

Windows of Faith

*Muslim Women Scholar-Activists
in North America*



Edited by

Gisela Webb



Syracuse University Press

Copyright © 2000 by Syracuse University Press
Syracuse, New York 13244-5160
All Rights Reserved

First Edition 2000
00 01 02 03 04 05 6 5 4 3 2 1

Epigraph calligraphy by Elinor 'A'ishah Holland

The paper used in this publication meets the minimum requirements of
American National Standard for Information Sciences—Permanence of
Paper for Printed Library Materials, ANSI Z39.48-1984. ©

Library of Congress Cataloging-in-Publication Data

Windows of faith : Muslim women scholar-activists in North America /
edited by Gisela Webb.

p. cm. — (Women and gender in North American religions)

Includes bibliographical references and index.

ISBN 0-8156-2851-X (cloth : alk. paper). — ISBN 0-8156-2852-8
(pbk. : alk. paper)

1. Muslim women. 2. Women in Islam. I. Webb, Gisela.
II. Series.

HQ1170.W52 1999

305.48'6971—dc21 99-40405

Manufactured in the United States of America



In the Name of God, the Merciful, the Compassionate

ophies, history, beliefs and practices. Active as the "new authorities," they are called upon to give expert testimony, thereby shaping a legal view and public understanding of Islam and Muslims in this country. I often find myself in this precarious situation. For better or worse, these testimonies set legal precedents but remain generally unknown in the Muslim community.

Muslims often look differently, act differently, and certainly worship differently than the larger American community. The immediate consequences of this difference have been various discrimination and civil rights violations. In many cities animosities toward Islam and Muslims have been initiated or nurtured by the local media. Job discrimination and other civil rights violations usually follow. The most prominent Muslim organization tracking violent and nonviolent discriminations against Muslims is the Council on American-Islamic Relations (CAIR). Through its efforts, many incidents of employment and public discrimination against Islam and Muslims are no longer isolated events, but are responded to nationally. As Muslims enter politics and law and are able to balance understanding of Islam with U.S. law, the incidents of discrimination, one hopes, will significantly decline.

Furthermore, the struggle for rights among America's most prolific and notorious litigants—prisoners—has been the source of much case law that defines religion. Muslim prisoners have sued, for example, for the right to have their given names changed to Arabic names, for the right to study Islam, and for the right to practice the fast of Ramadan and have it recognized as Islamic. Here enters the scholar in the role of expert witness, stating under oath what Islam is and what it is not, who is "Muslim" and who is not. These questions are at least fourteen hundred years old in Muslim circles and have over the centuries been given various answers. What the court, the district attorney, or the warden's office wants, however, is an immediate, definitive answer that can withstand appeals and/or further litigation (Moore 1991, 136–56).

The scholar of Islam trained in an American university will ostensibly give the broadest view possible, taking in all of the twists and turns of history and its testimony to the perennial relationship of power and knowledge. Scholars of Islam know what a *fatwa* (legal opinion) is and who is qualified to give one. They also know that the class of "learned men" has often suffered from corruption and that their *fatawa* (pl. *fatwa*) have some-

6

The Scholar and the Fatwa Legal Issues Facing African American and Immigrant Muslim Communities in the United States

AMINAH BEVERLY MCCLOUD

☞ Scholarship and authority in Islam have always been the prerogative of an elite group of men who have been invested in traditional methods and interpretations. When Muslims and, recently, non-Muslims think of legality in Islam, all thoughts are directed to the *fatwa* (legal opinion), and all eyes look to the East for the source of tradition and authority. Here in the United States, predominately American-trained Islamicists are negotiating the terrain that is normally the domain of the *'alim* (one learned in religious knowledge), *mufli* (jurisconsult), and *qadi* (the Islamic "judge") in the Muslim world. There certainly will be new, dynamic entries to the body of Islamic law as time goes on, and there will be further reforming of the categories of *qiyas* (analogical reasoning), *istihsan* (juristic preference), and *istislah* (consideration of the public interest) to make new tradition.

Legal issues facing Muslim Americans span several categories, including family law, civil rights law, and criminal law. Differences in culture and religion, intertwined and inseparable, provide the foundation for almost all the disputes. As with most religious communities in America, a period of time passes while the community establishes itself in the (traditional) system before it ventures out to try to engage the larger community.

For the moment, scholars of Islam, and sometimes informed *imams*, are providing the majority of the answers to questions about Islam—its philos-

times reflected a concern for patronage. U.S. court officers, guidance counselors, lawyers, and mediators seek information that they can use and that has been reasoned with an understanding of U.S. law. The scholar, knowingly or unknowingly, becomes the agent who gives legal advice that, one hopes, is grounded in Islamic knowledge.

The implications of this situation are far-reaching for the Muslim world's self-understanding. In the Muslim world "learnedness" on issues of the law has always been first and foremost male. Moreover, it is the acculturated line of men, with each stage certified along the way. Its maleness notwithstanding, the study of the law in Islam is analogous to the study of law anywhere. In the United States, however, there is no long-standing inquiry of Islamic law, and the history of Islam in this country is still relatively young. The lack of knowledge of Islamic law in this country has often meant that "Islam" and "Muslims" can be almost anything that anyone chooses. Because various Islamic communities have arrived with various cultural manifestations of Islam and disparate understandings of what it means to be a Muslim, all claims are taken to be valid until proven invalid. Muslim scholars of every possible variant of Islamic law arrive in the United States with each ethnic community, often speaking very little English and having little if any knowledge of U.S. law and culture.

The Muslim community in America is divided in several ways, with ethnicity heading the list. Internal frictions in the Muslim world reveal themselves in the U.S. context in the form of racism and in various forms of nationalism, often following patterns of European and American race and class distinction. American communities self-segregate despite claims of egalitarianism and Muslim "brotherhood" (McCloud 1995). Legal matters, however, admit only class and "Americanness." The result is that a Muslim is a Muslim unless he or she is wealthy or has diplomatic immunity, both of which tend to transcend the law. As previously stated, for the majority of Muslims, there are increasing experiences of discrimination and other injustices (including inside the Muslim community), thus increasing the contact of Muslims with U.S. law, whose officials, in my experience, often attempt fairness in understanding. These attempts often lead them to seek out the academic scholars in Islam. These scholars may be Muslim or not, female or male, objective or not. Whoever they are, they are expressing opinions that are recorded as fact. Why, one may ask, do the scholars not consult with the communities and

their leaders? One answer is that there is a refusal on the part of those within Muslim communities who are trained in Islamic law. Another answer is simply that it has never been done. Muslims, even inside their ethnic enclaves, generally follow "what has always been." When faced with a new game with different players, there is no available reasoning for a new strategy, so there tends to be no strategy. The game continues, however, and its results will certainly add to the annals of Islamic law.

As a budding Islamicist and an African American *Muslimah* (Muslim woman), my position in academia is at best tenuous while in the Muslim community it is generally invisible. Islamic Studies is still relatively new. The study of Islam has been a subcategory in orientalist university departments of Arabic, Near East Studies, Middle Eastern Studies, and/or Arab History. As a result, scholars in these fields do not understand the worldview of Islam, and their perspectives on the religion are often rigid and narrow. My voice, however, is increasingly heard in legal documents, articles, and consultations on issues involving Muslims that reach the stage of litigation. Rendering an opinion on legalities in Islam is a position of privilege extended only to non-Muslim Islamicists and Muslim males, so my position is destined to be controversial.

I have been asked to look at and render an "Islamically based" opinion on a number of types of situations from who is a Muslim to how to distinguish *sawm* (the Islamic fast) from other religious feasts to issues around women's rights and Islamic marriages. For this brief overview, I briefly explore the issues surrounding Muslim women, particularly marriage and divorce.

American Muslim women, on one level, are the "free-est" Muslim women on the planet, that is, on the level of access to public participation in whatever public arena they choose. There is mandatory public education, guaranteeing that women have basic education. If women want to and can work, jobs are available. For physically abused women, there are shelters with skills training components. Women can drive cars and live on their own without neighborhood retaliation. This list is long. Muslim women are also exposed to a society where everyone is almost free to do anything one can think of—good or evil—and assert it as a right.

Their actual lived-out freedom, however, closely conforms to their level of acceptance of the historical patriarchy of the Muslim world. As a result, many Muslim women find themselves in situations of legal import

both within the Islamic and U.S. legal systems, yet without the knowledge of how to benefit from the rights accorded by either.

In Islam the marriage contract is, if executed properly, a document of protection and security. In various Muslim countries marriages are registered according to particular custom and are very public. When Muslims have immigrated to the United States, their marriages have generally received the protection of the courts. Marriage contracts are understood as prenuptial or nuptial agreements.

"Islamic" marriages (marriages without a civil license) are considered common-law marriages in those states that have common-law statutes; U.S. family law generally recognizes "common-law" marriages. There are still about a dozen states that demand a civil contract registered with the state. Common-law statutes are used by the U.S. courts in establishing paternity, inheritance, alimony, child custody, and property rights in disputes and litigations. Nevertheless, marriages that have been contracted in other countries are sacrosanct, whereas marriages undertaken in the States run a risk in absence of the civil contract. American Muslims often espouse the view that the only marriage of significance is the "Islamic marriage," but this marriage often takes place without a contract, bringing into serious question the intentions of the parties involved. This is ironic, not to mention illegal, from an Islamic juridical perspective because traditionally there is no valid marriage without a marriage contract.

Furthermore, there is no valid Islamic marriage without a contract that specifies the *mahr* (dowry). No matter what else is included, the dowry must be specified and its agreement witnessed. The entire dowry or an agreed-upon portion of it, in some cases even symbolic, must be given at the time of the marriage. The rest, if necessary, can be deferred, but, this, too must be specified and witnessed. There are several possible extenuating circumstances that should compel American Muslim women to consider their marriage contracts with great care. For example, some women enter new marriages with children from previous ones. This should require a careful delineation of the care and training to be provided in the new marriage. In the event of the death of the parental spouse, the contract is one place (in addition to a will) wherein arrangements are agreed upon. When the wife is a student, a professional, or simply wealthy, the contract can and should include agreed-upon stipulations regarding these issues.

Marriage in Islam is, furthermore, intimately bound to the issue of

inheritance, one of the traditional mainstays of the Muslim community. The Islamic laws of inheritance cannot apply for "unmarried" people. In spite of guidance and protection offered by the Qur'an, Muslim women in America continue to fail themselves in consultations and litigation because they do not fulfill their obligations and/or exercise their rights. They still "marry" and have children without marriage contracts. From the Islamic perspective, the *nizyah* (intention) of any Muslim who would marry without a contract could not be good. If there is no dowry, there is no marriage, and, therefore, no rights accrue.

Although U.S. family law recognizes "religious marriages" as; "common-law marriages" in many states, it does not recognize religious divorce in most states. Thus, if there has never been a (U.S. legal) marriage and there is discussion of divorce "Islamically," one must get a civil divorce in addition to a religious divorce really to be divorced and for the rights of divorce to accrue (e.g., maintenance, child support, and even the right to remarry). I suspect that quite a few women besides men qualify as bigamists. Lawyers and judges regularly consult academicians about the religious legalities of the community "goings on."

A frequent example is a woman who petitions the court for child support. The court needs divorce papers to ascertain what was agreed upon at the time of the divorce. It is ascertained that there was a religious divorce from an "Islamically" nonvalid marriage. What is the court to decide? Most judges and lawyers do not feel that they have the freedom to speak on the peculiarities of individual religious interpretation, thereby going beyond their legal bounds. Unfortunately, this sometimes has disastrous results, including the complete removal of the child from either custodial parent. Clearly, agreements that are witnessed and, therefore, are binding in U.S. (and Islamic) law work to the benefit of Muslim women who are mindful. The absence of the written contract results in everything being left up to a dispassionate judge. Women's rights to alimony and child support depend on their income unless there has been a prior agreement which states things differently.

Related to the subject of marriage and divorce is the issue of polygyny, both in sequential marriage (where one has never obtained a real divorce) and in simultaneous marriages. Remembering the Qur'anic affirmation of the right to marry up to four women (and forgetting the historical context and stipulations of that affirmation), Muslim men have sought polygyny

with haste. As leaders of various communities set the example, marriages of years of devotion fall into chaos. Muslim women often find themselves in a religious dilemma: Who can go against what Allah permits? Some Muslim women have found themselves in court, ironically, not pursuing charges of bigamy, but like other American women, filing charges over some sort of fraud. All of the potential legal consequences of the practice of polygyny in the American Muslim context have not yet appeared, but they are bound to find their way into the courts as more and more women seek alimony and child support. It also seems clear to me that the lack of records about who married "whom, when, and where"—in addition to the constant geographical movements of individuals and families—is bound to result in a brother marrying a sister in the near future.

American Muslims also face potential problems as they seek to marry their children at ages lower than the legal limit and when they deal with Muslim youth who assert their rights to choose mates and to pursue their legal rights under U.S. law. Many Muslim families fear the "looseness" and permissiveness of U.S. society. Yet despite the increasing efforts of a growing number of Muslim camps and social events, American Muslim children are thoroughly indoctrinated in American society and culture. There are "runaways" from "oppressive" family conditions that require social agencies and the court system to intervene. In at least one instance, death has occurred at the hands of an irate and "dishonored" father over the "behavior" of his daughter.

Still another area of concern and legal deliberation is child-rearing practices, which vary widely in Muslim cultures. Love and protection of children is the norm in Muslim society. In some cultures, however, physical discipline is allowed, which by general American standards would be considered abusive (e.g., spanking with belts, shoes, etc.). When observed by non-Muslims, these practices have resulted in social service intervention. There also have been situations where standards of affection permitted in some Muslim cultures have met with disapproval in the American context. I am aware of one such case in which an open display of affection of a father toward his daughter (in ways acceptable in his own "conservative" culture) resulted in charges of sexual abuse. The subsequent intervention of various courts, both criminal and family, have cost this family almost everything they own, leaving them almost indigent. Even if they

manage to get their children back, they will be in a desperate situation to care for them.

Spousal abuse and its general tolerance among Muslims—based on misinterpretation of one Qur'anic verse—is also a cause for concern. Immigrant women in marriages where abuse occurs tend to experience it as part of the normal course of life and submit—especially to verbal and emotional abuse—without complaint. Their daughters are more likely to be vigilant that the verbal abuse does not turn into physical abuse and to assert the threat of police intervention in an effort to modify their fathers' behavior. Increasingly, national conferences have sessions on family problems with discussions on abuse: what it is, what are possible resolutions to conflict, and the options when no resolution is possible. In some instances abuse has forced some women to seek the services of battered women's shelters. It is in some of these shelters that an additional concern has arisen for Muslim women: they are at times encouraged to convert to Christianity, and Islam, with its "sanction" of the beating of women, is presented as the problem.

As an aspiring scholar and community activist, I often find myself overwhelmed both by the enormity of some of these issues and the need for an American elaboration of a Muslim culture that is a synthesis of the old and new. My experience is that inside local Muslim communities, female scholars of anything Islamic are not seen favorably or are simply ignored. What such women can contribute to thinking about these new Muslim communities is also ignored. Yet they find themselves in constant demand by the non-Muslim community to explain what is going on at the grass-roots level. This situation puts scholars, who are generally invisible anyway—as Muslim women tend to be in their communities—in a dilemma. They have to be careful in their observations and assertions. They cannot afford the security or safety of belonging to only one community because it automatically decreases their perspective and capacity to "see" the larger community. Yet getting to know and observe Muslim communities requires at least a minimal level of acceptance as a visitor. Ironically, this is an extremely difficult position to maintain for the insider. Muslims, as with any religious community, can be hostile to their own if criticism and ideological challenge are suspected. Women scholars have to be measured and timely in their responses to inquiries because they understand

that their answers can lead to danger and prejudice from within and without.

The Muslim scholar is also aware that although the community is not likely to know what has been said about it by the scholar, the community deserves to have its rights protected. Thus, the Muslim scholar, particularly if the scholar is a woman, is caught between her scholarly demands and the increasing requests for "expert Islamic opinion," on the one hand, and her own participation in the dynamics of growth and change in American Muslim communities, on the other, as Muslim communities forge an Islamic identity against the backdrop of their own "American" experience and culture. There is much work ahead.

PART THREE

Literature, Spirituality