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Is Brown the New Black?:¹ American Muslims, Inherent Propensity for Violence,² and America's Racial History

Amara S. Chaudhry-Kravitz³

1. The title of this article, borrowed from the world of women's fashion, may at first seem to trivialize a complex, multi-faceted topic of sociological, legal, and political significance. The author chose this title for stylistic reasons—though her thesis would arguably have been more effectively articulated if the title was: “Is ‘Brown’ Actually a New Shade of ‘Black’?” To clarify the use of color words in the title, the term “brown” is a shorthand expression commonly used by Muslims of varied racial and ethnic backgrounds and divergent physical characteristics when referring to the equally diverse and pluralistic American Muslim community. The term “black” in the title is a shorthand expression frequently used by Americans of culturally diverse backgrounds to refer to African Americans. In using this term, the author is fully aware that African Americans occupy a unique position in American society as a result of a very particular cultural history and a shared contemporary experience of the present-day legacy of that history. As stated below, the author's thesis rests upon her assertion that America's racial history is largely dependent upon a socially constructed white/non-white binary in which persons defined as “non-white” are presumed to have an inherent propensity for violence. The author's choice of title derives from the fact that the primary example of this racial binary in American culture, and the presumptions of violence which apply thereto, in the United States is the black/white binary. Though “brown” may not be “the new black,” the author asserts that “brown” is certainly a shade of “non-white” and that it would be helpful for American society to dialogue about the similarities and differences between these distinctions.

2. This article asserts that American Muslims are *perceived* as having an inherent propensity for violence and theorizes that this perception is related to an American racial history, which has a long history of perceiving “non-white” persons in this manner. It is this *perceived* inherent propensity for violence that is referenced in the title for this article, though the word “perceived” has been omitted for stylistic reasons.

3. Amara Chaudhry-Kravitz currently serves as legal director for the Council on American-Islamic Relations Philadelphia Office (CAIR-Philadelphia). This article is her second scholarly publication on the issue of legal definitions of race, the imposition of legal racial classification categories, and the presumptions of violence that drive those definitions. Her first article, “Lessons from Jim Crow: What Those Seeking Self-Determination for Transgender Individuals Can Learn from American's History with Racial Classification Categories” was published during her years of service as legal director for an LGBT civil rights practice, which immediately preceded her current position. See Amara S. Chaudhry, *Lessons from Jim Crow: What Those Seeking Self-Determination for Transgender Individuals Can Learn from American's History with Racial Classification Categories*, 18 TEMP. POL. & CIV. RTS. L. REV. 505 (2009).

Ms. Chaudhry-Kravitz's primary research interest focuses upon the ways in which the American construction of “race” affects the extent to which American Muslim identity is associated with a presumed inherent propensity for violence and criminal behavior. At

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I. Introduction

Good morning everybody.⁴ So as I was preparing to come here today,⁵ and I looked at the topic of “Where We Are, Where We’ve Been, Where

CAIR-Philadelphia, she focuses her legal work on cases that involve this association and legal consequences of this association mostly in the context of national security and criminal justice.

Prior to her career as a “civil rights” attorney, Ms. Chaudhry-Kravitz devoted the majority of her career to the field of criminal justice. Immediately following her graduation from Washington & Lee University School of Law, she worked for many years as an assistant public defender and private criminal defense attorney in both West Virginia and Pennsylvania. She has represented both juveniles and adults in state and federal court at every level of proceeding, including jury trials and state and federal appellate work. She also worked in the criminal justice field while an undergraduate at the University of Virginia through internships with juvenile probation departments and a juvenile court-ordered diversion program.

It is Ms. Chaudhry-Kravitz’s years working in the criminal justice field, and her significant research into the historical legal construct of race, which prompted her to write this article about race-based presumptions of violence.

4. This article stems from my remarks during a symposium at Washington & Lee University School of Law. To capture the essence of those remarks, this article contains language commonly associated with oral, rather than written, communication. I hope the reader enjoys that stylistic device.

5. See *supra* note 4.

We're Going,"⁶ I decided that topic was too broad for me to discuss in fifteen to twenty minutes, and I needed to narrow it a little bit for the purpose of my remarks.

In an effort to narrow this topic, I will focus specifically on the increasing criminalization⁷ of American Muslim identity post-9/11⁸ and the extent to which that criminalization is affected by a racial element or a racial component. However, to remain true to the structure implied by this panel's title, I will structure my discussion within the "Where We Are, Where We've Been, Where We're Going" framework. For the "Where We Are" discussion, I will demonstrate how American Muslim identity has been "criminalized" post-9/11. I'll then segue into the "Where We've Been Discussion" in which I will analyze the criminalization of American Muslim identity within the larger framework of America's racial history. Finally, in the "Where We're Going" discussion, I will posit to you that understanding the racial underpinnings of anti-Muslim bias in the United States is necessary in order to effectively advocate for American Muslim legal equality.

Throughout my remarks, my thesis is simple. I assert that the criminalization of American Muslim group identity is a by-product of two things: (1) the historical racialization of that identity as a "non-white" racial category, and (2) the presumption, throughout American history, that "non-white" persons have an inherent propensity for violence and criminality.

II. Defining Our Terms

Before I delve too deeply into the substance of my remarks, I want to take a moment to define my terms.

Throughout my remarks, I will use the phrase "American Muslim." When I use this term, I am referring to persons living in the United States who either self-identify as "Muslim," or who are identified by others as "Muslim" regardless of whether the basis of that identity lies in internal religious beliefs, externally articulated religious beliefs, and/or externally

6. This was the title of the first panel presentation at Washington & Lee University School of Law's Journal of Civil Rights and Social Justice's 2013 Symposium. See Symposium, *Discrimination Against Muslim Americans in a Post-9/11 World*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. (2013).

7. The term "criminalization," as it is used in this article, is described in Part II, below.

8. Throughout this article, the term "9/11" will be used as a shorthand expression referring to the tragic attacks on our nation that occurred on September 11, 2001.

expressed religious practices. The term “Muslim” shall apply to any such identified persons regardless of race, ethnicity, national origin, or country of familial origin. The term also applies irrespective of an individual’s country of citizenship, whether a person is an immigrant or American born, and regardless of the duration of the individual’s, or the individual’s family’s, history in the United States.

When I speak about “criminalization,” I’m speaking about explicit, implicit, or even unconscious use of Muslim identity as either an *ex ante*⁹ basis for predicting an individual’s propensity for violence or likelihood to engage in criminal behavior¹⁰ in the future, or as an *ex post facto*¹¹ basis for determining the likelihood that an individual has engaged in violence and/or criminal behavior in the past or present.¹²

9. *Ex ante* is a Latin phrase meaning “before the event.”

10. The “criminal behavior” to which I am referring includes, but is not limited to, the terrorism crimes outlined in Title 18, Chapter 113B, of the United States Code, though there is an ongoing debate as to whether the federal criminal justice system is the appropriate forum to address “terrorism” and “terroristic acts” and whether “terrorism” should be considered as a “criminal act” or an “act of war.” While I acknowledge the validity of that debate, the debate itself is largely beyond the scope of this article. Instead, this article focuses only upon an explicit or implied presumption of an inherent propensity for violence, and the term “criminalization” is being used as a short-hand express for that presumption.

11. *Ex post facto* is a Latin phrase meaning “after the event.” Though this phrase is most commonly used to describe a law that retroactively criminalizes previously noncriminal actions, this article uses the term in a more literal context.

12. My definition of the term “criminalization” was somewhat inspired by language used by William M. Carter, Jr., to describe “racial profiling.” See *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (Winter, 2004) (“Racial profiling, or the use of race as an *ex ante* basis for criminal suspicion.”). At Note 21, Dean Carter acknowledges that “racial profiling” may apply to other societal groups other than African Americans, but, as his article discusses racial profiling as an “incident [] or badge [] of slavery” under the Thirteenth Amendment; he does not attempt to analyze the extent to which “racial profiling” applies to other societal groups.

There is a reason why I avoided the term “racial profiling” in this article. The term “racial profiling,” by its own terms, applies only to “profiling” based upon “race.” As discussed in Part V of this article, many civil rights advocates, both internal and external to the American Muslim community, have used the term “racial profiling” to describe the practice of using American Muslim identity as an *ex ante* basis for criminal suspicion. While the use of the term “profiling” in this way seems to coincide with Dean Carter’s definition of “racial profiling,” one question remains: Is profiling on the basis of “Muslim” identity a form of profiling on the basis of a “racial” identity? This is the central question posed by this article. As the classification of “Muslim” identity as a “racial” identity is the central issue being examined herein, I thought it inappropriate to use the term “racial profiling” (which seemingly concludes, without examination, that “Muslim” identity has been socially construed as a “racial” identity).

When I speak of the “racialization,” I am referring to the extent to which American Muslim identity is construed, and has been historically construed, as a racial category. As I describe below in Part III, below, I believe that it is undisputed that American Muslims have a socially constructed group identity, and this group identity has been criminalized. The question, which is examined by this article, is whether that socially constructed group identity is, and should be understood as, a racial identity. In answering this question, I will argue that American Muslim should be construed as a racial identity, I will describe how Muslim identity has been socially constructed as a “non-white” racial identity¹³ in a nation which has a long history of assuming that persons who belong to populations consisting mostly of individuals with black or brown skin have a higher propensity for violence and criminality.¹⁴ Therefore, considering American Muslim identity in the context of American racial history and the historical

13. I am not the first writer to comment upon the “racialization” of “Muslim” identity. However, I want to clarify my position on this topic in relation to other authors.

Some scholars, particularly those in the field of Asian critical race studies, have referred to this racialization process as similar to, and perhaps a continuation of, the historic “otherization” or “alienation” of Asian American identity, in which persons belonging to that socially constructed racial group are seen as “perpetual others” or “perpetual foreigners” in American society. These theories of the “otherization” or “alienation” of American Muslim identity assume that “Muslims,” as a racial category, are external to the classic black/white racial binary which has historically defined American society, including those Muslims who, but for their Muslim identity, would otherwise be defined racially as either “black” or “white.”

This article does not discuss the “racialization” of American Muslim identity in quite the same way. Instead, I adopt an approach more similar to that taken by Ian Haney Lopez. In so doing, I would argue that Haney suggests a white/non-white racial binary which is similar to the black/white racial binary most commonly discussed in the field of critical race studies and the legal construction of race. *See generally* IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (positing that a white racial identity has been significant in American history and that the social and legal position of persons of non-white racial identities results from their exclusion from the socially desirable white racial group).

Borrowing from Haney’s white/non-white dichotomy, this article suggests that American Muslims have been “racialized” within, and not external to, America’s traditional racial binaries. Furthermore, I assert that American Muslim identity has been “criminalized” precisely because American Muslims are being socially construed as belonging to a racial category which has long been perceived as having an inherent propensity for violence and criminality.

14. *See* Carter, *supra* note 12, at 56–60 (discussing the extent to which non-white racial identity is associated with an inherent propensity for violence and criminality and documenting the extent to which this criminalization process has applied to other racial groups); *see also* Chaudhry, *supra* note 3, at 506–07 (describing the history of criminalization of the African American racial identity).

criminalization of non-white racial identity, I argue that American Muslims have been criminalized on the basis of their group identity precisely because their group identity has been racialized as a “non-white” racial identity.

In order to understand the concept I label as “racialization,” it is necessary to distinguish between anti-Muslim bias (specifically, the criminalization of American Muslim identity), which is, in effect, a racialized bias, and anti-Muslim bias, which is a religious bias. When I refer to a racialized bias, I refer to a belief (possibly, unstated or even unconscious) that American Muslims have an inherent propensity for violence as an intrinsic and organic part of their very being. This propensity is inborn, immutable, and cannot be removed by converting to another religious faith or otherwise altering one’s religious beliefs or practices. This racialized bias against American Muslims should be understood to be separate and distinct from a belief (which, again, may be unstated or even unconscious) that Muslims’ belief system encourages violence and that a Muslim can be “cured,” as it were, from his propensity for violence by converting to another faith or otherwise altering his religious beliefs.¹⁵ As one scholar phrases it, “In a religious conflict, it is not who you are but what you believe that is important. Under a racist regime, there is no escape from who you are...or are perceived to be.”¹⁶

III. Where We Are: Post-9/11 Criminalization of American Muslim Identity

A. In a Post-9/11 World, American Muslim Identity Has Been Criminalized

So, beginning by speaking about where we are now, I’m going to assert an almost indisputable fact—that American Muslim identity has been criminalized post-9/11. In other words, American Muslims have been socially constructed to have a shared group identity, and persons associated with that socially constructed group identity are presumed to have an inherent inclination toward violent behavior. As described below, I assert that there have been a multitude of post-9/11 governmental policies enacted

15. See *infra* Part IV, for an analysis of this concept as applied to another, non-Muslim, people with a socially constructed group identity that contains both religious and racial components.

16. Moustafa Bayoumi, *Racing Religion*, in *AMERICAN STUDIES: AN ANTHOLOGY* 99, 103 (Janice A. Radway, Kevin Gaines, Barry Shank & Penny Von Eschen eds., 2009).

post-9/11 which appear to be premised upon this presumption of criminality.¹⁷

We see examples of this apparent presumption of criminality everywhere. We begin with FBI surveillance of mosques.¹⁸ We have also seen federal prosecutorial targeting of religious and civic organizations, such as CAIR¹⁹ and other national organizations, including Islamic

17. The term “presumption of criminality” shall be understood herein to refer to a presumption of criminal suspicion. See Carter, *supra* note 12, at 40 (discussing the use of racial factors by police as a means by which to focus their search for a criminal suspect).

18. Both the American Civil Liberties Union of Southern California (ACLU-So. Cal.) and the Council on American-Islamic Relations of Greater Los Angeles (CAIR-LA) have heavily documented FBI surveillance of mosques and Islamic centers. See GREATER LOS ANGELES AREA CHAPTER, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (2009) available at http://ca.cair.com/download.php?f=/downloads/CAIR_FBI_Abuses_Annotated_Source_List--Articles_and_Cases.pdf.

In February 2011, the ACLU-So. Cal. and CAIR-LA filed a lawsuit against the FBI alleging that FBI actions—specifically, using undercover agents to enter mosques to collect personal information, and information about “constitutionally protected” religious practices—violated the Establishment and Free Exercise Clauses of the First Amendment, as well as other provisions of the United States Constitution. See *Fazaga v. F.B.I.*, 884 F. Supp. 2d 1022 (C.D. Ca. 2012).

19. See *United States v. Holy Land Found. for Relief & Dev.*, CRIM.A.3:04-CR-240-G, 2007 WL 1498813 (N.D. Tex. 2007). The Council on American-Islamic Relations, a nationwide non-profit civil rights organization for which the author of this article works, is known by the acronym “CAIR.” On May 29, 2007, the United States Attorney’s Office for the Northern District of Texas filed, in a criminal containing a sealed indictment, a document titled “Government’s Trial Brief” which included an “Attachment A” which listed the names of numerous American Muslim organizations, including CAIR and 245 others as “co-conspirators” in a case in which they were never indicted. See The Investigative Project on Terrorism, http://www.investigativeproject.org/documents/case_docs/423.pdf. Because the persons and organizations named on this list were never formally indicted, they became known simply as “unindicted co-conspirators” (or, “UCC,” as a short-hand reference). Due to political pressure (in which media attention was used to apply this pressure), Attorney General Eric Holder was asked to review the Holy Land Foundation case file to see if there was sufficient legal or factual basis to seek an indictment against these alleged “co-conspirators.” Notably, Mr. Holder’s predecessors in President Bush’s Justice Department had initially considered seeking such indictments but ultimately decided otherwise. See *Bush Justice Department Nixed CAIR Indictment in 2004*, POLITICO.COM, http://www.politico.com/blogs/joshgerstein/0411/Source_Bush_Justice_Department_nixed_CAIR_indictment_in_2004.html. Attorney General Holder agreed to such a review and released a public statement indicating that, “looking at the facts and law,” the Justice Department under his direction would not reverse the decision of the previous administration. *Holder DOJ Nixed CAIR Leaders Prosecution*, POLITICO.COM, http://www.politico.com/blogs/joshgerstein/0411/Holder_DOJ_nixed_CAIR_leaders_prosecution.html. On July 1, 2009, a district court judge in northern Texas officially sealed both the “Government’s Trial Brief” and its “Attachment A” because “[n]either CAIR nor the other unindicted co-conspirators have been charged with a crime and they have [had] no judicial forum in which to defend against the accusation.” Criminal

charities.²⁰ But the federal government is not the only one keeping its eye on the Muslim community. For example, we know that the NYPD has conducted surveillance from Pennsylvania to Connecticut, and specifically it has targeted both mosques and Muslim student associations at universities.²¹ We see the criminalization of American Muslim identity at airports when DHS and TSA employees target “Muslim-looking” individuals, or individuals with “Muslim-sounding” names for secondary screenings based upon an unspoken presumption that American Muslims have an inherent propensity to engage in acts of violence against the United

Case No. 3:04-cr-00240-P, Docket Entry No. 1356, at p.10 of 20 (N.D. Tex.) (publicly available at: <http://www.scribd.com/doc/43380629/2009-order-on-Holy-Land-Foundation-unindicted-coconspirator-list>). The court further noted that “the release of the List subjected CAIR to annoyance, ridicule, scorn, and loss of reputation in the community” and that the Government had a multitude of options available to it that it did not release the list out of necessity. *Id.* at pp. 10–11 of 20. Later, in 2010, the U.S. Court of Appeals for the Fifth Circuit ruled in favor of an un-indicted co-conspirator who had filed a civil rights lawsuit against the Department of Justice. In ruling against the DOJ, the court found that the public release of the names of these so-called “unindicted co-conspirators” resulted in a violation of the named parties’ due process rights (i.e., an opportunity to defend themselves against allegations of criminal impropriety).

20. *See id.*; *see also* Steve C. Posner, *Posner on United States v. Holy Land Foundation for Relief and Development*, 2008 EMERGING ISSUES 891 (2007); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003).

21. *See Highlights of AP's Pulitzer Prize-winning probe into NYPD intelligence operations*, AP.ORG <http://www.ap.org/media-center/nypd/investigation> (last visited Nov. 27, 2013).

States or its citizens.²² We have also seen anti-Muslim trainings by law enforcement²³ in the United States military.²⁴

B. Is This Criminalization a Result of a “Racialization” of American Muslim Identity?

So now let’s analyze some of the possible explanations for the criminalization I just described. Okay, so if American Muslims have a socially constructed group identity, and are presumed to have a propensity for violence and criminal behavior on the basis of that group identity, why does this presumption exist? What, specifically, about that group identity leads to the presumption of criminality? And, as I suggest, is this presumption predicated upon a socially constructed definition of “race,” or is it predicated upon something else? Well let’s think critically about some of the contemporary examples of this criminalization, described in Subpart

22. “Muslim profiling” at airports is one of the most commonly discussed examples of what I define here as the increasing criminalization of American Muslim identity. However, it is unclear how widespread this phenomenon truly is. Intake data from “the nation’s largest Muslim civil rights organization,” the Council on American-Islamic Relations (CAIR) shows that only 1 percent of its intake calls are comprised of persons who seek CAIR’s legal assistance due to perceived “Muslim profiling” at airports. Though intake data can be affected by a multitude of factors, this data has remained constant for several years and consistent, as an average, across CAIR chapters nationwide. See COUNCIL ON AMERICAN-ISLAMIC RELATIONS, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 2009: SEEKING FULL INCLUSION, 11 (2009), available at <https://www.cair.com/images/pdf/CAIR-2009-Civil-Rights-Report.pdf> (reporting that 2.71 percent of civil rights cases involving Muslim-Americans arose from incidents that occurred in airports).

Despite this author’s uncertainty regarding the prevalence of this practice, the existence and prevalence of “airport profiling” of American Muslims has become a mainstay of scholarship discussing the civil rights of Americans in the post-9/11 era. See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1580 and nn. 13–14 (2002) (examining the legitimacy of racial profiling and the relationship between citizenship, nation and identity).

23. See SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT, *FBI Used Training Materials from Anti-Muslim Extremists*, Issue No. 144 (2011), available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/winter/fbi-used-training-materials-from-anti>; see also Muslim Public Affairs Counsel, *Enough is Enough: The anti-Muslim Training Tide Must Turn*, (May 18, 2012) available at <http://www.mpac.org/programs/government-relations/dc-news-and-views/enough-is-enough-the-anti-muslim-training-tide-must-turn.php> (providing a more extensive discussion of anti-Muslim training materials used by the United States military, the Department of Justice, the Federal Bureau of Investigation and the New York Police Department).

24. See Spencer Ackerman, *FBI Teaches Agents: ‘Mainstream’ Muslims are ‘Violent, Radical’*, WIRED.COM (Sept. 14, 2011), available at <http://www.wired.com/dangerroom/2011/09/fbi-muslims-radical/all/1> (documenting the anti-Muslim training materials by the United States military).

Above, and let's think about whether these examples of criminalization appear to be motivated by "race" or by some other factor.

When we speak about profiling at airports and borders, we are normally talking about individuals who are stopped, pulled aside, maybe even subjected to additional questioning or screening simply because of things such as their name or their physical appearance (i.e., the so-called "Muslim looking" people).²⁵ In that case, well, it sure looks like a racialized practice, right?

For example, let's say you go to an airport and your name is something along the lines of "Abdul Hakim Mohammed Jamal." Well, now, despite your name, it's entirely possible that you never were a Muslim, or that you were formerly a Muslim but you converted to a non-Muslim faith well in advance of going to the airport on that date. However, if your name is still Abdul Hakim Mohammed Jamal, and/or you look like a guy who could be named Abdul Hakim Mohammed Jamal, well then you know to get to the airport early because you anticipate difficulty getting through security. Right? That's what I'm saying. . . . I'm just saying, you know, that that's still a situation.²⁶ And I know this from experience. I had a client, a gentleman who was stopped at the US-Canadian border, and the sole questions the Customs and Border Patrol (CBP) asked him were "You—what's your name?" Now, I can't remember if his name was Muhammad Jamaal or Jamaal Muhammad, but let's just say he looked like a guy who could have one of those names—so he was asked that particular question which led to a completely predictable follow-up question. The client gave his name, and he was asked, "Where are you from?" Of course, he said "Norristown, PA" which completely agitated the CBP agent who responded, "You know what I mean—where are you from originally." The client disclosed his country of national origin, a well-known Muslim-majority nation,²⁷ and all he heard was "Okay, come over here" before he was handcuffed and detained just shy of forty-eight hours (and people who practice criminal law know that forty-eight hours used to mean something in that context). Another client of mine had the exact same experience—even though the nation he disclosed was his family's country of origin, and he was a native-born American citizen.

25. See Muneer Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1261 (2004) (arguing that a new post-9/11 racial identity has formed which includes all "Muslim-looking" people).

26. See *supra* notes 4–5.

27. A nation generally known to the American population as having a large Muslim majority population.

In situations such as the one we just described, we're looking at discrimination on the basis of what we call immutable characteristics. My client was singled out for a certain line of questioning—one which would predictably disclose information which would later be used to deprive him of his liberty—based upon characteristics he could not change. He could not change the physical appearance, which prompted the initial questioning. He also could not do anything to alter the location of his birth, and truthfully disclosing that information caused suspicion that he might possess a criminal intent (or has already engaged in criminal behavior) and resulted detention. So situations such as the one I just described appear to criminalize Muslim identity on the basis of national origin, race, or ethnicity—all of which are immutable characteristics.

Even presumptions which, at first, appear to be based on non-racial factors, can, in fact, be motivated by social constructs of “race.” For example, last night, as I was looking over some anti-Muslim training materials used by the United States military,²⁸ I noticed something that I had not previously seen before. Now, most anti-Muslim training materials, whether coming from the military or law enforcement, focus almost entirely upon religious beliefs and practices, and these slides were no different. However, I was struck by the constant reference to “moderate” (in quotes) Muslims in these Power Point slides. Actually, every mention of “moderate” Muslims contained the word “moderate” in quotation marks, as if to suggest that “moderate” Muslims (however the term “moderate” be defined) do not exist. The slides continue to expand upon this point, indicating that all persons with a Muslim identity share an inherent sympathy for terrorism committed in the name of Islam, regardless of that person's religious practices or expressed religious beliefs.²⁹ If, as these slides suggest, a Muslim's propensity of violence is not dependent upon his religious beliefs or practices, then what *is* this inherent propensity dependent upon? What aspect of his “Muslim” identity is the relevant factor? I would suggest the individual's association with the Muslim “race”—in other words, the racialization of his Muslim identity—that is the basis for presuming his inherent propensity for violence.

However, it is not always that simple. In some situations, the presumptions of criminality associated with American Muslim identity

28. See Lt. Col. Matthew A. Dooley, Power Point Presentation: “*So What Can We Do?*” *A Counter-Jihad Op Design Model*, 23 (2011), available at http://www.wired.com/images_blogs/dangerroom/2012/05/dooley_counter_jihad_op_design_v11.pdf (last visited Oct. 5, 2013).

29. *Id.* at 28.

appear to be based, at least in part, upon completely mutable characteristics such as religious beliefs or religious behavior. However, even in those situations, the initial interest in the individual is, most often, still reliant upon a racialized presumption that all Muslims have an inherent propensity for violence. Let's take, for example, the FBI's surveillance of mosque attendees.³⁰ In my own legal practice, I have seen the FBI take a particular interest in American Muslims who publicly engage in certain religious practices commonly associated with the devout. For example, the FBI has specifically targeted American Muslims who have been observed as frequent mosque attendees, those who engage in proselytizing of the faith, and those who regularly attend community meetings to discuss the faith. Furthermore, when American Muslims have agreed to be interviewed by the FBI in a "national security" matter, they almost always are questioned about their specific religious beliefs and practices. They are asked about whether they pray at home, whether they pray five times a day, and whether they fast during Ramadan. In this scenario, the racialized Muslim identity still targets American Muslims for close scrutiny, but now there is no longer a presumption of an *inherent* propensity for violence and criminality. Instead, the determination as to whether someone has a propensity for violence and criminality is based upon that person's beliefs or behaviors.

*IV. Where We've Been: Legal Constructs, and Consequences, of Race in America and the Historical Racialization of American Muslim Identity*³¹

So we know that this is where we are now: American Muslims have been "criminalized," and it appears as though the underlying predicate of that criminalization rests both in some sort of socially constructed "racialized" American Muslim group identity and on the basis of wholly mutable characteristics such as individualized beliefs and behavior.

Now, I want to step back a minute to discuss "Where We've Been." If, as I suggest, the criminalization of American Muslim identity post-9/11 is based, at least to some extent, upon socially constructed notions of

30. Bayoumi, *supra* note 16.

31. As detailed in the notes contained in this article, my research into the relevant case law on this issue owes a huge debt to Moustafa Bayoumi's seminal article documenting the extent to which American Muslim identity was legally construed as a non-white racial identity and the legal consequences of these judicial determinations regarding the "race" of "American Muslims" (as I have defined those persons in Part II, above). To be candid, almost all scholars who have written about the "racialization" of American Muslim identity owe a huge debt to Professor Bayoumi's detailed and deliberate research.

“race,” then there are new questions to discuss. First, can a religious identity be “racialized,” or are racial and religious identities two separate social constructs? Second, if religious identity can be “racialized,” what is the evidence that American Muslim identity has been “racialized?”

I will answer these questions concurrently, beginning with cases that demonstrate that American Muslim identity, a seemingly religious identity, has been historically construed as a non-white racial identity as a matter of law. The very existence of this body of case law, and the language contained therein, is evidence that a religious identity can be “racialized” and, by way of an example, that Muslim religious identity has been so racialized.

The greatest evidence of this racialization of American Muslims as “non-white” is contained in cases which are known as the “racial prerequisite cases.” These are cases that were decided during the time period beginning in 1790 and ending in 1952 in which the Naturalization Act limited American citizenship to what was called “free white persons,”³² but without defining exactly who would be included in this particular racial category. The Act was later broadened in 1870 to include persons of “African nativity” and persons of “African descent”³³ and again in 1940 to include “races indigenous to the Western Hemisphere.”³⁴ During this time period, any persons who immigrated to the United States who did not qualify as either a “free white person,” a person belonging to a race “indigenous to the Western Hemisphere,” or a person of “African nativity” or “African descent” could lawfully enter the United States but could not be naturalized as a citizen of the United States.³⁵ In the racial prerequisite

32. See Bayoumi, *supra* note 16, at 99. Bayoumi’s article is considered to be the seminal publication on the topic of the racialization of the Islamic faith. It has been reprinted in numerous publications. For the purposes of this article, the author will cite to page numbers as they appear in the volume of *American Studies* upon which she principally relied while preparing this article for publication.

33. See Naturalization Act of 1870, 16 Stat. 254, 256 (1870).

34. See Naturalization Act of 1940, Pub. L. No. 853, 54 Stat. 1137, 1140 (1940).

35. As a historical point, I want to mention the Immigration Act of 1917, which created what it called the “Asiatic Barred Zone” (and is consequently also known as the “Asian Barred Zone” Act), which barred immigration from the continent of Asia and “[a]ny country not owned by the U.S. adjacent to the continent of Asia.” Pub. L. No. 301, 39 Stat. 874, 881 (1917). Presumably, this new Act would have had a profound effect upon immigration from the Muslim-majority world (much of which is located within the continent of Asia or adjacent thereto). As a matter of law, any person who sought to immigrate to the United States from a nation located within the barred zone would not merely be deprived of the possibility of becoming a naturalized citizen, he would also be banned from any lawful entry into the United States. Despite this historical point, however, this article discusses a

cases, an immigrant filed an application for citizenship and a federal court, when considering whether to grant that decision, was faced with the question of deciding whether the immigrant could lawfully claim to be “free white persons” and, therefore, eligible to become a citizen under the Naturalization Act.

Specifically, I want to discuss some racial prerequisite cases, which involve petitioners from the Muslim-majority world, or other nations within the Greater Middle East. The purpose of this discussion is to demonstrate the extent to which religious identity or affiliation was historically used, in the context of the racial prerequisite cases, by federal courts to make a legal determination as to race.

The first case I want to talk about is *In re Hassan*, which arose out of the Eastern District of Michigan in 1942.³⁶ In that case, a Yemeni Muslim man was petitioning a federal district court to be naturalized as a citizen of the United States.³⁷ As he petitioned the court, Mr. Hassan employed a tactic which was common among petitioners in the racial prerequisite cases³⁸—he asserted that he was a member of the “white race” due to the fact that he belonged to an ethnic group which “are remote descendants of and therefore members of the Caucasian or white race. . . .”³⁹ Mr. Hassan also seemed to assume that his physical appearance—which, as the court noted in its decision, included an “extremely dark complexion”⁴⁰—would pose an obstacle to his ability to claim to be a member of the “white” race because he came to court “armed with affidavits”⁴¹ stating that his coloring “is typical of the majority of Arabians [sic] from the region from which he

number of racial prerequisite cases, which were decided during the time period when the Asiatic Barred Zone Act was in effect. Each of the cases cited and discussed herein involve petitions for naturalization (and not removal or deportation proceedings). Due to the procedural posture of these cases, and the legal issues contained therein, it can be concluded that the petitioners in each of these cases entered the United States lawfully and, therefore, their inclusion in the “white” race was only relevant, as a legal matter, to their ability to be naturalized as citizens of the United States.

36. *In re Hassan*, 48 F. Supp. 843 (E.D. Mich. 1942).

37. Bayoumi, *supra* note 16, at 99.

38. Based upon the author’s review of multiple racial prerequisite cases, including, but not limited to: cases cited herein, the case of *U.S. v. Thind*, 261 U.S. 204 (1923), the cases cited in Bayoumi’s article *Racing Religion* and other similar scholarly works.

39. *Hassan*, 48 F. Supp. at 846.

40. *Id.* at 844.

41. Bayoumi, *supra* note 16, at 100.

comes, which [in] fact is attributed to the intense heat and the blazing sun of that area.”⁴²

The court ultimately rejected Mr. Hassan’s assertion that he was a “free white person” and denied his petition for naturalization. However, the court did not base its denial upon either Mr. Hassan’s stated ancestry (as a remote descendant of the Caucasian or white race) or upon his physical appearance (including the “extremely dark complexion”).⁴³ Instead, the court denied Mr. Hassan’s petition because he came from a region of the world where Islam was being practiced. The court specifically gave the following reason for its decision: “Apart from the dark-skin of the Arabs, it is well-known that they are a part of the Mohammedan⁴⁴ [sic] world and that a wide gulf separates their culture from that of the predominately Christian peoples of Europe.”⁴⁵

This language in *Hassan* raises several interesting points. First, and most obviously, the court uses Mr. Hassan’s Muslim identity as a basis for defining his race as non-white. Second, the court indicates that “Christian” identity is necessary to be considered a “free white person” person eligible for citizenship. Third, and most intriguingly, the court seems to base its decision not on Mr. Hassan’s individual religious identity, but upon the majority religion in the region of the world from which Mr. Hassan emigrated. This is an example of the racialization of Muslim identity—the notion that this particular religious identity applies to all persons who possess the same set of immutable characteristics, such as a shared ethnicity, regardless of any individual’s particular religious beliefs. Indeed, the court’s language fails to identify whether Mr. Hassan, as an individual, identifies as “Muslim” or practices the Islamic faith. Instead, the court only identifies Mr. Hassan as belonging to an ethnic group, “Arab,” which is associated with the Muslim-majority world. Mr. Hassan is deemed non-white because his ethnicity, an immutable characteristic, imparts upon him a Muslim identity. Based upon this language, it would appear that the

42. *In re Hassan*, 48 F. Supp. 843, 845 (E.D. Mich. 1942).

43. *Id.*

44. The term “Mohammedan” is an archaic term and generally considered to be a pejorative term used to describe Muslims (i.e., practitioners of the Islamic faith). The term is considered pejorative to Muslims who feel that it both misstates and misunderstands the Islamic religion, by suggesting that Muslims’ reverence for the Prophet Mohammed is akin to worship of a deity other than “the God of Abraham,” and attempts to distinguish the Islamic faith from other Abrahamic faith traditions. Nonetheless, the term was commonly used during certain periods in United States history. The term is contained herein in quotations from legal documents that were written during those time periods.

45. *Hassan*, 48 F. Supp. at 845.

judge construed Muslim identity in such a racialized manner that the religious beliefs and practices of Mr. Hassan were legally irrelevant.

This question of whether a person's individual religious beliefs affect his racial identity is commonly repeated in the racial prerequisite cases and produce conflicting results. In the case of *In re Ellis*,⁴⁶ a Syrian immigrant was allowed to obtain citizenship as a free white person because, as the court noted, "he was reared a Catholic and is still of that faith."⁴⁷ In another case involving a Syrian immigrant, *Ex parte Shahid*,⁴⁸ the court denies the petitioner's citizenship application on grounds other than the petitioner's race, but articulates his discomfort with the notion that the definition of "free white persons" should exclude a consideration of religious identity.⁴⁹ Limiting the definition of "free white persons" solely to "Europeans," the judge explained, that it would be troubling since such a definition "would exclude persons coming from the very cradle of the Jewish and Christian religions."⁵⁰ Though the judge in *Shahid* never clarified whether he believed that an *individual's* religious beliefs or practices, or whether the relevant factor was the predominate religion in a petitioner's country of origin, the judge nonetheless clearly opines that religion should be a consideration when legally defining an individual's race.

More interesting generally are the cases involving Armenian⁵¹ immigrants during this time period. For example, in *United States v. Cartozian*,⁵² a federal district court in Oregon granted an Armenian immigrant's citizenship petition on the stated belief that Armenians, on account of their religion, could be defined as free white persons eligible for citizenship.⁵³ Specifically, the court opined, "[a]lthough the Armenian province is within the confines of the Turkish empire, being in Asia Minor, the people thereof have always held themselves aloof from the Turks, the Kurds, and allied peoples, principally, it might be said, on account of their

46. *In re Ellis*, 179 F. 1002 (D. Or. 1910).

47. *Id.*

48. *Ex parte Shahid*, 205 F. 812 (E.D.S.C. 1913).

49. Bayoumi, *supra* note 16, at 105.

50. *Shahid*, 205 F. at 816.

51. See *Armenia*, WIKIPEDIA.ORG, (Oct. 11, 2013, 6:27 PM), <http://en.wikipedia.org/wiki/Armenia> (noting the predominance of Christianity in Armenia, as well as providing general information about Armenia); see also *Greater Middle East*, WIKIPEDIA.ORG (Oct. 11, 2013, 6:30 PM), http://en.wikipedia.org/wiki/Greater_Middle_East (identifying Armenia as a part of the Greater Middle East).

52. *United States v. Cartozian*, 6 F.2d 919 (D. Or. 1925).

53. See Bayoumi, *supra* note 16, at 106 (briefly discussing *Cartozian*).

religion.”⁵⁴ In other words, Christianity makes the Armenians more culturally aligned with Europeans and this religious commonality makes the Armenians “white.” In another naturalization case involving an Armenian petition, *In re Halladjian*,⁵⁵ a federal district court sitting in Massachusetts opined:

“Race . . . is not an easy working test of white color.... In the warfare which has raged since the beginning of history about the eastern Mediterranean between Europeans and Asiatics, the Armenians have generally . . . been found on the European side.... By reason of their Christianity, they generally ranged themselves against the Persian fire-worshippers, and against the Mohammedans.”⁵⁶

As in *Cartozian*, the court in *Halladjian* once again concluded that Armenians, due to the historic Christianity of their nation, are culturally aligned with Europeans and, therefore, their collective historic Christianity makes them, as a people, “white.” Once again, the court is unclear whether an individual’s religious identity is legally relevant but, once again, the court clearly articulates a racialized view that the historical majority religion of a people determines that group’s racial identity.

This racialization of a religious identity is not unique to Muslims or to the United States. Consider, for example, the discourse and dialogue that surrounds Jewish identity and the definition thereof. Or, perhaps more appropriately, consider the way in which non-Jews have defined Jewish identity during certain periods of history. Above, I referenced two interesting points raised by the first case I discuss in this subpart, *In re Hassan*. However, the third point raised by the *Hassan* decision is, perhaps, the most intriguing. The *Hassan* decision was entered in 1942. Now, let us think about what was happening in world history in 1942 and whether there was any other part of the world, outside of the United States, in which a federal government was determining “whiteness” (or inclusion in the “Aryan,” “European,” or “Caucasian” race) on the basis of religion? Right? Now, keeping this concept of world history in mind, let’s actually think about the Third Reich for a moment. Remember that Jewish identity was often determined by ancestry. If you were born a Jew you were a Jew. You could try to convert your way out of it, you were still a Jew. As noted by one scholar, “anti-Semitism became *racism* when the belief took hold that Jews were *intrinsically and organically* evil rather than merely having

54. *Cartozian*, 6 F.2d at 921.

55. *In re Halladjian* 174 F. 834 (C. C. D. Mass. 1909).

56. *Id.* at 840–41.

false beliefs and wrong dispositions.”⁵⁷ In other words, religious bias predicated upon actual or perceived⁵⁸ religious beliefs and practices is not racism, as a person is able to avoid this bias by changing their religious beliefs and practices. However, “religious” bias which relies upon a (stated, unstated, or even unconscious) belief that persons belonging to a certain religious group are “intrinsic and organically evil”—regardless of their religious beliefs or practices—is racism, and an individual cannot avoid this bias by converting to a different religion.

V. Where We’re Going: How Understanding the Racialization of American Muslim Identity May Affect the Criminalization of that Identity

In Parts III and IV of this article, above, I have demonstrated that American Muslim identity has been criminalized, and I have demonstrated that American Muslim identity has been historically racialized—specifically, as a non-white racial group. Moreover, I have briefly discussed an almost undisputable reality of America’s racial history—that non-white persons, due to their racial identity, are presumed to have an inherent propensity for violence and criminality. But have I answered the question of whether American Muslim identity, as one particular non-white racial identity, has been criminalized *because* it has been racialized? Is this even possible to prove? Moreover, why does it matter whether racialization is the driving force behind this criminalization?

Now, in some ways it seems like it shouldn’t really matter whether the criminalization of American Muslim identity is based upon “race” or “religion.” Because strict scrutiny applies either way—whether a government is discriminating on the basis of race, or on the basis of religion. So, if the same level of scrutiny applies regardless of which claim is asserted, one could (wrongly) assume that the labeling of anti-Muslim profiling as “racial” profiling has no legal, political, or strategic relevance.

57. George M. Fredrickson, *Racism: A Short History* 19 (Princeton Univ. Press 2002).

58. I would qualify this “actual or perceived” language to assert that a bias predicated upon perceptions of religious beliefs and practices could still be classified as “racism” if those perceptions themselves assume an “intrinsic [] and organic [] evil.” For example, consider the typical non-Muslim American’s understanding of the religious belief “jihad” and the perceptions of religious behaviors which accompany this religious belief. If one assumes that a religious belief in “jihad” is synonymous violence and world domination, then that assumption may be based upon a belief that Muslims are “intrinsic and organically evil.”

However, the error in such an assumption is that the assumption itself ignores a certain psychosocial reality of American culture: Americans simply view racial discrimination as a more sinister, more egregious form of hate. Therefore, I would posit to you that it does matter whether American Muslims are being criminalized as a “race” or as a result of their “religion.” Because, as Americans, we do have an innate sense that discriminating against somebody for an immutable characteristic which they cannot change is just morally reprehensible. Even more precisely, we have a racial history that causes us to believe that governmental discrimination on the basis of “race” is more socially deplorable than other forms of discrimination on other bases. In contrast, discrimination based upon mutable characteristics, such as an individual’s beliefs (thoughts) or practices (actions) remains much more socially acceptable than discrimination based upon immutable characteristics such as race, ethnicity, and national origin.

This socialized distinction between racial and religious discrimination has been incorporated into the language of certain governmental policies. For example, two of the FBI’s internal operating guidelines draw this very distinction. Both the “Attorney General’s Guidelines for Domestic FBI Operations”⁵⁹ and the “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,”⁶⁰ prohibit the use of race, ethnicity, or national origin, as an *ex ante* basis for predicting criminality. However, both guidelines, through their explicit silence on the matter, permit the use of religion (practices and beliefs) to determine and predict criminality. Such a distinction suggests a social awareness on the part of the FBI and an implicit acknowledgement that actions perceived as “racial profiling” are not well accepted by the American public—and may even suggest that the FBI itself, its decision-makers, share this cultural value. Either way, the FBI’s distinction certainly appears as an attempt to reconcile official policy with American cultural values toward discrimination on the basis of “race.”

If the FBI is ambivalent, or even uncertain, as to whether “Muslim” identity is and should be considered a “racial” identity, it is not alone. Following the symposium at which the research for this article was initially presented, scores of American lives were lost (or inalterably changed)

59. See Memorandum from Michael Mukasey, Attorney Gen., to the Heads of Dep’t Components 2 (Sept. 28, 2008), *available at* <http://www.justice.gov/ag/readingroom/guidelines.pdf>.

60. See Dep’t of Guidance Regarding Use of Race by Federal Law Enforcement Agencies (Jan. 2003), *available at* http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

during a terrorist attack on the City of Boston.⁶¹ As we know now, the perpetrators of that attack were American Muslims who had born in a Muslim-majority region in Caucasus mountains, immigrated to the United States lawfully, and who identified as American Muslims. However, before the suspects had been publicly identified, a journalist published an article titled “Let’s Hope the Boston Marathon Bomber is a White American.”⁶² The article drew sharp criticism and its author was accused of “playing the race card.”⁶³ At the heart of this criticism was an implied suggestion that those who categorize the criminalization of American Muslim identity as the criminalization of a racial (as opposed to religious) identity are trying to play into American sympathies—our general disdain for racial profiling—and are opportunistically using a dishonest labeling practice in order to do so.⁶⁴ In response to this criticism, another author published an article,⁶⁵ which cited many of the cases cited herein, and asserted that the labeling of Muslim identity as a racial (or racialized) identity is not dishonest and is consistent with the historic racialization of American Muslim identity. Moreover, the response article cited specific case law in support of its thesis, thereby demonstrating that American Muslim identity has *legally* been defined as a racial category consistently throughout the history of the United States. This citation of legal precedent gives enhanced credence to the prior author’s analysis of the laws and policies which have been applied, almost exclusively, to American Muslim identity in the post-9/11 era.

Moving forward, as we think about how to effectively argue on behalf of American Muslim civil rights, these two articles—written by columnists,

61. See *Boston Marathon bombings*, WIKIPEDIA.ORG, (Oct. 11, 2013, 7:03 PM), www.en.wikipedia.org/wiki/Boston_Marathon_bombings (describing bombs that exploded at the April 15, 2013 Boston Marathon, “killing 3 people and injuring an estimated 264 others”).

62. David Sirota, *Let’s hope the Boston Marathon bomber is a white American*, SALON (Oct. 11, 2013, 10:58 PM), http://www.salon.com/2013/04/16/lets_hope_the_boston_marathon_bomber_is_a_white_american/.

63. See Greg Pollowitz, *David Sirota, Salon, and White Privilege*, NAT’L REV. ONLINE MEDIA BLOG (Oct. 11, 2013, 7:48 PM), <http://www.nationalreview.com/media-blog/345855/david-sirota-salon-and-white-privilege>.

64. *Id.* (noting that the article does display a more nuanced understanding of “Muslim” as a racial, or racialized, group identity and distinguished between what Sirota calls “white non-Islamic terrorists” and “non-white or developing-world terroris[ts]”).

65. See Peter Beinart, *Are the Tsarnaevs White?*, THE DAILY BEAST (Apr. 24, 2013), <http://www.thedailybeast.com/articles/2013/04/24/are-the-tsarnaevs-white.html> (last visited Oct. 11, 2013) (implying that those who identify the Boston Marathon bombing as a racialized criminalization are attempting to play into American sympathies).

not lawyers—are somewhat instructive. Many organizations which advocate for American Muslim civil rights, much like the first author, boldly assert that the criminalization of American Muslim identity is a form of “racial profiling” and that all anti-Muslim bias is racial bias—without providing any data or research to support this assertion. As reaction to the “Let’s Hope the Boston Marathon Bombers Are White” article demonstrates, this strategy is ineffective if it contains no data or research to support the assertion. For example, when attorneys have made this same unsupported assertion in legal proceedings, they have been unsuccessful.⁶⁶ A more effective strategy would follow the example of the second author who wrote the “Are the Tsarnaevs White?” article. I would still encourage advocates for American Muslim legal equality to argue the impropriety of using Muslim identity as an *ex ante* basis for determining criminal suspicion. However, and this is important, I would assert that it is an ineffective strategy to simply label the criminalization of Muslim identity as a form of racial profiling and to assume that your target audience agrees that this label is accurate and appropriate. Instead, I would argue that we will need to justify our use of this label in every instance in which we use the label. Only then can we change the way in which our target audiences are able to see the criminalization of American Muslim identity (i.e., the presumption of an inherent propensity for violence and criminality) in the proper light.

Thank you for your time, everybody.

66. *Abdallah v. Allegheny Valley Sch.*, 2011 U.S. Dist. LEXIS 10667 (E.D. Pa. 2011) (denying plaintiff’s assertion that his Muslim identity was a racial identity and reasoning that: “While a court will accept well-pled allegations as true for the purposes of the motion, *it will not accept bald assertions, unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations*” (citing *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997))) (emphasis added).