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Editor's Introduction to the Special Issue

by Hedayat Heikal, Special Issue Editor

This special issue of the *Journal of Islamic Law* started with one question: how do Islamic legal traditions, whether in theory or in practice, inform contemporary debates on racial justice and equality, particularly with the notable rise of mass incarceration? Exploring this question appeared to us critical in several respects. First, race continues to be a major fault line in today's world—W. E. B. Dubois's color line persists. Race also continues to affect the way Black people and other people of color—including many Muslims—are treated on a day-to-day basis. Second, the Black Lives Matter moment brought realist approaches to law out of law reviews and into the mainstream conversation through its focus on structural inequalities, mass incarceration, and the policing of communities of color and immigrants in the United States. No matter what law *said* it did, one had to look at what it *actually* did to affect (different segments of) society. Third, Muslims, be it in the United States or in the Global South, were not simply subjects or victims of the law or of its systems. We recognized that they are actors shaping the course of the developments in law and society that touch on racial equality, criminal justice, and equality; and they sometimes draw on Islamic traditions in doing so. We sought to examine how.

The three Essays in this Special Issue of the *Journal* examine some of these Islamic "traditions of action" and how they bear on questions of racial justice and equality today. **Adnan Zulfiqar** shows us that fierce critiques of incarceration can and do exist outside of the United States in his essay *The Immorality*

of Incarceration: Between Jāvēd Aḥmad Ghāmidī and Angela Y. Davis. Zulfiqar focuses on the work of one prominent jurist and Islamic public intellectual in contemporary Pakistan, Jāvēd Ghāmidī, which he juxtaposes with the well-known public intellectual in the contemporary United States, Angela Davis. He posits that prominent prison abolitionists in the U.S. context argue against incarceration because of its historic roots as a tool of racial violence and its disproportionate impact on minority groups. By contrast, Ghāmidī's argument against incarceration is directed against the very institution of prison. In this sense, his is primarily a conceptual moral critique. The moral critique is rooted in the ways in which long-term confinement harms the person and the community while not offering a plausible path to rehabilitation. The historical and moral critiques of prison meet at abolition, but Zulfiqar offers new pathways for exploring how and why the one might offer insight and strength to the other in ways that American and Islamic arguments for abolition have not fully explored.

SpearIt's essay, *Muslims in American Prisons: Advancing the Rule of Law through Litigation Praxis*, brings into focus the efforts of Muslims "resisting" conditions of long-term confinement through litigation in the United States. The Essay reminds the reader that lawsuits by Black Muslims in the 1960s (chief among them, *Cooper v. Pate*) were at the foundation of the modern prisoners' rights movement. *Cooper* was no less than the *Brown v. Board of Education* for prisoners' rights—"although a *per curiam* opinion, lacking the powerful language of *Brown v. Board of Education,* [*Cooper*] left no doubt that prisoners have rights that must be respected."[1] Surveying the impact of *Cooper* and other lawsuits that followed it on the treatment of not just Muslim prisoners, but all prisoners, and on the contours of American law more broadly, SpearIt argues that Muslim prisoners pursuing litigation have done so out of a sense of Islamic/religious obligation. This religious motivation is clearly on display when litigation involves a Free Exercise claim. But the author also shows it to be on display in two other senses: where

1 James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960–80*, 2 Crime & Just. 429, 440 (1980).

a religious movement, such as the Nation of Islam in the 1960s, encourages and supports such litigation; and where religion is motivating the protagonists to take a stand for justice. With these examples, SpearIt shows how litigants draw on Islamic traditions of action to advance the rule of law.

In the third and final essay, *Shīʿī Ideas of Slavery: A Study of Iran in the Qājar Era Before and After the Constitutional Revolution*, **Seyed Masoud Noori** and **Zahra Azhar** turn our gaze to the debate on the abolition of slavery in nineteenth-century Iran. Noori and Azhar argue that the Shīʿī Islamic legal tradition perceived slavery to be permissible (halal), which led its supporters to oppose British pressure for the abolition of slavery. Some scholars admitted that the trading of enslaved people was legally questionable or "abominable" (*makrūh*), yet they saw no contradiction in sanctioning the institution of slavery itself. This approach to *sharīʿa* survived the upheaval of Iran's turn-of-the-century Constitutional Revolution well after the shah, Iran's ruler at the time, had abolished the importation of enslaved people via maritime routes. The approach also persisted even after fundamental rights, such as freedom and equality, entered the vocabulary of political and nationalist contestation. Noori and Azhar analyze the works and correspondence of prominent *mujtahidīn* (expert jurists) of the Constitutional Era, focusing on Shaykh Muḥammad Kāẓim Khurāsānī and Shaykh Muḥammad Ḥusayn Nāʿīnī Gharavī,who supported the Constitutionalist cause.While *mujtahidīn* on the side of the Constitutionalists argued that freedom and equality are authentic Islamic legal principles, these principles did not influence their positions on the question of slavery, such that they found slavery to be, at most, disfavored,yet still permissible. It was not until modern times that slavery was outlawed.

Where Zulfiqar and SpearIt identify Islamic traditions of action that challenge incarceration, racial inequity, and the status quo, Noori and Azhar identify an Islamic tradition that preserved a historical status quo and justified an abominable practice of which the vast majority of Muslims in Iran (and elsewhere) disapprove. This palpable disconnect between text and context reminds us of why the study of Islamic legal traditions as they

pertain to racial justice and equality and to a variety of other contemporary problems of law and society must be construed broadly to encompass *sharīʿa* in principle and *sharīʿa* in action, text and context, Islam and Muslims. The lived experiences of Muslims and their productions of meaning is of no less interest than Islam's legal-doctrinal and historical sources.[2]

2 This understanding of "Islamic" invokes Shahab Ahmed's view that actors produce Islamic meanings by way of "hermeneutical engagement with the Pre-Text, Text, and Con-Text of the Revelation to Muhammad." Shahab Ahmed, What is Islam? 363 (2015).

The Immorality of Incarceration: Between Jāvēd Aḥmad Ghāmidī and Angela Y. Davis

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Abstract

The carceral nature of America's criminal system has become a subject of fierce debate over the past few years as the extent of incarceration has gained notoriety. As a result, the decades-old argument for the abolition of prison has received its greatest reception to date, becoming the subject of popular conversation and a plethora of scholarly articles. Much of this discussion has centered on diagnosing the causes of mass incarceration. Empirical and historical studies have offered a strong case for the pervasive role of racial animus and discrimination in expanding the carceral state, which in turn has produced an abolitionist response as remedy to a broken system. At the same time, contexts far removed from America's racial paradigm have also produced fierce critiques of incarceration. The introduction of prisons by European colonial powers met with native resistance across the Global South and, in the period since, a range of scholarly writing has continued to challenge prisons. Among the Global South's most prominent examples of this abolitionist response has been those from scholars of Islamic law. These jurists have offered critiques that argue for both a doctrinal incongruence between incarceration and the Islamic legal tradition, as well as a moral chastisement of the carceral state. This Essay seeks to explore one such critique that represents a strand of abolitionist thinking in the Islamic legal tradition. While the American discourse has been preoccupied with abolition as a remedy for

mass incarceration, the Islamic discourse is largely devoid of this concern; it critiques the institution of prison itself. The Essay's overarching aim is to show how perspectives from the Global South, in this case Islamic law, might inform new approaches to abolition in other contexts. To accomplish this, the piece uses the thought of Muslim jurist and intellectual, Jāvēd Aḥmad Ghāmidī, examining both his ideas on imprisonment and broader approach to questions of law and morality. It then brings this discourse into conversation with key ideas in the work of American scholar–activist Angela Yvonne Davis. The animating inquiry will center on the moral arguments made in support of prison abolition and how Ghāmidī's ideas, and by extension Islamic law, offer a unique perspective on this timely matter.

I. Introduction

On February 4, 1969, Nelson Mandela wrote a letter from prison to two of his children, Zindzi and Zenani. In it, he mentioned a prior correspondence with Zindzi where she described her heart as "sore" because of her father's absence and inquired about his return. Mandela responded that he did not know when he would return and instead reassured his young children that he was "full of strength and hope," only longing to be with them.[1] In July 1969, Mandela faced another painful reminder of the estrangement incarceration produces when prison authorities denied him permission to attend the funeral of his eldest son, Thembi, who died in a tragic car accident.[2] A year later, in August 1970, after learning his family was being harassed by authorities, Mandela described his anguish as being "soaked in gall, every part of me, my flesh, bloodstream, bone and soul, so bitter am I to be completely powerless to help you in the rough and fierce ordeals you are going through."[3]

1 *"Hope is a Powerful Weapon": Unpublished Mandela Prison Letters*, N.Y. Times, July 6, 2018, http://www.nytimes.com/2018/07/06/opinion/sunday/nelson-mandela-unpublished-prison-letters-excerpts.html.

2 Peter Hain, Mandela: His Essential Life 91–92 (2018). Almost a year prior, in September 1968, Mandela's mother passed away and he was denied permission to attend her funeral as well (Id.).

3 *Nelson Mandela's Letters Reveal South Africa Jail Agony*, BBC News, Oct. 10, 2010, http://www.bbc.com/news/world-africa-11509771.

These snippets of Mandela's prison correspondence capture experiences common to the incarcerated, regardless of their station in life. To be confined for prolonged periods means enduring features, such as familial estrangement, inherent to the institution of prison wherever it is located.[4] The trauma—psychological, emotional, and physical—associated with confinement is implicitly, if not explicitly, accepted as a tortuous, but reasonable element of punishing every jail-worthy crime.[5] In the centuries since its introduction, modern prison has become ubiquitous with criminal punishment everywhere and the enterprise is presented as not simply a more "humane" alternative to corporal punishment, but as the only available option. The original rehabilitative objective of imprisonment, inspired by its Quaker origins, is effectively obsolete now, only offered to justify a prisoner's reentry into society, but expected to occur *despite* prison, not because of it.[6] Since its origins though, the modern prison has been subject to widespread criticism. Even the English writer Charles Dickens registered his distaste for prison after a visit in 1842 to Philadelphia's recently established Eastern State Penitentiary, observing that "rigid, strict and hopeless solitary confinement" was "cruel and wrong."[7] More recently, arguably

4 One commentator refers to this as a type of violence that occurs through prison's isolation, noting that "every incarcerated human is stripped of family." Tayari Jones, *What Nelson Mandela Lost*, N.Y. Times, July 6, 2018, http://www.nytimes.com/2018/07/06/opinion/sunday/nelson-mandela-tayari-jones-prison-letters.html. In his initial years of incarceration, Mandela was allowed only "one visitor and one letter (up to 500 words) every six months" (Peter Limb, Nelson Mandela: A Biography 86 (2008)).

5 According to the U.S. Department of Justice's Bureau of Justice Statistics report from 2007, nearly one in twenty prisoners report being raped or sexually abused behind bars, more than 70,000 prisoners per year. See Allen J. Beck and Paige M. Harrison, *Sexual Victimization in State and Federal Prisons Reported by Inmates, 2007*, Bureau of Justice Statistics Special Report (Apr. 9, 2008), available at http://bjs.ojp.gov/content/pub/pdf/svsfpri07.pdf.

6 In fact, one might argue that a retributivist justification for long-term confinement is also flawed because prison's collateral consequences distort the moral desert calculation. Of course, this is not the position of all retributivist thinkers, some of whom argue that there are many "desert-based reasons to withhold liability and lessen punishment." See Doug Husak, *Retributivism and Over-Punishment*, 41 L. & Phil. 169–73 (2022).

7 Charles Dickens, American Notes for General Circulation 1:238 (reissue ed. 2009). He went on to describe the punishment of prison as "torture" and

stemming from increased awareness of problems with American "criminal justice," a renewed interest has emerged in reimagining punishment for a future world without prisons.[8]

The prevailing critique of prisons today tends to be American-centric, where prison is seen as a continuation of the United States' unique history of racial violence. Arguments against incarceration are responsive to systemic factors underlying America's prison crisis; abolitionist ideas from other parts of the world rarely inform this critique.[9] The operating assumption is that anti-carceral thinking is only produced in the United States or Europe; other populations are presumed to be less critical of the idea of prison or simply reconciled to its inevitability.[10] In actual fact, the Global South contains its own discourse on abolition, independent of any Anglo-European influence, and offers valuable insights for anti-carceral thinking generally. The discourse is anchored by a belief that long-term confinement is unethical, and prison is an immoral institution; there is comparatively less interest in the systemic shortcomings of any particular

"agony," noting that the "daily tampering with the mysteries of the brain" are "immeasurably worse than any torture of the body" (Id. at 239).

8 With approximately 2.2 million American citizens behind bars, not to mention those in immigrant detention, there has been "a 943 percent increase over the past half century" in the number of prisoners. The rate of incarceration in the United States is "five to ten times higher" than comparable nations and it imprisons 25% of the world's prison population. See Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America 5 (2016).

9 Broader critiques of prison, such as those offered by Michel Foucault, also prove influential in abolitionist thought but draw primarily from the Anglo-European context. See generally Michel Foucault, Discipline and Punish: The Birth of the Prison (trans. Alan Sheridan, 1977). For example, even in the work of Angela Y. Davis, there is mention of various abolitionist thinkers including Foucault, Thomas Matheison, Willem de Haan, Herman Bianchi, Nils Christie, etc. but an absence of any discussion of theories from the Global South (Angela Y. Davis, The Angela Y. Davis Reader 102 (1998)).

10 It is important to note that being "reconciled to its inevitability" has a lot to do with the fact that prison is both a feature of how criminality is punished in the modern period and a remnant of the colonial occupations that defined much of the Global South's current governing systems and institutions. See generally Frank Dikötter and Ian Brown, eds., Cultures of Confinement: A History of Prison in Africa, Asia and Latin America (2007); Babacar Bâ, *La Prison Coloniale au Sénégal, 1790–1960: Carcéral de Conquête et Défiances Locales*, 8 French Colonial Hist. 81 (2007).

criminal justice system.[11] Among the most prominent voices in the Global South critiquing prisons are scholars of Islamic law. Their approach interrogates long-term imprisonment with arguments grounded in religious scripture or inspired by values derived therefrom. Their critique is both moral and legal, because the two concepts are inextricably linked for Islamic law—a law sourced from religious texts and elucidated by jurists trained in religious sciences. Put simply, hardly anything can be both immoral and legal in a system that at once punishes criminality as well as sinfulness.[12]

These two types of moral critique, circumstantial and conceptual, described above and elaborated below, include strong arguments for why confinement as punishment is problematic. Yet they are rarely considered alongside each other. The purpose of this essay is to explore the abolitionist views of one contemporary Muslim thinker, Jāvēd Aḥmad Ghāmidī, then consider them in light of arguments made in the American context, specifically by the scholar–activist Angela Y. Davis.[13]

11 In some respects, this echoes a similar distinction in the contemporary West, specifically the United States and continental Europe, between two "contrasting ideas on how to build a just system of criminal justice" (James Q. Whitman, *Presumption of Innocence or Presumption of Mercy? Weighing Two Western Modes of Justice*," 94 Tex. L. Rev. 933 (2016)). As Whitman points out, both approaches seek a more humane criminal justice system, but emphasize different stages in the process. The American approach is premised on a "libertarian fear" that considers state actors as the primary threat to justice, where "rogue government officers will target innocent persons" (Id. at 981). Hence, the American system includes robust procedural safeguards that might allow even the guilty to go free, but presumably prevent the punishment of innocents. The American approach seems less concerned with the cruelty that might ensure once someone is labeled as guilty. On the other hand, the continental European approach is far more deferential to authority, but "determined to keep the practice of punishment within decent, civilized limits" (Id.). The "tendency" in continental Europe is to "announce a stern nominal sentence," which allows for public condemnation, but then leave "room for mercy" for the individual offender (Id. at 980).

12 The immorality of prisons has featured in Western abolitionist thinking as well, but typically in relation to the circumstances that produce individuals to be incarcerated. It is the biases and unethical motives behind the rise of prisons, along with the harrowing conditions inside prisons, which make prison immoral for Western abolitionists. For thinkers from the Islamic tradition, long-term imprisonment by its very nature is immoral regardless of any other consideration.

13 Having endured time in prison because of her political activism, Davis's work provides a multi-faceted examination of imprisonment in her argument for abolition. For my purposes here, her book, Angela Y. Davis, Are Prisons Obsolete? (2003), provides an especially useful anchor for discussing her main arguments on the

Unlike Davis, abolition is not a primary focus for Ghāmidī; it is, rather, a rare departure from most of his other writings discussing traditional topics in Islamic jurisprudence. The fact that he chose to write on the subject conveys the legal significance he attaches to the moral shortcomings of using long-term imprisonment as criminal punishment.

Prior to examining the moral critique of imprisonment, a cursory introduction to the history of prison is useful. As noted earlier, the modern institution of prison came about as a more civilized alternative, at least in theory, to the system of corporal punishment that existed in Europe. The severity of corporal punishment was akin to torture; between 1780 and 1820, Europe and the New World developed penitentiaries built on the idea of strict discipline and regiment as an avenue for rehabilitation.[14] The penitentiary as a place for both retribution and rehabilitation was a novel approach to punishment, first appearing in the United States around the time of the American revolution.[15] Prior to this, prisons were largely places of detention for those awaiting the administration of corporal punishment; prison itself had not been punishment.[16] This changed by the eighteenth century in Europe and nineteenth century in the United States: imprisonment became the "principal mode of punishment."[17] In the United States, the new system

subject. For a description of her time in prison, see Angela Y. Davis, Angela Davis: An Autobiography 15–30 (1988).

14 Roger-Pol Droit, *Michel Foucault, on the Role of Prisons*, N.Y. Times, Aug. 5, 1975, http://archive.nytimes.com/www.nytimes.com/books/00/12/17/specials/foucault-prisons.html?r=1.

15 Davis, Obsolete, *supra* note 13 at 26.

16 Id. at 26. Mary Gibson notes that the "paradigm" originally developed by Foucault and others argued that the birth of prisons occurred "between 1760 and 1840, when the rising middle class abolished public rituals of corporal punishment as incompatible with its new aspirations to build a modern liberal and industrial society" (Mary Gibson, *Review Essay: Global Perspectives on the Birth of Prison*, 116 no. 4 Am. Hist. Rev. 1040 (2011).

17 Davis, Obsolete, *supra* note 13 at 42. Two rival models of imprisonment were developed in this early era: the Auburn and the Pennsylvania systems. The difference between the two was not significant as both had the same philosophical basis. The Eastern State Penitentiary, mentioned above, was an example of the Pennsylvania model and emphasized "total isolation, silence and solitude" (Id. at 47). This was an extension of the Walnut Street Jail, arguably the first penitentiary in the United States (Jen Manion, Liberty's Prisoners: Carceral Culture in Early America 34

of long-term imprisonment eventually led to an exponential growth in the prisoner population, a phenomenon now known as "mass incarceration."[18]

Elsewhere, colonial rule introduced criminal justice systems with prison as a form of punishment into Asia and Africa.[19] Prior to that, imprisonment was used in a more limited manner, but not as a form of punishment. In the premodern Islamic legal context, confinement was strictly limited by jurists as a means of temporary detention.[20] Generally speaking, Islamic legal treatises contain both punitive and non-punitive response to crimes. For the former, the focus is largely on corporal punishment utilized in three main categories of punishment: *hudūd* (explicitly delineated in Islam's core sources), retaliatory (*qiṣāṣ*)

(2015)). Walnut Street required total isolation of prisoners in single cells where they lived, ate, worked, read the Bible, and found an opportunity to reflect and repent (Davis, Obsolete, *supra* note 13 at 47). The Auburn model also incorporated the idea of solitude but included labor as part of the regimen (Id.).

18 As of 2019, the Federal Bureau of Prisons reported a total of 2,068,800 prisoners, a rate of 629 imprisoned per 100,000 population and there were 4,455 prisons across the country with a 95.6% occupancy rate. In comparison, the number of prisoners in 1940 was 264,834, by 1970 this was 328,020, and 15 years later, in 1985, it had more than doubled to 744,208. The number doubled again in the next decade, so that by 1995 the prison population was 1,585,586 and by 2000 it was over 2 million. *United States of America*, World Prison Brief, http://www.prisonstudies.org/country/united-states-america (last visited Feb. 12, 2022). In about thirty years, the prison population in the U.S. grew by a staggering 1.7 million. The most obvious explanation for this rise in prison population would be a massive explosion in criminality during this period. However, the statistics seem to suggest otherwise. According to Federal Bureau of Investigation (FBI) data, violent crime fell by almost 50% and property crime 55% from 1993 to 2019, while the Bureau of Justice Statistics (BJS) recorded an overall 74% decline in violent crime and property crime in the same period. John Gramlich, *What the Data Says (And Doesn't Say) about Crime in the United States*, Pew Research Center (Nov. 20, 2020), http://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/.

19 Non-Western societies began their experience with prisons about a hundred years after Europe and the United States; unsurprising since "prison was an export of the late-nineteenth-century colonial project" that was subsequently "reinterpreted by local rulers to serve their interests" (Gibson, *Review*, *supra* note 16 at 1057). For instance, in India, the English prison system was introduced in the late eighteenth century in Calcutta and Madras (Davis, Obsolete, *supra* note 13 at 42).

20 See generally Irene Schneider, "Imprisonment in Pre-Classical and Classical Islamic Law," 2 Isl. L. & Soc. no. 2 (1995) at 157. For a discussion of imprisonment under the Saljūqs of Iraq and Persia (fifth/eleventh and sixth/twelfth centuries), see Christian Lange, Justice, Punishment and the Medieval Muslim Imagination 89–94 (2008).

and discretionary (*taʿzīr*). Non-punitive responses include payment of financial compensation (*diya*) to the victim or their next of kin.[21] Historically, the writing of premodern Muslim jurists demonstrates a reluctance to utilize prison as punishment in any sense.[22] Unlike in the United States, the Islamic legal tradition's criticism of long-term imprisonment does not arise out of a response to particular social conditions that disproportionately impact certain groups. Since prison was not the norm, it was often not significant enough a topic to receive much treatment in medieval Islamic legal treatises. When it was discussed, there was typically a critique along with an explanation of the distinction between permissible temporary detention and objectionable long-term imprisonment.

II. The Conceptual Moral Critique: Jāvēd Aḥmad Ghāmidī

Building on this background, the views of contemporary jurists of Islamic law on long-term imprisonment might be divided into three broad viewpoints. First is a view that permits long prison sentences as a type of discretionary punishment (*taʿzīr*). These jurists recognize that long-term imprisonment is generally absent from the Islamic historical record but utilize other jurisprudential ideas to empower political authorities with the discretion to legislate prison as punishment.[23] Second

21 For more on these punishments, see Intisar A. Rabb, Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law 30–37 (2014); see also Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century 30–38, 53–68 (2005).

22 This is not to say that jurists had no conception of long-term imprisonment. In fact, some even allow the guilty to "be confined until death" (*takhlīd fī al-ḥabs ilā al-mawt*) as a discretionary punishment (*taʿzīr*). See ʿIzz al-Dīn ʿAbd al-ʿAzīz b. ʿAbd al-Salām, al-Qawāʿid al-kubrā 1:161 (eds. Nazīh Kamāl Ḥammād and ʿUthmān Jumʿa Ḍamīriyya, 2000). Of course, despite permitting long-term imprisonment, Ibn ʿAbd al-Sālam expresses his personal reservations about it (Id. at 160). I am grateful to Mariam Sheibani for this reference.

23 See, e.g., Ḥasan ʿAbd al-Ghanī Abū Ghudda, Aḥkām al-sijin wa-muʿāmalat al-sujanāʾ ("Legal Guidelines on Prison and the Treatment of Prisoners") 34–35 (1986); see also ʿAbd al-Ḥayy Yūsuf, *Ḥukm al-sijin fī 'l-Islām* ("Ruling on Prison in Islam"), Maktabat Fatāwā al-Shaykh ʿAbd al-Ḥayy Yūsuf, YouTube video, June 15, 2020, http://www.youtube.com/watch?v=miRj3Hn5Ts8.

is the view that incarceration is impermissible because it subverts Islamic law by replacing scripturally prescribed, corporal punishment with long-term confinement. This position does not critique prison per se, but laments how imprisonment is used to bypass scripturally prescribed punishments.[24] The final viewpoint rejects the entire idea of long-term imprisonment as a form of punishment because it is fundamentally immoral and, since it is immoral, it is also effectively impermissible under Islamic law. This in effect is the "abolitionist" position within Islamic legal discourse. In the contemporary period, one prominent voice representing this position is the Pakistani religious scholar and public intellectual Jāvēd Aḥmad Ghāmidī (b. 1951).

Born to a peasant family in the Punjab region (Pakistan), Ghāmidī trained in both traditional Islamic sciences and at secular universities: his early education included secular subjects, Arabic, Persian and the *Dars-e Nizāmī* curriculum (1959–66).[25] He then studied philosophy, English literature, and Islamic studies at Government College in Lahore (1968–73). During this period, Ghāmidī began associating with the famous theologian and political theorist, Abū 'l-ʿAlāʾ Mawdūdī (d. 1979), and briefly joined *Jamāʿat-e Islāmī*. From 1973 to 1983, he actively studied under his most influential teacher, Amīn Aḥsan Iṣlaḥī (d. 1997).[26] Ghāmidī is the author of a number of books, including his magnum opus, *Mīzān* ("*Balance*"), on theology, legal theory, ethics, and substantive law.[27] His main ideas on prison abolition appear in a short piece, in Urdu, entitled "Qayd

24 See, e.g., Aḥmad al-Naqīb, *Halʿuqūbat al-sijin lahā aṣl fī dīn al-Islām?* ("Does Prison Punishment Have a Basis in the Islamic faith?"), AL-BAṢIRAH NET, YouTube video, Nov. 3, 2010, http://www.youtube.com/watch?v=yXEtAynZljo.

25 Muhammad Khalid Masud, *Rethinking* Sharīʿa*: Jāvēd Aḥmad Ghāmidī*, 47 DIE WELT DES ISLAMS 357–60 (2007).

26 Ghāmidī's thought is heavily influenced by his teacher, Amīn Aḥsan Iṣlaḥī (1904–97), author of the nine-volume Qurʾānic exegesis, *Taddabur-i-Qurʾān* ("Reflection on the Qurʾān") AMĪN AḤSAN IṢLĀḤĪ, TADDABUR-I QURʾĀN ("Reflection on the Qurʾān") (2004). See also MUSTANSIR MIR, COHERENCE IN THE QURʾĀN (1986).

27 JĀVĒD AḤMAD GHĀMIDĪ, MĪZĀN ("Balance") (11th ed., 2018). The first edition of *Mīzān* was published in 1985. He is also the author of a five-volume Qurʾānic exegesis*,* AL-BAYĀN ("The Exposition") (2018). In addition, he has published works of poetry and essay collections and is a regular contributor to the monthly Urdu-language journal *Ishrāq*.

kī Sazā" ("Prison as Punishment"), published in July 1989.[28] His abolitionist ideas can also be found in another piece from 1993: "Hudūd va Taʿzīrāt: Chand ahamm Mabāḥith" ("*Hudūd* and Discretionary Punishment: A Few Important Points").[29]

To properly situate Ghāmidī's article on "Prison as Punishment," it is important to understand the context in which it was written. While Angela Davis's work, discussed later, emerges out of a history of racial violence and discrimination in her context, Ghāmidī's piece seems to take advantage of a particular moment in Pakistan's legal history to offer a conceptual critique of confinement. When Ghāmidī wrote his article Pakistan was enduring a decade-long debate over Islamic reforms in the country including to its legal system.[30] Prison was not the only reform-related topic that Ghāmidī commented on, but it proved to be the least controversial: anti-carceral ideas resonated with the traditional approach to punishment under Islamic law.[31]

The immorality of incarceration is fundamental to Ghāmidī's entire argument for abolition. While Ghāmidī's context is one of a state still grappling with the legacy of colonialism, his abolitionist reasoning focuses on prison in the abstract and not simply as a product of that imperial history. In other words, his argument does not rest on demonstrating the immorality of circumstances that produce prisons but rather attacks the very concept of prison itself. In contrast to Davis, Ghāmidī's critique might be characterized as a "conceptual moral critique." His first step is to immediately engage the specter of

28 Jāvēd Aḥmad Ghāmidī, *Qayd kī Sazā* ("Prison as Punishment"), Ishrāq no. 11, 37–42 (July 1989).

29 Jāvēd Aḥmad Ghāmidī, *Ḥudūd va Taʿzīrāt: Chand ahamm mabāḥith* ("*Hudūd* and Discretionary Punishment: A few Important Points"), in Burhān ("Proof") 143–46 (7th ed., 2009).

30 A Hudūd Ordinance had been introduced in 1979 and by 1990 an ordinance on *qiṣāṣ* and *diyat* was also put forward. For a brief history of this period, see Moeen H. Cheema, *Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law*, 60 Am. J. Comp. L. 875, 878–900 (2012). This process also had corollaries around the world. See generally Rudolph Peters, *The Islamization of Criminal Law: A Comparative Analysis*, 34 Die Welts des Islams no. 2 (1994).

31 Telephone conversation with Jāvēd Aḥmad Ghāmidī, Sept. 9, 2020. Ghāmidī's piece reflects this since the language is geared towards Pakistan's secular elite who considered prison an important sign of being modern.

morality by disassociating incarceration from the sacred, arguing that prison is an institution "human beings have devised for themselves" not one that is part of a "divine" plan. Since prison has no celestial mandate, it can claim no sacred sanctity and criticism of the institution can propose abolition without contravening religious sentiments. Having situated prison outside the sacred, Ghāmidī issues a scathing moral assessment, calling prison among the "enormities" humans have created that represent "the worst forms of oppression" (*badtarīn ẓulm*).[32] In fact, he goes further and categorizes incarceration as among "the worst crimes" (*badtarīn juram*) against humanity.[33] While acknowledging the historic presence of prisons, Ghāmidī distinguishes between the temporary nature of confinement in the past as compared to today.[34] He considers long-term imprisonment a practice inherited from Western countries as a result of their global hegemony.[35] This is the final part of his framing: having placed prison outside the sacred, Ghāmidī now makes it foreign to his context. These rhetorical moves allow moral criticism of prison to be more easily received since they threaten neither religious nor national identity.

Building on this framework, then, Ghāmidī structures his argument for the immorality of incarceration around three primary ideas: harm to the individual, harm to the community, and implausible rehabilitation.

a. Harm to the Individual

Ghāmidī initiates his critique by arguing that long-term imprisonment is the cause of psychological and emotional harm to the individual which should be considered immoral for several reasons. He highlights a distinct feature of incarceration that contributes to its immorality: the idea of "perpetual" harm. The idea is simply that because imprisonment persists for an extended period of time its harms are revisited

32 Ghāmidī, *Prison*, *supra* note 28 at 37.

33 Id. at 38.

34 Id. at 37. People were either confined awaiting trial or waiting for the administration of punishment.

35 Id.

daily.[36] As Ghāmidī notes, this recurring and persistent harm torments the "hidden recesses of a person's core personality" (*andar chupī huwī us kī aṣl shakẖṣiyyat*).[37] The very nature of prison itself becomes a source of this torment, especially because an individual forfeits control over their body and are left completely at the mercy of others. Ghāmidī bemoans the fact that a person's "rising, sitting, eating, drinking, sleeping, waking, and even . . . relieving themselves" are out of their control. For Ghāmidī, this state of being leads to a loss of dignity (*ʿizzat-i-nafs*) followed by an overwhelming need for the individual to find a way to liberate themselves and recover their "complete self" (*apnī wujūd kī takmīl*).[38]

Alongside the psychological, Ghāmidī also argues that imprisonment inflicts serious emotional harm on the imprisoned by depriving them of any connection to their closest kin. This is further evidence of how imprisonment leaves an individual incomplete, withdrawing them from sources of affection and treating them as devoid of emotion. Echoing the sentiments in Mandela's prison correspondence, Ghāmidī suggests that prison forces an individual to suppress their innate desire for emotional connection to their kin, a hardship that, he says with reference to Muslim scripture, even God never demands.[39]

36 Id. at 38. He juxtaposes this against even severe corporal punishment which he says is momentary and does not have the deleterious effects of a perpetual punishment.

37 Id. at 38.

38 Id. at 38. While Ghāmidī offers a stinging critique of even the mundane controls over the prisoner's body, Davis addresses the severe harm that comes from physical abuse, specifically sexual abuse, that is endured in prison. As she notes, "prison is a space in which the threat of sexualized violence that looms in the larger society is effectively sanctioned as a routine aspect of the landscape of punishment behind prison walls" (Davis, Obsolete, *supra* note 13 at 77–78). She mentions studies that show how sexual abuse in female prisons is an "abiding . . . form of punishment" and is indicative of the fact that "ideas and practices" shunned in larger society "retain all their ghastly vitality behind prison walls" (Id. at 80). Elsewhere Davis recounts another jarring image of how prison robs you of dignity, describing the pregnant prisoner lying on a hospital cart, close to delivering her child and left unattended in a corner of a room (Davis, Autobiography, *supra* note 13 at 21–22).

39 He specifically mentions Ramadan as illustrative of the fact that God asks human beings to restrict their core desires for food, drink, and even physical intimacy, but never restricts your emotional connections (Ghāmidī, "Prison," *supra* note 28 at 38).

The subtext is clear: this human institution is not only inhumane, but ungodly. Reverting to scripture, Ghāmidī describes the harm prison causes the individual as one that leaves them in a state of "neither dying nor living" (*lā yamūtu fīhā wa lā yaḥyā*): words that the Qurʾān uses to describe hell (Q 87:13).[40] Ghāmidī seems to be saying that prison's psychological harm negates the individual self, while its emotional harm negates the relational self.

b. Harm to the Community

For Ghāmidī, the second argument for the immorality of incarceration is prison's harm to the community; what we might think of as collateral punishment.[41] He notes that prison is not simply punishment for the criminal; it becomes a punishment for close relations who committed no wrong. This harm is most devastatingly experienced by the prisoner's family, especially the spouse who suffers "psychologically," "socially," "financially," and "ethically" while trying to survive the absence of their marital partner.[42] Similarly, Ghāmidī notes the harm caused to children left with the damaging choice of either avoiding any contact with their imprisoned parent or suffering the trauma of visiting them in prison, locked in a cage. Neither option is acceptable to Ghāmidī and he returns to the idea of perpetual harm, noting how the child who visits their parent in prison must cope with the renewal of their trauma during each visit; a process with destructive consequences for their personality.[43] He asks how society can reasonably expect any child to develop a stable (*tawāzan*) personality that is not hostage to raw emotions (*jazbāt*) stirred by this sustained

40 Id.

41 In the American criminal law discourse this might be referred to as "hidden victims," who are family members of the incarcerated and rarely acknowledged by the system. See generally Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, Nat'l Inst. Just. J. no. 278 (May 2017), available at: http://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children.

42 Ghāmidī, *Prison*, *supra* note 28 at 38.

43 Id.

trauma.[44] Furthermore, he rhetorically wonders "what precise justification can the classical works on ethics present to these children" to explain why they must be punished with this type of estrangement? He seems to be probing a deeper philosophical question about the application of our theories of punishment beyond the individual and to the community. In this way, Ghāmidī is placing the imprisoned individual in a larger ecosystem of human connections and challenging the idea that long-term incapacitation is narrow in its impact. It is a concern expressed in personal terms by Davis, when she recounts how during her imprisonment she thought of her mother and father and "hoped they would make it through this ordeal."[45]

c. Implausible Rehabilitation

The final argument Ghāmidī makes critiquing prison arises from his skepticism of the utilitarian "goals" this form of punishment is supposed to achieve. While deterrence and incapacitation are most often presented as objectives for imprisonment, rehabilitation remains an important underlying rationale for prisons, despite having fallen out of favor.[46] From the origin of prisons as a Quaker project for individual redemption through self-reflection to the very function of parole boards, rehabilitation has been instrumental in rationalizing incarceration.[47] One

44 Id. Studies suggest that the impact of incarcerated children is quite severe with many exhibiting "low self-esteem, depression, emotional withdrawal from friends and family, and inappropriate or disruptive behavior at home and in school." Nearly half the prisoners in state prisons are parents and an estimated 1.7 million minor parents have an incarcerated parent. Lois M. Davis et al., *Understanding the Public Health Implications of Prisoner Reentry in California: State-of-the-State Report*, RAND Corp. 117–18 (2011).

45 Davis, Autobiography, *supra* note 13 at 23. Elsewhere she describes prison as a dreadful place "designed to separate them [prisoners] from their communities and families" (Davis, Obsolete, *supra* note 13 at 10).

46 Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 47 Am. Crim. L. Rev. 1247, 1249–50 (2011). As O'Hear notes, parole is "making a comeback" and since 2000, "at least thirty-six states have enhanced release opportunities for prison inmates" (Id. at 1248).

47 Ashley T. Rubin, The Deviant Prison: Philadelphia's Eastern State Penitentiary and the Origins of America's Modern Penal System 1829–1913, 180, 353 (2021).

might even argue that without the possibility of rehabilitation, no matter how implausible, prison as an institution seems especially inhumane. For his part, Ghāmidī considers the objective of prison rehabilitation as necessary for any morally "reasonable society." As he notes, alongside disciplining (*tādīb*) and deterring (*tanbīḥ*) criminality, any reasonable society should want its criminal actors to be rehabilitated (*iṣlāḥ*). And, if this is the goal, imprisonment as an avenue to achieve this rehabilitation is patently absurd (*ṭurfah-yitamāshā*) given the very nature of prison.[48]

In Ghāmidī's view, it is self-evident that effective reform of any individual will be heavily influenced by the company (*ṣuḥbat*) they keep. Hence, he is perplexed by carceral states that seek to reform criminals by either isolating them or separating them from the most likely sources for positive intervention in their lives: community, family, and kinfolk.[49] He asks quite incredulously: what rehabilitation can we reasonably expect will result from prolonged confinement in the company of other criminals? Ghāmidī argues that common sense requires any society truly interested in transforming criminals into productive members of the community to create opportunities consistently and constantly for that to happen.[50] In addition, he creates a greater moral responsibility to address societal factors producing criminal behavior.

Let me conclude with a few broad thoughts on Ghāmidī's ideas on abolition. First, they represent a rare instance where an Islamic scholar steps outside purely religious arguments and offers a moral critique in the capacity of a public intellectual.[51]

48 Ghāmidī, *Prison*, *supra* note 28 at 39.

49 Id. Of course, one might argue that these sources are not always positive, but Ghāmidī would likely contend that more often than not the impact is positive.

50 Id. Davis points out that the opposite tends to be true as prisons increasingly lack educational opportunities that were previously present and this is indicative of the "official disregard for rehabilitative strategies" especially those encouraging "autonomy of the mind" (Davis, Obsolete, *supra* note 13 at 57). For her, much of this is due to "corporate involvement" in prisons leading to the displacement of rehabilitation with incapacitation as the "major objective of imprisonment" (Id. at 73).

51 There are occasions where scholars will provide a moral critique as an extension of their religious one, but unlike Ghāmidī, they are not advocating the abolishment of prison on the basis of this critique. They either simply point out its flaws or suggest ways for reform. See, e.g., ʿAbd al-ʿAzīz al-Ṭarīfī, *Lā tūjad ʿuqūbat al-sijin fī*

Ghāmidī focuses on the carceral system's ethical travesties, philosophical shortcomings, and the incongruence between its goals and realities. This is not to say that he avoids discussing religion; Islam is always operating in the background as the core value system upon which his critique is based. Although he does not classify prison with religiously and legally loaded terms like "forbidden" (haram), he implies as much by stating unequivocally that there is "no conception in Islamic law's core sources of confining people to prison cells for years on end."[52] The implication seems to be that any government that uses prison as punishment diminishes its claims to being "Islamic."

Second, unlike others who are willing to accommodate the idea of prison or even advocate ways in which it can be made morally acceptable through reform, for Ghāmidī, prison appears virtually irredeemable. In his view, prison inflicts harm disproportionate to any criminal act and is generally unable to rehabilitate. It should be noted though that Ghāmidī does not eschew the idea of punishment itself; he is simply arguing against *this* type of punishment.[53] Finally, Ghāmidī wrote his piece when American "tough on crime" rhetoric was peaking, culminating in the now infamous Violent Crime Control and Law Enforcement Act of 1994. Not surprisingly, he makes no reference to this or any other Western discourse in his writing. He speaks of similar challenges in his own context but uses moral arguments with universal application. It is indicative of the fact that the Global South has its own discourses on areas of shared concern, with unique insights that might provide helpful perspectives beyond its borders.

al-Islām ("There is No Prison Punishment in Islam"), Kalimat Ḥaqq, YouTube video, Dec. 28, 2017, http://www.youtube.com/watch?v=gK1dCoBLkMI. For a perspective on reform, see Zāhid al-Rāshidi, *Jaylon ke Niẓām mein Iṣlāḥ kī Durūrat* ("The Need for the Prison System to be Reformed"), Tarjumān al-Islām, Nov. 12, 1976, http://zahidrashdi.org/1267.

52 Ghāmidī, *Prison*, *supra* note 28 at 39.

53 In some respects this is quite different from what Davis believes needs to be done to advance the abolitionist argument. For her, a "major theoretical and practical challenge of penal abolitionism is to disarticulate crime and punishment" (Davis, Reader, *supra* note 9 at 103).

III. The Applied Moral Critique: Angela Y. Davis

Having discussed Ghāmidī's ideas above, let me briefly juxtapose them to the approach of Angela Y. Davis (b. 1944), among the most prominent thinkers in the Anglo-American abolitionist discourse.[54] Prison has consistently remained a focal point in Davis's writing and activism, both informed by her own experience as a prisoner and her scholarship. In Davis's assessment, the "gravity" of the growth in the American prison population is even more pronounced if we consider the fact that the U.S. population is less than 5% of the world's total population but makes up "more than 20% of the world's combined prison population."[55] For some critics of American criminal justice, mass incarceration is the by-product of over-criminalization and the proliferation of new criminal laws by politicians seeking to burnish their "law and order" credentials with voting publics.[56] Davis's scholarship suggests more insidious reasons for the dramatic growth of the U.S. prison population: historic racism and the prison–industrial complex. She considers both indicative of

54 Born in Birmingham, Alabama, she was educated in French literature at Brandeis University, went on to study at the University of California, San Diego, and eventually completed a doctorate in philosophy from Humboldt University in Germany. In addition to playing leadership roles in the Communist Party, the Student Nonviolent Coordinating Committee (SNCC), and Critical Resistance, she has also been a university professor at UCLA, San Francisco State University, and the University of California, Santa Cruz (Sharon Lynette Jones, ed., Conversations with Angela Davis (2021) at ix). She gained some notoriety in the early 1970s when she was charged with three capital offenses in connection to a failed inmate escape from Soledad prison and landed on the FBI's Ten Most Wanted Fugitive List (Nelson George, *Angela Davis*, N.Y. Times, Oct. 19, 2020, http://www.nytimes.com/interactive/2020/10/19/t-magazine/angela-davis.html). After being captured, she spent eighteen months in jail before being acquitted in 1972. Davis's charges stemmed from the fact that one of the inmate's brothers, Jonathan Jackson, used firearms registered to Davis to take over a Marin County Courthouse leading to the death of four people. Prior to her trial she had been a "noted scholar" but afterwards she became "an international symbol of resistance," her iconic image gracing revolutionary posters worldwide (Id.).

55 Davis, Obsolete, *supra* note 13 at 11.

56 See generally Anthony B. Bradley, Ending Overcriminalization and Mass Incarceration: Hope from Civil Society (2018); see also Charles G. Koch and Mark V. Holden, *The Danger of Putting So Many People in Prison*, Chi. Trib., Jan. 28, 2015, http://www.chicagotribune.com/opinion/commentary/ct-overcriminalization-koch-congress-laws-perspec-01286-20150127-story.html.

a general indictment of American criminal justice and demonstrative of the immorality of incarceration. These reasons behind the growth of prison populations supply what I term an "applied moral critique" of prison in Davis's thought.[57]

a. Historic Racism

For Davis, there is an obvious connection between the historic experience of race in America and the current prison crisis. Statistics show that by the end of 2011, the imprisonment rate for African American males was 6.3 times that of white males.[58] This connection is not a recent phenomenon and Davis forthrightly suggests a correlation between the abolition of slavery and the authorization of slavery as punishment. Emancipation and authorizing of penal servitude created an "immense black presence within southern prisons" and essentially transformed prison into a punishment to manage former slaves.[59] To this end, Davis notes the development of "Slave Codes" and "Black Codes" that were meant to police Black populations for relatively minor behavior such as "vagrancy, breech of job contracts, absence from work, the possession of firearms, insulting gestures or acts."[60] In her view, once freed, Black people simply moved from a situation where their relationship with the state was mediated by a master to one where it was unmediated; they moved from a status of slave to that of criminal.[61] Her concern, then, is specifically with the way "the prison system in the US took up and was bolstered by historical forms of racism and how it continues to play a critical role in the racialization of

57 Davis explicitly acknowledges that she became an antiprison activist during the late 1960s, implying that her abolitionist ideas were very much a byproduct of this activism. It is unsurprising then that her approach to the question of abolition would be firmly rooted in how prisons functioned in practice and what circumstances surrounded those placed in prison (Davis, Obsolete, *supra* note 13 at 11).

58 Joshua Dressler and Stephen Garvey, Criminal Law: Cases and Materials 32 (7th ed., 2016).

59 Davis, Reader, *supra* note 9 at 99.

60 Id. at 100. For a more comprehensive discussion of Slave Codes, see generally Sally E. Hadden, Slave Patrols: Law and Violence in Virginia and the Carolinas (2003).

61 Davis, Reader, *supra* note 9 at 100.

punishment."[62] In that sense, for Davis, prison has come to occupy a similar place to slavery and lynching, in that it is a racist institution that "many, if not most, could not foresee" would ever decline and collapse.[63] As she notes:

> If we are already persuaded that racism should not be allowed to define the planet's future and if we can successfully argue that prisons are racist institutions, this may lead us to take seriously the prospect of declaring prisons obsolete.[64]

The immorality of incarceration, in Davis's eyes, is connected to the immorality of racism. Prison as an institution is infused with racism—from its origins to the manner in which it is perpetuated—and thus must necessarily be immoral.

b. Prison–Industrial Complex

The second component of Davis's moral critique of incarceration is her interrogation of prison as a product of the prison–industrial complex. Here, her argument turns from race to class, and she offers a distinctly Marxist analysis of the connection between prisons and the profit-making motives of corporations. She notes that the "drive to produce more prisons" and fill them with prisoners came in the 1980s under the political banner of getting "tough on crime." Incarceration performed the task of incapacitation, removing criminal elements from communities in order to make them safer. Yet, Davis points out that the "practice of mass incarceration" during this period "had little or no effect on official crime rates." The result was not safer communities but just "larger prison populations."[65]

Hence, "imprisoned bodies," the majority of which were those of people of color, became "sources of profit" that "devour public funds" that could otherwise be channeled into

62 Id. at 105.
63 Id. at 24.
64 Id. at 25.
65 Id. at 11.

social programs.[66] This use of the prisoner as a source of profit is nothing new, as she explains. The prison–industrial complex has historically used prisoners as subjects in medical research, the results of which have served private corporations.[67] For instance, she mentions the career of Albert Kligman, a research dermatologist at the University of Pennsylvania who conducted "hundreds of experiments" on prisoners in what were later recognized as "unethical research methods."[68] The trend of privatizing prisons is indicative of the rising presence of corporations in the "prison economy."[69]

For Davis, the privileging of profit over people is indicative of the moral bankruptcy within global capitalism. The very capitalist-driven process that fuels the prison–industrial complex is also the source of destruction for communities which subsequently produce the prisoners. Corporations migrate around the world in search of the cheapest labor pools. The departure of these corporations usually undercuts the economic base of communities, affecting other social programs and services. Communities are left damaged and from them emerge "perfect candidates for prison."[70] As Davis notes, "mass imprisonment generates profits as it devours social wealth, and thus it tends to reproduce the very conditions that lead people to prison."[71] In this way then, it exposes another aspect of the immorality of incarceration.

IV. Conclusion

The above discussion offers an opportunity for us to expand our thinking on prison abolition by engaging discourses outside the Anglo-European tradition. The staggering growth of our prison populations in the United States in this era of mass incarceration have brought anti-carceral ideas into the mainstream. At the same time, the state of our society and its criminal justice

66 Id. at 88.
67 Id. at 89.
68 Id.
69 Id. at 92–93.
70 Id. at 16.
71 Id. at 17.

system dominates the types of arguments made to challenge imprisonment. The moral critique lingers in the shadows, ever-present but of secondary importance. For non-Western traditions, unencumbered by this unique historical experience of mass incarceration and its precursors, the argument for abolition is often strictly a moral one. This is especially true for the Islamic legal tradition with its religious orientation inherently engaging questions of morality. Placing anti-carceral arguments from Islamic thought alongside American ones offers an opportunity to investigate points of alignment and avenues to learn from the differences. The ideas of Davis and Ghāmidī serve that purpose here. Their approaches to the immorality of incarceration are distinct, with Davis relying on the experience of prison and its inexorable connection with grave historical wrongs to formulate her stance while Ghāmidī considers prison as fundamentally flawed regardless of context. These two types of moral critique, straddling the applied and the conceptual, not only demonstrate the basic immorality of incarceration, but that this sentiment is shared across geographies and traditions.

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 on-going 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.[1] 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."[2] 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.[3] 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

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.[4] 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.[5] 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.[6] 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.[7]

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."[8] According to Felecia Dix-Richardson and Billy R. Close, "some researchers

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."[9] "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."[10] 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.[11] 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."[12] 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.[13] 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.[14] These results are even more striking when compared to the percentage of Muslims in society. For example, at about this same time, Muslims accounted

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.[15] 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.[16]

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."[17] The NOI situated justice and equality at the center of its mission, but, most pointedly, "Justice for the Black Man."[18] 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, Shīʿī, 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.

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.[19] 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.[20]

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."[21] 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."[22]

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.*[23]

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."[24] 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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23 Comment, *Suits by Black Muslim Prisoners to Enforce Religious Rights—Obstacles to a Hearingon the Merits*, 20 Rutgers L. Rev. 528, 570 (1966).

24 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.[25] 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.[26] 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.[27] In this case, the plaintiff, Cooper, who followed the NOI, was sent to solitary confinement and given other penalties for claiming

25 Marie A. Failinger, *Islam in the Mind of American State Courts: 1960 to 2001*, 28 S. Cal. Rev. L. Soc. Just. 21 (2019).

26 *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).

27 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 Furguson*, 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.[28] 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."[29]

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 Qurʾān, to communicate with other NOI followers, to visit with ministers of their faith, and to attend religious services.[30] 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,[31] newly-created Communication Management Units,[32] use of force,[33] and restrictions on access to courts and

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 jailhouse 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.[34] More recent issues center on the right to wear the headscarf veil (hijab) in female jails and prisons,[35] religious practices,[36] observance of Ramadan,[37] religious paraphernalia,[38] worship space,[39] dress[40] and grooming,[41] religious literature,[42] and access to religious leaders and services.[43] 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

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/.

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 Shīʿī 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.[44]

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.[45] 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.[46] 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] fucking grievance because I kill Muslims."[47]

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?[48]

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

48 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.[49]

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.[50]

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

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.*[51]

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

51 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."[52] 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

52 *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.[53] 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."[54] 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."[55] 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."[56] 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."[57]

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.[58]

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

58 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."[59] 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.[60]

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 Qurʾān and other religious writings, and getting access to religious leaders.[61] In these lawsuits, the desire to litigate is an expression of commitment to faith. This situation is a pure instance

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 Sunnī 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.[62] 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."[63] 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.[64]

As these sentiments proclaim, a court action does not commence coincidently, 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."[65] 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.[66]

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.[67] 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 . . . .[68]

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."[69] 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.[70] 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.[71] 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

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."[72] One subject described, "When you are doing activism and you're advocating for the disadvantaged, you are expressing your faith."[73] 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."[74]

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."[75] 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."[76] 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

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.'"[77] 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.[78]

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.*[79]

> *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.*[80]

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 "*sharīʿa* 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

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 *sharīʿa* law.[81] 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 *sharīʿa* 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.[82] 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

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.[83]

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,[84] 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.

84 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.[85] 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.[86] Association with Islam is reported to improve adjustment to prison, self-esteem,[87] and reformatory potential,[88] as well as reduce recidivism rates more than other groups statewide[89] and nationwide.[90] 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

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, Univeristy 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,"[91] 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,"[92] 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.

91 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).

92 Id. at 1388.

Shīʿī Ideas of Slavery: A Study of Iran in the Qājar Era Before and After the Constitutional Revolution

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Abstract

*The wave of struggle against the slave trade which began in eighteenth century Europe reached the Middle East and countries in Persian Gulf in the nineteenth century. In its efforts to end slave trade, Britain concluded treaties with Ottomans, sheikhs in Oman, and the king of Masqat. This concentrated the trade of enslaved Black people from Africa in Iran. The study of this period in Iran is important because Muḥammad Shāh, the then ruler in Iran, believed that since any order that bans the slave trade is against Islam, concluding any accord in this regard was beyond his control and was related to sharīʿa. This Essay discusses and compares the opinions of Shīʿī scholars in the Qājar era, when the question of the abolition of slavery was first posed via British diplomatic channels, and subsequently during the Constitutional Revolution 1905 (*Enghelāb-e Mashrūteh*), to see if the introduction of Human Rights concepts at the time had any effect on fatwas about slave trade. This is done by the study of historical documents, including royal correspondence, exchange of letters among Shīʿī scholars, and scholarly fatwas. This Essay argues that jurisprudential opinions continued to regard slavery as permissible within the sharīʿa despite political and diplomatic pressures to abolish it and despite the importance of the principles of freedom and equality in the Constitutional era.*

I. Introduction

The movement that led to abolishing slavery, at least in its traditional sense, began to spread globally in the mid-nineteenth century. This abolitionist movement, as an organized effort that tried to end the practice of slavery, arrived in Iran (Persia, prior to 1935) with the efforts of Britain during the reign of Muḥammad Shāh Qājar. Negotiations between the shah and Britain and the British attempt to obtain a fatwa banning slavery make this period of Iranian history unique for scholars of Islamic history and law. Although the questions related to slavery were always rampant in religious texts, practices, fatwas, and teachings, the study of this era is critical because of how the positions of Shīʿī jurists on slavery were taken out of the classrooms into people's daily lives. In addition, the large number of documents available from the period allow scholars to provide nuanced analysis of the positions of Shīʿī jurists on slavery.

This Essay attempts to understand the historical period in which the fatwas on slavery were issued. The early period, extending from the reign of Muḥammad Shāh Qājar (October 23, 1834 to September 5, 1848) and shortly afterward during the reign of Nāṣir al-Dīn Shāh Qājar (September 5, 1848 to May 1, 1896), was characterized by the importance of slavery in Iran and British diplomatic pressure to abolish slavery. During that period, law in the modern sense had not yet fully developed in Iran. *ʿUlamāʾ* (or *mujtahidīn*) regulated the daily affairs of ordinary people through their fatwas derived from an interpretation of the Quʾrān and the teachings of the Prophet and the twelve Imams, and the shah was considered to be the head of the Shīʿī religion.[1] To that aim, this Essay explores fatwas, religious and political documents, and texts to obtain an objective narration of Shīʿī jurists' positions on slavery.

The Essay relies mainly on the use of primary documents (in Arabic and Persian), as translated by the authors. Such

1 See Nikki R. Keddie, *The Roots of the ʿUlamāʾs Power in Modern Iran*, in Nikki R. Keddie, ed., Scholars, Saints, and Sufis: Muslim Religious Institutions in the Middle East since 1500, 216–29 (1972).

an exposition of the primary sources will demonstrate the legal concept of slavery in Iran and its differences with the concept of slavery in the West. The first part of this Essay is dedicated to studying the historical background and the second part analyzes the fatwas and religious documents of this period. The third part of the Essay looks to the Constitutional era (*Enghelāb-e Mashrūteh*, 1905–11): a period in which Iranians became acquainted with modern socio-legal concepts such as equality and freedom. At this time, many *mujtahidīn* and religious scholars, by issuing progressive fatwas, tried to show that Islam is compatible with modern law and the modern legal system.[2] Developments during the this era, especially when juxtaposed against the earlier Qājar period, show the lack of influence of modern legal concepts on fatwas regarding slavery.

II. Slavery during the Qājar period

Throughout the history of Iran, from antiquity to the first half of the twentieth century CE, the use of enslaved people with different names and functions such as servant (*gholām*), maid (*kanīz*), or eunuch (*khājeh*), existed in various social, military, political or economic fields.[3] Until the middle of the nineteenth century, captivity in wars and invasions was the primary supply source for such slavery. But at the beginning of the nineteenth century and during the Qājar rule in Iran, slave traders and dealers imported large numbers of enslaved people from East Africa to the southern ports of Iran. This led to an increase in enslaved African people in the late nineteenth and early twentieth centuries who were transported from the these ports to the domestic

2 See Mangol Bayat, Iran's First Revolution: Shi'ism and the Constitutional Revolution of 1905–1909 (1991).

3 On slavery in Iran, see Thomas Ricks, *Slaves and Slave-Trading in Shi'i Iran, AD 1500–1900*, 36 no. 4 J. of Asian and African Studs. 407–18 (2001); Behnaz A. Mirzai, *Slavery, the Abolition of the Slave Trade, and the Emancipation of Slaves in Iran (1828–1928)*, Ph.D. dissertation, York University (2004); Jeffrey Eric Eden, *Slavery and Empire in Central Asia*, doctoral dissertation, Harvard University (2016). Sir Thomas Herbert, an English historian and writer who traveled to Iran in the early 17th century during the Safavid rule, reported the sale of Indian and African enslaved people by Iranians in Bandar Abbas, see: J.G. Lorimer, Gazetteer of the Persian Gulf, Oman, and Central Arabia 24, 75 (1915).

markets of Iran for sale.[4] This trend continued until the middle of the twentieth century. Although the exact number of enslaved people is unknown,[5] according to the reports of British agents living in the ports of the Persian Gulf, the number of African enslaved people entering these ports during the nineteenth century was not small.[6] Others estimated the number at about two to three thousand annually.[7] In some other documents, the annual number of enslaved people traded in the Persian Gulf was estimated to be four to five thousand.[8] The enslaved people present in Qājar Iran were not limited to enslaved Black Africans; others of various racial and ethnic groups, including Iranians, can be seen at that time.[9] This group of enslaved people were mainly captured in punitive attacks, especially against the Turkmens, Balochis, or during the regular Iran–Russia wars (Russo–Persian Wars or Russo–Iranian Wars).[10] Another group was supplied through trade and sale, and a small part had originally been sold into slavery due to poverty.[11]

Some enslaved Black Africans were transported to Iran by land pilgrims to holy cities such as Mecca, Medina, and

4 Abbas Amanat, Cities and Trade: Consul Abbott on the Economy and Society of Iran 1847–1866, 172 (1983); James Baillie Fraser, Narrative of a Journey into Khorasan, in the Years 1821 and 1822, 51 (1825).

5 For more information regarding the number of enslaved people imported into Iran see Mirzai, *Slavery*, *supra* note 3 at 63–66.

6 Lorimer, Gazetteer, *supra* note 3 at 24–93; J.B. Kelly, Britain and The Persian Gulf: 1795–1880, 418 (1968).

7 Sheil, Lady Mary, Glimpses of Life and Manners in Persia (reprint 1973).

8 Rigby to Anderson, dated Zanzibar, May 14, 1861, AA3/20, ZNL.

9 G.H. Zargari Nejad and Narges Alipour, *A Glance at the State of Kanīzān, Ghulāmān and Eunuchs during the Qajar Er*a, 2 (Summer 2009) Journal of Historical Researches 1–18. (Original Persian text available at: http://jhr.ui.ac.ir/article_16484_6ee3b483c3a38849288757822a8eebf3.pdf.)

10 These wars were a series of five conflicts between 1651 and 1828, concerning Persia (Iran) and the Russian Empire, which affected Iranian history in many ways. Regarding the topic of this article, one of the first bans on slavery was imposed by the Russians on Iran. With the beginning of the Qājar rule, the entry of white enslaved and maids from the Caucasus region and beyond was significantly reduced because the Russians banned the sale and purchase of Caucasian men and women after the occupation of the Caucasus region and the conclusion of the Treaty of Turkmenchay with the Iranian government in 1827: J. Basset, Persia, the Land of the Imams: A Narrative of Travel and Residence 278 (1887).

11 Zargari Nejad and Alipour, *Glance*, *supra* note 9.

Karbala.[12] The entry of enslaved people through pilgrims continued after the first decree banning the sale of enslaved people in 1848. Most of the other enslaved people entered Iran through the Persian Gulf. The Persian Gulf was a route through which the East African and Ethiopian enslaved people were traded to meet the needs of the eastern markets in the provinces of present-day Saudi Arabia, Iraq, and Iran.[13]

Unlike Europe and the United States, the abolition of slavery and suppression of the trade in enslaved people in Iran was not characterized by intense protests, rebellions, or revolts by enslaved people. Instead, as had happened before, after the conclusion of the Turkmenchay Treaty,[14] pressure from other countries and diplomacy caused it; the pressure which is called "government-to-government negations."[15] As Behnaz Mirzai describes it: "The humanitarian concerns that drove the international discourse were not those that resonated in Iran, where discussions about the slave trade focused instead on religious and political concerns and issues of nationhood."[16] This is why this period is the best to look at in terms of fatwas related to slavery.

With the Slavery Abolition Act of 1833, the British abolitionist movement, which had emerged in the eighteenth century largely from both Quaker and secular Enlightment thought, achieved an important victory in Britain.[17] After that, the abolition of slavery gradually spread abroad to territories under the control of or influenced by the British imperial enterprise, including the Persian Gulf. After a successful attempt to abolish slavery in the Ottoman Empire and Muscat,[18] Britain began

12 Id.

13 Kelly, Britain, *supra* note 6 at 414.

14 See Mirzai, *Slavery*, *supra* note 3 at 66.

15 Ehud R. Toledano, *Abolition and Anti-Slavery in the Ottoman Empire: A Case to Answer*, in William Mulligan and Maurice Bric, eds., A Global History of Anti-Slavery Politics in the Nineteenth Century 118 (2013).

16 Behanz A. Mirzai, A History of Slavery and Emancipation in Iran 1800–1929, 132 (2017).

17 Lorimer, Gazetteer, *supra* note 3 at 247; Mirzai, History, *supra* note 16 at 133.

18 The general suppression of the trade in enslaved Africans in the Ottoman states took place in 1857. See Behnaz A. Mirzai, *The Persian Gulf and Britain: The Suppression of the African Slave Trade*, in Hideaki Suzuki, ed., Abolitions as a

negotiations with the Shah of Iran, Muḥammad Shāh. Abolition negotiations were first raised as a political issue in Iran–Britain relations in 1841. When Sir John McNeil was on his way to Iran to re-establish ties between the two governments after the Herat War, he was commissioned by Lord Palmerston, the British Foreign Secretary, to obtain a decree and royal edict from the shah to abolish slavery. Palmerston argued that given that progressive countries in Europe and the United States had repealed the law of slavery, Iran should accept the same approach.[19] Palmerston counseled McNeil to "urge the Shah to extend his prohibition to the importation of slaves by sea as well as by land, and to the importation of enslaved people from Africa and India, as well as from the countries bordering upon Persia."[20] But because of the strained relations between Iran and Britain after the Herat war, McNeil did not raise the issue at all.[21]

Following this, Palmerston instructed Colonel Justin Sheil, the Secretary of State in Tehran, to request the Shah of Iran to issue a decree similar to the Muscat Treaty. In his letter to Muḥammad Shāh's Prime Minister Ḥājī Mīrzā Āqāsī of 1847, Sheil wrote:

> Your Excellency, I respectfully write this correspondence to you following our discussion on the transactions in blacks. You are aware of the strong insistence of the British government to prohibit this obscene trade. As part of this process, the British government solicits the support of the Iranian government in this praiseworthy act.[22]

Global Experience 113–29 (2016); Toledano, *Abolition*, *supra* note 15; Y. Hakan Erdem, Slavery in the Ottoman Empire and Its Demise, 1800–1909 (1996); see also Chhaya Goswami, The Call of the Sea: Kachchhi Traders in Muscat and Zanzibar, C. 1800–1880, 117–36 (2011).

19 Vahid Shahsavarani and Mohammad Mortezai, Slavery in the Qajar Period: An Archaeological Approach to Study Slavery in Late Islamic Period 55 (2018).

20 Palmerston to McNeil, July 9, 1841, FO 84/373, NAUK. Cited by Mirzai, History, *supra* note 16 at 135.

21 See Kelly, Britain, *supra* note 6 at 593; Fereydūn Adamiyāt, Amīr Kabīr va Īrān 516 (1983) (original text in Persian).

22 Justin Sheil to Ḥājī Mīrzā Āqāsī, 1263, Q1263.6.5, VUK, Tehran. Cited by Mirzai, History, *supra* note 16 at 135.

However Muḥammad Shāh considered the act of buying and selling enslaved people to be lawful under *sharīʿa* and that any interpretation of Islamic law was beyond his power. In a letter to Ḥājī Mīrzā Āqāsī, he explained these points as such:

> Buying women and men is based on the *Sharia* of the last Prophet. I cannot prohibit my people from something which is lawful on the *Sharia* . . . . I cannot issue a decree and sign an agreement which is against the *Sharia*.[23]

In three different cases, Sheil and his successor, Farrant,[24] tried to show that abolition was in line with religion. First, they considered such a thing to be in accordance with Christianity, to which Muḥammad Shāh responded:

> If according to their religion [Christianity] this traffic is considered an abominable practice, in our religion it is lawful. Why should the things which our Prophet has made lawful to us be imputed detestable?[25]

In the next two cases, Muḥammad Shāh tried to highlight the differences between Shīʿī Islam and other denominations. So the examples that had been provided by Shiel and Farrant of other Islamic countries like Muscat (in modern-day Oman) and the Ottoman Empire were neither necessarily relevant to Iran in this regard; he wrote:

> Turks are Sunni, and they are in opposition to the Iranians. The Imam of Masqat is also from the Khawarej, and one level better than a kāfar [non-believer].

23 Muḥammad Shāh's autograph to Mīrzā Āqāsī reprinted in Narges Alipour, *Slave Trade Prohibition during Qajar Period as Stated by Documents (From 1257/1841 until 1300/1882)*, 42 no. 2 Journal of History and Culture 149–78 (Winter and Spring 2011). Original text in Persian available at https://jhistory.um.ac.ir/article_24945.html?lang=en.

24 Colonel Francis Farrant replaced Sheil after his recall to London in late 1847.

25 Sheil to Palmerston, Tehran, April 27, 1847, FO 84/692, NAUK. Aghassee to Sheil, December 20, 1846, FO 84/647, NAUK. Cited by Mirzai, History, *supra* note 16 at 139.

> Then, we, who are the leaders of Shiʿi Islam, will not follow them.[26]

Although Muḥammad Shāh eventually changed his position and issued a decree banning the slave trade through the Persian Gulf prior to his death,[27] for several years before he reached this point, his way of argument against this decree led British delegates to consult with famous *mujtahidīn* in Tehran and Najaf in order to find support for their arguments that the abolition of the slave trade was not against Shīʿī Islam. To do so, they asked six eminent *mujtahidīn* in Tehran and some others in Najaf to issue fatwas about this problem, hoping that they could use at least one of them to influence the king. The fatwas and other religious texts issued in this period are among the most valuable documents and materials to study the Shīʿī Islamic position on slavery and servitude in practice. To do so, the next part of this article is devoted to the study of these texts.

III. Fatwas in the Pre-Constitutional period

Before examining the religious texts, documents, and fatwas relating to enslaved people in the pre-constitutional period, especially in the years when the issue of banning the slave trade was raised, it is necessary to allude to a few points. Although ostensibly the Qājar Shāh was considered the absolute and highest power in the country, his power was always limited by *sharīʿa* and the opinion of those who were the custodians of *sharīʿa* (namely the *ʿulamāʾ*). Everything touching the people's daily lives was discussed as a legitimate (halal) or illegitimate (haram) matter in the fatwas of the *ʿulamāʾ*. For this reason, if the shah wanted to issue a ruling on the people's daily affairs, such as slavery or its prohibition, he had to give a command in compliance with the *sharīʿa*. Therefore, if slavery and the slave trade were legitimate according to the *sharīʿa* and according to the fatwas of the *mujtahidīn*, the shah could not have declared

26 Adamiyāt, Amīr, *supra* note 21 at 517.

27 The decree was issued in 1847. The original autograph of Muḥammad Shāh's decree in Persian is reproduced at Alipour, *Slave*, *supra* note 23 at 173.

them illegitimate without a valid fatwa. In fact, in such a case, the illegal was equal to the illegitimate, and the legal was equivalent to the legitimate, which was determined by religion and not by the shah's power. This is why Muḥammad Shāh always pointed to the legality of slavery and its conformity with Islam, and the representatives of Britain also sought fatwas in this regard. To abolish the slave trade, the abolitionist position needed the support of an authoritative religious decision to end slavery.[28]

The second issue worth mentioning here is the nature of what Britain asked to be abandoned, i.e., trading enslaved people through the sea, in Shīʿī Islam. According to the principle of freedom (*aṣālat al-ḥurriyya*),[29] which considers freedom of all human beings as a basic assumption, slavery (*riqqiyya*) is not acceptable unless there is a valid religious reason behind it. In Shīʿī jurisprudence, a total of seven religious means (*sabab*) for slavery have been presented. With the realization of any of them, a person becomes another person's property, deprived of some of his human rights, and the duties of an enslaved person will be imposed on them. These reasons are slavery in war,[30] slavery through conquest,[31] slavery through buying from the guardians (*walī*),[32] slavery transmission through parents to children,[33] slavery through confession,[34] foundlings in non-believers' territory (*dār al-kufr*),[35] and buying from a non-Muslim market.[36] What Britain asked Muḥammad Shāh to do was to ban one of these means of slavery, the seventh means, which is slavery by buying from the non-Muslim market. Although this *sabab* does not

28 For more on the relationship between the shah and the *ʿulamāʾ* in Iran, see Hamid Enayat, Modern Islamic Political Thought (2001).

29 For further elaboration see Abū ʾl-Qāsim al-Qummī, Jamʿ al-shitāt fī ajwibat al-suʾālāt, vol. 2 (1992) (original text in Arabic).

30 Muḥammad Kāẓim al-Yazdī, al-ʿUrwa al-wuthqā 21:367 (1956); Muḥammad Ḥasan al-Najafī al-Jawāhirī, Jawhar al-kalām fī sharḥ Sharāʾiʿ al-Islām 1:373, 379 (1983).

31 Yazdī, ʿUrwa, *supra* note 30 at 2: 368; Jawāhirī, Jawhar, *supra* note 30 at 24:229.

32 Id. at 30:287.

33 Id. at 24:126.

34 Id.

35 Id.

36 Id.

create slavery like the previous six causes, it grants the permission to transfer enslaved people to the Muslim market (*sūq al-Muslimīn* and *dār al-Islām*), which effectively gives a religious justification to import the existing slavery in a non-Muslim market into Muslim lands. Given the above, we can now take a closer look at these texts and fatwas.

The question the British agent asked from several *mujtahidīn* was as follows:

> What do the learned Doctors in Religion and the Law decree on the following point? If they should abolish the transport of black male and female slaves and abstain from the traffic, is it any injury or not to the faith?[37]

In response, all the *mujtahidīn,* citing a hadith from the Prophet Muḥammad,[38] considered the sale of enslaved people to be an abominable (*makrūh*) act that should not be done. Still, none of them considered this act illegitimate (haram). Mullā ʿAlī Kanī's fatwa in this regard reads:

> Trading in, and buying and selling male and female slaves is not illegitimate, but it is an abomination, as is stated in the *Sunnat* (the practice of the Prophet and his family) "The worst people are those who sell human beings." . . . If it is abandoned on this account, it is good, but if [it is abandoned] on account of its being illegitimate, it is wrong.[39]

The fatwa of Āghā Maḥmūd, another prominent figure of the time, was that "the act of selling men and trading in them is abominable, and it is certainly better not to do it."[40] When Sheil informed the shah about the opinions of the *mujtahidīn*, he, in response, mentioned the fatwa of another *mujtahid*, which said

37 Questions to various priests in Tehran relative to the slave trade with their replies, translated by Justin Sheil, 1847, FO 84/692, NAUK, London. Cited by Mirzai, History, *supra* note 16 at 140.

38 Muḥammad b. Yaʿqūb al-Kulaynī, Kāfi 6:114 (1987).

39 Id. at 6:141.

40 Id.

that Muslims "must fight non-believers and enslave them to convert to Islam."[41]

Sheil then instructed Sir Henry Rawlinson, the British official in Baghdad, to search for a favorable fatwa between *mujtahidīn* in Karbala and Najaf. He sought a fatwa stating in particular that a ban on the transport of enslaved people through the sea is not illegitimate. Shaykh Muḥammad Ḥasan, one of the eminent *mujtahidīn* in Karbala, told Rawlinson that slavery is legitimate and "the temporal power cannot forbid a legitimate act; consequently, such a prohibition would be illegitimate."[42] He also added that the possession of enslaved people is in accordance with the acknowledged and long-established customs of Islam, and the transport of enslaved people is nowhere condemned or even reprobated in the Qurʾān or the traditions.[43] Although he refers to the Qurʾān, it is essential to note that all the seven causes mentioned above are based on traditions and hadith—narration from the Prophet or the Imams—and the consensus of the jurists. None of these causes directly relies on the text of the Qurʾān.[44]

Shaykh Muḥammad Ḥasan also emphasized that the same hadith ("the worst people are those who sell human beings") refers exclusively to those who make a business out of the slave trade, spending their whole lives in this particular commerce.[45] So with this fatwa, he clearly distinguished between slavery and the slave trade as a profession and expressed that what is not recommended is choosing slave trade as a profession, not intending to prohibit slavery *per se*.

The distinction between slavery and trading in enslaved people seems to be derived from an essential function defined for slavery and the main reason for the support from the *ʿulamāʾ*: slavery is seen as a means to facilitate conversion to Islam by

41 Adamiyāt, Amīr, *supra* note 21 at 516.

42 Sheil to Rawlinson, September 18, 1847, FO 84/692, NAUK. Cited by Mirzai, History, *supra* note 16 at 141.

43 Rawlinson to Sheil, Baghdad, November 8, 1847, L/PS/5/453, BL. Id.

44 Mohsen Kadivar, *Slavery in Contemporary Islam*, in Mohsen Kadivar, *Hagh al-Nas*: Islam and Human Rights 341–78 (2007).

45 Rawlinson to Farrant, Baghdad, January 15, 1848, FO 84/737, NAUK. Cited by Mirzai, History, *supra* note 16 at 142.

non-Muslims. Since, for the *ʿulamāʾ*, Islam is the ultimate form of freedom of human beings, slavery helps non-Muslims enter the free people's society (*jāmiʿ al-aḥrār*). By becoming a Muslim, one becomes a member of this society and remains free forever. Alame Tabatabaie, the leading contemporary figure in the Shīʿī jurisprudence and interpretation of the Qurʾān, explains that whoever consistently fights against Islam stands outside the society of free human beings; that means he or she is a slave by nature (*fiṭra*), and therefore, can be abducted and sold as an enslaved person. For such a person, converting to Islam is the only way to become a member of free people's society; slavery is seen as means through which they can be educated and ready to become free human beings.[46] The idea of slavery as an intermediary means to become a member of free people's society is also evident in the text of the documents issued by the owner or master when a previously enslaved person becomes free because he or she converted to Islam.[47]

IV. An Examination of the Fatwas of Shīʿī Jurists in the Constitutional Era

There is no generally accepted theory on the roots and causes of Iran's Constitutional Revolution,[48] but there is a consensus over the fact that it marks a huge and fundamental change in Iran's political and social structure.[49] The *ʿulamāʾ*, growing intellectual elites, and merchants of Iran's market were the main players of the revolution; all seeking to fight against the foreign dominance by Russia and Britain by precluding the growth of the shah's power in Iran through a constitution. The Constitutional Revolution also introduced the modern concept of law and legal order, as well as humanism and related concepts such as human

46 Muḥammad Ḥusayn al-Ṭabāṭabāʾī, *Kalām fī al-riqq wa'l-istiʿbād*, in Mīzān fī tafsīr al-Qurʾān 6:343 (2000).

47 For samples of these documents, see Nargis Alipour, The Documents of Slave Selling and its Prohibition During Qajarid Era 278–99 (2011).

48 See Ervand Abrahamian, *The Causes of the Constitutional Revolution in Iran*, 10 no. 3 Int'l J. Mid. E. Studs. 381–414 (1979).

49 See Abbas Amanat, *The Constitutional Revolution: Road to a Plural Modernity (1905–1911)*, in Iran: A Modern History 315–86 (2017).

equality and freedom. The study of fatwas over slavery in this period can thus help us elucidate and understand the effect of any modern concepts and Constitutional Era debates on the traditional understanding of slavery to see if social, political, and legal changes in their day had any actual effect on fatwas on slavery. To answer this, the final part of this Essay first focuses on the fatwas issued by Muḥammad Kāẓim Yazdī and Shaykh Muḥammad Kāẓim Khurāsānī. Then it discusses the ideas of Shaykh Faḍlullāh Nūrī and Shaykh Muḥammad Ḥusayn Nāʿīnī Gharavī. All of them are key and leading figures in the two opposing sides of the Constitutional Era debates.

a. Yazdī and Khurāsānī: Two Boats, Same Port

Muḥammad Kāẓim Yazdī (1831–1919) was a prominent Twelver Shīʿī *marjaʿ* based in Najaf, most famous for his anti-constitutionalist stand during the Iranian Constitutional Revolution. Before he manifestly opposed the constitutional approach following the execution of a prominent religious leader by pro-constitutionalists, he was among the pious apolitical *ʿulamāʾ* who had originally refused to support the constitutional movement despite insistent pressure by pro-constitution clergy.

As a religious leader, he was most likely aware of the changes taking place in the system of slavery and its abolition. His role in the struggle against the British Empire is noted in historical sources relating to events of the 1920s;[50] there is also a record of telegrams, correspondence, and questions from both constitutionalist and anti-constitutional groups to him available in a collection of documents published from the Qājar period.[51] Moreover, he took an active role against political events in

50 Ghassan R. Atiyyah, Iraq, 1908–1921: A Socio-political Study 231–32 (1973); Waleed K. Almasaedi, *Iraqi Shi'ites and Identity Conflict: A Study in the Developments of their Religious-Political Identities From 1920–2003*, thesis submitted to the faculty of the Virginia Polytechnic Institute and State University (2020), http://vtechworks.lib.vt.edu/bitstream/handle/10919/102108/Almasaedi_WK_T_2021.pdf; Marsin R. Alshamary, *Prophets and Priests: Religious Leaders and Protest in Iraq*, thesis submitted to Massachusetts Institute Of Technology (2020), http://dspace.mit.edu/bitstream/handle/1721.1/130603/1249943171-MIT.pdf.

51 Hamid Algar, Religion and State in Iran 1785–1906: The Role of the Ulama in the Qajar Period (1969).

Muslim countries including Tripoli and Iran.[52] But it is surprising that in his opinions and fatwas about several issues related to enslaved people, there is no significant difference with the fatwas of jurists, for example, five centuries before him.

It is worth noting that when a *mujtahid* is not directly asked to give his opinion on slavery, he may still be compelled to express his position in this regard in response to other questions. Examples of this indirect expression can be found in *al-ʿUrwa al-wuthqā*, which is the most prominent compilation of *fiqh* works authored by Muḥammad Kāẓim Yazdī.[53] In one of his fatwas on the subject of Islamic endowment (*waqf*), he indirectly reiterates the endorsement of slavery and treatment of an enslaved person as a possession that can be endowed under *sharīʿa*. He believes that freeing an endowed enslaved person, even if it is said that he was transferred to the beneficiaries of the endowment, is undoubtedly invalid because of the consensus and the hadith that indicate the inadmissibility of disposing of an endowed asset by selling, giving, or similar actions which lead to transferring ownership.[54]

Other examples of his fatwas show that his opinion on slavery is based on the concept of *istīlāʿ* (literally, "the might") of Muslims over non-believers when equality in society was among the basic principles of the constitutional movement in Iran. This includes situations in which the beneficiary of a Muslim endowment beneficiary becomes apostate or in which a non-believing enslaved person converts to Islam. According to him, the enslaved person is not obliged to serve non-believers, including endowment beneficiaries.[55] The endorsement of

52 One example is a fatwa he issued when the Italian government was mobilizing its forces to occupy Libya in North Africa, and Russian troops were occupying some parts of north Iran and British troops the south. Zuhyar Sulayman, *The Islamic Revolution of 1920 in Iraq*, http://www.icit-digital.org/articles/the-islamic-revolution-of-1920-in-iraq.

53 This three-volume Arabic book includes diverse chapters on *fiqh* and expresses 3260 (Islamic) legal rulings issued in 1919. After the book's publication, many *mujtahidīn* wrote their jurisprudential opinions in the form of explanatory or critical footnotes on Yazdī's fatwas in this book. So far, thirty-seven people have written footnotes on or separate summarizations of this book.

54 Yazdī, ʿUrwa, *supra* note 30 at 6:349.

55 Id. at 6:356.

slavery can also be seen in his fatwas on ownership,[56] personal issues of an enslaved person (such as marriage),[57] and agency.[58] The premise of all these fatwas is that a group of people can still be the subject of ownership, like any other property. In other words, the efforts to completely abolish slavery and the Constitutional Era ideas about the freedom and equality of all human beings had not changed the jurisprudential approach of this famous jurist or the conclusion of his arguments.

Let us now look at the other side of the spectrum, the supporters of the constitutional movement, and pose the same question regarding the influence of Constitutional Era developments on their jurisprudence. Shaykh Muḥammad Kāẓim Khurāsānī (1839–1911), commonly known as Ākhūnd Khurāsānī, was a high-level figure in the same rank as Yazdī. Khurāsānī is known for using his position as a *marjaʿ* for a potent political leadership in the Constitutional Revolution, where he was one of the main clerical supporters of the revolution. He believed that a "constitutional form of government" would be the best possible choice in the absence of the Imam and regarded the "constitutional revolution" as a *jihad* (holy war) in which all Muslims had to participate.[59]

Among Khurāsānī's most famous works are *The Sufficiency* (*Kifāyat al-usūl*) and his important commentaries on *Makāsib* by Shaykh Murtaḍā al-Anṣārī (1781–1864). Khurāsānī's commentaries on *Makāsib* are a valuable source for knowledge of his jurisprudential opinions. In *Makāsib*, Anṣārī raises the question of whether an owner can sell a runaway enslaved person, given that he cannot now deliver him to the customer. Anṣārī's answer is that he cannot, unless he adds something else to the runaway

56 Id. at 6:607.

57 Id. See also at 5:577. On the intervention of the master into the marriage of his enslaved see at 6:579–80.

58 Id. at 6:211.

59 When Shaykh Faḍlullāh Nūrī declared journalists non-Muslims for their support of the new Constitutional Assembly, Khurāsānī retaliated by announcing that Nūrī was himself no longer a Muslim, leading to Nūrī's execution: Roy Mottahedeh, The Mantle of the Prophet: Religion and Politics in Iran 218–19 (revised edition 2008) [orig. publ. 1985]. The reaction to Nūrī's execution in Najaf harmed Khurāsānī and other constitution supporters and led to a rivalry with Yazdī: Said Amir Arjomand, The Turban for the Crown 52 (1988).

enslaved person in the contract of the sale. Khurāsānī opposes his teacher's fatwa, saying that the owner can sell a runaway enslaved person without attaching anything.[60] It is not necessary to evaluate the reasons underlying each of the two fatwas. Instead, it is relevant to this paper to mention that Khurāsānī did not say a single word about the principle of human dignity or of freedom or that the sale and purchase of enslaved people should be banned by *sharīʿa* because of the importance of human dignity in the *sharīʿa*. A similar way of reasoning can be found in related issues such as the voiding of a contract if the subject is vague[61] or the sale of a enslaved Muslim person to a non-Muslim purchaser.[62] Here, too, Khurāsānī comments on the Anṣārī fatwa without the slightest hint that the sale of human beings is disfavored in the current era or should be prohibited.

Although the views of Khurāsānī and Anṣārī on the Constitutional movement were different and even opposed each other, their fatwas on slavery are more-or-less the consistent with each other. This paradoxical situation is not specific to these two jurists, and it is also observed among other jurists of the Constitutional Era.

b. Nūrī and Nāʿīnī: A Discussion over Freedom and Equality

During the Constitutional Revolution in Iran, concepts such as freedom and equality of human beings were among the most important drivers of the revolution and important topics for discussion among scholars, both for and against the revolution. The same concepts played a pivotal role in the development and evolution of approaches towards the abolition of slavery in the West. This part examines the works of two of the leading Iranian *mujtahidīn* Shaykh Faḍlullāh Nūrī (1843–1909) and Shaykh Muḥammad Ḥusayn Nāʿīnī Gharavī (1860–1936), who elaborated on the concepts of freedom and equality and helped define them albeit in opposing directions. Despite their political

60 Muḥammad Kāẓim al-Khūrāsānī, Ḥāshiyat al-Makāsib 125 (1985).
61 Id. at 50.
62 Id. at 99.

and jurisprudential differences, however, these two jurists had at least one thing in common: their stances on freedom and equality had no effect on their rulings over slavery.

The *Tadhkirat al-ghāfil wa-irshād al-jāhil* (attributed to Shaykh Faḍlullāh Nūrī), written in 1908, and the *Tanbīh al-umma* (by Mīrzāʾī Nāʿinī), written in 1909, comprise an indirect debate between these two Shīʿī *mujtahidīn*.[63] Nūrī argued that the principles of equality and freedom destroy the strong pillar of divine law, because the consistency of Islam is based on worship (before God), not freedom, and the rules of *sharīʿa* are based on difference, not equality. He then addressed some jurisprudential rulings to show, for example, that rulings do not consider men and women or non-believers and Muslim as equals.[64]

On the other side, without naming Nūrī, Nāʿinī considered Nūrī's statements to be fallacious and responded to them in his own works. While Nūrī considered freedom and equality as two destructive principles to *sharīʿa*, Nāʿinī saw them as two honorable and valuable principles.[65] Even more so, he considers them at their core to be Islamic principles. What is relevant to this article is that although Nāʿinī considers freedom and equality is this way, his fatwas on slavery and servitude are the same as those of other jurists. It is as if he does not entertain the possibility that enslaved people could be the subjects of these two principles. For example, Nāʿinī makes similar statements to other jurists in describing the issue of selling a runaway enslaved person. Additionally, he showed no objection to the case of slavery nor the slave trade.[66] Nāʿinī—contrary to his reliance on the principles of equality and freedom in his debates with Nūrī—did not invoke those principles here.

63 To read more about the differences and arguments of the two against each other's opinions see: Seyed Masoud Noori, *The Life of Sheikh Fazlullah Noori and a Comparison of His Political Thought with the Views of Mirza Naini*, 73–74 Social Science Monthly Review 79–85 (Nov.–Dec. 2003); Seyed Masoud Noori, *Shia Political Philosophy in the Thought of Mirza Naini*, 73–74 Social Science Monthly Review 31–37 (Nov.–Dec. 2003).

64 Mehdi Ansari, Sheikh Fazlollah Noori and Constitutionalism 59 (1990).

65 Noori, *Life*, *supra* note 63.

66 Mūsā al-Najafī al-Khwānsārī, Munyat al-ṭālib fī sharḥ al-Makāsib ("Rewriting the Lesson of Mīrzāʿī Nāʿīnī") 387–88 (1954).

One possible exception is an indirect hint in one of his fatwas over an issue related to slavery in which he admits that slavery "is *unfortunately* not the case in our time"[67] (emphasis added). This sentence is worthy of our attention because: the author says that in our time, there is no more slavery; and he regrets the absence of enslaved people. An alternative interpretation of the word "unfortunately" may refer to the idea of becoming free by converting to Islam. It is said that a prevailing opinion of many Islamic scholars is that freedom is defined only by being Muslim. Therefore, slavery is a way to help people to become Muslim and, as a result, free. That means abolishing slavery blocks one of the means of becoming a free human by Islam.[68]

V. Conclusion

The study of fatwas in the Constitutional Revolution thus shows that the discussion over human equality and freedom does not manifest into an effect on the understanding of *ʿulamāʾ* of slavery in *sharīʿa*. It is also important to note that this attitude still reigns today. Some present-day jurists have turned away from contemplating and *ijtihād* (interpretation) in such issues and simply state that "because the rulings of slave men and women are not practically used in our time, abandoning them and spending time on more important matters is a priority."[69] This means that even the current jurists do not reach the conclusion that slavery has been abolished or is prohibited under *sharīʿa*. Instead, they still believe if these questions arise in society, the *sharīʿa* has to answer them.

67 Shaykh Anṣārī discussed the rulings on the release of an enslaved woman due her to having children with her owner and has carefully separated the rules and exceptions. Nāʿinī (as his student, the author of the book, says) commented, "It is fair to say that the author [i.e., Shaykh Anṣārī] has stated the rule and its exceptions well. May God reward him on behalf of the Muslims, but this is unfortunately not the case in our time." Id. at 372.

68 Kadivar, *Slavery*, *supra* note 44 at 345.

69 Nāṣir Makārim Shīrāzī, al-ʿUrwa al-wuthqa with footnotes 1:366 (2021).

It is also evident from the discussions and teachings of the jurists discussed above that during the Qājar era or after the Constitutional Revolution in Iran there was little direct or effective dialogue between the leading Western thoughts at the time and Islamic jurisprudence. This is because they seem to be two different worlds of thinking with different basic principles (if not opposing). This difference can be seen in the arguments presented concerning slavery in fatwas. Although some commentators had already referred to principles like freedom and equality in their teachings, it never became the dominant trend among Shīʿī scholars in their jurisprudence. Quite the contrary, slavery is seen as a means towards person's absolute freedom, i.e., converting to Islam. Shīʿī scholars in Iran continued to believe that slavery is a means for non-believers to convert to obtain their eternal freedom as a reward for becoming Muslim. Hence, for them abolishing slavery is equal to abolishing (a means) towards human freedom.

It is worth noting that the authors do not suggest that Islam is not compatible with principles such as freedom or equality or with the abolition of slavery; rather, it seems that these concepts were not translated to fit into a completely different system of thought. Today one could characterize the prevailing opinion among Shīʿī *mujtahidīn* as the following: that commandments over slavery in the scriptures do not mean that slavery is obligatory or even recommended and Islam opposes slavery and introduced various ways to free enslaved people, but has not abolished slavery all at once due to the unpreparedness of public opinion for its sudden abolition.[70] If this explanation is accepted, the ground is finally prepared for the *sharīʿa* to reach the goal of abolishing slavery indirectly via the fact that slavery has become disfavored in Muslim public opinion and public opinion is prepared, indeed would welcome, abolition. Everything is ready for the jurists to issue a fatwa that slavery in our time is forbidden in light of these changed circumstances. This position has gained more and more voice among contemporary Shīʿī *mujtahidīn*, albeit it is still far from

70 See, for example, Naser Makarem Shirazi, Islam and Emancipation of Slaves 16 (1975).

becoming mainstream discourse. However, even those *mujtahidīn* who still find slavery permitted in *sharīʿa* confine it to the wars against non-believers,[71] and among them, some accept slavery only if this war is led by the Imam.[72] Therefore, practically, there is no room for slavery in modern Shīʿa, at least until the Imam is present again in Shīʿī society.[73]

So the yet unanswered question is: How does contemporary Islam deal with the issue of slavery? A simplistic answer that slavery is no longer a practical issue in society only postpones any possible solution. Islamic jurisprudence, anyway, needs to find an answer to this question.

71 Muhammad Taghi Mesbah Yazdi, A Glance at Human Rights from the Perspective of Islam 168–69 (2008).

72 Slavery is allowed in Islamic law, but it is limited to capturing non-believers in religious *jihad*. However, the Shīʿa hold that *jihad* as religious war can only be conducted in the presence of the Imam—the rightful successor to the Prophet Muḥammad through the lineage of ʿAlī b. Abī Ṭālib—who is currently absent ("in occlusion"). The Declaration of Human Rights is also applied where all people can reconcile with each other and live in peace. Abu al-Hasan Sharani and Qarib Muhammad, Nasre Tubi or Encyclopedia of Quranic Vocabulary 186 (2015).

73 The emphasis on educating an enslaved person to convert to Islam and become a truly free person seems, to a significant if not exclusive extent, to be based on the existence of a war situation as only one of the *asbāb* (means) of obtaining an enslaved person in Islam. But this basis is also relied upon by most of the jurists to justify slavery in other situations and through other *asbāb*. In this regard, when there is no longer a war situation between Muslim society and non-believers, these justifications lose their effective force; the direct consequence is that other *asbāb* also lose their reason unless there are other drives or motivations to justify them.

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