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Pluralistic Professionalisms: Religious Identity, Excluded Voice, and a Toolkit for the Periphery

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PLURALISTIC PROFESSIONALISMS: RELIGIOUS IDENTITY, EXCLUDED VOICE, AND A TOOLKIT FOR THE PERIPHERY

*by: Swethaa S. Ballakrishnen**

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I. INTRODUCTION

Assimilation of new entrants into the legal profession has been a signature strain of Carrie Menkel-Meadow’s research. Even if the empirical particularities have since evolved, her pathbreaking research on women lawyers and gendered lawyering processes remain prime examples of socio-legal work on lawyers with important theoretical extensions.¹ For example, in *Portia in a Different Voice*, her now classic piece from 1985, Menkel-Meadow analyzes how numbers alone are insufficient indicia of feminization within the legal profession.² Beyond the description of the state of the legal profession at the time of writing, her argument that we should pay attention to *what lawyers do* rather than *how many of them there are* changed a line of scholarship about lawyer demography and demanded that it pay more attention to experience and nuance in what could seem like a critical mass.³ Simi-

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1. E.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39 (1985) [hereinafter Menkel-Meadow, *Portia in a Different Voice*]; Carrie Menkel-Meadow, *Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers: What Difference Does “Gender Difference” Make?*, DISP. RESOL. MAG., Spring 2012, at 4 [hereinafter Menkel-Meadow, *Women in Dispute Resolution*].

2. See Menkel-Meadow, *Portia in a Different Voice*, *supra* note 1.

3. E.g., *id.*; Menkel-Meadow, *Women in Dispute Resolution*, *supra* note 1.

larly, in 1987, while analyzing the assimilation of minority groups, she asks, in productive provocation, “Is assimilation a desirable goal?” to suggest that excluded voices might—even when seemingly included—suffer from everyday exclusion because they do not have access to the kinds of social and economic capital necessary for true inclusion.⁴ In another line of research focused on legal institutions and decision-making metrics rather than systems and experiences of lawyers, Menkel-Meadow discusses her now-eminant theory of “process pluralism”: the idea that a range of embedded processes need to merge in client-forward ways to offer meaningful justice.⁵ Although Menkel-Meadow’s work on the empirical legal profession has been what has most directly influenced my own scholarly inquiry, this theoretical kernel from her dispute resolution research inspires extending the analyses to new kinds of diversity in the legal profession.

Following the spirit of her research focused on bespoke hybridization,⁶ this Article merges these two lines of significant theory across interrelated fields to consider “pluralistic professionalisms”—pluralism in professional values and identity—by focusing on the experience of Muslim actors in contemporary legal landscapes. Although scholarship has reinforced the myriad ways in which identity capital within the legal profession is built⁷ and valorized,⁸ religion complicates the analysis because it involves the performance of not just an individual’s

4. Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIA. L. REV. 29, 51–52 (1987) [hereinafter Menkel-Meadow, *Excluded Voices*].

5. Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7 (2004); see also Carrie Menkel-Meadow, *Process Pluralism in Transitional/Restorative Justice: Lessons from Dispute Resolution with Cultural Variations in Goals Beyond Rule of Law and Democracy Development (Argentina and Chile)*, 3 INT’L J. CONFLICT ENGAGEMENT & RESOL. 3 (2015) (applying process pluralism concepts to transitional justice process and institutional design in the context of Argentina and Chile).

6. Carrie Menkel-Meadow, *Hybrid and Mixed Dispute Resolution Processes: Integrity of Process Pluralism*, in *COMPARATIVE DISPUTE RESOLUTION* (Maria Federica Moscati et al. eds., 2020) (arguing that hybrid processes are most likely to provide institutional justice). One way in which Menkel-Meadow suggests making space for such hybridity is through bespoke or tailored forms of pluralism that take into account what the client seeks rather than what the institutions desire for their own viability and legitimacy. Carrie Menkel-Meadow, *Unsettling the Lawyers: Other Forms of Justice in Indigenous Claims of Expropriation*, 64 U. TORONTO L.J. 620, 639 (2014).

7. Eli Wald, *Lawyers’ Identity Capital*, 23 INT’L J. LEGAL PRO. 109 (2016) [hereinafter Wald, *Lawyers’ Identity Capital*]; Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509 (2015) [hereinafter Wald, *BigLaw Identity Capital*].

8. The case of international law students in different interactional contexts provides an example of the way in which identity capital might be built but valorized differently in different contexts. See Swetha Ballakrishnen, *Homeward Bound: What Does a Global Legal Education Offer the Indian Returnees?*, 80 FORDHAM L. REV. 2441 (2012); Carole Silver, *States Side Story: Career Paths of International LL.M. Students, or “I Like to Be in America,”* 80 FORDHAM L. REV. 2383 (2012).

identity, but also its additional interaction with law's neutrality and its presumptions—despite enough evidence to the contrary—of secularity.⁹ Islam further exposes cleavages in these intersectionalities because of the way this particular religious identity is gendered, racialized, and read, especially in the Global North, often under the violent pretense of “liberal” progress.¹⁰

In contending with this complicated juxtaposition, this Article argues for paying attention to a particular kind of process pluralism in the creation of professional identity. Part II outlines the ways in which Menkel-Meadow's scholarship on diversity and identity in the legal profession creates what I refer to as a “toolkit for the periphery” that allows us to consider new kinds of professional entrants and navigations. Part III unpacks the ways in which religious identity and performance complicates the analysis of identity alterity and uses Menkel-Meadow's process pluralism as a way to consider these conjunctions. Part IV uses data from an ongoing Navigating Identities in Legal Education (“NILE”) project, as well as case law on Islamophobic workplace discrimination, to reveal the ways in which “ideal” or “good” identities of the Muslim lawyer are constructed in post-September 11, 2001 (“9/11”) America. The concluding Part V employs the concept of pluralistic professionalisms to make sense of the data in the previous section and to extend these two seemingly under-connected strains in Menkel-Meadow's research centering on process pluralism and professional identity. Although the Islamic identity and the experiences of Muslim lawyers are the focal points of this Essay, the argument for professional pluralism—much like Menkel-Meadow's research—extends beyond the particularities of this specific case.

II. A TOOLKIT FOR THE PERIPHERY: NEW VOICES IN THE LEGAL PROFESSION

Menkel-Meadow's approach to understanding what she thinks of as new and excluded voices in the legal profession has long inspired re-

9. For a general discussion on the intersection of discrimination and professional role, see Russell G. Pearce & Adam Winer, *From Emancipation to Assimilation: Is Secular Liberalism Still Good for Jewish Lawyers?*, in *Jews and the Law* 171 (Ari Mermelstein et al. eds., 2014).

10. Cyra Akila Choudhury, *Beyond Culture: Human Rights Universalisms Versus Religious and Cultural Relativism in the Activism for Gender Justice*, 30 *BERKELEY J. GENDER L. & JUST.* 226, 229 (2015); Cyra Akila Choudhury, *Racecraft and Identity in the Emergence of Islam as a Race*, 91 *U. CIN. L. REV.* 1 (2022) [hereinafter Choudhury, *Racecraft and Identity*]; RATNA KAPUR, *GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL* 124–25 (2018); Stella Burch Elias, *Testing Citizenship*, 96 *B.U. L. REV.* 2093, 2095–97 (2016) (discussing how unprecedented increases in global migration, worldwide recession, and national security threats, have led the United States, along with many other countries in the Global North, to revisit their treatment of Muslims.). For citations to works concerning Islam and legal identity specifically, see *infra* note 49.

search on peripheral actors and the ways in which institutions accommodate them. Written at a time when a rise in the number of women entering the legal profession might have been seen as “success,” her suggestion that scholars ought to instead heed the implications of this increase changed the conversation about the feminization of the workforce.¹¹ In *Portia in a Different Voice*, for example, she writes:

[A]s long as such differences [sociological, biological, political, or some combination] exist, studies of the world—here the legal profession—that fail to take into account women’s experience of that world are incomplete, and prevent us from having a greater repertoire of societal as well as individual choices. . . . [M]ore women lawyers may be necessary to form a critical mass that will give full expression to a women’s voice in law¹²

In allowing for numbers to be both significant and also not quite, when considered in isolation, her argument for considering the weight of numbers changed the framing of how subsequent scholars considered the *way* in which these numbers informed larger institutional architectures.¹³

While advocating for this paradigm shift, Menkel-Meadow’s scholarship outlines a path-dependency for three kinds of analysis: the first is a focus on *feminist subversion* and the ways in which thinking of gendered lawyering processes could change institutional structures beyond just their demographic footprint. Relatedly, it urges scholars to look beyond numbers for *theoretical sophistication*—to allow for grounded theory to be adapted beyond a situational context so it could serve as frameworks for other kinds of writing and analysis. For example, in *Excluded Voices*, where she posits the provocative challenge about the desirability of assimilation (or at least the effect of assimilation), she suggests:

In my study of women lawyers I have been looking at a model of the incorporation of European immigrants into elite law firms. The models are varied. First Catholics, then Jews, were admitted to elite law firms, but the most comprehensive study to date of the sociology of lawyers, Heinz & Laumann’s *Chicago Lawyers*, demonstrates that the ethnic separation of lawyers begins in the tracking of law school and continues through legal specializations and bar association memberships. Unlike the Jews and Catholics, however, women and other excluded groups may not be able to draw on wealthy same-group client bases to help create their own law firms with enough success to rival and “merge” with more restrictive forms of

11. See Menkel-Meadow, *Portia in a Different Voice*, *supra* note 1.

12. *Id.* at 42–43.

13. For example, following this impetus, my own research has tracked the importance of moving beyond feminization demographics to pay attention to multi-level mechanisms that might produce sustainable equality outcomes in the legal profession. See SWETHAA S. BALLAKRISHNEN, ACCIDENTAL FEMINISM: GENDER PARITY AND SELECTIVE MOBILITY AMONG INDIA’S PROFESSIONAL ELITE (2021).

law practice. We have melted together to the extent that we all eat bagels, sushi, tacos, pizza, and dim sum, but we live in a nation that probably still would not elect a Geraldine Ferraro, a Mario Cuomo, or a Jesse Jackson (integrated food, not power!).¹⁴

Beyond its atemporal consideration of inclusion into the legal profession (an important descriptive tracking that helps consider the patterns of different kinds of peripheral voices and actors), the argument about integrated food as a façade for substantive assimilation that shares power pushes the boundary as a theoretical project because it urges the reader to consider what it means to valorize what might look like success. It certainly influenced my own research as it considered the visibly unprecedented success of elite women lawyers in India and forced me to consider those women's successes against the backdrop of more unsavory institutional inequalities that buoyed such odds.¹⁵ Similarly, Menkel-Meadow's scholarship with respect to the ethics of care¹⁶—attributed to a gendered idealization following feminization—as influencing *lawyering* rather than the *lawyer*, is an influential way not just to consider the particular context of women lawyers in the profession at a particular point in time, but also renders tools for thinking about how individual experiences within legal institutions could trickle up to create interventions in the structures that hold them. This capacity to extend analytical agency beyond the circumscription of one's particular argument lends itself especially to the third of Menkel-Meadow's tools for analytical building—her interwoven commitment to *narrative* and *intersectional positionality* in her writing.¹⁷ Her regular references to her own socialization and upbringing¹⁸—at a time when personal narrative was not a normative analytical tool, particularly in legal ethics scholarship—ground the ways in which her arguments are framed by personal history and allow for solidarities to be formed across what she acknowledges to be wide differences.¹⁹ Menkel-Meadow's capacity to be comfortably in conversation with her past selves reveals the growth necessary for robust

14. Menkel-Meadow, *Excluded Voices*, *supra* note 4, at 51–52 (footnotes omitted).

15. BALLAKRISHNEN, *supra* note 13.

16. *E.g.*, Menkel-Meadow, *Portia in a Different Voice*, *supra* note 1.

17. *See, e.g.*, Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 1 J. INST. STUDY LEGAL ETHICS 49 (1996).

18. For example, she speaks about growing up in Long Island and her secular humanist religious socialization within Ethical Culture. Carrie Menkel-Meadow, *Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violent and Empathic Means of Human Problem Solving*, 8 UNBOUND: HARV. J. LEGAL LEFT 79 (2013); Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905 (2000).

19. While arguing for empathy in mediation, she also recognizes the limits of such positionality: she acknowledges that “‘I can share your pain’ is not the same for a white Jewish woman . . . as for a [B]lack woman” but argues that analogy helps us “experience the Other from our own position, from our own values, from our own experiences.” Carrie Menkel-Meadow, *What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life*, 81 MINN. L. REV. 1413, 1424 (1997).

scholarship. About a decade after she wrote *Portia in a Different Voice*, for example, Menkel-Meadow re-encountered her argument and the ways in which her scholarship had been received. She was self-reflexive in this re-reading about the complexities of examining the role of gender in legal ethics and practice, especially as it concerned the “ethics of care” that held together what she had described as a “women’s lawyering process.”²⁰ Recently, my collaborator, Sara Dezalay, and I asked Menkel-Meadow to reflect on her career as a sociolegal scholar. Specifically, we asked her to be reflective about her positionality as a node for building theory.²¹ Her ability for this reflective and rigorous recall was telling in the way she traced her own intellectual mobility from being an “early feminist . . . with conventional goals” to a “more radical” college student,²² and eventually the global feminist scholar whose research followed her sociopolitical curiosities.²³ It is these analytical tools from her scholarship—a “toolkit for the periphery”—that offer heft and agility as we consider new kinds of identity scholarship and peripheral precarity in legal profession research. Essentially, two questions emerge: (1) How do we consider our research questions as offering tools for understanding sites beyond their own circumstances? and (2) Can we do it in ways that center our own positionality and subvert normative ways of seeing? Or at least, since scholarship is at least as much about how it is read as it is written, these are the tools that I choose to inherit from the unending treasures in Menkel-Meadow’s bibliography.

III. THE DIFFERENCE WITH DIFFERENCE: THE NUANCE IN CONSIDERING RELIGION AS IDENTITY

Scholars have long used lawyers’ identity performance and identity negotiation as focal points to understand the lived experience of these discriminating categories, especially as they pertain to ideas of an ideal actor, i.e., a “good lawyer.”²⁴ Central to this research is a critique of the “background framework” always in place when one considers the coordinates of an “ideal worker.”²⁵ The legitimacy inherent in the

20. Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL’Y & L. 75, 77 (1994).

21. Carrie Menkel-Meadow, *Genealogy of a Globalised Socio-Legal (and Feminist) Scholar*, in INVISIBLE INSTITUTIONALISMS: COLLECTIVE REFLECTIONS ON THE SHADOWS OF LEGAL GLOBALISATION 227 (Swethaa S. Ballakrishnen & Sara Dezalay eds., 2021).

22. *Id.* at 29–30.

23. *Id.* at 32–34.

24. E.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Kenji Yoshino, *Tribe*, 42 TULSA L. REV. 961, 970–971 (2007).

25. The norm of an “ideal worker” and its problems, particularly for gender, first garnered traction with Joan Williams. Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991). On the idea of a “good lawyer” in legal profession research, see Richard Wasserstrom, *Legal Education and the Good Lawyer*, 34 J. LEGAL EDUC. 155 (1984); Marc Galanter, *When Legal Worlds*

construction of this ideal-worker image is predicated on a range of factors that goes to the substance of lawyers' roles (e.g., neutrality, client consciousness, etc.), but in everyday experience, it implicates identity because of the ways in which personal markers are performed and perceived.

Religious lawyering has had some traction within these scholarly conversations about the profession.²⁶ Early work on Christian lawyering, for example, focused on the ways in which religious legal ethics changed the code of what ought to be expected from a lawyer's role and how the covenant of faith was important to consider while mapping a lawyer's duty to clients, community, and even self.²⁷ But beyond this idea of religious lawyering as important in and of itself, the idea's implications for the secular culture within which it is embedded has motivated more recent scholarship.²⁸ Pearce and Uelmen, in their important work on religious lawyering in a liberal democracy, for example, argue that religious capacities transcend one's own subjective commitment to spiritual choice and instead perform the important function of almost utopic possibility—bridging the gap between how “things really are” and the way they ought to be.²⁹

Still, religious ethics do not make an individual's identities as a lawyer and as a member of a particular religion seamlessly comparable. Religion might complicate one's style of lawyering very differently than one's capacity to bring one's “working self”³⁰ into one's professional work environment. For one, while religious ethics might impact one's professional responsibility (and indeed, as scholars argue, the

Collide: Reflections on Bhopal, the Good Lawyer, and the American Law School, 36 J. LEGAL EDUC. 292 (1986), and Milton C. Regan, Jr., *Getting Our Stories Straight: Narrative Autonomy and Feminist Commitments*, 72 IND. L.J. 449 (1997).

26. For the starting point of this literature on religion and identity in lawyering, see Russell G. Pearce, *Jewish Lawyering in a Multicultural Society*, 14 CARDOZO L. REV. 1613 (1992), which was in conversation with a 1993 article on bleached out professionalism, Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577 (1993).

27. See, e.g., Thomas L. Shaffer, *A Lawyer with Heart*, 12 CHRISTIAN LEGAL SOC'Y Q. 26, 26 (1991) (book review) (referring explicitly to this as “[l]awyer with [h]eart,” suggesting that the implications for religious lawyering are not just about moral codes, but also about personal selves and identity); see also Joseph Allegretti, “*In All This Love Will Be the Best Guide*”: John Calvin on the Christian's Resort to the Secular Legal System, 9 J.L. & RELIGION 1 (1991).

28. See Russell G. Pearce, *Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 FORDHAM L. REV. 1075 (1998). Much of this followed the 1998 Fordham Law School conference, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, that consolidated the interest in the religious lawyering movement beyond a special group of actors. See generally Symposium, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, 66 FORDHAM L. REV. 1075 (1998).

29. Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 CASE W. RESV. L. REV. 127, 141–42 (2004) (internal quotation marks omitted).

30. Carbado & Gulati, *supra* note 24, at 1261.

worlds in which the two intervene), the everyday experience of lawyering is likely to be complicated by one's performed and perceived identity and the ways in which it is particularly racialized, classed, and gendered.³¹ Seeing it as an identity, rather than as a spiritual leaning or a social responsibility, gives us new tools to think about the historical, social, and cultural implications of religious identity within the legal profession. Research on Jewish identity and lawyering, for example, has been illustrative about one set of these extensions.³² Eli Wald's work on Jewish law firms, for example, traces the ways in which cultural values and market conditions (none of which had anything particularly to do with religion or religious intent) post-World War II were central to the rise to prominence of Jewish lawyers and their significance in the profession.³³ Wald's work is informative because it suggests that the gradual decline of blatant anti-Semitism and religious-based discrimination within the legal profession, although not particularly set up to do so, resulted in a marbling effect where, in contrast to the "white shoe" ethos of the large WASP firms that wished to stay out of "undignified" parts of practice, there was natural opportunity for specialization in these areas by Jewish lawyers.³⁴ The analytical comparison here is to the way in which a range of political and cultural factors produced, without intention, legal cultures and trajectories for professionals, as well as the ways in which this kind of essentialized entry into the market for legal services—what Wald refers to as the "flip side of bias phenomenon"³⁵—had implications for bias and stereotyping.

Yet, this has not been the overarching experience of assimilation for other religious minorities in the legal profession, many of whose experiences we know little to nothing about.³⁶ What seems to emerge

31. Examples of taking on this express charge of thinking through reflexive lawyer identities and race can be seen in Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 *FORDHAM L. REV.* 2081 (2005), and Eduardo R.C. Capulong et al., 'Race, Racism, and American Law': A Seminar from the Indigenous, Black, and Immigrant Legal Perspectives, 21 *SCHOLAR* 1 (2019).

32. E.g., Levinson, *supra* note 26; Wald, *BigLaw Identity Capital*, *supra* note 7, at 2525; see also Eli Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?*, 76 *UMKC L. REV.* 885 (2008) [hereinafter Wald, *Rise of the Jewish Law Firm*]; Eli Wald & Russel G. Pearce, *What's Love Got To Do with Lawyers? Thoughts on Relationality, Love, and Lawyers' Work*, 17 *LEGAL ETHICS* 334 (2014) (book review); Wald, *Lawyers' Identity Capital*, *supra* note 7; Eli Wald, *Jewish Lawyers and the U.S. Legal Profession: The End of the Affair?*, 36 *TOURO L. REV.* 299 (2020) [hereinafter Wald, *The End of the Affair?*].

33. Wald, *Rise of the Jewish Law Firm*, *supra* note 32, at 885–86.

34. *Id.* at 886 & n.5 (internal quotation marks omitted) (citing Elizabeth Chambliss, *The Shoe Still Fits*, *LEGAL AFFS.*, Sept./Oct. 2005, https://www.legalaffairs.org/issues/September-October-2005/toa_sepoct05.msp [<https://perma.cc/X379-X68T>]).

35. Wald, *Rise of the Jewish Law Firm*, *supra* note 32, at 886 (internal quotation marks omitted).

36. See, e.g., John W. Welch, *Toward a Mormon Jurisprudence*, 21 *REGENT U. L. REV.* 79 (2008). For a more general discussion of the assimilation of religious minorities into the legal profession, see Swethaa Ballakrishnen, *Making It Halal, Blasé Dis-*

from a bird's eye perspective is that despite many of the common origins³⁷—and accounts³⁸—of ethnicity-centered hate, the socio-cultural narratives³⁹ about Muslims in America after 9/11 have had a very dif-

crimination and the Construction of the “Good” Muslim Lawyer, in HANDBOOK ON RACE, RACISM AND THE LAW (Aziza Ahmed & Guy-Uriel Charles eds., forthcoming 2023).

37. See, e.g., Adam Shatz et al., *Great Replacement Theory*, LONDON REV. BOOKS: LBR PODCAST (June 14, 2022), <https://www.lrb.co.uk/podcasts-and-videos/podcasts/the-lrb-podcast/great-replacement-theory> (explaining both the common roots of anti-Semitism and Islamophobia, and the distinctions between the two in their branching out despite having a common origination story).

38. See *infra* Part IV for accounts of such hate or discrimination against Muslim lawyers or law students. For more general accounts of ethnicity-centered hate or discrimination against Muslims, see, for example, Costas Panagopoulos, *The Polls—Trends: Arab and Muslim Americans and Islam in the Aftermath of 9/11*, 70 PUB. OP. Q. 608, 608–09 (2006), <https://doi.org/10.1093/poq/nfl029> (noting that the “sharpest movement in opinion dynamics” regarding Arab and Muslim Americans and Islam occurred “in the immediate aftermath of the 9/11 attacks”), as well as KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR 6–7* (2018) (explaining that 9/11 “assigned the immediate presumption of terrorism to Islam and the immediate presumption of guilt to Muslim citizens and immigrants”). Compare FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., *Section II: Crime Index Offenses Reported*, in CRIME IN THE UNITED STATES 2000, at 5, 60 (2001), <https://ucr.fbi.gov/crime-in-the-u.s/2000/00sec2.pdf> [<https://perma.cc/2XKJ-N4S8>] (showing that hate crimes against Muslims totaled 28 incidents in 2000), with FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., *Section II: Crime Index Offenses Reported*, in CRIME IN THE UNITED STATES 2001, at 10, 60 (2002), <https://ucr.fbi.gov/crime-in-the-u.s/2001/01sec2.pdf> [<https://perma.cc/ABG9-BS4E>] (showing that hate crimes against Muslims totaled 481 incidents in 2001, the same year as the 9/11 attacks). See also *infra* note 40 for accounts of anti-Semitic attacks.

39. For example, there is a diffuse narrative of Islam that has been conflated with threats against American values and democracy. See, e.g., L. Ali Khan, *Populist and Islamist Challenges for International Law*, J. KAN. BAR ASS’N, Jan. 2020, at 47, 48 (reviewing PAUL CLITEUR & AMOS N. GUIORA, *POPULIST AND ISLAMIST CHALLENGES FOR INTERNATIONAL LAW* (2019)) (rephrasing the book authors’ claim, and stating that “Islamism is incompatible with liberal democracy” and “[b]ecause all ‘isms’ are proselytizing ideologies, . . . Islamism, much like Nazism and communism, is also an ideology”); Hilal Elver, *Racializing Islam Before and After 9/11: From Melting Pot to Islamophobia*, 21 TRANSNAT’L L. & CONTEMP. PROBS. 119, 122 (2012) (“[T]he term ‘Islam’ historically has been used as a common denominator to establish a category, constructing ‘others’ by reference to a dominant white, Anglo-Saxon, protestant American culture and ideology. The legal system articulates, permits, and allows this construction implicitly or explicitly, using as a strong justification its sense of the foreign culture of Muslims as sometimes ‘uncivilized.’ This background prepared the post-9/11 political environment by using the state’s responsibility to protect American citizens from ‘terrorism.’”); Khaled A. Beydoun, *9/11 and 11/9: The Law, Lives and Lies That Bind*, 20 CUNY L. REV. 455, 458 (2017) (“The philosophy that drove counterterror policies implemented after 9/11 and 11/9 were rooted in a binary that envisioned Islam as the civilizational nemesis of the U.S. In short, the hardline national security programs enforced by the Bush and Trump Administrations profiled Islam, and the religion’s adherents, as presumptive enemies of the state.”); Panagopoulos, *supra* note 38; Lena Kampf & Indra Sen, *History Does Not Repeat Itself, But Ignorance Does: Post-9/11 Treatment of Muslims and the Liberty-Security Dilemma*, HUMAN. ACTION USA, https://www.humanityinaction.org/knowledge_detail/history-does-not-repeat-itself-but-ignorance-does-post-9-11-treatment-of-muslims-and-the-liberty-security-dilemma/ [<https://perma.cc/B8WB-AC3X>].

ferent trajectory when contrasted against the narratives of Jewish assimilation that other scholars have observed within the profession.⁴⁰ At least some part of this research asymmetry has been due to the relative ambiguity regarding Muslim demographics in the United States, which have long suffered from problematic quantification,⁴¹

40. Eli Wald, for example, suggests that there has been an overall relative decrease in anti-Semitism following World War II. Wald, *The End of the Affair?*, *supra* note 32, at 327–29. Even so, this is not to say these incidents of hate have stayed down. See, e.g., William Brangham & Rachel Wellford, *Antisemitic Incidents Hit a Record High in 2021. What's Behind the Rise in Hate?*, PBS: PBS NEWSHOUR (Apr. 29, 2022, 6:39 PM), <https://www.pbs.org/newshour/show/antisemitic-incidents-hit-a-record-high-in-2021-whats-behind-the-rise-in-hate> [<https://perma.cc/M38S-FXJV>] (finding that there was a 34% rise in antisemitic incidents in 2021, with 2,717 incidents in total, averaging out to more than 7 antisemitic incidents per day); Anti-Defamation League, *2021 Online Antisemitism Report Card*, ADL (May 3, 2022), <https://www.adl.org/resources/report/2021-online-antisemitism-report-card> [<https://perma.cc/3BXZ-444G>] (“2019 and 2020 were, respectively, the highest and third-highest years on record for cases of harassment, vandalism, and assault against Jews in the United States since tracking began in 1979.”); Harriet Sherwood, *Nearly Two-Thirds of US Young Adults Unaware 6m Jews Killed in the Holocaust*, *GUARDIAN* (Sept. 16, 2020, 12:01 AM), <https://www.theguardian.com/world/2020/sep/16/holocaust-us-adults-study> [<https://perma.cc/3ABJ-LJ3L>] (finding that 63% of American adults ages 18–39 do not know that 6 million Jewish people were killed during the Holocaust, more than 10% believe Jews caused the Holocaust, and 23% believe the Holocaust is a myth, an exaggeration, or are not sure); John Daniels, *The Rise of Global Anti-Semitism*, *WILSON CTR.*, <https://www.wilsoncenter.org/event/the-rise-global-anti-semitism> [<https://perma.cc/R8YU-W4YB>] (summarizing a 2014 meeting hosted by the Woodrow Wilson Center and George Washington University, and stating that “anti-Semitism was avoided in public during the decades following the Holocaust, but it still remained prominent in private” and that “[r]ecently, anti-Semitism is being expressed more overtly,” via acts like burning synagogues, desecrating Jewish cemeteries, and targeting and violently attacking Jews). However, despite this troubling trend in anti-Semitism more generally, Wald’s claim about professional work and lawyer identity remain an important distinguishing point while considering this sub-population. See Wald, *The End of the Affair?*, *supra* note 32, at 327–29.

41. The 2020 Census did not create an ethnicity category for Middle Eastern Americans, which has had an especial impact on Middle Eastern and North African (“MENA”) Muslims who have had to identify within stark “white and non-white paradigms.” Laura Measher, *The 2020 Census Continues the Whitewashing of Middle Eastern Americans*, *NBC NEWS: THINK* (May 21, 2020, 10:08 AM), <https://www.nbcnews.com/think/opinion/2020-census-continues-whitewashing-middle-eastern-americans-ncna1212051> [<https://perma.cc/P6K4-LXL7>]. A Census Bureau study conducted after the 2010 Census found that the percentage of individuals from the Middle Eastern and North African (“MENA”) regions who identified as white dropped from almost 86% to 20% when given the option to select MENA instead, with the study further concluding that adding the MENA category in the 2020 Census “would be ‘optimal’ and would improve the accuracy of the national head count for the community.” *Id.* Despite these findings, however, the Census Bureau declined to include the category in the 2020 Census “because further testing was needed to determine whether the MENA category should go under ethnicity instead of race.” *Id.* For a more general discussion of the connection between and conflation of Islam and the Middle East, see Srividya Maganti, *Not So Black-and-White*, *HARV. POL. REV.* (Jan. 30, 2020), <https://harvardpolitics.com/not-black-and-white/> [<https://perma.cc/EGU9-FZ8E>].

despite Muslims being a rising minority population.⁴² Although the American Bar Association (“ABA”) does not report on Muslim lawyers,⁴³ Muslim labor and education statistics and the ways in which the bar has organized,⁴⁴ especially over the last decade, have revealed a growing cohort interest within the population. The Muslim population in the United States is highly educated and well represented in the professions, especially when compared to the general population.⁴⁵

42. In 2017, an estimated 3.45 million Muslims were living in the United States, making up about 1% of the country’s total population. Besheer Mohamed, *New Estimates Show U.S. Muslim Population Continues To Grow*, PEW RSCH. CTR. (Jan. 3, 2018), <https://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/> [<https://perma.cc/P4FM-BA6F>].

43. AM. BAR ASS’N, ABA NATIONAL LAWYER POPULATION SURVEY: 10-YEAR TREND IN LAWYER DEMOGRAPHICS (2022), https://www.americanbar.org/content/dam/aba/administrative/market_research/2022-national-lawyer-population-survey.pdf [<https://perma.cc/YH67-UUB3>]. The survey does have reports on demographics and trends in lawyer populations over 10-year periods that focus on gender and race/ethnicity. *Id.* In 2022, the ABA reports that the national lawyer demographics for African-Americans was 5%, 5% for Asians, 6% for Hispanics, 3% for Multiracial, and 0% for Native Americans. *Id.* Twenty-one states reported their demographics. *Id.*

44. There is an increasing interest among Muslim lawyers to organize within the bar. The National Association of Muslim Lawyers (“NAML”), for example, started in 1996, currently has over 600 members, and “serve[s] this diverse community by providing networking and mentorship services, organizing educational programs on current legal topics of interest, supporting regional Muslim bar associations, and serving the law-related needs of the general public through community service efforts.” See NAT’L ASS’N MUSLIM LAWS., <https://www.naml.info/about> [<https://perma.cc/AH54-A2HP>]. In 2016, NAML’s board of directors was restructured to represent each major regional Muslim bar association around the country. *Id.* This nationally networked team now leads NAML’s activities with a focus on the active and rapidly changing professional landscape for Muslim lawyers. *Id.* Similarly, since 2005, the Association of Muslim American Lawyers (“AMAL”) has, through various seminars, panel discussions, and community activism, sought “to promote not only the administration of justice, but also an awareness of American and Islamic jurisprudence among minority and immigrant (and especially Muslim) communities in the Tri-State area—all while emphasizing the highest standards of professionalism and integrity.” ASS’N MUSLIM AM. LAWS., <https://www.theamal.org/about-us/> [<https://perma.cc/Z4WD-FF72>].

45. Regarding education, for example, one survey found that over 25% of Muslims have at least a college education, which was “very similar to the general population but still greater than natives.” Alex Nowrasteh, *Muslim Assimilation: Demographics, Education, Income, and Opinions of Violence*, CATO INST. (Aug. 24, 2016, 10:48 AM), <https://www.cato.org/blog/muslim-assimilation-demographic-education-income-opinions-violence> [<https://perma.cc/XFY2-UUCN>]. Further, compared to the 13% of the general public and 27% of those born in the United States, 25% of U.S. Muslims were enrolled in college as of 2016. Similarly, another poll found that 31% of U.S. Muslims were full-time college students, “a more than three-fold difference above the U.S. general population.” *Id.*

Concerning both general and professional employment, the results were more mixed. One survey found that Muslims were “a little less likely to be employed full-time, more likely to be employed part-time, and about as likely to not to be employed although more of them are looking for work” as compared to the general public. *Id.* However, more Muslims were self-employed or small business owners than the general public—20% compared to 17%, respectively—a percentage comparable to that of all immigrants (21%). *Id.* Another poll found that more Muslims held jobs (70%) than any other religious group surveyed, a number which was greater also than that of

Perhaps related to their unique experience in interacting with institutional religious discrimination,⁴⁶ their political activity also exceeds that of the general public.⁴⁷

Although the navigation of identity by Muslim lawyers has become an increasingly important topic of discussion within in-group community building practices,⁴⁸ research accounts on the subject are still, to

the general population (64%). *Id.* Of those Muslims who were employed, 30% were professional, which was greater than the 26% of the general population, but which was less than the 42% of the religious demographic with the most professionals. *Id.*

At least some of this decrease in employment can be connected to the anti-terrorism measures after 9/11. See Dalia Mogahed & Erum Ikramullah, *American Muslim Poll 2020: Amid Pandemic and Protest*, INST. FOR SOC. POL'Y & UNDERSTANDING (Oct. 1, 2020), <https://www.ispu.org/american-muslim-poll-2020-amid-pandemic-and-protest/> [<https://perma.cc/Q7GV-XZ92>] [hereinafter *American Muslim Poll*]. For example, using data from the U.S. Census Bureau, some researchers concluded that such measures “were associated with a relative decrease in employment, hours worked, and the earnings of immigrants from Muslim-majority countries.” Faisal Rabby & William M. Rodgers III, *Post 9-11 U.S. Muslim Labor Market Outcomes 2* (Inst. for the Study of Lab., Discussion Paper No. 4411, 2009), <https://doi.org/10.2139/ssrn.1489234>. The researchers also noted that “[t]he largest decreases were among the youngest immigrant men (ages 16 to 25) from the Middle East (excluding Israel), Iran and Afghanistan, whose demographic profiles are the closest to the terrorists.” *Id.* However, and most significant to the researchers, the three adverse impacts from these measures seemed to be short lived, finding that “[m]any of the estimated losses dissipate[d] by the end of 2004.” *Id.* at 2–3. This discussion paper was later published in the *Atlantic Economic Journal*. Faisal Rabby & William M. Rodgers III, *Post 9-11 U.S. Muslim Labor Market Outcome*, 39 *ATL. ECON. J.* 273 (2011), <https://doi.org/10.1007/s11293-011-9281-3>.

46. Muslims were most likely to be at the receiving end of religious discrimination. *American Muslim Poll*, *supra* note 45, at 22. Of all those who reported any level of religious discrimination, across settings, Muslims were unique because of the way in which they experienced it. *Id.* While Jews reported such discrimination at frequencies (in 2020) equal to that of Muslims, the discrimination was interpersonal. *Id.* On the other hand, Muslims experienced heightened levels of religious discrimination at the institutional level. *Id.* For example, they experienced it at the airport (44% of Muslims, as compared to Jews (2%) and the general public (5%)), when applying for a job (33%, as compared to 5% and 8%, respectively), when interacting with law enforcement (31%, as compared to 2% and 8%, respectively), and when receiving healthcare (25% of Muslims, as compared to 5% of both the Jews and the general public). *Id.* Of all the situations and circumstances listed above, “the airport is the most frequent place of perceived *institutional* religious discrimination among Muslims, at 44%.” *Id.*

47. For instance, Muslims are more likely to volunteer for political campaigns and support community building that can result in transformed political conditions. *Id.* at 12, 15. For example, a greater percentage of Muslims (65%) favored political coalition building with Black Lives Matter than Jews (54%), Catholics (42%), Protestants (37%), white Evangelicals (30%), or the general public (44%). *Id.* at 15. Similarly, while fewer Muslims were registered to vote when compared to members of groups, a much higher percentage (22%) attended at least one town hall when compared to “Protestants (15%), white Evangelicals (12%), non-affiliated Americans (14%), and the general public (15%).” *Id.* at 12. Moreover, more Muslims and Jews (16% each) were likely to volunteer for a political campaign when compared to Catholics (5%), Protestants (8%), white Evangelicals (9%), the non-affiliated (4%), and the general public (7%). *Id.*

48. National conferences and social media associations for lawyers and law students have been growing. Examples of such institutions include the National Muslim Law Students Association, which holds annual conferences for Muslim Law Students.

the extent they exist, sparse.⁴⁹ Focusing instead on how lawyer identity is performed and navigated within institutions that other than allows us to consider the everyday inequality endured by individuals who are seen as peripheral. In her article on conscious identity performance, for example, Professor Leslie Culver argues—particularly using the example of a Muslim attorney—that assumptions about individual culture⁵⁰ and identity (rather than knowledge about religion or religious ethics, for example) impose a range of restrictions on the ways in which lawyers are perceived in legal spaces, which in turn can change how they perform their individual identity.⁵¹ Starting from the perspective of the periphery—a vantage point following a tradition committed to analyzing the periphery to understand inequality—we see the ways in which law and legal institutions perform blasé and

About Us, NAT'L MUSLIM L. STUDENTS ASS'N, <https://www.nmlsa.com/about> [<https://perma.cc/K9UL-5Z6Z>]. Additionally, Muslim Law Students Associations (“MLSA”) (many of which were invited to participate in the Navigating Identity in Legal Experiences (“NILE”) Study, including Duke University School of Law MLSA, New York University School of Law MLSA, Columbia Law School MLSA, Florida International University College of Law, and Wayne State University Law School MLSA) have cropped up in most law schools across the country. *Student Organizations*, DUKE L., <https://law.duke.edu/life/orgs/> [<https://perma.cc/67J7-7BYS>]; *Muslim Law Students Association (MLSA)*, NYU L., <https://www.law.nyu.edu/studentorganizations/muslimlawstudentsassociation> [<https://perma.cc/Z5N4-TANE>]; *Muslim Law Students Association*, COLUM. L. SCH., <https://orgs.law.columbia.edu/muslim-law/> [<https://perma.cc/5T7F-NZ3E>]; FIU L., <https://law.fiu.edu/> [<https://perma.cc/A3RS-TKKQ>]; *Student Organizations*, WAYNE STATE U. L. SCH., <https://law.wayne.edu/students/organizations#definition-64246> [<https://perma.cc/UB42-PQTW>]. For purposes of the NILE study, a list of 35 MLSAs was gathered and contacted via email to solicit participants. Other such organizations include Muslim Women in Law, which seeks to provide resources and opportunities for Muslim women within legal fields. *Muslim Women in Law*, INSTAGRAM, <http://www.instagram.com/muslimwomeninlaw> (last visited Dec. 27, 2022).

49. See, with notable exception, Azizah al-Hibri, *On Being a Muslim Corporate Lawyer*, 27 TEX. TECH. L. REV. 947, 961 (1996), Azizah al-Hibri, *Faith and the Attorney-Client Relationship: A Muslim Perspective*, 66 FORDHAM L. REV. 1131, 1134–36 (1998), and Dewayna A. Bazzi, *Local and Special-Purpose Bar Associations: Who Is the Muslim Bar?*, MICH. BAR J., Sept. 2016, at 14.

50. In a forthcoming work about mediating disputes across cultures, Carrie Menkel-Meadow begins by describing culture as a “product of ‘groupness’ including practices, beliefs, norms, rules, behaviors and customs which are often further identified with race, nationality, ethnicity, religion, gender, and social groups,” noting later that “[c]ulture affects the way we see and process the world, with language, images, assumptions, norms, and the choices we see as acceptable and viable in particular situations.” Carrie Menkel-Meadow, *Cross-Cultural Disputes and Mediator Strategies*, in THE ROUTLEDGE HANDBOOK OF INTERCULTURAL MEDIATION (Dominic Busch ed., forthcoming 2023) (manuscript at 30), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4230372.

51. Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. 577, 612–13 (2018). A Muslim attorney, specifically, faces the following burdens: the inherent burden in making the conscious identity choice to publicly displace her “culture” in the workplace, the psychological and emotional impacts of that choice, and the burden in navigating how, “on top of simply trying to do her work as an attorney, she will always be reminded, explicitly or implicitly, not just that she is not white, but that she is an ‘other.’” *Id.*

often justified inequality while gaining from the posturing of possible progressive equality. It is this navigation of everyday identity and socialization from the perspective of Muslims in the legal profession that I turn to next.

IV. INTERSECTIONAL CONSTRUCTIONS OF THE “IDEAL” MUSLIM LAWYER

The most notable example of Muslim-identity discrimination in professional employment is *Hasan v. Foley & Lardner LLP*.⁵² There, Zafar Hasan, a Muslim of Indian descent and a former associate at a large, international law firm, brought an action claiming that the firm fired him after the 9/11 attacks because of his religion, race, national origin, and color; the district court granted the firm’s motion for summary judgment, and Mr. Hasan appealed.⁵³ The appellate court reversed the judgment of the district court and remanded the case for further proceedings, holding that due to genuine issues of material fact, summary judgement as to whether employer discrimination against employee existed was precluded.⁵⁴ *Hasan* has been relied on in equality jurisprudence to show that, rather than relying on the near-impossible-to-replicate “mosaic of evidence” standard customarily relied upon by the courts, circumstantial evidence and longer chains of inference may prove the existence of a discriminatory, hostile environment. Specifically, only about five⁵⁵ cases that deal with the discrimination of Muslims cite *Hasan*,⁵⁶ and much of this reliance has been to distinguish the ways in which Hasan met the standard using what scholars have agreed to be a “rare fact pattern.”⁵⁷ In fact, of the 137

52. 552 F.3d 520 (7th Cir. 2008).

53. *Id.* at 522. This is not to say the targeted repression of and discrimination against Muslims in the United States did not exist before 9/11. See, e.g., Farah Brelvi & Asifa Quraishi-Landes, *It’s Been Two-Hundred Years, Not Twenty: Targeted Repression in the US Started Long Before 9/11*, COMMON DREAMS (Sept. 24, 2021), <https://www.commondreams.org/views/2021/09/24/its-been-two-hundred-years-not-twenty-targeted-repression-us-started-long-911> [<https://perma.cc/5VG5-WB4R>].

54. *Id.* at 530–31.

55. From 2009 through 2022, 139 opinions cite *Hasan*. Of these, only 6 both cite *Hasan* and deal with discrimination of Muslim plaintiffs, and only 5 of those are broadly in the employment context. See cases cited *infra* note 59.

56. Cases citing *Hasan* were found using the Citing References tab on Westlaw and Citing Decisions on Lexis. These cases were then filtered using a plain text search of the term “Muslim” and “Islam.” All these results were reviewed, and cases in which the plaintiff was a Muslim were recorded.

57. *Hasan* is used to show evidence similar to microaggressions, including evidence of “suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn” that might be read as motivating factors in disparate treatment claims. See Eden B. King et al., *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCH. PUB. POL’Y & L. 54, 60 (2011) (quoting *Venturelli v. ARC Cmty. Servs., Inc.*, 350 F.3d 592, 601 (7th Cir. 2003)), <https://doi.org/10.1037/a0021673>. But alongside this usage is clear distinguishing based on facts—often to highlight how *Hasan* is a “rare case” where a

cases⁵⁸ that cite *Hasan*, for example, only 5 involved a Muslim plaintiff in an employment context, none of whom were successful.⁵⁹ And in the last ten years, the reliance on this standard for discrimination jurisprudence has been dwindling even further.⁶⁰ As a result, reliance on *Hasan* has been a fairly toothless endeavor, despite being a possible equality standard at first glance,⁶¹ and students and professionals alike seem to have internalized this institutional reticence to acknowledging microaggressions. Even beyond *Hasan*, proving workplace discrimination on the grounds of religious identity—especially for a socio-politically charged intersectional identity such as Islam—is fraught because of the exacting standards necessary to prove discrimination.⁶² Most

plaintiff was able to “assemble pieces of circumstantial evidence” to paint a “mosaic” showing discriminatory treatment without reliance on immutable characteristics (in particular, since 9/11 was an event that happened after the hiring the *Hasan*, it triggered a change in the determination and perception of Muslim identity rather than a change in underlying identity factors, like race or ethnicity). See Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. PITT. L. REV. 65, 75–76 (2011) (citing *Hasan*, 552 F.3d at 526); Peter Siegelman, *Protecting the Compromised Worker: A Challenge for Employment Discrimination Law*, 64 BUFF. L. REV. 565, 578 & n.30 (2016).

58. All cases citing *Hasan* were found using the Citing References tab on Westlaw and Citing Decisions on Lexis. See *supra* notes 55–56.

59. See *Karim v. H & M Int'l. Transp., Inc.*, No. 08-cv-2332, 2009 WL 3188064 (N.D. Ill. Sept. 30, 2009); *Abuelyaman v. Ill. State Univ.*, No. 07-1151, 2009 WL 3837012 (C.D. Ill. Nov. 13, 2009), *aff'd*, 667 F.3d 800 (7th Cir. 2011); *Shakir v. Bd. of Trs. of Rend Lake Coll.*, No. 08-cv-768-DRH, 2010 WL 538296 (S.D. Ill. Feb. 8, 2010); *Memon v. W. Tech. Coll.*, No. 14-cv-581-jdp, 2016 WL 1180205 (W.D. Wis. Mar. 25, 2016), *aff'd*, 673 F. App'x 529 (7th Cir. 2016); *Diab v. Chi. Bd. of Educ.*, 850 F. Supp. 2d 899 (N.D. Ill. 2012).

60. Cases citing *Hasan* range from 2009 through 2022. While from 2009 to 2012 an average of 16 cases per year cited *Hasan*, reaching a peak of 23 in 2012, in the past 6 years, citations have decreased to an average of 5 per year (with 4 in 2017, 7 in 2018, 9 in 2019, 1 in 2020, and 4 in 2021). In 2022, only 3 cases cited *Hasan*. See *supra* note 56 for an explanation of how these cases were located. Moreover, while academic literature featured substantive—i.e., more than just a general citation—discussions of *Hasan* between 2008 and 2011, more recent scholarship rarely addresses it. Compare, e.g., Cheryl L. Anderson & Leonard Gross, *Discrimination Claims Against Law Firms: Managing Attorney-Employees from Hiring to Firing*, 43 TEX. TECH L. REV. 515, 559–60, 560 n.317 (2011) (using *Hasan*, with a detailed explanatory parenthetical, as an example to explain the relevance and effect of stereotypical or discriminatory comments made by law firm members on courts' decisions in summary judgment motions), with Emily Holtzman, Note, *Balancing Act: Admissibility of Propensity Evidence Under Article I, Section 18(c) of the Missouri Constitution*, 84 MO. L. REV. 1135, 1149 & n.126 (2019) (citing *Hasan* as a general example of an employment discrimination claim).

61. *Hasan*, for example, has been considered one of the only decisions in which district courts analyzed whether “‘me too’ evidence is a ‘relevant component of the ‘mosaic’ of evidence.’” Nicholas C. Soltman, Comment, *What About “Me (Too)”?* *The Case for Admitting Evidence of Discrimination Against Nonparties*, 76 U. CHI. L. REV. 1875, 1894 & n.127 (2009) (citing *Hasan*, 552 F.3d at 529).

62. See, e.g., *Rivera v. P.R. Aqueduct & Sewers Auth.*, 331 F.3d 183 (1st Cir. 2003) (dismissing on a motion for summary employment discrimination claims by a Catholic plaintiff against coworkers who mockingly called her “Mother Theresa” and gave her

cases rely on intersectional grounds to prove the mosaic of evidence necessary for discrimination, and these standards become even harder to prove in elite professional workplaces.⁶³ Of the 259 cases of employment discrimination involving Muslims that were surveyed for this research,⁶⁴ only 58 were successful.⁶⁵ Of the 259 cases, 104 involved plaintiffs in professional positions (17 of whom were successful).⁶⁶ Although it is possible that many infractions around

a birthday card of a pig adorned with a rosary, in addition to generally criticizing the Catholic church and the plaintiff's religiosity in front of her and others); *Brodt v. City of New York*, 4 F. Supp. 3d 562 (S.D.N.Y. 2014) (holding that a Jewish employee whose supervisor played with the employee's yarmulke, constantly mocked him, and made snide remarks about his regularly attending prayer service failed to state a religious discrimination claim); *Kalsi v. N.Y.C. Transit Auth.*, 62 F. Supp. 2d 745 (E.D.N.Y. 1998), *aff'd*, 189 F.3d 461 (2d Cir. 1999) (holding that a Sikh man who, despite an explicit OSHA exemption, was terminated for not wearing a hardhat failed to state a religious discrimination claim).

63. *See, e.g.*, *Memon v. Deloitte Consulting, LLP*, 779 F. Supp. 2d 619 (S.D. Tex. 2011) (denying an employer's motion for summary judgment in an employment discrimination case after engaging in a race- and religion-based analysis of employer's actions against Muslim plaintiff, a professional consultant, and specifically examining the way supervisors treated plaintiff on his project, the employer's requirement that plaintiff not perform a religious ritual (Wazu) at the project's work site, the employer's changing of plaintiff's duties on the project, the employer's later removal of the plaintiff from the project, and the employer's ultimate termination of the plaintiff from the company); *EEOC v. Reads, Inc.*, 759 F. Supp. 1150, 1155 (E.D. Pa. 1991) (finding that a Muslim applicant for a school counseling position at a Catholic school established a prima facie case of religious discrimination "by showing that she (1) [had] a bona fide religious belief which conflicts with an employment requirement; (2) informed the employer of the belief; and (3) was adversely affected for failure to comply with the conflicting employment practice").

64. Cases were gathered using both the Westlaw and Lexis case databases. In a first round, all cases were filtered by topic "Civil Rights" (Westlaw) or by practice area "Civil Rights Law" (Lexis). In Westlaw, the topic was searched using an exact phrase in the search bar: "workplace discrimination" AND ("Muslim" OR "Islam"). Those results were further filtered by plain text keyword searches using the terms "workplace" or "employment," and then again by "Muslim," "Islam," or "hijab." In Lexis, the topic was searched by using the "All of these terms" feature, with the keywords "Muslim," "Islam," and "workplace." The same methods were applied again in both Westlaw and Lexis, this time under the topic "Labor & Employment" (Westlaw) or "Labor & Employment Law" (Lexis). Once complete, these topical searches were followed by general plain text searches in all jurisdictions using the key terms "workplace," "Muslim," and "Islam." When larger federal cases like *Hasan* or *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), for example, were discovered, searches using the "Citing References" (Westlaw) or "Citing Decisions" (Lexis) features for those cases were run using keywords "Muslim" and "Islam." Additionally, Westlaw Key Number searches, using the keys 231H Labor and Employment, 78-1151 Religious Discrimination, and 78-1159 Disparate Treatment, were run using similar keywords. Finally, Boolean searches for the terms "Muslim," "Islam," "discrimination," "adverse action," "workplace," "Title VII," and "Equal Employment Opportunity Commission" were used in various combinations in all jurisdictions in both Westlaw and Lexis. The full list of cases found using the above methods is on file with the Author.

65. The list of these cases meeting this criterion is on file with the Author.

66. Here, "professional positions" refers to a job or career "that requires a specific amount of advanced training and education," often some type of post-secondary edu-

discrimination might not go to court, the available data on settlements does not seem to suggest more institutional recognition of everyday identity-based violence that might have to be tolerated by Muslims.⁶⁷ Of the 84 settlements surveyed,⁶⁸ only 29 plaintiffs seemed successful,⁶⁹ and here too, only 15 of the overall total were professionals⁷⁰ (2 of whom seemed successful⁷¹).

Beyond broad demographics, these numbers cement the reasons for institutional distrust of legal institutions that many of the respondents showed in the interview data.⁷² For example, Nadia,⁷³ a South Asian 2L, explained that she hesitated to report a racial slur to her department because she was unsure whether it would produce a non-disappointing outcome:

caution. *Nonprofessional vs. Professional Jobs: What's the Difference?*, INDEED, <https://www.indeed.com/career-advice/finding-a-job/nonprofessional-vs-professional-jobs> (July 21, 2022) (relying on EEOC classifications). While training periods are sometimes required for these positions, “most individuals who work in a professional job acquire the skills necessary for their position through their education instead of their training.” *Id.* Hence, any job that required years of schooling or a senior position where the employee would have had years of training on the job is defined as “professional.” In the surveyed cases, those in professional positions are typically doctors and healthcare workers, teachers, professors, pilots, and senior police or FBI officers, to name a few. The list of cases meeting these different criteria is on file with the Author.

67. Settlement data was gathered through *Above the Law*, ABOVE L., <https://abovethelaw.com/> (last visited Dec. 28, 2022), and the “Jury Verdicts & Settlements” and “Litigation Analytics” features of the electronic databases Lexis and Bloomberg Law, respectively. Searches were run on *Above the Law* using the keywords “Muslim,” “Islam,” and “hijab” concurrently with the term “settlement.” On Lexis, settlements were filtered by practice area, “Labor and Employment Law.” Within this category, broad searches were run using the abovementioned keywords. On Bloomberg Law, searches were performed using the same keywords. It is worthwhile to note that substantive information (including factual details) was not available for all settlements collected.

68. Data about the success of all settlements was not available; hence, this number reflects only those settlements that reported success or lack thereof. A list of settlements meeting this criterion is on file with the Author.

69. A list of settlements meeting this criterion is on file with the Author.

70. For an explanation of what “professional position” means in this Article, see *supra* note 66. A list of settlements meeting these criteria is on file with the Author.

71. Consent Decree, *EEOC v. Barber Auto Sales, Inc.*, No. CIV-S-03-0657 GEB GGH (E.D. Cal. Apr. 1, 2004) (seven Afghan, Muslim workers, all working within the finance department or as a general sales manager, settle their religious and national origin discrimination claims with their employers, two car dealerships, for \$550,000); Consent Decree, *EEOC v. Merrill Lynch & Co.*, No. 07-CIV-617 (DAB) (KNF) (S.D.N.Y. Jan. 6, 2009) (Iranian, Muslim analyst settles religious and national origin discrimination claims with his employer, a multinational bank, for \$1,550,000).

72. This is part of a larger study concerning the ways in which minorities navigate the legal profession that is currently underway—the Navigating Identity in Legal Experiences (“NILE”) Study. The sample M of Muslim students and lawyers is currently at 15 with 5 more interviews scheduled at the time this Article is being sent to press, and the sample M portion of the of the overall NILE Study hereinafter will be referred to as the “NILEM Study.” For additional information regarding the study, see *supra* note 48. The other minority populations in the larger study are lawyers and law students with disabilities, and trans and non-binary lawyers and law students.

73. All names are pseudonyms to protect the anonymity of the respondents.

I honestly just didn't want to deal with it. . . . I just wasn't in a place where I felt comfortable enough to genuinely feel like; okay, this issue can be solved. Like, something will come out of this. In some way he might be, I don't know, reprimanded or whatever. I just was so scared that I would be disappointed by the outcome that I didn't want to bring it up.⁷⁴

Nadia's sense of disillusionment about the institutions she had to navigate was reinforced in other ways by her peers, who were often given blatant and implicit cues to moderate their identities.⁷⁵ Ample cues pushing Muslims in the profession to conform include disregard during recruitment interviews,⁷⁶ hostility from peers,⁷⁷ or advice from well-meaning mentors to go with the flow as much as possible⁷⁸ and "pick their battles."⁷⁹ This was particularly taxing for women who felt like no matter how they presented, there were intersectional expectations about their interiorities. Irrespective of their religious commitments, their identity as Muslim—either through appearance, name, or the way they dressed—moderated their everyday navigation of the legal profession. For Nadia, who did not "fit" what she referred to as the "stereotypical image of a Muslim female law student" because she did not wear a headscarf or "dress super-conservatively," there was the sense that she almost had to prove that she was part of the community, a performance that she confessed she did not sense was necessary

74. Zoom Interview with Respondent 11, Participant, NILEM Study (Apr. 9, 2001) [hereinafter Interview 11] (interview notes on file with author).

75. See *id.* (discussing the relationship between law school networking or social events and alcohol and explaining how difficult it is to socialize without alcohol being involved).

76. See, e.g., Zoom Interview with Respondent 5, Participant, NILEM Study (Mar. 26, 2021) (discussing the decision by Zalima, a Black one-and-half generation immigrant 3L, to reconsider a firm she "really wanted to go to" following an interview where a white law firm partner "wasn't engaged in the conversation anymore" once she revealed her identity) (interview notes on file with author).

77. See, e.g., Zoom Interview with Respondent 9, Participant, NILEM Study (Apr. 5, 2021) (discussing a student's feeling of nervousness about getting work at her summer job because she presented as Muslim and one of her peers had given her the impression that he was not an ally) (interview notes on file with author). She describes the fear of such assumed exclusion:

[B]ecause of their own beliefs, they are more hesitant to want to work with you. Or, you're kind of sitting there in fear; are they going to mention it? Are they going to make part of my identity an issue for them? When it has nothing to do with my intellect, my work ethic, all of that stuff.

Id.

78. See, e.g., Zoom Interview with Respondent 8, Participant, NILEM Study (Apr. 2, 2021) [hereinafter Interview 8] (interview notes on file with author); Zoom Interview with Respondent 4, Participant, NILEM Study (Mar. 26, 2021) (exploring advice from well-meaning mentors and other Muslims in law firms and its frustrating call for conformity) (interview notes on file with author).

79. Consider Sabah's retelling that "[i]f you always challenge [others] . . . then it's going to have less of an [e]ffect, from my experience. So, I guess I choose." Interview 8, *supra* note 78. Another student says he did not want to "make a fuss about needing to fast" because it might draw attention to his identity. Zoom Interview with Respondent 6, Participant, NILEM Study (Apr. 6, 2021) (interview notes on file with author).

until she came to law school.⁸⁰ For women who did not “code” as being Muslim, their names were often stuck between other kinds of category assumptions. For example, Maria, whose last name was determinately Islamic, expressed one version of this double bind where she felt the extra need to speak up about Muslim issues because she was not always seen as being part of the community:

Because usually you'll get to [M]iddle [E]astern war, or France's ban on the hijab. And then sometimes usually... actually, almost always I'll speak up. . . . And also, now that I'm not wearing the hijab, I guess that's where I've kind of taken on that personality to step up. Because I don't really code Muslim. I'll wear sleeveless, or shorts, and things like that. That's where people kind of question; her last name is [Islamic]; it must just be a coincidence. Or they're not really sure.⁸¹

This interrogation of identity was not always from outsiders, and oftentimes this identity had to be navigated with in-group stakeholders as well. Just as Maria had to aggressively show her affiliation to her community to outsiders who might not be sure if she was Muslim, others had to manage these expectations of propriety as constructed from within their community. Aliya spoke about how she felt alienated by Muslim seniors at the workplace because she did not conform to the identity they expected—while a South Asian male partner was interested in hiring her when he assumed she was a “good Muslim girl,” he was uncomfortable once she did not continue to adhere to whatever expectations he might have had for her identity.⁸²

These assumptions about identity shaped the double bind inherent for many Muslim actors in the legal profession. Despite their politically charged reasons for entering law school, they were left to navigate an environment where they faced a double bind of both conforming to scripts that did not always serve them and coding as too radical when they did speak up. Together, they were mired in institutional cues that urged them to be “less” of themselves and, as other minority actors have found in these spaces, “bleach out.”⁸³ As Fouzia

80. Interview 11, *supra* note 74.

81. Zoom Interview with Respondent 14, Participant, NILEM Study (Apr. 13, 2021) (interview notes on file with author).

82. Zoom Interview with Respondent 13, Participant, NILEM Study (Apr. 9, 2021) (interview notes on file with author). In her words, he had a “100 percent Pakistani dad reaction that he did not actually vocalize” because she had not dressed in ways that conformed to his expectation of “the proper way to be a Muslim woman” and that, as a result, “whatever connection we could have had as Muslim people was severed, or something.” *Id.*

83. Levinson, *supra* note 26. The term was originally created to explain how those who enter any profession must “make otherwise irrelevant what might be seen as central aspects of one’s self-identity.” *Id.* at 1601. On important extensions of its implications for race and identity, see David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached Out Lawyering*, 5 INT’L J. LEGAL PRO. 141 (1998).

explained, the navigation of these intersectional identities was an effort constructed around impossible standards: she felt nervous making an intervention because she had internalized the expectation that “it has to be perfect[,] . . . to be eloquent. . . . You’re representing billions of people—and so, it’s a lot of pressure at times.”⁸⁴

V. CONCLUSION: PLURALISTIC PROFESSIONALISMS

These accounts reveal the ways in which identity categories—especially for populations that are socio-politically complicated—are interactional and nonlinear. They highlight the frustration that minority actors often must encounter based on in-group and out-group understandings of identity and propriety, understandings which do the work of exclusion despite purporting to be inclusive because the categories of such inclusion are not nuanced enough to accommodate them. As a response to these hostile environments, the intentional underplaying of one’s identity might be a legitimate—even strategic—reaction because the aggressions, not to mention the discrimination, endured by these individuals are likely to be underplayed. In turn, such invisibility could reinforce notions of what it means to be a “good lawyer” or a “good Muslim” and reinforce the lukewarm reception that follows interactional tensions. And there is reason to argue that despite the larger framework of even well-intentioned diversity initiatives, some kinds of minorities are valorized while others are alienated. And it is this juxtaposition that makes the focus on the experience of Muslim lawyers and law students crucial.

The racialization of Islam, especially after the 9/11 attacks in America, has had important implications for critical race and identity scholars.⁸⁵ For one, it created a cemented narrative of what it meant to be *seen* and received as Muslim.⁸⁶ Scholars of post-9/11 Islamophobia argue that the visible and brutal violence caused by the attacks produced a culture of fear and identity resistance that is legitimated by “valid” stock narratives about neutrality and specific concerns of radical threat.⁸⁷ The impact of this kind of “respectable racism”⁸⁸ is not just about the rise and reinforcement of this post-9/11 culture of pervasive Islamophobia. It also traces very specific out-

84. Zoom Interview with Respondent 3, Participant, NILEM Study (Mar. 26, 2021) (interview notes on file with author).

85. See Choudhury, *Racecraft and Identity*, *supra* note 10; SAHAR AZIZ, *THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM* (2022).

86. See BEYDOUN, *supra* note 38, at 119–20.

87. For a general consideration of these stereotypes and their entrenched impossibilities, see Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33 (2009). See also SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? (Mary L. Dudziak ed., 2003); ISLAMOPHOBIA AND THE LAW (Cyra Akila Choudhury & Khaled A. Beydoun eds., 2020).

88. See, e.g., JIM WOLFREYS, *REPUBLIC OF ISLAMOPHOBIA: THE RISE OF RESPECTABLE RACISM IN FRANCE* (2017).

comes of difference and discrimination across contexts, including, and significantly, within the law. For instance, other research has found important implications for this kind of acceptable racism in public sanction and security concerns,⁸⁹ court responses,⁹⁰ workplace discrimination,⁹¹ and the gendering of Muslim women⁹² and, more generally, global peripheral actors.⁹³ But for the particular purposes of this Article on identity within the legal profession, it has meant that American legal organizations and lawyers within them have certain kinds of ideological tools at their disposal that allow for interpersonal microaggressions and even discrimination (even if it is culpable as such), because such discrimination based on Islamic identity feels legitimate and justified, or in a sense, not really discrimination at all. It is this kind of legitimized interactional friction that I have called, in other works, “blasé discrimination.”⁹⁴

Menkel-Meadow agrees that identity—including religious identity⁹⁵—cannot be isolated, especially as it pertains to decision-making,

89. See, e.g., Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59 (2004) (arguing that the war on terror(ism) has created categories of “good aliens” and “good citizens” that introduce demonizing narratives and false dichotomies). Similarly, Leti Volpp’s work suggests the ways in which orientalist tropes and racial profiling have important implications for citizenship, immigration, and identity. See Leti Volpp, *The Citizen and the Terrorist*, in SEPTEMBER 11 IN HISTORY, *supra* note 87, at 147.

90. On the ways in which the law systematically hides in plain sight Islamophobia through process, see, for example, Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379 (2017), and Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29 (2013).

91. See, for example, Letter from Sahar F. Aziz, Assoc. Professor of L., Tex. Wesleyan Sch. of L., to Comm’rs, EEOC (July 18, 2012), https://www.ispu.org/wp-content/uploads/2012/03/2012_7-18-12_Aziz_Testimony_to_EEOC_on_Religious_Discrimination.pdf?x23798 [<https://perma.cc/JM8R-MATF>], which includes, as an enclosure, Professor Aziz’s written testimony before the EEOC regarding religious discrimination. See also, for example, Eman Abdelhadi, *Religiosity and Muslim Women’s Employment in the United States*, 3 SOCIUS, 2017, <https://doi.org/10.1177/2378023117729969>, and Eman Abdelhadi, *The Hijab and Muslim Women’s Employment in the United States*, 61 RSCH. SOC. STRATIFICATION & MOBILITY 26 (2019), <https://doi.org/10.1016/j.rssm.2019.01.006>, for research specifically addressing Muslim women’s employment in the United States.

92. For a general review of this topic, see Aziza Ahmed, *The Gender of Islamophobia*, in ISLAMOPHOBIA AND THE LAW, *supra* note 87, and Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women’s Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1 (2014).

93. There is a rich, critical scholarship of postcolonial law and society that examines gender equality in relation to the Islamic gendered body and praxis (particularly around veil bans), analyzing these bans as extensions of exclusionary Western colonial archetypes. See, e.g., Saba Mahmood, *Religion, Feminism, and Empire: The New Ambassadors of Islamophobia*, in FEMINISM, SEXUALITY, AND THE RETURN OF RELIGION 77 (Linda Martín Alcoff & John D. Caputo eds., 2011).

94. Ballakrishnen, *supra* note 36.

95. Examining how spirituality relates to the practice of law, she argues that to consider the spiritual practices as they influence our values and morality in conflict resolution and that secular humanist values of self-determination and autonomy need

and that since our values are socialized in a range of ways, it would serve to not just tolerate, but also consider identity on its own terms as a source that offers orienting principles. Although personal activity should not—empirically or morally—affect professional duty, considering positionality both for interests and convergence might offer orienting principles that craft us all to be better lawyers. In turn, this concept of identity as crucial to socialization naturally extends to the centrality of identity when considering process pluralism since choice in decision-making necessarily implicates “passionate commitments of emotion, religion, and moral values.”⁹⁶ Further, what can be seen at an abstract level as a way of being is actually, at an everyday level, a coagulation of habit and practice. So religious identity might be a way of being, but since habits of character are resilient, they might, in turn, shape our everyday decision-making.⁹⁷ Extending this idea of “process pluralism” to identity allows one to witness the multiplicity of ways in which minority actors experience belonging in the legal profession. In this empirical case, if we move past our biases of what a good lawyer or a good Muslim lawyer ought to be like, we allow for the plurality of professionalisms to inform what a good lawyer *is*. It also, simultaneously, offers ways to reframe what good inclusion could do in legal institutions. Professional pluralisms—or different ways of being a professional—allow us to locate the coordinates of new kinds of actors within the legal profession not as compared to an ideal type, but rather as a function of their own terms. These plural identities matter because they trickle *up* to form institutional cultures and inheritances.

But here again, it is useful to heed Menkel-Meadow’s advice about subversive empirics. Numbers and aesthetics, while useful for signaling intention, will not on their own do the work of meaningful or unbleached inclusion.⁹⁸ Looking beyond numbers might allow us to focus on the ways in which broad nods to diversity might be leaving several unequally treated micro-populations of the profession hiding in plain sight. In Menkel-Meadow’s words, subversive reorienting of

to be valued alongside religious values (both when they coincided with them, and when they diverged). Carrie Menkel-Meadow, *And Now a Word About Secular Humanism, Spirituality, and the Practice of Justice and Conflict Resolution*, 28 *FORDHAM URB. L.J.* 1073, 1087 (2001).

96. Carrie Menkel-Meadow, Lecture, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 *GEO. L.J.* 553, 555–56 (2006).

97. Using the illustrative example of Atticus Finch, Menkel-Meadow argues that “big ethical decisions” are not that different from the “many daily choices.” What, at an abstract level, could be a way of being is, at an everyday level, habit and practice that inform “habits of character” and our “ordinary ethics.” Carrie Menkel-Meadow, *The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft*, 31 *MCGEORGE L. REV.* 1, 12 (1999) (internal quotation marks omitted).

98. Menkel-Meadow, *Portia in a Different Voice*, *supra* note 1; Menkel-Meadow, *Women in Dispute Resolution*, *supra* note 1.

progress needs to move beyond pizza and sushi (and kebabs!) to merging on meaningful terms.⁹⁹

99. Menkel-Meadow, *Excluded Voices*, *supra* note 4, at 51–52.

