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Veiling and Inverted Masking

Vanita Saleema Snow†

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INTRODUCTION

“Good morning, Your Honor, AA, here on behalf of the United States government.”¹ AA recounted her proudest moment: appearing in federal district court as an attorney for the Department of Justice (DOJ) in a religious accommodation case under Title VII of the Civil Rights Act of 1964.² There she

DOI: <https://doi.org/10.15779/Z38PC2T93K>.

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1. AA and I presented at the National Muslim Law Students Association annual conference at Yale Law School on November 3, 2018. I attentively listened to her story and visualized her proudly appearing in federal court in full hijab.

2. *Id.* See also Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. IV 2011)).

stood, an Ivy League graduate and the granddaughter of sharecroppers. She appeared before the court as an African-American Muslim woman in hijab representing the government to uphold the constitutional rights of another Muslim woman.³ The complainant, Safoorah Khan, was employed as a teacher in a small Illinois school district and had requested a religious accommodation to make the annual Islamic pilgrimage to Mecca (hajj).⁴ The school district denied Ms. Khan's request.⁵

Although the employer raised economic hardship as its legal defense, trends suggest that the school district may have denied Khan's request because her secular practices, in its view, did not align with her claim that she had a religious obligation to make hajj.⁶ AA successfully settled Khan's case against her employer and secured \$75,000 for Khan in lost wages.⁷ I argue that because Khan did not perform her religion as the employer expected, such as by wearing hijab, the employer challenged the sincerity of her religious belief.⁸ Specifically, I argue that Khan experienced the effects of what I refer to as *inverted masking* when the school district denied her request. In the inverted masking paradigm, employers are more prone to challenge employees' religious accommodation requests when the employee is inconsistent in religious practices or fails to perform a religious identity as the employer would expect. An array of large-scale employment litigation over discrimination against specifically Muslim employees provides evidence of the inverted masking paradigm in action.⁹

Muslims, especially Muslim women, face special difficulties in a post-*Trump v. Hawaii* America.¹⁰ Since the election of Donald Trump, assaults against Muslims are higher even than they were immediately after the September 11,

3. Safoorah Khan filed a complaint with the Equal Employment Opportunity Commission (EEOC), which later referred the case to the Department of Justice (DOJ). Complaint at 13, *United States v. Bd. of Educ.*, 1:10-CV-07900 (N.D. Ill. Dec. 13, 2010).
4. Press Release, Dep't of Just., Justice Department Files Religious Discrimination Lawsuit Against Berkeley School District in Illinois (Dec. 13, 2010), <https://www.justice.gov/opa/pr/justice-department-files-religious-discrimination-lawsuit-against-berkeley-school-district> [<https://perma.cc/3TL7-4G7U>]; Complaint, *supra* note 3, at 1.
5. *Id.*
6. *Cf.* *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 682 (9th Cir. 1998) (requiring that the plaintiff show more than a "lone unilateral statement" as evidence of sincere religious belief). In *Tiano*, the plaintiff failed to prove a bona fide religious belief that she was called to go on a pilgrimage to Yugoslavia because she "felt [she] was called to go." *Id.*
7. Press Release, Dep't of Just., Justice Department Settles Religious Discrimination Lawsuit Against Berkeley School District in Illinois (Oct. 13, 2011), <https://www.justice.gov/opa/pr/justice-department-settles-religious-discrimination-lawsuit-against-berkeley-school-district> [<https://perma.cc/9GEP-J82Y>].
8. *See* Complaint, *supra* note 3, at 1.
9. *See* *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, 2031 (2015); Consent Decree, *EEOC v. Swift Aviation Grp.*, No. CV-12-01867-PHX-NVW (D. Ariz., July 23, 2013); *see generally* U.S. EQUAL EMP. OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW ABOUT THE EEOC AND RELIGIOUS AND NATIONAL ORIGIN DISCRIMINATION INVOLVING THE MUSLIM, SIKH, ARAB, MIDDLE EASTERN AND SOUTH ASIAN COMMUNITIES, <https://www.eeoc.gov/wysk/what-you-should-know-about-eeoc-and-religious-and-national-origin-discrimination-involving> (last visited Sept. 21, 2019) [<https://perma.cc/VP9Q-ZJJ9>].
10. *Trump v. Hawaii*, 138 S.Ct. 2392 (2018) (holding entry restrictions from Muslim-majority foreign states is a valid exercise of presidential power).

2001, attacks,¹¹ and 50 percent of Muslims have experienced discrimination.¹² Donald Trump has perpetuated negative stereotypes about Muslim women,¹³ and some argue that Muslim women are particularly susceptible to hate crimes because of the intersection of their gender and Muslim identities.¹⁴

As a safeguard against mounting employment discrimination, rising anti-Islamic sentiments, and new anti-Islamic policies in the United States, Muslims increasingly engage in the tradition of masking their identity. On airplanes, many Muslims hesitate to speak Arabic or to carry books on the Middle East, for fear doing so might trigger the Transportation Security Administration (TSA) to perform extra screenings or prompt airline personnel to remove them from the plane for additional vetting.¹⁵ Some Muslim women stop wearing their headscarves (hijab) by choice, while others stop as a disguise mechanism.¹⁶ Undoubtedly, wearing hijab or the veil has become a visible signal of defiance to assimilation,¹⁷ and their involuntary removal an attempt to mask aspects of an outsider religious identity.¹⁸

In his seminal article *Covering*, Professor Kenji Yoshino analyzed the covering of identity in the context of race, sexual orientation, and gender.¹⁹ He also questioned the benefits of assimilation for those who experience identity-

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11. Katayoun Kishi, *Assaults Against Muslims in U.S. Surpass 2001 Level*, PEW RSCH. CTR. (Nov. 15, 2017), <https://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/> [<https://perma.cc/P9YA-82UF>].
 12. *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream: Findings from Pew Research Center's 2017 Survey of U.S. Muslims*, PEW RSCH. CTR. (July 26, 2017), <https://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/> [<https://perma.cc/D68Q-PC6C>].
 13. See Creede Newton, *Hate Crimes Rose by Nearly 5 Percent in 2016: FBI*, AL JAZEERA (Nov. 14, 2017), <https://www.aljazeera.com/news/2017/11/14/hate-crimes-rose-by-nearly-5-percent-in-2016-fbi> [<https://perma.cc/C4R7-K2SS>]; see also Karsten Müller & Carlo Schwarz, *From Hashtag to Hate Crime: Twitter and Anti-Minority Sentiment* (July 24, 2020), <https://ssrn.com/abstract=3149103>.
 14. See Michelle D. Byng, *Mediating Discrimination: Resisting Oppression Among African-American Muslim Women*, 45 SOC. PROBS. 473, 474 (1998).
 15. See Neil Vigdor, *Delta Fined for Discriminating Against Muslim Passenger*, N.Y. TIMES (Jan. 27, 2020), <https://www.nytimes.com/2020/01/27/business/delta-airlines-muslim-passengers.html> [<https://perma.cc/JK2H-QN42>]; see also Michael T. Luongo, *Traveling While Muslim Complicates Air Travel*, N.Y. TIMES (Nov. 7, 2016), <https://www.nytimes.com/2016/11/08/business/traveling-while-muslim-complicates-air-travel.html> [<https://perma.cc/7VKV-6R2B>]; WE WEAR THE MASK: 15 TRUE STORIES OF PASSING IN AMERICA 190–91 (Brando Skyhorse & Lisa Page eds., 2017).
 16. See, e.g., Asma Khalid, *Lifting the Veil: Muslim Women Explain Their Choice*, NAT'L PUB. RADIO (April 21, 2011, 12:01 AM), <https://www.npr.org/2011/04/21/135523680/lifting-the-veil-muslim-women-explain-their-choice> [<https://perma.cc/U535-8XZS>] (discussing women's reasons to unveil or veil themselves).
 17. See *id.*
 18. See *id.*
 19. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 875–79 (2002).

based discrimination.²⁰ Meanwhile, other scholars, particularly Sara Ahmed,²¹ Sahar Aziz,²² and Khaled Beydoun,²³ have examined assimilation and specifically Muslim identity markers, including what it means to “act[] Muslim.”²⁴ I build upon and link these two strains of scholarship by introducing the new theoretical framework of inverted masking.

Inverted masking is a legal consequence of masking identity, whether through covering, passing, or converting. Inverted masking’s legal ramifications emerge when a group masks or misperforms its identity to shield against discrimination. While most attempts at masking are protective, inverted masking creates legal barriers when claimants attempt to challenge identity-based discrimination. I argue that employees, particularly Muslims, who mask their religious identity or fail to perform their religious identity as employers expect are more likely to have employers deny their religious accommodation requests under Title VII of the Civil Rights Act of 1964.²⁵ The scant judicial record suggests that an employer is more likely to grant a religious accommodation if the request aligns with their expectations of the religion and the claimant is consistent with her religious practices.²⁶

Significantly, Title VII provides that an employer may not “discriminate against any individual with respect to h[er] compensation, terms, conditions, or privileges of employment” because of her religion.²⁷ The term “religion” is broadly defined.²⁸ The Supreme Court has interpreted religion to create an affirmative duty on employers to accommodate an employee or applicant’s

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20. Yoshino, *supra* note 19, at 876–87. When Kenji Yoshino examined the correlation between covering of identity and equal protection jurisprudence, he determined that mutable traits, such as sexual orientation, are offered less stringent protections than immutable identities like race (strict scrutiny) and gender (intermediate scrutiny). However, Yoshino argued that assimilation is a form of covering identity that racial minorities, women, and gay people all experience—a covering of identity that antidiscrimination statutes fail to fully address.
 21. See Sara Ahmed, *Affective Economies*, 22 SOC. TEXT 117, 130–32 (2004).
 22. See Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women’s Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1 (2014) [hereinafter Aziz, *Coercive Assimilationism*]; Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191, 216–17 (2012) [hereinafter Aziz, *From the Oppressed*].
 23. See generally Khaled Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1 (2018).
 24. See *id.*
 25. See, e.g., *Tiano v. Dillard Dep’t Stores, Inc.*, 139 F.3d 679, 681–83 (9th Cir. 1998); *Jiglov v. Hotel Peabody, G.P.*, 719 F. Supp. 2d 918, 927–34 (W.D. Tenn. 2010) (finding that the plaintiff’s leave request for a day of religious service did not create an undue hardship on the employer and was a protected religious observance, not a personal preference); Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2012) (prohibiting employment discrimination based on race, color, sex, religion, or national origin).
 26. Conceivably, the gap between litigation in this area and the denial of employees’ religious accommodations is partially attributable to the justice gap that prevents many low- and middle-income employees from challenging employer actions. Significantly, both EEOC and DOJ have been subjected to backlash for challenging public employers for failing to accommodate Muslim employees. Under the Trump administration, these cases were likely more prone to both political backlash and anti-Islam rhetoric.
 27. 42 U.S.C. § 2000e-2(a)(1).
 28. See 42 U.S.C. § 2000e(j); see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693–96 (2014).

sincerely held religious beliefs unless it creates an undue hardship on the employer's business.²⁹ Yet, it is this broad definition of religion, which in essence amounts to no definition, that has increasingly led employers to scrutinize the sincerity of an employee's beliefs.³⁰ The trend suggests that employers are assessing claimants' religiosity and consistent application of religious doctrine.³¹

Since the framing of identity narratives shape policies and judicial decisions, I examine the different theories of what makes identity and which theory American law more closely embraces in Part I of this Article. The rest of Part I focuses on the correlation between ascribed gender identities and the legal barriers associated with binary classifications of gender, race, and religion. Policies that align with the binaries of gender (male/female), race (white/non-white), and religion (Christian/non-Christian) tend to conflict with each other when nondominant identities converge in individuals—particularly African-American Muslim women.

Part II surveys forms of identity masking. This survey includes Muslims who mask to assimilate into society and escape potential discrimination. This Part provides additional background for the inverted masking thesis. This background includes contemporary examples of legislated masking, a paradigm in which individuals mask their identity to benefit from fundamental civil rights in employment,³² military service,³³ and religious practices.³⁴ Part II also discusses legislation that requires Muslim women to remove visible symbols of religious

29. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 76–85 (1977).

30. *See United States v. Quaintance*, 608 F.3d 717, 722–23 (10th Cir. 2010) (finding that a church's marijuana possession and distribution were business transactions rather than sincerely held religious beliefs); *cf. Braunfeld v. Brown*, 366 U.S. 599, 608–09 (2019) (holding that a facially neutral statute prohibiting retail businesses from operating on Sundays did not violate equal protection or the freedom of religion of Orthodox Jewish storeowners whose day of rest is on Saturday because the statute affected only Orthodox Jewish storeowners who believed that it is necessary to work on Sunday).

31. *See Hobby Lobby Stores*, 573 U.S. at 703; *see also Trans World Airlines*, 432 U.S. at 67–69, 79–85.

32. *E.g., Webb v. City of Philadelphia*, 562 F.3d 256, 259–62 (3d Cir. 2009); *see also Hobby Lobby Stores*, 573 U.S. at 728–36; *see also Seval Yildirim, Freeman v. Dep't of Highway Safety & Motor Vehicles and Webb v. City of Philadelphia – Accommodation Tangles in the Laws Over Hair*, in *LAW & RELIGION: CASES IN CONTEXT* 293, 297–300 (Leslie C. Griffin, ed., 2010); *see also Separation of Church and Cubicle: Religion in the Workplace*, KNOWLEDGE @ WHARTON (Apr. 30, 2015), <https://knowledge.wharton.upenn.edu/article/separation-of-church-and-cubicle-religion-in-the-modern-workplace/> [https://perma.cc/UPD5-72FV].

33. *E.g., Woodward v. United States*, 871 F.2d 1068, 1068 (Fed. Cir. 1989) (holding that the Navy's policy of discharging gay service members did not violate the right to privacy); *Dronenburg v. Zech*, 741 F.2d 1388, 1388 (D.C. Cir. 1984) (holding discharge based on "homosexual conduct" does not violate the equal protection clause or the right to privacy).

34. *E.g., Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So. 2d 48, 52–57 (Fla. Dist. Ct. App. 2006); *see also Yildirim, supra* note 32; *see generally Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2014-4, RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES (2014), <https://www.eeoc.gov/laws/guidance/religious-garb-and-grooming-workplace-rights-and-responsibilities> (last visited Sept. 27, 2019) [https://perma.cc/2AF4-VK3J] (explaining exceptions to religious accommodation requirements).

identity, such as the hijab and other forms of veiling.

In Part III, I fully introduce the inverted masking paradigm. In this Article, I limit my focus to inverted masking in religious accommodation claims in the Title VII context. Nevertheless, it is worth noting that inverted masking can also occur under the Equal Protection Clause,³⁵ Religious Freedom Restoration Act,³⁶ and other identity-based protections. This Part includes a survey of courts' scrutiny of sincerity in religious accommodation cases under Title VII where inverted masking was at play. I show the nexus between claimants' masked identity and the courts' query of the sincerity of claimants' religious beliefs. Finally, I prescribe centering African-American³⁷ Muslim women in religious accommodation litigation as one strategy to break down adverse stereotypes and fight the legal consequence of inverted masking.

I. THE IDENTITY DICHOTOMY

The relationship between identity and the law is often explored through various theoretical frameworks, including critical race theory,³⁸ queer theory,³⁹ feminist legal theory,⁴⁰ and covering theory.⁴¹ These frameworks, and many others, offer both different perspectives on identity formation and performance and oppositional accounts of how the law addresses marginalized identities. Aristotle's law of identity provides a foundation for the concept of identity in logic and metaphysics.⁴² His theory suggests that everything has an identity, or it is nonexistent.⁴³ That identity will remain constant and not change.⁴⁴ Thus, a "rose is a rose is a rose."⁴⁵ The rose has specific characteristics and traits that help define

35. U.S. CONST. amend. XIV, § 1.

36. 42 U.S.C. § 2000bb (2012).

37. In this article, the term "African American" is used for Black people whose ancestors were brought to the Americas as slaves. The word "Black" is used to include Black people who have a different country of origin.

38. *E.g.*, Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 323-30 (1987) (examining the importance of critical legal scholarship, presently called critical race theory, to oppressed communities, particularly regarding the topic of reparations).

39. *E.g.*, Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J.C.R. & SOC. JUST. 3, 9-16 (2008); *see generally* Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender' and 'Sexual Orientation' in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 344-377 (1995) (explaining queer theory and offering strategic goals to achieve sexual equality).

40. *E.g.* Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 43 (1990) (arguing that feminist theory should not be preoccupied with an individual's differences but should focus on unity and common ground against male tyranny).

41. *See generally* Yoshino, *supra* note 19.

42. M.A.R. HABIB, *HEGEL AND THE FOUNDATIONS OF LITERARY THEORY* 72-73 (2019).

43. *See* ARISTOTLE, *CATEGORIES. ON INTERPRETATION. PRIOR ANALYTICS*. 3a 10-13; 3b 34; 8a 19 (Jeffrey Henderson, ed., H. P. Cooke & Hugh Tredennick trans., 1973).

44. *Id.*

45. GERTRUDE STEIN, *GEOGRAPHY AND PLAY*, 187 (Univ. of Wis. Press 1993) (1922).

its existence.⁴⁶

Social scientists, such as Erving Goffman, offer other relevant paradigms that have influenced how legal scholars consider the correlation between identity and the law.⁴⁷ Specifically, Goffman's scholarship analogizes identity formation to the interaction an actor has with an audience.⁴⁸ In the theatrical realm, performers develop their characters and mold the delivery to meet audience expectations. Thus, unlike the Aristotelian law of identity, Goffman proffered that established social norms may shift how an audience interprets a fixed situation.⁴⁹ Additionally, because audiences anticipate that narratives will meet existing expectations, an audience may interpret a performance differently from how the performer intended.⁵⁰ The actor may similarly give the audience what it wants, meeting performance expectations, even when those expectations deviate from the performer's authentic self.⁵¹

Though Goffman's concept of identity performance reflects the real-life nuances of identity, the law more closely adopts Aristotle's law of identity. Like the Aristotelian law of identity, the law seeks to determine the characteristics of whatever is at issue.⁵² It then groups parties, causes of actions, or fact patterns based on unifying characteristics that then determine that claims or groups of people are somehow the same.⁵³ Foundationally, the law operates on this sameness principle. For example, the concept of *stare decisis* is what keeps the wheels of justice turning: similar facts lead to the same legal result.⁵⁴ Even though one defendant may have stolen an apple and, in a subsequent case, another defendant stole an orange, the stolen objects' sameness as fruits makes the cases analogous and justifies a court following precedent.⁵⁵ At trial, to authenticate a document under Federal Rules of Evidence 901, the attorney must prove the document is what it purports to be by demonstrating sameness between what is presented at trial and the original document.⁵⁶ Patent law similarly requires the patent owner to demonstrate a sameness to show a violation of a patent.⁵⁷

The sameness principle is also how the Title VII paradigm promotes equality by protecting individuals who are similarly situated with immutable traits, such as

46. See Monica Beyer, *Characteristics of the Rose Flower*, HUNKER (March 21, 2018), <https://www.hunker.com/13427234/characteristics-of-the-rose-flower> [<https://perma.cc/7YR4-X7C7>].

47. See, e.g., Paul Campos, *Lawyers and Spoiled Identity*, 28 GEO. J. LEGAL ETHICS 73 (2015).

48. See generally ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

49. *Id.* at 17–22.

50. *Id.* at 34–42.

51. Olivier Klein, Russell Spears & Stephen Reicher, *Social Identity Performance: Extending the Strategic Side of SIDE*, 11 PERSONALITY & PSYCH. REV. 28, 33 (2007).

52. See Lindsay Head, *Standing (Near)by Things Decided*, 15 LEGAL COMM'N. & RHETORIC: JALWD 189, 202–04 (2018).

53. See *Identity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

54. See Head, *supra* note 52, at 203.

55. See *id.* at 204.

56. FED. R. EVID. 901.

57. See *Gorham Co. v. White*, 81 U.S. 511, 526–27 (1871).

race, gender, and religion.⁵⁸ However, categories grounded in group sameness are limiting and overlook individuals who uniquely self-identify differently than their societal group identity or have intersectional identities.⁵⁹ Additionally, group sameness is embedded with stereotypes and delineates based on whether an individual is a member of the dominant group or not: male or female; white or non-white; and, to a lesser degree, Christian or non-Christian. Below, I focus on the ascribed binary classifications in gender and the intersectional identity of being a Black Muslim woman.

A. Binary Gender Identity⁶⁰

A challenge with binary gender construction is that it ascribes characteristics to men and women that do not reflect social realities.⁶¹ Both the law and broader society are slowly recognizing gender nonbinary, gender neutral, gender nonconforming, and other self-defining gender identities.⁶² For those whom the law classifies as women, the classification is supposedly supported by biological differences that align men as eminent and women as their subset. Beyond the female binary biological categorization, women's gender identity is also

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58. In this article, I do not address immutability in equal protection cases as distinguished from Title VII. In the constitutional law context, courts and scholars have extensively challenged the application of the immutability doctrine in equal protection jurisprudence, but the inferential immutability standard is frequently used in the Title VII context. For discussion on the issues, see, e.g., Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453, 457–58 (2010); Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015); Sandi Farrell, *Toward Getting Beyond the Blame Game: A Critique of the Ideology of Voluntarism in Title VII Jurisprudence*, 92 KY. L.J. 483, 515 (2004).
59. See *Bostock v. Clayton County*, 590 U.S. ___, 8–9 (2020) (unpacking Title VII's focus on individuals distinct from groups they may identify with); see also W. James Booth, *Communities of Memory: On Identity, Memory, and Debt*, 93 AM. POL. SCI. REV. 249, 250–51 (1999) (discussing facets of identity and identity evolution across time); Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, CALIF. L. REV. 1243, 1266–67 (2014) (discussing the intersectional identity of multiracial individuals).
60. I recognize the depth of identity within a gender context, including gender nonbinary and gender nonconforming identities. However, I do not fully explore these issues in this Article because, as a Critical Race Theorist, I believe in speaking to one's experiences. Indeed, I center myself in this article as a cisgender Black Muslim woman. I reference other genders as not to render them invisible.
61. See Adam R. Chang and Stephanie M. Wildman, *Gender In/Sight: Examining Culture and Constructions of Gender*, 18 GEO. J. GENDER & L. 43, 57–58 (2017); see, e.g., Casey Parks, *Gresham-Barlow School District Agrees to Pay Transgender Teacher, Add Gender-Neutral Bathrooms after Complaint*, OR. LIVE (Jan. 9, 2019), https://www.oregonlive.com/education/2016/05/gresham_barlow_transgender_tea.html [<https://perma.cc/TB7V-XA4M>]; *A Map of Gender-Diverse Cultures*, PUB. BROAD. SYS. (Aug. 11, 2015), https://www.pbs.org/independentlens/content/two-spirits_map-html/ [<https://perma.cc/5JU5-JH23>] (describing, with an interactive map, various societies around the world that include more than two genders as a part of their language, culture, or religion).
62. See, e.g., 65 D.C. Reg 11402 (Oct. 9, 2018) (allowing applicants for a license, permit, or identification card to choose nonbinary as a gender marker); S.B. 179 S., Reg. Sess. (Cal. 2017) (allowing nonbinary as a gender marker option for California birth certificates, driver's licenses, or identification cards); *Zzyym v. Kerry*, 220 F. Supp. 3d 1106 (2016) (holding that the U.S. State Department's passport denial of an intersex individual was arbitrary and capricious).

embedded in other restrictive stereotypes, including defining women as nurturing, fragile, emotionally unstable, helpless, and vulnerable.⁶³ These identity stereotypes have adversely affected women's educational opportunities,⁶⁴ legal outcomes,⁶⁵ and employment practices.⁶⁶ Yet, nonconformity to binary gender stereotypes has likewise disadvantaged women and others who do not fit the binary classification system.

In employment situations, when women violated gendered stereotypes and acted too "manly" or attempted to do "man's work," they jeopardized their career opportunities.⁶⁷ *Price Waterhouse v. Hopkins*⁶⁸ laid the foundation for challenging the use of gendered interpersonal skills as the basis for making partner in an accounting firm, but overgeneralized identities continue to affect women adversely in the labor market.⁶⁹ Employers silence women in meetings, do not accept women's professional judgment, and do not credit women for their work.⁷⁰ Consequently, women are slower to assume leadership positions in the workplace

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63. Vulnerability in feminist legal theory is extensive, and my reference is not comprehensive of the depth of analysis required to cover the topic fully. Instead, I argue that vulnerability remains a critical aspect of women's identity in the law. *See generally* Maritza I. Reyes, *Professional Women Silenced by Men-Made Norms*, 47 AKRON L. REV. 897, 900, 922 n.221 (2015) (explaining a woman's invisibility and analyzing law professor Anita Hill's story as an example of a woman's vulnerability and "place" in man's society).
64. In the 1870s, the first women were being admitted to law school. *See generally* D. Kelly Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870–1890*, 28 J. LEGAL EDUC. 485, 484–94 (1976). However, in 1873, with *Bradwell v. Illinois*, 83 U.S. 130 (1873), the U.S. Supreme Court held that a state did not have to admit a married woman to the bar. While attending law school, women experienced enduring discrimination in the classroom. *See, e.g.*, Nancy S. Erickson, *Legal Education: The Last Academic Bastion of Sex Bias?*, 10 NOVA L. REV. 457 (1986); JILL ABRAMSON & BARBARA FRANKLIN, WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974 10–11 (1986); CYNTHIA EPSTEIN, WOMEN IN LAW 50, 60–61 (1981).
65. *See* Andrea L. Miller, *Expertise Fails to Attenuate Gendered Biases in Judicial Decision-Making*, 10 SOC. PSYCH. & PERSONALITY SCI. 228, 228–29 (2018).
66. *See* Kathleen Brown, 'Changed... into the Fashion of a Man': *The Politics of Sexual Difference in a Seventeenth-Century Anglo-American Settlement*, 6 J. HIST. SEXUALITY 171, 191–92 (1995) (recounting how changing symbols of identity, such as hair and dress, allowed women to enter more lucrative fields).
67. Binary gender identity classification has been reflected in employment practices that supported feminine identity in dress, hair, makeup, vocal tone, and other gendered labels. Partners at Price Waterhouse criticized Ann Hopkins for her aggressive behavior and told her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.C. 1985), *rev'd*, 490 U.S. 228 (1989); *see, e.g.*, *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1209 (8th Cir. 1985) (claimant argued that employer removed her as co-anchor because she was "too old, too unattractive, and not deferential enough to men").
68. *Price Waterhouse*, 618 F. Supp. at 1117.
69. *See generally* Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1165–66 (1991). *But see* Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 54 (2010).
70. *See* Sheryl Sandberg & Adam Grant, *Speaking While Female*, N.Y. TIMES (Jan. 12, 2015), <https://www.nytimes.com/2015/01/11/opinion/sunday/speaking-while-female.html> [<https://perma.cc/TUS5-KSKL>]; Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 54–55 (1996).

and often feel invisible at work.⁷¹ Both situations enhance the gender wage gap.⁷²

Historically, gender-based identity stereotypes have also supported laws denying women opportunities to serve on juries⁷³ and in the military,⁷⁴ limiting the number of hours women could work,⁷⁵ and restricting the type of work they could perform.⁷⁶ The nurturer stereotype continues to influence courts in child custody matters and employers' hiring practices, leading employers to refrain from hiring women with young children⁷⁷ and to deny paternity leave to fathers. This stereotype assumes that mothers care for their children during the infants' formative months.⁷⁸ Analogously, judges have relied on this nurturer stereotype to presume mothers would have physical custody, limiting women's economic stability.⁷⁹

The gendered identity marker of vulnerability also created a body of law that endorsed women needing permission to marry,⁸⁰ own property,⁸¹ and seek a

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71. See Nikki Waller, *How Men & Women See the Workplace Differently*, WALL ST. J. (Sept. 27, 2016), <http://graphics.wsj.com/how-men-and-women-see-the-workplace-differently/> [<https://perma.cc/H3HY-DTGM>].
72. See Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RSCH. CTR. (Mar. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/> [<https://perma.cc/N9F3-A564>].
73. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding Louisiana's systemic pattern of excluding women from jury duty violated the Sixth Amendment).
74. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding national security interests to exclude women from the military).
75. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (ruling that restricting women's work hours was constitutional); See also *Miller v. Wilson*, 236 U.S. 373 (1915).
76. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding state law that prohibited women from being licensed bartenders in certain cities); *W.C. Ritchie & Co. v. Wayman*, 91 N.E. 695 (Ill. 1910) (upholding state law that regulated the employment of women in mechanical establishments or factories to limited hours).
77. See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (holding under Title VII an employer could not refuse to hire women with young children but agree to hire men with young children).
78. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077–79 (1994).
79. Child support payments do not adequately consider the lost wages women experience when they are pregnant. Shari Motro, *Preglimony*, 63 STAN. L. REV. 647, 651–52; see, e.g., *Taylor v. Finck*, 211 S.W.3d 532, 537 (Ark. 2005) (explaining Arkansas law requiring that, when calculating expenses due to a mother from the father, lost wages normally would not be included). Hourly workers are often unable to work overtime or evening shifts with higher pay because of their childcare needs. See Sandra Alcaide & Lynne Marie Kohm, *Obergefell: A Game-Changer for Women*, 14 AVE MARIA L. REV. 99, 106 (2016) (describing the “motherhood wage penalty” as “lost wages due to costs and time of childcare and household chores”).
80. See JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 48 (1987); see also Jane E. Larson, “*Women Understand So Little, They Call My Good Nature ‘Deceit’*”: A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 382 n.25 (1993) (clarifying Roman law's definition of rape to mean marriage without a father's consent).
81. See Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1497 (2009).

divorce.⁸² Some states continue to require fault for divorce,⁸³ a standard that romanticizes paternalism and often leaves women with limited options and legal protections.⁸⁴ In fact, fault divorces have largely equated to men needing to grant women permission for the divorce.⁸⁵

Although the identity marker of vulnerability has largely failed women and created glass ceilings in board rooms, vulnerability has paradoxically protected white women and uplifted them.⁸⁶ In claims of intimate partner violence where white women allege men abused them, courts are more likely to believe complainants because of their perceived vulnerability.⁸⁷ Significantly, intimate partner violence often revolves around issues of power and control, with women largely being the subject of another's control.⁸⁸ The control may manifest through

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82. See, e.g., Joseph A. Ranney, *Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin*, 6 WM. & MARY J. OF RACE, GENDER & SOC. JUST. 493, 495 (2000) (describing the evolution of property rights for women in Virginia, New York, and Wisconsin).
83. See generally DEMIE KURZ, FOR RICHER, FOR POORER: MOTHERS CONFRONT DIVORCE 24 (1995) (providing a thorough examination of the costs and consequences of divorce for women); see also Marion Crain, "Where Have All the Cowboys Gone?" *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1886–87 n.48 (1999) (explaining that divorce was allowed if one spouse was at fault for having committed specified violations).
84. Justice Brennan argued that romanticizing the idea that society needs to protect women has resulted, "in practical effect, [to] put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); see Pamela J. Smith, *Part I—Romantic Paternalism – The Ties That Bind Also Free: Revealing the Contours of Judicial Affinity for White Women*, 3 J. GENDER, RACE & JUST. 107, 113–16 (1999) (describing the restrictions of romantic paternalism).
85. See NORMA BASCH, *FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS* 61 (The Regents of the University of California eds., 1999) (arguing that fault divorce "invested wives with a measure of legal independence and then rhetorically obscured it or degraded it"); see, e.g., Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 L. & HIST. REV. 245, 266–67 (2006) (describing *Byers v. Byers*, 21 Iowa 268 (1866), where a woman fought to receive the remainder of her allotted \$2,000 for "ceas[ing] to be a member of [her former husband's] family," but national sentiment was that divorce should be allowed for more than a short list of reasons); but see Allen M. Parkman, *The Contractual Alternative to Marriage*, 32 N. KY. L. REV. 125, 127 (2005) (arguing that fault divorces encouraged couples to make their marriage work, rather than abandoning marriage quickly with a no-fault divorce).
86. Vulnerability has also led to white women prevailing when they raised charges of rape against Black men. However, race is likely a more dominant factor. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1250–51 (1991).
87. See Venessa Garcia & Patrick McManimon, *Intersectionality and Intimate Partner Violence: Barriers Women Face*, TIKKUN (Feb. 8, 2016), <https://www.tikkun.org/blog/2016/02/08/intersectionality-and-intimate-partner-violence-barriers-women-face/> [<https://perma.cc/598W-XJRA>] (describing how different groups experience intimate partner violence differently).
88. U.S. COMM'N ON C.R., *BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 3–4, 128–30 (1978) (describing accounts where people testified that "women have always been subordinated to men and their brutalization is a direct byproduct of that subordination" and that the "power relationship between husband and wife" results in intimate partner violence). Certainly, men are also survivors of intimate partner violence. Judges more frequently denied men protective orders based on assumptions about male identity that determine men are neither vulnerable nor

physical, emotional, verbal, psychological, or financial abuse.⁸⁹

Support for legal protections began when the domestic violence movement identified women as vulnerable and in need of protection.⁹⁰ However, these same paternalistic stereotypes led judges to advise women to return to their abusers and work things out.⁹¹ Systemic reform and the development of community responses to intimate partner violence improved judges' understanding of the power and control factors embedded in intimate partner violence.⁹² These shifts in attitudes, largely about women's identity, increased the number of protective orders courts now grant.⁹³ However, because vulnerability is associated with women's identity, men and those who are gender nonconforming or gender nonbinary are less likely to prevail when filing protective orders against women or other men.⁹⁴

In the Title VII context, courts continue to assess claims through a binary lens of whether employers treat men and women differently.⁹⁵ As a solution to

powerless. Cf. ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL 6 (1993) (explaining that under the Duluth model, battered males are believed to have a better ability to leave relationships safely).

89. See PENCE & PAYMAR, *supra* note 88, at 3.
90. A. Rachel Camp, *Pursuing Accountability for Perpetrators of Intimate Partner Violence: The Peril (and Utility?) of Shame*, 98 B. U. L. REV. 1677, 1724–26 (2018) (describing common explanations for and stereotypes about people affected by intimate partner violence).
91. See, e.g., Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 888, n.36 (2006); see also Judith E. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J.L. & POL'Y 617, 662–665 (2006) (providing an explanation of some reasons why a person may remain in an abusive relationship); see also JESSICA L. GOLDMAN, VIOLENCE AGAINST WOMEN 94–101 (Karin L. Swisher & Carol Wekesser eds., 1994) (explaining how a judge who does not understand intimate partner violence could “fall into the old trap of blaming the victim and impos[ing] lenient sentences”).
92. See, e.g., Melissa L. Breger, *Reforming by Re-Norming: How the Legal System Has the Potential to Change a Toxic Culture of Domestic Violence*, 4 J. LEGIS. 170, 193–98 (2017) (detailing how New York, New Jersey, and federal laws have changed to combat domestic partner violence); Remla Parthasarathy, *Identifying and Depicting Culture in Intimate Partner Violence*, 22 BUFF. J. GENDER L. & SOC. POL'Y 71, 92–93 (2014) (explaining how the Wheel has changed the evaluation of intimate partner violence in civil and criminal trials).
93. See, e.g., JAKE FAWCETT, KELLY STARR & ANKITA PATEL, NOW THAT WE KNOW: FINDINGS AND RECOMMENDATIONS FROM THE WASHINGTON STATE DOMESTIC VIOLENCE FATALITY REVIEW 21 n.24 (2008) (reporting a 53 percent increase in a county in Washington State in petitions requested and temporary protection orders granted when using trained advocates).
94. See, e.g., Eric Stiles, Ivonne Ortiz & Casey Keene, *Serving Male-Identified Survivors of Intimate Partner Violence*, NAT'L RES. CTR. ON DOMESTIC VIOLENCE, 3–4, 8 (July 2017), https://vawnet.org/sites/default/files/assets/files/2017-07/NRC DV_TAG-ServingMaleSurvivors-July2017.pdf [<https://perma.cc/84KQ-2BGG>] (providing an explanation of how providers can address the experiences of intimate partner violence for people who do not identify as women). It is worth noting that these conceptions of gender also make it hard for members of same-sex couples to receive protective orders. Jacquie Andreano, *The Disproportionate Effect of Mutual Restraining Orders on Same-Sex Domestic Violence Victims*, 108 CALIF. L. REV. 1047, 1053 (2020).
95. See Michael L. Vasu & Ellen Storey Vasu, *Gender Stereotypes and Discriminatory Behaviors Toward Female Attorneys: The North Carolina Case*, 13 CAMPBELL L. REV. 183, 185 (1991) (“Many of the barriers to equal participation by women are embedded in the history of women and the law”). Dicta in the Supreme Court's new decision in *Bostock v. Clayton County* acknowledges the historical binary nature of Title VII: “[W]e proceed on the assumption that ‘sex’ signified what the employers suggest, referring only to biological distinctions between male and female.” *Bostock v. Clayton County*, 590 U.S. ___ (2020).

binary identity stereotypes, such as vulnerability, some second-wave feminists promoted a sameness theory to support equality for women.⁹⁶ However, feminists have largely disagreed on whether to promote women as being the same, and having the same rights, as men.⁹⁷ The sameness versus difference paradigm continues to plague the women's movement.⁹⁸

In the law, the sameness paradigm overlooks employment policies that disproportionately affect women. For example, cases challenging the exclusion of pregnancy from health care initially failed under a sameness framework.⁹⁹ Height and weight requirements in employment that discriminate against women also initially failed.¹⁰⁰ Sex-differentiated pension contributions failed too, despite employers' arguments that women live longer.¹⁰¹ The sameness model also ignores the need for equity to address the ramifications of systemic gender-based discrimination and the ongoing harm of past discrimination.¹⁰² Thus, while defining women as the same as men in employment may narrow employment disparities, it will never allow women to "catch up."¹⁰³ Instead, the sameness paradigm continues to promote a flawed gender identity equality model that overlooks the principles of equity.¹⁰⁴ Accordingly, inherent systemic disparities have supported male-dominated power systems in employment contexts, including coercing women to remain silent to uphold men's power in sexual

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96. RUTH ROSEN, *THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA* 111 (2000).
97. See generally DEBORAH L. RHODE, *JUSTICE AND GENDER* (1989) (discussing challenges for treating women similarly to men in the reproductive context); Keith Cunningham-Parmeter, *(Un)Equal Protection: Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 22–26 (2015).
98. Abby Vesoulis, *Women First Marched to Challenge Trump. Now They Are Challenging Each Other*, TIME (Jan. 19, 2019), <https://time.com/5505787/womens-march-washington-controversy/> [<https://perma.cc/ST6B-K3F4>].
99. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974) (overturned by statute); Walter L. Stiehm, *Poverty Law: Access to Healthcare and Barriers to the Poor*, 4 QUINNIPIAC HEALTH L.J. 279, 301–03 (2001); Shilpa Phadke, Jamila Taylor, & Anusha Ravi, *How Trump's FY 2019 Budget Hurts Women*, CTR. FOR AM. PROGRESS (Feb. 16, 2018), <https://cdn.americanprogress.org/content/uploads/2018/02/15121832/fy19Budget-Women-factsheet.pdf> [<https://perma.cc/2TLQ-2WHA>]; see also *Fact Sheet: New Trump Rule Would Take Away Women's Health Care and Reproductive Rights*, HEALTH CARE FOR AM. NOW! (May 23, 2018), <http://healthcareforamericanow.org/resources/factsheets/fact-sheet-new-trump-rule-take-away-womens-health-care-reproductive-rights> [<https://perma.cc/7UE6-7WRN>]; see generally 42 C.F.R. § 59 (2018).
100. See generally *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (upholding a district court decision ruling that statutory minimum height and weight requirements for positions in the Alabama prison system discriminated based on sex under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1983).
101. See, e.g., *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).
102. See Cunningham-Parmeter, *supra* note 97, at 1–8 (arguing overcoming gender-based stereotypes and providing incentives for fathers to share childcare will enhance women's economic position).
103. See, e.g., Graf et al., *supra* note 72.
104. See Cunningham-Parmeter, *supra* note 97, at 20–26 (highlighting the judicial and legislative evolution of sameness model and its effect on gender equity).

harassment and sexual assault cases.¹⁰⁵

B. Black and African-American Women: Race Intersects with Gender

Before “intersectionality” was a common term in critical race theory,¹⁰⁶ Nina Simone sang of “Four Women”: Peaches, Sweet Thing, Aunt Sarah, and Saffronia.¹⁰⁷ Each woman represented a Black woman stereotype: the angry Black woman, the Jezebel, the mammy, and the beautiful mulatto.¹⁰⁸ “Four Women” reflected the inimitable identity-based challenges African-American women experience based on their joint gender and racial identity. Nina Simone’s women are tough, not vulnerable like white women.¹⁰⁹

The absence of this vulnerability narrative has important legal significance for Black women.¹¹⁰ In intimate partner violence cases, Black women are less likely to secure a protective order and consistently have less favorable results than white women.¹¹¹ In the criminal justice system, Black women are eight times more likely to be incarcerated than white women.¹¹² Perceptions that Black women are, as Simone put it, “strong enough to take the pain inflicted again and again”¹¹³ have also led to poor medical treatment and denial of pain medication in life-threatening circumstances.¹¹⁴ Medical practitioners question Black women when they

105. See generally ELYSE SHAW, ARIANE HEGEWISCH & CYNTHIA HESS, *SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS* (2018) (explaining the disproportionate weight on women when establishing workplace sexual harassment).

106. See, e.g., Crenshaw, *supra* note 86, at 1242. But see Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 15–17 (1991).

107. NINA SIMONE, *Four Women*, on WILD IS THE WIND (Philip Records 1966).

108. *Id.*

109. See, e.g., Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53 (1999); see also Mari J. Matsuda, *supra* note 38 (discussing “the similar perspectives and goals of people of color and critical legal scholars”).

110. Professor Kimberlé Crenshaw’s seminal article, *Mapping the Margins*, explains how white feminists often overlook the racial hierarchy of oppression. Crenshaw, *supra* note 86, at 1244, n.8; see also Smith, *supra* note 109, at 164–66 (analyzing the microaggressions surrounding Black women in academia, who are criticized for their normative behavior. For example, when exercising authority, white professors are viewed as confident, vocal, and assertive while Black professors are characterized as aggressive, arrogant, and combative).

111. See Njeri Mathis Rutledge, *Employers Know Best? The Application of Workplace Restraining Orders to Domestic Violence Cases*, 48 LOY. L.A. L. REV. 175, 206–07 (2014); *c.f.* Symposium, *Employers Know Best? The Application of Workplace Restraining Orders to Domestic Violence Cases*, 48 LOY. L.A. L. REV. 175, 204–07 (2014) (referencing a Black woman’s intimate partner violence experience where a judge failed to extend her protective order and three weeks later her batterer set her on fire); see also, Adele M. Morrison, *Deconstructing the Image Repertoire of Women of Color: Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1082–83 (2006) (stating that to most people, a “‘battered woman’ is white,” because a stereotypical woman of color “like[s] to fight,” is “hot blooded,” or is “trained for this”).

112. Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1251 (2012).

113. SIMONE, *supra* note 107.

114. Kelly M. Hoffman, Sophia Trawalter, Jordan R. Axt & M. Norman Oliver, *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs about Biological Differences between Blacks and Whites*, 113 PROC. NAT’L ACAD. SCI. U.S.A. 4296, 4296 (Apr. 4, 2019).

describe their pain, provide flawed pain assessment and treatment plans, deny medical services, and believe Black women have a higher pain threshold than white women.¹¹⁵

This same perceived absence of vulnerability affects Black women in sexual assault and rape cases, where they are also less likely to be believed than white women.¹¹⁶ For example, Anita Hill's grueling experience during Justice Clarence Thomas's Supreme Court confirmation hearing¹¹⁷ received renewed examination along racial and gendered lines when Christine Blasey Ford testified during Justice Brett Kavanaugh's confirmation hearing.¹¹⁸ Both hearings reinforced the gender biases in Congress and in Supreme Court appointments.¹¹⁹ They also triggered wounds for many women who similarly violated the expectation to remain silent in sexual harassment and assault cases. Anita Hill's testimony also reinforced the heightened scrutiny Black women face in sexual harassment and assault cases—more skepticism, more questions about credibility, and less compassion.¹²⁰

The impacts of the intersection of gender and race also allow white women to advance further in their legal careers than Black women.¹²¹ While white women are fighting for a seat at the table, qualified Black women never even receive an invitation to the meeting.¹²² At large law firms, once Black women make partner,

115. *See id.* at 4299–300.

116. *See generally* Crenshaw, *supra* note 86, at 1269–71.

117. For context of the intersectional issues at play during the Anita Hill hearings, *see generally* Kimberlé Crenshaw, *Whose Story Is It, Anyway?*, in *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF REALITY* 402 (Toni Morrison ed., 1992).

118. The Republicans who questioned both Hill and Ford were all white men. Sabrina Siddiqui, *Kavanaugh Hearing Recalls Clarence Thomas Case: Will History Repeat Itself?*, *GUARDIAN* (Sept. 27, 2018), <https://www.theguardian.com/us-news/2018/sep/27/brett-kavanaugh-clarence-thomas-anita-hill-hearings> [<https://perma.cc/UX6J-NN55>] (writing “Republicans on the panel are all white men – again”); *see also* Jill Filipovic, *How Far Have We Really Come Since Anita Hill?*, *VANITY FAIR* (Sept. 20, 2018), <https://www.vanityfair.com/style/2018/09/christine-blasey-ford-anita-hill> [<https://perma.cc/6955-5DJZ>]; *see generally* Kimberlé Crenshaw, *We Still Haven't Learned From Anita Hill's Testimony*, *N.Y. TIMES* (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/opinion/anita-hill-clarence-thomas-brett-kavanaugh-christine-ford.html> [<https://perma.cc/MJ8U-6H3W>].

119. *See Americans Divided on Kavanaugh's Nomination to the Supreme Court*, *PEW RSCH. CTR.* (July 17, 2018), <https://www.pewresearch.org/politics/2018/07/17/americans-divided-on-kavanaughs-nomination-to-the-supreme-court/> [<https://perma.cc/32F6-AMX9>] (finding that 32 percent of men opposed the nomination compared with 40 percent of women who opposed the nomination).

120. *See* Peter Baker & Carl Hulse, *Echoes of Anita Hill, but in a Different Era for Women*, *N.Y. TIMES* (Sept. 17, 2018), <https://www.nytimes.com/2018/09/17/us/politics/anita-hill-clarence-thomas-brett-kavanaugh-christine-blasey-ford.html> [<https://perma.cc/YLP6-6LKG>]; Crenshaw, *supra* note 118 (analyzing the intersectional component of the Clarence Thomas hearing, including Hill being disbelieved and scrutinized); PBS NewsHour, *Demonstrators Chant, 'We Believe Anita Hill! We Believe Dr. Blasey!'*, *YOUTUBE* (Sept. 20, 2018), <https://www.youtube.com/watch?v=AUXfruZEsG0> [<https://perma.cc/5RK6-T8TH>].

121. *See generally* Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 *DUKE L.J.* 365 (1991).

122. Social stratification by gender and race shows white women still represent less than 19 percent of attorneys serving on executive and management committees at law firms, compared to

they report that other partners regularly alienate them from firm decisions, new client meetings, and other opportunities that would advance their economic position.¹²³ This antagonistic work environment forces many Black women to leave law firms.¹²⁴ Disparity in employment opportunities for Black women is not limited to the legal field. Overall, Black women earn 11.7 percent less than white women.¹²⁵ This convergence of gender and race is yet another source of discrimination based on identity stereotypes.¹²⁶

C. Muslim Women: Religious Identity Intersects with Gender

The Constitution defines a national identity that limits government intrusion in religious liberty.¹²⁷ However, the Founding Fathers created this national identity when religious freedom for *everyone*, including Muslims, Jews, and Catholics, was never fully contemplated.¹²⁸ Despite a proffered narrative about individual rights and pluralism, both scholars and courts have explored whether the United States is, in fact, a Christian nation.¹²⁹ The Trump Administration's ban preventing visa holders and refugees from Muslim-majority countries from entering the United States forced scholars and civil rights advocates to reconsider this

women of color who represented less than 3 percent of law firms' leadership positions. Tracy Jan, *The Legal Profession Is Diversifying. But Not at the Top*, WASH. POST (Nov. 7, 2017, 5:08 AM), <https://www.washingtonpost.com/news/wonk/wp/2017/11/27/the-legal-profession-is-diversifying-but-not-at-the-top/?noredirect=on> [<https://perma.cc/TT4N-ABDZ>].

123. Liane Jackson, *Minority Women Are Disappearing from BigLaw—and Here's Why*, ABA JOURNAL (Mar. 1, 2016, 12:15 AM), https://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why [<https://perma.cc/P4FG-MC4M>].
124. *See id.* Black women only represent 0.7 percent of law firm partners at top firms. INSTITUTE FOR INCLUSION IN THE LEGAL PROFESSION (IILP) REVIEW: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION, 14 (2019–2020). Black women in academia have historically experienced similar discriminatory challenges, including resistance among law schools to hiring Black women and fewer opportunities for tenure. *See* Derrick Bell, *The Chronicle of the DeVine Gift*, 99 HARV. L. REV. 4 (1985); Derrick Bell, *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319 (1986).
125. Valerie Wilson & William M. Rodgers III, *Black-White Wage Gaps Expand with Rising Wage Inequality*, ECON. POL'Y INST., 1 (Sept. 19, 2016), <https://files.epi.org/pdf/101972.pdf> [<https://perma.cc/UU8V-F6P4>]. Additionally, 21.4 percent of Black women are living in poverty, compared to 9.7 percent of white women. Kayla Patrick, *National Snapshot: Poverty Among Women & Families, 2016*, NAT'L WOMEN'S L. CTR. (Sept. 2017), <https://nwlc.org/wp-content/uploads/2017/09/Poverty-Snapshot-Factsheet-2017.pdf> [<https://perma.cc/3PAW-3RGR>]. In December 2018, unemployment rates for Black women twenty years old and over was at 5.3 percent, compared to white women's unemployment rate of 2.8 percent. BUREAU OF LABOR STATISTICS: THE EMPLOYMENT SITUATION, U.S. DEPT. OF LABOR (Dec. 2018), https://www.bls.gov/news.release/archives/empsit_01042019.pdf [<https://perma.cc/RHP5-DBNH>].
126. *See generally* Caldwell, *supra* note 121, at 381–83.
127. Symposium, *The Future of Religious Pluralism: Justice O'Connor and the Establishment Clause*, 39 ARIZ. ST. L.J. 895 (2007).
128. *Id.* at 897–911.
129. Jared Goldstein effectively explores the various debates over whether the United States is a Christian nation. Jared A. Goldstein, *How the Constitution Became Christian*, 68 HASTINGS L.J. 259 (2017); *see also* Rector *etc.* of Holy Trinity Church v. United States, 143 U.S. 457, 471 (1982).

question.¹³⁰

Christianity remains the dominant religious identity in the United States.¹³¹ Thus, defining monotheist traditions of Christianity, Judaism, and Islam frequently centers on examining how those modes of religious practices align with Christian norms.¹³² It is increasingly common for Christians not to wear crosses or other visible signs of faith, but Muslim and Jewish religious identities are frequently associated with visible markers that establish someone is a believer of the faith. The visible markers for Muslims are many, including having an Arab-sounding name, wearing hijab (for women), having a beard (for men), or wearing a kufi (for men). Similarly, wearing tzitzit and kippah are often recognizable signifiers for Jewish men. Islam and Judaism both prescribe ways to live life.¹³³ It is more than attending a weekly service. Muslims are instructed to pray five times a day,¹³⁴ give zakat,¹³⁵ perform hajj,¹³⁶ not eat pork,¹³⁷ etc. But what about people who do not openly practice their faith in this way? Some Muslims do not exclusively eat halal or practice their faith so outwardly.¹³⁸ In the same way many

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130. Seven days after entering office, Trump issued Executive Order 13769, Protecting the Nation from Foreign Terrorist Entry into the United States. The notorious order temporarily barred entry of refugees and nationals from seven Muslim-majority countries—Iraq, Libya, Syria, Somalia, Sudan, and Yemen—with an indefinite ban on refugees from Syria. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan 27, 2017); Michael D. Shear & Helen Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html> [https://perma.cc/GXD2-6TA8].
131. PEW RSCH. CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE 3 (May 12, 2015), <https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> [https://perma.cc/6BTL-ZTS4].
132. I primarily focus on monotheist religions because accommodation issues differ when the claimant has a less established religious identity.
133. Both Islam and Judaism have rules of conduct. See generally Sayyid Muhammed Syeed & Mark J. Pelavin, *Children of Abraham: Jews and Muslims in Conversation*, UNION FOR REFORM JUDAISM & ISLAMIC SOC'Y OF N. AM., <http://www.rac.org/sites/default/files/Children-of-Abraham-Muslim-Jewish-Guide.pdf> (last visited Sept. 21, 2020) [https://perma.cc/578D-SBD5].
134. Prayer is the second pillar of Islam. See Qur'an, *Sura* 2:2–5, 2:43, 2:238–239, <https://quranyusufali.com/2/?hilite=%272%3A238%27> (last visited Oct. 29, 2020) [https://perma.cc/3WHW-Y55A]; *Id.* at 11:114, <https://quranyusufali.com/11/> (last visited Sept. 23, 2020) [https://perma.cc/G35W-ZWN2]; *Id.* at 17:78–79, 17:110, <https://quranyusufali.com/17/> (last visited Sept. 23, 2020) [https://perma.cc/HW33-DXF3].
135. Zakat is the third pillar of Islam. Muslims are required to give charitably, as discussed in the Qur'an. E.g. Qur'an, *Al A'raf* 7:156, <https://quranyusufali.com/7/> (last visited Sept. 23, 2020) [https://perma.cc/ET6W-6F88]; Qur'an, *Maryam* 19:31, 19:55, <https://quranyusufali.com/19/> (last visited Sept. 23, 2020) [https://perma.cc/3FZH-QWA9]. Qur'an, *Al Anbiya* 21:73 (Yusel Ali), <https://quranyusufali.com/21/> (last visited Sept. 23, 2020) [https://perma.cc/YTJ3-JUK8].
136. Qur'an, *Al-Baqara* 2:173 (Yusel Ali), <https://quranyusufali.com/2/> (last visited Sept. 23, 2020) [https://perma.cc/P6XF-7V7H].
137. *Id.*
138. See Shuja Haider, *Culturally Muslim*, JEWISH CURRENTS (Aug. 16, 2018), <https://jewishcurrents.org/culturally-muslim/> [https://perma.cc/QCP5-52H5]. See also David Shariatmadari, *Time for Cultural Muslims to Come Out*, GUARDIAN (Mar. 26, 2009), <https://www.theguardian.com/commentisfree/belief/2009/mar/25/religion-muslims-community-identity> [https://perma.cc/75QE-BTFS].

American Jews might only attend synagogue during the High Holy Days,¹³⁹ there are Muslims who consider themselves fully Muslim, but they are only visibly *seen* as such during Ramadan.¹⁴⁰

Despite their diversity, Muslims are depicted as a monolithic group that has been positioned as foreign intruder and terrorist in the post-9/11 world.¹⁴¹ Merging the religious identity with terrorism allowed the *Trump v. Hawaii* Court to support the Administration's national security interest and apply a rational basis level of review.¹⁴² Ultimately, these religious identity markers create a binary religious identity for those who are devoutly religious and those who are culturally Jewish or culturally Muslim. The identity delineation still results in a classification of those who are—Christians and non-Christians.

The intersectional identity of Muslim women especially suffers from binary classification. The head scarf has become both an intrafaith and interfaith identifier. As such, in Muslim communities, women are frequently described as hijabeesees or nonhijabeesees.¹⁴³ Those with an aversion to Islam have manipulated the head scarf identity marker to portray Muslim women as invisible, silenced, meek, and veiled.¹⁴⁴

Although the Trump administration was often transparent in its attitudes and policies toward Muslims, one clandestine strategy was to disempower Muslims further by framing Islam as oppressing women. When Donald Trump proselytized that Islam oppresses women, the language enabled his administration to gain additional allies against Muslims and supporters for the war on terrorism.¹⁴⁵ As a presidential candidate, Donald Trump used this strategy when he assailed Ghazala Khan for silently standing next to her husband when her husband spoke at the Democratic National Convention about the bravery of their deceased son, U.S. Army Captain Humayun Khan.¹⁴⁶ Donald Trump attributed Ghazala Khan's silence to Islamic principles that prohibited her from speaking. But in fact, she was a mother mourning the loss of her only son.¹⁴⁷

The incident sparked the #CanYouHearUsNow campaign, a social media strategy advocates used to ensure Muslim women's voices were not only heard,

139. See Haider, *supra* note 138 (discussing the idea of being culturally Muslim and culturally Jewish).

140. EEOC v. Alamo Rent-A-Car, LLC, 432 F. Supp. 2d 1007, 1011 (D. Ariz. 2006).

141. Under the Bush administration, Congress swiftly amended the Foreign Intelligence Surveillance Act (FISA) and enacted the *United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, commonly referenced as the USA PATRIOT Act.

142. *Trump v. Hawaii*, 138 S.Ct. 2392 (2018).

143. Within the Muslim community, Muslim women are often defined by whether or not they wear a head scarf (hijab).

144. Aziz, *From the Oppressed*, *supra* note 22, at 192.

145. Rafia Zakaria, *Why Donald Trump Needs Muslim Women*, NATION (Aug. 11, 2017), <https://www.thenation.com/article/archive/why-donald-trump-needs-muslim-women/> [<https://perma.cc/326T-R6E9>].

146. *Fury as Trump Mocks Muslim Soldier's Mother Ghazala Khan*, BBC NEWS (July 31, 2016), <https://www.bbc.com/news/election-us-2016-36935175> [<https://perma.cc/2J6J-7DJG>].

147. *Id.*

but amplified.¹⁴⁸ With social media posts, media interviews, and opinion editorials, Muslim women shared their experiences as women united across class, race, and ethnicity.¹⁴⁹ However, the movement did little to dismantle the framework of the oppressed Muslim woman. Instead, Western society continues to portray Muslim women as not only oppressed but also in need of being saved.¹⁵⁰

As part of the narrative of needing to be saved, there is an underlying message that Muslim women are forced to wear hijab and, in some instances, full-face or body coverings.¹⁵¹ Even well-intentioned activists promote the Muslim women oppression framework and use the veil as the symbol of oppression.¹⁵² When Muslim students and allies at Spelman College promoted World Hijab Day,¹⁵³ Spelman faculty drafted a letter opposing the event.¹⁵⁴ The professors highlighted the plight of Iraqi women forced to wear hijab, not the American Muslim women who face harassment and attacks because they choose to wear the identifying head covering.¹⁵⁵ Despite their good intentions, the professors overlooked the political dimension of their statement and the agency principles embedded in feminist thought, which support women defining themselves in empowering ways.¹⁵⁶ They also overlooked the gender equity principles

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148. Simra Marjiam, *Can You Hear Us Now: An Ongoing Movement to Raise the Voices of Muslim Women*, HUFF. POST (Aug. 1, 2017, 7:05pm), https://www.huffpost.com/entry/can-you-hear-us-now-an-ongoing-movement-to-raise-the_b_59810888e4b0b35d274c5e82 [<https://perma.cc/2CDD-22SS>].
149. Dana Liebelson, *Muslim American Fire Back at Trump: 'Can You Hear Us Now?'*, HUFF. POST (Aug. 1, 2016, 2:59pm), https://www.huffpost.com/entry/muslim-women-trump-can-you-hear-us-now_n_579f8ad3e4b0e2e15eb69922 [<https://perma.cc/3WKW-XRK2>].
150. Lila Abu-Lughod, *Do Muslim Women Really Need Saving?*, 104 AM. ANTHROPOLOGICAL ASS'N 783, 785 (Sep. 2002) (describing the full body veil as a liberating invention and the war on terrorism a misconceived attempt to free Muslim women from bondage).
151. Amara S. Chaudhry-Kravitz, *The New Facially Neutral "Anti-Shariah" Bills: A Constitutional Analysis*, 20 WASH. & LEE J. C.R. & SOC. JUST. 25, 33 (2013); Anissa Helie & Marie Ashe, *Multiculturalist Liberalism and Harms to Women: Looking Through the Issue of "The Veil"*, 19 U.C. DAVIS J. INT'L L. & POL'Y 1, 23 (2012).
152. Islamic jurisprudence supports that Muslim women do not need saving. Historically, Muslim women have had more legal and social rights than women in most Western societies. For example, it is Islamic tradition for Muslim women to retain their last name upon marriage to reinforce that they are not their husband's property. Despite the gender equity principles embedded in Islamic jurisprudence, oppression of Muslim women is incorrectly attributed to the Islamic religion. Abed Awad, *A Muslim American Reflects on the 100th Anniversary of the 19th Amendment to the U.S. Constitution*, MEDIUM: ABED AWAD BLOG (July 4, 2020), <https://medium.com/@awadabed2000/a-muslim-american-reflects-on-the-100th-anniversary-of-the-19th-amendment-to-the-u-s-constitution-33a516a4fe08> [<https://perma.cc/KCF9-SL8B>]. For those who misunderstand Islamic jurisprudence, the veil is a symbol of gender oppression. See generally Aziz, *From the Oppressed*, supra note 22, at 191.
153. WORLD HIJAB DAY, <https://worldhijabday.com/> (last visited May 17, 2018) [<https://perma.cc/Y597-AT69>].
154. Nisa Muhammad, *Hijab and the Policing of Black Women and Girls: Black Muslims Respond*, SAPELO SQUARE (Mar. 7, 2018), <https://sapelosquare.com/2018/03/07/the-policing-of-black-muslim-women-and-girls-with-their-hijab-black-muslims-respond/> [<https://perma.cc/R749-MR7L>].
155. See *id.*
156. See Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999).

embedded in Islamic jurisprudence.¹⁵⁷

Assigning the hijab as the dominant Muslim women's identity marker helps reinforce the notion that Muslim women are outsiders. Muslim women who choose to veil their face completely are even further down the Muslim women oppression spectrum.¹⁵⁸ The veil has been systematically attacked on both domestic and international fronts, and it remains a common symbol associated with the oppression of Muslim women.

D. African-American Muslim Women: The Challenges of Identity Convergence

To be African-American, Muslim, and a woman has additional challenges.¹⁵⁹ While patriarchy affects all women, white Muslim women are usually adored and welcomed in American Muslim communities.¹⁶⁰ Conversely, because of pervasive anti-Blackness norms, African-American Muslim women find themselves ostracized in both Christian and Muslim societies: non-African-American Muslim communities degrade them because of their African-American heritage and non-Muslim communities discriminate against them because of their religion.¹⁶¹

Isolating these intersectional identities pushes African-American women to the margins¹⁶² and further destroys their psychological, economic, and constitutional safeguards of religious freedom in a pluralistic society.¹⁶³ The risk of losing these safeguards seems to coerce these women into masking their layered

157. See generally Aziz, *From the Oppressed*, *supra* note 22, at 219–20 (describing how some Western multiculturalists and “Muslim feminists” believe that the headscarf is not anti-feminist or a tool of oppression).

158. See Faegheh Shirazi & Smeeta Mishra, *Young Muslim Women on the Face Veil (Niqab): A Tool of Resistance in Europe but Rejected in the United States*, 13 INT'L J. CULTURAL STUD. 43, 44–47 (2010).

159. In discussing demarginalizing women of color who are often silenced, Professor Wing stated, “we must analyze the holistic identities, rather than examining them from a black perspective today and from a woman's perspective tomorrow.” Adrien Katherine Wing, *Global Critical Race Feminism Post 9-11: Afghanistan*, 10 WASH. U. J.L. & POL'Y 19, 30 (2002).

160. See generally Yasmine Flodin-Ali, *What Malcolm X Taught Me About Muslim America*, RELIGION & POL. (May 22, 2018), <https://religionandpolitics.org/2018/05/22/what-malcolm-x-taught-me-about-muslim-america/> [<https://perma.cc/8D3R-KMGS>] (comparing the author's experience as a half-Swedish, half-Pakistani woman in the Muslim community in Brooklyn with the experience of a West African Muslim international student at an undergraduate university's Muslim Student Association); cf. Aina Khan, *Britain's Black Muslims: Ignored, Discriminated and Resisting*, AL JAZEERA (June 22, 2018), <https://www.aljazeera.com/features/2018/6/22/britains-black-muslims-ignored-discriminated-and-resisting> [<https://perma.cc/9GKF-UUV7>] (explaining the tenth-century practice of differentiating slaves based on the color of their skin: the Arabic word “abd” (slave) described both enslaved and free Black people, and the Arabic word “mamluk” described enslaved white people. Even when Arabic-speaking Muslim countries enslaved them both, mamluk were considered superior to abd).

161. See KHALED BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR*, 162–70 (2018).

162. See Wing, *supra* note 159, at 30.

163. See Aziz, *From the Oppressed* *supra* note 22, at 223–224; Byng, *supra* note 14, at 474–75.

identities.

Professor Yoshino defined the spectrum of identity muting as converting, passing, and covering.¹⁶⁴ Converting is the most extreme, with the individual totally abandoning an identity trait and fully assimilating to the status quo.¹⁶⁵ For an extreme example, gay people may use conversion “therapy” to fully change their sexual orientation to straight.¹⁶⁶ As an example of passing, fair-skinned African Americans have often passed as white to benefit from the privileges associated with whiteness, including freedom from slavery and other societal benefits of housing, employment, and travel.¹⁶⁷ Covering is the lowest level of identity muting, but it has various nuances. It may include shifting from ethnic dress to traditional business suits, changing natural hairstyles to straightened hair, or shifting ethnic dialect.¹⁶⁸ Many of these shifts help their wearers assimilate and allow white people to feel more comfortable with behaviors associated with otherness. Coerced masking may happen at any level on Professor Yoshino’s spectrum of identity muting. Implicit in coerced masking is the Hobson’s choice of masking or being one’s authentic self and losing essential societal benefits, such as protection from police brutality or access to employment and other economic opportunities. The next section examines the masking of identity in its various forms and reveals how Black Muslim women experience unique challenges when masking identity to gain legal protections.

II. MASKING IDENTITY

The African-American poet Paul Laurence Dunbar wistfully addressed masking one’s authentic self in “We Wear the Mask”:

We wear the mask that grins and lies,
It hides our cheeks and shades our eyes,—
This debt we pay to human guile;
With torn and bleeding hearts we smile,
And mouth with myriad subtleties.¹⁶⁹

Dunbar used the phrase “wear the mask” as both a metaphor for the pain associated with muting racial identity and as a literary description of the features and purpose of being “mask[ed].” Other literary artists have addressed masking, including the white poet John Marston who wrote, “Her mask so hinders me, I cannot see her beauty’s dignity.”¹⁷⁰ Whereas Marston depicted a literal mask that covered the beauty of its (white) wearer, Dunbar wrote of the figurative mask that

164. *See generally* Yoshino, *supra* note 19.

165. *See id.* at 785–86.

166. *See id.* at 784–85.

167. *See id.* at 925–27.

168. *See id.* at 811–12.

169. PAUL LAURENCE DUNBAR, *THE COLLECTED POETRY OF PAUL LAURENCE DUNBAR* 71 (Joanne Braxton ed., 1993) (1913).

170. KATHERINE LESTER & BESS VIOLA OERKE, *ACCESSORIES OF DRESS: AN ILLUSTRATED ENCYCLOPEDIA* 101 (2004).

Black people feel they must wear to hide their identity—and the suffering that is bound up in that identity—from the rest of the world.

A mask performs both literal and figurative acts of protection for its wearer. A physical mask can protect against chemical hazards, serving as a safety mechanism to purify air and prevent other intrusions into the body.¹⁷¹ A physical mask can also allow wearers to have dual identities: the person underneath the mask and the new *masked* persona that allows them to perform actions that wearers could not or would not perform otherwise,¹⁷² such as hiding their face to rob a bank, terrify or amuse others during Halloween, or participate in an *Eyes Wide Shut*¹⁷³ level of debauchery. In other areas of society, such as the law, wearing a figurative mask can protect against discrimination, hate crimes,¹⁷⁴ or emotional harm.¹⁷⁵

Indeed, the symbolism of the mask is multidimensional and deeply rooted in various cultures and societies. To illustrate, throughout the African diaspora, the mask has had various purposes and diverse meanings depending on the country and ethnic group.¹⁷⁶ In some instances, traditional masking has been part of special gatherings, rituals, and religious ceremonies, with dancers wearing the mask to transcend human form and assume godlike characteristics.¹⁷⁷ Soldiers from both ancient Greece and ancient Rome used Gorgon masks or masks of Athena, goddess of war, to terrify their enemies.¹⁷⁸ In ancient Greece, the tragic mask was also used to conceal human nature, while the comedic mask represented the possibility of human nature.¹⁷⁹ In Black oral folklore, masks were used to depict the trickster character—one who works to destroy someone with oppressive power over them.¹⁸⁰ Dunbar and other Black writers used the trickster persona to describe

171. I refer to discrimination as an intrusion because, beyond the economic harm, discrimination has the capacity to create psychological trauma.

172. The classic example would be Batman, who wears a mask to conceal his true identity as the billionaire Bruce Wayne, an action that transforms him into a crime-fighting superhero. BATMAN, DC COMICS, <https://www.dccomics.com/characters/batman> (last visited on Oct. 29, 2020) [<https://perma.cc/3JZS-53HR>].

173. *Eyes Wide Shut* is a film that was notable for its sexually explicit scenes. The film centers a masked orgy and, in popular culture, has become synonymous with anonymous sexual depravity. EYES WIDE SHUT (Stanley Kubrick Productions 1999).

174. See James G. Bell & Barbara Perry, *Outside Looking In: The Community Impacts of Anti-Lesbian, Gay, and Bisexual Hate Crime*, 62 J. OF HOMOSEXUALITY 98, 112–115 (2015) (finding that masking sexual orientation can protect against potential hate crimes but causes psychological harm).

175. See *id.*

176. CAROL FINLEY, THE ART OF AFRICAN MASKS: EXPLORING CULTURAL TRADITIONS 9–10 (1999).

177. Ladislav Segy, *Mask in African Dance*, 16 NEGRO HIST. BULL. 99, 99 (Feb. 1953).

178. *Id.*

179. Thalia was depicted in a comedic mask, and her sister Melpomene wore the mask of tragedy. DAVID WEST, SOME CULTS OF GREEK GODDESSES AND FEMALE DAEMONS OF ORIENTAL ORIGIN 155 (Kevelaer et al. eds., 1995).

180. Trudier Harris writes, “By definition, tricksters are animals or characters who, while ostensibly disadvantaged and weak in a contest of wills, power, and/or resources, succeed in getting the best of their larger, more powerful adversaries. Tricksters achieve their objectives through

enslaved Africans covering their abolitionist message with one that made white people feel comfortable.¹⁸¹ Masks can serve many purposes within their given geographical, historical, and social context.

For the inverted masking paradigm, I adopt the word *masking* as both a literal and figurative reference to what has been so embedded in Black traditions: hiding one's identity or adopting a new one as a survival strategy.¹⁸² The word's deep roots have seeds planted in African ceremonial dances that subsequently sprung forth in various literary devices, including Paul Laurence Dunbar's poetry. The term is also rich with nuanced meaning that exists in the law.¹⁸³ Although masking may exist on a spectrum, it often remains an attempt to assimilate into society to gain full citizenship and avoid societal backlash and economic harm.¹⁸⁴ As examined below, the levels of masking have both social and legal functions and consequences.

A. Masking to Assimilate

Social integration is often measured by political ideologies, group association, entertainment preference, dress, neighborhood selection, vehicle choice, friends, and vocal expression.¹⁸⁵ These seemingly superficial measurements are identity benchmarks; masking these culturally identifiable preferences is one way to remove "otherness" associated with a perceived marginalized identity.¹⁸⁶ Social integration includes both conscious and unconscious displays or performance of relevant norms that support dominant group identity.¹⁸⁷ These performance demands often lead an individual to reveal the traits she anticipates are most acceptable and mask those traits considered socially undesirable before a particular audience.¹⁸⁸

The lowest level of masking usually includes toning down one's identity to better assimilate. One African-American Muslim woman described her quest to

indirection and mask-wearing" Trudier Harris, *The Trickster in African American Literature*, NAT'L HUMAN. CTR. (Sept. 26, 2019), <http://nationalhumanitiescenter.org/tserve/freedom/1865-1917/essays/trickster.htm> [<https://perma.cc/UU2P-FT6Q>].

181. Viktor Osinubi, *Privileging the African Metaphysics of Presence in American Slave Culture: The Example of Charles W. Chesnut's "The Passing of Grandison,"* 43 *STUD. LITERARY IMAGINATION* 47, 47 (Fall 2010).

182. *See id.* at 48–50.

183. *See generally* WE WEAR THE MASK, *supra* note 15 (providing accounts of various incidents of people passing to gain acceptance).

184. *See* Bell & Perry, *supra* note 174, at 98–120 (finding that masking sexual orientation is used to protect against potential hate crimes but causes psychological harm).

185. Klein et al., *supra* note 51, at 30–31.

186. *See id.* at 32–33.

187. *Id.* at 31; Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 *N.Y.U. L. Rev.* 425, 459–61 (2014).

188. *See* GOFFMAN, *supra* note 48, at 43, 51. This identity metamorphose encapsulates Goffman's performance of identity and the spectrum of identity assimilation Professor Yoshino explored in *Covering*. *See* Yoshino, *supra* note 19, at 769.

make people feel comfortable at her big law firm.¹⁸⁹ She recognized the implicit dress codes that served as a proxy for judgment, and she changed the color scheme of her headscarf to dark tones to reduce its visibility.¹⁹⁰ Although a small level of masking, she still attempted to shift to what she perceived as the group norm by toning down her Muslim identity—what Professor Yoshino would describe as “covering” her authentic self.¹⁹¹ For other Muslim women, covering may mean tying their hijab in a nonthreatening style, such as an African galee or fashion turban. She may decide to wear modest Western clothing instead of overgarments—a full-length cover coat that goes over street clothes.¹⁹²

The motivations behind masking vary just as the levels of masking do. I have seen some Muslims minimize their religious identity to assimilate into white Christian society but remain actively engaged in Muslim advocacy issues, like the trickster character of folklore who uses a mask to achieve their end in an oppressive society. By contrast, I have seen others behave more like the Uncle Tom persona and simply believe that they have been fully accepted into mainstream society by masking their Islamic identity.¹⁹³ Masking at this level can aptly be termed “acting white,” where individuals assimilate by adopting white culture, leading white people to feel a bit more comfortable with their otherness.¹⁹⁴ Yet an online comment responding to Candace Owens’s statement that racism is over reminds readers how ineffective masking may be:

I see you, leaning hard into whiteness as if it’ll save you. We’ve tried it for generations; it won’t. Like Candace, you ain’t ever gonna be one of them, no matter what. Look after your own . . . instead of lowering yourself to be the non-white pet of people who don’t really want you in their house.¹⁹⁵

The comment highlights that when traces of the marginalized identity exist, assimilation is never fully effective in removing the otherness. Perhaps the September 11 attacks were the reckoning moment when Muslims recognized that they were the “pet of people who don’t really want [them] in their house.”¹⁹⁶ Muslims were no longer exotics from a foreign land, but foreign terrorists. The

189. Christine Hauser, *How Professionals of Color Say They Counter Bias at Work*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/us/racial-bias-work.html> [<https://perma.cc/S7RU-84SQ>].

190. *See id.*

191. *Id.*; *see* Yoshino, *supra* note 19, at 811–12.

192. *See* Aziz, *From the Oppressed*, *supra* note 22, at 229.

193. *See generally* Adena Spingarn, *When ‘Uncle Tom’ Became an Insult*, ROOT (May 17, 2010), <https://www.theroot.com/when-uncle-tom-became-an-insult-1790879561> [<https://perma.cc/RLB2-N892>].

194. *See* PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (2000).

195. Dildoswaggins, Comment to Monique Judge, *Candace Owens Thinks Racism Is ‘Over’ Because She Has ‘Never Been a Slave.’*, ROOT (Mar. 4, 2019), <https://www.theroot.com/candace-owens-thinks-racism-is-over-because-she-has-1833034080> [<https://perma.cc/B4WM-2U3H>].

196. *Id.*; *see* Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 20 SOC. TEXT 101, 110 (2002).

Supreme Court's decision in *Trump v. Hawaii* implicitly endorsed this position.¹⁹⁷

African-American Muslim women may engage in this lower level of masking, allowing them to assimilate into white Christian society more easily. On the other hand, intersectional identities and intracommunity racism coerce some African-American Muslim women to tone down their African-American heritage to prove that they are Muslim enough to non-Black Muslims.¹⁹⁸ They may attend a non-Black mosque, wear hijab or overgarments in the style of Arab Muslims, and use Arabic phrases. Intracommunity racism remains a barrier to full assimilation. Regardless of their dress, their African-American heritage is a barrier to being perceived as having an authentic Islamic identity.¹⁹⁹

Ironically, stereotypes about Muslim women being foreign intruders often allow African-American Muslim women to assimilate into non-Muslim communities more easily.²⁰⁰ Perhaps this dichotomy exists because others perceive African-American Muslims as less of outsiders to the American mainstream.²⁰¹ However, the role of race remains a determinant in who is really Muslim. For instance, despite his anti-Muslim sentiments, Trump stated during his presidential election that he would consider not banning all Muslims from entering the country, such as Scottish Muslims.²⁰² Trump's statement highlights the intersection between race and religion, an intersection that reinforces the power of whiteness—even in subrogated classes.²⁰³

Trump's statement also highlights the assimilation myth. It is a myth that suggests all Americans have a shared identity.²⁰⁴ That identity is not based on patriotism but on ethnocentric values that seek to alienate those who refuse to assimilate into the proverbial melting pot of North American society.²⁰⁵ Such assimilation often requires people who are not white, Christian, or cisgender men to dissolve traces of their race, religion, or gender to belong.²⁰⁶

Although contrary to contemporary constitutional thought, policies and laws

197. See generally *Trump v. Hawaii*, 138 S. Ct. at 2434.

198. See BEYDOUN, *supra* note 161, at 162–70.

199. See *id.*

200. See Karen Fraser Wyche, *African American Muslim Woman: An Invisible Group*, 51 SEX ROLES 319, 323 (2004).

201. See BEYDOUN, *supra* note 161, at 162–70.

202. See Jenna Johnson, *Trump Now Proposes Only Muslims from Terrorism-Heavy Countries Would Be Banned from U.S.*, WASH. POST (June 26, 2016, 10:05 AM), <https://www.washingtonpost.com/news/post-politics/wp/2016/06/25/trump-now-says-muslim-ban-only-applies-to-those-from-terrorism-heavy-countries/> [https://perma.cc/E5Y2-77JQ].

203. See Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993) (examining the social construct of race, including the intersection of race, power, and property ownership).

204. See Elaine S. Sylvester, *Belonging: Race or Categories*, 50 CREIGHTON L. REV. 737, 739–40 (2017); Booth, *supra* note 59, at 250.

205. See Ahmed, *supra* note 21, at 130–132; *Trump v. Hawaii*, 138 S. Ct. at 2434–36 (Sotomayor, J., dissenting).

206. See Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT'L L. 1, 22, 31–32 (1998); see generally Harris, *supra* note 203 (describing a theory of “passing and trespassing” that supports the notion that “others” are not worthy of the rights embedded in the Constitution).

continue to uphold the melting pot ideology and encourage identity masking.²⁰⁷ The highest level of masking eliminates one's identity to assimilate fully into white Christian society—a level of assimilation Professor Yoshino refers to as converting.²⁰⁸ On the same level as converting is coerced masking, such as legislation mandating Muslim women remove hijab, face veils, and burqas.²⁰⁹ In the Title VII context, coerced masking occurs when employers require a Muslim woman to remove her hijab²¹⁰ or a Muslim man to shave his beard.²¹¹

B. Legislated Masking²¹²

Legislated masking occurs when individuals feel coerced to mask their identity in response to legislation. The masking can occur to gain legal rights and protections or by specific legislative demand.²¹³ People from marginalized communities have masked to protect themselves from discrimination.²¹⁴ For example, African Americans sometimes passed as white to escape slavery,²¹⁵ Jim Crow laws, and other vestiges of racism.²¹⁶ During World War II, people of Japanese descent masked their Japanese ancestry to avoid internment and other consequences of ethnic bias.²¹⁷ Many in the LGBTQ community have also masked to avoid prosecution under sodomy laws, serve in the military, and maintain employment.²¹⁸ This level of coerced masking allows marginalized groups to skirt the law or gain protections under the law.

Specific legislation has also explicitly forced many marginalized groups, including Muslim women, to mask aspects of their identity to gain legal rights and

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207. See Julia Higgins, *The Rise and Fall of the Melting Pot*, THE WILSON Q. (Dec. 5, 2015), <https://www.wilsonquarterly.com/stories/the-rise-and-fall-of-the-american-melting-pot/> [https://perma.cc/WDA8-KD3D]; cf. Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, 26 TUL. ENVTL. L.J. 239, 249 (2013).
208. See Yoshino, *supra* note 19, at 785.
209. See generally Shaira Nanwani, *The Burqa Ban: An Unreasonable Limitation on Religious Freedom or Justifiable Restriction?*, 25 EMORY INT'L L. REV. 1431 (2011).
210. See *Abercrombie*, 135 S. Ct. at 2030.
211. See *Hussein v. Waldorf-Astoria*, 134 F. Supp. 2d 591, 597 (S.D.N.Y. 2001).
212. I use the term "legislated masking" to reference policies that openly coerce or require groups to mute their identity to participate in and benefit from basic societal programs.
213. See *Hussein*, 134 F. Supp. 2d at 591.
214. Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. 1283, 1285–86 (2007). See, e.g., Dirk Johnson, *Are Homosexuals the New Enemy?*, N.Y. TIMES, Jan. 28, 1993, at A16 (documenting the level of discrimination against gay men in the military).
215. See *Dred Scott v. Sandford*, 60 U.S. 393, 423 (1857).
216. There is also a history of African Americans who refused to pass and mask their identity, which also had consequences. See JAMES WELDON JOHNSON, *THE AUTOBIOGRAPHY OF AN EX-COLORED MAN* (1912) (documenting the trauma associated with living a white life with a Black consciousness). It stands to reason that Muslims forced to mask their identity would experience similar trauma.
217. See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942) (authorizing the imprisonment of Japanese Americans).
218. See generally Yoshino, *supra* note 19 (detailing the layers of masking in the LGBTQ community); Brown, *supra* note 66. The landmark case *Bostock* has recently interpreted Title VII to protect employees from discrimination based on their sexual orientation. 590 U.S. ____ (2020).

protections.²¹⁹ The military’s “Don’t Ask, Don’t Tell” policy, which required “gay[s] and lesbians” to mute their identity to serve in the military, is likely the most widely known contemporary legislated masking example in America.²²⁰ However, Muslim women have also been a persistent target of legislated masking. In twentieth-century Muslim Uzbekistan, the Soviet “modernization” campaign sought to liberate Uzbek women by having them remove their full-body veils.²²¹ Although Soviet propaganda promoted these veil-removal policies (*hujum*) as a movement for gender equity, some Muslim women perceived the *hujum* as removing an Islamic identity marker and undermining the hold of Islam (and its religious leaders).²²² This flawed campaign operated on the premise that Islam, not cultural appropriation of the religion, oppressed women.²²³ It also overlooked that in the seventh century, Muslim women had many legal rights that not even American women had until the nineteenth century—capacity to contract, marry, and own and inherit property.²²⁴ Yet the veil remained a symbol of both oppression and resistance against assimilation.²²⁵

The twenty-first century has not been much better. Europe has legislated various iterations of banning full face and body coverings (colloquially known as the “burqa ban”).²²⁶ The underlying message of these bans frames Muslim women as outsiders who needed to assimilate by removing their identity-based clothing.²²⁷ After Austria successfully banned the burqa,²²⁸ Quebec also barred public workers from wearing the burqa and required women to remove their face veils when riding public transit or receiving government services.²²⁹

Legislators in the United States have attempted similar strategies to legislate Muslim women’s masking.²³⁰ In 2016, Georgia State Representative Jason

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219. See Higgins, *supra* note 207; cf. Tsosie, *supra* note 207 (describing how the melting-pot ideology does not resonate with Indigenous people because their cultures are not lived in “private”).
220. 10 U.S.C. § 654 (2010) (repealed).
221. DOUGLAS NORTHRUP, *VEILED EMPIRE: GENDER AND POWER IN STALINIST CENTRAL ASIA* 199 (2016).
222. *Id.*
223. *See id.*
224. Awad, *supra* note 152.
225. NORTHRUP, *supra* note 221, at 185–86.
226. *The Islamic Veil Across Europe*, BBC NEWS (May 31, 2018), <https://www.bbc.com/news/world-europe-13038095> [<https://perma.cc/5BU5-PZG2>]; See *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. (2014).
227. Nanwani, *supra* note 209.
228. Rick Noack, *Austria’s New Anti-Burqa Law Isn’t Quite Working as Intended*, WASH. POST (Oct. 9, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/10/09/austria-wanted-to-ban-burqas-now-it-also-fines-mascots-and-stops-cyclists-who-wear-scarves/> [<https://perma.cc/L234-TYZT>].
229. Dan Levin, *Quebec Bars People in Face Coverings from Receiving Public Services*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/world/canada/quebec-face-coverings-ban.html> [<https://perma.cc/C986-SEMH>].
230. See, e.g., Sharon Schmickle, *Bill in Legislature Prompts Dispute Over Muslim Women’s Headscarves*, MINN. POST (Mar. 4, 2009), <https://www.minnpost.com/politics-policy/2009/03/bill-legislature-prompts-dispute-over-muslim-womens-headscarves/> [<https://perma.cc/7G9C-XLNR>].

Spencer introduced a bill that would have banned Muslim women from wearing a burqa and any face coverings.²³¹ Spencer's bill reflected a desire to preserve American society as white and Christian: "This bill is simply a response to constituents that do have concerns of the rise of Islamic terrorism, and we in the State of Georgia do not want our laws used against us."²³² However, when opponents challenged the constitutionality of the proposed legislation, Spencer rescinded the bill and explained that it was intended to address threats from "masked terrorists," but not any specific group.²³³

Legislated masking to gain access to legal protections also occurs in the broader Muslim community. Some Muslim refugees convert to Christianity—thus masking their prior religious identities—to strengthen asylum applications to Canada, the United States, and Germany.²³⁴ Since an asylee may base an application on a well-founded fear of persecution, converting to Christianity may help to create the perception of such a fear.²³⁵ Although Christians are generally not persecuted in Muslim-majority countries, some Islamic scholars consider it a crime punishable by death when Muslims convert to Christianity.²³⁶ Although advocates advise refugees that converting is not necessary to strengthen their applications,²³⁷ immigration policies—such as the Muslim Ban—seem to suggest otherwise.²³⁸

Masking one's identity, whether to avoid punishment or to access protections, has consequences. In addition to the potential psychological

231. The original version of the statute provided: "A person is guilty of a misdemeanor when he or she wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as the conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so." Ga. Code Ann. § 16-11-38 (West 2019); Spencer sought to change the gender to he or she, so that the bill would include women wearing niqab. H.B. 3, 2016 Leg., Reg. Sess. (Ga. 2016).

232. Associated Press, *Georgia Lawmaker Drops No-Mask Proposal after Muslim Backlash*, FOX NEWS (Nov. 17, 2016), <https://www.foxnews.com/politics/georgia-lawmaker-drops-no-mask-proposal-after-muslim-backlash> [<https://perma.cc/J97G-W626>].

233. *Id.*; Aaron Diamant, *Lawmaker Withdraws Bill Banning Women from Wearing Burqas in Public*, WSB-TV (Nov. 17, 2016), <https://www.wsbtv.com/news/local/new-bill-would-ban-women-from-wearing-burqas-for-drivers-license-photos/467901403/> [<https://perma.cc/8E6M-56XD>].

234. *See, e.g.*, Josie Ensor, *The Muslim Refugees Converting to Christianity 'to Find Safety'*, TELEGRAPH (Jan. 30, 2017), <https://www.telegraph.co.uk/news/2017/01/30/muslim-refugees-converting-christianity-find-safety/> [<https://perma.cc/NL6S-4URM>]; Lizzie Dearden, *Muslim Refugees Are Converting to Christianity in Germany*, INDEPENDENT (Dec. 9, 2016), <https://www.independent.co.uk/news/world/europe/muslim-refugees-converting-christianity-germany-crisis-asylum-seekers-migrants-iran-afghanistan-syria-eritrea-a7466611.html> [<https://perma.cc/35C4-REWP>]. Khaled Beydoun and Erika Wilson explore this veiling of identity in racial identity as "reverse passing." Khaled Beydoun & Erika Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 309 (2017).

235. *See* Ensor, *supra* note 234.

236. JOHN ESPOSITO, WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM, 73–75 (2nd ed. 2011). The issue of apostasy is nuanced and this sentence is not intended to explain the schools of Islamic law on the topic or jurist in-depth analysis of the issue.

237. *See* Dearden, *supra* note 234.

238. *See* Holger Sonntag, *Testing Religion: Adjudicating Claims of Religious Prosecution Brought by Iranians in the U.S. and Germany*, 68 CASE W. RES. L. REV. 975, 986–88 (2018).

trauma,²³⁹ masking religious identity has legal implications in the Title VII context. As explained in the next section, Muslims who mask to safeguard against discrimination often find that masking is used against them to deny religious accommodation requests—particularly requests by Muslim women who remove the veil or fail to perform their religious identity.

III. INVERTED MASKING

Although Safoorah Khan made a successful Title VII claim against her employer, employers are still inclined to question religious accommodations when their employees' performance of their religious identity is inconsistent with what the employer knows about the religious practice.²⁴⁰ It is this binary framework of religious identity that often leads employers to challenge accommodation requests when the requesting employee's religious practices deviate from what the employer observes from other employees of the same religion.²⁴¹ This "deviation factor" also suggests employers are less familiar with minority religions and require training.²⁴² Consequently, employers largely rely on uninformed understandings of Islamic practices to assess their Muslim employees' religious practices.

A. Establishing a Sincerely Held Belief: Legal Standard

To establish a *prima facie* case of religious discrimination under Title VII, a plaintiff must demonstrate that she has "a bona fide religious belief that conflicts with an employment requirement."²⁴³ She must also establish that the accommodation was a motivating factor in the adverse action.²⁴⁴ If an employee establishes these elements, the burden shifts to the employer to establish a good faith effort to reasonably accommodate the religious belief or to prove that the accommodation would cause undue hardship to the employer's business.²⁴⁵

However, the analytical framework to determine whether an employee's religious belief is "truly held" is becoming increasingly contentious because the standard is unclear and inconsistent.²⁴⁶ Although assessing sincerely held religious beliefs is factually driven and handled on a case-by-case basis,²⁴⁷ expert witnesses

239. See generally WE WEAR THE MASK, *supra* note 15.

240. See, e.g., Compl. at 3, *Sardeye v. Walmart Stores E., LP*, No. 3-18-CV-01261, 2019 U.S. Dist. LEXIS 154118 (M.D. Tenn. Sept. 10, 2019).

241. See, e.g., *id.*

242. See Dina Gerdeman, *Religion in the Workplace: What Managers Need to Know*, WORKING KNOWLEDGE (Sept. 27, 2018), <https://hbswk.hbs.edu/item/religion-in-the-workplace-what-managers-need-to-know> [<https://perma.cc/8M8U-9KXU>].

243. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2nd Cir. 1985).

244. Circuit courts have been unclear about how explicit employees must be in their requests for religious accommodations. The Supreme Court provided minimal guidance in *EEOC v. Abercrombie & Fitch Stores Inc.*, 135 S.Ct. 2028 (2015).

245. *Trans World Airlines, Inc.*, 432 U.S. at 74.

246. *See United States v. Seeger*, 380 U.S. 163, 185–186 (1965).

247. *Philbrook*, 757 F.2d at 481.

are frequently used to determine the validity of an employee's belief.²⁴⁸ The expert approach is problematic because lived religion is often specific to that individual, their family unit, or their community, rather than a standardized adherence to textual doctrine. For example, although there are various schools of thought²⁴⁹ on whether Muslim women are required to wear hijab (head covering), veil (face covering), a burqa (full body covering), or no head covering at all,²⁵⁰ a Muslim woman who subscribes to any of these four approaches sincerely believes that she is practicing in accordance with her beliefs. Furthermore, Muslim women also have different perspectives on when one is required to obey a religious mandate and when one may disobey.²⁵¹ As a result, should an expert testify that a Muslim woman's choice to wear any of the above coverings is not a requirement of the religion, courts could overlook the subjectivity of religious interpretation and practice.

Employees should not have to demonstrate sincerity by practicing an objectively correct interpretation of a religion, but merely by observing what they believe is part of their faith.²⁵² This approach is especially compelling considering that Title VII broadly defines religion as "all aspects of religious observance and practice, as well as belief."²⁵³ As such, courts should apply a similarly broad definition of what constitutes a "truly held" or sincerely held belief.²⁵⁴ Furthermore, experts also tend to endorse as legitimate religious experience the very identity markers that lead to the identity-based discrimination that Title VII was designed to protect against. As explained below, assessing religious sincerity through visible markers abrogates First Amendment protections and undermines one of the purposes of Title VII—to prohibit discrimination on the basis of religion.

B. Religious Visibility and Norms

The Supreme Court's broad definition of religion is by design. The Court does not want to judge religiosity.²⁵⁵ However, this does not stop an employer from arguing that an employee's requested religious accommodation is actually a secularly motivated personal preference because the employer finds she is visibly

248. See Jared A. Goldstein, *Is There a Religious Question Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 502–03 (2005).

249. See Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 6–9 (1997) (explaining the five schools of Islamic thought and traditional jurisprudence).

250. Shirazi & Mishra, *supra* note 158, at 44–47.

251. Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil? Muslim Women, France and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 750–52 (2006).

252. See *id.* (reasoning that "the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held'"); see also *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) (holding "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

253. 42 U.S.C. § 2000e(j) (2012).

254. See *Seeger*, 380 U.S. at 185.

255. See *id.* at 184 (providing religion is "intensely personal" and courts must give "great weight" to claimants' portrayals of their beliefs).

inconsistent in her religious practice.²⁵⁶ For example, Kimberly Bloom, a born-again Christian, requested an accommodation not to work on Sundays.²⁵⁷ Her employer, Aldi Inc., denied her religious accommodation request, framed the request as a personal preference, and used Bloom's lack of strict religious adherence as a basis for its argument:

Bloom . . . does not attend church; and, in fact, she has only attended on a single occasion, since the late 1990s On Sundays, Bloom spends time with family, reads the Bible, and watches a preacher on television She makes her own distinctions as to what is or is not permitted on Sundays—for example, she will play board games with her grown children but will not go to the movies, and will go for a ride or walk but will not mow the lawn. She does not point to any Bible passage or religious materials that make her rather self-serving distinctions.²⁵⁸

The Equal Employment Opportunity Commission (EEOC) challenged the employer's characterization of the request as a personal preference.²⁵⁹ The court ultimately found for Bloom, reasoning that her decision not to attend church on the Sabbath was immaterial to whether her beliefs qualify as religious for purposes of Title VII.²⁶⁰ Although Bloom was ultimately successful in establishing the sincerity of her belief, it was her antinormative Christian behavior that led the employer to challenge the sincerity of her religious accommodation.²⁶¹

In another matter, Alamo Rent-A-Car denied Bilan Nur's request to wear hijab during Ramadan, contending that Nur's religious accommodation request was not based on a sincerely held religious belief.²⁶² In support of its position, Alamo referenced in its brief Nur's inconsistency in wearing a "veil" during Ramadan the prior year: "Alamo points to evidence that during Ramadan in 2000 (the year prior to the Ramadan at issue), Alamo's management asked Nur to remove her head covering, and she complied, and did not assert a religious need to object to the request."²⁶³ Alamo's argument relied on the ease with which Nur willingly masked her religious identity at its request.²⁶⁴ The court ultimately ruled for Nur on summary judgment, acknowledging that the employer forcing her to

256. See *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997) (employer argued that Jewish employee never requested leave for Yom Kippur in her eight-year work history and thus her religious belief was not sincerely held).

257. *EEOC v. Aldi, Inc.*, No. 06-01210, 2009 WL 3183077, at *3 (W.D. Pa. Sept. 30, 2009).

258. Defendant Aldi's Memorandum in Support of Its Motion for Summary Judgment at 12, *EEOC v. Aldi, Inc.*, No. 06-01210, 2009 WL 3183077 at *12 (W.D. Pa. Sept. 30, 2009).

259. *Id.* at *11.

260. *Id.* at *12; see also *Williams v. Harvey*, 2006 WL 2456406 (Aug. 21, 2006) (denying employee's claim because the employee knew about the Sunday schedule, accepted the job with knowledge of the rotating Sunday schedule, and later refused to work on Sunday after ignoring reasonable accommodations offered by the employer).

261. See Defendant Aldi's Memorandum in Support of Its Motion for Summary Judgment at 12, *EEOC v. Aldi, Inc.*, 2009 WL 3183077 at *9.

262. *Alamo Rent-A-Car*, 432 F. Supp. 2d at 1011.

263. *Id.* at 1009, 1011.

264. *Alamo Rent-A-Car*, 432 F. Supp. 2d at 1012.

hide in the back room when she wore hijab was not a reasonable accommodation.²⁶⁵

Levels of inverted masking were at play in both cases. For Bloom, Christian norms guided her employer's analysis of the sincerity of her religious belief. For Bloom's employer, the most important of these norms was the plaintiff's lack of adherence to what her employer determined devout Christians must do on Sundays—go to church.²⁶⁶ Thus, it was not enough for Bloom's employer that Bloom profess that her religious beliefs prevented her from working on Sundays; Bloom also had to perform her Christian identity according to her employer's expectations. The more her behavior adhered to Christian norms, the easier it was for her employer to believe her sincerity.²⁶⁷ For Nur, her willingness to remove her hijab to serve customers and assimilate at her employer's request made her employer question the sincerity of her religious practice.²⁶⁸ The temporary masking before customers prevented Nur from securing an accommodation during the most important month in the Islamic calendar—Ramadan. Though the court ruled for Nur, it was her perceived lack of religious consistency that gave fodder to the employer's initial challenge to her sincerely held religious belief.²⁶⁹ Such conduct suggests that employers believe that employees waive their right to religious accommodation if there has been any inconsistency in their religious practices.

In addition to religious consistency, a lack of visible religious markers, such as a hijab or beard, also influences employers' inclinations to challenge employees' sincerity.²⁷⁰ For example, Hilton Hotels questioned employee Mamdouh Hussein's claim that he needed to wear a beard for religious reasons.²⁷¹ Hilton observed that Hussein had never worn a beard in the fourteen years of his employment.²⁷² Hussein's employer also professed that they never knew Hussein was Muslim until he requested the accommodation.²⁷³ In this case, the court agreed with the employer. The court granted Hilton Hotels summary judgment, reasoning,

Hussein has made no effort to explain why, if his religion prevented him from

265. *Id.* at 1017.

266. *See* Defendant Aldi's Memorandum, *supra* note 258, at **9, 12.

267. *See* *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1088 (6th Cir. 1987) (finding it reasonable for an employee to find Sunday replacement as part of an accommodation); *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1031 (8th Cir. 2008) (holding UPS failed to reasonably accommodate an employee's religious beliefs when it terminated an employee who could not find a replacement driver to complete his route that extended past sundown on a Friday).

268. *See* *Alamo Rent-A-Car*, 432 F. Supp. 2d at 1011.

269. *See id.*; *see also* *EEOC v. IBP, Inc.*, 824 F. Supp. 147, 151 (C.D. Ill. 1993) (holding subsequent absence of faith did not establish previous religious beliefs were insincere when the employee refused to work on his Sabbath).

270. *See Hussein*, 134 F. Supp. at 594 (detailing an employer that doubted the sincerity of an employee's religion when he failed to inform the company of his religious beliefs surrounding facial hair until fourteen years into his employment).

271. *Id.*

272. *Id.* at 596.

273. *Id.*

shaving, he had never worn a beard before. He does not contend, for example, that he had just converted to his religion. Finally, within three months, he shaved his beard, an undisputed fact that also undercuts his claim of religious necessity.²⁷⁴

Hussein's challenge against Hilton Hotels presents another inverted masking model—one that relies on a lack of identity performance measured by visibility. The court's reliance on Hilton's assertion that it did not know Hussein was Muslim, and therefore lacked notice,²⁷⁵ established a dangerous precedent in Title VII proceedings. The court used this lack of knowledge to bolster the employer's position that Hussein's belief was not sincere.²⁷⁶ Such an approach suggests that the employer expected some outward performance of Hussein's Islamic religious identity. Had that performance of identity existed to verify his sincerely held belief, the employer may have hesitated to challenge Hussein's level of sincerity. Without visible identity markers, an employer has no reason to know an employee's religion, unless the employee seeks an accommodation. Furthermore, the court's reasoning that Hussein's shaving his beard undercut the religious necessity of keeping the beard overlooked that religiosity is often fluid. Thus, Hussein's decision to shave his beard should have no bearing on whether a belief is sincerely held.

Measuring employees' sincerity against other employees' religious performance creates similar barriers to employees securing a religious accommodation. Walmart denied Fadumo Sardeye, a Somali Muslim woman, an exemption from shelving alcohol and pork products.²⁷⁷ Sardeye believed that, as a Muslim, she was prohibited from touching the products, and she stressed that another Walmart store had accommodated her request for fifteen years.²⁷⁸ Other employees, however, complained about Sardeye's exemption, pointing to other Muslim employees who had regularly shelved alcohol during their employment.²⁷⁹ To accommodate her request, her new manager required that Sardeye provide Qur'anic proof that she was prohibited from touching pork and alcohol products.²⁸⁰ Reliance on the Qur'an as the sole source of religious guidance is a misunderstanding of Islamic jurisprudence and religious practice.²⁸¹ Walmart also

274. *See Hussein*, 134 F. Supp. at 596–97.

275. *See id.* (recognizing the undisputed fact that Hussein never mentioned the conflict between the employer's policy and his religion until he was questioned about his beard; asserting Hussein failed to give his employer notice to make an arrangement for any accommodations and without this notice, there was no prima facie case).

276. *Id.*

277. Compl. at 3–4, *Walmart Stores*, No. 3-18-CV-01261.

278. *Id.* at 2–3.

279. *Id.* at 5; Holly Meyer, *Muslim Woman Sues Walmart for Religious Discrimination After Being Fired from Knoxville Store*, TENNESSEAN (Nov. 8, 2018), <https://www.tennessean.com/story/news/religion/2018/11/08/knoxville-muslim-woman-sues-walmart-religious-discrimination-lawsuit/1928776002/> [<https://perma.cc/7BW8-78MR>].

280. Compl. at 5, *Walmart Stores*, No. 3-18-CV-01261.

281. Mamoud Munes Tomeh, *Persuasion and Authority in Islamic Law*, 3 BERKELEY J. MIDDLE E. & ISLAMIC L. 141, 143 (2010).

incorrectly used the religiosity of other Muslim employees as an implicit barometer to measure Sardeye's sincerity.²⁸² Walmart should have measured Sardeye's sincerity using a subjective standard, not status quo behavior or whether a Qur'anic mandate exists.²⁸³

In assessing the consistency of religious practices, employers discount masking marginalized identities for personal protection.²⁸⁴ Attitudes toward Muslims after the September 11 attacks highlighted the importance of occasionally masking for personal protection.²⁸⁵ Conceivably, the 9/11 backlash explains why Alamo Rent-A-Car denied Nur's request to wear hijab during Ramadan in 2001 but allegedly granted the same request in 1999 and 2000.²⁸⁶ Thus, it should not be surprising that Muslims mask their religious identity to assimilate and avoid discrimination. After 9/11, it was also not uncommon for Muslims to underperform their religious identity in response to religious animosity by showing they were like others in their community and equally American.²⁸⁷ This divergence of responses reinforces that religious performance takes many forms, including shifting religiosity and visibility of religious identity. Employers' assumptions that these shifts undermine sincerely held religious beliefs invert equal protections, creating the inverted masking paradigm.

C. Removing the Mask

We must eliminate binary narratives around religious and gender identities to combat inverted masking in religious accommodation employment settings. Black Muslim women offer us a glimpse at how this might be possible. While normative assumptions of Muslim women as oppressed and meek prevail,²⁸⁸ Black women are stereotyped as being angry, aggressive, loud, and sassy.²⁸⁹ The contrast makes a Black Muslim woman's identity incongruent. Such incongruous stereotypes can contradict one another when discussed theoretically. AA's representation of Khan demonstrates how such binary assumptions might be challenged in court.

AA's presence on the litigation team for Khan allowed the DOJ to disrupt various Muslim identity stereotypes. Arguably, as one of the lead attorneys, AA

282. Compl. at 5, *Walmart Stores*, No. 3-18-CV-01261.

283. *Peterson v. Wilmur Commc'ns, Inc.*, 205 F. Supp. 2d 1014, 1018 (E.D. Wis. 2002).

284. *See generally* WE WEAR THE MASK, *supra* note 15.

285. Faiza Patel & Meghan Koushik, COUNTERING VIOLENT EXTREMISM, BRENNAN CTR. FOR JUST., 1 (2017).

286. *Alamo Rent-A-Car*, 432 F. Supp. 2d at 1011–12.

287. Cyra Akila Choudhury, *Terrorists & Muslims: The Construction, Performance, and Regulation of Muslim Identities in the Post-9/11 United States*, 7 RUTGERS J.L. & RELIGION 1, 3 (2006).

288. Susan Carland, *If You Want to Know About Muslim Women's Rights, Ask Muslim Women*, GUARDIAN (May 6, 2017), <https://www.theguardian.com/world/2017/may/07/if-you-want-to-know-about-muslim-womens-rights-ask-muslim-women> [https://perma.cc/ZAR6-D3BU].

289. *See generally* Patricia Luckoo, *Deconstructing Negative Stereotypes, Myth and Microaggressions About Black Women: Reconstructing Black Women's Narrative, Identity and The Empowering Nature of Ethnic Identity* (2018) (Ph.D. dissertation, National Louis University) (on file with Digital Commons at National Louis University).

had the potential to dispel the notion of a binary Muslim identity before a jury—a factor that may have led the school district to settle the case. Self-defining moments, such as this example, are how I prescribe that Black Muslim women continue to dismantle the effects of inverted masking.

CONCLUSION

It is difficult to believe that which we cannot see. Yet faith is just that—belief in the unseen.²⁹⁰ Identity is also often complicated, multilayered, and invisible to employers. It is the coerced covering of identity—our ethnicity, religion, and culture—that Title VII and other anti-discrimination laws seek to protect, a protection grounded in the belief that the American fabric is woven with multiple threads.

Well-intentioned employers must overcome identity stereotypes to recognize that religiosity is as diverse as societal fiber. Even if courts do not want to measure religiosity, society and employers do.²⁹¹ And Muslim women are acutely aware of the need to mask religious identity to make others feel comfortable. Intracommunity and intercommunity racism, gender inequity, Islamophobia, and binary identity markers have pushed Muslim women to the margins.

Thus, when employers inappropriately use identity markers as a barometer to assess religious sincerity in the Title VII framework, they should remember Billie Holiday's words: "If I go to church on Sunday / then cabaret all day Monday / ain't nobody's business if I do."²⁹²

290. *The Holy Qur'an: Arabic Text and English Translation*, Islam Int'l Publications Ltd. 1, 2 (Maulawi Sher 'Ali trans., 2015), <https://www.alislam.org/quran/Holy-Quran-English.pdf> [<https://perma.cc/U3ZA-XXS8>].

291. See Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453, 455–57 (2010); e.g., Eman Quotah, *I'm Muslim but Don't Wear a Headscarf. Stop Using Hijabs as a Tool for 'Solidarity'* USA TODAY (Apr. 24, 2019, 6:00 AM), <https://www.usatoday.com/story/opinion/voices/2019/04/24/muslim-women-islam-headscarves-hijab-saudi-arabia-column/3540144002/> [<https://perma.cc/5J65-27L6>]; but see, e.g., John Blake, *Muslim Women Uncover Myths About the Hijab*, CNN (Aug. 12, 2009, 7:54 AM), <http://www.cnn.com/2009/US/08/12/generation.islam.hijab/index.html> [<https://perma.cc/8AP4-CEVA>]; Aziz, *Coercive Assimilationism*, *supra* note 22, at 17.

292. Billie Holiday, *Ain't Nobody's Business If I Do*, on THE LADY SINGS (UMG Recordings, Inc. 1956).