, and extent of the prospective spouse's property; and (3) the terms do not promote or encourage divorce or profiteering by divorce."[95]

The court found that the couple's *mahr* agreement failed to satisfy the first requirement. Zawahiri testified that he felt "embarrassed and stressed" during the *mahr* negotiations, which took place immediately before the ceremony.[96] The court presumed coercion merely because the groom and his father-in-law had not previously discussed the *mahr* amount.[97] The court did not try to investigate how *mahr* contracts are usually made, or when parties generally agree upon the *mahr* amount. The court never asked Zawahiri if he knew that he would have to agree to a *mahr* before entering a Muslim marriage or if he had considered an amount before he arrived for the ceremony. The court presented the *mahr* quite like a dowry. The court subtly suggested that a *mahr* is an archaic and outdated concept, using the term interchangeably with dowry and making no attempt to understand the purpose of the *mahr*.[98] By determining that the *mahr* agreement was too rushed to be enforceable, the court suggested that Zawahiri was blindsided by his wife-to-be's sudden demand for a *mahr*. Given the prevalence of *mahr* in Islamic marriages and Zawahiri's professed devotion to his religion, it is difficult to see how this could be the case.

The court found another reason to refuse to enforce the contract. Zawahiri argued, and the court accepted, that enforcing the *mahr* would violate the Establishment Clause of the Ohio Constitution.[99] Zawahiri suggested that the Ohio court would be "establishing" Islam as a state religion if it forced him to pay the *mahr* amount to which he had contracted. There is no real reason to believe that this is the case. Other courts have approached the establishment question in the same context and reached the opposite conclusion. Courts enforce contracts of all kinds, so long as the parties acted freely and their offer and acceptance of the contract was valid. The New Jersey Superior Court in 2002 asked, "Why should a contract for the promise to pay money be

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90 *Id*.

91 *Id*.

92 *Id*.

93 Zawahiri, 2008 WL 2698679, at *1.

94 *Id*.

95 *Id*. at *4 (quoting Gross v. Gross, 11 Ohio St.3d 99, 99 (Ohio 1984)).

96 *Id*. at *6.

97 *Id*.

98 *Id* at *7.

99 Zawahiri, 2008 WL 2698679, at *7.

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less of a contract just because it was entered into at the time of an Islamic marriage ceremony?"[100]

There is nothing inherently "religious" about Zawahiri and Alwattar's *mahr* agreement. It does not try to force either party to conform to Islamic standards or perform Muslim rituals. The *mahr* simply guarantees a pension to Alwattar in the event of divorce or her husband's death, something quite common in contemporary American marriages. By rejecting the *mahr* contract through the Establishment Clause, the court did something even more surprising. The court's opinion states that "the court is hopeful [Alwattar] will be able to enforce the provision and obtain relief through other *religious* means."[101] The court continues by giving an example of how Alwattar could obtain her relief: "the husband could be jailed in Syria if he has not paid the dowry."[102] It is difficult to imagine how this could be a suitable means for Alwattar's relief. The marriage took place in Ohio, between two Ohio residents who were presumably American nationals. Syria has no jurisdiction over an American couple (even if they were Syrian citizens) for a crime under Syrian law that took place on American soil. Moreover, Syria is not an enforcer of "Islamic" law wherever one finds it. Is the court suggesting that only "Islamic" countries can enforce "Islamic" law? Is an agreement between Muslims automatically "Islamic" by nature of the religious identity of the parties, although an agreement on the same terms between two Christian parties constitutes a "secular" agreement? Is it possible that the two Muslim parties had "secular" intent when discussing the terms of a fiscal agreement? Ultimately, the *Zawahiri* decision leaves more questions than answers regarding how American courts should rule when self-identified religious parties enter into agreements with each other.

B. *Aleem v. Aleem*[103]

After many years of marriage, Farah Aleem filed for divorce from her husband, Irfan Aleem, in a Maryland court.[104] While the American action was still pending, Irfan went to the Pakistan Embassy in Washington, D.C. to obtain a Pakistani divorce, known as *talaq*.[105] The Aleems, both Pakistani citizens, were married in Pakistan in 1980.[106] The couple agreed on a postponed *mahr* of 51,000 rupees (about $2,500).[107] The couple left Pakistan shortly after their wedding, moving to England for several years, before settling in Maryland, where Irfan worked at the World Bank.[108]

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100 Odatalla v. Odatalla, 801 A.2d 93, 95 (N.J. Super. Ct. Ch. Div. 2002).

101 *Zawahiri*, 2008 WL 2698679, at *6 (brackets in original, emphasis added).

102 *Id.*

103 Aleem v. Aleem, 947 A.2d 489 (Md. 2008).

104 *Id.* at 490-91.

105 *Id. Talaq* (also written *talak*) is a form of divorce in an Islamic marriage with roots going back to pre-Islamic Arabia. Only the husband has the right to *talaq*, in which he repudiates his wife by pronouncement and thus dissolves the marriage. The Qur'an does not lay out specific instances that must necessarily be present for a man to perform *talaq*, but most Islamic jurists and *fqihs* (religious scholars) agree that *talaq* should not be performed without good cause. *Talaq* has been adopted into the legal codes of some Islamic countries, although many have updated and modernized their family laws to reflect more accurately contemporary notions of women's rights and equality. For more on *talaq* in general, *see* A. Layish, *Talak*, *in* 10 ENCYCLOPAEDIA OF ISLAM 151 (P. J. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel & W.P. Heinrichs, eds., 2000).

106 *Aleem,* 947 A.2d at 491.

107 *Id.* at 493-94.

108 *Id.* at 494.

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The Aleems lived a comfortable life in Maryland. At the time of their divorce, the court estimated the value of their assets, including Irfan's pension from the World Bank, their real property, and other personal items, at nearly two million dollars.[109] Under Maryland law, a couple's property "should be adjusted fairly and equitably" between the spouses.[110] One can understand this to mean that Farah was entitled to a significant portion, if not one half, of the marital property, valued at just under two million dollars. In the trial court, Irfan argued that since Irfan and Farah obtained a divorce under Pakistani law, the American court was excluded from litigating the division of property.[111] Irfan supported his argument by pointing to a long-standing tradition of comity, under which American courts refrain from interfering in the decisions of foreign courts.[112] According to Irfan, under Pakistani law, Farah would only be entitled to the *mahr*, as no other relevant provision for dividing the property belonging to a single spouse exists under the law.[113] As a matter of diplomacy and international law, comity helps maintain good relations between sovereign nations. However, when a foreign decision is contrary to the policy of American law, courts should not be bound by the domestic decision of a foreign tribunal.[114]

The Maryland Court of Appeals correctly agreed with the trial court and the Court of Special Appeals that to award Farah the $2,500 stipulated in the *mahr* agreement, while her husband left the marriage with nearly two million dollars in assets acquired during the marriage, would be against the Maryland public policy of equitable and fair division of property.[115] However, the court spent much of its opinion mischaracterizing and misrepresenting "Islamic law" in order to reach that conclusion. Islamic law is treated as a monolithic entity, established in the Qur'an and wholeheartedly adopted by some countries. The court fails to distinguish between different schools of Islamic legal thought or identify variations among countries that have adopted, in part or in whole, an Islamic legal code.

This misrepresentation is evident from the first pages of the decision, where the court tries to explain the meaning of *talaq*: "Apparently, under Islamic law, where that Islamic law has been adopted as the secular law of a jurisdiction, such as Pakistan, a husband has a virtual automatic right to *talaq* . . . ."[116] According to the court, not only is there a singular entity known as "Islamic law," but Pakistan adopted it into its secular code. The court continues, trying to explain the limited nature of its decision: "Our holding in this case relates to . . . Islamic law only to the extent it is also the civil law of a country. The viability of Islamic law as a religious canon is not intended to be affected."[117] There is no need for this caveat. "Islamic law," to the extent that any such law is definable, plays no real role in this case. *Pakistani* law is at issue, regardless of whether such law should be characterized as "religious," "secular," or "civil." By labeling the issue as one under "Islamic law [that] has been adopted as the secular law of a jurisdiction,"[118] the court is overreaching beyond the laws of Pakistan and implying that the judgment of any Muslim

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109 *Id*. at 491 n2.
110 *Id*. at 500 (internal quotations omitted).
111 Aleem v. Aleem, 947 A.2d 489, 490 (Md. 2008).
112 *Id*. at 494-95.
113 *Id*. at 494 n.5.
114 *Id*. at 495.
115 *Id*. at 502.
116 *Id*. at 491 n.1.
117 *Id*.
118 *Id*.

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country that has incorporated Islamic teaching into its civil code could be ignored as a matter of public policy based on this decision. The court seems blissfully unaware of the Christian-normative basis for much of Anglo-American law, much less its potentially disparate effects on religious minorities.

The court further misrepresents the purpose of the *mahr*. Clearly, in this case, there is a huge gap between the value of the *mahr* and the equitable distribution of the Aleem's property. The court understands that "[t]his stark discrepancy highlights the difference in the public policies of this State and the public policies of Islamic law, in the form adopted as the civil, secular law of countries such as Pakistan."[119] Like the asylum claims examined earlier, the court assumes that women are subjugated automatically under Islam. The tone of the opinion suggests that the court is horrified at the gross inequity Irfan proposes and the court attributes this inequity to Islamic law. Quite to the contrary, *mahr* is a means of guaranteeing a woman financial insurance in the event of divorce or death. Because there is an underlying assumption that Islam is "bad" for women, the court interprets *mahr* as a means of belittling women and subjugating their socio-economic positions. However, one does not have to look far to see how the *mahr* provides much more generous compensation to the wife than other contemporary American laws. In *Zawahiri*, the couple was young and only married for a short period of time. Because they had not accumulated any significant property, the *mahr* was the only valuable property at issue in the case. Alwattar was left empty-handed when the American court refused to recognize her *mahr* as a valid prenuptial contract.

Although some jurisdictions have begun to recognize the validity of *mahr*, many courts still seem hesitant to enforce any agreement that appears Islamic in nature. Whereas the Supreme Court of the United States has considered "morality," when it reflects perceived Christian majority values, a valid basis for enforcing public policy,[120] the same is apparently not the case when the values are perceived as Islamic. Assumptions that Islam oppresses women color the judgments of judges who understand the motivation behind Muslim tradition more through prejudice and misconceptions than through an understanding of intellectual history or religious philosophy.

IV. RELIGIOUS FREEDOM AND NATIONAL SECURITY: THE *HIJAB* AND IDENTIFICATION

One of the most visible and prevalent issues Muslims face is the personal use and public restriction of religious headdress. No prototypical Islamic head covering exists. Both men and women cover their heads in ways that could be classified as "Islamic," depending on one's cultural tradition and particular religious beliefs. However, the *hijab* is the article of clothing that seems to get the most press. The word *hijab*, meaning literally a curtain or a veil, is used only a few times in the Qur'an and the Hadith, in passages about the Prophet Mohammed drawing a curtain between his wife and other men.[121] The word has many rich and varied meanings in Islamic thought, from the veil literally worn over one's head or face to a mystical separation

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[119] *Id*. at 494 n.5.

[120] *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a state's criminalization of sodomy based on conceived notions of "American" morality).

[121] *See* J. Chelhod, *Hijab*, *in* 3 ENCYCLOPAEDIA OF ISLAM 359 (B. Lewis, V. L. Ménage, Ch. Pellat & J. Schacht eds., 2d ed. 1971) (providing more details regarding the *hijab*)

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between Man and Truth.[122] In contemporary usage, *hijab* can refer to the institution of veiling itself.[123] It is also commonly used to refer to a specific covering worn by some Muslim women who cover their hair, necks, arms, and legs entirely, but leave their faces, hands, and feet bare in public. Other covering Muslim women wear are also sometimes labeled *hijab* or other names particular to a specific region or ethnic group (such as *niqab, burka,* or *chador*).[124] This covering ranges from loosely wearing a scarf over one's hair to covering the body from head to toe, including the eyes. Islamic scholars have argued for centuries about the necessity of female veiling (as well as male and female modesty in general) and there is no consensus regarding to what extent one should veil, if at all.[125]

Nevertheless, many Muslim women feel it is their religious duty to remain covered in public. It is as sacred to them as communion is to some Christians or donning a yarmulke is to some Jewish men. This has not prevented secular states from enforcing restrictions on veiling. The most notorious modern example, of course, is France's ban on "'conspicuous' religious symbols" in schools, which was passed in 2004.[126] Furthermore, limits on Islamic dress are not confined to non-Muslim countries. The Shah's henchmen were infamous for carrying scissors to slice open the *chadors* of women caught wearing the traditional dress on the street in pre-1979 Iran.[127] A lively debate has also existed in Turkey since Attaturk's rule regarding whether or not to lift the ban on veils in civic spaces.[128] As many governments react to acts of terrorism, they often couch the debate surrounding veiling between religious freedom and national security.

A. *Freeman v. Department of Highway Safety and Motor Vehicles*[129]

Sultaana Lakiana Myke Freeman converted to Islam in 1997 at the age of thirty.[130] Shortly thereafter, she began regularly wearing a veil, which covered her hair and face.[131] While a resident of Illinois, Freeman had been photographed for her driver's license wearing her veil.[132] She later moved to Florida, where she presented herself for a state driver's license in February 2001, wearing the *hijab*.[133] The clerk who took Freeman's photograph hesitated to do so while her face was covered, but he eventually received permission to take the photograph in spite of

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122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 Jon Henley, *French MPs Vote for Veil Ban in State Schools*, THE GUARDIAN, Feb. 11, 2004, *available at* http://www.guardian.co.uk/world/2004/feb/11/schools.schoolsworldwide.

127 *See, e.g.,* N.M. Thomas, *On Headscarves and Heterogeneity: Reflections on the French Foulard Affair,* 29 DIALECTICAL ANTHROPOLOGY 373 (2005)

128 *See* Banu Gokariksel & Katharyne Mitchell, *Veiling, Secularism, and the Neoliberal Subject: National Narratives and Supranational Desires in Turkey and France*, 5 GLOBAL NETWORKS 147 (2005).

129 Freeman v. Dep't of Highway Safety and Motor Vehicles, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006).

130 *Id.* at 51.

131 *Id.*

132 *Id.* The court uses the terms veil and *hijab* interchangeably in this case. For purposes of this discussion, I have adopted the terms as synonyms as well, although the veil Freeman wears is not the most common form associated with the Arabic term.

133 *Id.*

Freeman's "headgear," which he did.[134]

Several months after September 11, 2001 attacks on the World Trade Center and the Pentagon, Freeman received a letter from the Department of Motor Vehicles, informing her that she must present herself for a photograph without her veil, or her license would be canceled.[135] After Freeman refused to be photographed without her veil, the state canceled her license and she appealed.[136]

Both sides presented experts who testified to the necessity of veiling for Muslims.[137] The sides only disagreed over the possibility of making exceptions to the general rule.[138] In the absence of differing opinion, the court had no choice but to accept the argument that Islam *dictates* veiling. While the trial and appellate courts recognized some debate within the Islamic community regarding the enforcement of veiling and its potential exceptions, this debate is limited to those who believe, first of all, that Muslim women must veil as a tenet of their faith.

In deciding whether the requirement to remove Freeman's veil for an identification photograph violated her right to religious freedom, the court relied on an earlier Florida case, *Warner v. City of Boca Raton*,[139] which interpreted the breadth of the Florida Religious Freedom Restoration Act ("FRFRA"). FRFRA forbids the state from substantially burdening one's exercise of religion unless the state shows the burden: "(a) is in furtherance of a compelling government interest; and (b) is the least restrictive means of furthering that compelling government interest."[140] However, while the main issue in *Warner* was whether the plaintiffs held genuine religious beliefs, the *Freeman* court hardly addressed the issue.[141] To the appellate court, Freeman truly believed that she must veil, affirming the trial judge's conclusion.[142] Even though the court accepted Freeman's practice as a central tenet of her faith, it still determined that her exercise of that faith was not substantially burdened by the government's insistence that she act directly contrarily to her beliefs. One wonders to what extent latent fears about Muslims influenced the court's decision.

The trial judge made pains in his opinion to point out that Freeman was not "being singled out because she is a Muslim."[143] Moreover, the court was sure to note that Freeman herself is not a terrorist. Nonetheless, the justification for denying Freeman her right to exercise her religion suggests a connection between Islam and terrorism: while "the Court acknowledges that Plaintiff herself most likely poses no threat to national security, there likely are people who would be willing to use a ruling permitting the wearing of fullface cloaks in driver's license photos by pretending to ascribe to religious beliefs in order to carry out activities that would

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[134] Freeman, 924 So. 2d at 51.

[135] *Id.* at 51-52.

[136] *Id.* at 50.

[137] *Id.* at 52.

[138] *Id.*

[139] Warner v. Boca Raton, 887 So. 2d 1023 (Fla. 2004). *See also* WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2005) (providing a detailed examination of the *Warner* case by one of the theological experts called to testify at the trial).

[140] FLA. STAT. § 761.03 (2003).

[141] *Freeman*, 924 So. 2d at 53.

[142] *Id.* at 54.

[143] Freeman v. Florida, No. 2002-CA-2828, 2003 WL 21338619, at *5 (Fla. Cir. Ct. 2003).

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threaten lives."[144] The reader immediately understands what these hypothetical threats are: Islamic terrorists literally hiding behind the veil of protected religion. As Kathleen Moore notes in her analysis of *Freeman*, "[t]he upshot of the court's ruling is that a Muslim woman who was not suspected of any crime was associated with the threat of terrorism merely on the basis of her appearance."[145] In a trial that ultimately had no relation to "radical Islam" or terrorism, the court reiterated the underlying fear that many Americans have about Muslims: that their very presence is a threat to "our" way of life and they will stop at nothing to destroy our freedoms.

V. CONCLUSION

Stereotypes about Muslims and fears of Islamic terrorism permeate the opinions of U.S. courts in many facets of the law. These stereotypes evidently reflect widely-held biases in American society. Akram's neo-Orientalism is not limited to asylum cases, but can be identified in criminal, family, and civil rights cases as well. Although a watershed event in so many other areas of American life, September 11 did not seem to significantly change the ways in which American courts approach Muslim parties. However, as the Muslim population grows and becomes increasingly willing to avail American courts, negative stereotypes about Islam will affect many more parties in the legal system, potentially ostracizing the community. Advocates for Muslim clients should be aware that judges and juries are not immune from social biases and should attempt to fashion their arguments in ways that do not prey on underlying anti-Islamic sentiments.

American Muslims face a society that, despite its overtones of multi-culturalism and tolerance, has identified Islam as the enemy. According to American courts, Islamic culture is violent, irrational, and opposed to liberal values. Consequently, Americans do not need to tolerate, much less encourage, this type of culture because it threatens the foundation of American secularism. Although courts are a reflection of society, they also have the incredible potential to dictate the parameters of social debate. If, through effective advocacy, courts begin to recognize Muslims as the diverse group that they are, then perhaps the rest of society will follow.

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[144] *Id.* at *7.

[145] Kathleen M. Moore, *Visible through the Veil: The Regulation of Islam in American Law*, 68 SOC. OF RELIGION 237, 247 (2007).

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