

Distribution Agreement

In presenting this thesis or dissertation as a partial fulfillment of the requirements for an advanced degree from Emory University, I hereby grant to Emory University and its agents the non-exclusive license to archive, make accessible, and display my thesis or dissertation in whole or in part in all forms of media, now or hereafter known, including display on the world wide web. I understand that I may select some access restrictions as part of the online submission of this thesis or dissertation. I retain all ownership rights to the copyright of the thesis or dissertation. I also retain the right to use in future works (such as articles or books) all or part of this thesis or dissertation.

Signature:

Criminalization of Muslims in the United States:
A Homegrown Threat to Justice

By

Amanda Parris
Master of Theological Studies

Candler School of Theology

Dr. Deanna Ferree Womack
Thesis Advisor

Dr. David Pacini
Director, Master of Theological Studies Program

Criminalization of Muslims in the United States:
A Homegrown Threat to Justice

By

Amanda Parris

Thesis Committee Chair: Dr. Deanna Ferree Womack

An abstract of
a thesis submitted to the Faculty of the
Candler School of Theology
in partial fulfillment of the requirements for the degree of
Master of Theological Studies
2018

Abstract

Criminalization of Muslims in the United States:

A Homegrown Threat to Justice

By Amanda Parris

Muslims in America are faced with mounting terrorizations from both private actors and the United States government. Still, Muslim Americans are caricatured as a rising *homegrown* threat and criminalized accordingly. This criminalization is a distinct subcategory of Islamophobia that requires a working definition and a criminal justice perspective to combat the disproportionate and aggressive targeting of Muslims through policing, prosecution, and imprisonment tactics. This paper argues the importance of invoking the term “criminalization of Muslims” as a tool to define and frame this abuse of Muslims by the criminal justice system. Likewise, this thesis contends that the policing, prosecution, and imprisonment practices and tactics used against Muslim individuals and communities must be viewed as a criminal justice problem in order to protect and support Muslim Americans going forward. The criminalization of Muslims operates within the adversarial criminal justice system and thrives through false theories of radicalization and homegrown threats connected with the Muslim identity. It is a distinct subcategory of institutionalized Islamophobia that has permitted the violation and desecration of Muslim Americans’ civil liberties and religious life by the state. Manifestations of the criminalization process – preventative policing, unjust prosecutions, and inhumane confinement – are reflective of broader problems within the US criminal justice system. Much like the failed War on Drugs, the War on Terror touches criminal justice reform issues such as mass incarceration, police reform, discriminatory profiling, sentencing reform, and solitary confinement. Criminal justice reform advocates and Muslim communities must continue to increase their awareness and advocacy efforts regarding such criminalization targeting Muslims.

Criminalization of Muslims in the United States:
A Homegrown Threat to Justice

By

Amanda Parris

Thesis Committee Chair: Dr. Deanna Ferree Womack

A thesis submitted to the Faculty of the
Candler School of Theology
in partial fulfillment of the requirements for the degree of
Master of Theological Studies
2018

Criminalization of Muslims in the United States: A Homegrown Threat to Justice

Table of Contents

Introduction.....	1
Part I: Islamophobia: Context Behind Criminalizing Muslims.....	3
Part II: Criminalization of Muslims: History and Definition.....	13
A. Backlash Since 9/11	15
B. The Misunderstandings of the Radicalization Theory	23
Part III: Framing as a Criminal Justice Matter.....	34
A. Policing.....	38
i. Surveillance	39
ii. Profiling.....	48
iii. Police Community Engagement.....	55
B. Prosecutions and Prison.....	59
i. Preemptive Prosecutions	62
ii. Trial and Sentencing.....	65
iii. Imprisonment.....	68
Part IV: Responding to a Growing Criminal Justice Problem	71
Conclusion	80

Introduction

Criminalization of Muslims is the process by which the systematic actions of the United States criminal justice system, law enforcement, and counterterrorism policies and practices disproportionately and aggressively target Muslim Americans via policing, prosecution, and imprisonment with a distinct lack of regard for civil liberties. Put another way, criminalization of Muslims is a form of Islamophobia expressed in the policies and practices of the criminal justice system and law enforcement arm of the state. This criminalization paradigm stems from Islamophobia, specifically as a distinct subcategory of institutionalized Islamophobia. The criminalization of Muslims operates within the adversarial criminal justice system and thrives through false theories of radicalization and homegrown threats connected with the Muslim identity. Manifestations of the criminalization process – preventative policing, unjust prosecutions, and inhumane confinement – are reflective of broader problems within the US criminal justice system. Much like the failed War on Drugs, the War on Terror touches criminal justice reform issues such as mass incarceration, police reform, discriminatory profiling, sentencing reform, and solitary confinement.¹ Analogous to other institutionalized criminal justice concerns, the criminalization of Muslims causes actual and incalculable harms in the communities impacted. This thesis paper contends that the term criminalization of Muslims is a tool for scholars, advocates, and communities to define and frame the mistreatment of Muslims by the criminal justice system, opposed to using government counter-terrorism and national security language to express the same issues. Secondly, in this study I argue that the policing,

¹ For more on the issues of mass incarceration, policing, and the prison system, see the following: Barry Friedman, *Unwarranted: Policing Without Permission* (New York: Farrar Straus and Giroux, 2017); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012); Robert Perkinson, *Texas Tough: The Rise of America's Prison Empire* (New York: Metropolitan Books, 2010).

prosecution, and imprisonment practices and tactics used against Muslim individuals and communities must be viewed as a criminal justice problem in order to protect adequately Muslim Americans and collaborate with other affected communities and advocates doing similar criminal justice reform work. Lastly, with the rising threats against Muslims in America, Muslims and non-Muslims alike need to appreciate and resist the criminalization of Muslims. Therefore, I conclude my paper with two sets of recommendations: as Muslims, we must confront civil liberties violations by knowing our rights, resisting invasive law enforcement tactics, and unifying for criminal justice reform; and as criminal justice reform advocates, we must support Muslim advocacy organizations, utilize our criminal law expertise, and raise public awareness of the criminal justice issues plaguing Muslim communities.

This paper is divided into four sections - contextualizing, defining, framing, and responding to the criminalization of Muslims – in order to advance my argument that the criminalization of Muslims is a distinct subcategory of Islamophobia that requires a working definition and a criminal justice perspective to combat such state action efficiently. Part I contextualizes this criminalization by situating the process within Islamophobia generally and institutionalized Islamophobia specifically. Part II offers a synopsis of the criminalization process by providing the recent history of the criminalization of Muslims and examining the radicalization theory that underlies the criminalization paradigm. Subsequently, Part III surveys the major criminal justice issues forged by the process of criminalization by reviewing three categories: policing practices, prosecutorial tactics, and matters related to imprisonment. Lastly, Part IV recommends ways for Muslim civilians and legal advocates alike to respond to ongoing criminalization. This paper seeks to strengthen further the ongoing efforts to combat the criminalization process with three specific recommendations that push for increased community

awareness and activism. To conclude, in order to foster a stronger coalition between criminal justice reform advocates and Muslim communities, I provide three reasons why criminal justice allies should increase their awareness and advocacy efforts regarding such criminalization targeting Muslims.

Part I: Islamophobia: Context Behind Criminalizing Muslims

Islamophobia has two distinct parts: private Islamophobia and institutionalized Islamophobia. In order to understand the criminalization of Muslims, it is central first to appreciate Islamophobia more generally and the distinctions between institutional and private Islamophobia in the United States context. Understanding institutionalized Islamophobia is specifically important because the criminalization of Muslims, as the topic of this paper, falls under the institutionalized form.

September 11, 2001. The United States experienced the worst terrorist attack the country had ever known. In the wake of that attack, Muslim Americans were no longer simply *others* who experienced typical prejudice for being non-white or non-Christian. Suddenly, Muslims were hated, feared, and demonized. By the end of that day, Muslims were being harassed and threatened.² By the end of the week, people thought to be Muslims were murdered because of

² The following are just a few instances of bias-based attacks within the immediate aftermath of 9/11 that were not only reported, but the suspect(s) was also charged with a hate crime and convicted. For example, one suspect was charged with a hate crime after holding an Arab American at gunpoint while making anti-Arab threats the day of September 11, 2001. Another suspect was charged with a hate crime and reckless endangerment after attempting to run over a Pakistani woman with a car on September 12, 2001. On September 13, 2001, three teens were charged with a hate crime after firebombing a store owned by Arab Americans. In two separate incidents both on September 15, 2001, two people were shot to death: Balbir Singh Sodhi and Waqar Hasan. Sodhi, a Sikh man, was shot and killed outside his store, as the shooter mistakenly believed he was Muslim. After murdering Sodhi, the shooter shot at a Lebanese man and at the home of an Afghan family. Hasan, a Pakistani man, was shot and killed in his store, as the shooter said that he was upset with Middle Easterners. Hasan's killer went on to murder of Vasudev Patel at a

their religion and ethnicity.³ Over the next couple years, discrimination spread on both an institutional and individual level against Muslims.⁴ Increasingly, law enforcement spied on mosques and employed extensive electronic surveillance tactics within Muslim American communities.⁵ In 2015, nearly fifteen years after 9/11, the United States witnessed a significant increase in discrimination, violence, and hatred directed at Muslim Americans. From the murder of three students in Chapel Hill⁶ to innumerable and growing attacks on places of worship, the number of crimes taking place against Muslims was climbing at a rate higher than any other category of hate crime,⁷ and surpassing the number of attacks on these same communities in previous years.⁸ Since 2015, calls were made for the religious testing of Muslims in America and a presidential candidate whose campaign platform centered on banning Muslims from the United States was successfully elected as President.⁹

convenience store a few weeks later. For other incidents see the following resource: “A List of Anti-Muslim Hate Crimes and Bias Incidents Collected by the SPLC from News Reports Since 9/11,” Southern Poverty Law Center, March 29, 2011, <https://www.splcenter.org/news/2011/03/29/anti-muslim-incidents-sept-11-2001>.

³ Id.

⁴ Hussein Ibish, “Report on Hate Crimes and Discrimination Against Arab Americans: The Post-September 11 Backlash, September 11, 2001 - October 11, 2002,” American-Arab Anti-Discrimination Committee, 2003. Report available at https://www.mbd.gov/sites/mbda.gov/files/migrated/files-attachments/September_11_Backlash.pdf.

⁵ See, “A Question of Freedom,” *The Economist*, March 6, 2003, <https://www.economist.com/node/1622177>. See also, Lynette Clemetson, “F.B.I. Tries to Dispel Surveillance Concerns,” *New York Times*, January 12, 2006, <https://www.nytimes.com/2006/01/12/politics/fbi-tries-to-dispel-surveillance-concerns.html>; Jerry Martin, “Lawsuit Alleges FBI Violated Muslims' Freedom of Religion,” *Washington Post*, February 22, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/02/22/AR2011022206975_2.html; “NYPD Secretly Labels Mosques as Terror Groups and Spies on Them,” *The Guardian*, August 28, 2013, <https://www.theguardian.com/world/2013/aug/28/nypd-surveillance-mosques-terror-spying>.

⁶ Margaret Talbot, “The Story of a Hate Crime: What Led to The Murder of Three Muslim Students in Chapel Hill?” *New Yorker*, June 22, 2015, <http://www.newyorker.com/magazine/2015/06/22/the-story-of-a-hate-crime>.

⁷ Mark Potok, “FBI: Reported Hate Crimes Down Nationally, Except Against Muslims,” Southern Poverty Law Center, November 16, 2015, <https://www.splcenter.org/hatewatch/2015/11/16/fbi-reported-hate-crimes-down-nationally-except-against-muslims>.

⁸ “CAIR Report: Number of Incidents Targeting U.S. Mosque in 2015 Highest Ever Recorded,” Council on American-Islamic Relations, December 17, 2015, <http://www.cair.com/press-center/press-releases/13313-mosques-targeted.html>.

⁹ Melissa Etehad, “After Nice, Newt Gingrich Wants to ‘Test’ Every Muslim in the U.S. and Deport Sharia Believers,” *Washington Post*, July 15, 2016, https://www.washingtonpost.com/news/morning-mix/wp/2016/07/15/after-nice-newt-gingrich-wants-to-test-every-american-muslim-and-deport-those-who-believe-in-sharia/?utm_term=.0011d93cfd51; See also, Ryan Beckwith, “President Trump's Own Words Keep Hurting His Travel Ban,” *Time Magazine*, March 16, 2017, <http://time.com/4703614/travel-ban-judges-donald-trump-words/>; Jessica Estepa, “‘Preventing Muslim Immigration’ Statement Disappears From Trump's Campaign Site,” *USA Today*,

This brief overview of the America-Muslim relationship from 2001- 2017 serves as an introduction to the concept of Islamophobia. A variation of the information above is what often comes to mind when the term Islamophobia is invoked. Private acts of hate or discrimination tend to dominate the conversation and media coverage, while hate and fear are the associated motives. The term Islamophobia is used in numerous contexts with countless definitions. A suitable definition is provided by writer and researcher Wajahat Ali who defines Islamophobia as “an exaggerated fear, hatred, and hostility toward Islam and Muslims that is perpetuated by negative stereotypes resulting in bias, discrimination, and the marginalization and exclusion of Muslims from America’s social, political, and civil life.”¹⁰ However, for this thesis, I will apply a slightly broader concept of Islamophobia. Law professor and scholar Khaled Beydoun expands the meaning, noting that Islamophobia is “neither political rhetoric nor law alone.” Instead, he defines it as “a cogent system and dialectic whereby the popular and political bigotry espoused by reactionary figures is informed, endorsed, and emboldened by judicial rulings and state policy.”¹¹ In order to contextualize the criminalization of Muslims, we must first understand Islamophobia as an umbrella term that encompasses all of these concepts.

Historically, Islamophobia may find its origins in Orientalism. Scholars note that the negative perceptions of Islam, which are the foundations of modern day Islamophobia, are a continuation of past Orientalism.¹² Both generate stereotypes that “systematically frame Muslim

May 8, 2017, <https://www.usatoday.com/story/news/politics/onpolitics/2017/05/08/preventing-muslim-immigration-statement-disappears-donald-trump-campaign-site/101436780/>.

¹⁰ Wajahat Ali, Eli Clifton, Matthew Duss, Lee Fang, Scott Keyes, and Faiz Shakir, “Fear, Inc.: The Roots of the Islamophobia Network in America,” *Center for American Progress*, August 2011, <https://cdn.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf>.

¹¹¹ Khaled Beydoun, “‘Muslim Bans’ and the (Re)making of Political Islamophobia,” *University of Illinois Law Review* 2017, no. 5 (2017): 1773.

¹² *Id.* at 1749.

Americans as foreigners, subversives, and terrorists.”¹³ Notably, nowadays, these same negative perceptions and stereotypes have formed the basis of the War on Terror, driven counterterrorism policies, and powered bias-based attacks and discrimination.

For many Americans, Islamophobia is often viewed as strictly a private matter. Examples of private Islamophobia range from the nearly twenty individuals who were murdered shortly after 9/11 in bias-based attacks to the employment discrimination faced by many Muslims, such as in the 2015 Supreme Court case involving *Abercrombie and Fitch*.¹⁴ The private aspects also include the over 300 bias-based “hate incidents” recorded during the year preceding the recent presidential election, a more than 45% increase over the previous year-long time frame.¹⁵ Another example of private Islamophobia is bullying by peers in school. A report published in 2017 found that 53% of student respondents admitted being insulted, teased, or abused in their school for being Muslim; the data on school bullying *for being Muslim* is now more than double the national figure on bullying in schools generally.¹⁶

Notably, a political version of private Islamophobia borders on institutionalized Islamophobia when embraced by a government official or candidate for public office. This form of private Islamophobia further permits “Islamophobia by framing it as a necessary step toward countering radicalization.”¹⁷ Since 2001, the assumption that Muslims are predisposed to violent terrorism has been embedded in politics and political rhetoric.¹⁸ This assumption is still prevalent

¹³ Khaled Beydoun, “Acting Muslim,” *Harvard Civil Rights – Civil Liberties Law Review* 53, forthcoming (2018): 18. Article accessible at: <https://ssrn.com/abstract=2926162>.

¹⁴ Beydoun, “Political Islamophobia,” 1730. See also, *E.E.O.C. v. Abercrombie & Fitch*, 135 S. Ct. 2028 (2015).

¹⁵ “Communities on Fire: Confronting Hate Violence and Xenophobic Political Rhetoric,” *South Asian Americans Leading Together*, 2018, <http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf>.

¹⁶ “Unshakable: The Bullying of Muslim Students and the Unwavering Movement to Eradicate It,” Council on American-Islamic Relation – California, 2017, https://ca.cair.com/downloads/2017_CAIR-CA_School_Bullying_Report.pdf.

¹⁷ Beydoun, “Political Islamophobia,” 1738.

¹⁸ Sahar Aziz, “Policing Terrorists in the Community,” *Harvard National Security Journal* 5 (2014): 154.

from both political parties, candidates, and media sources. Politicized sorts of private Islamophobia commonly enter the national spotlight. For example, during his presidential campaign, Donald Trump stated that “we’re going to have no choice” but to close some mosques. He gained support for the presidency by declaring that Muslims should be registered, adding that there “should be a lot of systems, beyond databases.”¹⁹ Likewise, former presidents, such as Bill Clinton, have made remarks that further fed into the *Good Muslim - Bad Muslim* binary.²⁰ Many US politicians have engaged with Islamophobia at one level or another. Newt Gingrich demanded that the United States government should deport all Muslims who practice Sharia, a form of religious laws and pronouncements.²¹ Ted Cruz invited a conspiracy theorist who works for an anti-Muslim organization to speak to the US Senate. The panelist, among other things, insisted that leading Muslim American civil rights organizations are infiltrated by terrorists.²² On the other side of Donald Trump in the presidential election, Hilary Clinton embraced Islamophobic rhetoric by asserting that “[w]e need American Muslims to be part of our eyes and ears on our front lines.”²³ These notorious comments illustrate the politicized version of private Islamophobia that flows throughout US politics.

¹⁹ Reena Flores, “Kris Kobach Says Trump Team Considering a Muslim Registry,” *CBS News*, November 17, 2016, <https://www.cbsnews.com/news/kris-kobach-says-trump-team-considering-a-muslim-registry/>.

²⁰ President Clinton said, “If you’re a Muslim and you love America and freedom and you hate terror, stay here and help us win and make a future together. We want you.” See, Paul Shinkman, “Bill Clinton’s Muslim Reference Criticized as No Different Than Trump,” *US News*, July 27, 2016, <https://www.usnews.com/news/articles/2016-07-27/bill-clintons-muslim-reference-criticized-as-no-different-than-trumps-policies>.

²¹ David Graham, “Gingrich’s Outrageous Call to Deport All Practicing U.S. Muslims,” *The Atlantic*, July 15, 2016, <https://www.theatlantic.com/politics/archive/2016/07/newt-gingrich-sharia-nice/491474/>.

²² Alex Emmons and Zaid Jilani, “Ted Cruz Brings Anti-Muslim Conspiracy Theorist to Testify at Senate Hearing,” *The Intercept*, June 29, 2016, <https://theintercept.com/2016/06/29/ted-cruz-brings-anti-muslim-conspiracy-theorist-to-testify-at-senate-hearing/>.

²³ Mohamed Hassan, “Muslim Americans Express Disappointment Over 2016 Debate Rhetoric Tying Muslims to Terrorism,” *NBC News*, October 10 2016, <https://www.nbcnews.com/news/asian-america/muslim-americans-express-disappointment-over-debate-rhetoric-tying-muslims-terrorism-n663431>.

Anti-Muslims rhetoric and acts by private actors are increasingly observable for Muslims and non-Muslims in partisan language, campaign platforms, and individual actions. Muslim Americans must navigate these incidents daily and non-Muslims regularly witness (or may engage in) these happenings in person or through media. Accordingly, bias-based attacks, discrimination by private actors, political rhetoric, hate speech, and the like are often the focus of conversations on Islamophobia.

Though there is an evident emphasis on private Islamophobia, Islamophobia is not solely executed at the hands of private actors. In fact, institutionalized Islamophobia often exacts more damage.²⁴ This form of Islamophobia operates in formal law and policy.²⁵ It is “deeply embedded” in the United States legal system and frames “Islam as un-American and oppositional, and Muslims as suspicious and unassimilable.”²⁶ Consequently, institutionalized Islamophobia has permitted the classification of Islam as a threat and, as discussed in this paper, also encouraged the criminalization of Muslims, which in turn allows a different set of laws, or lack of laws, to govern Muslims’ interactions with law enforcement and the criminal justice system altogether.

To illustrate the forms of Islamophobia described above, I want to provide two examples that personally affect me as I sit writing this paper. First, a mosque that I recently attended, and will soon regularly attend, was infiltrated with armed anti-Muslim fanatics who trespassed through the mosque with their children, taking materials from the place of worship, and

²⁴ Khaled Beydoun, “Islamophobia: Toward a Legal Definition and Framework,” *Columbia Law Review Online* 116, (2016): 114.

²⁵ Beydoun, “Political Islamophobia,” 1738.

²⁶ *Id.*

screaming at congregants that they worship Satan and molest children.²⁷ The adults also encouraged their children to trespass, at one point jumping on a funeral van and yelling anti-Muslim rhetoric.²⁸ Simultaneously, in Georgia where I attend Emory University, police officers received a training session labeled “Islam in America” by a known anti-Muslim individual, former Woodstock Police Chief David Bores, who is entirely unqualified to provide such trainings.²⁹ In a previous training session called “What We Don't Know About Mosques,” Bores told police officers to “think of a mosque as an armory” because “mosques have traditionally been used for military purposes.”³⁰ Adding insult to injury, Muslims were kept from attending the event while other community members were invited.

These examples foremost demonstrate how Islamophobia is inescapable for Muslim Americans, and secondly illustrate the difference between private and institutionalized Islamophobia. Trespassing, vandalizing, or threatening Muslims is a form of strictly private Islamophobia. A government endorsed training is a form of institutionalized Islamophobia, and moreover, fits into the subset of *criminalization* as the government institution was law enforcement and the training *as a state action* further endorsed the notion that Muslims are predisposed to criminal acts.

²⁷ Maria Polletta, “Kids in Tow, Women Mock Muslims Inside Tempe Mosque,” *AZ Central*, March 14, 2018, <https://www.azcentral.com/story/news/local/tempe/2018/03/14/facebook-live-video-2-women-take-items-slur-muslims-mosque-tempe/422724002/>; See also, Rowaida Abdelaziz, “2 Women Who Took Children To Vandalize An Arizona Mosque Are Arrested,” *Huffington Post*, March 16, 2018, https://www.huffingtonpost.com/entry/tempe-women-arrested-mosque-theft_us_5aaaff19e4b0337adf826764.

²⁸ <https://www.nytimes.com/2018/03/16/us/women-mosque-video-arizona.html>

²⁹ Ellen Eldridge, “‘Islam in America’ Course Not Approved Yet For Credit,” *The Atlanta Journal-Constitution*, March 9, 2018, <https://www.ajc.com/news/local/sheriff-backdoor-ban-keeps-muslims-from-police-training-says-cair-director/4sve2Dk7QMztdZxaz3FSSM/>.

³⁰ Savannah Brock, “Barrow Sheriff Responds to ‘Islam in America’ Training,” March 6, 2018, *11 Alive News*, <http://www.11alive.com/article/news/barrow-sheriff-responds-to-islam-in-america-training/85-525958663>.

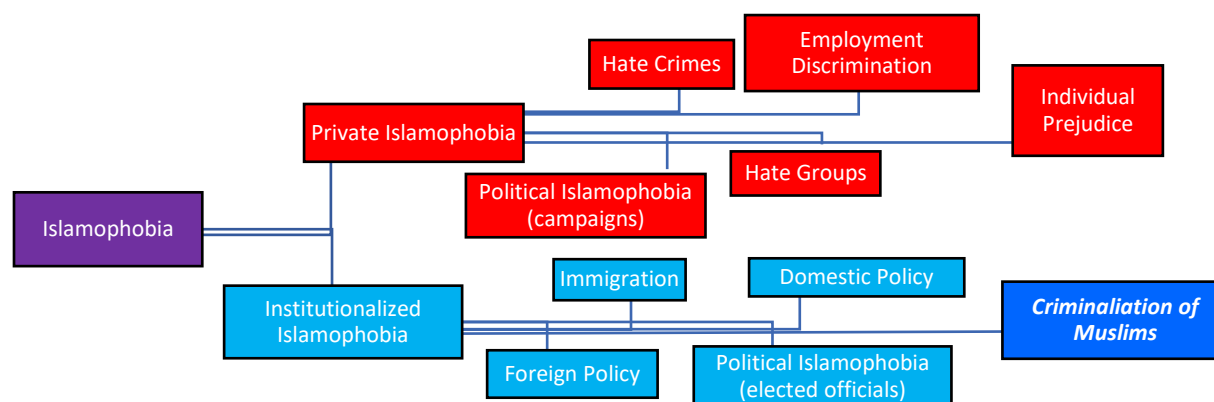


Figure 1. The Different Categories and Subcategories of Islamophobia.

As shown in Figure 1, institutionalized Islamophobia includes many subcategories, only one of which is centered in the criminal justice system. Outside of the criminalization context, other instances of institutionalized forms include the attempts and successful passages of anti-Muslim legislation such as anti-Sharia laws and hijab bans.³¹ Other instances include religious discrimination by police departments and other government institutions as far as employment and lack of accommodations for religious dress and grooming practices.³² Institutionalized forms also include the Muslim Ban, and other types of discriminatory immigration policies and

³¹ “Anti-Sharia Law Bills in the United States,” *Southern Poverty Law Center*, February 5, 2018, <https://www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law-bills-united-states>. See also, Lindsey Bever “After Outcry, Georgia Lawmaker Abandons Bill That Would Have Banned Muslims From Wearing Veils,” *Washington Post*, November 18, 2016, https://www.washingtonpost.com/news/acts-of-faith/wp/2016/11/18/after-outcry-georgia-lawmaker-abandons-bill-that-would-have-banned-muslims-from-wearing-veils/?utm_term=.15c11427553f.

³² For one example of a police department refusing accommodations, see Encarnacion Pyle and Mark Ferenchik, “Somali Police Recruit Leaves Class Over Head-Scarf Rule,” *Columbus Dispatch*, April 28, 2015, <http://www.dispatch.com/content/stories/local/2015/04/28/head-scarves-debated-after-somali-police-recruit-exits.html>. For other examples outside of police departments, see the prison context in *Holt v. Hobbs*, 134 S. Ct. 1512 (2014) and transportation systems in *United States v. New York Transit Authority*, Department of Justice Settlement, available at <https://www.justice.gov/iso/opa/resources/9542012530151150240444.pdf>.

practices, as well as the proposed Muslim registration.³³ Further significant examples are the countless zoning battles against constructing mosques and other Muslim religious edifices including funeral homes and cemeteries.³⁴ Professor of law and social justice scholar, Sahar Aziz explains, “Many towns have pressured local governments to bar mosques constructions and expansions on grounds that they are terrorist breeding centers.”³⁵ Furthermore, institutionalized Islamophobia is embedded in foreign policies and military strategies that permit or perpetuate the mistreatment of Muslims abroad as showcased in matters such as the inhumane detention of persons at Guantanamo Bay,³⁶ torture committed in black site locations,³⁷ and drone strikes resulting in incredible loss of civilian life in Pakistan, Afghanistan, and other Muslim-majority countries.³⁸

Separate from these various institutionalized forms stands the subset of institutionalized Islamophobia within the criminal justice system that I term the “Criminalization of Muslims.” Here, Islamophobic stereotypes of Muslims are the foundation of government suspicion of Islam and Muslims that drive current counterterrorism policies and practices.³⁹ Beydoun explains that the “institutionalization of the presumption that Muslim Americans are engaged in terror classified them as a segment of the polity that requires special policing, which then justifies the emaciation of Muslim Americans’ Free Exercise rights.”⁴⁰ The laws, policies, and practices that

³³ See generally, Beydoun, “Political Islamophobia.”

³⁴ For example, see Max Blau, “Georgia County Fights Plans For Mosque,” *CNN*, August 24, 2016, <https://www.cnn.com/2016/08/23/us/georgia-town-mosque-fight/index.html>.

³⁵ Aziz, “Policing Terrorists,” 187.

³⁶ “Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba,” *Center for Constitutional Rights*, 2007, https://ccrjustice.org/sites/default/files/assets/Report_ReportOnTorture.pdf.

³⁷ Larry Siems, “Inside the CIA’s Black Site Torture Room,” *The Guardian*, October 9, 2017, <https://www.theguardian.com/us-news/ng-interactive/2017/oct/09/cia-torture-black-site-enhanced-interrogation>.

³⁸ “*Counting Drone Strike Deaths*,” *Columbia Law School*, 2012, <http://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIACountingDronesFinal.pdf>.

³⁹ Beydoun, “Political Islamophobia,” 1747.

⁴⁰ Beydoun, “Acting Muslim,” 25.

sculpt the criminalization of Muslims are incredibly powerful and dangerous aspects of Islamophobia. This criminalization in turn feeds other forms of private and institutionalized Islamophobia, creating a vicious and violent cycle for Muslim Americans.⁴¹

Thus, by virtue of institutionalized Islamophobia, government actors and agencies through law and policy employ Islamophobia on a systematic level. As another definition showcases, while private forms are the first to come to mind, Islamophobia includes conduct by institutions, including law enforcements: “general suspicion, physical attacks against mosques and Muslim individuals, and discriminatory behavior by state agencies especially the police against Muslim communities.”⁴² Put another way, institutionalized Islamophobia is displayed in “various laws, policies, and practices that effectively signal to the public that ‘those’ Muslims are forever foreign, disloyal and unworthy of empathy because ‘they’ want to kill and terrorize ‘us’ Americans, thereby relegating Muslims to second-class citizenship.”⁴³ This form of government sponsored Islamophobia inflicts stigmatic and dignitary harms on Muslim Americans, in addition to deterring them from participating in “religious and cultural practices that define them.”⁴⁴ In order to address this form of Islamophobia, one must “collapse an analytical wall between private and structural Islamophobia that perpetuates the latter as a legitimate form of Islamophobia.”⁴⁵ Too often, institutionalized Islamophobia is justified in the name of the War on Terror which in turn allows Muslims to be criminalized. Legitimized by national security language, such unjust criminalization propagates within the criminal justice system and feeds stereotypes of Muslims as violent threats, furthering private bias-based incidents. Both forms of

⁴¹ Id. at 17.

⁴² Ali Rattansi, *Racism: A Very Short Introduction* (Oxford: Oxford University Press, 2007), 108.

⁴³ Aziz, “Policing Terrorists,” 180.

⁴⁴ Id. at 180-181; Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, *Brooklyn Law Review* 77 (2011): 64-67.

⁴⁵ Beydoun, “Islamophobia,” 124.

Islamophobia insist that the conversation focus on national security and terrorism. However, to better protect and support Muslim Americans, the policing, prosecution, and imprisonment of Muslims should be framed in a criminal justice reform context.

I argue in this thesis that by framing the criminalization of Muslims as a criminal justice issue, advocates and communities may combat the systematic way in which law enforcement continues to legitimize such forms of Islamophobia in the criminal justice system. Moreover, we may begin viewing such institutionalized Islamophobia as a form of systematic discrimination that overlaps with other criminal justice reform issues – squarely a criminal justice problem that must be addressed as such. Thus, by defining and framing such issues as criminal justice centered and utilizing the term Criminalization of Muslims, scholars, advocates, and communities are given a meaningful tool to more efficiently discuss and combat this form of Islamophobia. Next, in Part II, I further define Criminalization of Muslims and review the laws and policies that sparked and fueled the process of criminalizing Muslim Americans.

Part II: Criminalization of Muslims: History and Definition

As discussed in Part I, the criminalization of Muslims is a major subset of institutionalized Islamophobia. I define “criminalization of Muslims” as follows: the criminal justice system, law enforcement, and counterterrorism policies and practices that disproportionately and aggressively target Muslim Americans via policing, prosecution, and imprisonment with a distinct lack of regard for civil liberties. Markedly, preventative policing and preventative prosecutions are a signature part of this criminalization, as is the inhumane

imprisonment and excessive detention disproportionately impacting Muslim Americans. Each of these are highlighted in the next section, Part III.

Criminalization of Muslims takes place at the hands of law enforcement within the United States. It appeals to protections normally afforded in the criminal justice system such as the First, Fourth, Fifth, Sixth, and Fourteenth Amendments, especially the Due Process and Equal Protection. Such criminalization consists of the following legal issues: religious and racial profiling; surveillance and other information gathering tactics; law enforcement mapping; the use of informants and undercover officers; law enforcement interviews; police community engagement and outreach ploys; the No-Fly List and other government watchlists; entrapment; prosecutions of vulnerable persons; preemptive prosecutions; lengthy prison sentences for non-violent crimes; fair trial rights; pretrial imprisonment; solitary confinement; inhumane prison conditions; and protracted detention at borders and airports.

In this section, I offer a brief history on the contemporary criminalization of Muslims starting with September 11, 2001, up until present day. Notably, this criminalization process is often cloaked in national security and foreign terrorist threat rhetoric. However, the actual victims of this state action are Muslim Americans, their families, and their communities. Additionally, here I explore the radicalization theory in more detail because this theory is central to many aspects of the current and ongoing criminalization paradigm especially coloring law enforcement's mindset regarding Muslims and Islam.

A. Backlash Since 9/11

After September 11, 2001, the reaction was severe against Muslims inside and outside of the United States. Backlash took many forms, from bias-based harassment to vandalism to the murder of Muslims and individuals mistaken for Muslims. However, backlash was also present in state action within the US. Most notably, the USA PATRIOT Act was swiftly enacted on October 21, 2001. The Act skirted around the Fourth Amendment in order to implement “unprecedented surveillance and religious-profiling programs.”⁴⁶ It also removed crucial restrictions between law enforcement and intelligence agencies, such as the Central Intelligence Agency (CIA), the Department of Justice (DOJ), and the National Security Agency (NSA). Across the board, the USA PATRIOT Act increased state surveillance power, especially federal electronic surveillance.⁴⁷ At the same time, other federal agencies significantly relaxed their investigative guidelines and began implementing dragnet approaches to the policing of Muslim American communities.⁴⁸ Dragnet approaches, also termed fishing expeditions, are methods of policing where law enforcement systematically target Muslims for questioning, screening, or surveillance. Examples of such disproportionate dragnet targeting of Muslims by law enforcement include the large number of Muslims chosen without suspicion for “voluntary” interviews by law enforcement and immigration officers, the excessive amount of surveillance resources directed at Muslims as opposed to other demographic groups, the unspecific and open-ended mass collection of average Muslims’ internet activities, and the overwhelming number of National Security Letters sent to businesses with Muslim clients.⁴⁹ Such fishing expeditions take

⁴⁶ Beydoun, “Political Islamophobia,” 1749.

⁴⁷ Beydoun, “Acting Muslim,” 27.

⁴⁸ Aziz, “Policing Terrorists,” 185.

⁴⁹ “Illusion of Justice: Human Rights Abuse in US Terrorism Prosecutions,” *Human Rights Watch and Columbia Law School Human Rights Institute* (2014): 28-29, 32. Report available at

place without any reasonable suspicion that a person has the propensity to commit violence or a crime in general.⁵⁰ Meanwhile, Aziz points out that law enforcement has yet to use such forms of policing against “Christian evangelical communities that staunchly oppose abortion” or “far-right Christian communities that stockpile weapons because they wish to overthrow the government.”⁵¹ In fact, from 2008 to 2016, at least twice as many more domestic terrorist attacks or plots were carried out by ring-wing extremists than so-called Islamic extremists.⁵² Significantly, 48% of so-called Islamic extremists incidents were actually law enforcement sting operations, dramatically bloating the number of “Muslim-related” incidents, while markedly the rate of sting operations for domestic non-Islamic extremists were *more than four times less than that* of so-called Islamic extremists. Therefore, even though Muslims constitute just a fraction of the population and represent a small portion of domestic terrorism threats, Muslim Americans are policed by a wholly disproportionate amount of resources (including but not limited to tax dollars, informants, surveillance, and law enforcement agents) as opposed to far-right wing organizations, white supremacists, and hate groups, or white people or Christians to be more analogists to Muslims as an entire group being targeted.⁵³

Muslim Americans quickly became the disproportionate targets of increased surveillance and terrorism prosecutions after 9/11.⁵⁴ In 2002, the Department of Homeland Security (“DHS”)

http://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/final_report_-_illusion_of_justice.pdf.

⁵⁰ Id. at 23.

⁵¹ Id. at 27-28.

⁵² “Homegrown Terrorism Database,” Center for Investigative Reporting, compiled by The Investigative Fund at The Nation Institute, database accessible at <https://apps.revealnews.org/homegrown-terror/>.

⁵³ “Congressional Report Highlights Gaps in U.S. Domestic Terrorism Policy,” *Southern Poverty Law Center*, January 2, 2018, <https://www.splcenter.org/hatewatch/2018/01/02/congressional-report-highlights-gaps-us-domestic-terrorism-policy>. See also, Sarah Ruiz-Grossman, “Most of America’s Terrorists are White and Not Muslim,” *Huffington Post*, August 23, 2017, https://www.huffingtonpost.com/entry/domestic-terrorism-white-supremacists-islamist-extremists_us_594c46e4e4b0da2c731a84df.

⁵⁴ Beydoun, “Acting Muslim,” 29.

was created in order to aggressively execute the USA PATRIOT Act.⁵⁵ That same year the National Security Entry Exit Registration System (“NSEERS”) was implemented, further targeting Muslims in the US.⁵⁶ Also in 2002, the Federal Bureau of Investigation (“FBI”) guidelines were considerably altered to give the agency more power.⁵⁷

In 2005, during the second term of the George W. Bush administration, homegrown terrorism fears grew along with counter-radicalization.⁵⁸ Homegrown terrorists, or Homegrown Violent Extremists, are defined by the FBI as “global-jihad-inspired individuals who are based in the U.S., have been radicalized primarily in the U.S., and are not directly collaborating with a foreign terrorist organization.”⁵⁹ Put another way, a Muslim in America who is not a terrorist but then goes through a *radicalization process* to become a terrorist. Hence, with increased fear mongering and political rhetoric, Muslim Americans faced a new threat: the creation and implementation of *the radicalization theory*.⁶⁰ The radicalization theory essentially articulates a step-by-step process on how a Muslim in America transforms into a homegrown terrorist. In 2006, the FBI issued an intelligence assessment titled, *The Radicalization Process: From Conversion to Jihad*. The following year, the City of New York Police Department (“NYPD”) published a 100-page public report titled, *Radicalization in the West: The Homegrown Threat*. The radicalization theory and these two law enforcement reports will be discussed in more depth in the following section on radicalization.

⁵⁵ Beydoun, “Political Islamophobia,” 1749.

⁵⁶ Id.

⁵⁷ Amna Akbar, “Policing ‘Radicalization,’” *UC Irvine Law Review* 3 (2013): 847.

⁵⁸ Aziz, “Policing Terrorists,” 163-164.

⁵⁹ “Terrorism,” US Federal Bureau of Investigation, accessed March 29, 2018, <https://www.fbi.gov/investigate/terrorism>.

⁶⁰ For more information on fear mongering and a more than \$40 million-dollar network pushing Islamophobia and so-called Islamic terrorists fears from 2001-2011, see Wajahat Ali, Eli Clifton, Matthew Duss, Lee Fang, Scott Keyes, and Faiz Shakir, “Fear, Inc.: The Roots of the Islamophobia Network in America,” *Center for American Progress*, August 2011, <https://cdn.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf>.

In 2008, George W. Bush left the office of the president and the Barack Obama administration began implementing changes in terms and rhetoric within counterterrorism policy. Likely the most memorable change in word choice was his refusal to use the term “radical Islam.”⁶¹ However, the changes in language did not necessarily correspond to changes in policy and practice.⁶² Notably, in 2008, the guidelines governing the FBI were changed for the second time since 9/11, which permitted “the FBI to exercise greater power with fewer procedural constraints or suspicion thresholds.”⁶³ Then, a new counterterrorism program permanently altered the policing of Muslim Americans: Countering Violent Extremism (CVE).

Although the NYPD started using CVE forms of policing in 2002, the national roll out of these policing policies and practices did not occur until after President Obama took office.⁶⁴ The new administration fully implemented the CVE Program within the first couple years. In 2011, the strategic implementation plan, *Empowering Local Partners to Prevent Violent Extremism in the United States*, declared the new employment of government programs purportedly “supporting community-based approaches to ‘countering violent extremism.’”⁶⁵ Notably, the title included the word *violent* in order to highlight the program’s focus on persons participating in and plotting acts of violence. Otherwise, the term *extremism* alone “connotes lawful political dissent.”⁶⁶ Accordingly, countering extremism without the word violent would be countering a First Amendment right to political dissent. Disconcertingly, in Part III, I highlight that in many *extremism* cases, violence is clearly absent, particularly with material support charges.

⁶¹ Larisa Epatko, “Obama Explains Why He Doesn’t Use ‘Radical Islam,’” *PBS News Hour*, June 14, 2016, <https://www.pbs.org/newshour/world/watch-live-obama-statement-on-countering-violent-extremism>.

⁶² Trevor McCrisken, “Ten Years On: Obama’s War on Terrorism in Rhetoric and Practice,” *International Affairs* 87, no. 4 (July 2011): 781-801.

⁶³ Akbar, “Policing ‘Radicalization,’” 847.

⁶⁴ Beydoun, “Acting Muslim,” 4.

⁶⁵ Akbar, “Policing ‘Radicalization,’” 822-23.

⁶⁶ Aziz, “Policing Terrorists,” 167.

Though a significant policy change, the CVE program did not so much move away from the electronic surveillance of the past administration, as it instead added an additional tool to the counterterrorism kit: “deputized, on-the-ground watchdogs.”⁶⁷ With this action, the Obama administration shifted counterterrorism from the federal to the local level. Beydoun describes the administration’s move as “retrench[ing] the unchecked federal surveillance authority that hallmarked the Bush Era counterterror program” while “usher[ing] in a paradigm that shifted the eyes of the state from the federal to the local level.”⁶⁸ This action further required cooperation between federal, state, and local law enforcement.

One of the biggest issues surrounding CVE programs is the impact they had on local law enforcement and direct interactions between the government and Muslim American communities. A key component of these new counterterrorism policies was to recruit local law enforcement and implement community engagement tactics. The first known CVE programs started to provide federal policing tools to local law enforcement in Los Angeles, Minneapolis, and Boston in 2014. These three cities have large Muslim populations and notably have large indigent Muslim communities.⁶⁹

CVE programs are almost, if not entirely, focused on Muslims.⁷⁰ Although, CVE also outlined neo-Nazis, hate groups, white supremacists, and international and domestic terrorist groups generally, in reality CVE is not interested in policing or prosecuting other types of violent extremism or domestic terrorism radicalization.⁷¹ Beydoun emphasizes that “radicalization is functionally framed by DHS as a purely Muslim phenomenon adding CVE Policing to the corpus

⁶⁷ Beydoun, “Acting Muslim,” 32.

⁶⁸ *Id.* at 30.

⁶⁹ Beydoun, “Political Islamophobia,” 1754.

⁷⁰ Beydoun, “Acting Muslim,” 31.

⁷¹ *Id.*

of state surveillance and policing programs dedicated entirely to preventing and punishing Muslim threats – real and imagined.”⁷² The new program *explicitly* connected radicalization with the Muslim identity.⁷³ Observant Muslims, converts to the faith, and those individuals with a previously secular-leaning lifestyle who began embracing a more religious identity became policing targets. Muslim Americans who criticized the US as far as domestic or foreign policy, including the war in Iraq and other human rights violations, or those critical of Islamophobia or racism, became targets of policing, including surveillance, use of informants, and other investigative tactics.

It is important to note that the definition of countering violent extremism changes depending on which government agency is executing an action. Thus, the government and other supporters of counter-radicalization policies started using the term *community engagement* to describe essentially the same activities.⁷⁴ Community engagement was and continues to be a counter-radicalization “tactic and a preventative component of the prosecution-driven counterterrorism strategy.”⁷⁵ Moreover, the term *community policing* has also been popularized and implemented as another preferred term. However, regardless of whether the words employed are countering violent extremism, community engagement, or community policing, these terms describe the same thing: “the federal government’s preventative, ideologically based counterterrorism programs.”⁷⁶ These terms each embrace the radicalization theory which offers legitimacy to Islamophobic sentiment and reinforces harmful Muslim stereotypes.⁷⁷

⁷² Beydoun, “Political Islamophobia,” 1754.

⁷³ Id. at 1753.

⁷⁴ Aziz, “Policing Terrorists,” 167.

⁷⁵ Id. at 167-168. See also, “Countering Violent Extremism,” *The Brennan Center for Justice*, 2017, https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20CVE%20Report_0.pdf.

⁷⁶ Aziz, “Policing Terrorists,” 168.

⁷⁷ Akbar, “Policing ‘Radicalization,’” 876.

Donald Trump was elected president after running an anti-Muslim campaign that promised a Muslim ban, closing some mosques, and increasing surveillance of Muslim communities. He also argued that the family of suspected terrorists should be targeted and killed, and he declared that “Islam hates us!”⁷⁸ Notably, the new administration has struggled with transparency. It is public knowledge that the administration considered changing the CVE program to the Countering Islamic Extremism (CIV) program in order to focus exclusively on Muslims in both name and practice.⁷⁹ In lieu of changing the name, however, the Trump administration pulled the funding of programs combating white supremacy and far-right extremism.⁸⁰ DHS also pulled funding for Muslim community organization and redirected the funding to additional law enforcement programs.⁸¹ Accordingly, the CVE program has been tailored to only target Muslims, to pull away from community partnerships with Muslim leadership, and to more aggressively fund local police departments.⁸² In reality, this means that the information and events documented in this thesis will only increase and intensify in the years to come.

Under this new administration, homegrown terrorism has been portrayed as a growing and immediate concern facing Americans each day. However, it is worth pointing out that while prosecutions for homegrown terrorism have averaged roughly six prosecutions each year since

⁷⁸ Tom LoBianco, “Donald Trump on Terrorists: ‘Take Out Their Families,’” *CNN*, December 3, 2015, <https://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/index.html>. See also, Jenna Johnson and Abigail Hauslohner, “I Think Islam Hates Us’: A Timeline of Trump’s Comments About Islam and Muslims,” *Washington Post*, May 20, 2017, https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.a308e7595926.

⁷⁹ Julia Edwards Ainsley, Dustin Volz, and Kristina Cooke, “Exclusive: Trump To Focus Counter-Extremism Program Solely on Islam,” *Reuters*, February 1, 2017, https://www.reuters.com/article/us-usa-trump-extremists-program-exclusiv/exclusive-trump-to-focus-counter-extremism-program-solely-on-islam-sources-idUSKBN15G5VO?feedType=RSS&feedName=topNews&utm_source=twitter&utm_medium=Social.

⁸⁰ Jennifer Hansler, “DHS Shifts Focus of Funding To Counter Violent Extremism,” *CNN*, July 4, 2017, <https://www.cnn.com/2017/07/01/politics/cve-funding-changes/index.html>.

⁸¹ *Id.*

⁸² *Id.*

9/11, homegrown terrorism was a much larger problem in the late 20th century.⁸³ For example, in the 1970s, an average of sixty to seventy terrorist incidents occurred within the US each year. The number of terrorism incidents was fifteen to twenty times that seen in the years after 9/11.⁸⁴ In the 1970s, hundreds of terrorist bombings, hijackings, and shootings were executed in contrast to roughly twenty-five terrorist attacks between 2001-2015 committed by terrorists with assorted ideologies including so-called Islamic terrorists, white supremacists, and anti-government radicals.⁸⁵ Terrorists killed 184 and injured more than 600 people in the 1970s, as opposed to, from 2001-2015, terrorists killed seventy-four people in the United States. Notably, in the 1970s, terrorism was not considered a “Muslim problem.”

Studies have in fact found no evidence that Muslim Americans are growing “more radical.”⁸⁶ Religion is increasingly shown to not be linked with terrorism at all. A study completed by Britain’s security service M15 that attempted to study the connection between terrorism and understandings of Islam, found that “[f]ar from being religious zealots, a large number of those involved in terrorism do not practice their faith regularly. Many lack religious literacy and could actually be regarded as religious novices.”⁸⁷ Markedly, evidence instead

⁸³ Faiza Patel, “Rethinking Radicalization,” *The Brennan Center for Justice* (2011): 5-6. Report available at <https://www.brennancenter.org/sites/default/files/legacy/RethinkingRadicalization.pdf>.

⁸⁴ *Id.*

⁸⁵ Peter Bergen, “The Golden Age of Terrorism,” *CNN*, August 21, 2015, <https://www.cnn.com/2015/07/28/opinions/bergen-1970s-terrorism/index.html>. Article cites to the project, “Terrorism in America After 9/11,” New America, available at <https://www.newamerica.org/in-depth/terrorism-in-america/part-i-overview-terrorism-cases-2001-today/>.

⁸⁶ Patel, “Rethinking Radicalization,” 6. See also additional studies compiled by the Brennan Center for Justice elsewhere in their report that complement the Rand Study findings.

⁸⁷ *Id.* at 10. Patel directly quotes Alan Travis with the Guardian who reported on the M15 study. The M15 study itself is not available however the Guardian reported extensively on its contents. See, Alan Travis, “MI5 Report Challenges Views on Terrorism in Britain,” *The Guardian*, August 20, 2008, <https://www.theguardian.com/uk/2008/aug/20/uksecurity.terrorism1>.

shows that a “well-established” religious identity guards an individual against violent radicalization.⁸⁸ The Brennan Center for Justice emphasized the following points:

Overall, the available research does not support the view that Islam drives terrorism or that observing the Muslim faith – even a particularly stringent or conservative variety of that faith – is a step on the path to violence. In fact, that research suggests the opposite: Instead of promoting radicalization, a strong religious identity could well serve to inoculate people against turning to violence in the name of Islam.⁸⁹

Next, with this in mind, I explore the radicalization theory discussed above in more detail in order to highlight the criminal justice system’s role in perpetuating the criminalization of Muslims.

B. The Misunderstandings of the Radicalization Theory

Radicalization theory was developed to counter the alleged growing threat of homegrown terrorists – Americans, or persons residing in the US, who were radicalized within this country and learned terrorist tactics either here or abroad.⁹⁰ Although the threat of Muslim Americans transforming into homegrown terrorists is very small, the radicalization theory rapidly grew in popularity as a state policy priority and concept more generally.⁹¹ Radicalization theory consists of four clear stages of progression that mark an individual’s ascent from a non-terrorist Muslim to a violent terrorist. The theory advocates that the road from Muslim to violent terrorist is “a

⁸⁸ Patel, “Rethinking Radicalization,” 10.

⁸⁹ Id.

⁹⁰ Id. at 5. Patel directly quotes Homeland Security statement made by Janet Napolitano. See, “Nine Years After 9/11: Confronting the Terrorist Threat to the Homeland,” *Hearing Before the Senate Committee on Homeland Security and Governmental Affairs*, 2010, http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=8cd9834b-6c0a-4d14-821d-42bfa35e0092.

⁹¹ Patel, “Rethinking Radicalization,” 5; Akbar, “Policing ‘Radicalization,’” 818.

predictable one produced by or correlated with religious and political cultures of Muslim communities.”⁹² It has been widely accepted by the law enforcement community in the US.

In publicizing this theory, first the FBI issued the aforementioned intelligence assessment titled, *The Radicalization Process: From Conversion to Jihad*, in 2006. In the report, the FBI claims to be able to identify and predict the process by which a Muslim American becomes a terrorist. The radicalization process has four stages: pre-radicalization, identification, indoctrination, and action. Each stage consists of signature factors that function like radicalization road signs. The following year the NYPD published the 100-page public report titled, *Radicalization in the West: The Homegrown Threat*, that reflects the FBI’s 2006 report with similar stages and markers with much greater detail. Much of US law enforcement’s perception of the radicalization theory, including the FBI itself, is based on the material provided in the NYPD report.⁹³

The FBI and NYPD have slightly differing titles for each stage, but each are essentially the same. Each stage offers multiple signature factors that mark progression in the radicalization process. For the first stage, the NYPD report states the following are some of the signature factors: “[m]iddle class families and students” and “the bored and/or frustrated, successful college students, the unemployed, the second and third generation, new immigrants, petty criminals, and prison parolees.”⁹⁴ At the first stage, gender, ethnicity, and race, along with concentrated Muslim neighborhoods, are suspect.⁹⁵ The report warns that “[e]nclaves of ethnic populations that are largely Muslim often serve as ‘ideological sanctuaries’ for the seeds of radical thought.”⁹⁶ It goes

⁹² Akbar, “Policing ‘Radicalization,’” 811.

⁹³ Patel, “Rethinking Radicalization,” 14.

⁹⁴ Mitchell Silber and Arvin Bhatt, “Radicalization in the West: The Homegrown Threat,” *NYPD Report* (2007): 22.

⁹⁵ *Id.*

⁹⁶ *Id.*

on to note that a level of acceptance of extremism exists within Muslim communities: “Within diaspora Muslim communities in the West, there is a certain tolerance for the existence of the extremist subculture that enables radicalization.”⁹⁷ Muslims with “ordinary” lives from “varied” ethnic background and also converts, mostly male but also female, between the ages of fifteen and thirty-five years old are suspect under stage one.⁹⁸ The report warns: “Radicalization is indiscriminate and those attracted to it include New York City citizens from all walks of life, ranging from university students, engineers, business owners, teachers, lawyers, cab drivers to construction workers.”⁹⁹ Basically, *Muslim Americans* are suspect.

In the second stage, the police report states that the following are also concerns: “pilgrimage to Mecca,” “[g]rowing a beard,” and “pa[ying] off the mortgage on [one’s] house because Islam forbids paying interest on loans.”¹⁰⁰ An individual who becomes “born-again” or has a “‘religious’ renewal” of their faith is suspect.¹⁰¹ The NYPD report states that Muslims who have experienced “alienation, discrimination, racism – real or perceived” are suspect.¹⁰² In this stage, religious beliefs and practices and other First Amendment activity become predictors of criminality.¹⁰³ The Muslim identity becomes equated with a predisposition for violence. Religious head coverings or traditional styles of cultural clothing are markers.¹⁰⁴ Proselytizing, praying, or attending religious study are also all markers of progression in radicalization.¹⁰⁵ Here, religious practices that are unrelated to a suspicion of criminal activity become a reason to

⁹⁷ Id.

⁹⁸ Id. at 22-29.

⁹⁹ Id. at 67.

¹⁰⁰ Id. at 31. See, Akbar, “Policing ‘Radicalization,’” 827, quoting the FBI report, not made public but later leaked: *The Radicalization Process: From Conversion to Jihad* (2006).

¹⁰¹ Id. at 30.

¹⁰² Id. at 7.

¹⁰³ Id. at 30-35. See, Akbar, “Policing ‘Radicalization,’” 835.

¹⁰⁴ Silber and Bhatt, “Radicalization in the West,” 31. See, Akbar, “Policing ‘Radicalization,’” 827, quoting “Radicalization Process,” *FBI Report*.

¹⁰⁵ Akbar, “Policing ‘Radicalization,’” 827, quoting “Radicalization Process,” *FBI Report*.

suspect criminality.¹⁰⁶ Likewise, giving up or cutting back on habits such as smoking cigarettes, drinking alcohol, or gambling is a red flag.¹⁰⁷ Many uneventful deviations in behavior such as no longer wearing “urban hip-hop gangster clothes” are indicators in the radicalization process too.¹⁰⁸ Of particular concern are any personal crises or struggles a Muslim may experience. The report lists the following: “the death of a family member, a parolee’s search for a new direction in life, a turn to religion as a means to dealing with life crises and disappointment or for atoning for past transgressions, and loneliness.”¹⁰⁹ Law enforcement officials who internalized this theory also perceive “dissent with mainstream American political discourse, and identification with other Muslims, as integral to radicalization.”¹¹⁰ Engaging in community issues and participating in public activism are additional signature factors.¹¹¹ The NYPD report lists becoming “involved in social activism and community issues” as another marker while the FBI report notes that a Muslim American’s “[f]requent attendance at a mosque or prayer group” or “[i]ncreased activity in a pro-Muslim social group or political cause” may be viewed as pre-criminal movements.¹¹²

The third and fourth stages are more tailored in their signatures in that these stages do not continue to flag a large number of everyday Muslim behaviors like the first and second stages do. Yet, the third stage also includes markers such as withdrawal from a mosque and the politicization of new beliefs.¹¹³ The report notes that sometimes this withdrawal may occur

¹⁰⁶ Id. at 835.

¹⁰⁷ Silber and Bhatt, “Radicalization in the West,” 31.

¹⁰⁸ Id.

¹⁰⁹ Id. at 30.

¹¹⁰ Amna Akbar, Policing “Radicalization” (2013), 835.

¹¹¹ Id.

¹¹² Silber and Bhatt, “Radicalization in the West,” 31. See, Akbar, “Policing ‘Radicalization,’” 827, quoting “Radicalization Process,” *FBI Report*.

¹¹³ Silber and Bhatt, “Radicalization in the West,” 36-37.

because “the individual’s level of extremism surpasses that of the mosque.”¹¹⁴ Other indicators in stage three include believing that the Iraqi war was an attack on Islam or the Muslim world.¹¹⁵ Muslims who have spent time in jail or prison are especially suspect in that the report labels prison a “Radicalizing Cauldron.”¹¹⁶

The fourth and final stage includes participating in “Outward Bound-like Activities” as signature factors.¹¹⁷ A person may reach the final stage of radicalizing into a homegrown terrorist by participating in activities such as “camping, white-water rafting, paintball games, [and] target shooting” because these common recreational pastimes are interpreted as possible terrorist training activities.¹¹⁸ The report notes that the final stage “which defines the actual attack--can occur quickly, and with very little warning” therefore intervention in previous stages are critical as the possible attack may occur within weeks of the second or third stage.¹¹⁹ In addition, during any of these stages, though specifically a marker in stage four, traveling abroad is viewed as potentially pre-criminal behavior and indicators of alarming progression.¹²⁰ Particularly traveling to a Muslim-majority country, not excluding visiting family or traveling for educational purposes, invites law enforcement attention, protracted border detention during the return trip, and placement on a No-Fly list.¹²¹

Law enforcement maintains that starting the process does not mean a Muslim will advance through each stage and ultimately become a violent terrorist. Still, the NYPD stresses that, after having entered the stage-by-stage process, “it does not mean that if one does not

¹¹⁴ Id. at 36.

¹¹⁵ Id.

¹¹⁶ Id. at 39.

¹¹⁷ Id. at 44.

¹¹⁸ Id.

¹¹⁹ Id. at 43.

¹²⁰ Id.

¹²¹ Id. at 43-44. See also, Akbar, “Policing ‘Radicalization,’” 836.

become a terrorist, he or she is no longer a threat.”¹²² Nevertheless, every Muslim will undoubtedly pass through at least one stage. Many Muslim Americans may easily check off signature factors in each stage by engaging in average non-threatening behavior, potentially becoming threats in the eyes of law enforcement.

Professor of criminal law and prominent scholar in the field of national security, Amna Akbar summarizes the conclusions of radicalization theory generally, and specifically the law enforcement reports on the topic, as follows: “Muslim religiosity and politicization predictably correlate with terrorism” and “Muslim collective spaces – where Muslim political and religious cultures would emerge – are sites for radicalization.” Regarding the 2007 NYPD report, Akbar stresses that law enforcement perceive radicalization concerns as justification to target the religious and political cultures of Muslim American communities.¹²³ Accordingly, finding a Muslim American who completed college without accomplishing the vast majority of the markers just described above would present a challenge.

A case in point. Due to the radicalization theory, law enforcement was alarmed when Muslim college students in a Muslim Student Association (MSA), a student organization located at many US colleges and universities, arranged a student group paintball outing. Similarly, a red flag went up when another MSA group organized a student white water rafting trip.¹²⁴ Information available in leaked police reports shows that law enforcement sent an undercover informant on this college rafting trip posing as a Muslim college student.¹²⁵ In the report, the undercover agent made a note that the students prayed at least four times a day as if this was

¹²² Id. at 84.

¹²³ Akbar, “Policing ‘Radicalization,’” 836.

¹²⁴ “Mapping Muslims: NYPD Spying and Its Impact on American Muslims,” *CLEAR Project* (2013), 8. Report available at <http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf>.

¹²⁵ Id. at 26.

relevant to criminal activity.¹²⁶ Based on police reports, some MSAs were targeted for surveillance, informants, and other policing tactics *specifically* because students planned such outdoor outings that had been identified as markers in the final stage of radicalization.¹²⁷ Akbar underscores that the “first three stages of radicalization are focused on where Muslims live and congregate, manifestations of religious and political beliefs, and social or religious activities.”¹²⁸ Therefore, the average Muslim college student who to any extent practices her or his faith, while starting to mature into different interests – maybe by parting ways with freshman partying habits, exploring politics for the first time, or becoming more engaged or disengaged from their religious community – may be viewed as progressing more than half-way to becoming a violent terrorist. Then, if they also participate in rafting or other common American outdoor pastimes that have been identified as red flags, they have now potentially in the eyes of law enforcement entered through every stage of radicalizing to become a potential homegrown terrorist.¹²⁹

Countless government agencies and law enforcement departments subscribe to the radicalization theory, although “no singular, official, government-wide understanding of radicalization” transcends all state agencies and law enforcement departments.¹³⁰ However, at least three concepts are consistent across the varying views on radicalization. First, the belief that radicalization is an *observable and predictable* process where a Muslim living in the United States transforms into a terrorist. Second, the *government has a role* to fulfill by surveilling and opposing radicalization. Third, the conclusion that radicalization is *a product of religious and*

¹²⁶ Id. at 40.

¹²⁷ Id.

¹²⁸ Akbar, “Policing ‘Radicalization,’” 836.

¹²⁹ Personally, having been an outdoor-loving Muslim college student, I would easily have checked boxes in all four stages of radicalization.

¹³⁰ Id. at 814.

political cultures within Muslim American communities.¹³¹ In other words, the US government, particularly law enforcement, views the religious and political cultures within Muslim communities as provoking radicalization in individuals.¹³²

The radicalization theory and counter-radicalization practices are almost, if not entirely, focused on Muslims and Islam.¹³³ This disproportionate focus on Muslim Americans is faulty given the continuous threat of domestic terrorism activities from non-Muslim individuals and groups.¹³⁴ Moreover, it is erroneous that “devoutness” in Muslim Americans is explicitly tied to threats of violence. These inaccuracies are found in resources, such as training materials and reports, still used by law enforcement including the FBI.¹³⁵ Even if the materials and reports themselves have started to collect dust, the conclusions and underlying concepts of the radicalization theory have helped to shape law enforcement interactions with Muslim communities taking place today and into the foreseeable future.

Despite its widespread appeal to law enforcement, the radicalization theory is inherently flawed and based on faulty methodology. Correspondingly, the theory is not likely to be effective as a counterterrorism approach. Law enforcement-sanctioned radicalization theories have been found to be unjustifiably reductionist and contrary to many research studies conducted by social scientists and psychologists, as well as government bodies.¹³⁶ For example, referring to the FBI report, Akbar has noted that in addition to “proposing what on its face seems a reductionist view of how someone might decide to commit any crime – let alone a crime of great magnitude – the

¹³¹ Id.

¹³² Id.

¹³³ Id. at 811, 820.

¹³⁴ “Murder and Extremism in the United States in 2017: An ADL Center on Extremism Report,” *Anti-Defamation League*, 2017, <https://www.adl.org/resources/reports/murder-and-extremism-in-the-united-states-in-2017>.

¹³⁵ Akbar, “Policing ‘Radicalization,’” 826.

¹³⁶ Patel, “Rethinking Radicalization,” 5.

twelve-page document includes almost no citations, sourcing, or indication of methodology.”¹³⁷

The NYPD report, which is widely relied on by other US law enforcement groups (including federal agencies) and provides much of the details on radicalization theory, hinged on insufficient data and faulty methods as well. After researching the theory, the Brennan Center for Justice found the following:

Contrary to social science norms, the NYPD Report fails to consider whether the religious conduct and expressive activity that it characterizes as early signatures of radicalization occur with any more frequency among terrorists than among all American Muslims. Compounding this flaw, the innocuous nature of many of the signatures identified by the NYPD – such as growing a beard or becoming involved in community activities – means that they are likely to be found in a large segment of the American Muslim populations. If the NYPD (or other agencies that rely on the report) were to attach significance to these types of markers, they would be monitoring a very large set of people without much likelihood of finding terrorists.¹³⁸

Moreover, this popular law enforcement report uses only eleven hand-picked cases, of which only five are US cases, in order to make conclusions on wide-ranging segments of the US Muslim population.¹³⁹ Of the five US cases, none involved the commission of a violent crime and all but one appeared to lack any intention to commit violence.¹⁴⁰ In the single US case that involved a plot to commit a violent crime, a government informant encouraged the defendant to commit the crime, pushed the motive, suggested the method, and provided the weapons.

The case centered on an informant, a fifty-year-old man pretending to have terminal cancer, who *without any suspicion of criminal activity* befriended Shawahar Matin Siraj during

¹³⁷ Akbar, “Policing ‘Radicalization,’” 820, referring to “Radicalization Process,” *FBI Report*.

¹³⁸ Patel, “Rethinking Radicalization,” 16.

¹³⁹ *Id.* at 14.

¹⁴⁰ Akbar, “Policing ‘Radicalization,’” 838.

the routine surveillance of a Muslim community.¹⁴¹ For months, the informant tried to encourage Siraj to become angry at the United States. Later, a forensic psychologist who evaluated Siraj would describe him as having diminished judgment and possessing impaired critical thinking and analytical skills.¹⁴² Habitually, the informant would make Siraj view images of Muslim children being burned alive, Muslim women being raped by the American military, and other violent acts.¹⁴³ In the end, the informant planned an attack with Siraj and his friend, who had dropped out of high school, had an alcohol and drug problem, and was diagnosed with paranoid schizophrenia with delusions. Siraj never completely agreed with the terrorist attack plan. He told the informant he first had to ask his mom.¹⁴⁴

Siraj's *radicalization* process is the only US case used to support the NYPD radicalization theory. Hence, law enforcement is using a theory based mostly on one case where law enforcement itself radicalized the perpetrator and planned the terrorist plot and is in turn using that government-facilitated process to predict radicalization. This flawed method creates a self-fulfilling cycle where police facilitate crimes and then rely on that representation of the facilitation as evidence for a radicalization process theory, which then justifies the use of more informants to recreate the government-facilitated process again.

In reality, the creation of a predictable and structured radicalization process is not feasible. Foremost, the entire notion that Muslim American communities are "vulnerable to radicalization and recruitment" has been disproven.¹⁴⁵ Policy experts and scholars have not adequately theorized what brings a Muslim American to adopt certain ideologies in such a way

¹⁴¹ "Illusion of Justice," *Human Rights Watch*, 24-25.

¹⁴² *Id.* at 27.

¹⁴³ *Id.* at 24-25.

¹⁴⁴ *Id.* at 28.

¹⁴⁵ Aziz, "Policing Terrorists," 167.

that induces them to commit politically motivated violence.¹⁴⁶ Numerous scholars and government-funded studies have continually stressed the difficulty of predicting who is likely to commit violent crimes.¹⁴⁷ Significantly, these studies and scholars have “cautioned against viewing radicalization as a ‘conveyor belt’ that starts with grievances and ends with violence, with easily discernible signposts along the way.”¹⁴⁸ In contrast to identifying definite contacts to criminal activity, detecting indicators of radicalization that theoretically enable early identification of prospective terrorists is not possible.¹⁴⁹ Additionally, research “largely debunk the claim that religiosity is linked to a propensity for terrorism.”¹⁵⁰ Instead, no actual straightforward discernable profiles or markers exist.¹⁵¹ Policy analysts stress that it is especially difficult to foresee any type of violent behavior.¹⁵² Nevertheless, law enforcement is fixated on predicting and policing the supposed radicalization of Muslims even though data confirms that the threat from Muslims is “minimal to nonexistent” particularly “in comparison to violence from white-supremacist and right-wing groups.”¹⁵³ Still, the FBI and NYPD marshalled in a radicalization theory that broadly influenced national policing practices and successfully revamped law enforcement priorities in order to target and infiltrate Muslim communities.¹⁵⁴ This radicalization theory has permeated US law enforcement at every level. In the last ten years, countless federal and local government literature has accepted without question that Muslim radicalization is a lurking and present danger.¹⁵⁵

¹⁴⁶ *Id.* at 166.

¹⁴⁷ Patel, “Rethinking Radicalization,” 9.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 3.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 8.

¹⁵² *Id.* at 9.

¹⁵³ Akbar, “Policing ‘Radicalization,’” 811.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 821; Patel, “Rethinking Radicalization,” 3.

In the last decade, counterterrorism policies and the radicalization theory caused a major shift in the relationship between Muslims, law enforcement, and the criminal justice system, which resulted in the criminalization of Muslims. Criminalization is the consequence of counterterrorism policies. However, it should be framed firmly as a criminal justice issue, and not a national security issue for the benefit of advocates, scholars, and impacted communities. Next, in Part III, I reject a national security and counterterrorism framework and explore criminalization through three categories – policing practices, prosecutorial tactics, and imprisonment concerns – to demonstrate that the criminalization of Muslims may be dealt with more efficiently as a criminal justice reform matter.

Part III: Framing as a Criminal Justice Matter

The real-world consequences of the radicalization theory and other counterterrorism laws and practices has been the criminalization of Muslims within the United States. That is, the “War on Terror” at home has created a multitude of criminal justice issues for Muslims as far as policing, prosecution, and imprisonment. Much like the War on Drugs criminalized people of color and sparked mass incarceration, the “War on Terror” has criminalized Muslims, who are also predominantly people of color,¹⁵⁶ and fueled unwarranted police profiling, excessive

¹⁵⁶ This religious community is the most racially diverse religious group in the country. Roughly one out of three Muslims Americans are African American. Another third of the population is of South Asian ancestry and about one quarter is of Arab ancestry. The remaining percentage is representative of various nationalities and backgrounds from across the globe including a growing Latino Muslim population. See, “American Muslims in the United States,” Teaching Tolerance: A Project of the Southern Poverty Law Center, accessed March 21, 2016, <http://www.tolerance.org/publication/american-muslims-united-states>.

sentencing, and extreme pretrial confinement of Muslims.¹⁵⁷ In this section, I will explore several familiar criminal justice problems that are impacting Muslim Americans as a result of the aforementioned theories, legislation, and police policies.

Here, I argue two points: first, the term “criminalization of Muslims” is important as a tool to discuss a specific form of Islamophobia that falls into the area of criminal justice and thus requires criminal justice reform; second, framing these criminalization issues as issues of the US criminal justice system, instead of an obscure national security problem, is sensible given the parallels between the criminalization of Muslims and other timely criminal justice reform issues. Discussed below, my reasoning for invoking the term “criminalization of Muslims,” and framing the issues embodied in that term as *criminal justice issues* is so that scholars, advocates, and communities are more capable of combating such unjust treatment. After briefly outlining my argument and reasoning, I survey several issues related to criminalization in the areas of policing, prosecution, and imprisonment to showcase the clear criminal justice complications and consequences stemming from counterterrorism policies and institutionalized Islamophobic practices within the criminal justice system.

Foremost, the term “criminalization of Muslims,” as opposed to the umbrella term Islamophobia or some esoteric national security phraseology, will allow scholars, advocates, and impacted communities to discuss these issues outside of the forced language of homeland security and terrorism. Additionally, it will allow scholars to build on this term and provide a tool for discussing this subject without conflating other forms of institutionalized Islamophobia that take places outside of the criminal justice system. The term “criminalization of Muslims” is

¹⁵⁷ See, Azadeh Shahshahani and Stephanie Guilloud, “How the U.S. Government Has Used 9/11 to Criminalize People of Color,” *In These Times*, September 12, 2016, <http://inthesetimes.com/article/19446/how-the-u.s.-government-used-9-11-to-criminalize-people-of-color>.

presently used during informal conversations and legal panels. However, it has been mentioned in scarcely any scholarly writing including legal journals. Instead, national security parlance and counterterrorism jargon are the only descriptors utilized.

The instances of criminalization discussed in this paper are too often pigeonholed by national security and War on Terror language and rational, relegating conversations and reform efforts on such issues to outside the realm of criminal justice. This delegation not only makes it difficult for scholars of different disciplines to engage on the specific yet interdisciplinary topic, but also deters criminal justice advocates who are best equipped to support Muslims in this area of law from engaging the subject. Moreover, it muddles community activism efforts and clouds the legal rights of Muslim Americans in such situations. In contrast, criminal justice-related problems experienced by Muslims due to targeted law enforcement policies should be definitively framed as criminal justice issues. A criminal justice framework will provide a platform for advocates to include Muslim-related issues in reform efforts, and also a platform for Muslims to more astutely interact with law enforcement and navigate the many issues outlined here. Legal advocates and Muslim communities presumably will engage differently with *the national security system* as opposed to *the criminal justice system*, as the former is unapproachable and obscured. In comparison, the latter is more familiar and transparent, has set constitutional rights and freedoms affixed to it, and comes with an immense network of advocates with a strong background in reform work.

Furthermore, use of the national security and law enforcement language of counterterrorism serves to indulge the radicalization framework and the stereotypes of Muslims as predisposed to terrorism, or put another way, that terrorism is a distinctive Muslim problem. National security invokes the pressure to be *patriotic* by collaborating with law enforcement and

foregoing individual legal rights in order to protect the country at large against security threats. Terrorism and national security rhetoric easily allow for the sacrifice of Muslims for the greater good instead of framing them as the undeserving target of a governmental system. On the other hand, criminalization invokes access to criminal rights such as the right to counsel and the right to remain silent. A criminalization framework highlights the issues of mass incarceration, police profiling, and due process concerns, and provides an existing framework for reform including these exact issues. For Muslim communities and individuals, criminalization language illuminates the adversarial criminal justice system instead of invoking the *Good Muslims - Bad Muslim* binary created by homeland security politicking.

Ultimately, regardless of the national security language invoked, the legal issues discussed below are criminal justice matters and must be framed as such for the benefit of Muslim Americans and their communities. Below, I present policing practices, prosecution tactics, and imprisonment concerns that highlight the need for a criminal justice framework. Then, in the remaining section of this paper, I offer recommendations for both advocates and communities in order to navigate more efficiently these issues in the criminal justice system.

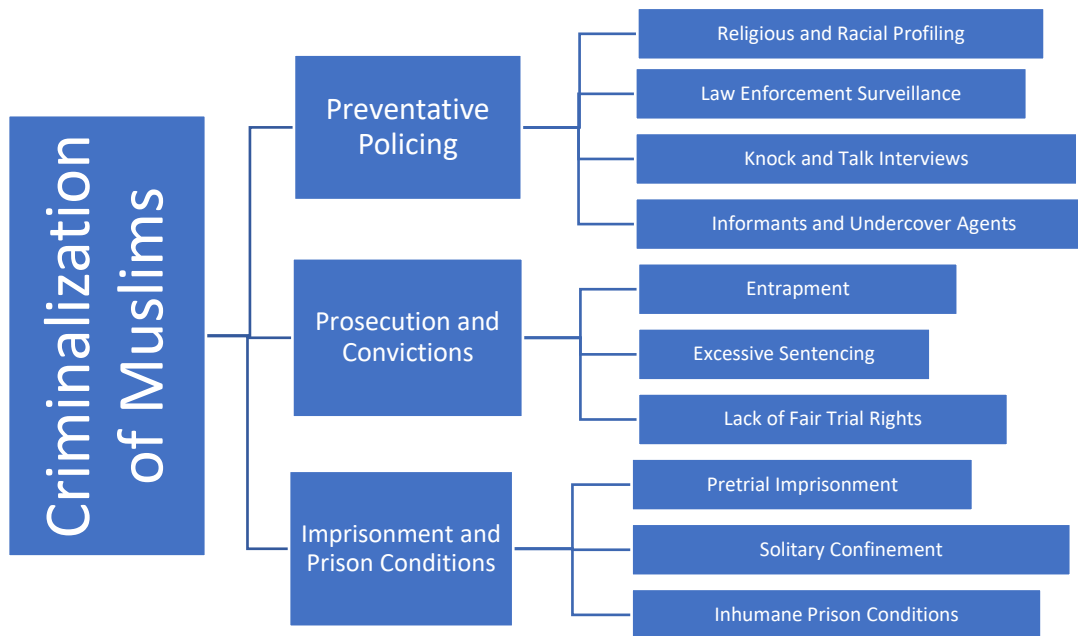


Figure 2. A Breakdown of Common Issues that Constitute the Criminalization of Muslims

A. Policing

The radicalization theory dramatically changed how Muslim Americans are policed. Local and federal law enforcement’s adoption of the theory prompted the unprecedented use of preventative policing and prosecutions, or what Akbar coins a “preventative paradigm.”¹⁵⁸ Preventative policing requires a systematic process for recognizing hypothetical prospective offenders, extensive surveillance to identify would-be criminals before they commit illegal behavior, the criminalization of otherwise legal conduct, and a way of prosecuting forms of theoretical pre-criminal behavior. The radicalization report by the NYPD suggests that the appropriate point for police to intervene is the first stage of the process where the signature factor

¹⁵⁸ Akbar, “Policing ‘Radicalization,’” 813.

is principally being a young male Muslim.¹⁵⁹ Due to this religious conveyer belt model of radicalization, many Muslim Americans are sent to the assembly line for merely possessing certain immutable characteristics.¹⁶⁰ Unfortunately, this preventative framework has pervaded law enforcement policies and practices in the United States and either sparked or inflamed the issues contained within in Figure 2.¹⁶¹

Here, I review specific issues of preventative policing impacting Muslims: 1) *profiling* which includes the use of religious and racial profiling, police mapping, and the No-Fly List; 2) *surveillance* which includes the use of wiretapping and other electronic surveillance, informants, and undercover agents; 3) *police engagement* which includes the use of knock and talk interviews, harassment and threats, and community outreach events. By highlighting these three areas of policing tactics employed against Muslim Americans, I aim to educate both Muslims and non-Muslims on the threats facing these communities. However, I also hope to appeal to criminal justice advocates and criminal defense attorneys who understandably may not be familiar with the criminal justice battles facing Muslim Americans but may see many similarities between issues they are accustomed to and the ones presented below.

i. Surveillance

Radicalization theory has greatly expanded what is considered the “legitimate scope of police work” when it comes to Muslim Americans.¹⁶² It elicited widespread surveillance of the religious cultures, political opinions, and physical geographies in Muslim communities.¹⁶³

¹⁵⁹ Patel, “Rethinking Radicalization,” 16.

¹⁶⁰ Id. at 3.

¹⁶¹ Akbar, “Policing ‘Radicalization,’” 810.

¹⁶² Id. at 813.

¹⁶³ Id. at 837.

Implementing preventative policing in order to intervene in a theoretical radicalization process requires *extensive* intelligence gathering efforts. Accordingly, counterterrorism intelligence priorities were shifted in order to maximize the collection of information on Muslims, especially regarding religion, politics, and culture.¹⁶⁴ A myriad of spaces where Muslims congregate have become suspect, whether at a mosque, hookah bar, or bookstore.¹⁶⁵ An incredible amount of resources have been used to monitor Muslim Americans and the many places they visit, enjoy, and live.¹⁶⁶ Local and state police funnel information collected on local Muslim individuals and communities into massive databases shared with federal agencies, often located at fusion centers.¹⁶⁷ Shielded from public scrutiny, fusion centers are “state and locally-created agencies that collect and analyze information about perceived threats to security and public order.”¹⁶⁸ Over seventy fusion centers across the US, funded by nearly half a billion dollars from DHS, are substantially focused on collecting information of Muslims’ religious and political activities and beliefs.¹⁶⁹

In general, counter-radicalization law enforcement programs are principally, if not entirely, fixated on Muslims.¹⁷⁰ Consequently, substantial harms are inflicted on Muslims due to the radicalization theory, the law enforcement strategies that the theory has inspired, and the tone of counterterrorism policies more broadly. Such theories echo and sustain a noxious loop of suspicion towards Muslims and Islam.¹⁷¹ Critics of current counterterrorism policy contend that “law enforcement should not be authorized to spy on or investigate any person or group without

¹⁶⁴ Id. at 845.

¹⁶⁵ Id. at 817, 812.

¹⁶⁶ Id. at 813.

¹⁶⁷ Patel, “Rethinking Radicalization,” 23.

¹⁶⁸ Patel 22-23

¹⁶⁹ Patel 22-23.

¹⁷⁰ Akbar, “Policing ‘Radicalization,’” 820.

¹⁷¹ Id. at 882.

individualized suspicion of predicate act of criminal activity.”¹⁷² Many scholars and advocates argue that civil liberties are being violated by these programs. Plus, by validating the radicalization theory, these law enforcement programs create a self-perpetuating cycle between private and institutionalized Islamophobia. Law enforcement policies and practices described here move “the idea that Muslim communities and cultures threaten national security from the world of bias to the realm of savvy expertise.”¹⁷³ Ultimately, Muslim Americans are negatively affected with little consideration of the cost to these communities.¹⁷⁴

Preventative policing includes a wide range of tactics. One commonly used tactic is the surveillance of Muslim community spaces such as mosques, Muslim-owned businesses, student organizations, and other religious spaces. For instance, the NYPD recorded which Muslim businesses temporarily closed for prayers, played Al-Jazeera, or sold halal products and alcohol.¹⁷⁵ Information gathering tactics employed against Muslim Americans consist of various known and unknown forms of government surveillance such as electronic surveillance including internet spying and wiretaps, spying by informants or undercover agents, “sneak and peek” searches, the mining of personal information, and the aggressive use of sting operations.¹⁷⁶ The government disproportionately employs these surveillance campaigns against Muslim individuals and communities.¹⁷⁷ This form of policing is uniquely focused on religion and religious practices.¹⁷⁸ Surveillance and information gathering practices are performed by law

¹⁷² Aziz, “Policing Terrorists,” 161.

¹⁷³ Akbar, “Policing ‘Radicalization,’” 882.

¹⁷⁴ *Id.* at 815.

¹⁷⁵ “Mapping Muslims,” *CLEAR*, 8.

¹⁷⁶ See, “Illusion of Justice,” *Human Rights Watch*.

¹⁷⁷ Aziz, “Policing Terrorists,” 183-185.

¹⁷⁸ “Mapping Muslims,” *CLEAR*, 8.

enforcement on multiple levels from federal agents to state police departments to city detectives to local beat cops and traffic cops.¹⁷⁹

Two additional unusual forms of surveillance are also used against Muslims: National Security Letters (NSL) and “sneak and peek” searches. Under the USA PATRIOT Act, law enforcement can obtain personal information such as phone and computer records, credit history, and banking information. FBI agents may obtain this information based on a NSL. These letters have been disproportionately issued to businesses and banks with Muslim clients.¹⁸⁰ NSLs are similar to subpoenas but do not require judicial approval. No checks and balances are available. NSLs are used on large groups of people not involved in any criminal activity. For example, from 2003 to 2005, federal law enforcement issued a total of 143,074 National Security Letters.¹⁸¹ Out of all of those NSLs, only fifty-three letters led to criminal charges recommendations.¹⁸² Likewise, while sneak and peek searches in people’s homes or offices are not known to be common practices, the concept is disconcerting all the same. The ACLU explains that “the government could enter a house, apartment or office with a search warrant when the occupant was away, search through her property and take photographs, and in some cases seize physical property and electronic communications, and not tell her until later.”¹⁸³

¹⁷⁹ Id at 38.

¹⁸⁰ Aziz, “Policing Terrorists,” 184.

¹⁸¹ Shahshahani and Guilloud, “How the U.S. Government Has Used 9/11 to Criminalize People of Color,” *In These Times*, September 12, 2016, <http://inthesetimes.com/article/19446/how-the-u.s.-government-used-9-11-to-criminalize-people-of-color>.

¹⁸² Of the fifty-three letters, seventeen were for money laundering, seventeen were related to immigration, and nineteen involved fraud. Zero were for terrorism. See, “A Review of the Federal Bureau of Investigation’s Use of National Security Letters,” *The Department of Justice*, March 2007, <https://oig.justice.gov/special/s0703b/final.pdf>. See also, “A Review of the FBI’s Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006,” *The Department of Justice*, March 2008, <https://oig.justice.gov/special/s0803b/final.pdf>.

¹⁸³ “How the USA-Patriot Act Expands Law Enforcement ‘Sneak and Peek’ Warrants,” *ACLU*, accessed February 10, 2018, <https://www.aclu.org/other/how-usa-patriot-act-expands-law-enforcement-sneak-and-peek-warrants>.

Statistics on such searches are unavailable and whether every person who is targeted is actually informed afterwards of such searches is unknown. This search tactic is incredibly invasive and sparks understandable paranoia in individuals and communities.

More commonly, Muslims are disproportionately targeted by informants and undercover officers, typically when no individualized suspicion exists and criminal activity is not probable.¹⁸⁴ The use of informants in Muslim social circles and neighborhoods is extensive and well-established.¹⁸⁵ In 2008, the FBI had over 15,000 paid informants in total.¹⁸⁶ The actual number of paid or unpaid informants currently infiltrating the lives of Muslim Americans is indiscernible. In contrast to undercover agents, informants are often aggressively recruited, from both within and outside of the targeted communities.¹⁸⁷ While informants are “standard fare” in the US criminal system, the “problems of police coercion in recruiting and setting terms for the relationship, and secrecy and lack of accountability, apply across the board.”¹⁸⁸ Yet, the extensive and suspicionless deployment of informants in religious and sacred spaces is unique to Muslim communities.

The use of informants and undercover agents creates an environment of mistrust.¹⁸⁹ Informants enter the social spaces of “coffee shops, delis, and other local hangouts, seeking to gather information or befriend and inform on locals they meet.”¹⁹⁰ For example, the NYPD had undercover officers go to neighborhoods to isolate “hot spots” which included restaurants, cafes, halal meat shops, and hookah bars.¹⁹¹ Arabic-speaking undercover officers were assigned to

¹⁸⁴ Akbar, “Policing ‘Radicalization,’” 863; Aziz, “Policing Terrorists,” 29.

¹⁸⁵ Akbar, “Policing ‘Radicalization,’” 862.

¹⁸⁶ “Illusion of Justice,” *Human Rights Watch*, 19.

¹⁸⁷ Akbar, “Policing ‘Radicalization,’” 846.

¹⁸⁸ *Id.* at 861.

¹⁸⁹ “Mapping Muslims,” *CLEAR*, 4.

¹⁹⁰ “Illusion of Justice,” *Human Rights Watch*, 19.

¹⁹¹ “Mapping Muslims,” *CLEAR*, 10.

Egyptian communities while Pakistani undercover officers were sent into Pakistani communities to listen to “neighborhood gossip” and “get a feel” for the community.¹⁹² In order to “gauge sentiment,” undercover officers visited schools and businesses, played in community cricket matches, sat in coffee shops, and went on student trips.¹⁹³ Undercover officers observed and recorded every detail from pointless chitchat after congregational prayers to what type of pizza was served at an Arab-pizzeria.¹⁹⁴

Meanwhile, it is widely documented that informants infiltrated religious events and places of worship.¹⁹⁵ Informants frequently inject violent and controversial conversations into these religious spaces. They have recorded what people said within mosques, including imams, and gathered lists of attendees.¹⁹⁶ The NYPD continued to send informants into Muslims spaces well after the NYPD surveillance went public. For example, a year after the news of surveillance became public, Shamiur Rahman, a nineteen-year-old was recruited as an informant by the police after he was caught on a marijuana possession charge. He later purposefully exposed himself or “outed himself” on social media.¹⁹⁷ Undoubtedly, Rahman will never quite have the same relationship with his faith or religious community again. Likewise, the many Muslims who interacted with him are permanently altered by such deception targeted at their religious sphere. A Muslim student who unknowingly took Rahman in as a friend said the following: “So I took him in, introduced him to all of my friends, got him involved in our extracurricular activities. I would wake him up for prayer every morning. He slept over my house, and I let him in even

¹⁹² Id.

¹⁹³ Id.

¹⁹⁴ Id. at 10-11.

¹⁹⁵ Id. at 10.

¹⁹⁶ Id. at 11.

¹⁹⁷ Dashiell Bennett, “NYPD Informant Says He Was Paid to 'Bait' Muslims,” *The Atlantic*, October 23, 2012, <https://www.theatlantic.com/national/archive/2012/10/nypd-informant-says-he-was-paid-bait-muslims/322225/>.

though he smelled of marijuana but I tried to look past it because I knew he was new to Islam.”¹⁹⁸ As a result of such incredibly invasive police tactics, Muslims Americans are often suspicious of other Muslim Americans.

Many other spies infiltrated Muslim cohorts in student organizations and religious congregations in mosques and community centers, all while posing as fellow Muslims.¹⁹⁹ Informants are likely at “each and every mosque in the United States” impacting every Muslims’ religious life.²⁰⁰ Informants and undercover agents often pretend to be converts or newcomers in these congregations or student groups.²⁰¹ For example, undercover police officers spied on students at Brooklyn College over the period of at least four years from 2011 to 2015.²⁰² The undercover police officer told Muslim students that she was raised in a secular Turkish family and wanted to learn more about her faith.²⁰³ Quickly after arriving at the school, the undercover police officer faked converting to Islam in the company of these Muslim college students.²⁰⁴ The presence of the undercover agent, who uncovered nothing of value in four years, devastated the lives of the students she encountered by invading their most personal space, planting seeds of anxiety and distrust for years to come.²⁰⁵ She occupied countless aspects of their lives: “Exploiting the welcoming nature of Muslim students, she went to their picnics and get-togethers, visited their homes, and even served as a bridesmaid in one woman’s wedding.”²⁰⁶

¹⁹⁸ “Mapping Muslims,” *CLEAR*, 40.

¹⁹⁹ Aziz, “Policing Terrorists,” 29.

²⁰⁰ Akbar, “Policing ‘Radicalization,’” 862.

²⁰¹ “Illusion of Justice,” *Human Rights Watch*, 19.

²⁰² Aviva Stahl and Jeanne Theoharis, “The Ongoing Trauma of the Muslim Students an Undercover Cop Spied on For 4 Years,” *Broadly*, April 21, 2017, https://broadly.vice.com/en_us/article/bjgz4z/the-ongoing-trauma-of-the-muslim-students-an-undercover-cop-spied-on-for-4-years. Information in article is from the documentary is *Watched*, more information available at <https://www.tribecafilm.com/filmguide/watched-2017>.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

This story is not unique. Informants are positioned throughout numerous Muslim student groups and social networks around the country.²⁰⁷ For instance, a twenty-year-old college student converted to Islam and formally took the *shahada*, the Muslim profession of faith, which requires a certain number of Muslim witnesses. Later, the student discovered that one of the witnesses was actually an informant.²⁰⁸ No portion of a Muslim's life and faith is off-limits to law enforcement.

Law enforcement regularly and purposefully collect information that has no connection whatsoever with criminal activity. For example, informants often serve as "listening posts" in order to compile information about the religious and political cultures of Muslim Americans, and other details such as recording the contents of prayers and sermons at mosques.²⁰⁹ Informants also collect license plates numbers of vehicles at Muslim events or institutions and the names of those attending the mosque for worship.²¹⁰

In contrast to listening, many times law enforcement and informants act as agitators in these environments. Since September 11, 2001, roughly half of the terrorism prosecutions have involved the use of informants and roughly a quarter have involved law enforcement sting operations. In many of these cases, the government formed the motive, developed the plot, and provided the materials from start to finish.²¹¹ Some individuals "initially or repeatedly expressed a reluctance" to agree with any terrorism-related activity or acts of violence proposed and advocated for by the informant. However, in these cases, government informants and undercover

²⁰⁷ Akbar, "Policing 'Radicalization,'" 862.

²⁰⁸ "Mapping Muslims," *CLEAR*, 17.

²⁰⁹ *Id.* at 863.

²¹⁰ *Id.*

²¹¹ "Illusion of Justice," *Human Rights Watch*, 47.

agents continue to plot and pressure the target to capitulate and acquiesce.²¹² The use of informants has also been reported in cases where law enforcement preyed on “Muslim men with diminished mental capacity and financial problems” in order to pressure them to participate in plots designed by informants.²¹³ The use of informants and entrapment practices in prosecutions is discussed in more detail in the following section on prosecution and convictions.

Consequently, one of the most unsettling points regarding the use of informants is that law enforcement actively shape conversations on religion, crime, and politics within Muslim communities. Law enforcement personnel and informants subvert Muslim communities by actively encouraging criminal activity, pressuring individuals to engage in violence, and openly speaking about and promoting violence in the name of religion within religious spaces and armed with religious vocabulary such as *jihad*.²¹⁴ For example, informants intentionally speak of a violent jihad, suicide bombings, and Osama bin Laden in Muslim spaces while posing as Muslims.²¹⁵ Akbar illustrates the situation as follows:

Informants have openly espoused support for terrorism in mosques and other Muslim community institutions, and have taken to aggressively criticizing American foreign policy, while promoting the idea that Muslims have a duty to harm the United States. Informants have also emphasized the need to act on such a duty, to the point of pushing for, designing, and providing the means for a terrorist attack.²¹⁶

These law enforcement acts are supposedly in the interest of *countering*, or opposing, terrorism and violence. Promoting violence and a version of Islam that condones terrorism seemingly does the opposite, especially given the vast numbers of informants and communities that have been

²¹² Id. at 45.

²¹³ Aziz, “Policing Terrorists,” 183-184; “Illusion of Justice,” *Human Rights Watch*, 14, 22.

²¹⁴ Akbar, “Policing ‘Radicalization,’” 863-64.

²¹⁵ Id. at 864.

²¹⁶ Id.

infiltrated by law enforcement agitators. Who is pushing so-called Islamic extremism more – law enforcement or extremists? Such a question is unanswerable but chilling all the same.

Notably, there is no need for a Muslim to leave one's home in order to be extensively monitored and unknowingly approached by law enforcement because informants and undercover agents also participate in internet trolling on websites and social media. Accordingly, the self-proclaimed Muslim posting or encouraging violent or otherwise disturbing views online may not be genuine. Those extremist views may be powered by US law enforcement. Furthermore, Muslim college students who want to avoid befriending other Muslim students or attending a mosque for fear of being targeted by law enforcement cannot simply hide in their dorm rooms. The NYPD, for instance, cyber-monitored group chats, emails, listservs, and blogs of Muslim students as part of their daily routine.²¹⁷ MSAs operating far outside of New York City were monitored as well such as the University of Pennsylvania, Yale, Rutgers, and Syracuse.²¹⁸ Law enforcement surveillance seems inescapable for Muslims in the United States.

ii. Profiling

Preventative policing is opposed to *reactive law enforcement* which consists of “investigations of criminal activity, prosecution of suspects in the process of committing or after committing a terrorist act, conviction, and incarceration.”²¹⁹ Reactive law enforcement causes significantly less harm to individuals, communities, and their civil liberty rights. Reactive policing and reactive prosecution is the preferred method of policing that should be used within Muslim communities, as it is also the preferred method for *the majority of American*

²¹⁷ “Mapping Muslims,” *CLEAR*, 40.

²¹⁸ *Id.*

²¹⁹ Aziz, “Policing Terrorist,” 160.

communities. However, the state primarily uses preventative policing and prosecution against Muslim communities. In other words, “in contrast to murder, burglary, or other forms of ‘traditional crimes’ where law enforcement does not get involved until after the criminal act has occurred, in counterterrorism they seek to predict and preempt the criminal act.”²²⁰ This preference towards preventative policing and preventative prosecutions alone causes the vast majority of civil liberties violations and other harms experienced by Muslim Americans.

Moreover, the ability of preventative policing policies actually to protect against terrorism is highly disputable. Regarding the NYPD, Paul Galati, the Chief of the Intelligence Division, testified in 2012 that the police unit tasked with monitoring Muslim Americans and their community life did not produce even one criminal lead during his tenure.²²¹ With law enforcement success scored by the number of investigations, prosecutions, and convictions, there are perverse incentives to make homegrown terrorists out of vulnerable individuals via use of informants and countless other civil liberties violations, especially given the massive amounts of tax payer dollars spent on counterterrorism. Pressure is high to show results. Thus, the use of preventative policing and prosecution leads to criminalizing the average behavior of Muslim Americans through unsourced and unproven radicalization theories. Muslim Americans become criminalized without any form of individualized suspicion of any wrongdoing. This type of criminalization legitimizes policing practices such as religious profiling, racial profiling, police mapping, and broad use of the No-Fly List against Muslim Americans, which create and power a dangerous cycle.

²²⁰ *Id.* at 160-161.

²²¹ “Mapping Muslims,” *CLEAR*, 4.

Muslims are disproportionately targeted and criminalized by US law enforcement. Given the widely accepted belief that Muslims have a higher propensity for terrorism, the religious and racial profiling used against Muslims may come with little surprise. Religious and racial profiling are evident in the disproportionate number of Muslims approached for “voluntary” interviews by law enforcement and stopped for heightened border screenings compared to other groups.²²² These forms of profiling are also demonstrated in the relatively high percentage of Muslim names that appear as false positives on the No-Fly List.²²³ The radicalization theory has been described as “a blueprint for a policy of profiling and suspicionless surveillance” and law enforcement profiling tactics have become the common result of its popularity with police.²²⁴ Muslim American young men are the targets of significant law enforcement scrutiny for countless reasons such as “if they are openly critical of American foreign policy, attend their local mosque or hookah bar, partake in their university Muslim student association, or travel to Muslim-majority countries.”²²⁵ Reports have also confirmed that *local law enforcement* departments are surveilling Muslim Americans within their local jurisdiction based on religious and political activity, as opposed to any individualized suspicion of connection or involvement in criminal activity.²²⁶ Such practices mirror the radicalization theory markers.

Likewise, counterterrorism enforcement disproportionately maps Muslim communities and spaces frequently used by Muslims such as mosques, Muslim student associations, Muslim-owned businesses, community centers, hookah bars, and restaurants.²²⁷ Even Islamic bookstores

²²² Aziz, “Policing Terrorists,” 183.

²²³ Id.

²²⁴ “Mapping Muslims,” *CLEAR*, 13.

²²⁵ Akbar, “Policing ‘Radicalization,’” 872.

²²⁶ Patel, “Rethinking Radicalization,” 23.

²²⁷ Aziz, “Policing Terrorists,” 184.

and halal butchers are mapped and monitored.²²⁸ Law enforcement mapping of Muslim spaces serves a dual purpose of investigating potential criminal activity and predominately collecting information on the lawful happenings and habits of Muslim Americans. Law enforcement also seek information on community organizations, student groups, and Muslim leadership.²²⁹ Notably, the act of mapping encourages more surveillance and suspicion.²³⁰ Local and federal law enforcement both participate in the act of mapping. Local FBI offices have successfully mapped concentrated Muslim communities while the NYPD with its Intelligence Division's Demographics Unit has also mapped the demographics of Muslim neighborhoods.²³¹

In addition to targeting Muslim Americans as religious communities, mapping is racialized in order to identify geographies of concentrated racial and ethnic communities.²³² Law enforcement agents specifically “collect, map, and analyze racial and ethnic demographic information, including the location of businesses and other facilities servicing those demographic groups.”²³³ Much of the mapping of Muslim neighborhoods and places are based on racializing spaces. However, where the police have “created maps of Arab neighborhoods that included Arab Jews and Christians, the maps explicitly excluded the non-Muslims from their purview.”²³⁴ Thus, while race and ethnicity play a large role, the act of mapping ultimately comes down to the targeting of Islam and Muslims as suspect. The NYPD even had a unit called the Demographics

²²⁸ Akbar, “Policing ‘Radicalization,’” 871.

²²⁹ Aziz, “Policing Terrorists,” 196-197.

²³⁰ Akbar, “Policing ‘Radicalization,’” 856.

²³¹ Id. at 857. More information on Freedom of Information Act documents obtained by ACLU, see ACLU Eye on the FBI: The FBI is Engaged in Unconstitutional Racial Profiling and Racial ‘Mapping,’ *ACLU*, October 20, 2011, https://www.aclu.org/sites/default/files/field_document/aclu_eye_on_the_fbi_alert_-_fbi_engaged_in_unconstitutional_racial_profiling_and_racial_mapping_0.pdf.

²³² Akbar, “Policing ‘Radicalization,’” 855.

²³³ “Mapping Muslims,” *CLEAR*, 10. See, “Syrian Locations of Concern Report,” *NYPD*, (date unknown, leaked by AP), <http://hosted.ap.org/specials/interactives/documents/nypd/nypd-syria.pdf>. See also, Akbar, “Policing ‘Radicalization,’” 857.

²³⁴ Akbar, “Policing ‘Radicalization,’” 858-59.

Unit, which has since been renamed the Zone Assessments Unit. The police unit fixated explicitly on twenty-eight “ancestries of interest” that covered mostly every Muslim-majority country and notably included “American Black Muslim” as an ancestry of interest.²³⁵ Such race-based surveillance has a history as far back as the “Italian squads” formed in 1904 to surveil the culture, activities, and practices of Italians Americans and immigrants in the New York City area.²³⁶ The NYPD also engaged in dissent-based surveillance that monitored political activists, communists, anarchists, labor activists, and civil rights activists throughout the 1900s.²³⁷ Law enforcement monitored groups such as the National Association for the Advancement of Colored People (NAACP) and American Civil Liberties Union (ACLU).²³⁸ Regarding modern-day surveillance of Muslim Americans, the NYPD has mapped Muslims within New York City and outside of New York City including New Jersey, Pennsylvania, and Connecticut.²³⁹ The police department monitored or infiltrated at least 250 mosques, which they labeled “hot spots” within the city and surrounding areas.²⁴⁰ Consequently, visiting a mosque has become “tantamount to placing oneself on law enforcement’s radar” for Muslim Americans, and has noticeably impacted attendance and involvement.²⁴¹

Equally important, religious and racial profiling of Muslims is fueled by anti-Muslim and anti-Islam law enforcement trainings that still take place today. At the beginning of this paper, I illustrated two recent examples of Islamophobia: an anti-Muslim incident at a mosque in Arizona and an anti-Muslim police training event in Georgia. The example of an Islamophobic police

²³⁵ “Mapping Muslims,” *CLEAR*, 7.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 8.

²³⁹ *Id.* at 11.

²⁴⁰ *Id.* at 12.

²⁴¹ *Id.*

training taught by an unqualified self-described expert on Islam is not unique.²⁴² Anti-Muslim trainings have been and continue to be a serious issue prevalent in the law enforcement community. Again, I will use another example from the NYPD because so many documents have been publicly leaked from this particular department. The film *Third Jihad* was played repeatedly at law enforcement events and orientations within the NYPD. The Creating Law Enforcement Accountability & Responsibility (“CLEAR”) project describes the film as follows: “The film presents a montage of images of terrorist attacks, beheadings and dead bodies, while a narrator suggests that American Muslims aim to ‘infiltrate and dominate’ America, and that they are engaging in a ‘cultural Jihad’ aimed at infiltrating and undermining American society.”²⁴³ The anti-Muslim film that blatantly cast Muslim Americans in a negative light was shown to over 1,400 police officers on a continual loop.²⁴⁴ Notably, Police Commissioner Ray Kelly and NYPD Spokesman Paul Brown participated in the film’s production.²⁴⁵ Similar examples are present in cities and small towns across the country.

Regarding the other example provided at the beginning of this paper of a bias-based attack on a mosque committed by private actors in Tempe, part of metro-Phoenix, it is worth noting that these private actors were residents of a nearby suburb, Mesa, Arizona. Last year in Mesa, the government paid thousands of public funds to John Guandolo, an anti-Muslim conspiracy theorist with strong ties to hate groups, to teach police officers about Muslims and

²⁴² “Letters and Report on Anti-Muslim Georgia Police Instructor,” *CAIR Georgia*, March 2, 2018, <https://www.dropbox.com/s/0owbc7wd1r48a4v/Report%20on%20Anti-Islam%20Police%20Training.pdf?dl=0>.

²⁴³ “Mapping Muslims,” *CLEAR*, 32.

²⁴⁴ Michael Powell, “In Shift, Police Say Leader Helped with Anti-Islam Film and Now Regrets It,” *New York Times*, January 24, 2012, <https://www.nytimes.com/2012/01/25/nyregion/police-commissioner-kelly-helped-with-anti-islam-film-and-regrets-it.html>.

²⁴⁵ “Mapping Muslims,” *CLEAR*, 32.

Islam at the Mesa Police Department training facility.²⁴⁶ By way of his consulting company, Guandolo spreads the message to law enforcement that Muslim Americans have developed an enormous and secretive plan to overtake the US and implement Sharia – almost identical to some of the rhetoric yelled in the video of the Tempe mosque incident.²⁴⁷ Guandolo has made false claims such as Muslims are buying gas stations and hotels in order to execute a future terrorist plot and 80% of US mosques advocate and preach violent extremism.²⁴⁸ He has also urged law enforcement to start “locking-up” Muslim civil rights advocates, particularly employees of the Council on American-Islamic Relations (“CAIR”), and suggested that CAIR should be charged with federal terrorism charges.²⁴⁹ Anti-Muslim police trainings and Islam “experts” are not rare.²⁵⁰

With this kind of ignorance and falsehood imbedded in police trainings, it is not surprising that the ordinary interactions between police and Muslims are too often dangerously escalated and unnecessarily turned into counterterrorism investigations.²⁵¹ Muslim community members who lose their wallets should not be questioned by counterterrorism units. Yet, they are.²⁵² Muslims on vacation should not be searched and detained for looking-Muslim while filming landmarks and photographing tourist attractions. Yet, they are.²⁵³ Muslims should not be

²⁴⁶ Christopher Mathias, “Anti-Muslim Extremist Is Training Police in Arizona,” *Huffington Post*, May 15, 2017, https://www.huffingtonpost.com/entry/john-guandolo-arizona-anti-muslim-extremist_us_591b0291e4b0809be1582678.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ “Muslim-Bashing Bigot John Guandolo to Train Cops in Mesa, Arizona,” *Southern Poverty Law Center*, May 15, 2017, <https://www.splcenter.org/hatewatch/2017/05/15/muslim-bashing-bigot-john-guandolo-train-cops-mesa-arizona>.

²⁵⁰ “Mapping Muslims,” *CLEAR*, 6.

²⁵¹ *Id.* at 33

²⁵² Muslim individuals who file complaints about identity theft were interrogated by police from counterterrorism unit. *Id.*

²⁵³ Muslim tourists have been stopped, searched, and detained for filming infamous tourist locations in NYC. *Id.*

arrested for having Quran verses or Arabic prayers on their persons. Yet, they are.²⁵⁴ These types of law enforcement sponsored events not only fuel more religious and racial police profiling, but they also power private actors to lash out at Muslims and legitimize such hate.²⁵⁵ For Muslim Americans who are feeling the toll of such policing and hope to correct false assumptions, community engagement activities may seem like an opportunity to build back trust and strengthen communication between Muslims and police. In the following subsection, I demonstrate that in practice community engagement has the opposite results.

iii. Police Community Engagement

“Many mosques value the relationships they have with precincts and top brass. When mosques receive hate mail or encounter other law enforcement problems, they call up the local sergeant. When news of the surveillance broke, some mosques were caught between a rock and hard place because they were unpleasantly surprised by the news but didn’t want to offer public condemnation and threaten those relationships.”

– Asim Rehman, Muslim Bar Association of New York

Surveillance has broken the trust between Muslim communities and the police.²⁵⁶ However desirable meaningful police engagement may be, the types of interactions and disingenuous outreach efforts taking place within Muslim communities should be unwelcomed by Muslim Americans.²⁵⁷ Police interviews, harassments, threats, and intelligence-gathering outreach events are part of a false narrative of community policing and engagement with Muslim Americans.

²⁵⁴ Former NYPD Officer reported Muslims being arrested and investigated for having folded Qurans or Arabic religion-related words or prayers in their pockets for such reasons as protection during traveling. Sometimes the officer would have to get the individuals released. Id.

²⁵⁵ Id. at 4.

²⁵⁶ Id.

²⁵⁷ Id. at 36.

The prevalent police practice of employing so-called “voluntary” interviews is notorious in Muslim American communities.²⁵⁸ Frequently termed “knock and talks” due to their unprovoked and sudden occurrence, these interviews are considered voluntary or pretextual interviews by law enforcement. Knock and talk interviews occur when a law enforcement officer approaches a person at her or his home, work, or community space to request their participation in an interview or conversation.²⁵⁹ CLEAR states in its report that nearly every person they have interviewed has personally experienced being approached or knows someone who has.²⁶⁰ While it is difficult to measure the use of this practice due to a lack of available statistics, Muslims are too familiar with it.²⁶¹

At first glance, this *request* may seem harmless. In reality, it is embarrassing, intimidating, and all around uncomfortable for the person involved, their family, their neighbors, and others who are made aware of the law enforcement presence. A clear stigma is attached to visits by law enforcement, even more so for visits from detectives or FBI agents.²⁶² Other Muslim community members are especially wary of individuals approached by law enforcement.²⁶³ The practice is a policing tactic used regularly, aggressively, and disproportionately against Muslims.²⁶⁴ Often, law enforcement will speak to a person based on a First Amendment activity such as associations or protected speech.²⁶⁵ Other times, law enforcement will approach someone due to their appearance, ancestry, or ethnicity.²⁶⁶ Akbar

²⁵⁸ Id. at 28.

²⁵⁹ Akbar, “Policing ‘Radicalization,’” 859.

²⁶⁰ “Mapping Muslims,” *CLEAR*, 28.

²⁶¹ Id.

²⁶² Id.

²⁶³ Id.

²⁶⁴ Akbar, “Policing ‘Radicalization,’” 859.

²⁶⁵ “Mapping Muslims,” *CLEAR*, 28.

²⁶⁶ Id.

elaborates, “Though the interview is technically voluntary, like in other contexts where communities of color deal with law enforcement, this technicality escapes most Muslims when they are confronted with law enforcement contact.”²⁶⁷ During knock and talk interviews, FBI or other law enforcement agents frequently question the person about their political and religious beliefs, activities, and sentiments.²⁶⁸ Similarly, the NYPD had a unit that would visit precincts and jails in order to interview arrestees or crime victims with Muslim or Arab backgrounds. Clients of both CLEAR and Asian American Legal Defense and Education Fund (AALDEF) were taken to the police precinct for various reasons and subsequently interrogated. For instances, one client was a defendant in a traffic violation and another was a victim filing an identity theft complaint. At the precinct, numerous Muslims such as these individuals were met by police officers or even detectives from a separate unit who questioned them regarding their religious and political views and information about their community.²⁶⁹

In addition, community policing or community outreach are misleading concepts when used in relation to Muslim communities and US law enforcement. Regardless of the term used, the aim is “to preventively and aggressively combat terrorism within Muslim communities through an adversarial criminal justice system.”²⁷⁰ Like in other criminal justice settings, achievement in the counterterrorism context is calculated based on the number of investigations, prosecutions, and conviction commenced.²⁷¹ Accordingly, community outreach communications and events are viewed as another opportunity for law enforcement success in relation to these goals, not community trust or relationship building. The failings of community outreach efforts

²⁶⁷ Akbar, “Policing ‘Radicalization,’” 859-60.

²⁶⁸ *Id.* at 860.

²⁶⁹ “Mapping Muslims,” *CLEAR*, 11.

²⁷⁰ Aziz, “Policing Terrorists,” 157.

²⁷¹ *Id.* at 159.

in Muslim communities “extend beyond the usual incompetency associated with some government programs or failures to implement systemic reforms.”²⁷² The motives behind such practices may not even include relationship building or reform. Instead, the purposes are increasing surveillance and searching for new investigations. These objectives are not farfetched because law enforcement have used community engagement events to collect information and spy on communities and individuals in the recent past. Leaked police documents confirmed the NYPD’s use of community outreach as an intelligence gathering means.²⁷³ Both the NYPD and FBI community outreach programs aim to collect information on religious practices, opinions and beliefs, demographics, politics and culture, and community activities.²⁷⁴ Any relationship between a Muslim individual or institution and the police is thus suspect. Law enforcement often closely track their own community partners.²⁷⁵ Akbar notes that “these community engagement programs feed into radicalization policing.”²⁷⁶ Even the Homeland Security’s Office for Civil Rights and Civil Liberties, which presents itself as combating hate crimes, discrimination, and other civil liberties concerns, has collaborated with law enforcement and intelligence agencies to target Muslim communities. Community engagement has become “a cornerstone of national security policing, specifically to counter-radicalization efforts” making it even harder for Muslims to trust law enforcement.

Even more regrettably, when so-called voluntary means of engagement are rejected or insufficient, law enforcement has resorted to harassment and threats. For instance, both threats and harassment are used to coerce participation in knock and talk interviews. Officers will

²⁷² Id. at 171.

²⁷³ “Mapping Muslims,” *CLEAR*, 36.

²⁷⁴ Akbar, “Policing ‘Radicalization,’” 866.

²⁷⁵ Id. at 868.

²⁷⁶ Id.

repeatedly visit individuals at work and at home. Some officers threaten immigration consequences while others have threatened to or actually have placed individuals on the No-Fly List as retaliation for not participating in a so-called voluntary interview or for refusing to become informants. In addition, law enforcement have attempted to coerce Muslims to become informants and retaliated when individuals refuse. For example, Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari are Muslim Americans with no criminal history who were added to or needlessly kept on the No-Fly List after law enforcement failed to coerce them to become informants.²⁷⁷ All of the above-mentioned policing issues shape the everyday experiences of Muslim Americans interacting with law enforcement. In the next section, I review prosecution and prison related issues.

B. Prosecutions and Prison

With several criminal justice reform issues such as mass incarceration, the criminalization of poverty, and the failed War on Drugs, perverse incentives exist that may motivate or influence policing and prosecutions. The same is true for the criminalization of Muslims. Law enforcement is eager to “prosecute and show tangible results in the form of convictions to account for the billions of taxpayer dollars spent on counterterrorism.” Government press conferences will make a teenage boy who took video recordings of Washington DC tourist attractions and played paintball games in his home state of Georgia appear like a notorious terrorist who planned a massive international conspiracy for “violent

²⁷⁷ *Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015). See also, “*Tanvir v. Tanvir Case Page*,” Center for Constitutional Rights, accessed February 22, 2017, <https://ccrjustice.org/home/what-we-do/our-cases/tanvir-v-holder>.

jihad.”²⁷⁸ That was the case with Ehsanul Sadequee, who was born in Virginia and grew up in Georgia.

Sadequee’s case represents an instance of preemptive prosecution. The Department of Justice (DOJ) claimed that when Sadequee was fifteen years old and visiting Bangladesh, “he sent an email seeking to join the Taliban” in order to “help them in their fight against United States and coalition forces in Afghanistan.”²⁷⁹ A few years later, when he was eighteen or nineteen years old, Sadequee allegedly filmed short videos of “symbolic and infrastructure targets for potential terrorist attacks in the Washington, D.C., area, including the U.S. Capitol, the World Bank, the Masonic Temple, and a fuel tank farm.”²⁸⁰ This was his crime as explained by the DOJ. In other words, a teenage Muslim college student went to Washington, DC and recorded short clips of tourist sites on his phone. He also engaged in some online conversations, translated some Islamic texts, and played paintball.²⁸¹ This was the evidence that convicted him of four counts of supporting terrorists and a foreign terrorist organization.²⁸²

Sadequee faced a lengthy sentence for the videos and conversations. He could have received a maximum sentence of sixty years in prison, followed by a term of supervised release up to life, and a fine of up to \$1,000,000.²⁸³ He was ultimately sentenced to seventeen years in federal prison and thirty years of intense supervision after his release.²⁸⁴ He did not provide

²⁷⁸ “Atlanta Defendant Found Guilty of Supporting Terrorists,” Department of Justice, August 12, 2009, <https://www.justice.gov/opa/pr/atlanta-defendant-found-guilty-supporting-terrorists>.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ Shahshahani and Guilloud, “How the U.S. Government Has Used 9/11 to Criminalize People of Color,” *In These Times*, September 12, 2016, <http://inthesetimes.com/article/19446/how-the-u.s.-government-used-9-11-to-criminalize-people-of-color>.

²⁸² “Atlanta Defendant,” Department of Justice.

²⁸³ *Id.*

²⁸⁴ Ashley Hayes, “Georgia men get lengthy prison time for supporting terrorists,” *CNN*, December 14, 2009, <http://www.cnn.com/2009/CRIME/12/14/terror.sentence/index.html>.

material support to a terrorist groups nor did he commit any violent acts. He arguably did not actually commit a crime – he had conversations, protected speech and thought, he traveled, and he took pictures and video clips on his phone.

After being held in solitary confinement for a period of time, Sadequee opted to represent himself at trial, a form of representation that is not at all recommended. Notably, more than fifteen days in solitary confinement is considered torture by the UN Special Rapporteur of the Human Rights on Torture. Just a couple weeks in solitary confinement causes permanent and lasting psychological damage.²⁸⁵ Before his trial, before being found guilty, Sadequee spent *three-and-a-half years* in solitary confinement. Under international human rights standards, this is considered severe torture.²⁸⁶ In this state of mind, he represented himself at trial.

Additionally, two potential jurors from Sadequee’s trial told the court – before they were selected as jurors – that they were in fact prejudiced against Muslims. Both individuals were subsequently chosen to be seated on the jury. One juror walked out of Sadequee’s trial and said, “I wish we could have given him the death penalty.” The juror wanted Sadequee killed for filming monuments and having controversial conversations as a teenager. A fair and speedy trial with an impartial jury, the rights outlined in the Sixth Amendment, might be the equivalent of a unicorn to a Muslim American defendant in the criminal justice system.

²⁸⁵ Jean Casella, *Hell Is a Very Small Place: Voices from Solitary Confinement* (New York: The New Press, 2016): 223.

²⁸⁶ United Nations General Assembly, Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>.

i. Preemptive Prosecutions

Here, I explore the issue of preemptive prosecutions including some issues relating to prosecution such as material support charges, entrapment, and targeting vulnerable persons. In addition to policing, the radicalization theory has influenced the exercise of prosecutorial discretion.²⁸⁷ In the past decade, an increasing number of counterterrorism-related prosecutions have targeted protected speech including religious speech.²⁸⁸ For example, material support charges have enabled the targeting of religious activities and opened the door for unprecedented prosecutorial discretion.²⁸⁹ These charges ordinarily do not involve any violent activity.²⁹⁰ The combination of material support charges and conspiracy charges have dominated and continue to dominate counterterrorism prosecutions.²⁹¹ Both charges have “an unclear nexus to any violence or intention to commit violent acts.”²⁹² Preventative prosecutions made up the vast majority of prosecutions from 2001-2010.²⁹³ Such forms of preemptive prosecutions such as in material support cases are used to prosecute individuals whose “beliefs, ideologies or religious affiliations raise concerns for the government.”²⁹⁴ While many prosecutions do in fact target people planning or financing terrorist attacks, an alarming number of prosecutions focus on Muslims who were not actually involved in plotting or financing violence acts when the government initiated investigations against them.²⁹⁵ Moreover, though the majority of domestic terrorism is not

²⁸⁷ Akbar, “Policing ‘Radicalization,’” 828.

²⁸⁸ Id. (Akbar 828)

²⁸⁹ Id. at 841-842.

²⁹⁰ Id. at 842-843.

²⁹¹ Id. at 829.

²⁹² “Inventing Terrorism: The Lawfare of Preemptive Prosecution,” *Project SALAM – Support and Legal Advocacy for Muslims*, May 2014, <http://www.projectsalam.org/inventing-terrorists-study.pdf>.

²⁹³ Id.

²⁹⁴ Shahshahani and Guilloud, “How the U.S. Government Has Used 9/11 to Criminalize People of Color,” *In These Times*, September 12, 2016, <http://inthesetimes.com/article/19446/how-the-u.s.-government-used-9-11-to-criminalize-people-of-color>.

²⁹⁵ “Illusion of Justice,” *Human Rights Watch*, 2.

committed by Muslims, the majority of high-profile terrorism prosecutions were focused on Muslims.²⁹⁶ Some critics believe that Muslim suspects are fashioned through preemptive prosecution tactics in order to justify the enormous counterterrorism budget.²⁹⁷

Entrapment is another prevalent concern in terrorism-related prosecutions. Entrapment is where “the government creates the opportunity for criminal activity, encourages an otherwise law-abiding person to engage in it, and then prosecutes him for it.”²⁹⁸ As mentioned above, prosecutions involving informants often show a lack of plotting or financing anything related to criminal activity until after the government stepped into the picture.²⁹⁹ An entrapment defense is difficult to succeed with in a normal criminal case. It is nearly impossible in a terrorism-related case involving a Muslim. In fact, an entrapment defense has never been successful for a Muslim in the terrorism context.³⁰⁰ A defendant must demonstrate that the government induced him to act and that he was not “predisposed” to commit the crime.³⁰¹ Finding whether a particular defendant was predisposed, the court delves into a defendant’s beliefs, opinions, background, and reputation.³⁰² Put another way, the trial becomes fixated on the defendant’s religion, politics, and other characteristics, and no longer focuses on the actual alleged crime. This “character inquiry” makes the entrapment defense unattainable for Muslims “in the terrorism context, where

²⁹⁶ *Id.* (HRW)

²⁹⁷ Shahshahani and Guilloud, “How the U.S. Government Has Used 9/11 to Criminalize People of Color,” *In These Times*, September 12, 2016, <http://inthesetimes.com/article/19446/how-the-u.s.-government-used-9-11-to-criminalize-people-of-color>.

²⁹⁸ “Illusion of Justice,” Human Rights Watch, 57.

²⁹⁹ “Illusion of Justice,” Human Rights Watch, 14.

³⁰⁰ Lisa Rose, “How a Suicidal Pizza Man Found Himself Ensnared in an FBI Terror Sting,” *CNN*, November 29, 2017, <https://www.cnn.com/2017/11/29/politics/aby-rayyan-fbi-terror-sting-pizza-man/index.html>.

³⁰¹ *Id.* at 57.

³⁰² *Id.* at 57.

inflammatory stereotypes and highly charged characterizations of Islam and foreigners often prevail.”³⁰³ Sadequee’s case is a clear example of such prejudice directly within the jury itself.

Another form of prosecutorial conduct that raises cause for concern is the discriminatory investigations targeted at people with intellectual and mental disabilities.³⁰⁴ The targeting of persons with mental health diagnoses and intellectual disabilities is abhorrent. Especially, the use of inflammatory and outrageous statements from suspects who have mental health issues is troubling and not helpful to the fight against actual terrorism.³⁰⁵ Considering the bias in the jury pool, many people will not see a boy or a man with bizarre outbursts due to a disability or disease. They will see a violent heartless predator. Aziz’s illustration of *the Christmas tree bomber* highlights the fears of Muslim parents with children who have mental or intellectual disabilities:

Indeed, when Seattle Christmas tree bomber’s father solicited the assistance of the FBI in connection with his concerns about his son’s mental health problems, the FBI initiated a sting operation led by an informant that led to his son’s prosecution for terrorism. Law enforcement did not respond by seeking mental health intervention. In the end, CCP will not change the deeply entrenched adversarial system.³⁰⁶

On occasion, Muslims with mental or intellectual disabilities have been involved in terrorism-related activities and cannot be precluded from law enforcement investigations. However, exceedingly invasive and aggressive investigative and prosecutorial practices should not be used on vulnerable persons, regardless of their faith.

³⁰³ Id. at 3.

³⁰⁴ “Illusion of Justice,” Human Rights Watch, 22.

³⁰⁵ Id. at 27-41.

³⁰⁶ Sahar F. Aziz, *Policing Terrorists in the Community* (2013), 53.

ii. Trial and Sentencing

Tarek Mehanna was charged with material support, conspiracy, and attempt charges after providing false information to the FBI.³⁰⁷ Mehanna had translated and posted documents online including the translation of an old Arabic text, *39 Ways to Serve and Participate in Jihad*.³⁰⁸ Consequently, FBI agents approached him to become an informant.³⁰⁹ Mehanna refused.³¹⁰ He was arrested soon afterwards.³¹¹ The prosecution painted these activities as amounting to *the media wing* of al-Qaeda while the defense claimed that Mehanna was a strong critic of US policies and the activities at issue were purely protected speech under the First Amendment.³¹²

Fair trial issues are notorious in these trials such as the use of unqualified experts, excessive security, mistranslations of languages especially Arabic, and other prejudicial tactics.³¹³ In Mehanna's case, the defense submitted a motion to dismiss the material support charges on the ground that the criminal charges were based on protected First Amendment activity.³¹⁴ However, the judge denied the motion.³¹⁵ Akbars notes an apparent "Muslim exemption" to the First Amendment.³¹⁶ Regarding *media*, during Mehanna's trial, the government presented inflammatory videos and photos including:

28 different images of New York's World Trade Center in flames, 33 video clips and 95 thumbnail photos, many of which were only found as cache files on Mehanna's computer. The prosecutors mentioned Osama

³⁰⁷ Akbar, "Policing 'Radicalization,'" 829.

³⁰⁸ *Id.* at 830.

³⁰⁹ "Illusion of Justice," Human Rights Watch, 70.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Akbar, "Policing 'Radicalization,'" 830.

³¹³ "Inventing Terrorism: The Lawfare of Preemptive Prosecution," *Project SALAM – Support and Legal Advocacy for Muslims*, May 2014, <http://www.projectsalam.org/inventing-terrorists-study.pdf>.

³¹⁴ "Illusion of Justice," Human Rights Watch, 71.

³¹⁵ *Id.*

³¹⁶ *Id.* at 831.

Bin Laden 18 times before the close of the trial, even though there was no evidence presented of any relationship between Mehanna and Bin Laden.³¹⁷

Such inflammatory evidence seeks to bolster jurors' fears and prejudices.³¹⁸ This example highlights some of the many trial rights violations occurring in such cases. Other issues involving evidence include evidence contained by coercion, uncontested classified evidence, and the limited ability to challenge warrants because of extreme government secrecy.³¹⁹ Classified evidence obtained by warrantless searches or surveillance are nearly impossible to fairly contest.³²⁰ Similarly, the prosecution uses anonymous witnesses in many of these cases wherein the witness's identity is hidden even from the defense lawyers.³²¹ Not only is it impossible to confront the witness, as is a criminal defendant's right, but the defense counsel cannot even properly prepare for the case.³²² Moreover, with the inability to investigate the witness' background, it is simply not possible to challenge the witness' reliability, which is the right of a criminal defendant.³²³ Additionally, standard probable cause requirements for searches are often absent in such cases.³²⁴ The number of fair trial and evidentiary issues that frequent terrorism-related cases involving Muslims is simply too large for this paper to address.³²⁵

Excessive sentencing is prevalent throughout terrorism-related prosecutions involving Muslim defendants. Also, the government tends to use criminal terrorism charges in cases involving Muslim defendants charged with violent crimes, but not against non-Muslims charged

³¹⁷ Id. at 85.

³¹⁸ Id. at 76.

³¹⁹ Id. at 4.

³²⁰ Id. at 76.

³²¹ Id. at 95.

³²² Id.

³²³ Id.

³²⁴ Id. at 96.

³²⁵ Id. at 76-121.

with similar conduct.³²⁶ Many issues, especially *terrorism adjustments*, compounded to excessively increase sentencing periods in comparison to other sentencing periods for comparable crimes.³²⁷ However, yet again, material support charges are part of the problem here. Material support statutes are overly broad and therefore “punish behavior that [does] not demonstrate intent to support terrorism.”³²⁸ Muslims have been sentenced to more than fifteen years, including life imprisonment for material support and conspiracy.³²⁹ One example that combines both fair trial rights and excessive sentencing is the case of Ahmed Omar Abu Ali.³³⁰ As a US citizen, Ali was picked up in a mass arrest operation in Saudi Arabia. After being detained, allegedly tortured, and denied food by the Saudi government, he confessed many acts and intentions to Saudi officials.³³¹ Due to his confession in Saudi custody, which he maintained was false and the product of torture, Ali was prosecuted in the US criminal justice system. He was ultimately convicted of conspiracy, providing material support, and conspiracy to assassinate the president.³³² Ahmed is currently serving a life sentence in solitary confinement at the supermax prison in Colorado.³³³

The abovementioned issues combine and exacerbate the problems facing Muslims within the criminal justice system. From policing tactics to preemptive prosecutions to extensive sentencing, Muslim Americans experience a vastly different criminal justice system than the majority of Americans who participate in similar activity or speech. Those differences do not end

³²⁶ “Targeted and Entrapped: Manufacturing the ‘Homegrown Threat’ in the United States,” *Center for Human Rights and Global Justice*, NYU School of Law (2011): 6. Report available at <https://chrgj.org/wp-content/uploads/2016/09/targetedandentrapped.pdf>.

³²⁷ “Illusion of Justice,” *Human Rights Watch*, 123-125.

³²⁸ *Id.* at 4.

³²⁹ *Id.* at 4.

³³⁰ *Id.* at 5.

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

after the trial ends. Alternatively, Muslims are regularly put into an almost separate prison system from the rest of Americans. As discussed in the following subsection, for a Muslim, solitary confinement, inhumane conditions, and extraordinarily long pre-trial imprisonment is often the standard.

iii. Imprisonment

Fahad Hashmi allowed an acquaintance along with his luggage to stay in his apartment.³³⁴ The luggage apparently contained socks, ponchos, and raincoats, which was later termed *military gear* by the prosecution team.³³⁵ Hashmi was held in *pretrial* solitary confinement for nearly three years before ever being convicted guilty of a crime.³³⁶ Hashmi never actually got his day in court. Eventually, he pled guilty to one count of conspiring to provide material support – the socks and raincoats – and was sentenced to fifteen years in prison.³³⁷ In terrorism-related cases with Muslim defendants, the government often holds suspects in solitary confinement prior to trial.³³⁸ The international legal community considers this cruel and unusual punishment, as well as inhumane treatment and torture. Such behavior by the US government compels defendants to waive their constitutional right to trial and accept plea deals.³³⁹ Notably, it severely restricts a person's ability to assist in their own defense.³⁴⁰

In another case, Uzair Paracha refused to take a plea deal.³⁴¹ Before ever being convicted of material support charges, he was confined in solitary for roughly two years.³⁴² After he was

³³⁴ Id. at 68.

³³⁵ Id.

³³⁶ Id.

³³⁷ Id.

³³⁸ Id. at 112.

³³⁹ Id.

³⁴⁰ Id.

³⁴¹ Id. at 6.

³⁴² Id.

convicted, the solitary confinement was curtailed so that he could begin interacting with other inmates.³⁴³ Paracha pointed out, “I faced the harshest part of the [Special Administrative Measures (SAMs)] while I was innocent in the eyes of American law.”³⁴⁴ The use of SAMs and the Communication Management Unit (CMU) are harsh restrictions put on Muslim defendants in terrorism-related prosecutions.³⁴⁵

Significant numbers of terrorism-related defendants are being held in pretrial solitary confinement. Most likely, more defendants are being held in pretrial solitary confinement than post-conviction solitary confinement. This practice is especially disturbing because it may be used as a government tactic to gain more convictions or plea deals.³⁴⁶ Other documented issues related to imprisonment are as follows: unnecessary strip searches,³⁴⁷ infringement on religious practices and disrespect to religious holy books,³⁴⁸ extreme temperatures,³⁴⁹ unremitting bright lightening that is never turned off,³⁵⁰ and bans on speaking with media and other restrictions on communications.³⁵¹ The aforementioned prison conditions are torturous and against principles upheld in the US constitution. The conditions and concerns cited here are not the totality of experiences faced by Muslims in the criminal justice and prison systems. They are only a fraction. My aim in this section is to provide a brief insight to what policies and practices are disproportionately confronting Muslims in the criminal justice system from start to finish.

³⁴³ Id.

³⁴⁴ Id.

³⁴⁵ For more information see “Illusion of Justice,” *Human Rights Watch*, 133-163.

³⁴⁶ Id. at 11.

³⁴⁷ Id. at 118.

³⁴⁸ Id. at 117-118.

³⁴⁹ Id.

³⁵⁰ Id. at 117.

³⁵¹ Id. at 116.

Notably, Muslims are unequally experiencing such harsh and cruel conditions. For example, the record for the longest period of pretrial solitary confinement documented in the US federal criminal justice system belongs to a Muslim. Mohamed Warsame was held in pretrial solitary confinement for *five-and-a-half-years*.³⁵² In an attempt to appreciate this information, it is useful to know that during such time, Warsame was allowed to shower only once a week.³⁵³ He was originally held as a material witness and ultimately charged with material support.³⁵⁴ Under a plea deal, he was sentenced to ninety-two months in prison including time served and was immediately deported home to Canada.³⁵⁵ It is hard to imagine that Warsame was such a threat to the US that the government had to keep him in severe solitary confinement for nearly six years before even being convicted, yet quickly sent him across the border to roam freely in Canada.

As these examples demonstrate, the criminalization of Muslims is a growing problem. Muslim Americans and non-Muslim allies must appreciate that terms like *counterterrorism*, *counter-radicalization*, and *national security* used in relation to Muslim Americans signify the criminal justice system with all of its institutionalized problems. Many Americans are already familiar with criminal justice problems such as mass incarceration, racial profiling, police brutality, and abusive uses of solitary confinement. Recommendations for responding to the growing criminalization of Muslims are provided below in the final section of this paper.

³⁵² Id. at 109.

³⁵³ Id. at 115.

³⁵⁴ Id., footnote 507.

³⁵⁵ Id. at 115.

Part IV: Responding to a Growing Criminal Justice Problem

Muslim Americans are interacting with law enforcement and many parts of the government within the ever-growing United States criminal justice system. The Trump administration is likely to increase criminalization efforts targeting Muslims. Accordingly, Muslims must protect themselves and push for reform. Simultaneously, criminal justice lawyers and advocates must increase their support of these targeted communities.

In order to combat the criminalization of Muslims, criminal justice advocates, organizations, and attorneys must continue to reach out to, collaborate with, and support Muslim communities. Three main reasons why criminal justice allies need to increase their advocacy related to the criminalization of Muslims are as follows: 1) mainstream Muslim organizations cannot adequately address these issues alone; 2) addressing the criminalization of Muslims requires a specialization in the criminal justice system and many criminal justice issues impacting Muslim Americans overlap with other reform priorities; and 3) criminal justice advocates have a unique opportunity to raise awareness of this growing issue to a broader audience.

First, mainstream Muslim organizations are doing incredible work in numerous areas including, but not limited to, civil liberties, public image, religious discrimination, and bias-based attacks. However, Muslim organizations cannot singlehandedly combat all forms of Islamophobia. They need partners and allies. For example, recently with the Muslim ban and other immigration issues, countless immigration-related organizations stepped in to help Muslims. Also, regarding hate crimes, many allies have partnered with mainstream Muslim organizations to address these repudiate attacks. As discussed above, it may be easy to write off

the criminalization of Muslims as a “national security” issue. However, the legal problems created by the criminalization of Muslims are criminal justice system problems which necessitate criminal justice allies and experts. Muslim organizations are being forced to deal with immigration, religious discrimination, hate crimes, and countless other areas of law and public policy simultaneously. This overextends the reach of the services available.

Moreover, mainstream Muslim organizations are under constant threat of being criminalized themselves. In general, Muslim organizations including Muslim civil rights organizations are viewed as suspicious by the government and private actors. An ongoing conspiracy theory favored in far ring-wing and Islamophobic circles, for example, is that CAIR, the major Muslim civil rights organization in the United States, is a front for terrorism or otherwise is or has been involved in criminal activity. These attacks against the organization are so prevalent that the organization has an entire tab on its website dedicated to addressing this misinformation.³⁵⁶ Many of these rumors are created by private actors, but some of the misinformation is fueled or even created by the US government in its efforts to criminalize Muslim charities. For example, the Holy Land Foundation (HLF) case, is frequently used by private actors to attack countless Muslim non-profits. Roughly 300 Muslim organizations and individuals were listed as unindicted co-conspirators relating to the HLF case. Ultimately, the government was found to have violated the Fifth Amendment rights of CAIR and other organizations on this list – organizations that were involved in no wrongdoing whatsoever nor invited any suspicion of wrongdoing.

³⁵⁶ “Top Internet Misinformation and Conspiracy Theories About CAIR,” CAIR website, accessible at <https://www.cair.com/about-us/dispelling-rumors-about-cair.html>.

Furthermore, it is important to understand the HLF case itself to appreciate how Muslim charities and organizations have been targeted and labeled. The Holy Land Foundation was founded in 1989 and by 2001 it was the largest Muslim charity in the United States.³⁵⁷ The HLF investigation started before 9/11 and focused on HLF's international charity efforts helping Palestinians. The government alleged that the charity assisted Hamas, but not by directly funding terrorism. Instead, the government's case was built on the following argument: "HLF provided funds to Palestinian charities; the charities implemented Hamas' social programs, the social programs helped win the 'hearts and minds' of the Palestinian people, and the support enabled Hamas' military wing to carry out terrorist attacks."³⁵⁸ Notably, the majority of the conduct at issue in the case occurred before Hamas was ever labeled as a Foreign Terrorist Organization in 1997.³⁵⁹ Yet, the material support statutes do not require any showing that the support was intended by the defendant to benefit an unlawful act. After the first HLF trial concluded with a hung jury, the defendants were convicted in the second trial under such statutes.³⁶⁰

Muslim organizations are targeted by the government and private actors alike, which makes it difficult for them to defend fully Muslim Americans from criminalization. Notably, law enforcement has on occasion resolved to label Muslim civil rights groups as "a potential threat to national security."³⁶¹ Such criminalization of Muslim organizations may inadvertently influence them on issues of criminalization. In addition, Muslim organizations importantly work to defend Muslim Americans' public image and rebut harmful stereotypes. Yet, in doing this much needed work, sometimes Muslim organizations position themselves in a way that makes it difficult for

³⁵⁷ "Illusion of Justice," *Human Rights Watch*, 66.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 65.

³⁶⁰ *Id.* at 66.

³⁶¹ Aziz, "Policing Terrorists," 202.

them to adequately combat the criminalization of Muslims or provide criminal justice related legal advice. For example, directly under their “Dispelling Rumors” tab, CAIR has two other website tabs: 1) CAIR's Anti-Terrorism Campaigns; and 2) Working with Law Enforcement. CAIR actively disputes any implications that it tells Muslims not to speak to the FBI and instead promotes their work and collaboration with FBI and law enforcement generally. Accordingly, CAIR actively encourages Muslim Americans, who have been contacted by the FBI when there is no suspicion of wrongdoing to bring a lawyer with them to meet the FBI. Of course, it is always good advice to have an attorney present when speaking with law enforcement. However, this advice in regard to the meetings goes against the advice of many criminal justice lawyers and advocates who caution clients not to go to the meeting. They argue that nothing good will come from volunteering to interview with law enforcement. If CAIR or other Muslim organizations took the same stance on law enforcement interviews however, the organization would appear to be anti-law enforcement, which could harm their ability to advocate for Muslims in countless other areas.

Muslim organizations are walking a thin line in their attempts to support and protect Muslim Americas to the best of their abilities. Yet, these organizations have multiple mission statements that may interfere with the needed efforts to combat the criminalization of Muslims. In addition, these organizations are simultaneously trying to defend themselves from criminalization as well. Too often, mainstream Muslim organizations are placed in the position of condemning every and all terrorism attacks and rejoicing at the terrorism-related prosecutions, instead of “engag[ing] critically in debate about the utility of the aggressive policing and prosecuting tactics at work in Muslim communities.”³⁶² These points are not to fault nor attack

³⁶² Akbar, “Policing ‘Radicalization,’” 882.

mainstream Muslim organizations. Instead, I seek to demonstrate how crucial the need is for criminal justice allies to compliment and collaborate with Muslim Americans, Muslim communities, and Muslim organizations in order to better protect and support them.

My second point regarding Muslim Americans' need for criminal justice allies and advocates is that criminal justice organizations, attorneys, and grassroots organizers are specialized in the criminal justice system, criminal law, and criminal justice reform measures. Foremost, criminal law attorneys work in this legal space. Of course, each case is different and counterterrorism laws may alter the rulebook. However, these are legal areas with which the criminal justice attorney is familiar. For example, when looking for legal advice on whether or not to participate in interviews with law enforcement during knock and talks, one should not contact an immigration attorney or employment discrimination law expert. Knock and talks and other interactions with law enforcement require criminal defense expertise. Many criminalization problems invoke questions related to Equal Protections, Due Process, Fourth Amendment, Fifth Amendment, and Sixth Amendment issues. These legal issues are within the criminal justice advocates wheelhouse.

Likewise, criminal justice reformers and allies are acquainted with many of the issues facing Muslim Americans because they have dealt with or continue to deal with them in regard to other communities or the society at large. Many of these organizations and individuals are already working to end mass incarceration, including excessive long sentences for nonviolent crimes, in addition to organizing for police reform. Moreover, criminal justice advocates understand the systemic criminalization of people of color, as well as the very real harms of law enforcement profiling. Many of these same advocates continue to work to reform solitary confinement and pretrial imprisonment. Meanwhile, access to legal representation and the

implementation of fair trial procedures are ongoing struggles for criminal justice organizations. Simply put, criminal justice advocates are highly qualified to fight these battles.

Admittedly, Muslim Americans are not winning many criminal justice battles now. As far as surveillance, the secretive aspects of spying understandably make it challenging for Muslims to prove they are under surveillance.³⁶³ Interviews and community outreach events present real concerns surrounding consent, though realistically “courts are unlikely to be any more sympathetic to Fourth Amendment challenges in the terrorism context than in the ordinary crime context.”³⁶⁴ Also, Akbar points out that the Fourth Amendment will not likely be useful for interactions with informants or undercover agents, nor will the Fifth or Sixth Amendment right to Miranda warnings and legal counsel.³⁶⁵ And, as discussed above, entrapment is a nearly impossible argument to make. However, criminal justice advocates have been in these situations before and have secured fair trial rights, the right to defense attorneys for indigent defendants, and the right to have an attorney present during police interrogations.³⁶⁶ From Miranda warnings to Batson challenges to banning the death penalty for juveniles, criminal justice advocates found success under the most challenging circumstances.³⁶⁷ Criminal justice organizations and reformers are consistently breaking down barriers to justice. These advocates with their tenacity and expertise are exactly who Muslim Americans need in their corner.

Third and finally, criminal justice organizations and advocates must partner with Muslim Americans to combat the criminalization of Muslims because these organizations and individuals

³⁶³ Id. at 851.

³⁶⁴ Id.

³⁶⁵ Id. at 851-52.

³⁶⁶ See, *Powell v. Alabama*, 287 U.S. 45 (1932), *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Escobedo v. Illinois*, 378 U.S. 478 (1964).

³⁶⁷ See, *Miranda v. Arizona*, 384 U.S. 436 (1966), *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Roper v. Simmons*, 543 U.S. 551 (2005).

have a large platform to promote, research, and report on the issues that will reach a broad audience of non-Muslims and Muslims. Akbar emphasized that “there is a lack of political checks on these police practices, waged as they are against Muslims in the name of national security.”³⁶⁸ However, criminal justice organizations publish regular reports on the problems with the criminal justice system that range from the growing criminalization of poverty to the human rights abuses related to prison conditions. These reports encourage individuals, journalists, and government officials to consider the issues. These same organizations push a strong online and social media presence on criminal justice reform issues, and occasionally spark national conversations. Additionally, many of these organizations, separate from their litigation efforts, enact public police reform efforts at all levels of government – local, state, and federal. Merely inviting the issues embedded in the criminalization of Muslims into their public awareness machine would do wonders by bringing light to these issues that have often just been whispered about within some Muslim communities and discussed by a handful of scholars and small or niche organizations. The criminalization of Muslims, including the threats against Muslim organizations, is an involving issue that will likely increase due to recent political rhetoric and this administration’s leanings towards anti-Muslim policies.

Separately, I have two recommendations for Muslims Americans. First, Muslim Americans must understand their rights within the criminal justice system and prioritize access to legal representation. In turn, Muslims should encourage others within their communities to know their rights and increase access to legal advice and representation. Additionally, Muslim Americans and any organizations claiming to represent them must discontinue any voluntary interactions, including “community engagement” with law enforcement. Unless a specific crime

³⁶⁸ Akbar, “Policing ‘Radicalization,’” 854.

or safety concern has presented itself wherein any American would need to contact the police, such as a hate crime, robbery, or missing person, Muslim Americans should not be speaking or collaborating with police, prosecutors, investigators, or other persons connected with the law enforcement arm of the state for their own protection. Second, Muslim Americans need to increase efforts for genuine policy changes and creating public awareness of the mistreatment of Muslim Americans by law enforcement and the criminal justice system more broadly. Individuals should actively encourage their friends, families, and community members to become citizen activists pushing for law enforcement and criminal justice reform measures for Muslims and non-Muslims alike. Additionally, both Muslim and non-Muslim organizations should partner in order to support the growing resistance and grassroots movements within communities.

Until major policy reforms are made, voluntary engagement with law enforcement more often than not harms Muslim Americans and Muslim communities. Still, many Muslim Americans advocate for collaboration and engagement with local law enforcement. Some organizations, leaders, and individuals are optimistic about reforming invasive and illegal counterterrorism techniques through interactions and partnerships with law enforcement. However, this openness severely “underestimates the deeply entrenched adversarial nature of America’s criminal justice system, overlooks the long history of disparate treatment of racial and ethnic minorities, and misunderstands the incentive structure governing law enforcement agents and prosecutors.”³⁶⁹ Concerns such as civil rights and hate crimes are frequently addressed by outreach meetings “run by low-level federal bureaucrats who set the agenda with the same pre-

³⁶⁹ Aziz, “Policing Terrorists,” 174.

selected and vetted community members” that claim to represent diverse local communities.”³⁷⁰ Moreover, Muslims are seldom consulted in the choosing of the community representatives who are permitted to participate in outreach meetings.³⁷¹ Meanwhile, “no public oversight or accountability mechanisms” exist in such community engagement settings.³⁷² Instead, the engagement serves to remove the *perception* of inequity.³⁷³ Community engagement events such as these types of meetings are useless to reform efforts, and Muslim leaders do more harm than good attending. Aziz explains that so long as “government officials can honestly claim that they met with Muslims a specific number of times, they can create the appearance of collaboration that fulfills executive directives to engage Muslim communities.”³⁷⁴ She also points out that “outreach meetings offer the government a rebuke to critiques that it discriminates against or does not respect the rights of Muslims.”³⁷⁵ Much of these community engagement efforts are simply public stunts focused on quieting allegations of law enforcement profiling and other civil liberties violations.³⁷⁶

Many non-Muslims and even Muslim Americans do not realize how the state and local law enforcement criminalize Muslims and their communities and the incredible harm that stems from that criminalization. Adding to the lack of awareness, criminal justice issues are rarely promoted with reference to Muslim Americans. Generally, Muslim-related advocacy issues are painted as mostly involving immigration, religious accommodations or hate crimes, or “foreign” national security problems. The criminalization of Muslims is not highlighted as a pressing

³⁷⁰ Id. at 169-170.

³⁷¹ Id. at 170.

³⁷² Id.

³⁷³ Id.

³⁷⁴ Id. at 171.

³⁷⁵ Id.

³⁷⁶ Id. at 170-171.

concern given the countless other issues more easily associated with the criminal justice system such as stop and frisks, racial profiling, and mass incarceration. Muslim citizen activists and grassroots efforts are key to changing this narrative and bringing light to this major criminal justice reform issue. Accordingly, Muslims must continue to actively engage the issue both inside and outside of their communities. I strongly recommend all Muslims to reach out to criminal justice allies in order to address the many issues presented in this paper. I am optimistic that together we can achieve meaningful reform.

Conclusion

At this point, we do not know what Trump is doing about policing and prosecuting the Muslim American community. He seems obsessed with immigration, the Muslim ban, and building a wall for supposedly counterterrorism or national security reasons. However, he threatened and commented (tweeted) on policing Muslim Americans in disturbing ways. Both Jeff Sessions and Donald Trump view Islam and the West as a clash of civilizations. Thus, Muslim Americans and advocates need to be prepared to defend and protect the Muslim community. We must understand the way agencies and local law enforcement have acted, and all signs point to still are acting, towards Muslim Americans. This criminal justice problem is deeply rooted and has a long history. It will likely only become worse in the near future. Raising awareness, building partnerships, and resisting these law enforcement and criminal justice abuses veiled in national security language is critical to ensuring Muslim Americans hold on to their civil liberties and have access to justice and the criminal justice rights to which all Americans are entitled.