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

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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.

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. 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). The school district denied Ms. Khan’s request.

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. AA successfully settled Khan’s case against her employer and secured $75,000 for Khan in lost wages. 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. 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.

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

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.
8. See Complaint, supra note 3, at 1.
2001, attacks, and 50 percent of Muslims have experienced discrimination. Donald Trump has perpetuated negative stereotypes about Muslim women, and some argue that Muslim women are particularly susceptible to hate crimes because of the intersection of their gender and Muslim identities.

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. Some Muslim women stop wearing their headscarves (hijab) by choice, while others stop as a disguise mechanism. Undoubtedly, wearing hijab or the veil has become a visible signal of defiance to assimilation, and their involuntary removal an attempt to mask aspects of an outsider religious identity.

In his seminal article Covering, Professor Kenji Yoshino analyzed the covering of identity in the context of race, sexual orientation, and gender. He also questioned the benefits of assimilation for those who experience identity-
based discrimination. Meanwhile, other scholars, particularly Sara Ahmed, Sahar Aziz, and Khaled Beydoun, have examined assimilation and specifically Muslim identity markers, including what it means to “act[] Muslim.” 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.

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

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—covering of identity that antidiscrimination statutes fail to fully address.


See id.

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).

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.


sincerely held religious beliefs unless it creates an undue hardship on the employer’s business.\textsuperscript{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.\textsuperscript{30} The trend suggests that employers are assessing claimants’ religiosity and consistent application of religious doctrine.\textsuperscript{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,\textsuperscript{32} military service,\textsuperscript{33} and religious practices.\textsuperscript{34} Part II also discusses legislation that requires Muslim women to remove visible symbols of religious

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\textsuperscript{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 (1999) (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).

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


\textsuperscript{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).

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, Religious Freedom Restoration Act, 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-American 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, queer theory, feminist legal theory, and covering theory. 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. His theory suggests that everything has an identity, or it is nonexistent. That identity will remain constant and not change. Thus, a “rose is a rose is a rose.” The rose has specific characteristics and traits that help define
its existence. Social scientists, such as Erving Goffman, offer other relevant paradigms that have influenced how legal scholars consider the correlation between identity and the law. Specifically, Goffman’s scholarship analogizes identity formation to the interaction an actor has with an audience. 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. Additionally, because audiences anticipate that narratives will meet existing expectations, an audience may interpret a performance differently from how the performer intended. The actor may similarly give the audience what it wants, meeting performance expectations, even when those expectations deviate from the performer’s authentic self.

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. 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. 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. 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. 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. Patent law similarly requires the patent owner to demonstrate a sameness to show a violation of a patent.

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).
49. Id. at 17–22.
50. Id. at 34–42.
54. See Head, supra note 52, at 203.
55. See id. at 204.
56. FED. R. EVID. 901.
race, gender, and religion.\textsuperscript{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.\textsuperscript{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 Identity\textsuperscript{60}

A challenge with binary gender construction is that it ascribes characteristics to men and women that do not reflect social realities.\textsuperscript{61} Both the law and broader society are slowly recognizing gender nonbinary, gender neutral, gender nonconforming, and other self-defining gender identities.\textsuperscript{62} For those whom the law classifies as women, the classification is supposed 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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\item 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).
\item 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).
\item 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.
\item 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. LIV. (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/JJU5-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).
\item 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); Zyem 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).
\end{itemize}
embedded in other restrictive stereotypes, including defining women as nurturing, fragile, emotionally unstable, helpless, and vulnerable. These identity stereotypes have adversely affected women’s educational opportunities, legal outcomes, and employment practices. 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. Price Waterhouse v. Hopkins 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. Employers silence women in meetings, do not accept women’s professional judgment, and do not credit women for their work. Consequently, women are slower to assume leadership positions in the workplace.

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 vulnerability 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).


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.


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

The gendered identity marker of vulnerability also created a body of law that endorsed women needing permission to marry, own property, and seek a
Some states continue to require fault for divorce, a standard that romanticizes paternalism and often leaves women with limited options and legal protections. In fact, fault divorces have largely equated to men needing to grant women permission for the divorce.

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. 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. Significantly, intimate partner violence often revolves around issues of power and control, with women largely being the subject of another’s control. The control may manifest through

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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).
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 “causing 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).
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
Support for legal protections began when the domestic violence movement identified women as vulnerable and in need of protection. However, these same paternalistic stereotypes led judges to advise women to return to their abusers and work things out. 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. These shifts in attitudes, largely about women’s identity, increased the number of protective orders courts now grant. 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.

In the Title VII context, courts continue to assess claims through a binary lens of whether employers treat men and women differently. As a solution to
binary identity stereotypes, such as vulnerability, some second-wave feminists promoted a sameness theory to support equality for women. However, feminists have largely disagreed on whether to promote women as being the same, and having the same rights, as men. The sameness versus difference paradigm continues to plague the women’s movement.

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. Height and weight requirements in employment that discriminate against women also initially failed. Sex-differentiated pension contributions failed too, despite employers’ arguments that women live longer. 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. Thus, while defining women as the same as men in employment may narrow employment disparities, it will never allow women to “catch up.” Instead, the sameness paradigm continues to promote a flawed gender identity equality model that overlooks the principles of equity. 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

102. See Cunningham-Parmer, 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-Parmer, 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


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”).


113. SIMONE, supra note 107.

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,
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


126. See generally Caldwell, supra note 121, at 381–83.


128. Id. at 897–911.

Christianity remains the dominant religious identity in the United States. Thus, defining monotheist traditions of Christianity, Judaism, and Islam frequently centers on examining how those modes of religious practices align with Christian norms. 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. It is more than attending a weekly service. Muslims are instructed to pray five times a day, give zakat, perform hajj, not eat pork, 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. In the same way many


132. I primarily focus on monotheist religions because accommodation issues differ when the claimant has a less established religious identity.


137. Id.

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

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. 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. 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. Those with an aversion to Islam have manipulated the head scarf identity marker to portray Muslim women as invisible, silenced, meek, and veiled.

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. 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. 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.

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

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


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.


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.


147. Id.
but amplified. With social media posts, media interviews, and opinion editorials, Muslim women shared their experiences as women united across class, race, and ethnicity. 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.

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. Even well-intentioned activists promote the Muslim women oppression framework and use the veil as the symbol of oppression. When Muslim students and allies at Spelman College promoted World Hijab Day, Spelman faculty drafted a letter opposing the event. 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. 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. They also overlooked the gender equity principles


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).


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/@awadabe2000/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 Aziza, From the Oppressed, supra note 22, at 191.


155. See id.

embedded in Islamic jurisprudence.\textsuperscript{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.\textsuperscript{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.\textsuperscript{159} While patriarchy affects all women, white Muslim women are usually adored and welcomed in American Muslim communities.\textsuperscript{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.\textsuperscript{161}

Isolating these intersectional identities pushes African-American women to the margins\textsuperscript{162} and further destroys their psychological, economic, and constitutional safeguards of religious freedom in a pluralistic society.\textsuperscript{163} The risk of losing these safeguards seems to coerce these women into masking their layered

\textsuperscript{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).


\textsuperscript{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).

\textsuperscript{160}. See generally Yasmine Fodin-Ali, What Malcom 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).


\textsuperscript{162}. See Wing, supra note 159, at 30.

\textsuperscript{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

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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.
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. 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, such as hiding their face to rob a bank, terrify or amuse others during Halloween, or participate in an Eyes Wide Shut level of debauchery. In other areas of society, such as the law, wearing a figurative mask can protect against discrimination, hate crimes, or emotional harm.

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. 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. Soldiers from both ancient Greece and ancient Rome used Gorgon masks or masks of Athena, goddess of war, to terrify their enemies. In ancient Greece, the tragic mask was also used to conceal human nature, while the comedic mask represented the possibility of human nature. In Black oral folklore, masks were used to depict the trickster character—one who works to destroy someone with oppressive power over them. 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.
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.
175. See id.
178. Id.
179. Thalia was depicted in a comedic mask, and her sister Melpomene wore the mask of tragedy.
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.\(^\text{181}\) 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.\(^\text{182}\) 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.\(^\text{183}\) 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.\(^\text{184}\) 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.\(^\text{185}\) These seemingly superficial measurements are identity benchmarks; masking these culturally identifiable preferences is one way to remove “otherness” associated with a perceived marginalized identity.\(^\text{186}\) Social integration includes both conscious and unconscious displays or performance of relevant norms that support dominant group identity.\(^\text{187}\) 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.\(^\text{188}\)

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

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\(^{182}\) 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).


\(^{186}\) See *id.* at 32–33.


\(^{188}\) 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{196} Muslims were no longer exotics from a foreign land, but foreign terrorists. The

\begin{thebibliography}{99}
\bibitem{190} See id.
\bibitem{191} \textit{Id.}; see Yoshino, supra note 19, at 811–12.
\bibitem{192} See Aziz, \textit{From the Oppressed}, supra note 22, at 229.
\bibitem{194} See \textsc{Paul M. Barrett, The Good Black: A True Story of Race in America} (2000).
\bibitem{195} Dildoswaggins, Comment to Monique Judge, \textit{Candace Owens Thinks Racism Is ‘Over’ Because She Has ‘Never Been a Slave’}, \textsc{Root} (Mar. 4, 2019), https://www.theroot.com/candace-owens-thinks-racism-is-over-because-she-has-1833034080 [https://perma.cc/B4WM-2U3H].
\bibitem{196} \textit{Id.}; see Muneer Ahmad, \textit{Homeland Insecurities: Racial Violence the Day After September 11}, \textsc{20 Soc. Text} 101, 110 (2002).
\end{thebibliography}
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

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198. See *BEYDOUN*, supra note 161, at 162–70.
199. See id.
201. See *BEYDOUN*, supra note 161, at 162–70.
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.
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.\textsuperscript{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.\textsuperscript{208} On the same level as converting is coerced masking, such as legislation mandating Muslim women remove hijab, face veils, and burqas.\textsuperscript{209} In the Title VII context, coerced masking occurs when employers require a Muslim woman to remove her hijab\textsuperscript{210} or a Muslim man to shave his beard.\textsuperscript{211}

**B. Legislated Masking\textsuperscript{212}**

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.\textsuperscript{213} People from marginalized communities have masked to protect themselves from discrimination.\textsuperscript{214} For example, African Americans sometimes passed as white to escape slavery,\textsuperscript{215} Jim Crow laws, and other vestiges of racism.\textsuperscript{216} During World War II, people of Japanese descent masked their Japanese ancestry to avoid internment and other consequences of ethnic bias.\textsuperscript{217} Many in the LGBTQ community have also masked to avoid prosecution under sodomy laws, serve in the military, and maintain employment.\textsuperscript{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

\begin{footnotesize}
\item[208] See Yoshino, supra note 19, at 785.
\item[210] See Abercrombie, 135 S. Ct. at 2030.
\item[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.
\item[213] See Hussein, 134 F. Supp. 2d at 591.
\item[215] See Dred Scott v. Sandford, 60 U.S. 393, 423 (1857).
\item[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.
\item[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).
\end{footnotesize}
VEILING AND INVERTED MASKING

protections. 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. 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. 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). This flawed campaign operated on the premise that Islam, not cultural appropriation of the religion, oppressed women. 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. Yet the veil remained a symbol of both oppression and resistance against assimilation.

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”). The underlying message of these bans frames Muslim women as outsiders who needed to assimilate by removing their identity-based clothing. After Austria successfully banned the burqa, 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.

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

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”).


221. DOUGLAS NORTHROP, VEILED EMPIRE: GENDER AND POWER IN STALINIST CENTRAL ASIA 199 (2016).

222. Id.

223. See id.

224. Awad, supra note 152.

225. NORTHROP, supra note 221, at 185–86.


227. Nanwani, supra note 209.


Spencer introduced a bill that would have banned Muslim women from wearing a burqa and any face coverings.\footnote{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.”\footnote{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.\footnote{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.\footnote{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.\footnote{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.\footnote{236} Although advocates advise refugees that converting is not necessary to strengthen their applications,\footnote{237} immigration policies—such as the Muslim Ban—seem to suggest otherwise.\footnote{238}

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

\footnotesize{\begin{itemize}
\item \footnote{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 to 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).}
\item \footnote{235}{See Ensor, supra note 234.}
\item \footnote{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.}
\item \footnote{237}{See Dearden, supra note 234.}
\item \footnote{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).} \end{itemize}
trauma, 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. 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. This “deviation factor” also suggests employers are less familiar with minority religions and require training. 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.” She must also establish that the accommodation was a motivating factor in the adverse action. 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.

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. Although assessing sincerely held religious beliefs is factually driven and handled on a case-by-case basis, expert witnesses...
are frequently used to determine the validity of an employee’s belief. 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 thought 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, 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. 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. This approach is especially compelling considering that Title VII broadly defines religion as “all aspects of religious observance and practice, as well as belief.” As such, courts should apply a similarly broad definition of what constitutes a “truly held” or sincerely held belief. 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. 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

250. Shirazi & Mishra, supra note 158, at 44–47.
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”).
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. For example, Kimberly Bloom, a born-again Christian, requested an accommodation not to work on Sundays. 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.

The Equal Employment Opportunity Commission (EEOC) challenged the employer’s characterization of the request as a personal preference. 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. 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.

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. 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.” Alamo’s argument relied on the ease with which Nur willingly masked her religious identity at its request. The court ultimately ruled for Nur on summary judgment, acknowledging that the employer forcing her to

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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).
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).
263. Id. at 1009, 1011.
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 1017, 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.2d 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

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. Id. at 2–3.
279. Id. at 5; Walmart Stores, No. 3-18-CV-01261.
incorrectly used the religiosity of other Muslim employees as an implicit barometer to measure Sardeye’s sincerity. Walmart should have measured Sardeye’s sincerity using a subjective standard, not status quo behavior or whether a Qur’anic mandate exists.

In assessing the consistency of religious practices, employers discount masking marginalized identities for personal protection. Attitudes toward Muslims after the September 11 attacks highlighted the importance of occasionally masking for personal protection. 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. 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.

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, Black women are stereotyped as being angry, aggressive, loud, and sassy. 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

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282. Compl. at 5, Walmart Stores, No. 3-18-CV-01261.
284. See generally WE WEAR THE MASK, supra note 15.
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. 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. 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. Billie Holiday, Ain’t Nobody’s Business If I Do, on THE LADY SINGS (UMG Recordings, Inc. 1956).