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“COMBATING ANTI-MUSLIM AND ANTI-ARAB HATE AND BIAS”
TESTIMONY BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS
BRIEFING ON
FEDERAL CIVIL RIGHTS ENGAGEMENT WITH ARAB AND MUSLIM AMERICAN
COMMUNITIES POST 9/11
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CHAIRMAN CASTRO, VICE CHAIRMAN THERNSTROM, AND MEMBERS OF THE COMMISSION:

It is a pleasure to appear again before you today.¹ I have been asked to testify on the problem of anti-Muslim and anti-Arab discrimination in the United States. As the President of a Jewish civil rights organization, the Louis D. Brandeis Center for Human Rights Under Law, I am particularly pleased by this opportunity to speak out against these forms of invidious discrimination. The mission of the Louis D. Brandeis Center is to advance the civil and human rights of the Jewish people and promote justice for all.² We believe that the civil and human rights of the Jewish people are inextricably bound to the pursuit of justice for all peoples. The Louis D. Brandeis Center promotes justice for all as a means of securing the rights of the Jewish people and secures the rights of the Jewish people as a means of advancing justice for all. We welcome the opportunity to speak out against anti-Muslim and anti-Arab discrimination and to support the equal rights of all Americans. Since my own expertise is more focused on religious discrimination, most of my testimony will address anti-Muslim, especially in American prisons and schools, rather than anti-Arab discrimination. However, I will have a few words to say at the end of my testimony about anti-Arab stereotyping and discrimination against persons incorrectly perceived to be Muslim or Arab, such as members of the Sikh community.

¹ Prof. Dawinder S. Sidhu provided helpful comments and suggestions on this testimony, while Jack Shaheen and Amrita Singh shared useful information on anti-Arab stereotypes and anti-Sikh discrimination, respectively. Nevertheless, ultimate responsibility for this testimony remains with the author.

² See Louis D. Brandeis Center, *Mission and Values Statements*, <http://brandeiscenter.com/index.php?/about/mission>.

The Commission and Religious Discrimination

At the outset, let me commend the Commission for its continuing attention to discrimination against religious minorities, especially in the last half dozen years.³ Three decades ago, this Commission pointedly entitled its first report on this subject, “RELIGIOUS DISCRIMINATION: A NEGLECTED ISSUE.”⁴ The Commission revisited this understudied topic six years ago, during my tenure as Staff Director, issuing the influential 2006 report on anti-Semitism in higher education, *CAMPUS ANTI-SEMITISM*.⁵ The following year, the Commission turned to anti-Catholic discrimination in the briefing which led to its report on *SCHOOL CHOICE: THE BLAINE AMENDMENTS & ANTI-CATHOLICISM*.⁶ In 2008, the Commission returned again to the topic of religious discrimination, devoting its 2008 statutory report to the problem of religious freedom in penal institutions.⁷ In 2010, the Commission considered discrimination against Muslims and Arabs in its briefing report on *DOMESTIC WIRETAPPING IN THE WAR ON TERROR*.⁸ Just last year, I was pleased to testify before the Commission at its briefing on bullying in the public schools, which included an important component on bullying of religious minorities.⁹ Today, it is proper that the Commission build upon this distinguished history, focusing on anti-Muslim and anti-Arab discrimination.

³ See Kenneth L. Marcus, *The Right Frontier for Civil Rights Reform*, 19 GEO. MASON U. CIV. RTS. L.J. 77, 78 & note 8 (2008) (noting the prominence of religious freedom in the Commission’s recent agenda).

⁴ U.S. COMM’N ON CIV. RTS., *RELIGIOUS DISCRIMINATION: A NEGLECTED ISSUE* (1979)

⁵ U.S. COMM’N ON CIV. RTS., *CAMPUS ANTI-SEMITISM* (2006).

⁶ U.S. COMM’N ON CIV. RTS., *SCHOOL CHOICE: THE BLAINE AMENDMENTS & ANTI-CATHOLICISM* (2008).

⁷ U.S. COMM’N ON CIV. RTS., *ENFORCING RELIGIOUS FREEDOM IN PRISON - 2008 STATUTORY REPORT* (2008).

⁸ U.S. COMM’N ON CIV. RTS., *DOMESTIC WIRETAPPING IN THE WAR ON TERROR* (2010). The Commission’s State Advisory Committee’s have also examined similar issues. *See, e.g.*, District of Columbia, Maryland, and Virginia Advisory Committees to the U.S. Commission on Civil Rights, *CIVIL RIGHTS CONCERNS IN METROPOLITAN WASHINGTON, D.C., AREA IN THE AFTERMATH OF THE SEPTEMBER 11, 2001, TRAGEDIES* (2003).

⁹ U.S. COMM’N ON CIV. RTS., *PEER-TO-PEER VIOLENCE AND BULLYING: EXAMINING THE FEDERAL RESPONSE* (2011).

Context and Perspective

As a preliminary matter, it may be helpful to place the problem of anti-Muslim discrimination in proper context and perspective. Too often civil rights dialogues alternate between the extremes of denial and alarmism. This is true of contemporary discussions of virtually every form of discrimination. In each case, this amounts to polarized conversations in which participants present one-sided representations following into two categories. On the one side, advocates may overstate the nature or amount of discrimination, understate the effectiveness of enforcement efforts, or ignore countervailing considerations such as favorable public attitudes towards whatever minority group is in question. On the other side, skeptics may understate what advocates overstate, overstate what they understate, and ignore the converse set of countervailing considerations. I have written about this phenomenon in the context of anti-Semitism, but it is ubiquitous in the public conversation regarding virtually all forms of discrimination.¹⁰

In the case of anti-Muslim discrimination, a similar pattern emerges. The skeptics should remember that in 2010 alone, the FBI reports that 160 documented American hate crimes were committed against Muslims.¹¹ This amounts to 13.2% of all religious motivated hate crimes in the United States. Moreover, these figures may understate actual incident rates for several reasons. For example, no agency can ever assume 100 percent reporting rates; some Muslims may be suspicious of federal law enforcement officials; and these figures address only specified

¹⁰ Kenneth L. Marcus, *Title VI Debate Exaggerating On-Campus Anti-Semitism? Not as Big or Small a Problem as Sides Make It*, JEWISH WEEK (July 19, 2012), http://brandeiscenter.com/index.php?publications/research_opinion_full/title_vi_debate_exaggerating_on_campus_anti_semitism_not_as_big_or_small_a.

¹¹ FEDERAL BUREAU OF INVESTIGATION, HATE CRIMES STATISTICS 2010, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/tables/table-1-incidents-offenses-victims-and-known-offenders-by-bias-motivation-2010.xls>

hate crimes while excluding many serious hate and bias incidents that do not technically rise to the level of a hate crime. Any amount of hate crime is too much, and these figures should be considered entirely unacceptable, as well as reason for serious concern.

At the same time, advocates should remember that the federal government has developed numerous initiatives to address anti-Muslim and anti-Arab discrimination, including both outreach and enforcement initiatives. In addition, there have been numerous community efforts to mitigate discrimination or bias, such as social and civic engagement.¹² Moreover, the most recent figures for anti-Muslim discrimination, while serious and disturbing, fall considerably below the figures for some other groups. By way of comparison, the 2010 FBI Hate Crimes Statistics report 2,201 anti-black hate crimes and 739 hate crimes directed against gay males. In the religion category, anti-Jewish hate crimes amounted to 887 incidents, which is more than five times the number of anti-Muslim incidents. While deeply dismaying, the volume of anti-Muslim incidents since September 11, 2001 have not reached the levels that some of us in the civil rights community had feared. A proper civil rights policy should aim to reduce these levels to zero for all groups, including Muslims.

Anti-Muslim Harassment in American Schools

Last year, I had the honor of testifying before this Commission regarding harassment of Muslim school children and other religious minorities.¹³ In that testimony, I described in some detail the serious harassment and bullying that many Muslim and Sikh children have faced in American schools since 9/11. By way of example, I described the incident in which a Muslim

¹² Dawinder S. Sidhu, Blog posting, "Oak Creek and the Future of Sikhs in America," WASHINGTON POST GUEST VOICES BLOG, http://www.washingtonpost.com/blogs/guest-voices/post/oak-creek-and-the-future-of-sikhs-in-america/2012/10/02/0c21c1f8-0cdc-11e2-bd1a-b868e65d57eb_blog.html (October 2, 2012).

¹³ Kenneth L. Marcus, "Religious Harassment in the Public Schools," Testimony before U.S. Commission on Civil Rights (May 13, 2011), <http://jewishresearch.org/PDFs/usccr-bullying-testimony.pdf>.

junior high school student reported being beaten until he bled at a Staten Island middle school. "They punched me," the student reported, "They spit in my face. They tripped me on the floor. They kicked me with their feet and punched me.... And as they were kicking and laughing, they kept saying, 'You f___ing terrorist, f___ Muslim, you f___ing terrorist.'"¹⁴ This young man reported being kicked so hard in the groin that he bled in his urine. In another Staten Island incident, students allegedly yanked a 13-year-old Muslim girl's head scarf and beat her. "They just attacked me," the girl reportedly charged, "They called me 'terrorist.' They called me 'Muslim.' I'm afraid they might come back and beat me again."¹⁵

Since then, the Commission has issued an important report regarding anti-Muslim bullying, PEER-TO-PEER VIOLENCE AND BULLYING: EXAMINING THE FEDERAL RESPONSE (the "BULLYING" report).¹⁶ The BULLYING report describes the unacceptable levels of harassment which Muslim and Sikh students face in public schools, both in the text of the report and in its findings. In the BULLYING report, the Commission described, *inter alia*, the harassment that Muslim and Sikh students face in many public schools, including these examples. In addition, the Commission described the troubling lacunae in federal civil rights law which I had brought to its attention:

Although [the U.S. Department of Education ("ED")] enforces Title VI [of the Civil Rights Act of 1964) with respect to harassment of members of religious groups based on their shared ancestry or ethnic characteristics, Title VI itself leaves a hole in ED's enforcement. That is, Title VI does not protect against harassment of students based solely on their religious faith, nor does it protect

¹⁴ Ikimulisa Livingston and Leonard Greene, *Terrorized for being a Muslim*, N.Y. Post (Oct. 12, 2010) http://www.nypost.com/p/news/local/staten_island/terrorized_for_being_muslim_8rQSU8Z5ibbMOeJnDGFORO#ixzz1Kw0Zei1A

¹⁵ Edgar Sandoval, Matthew Lysiak and Rich Shapiro, *Girl attacked for wearing a veil says 11-year-old bullied, beat her for months with another student*, N.Y. Daily News (Mar. 31, 2011), http://articles.nydailynews.com/2011-03-31/news/29386377_1_hate-crime-charges-muslim-girl-head-scarf.

¹⁶ U.S. COMM'N ON CIV. RTS., PEER-TO-PEER VIOLENCE AND BULLYING: EXAMINING THE FEDERAL RESPONSE (2011).

against harassment of students who belong to religious groups that do not have shared ancestry or ethnic characteristics.¹⁷

The Commission pointed out, quite correctly, that “[a]s a result, ED cannot protect students from the ‘peculiar harms created by religious bigotry.’ Furthermore, under current law, religious groups with shared ancestry or ethnic characteristics receive certain protections that religious groups without shared ancestry or ethnic characteristics do not receive, and would-be discriminators can evade Title VI liability by claiming that [their actions are] based solely on religious bigotry.”¹⁸ In order to address this problem, I argued that Congress should pass legislation to prohibit religious harassment in federally funded educational programs and activities.

The Commission made some important recommendations regarding federal civil rights enforcement in this area, but it has not yet adopted any recommendations which would fix these problems which the Commission has recognized. Now would be an appropriate time for the Commission to complete the task that it began with that report by urging Congress to prohibit religious harassment in federally funded educational programs and activities. This proposed recommendation may be bolder than what the “BULLYING” report recommends, but it is more limited than what Commissioner Achtenberg rightly argued, in her concurring statement, that the record before the Commission credibly supports: “Congress should enact, and the President should sign into law, an amendment Title VI of the Civil Rights Act of 1964 to prohibit discrimination on the basis of religion.”¹⁹

¹⁷ Id., p. 59 (citing Marcus testimony).

¹⁸ Id at 59-60 (citing and quoting Marcus testimony).

¹⁹ Id. at 101, 126 (Statement of Commissioner Roberta Achtenberg).

For several years, I argued that Congress should do precisely as Commissioner Achtenberg recommends, although I also advocated an exception for religious institutions.²⁰ Like most commentators, I believe that religiously affiliated educational institutions should be able to discriminate in favor of co-religionists in certain circumstances, such as hiring, promotions and admissions. The problem is that the scope of this exception remains controversial, and fears that it could become too broad or too narrow have long delayed passage of legislation that would bar religious discrimination in federally funded educational institutions. In addition, some commentators have worried about the extent of reasonable accommodations that would be required if Congress were to bar religious discrimination, and some have questioned whether an overly aggressive interpretation could lead to Establishment Clause problems.

In order to resolve this disagreement, many thoughtful advocates have urged a more modest version of religious freedom in education legislation. Specifically, they argue that Congress should merely bar religious *harassment*, rather than religious discrimination *per se*. The rationale for this more modest recommendation is that it would avoid arguments over either the scope of requisite reasonable accommodations or disputes over the extent to which religious institutions should be exempted from the general rule. Moreover, advocates generally agree that the most pressing form of religious discrimination facing religious minorities is harassment or bullying. This Commission would provide a considerable service if it supported this more modest version of the legislation which I discussed last year and which Commissioner Achtenberg recommended.

²⁰ See, e.g., Kenneth L. Marcus, *Privileging and Protecting Schoolhouse Religion*, 37 J. OF LAW & ED. 505 (Oct. 2008); Kenneth L. Marcus, *The Most Important Right We Think We have but Don't: Freedom from Religious Discrimination in Education*, 7 NEVADA L. J. 171 (Fall 2006).

Unfortunately, the underlying problems have not abated, and Congress has not acted to address the relevant policy deficiencies. As the incoming Congress approaches the task of reauthorizing the Elementary and Secondary Education Act, it will be important for the Commission to make its voice heard as to how Muslim students, as well other religious minorities, can be more effectively protected. The Commission has already acknowledged the severity of the problem facing Muslim and other religious minority school children, and it has eloquently explained the reasons why new legislation is need. The obvious next step would be for the Commission to recommend legislation to prohibit religious harassment in federally assisted programs and activities.

*Anti-Muslim Discrimination in American Prisons*²¹

The Commission has also recently examined the problem of religious minorities, including Muslims, in American penal institutions.²² This is a serious topic worthy of further consideration. Prisoners' rights are an important and appropriate issue for the Commission, given the large percentage of complaints which the Commission receives from prisoners. This is a particularly salient issue for Muslims, given the disproportionate rate of Muslim incarceration.²³ Muslims constitute nearly a tenth of the American prison population, although they are only 0.6% of the general population.²⁴

The post 9/11 surge in Muslim prison population has stirred deep-seated fears and resentments, including the specter that the American prison system will become a breeding

²¹ This section draws heavily upon Kenneth L. Marcus, *Jailhouse Islamophobia: Anti-Muslim Discrimination in American Prisons*, 1 RACE & SOCIAL PROBLEMS 36-44 (March 2009).

²² U.S. COMM'N ON CIV. RTS., ENFORCING RELIGIOUS FREEDOM IN PRISON - 2008 STATUTORY REPORT (2008).

²³ It should be noted that these rates result in part from conversions undertaken by prisoners while under incarceration.

²⁴ *Id.*, p. 13, Table 2.1

system for “radicalized Islam.”²⁵ With these fears have come restraints on Muslim religious expression, as prison officials cite a need to maintain orderly prison administration and ensure homeland security.²⁶ This is a very complex issue involving legitimate questions of prison as well as homeland security together with civil rights challenges.

Recent anti-Muslim allegations have included, for example, refusal to honor *hallal* dietary restrictions, to allow prisoners to wear religious garb (such as the *keffiyeh* or *hijab*), or to obtain access to chapels or religious services; denial of Qur’ans and other religious materials; interference with observance of holidays such as *Ramadan*, *Eid-Ghadir*, and *Muharram*; and forced participation in Christian religious services. Such cases have increased sharply over the last few years.²⁷

Some experts argue that religious activity is “often barely tolerated and in some institutions even discouraged” in American prisons today.²⁸ Members of virtually all religions, including mainstream Christian denominations, have testified that they have been denied basic religious freedoms while under incarceration, including access to Bibles and religious services and programs.²⁹

Prison staff, fellow inmates, chaplains, and faith-based service providers have all been involved in perpetrating religious discrimination in prison. Prison chaplains report that religious

²⁵ See, e.g., Colson 2002; Marks 2006, available at <http://www.csmonitor.com/2006/0920/p03s02-ussc.html> (“The radicalization and recruitment of terrorists present a threat of ‘unknown magnitude,’ according to national security experts.”)

²⁶ See, e.g., A. Al-Amin, “Religious Discrimination and Prisoners’ Rights: A Muslim’s Point of View,” p. 2 (“Prison radicalization primarily occurs through anti-U.S. sermons provided by contract, volunteer, or staff imams...”).

²⁷ Kenneth L. Marcus, *Jailhouse Islamophobia: Anti-Muslim Discrimination in American Prisons*, 1 RACE & SOCIAL PROBLEMS 36-44 (March 2009).

²⁸ P. Nolan, Vice President of Prison Fellowship, “Religious Discrimination and Prisoners’ Rights,” testimony before U.S. Commission on Civil Rights, Br. on Religious Discrimination and Prisoners’ Rights, Feb. 8, 2008, at 2, 3-5.

²⁹ *Id.* at 2.

services are often delayed, interrupted or cancelled for no apparent reason; and custodial staffs are perceived as dismissive or contemptuous of those who participate in religious self-improvement programs.³⁰ Correctional staff frequently distrust prison chaplains, questioning the motives of those who minister to people who have not conformed to social conventions.³¹ Further, some staff may consider it appropriate to punish prisoners, on an *ad hoc* basis, by denying them access to religious worship.³² Additionally, religious minority inmates may face persecution by other inmates; after all, prisons house neo-Nazis, “Christian Identity” supremacists, and others convicted of religiously motivated hate crimes.³³ Finally, faith-based service providers, servicing contracts with federal and state prisons, have provided various special material benefits to inmates of their faith that are denied to others,³⁴ and have disparaged prisoners of other faiths.³⁵ In some cases, discrimination may arise from an unconscious presumption in favor of mainstream Protestant religious practice³⁶ (which Chaplain Patrick M. McCollum calls the “Dominant Religion Lens Factor”)³⁷ or an explicit bias in favor of fundamentalist or evangelical programming.³⁸ As a consequence of these policies and behaviors, non-mainstream religions of all kinds report higher levels of religious animus.³⁹ This

³⁰ Al-Amin 2008.

³¹ C. Atkins, Warden, Maryland Correctional Institution—Jessup, “Prison Security and Compliance with Religious Land Use Institutionalized Persons Act and the Religious Freedom Restoration Act,” testimony before U.S. Commission on Civil Rights, Br. on Religious Discrimination and Prisoners’ Rights, Feb. 8. at 1.

³² G. Friedman, Chairman, Jewish Prisoner Services International, “Religious Discrimination in U.S. Prison and Jails,” testimony before U.S. Commission on Civil Rights, Br. On Religious Discrimination and Prisoners’ Rights, Feb. 8. at 1.

³³ *Id.* at 1.

³⁴ *Americans United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 862, (S.D. Iowa 2006), *aff’d in part and rev’d in part on other grounds*, 509 F.3d 406, 413-16, 424 (8th Cir. 2007); Luchenitser 2008 at 1, 4-6.

³⁵ *Id.* at 3-4; *Americans United*, 432 F. Supp.2d at 899, 900, 909-910; *Americans United*, 509 F.3d at 425.

³⁶ Friedman 2008 at 2.

³⁷ McCollum 2008, p. 3.

³⁸ Friedman 2008 at 2.

³⁹ McCollum, Rev. Patrick M. (2008). Director and Chair, National Correctional Chaplancy Directors Association and Statewide Wiccan Chaplain, California Department of Corrections, “Position Statement on Religious Discrimination in Prisons,” Testimony before U.S. Commission on Civil Rights, Br. On Religious Discrimination

particularly includes Muslim inmates but also extends to institutionalized persons of other faiths.⁴⁰

While other minority religious prisoners face considerable discrimination, the situation facing Muslim prisoners is both larger and more complex. This is due to their substantial percentage of the prison population, concerns about Islamic radicalization in prison, and particular animosities held towards members of the Muslim faith.⁴¹ During the 2001-2006 period, Muslims brought the greatest number of prisoners' religious discrimination claims under Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). During that period, Muslims brought 62 out of the 229 cases analyzed.⁴² This represents 27 percent of the cases, or roughly three times Muslims' share of the prison population.

Moreover, as a general rule, empirical research shows that Muslims are substantially less likely to prevail in religious freedom litigation than member of other religious groups.⁴³ This is especially true in prisoners' rights cases. This month, the IOWA LAW REVIEW is publishing new data which shows, based on a large sample of religious freedom cases from 1996-2005, a striking comparison of success rates for Muslims versus non-Muslims in both prison and non-prison cases, holding all other variables constant. This research shows that Muslims succeed before federal judges at a rate of 15.5% in prisoner cases and 17.9% in non-prison cases.⁴⁴ By contrast, non-Muslims succeed before federal judges at a rate of 44.8% in prison cases and 37.3% in non-

and Prisoners' Rights, Feb. 8., p. 1-2 ("While practices differ from state to state, I have found discrimination against non-traditional religions everywhere.")

⁴⁰ Al-Amin 2008 at 7.

⁴¹ For a general discussion of contemporary anti-Muslim attitudes, see Gottschalk, P., & Greenberg, G. ISLAMOPHOBIA (2008).

⁴² U.S. Commission on Civil Rights 2008.

⁴³ Gregory C. Sisk and Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231 (Nov. 2012).

⁴⁴ Id. at 237.

prison case.⁴⁵ Therefore, a Muslim prisoner raising a Free Exercise or Accommodation claim has only about a third the chance for success as a non-Muslim prisoner, while Muslims raising claims outside a prison context succeed at a rate that is roughly half that of non-Muslim claimants.⁴⁶

Homeland Security Justifications

In many cases, prison authorities have justified restrictions on Muslim prisoners as a necessary means of ensuring not only prison safety but also homeland security. Their argument is that Muslim religious services may be used as a means of fostering Islamic radicalization. Prison radicalization is a phenomenon that has been defined as “the process by which inmates ... adopt extreme views, including beliefs that violent measures need to be taken for political or religious purposes.”⁴⁷ It is a global phenomenon, encountered to a greater extent in Europe, the Middle East and Latin America than in the United States.⁴⁸ However, it is a particular source of concern the United States, with the world’s largest prison population and highest incarceration rates, and an enormous challenge in the prospect that radicalized prisoners could become terrorists as a result of their experiences under incarceration.⁴⁹ This concern has developed in response to numerous examples of terrorist incidents that were advanced in some measure by the

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ The George Washington University Homeland Security Policy Institute and the University of Virginia Critical Incident Analysis Group, 2004.

⁴⁸ F. J. Cilluffo, Director, Homeland Security Policy Institute, The George Washington University, testimony before U.S. Commission on Civil Rights, Br. on Religious Discrimination and Prisoners’ Rights, Feb. 8, 2008 pp. 3, 5.

⁴⁹ *Id.*, p. 2.

radicalization of certain prison inmates.⁵⁰ As Abu Musab al-Zarqawi has said, “prison makes our fight stronger.”⁵¹

This phenomenon takes many forms, but observers have expressed concern with two particular variations: the so-called “Jailhouse Islam,” which incorporate violent prison culture into religious practice using a “cut-and-paste” version of the Qur’an and “Prislam,” in which prisoners join Islamic gangs for protection and convert out of necessity (see Hamm’s Chapter for details).⁵² Prisons are fertile environments for radicalization, since inmates exhibit high-risk characteristics such as unemployment and alienation, as well as psychological factors such as high levels of personal distress, cultural disillusionment, lack of intrinsic beliefs or values, dysfunctional families and dependent personality tendencies,⁵³ exacerbated by overcrowding and prisoners’ need for protection,⁵⁴ in an inherently violent environment.⁵⁵

Ironically, anti-Muslim discrimination in American prisons may exacerbate the problem of prison radicalization. For example, the inadequate number of legitimate Muslim religious providers may create an opportunity for extremists to fill the role of religious service providers.⁵⁶ As Frank Cilluffo has observed, increasing the availability of legitimate Muslim religious

⁵⁰ See, e.g., The George Washington University Homeland Security Policy Institute and The University of Virginia Critical Incident Analysis Group, p. 3.

⁵¹ *Id.*, p. 1.

⁵² Cilluffo 2008 at 2.

⁵³ The George Washington University Homeland Security Policy Institute and The University of Virginia Critical Incident Analysis Group 2004, pp. 1, 4.

⁵⁴ Cilluffo 2008 at 1.

⁵⁵ The George Washington University Homeland Security Policy Institute and The University of Virginia Critical Incident Analysis Group, Special Report 2004, p. 4.

⁵⁶ Cilluffo 2008 at 4; The George Washington University Homeland Security Policy Institute and The University of Virginia Critical Incident Analysis Group 2004, p. 6.

services may decrease the opportunities for prison radicalization.⁵⁷ Similarly, religious faith and practice can help to ameliorate the problem.⁵⁸

Religious Land Use and Institutionalized Persons Act of 2000

RLUIPA was enacted in part to address religious discrimination in the prison system, but it has not fully lived up to its promise.⁵⁹ Five years after its passage, in the case of *Cutter v. Wilkinson*,⁶⁰ the United States Supreme Court unanimously upheld RLUIPA against constitutional challenge. Despite this legislation, Muslim prisoners continue to report countless examples of discrimination in facilities around the country.⁶¹ While these reports may vary in veracity, they paint a picture which should be reason for concern.

Ironically, while Congress directed the courts to apply the most stringent form of judicial scrutiny to these cases, the courts continue to reject most claims. One reason is that, despite RLUIPA and *Cutter v. Wilkinson*, many courts are applying a diluted form of the applicable legal standard. Indeed, the “war on terror” has justified increasing deference to prison administration to the detriment of incarcerated Muslims.

Against this backdrop, RLUIPA appeared to represent a remarkable change.⁶² In 2000, responding to RFRA’s partial invalidation, Congress held a number of hearings, over a three-year period, to gather facts about the extent of religious discrimination across the country.⁶³ For example, Congress heard that in one Ohio prison officials refused to provide Muslims with Hallal food, although they provided Kosher food to Jewish inmates and that Qur’ans and other

⁵⁷ Cilluffo 2008, p. 4.

⁵⁸ *Id.*, p.6.

⁵⁹ 42 U.S.C. §§ 2000cc *et seq.*

⁶⁰ 544 U.S. 709 (2005).

⁶¹ *See, e.g.*, Al-Amin.

⁶² Derek Gaubatz, *RLUIPA at Four*, 28 HARV. J.L. & PUB. POL’Y 504 (2005).

⁶³ *Cutter*, 544 U.S. 709, 716 n.5 (2005); *see, generally*, Gaubatz 2005, p. 510.

prayer books were frequently confiscated, damaged, or discarded.⁶⁴ In a joint statement, the bill's sponsors, Senators Edward Kennedy and Orrin Hatch, concluded that “[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.”⁶⁵

Congress passed RLUIPA to ensure that state and local prison inmates would provide the same stringent standard of review applied to federal prisoners under RFRA. Strikingly, both the Senate and the House of Representatives were unanimous in its passage.⁶⁶ RLUIPA prohibits federal and state agencies from undertaking actions that impose a “substantial burden” on the religious exercise of an incarcerated person, even if the burden results from a rule of general applicability, unless the government can demonstrate that imposition of the burden furthers a “compelling governmental interest” and is the “least restrictive means” of furthering that interest.⁶⁷ While RLUIPA does not define such terms as “compelling government interest” or “least restrictive means,” the legislation clearly intends to reinstate the strict scrutiny test that prevailed, at least in theory, between *Sherbert* and *O’Lone/Smith*.

The Supreme Court unanimously affirmed RLUIPA against an Establishment Clause challenge in *Cutter v. Wilkinson*.⁶⁸ In *Cutter*, Ohio prison inmates sued the state’s department of corrections for failing to accommodate their religious exercise of non-mainstream religions (*e.g.*, Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian).⁶⁹ Specifically, they alleged that prison officials retaliated and discriminated against them by denying them

⁶⁴ *Cutter*, 544 U.S. at 716 n.5.

⁶⁵ *Id.* at 716 (quoting 146 Cong. Rec. S7774, S7775) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA).

⁶⁶ See S.2869, Bill Summary and Status for 106th Congress (2000), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:SN02869:222L&summ2:m&.;> Gaubatz 2005, p. 504-505.

⁶⁷ 42 U.S.C. at § 2000cc-1(a).

⁶⁸ 544 U.S. 709 (2005).

⁶⁹ *Id.* at 712.

access to religious literature, denying them the same opportunities for group worship afforded to adherents of mainstream religions, forbidding them to adhere to religiously required codes of dress and conduct, withholding religious ceremonial objects, and failing to provide them with a chaplain trained in their faith.⁷⁰ In response, the prison officials contended that RLUIPA's institutionalized persons provision improperly advances religion in violation of the Establishment Clause.⁷¹

Justice Ruth Bader Ginsburg wrote the unanimous opinion for the Court, affirming RLUIPA against this challenge, but doing so in a way that may undermine the statute's effectiveness. The decision was initially received as a significant victory for religious freedom,⁷² but a closer look suggests that the victory was far from complete. While Justice Ginsburg reasoned that the statute alleviates "exceptional government-created burdens" on religious exercise,⁷³ she also emphasized, that the statute does not improperly elevate accommodation of religion over penal officers' interest in maintaining order and safety.⁷⁴ In particular, Ginsburg indicated that lawmakers were mindful of the urgency of prison security, and that they anticipated that courts would apply RLUIPA with "due deference" to the "experience and expertise" of prison administrators in establishing rules to maintain order, security and discipline, consistent with budgetary considerations.⁷⁵ For this reason, Ginsburg stated that while "prison

⁷⁰ *Id.* at 712-13.

⁷¹ *Id.* at 713.

⁷² Goldberg, p. 1404 (arguing that "[u]nder *Cutter*, religion has achieved a special status it has not enjoyed in years, and this result can only be explained by the Free Exercise Clause...religion has not only regained parity with free speech, it now receives greater protection in the prison setting.").

⁷³ *Id.* at 720.

⁷⁴ *Id.* at 722.

⁷⁵ *Id.* at 723 (quoting Joint Statement 775, in turn quoting S. Rep. No. 103-111 at 10).

security is a compelling state interest,” nevertheless “deference is due to institutional officials’ expertise in this area.”⁷⁶

There is an unavoidable tension between Justice Ginsburg’s affirmance of RLUIPA’s strict scrutiny test – which is by definition the opposite of deferential – and her insistence that the courts should nevertheless apply it in a deferential manner. By having it both ways, as it were, Ginsburg may appear to strike a moderate compromise, but the result is an incoherent legal doctrine. Courts are directed to apply the strict scrutiny but to do so in a manner which is inconsistent with the requirements of that standard. Ironically, Ginsburg explicitly relies on an earlier opinion which has been criticized on particularly that basis. Citing the Supreme Court’s earlier decision in the University of Michigan affirmative action litigation, Ginsburg explains that “context matters” in the application of strict scrutiny, by which she means that different degrees of deference are required depending on the circumstances.⁷⁷ In that case, Justice Sandra Day O’Connor’s opinion, applying the same test in a deferential manner to the use of race-preferential affirmative action in university admission, was strongly criticized for undermining the standard of review.⁷⁸

Moreover, in relying upon the deferential language of Senators Kennedy and Hatch, Justice Ginsburg tacitly incorporated the very language that had created problems for prison inmates under RFRA: “the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of

⁷⁶ Cutter, 544 U.S. at 725 n. 13.

⁷⁷ *Id.* at 723 (quoting *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

⁷⁸ *Grutter*, 539 U.S. at 374-75 (Kennedy, J., dissenting).

costs and limited resources.”⁷⁹ Unfortunately, it is precisely this same language that RLUIPA’s co-sponsors repeated in their joint statement and which Justice Ginsburg approvingly quoted. Furthermore, Ginsburg failed to cite the following sentence in both the RFRA Senate Committee Report and the RLUIPA joint statement: “At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act’s requirements.”⁸⁰

Although some courts now give prisoners’ religious freedom claims the “hard look” which RLUIPA and its strict scrutiny standard require, others do not.⁸¹ Despite the traditional requirements of strict scrutiny, some lower courts uphold substantial burdens on prisoners’ religious rights based on considerations of mere administrative convenience or budgetary considerations; accept cursory assertions by prison officials rather than requiring convincing demonstration; forgive the absence of serious consideration, or any consideration, of less restrictive means of achieving governmental objectives; refuse to make institutional comparisons to determine whether other facilities have been able to extend religious accommodations without suffering adverse consequences; and tolerate wide inconsistencies among the treatment of prisoners.⁸² At least one court has acknowledged this problem with surprising candor:

Some courts, in examining prison regulations under RFRA and RLUIPA, have softened the compelling interest test to allow speculative administrative judgments concerning security and cost to suffice to allow the regulation to survive strict scrutiny ...It is also an approach that is dangerous for the protection of the constitutional rights of individuals outside of prison. Watering down strict

⁷⁹ Senate Report 103-111 at 10 (1993); 146 *Cong. Rec.* S7775 (daily ed. July 27, 2000).

⁸⁰ *Id.*

⁸¹ J.D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053 (2009).

⁸² *See id.*, pp. 2080-2092, and cases cited therein.

scrutiny in a result-oriented manner in the prison context could subvert its rigor in other fields where it is applied.⁸³

Unfortunately, this has indeed been a consequence of the manner in which the Ginsburg opinion selectively incorporated the legislative record.

The Need for Change

In short, the *Cutter* court's strong reliance on legislative "deference" comments has undercut RLUIPA's facial insistence upon strict scrutiny, leading to weak, inconsistent opinions by the lower courts. Unfortunately, as long as the courts continue to apply diluted versions of the compelling interest standard, they will countenance improper, discriminatory conduct by prison officials. The degree of deference provided by many lower courts, with apparent congressional and Supreme Court approval, is inconsistent not only with the concept of strict scrutiny, but also with everything that we know about the conduct of prison officials in matters of religious free exercise. This failure to apply proper strict scrutiny standards amounts to a willful blindness by the courts to the documented discrimination which Muslim inmates and other incarcerated persons continue to face.

A decade after Congress unanimously passed RLUIPA, incarcerated persons still face the same challenge that motivated the bill's sponsor's to initiate the legislation. As Senators Orin Hatch and Ted Kennedy had jointly announced at the time: "[i]nstitutional residents' rights to practice their faith is at the mercy of those running the institutions."⁸⁴ The condition of Muslim prisoners is important, not only for obvious humanitarian reasons, but also because prisoners

⁸³ *Madison v. Riter*, 240 F. Supp. 2d 566, 578 n.10 (W.D. Va. 2003), *overruled on other grounds* 355 F.3d 310 (4th Cir. 2003).

⁸⁴ Joint Statement of Senators Hatch & Kennedy, 146 Cong. Rec. at S7775.

now represent more than one percent of the American population.⁸⁵ Moreover, when freedoms are denied incarcerated persons, they may soon be denied to others as well. In this sense, the increased deference afforded prison administrators under the war on terror has potential hidden civil liberties costs not only for incarcerated Muslims but also for the population at large.

Civil liberties aside, the failure of American courts and prison administrators to fulfill the promise of RLUIPA during the post-9/11 period may not be surprising, but it creates additional non-obvious risks for the general population. Ironically, the failure to accommodate mainstream Muslim religious practice in American prisons has negative ramifications for homeland security to the extent that it creates a vacuum within the prison system which radicals may then fill. In this sense, homeland security justifications for limiting Muslim religious practice tend to have the perverse effect of frustrating the very interests that they are intended to serve.

One way to effectively prevent anti-Muslim discrimination in American prisons is for courts to apply RLUIPA's liability standard as written, rather than by giving undue deference to prison officials in a manner that is inconsistent with the rigors of judicial strict scrutiny; for the Justice Department to aggressively enforce these cases; and for Congress to establish a process for administrative complaint resolution. Currently, processes exist for prisoners to raise complaints within their own prison systems and, if necessary, to seek Justice Department intervention. Given the rarity of Justice Department involvement, and the weakness of internal administrative reviews, Congress should provide for federal administrative review of prisoner complaints at federally assisted state and private prisons, just as such review is provided in the educational, health, employment and housing sectors.

⁸⁵ The Pew Center on the States, ONE IN 100: BEHIND BARS IN AMERICA 2008, *available at* <http://www.pewcenteronthestates.org/uploadedFiles/One520in520100.pdf>.

Anti-Muslim and Anti-Arab Stereotypes in Popular Culture

Although my testimony primarily addresses anti-Muslim discrimination, I would remiss if I did not say at least a word about a disturbing related issue, which I believe to be within the scope of this briefing: anti-Arab and anti-Muslim stereotypes in popular culture. This issue relates not to federal civil rights enforcement but to a form of bias which public officials might use their bully pulpit to address and to condemn. Since at least 1918, American movies have been ridden with negative images of Arab men and women.

As Jack Shaheen explains, “Despite the diversity of Arab and Muslim experience, reel Arab women have appeared mostly mute and submissive—belly dancers, bundles in black and beasts of burden. Arab men have fared no better, appearing as Bedouin bandits, sinister sheiks, comic buffoons and weapon-wielding terrorists.”⁸⁶ As a result, moviegoers tend to see Arabs primarily as oil producers or terrorists. In the Arab American community, this is sometimes called the “three B syndrome”: Arab Americans are portrayed in movies and television as either “bombers, belly dancers, or billionaires.”⁸⁷ Laila Lailami illustrates this point memorably in her “12-step guide to making a successful Arab-bashing movie,” which conveys a serious message beneath its tongue-in-check delivery:

Step 1: The villains must all have beards....

Step 2: They must all wear kaffiyehs, regardless of where they are from...Step 3:

Naturally, all the villains must speak broken English and be rude in their manner.

Step 4: They must all have easily recognizable names like Ali, Abdul or Mustapha.

⁸⁶ Jack Shaheen, *The Making of the ‘Green Menace’: From Reel Arab Bandits to Big-Screen Muslim Monsters: How the Media Have Stoked the Hate*, THE NATION (July 2/9, 2012).

⁸⁷ Mazin B. Qumsiyeh, *100 Years of Anti-Arab and Anti-Muslim Stereotyping*, THE PRISM (Jan. 1998), http://www.ibiblio.org/prism/jan98/anti_arab.html.

Step 5: They should all smoke....

Step 6: Find a reason for them to have or steal nuclear weapons....

Step 7: Have them threaten to blow something up. Great care must be used in the threat scene. The danger must be clear and immediate.... In all cases, you must make it clear that the motive has to do with holy war.

Step 8: Have a prayer scene....

Step 9: If your movie is set in a plane, do not worry because you can still have the protagonists pray in the aisles.

Step 10: Never, ever cast a woman as part of the group. But if you must, she should be entirely veiled in black; preferably, she should be mistreated by other Arabs....

Step 11: It is most useful to have the villains scream "Die, infidels" before the final confrontation.

Step 12: When all previous steps are completed, have your hero kick some Middle Eastern butt. Everyone will cheer and go home happy, and you can sit back and watch the money roll in.⁸⁸

While Dr. Lailami's style is satirical, it conveys the extent to which anti-Arab and anti-Muslim stereotypes have become ingrained in Hollywood moviemaking conventions. Moreover, these stereotypes must be viewed in the context of the continuing discrimination and hate which is directed at Arab and Muslim Americans.

Arabs and Muslims are not, of course, the only groups that are portrayed negatively in movies or elsewhere in popular culture. However, the frequency and severity of these adverse

⁸⁸ Laila Lailami, *Arab-Bashing for Fun and Profit*, L.A. Times (July 28, 1997), <http://articles.latimes.com/1997/jul/28/entertainment/ca-16983>.

stereotypes have reached the point where it may be salutary to remind both producers and audiences of the need for more realistic and balanced portrayals. Public officials should use the bully pulpit to remind popular culture's producers and consumers of the variety of Arab and Muslim experience in the United States, as well as the hurtfulness and hollowness of the way in which these groups are often portrayed. Needless to say, governmental officials should not censor private speech in any manner cognizable to the First Amendment, nor to intimidate those who choose to misuse their constitutional rights in these ways. However, there is much room for public officials to address pernicious stereotypes without encroaching upon protected expression.

Discrimination Against Perceived Muslims

It is impossible to conduct a comprehensive review of post-9/11 discrimination or government engagement without considering the challenges facing the Sikh community. Last year, the Commission heard considerable testimony concerning anti-Sikh bullying and harassment in the public schools. The Commission's BULLYING report describes some of these serious incidents. The volume and severity of post-9/11 anti-Sikh discrimination provides yet another reason why the government must address school house religious harassment.⁸⁹ Sikhs are subject to abuse in other venues as well, such as airports in particular.⁹⁰

In many cases, Sikhs apparently are targeted based on a misperception that they are Arabs or Muslims. In others, they may be persecuted based on their Sikh identity. A 2006 Harvard University survey of Sikh Americans revealed that 83 percent of respondents either

⁸⁹ See, generally, THE SIKH COALITION, ET AL., BIAS-BASED HARASSMENT IN NEW YORK CITY PUBLIC SCHOOLS: A REPORT CARD ON THE DEPARTMENT OF EDUCATION'S IMPLEMENTATION OF CHANCELLOR'S REGULATION A-832 <http://www.sikhcoalition.org/documents/pdf/Bias-based-Harassment-in-NYC-Public-Schools.pdf> (2009).

⁹⁰ For other examples of post-9/11 discrimination against Sikhs in various contexts, see DAWINDER S. SIDHU AND NEHA SINGH GOHIL, CIVIL RIGHTS IN WARTIME: THE POST-9/11 SIKH EXPERIENCE (2009).

personally experienced or knew someone who experienced a hate crime or incident on account of their religion. In light of the volume and severity of these incidents, federal post-9/11 outreach, policy and enforcement should always include Sikhs to the same extent as other groups.

Moreover, and equally importantly, federal statistics programs should include Sikhs (and also Arabs) as a separate category, in order to track and better understand the volume of these incidents. Two major national Sikh organizations (the Sikh American Legal Defense and Education Fund and the Sikh Coalition) have recently made this request:

We believe that the practice of enumerating vulnerable religious groups on the Hate Crime Incident Report (Form 1-699) makes it more likely that hate crime victims in such groups will report hate crimes to law enforcement agencies. We also believe that enumerating vulnerable religious groups on Form 1-699 strengthens efforts by law enforcement agencies to identify, learn about, foster partnerships with, and accurately prosecute hate crimes on behalf of the affected communities. These hypotheses are underscored by social research in the school bullying context, which suggests that enumerated anti-bullying policies are more effectively enforced than those which lack enumerated categories. By analogy, we believe that adding an Anti-Sikh category to Form 1-699 will enhance partnerships between law enforcement agencies and Sikh communities nationwide and increase hate crime reporting by Sikhs.

The FBI has the capacity to take a nuanced and granular approach to hate crime data collection. Nowhere is this more apparent than the agency's documentation of hate crimes against the LGBT community. Although it could be argued that hate crimes against bisexuals presumptively result from "anti-gay" bias and should be documented accordingly, the FBI—apparently on its own volition—has created a distinct category for crimes motivated by bias toward bisexuals on Form 1-699 and rightfully adopted a thorough approach to data collection about anti-LGBT hate crimes. We request the same for the Sikh community.⁹¹

⁹¹ Letter of Sikh American Legal Defense and Education Fund (SALDEF) and The Sikh Coalition to The Honorable Thomas E. Perez, Assistant Attorney General Civil Rights Division, U.S. Department of Justice, dated September 28, 2012, Re: Tracking Hate Crimes Against Sikhs in the United States, p. 2.

In light of these powerful arguments, SALDEF and the Sikh Coalition have made the following two reasonable recommendations, *inter alia*, which the Civil Rights Commission should considering joining:

1. We request that the FBI create a distinct category for Anti-Sikh hate crimes on Form 1-699 for crimes motivated by bias toward Sikhs, as evidenced, for example, by epithets about the Sikh religion or articles of faith, or intentional targeting of Sikh places of worship or articles of faith.

2. We recommend that the FBI use the Anti-Multiple Religions, Group category on Form 1-699 to document crimes against Sikhs that would not have occurred but for the victim's conspicuous Sikh identity, but which are also marked by the presence of anti-Muslim bias. Under this approach, it is critically important that such entries be supplemented with disaggregated, published information about the bias motivations underlying each crime in the FBI's periodic hate crime statistics reports. As alternatives, the FBI can record such crimes by marking two categories—a new Anti-Sikh category and the existing Anti-Islamic (Muslim) category—or by creating a distinct Anti-Muslim (Sikh Victim) category. For data collection requiring this level of nuance, we believe that the FBI should have the flexibility to develop a workable solution, and we are committed to partnering with the FBI to ensure that the best solution is implemented.⁹²

These are very reasonable suggestions, and the Commission could play a very helpful role in advancing them.

Conclusion and Recommendations

Anti-Muslim and anti-Arab discrimination are a serious post-9/11 problem in the United States, and they warrant serious attention by federal civil rights authorities. The extent of the problem may not be as great as some had feared a decade ago, due in part to federal initiatives, but it certainly deserves focused efforts at elimination. In the schools, federal authorities will not be able to ensure effective protection of Muslim student rights absent legislation to prohibit religious harassment in federally assisted educational programs and activities. In the prisons,

⁹² Id. at pp. 2-3.

federal authorities should seek a more vigorous application of RLIUPA, in keeping with the plain language of that statute. Congress should create a federal administrative complaint-resolution system for prisoners' religious (and other civil rights) complaints comparable to what exists in other federally assisted institutions. Public officials should also speak out against pernicious stereotypes of Arabs and Muslims in popular culture. Finally, other religious minority groups, such as Sikhs, face similar post-9/11 hate and bias based at least partly on incorrect perception of Arab or Muslim status. Sikhs should be afforded the same protections, as well as the same outreach and engagement, as Arabs and Muslims. For example, federal statistics programs should track and monitor anti-Sikh discrimination to the same extent as it tracks discrimination against other groups.