

Westernized Women?: The Construction of Muslim Women's Dissent in U.S. Asylum Law



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ABSTRACT

This Comment examines a group of asylum cases in which the applicants, women of Muslim heritage, were portrayed or understood as Westernized because of their beliefs in gender equality. This Comment utilizes the work of female scholars of Muslim heritage, whose work on gender, Islam, and Orientalism has provided critical insights which can help us understand how women of Muslim heritage are constructed in U.S. asylum law. These scholars have described an imagined binary between the liberated Western woman and the oppressed Muslim woman which this Comment argues has been replicated and reinforced in asylum law. This Comment explores how intersectionality theory can provide a framework that helps explain how the asylum claims of women of Muslim heritage are often depoliticized along both gender and racialized lines. This Comment argues that rethinking the influence of gendered Orientalism on asylum law can help provide more accurate and fair decisions for female Muslim asylum-seekers.

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TABLE OF CONTENTS

INTRODUCTION.....	1304
I. DOUBLE REVOLUTION: WOMEN OF MUSLIM HERITAGE RESISTING NEOCOLONIALISM AND PATRIARCHY.....	1306
II. A CRITIQUE OF THE “WESTERNIZED WOMEN” CASES	1315
III. DOUBLE DEPOLITICIZATION: AN INTERSECTIONAL APPROACH TO THE “WESTERNIZED WOMEN” CASES	1321
CONCLUSION	1327

INTRODUCTION

In 1994, an immigration judge in Arlington, Virginia defied precedent by awarding asylum to a Jordanian woman, called “A,” who sought protection following years of domestic abuse at the hands of her husband.¹ At the time of this decision, there existed little or no precedent to support a grant of asylum to women fleeing domestic violence.² This was long before the tragic denial of asylum to Rody Alvarado, a domestic violence survivor from Guatemala,³ would spur asylum advocates into action,⁴ eventually leading to a landmark BIA decision establishing that domestic violence can be considered a form of persecution under asylum law.⁵ The Arlington immigration judge’s stated reason for bucking precedent and recognizing A’s claim was that, unlike other asylum applicants who had fled domestic violence, A’s persecution could be characterized as political because she “espouse[d] Western values.”⁶

Since this decision, asylum claims by women of Muslim heritage⁷ have tended to conspicuously represent applicants as “Western,” producing a group of cases I call the “Westernized women” cases. This representation often involves a problematic conflation between being “Western” and believing in gender equality. In this Comment, I analyze the “Westernized women” cases as examples of the legal construction of race and gender, arguing that these cases demonstrate the influence of popular neo-Orientalist misunderstandings of female Muslim identity within our legal system.

This Comment finds its inspiration in the work of female scholars of Muslim heritage such as Leila Ahmed, Lila Abu-Lughod, Susan Musarrat Akram,

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1. *In re A-and Z-*, A72-190-893, A72-793-219 (EOIR Arlington, Va. Dec. 20, 1994) (mem); see also *IJ Grants Asylum to Woman Based on Spousal Abuse*, *INS Guidelines Imminent*, 72 INTERPRETER RELEASES 521, 522 (1995) [hereinafter *IJ Grants Asylum*].
 2. See *IJ Grants Asylum*, *supra* note 2, at 522 (stating that this case is believed to be the first-ever grant of asylum based on a claim of domestic violence).
 3. *In re R-A-*, 22 I. & N. Dec. 906, 928 (B.I.A. 1999); *Matter of R-A-*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uchastings.edu/our-work/matter-r> [<https://perma.cc/LG4A-KRK3>].
 4. See *Matter of R-A-*, *supra* note 3 (describing the “14-year legal battle” which “became the battleground on the issue of whether domestic violence can be a basis for asylum”).
 5. See *In re A-R-C-G-*, 26 I. & N. Dec. 388, 392–95 (B.I.A. 2014).
 6. *IJ Grants Asylum*, *supra* note 1, at 522.
 7. Throughout this Comment, I use the term “women of Muslim heritage” when referring to a group which includes some women who are secular or otherwise do not identify as Muslim, but who are coded as Muslim in the U.S. context, whether that is because of race, religious heritage, language, dress, political affiliations, etc. I use the term “Muslim women” when referring to women who identify as Muslim and when referring to racialized constructs, such as the construct of the oppressed Muslim woman.

and Karima Bennoune. These women have offered powerful critiques of the dominant right wing constructions of Muslim female identity from both Islamic and Western sources, which loom large in the “Westernized women” cases.⁸ In Part I, I draw upon a central insight from their work—that right wing Islamic and Western constructions of Muslim women are mutually reinforcing in that both constructions reject Muslim feminism as incoherent, represent Islam as inherently patriarchal, and portray feminism as a Western export. In Part II, I provide evidence that the neo-Orientalist narratives about women of Muslim heritage critiqued in Part I have influenced U.S. asylum adjudicators and immigration judges. I argue that the “Westernized women” cases demonstrate that judges view Islam and the West in a binaristic and oppositional manner and therefore treat Muslim feminism with suspicion.

Part III explores how the concept of intersectionality can help make sense of the “Westernized women” cases. Similar to the “double discrimination” described by Kimberlé Crenshaw in her seminal work on intersectionality in the law,⁹ women of Muslim heritage in the asylum system face a phenomenon I call *double depoliticization*. Women of Muslim heritage face the depoliticization of gender-based claims faced by all female asylum applicants, but they face an additional hurdle in that their oppression is itself depoliticized, considered cultural rather than political under Orientalist modes of understanding. This is a dangerous combination in asylum law, in which distinctions between the political and the cultural serve as the lines of demarcation between valid and invalid claims.

In our current political moment, there is a deep ambivalence towards immigrants and refugees in the U.S.¹⁰ There are new features of racialization and othering taking place, such as a shift towards constructing Muslim women as at risk of terrorist radicalization,¹¹ but overall the representations we see are deeply in-

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8. See, e.g., LILA ABU-LUGHOD, DO MUSLIM WOMEN NEED SAVING? (2013); LEILA AHMED, WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE 54 (1992); Leila Ahmed, *Western Ethnocentrism and Perceptions of the Harem*, 8 FEMINIST STUD. 521 (1982); Susan Musarrat Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 INT'L J. REFUGEE L. 7 (2000); Karima Bennoune, *Remembering the Other's Others: Theorizing the Approach of International Law to Muslim Fundamentalism*, 41 COLUM. HUM. RTS. L. REV. 635 (2010).
 9. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149.
 10. See, e.g., Michael D. Shear & Helene Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html>.
 11. See Sahar F. Aziz, *Coercing Assimilation: The Case of Muslim Women of Color*, 24 TRANSNAT'L L. & CONTEMP. PROBS. 341, 342 (2015), reprinted in 18 J. GENDER, RACE & JUST. 389 (2016) (“After September 11, 2001, the stereotype of Muslim women as terrorists, co-conspirators, or aiders and abettors to their male terrorist family members has superseded the stereotype that they are oppressed, subjugated, infantile beings, without individual agency who need to be saved . . .”).

formed by historical colonial narratives. To be a woman of Muslim heritage fleeing a Muslim-majority country and seeking asylum in the West is to be in a position fraught with sociohistorical meaning. This Comment is the first to analyze the group of “Westernized women” cases as a group and from a perspective informed by the scholarship and voices of women of Muslim heritage. It seeks to expose the role that asylum law has played in racializing women of Muslim heritage, a group which has received relatively little scholarly attention within the legal literature.

I. DOUBLE REVOLUTION: WOMEN OF MUSLIM HERITAGE RESISTING NEOCOLONIALISM AND PATRIARCHY

On a Tuesday afternoon in 2012, Malala Yousafzai, a fourteen-year-old advocate for girls’ education, was shot in the head by a member of the Taliban, a jihadist group, as she walked home from school.¹² Facing an international outcry, Taliban members explained their motivations in a series of press releases, claiming that Yousafzai was allied with “Western satanic forces,”¹³ and referring to her as “Macaulay’s child,”¹⁴ a pejorative term for South Asians who are perceived as Western, recalling the “civilizing mission” of nineteenth century British colonialist Thomas Macaulay.¹⁵ When Malala began to meet with Western leaders, the Taliban successfully used these meetings as propaganda, implying to Pakistanis that she was an “American agent”¹⁶ and undermining the movement that had sprung up in anger after the attack.¹⁷ A meme depicting President Obama laughing and joking “[t]hey still believe that Taliban attacked Malala” circulated

12. Basharat Peer, *The Girl Who Wanted to Go to School*, NEW YORKER (Oct. 10, 2012), <http://www.newyorker.com/news/news-desk/the-girl-who-wanted-to-go-to-school> [https://perma.cc/8BDU-G4GS].

13. Ludovica Iaccino, *Peshawar School Attack: Taliban’s ‘Revenge’ for Malala Yousafzai’s Nobel Peace Prize*, INT’L BUS. TIMES (Dec. 16, 2014, 11:57 GMT), <http://www.ibtimes.co.uk/peshawar-school-attack-talibans-revenge-malala-yousafzais-nobel-peace-prize-1479754> [https://perma.cc/8JCD-9JFV].

14. See Jonathan DeHart, *Why Did the Taliban Shoot Malala?*, DIPLOMAT (July 18, 2013), <http://thediplomat.com/2013/07/why-did-the-taliban-shoot-malala> [https://perma.cc/9SM2-D269].

15. Charles H. Heimsath, *The Intellectual Climate in India Today: The Challenge to Macaulayism*, 15 ASIAN SURV. 366, 366 (1975) (describing Macaulay’s theory of modernization in India as aiming to create “a class of persons Indian in blood and colour, but English in tastes, in opinions, and in morals and intellect”).

16. Declan Walsh, *‘Malala Moment’ May Have Passed in Pakistan, as Rage Over a Shooting Ebbs*, N.Y. TIMES (Oct. 19, 2012), <http://www.nytimes.com/2012/10/20/world/asia/pakistan-rage-at-girl-shooting-gives-way-to-skepticism.html>.

17. See Beenish Ahmed, *What People in Pakistan Really Think About Nobel Prize Winner Malala Yousafzai*, THINKPROGRESS (Oct. 10, 2014), <http://thinkprogress.org/world/2014/10/10/3578820/malala-yousafzai-nobel-prize> [https://perma.cc/9KFF-6NAM].

widely on Pakistani social media, accompanied by comments suggesting that the attack was a conspiracy concocted to legitimize further American adventurism in the region.¹⁸

Meanwhile, in the West, Malala was heavily mediatized as a victim of the Taliban, and her critical remarks against the U.S. drone program in Pakistan¹⁹ were subsumed by the more politically expedient victim narrative. The stories of other Pakistani girls victimized by U.S. intervention, such as Nabila Rehman, who testified at a virtually empty U.S. congressional hearing about the U.S. drone-caused death of her grandmother, were submerged beneath content centering on the Taliban's crimes while relegating U.S. crimes to the periphery.²⁰

This tug-of-war over the meaning of Malala's story illustrates one of the key themes in the writing of female scholars of Muslim heritage about gender: the ever-present threat of cooptation into a right wing Islamic or neocolonialist narrative. This threat has led these scholars to write in a style that is replete with caveat and nuance, but is also bold and defiant, resisting external definitions. These scholars have developed critiques that are "multi-directional,"²¹ indicting jihadist and neo-imperialist powers alike. They have answered right wing Islamic claims to be the true representatives of Muslim culture with their own claims of religious and cultural authenticity, arguing that they are the heirs of an indigenous tradition of advocating for gender equality that predates colonialism. This entails a rejection of the idea that feminism is Western and the idea that Muslim culture is inherently or inevitably patriarchal.

Understanding the response of women of Muslim heritage to external attempts to define their identities is critical for understanding the dynamics at play in the "Westernized women" cases, analyzed in the next Part. In this Part, I first describe the two most dominant narratives about women of Muslim heritage, which originate in right wing Islamic and Western colonialist/neocolonialist discourses, respectively. Then, I describe how female scholars of Muslim heritage have critically intervened in these narratives, levelling powerful multidirectional critiques that resist cooptation.

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The fifteenth issue of *Dabiq*, the ISIS propaganda magazine, provides an eighty-two-page spirited takedown of all things "Western," from Christianity to

18. *Id.*

19. *Malala to Obama: Drone Strikes 'Fueling Terrorism'*, CNN: POL. (Oct. 12, 2013, 5:40 PM), <http://www.cnn.com/2013/10/12/politics/obamas-meet-malalas> [https://perma.cc/WG8W-C6BS].

20. See Sufyan bin Uzayr, *A Tale of Two Girls Victimized by the West: Malala and Nabeela*, FOREIGN POLY FOCUS (Dec. 17, 2014), <http://fpif.org/tale-two-girls-victimized-west-malala-nabeela> [https://perma.cc/W8XZ-U3YC].

21. Bennoune, *supra* note 8, at 697.

marijuana.²² Within its glossy pages, sandwiched between gleefully captioned images of terrorist attacks in France and the U.S., feminism and the abandonment of traditional gender roles are repeatedly decried as “evil.”²³ These sentiments are echoed in the manifesto of the Al-Khansaa brigade, the all-female police force in ISIS territory, which flatly refers to the “western model for women” as a “failure” and states that the “negatives that are caused in communities from the ‘women’s emancipation’ narrative . . . [A]re apparent . . .”²⁴ These pieces of propaganda fit into the larger project in the transnational jihadist movement of reframing the resistance of women of Muslim heritage to gender-based oppression as collusion with neocolonialism,²⁵ justifying violence against politically disobedient women, who have been reimagined as enemy combatants in the battle against Western influence.²⁶ Although these movements represent a small proportion of Muslims in the world, they have used violence, terror, and vast financial resources to draw outsized attention to their message.

Just as Malala Yousafzai faced accusations of Western cooptation when she challenged Taliban policy on girls’ education, women’s rights activists who resist jihadism have reported that they are often labeled as “Western” in an effort to discredit their work.²⁷ Like Yousafzai, the women of the Revolutionary Association of the Women of Afghanistan were labeled as “CIA agents” due to their resistance to the Taliban, even despite their strong stance against U.S. militarism

22. *The Fitrah of Mankind and the Near-Extinction of Western Woman*, DABIQ, July 2016, at 20.

23. *Id.*

24. CHARLIE WINTER, QUILLIAM FOUND., *WOMEN IN THE ISLAMIC STATE: A MANIFESTO ON WOMEN BY THE AL-KHANSSAA BRIGADE 19* (Charlie Winter trans. 2015).

25. See Ahmed, *supra* note 8, at 532–33 (“[T]he Islamic movement, which now seems everywhere to be gaining ground, designates feminism among all the aspects of the West and of Westernization that it generally abhors, as most specifically worthy of its hatred. . . . This ploy [is] intended to deflect Islamic women from their demand for justice . . .”).

26. Rina Amiri, *Muslim Women as Symbols—and Pawns*, N.Y. TIMES (Nov. 27, 2001), <http://webcache.googleusercontent.com/search?q=cache:t89xPACDTW0J:mobile.nytimes.com/2001/11/27/opinion/muslim-women-as-symbols-and-pawns.html+&ccd=1&chl=en&ct=clnk&gl=us> [https://perma.cc/KEG2-8XRY] (“It has come to be assumed in much of the Muslim world that to be a proponent of women’s rights is to be pro-Western. This enmeshing of gender and geopolitics has robbed Muslim women of their ability to develop a discourse on their rights independent of a cultural debate between the Western and Muslim worlds.”).

27. CASSANDRA BALCHIN, AWID, *RELIGIOUS FUNDAMENTALISMS ON THE RISE: A CASE FOR ACTION 28* (Deepa Shankaran & Shareen Gokal eds., 2008) (finding that women’s rights activists in Muslim contexts are most commonly discredited by being labeled “secular” and “western”); see also NADJE AL-ALI, *SECULARISM, GENDER AND THE STATE IN THE MIDDLE EAST: THE EGYPTIAN WOMEN’S MOVEMENT 1* (2000) (describing the ways in which the Egyptian women’s movement has been accused of “collaborating with western imperialism by importing alien ideas and practices”).

in the region.²⁸ Moroccan feminists working to amend gender-discriminatory provisions in the family code had to be “[w]ary of being labeled as Western agents,” leading them to bolster claims of local authenticity with a signature campaign and Quranic arguments.²⁹

This dynamic, whereby women’s rights work comes to represent neocolonialism, has had serious consequences for the legal representation of Muslim women such as Bariya Magazu in Nigeria, who was sentenced to one hundred lashes for engaging in extramarital sexual intercourse even though she claimed to have been raped.³⁰ When Canadian feminists became interested in her case and intervened, they paired their objection to the punishment with an overall rejection of sharia law, undermining plausible arguments that punishment of rape victims is disallowed under sharia law.³¹ Public officials in Nigeria then carried out Magazu’s punishment one week early, framing this action as a response to Western attempts to undermine Islam.³² The actions of the Western feminists were dangerously negligent, but the Nigerian officials were all too eager to capitalize on the feminists’ tone-deafness to make a political point on the back of a pregnant teenager. As Leila Ahmed has argued: “[T]o target feminism as ‘Western’ . . . is to skillfully exploit . . . anger [against Western imperialism] in the service of confusion, as if justice and the idea that it must be extended to all humankind, wherever such ideas arise, can be called ‘Western’ or ‘Eastern.’”³³

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At the same time that jihadist constructions of women of Muslim heritage have gained worldwide attention, Western discourse has taken a xenophobic turn, and stereotypes originating in the colonial encounter have regained prominence. The oppression of women of Muslim heritage, and specifically the imposition of veiling, has long been used as a symbol to legitimize Western interventionism in the Middle East and North Africa,³⁴ exemplified by Lord Cromer’s

28. ANNE E. BRODSKY, *WITH ALL OUR STRENGTH: THE REVOLUTIONARY ASSOCIATION OF THE WOMEN OF AFGHANISTAN* 57 (2003).

29. ISOBEL COLEMAN, *PARADISE BENEATH HER FEET: HOW WOMEN ARE TRANSFORMING THE MIDDLE EAST* 77 (2010).

30. Asifa Quraishi, *What if Sharia Weren’t the Enemy?: Rethinking International Women’s Rights Advocacy on Islamic Law*, 22 COLUM. J. GENDER & L. 173, 179–80 (2011).

31. *Id.* at 181–85.

32. *Id.* at 187–89.

33. Ahmed, *supra* note 8, at 533.

34. See AHMED, *supra* note 8, at 154; *cf. id.* at 54–55 (disussing the imposition of veiling and its origins in the seclusion of women to protect them from “situations that were becoming unacceptable to new Muslim eyes”).

use of the veil to justify British colonization of Egypt.³⁵ Cromer was deeply committed to the maintenance of patriarchy in England, founding an organization to oppose women's suffrage while paradoxically decrying "[t]he degradation of women in the East" when it suited his colonialist project.³⁶

The representation of women of Muslim heritage as endangered by Muslim men³⁷ has been refashioned for neocolonialist purposes in the United States in more recent times. For example, in the post-9/11 context, the supposed oppression of women in Muslim society was invoked as a justification for U.S. military intervention in Afghanistan. As the U.S. invasion ramped up, media imagery of female Muslim victims of the Taliban did as well.³⁸ Laura Bush claimed in her 2001 radio address to the nation that "the fight against terrorism is also a fight for the rights and dignity of women."³⁹ Her husband also expressed this sentiment, urging the United States to stay in Afghanistan after his presidency ended because he felt that the country could not "stand by and watch women's rights be abused."⁴⁰

This was a newfound concern for President Bush and the country as a whole; just a few months before 9/11, "when a delegation of Taliban officials visited Washington, Afghan women and some American feminists picketed the government building where they met and called on the government to save the women of Afghanistan. Their efforts were totally ignored by the press and the U.S. administration."⁴¹ Although the U.S. government tolerated women's rights

35. *Id.* at 152–53. The use of this symbolism does not begin in the colonial era, but draws upon representations of Muslim women as oppressed that begin during the Crusades. See Ahmed, *supra* note 8, at 524 ("Throughout this time the guardians of Western civilization, with the clergy at their head, produced volumes about the evil, irrational, and so forth, condition of the Muslims—naturally including statements about the degraded condition of Muslim women.").

36. AHMED, *supra* note 8, at 152–53.

37. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271, 296 (Cary Nelson & Lawrence Grossberg eds., 1988) (describing the colonial narrative as "White men are saving brown women from brown men").

38. Evelyn Alsultany, *Arabs and Muslims in the Media After 9/11: Representational Strategies for a "Postrace" Era*, 65 AM. Q. 161, 168 n.14 (2013) (listing examples of mass media representations of Afghan women as oppressed by the Taliban); see also Carol Stabile & Deepa Kumar, *Unveiling Imperialism: Media, Gender and the War on Afghanistan*, 27 MEDIA, CULTURE & SOC'Y 765, 765 (2005) ("Burqa-clad women were featured on the cover of the *New York Times* magazine (in a feature story that, interestingly enough, had absolutely nothing to say about women), as well as *Business Week*, *Newsweek*, *Time* and other general interest magazines.").

39. Kim Berry, *The Symbolic Use of Afghan Women in the War on Terror*, 27 HUMBOLDT J. SOC. REL. 137, 137 (2003).

40. Keach Hagey, *Bush: Stay in Afghanistan for Women's Sake*, POLITICO (Apr. 1, 2011, 12:06 AM), http://www.politico.com/blogs/onmedia/0411/Bush_Stay_in_Afghanistan_for_womens_sake.html [https://perma.cc/AAT6-S7VZ].

41. See Yvonne Yazbeck Haddad, *The Post-9/11 Hijab as Icon*, 68 SOC. RELIGION 253, 255 (2007).

violations in Afghanistan before 9/11⁴² and allied itself with other serious violators of women's rights during its military operations in Afghanistan,⁴³ the government continued to promote the notion that the mission was liberatory, and even feminist.⁴⁴

Following the President Obama, who largely did not comment upon the topic of gender and Islam,⁴⁵ President Donald Trump has also drawn upon the image of the oppressed Muslim woman to justify further intervention in Iraq and Syria.⁴⁶ In his 2016 speech entitled "Understanding the Threat: Radical Islam and the Age Of Terror," Trump spoke of the "oppression of women . . . in many Muslim nations," highlighting the practice of honor killings in Pakistan, but also suggesting that the practice has "reached our own shores."⁴⁷ These ideas were likely employed to shame President Obama for failing to have a stronger military presence in the Middle East and North Africa, which he seemed to equate with protecting Muslim women. President Trump has suggested policies like reinvading Iraq to keep the oil, indicating that his concern for Muslim

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42. See Sonali Kolhatkar, *The Impact of U.S. Intervention on Afghan Women's Rights*, 17 BERKELEY WOMEN'S L.J. 12, 15 (2002) (describing CIA funding to the Afghan Mujahadeen and warlords, who often disregarded women's rights and, in some cases, even threw acid on women who refused to veil).
43. See *Military Assistance to the Afghan Opposition: Human Rights Watch Backgrounder*, HUM. RTS. WATCH (Oct. 5, 2001), <https://www.hrw.org/legacy/backgrounder/asia/afghan-bck1005.htm> [<https://perma.cc/BBY5-WXC5>].
44. See STEFANIE SANCHES, U. NOTTINGHAM HUM. RTS. L. CTR., DISEMPOWERING FEMINISM IN THE MIDDLE EAST: HOW THE POLARIZATION OF ISLAM AND FEMINISM PERPETUATES MALE DOMINANCE 3 (2014), <https://www.nottingham.ac.uk/hrlc/documents/student-conference-2014/sanches-arab-feminism-paper.pdf> [<https://perma.cc/82FM-VXX2>] (suggesting that, in its conflicts in the Middle East, "feminist rhetoric and language is tactically exploited by the US government for strategic purposes").
45. President Obama's rhetoric generally suggested that Americans should not stereotype Muslims. See Rebecca Kaplan, *Obama: Notion That West at War With Islam an "Ugly Lie"*, CBS NEWS (Feb. 19, 2015 11:39 AM), <http://www.cbsnews.com/news/obama-west-war-islam-ugly-lie-extremism-summit> [<https://perma.cc/8YMJ-JWF5>]. First Lady Michelle Obama engaged the topic more directly, criticizing popular negative constructions of Muslim female identity: "Maybe you read the news and hear what folks are saying about your religion," the first lady told [a group of female Muslim students], many of whom were wearing hijab. "And you wonder if anyone ever sees beyond your headscarf to see who you really are, instead of being blinded by the fears and misperceptions in their own minds. And I know how painful and how frustrating all of that can be." Carol Kuruvilla, HUFFINGTON POST (June 17, 2015, 5:35 PM ET), http://www.huffingtonpost.com/2015/06/17/michelle-obama-mulberry-school-for-girls_n_7606940.html [<https://perma.cc/TBN4-6MMU>] (quoting Michelle Obama).
46. Donald J. Trump, 2016 U.S. Republican Presidential Candidate, Address at Youngstown State University: Understanding the Threat: Radical Islam and the Age of Terror (Aug. 15, 2016), https://assets.donaldjtrump.com/DJT_Radical_Islam_Speech.pdf [<https://perma.cc/DD86-7GR3>].
47. *Id.* at 7, 13.

women seems to be a thin veneer beneath which lies the same desire for plunder which has often motivated representations of Muslim woman as helpless.⁴⁸

Earlier in the campaign, Trump had drawn criticism for insinuating that Ghazala Khan, the mother of a slain Muslim-American soldier, was forbidden from speaking by her husband when they stood on stage at the Democratic National Convention.⁴⁹ In this moment, then-candidate Trump, in an attempt to deflect the criticism he received from the Khans, again drew upon the xenophobic notion that Muslim-American immigrants import backwards gender norms to the United States.⁵⁰ Although I have focused here on examples from the realm of presidential politics, negative stereotypes about Muslims have permeated the American consciousness and are replicated in many other domains, most importantly entertainment and news media⁵¹ as well as the culture of U.S. law enforcement.⁵²

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In both of the salient narratives discussed thus far, from both about Western and Islam right wing commentators, Muslim feminism is represented as paradoxical. Women of Muslim heritage are constructed as waiting for feminist intervention originating in the West, rather than generating their own unique,

48. See Taylor Link, *Iraq Is Worried That Donald Trump Says He May Re-Invade to Take Their Oil*, SALON (Jan. 24, 2017 6:00 AM), <http://www.salon.com/2017/01/24/iraq-is-worried-that-donald-trump-says-he-wants-to-re-invade-to-take-their-oil> [https://perma.cc/X3Q4-PG8V] (“[W]e should have kept [Iraq’s] oil, but, OK, maybe we’ll have another chance.” (quoting Donald Trump)).

49. Clare Foran, *How American Muslim Women Are Taking on Trump*, ATLANTIC (Aug. 24, 2016), <https://www.theatlantic.com/politics/archive/2016/08/muslim-women-trump-islamophobia-ghazala-khan/496925> [https://perma.cc/6TC5-ZVB3]; see also Amy Davidson, *What Donald Trump Doesn’t Get About Ghazala and Khizr Khan*, NEW YORKER (Aug. 1, 2016), <http://www.newyorker.com/news/amy-davidson/what-donald-trump-doesnt-get-about-ghazala-and-khizr-khan> [https://perma.cc/H4HY-4P5J] (describing the tense back-and-forth between then-candidate Trump and the Khans following their appearance at the DNC, including Trump’s accusation that Ghazala Khan “had nothing to say . . . maybe she wasn’t *allowed* to have anything to say. You tell me.”).

50. Davidson, *supra* note 49 (describing Trump’s comments as “waver[ing] between the dismissal of the idea that Ghazala might have a thought in her head and the opportunity to insinuate that Khizr was a domestic crypto-Sharia tyrant”).

51. See, e.g., John Tehranian, *The Last Minstrel Show? Racial Profiling, the War on Terrorism and the Mass Media*, 41 CONN. L. REV. 781 (2009) (describing the prevalence of negative stereotypes of Muslim and Middle Eastern people, such as the stereotype of the passive Muslim woman, in Western entertainment media); see also Fatemeh Fakhraie, Opinion, *The Media Is Obsessed With How Muslim Women Look*, CNN (Aug. 30, 2010, 6:44 AM), <http://www.cnn.com/2010/OPINION/08/30/muslim.women.media/index.html> [https://perma.cc/K4FZ-CQZ6] (arguing that Western media focuses disproportionately on Muslim women’s appearance as compared to their actions or beliefs).

52. Aziz Z. Huq, *Modeling Terrorist Radicalization*, 2 DUKE F. L. & SOC. CHANGE 39, 43–48 (2010) (arguing that U.S. law enforcement have an understanding of the radicalization process which relies upon inaccurate and stereotypical ideas about Muslims).

culturally-specific feminisms. The two narratives also converge in constructing Islam as inherently patriarchal and rejecting alternative interpretations which would pull apart religion from cultural practices around gender. These similarities have not been lost on women of Muslim heritage; in their academic writings on gender and Muslim identity, they have pointed out these moments of collusion, wherein Western and Islamic right wing discourses are saying the same things for different reasons.⁵³ They have responded to these outside attempts to define their realities in ways that do not align with their lived experiences.

Although female scholars of Muslim heritage hold a range of political views and orientations towards feminism, several themes emerge in their writings about gender. First, they criticize the binary between the “the West” and “Islam”⁵⁴ and its gendered variant⁵⁵—the binary between the “Western feminist” and the “oppressed Muslim woman”—as illusory,⁵⁶ created to justify patriarchy and interventionism.⁵⁷

53. See *infra* Part I.

54. Indeed, Abu-Lughod notes:

One of the things we have to be most careful about is not to fall into polarizations that place feminism . . . only on the side of the West. . . . [N]ot only is it wrong to see history simplistically in terms of a putative opposition between Islam and the West . . . but it is also strategically dangerous to accept this cultural opposition between Islam and the West, between fundamentalism and feminism.

ABU-LUGHOD, *supra* note 8, at 44–45; see also Ratna Kapur, *Un-Veiling Women's Rights in the War on Terrorism*, 9 DUKE J. GENDER L. & POL'Y 211, 215 (2002) (“[L]eaders in America and elsewhere have frequently engaged with Islam in ways that are reductionist and simplistic, often casting it as authoritarian and in opposition to the West and Western values.”); Amartya Sen, Opinion, *A World Not Neatly Divided*, N.Y. TIMES (Nov. 23, 2001), <http://www.nytimes.com/2001/11/23/opinion/a-world-not-neatly-divided.html> [<https://perma.cc/T83D-RECA>] (critiquing the conception of a world neatly divided between East and West and disrupting the idea that either the “Islamic world” or the “Western world” are coherent concepts).

55. Deepa Kumar, *Imperialist Feminism and Liberalism*, OPENDEMOCRACY (Nov. 6, 2014), <https://www.opendemocracy.net/deepa-kumar/imperialist-feminism-and-liberalism> [<https://perma.cc/T76C-5929>] (“[C]olonial feminism, is based on the appropriation of women’s rights in the service of empire. Birthed in the nineteenth century in the context of European colonialism, it rests on the construction of a barbaric, misogynistic ‘Muslim world’ that must be civilized by a liberal, enlightened West; a rhetoric also known as gendered Orientalism.”).

56. ABU-LUGHOD, *supra* note 8, at 45 (arguing that there are “many people within Muslim countries who are trying to find alternatives to present injustices . . . who do not accept that being feminist means being Western”); see also Tasneem Nashrulla, *32 Powerful and Brutally Honest Tweets from #LifeOfAMuslimFeminist*, BUZZFEED (Jan. 10, 2014, 5:24 PM), <http://www.buzzfeed.com/tasneemnashrulla/32-powerful-and-brutally-honest-tweets-from-lifeofamuslimfem#.bu3r0yDvn> [<https://perma.cc/6L98-PA56>] (quoting tweets of Muslim feminists which lament that “[b]eing told that feminism is for rebellious ‘western women’” and being labeled “Westernized” for “[d]efending feminism”).

57. Kapur, *supra* note 54, at 214 (“The focus on women’s concerns through the prism of religion and culture not only serves to cast Muslim women as ‘Other,’ it also serves to justify the liberating impulse of military intervention, defending such interventions as humane rescue operations.”).

Second, in naming instances of collusion between right wing Islamic and Western discourses, they have been able to partially immunize themselves from the cooptation experienced by many women of Muslim heritage such as Malala Yousafzai.⁵⁸ Throughout their writings, there are explicit denunciations of the oppression of women of Muslim heritage, whether enacted by the local religious police or faraway drone operators. These denunciations are often paired together, as if to upend the reader's expectations and purposefully avoid being taken up as a supporter of either the Western or Islamic right wing.⁵⁹ Whether they urge "multi-directional" resistance against Western and Islamic right wings⁶⁰ or phrase this as a call for a "double revolution"⁶¹ the necessity of a battle on multiple fronts is echoed throughout the writings of many authors.

Third, whether they are secular or Muslim, they argue that there is a strong indigenous and Islamic history of respect and advocacy for women's rights,⁶² so that labeling feminism as "Western" or treating "Muslim feminism" as a contradiction is a misunderstanding.⁶³ Female scholars of Muslim heritage point out that,

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58. See generally Krista Hunt, *The Strategic Co-Optation of Women's Rights*, 4 INT'L FEMINIST J. POL. 116 (2002).
59. See Bennoune, *supra* note 8, at 642–43; see also MONA ELTAHAWY, HEADSCARVES AND HYMENS: WHY THE MIDDLE EAST NEEDS A SEXUAL REVOLUTION 30 (2015) ("While I am acutely aware of Islamophobes and xenophobic political right-wingers who are all too glad to hear how badly Muslim men treat their women, I'm also acutely aware that there's a right wing among Muslim men that does propagate misogyny. We must confront both, not ally ourselves with one in order to fight the other.").
60. Karima Bennoune & Deniz Kandiyoti, *Your Fatwa Does Not Apply Here*, OPEN DEMOCRACY (Oct. 6, 2015), <https://www.opendemocracy.net/5050/karima-bennoune-deniz-kandiyoti/your-fatwa-does-not-apply-here> [<https://perma.cc/5WUX-542G>] (describing how Bennoune's work aims to "shift the focus of analysis from 'a clash of civilizations' to . . . 'a clash of right wings'").
61. ELTAHAWY, *supra* note 59, at 31.
62. See REZA ASLAN, NO GOD BUT GOD: THE ORIGINS, EVOLUTION AND FUTURE OF ISLAM, 72 (2d ed. 2011) (explaining that a new generation of female Quranic scholars are "beginning with the notion that it is not the moral teachings of Islam but the social conditions of seventh-century Arabia and the rampant misogyny of many male Quranic exegetes that have been responsible for women's historically inferior status in Muslim society . . ."); see also COLEMAN, *supra* note 29, at 40 ("Any man who believes that a Muslim woman who fights for her dignity . . . is a brainwashed victim of Western propaganda is a man who misunderstands his own religious heritage, his own cultural identity." (quoting Islamic scholar Fatima Mernissi)). Ghazala Khan echoed this argument in her response to Trump's comments implying that women's silence is required by Islam, when she stated: "When Donald Trump is talking about Islam, he is ignorant. If he studied the real Islam and Koran, all the ideas he gets from terrorists would change, because terrorism is a different religion." Ghazala Khan, Opinion, *Ghazala Khan: Trump Criticized My Silence. He Knows Nothing About True Sacrifice*, WASH. POST (July 31, 2016), https://www.washingtonpost.com/opinions/ghazala-khan-donald-trump-criticized-my-silence-he-knows-nothing-about-true-sacrifice/2016/07/31/c46e52ec-571c-11e6-831d-0324760ca856_story.html?utm_term=.a8a723cd17be [<https://perma.cc/2HUX-7C7F>].
63. Lama Abu-Odeh, Comment, *Post-Colonial Feminism and the Veil: Considering the Differences*, 26 NEW ENG. L. REV. 1527, 1533 (1992) (arguing that, in the Muslim world, a feminist is perceived

although often ignored in the West, there is a long reformist tradition within Islam and a contentious contemporary debate over issues of gender and Islam in Muslim-majority countries.⁶⁴ Their arguments lead to the conclusion that, insofar as Western commentators purport to be interested in saving Muslim women, they should be supportive of subaltern voices in the Muslim-majority world, rather than attempting to take credit for their points of view by labelling them “Western.” As Reza Aslan has argued, to “treat the Muslim woman not as an individual but as a symbol either of Islamic chastity or secular liberalism [is to commit] the same sin: the objectification of women.”⁶⁵

This set of interventions is useful in understanding how claims of Westernization have operated for women of Muslim heritage seeking asylum in the U.S. system. As the next Part demonstrates, U.S. judges and lawyers have analyzed these claims through the very binaries that female scholars of Muslim heritage have argued against.

II. A CRITIQUE OF THE “WESTERNIZED WOMEN” CASES

The first published asylum decision in which a woman of Muslim heritage sought asylum in the Western world involved a woman called “Nada,” who fled Saudi Arabia after she was attacked by religious police (Mutawwa’ain) for failing to wear her veil and walking with an escort in the manners proscribed by law in that country.⁶⁶ Her claim was rejected, and afterwards the Canadian Minister of Employment and Immigration commented on the case, arguing that in rejecting Nada’s claim, the court had narrowly avoided “impos[ing] its values” and engaging in cultural imperialism.⁶⁷ Nada disagreed and issued this forceful rebuke of the decision:

to have traded traditional ideologies of the role of women for Western ideologies and that “even if [the feminist] is allowed to speak, she suddenly finds herself in the uncomfortable position of ‘defending the west,’ an anomaly in itself in the post-colonial Muslim societies of the day”); see also KARIMA BENNOUNE, *YOUR FATWA DOES NOT APPLY HERE* 100 (2013) (“More than once I’ve been called someone who promotes Western ideas, a non-Muslim. . . . Usually, I say, since when is safety and respect of women an idea that is Western?”) (quoting Afghan women’s rights activist Noor Jahan Akbar).

64. Akram, *supra* note 8, at 29 (discussing the “enormous debate about the validity of any application of Qur’anic precepts to oppress women”).

65. ASLAN, *supra* note 62, at 74.

66. No. M91-04822, [1991] D.S.S.R. 1096 (Décisions de la Section du Statut de Réfugié); see also Canada: *Saudi Arabian Refugee Fleeing Gender Discrimination Not Welcome in Canada*, EQUALITY NOW, http://www.equalitynow.org/take_action/asylum_action21 [<https://perma.cc/YQ43-Y8W3>].

67. Akram, *supra* note 8, at 25–26 (quoting Judy Steed, *Refugee Board Chief Knows Racism First Hand*, TORONTO STAR, Feb. 28, 1993, at B5).

The discrimination and repression I lived with in Saudi Arabia had political and not cultural roots. When governments impose a certain set of beliefs on individuals, through propaganda, violence or torture, we are dealing not with culture but rather with political expediency. The claim that such practices are cultural is dangerous, if not racist. When a woman walks down the street in Saudi Arabia without a veil and the *Mutaww'ain* (religious police) flog her, this is not cultural, [it's] political. Who gave permission to the *Mutaww'ain*? The government. They fear that women will try to change things, and they'll lose their political power . . . The status of women in the Middle East is deteriorating, not because of Islam as some claim, but because of political oppression. Islam is being manipulated. In the Middle East, as everywhere else, men would do anything to preserve their power and authority. In Saudi Arabia, the veil is just a form of oppression, a way for men to say they have power over women . . . In the Middle East, men have chosen to exploit Islam for their own interests, not out of piety or fear of Allah. But elsewhere men have used other religions or ideologies to achieve personal political gains . . . Women are repressed everywhere around the world, no matter what the religions, no matter what the culture.⁶⁸

In her response, Nada issued a powerful multidirectional critique, calling out both the indigenous Saudi Arabian men who harmed her and the Western decisionmakers who conflated misogyny and Muslim culture. Her arguments, like those of the female scholars of Muslim heritage discussed in Part I, contest the notion that Islam is uniquely and unchangeably patriarchal, while recognizing the ways in which this claim serves to let both Western and indigenous oppressors off the hook.

Unfortunately, in the “Westernized women” claims brought in the United States following Nada’s case, the voice of the applicant is rarely heard in the briefs or decisions, and advocates usually portray applicants as uncritically accepting the notion that they are “Western” because they believe in ideals like gender equality and personal freedom. Although Nada cannot speak for all women of Muslim heritage who have sought asylum, it is important to keep her statement in mind to guard against taking lawyers’ or judges’ framings of these cases to be the views of the applicants. This Part demonstrates the ways in which the binaries constructed between Islam and the West as well as between the Western feminist

68. *Id.* at 26 (quoting *A Serious Step Toward Accepting Female Refugees*, OTTAWA CITIZEN, Mar. 11, 1993, at A13).

and the oppressed Muslim woman have manifested in the U.S. asylum courts and influenced the decisions of immigration judges.

In order to make out a legitimate asylum claim, one must demonstrate that one has been persecuted “on account of” one of the five protected grounds in the Refugee Convention: race, ethnicity, religion, political opinion, or particular social group (PSG).⁶⁹ This language from the international treaty has been incorporated into U.S. asylum law in the Immigration and Nationality Act.⁷⁰ Gender has been interpreted as analogous with the other immutable characteristics (race, ethnicity),⁷¹ but is generally only allowed to form the basis of an asylum claim when gender is part of what defines a PSG in which the members have other shared characteristics beyond gender. This has caused gender-based claims to be referred to as “gender-plus” because gender is often not enough on its own to constitute a PSG.⁷² The theory of “Westernized woman” cases has generally been that a woman of Muslim heritage was persecuted on account of gender “plus” Western-ness, in her country of origin.⁷³ The concept of Westernization is introduced as the trait that can further particularize a gender-based PSG.⁷⁴

The designation “Westernized woman” has been explicitly used in six U.S. asylum cases with published decisions.⁷⁵ In these cases and others⁷⁶ applicants are

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69. U. N. Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.
70. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2012).
71. *See In re A-T-*, 24 I. & N. Dec. 296, 304 n4 (B.I.A. 2007) (“[G]ender is an immutable trait . . .”), *vacated and remanded*, 24 I. & N. Dec. 617 (B.I.A. 2008).
72. Jaya Ramji-Nogales, *Gender “Plus” as a Particular Social Group*, INTLAWGRRLS (Aug. 20, 2013), <https://ilg2.org/2013/08/20/gender-plus-as-a-particular-social-group> [https://perma.cc/3CQV-RQHV].
73. Sometimes the theory is that, as a “Westernized woman,” the complainant has experienced freedom from certain harms that may be visited upon her in another country, such as forced marriage or an inability to be educated against a husband’s wishes. *See, e.g.,* *Taylor v. Gonzales*, 233 F. App’x. 408, 408–09 (5th Cir. 2007) (per curiam). There is not always a discernible theory of asylum in these cases; some merely mentioned that this is a “Westernized woman” case, and seemingly on that basis, dismiss the claim. *See Kane v. Gonzales*, 123 F. App’x. 518, 520 (3d Cir. 2005).
74. Men have also attempted to craft particular social group (PSG) on the basis of westernization. *See, e.g.,* *Noori v. Attorney Gen.*, 193 F. App’x. 181, 183 (3d Cir. 2006) (analyzing an applicant’s claim that he will be tortured on return to Afghanistan because he has become Westernized after twenty years in the U.S.).
75. *See Moosa v. Holder*, 644 F.3d 380, 383 (7th Cir. 2011); *Najmabadi v. Holder*, 597 F.3d 983, 986 (9th Cir. 2010); *Taylor*, 233 Fed. App’x. at 408; *Kane*, 123 F. App’x. at 519; *Yadegar-Sargis v. INS*, 297 F.3d 596, 605 (7th Cir. 2002); *Sharif v. INS*, 87 F.3d 932, 936 (7th Cir. 1996); *see also* Marra Guttenplan, Note, *Granting Asylum to Persecuted Afghan Western Women*, 12 CARDOZO J.L. & GENDER 391, 391 (2005) (describing Afghan Western women as those who do not wear the burqa and support the U.S. occupation).
76. Some of these cases are published, while others are self-reports of framing by lawyers whose cases did not result in published opinions in the Center for Gender and Refugees Studies database. *See*

framed as Western in many ways, whether it is by saying that she has a “Western lifestyle,”⁷⁷ wears “western clothes,”⁷⁸ has a “Western appearance,”⁷⁹ holds “Westernized ideas,”⁸⁰ or has come to “identify with the social and political beliefs of Western women.”⁸¹ Because most asylum decisions are unpublished, it is practically impossible to know how often this theory is argued.⁸²

Beyond simply labeling their clients as “Western,” the facts emphasized by U.S. lawyers seem strategically chosen to minimize Muslim-ness. We see women described as “not a devout Muslim,”⁸³ a nonpracticing Muslim,⁸⁴ or one who “did not have the mentality of a Moslem.”⁸⁵ Just as Malala Yousafzai was highly mediatized in the West partly because she was the “only girl with [her] face not covered” at her school,⁸⁶ the “Westernized women” in these cases are described as wearing “small veil[s],”⁸⁷ or as women who have “never worn a veil,”⁸⁸ who “did not wear a veil,”⁸⁹ who “could not wear this veil as it symbolizes to her oppression, submission and lack of freedom,”⁹⁰ who “refuse[d] to” veil,⁹¹ who were “forced to”

Search Asylum Case Outcomes, CTR. GENDER & REFUGEE STUD., <http://cgrs.uchastings.edu/search-cases> [<https://perma.cc/237K-SEEA>].

77. *McBride v. INS*, No. 92-5030, 1993 WL 209952, at *3 (5th Cir. June 3, 1993); *see also Case #32*, CTR. GENDER & REFUGEE STUD., <http://cgrs.uchastings.edu/case/case-32> [<https://perma.cc/54FY-MDPJ>].
78. *Case #30*, CTR. GENDER & REFUGEE STUD., <http://cgrs.uchastings.edu/case/case-30> [<https://perma.cc/8EC9-DG47>].
79. *Najmabadi*, 597 F.3d at 992.
80. *Case #375*, CTR. GENDER & REFUGEE STUD., <http://cgrs.uchastings.edu/case/case-375> [<https://perma.cc/2NHX-9DDR>].
81. *Moosa v. Holder*, 644 F.3d 380, 383 (7th Cir. 2011).
82. The few decisions that are available, along with the anecdotal experiences of practitioners collected in the UC Hastings Center for Gender and Refugee Studies database, suggest that this theory has been utilized more than a trivial number of times by advocates representing women of Muslim heritage.
83. *McBride v. INS*, No. 92-5030, 1993 WL 209952, at *3 (5th Cir. June 3, 1993).
84. *Fatin v. INS*, 12 F.3d 1233, 1237 (3d Cir. 1993).
85. *Safiaie v. INS*, 25 F.3d 636, 639 (8th Cir. 1994).
86. Sanches, *supra* note 44, at 3.
87. *Case #31*, CTR. GENDER & REFUGEE STUD., <http://cgrs.uchastings.edu/case/case-31> [<https://perma.cc/YMF3-8PMS>].
88. *Case #14*, CTR. GENDER & REFUGEE STUD., <http://cgrs.uchastings.edu/case/case-14> [<https://perma.cc/69ZY-9B88>].
89. *Case #22*, CTR. GENDER & REFUGEE STUD., <http://cgrs.uchastings.edu/case/case-22> [<https://perma.cc/JP8H-QGNV>]; *see also Case #210*, CTR. GENDER & REFUGEES STUD., <http://cgrs.uchastings.edu/case/case-210> [<https://perma.cc/V8MX-FFQ2>].
90. *Case #30*, *supra* note 78.
91. *Case #93*, CTR. GENDER & REFUGEE STUD., <http://cgrs.uchastings.edu/case/case-93> [<https://perma.cc/T6B3-ME8Y>].

veil,⁹² or who have “never worn a veil and consider[] the concept offensive and demeaning.”⁹³

Reflecting the right wing narratives about women of Muslim heritage described in Part I, these cases operationalize the assumption that Muslim women cannot maintain their Muslim identities while being feminists or challenging gender norms. Female Muslim dissidents have been shoehorned into two identities: the feminist who has rejected Islam and the observant Muslim woman for whom religion trumps gender equality. For an example of the latter, we can return to Nada, who claimed that the Saudi religious police, the *mutawwa'in*, had continuously harassed her when she went out in public with her face uncovered. Susan Mussarat Akram has argued that the Canadian Immigration and Refugee Board based its rejection of Nada's claim partly on lack of credibility because the Board did not believe that a Muslim woman would disagree with her father or her government.⁹⁴ This is evidenced by the court's insistence that Nada “would do better to” return and follow the laws of her homeland and the dictates of her father, indicating that her determination of her own best interest was ignored as incompatible with expectations of Muslim women's passivity and compliance.⁹⁵ This conclusion drew upon the notion that observant Muslim women's advocacy for gender equality is unintelligible.

In more recent U.S. cases, courts have gone in a different direction, accepting that a woman is a feminist only at the cost of her Muslim identity. In *Kane v. Gonzales*, the Third Circuit Court of Appeals referred to a Malian woman as a “westernized woman” who could not “accept the traditional, oppressed role of a Muslim woman in a Muslim society.”⁹⁶ This overgeneralization of all Muslim women as oppressed by “Muslim society” contrasts sharply with the attributes associated with “Western women” in *Moosa v. Holder*.⁹⁷ In that case, the applicant was measured against Western women, who were said to believe in democracy, “broad personal choice,” and “equal treatment with men.”⁹⁸ In *Sharif v. INS*,⁹⁹ an applicant was portrayed as holding “pro-western” beliefs” because of her “longing”

92. Case #327, CTR. GENDER & REFUGEE STUD., <http://cgrs.uchastings.edu/case/case-327> [<https://perma.cc/S3V9-D6NS>]; see also Case #12, CTR. GENDER & REFUGEE STUD., <http://cgrs.uchastings.edu/case/case-12> [<https://perma.cc/SY56-WYTN>].

93. Case #14, *supra* note 88.

94. See Akram, *supra* note 8, at [redacted]; No. M91-04822, [1991] D.S.S.R. 1096 (Décisions de la Section du Statut de Réfugié).

95. See Akram, *supra* note 8, at [redacted]; No. M91-04822, [1991] D.S.S.R. 1096.

96. *Kane v. Gonzales*, 123 F. App'x.518, 519 (3d Cir. 2005).

97. 644 F.3d 380 (7th Cir. 2011).

98. *Id.* at 383.

99. 87 F.3d 932 (7th Cir. 1996).

for “the freedoms enjoyed by American women.”¹⁰⁰ In these cases, Western women are depicted as uniformly feminist and liberated in comparison to the trope of the oppressed Muslim woman. The critiques by female scholars of Muslim heritage described in Part I would reject the binary imagined in these cases between the liberated Western woman and the oppressed Muslim woman. As they have argued, this understanding erases the activism of women of Muslim heritage in ways that legitimize right wing Islamic arguments that feminism is Western and therefore alien.¹⁰¹

Although there is much discussion of Westernization in these cases, U.S. courts have very rarely recognized the trait of “Westernization” as the basis for a valid PSG in asylum law.¹⁰² None of the precedential cases discussed above resulted in a grant of asylum to the applicant.¹⁰³ Of course, those who are *perceived as* Westernized are often persecuted by jihadist groups or theocratic governments on that basis.¹⁰⁴ In some other traditional receiving countries, Westernization is considered a valid basis for asylum, leading to factual inquiries into whether or not the applicant is Westernized enough to invoke protection.¹⁰⁵ Even though this standard problematically frames applicants as Western, at least it results in a grant of asylum for vulnerable people. In still other countries, those who are perceived as Western in a context where this perception leads to persecution have been awarded asylum. For example, a decision by the European Court of Human Rights has granted asylum to those Somali asylum seekers who are in danger from jihadist Al-Shabaab because of a “perception” that they are Westernized.¹⁰⁶

100. *Id.* at 934, 936.

101. *See* Bennoune, *supra* note 8, at 643 (“Local critics of Muslim fundamentalism sometimes find themselves caught between . . . a fundamentalist state at home and hegemonic Western powers abroad.”).

102. *See, e.g.*, Ahmed v. Holder, 611 F.3d 90 (1st Cir. 2010) (rejecting a claim of Westernization as a cognizable PSG because “an objective observer cannot reliably gauge who is or is not a member of the group”).

103. Some of the non-precedential cases did result in a grant of asylum, but because they were non-precedential, the reasoning on which they were based is unknown.

104. *See, e.g.*, CATHERINE GLADWELL & HANNAH ELWYN, U.N. REFUGEE AGENCY, BROKEN FUTURES: YOUNG AFGHAN ASYLUM SEEKERS IN THE UK AND ON RETURN TO THEIR COUNTRY OF ORIGIN 35–37 (2012), <http://www.unhcr.org/5098d2679.pdf> [<https://perma.cc/92C4-UWBP>].

105. Österreich-Asylgerichtshof [AsylGH] [Asylum Court], Nov. 21, 2011, C2 419963-2/2012, <http://www.asylumlawdatabase.eu/en/case-law/austria-asylum-court-21-november-2011-c2-419963-22012> [<https://perma.cc/3FKA-3FPN>] (remanding for a factual inquiry into whether or not an Afghan woman was Westernized and “to what extent the new rights acquired by the Applicant in Austria have already become a major component of her identity, so that suppression of these would equate to persecution relevant to asylum”).

106. Sufi v. United Kingdom, App. No. 8319/07, HUDOC (June 28, 2011), <http://hudoc.echr.coe.int/eng?i=001-105434> [<https://perma.cc/42K8-GKAL>]; *see also* RVS 31 July 2012, NJB 2012, 1779

This framing provides the nuance that is lacking from U.S. asylum law. In contrast, U.S. law brands asylum seekers as Western but generally fails to provide protection to those it has claimed as its own. The next Part explores in further detail how the false narrative of viewing gender persecution against women of Muslim heritage as cultural rather than political has led to this result.

III. DOUBLE DEPOLITICIZATION: AN INTERSECTIONAL APPROACH TO THE “WESTERNIZED WOMEN” CASES

Women of color often face unique struggles in the courts due to their existence at the intersection of two or more identities,¹⁰⁷ each with its own history of oppression. As Kimberlé Crenshaw argued in her seminal piece on intersectionality: “Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which [women of color] are subordinated.”¹⁰⁸ This is also true for women of Muslim heritage in the asylum context: Both the gendered and racialized aspects of their identities play a role in how their claims are perceived by lawyers and asylum adjudicators. The particular mechanism of intersectional subordination in these cases is the depoliticization of the claims of women of Muslim heritage along two axes: gender and racial category.¹⁰⁹

Asylum law is an area in which it is particularly important to have one’s persecution and dissent be viewed as *political*. Contrary to commonsense understandings, asylum was not designed to create international obligations of aid for all people in serious danger; it creates obligations to protect a limited class of people who face persecution because they are political dissidents or have been targeted

m.nt. (No.201200969/1/V2) (Neth.), <http://deplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2012:BX3193> [<https://perma.cc/VK33-NFDN>].

107. Women of Muslim heritage who wear the veil may face discrimination on three axes: gender, racialized category, and member of the group of veiled women. Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim-American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191, 223–24 (2012) (arguing that “headscarved Muslim women” face unique discrimination). In my research, I have found evidence that headscarved Muslim women face particularized discrimination in the asylum context but it is beyond the scope of this paper to defend this point.

108. Crenshaw, *supra* note 9, at 140.

109. “Muslim” has become imagined as a racialized category which captures multiple signifiers from Muslim religion, to Arab identity, to Middle Eastern origin, to certain political or social affiliations. See generally Sunita Patel, Comment, *Performative Aspects of Race: “Arab, Muslim, and South Asian” Racial Formation After September 11*, 10 UCLA ASIAN PAC. AM. L.J. 61, 63 (2005) (arguing that Arabs, Muslims, and South Asians have been racialized as one racial category in the U.S. imagination).

for political reasons. This type of system allows less interference with the sovereignty of other governments over their citizens, as a receiving country will only step in when core political rights are violated. In such a system, it is equally important, then, not to have one's claim viewed as cultural; as Gregor Noll has argued, "where persecution is located in culture, it risks being essentialized together with it, and perceived as part of a sphere which is to be respected, just as states are to respect each other's sovereignty."¹¹⁰

In the area of asylum law and international human rights law more broadly, gender has been historically depoliticized—cast as private, personal, and cultural.¹¹¹ The work of feminist lawyers and legal scholars has chipped away at this trend, but its legacy endures. For example, as a result of advocacy work and trends at the United Nations, the United States released Gender Guidelines in the 1990s that attempted to broaden asylum adjudicators' understandings to include protections for women dissenters. These guidelines explain how women's lives may be governed by gender discriminatory laws and norms which render everyday activities dangerous.¹¹² In this context, quotidian acts, such as wearing makeup or carrying schoolbooks, can become sites for potential resistance. Still, claims relying on such theories, where women's resistance looks different than men's, have continued to have trouble passing muster.¹¹³

110. Gregor Noll, *Asylum Claims and the Translation of Culture into Politics*, 41 TEX. INT'L L.J. 491, 493 (2006).

111. See Marisa Silenzi Cianciarulo, *Batterers as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims*, 35 HARV. J.L. & GENDER 117, 120 (2012) (arguing that U.S. asylum courts are hesitant to extend asylum to a woman who comes from a male-dominated society condoning violence against women because they view her abuse "not [as] a political act but merely an unfortunate situation that has occurred due to various psychological and social factors"). One scholar notes:

Human rights law in general, and U.S. asylum law in particular, privileges male-dominated public activities over the activities of women which take place in the private sphere. The UN Refugee Convention and the U.S. Refugee Act, among others, view sexual violence and oppression in particular as perpetrated in the private sphere, and not as 'political' or public oppression by the state.

Maya Raghu, Note, *Sex Trafficking of Thai Women and the United States Asylum Law Response*, 12 GEO. IMMIGR. L.J. 145, 168 (1997) (footnote omitted). See generally Crystal Doyle, Note, *Isn't "Persecution" Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution*, 15 WASH. & LEE J. CIV. RTS. & SOC. JUST. 519 (2009).

112. See *Fisher v. INS*, 79 F.3d 955, 968 (9th Cir. 1996). The Guidelines instruct asylum officers that "[b]reaching social mores (e.g., marrying outside of an arranged marriage, wearing lipstick or failing to comply with other cultural or religious norms) may result in harm, abuse or harsh treatment that is distinguishable from the treatment given the general population, frequently without meaningful recourse to state protection." Memorandum from Phyllis Coven, INS Office of Int'l Affairs, to all INS Asylum Officers Regarding Adjudicating Asylum Cases on the Basis of Gender (May 26, 1995), <http://www.state.gov/s/l/65633.htm> [<https://perma.cc/HHY6-4UWQ>].

113. See Cianciarulo, *supra* note 111.

The bias against viewing gender-based claims as political is shared by Muslim women and other female asylum seekers, but the systems which oppress Muslim women are further cast as cultural and therefore apolitical. As Susan Mussarat Akram has argued, asylum courts often explicitly assume that gender discrimination or persecution is required by “Islam,” which is not problematized as a monolithic concept.¹¹⁴ This implies that every Muslim agrees on these requirements, leaving no room to imagine political or religious disagreements of the kind recognized by asylum law. As Mahmood Mamdani has argued, the politics of East-West relations has been “culturalized”; popular conceptions have hewed to the principle that “every culture has a tangible essence that defines it, [which] explains politics as a consequence of that essence.”¹¹⁵

A hallmark of early post-9/11 discourse was that cultural explanations were often employed where political ones would have been more apt. Lila Abu-Lughod has characterized the War on Terror discourse in this way:

Instead of political and historical explanations, experts were being asked to give religio-cultural ones. Instead of questions that might lead to the exploration of global interconnections, we were offered ones that worked to artificially divide the world into separate spheres [T]he Muslim woman . . . [was] so crucial to this cultural mode of explanation.¹¹⁶

One example of a cultural explanation is the idea, oft-repeated by Western news outlets,¹¹⁷ that suicide bombers are motivated by the belief that they will be rewarded with a harem of seventy-two virgins in the afterlife.¹¹⁸ Explanations of terrorism have also often been peppered with attribution of motivations to “sharia,” “jihad,” or “fatwas,” while leaving these terms unexplained.¹¹⁹ The answers given

114. Akram, *supra* note 8, at 15.

115. MAHMOOD MAMDANI, *GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR AND THE ROOTS OF TERROR* 17 (2004).

116. Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism, and Its Others*, 104 *AM. ANTHROPOLOGIST* 783, 784 (2002).

117. Ibn Warraq, *Virgins? What Virgins?*, *GUARDIAN* (Jan. 11, 2002, 9:04 PM), <http://www.theguardian.com/books/2002/jan/12/books.guardianreview5> [<https://perma.cc/MGU3-TVKY>] (“Since September 11, news stories have repeated the story of suicide bombers and their heavenly rewards . . .”).

118. *See, e.g.*, Michelle Tsai, *Honey I’m Dead: How God Rewards a Female Suicide Bomber*, *SLATE* (Mar. 29, 2010, 11:16 AM), http://www.slate.com/articles/news_and_politics/recycled/2010/03/honey_im_dead.html [<https://perma.cc/YRW8-FB32>] (clarifying that this heavenly reward is available to all Muslim men and that the number ‘72’ is based on one individual’s interpretation, which is widely disputed).

119. *See, e.g.*, James A. Lyons, *Opinion, Identifying the Enemy*, *WASH. TIMES* (Mar. 31, 2016), <http://www.washingtontimes.com/news/2016/mar/31/james-lyons-islamist-terror-rooted-in-shariah-law> [<https://perma.cc/WC8U-JPZQ>].

by Republican presidents to the oft-repeated question “Why do they hate us?”¹²⁰ have consistently been cultural, with President Bush arguing that “They hate us for our freedoms”¹²¹ and President Trump even more categorically stating that “Islam hates us.”¹²²

When cultural explanations are preferred over political ones, an obvious consequence is that our understandings are incomplete. Cultural explanations also do not engage history, and erase the West as an active player. Histories of occupation, arming of enemies, or overthrow of elected leaders by the West may help complete this picture. Cultural explanations elide the exercise of power, shrouding the ways in which conflicts between East and West result from political choices rather than the inevitable playing out of essentialized characteristics. In these ways, using culture to depoliticize serves political elites in both the East and West.

Just as the West sees culture as an explanation for terrorism and conflict, it also employs it as an explanation for the gender roles and norms within Muslim-majority countries. For example, conflicts over veiling have been framed as “culture wars.”¹²³ Because veiling is a sartorial tradition that goes back centuries in the region where Islam was born, it is clearly, in some sense, cultural. But, in situations in which a government (or de facto political power) passes a law requiring women to wear a veil, and enlists its police force to enforce such a law with violence, in the service of political aims, Western discourses often continue to frame “the veil” as primarily a cultural artifact. To frame the debate as centrally about women’s tension with “culture” obscures women’s other tensions with forces like police brutality and the symbolic harms of discrimination. As a political

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120. See, e.g., Mona Eltahawy, *Why Do They Hate Us?: The Real War on Women Is in the Middle East*, FOREIGN POL’Y (Apr. 23, 2012), <http://foreignpolicy.com/2012/04/23/why-do-they-hate-us> [<https://perma.cc/4Z5Y-QRKF>]; Kellan Howell, *Bill Maher on Paris Attacks: ‘Why Do They Hate Us?’*, WASH. TIMES, (Nov. 14, 2015), <http://www.washingtontimes.com/news/2015/nov/14/bill-maher-on-paris-attacks-why-do-they-hate-us> [<https://perma.cc/VZ54-LRM4>]; Olivier Roy, Opinion, *Why Do They Hate Us? Not Because of Iraq*, N.Y. TIMES (July 22, 2005), http://www.nytimes.com/2005/07/22/opinion/why-do-they-hate-us-not-because-of-iraq.html?_r=0; Fareed Zakaria, *The Politics of Rage: Why Do They Hate Us?*, NEWSWEEK (Oct. 14, 2001, 8:00 PM), <http://www.newsweek.com/politics-rage-why-do-they-hate-us-154345> [<http://perma.cc/NG9T-Y6KN>].
121. C-SPAN, *Bush - Why Do They Hate Us?*, YOUTUBE (Mar. 9, 2013), <https://www.youtube.com/watch?v=-PKRHgmHzK0> [<https://perma.cc/H7DA-4UC6>].
122. Theodore Schliefer, *Donald Trump: ‘I Think Islam Hates Us’*, CNN: POL. (Mar. 10, 2016 5:56 PM), <http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html> [<https://perma.cc/R4ZH-E9HQ>].
123. See, e.g., Kim Murphy, *A Culture War Erupts Over Veils*, SARASOTA HERALD-TRIB. (Nov. 25, 2006), <https://news.google.com/newspapers?nid=1774&dat=20061125&cid=gVYeAAAAIbAJ&csjid=t4YEAAAAIbAJ&pg=6941,5358713&chl=en>.

symbol, the veil is protean, demonstrating at different times and for different women concepts as diverse as nationalism, religiosity, chastity, and position in the class hierarchy. But when a government defines the veil as a symbol of a religiously mandated second-class or separate status, this is patriarchal. Western attempts to understand the veil as only cultural blunt discussion of the political expedience of patriarchy, as, *inter alia*, a bargaining chip between moderate Muslim men and jihadists, a tool of social organization and control, and a method of identifying those who must be purged in the purifying of the Muslim polity. One important function that patriarchy plays for groups like ISIS is in recruiting, where part of the jihadist experience the group advertises includes the opportunity to act out traditional gender roles, and, for male recruits, experience a sense of renewed masculinity.¹²⁴

It is not uncommon for asylum courts to refer to laws which require modest dress and veiling only for women as “general social strife” or as the result of “laws of general applicability,” or as simply the consequence of “Muslim law.”¹²⁵ For example, in *Fatin v. INS*,¹²⁶ the court accepted the BIA’s statement that an applicant fleeing the imposition of the veil or pain and severe punishment would only be “subjected to ‘the same restrictions and regulations applicable to the Iranian population in general,’”¹²⁷ even though the regulations were facially discriminatory against women. In *Fisher v. INS*,¹²⁸ the court cited language from *Abedini v. INS*,¹²⁹ in which a male asylum applicant faced prosecution in Iran for the distribution of Western propaganda. His claim was dismissed because he had “merely . . . established that he faces . . . prosecution for an act deemed criminal in Iranian society, which is made applicable to all *people* in that country.”¹³⁰ The majority in *Fisher* quoted this phrase, but changed the word “people” to “women”

124. Dallin Van Leuven et al., *Analysing the Recruitment and Use of Foreign Men and Women in ISIL Through a Gender Perspective*, in *FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND* 97, 107 (Andrea de Guttry et al. eds., 2016) (“ISIL’s media presence is largely structured and calculated to draw young men as recruits, and employs hyper-militarised, hyper-masculinised and particularly violent motifs to portray its fighters as the epitome of ‘real men.’”). Desire to act out traditional gender roles seems to be less of a draw for the small number of women and girls who have traveled to join ISIS, whose reasons for joining are complex. Anita Peresin & Alberto Cervone, *The Western Muhajirat of ISIS*, 38 *STUD. CONFLICT & TERRORISM* 495, 502 (arguing that some female recruits are “attracted by propaganda showing images of armed women” and “expect a more militant role”).

125. Akram, *supra* note 8, at 18; *see also In re S-A-*, 22 I. & N. Dec. 1328, 1330 (B.I.A. 2000).

126. 12 F.3d 1233 (3d Cir. 1993).

127. *Id.* at 1243 n.12.

128. 79 F.3d 955 (9th Cir. 1996).

129. 971 F.2d 188 (9th Cir. 1992).

130. *Id.* at 191 (emphasis added).

as if this did not change the meaning.¹³¹ The majority then made even clearer that it did not view gender discrimination as political by opining that “[t]he mere existence of a law permitting the detention, arrest, or even imprisonment of a woman who does not wear the chador in Iran does not constitute persecution any more than it would if the same law existed in the United States.”¹³² The dissent countered that “[w]e are not very far from *The Handmaid’s Tale* when seven judges of this court are capable of expressing such a view.”¹³³

In *Moosa v. Holder*,¹³⁴ Taliban enforcement of gender-discriminatory interpretation of sharia by physical violence was considered merely “broad social strife”¹³⁵ affecting the “entire population[.]”¹³⁶ “Social strife” is a term used most often to refer to generalized conditions such as natural disasters¹³⁷ or famine.¹³⁸ It is inappropriately used to describe a regime of law and punishment which enforces a political system of patriarchy. In *Najmabadi v. Holder*,¹³⁹ Iranian gender-discriminatory laws were again characterized as “conditions affecting the population at large.”¹⁴⁰ Yet again, in *In re S-A-*, the court’s statement of facts asserted that a father’s complete control over his daughter was a tenet of “Muslim law.”¹⁴¹

In most of these cases, the idea that gender is apolitical is clearly being employed. These characterizations are arguably much easier to make when it is assumed that gender discrimination is part of Islamic culture, and understandings of the political motivations behind imposing gender-discriminatory laws are never discussed. Because the lack of discussion of political reasons for patriarchy is not limited to this context, the combination of female identity with any other cultural identity which is Otherized may also give rise to this double depoliticization effect. The backdrop of not affording other cultures political explanations for their behavior, whether it be on the world stage or in matters of domestic policy, clearly plays a role in how we categorize persecution as either cultural or political. Because asylum decisions often rely on an imprecise and even ad hoc distinction between the cultural and the political, the Orientalist culturalization of Muslim actions and identity hurts Muslim women’s claims.

131. *Fisher*, 79 F.3d at 962.

132. *Id.*

133. *Id.* at 969 (Noonan, J., dissenting).

134. 644 F.3d 380 (7th Cir. 2011).

135. *Id.* at 387.

136. *Id.* (quoting *Ahmed v. Gonzalez*, 467 F.3d 669, 673 (7th Cir. 2006)).

137. See *Subramaniam v. Dist. Dir., INS*, 724 F. Supp. 799, 802 (D. Colo. 1989).

138. See *Begzatowski v. INS*, 278 F.3d 665, 670 (7th Cir. 2002).

139. 597 F.3d 983 (9th Cir. 2010).

140. *Id.* at 990.

141. *In re S-A-*, 22 I. & N. Dec. 1328, 1330 (B.I.A. 2000).

CONCLUSION

This Comment has attempted to demonstrate that understanding popular constructions of women of Muslim heritage can shed light on the treatment of these women under asylum law. The concrete recommendations that flow from this analysis are first, that for women who face danger in their home countries due to a perception that they are “Westernized,” U.S. asylum lawyers and judges should recognize that this is merely a perception. These applicants form a part of a long legacy of indigenous women’s rights advocacy which should not be erased. This is important because these applicants’ ideological tensions with other Muslims in their home countries represents a central political debate in today’s Muslim-majority countries. This is related to the second recommendation: that the dynamic of double depoliticization described above be countered by further contextualization and cross-cultural understanding. The more one learns about Muslim-majority countries, their political contexts, and the lived experiences of women there, the more difficult it is to engage in the abstract binaristic categorization encouraged by our constructions of Islam and women of Muslim heritage. Making these changes would not only make the analysis of asylum claims from women of Muslim heritage more accurate, it would also make this analysis fairer. Currently, misunderstandings and stereotypes are undermining the efficacy of potentially valid asylum claims made by women of Muslim heritage.

To the surface-level observer, it might be expected that the Western championing of women of Muslim heritage who believe in gender equality, such as Malala Yousafzai, would lead to an openness towards the women discussed in this Comment. Asylum, as an arm of U.S. foreign policy, can help encourage dissent by providing a haven for dissenters who become the targets of state violence. Insofar as it is U.S. policy to encourage the dissent of women in Muslim-majority countries against gender discrimination or oppression, asylum should be offered as an escape route for those who do this critical work. Insofar as the U.S. is itself committed to the ideals of gender equality, it should be protecting those who fight for it on the front lines. I wrote this Comment because I believe that this disconnect between rhetoric and practice can be remedied if U.S. lawyers and judges can better understand the ways in which their analyses are importing a gendered Orientalist perspective. As this Comment has attempted to show, the work of female scholars of Muslim heritage and the framework of intersectionality theory can help guide this self-reflection in productive ways. It is my hope that this shift in ideological orientation can help shift decision-making in a way that makes our asylum system more sympathetic to the brave women of Muslim heritage who advocate for gender equality.