

# MUSLIMS IN AMERICAN PRISONS: ADVANCING THE RULE OF LAW THROUGH LITIGATION PRAXIS

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## **Abstract**

*Islamic ideas about justice and equality directly informed the development of prison law jurisprudence in the United States. Since the early 1960s, when federal courts began to hear claims by state prisoner-petitioners, Muslims began to look to courts to establish Islam in prison and inaugurated an ongoing campaign for civil rights. The trend is significant when considering Muslims represent a relatively small percentage of the American population. Decades of persistent litigation by Muslims in courts have been integral to developing the prisoners' rights movement in America. The Muslim impact on prison law and culture is an underappreciated phenomenon that involves African-American Muslims, the criminal justice system, and a spiritual quest for justice and equality. This Essay explores how Islamic ideals contributed to the litigation and how mundane lawsuits were transformed into an expression of genuine religiosity which, in turn, helped create new rules and policies that expanded the law's presence in prison. By appropriating courts in this way, Muslims emerged as staunch upholders of the rule of law. These lawsuits also unveiled a role-reversal between the guards and the guarded, since the prison staff and administration, entrusted to act lawfully, must be held accountable for violating institutional rules and even criminal law. Far from being antagonistic to American law, Muslims have not stopped attempting to ensure the rule of law prevails in prison.*

## I. INTRODUCTION TO MUSLIM PRISON LITIGATION

Muslims informed developments of the civil rights movements in mid-twentieth century America and catalyzed profound improvements in prison conditions. Since the early 1960s, when federal courts began to hear claims by state prisoner-petitioners, Muslims began looking to courts to establish Islam in prison and inaugurated a campaign to further religious rights for themselves and civil rights for all people in prison. As a civil rights leader who was deeply invested in the struggle to bring rights to people in prison, Malcolm X embodied both dimensions. The trend is significant considering that prior to this time, a person punished for crime was understood to have undergone a “civil death,” which meant practically that a person’s crime forfeited many basic rights and protections bestowed on civilians.<sup>1</sup> Courts’ allegiance to a “hands-off” philosophy prevented them from intervening in government punishment practices. Rights were scarce for those under lock and key, which evolved from times when people serving sentences were simply deemed “slaves of the state.”<sup>2</sup> Through litigation, Muslims helped transform prison life from these bleaker times, when the rule of law was at its weakest.

When litigation started gaining traction in the early 1960s, few prison systems recognized Muslims as followers of a legitimate religion. Establishing Islam itself therefore became the first struggle for Muslim prisoners to overcome. Correction officials deemed Muslims as suspicious, untrustworthy, and problematic.<sup>3</sup> Some of the suspicion was likely rooted in the fact that many who identified as Muslims had spent time in prison for refusing the draft in a war they believed was unjust, including Malcom X’s mentor and leader of the Nation of Islam (NOI), Elijah Muhammad. Moreover, the political orientation

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1 See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

2 *Ruffin v. Commonwealth*, 62 Va. 790, 796.

3 Cal. Dep’t of Corrections, Ad. Bull. No. 58/16, Feb. 25, 1958, at 1 (“The presence in our institutions of a small group of inmates who adhere to quasi-religious doctrines referred to as ‘Muslem,’ or who are members of the nation organization ‘Nation of Islam,’ has presented a management problem”).

of Muhammad's group cast Muslims as suspect, subversive, or at the very least, un-American.<sup>4</sup> As a result of these negative associations and as cases discussed in this essay show, prison officials harbored Islamophobic attitudes that burdened Muslims in prison with additional surveillance, eavesdropping, manipulation, and extra-legal punishments, often catalyzed by an individual simply proclaiming to be Muslim.<sup>5</sup> Muslim prisoners' discontent at their treatment eventually grew into resistance, which in turn became a justification for further discrimination, thus creating a vicious cycle.

The decades preceding this unfortunate era of corrections laid the foundation for the phenomenon of Muslim prison litigation and the prisoners' rights movement more broadly.<sup>6</sup> The subjection of Muslims to harsh treatment became the grounds from which they launched both coordinated and uncoordinated litigation to resist their treatment and confinement conditions. As a result, Muslims went on to win cases furthering religious freedom in prison. They would litigate an array of issues, including the use of solitary confinement, the right to health care, and the right to exercise other First Amendment entitlements.<sup>7</sup>

Scholars describe the impact of Muslim litigation in no uncertain terms. The litigation has been described as a "correctional law revolution, and the beginning of an evolving concern of the courts in correctional matters."<sup>8</sup> According to Felecia Dix-Richardson and Billy R. Close, "some researchers

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4 See Zoe Colley, "*All America is a Prison*": *The Nation of Islam and the Politicization of African American Prisoners*, 48 J. AM. STDS. 393 (2014) (describing perceptions that the NOI harbored pro-Japanese sentiment).

5 See, e.g., William Bennett Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 484 (1971).

6 The phrase "Muslim prison litigation" as used in this piece does not intend to paint a monolithic picture of Islam nor portray the litigation as a unified movement. Rather, the term refers to the body of lawsuits and court opinions involving Muslim petitioners suing for prison rights (as opposed to trying to undo a conviction or punishment). "Muslim" in this piece follows Edward W. Curtis's lead and refers to a person who self-identifies as Muslim or as a follower of Islam, see EDWARD W. CURTIS, *BLACK MUSLIM RELIGION IN THE NATION OF ISLAM, 1960–1975*, 10 (2006).

7 See generally Christopher Smith, *Black Muslims and the Development of Prisoners' Rights*, 24 J. BLACK STUD. 131 (1993).

8 Clair A. Cripe, *PROCEEDINGS OF THE 106TH ANNUAL CONGRESS OF CORRECTIONS, DENVER, AUGUST 22–26, 1976*, 25 (1977).

have credited the legal battles as the catalyst for creating recognized diversity within the inmate social system and changing the structure of the prison system.”<sup>9</sup> “In fact,” Kathleen Moore notes, “the area of law to which Muslims have made their most substantial contribution to date is the area of prisoners’ rights litigation.”<sup>10</sup> While litigants from various Muslim denominations comprised only a tiny minority of the prison population in the 1960s, they made significant and lasting imprints when it came to litigation.

Several markers and metrics offer a dramatic indication of the magnitude of this phenomenon. Perhaps most significantly, *Cooper v. Pate* is widely viewed as the case that opened the federal courts to people in prison, which became *the* watershed moment of judicial pushback to a hands-off philosophy.<sup>11</sup> Accordingly, this case and others “began the process through which the Muslims’ litigation would develop a legal legacy of enhanced, albeit limited, constitutional protections for all prisoners.”<sup>12</sup> In time, lawsuits by Muslims that actively shaped prison law burgeoned. This trend continued in the new millennium. The U.S. Commission on Civil Rights noted that between 2005 and 2007, the largest percentage of complaints that it received were from Muslims, accounting for over 26% of all complaints.<sup>13</sup> Also, between 2001 and 2006, Muslims were the most common plaintiffs bringing forth Religious Land Use and Institutionalized Persons Act (RLUIPA) claims, accounting for approximately 30% of all claims.<sup>14</sup> These results are even more striking when compared to the percentage of Muslims in society. For example, at about this same time, Muslims accounted

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9 Felecia Dix-Richardson and Billy R. Close, *Intersections of Race, Religion, and Inmate Culture: The Historical Development of Islam in American Corrections*, in RELIGION, THE COMMUNITY, AND THE REHABILITATION OF CRIMINAL OFFENDERS 87, 97 (Thomas P. O’Connor ed., 2002).

10 Kathleen Moore, *The Case for Muslim Constitutional Interpretive Activity*, 7 AM. J. ISLAMIC SOC. SCI. 69, 69 (1990).

11 *Cooper v. Pate*, 378 U.S. 546 (1964) (holding that the lower court erroneously dismissed prisoner-petitioner’s claim, which stated a viable cause of action).

12 Smith, *Black*, *supra* note 7.

13 U.S. COMM’N ON CIVIL RTS, ENFORCING RELIGIOUS FREEDOM IN PRISON 26 (2008).

14 *Id.* at 81–82.

for about 0.6 percent of adults nationally, yet represented nine percent of the federal prison population.<sup>15</sup> The figures demonstrate the disproportionate levels of Muslim involvement in litigation compared to their numbers in prison. The decades of persistent litigation by Muslims have been recognized as central to America's prisoners' rights movement, from its fledgling years up to the present.<sup>16</sup>

Such figures and commentary offer a sense of the scale of litigation, but less understood is how religious values influenced litigation. In the earliest lawsuits, NOI converts were the dominant force in creating space for Islam in prisons. Most early claims were made by adherents of this group, along with others who were collectively labeled "Black Muslims."<sup>17</sup> The NOI situated justice and equality at the center of its mission, but, most pointedly, "Justice for the Black Man."<sup>18</sup> Leaders of NOI treated justice and equality as inherently Islamic principles that Muslims had a duty to fulfill. This orientation framed lawsuits as noble and sublime—they were expressions of faith. In these early years, the face of a Muslim in court was almost always Black. However, in the post-9/11 era this face has been changing. Muslim litigants are more diverse in terms of both race and religious denomination, particularly as Sunnī, Shī'ī, and other adherents have increasingly brought claims in court and have connected their actions to religious belief.

This essay theorizes Muslim prison litigation as religious praxis. It is a story that involves African-American Muslims, prisons, and a spiritual quest for justice. The Essay attempts to show that some Muslims engage in litigation while in prison not simply to obtain a desired legal outcome, but because there is spiritual merit in doing so. The litigation efforts demonstrate that religiosity can manifest in uncanny ways, including bringing an action in court. Although many view litigation as a secular affair, this essay posits that sometimes the exact opposite is true.

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15 Id. at 13.

16 See, e.g., GARRET FELBER, *THOSE WHO KNOW DON'T SAY* (2020).

17 Turner, *Establishing*, *supra* note 5.

18 For examples see Khuram Hussain, "Muhammad Speaks" for Freedom, Justice, and Equality, *JSTOR DAILY*, May 13, 2021, <http://daily.jstor.org/occ-reveal-digital-muhammad-speaks/>.

Muslims have understood activism to be an expression of Muslim identity in numerous contexts.<sup>19</sup> This work points to prison litigation as one such context, where ideology and activism fuse together to create novel forms of religiosity. What follows is the first work of its kind that examines the religious influences on litigation and the implications for the rule of law.<sup>20</sup>

The focus on religion may help explain why Muslims are the most litigious religious group behind bars. Still, such framing is not intended to overlook the plausible claim that Muslims, in general, are subject to worse treatment than others in prison. If Muslims are indeed being treated this way, it would seem logical that they would generate more complaints. As the cases detail, anti-Islamic attitudes by prison staff and administration translated into a myriad of unfair, and sometimes brutal, treatments. Given that the very first step in getting a case to court involves exhausting prison remedies, potential litigants are left in the unsavory position of formally complaining against their day-to-day overseers. Although overseers are entrusted with ensuring the safety of wards and helping them lead law-abiding lives—to adhere to the rule of law—this role is occasionally lost in a world where some sit above the law. Hence, Muslims, as one scholar writes, “have been largely responsible for establishing prisoners’ constitutional rights to worship.”<sup>21</sup> Moreover, since prison officials perceive “the close unity of Muslims” under their authority as a threat thereto, “officials in most prisons, at one time or another, have banned the practice of Islam or imposed tight restrictions on Muslims but not on other religious denominations.”<sup>22</sup>

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19 See, e.g., Iman AbdoulKarim, *The Role of Gender and Religion in Muslim Women’s BLM Activism*, in RACE, RELIGION, AND BLACK LIVES MATTER (Christopher Cameron & Phillip Luke Sinitiere eds., 2021) (examining Muslim activism as a religious obligation).

20 The rule of law is a political concept understood to be the guiding legal principle in Western democratic societies. Under this ideology, society is organized according to the law’s supremacy. Perhaps the simplest and foremost descriptions of this concept are the maxims that characterize the rule, including that it is diametrically opposed to the “rule of men,” indicating the primacy of law. There is also a principle of equality in the rule that assures “no one is above the law” and guarantees the right of getting one’s “day in court.”

21 Turner, *Establishing*, *supra* note 5.

22 *Id.*

## II. PRISONS—EXCEPTION TO THE RULE

*Verbal formulas and judicially created obstacles that prevent the reaching of the merits of a complaint except in “exceptional circumstances” make a sham of “equal justice under law” and permit the suppression of an unpopular minority at the hands of arbitrary officials. By claiming that the actions of prison officials may not be reviewed, the courts may give these officials a status above the law.<sup>23</sup>*

In the United States, prisons represent the fringe of institutions where the ideals enshrined in the rule of law exist in a diminished capacity, and sometimes in suspension altogether. Whether it be the cherished ideal of “getting one’s day in court” or that nobody “is above the law,” these and related principles are sorely lacking in the prison context, where people are at their most vulnerable and the state holds a near-monopoly of power. They live an invisible existence under the law. As Mumia Abu-Jamal wrote during his time on Death Row, “Words like ‘justice,’ ‘freedom,’ ‘civil rights,’ and yes ‘crime,’ have different and elastic meanings depending on whose rights were violated . . . . For those . . . who wear the label *prisoner* around their necks, there is no law, there is no justice, there are no rights.”<sup>24</sup> This section details the awesome, nearly inscrutable power prison officials wield over those they ward, and demonstrates that prisons are an unfortunate exception to the rule of law. In demonstrating this point, this section also introduces the reader to the type of treatment and conditions of confinement that triggered litigation.

The prison’s exceptionalism likely has something to do with demographics of the incarcerated. Black Muslims in prison face double discrimination due to the intersectional identity of their religion and their race. American history abundantly shows that Blacks have always been associated with sin, criminality,

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<sup>23</sup> Comment, *Suits by Black Muslim Prisoners to Enforce Religious Rights—Obstacles to a Hearing on the Merits*, 20 RUTGERS L. REV. 528, 570 (1966).

<sup>24</sup> MUMIA ABU-JAMAL, *ALL THINGS CENSORED* 58 (Noelle Hanrahan, ed., 1995). Emphasis in original.

and expendability. Likewise, from the 1960s to the turn of the millennium, American courts have harbored unfavorable views about Muslims, which were magnified after the attacks of 9/11.<sup>25</sup> This combination of animus against Islam and Blackness has created an alterity regarded as unworthy of the law's protection. Under such pretenses, officials who act with impunity and intentionally disobey the law can make life in prison far more painful than a mere prison sentence.

*a. Treatment By Staff and Conditions of Confinement*

Mistreatment of Muslims in prison can be analyzed along two primary divisions. One is the affirmative conduct by prison officials—whether through direct conduct or indirect policies, rules, and regulations—that worsen an individual's existence behind bars. The other is the absence of action—whether through failure to carry out their legal responsibilities, or worse, outright disregard of the mistreatment of the wards—by both staff and fellow-wards.<sup>26</sup> The acts and omissions of prison staff can create an oppressive mix of domination and subjugation, where staff engage in abusive and repressive treatment of those they have been entrusted to care for or rehabilitate. This dual aspect of staff conduct is the foundation for understanding litigation efforts, since both forms of mistreatment became the basis for complaints and grievances that would spawn court action.

The *Cooper v. Pate* case is one of the earliest and most illustrious examples of how staff treatment and confinement conditions could create a desperate situation for Muslims.<sup>27</sup> In this case, the plaintiff, Cooper, who followed the NOI, was sent to solitary confinement and given other penalties for claiming

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<sup>25</sup> Marie A. Failing, *Islam in the Mind of American State Courts: 1960 to 2001*, 28 S. CAL. REV. L. SOC. JUST. 21 (2019).

<sup>26</sup> *Hearns v. Terhune*, No. 02-56302, 2005 U.S. App. Lexis 13034 (9th Cir. 2005) (Muslim alleged adequately that prison officials knew of a threat to him from other Muslims in prison).

<sup>27</sup> Other cases were precursors to the *Cooper* decision, which laid the groundwork for that decision, e.g., *Pierce v. La Vallee*, 293 F.2d 233 (2nd Cir. 1961); *In Re Ferguson*, 55 Cal. 2d 663 (1961); *Sewell v. Pegelow*, 291 F.2d 196 (4th Cir. 1961); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962).



to be a Muslim. In solitary, he was alone nearly constantly, with a blanket and a ration of one meal a day. He could shower and shave once a week and was allowed a half-hour of exercise daily in a small pen.<sup>28</sup> Writing in 1967, the Court of Appeals of the Seventh Circuit seemed shocked at his duration in solitary—which stood at over a decade—and emphasized that “Cooper’s stay in segregation is almost of record length.”<sup>29</sup>

*Cooper* foreshadowed issues that would occupy courts’ attention for the next several decades, including punishment practices and restrictions on religious rights. For example, in addition to being punished for claiming to be Muslim, Cooper and his fellow adherents were denied the ability to access religious materials including the Qur’ān, to communicate with other NOI followers, to visit with ministers of their faith, and to attend religious services.<sup>30</sup> Moreover, *Cooper* says that Muslims were viewed unfavorably by the administration, which in turn resulted in special discriminatory treatment. More than anything, the case demonstrated how extra-legal punishment could intersect with forms of religious and racial repression to cause more damage than the marginalization of religious rights.

Litigation after *Cooper* would uncover and challenge different manifestations of the same issues *Cooper* dealt with in the 1960s. Muslims would continue to challenge solitary confinement,<sup>31</sup> newly-created Communication Management Units,<sup>32</sup> use of force,<sup>33</sup> and restrictions on access to courts and

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28 Toussaint Losier, “. . . For Strictly Religious Reason[s]”: *Cooper v. Pate and the Origins of the Prisoners’ Rights Movement*, 15 *Souls* 19, 28 (2013).

29 *Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967).

30 *Cooper v. Pate*, 378 U.S. 546 (1964).

31 Perhaps no individual was as important as Martin Sostre when it came to advocating against the use of solitary confinement. Sostre was a paramount jail-house lawyer who was involved in several lawsuits as a plaintiff, and himself spent time in solitary unlawfully; see, e.g., *Aliym v. Miles*, 679 F.Supp. 1 (W.D. N.Y. 1988) (Muslim confined to Security Housing Unit for discipline may be denied right to attend religious services).

32 *Lindh v. Warden*, No. 2:09-CV-00215-JMS-MJD, 2013 WL 139699 (S.D. Ind. Jan 11, 2013).

33 *Arroyo Lopez v. Nuttall*, 25 F.Supp.2d 407 (S.D.N.Y. 1998) (freedom of religion violated when office shoved petitioner from behind during prayer); *Hill v. Blum*, 916 F.Supp. 470 (E.D. Pa. 1996) (squeezing of inmate’s testicles during pat search not an unreasonable search, cruel and unusual punishment, or religious violation).

libraries. Other grievances focused on the day-to-day management of the institution, including issues related to adequate nutrition, medical care, visitors, canteen, work detail, recreation, and programming.<sup>34</sup> More recent issues center on the right to wear the headscarf veil (hijab) in female jails and prisons,<sup>35</sup> religious practices,<sup>36</sup> observance of Ramadan,<sup>37</sup> religious paraphernalia,<sup>38</sup> worship space,<sup>39</sup> dress<sup>40</sup> and grooming,<sup>41</sup> religious literature,<sup>42</sup> and access to religious leaders and services.<sup>43</sup> These and other issues offer a glimpse into the legal uncertainties in prison, and the range of issues over which prison officials exercise control.

Sometimes officials force Muslims to endure hardships because of religious bias. Previous ethnographic research, including testimony from currently and formerly incarcerated individuals, describes guards ridiculing Muslims by calling them “Mohammad” or “Al-Qaeda,” referring to traditional clothing

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34 See, e.g., Holly Fournier and Jennifer Chambers, *CAIR-MI Settles Suit against MDOC over Ramadan Meals*, THE DETROIT NEWS, Jan. 11, 2017, <http://www.detroitnews.com/story/news/local/michigan/2017/01/11/cair-mi-settles-suit-against-mdoc-over-ramadan-meals/96447748/>.

35 *CAIR-Michigan Announces Federal Civil Rights Lawsuit Against City of Detroit, Michigan Department of Corrections for Woman Who Had Hijab Forcibly Removed for Booking Photo*, CAIR, Oct. 6, 2020, [http://www.cair.com/press\\_releases/cair-michigan-announces-federal-civil-rights-lawsuit-against-city-of-detroit-michigan-department-of-corrections-for-woman-who-had-hijab-forcibly-removed-for-booking-photo/](http://www.cair.com/press_releases/cair-michigan-announces-federal-civil-rights-lawsuit-against-city-of-detroit-michigan-department-of-corrections-for-woman-who-had-hijab-forcibly-removed-for-booking-photo/).

36 *McEachin v. McGuinnis*, 357 F.3d 197 (2nd Cir. 2004) (No. 02-0117) (punishment of Muslim for failing to respond to official’s order until he completed his prayers is a violation if the order intended to interfere with the free exercise of religion).

37 *Henderson v. Muniz*, 196 F. Supp. 3d 1092 (N.D.Cal. 2016).

38 *Hammons v. Saffle*, 348 F.3d 1250 (10th Cir. 2003) (No. 02-5009) (refusal to allow prayer oils is rationally related to a legitimate interest in deterring drug use and gang activity).

39 *Orafan v. Goord*, 411 F. Supp. 2d 153 (N.D.N.Y. 2006) (No. 00-CV-2022) (no violation of Shī‘ī Muslims’ rights by the availability of only Sunnī services at the prison).

40 *Abdullah v. Frank*, No. 04C1181, 2007 U.S. Dist. LEXIS 13215 (E.D. Wisc. 2007).

41 *Holt v. Hobbs*, 574 U.S. 352 (2015).

42 *Roddy v. Banks*, 124 Fed. Appx. 469 (8th Cir. 2005) (No. 03-3735) (Nation of Islam member made out a valid free exercise claim by the prison to allow him religious books).

43 *O’Lone v. Estate of Shabazz*, 42 U.S. 342 (1987).

as “nightgowns,” and repeatedly confiscating worship items, including incense, oils, beads, and foodstuffs.<sup>44</sup>

Retaliation by prison staff is one of the more unfortunate and recurring grievances in prison. Sometimes retaliation occurs when an individual files a complaint against a specific prison policy or staff member.<sup>45</sup> In other instances, complaints of retaliation come from individuals who have cases pending in court. In both instances, the person is subject to extra-legal punishment for following the prison’s protocol about filing grievances. Retaliatory actions can include searching one’s prison cell without cause, which is essentially a license to ransack a cell. In addition, confiscations are common, as are threats against individuals. In one case, an individual claimed he had personal belongings confiscated from his cell for filing a complaint that stated officers filed false charges against him.<sup>46</sup> The court sided with the Muslim petitioner, after he was able to show enough wrongdoing on behalf of prison staff to proceed with this case. However, this small victory hardly meant that petitioner’s long-term living conditions improved. After all, court documents alleged that even other corrections officers warned one official there would be grievances filed against him because of his conduct, to which he replied, “I don’t care about [a] fuck-ing grievance because I kill Muslims.”<sup>47</sup>

The threat of retaliation thus hangs constantly over Muslims, making the phenomenon of Muslim prison litigation even more extraordinary. Being subject to retaliation makes complaining or litigating dangerous business and puts the petitioner in harm’s way for trying to hold institutions and officials accountable. Perhaps one of the most blatant and harmful means of retaliation is when a prison transfers a ward to a different facility—defeating litigation efforts and creating untold havoc in that person’s life.

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44 See SpearIt, *Muslim Radicalization in Prison: Responding with Sound Penal Policy or the Sound of Alarm?* 49 GONZ. L. REV. 37 (2014).

45 *Wade v. Cal. Dept. of Corrections*, 171 Fed.Appx. 601 (9th Cir. 2006) (No. 05-1563).

46 *Howard v. Foster*, 208 F Supp. 3d 1152 (D. Nev. 2016).

47 *Id.*

*b. Transfer and Mootness*

As the previous section detailed the myriad means of misconduct by prison officials, this part considers how the law bars redress for some of these very harms. One mechanism by which prison officials are shielded from wrongdoing is when prisons transfer a ward out of a facility against which he has a pending legal claim. When a prison enacts such a transfer, it functions as an operative fact that allows courts to moot pending claims against prison officials and policies of the former facility, essentially extinguishing the possibility of redress. This practice merits consideration in the context of Muslim litigation in particular because a significant number of Muslim claims have succumbed to this doctrine, never to get their day in court. In these instances, the rule of law suffers a double violation: one for the initial wrong suffered at the hands of prison officials, and another for the fact that no one is ever brought to justice for it. The fear of transfer is not imaginary, and was noted in the *Holt v. Hobbs* litigation by the plaintiff Muhammad, who voiced fears of this tactic being used against him:

As part of that injunction, it stated that in my petition—because this is something that’s become a real issue with me there at the penitentiary, at Cummins Unit, that—that the defendants be banned or barred from transferring me to another institution in retaliation for this litigation. It’s a common tactic ADC [the Arkansas Department of Correction] uses to disrupt litigation. You understand what I’m saying?<sup>48</sup>

Holt was worried because he knew that being transferred from a facility that was the locus of a plaintiff’s allegations necessarily moots a claim for declaratory or injunctive relief against officials of that prison regardless of how far the litigation has progressed. As a result of this practice, courts in case after case ignore what officials have done at a prison merely because the

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<sup>48</sup> Joint Appendix on Writ of Certiorari to the United States Court of Appeals for The Eighth Circuit, *Holt v. Hobbs*, No. 13-6827 (filed Apr. 23, 2014).

institution has stopped the violative conduct or because the prisoner-petitioner has been shifted to another facility. This gap in justice is not new, as James Jacobs noted in the 1970s, 15–20 percent of cases “are disposed of by settlement or by mootness,” according to the head of the Prisoner Litigation Bureau of the Attorney General’s office.<sup>49</sup>

Even without such hurdles, litigating from within prison is not the same as from the outside. Incarcerated people are a particularly vulnerable class, and they are made more so from the ills of this doctrine. They have already faced a unique set of procedural barriers in getting their cases to court in addition to dealing with retaliation and other unfavorable treatment at the hands of administration and staff. Transfer and mootness reduce to nothing all the time, effort, and sacrifice of an individual who, under the hardship of prison, has managed to crack through the bureaucracy and get an audience with a court.<sup>50</sup>

However, these legal defeats fail to convey the extent of the harm, which includes the transfer itself. An involuntary transfer is a major disruption in a person’s life. At the most basic level, a transfer disrupts day-to-day living, including the ability to continue receiving mail, medication, counseling, and therapy. Such arrangements become compromised when one is forced to pack one’s possessions and vacate one’s assigned living space. The move may prevent visitation from relatives, friends, or other existing support systems and forces the transferee to become the new kid on the cellblock all over again with whatever friendships or goodwill that they have established dissipating. For those with other legal matters pending in court, the transfer interferes with an array of matters by impeding communication to one’s lawyer, disrupting legal documents and correspondences that must follow the transfer, and creating the very

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49 JAMES JACOBS, *STATEVILLE: THE PENITENTIARY IN MASS SOCIETY* 117 (1977).

50 The case, *Blake v. Ross*, 136 S.Ct. 1850 (2016) offers a poignant example of both. In this case, the prisoner-petitioner suffered injury including nerve damage at the hands of guards, however his civil claim was dismissed by the federal district court because the court found that he did not exhaust the prison protocol. The case eventually went to the Supreme Court, which remanded the case to the district court. While waiting for his case to be decided, he was transferred to another prison, which subsequently mooted his case.

real possibility of delayed responses, lost possessions, and lost mail, weakening one's potential for success in court. The situation lends the impression that the transfer sometimes acts as a de facto punishment for filing the lawsuit. The transfer shields prison officials from accountability for their misconduct, and the damage caused by their misconduct is worsened for the individual now also dealing with the disorientation of being transferred—all for trying to play by the rules.

### III. MUSLIM LITIGIOSITY: SEEKING JUSTICE THROUGH SPIRITUAL ACTIVISM

*You asked what motivates me to litigate: Justice and the taking of power from oppressors who seek to destroy Islam by watering it down. Islam enjoins the right and forbids the wrong, so . . . as righteous Muslims we have a duty to resist and disobey. So our form of resistance at the present time is court action.<sup>51</sup>*

When considering the long and ongoing legacy of Muslim prison litigation, one might be tempted to say that Muslims sue “religiously.” While such a description may ring metaphoric or tongue-in-cheek, in some cases, it also carries an element of truth. Litigation efforts are not “religious” simply because a Muslim is the petitioner in a lawsuit, but also because there are religious influences at different levels of analysis. On one level, much of the litigation pertains to issues bearing on religion itself, issues that involve religious rights. In these instances, an individual is acting in the cause of Islam. It is likewise true that religious organization has been a powerful influence on litigation efforts; Muslims have pooled resources and orchestrated lawsuits to create room for Islam in prison and freedom to practice as Muslims. There is also evidence that at the individual level, the messages of Islam about justice and equality motivate the decision to litigate and that, for some, engaging in litigation is an expression of religious faith. This section unifies the previous

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<sup>51</sup> Letter from Abdul Maalik Muhammad, Pet’r in *Holt v. Hobbs* (2015), (Jan. 16, 2022) (on file with author).

parts to demonstrate that Muslim prison litigation is not just a matter of Muslims suing in multitudes, but also of an ideology bearing directly on the will to litigate, and ultimately, on the law itself.

The topic of Muslim prison litigation inculcates law and religion in the prison context. As such, there are key takeaways distinct to law and jurisprudence. In addition are those findings specific to the study of religion and the nature of religious practice. Some lessons, however, are not so insular, and instead involve complex and dynamic interplays between law and religion, where consideration of one is inextricable from the other. Lastly are those lessons that teach us about our lack of understanding. Through the study of this phenomenon, we are made aware of gaps in scholarship and research that bear directly on the issues raised in this essay. Such blind spots are lamentable, but now they are known unknowns.

*a. Litigation within the Prisoners' Rights Movement*

An overlooked aspect of Muslim prison litigation is how the actions of Muslims reinforce core concepts that define the rule of law. "When prisoners emerge from the shadows to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather, they speak the language of the charter upon which all of us rely to hold official power accountable."<sup>52</sup> Prisons' erosion of the rule of law is sometimes an extension of the external world's erosion of the rule of law for those who are in prison in the first place due to police officers' subversion of the law (e.g., cases of unlawful deadly force, excessive physical force, tampering with evidence, withholding evidence, or acting in an array of other unlawful ways). Some correctional officers engage in similar subversion of the law that can make prison a lawless place of needless suffering. Muslim prison litigation is a saga about trying to make the rule of law more relevant in prison. By working on the recognition of Islam within prisons, Muslims were involved in some of the

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<sup>52</sup> *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 355 (1987) (Brennan, J. dissenting).

first cases that took the notion of civil rights in prison seriously, thus cementing Islam's centrality in the wider prisoners' rights movement.

James B. Jacobs theorized the impacts of litigation in the prisoners' rights movement once correctional facilities first came under the scope of federal courts, perhaps the chief of which was to broaden the rule of law's application in the correctional setting. One means was by effecting the bureaucratization of the prison and a new generation of administrators.<sup>53</sup> He notes that prior to litigation efforts, prison administrators operated on intuition: "There were no written rules and regulations, and daily operating procedures were passed down from one generation to the next . . . . Early lawsuits revealed the inability of prison officials to justify or even to explain their procedures."<sup>54</sup> However, courts began demanding rational decision-making procedures and written policies. The adoption of rules and regulations that restrained officials and the shift in the normative expectations of those incarcerated catalyzed an overhaul of prison systems. Moreover, Jacobs notes that the movement "expanded the procedural protections available to prisoners."<sup>55</sup> Previously, individuals were not entitled to even the most rudimentary procedural protections when faced with losing good time credits or receiving extra punishment. These gaps led to the development of legislative and administrative procedures, including grievance procedures for formal dispute resolution, arbitration, and "minimum standards" to certify compliance by prison officials. Finally, the litigation movement "heightened public awareness of prison conditions."<sup>56</sup> As media and other coverage publicized the brutality of prisons, they helped mobilize support for change. As a result of these developments, "legislative, regulatory, and supervisory bodies adopted rules . . . and facilitated correctional improvements."<sup>57</sup>

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53 James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960-80*, 2 CRIME AND JUSTICE 429, 458 (1980).

54 *Id.*

55 *Id.*

56 *Id.*

57 M. KAY HARRIS AND DUDLEY P. SPILLER, JR., AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 26 (1977).



On the judicial front, the litigation boosted the law by providing a growing body of precedent for future litigation efforts. The *Holt* case is instructive here because it demonstrates how the plaintiff relied on court opinions from other jurisdictions and practices of other prisons to push for the right to wear one-half-inch beards. Some of these practices already existed elsewhere because Muslims had pushed for change at those institutions. The petitioner in *Holt* used these existing tools to enact lasting change in prison. Effectively, the efforts of Muslims have created ground rules and precedents for individuals of other faiths to build on tomorrow's legal battles, and in some cases, to spark fervor to change the law.<sup>58</sup>

*b. Reimagining Religion's Role in Litigation*

For students of religion, the phenomenon of Muslim prison litigation presents several vital insights about how religion influences litigation efforts. This part considers three important means by which religion exerts its influence. First and perhaps most obvious is when the litigation involves an explicitly religious claim. In these cases, the very motivation for suing is religious in nature as it is about freedom to practice or express one's religion, and one may take the actions as standing for the cause of Islam. Religious organizations are another aspect of religion's influence on litigation. Second, it is clear the Muslim turn to courts in dramatic numbers was not all spontaneous or coincidental. Litigation efforts have progressed in part due to the strategic planning of religious groups both within prison and on the outside (in particular the NOI in the 1960s). Third, in addition to these influences are those instances where religious ideology inspires the individual to take a stand for justice. These

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<sup>58</sup> Most recently, the case of Dominique Ray, *Dunn v. Ray*, 586 U.S. 139 S. Ct. 661 (2019), has sparked a Supreme Court venture into religious rights and the death penalty. Ray sought to have an imam in the execution chamber with him in the same way that Christians were able to have their spiritual advisors in the room. While this case was being decided, the Court issued an order that allowed his execution to move forward regardless of the pending religious claim. This case was sharply criticized and the court revisited the issue in *Murphy v. Collier*, 587 U.S. 139 S.Ct. 1475 (2019) and *Dunn v. Smith*, 592 U.S. \_\_\_\_ (2021).

three spheres of influence invite us to reimagine religion's role in Muslim litigation. Taken as a whole, this part of the Essay supplements critical work on prison litigation efforts of Muslims in prison by underscoring the significance of religious ideas on those same efforts.

At the outset, it must be recognized that some of the litigation is partially a reflection of Muslim-specific repression, that is, Muslims sue more because they suffer greater hardships and have more grievances than other religious adherents. There is little doubt that legal justifications have been used to stifle religion and prevent Muslims from practicing their faith. As one study notes, departments of correction “have made it increasingly difficult for many inmates to practice their religious beliefs. Followers of the Christian and Jewish faiths have found it easiest to follow their spiritual convictions, while Muslims . . . have found it more difficult.”<sup>59</sup> The situation is an extension of longstanding practices that disadvantage Muslims. Take, for example, the issue of worship space—Christians have never had much cause to petition for separate worship spaces for Catholics and Protestants in prison. Christians could take these and other accommodations for granted, yet Muslims of different denominations have often been lumped together into a homogenous whole despite vast differences in the way these groups understand Islam. As a result, Muslims have had to continue litigating these issues in courts even today.<sup>60</sup>

In the early years of litigation around Muslim religious issues, the main battles were concentrated in several foundational areas: to establish Islam as a legitimate religion, obtaining the Qur'ān and other religious writings, and getting access to religious leaders.<sup>61</sup> In these lawsuits, the desire to litigate is an expression of commitment to faith. This situation is a pure instance

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59 Jeffrey Ian Ross, *Resisting the Carceral State: Prisoner Resistance from the Bottom Up*, 36 SOCIAL JUSTICE 28, 32 (2009–10).

60 For example, Abdul Maalik Muhammad has recently been involved in litigation to secure individual worship space for Sunni Muslims in Arkansas prisons, Massoud Hayoum, *Muslims Sue Arkansas Prisons Over Failure To Offer Prayer Services*, PACIFIC STANDARD, Mar. 8, 2019, <http://psmag.com/social-justice/muslims-sue-arkansas-prisons-over-failure-to-offer-prayer-services>.

61 Lawrence O'Kane, *Muslim Negroes Suing the State*, N.Y. TIMES, Mar. 19, 1961, at 46 (“The basic issue in all cases is the conflict between religious freedom

of religion influencing an individual to engage in a struggle on behalf of Islam. Advocating for Islamic customs, food, religious services, holidays, and the like is not the same as other advocacy because it involves deeply held beliefs and practices. There is spiritual significance in the lawsuit, the very least of which is the fact that the outcome can impact one's spiritual life itself.

Indeed, some have located Muslim prison litigation within the frame of the American prophetic tradition. In this respect, the action represents a means of identifying the diversity of political and religious identities and values that motivate activism.<sup>62</sup> The prophetic orientation drew upon civil rights activism and Islamically inspired motivations, and "became not only a vehicle for Black identity, but also a voice for Black Muslim prisoners—and in that context adopted reformist practices such as lawsuits to protect prisoners' religious freedom."<sup>63</sup> Through this approach, Muslims have taken a seemingly mundane affair like a lawsuit and sublimated it into an act of faith, as one individual describes:

The Grace of Allah has also been upon we Muslims in the New York State Correction System. He has given us several openings in the Federal Courts across the country so that we may seek redress from those in State and Federal authority who seek to regress our Freedom of Religious Worship, rights guaranteed us in the U.S. Constitution.<sup>64</sup>

As these sentiments proclaim, a court action does not commence coincidentally, but instead represents a conscious practice of theological proportions.

Moreover, religion influenced, and continues to influence, litigation efforts through conscious organizational efforts. In the

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as guaranteed under Federal and state Constitutions, and the duty of prison officials to make rules necessary for the safe and peaceful operations of the prison").

62 Caroline Seymour Jorn, Kristin Sziarto, and Anna Mansson McGinty, *The American Prophetic Tradition and Social Justice Activism among Muslims in Milwaukee, Wisconsin*, 13 CONTEMPORARY ISLAM 155, 156 (2019).

63 *Id.* at 159.

64 Quoted in FELBER, THOSE, *supra* note 16 at 67.

earliest times, the NOI has been duly credited with launching the first prison litigation movement, which one scholar describes, used law “to challenge officialdom.”<sup>65</sup> In its advocacy, including the publication, *Muhammad Speaks*, the NOI put the plight of the Black man in prison as central part of its missionary work. This concentration likely reflected the concerns of leadership:

In this sense, both Malcolm X and [Elijah] Muhammad shared a tradition of religiously motivated prison activism . . . Malcolm X moved to permanently alter conditions for Muslim prisoners by encouraging incarcerated NOI members to file petitions with the courts demanding that their civil liberties and civil rights be protected.<sup>66</sup>

Individuals like Martin Sostre and Thomas X. Cooper plunged deeply into litigation as a matter of religious conviction, but they did not operate in isolation. Both were NOI converts, and Sostre was a jailhouse lawyer who assisted others with their legal issues and was known for providing templates for others in their writ-writing endeavors.<sup>67</sup> The organizing did not go unnoticed, and one court even expressed suspicion at the lawsuits:

These are not cases where uneducated, inexperienced and helpless plaintiffs are involved. The similarity of the complaints, prepared while the plaintiffs were not supposed to be in communication with each other . . . taken together with the number of complaints directed to this court by these plaintiffs and others of the same sect, indicates that these applicants are part of a movement . . . .<sup>68</sup>

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65 Jacobs, *Prisoners'*, *supra* note 53 at 433.

66 MALACHI D. CRAWFORD, BLACK MUSLIMS AND THE LAW: CIVIL LIBERTIES FROM ELIJAH MUHAMMAD TO MUHAMMAD ALI 71 (2015).

67 FELBER, THOSE, *supra* note 16 at 68.

68 Justice Stephen Brennan in a Clinton, NY prison case quoted in the New York Times. Lawrence O’Kane, *Muslim Negroes Suing the State*, N.Y. TIMES, Mar. 19, 1961.

The court's characterization was not entirely off, for Muslims seemingly understood the potential of cooperation, and, as Felber notes, "articulated the relationship between incarcerated Muslims and those outside through the metaphor of war . . . . Black prisoners saw the courts as a breach in the walls, which allowed them to express their claims before the world outside."<sup>69</sup> Today, organizational efforts continue with groups like CAIR focusing on issues faced by Muslims in prison and using litigation as means to challenge prison policies and misconduct by officials.

Finally, it must be recognized that, for some individuals, religion influences litigation by inspiring one to activism through an Islamic ideology. While the endeavor to document instances of this occurring among prison-litigants is not an easy task, there is at least some evidence showing that, for some, religion (as opposed to simply the practice of one's religion) is a principal motivation behind the act of taking a case to court. This accords with Muslims outside prison who seek social justice in the name of religion.<sup>70</sup> Such activism was also evident in the likes of Elijah Muhammad and Muhammad Ali, who were conscientious objectors to war. The former spent time in prison by his refusal to enlist in the military, and Ali was essentially stripped of his livelihood during the years it took for his lawsuit to be raised to, and eventually decided by, the Supreme Court.<sup>71</sup> These individuals centered their struggles in their Islamic beliefs and showed religion as an impetus for political action.

The context of Black Lives Matter activism illustrates further evidence of how some Muslims understand faith and action to be inextricable. One study, for example, found that Muslims drew "a distinction between *dua* and doing to propose that a combination of prayer and direct action against injustice fulfills

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69 FELBER, THOSE, *supra* note 16 at 77.

70 Protest outside includes protesting police practices and involvement with Black Lives Matters campaigns. See, e.g., Donna Auston, *Prayer, Protest, and Police Brutality: Black Muslim Spiritual Resistance in the Ferguson Era*, 25 *TRANSFORMING ANTHROPOLOGY* 11 (2017), describing how religious acts of worship like prayer and fasting merged with activism: "Along with marching, challenging the legal system, grassroots organizing, and economic empowerment strategies, these ritual practices became part of the protest repertoire . . . ."; AbdoulKarim, *Role*, *supra* note 19.

71 See *Clay v. United States*, 403 U.S. 698 (1971).

Muslims’ obligations to uphold social justice . . . . Activism takes on religious significance as a ritualized form of resistance that animates Islamic social justice principles in their everyday lives.”<sup>72</sup> One subject described, “When you are doing activism and you’re advocating for the disadvantaged, you are expressing your faith.”<sup>73</sup> Another detailed her religious obligations toward social justice as compelling her to act. She was critical of Muslims “who see oppression happening from around the world and all they do is *dua* but no action.”<sup>74</sup>

In the early years of prison litigation, there is little doubt that some saw litigation as a religious obligation and saw their court actions as not only sanctioned by faith but encouraged by it. Martin Sostre offers a profile of this spiritual bent, as one who was aware that prison rules forbade a person in prison from having access to another’s legal materials, yet he urged colleagues to copy a writ, but to not leave it lying around. For him, the materials were “dynamite,” and he called pens, paper, and notebooks the “most essential weapons in fighting Shaitan.”<sup>75</sup> For him, litigation was a tool in a holy war that was also a personal expression of what constitutes religiosity—the same holds for his predecessor Thomas Cooper, who, under the strains of extra-legal punishment continued with his lawsuit regardless of cost. Even though prison officials tried to break him with their zero-tolerance policies and use of solitary confinement, they only strengthened his resolve to seek justice. “For the next decade, that is where he would remain . . . but instead of neutralizing Cooper, the isolation radicalized him.”<sup>76</sup> Rather than dominate him, the prison ignited a spiritual determination to endure years of litigation.

In the present, this tradition continues. For some behind bars, litigation is an action that comports with a religious edict. As the petitioner in *Holt* describes, “This form of action is one of the means of resisting oppression that the hadith refers to when

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72 AbdoulKarim, *Role*, *supra* note 19.

73 *Id.* at 213.

74 *Id.* at 213–14.

75 FELBER, THOSE, *supra* note 16 at 67–68.

76 Joseph T. Hallinan, *GOING UP THE RIVER: TRAVELS IN A PRISON NATION* 27 (2003).

it states that you can fight oppression or stop oppression by ‘using your tongue.’”<sup>77</sup> For him, litigation squares directly with Islamic practice:

Lawsuits surrounding Islamic issues are also a form of dawah or calling because it educates the non-Muslims about what true Islam is . . . . I believe that when I stand before Allah (swta) on the Day of Qiyam, when I receive my Book of Deeds inshallah in my right hand, that my actions here will be the things that allow me to run across the Sirat bridge into Paradise. As Imam Jamil Al-Amin said: I seek truth over a lie, I seek justice over injustice, and I fear Allah (swta) more than I fear the state.<sup>78</sup>

#### **IV. IRONY AT THE INTERSECTION OF PRISON ISLAM AND AMERICAN LAW**

*The Muslim prisoners’ cases had a profound impact upon the entire correctional system because they helped to change the existing relationships between “keeper” and “kept” and they provided the legal vehicles for all incarcerated persons to attempt to vindicate their constitutional rights.*<sup>79</sup>

*Writ writing and prison litigation had shone a light on the abusive discretionary powers of the corrections system and invited the courts to scrutinize the system itself.*<sup>80</sup>

The notion of a litigious Muslim contrasts with dominant narratives about Muslims, particularly Muslims in prison. In an age where some fear that Muslims in the U.S. seek to supplant American law with “*shari‘a* law” or that prisons are fertile fields for radicalization and recruitment for extremist or terrorist groups, this Essay points in the opposite direction. Some far-right

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77 Letter, *supra* note 51.

78 Id.

79 Smith, *Black*, *supra* note 7 at 17.

80 FELBER, THOSE, *supra* note 16 at 70.

groups have employed the term “litigation jihad” or “lawfare” to describe what they see as the use of litigation as a weapon to overthrow the American legal system or to instill it with *sharī‘a* law.<sup>81</sup> Yet these descriptive terms overlook developments in U.S. prison law, where Muslims in America have made the most significant legal impact. Whereas these disparaging terms intend to depict litigation as a means for frivolous or harassment suits, in prison, the claims often involve deeply-held religious beliefs and practices. In the most extreme cases, a lawsuit can mean the difference between life and death. Muslims have indeed struggled against their treatment in the classical sense of jihad; however, the turn to litigation has been largely defensive—to protect people in prison—rather than as an offensive strategy to undermine the legal system. Like Muslims outside of prison who use courts to handle civil matters, Muslims in prison have put a certain faith in American law and the core promise that they will get their day in court.

Here, litigation efforts are not about installing *sharī‘a* law as much as enforcing existing law and expanding the law’s protection. They underscore the Muslim contribution to the development of American law and the creation of a sizeable body of case law that has been useful to other litigants. For example, in the decade following the *Cooper* decision, numerous court opinions cited this case favorably.<sup>82</sup> Similarly, prisoner-petitioners have used the *Holt v. Hobbs* ruling to advance their own claims. Sometimes Muslims contribute to the law behind the scenes, including when the litigation produces a settlement. While there may be no case law produced via court opinion, settlements may result in rule changes or policy revisions. In such instances, the terms of the settlement enact a change in the “law” in ways that are less obvious.

That said, even when Muslims obtain court injunctions or other favorable rulings, getting prisons to follow the ruling is an entirely different obstacle. A particular victory does not

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81 See PAM GELLER, *STOP THE ISLAMIZATION OF AMERICA: A PRACTICAL GUIDE TO THE RESISTANCE* (2017).

82 Jacobs, *Prisoners’*, *supra* note 53 at 440–41. See also *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (citing *Cooper* favorably); *Cruz v. Beto*, 405 U.S. 319, 321–22 (1972) (same).



always amount to a victory for the rule of law because when a court issues a favorable ruling, it hardly guarantees enforcement. This is a notable trope in the case law—when prisoner-petitioners obtain a court victory only to have prison officials fail to abide by it. Omissions like these demonstrate how powerless people in prison are against their keepers. This point was raised by the Sunnī plaintiff in *Holt*, who sued for the right to grow a half-inch beard. At the district court level, the petitioner was granted an injunction to wear a half-inch beard until the court could hold an evidentiary hearing on the issue. In that hearing, he described the extra-legal struggle he faced after obtaining the injunction:

I would also point out to you that even though there has been a restraining order in place, that I've still been subjected to harassment on the part of ADC staff at various times. In fact, being locked up in [administrative segregation] under investigation on the grounds that Major Robertson stated that I had been in the law library and had typed an order up on the law library computer. When I told him that the order was valid, he tried to state that I had forged Judge Miller's signature. Even though I was let out of the segregation several hours later, after it was determined that the order was in fact valid. Going down the hallway—I even had to go and ask Warden Warner for assistance because I would carry the order in my pocket because certain shifts weren't notified that the order was in effect and that I was allowed to wear the beard, so officers and people in positions of authority would try to harass me and threaten to lock me up for having the beard and would say they didn't care what the order said, they didn't care that—if it came from a federal judge or not, this was the Department of Correction, this wasn't the feds [sic] . . . I couldn't even go to breakfast in the morning times because I was being harassed by staff in the hallways.<sup>83</sup>

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83 Gregory Holt, personal communication, Jan. 16, 2022.

As Muhammad's testimony describes, getting court permission is one battle, but getting prison officials to comply is another battle entirely. The situation lends credence to the notion that the rule of law is a political fantasy that is impossible to attain,<sup>84</sup> for even when the law is clear, prison officials can undermine its operability. Civil rights struggles outside of prison taught this lesson well: to change the law was only half of the battle; the other half was enforcement, or lack of enforcement to be more accurate. Moreover, prison officials intentionally ignoring hard-won victories deters people in prison from engaging in the grievance process and ultimately litigation altogether.

Some of the cases surrounding Muslim litigation go as far as to demonstrate a role reversal between the guards and the guarded. There, the criminal emerges not simply to expand prison rights, but also to compel prison staff to follow the law. In this role, the individual sheds the criminal designation and becomes a variety of legal proponents: sometimes jailhouse lawyer, sometimes as petitioner in a case or class action, or sometimes as a voice to ensure others in prison are treated justly. On the opposite side of this role, prison staff indulge the role of lawbreaker, knowingly violating rules and trampling on the rights of others. Muslims perform the regulatory function of watching the watcher and going to great legal lengths to hold prisons accountable.

Although such a check on government power might typically be expected to come from one of the other branches of government, (ideally from the executive branch itself), incarcerated Muslims have stepped up to lead the charge. In effect, they are a constraining force on the government with the convict turned lawful, working to hold the state accountable to the law, while the prison officials, mandated to reform and rehabilitate, instead conduct themselves in ways that suggest they need reform. This proposition may strike some as counterintuitive, but, given the litigious history of Muslim prisoners, its merit is undeniable: Islamic activism strengthens the very underpinnings of American law.

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<sup>84</sup> Timothy A. O. Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD J. LEG. STUD. 1 (1999).

There are also positive associations between litigation and rehabilitation efforts.<sup>85</sup> Rehabilitation embodies at least two critical aspects, one of which is rehabilitating individuals from the prison experience, the other is to induce one to lead a law abiding-life and stay out of prison. At the beginning, the filing of lawsuits led to greater opportunities for Muslims to practice religion in prison. By creating space for Islam in prison, Muslims were able to implement rehabilitation strategies as well. These efforts would yield noteworthy results, with both empirical and anecdotal evidence indicating such influence. For example, one of the earliest studies of American Islam that considered prisons noted that recovering alcoholics and drug addicts were able to cope in prison better after converting to Islam.<sup>86</sup> Association with Islam is reported to improve adjustment to prison, self-esteem,<sup>87</sup> and reformatory potential,<sup>88</sup> as well as reduce recidivism rates more than other groups statewide<sup>89</sup> and nationwide.<sup>90</sup> The opportunity to encounter Islam in prison became an effective entry point to a lawful life, free from crime. In this sense, the ability to practice religion is related to the rule of law because religion

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85 In the Christian context, it has been suggested that “religious devotion and litigation were commensurate. Examining your case for legal discrepancies and loopholes that might support a courtroom appeal and seeking forgiveness in church were compatible rehabilitative activities.” Such a description supports the present work by both showing the compatibility of religiosity and the act of suing and grounding both in rehabilitation. Stephanie Gaskill, *Moral Rehabilitation: Religion, Race, and Reform in America’s Incarceration Capital* 124 (2017) (Ph.D. dissertation, University of North Carolina at Chapel Hill), <http://cdr.lib.unc.edu/concern/dissertations/vh53ww96h>.

86 C. Eric Lincoln, *THE BLACK MUSLIMS IN AMERICA* 77–78 (1994).

87 T.A. Barringer, *Adult Transformation inside a Midwest Correctional Facility: Black Muslim Narratives of Their Islamic Conversion* 125 (1998) (unpublished Ph.D. dissertation, Northern Illinois University) (on file with author).

88 Felecia Dix-Richardson and Billy Close, *Intersections of Race, Religion and Inmate Culture: The Historical Development of Islam in American Corrections*, in *RELIGION, THE COMMUNITY, AND THE REHABILITATION OF CRIMINAL OFFENDERS* 11, 87 (Thomas P. O’Connor & Nathaniel J. Pallone, eds., 2003).

89 Byron Johnson et al., *Religious Programs, Institutional Adjustment, and Recidivism among Former Inmates in Prison Fellowship Programs*, 14 *JUST. Q.* (1997), available at <http://www.leaderu.com/humanities/johnson.html>.

90 Stephen Seymour, *The Silence of Prayer: An Examination of the Federal Bureau of Prisons’ Moratorium on the Hiring of Muslim Chaplains*, 37 *COLUM. HUM. RTS. L. REV.* 523, 532 (2006) (finding that the recidivism rate for Muslims was about 8% compared to 40% for Catholics and Protestants).

contributes to an existence that is more attuned to a law-abiding life. Whereas before, chaos and lawlessness may have reigned in one's life, now there is direction and determination to follow a higher law. Lawsuits created space for such encounters with Islam in prison, which have buttressed rehabilitation efforts.

A final oddity arises in the wake of widespread Muslim defeat in court. Empirically speaking, Muslims overwhelmingly lose court claims, yet this abysmal track record has hardly dampened the spirit or volume of lawsuits. Despite that, as one study showed, when it came to Free Exercise claims, “only Muslims were significantly and powerfully associated with a negative outcome before the courts,”<sup>91</sup> Muslims continue to turn to litigation in volume. The fact that adherents from other groups are twice as likely to win such cases is hardly a deterrent, and even though the pattern creates a “religious liberty success deficit for Muslims,”<sup>92</sup> they continue the shackled march to courthouses all over the nation. This reality, especially when combined with the conduct of prison officials that aims to cast a chill on the merits of even bothering with a complaint let alone engaging in full-blown litigation, may indicate that there is more at stake in a case than merely winning.

Muslim prison litigation is ultimately a response to lawlessness—some of which is an expression of spiritual consciousness trying to right earthly wrongs.

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<sup>91</sup> Michael Heise and Gregory C. Sisk, *Free Exercise of Religion before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1386 (2013).

<sup>92</sup> *Id.* at 1388.