WALKING WHILE MUSLIM

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> So, first of all, let me assert my firm belief that the only thing we have to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance.[1]
>
> The only thing we have is fear.[2]

I
INTRODUCTION

In the post-9/11 era, what exactly is meant by race? Race is composed significantly of a religious dimension that has not been critically isolated, analyzed or discussed. Islamic religious difference has been racialized in the context of the war on terror, just as religious differences contributed to the consolidation of Japanese American racial difference during World War II. Yet

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This essay builds on a previous project, Margaret Chon and Eric Yamamoto, *Resurrecting Korematsu: Post-September 11th National Security Curtailment of Civil Liberties* (July 2003), *at* http://www1.law.ucla.edu/~kang/racerightsreparation/Update__Ch__8/chon_yamamoto_race_rights_ch8.pdf (on file with Law & Contemporary Problems) [hereinafter *Resurrecting Korematsu*]. This essay is dedicated to the memory of Professor Chon's paternal grandparents, Chon Chang Dae and Oh Song Ok.

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1. Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), *at* http://www.yale.edu/lawweb/avalon/presiden/inaug/froos1.htm (on file with Law & Contemporary Problems.).

2. Mike Peters, *The Only Thing We Have Is Fear*, *at* http://cartoonistgroup.com/cards/view.php?id=b03e9a16ac5464e1223f2781ae5e856f (last visited Jan. 4, 2005) (emphasis original) (on file with Law & Contemporary Problems).

the existing architecture of domestic and international anti-discrimination law has avoided recognizing racial discrimination based on religious group difference. Domestic and international law simultaneously creates and obscures current "Muslim" racial identity. The most overt and publicly debated of law's methods in this regard is so-called racial profiling. Equally critical, however, is the incompleteness of legal remedies available to those targeted by religiously driven racial discrimination. Thus by both its commissions and omissions, law is implicated in this process of religioning race.

Legitimate reasons might exist for the relative indifference of the law to group claims of racial discrimination based on religious affiliation. Moreover, alternative means might be available for expressing religion-based harm, such as the Free Exercise Clause of the First Amendment. Nonetheless, religious identity is strikingly absent from the discourse of group-based rights claims. This is not to imply that a religious solution to the war on terror is necessary, but rather that religion should be closely examined as an analytical category in the law and policy of counter-terrorism.

Following the lead of those who argue that the true legacy of the Japanese American reparations movement lies less in its symbolism as a civil rights victory for a particular group than in its potentially ameliorative impact on other oppressed groups,[3] this essay explores the linkages between the differently situated social justice claims of Japanese Americans and Muslim Americans. In the internment cases, religious difference was one aspect of Japanese American racial difference constructed by law. The government's brief filed in the U.S. Supreme Court in *Hirabayashi v. United States*, for example, relied heavily on a cultural explanation of race, arguing in regard to the "Japanese Problem on the West Coast"[4] that a "factor to be taken into account in considering the viewpoints and loyalties of the West Coast Japanese is the existence and nature of Shintoism."[5] The Court accepted the overall

3. Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT'L L. & POL'Y 223, 223-24 (1992) ("[A] reparations law's salient meanings lie not in the achievement of payments and apologies to a particular group or in symbolic constitutional victories, but in the commitment of recipients and others to build upon the reparations process' inter-group linkages and political insights to contribute to a broad-based institutional and attitudinal restructuring."); *cf.* Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 19 B.C. THIRD WORLD L.J. 385 (1998); Mari J. Matsuda, *Looking to the Bottom Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"*, 8 ASIAN L.J. 1 (2001); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998-1999).

4. Brief for the United States, Hirabayashi v. United States, 320 U.S. 81 (1943), *in* 40 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 297 (Phillip B. Kurland & Gerhard Casper eds., 1975) [hereinafter Brief for the United States]; *see also* Lorraine K. Bannai and Dale Minami, *Internment During World War II and Litigations*, *in* ASIAN AMERICANS AND THE SUPREME COURT 755 (Hyung-Chan Kim ed., 1992) (critiquing the Supreme Court's acceptance of these cultural facts as a misuse of the doctrine of judicial notice).

5. Brief for the United States, *supra* note 4, at 303-04. Moreover, according to the government's logic, "[o]n the West Coast, a substantial number of Japanese were Buddhists, and it has been stated

premise that cultural differences justified the government's differential treatment what today is called profiling—of Japanese Americans because a propensity to espionage and sabotage can be inferred from those differences.[6]

In the 1940s, cultural, including religious, differences buttressed what is now widely agreed to be a race-based classification. Indeed, *Hirabayashi* and, subsequently, *Korematsu v. United States*,[7] are viewed as turning points in the Supreme Court's jurisprudence on equal protection, enunciating for the first time a potentially more searching judicial scrutiny of government classifications based on race.[8] The cases can also be seen as a pivotal point in the departure from court-endorsed scientific racism to more nuanced and purportedly less racist *cultural* explanations of racial difference. This judicial turn mirrored the progressive trends of anthropology and other social sciences of the day.[9] Nonetheless, the Court endorsed cultural explanations of race to defend the use of profiling. In these wartime cases, the Court folded religious difference into an inherent group willingness to engage in enemy activities. Thus these cases illustrate that culture-based explanations can construct not only benign or community-building group difference,[10] but also a difference based on the presumptive innate and inherited inferiority of a group—the crux of racism. One of the lessons of the internment is that more current cultural views of race are not a panacea to scientific racism.

Today there is widespread if sometimes tacit agreement that the category "Muslim" is a significant component of the war on terror. There is much more confusion and far less agreement on whether this category is a discriminatory proxy for racial difference or an incidental correlation to more acceptable governmental classifications. The historical parallel to the Japanese American experience raises legitimate concerns about exactly how the term "Muslim" is now being construed.

"Walking While Muslim" is an obvious play on the term popularized in the context of African-American racial profiling, "Driving While Black." Like the earlier term, the title suggests that certain people are being targeted for no

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that some of the Buddhist priests in the West Coast communities also attempted to indoctrinate their congregations with Japanese nationalism." *Id.* at 306.

6. Hirabayashi, 320 U.S. at 98-99. Thus, Justice Stone mentions the racially discriminatory naturalization laws as preventing Japanese "assimilation as an integral part of the white population" as well as the "large numbers of children of Japanese parentage [who] are sent to Japanese language schools outside the regular hours of public schools in the locality" as supporting the government's view that "these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions." *Id.* at 96-98.

7. 323 U.S. 214 (1944),

8. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection." Hirabayashi, 320 U.S. at 100.

9. Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, J. AM. HIST. 44 (1996).

10. Neil Gotanda, *A Critique of Our "Constitution is Colorblind*," 44 STAN. L. REV. 1 (1991) (explaining culture-race as a benign type of racial difference).

legitimate purpose—indeed, for reasons that according to U.S. civil rights and international human rights doctrines are questionable at best and illegal at worst. The word "walking" is implicitly contrasted with "praying" because the focus is on Muslim group identity and not on individual freedom to engage in ritualistic practices.

A new, more descriptively accurate term—terror-profiling—is introduced here. In addition, new remedies are suggested to counteract the abuses associated with terror-profiling. Specific domestic and international laws can and should be developed into more robust anti-discrimination tools. Domestically, under the U.S. equal protection doctrine, insights from the Japanese American internment can be applied to the current war on terror and should indicate a heightened standard of judicial review of claims of religious discrimination. After all, Justice Stone's famous footnote in *United States v. Carolene Products*, which is the embarkation point for "more exacting judicial scrutiny," mentions "religious" minorities in the same breath as racial minorities.[11] In the international arena, these same insights illustrate the need for an international treaty—or, at the very least, widespread national legislation based on human rights principles—to be applied to religious discrimination in the same way codification of such principles has already been applied to gender or race discrimination.

On the most abstract level, the goal of this essay is to deconstruct the terrorist "other" by critically examining religion as an element of race. Currently, the law's simultaneous presence and absence in the domain of religion contribute to the social construction of an inferior racial category, resulting in discrimination proscribed by public rhetoric but tolerated and even extended through key omissions in the structures of legal doctrine and theory.

II

FINDING RELIGION

Religion exists both in the cultural sense as well as the ritual sense. It is about a community of like-minded people who identify with each other in ways other than what they are doing when they are praying. Religion is an aspect, sometimes a defining aspect, of culture. However, it is different from other forms of culture because religious adherents believe that their system of beliefs has a divine origin: they believe God decided what the rules are, and these rules are more fixed than fluid.[12]

In the U.S., the law of religious freedom has been compartmentalized into a narrow First Amendment box. Relatively few cases have explored religious

11. U.S. v. Carolene Products Co., 304 U.S. 144 (1938) at 153 n.4 ("Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities."). Thanks to Michael Rooke-Ley for this insight.

12. This observation about "divine origin" may not be as descriptive of such belief systems as Buddhism as it is of Christianity and Islam; however, the latter two religious traditions are the main focus of this essay.

tolerance via the intersection of the First and Fourteenth Amendments.[13] But the category of religion is unruly, addressing more than just faith and ritual.[14] Rather than being confined neatly into a private sphere within a public-private dichotomy demanded by U.S. constitutional law, religion spills over into all aspects of civil life and, acknowledged or not, constitutes a critical component of the war on terror. Moreover, law actually affects the shape of religion just as it shapes other cultural aspects of human social organization. Religion and law are mutually constitutive components of culture.[15]

Even a single religion such as Islam or Christianity is composed of a diversity of perspectives.[16] Thus, any analysis is subject to all the usual postmodern caveats about representation, essentialism, and so on. Nonetheless—and at the risk of oversimplifying—Islam is different from present-day Christianity because its ritual practices tend to be more overtly integrated with daily life compared to the mainstream Protestant Christian denominations as practiced in the U.S.[17] This difference was also arguably true of the non-Christian Japanese American religious beliefs at the time Pearl

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13. *See* text accompanying notes 166 to 183 *infra.*

14. Madhavi Sunder, *Piercing the Veil*, 113 YALE L.J. 1399 (2003) (using feminist struggles in Muslim countries to contrast the "New Sovereignty" in which law is used to protect against challenges to cultural and religious authority, with the "New Enlightenment" in which individuals demand more reason and choice within their religious communities).

15. Religion, like race, is a category through which political power is deployed. Thus, in a majority Christian country such as the U.S., the dominant religious groups might exercise political power through the deployment of religious symbolism and activity, notwithstanding the supposed separation of church and state. We are indebted to Russell Powell for this important insight.

16. *See, e.g.*, Khaled Abou El Fadl, *9/11 and the Muslim Transformation*, *in* SEPTEMBER 11 IN HISTORY 70-111 (Mary L. Dudziak ed., 2003); *see also* Abdullahi Ahmed An-Na'im, *Islamic Fundamentalism and Social Change: Neither the "End of History" Nor a "Clash of Civilization," in* THE FREEDOM TO DO GOD'S WILL: RELIGIOUS FUNDAMENTALISM AND SOCIAL CHANGE 25 (Gerrie ter Haar & James J. Busuttil eds., 2002) (commenting that Islam is subject to the same social movements as other institutions and consequently may be practiced differently in different contexts).

17. While both the Catholic and Orthodox traditions have a daily liturgical tradition that is extremely important to some adherents, the percentage of those who attend daily mass and/or participate in liturgy of the hours is fairly small, at least in the U.S. and Western Europe. The relationship of formal ritual practice to the degree of religiosity is not at issue; rather, there tends to be a greater integration of religious ritual with aspects of non-religious life in Islamic countries, especially those governed by Islamic law. Moreover, the Muslim classical ideal arguably conflates religious categories and our modern view of political categories. That is, to be Muslim is ideally is to live in a state in which the political system operates according to Koranic principles, where religion and government are inseparable. We are indebted to Chris Hart, Anton Harris and Russell Powell for these observations. These differences between Christianity and Islam are particularly highlighted in modern political states governed by Islamic law. By contrast, the First Amendment's establishment clause has created in the U.S. a more formal separation between church and state. However,

> although the ritual aspects of [I]slam are more visible on a daily basis (for example, praying 5 times a day), [C]hristian ritual seems to pervade [U].[S]. culture, even as it goes unnamed as such: saying grace, [P]ledge of [A]llegiance, daily [B]ible reading (very common on the [D.C.] buses and metro), [B]ible study groups (not uncommon among DOJ lawyers these days), even groups like [A]lcoholics [A]nonymous.

E-mail from Muneer Ahmad, Associate Professor of Law, American University Washington College of Law, to Margaret Chon, Professor, Seattle University School of Law (Jan. 11, 2005, 9:55A.M.) (on file with Law & Contemporary Problems).

Harbor was attacked.[18] But regardless of the specific differences between majority and minority religions, minority religious affiliation can lead to group discrimination, particularly when the cultural distinctiveness of the minority religion is perceived as threatening to the majority.

In the overall framework for articulating anti-discrimination claims based on religion, two areas in particular merit attention: international human rights law and domestic civil rights laws viewed through the lens of critical race theory. Interestingly, despite their obvious nexus to the civil liberties and civil rights concerns expressed in the context of the war on terror, these two areas have failed to address or to account fully for the religious dimension in discrimination.

A. Domestic Civil Rights

1. Racial Formation

Critical race theorists consider race to be socially constructed. Sociologists Michael Omi and Howard Winant define racial formation "as the sociohistorical process by which racial categories are created, inhabited, transformed and destroyed."[19] An Asian "race" within America was formed, for example, by legal phenomena such as immigration, naturalization, and citizenship laws, as well as legally sanctioned economic discrimination. Law constituted and continues to construct Asian American group difference. The internment of Japanese Americans during World War II is a prime example of the legal construction of racial difference.[20]

Race is not only about phenotypic characteristics such as skin color or epicanthic folds, but also about how social meanings are organized around these phenotypic differences. In other words, physical difference per se is less important than the social significance attributed to the physical difference, which leads in turn to racial difference. The formation process is both internal and external to the group it defines. For example, during World War II, many Japanese Americans resisted their formation into an inferior racial group.[21]

The above definition of race suggests that the meanings about race change in response to social and political forces, including law. Indeed, new racial categories develop, and existing racial classifications shift over time. For instance, Arabs in America have been classified variously as Black, Asian, and,

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18. Gary Y. Okihiro, *Religion and Resistance in America's Concentration Camps*, 45 PHYLON 220, 225 (1984).

19. MICHAEL OMI AND HOWARD, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 55 (2d ed. 1994).

20. For a fuller account of this racial formation process, see YAMAMOTO ET AL. *supra* note *, at 31-90.

21. *See id.* at 95-176; *see also* ERIC MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II (2001); CONSCIENCE AND THE CONSTITUTION (Frank Abe ed., 2000).

currently, White.[22] In addition to the official government racial classifications, other understandings circulate concerning the racial identity of Arabs.[23] In the post-9/11 context, religion is one obvious factor.

Several legal commentators have noted the emerging formation of the figure of the terrorist as a racially different "other" other than the dominant White racial group,[24] Indeed, as Susan Akram and Kevin Johnson have argued, this new category of terrorist is a "complex matrix of 'otherness' based on race, national origin, religion, culture, and political ideology[, which] may contribute to the ferocity of the U.S. government's attacks on the civil rights of Arabs and Muslims."[25] Recently, U.S. foreign policy has involved wars against Middle Eastern and Central Asian countries with predominantly Muslim populations.[26] Additionally, the attack on U.S. soil on 9/11 was undeniably led by the terrorist group al-Qaeda, which associates itself with Islam.[27] As with any social construction of a racial category, Arabs and Muslims are formed not only in response to external pressures but also from within the group, as a matter of internal self-identification or differentiation.[28]

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22. Helen Hatab Samhan, *Not Quite White: Race Classification and the Arab American Experience*, *at* http://www.aaiusa.org/not_quite_white.htm (April 4, 1997) (presented at a symposium on Arab Americans by the Center for Contemporary Arab Studies, Georgetown University) (on file with Law & Contemp. Probs.). Ultimately, Arab can only be used as a linguistic category rather than representing phenotypic similarity. The cultural, ethnic and phenotypic diversity among Arabs is illustrated by comparing Yemenis to North Africans to Syrians. However, the Arabic written form is common across all Arab cultures. We are indebted to Russell Powell for this observation.

23. International law might characterize Arabs as a "national, religious or linguistic minority." *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Annex, Agenda Item 97, Supp. No. 49, at 4, U.N. Doc. A/Res/47/135 (1993).

24. As Professor Saito wrote prior to 9/11:

> Arab Americans and Muslims have been "raced" as "terrorists": foreign, disloyal, and imminently threatening. Although Arabs trace their roots to the Middle East and claim many different religious backgrounds, and Muslims come from all over the world and adhere to Islam, these distinctions are blurred and negative images about either Arabs or Muslims are often attributed to both. As Ibrahim Hooper of the Council on American-Islamic Relations notes, "The common stereotypes are that we're all Arabs, we're all violent and we're all conducting a holy war."

Saito, *supra* note 3, at 12.

25. Susan Akram and Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 299 (2002); *see generally* Nabeel Abraham, *Anti-Arab Racism and Violence in the United States*, *in* THE DEVELOPMENT OF ARAB-AMERICAN IDENTITY 155 (Ernest McCarus ed., 1994).

26. *See generally* Akram and Johnson, *supra* note 25.

27. Although many Muslims would consider the actions of al-Qaeda to be inconsistent with Islamic religious teachings, al-Qaeda could be described as Islamist, a term that has gained some currency to describe political movements that claim (whether legitimately or not) Islamic inspiration and aspiration. We are indebted to Muneer Ahmad for this observation. *See* Janet Tassel, *Militant About Islam*, HARV. MAG. (Jan.-Feb. 2005), *at* http://www.harvardmagazine.com/on-line/010540.html (on file with Law & Contemporary Problems).

28. Sunita Patel, *Performative Aspects of Race: "Arab, Muslim, and South Asian" Racial Formation After September 11*, 10 UCLA ASIAN PAC. AM. L.J. (forthcoming 2005) (manuscript on file with Law & Contemporary Problems);Yvonne Yazbeck Haddad, *Maintaining the Faith of the Fathers: Dilemmas of Religious Identity in Christian and Muslim Arab-American Communities*, *in* THE DEVELOPMENT OF ARAB-AMERICAN IDENTITY *supra* note 25, at 79-80; *see also* Peter Monoghan, *Defining the "Arab*

Indeed, because of the foreignness imputed to Arabs and Muslims in the U.S., there is a strong analogy between the racial formation of Asian Americans and that of Arab and Muslim Americans.[29] However, there are some important differences between the Japanese American experience during World War II and today's events. First, during World War II, Japanese Americans were viewed generally as ethnically distinct from other Asian groups, unlike today's indiscriminate conflation of Arab and Muslim Americans with non-Muslims of Middle Eastern descent, with non-Muslim South Asians such as Sikhs, or even generally with other people of color.[30] There is also widespread misunderstanding about the overlap between Arabs and Muslims, who are often lumped together but are fundamentally different identity groups. For example, the majority of Arabs in the U.S. are Christian, and Arabs constitute a minority of Muslims worldwide.[31] Partly due to these confusions, the current targeted group includes Latinos and Latinas, African Americans, Asian Americans, Native Americans, and even European Americans.[32] This current group is much more disaggregated across different national origins, dispersed across the geographic U.S., and more diverse ethnically than Japanese Americans were prior to World War II. The one common denominator across

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American": Critics Say A New Survey Blocks Community Input, CHRON. HIGHER EDUC., May 30, 2003, at A14 (discussing a Detroit-area survey about Arab Americans and the associated difficulty of finding a representative sample of Arab Americans).

29. The similarity is so apparent that more than a few Asian American scholars have explored it. As Professor Leti Volpp writes in reference to Edward Said's seminal work: "We are witnessing the redeployment of old Orientalist tropes. . . [in which] the West is defined as modern, democratic, and progressive, through the East['s] being defined as primitive, barbaric, and despotic." Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1586 (June 2002); *see also* Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 32-46 (2002-2003) (comparing the prosecution of Wen Ho Lee to the racial formation of Arabs and Muslims). *See generally After Words: Who Speaks on War, Justice and Peace?* 27-28 AMERASIA J. (2001/2002) (special issue of Asian American studies journal devoted to post-9/11 impact on communities of color).

30. At the time of the Pearl Harbor attack, the U.S. had a significant Chinese population, and "anti-Oriental" racism had been expressed against both Chinese and Japanese immigrants. However, after Pearl Harbor, the Chinese in the U.S. were generally distinguished from the Japanese. This may be due to the war against Japan's having been against a specific nation-state and ethnic group, which was the common enemy of the U.S. and China. By contrast, the war on terror is more diffuse and targeted toward no specific nation-state. Free-floating notions of Arab "ethnicity" and Muslim religious identity abound.

> The "Arab" is racialized as a terrorist, but the "Arab" racial category is sometimes conflated with the "Muslim" religious category, even though most Arabs in America are not Muslim and most of the world's Muslims are not Arabs. Further complicating matters is the fact that racialized suspicion and even violence extends to persons who are neither Muslim nor Arab but are believed to "look" like Arabs.

Joo, *supra* note 29, at 33-34. Professor Muneer Ahmad has labeled this phenomenon "The Construction of Muslim-Looking People and the 'Logic' of Fungibility," and argues that the category of "Muslim-looking" has racial content. Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1278 (2004) [hereinafter *A Rage Shared by Law*].

31. *100 Questions and Answer About Arab Americans: A Journalist's Guide*, DETROIT FREE PRESS, *at* http://www.freep.com/jobspage/arabs/index.htm (last visited Jan. 4, 2005) (on file with Law & Contemporary Problems).

32. *See* text accompanying notes 142-49 *infra*.

this heterogeneity, however, is that the members of the group are linked, mistakenly or not by physical or other cues such as surnames or dress—either to Islam as it is practiced here in the U.S. or to countries of origin with substantial Muslim populations such as Indonesia, Pakistan, the Philippines or, more commonly in the popular imagination, countries of the Middle East.[33]

Second, although two-thirds of the Japanese Americans interned were citizens, it is fair to say that many of the Arabs and Muslims being targeted by government action so far are non-citizens.[34] Immigration laws, with their relatively limp procedural due process protections, were the basis for law enforcement sweeps immediately after 9/11 and the subsequent registration, detention and deportation procedures such as the National Security Entry-Exit Registration System (NSEERS).[35] The final regulation, issued in August 2002, required all male non-citizens over the age of sixteen from twenty-five countries to report to the local Immigration and Naturalization Service (INS)[36] office for registration and fingerprinting.[37] Most of these countries are majority Muslim.

It is difficult to get exact numbers on Muslim non-citizens because the U.S. Census Bureau is forbidden from collecting data on religion.[38] Estimates of the

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33. Ishmael Reed, *Civil Rights: Six Experts Weigh In*, TIME, December 7, 2001, *available at* http://www.time.com/time/nation/article/0,8599,186589,00.html (on file with Law & Contemporary Problems).

> Within two weeks after the WTC and Pentagon bombings, my youngest daughter, Tennessee, was called a dirty Arab, twice. An elderly white woman made such a scene on a San Francisco bus that my daughter got off. She was wearing a scarf that I bought her in Egypt last year, but on the other occasion there was nothing distinctive about her clothing. Some of the post-9-11 profiling would be comic and ironic if the circumstances weren't so tragic. Marvin X, an African American playwright, has been criticizing some Arab American owners of ghetto stores for selling pork, alcohol, drugs and extending credit to poor women in exchange for sexual favors. A few days after the terrorist attack, he was surrounded by men with guns at Newark airport. They mistook him for an Arab terrorist.

Id.

34. David Cole has documented extensively how immigration laws have been used historically to violate the associational freedoms of non-citizens. *See, e.g.*, DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003); David Cole, *Secrecy, Guilty by Association, and the Terrorist Profile*, 15 J.L. & RELIGION 267 (2000-2001).

35. *Resurrecting Korematsu*, *supra* note *, at 33-34; *see also* text accompanying notes 131to 153 *infra*.

36. Now the United States Citizenship and Immigration Services or USCIS.

37. LAWYERS COMMITTEE FOR HUMAN RIGHTS, A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11 22-23 (September 2002), *at* http://www.humanrightsfirst.org/pubs/descriptions/loss_report.pdf (on file with Law & Contemporary Problems); *see also* Department of Homeland Security Fact Sheet (Changes to National Security Entry/Exit Registration System (NSEERS) (December 1, 2003), *at* http://www.dhs.gov/dhspublic/display?theme=43&content=3020 (on file with Law & Contemporary Problems).

> The domestic registration program included citizens or nationals from Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Libya, Lebanon, Morocco, North Korea, Oman, Pakistan, Qatar, Somalia, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. However, to date, individuals from more than 150 countries have been registered in the NSEERS program.

Id.

38. 13 USC § 221(c) (2004) ("[N]otwithstanding any other provision of this title, no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious

U.S. Muslim population range from one to seven million, depending on the source. As Table 1 indicates, the best current estimate is six to seven million.[39] At least 1.2 million people of Arab ancestry reside in the United States as of the 2000 Census.[40] Three-fifths of people of Arab ancestry in the U.S. are of Lebanese, Egyptian or Syrian ancestry, and the vast majority traces their ancestry to countries geographically located in the Middle East.[41] Another recent study estimates that seventy-three percent of Middle Eastern immigrants to the U.S. are Muslim;[42] suggesting perhaps that the most recent Arab immigrants, who are more likely to be Muslim than the earlier arrivals, who were predominantly Christian, are being targeted by government action. At least one estimate is that thirty-six percent of Muslims in the U.S. are citizens by birth.[43] However, this figure is from a study that weighted the percentage of survey respondents to include twenty percent African Americans and, consequently, may over-estimate birthright citizenship of those from the Middle East.[44]

In any event, while exact ratios of citizens to non-citizens being targeted by government action are not easily available, the relevant legal framework is often immigration law, which overrides due process rights with the plenary power doctrine.[45] By contrast, the profiling of the Japanese American community during World War II occurred in large part through the deprivation of the rights of citizens, who are presumably entitled to the full panoply of due process protections.

The vastly different numbers and kinds of people affected by racial formation in the post-9/11 era, compared to the internment, has ramifications respecting the social costs and benefits of profiling.[46] However, the crux of the argument here is that religion is a major constitutive component of race now,

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body."); *see Religion*, *at* http://www.census.gov/prod/www/religion.htm (last modified Oct. 1, 2004) (on file with Law & Contemporary Problems).

39. *See* Table 1, *infra* at p. 254

40. *Id.* The Electronic Privacy Information Center discovered through a Freedom of Information Act request that the U.S. Census Bureau shared information with Department of Homeland Security on Arab Americans. *See Freedom of Information Documents on the Census: Department of Homeland Security Obtained Data on Arab Americans from Census Bureau*, *at* http://www.epic.org/privacy/census/foia/default.html (last modified Sept. 17, 2004) (on file with Law & Contemporary Problems).

41. Table 1, *infra* at p. 244.

42. Steven A. Camarota, Center for Immigration Studies Backgrounder, *Immigrants from the Middle East: A Profile of the Foreign-Born Population from Pakistan to Morocco*, (August 2002), *at* http://www.cis.org/articles/2002/back902.html (on file with Law & Contemporary Problems).

43. Zogby International, *The American Muslim Poll* (December 2001), *at* http://www.projectmaps.com/ PMReport.htm (conducted for Project Maps) (on file with Law & Contemporary Problems).

44. *Id.*

45. *See, e.g.*, *Resurrecting Korematsu*, *supra* note *, at 19-48; Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427 (2002).

46. *See* Part III, *infra*.

different in degree but not in kind to the religious dimension of racial formation preceding and during the internment.

2. Religion and Race

In the context of the Japanese American internment, religion was one of several factors that constructed Japanese American racial difference. Stated recently from an Asian American perspective, "[b]efore World War II, Buddhists were clearly more marginalized than [Japanese American] Protestants. They were seen by the larger society as 'foreign' and more closely tied to Japan. Moreover, Buddhism was often confused with state Shintoism that was used by the Japanese government to instill nationalism in its citizens during the 1930s."[47] Despite the general suspicion surrounding Buddhist temples, "[i]n reality, the FBI had only unsupported notions that Buddhist priests were more 'pro-Japan' than other members of the Japanese-American community. Nevertheless, the FBI classified priests as 'known dangerous Group A suspects,' along with members of the Japanese consulate, fishermen, and influential businessmen."[48] Thus the first round of government arrests and detentions of individuals included Buddhist priests.[49]

Ample evidence of demonizing difference based on religion can also be found in legal documents of the day. As noted earlier, the government's *Hirabayashi* brief emphasized religious difference, particularly state Shintoism. Its concern over religious difference was tied to educational choices, such as education at Japanese language schools in the U.S. or schools in Japan. The government's position reflected the general "common sense" of the time.[50] These widely shared views, established as "fact"[51] in the *Hirabayashi* opinion, were then advanced *sub rosa* in the subsequent *Korematsu* case.[52] By then the government could also rely on the so-called "Final Report" issued by the

47. Stephen S. Fugita and Marilyn Fernandez, *Religion and Japanese American Views of Their Incarceration*, 5 J. ASIAN AM. STUD. 113, 116 (2002). Because of its nationalistic and militaristic strands, state Shintoism in the 1940s was not only culturally different but also politically threatening to non-Japanese. This resembles the way in which Islamic beliefs are frequently viewed today as bordering on religious zealotry against non-Muslims.

48. Duncan Ry ken Williams, *Camp Dharma: Japanese-American Buddhist Identity and the Internment Experience of World War II*, *in* WESTWARD DHARMA: BUDDHISM BEYOND ASIA 191, 192 (Charles S. Prebish and Martin Baumann eds., 2002).

49. *Id.* at 191 (citing PETER IRONS, JUSTICE AT WAR 22 (1993)).

50. Earl Warren, in his capacity of Attorney General of California at the time, claimed that the U.S.-born Japanese sent to Japan for education "received their religious instruction which ties up their religion with their Emperor, and they come back here imbued with the ideas and the policies of imperial Japan." DAVID L. FAIGMAN, LABORATORY OF JUSTICE: THE SUPREME COURT'S 200-YEAR STRUGGLE TO INTEGRATE SCIENCE AND THE LAW 133 (2004) (quoting Earl Warren's testimony before U.S. Congress, Hearings Before the Select Committee Investigating National Defense Migration, 77th Congress, 2d Session (1942)). One sees traces of this line of thinking in the *Hirabayashi* majority opinion, in which Justice Stone, while not mentioning religion, refers to the education of Japanese children in Japanese language schools as evidence of unassimilability.

51. Bannai & Minami, *supra* note 4; Nanette Dembitz, *Racial Discrimination and Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175, 185 (1945).

52. Dembitz, *supra* note 51, at 189.

Western Defense Command, which advanced the views that the Japanese in America were "a tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion."[53]

The power of these legal arguments constructing racial difference is also demonstrated by the unsuccessful efforts to rebut the inference of racial from religious difference by *amici* such as the Japanese American Citizens League.[54] In its *amicus* brief the Northern California branch of the American Civil Liberties Union even drew an analogy to the treatment of Jews and Catholics in the U.S.[55]

This much is clear from the historical record: Perceived religious difference contributed to racial formation of the Japanese Americans, justifying the differential treatment by the executive and legislative branches of government, and endorsed by the Supreme Court.[56] The *Hirabayashi* Court accepted such evidence as General DeWitt's testimony before the Senate, which pointed blame for the racial disloyalty at "propaganda disseminated by Japanese consuls, Buddhist priests and other leaders, among U.S.-born children of Japanese."[57] Although the *Korematsu* majority opinions are silent on the role of religion, Justice Murphy noted in his dissent that "[i]ndividuals of Japanese ancestry are condemned because they are said to be 'a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.'"[58] Religion was one marker of racial difference, so much so that it could be advanced without loss of credibility or face in legal rhetoric by elite lawyers and judges. It was not only culturally different but also politically threatening.

A similar differentiating process is at work today. Islamic beliefs are frequently viewed as religious zealotry directed against the secular or Christian West. One example of this is the term

53. FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST vii (1942).

54. Brief Amicus Curia, Hirabayashi v. United States, 320 U.S. 81 (1943), *in* LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, *supra* note 4, at 473-77.

55. "Racial characteristics have long been advanced as arguments against the assimilation of the Jews here . . . . Too frequently one hears the familiar lie that Jews are not assimilated in America as though the Nazi falsehood re-echoed from our own hills. The familiar statement that Catholics are not absorbed because of a spiritual link with Rome is also too frequently heard." Brief for Northern California Branch of the American Civil Liberties Union, Amicus Curiae, Hirabayashi v. United States, 320 U.S. 81 (1943), *in* LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, *supra* note 4, at 588-89.

56. The Supreme Court's rhetoric in these cases set up a false dichotomy between racism and military necessity, rather than an understanding that racism could be alloyed with military necessity. We are indebted to Jerry Kang for this insight. He further explores the "passive virtues" of the Court that enabled the judicial acquiescence to the racism manifest in the actions of the other two branches of government in Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933 (2003-2004).

57. Hirabayashi, 320 U.S. at 91; *see also* YAMAMOTO, ET AL., *supra* note *, at 123 (providing a full catalog of the evidence that the Court specifically mentions).

58. Korematsu, 323 U.S. at 238.

> jihad, which has gained much notoriety especially since 9/11. Jihad is a core principle in Islamic theology; it means to strive, to apply oneself, to struggle, and to persevere. Jihad, in the most straightforward sense, connotes a strong spiritual and material work ethic in Islam. . . . Importantly, the Qur'an does not use the word 'jihad' to refer to warfare or fighting; such acts are referred to as *qital*.[59]

Despite the layered meanings of jihad, it has entered into the common U.S. lexicon with a strong primary connotation of violent aggression against non-Muslims.[60]

Nonetheless, arguably Shintoism or Buddhism per se did not tip the balance into making the Japanese into a racial other. Rather, religious difference was one of several factors although perhaps not *the* dispositive factor that contributed to that particular instantiation of racial formation.[61] Can the same be said of the enemy in the war on terror?

3. Religioning Race

In critical race theory scholarship, religion is typically not discussed as an essential aspect of racial formation.[62] This omission might be due to the dominant black-white paradigm in which the racial minority group, African American, is typically part of the religious majority. Alternatively, the absence

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59. El Fadl, *supra* note 16, at 101-02; *see also* Abdulaziz A. Sachedina, *The Development of Jihad in Islamic Revelation and History*, in CROSS, CRESCENT, AND SWORD: THE JUSTIFICATION AND LIMITATION OF WAR IN WESTERNAND ISLAMIC TRADITION 6-38 (James Turner Johnson & John Kelsay eds., 1990) (discussing the development of the term "jihad" by Islamic jurists). Sa'id Hawa, of the Muslim Brotherhood movement of Syria, identifies five varieties of jihad from sources in the Qur'an and the sayings of Mohammed: jihad through language; jihad through learning; jihad through body and mind; political jihad; and financial jihad. Ibrahim Malik, *Jihad—Its Development and Relevance*, 2 PALESTINE-ISRAEL J. 32, 33 (Spring 1994). *See generally*, EDWARD SAID, COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD (1981).

60. *See, e.g.,* Diana West, *Military on the Mall,* WASH. TIMES, Jan. 21, 2005, at A21.

> Invariably, it is Islam and the murderous, expansionist ideology of jihad that drives that extreme fringe you read about to the point of unspeakable violence. And by the way, that's some fringe; according to Daniel Pipes' famous estimate, it includes 10 percent of the Muslim world—100 million-plus people.

Id; see also Michael Isikoff and Mark Hosenball, *Terror Watch: With Friends Like These*, NEWSWEEK, March 26, 2003 (referring to web-sites that "openly advocated violence, jihad and suicide bombings against the United States"); George Galster, *What Anti-War Activist Must Do Now*, DETROIT NEWS, March 26, 2003, at 11A ("America cannot achieve security from massive armed interventions in places that harbor or support terrorists. . . . [T]he radical mullahs will have no trouble recruiting for a jihad against the 'Great Satan.'").

61. *Cf.* FAIGMAN, *supra* note 50, at 133 (asserting that a principal reason advanced for Japanese-American unassimilability, according to "American strategists . . . was a religious one").

62. Some critical scholars have addressed the role of Catholicism in constructing a Latina and Latino other. Arguably, Catholicism is a subset of Christianity and deployed differently than a non-Christian religion such as Islam in the racial formation process. *See, e.g.*, José Roberto Juárez, Jr., *Hispanics, Catholicism, and the Legal Academy*, *in* CHRISTIAN PERSPECTIVES IN LEGAL THOUGHT 163 (Michael W. McConnell et al. eds., 2001); Laura Padilla, *Latinas and Religions: Subordination or State of Grace*, 33 U.C. DAVIS L. REV. 973 (2000); Reynardo Anaya Valencia, *On Being an "Out" Catholic: Contextualizing the Role of Religion at LatCrit II*, 19 CHICANO-LATINO L. REV. 449 (1998). *But see*, Devon Carbado, *Race to the Bottom*, 49 UCLA. L. REV. 1283 (2001-2002) (suggesting that gender and sexual orientation are critical analytical categories for racial formation analysis, but omitting religion).

of analysis might be due to the general secular orientation of critical theory, a sense that progressive politics are incommensurable with religious faith. Perhaps there is a fundamental paradigm conflict: It may seem at first glance hard to square religion, which in some faith traditions emphasizes divine origin, with race theory, which builds on the insights of social constructionism. In any event, other than the ascription of negative characteristics (for example, a propensity to violence, as well as the label "Muslim" to someone who looks physically different)—critical race theorists have not clarified how religion whether stylized, essentialized, or stereotyped contributes to the racial formation of the terrorist other.

As many critical race theorists have pointed out, race is a malleable and flexible concept, formed by social and political processes. At the same time, racial formation is the hardening of a combination of attributes into an ascribed "immutability," whether or not the attribute is in fact immutable. Furthermore, racism is the ascription of concomitant inferiority to those attributes. Thus, cultural explanations of racial difference can function in much the same way as pseudo-scientific explanations in constructing racial hierarchy.

Post-9/11 Islamic identity is a prime example of this. Like most aspects of culture, it is connected to ancestry in that family and community often influence or direct children's religious choices. Religion is not "immutable" in the way we understand skin color to be. Religious affiliation or identity is always a matter of choice. Yet, especially through the war on terror, Islam is acquiring characteristics of immutability, innateness, inevitable inheritability and, importantly, inferiority. In other words, religious difference is being "racialized." This is similar to the process that occurred after Pearl Harbor respecting the Japanese-American population: the difference is one of degree, not kind.

The key to understanding this is the recognition of power dynamics. As stated earlier, the enduring quality of racism is not phenotype so much as the creation and maintenance of power structures in which the phenotype is subordinated to other superior phenotypes. Legal initiatives enact these racial hierarchies, both symbolically and materially. Describing NSEERS, the post-9/11 government immigration initiative that disproportionately targets young men from countries with majority Muslim populations, Moustafa Bayoumi claims that "through its legal procedures, [it] in fact creates a race out of a religion."[63] He analogizes the process of racial formation around Islam in the war against terror to the blood laws of the Spanish Inquisition:

> Thus [George] Fredrickson, rightly I believe, finds racism and not religious division driving the Spanish inquisition's purity of blood laws. "Anti-Judaism became

63. Moustafa Bayoumi, *Racing Religion* at 7 (unpublished paper on file with Law & Contemporary Problems). As the Islamic reactions to President George W. Bush's reference to a "crusade" illustrate, the Spanish Inquisition and the Crusades are embedded in the pan-Islamic psyche as historical experiences of oppression that have yet to be addressed with reconciliation or admission of wrongdoing.

> antisemitism," Fredrickson explains, "whenever it turned into a consuming hatred that made getting rid of Jews seem preferable to trying to convert them, and anti-Semitism became racism when the belief took hold that Jews were intrinsically and organically evil rather than merely having false beliefs and wrong dispositions." . . . Jews and Muslims in medieval Spain were both collectively marked out as dangerous and excludable because of a belief in their innate and hereditary natures.[64]

That religion is one of several attributes of race, including non-religious physical markers of difference such as skin or hair color, should not distract us from the point that religion can be a *determinative* element in the construction of an inferior racial category. Religion's relation to the other constitutive attributes of this racial category, such as phenotype or national origin, is synergistic. But without focusing on religion alone, at least momentarily, the import of profiling in the context of post-9/11 cannot be fully understood. If racial formation creates an inferior racial group, and if a significant part of its racial difference is composed of religious difference, then profiling is also an attack on that religious group.

Religioning race has major doctrinal ramifications. Given the long tradition of religious freedom within the U.S. through the Establishment and Free Exercise clauses, this theoretical insight should trigger civil liberties responses based on the First Amendment. Alternatively, given the relatively shorter tradition of civil rights enforcement with respect to group-based claims such as claims brought by racial minorities, one would expect heightened doctrinal development around equal protection claims brought under the Fourteenth Amendment. However, domestic anti-discrimination doctrine mirrors the silence in theory. There has been remarkably little doctrinal discourse on the religious element of profiling.

Before this absence is explored more fully,[65] it is instructive to survey the international framework for religion-based anti-discrimination claims; multicultural societies in Western Europe and elsewhere outside the U.S. are also having difficulty in recognizing the religioning of race.[66]

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64. *Id.* at 9-10 (citing GEORGE FREDRICKSON, RACISM: A SHORT HISTORY 170 (2002)); *see also* Hirabayashi, 320 U.S. at 111 (Justice Murphy's dissent noting the "melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and other parts of Europe.")

65. *See* Part III, *infra.*

66. For instance, France's new ban on conspicuous religious symbols in public schools, enforced by disciplinary hearings and expulsions of students, does not apply to the priestly garb of state-funded Catholic chaplains. Elaine Sciolino, *France Turns to Tough Policy on Students' Religious Garb*, N.Y. TIMES, Oct. 22, 2004, at A3. The Netherlands is rethinking its attitudes toward diversity and the toleration of intolerant minorities since the murder of filmmaker Theo van Gogh on November 2, 2004. *See* Bruce Bawer, *The World: Perspective/Security vs. Freedom; Tolerant Dutch Wrestle With Tolerating Intolerance*, N.Y. TIMES, Nov. 14, 2004. However, approaches to these issues diverge on this side of the Atlantic. *See, e.g.*, Pew Forum on Religion and Public Life, *God and Foreign Policy: The Religious Divide Between the U.S. and Europe* (July 10, 2003), *at* http://pewforum.org/events/index.php?EventID=49 (on file with Law & Contemporary Problems).

B. International Human Rights

International law, particularly international human rights law, is relevant to the question of screening and profiling of suspected terrorists for a number of reasons. Generally, international law, which is incorporated into U.S. law,[67] is always applicable to government regulation of the trans-border movement of persons, especially when the regulation purports to address the problem of international terrorism.[68] More specifically, international human rights law guarantees freedom of religion and the rights of religious minorities;[69] promotes the elimination of religious intolerance and discrimination;[70] and provides rules and criteria for imposing limitations on the right to practice religion and for derogating from certain rights though never the right to freedom of religion in times of a public emergency threatening the life of the nation.[71]

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67. The Paquette Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law."); United States v. Ravara, 2 U.S. (2 Dall) 297, 297 n* (1793) ("[The] law of nations is part of the law of the United States"). *See generally* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 3-66 (2d ed. 2003).

68. Almost twenty separate international and regional conventions (treaties) have been adopted that address the problem of terrorism. *See United Nations Treaty Collection: Conventions on Terrorism*, *at* http://untreaty.un.org/English/Terrorism.asp (last modified Oct. 20, 2003) (on file with Law & Contemporary Problems). The United States has ratified at least twelve of these. *International Terrorism Conventions*, *at* http://www.state.gov/documents/organization/31570.pdf (on file with Law & Contemporary Problems); *see also* Joan Fitzpatrick, American Society of International Law Task Force on Terrorism, *Terrorism and Migration* (October 2002), *at* http://www.asil.org/taskforce/fitzpatr.pdf (on file with Law & Contemporary Problems).

69. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Annex, Supp. No. 16, at 52, U.N. Doc. A/6316 (1996), 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter *ICCPR*]. Article 18 begins, "[e]veryone shall have the right to freedom of thought, conscience and religion[,]" while Article 27 reads, "[i]n those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." *Id.* at 55-56; *see also Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, *supra* note 23. *See generally* NATAN LERNER, RELIGION, BELIEFS, AND INTERNATIONAL HUMAN RIGHTS (2000); BAHIYYIH G. TAHZIB, FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION (1996).

70. *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/Res/36/55 (1981) [hereinafter *Declaration on Religious Intolerance*]. Article 13(1) of the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Annex, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (1967) (entered into force January 3, 1976), states that one purpose of education is to "promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups." *Id.* at 51. Moreover, Articles 2(1) and 26 of the *ICCPR* include religion in their non-discrimination coverage. ICCPR, *supra* note 69, at 53, 55-56. The *Convention on the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260A, U.N. GAOR, 3d Sess., at 174, U.N. Doc. A/810 (1948), 78 U.N.T.S. 277 (open for signature Dec. 9, 1948 and entered into force Jan. 12, 1951), protects "national, ethnical, racial or religious" groups from, *inter alia*, "[d]irect and public incitement to commit genocide." *Id.* at 174-75 (Articles 2 and 3(c)). The incitement provision was implemented in U.S. law at 18 U.S.C. §1091 (2004). *See also* Abdelfattah Amor, *Civil and Political Rights, Including Religious Intolerance*, U.N. ESCOR, 56th Sess., U.N. Doc. E/CN.4/2003/66 (2003) (in accordance with Commission on Human Rights resolution 2002/40). Amor is the UN Special Rapporteur on freedom of religion or belief.

71. The Covenant permits no limitations on freedom of religious belief or the rights of religious minorities. By contrast, freedom to manifest one's religion or beliefs (through conduct such as prayer) "may be subject only to such limitations as are prescribed by law and are necessary to protect public

Indeed, the very origins of international law are closely intertwined with religious conflicts and their resolution.[72] Moreover, the Nazi persecution of the Jews was the catalyst for the human rights revolution that began in the late 1940s, while persecution of religious minorities remains one of the contemporary world's most persistent problems, from "ethnic cleansing" of Bosnian Muslims by Christian Serbs and Croats, to China's oppression of the Falun Gong, to slave-raids on the Christian and animist peoples of Southern Sudan.[73]

Nonetheless, international human rights law has been much less of a guardian of religion than one might expect. Unlike racial and gender discrimination or the rights of children, no binding treaty is dedicated to eliminating religious discrimination or to protecting religious minorities. No international enforcement body not even one as toothless as a United Nations standing committee is dedicated solely to upholding religious freedom. Only non-binding "soft law,"[74] in the form of two General Assembly declarations,

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safety, order, health, or morals or the fundamental rights and freedoms of others." *ICCPR*, *supra* note 69, at 54. The limitation of national security is pointedly absent from that provision. Contrast *ICCPR* Article 18 with Article 12(3), which includes national security along with public order, health or morals. *Id.* Significantly, Article 18 is one of the articles from which no derogation is ever permitted, even in time of public emergency. *Id*., at 18. *See General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights*, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993). By contrast, the *European Convention on Human Rights and Fundamental Freedoms*, E.T.S. No. 5, Rome, 4.XI (1950), does allow derogations in time of war or other public emergency to the right to freedom of religion.

72. The intellectual "founder" of international law, Hugo Grotius, "relied heavily on Old and New Testament citations to demonstrate a universal law of nations in his monumental 17th century text, *The Law of War and Peace*, usually seen as the first book on international law." Mark Weston Janis, *Religion and International Law*, ASIL INSIGHTS (Nov. 2002), *at* http://www.asil.org/insights/insigh93.htm (on file with Law & Contemporary Problems). The first modern treaty is considered to be 1648's Peace of Westphalia, which ended the Thirty Years War between Protestants and Catholics by guaranteeing the rights of religious minorities of one in the territory of the other. *See generally*, RELIGION AND INTERNATIONAL LAW (Mark W. Janis & Carolyn Evans eds., 1999). Michael Perry argues that "the idea of human rights" is "ineliminably religious." MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 11-41 (1998).

73. "The Jewish victims of the Holocaust were clearly contemplated by the drafters of the Refugee Convention when they included religion as one of the five grounds for protection in the Convention. Religious persecution and the importance of protection from it has not become an anachronism in the half-century following World War II. To the contrary, although the contours and context of religious persecution have changed since World War II, its persistence as a contemporary reality has not." KAREN MUSALO, CLAIMS FOR PROTECTION BASED ON RELIGION OR BELIEF: ANALYSIS AND PROPOSED CONCLUSIONS 2 (Department of International Protection, United Nations High Commissioner for Refugees, Dec. 2002). For information relating to Bosnia, China and Sudan, see, e.g., U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, THE INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2001 (2002).

74. "Soft law" consists of non-binding instruments adopted by international organizations in the form of declarations, resolutions, and codes of conduct, as well as by states, in the form of final acts at global summits, such as the Helsinki Accords, the Final Act of the Conference on Security and Cooperation in Europe held in Helsinki in 1975, or the Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women in 1995. It is often noted that though non-binding, soft law can be widely adhered to, perhaps due to its characteristically reduced precision in defining norms. It may eventually "harden" into binding international law. *See* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah

promotes the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,[75] adopted in 1981, and the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,[76] adopted in 1992. The absence of a "Convention on the Elimination of Religious Discrimination," with a committee to implement and monitor compliance with it, is glaring, especially given that the International Convention on the Elimination of All Forms of Racial Discrimination,[77] the Convention on the Elimination of All Forms of Discrimination Against Women,[78] and the Convention on the Rights of the Child,[79] were each preceded by similarly titled declarations.[80]

Robert Drinan, S.J., critical of the UN's failure to provide mechanisms to protect and enforce religious freedom, charges that "[t]he abdication, or at least the silence, of international law on the subject of religious freedom allows nations to feel certain that they will not be punished for doing dreadful things to persons who practice a religious faith of which the government disapproves."[81] Furthermore, "[t]he feeling is somehow pervasive that government organizations—or even a transnational legal body—should not get involved in

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Shelton ed., 2003); INTERNATIONAL COMPLIANCE WITH NON-BINDING ACCORDS (Edith Brown Weis ed., 1997); Hartmut Hillgenberg, *A Fresh Look at Soft Law,* 10 EUR. J. INT'L. L. 499 (1999).

75. *Declaration on Religious Intolerance*, *supra* note 70.

76. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, supra* note 23. The preamble notes that the Declaration was inspired by Article 27 of the *ICCPR*. *Id.* at 1.

77. *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106 U.N. GAOR, 20th Sess., Annex, Supp. No. 14, at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter *CERD*]. Although religion is mentioned in the first paragraph of *CERD*'s preamble in the context of the purposes of the United Nations ("to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion"), significantly, the definition of racial discrimination in Article 1 of the Convention omits religion as a protected aspect of that category ("race, colour, descent, or national or ethnic origin"). *Id.* at 47.

78. *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Annex, Supp. No. 46, at 193, U.N. Doc. A/34/46 (entered into force Sept. 3, 1981) [hereinafter *CEDAW*]. *CEDAW* does not contain the word "religion" even once, despite its extensive provisions on marriage, procreation, familial roles, child upbringing, and so forth. *Id.* Nevertheless, numerous Middle Eastern countries have entered reservations that purport to negate the Convention's obligations when they conflict with the Shari'a. *See* Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women,* 30 VA. J. INT'L L. 643 (1989-1990).

79. *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Annex, Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990). Article 14 guarantees the "right of the child to freedom of thought, conscience and religion." *Id.* at 168.

80. *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 1904, U.N. GAOR, 18th Sess., at 35, U.N. Doc. A/Res/1904(XVIII) (1967) (entered into force Jan. 4, 1969); *Declaration on the Elimination of Discrimination against Women*, G.A. Res. 2263, U.N. GAOR, 22nd Sess., at 35, U.N. Doc. A/Res/2263(XXII) (1967); *Declaration of the Rights of the Child*, G.A. Res. 1386, U.N. GAOR, 14th Sess., at 19, U.N. Doc. A/Res/1386(XIV) (1959).

81. ROBERT F. DRINAN, S.J., CAN GOD AND CAESAR COEXIST? BALANCING RELIGIOUS FREEDOM AND INTERNATIONAL LAW 13 (2004). Drinan notes that the Committee on Human Rights, which monitors violations of the *ICCPR*, has jurisdiction over religious freedom, but its "treatment of complaints about infringement of religious freedom guaranteed under the ICCPR has not exactly been generous. . . . No overwhelming victories for religious freedom have occurred" there. *Id*. at 36, 37.

the religious practices of 84 percent of the human race."[82] Searching for an explanation for why religion has been forsaken by the very body that was created to forestall another Holocaust, Drinan vaguely attributes its failure to the "uncertainty,"[83] "volatility,"[84] and "complexity" [85] of religious questions. Others have noted that religious discrimination and persecution arise from "questions of politics and power, relations between States, social and cultural factors, economics and even ancient history."[86] One historical factor Drinan alludes to is the assumption that with the demise of the atheist superpower, the Soviet Union, the threat to world religious freedom had subsided.[87] When the Cold War was in full force, the USSR could not have been expected to go along with any codification of religious rights.[88] Yet, with the end of the Cold War, should there not have been common cause for adoption of a binding convention on religious freedom? However, as so many have pointed out, the Cold War was quickly replaced by wars of a religious nature. Not surprisingly, UN law lags behind world reality.[89]

One might expect the European Court of Human Rights (ECHR), which is commonly regarded as part of the "most advanced and effective" of the international human rights enforcement systems,[90] to have a better track record

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82. *Id.* at 6.

83. *Id.* at 3.

84. *Id.* at 42

85. *Id*. at 13.

86. Musalo, *supra* note 73, at 3-4, (quoting the U.N. Special Rapporteur on Religious Intolerance in *Racial Discrimination and Religious Discrimination: Identification and Measures*, U.N. Doc. A/CONF.189/PC.1/7, para. 123 (Apr. 13, 2000). An earlier Special Rapporteur is in accord. Elizabeth Odio Benito, *Study of the Current Dimensions of the Problems of Intolerance and Discrimination Based on Religion or Belief*, U.N. Doc. E/CN.4/Sub2/1987/26, para. 163 (Aug 31, 1986).

87. DRINAN, *supra* note 81, at 31, 66-67.

88. Indeed, although persecution on account of religion is one of the five grounds for gaining refugee status under the 1951 Convention Relating to the Status of Refugees, that treaty's *travaux preparatoires* do not include any actual discussion of religion. Musalo, *supra* note 73, at 5 (citing NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION: A COMMENTARY 65 (1953)). UN bodies in those days may have been leery of "offending" the USSR by discussing religion. Due to the temporal and geographical restrictions in the Refugee Convention, victims of Soviet religious persecution were not then entitled to international protection.

89. There may also be some practical reasons for a shortage of international concern about religious liberty. Perhaps a significant number of human rights advocates in the most influential NGOs, at least those in the West, are secular and therefore indifferent to religion, or suspicious of it, if not downright hostile. Drinan writes: "Somewhere beneath the ambivalence or quiet hostility to religion in the minds of millions of people is the desire, even the hope, that international law will more and more privatize religion and preclude it from any active role in international affairs. Many international law experts share this hope; they tend to think that the elements of international order and the advancement of human rights will be better off without the influence or voice of religion." DRINAN, *supra* note 81, at 42. Just as likely, the academic, activist, and UN diplomatic communities may be reluctant to be seen as bestowing legitimacy on Israel for its legislatively sanctioned preferences for immigrants who are Jewish. *See* DRINAN, *supra*, at 201-03.

90. THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS 84 (1988). The ECHR system originally included a Commission of Human Rights, which gave preliminary consideration to complaints until it was phased out in 1998.

than the U.N. in the protection of religious rights.[91] While the ECHR has been operating since 1959, it was not until 1993 that it first found a government in violation of the right to freedom of conscience for convicting a Jehovah's Witness of illegal proselytizing.[92] Even that decision was so narrowly decided that one observer continued to fear that "rights of conscience are, at best, only tenuously protected" in the European rights system.[93] "The European court has too often treated rights of conscience as an awkward inconvenience to be tolerated rather than as a matter of fundamental importance"[94] by failing to require governments to impose less restrictive burdens on manifestations of religion, in deferring to state-established religions, and in allowing biases against nontraditional religions.[95] For instance, without considering the possibility of accommodation, a public school in the United Kingdom was allowed to deny a Muslim teacher a forty-five minute lunch break on Fridays to attend prayers.[96] Recently, foreshadowing how it might decide a case involving France's controversial new ban on wearing "conspicuous religion symbols" in public schools, the ECHR upheld Turkey's prohibition on the *hijab* the Islamic headscarf in universities. The Court concluded that the prohibition protected the paramount principles of secularism and equality and was necessary to maintain public order.[97]

The nature of international human rights, as well as that of religion, suggests two conceptual reasons for the "religion deficit" at the UN, in the ECHR, and throughout international law. First, human rights law grew out of a philosophical and political attachment to libertarian individualism,[98] and despite some contemporary jurisprudence on group rights, the traditional vision of human rights remains skeptical that group rights are either rationally coherent

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91. The ECHR enforces the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 71. Religious rights are guaranteed "either alone or in community with others." *Id*. at 9. (Article 9(1) guarantees freedom of thought, conscience and religion). *See also id*. at 10 (Article 14 prohibits discrimination); *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, E.T.S. No. 9, Paris, 20.III (1952) (open for signature 2 March 1952 and entered into force 18 May 1954) (Article 2 discusses religious education of children).

92. Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 18 (1993). *See* T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 305 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

93. Gunn, *supra* note 92, at 306.

94. *Id*. at 307-08.

95. *Id.* at 325.

96. Ahmad v. United Kingdom, App. No. 8160/78, 4 Eur. H.R. Rep. 126 (1981)(Eur. Comm'n).

97. Sahin v. Turkey, App. No. 44774/98 (Eur. Ct. H.R. June 29, 2004) *at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=5&portal=hbkm&action=html&highlight=Sahin%20%7C%20v.%20%7C%20Turkey&sessionid=520565&skin=hudoc-en (on file with Law & Contemporary Problems).

98. *See, e.g*., DAVID KELLEY, A LIFE OF ONE'S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE 1 *et seq.* (1998), *excerpted in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 257 (Henry J. Steiner & Philip Alston eds., 2000) [hereinafter STEINER & ALSTON]; HERSH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 61 *et seq.* (1950), *excerpted in* STEINER & ALSTON, *supra*, at 147; *see also* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 23-27, 112-14 (2d ed. 2003).

or practically effective.[99] Religion, however, is predominantly exercised in a community of adherents who, generally, identify with each other. Moreover, while individualism grants to each person the right and the will to make her own autonomous choices, religious persons believe that their conduct is mandated and dictated by its divine origin, if not the community's moral code itself.[100] Religion embraces a "confessional community," which "defines the group of individuals who embrace and live out [the religion's] creed, cult and code of conduct, both on their own and with fellow believers."[101]

A second reason reflects the tension between cultural relativism and universalism which has preoccupied the human rights movement for over two decades. As the authors of a leading human rights textbook explain:

> Put simply, the partisans of universality claim that universal human rights like rights to equal protection, physical security, free speech, freedom of religion and free association are and must be the same everywhere. . . . Advocates of cultural relativism claim that . . . rights and rules about morality are encoded in and thus depend on cultural context. . . . Hence notions of right (and wrong) and moral rules based on them necessarily differ throughout the world because the cultures in which they take root and inhere themselves differ.[102]

This debate raises a dilemma for international human rights law, particularly regarding the issue of gender equality. On the one hand, as noted above, religious human rights are protected by international law, which strives to treat all religions fairly and equivalently. On the other hand, some, if not most, religions are non-egalitarian regarding women and religious minorities.[103]

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99. *See* DONNELLY, *supra* note 98, at 204-08. *But see* GROUP RIGHTS (Judith Baker ed., 1994); INTERNATIONAL HUMAN RIGHTS IN THE 21ST CENTURY: PROTECTING THE RIGHTS OF GROUPS (Gene M. Lyons & James Mayall eds., 2003).

100. *See, e.g.*, CATHOLICISM AND LIBERALISM: CONTRIBUTIONS TO AMERICAN PUBLIC PHILOSOPHY (R. Bruce Douglass, David Hollenbach, eds., 1994); DAVID HOLLENBACH, CLAIMS IN CONFLICT : RETRIEVING AND RENEWING THE CATHOLIC HUMAN RIGHTS TRADITION (1979); WILLIAM A. LESSA & EVON Z. VOGT, READER IN COMPARATIVE RELIGION: AN ANTHROPOLOGICAL APPROACH (4th ed. 1979).

101. JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 230 (2000).

102. Henry J. Steiner & Philip Alston, *Comment on the Universalist-Relativist Debate*, *in* STEINER & ALSTON, *supra* note 98, at 366. They go on to comment: "But the strong relativist position goes beyond arguing that there is—as a matter of fact, empirically—an impressive diversity. It attaches an important consequence to this diversity: that no transcendent or transcultural ideas of right can be found or agreed on, and hence that no culture or state (whether or not in the guise of enforcing international human rights) is justified in attempting to impose on other cultures or states what must be understood to be ideas associated particularly with it. In this strong form, cultural relativism necessarily contradicts a basic premise of the human rights movement." *Id.* at 367; *see also* DONNELLY, *supra* note 98, at 89-92. For an example of the critique of human rights from a religious perspective, that of Hinduism, see Raimundo Panniker, *Is the Nation of Human Rights a Western Concept?* 120 DIOGENES 75 (1982) *excerpted in* STEINER & ALSTON, *supra* note 98, at 383.

103. *See* HUMAN RIGHTS AND RELIGIOUS VALUES: AN UNEASY RELATIONSHIP? (Abdullahi An-Naim et al. eds., 1995); Abdullahi Ahmed An-Na'im**,** *Religious Minorities under Islamic Law and the Limits of Cultural Relativism*, 9 HUM. RGTS. Q. 1 (1987); Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271 (1997); Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795

Therefore, should international human rights law treat religions such as Islam as "less than equal" when it comes to women's equal rights for instance, should it reject as incompatible with the Convention on the Elimination of All Forms of Discrimination Against Women all reservations that purport to hold Islamic law as superior?[104] The international human rights movement has been slow to respond in this way because the universalism/cultural relativism conundrum has still not been adequately resolved.[105]

C. Conclusion

Reasons exist for the tentative quality of religion-based anti-discrimination analysis, whether domestic or international. However, the urgent question now is whether religion is a legitimate basis for judgments about group profiling. The Japanese American experience suggests that it is all too easy to draw unfounded inferences from religious difference. In the end, the inability or unwillingness of domestic and international legal frameworks to address religion-based discrimination contributes to the formation of an inferior racial category. Law's absences speak as clearly as its presence. As Bayoumi writes, quoting Hannah Arendt, "Citizenship is . . . the 'right to have rights.'"[106] Conversely, the obscuring of potential rights or the erosion of recognized rights[107] tells us much about who is *not* considered a citizen, regardless of formal citizenship,[108] and who is different, or presumed inferior. Law constructs this difference and inferiority through its silence.

If we break the silence and foreground religious difference, what then?

(1991-1992); Donna J. Sullivan, *Resolving Conflicting Human Rights Standards in International Law: Remarks*, 85 AM. SOC'Y INT'L L. PROC. 344 (1991).

104. *See* Cook, *supra* note 78. For instance, "The Government of the State of Kuwait declares that it does not consider itself bound by the provision contained in article 16(f) inasmuch as it conflicts with the provisions of the *Islamic Shariah*, Islam being the official religion of the State." *Declarations and Reservations to CEDAW: United Nations Treaty Collection* (Feb. 5, 2002), *at* http://www.unhchr.ch/html/menu3/ b/treaty9_asp.htm (on file with Law & Contemporary Problems). Article 16 provides that "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: . . .[t]he same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount." *CEDAW*, *supra* note 78, at 196.

105. But see attempts to resolve it such as PERRY, *supra* note 72, at 57-86 and Diane F. Orentlicher, *Relativism and Religion*, *in* HUMAN RIGHTS AS POLITICS AND IDOLATRY 141 (Amy Gutman ed., 2001).

106. Moustafa Bayoumi, *A Bloody Stupid War*, MIDDLE EAST REPORT NO. 231, Summer 2004, at 36-45 (quoting HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296-97 (1973)).

107. *See, e.g.*, Natsu Taylor Saito, *For "Our" Security: Who is an "American" and What is Protected by Enhanced Law Enforcement and Intelligence Powers?*, 2 SEATTLE J. SOC. JUST. 23 (Fall/Winter 2003); American Civil Liberties Union, *USA PATRIOT Act, at* http://www.aclu.org/SafeandFree/ SafeandFree.cfm?ID=12126&c=207 (on file with Law & Contemporary Problems).

108. Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 72 SOCIAL TEXT 101, 103 (2002) ("September 11 and its aftermath expose the precariousness of citizenship status for all people of color, immigrants and nonimmigrants alike.").

III

FINDING LAW

Religion is a component missing from racial anti-discrimination theory and doctrine for reasons that have little to do with the absence of actual discriminatory action based on religion. If anything, the war on terror has heightened the need for legal shields against religious discrimination as an aspect of racial discrimination. When attention is paid to religious discrimination, it becomes apparent that law operates simultaneously through its overreaching and its absence: its commissions and omissions.

A. Law's Commissions: Constructing Race through Religious Discrimination

Racial profiling is typically understood to be a primary mechanism for constructing racial inferiority. What difference would it make if we better understood the religious dimension of racial formation through acts of profiling? Arguably, a more informed understanding of Islam might support profiling, if it leads to the targeting of potential terrorist groups based more on relevant facts and less on false information or stereotypes. Indeed, some post-9/11 commentators who are critical of large-scale sweeps or detentions do advocate more nuanced forms of profiling.[109]

However, a closer look at instances in which religion has been a factor in profiling since 9/11 strengthens arguments against profiling. This is not only because of very obvious instances of indiscriminate and wrongful targeting, some of which have come to the attention of the public,[110] but also because the inclusion of an estimated six to seven million U.S. Muslims not to mention the over one billion more outside the U.S.[111] into potential target groups vastly increases the social costs in the cost-benefit matrix of profiling, whether domestically or globally.

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109. *See* Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002); Eric Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571 (2002); Eric Muller, *Inference or Impact? Racial Profiling and the Internment's True Legacy*, 1 OHIO ST. J. CRIM. L. 1 (2003); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002). *But see* Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); Devon W. Carbado, (E)racing the Fourth Amendment, 100 MICH. L. REV. 946 (March 2002); Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (Fall 2003); Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 9 ASIAN L.J. 195, 197 (May 2002); Deborah Ramirez, Jennifer Hoopes, & Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195 (2003).

110. The Detroit convictions for material support of terrorism were recently thrown out by a federal district court. *Defendant Is Released in Detroit Terror Case*, N.Y. TIMES, Oct. 13, 2004, at A13. This is but one example of wrongful profiling, but also one of the few that actually implicates the terrorism provisions of the USA PATRIOT Act. Much post-9/11 profiling seems to have little to do with counter-terrorism and much more to do with with minor violations of immigration and other laws.

111. *See* Table 1, *infra* at p. 254.

1. Terror-Profiling: A Suggested Definition

Profiling, as analyzed in this essay, is not within the standard definitions of racial profiling prior to 9/11.[112] Terror-profiling is the selectively negative treatment both by government and private entities of individuals or groups thought to be associated with terrorist activity, based on race, ethnicity, national origin and/or religion. Most definitions of racial profiling are far narrower, focusing on (a) government action, excluding private activity; (b) individuals, excluding institutions or groups; and (c) race, ethnicity or national origin, but excluding religion. It also goes without saying that much of the discussion of profiling has been within the context of domestic criminal law enforcement rather than the much more amorphous and global context of combating terrorism.[113]

Terror-profiling is coined here not because of the desire to set up a straw man against which to make the anti-profiling argument more appealing, but rather because this broader definition captures more accurately the profiling taking place since 9/11. While this paper is mainly concerned with religious difference, other differences bear brief discussion. First, a discernable nexus exists between public (or government) and private (or non-state-sponsored) action: What the government does or does not do sets the tone for acts of violence by individuals.[114] While the official rhetoric of the current Administration counsels against racial or religious discrimination,[115] the reality

112. For a fuller discussion comparing racial profiling in the pre to post-9/11 context, see *Resurrecting Korematsu*, *supra* note *, at 57-66. Mixed motive profiling (profiling based on both permissible and impermissible reasons) is not addressed in detail in this essay, but explored in *Resurrecting Korematsu*. *Id.* at 57-58 (comparing Gross & Livingston's tolerance of mixed motive profiling with Carbado's rejection of it).

113. For example, the National Asian Pacific American Bar Association (NAPABA) recently defined racial profiling as "law enforcement initiated action that relies on the race, ethnicity or national origin of an individual rather than the behavior of the individual or information that leads the agency to a particular individual who has been identified as being, or having been, engaged in criminal activity." Paula Daniels, *NAPABA Position Paper: Recommendations for Oversight of the USA PATRIOT Act and for Federal Racial Profiling Legislation*, *at* http://www.napaba.org/uploads/napaba/RPPaperFINAL.pdf (on file with Law & Contemporary Problems). While this definition was propounded after 9/11, it is based largely on a pre-9/11 analysis. DEBORAH RAMIREZ, JACK MCDEVITT, & AMY FARRELL, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED (November 2000), *at* http://www.ncjrs.org/pdffiles1/bja/184768.pdf (on file with Law & Contemporary Problems).

114. Professor Leti Volpp has written:

> [S]ince September 11, the general public has engaged in extralegal racial profiling in the form of over one thousand incidents of violence homes, businesses, mosques, temples, and gurdwaras firebombed; individuals attacked with guns, knives, fists, and words; women with headscarves being beaten, pushed off buses, spat upon; children in school harassed by parents of other children, by classmates, and by teachers.

Volpp, *supra* note 29, at 1580-81; *see also* Ahmad, *supra* note 108, at 106 ("[T]he resulting racial hierarchy [is] a citizenship exchange market in which the relative belonging of any one racial or ethnic community fluctuates in accordance with prevailing social and political pressures. What is more, communities of color learn the *imperative* of subordination of others.").

115. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html (on file with Law & Contemporary Problems).

is one of tacit endorsement and even participation.[116] The Council on American-Islamic Relations estimates that incidents of anti-Muslim physical violence have more than doubled from 2002 to 2003.[117] Reported discriminatory incidents involving government agents rose from twenty-three percent of all cases in 2002 to thirty-three percent in 2003.[118] Moreover, in the war against terror, the federal government has actively encouraged private surveillance of suspected terrorists through its TIPS program.[119]

Consider also the impact of the media, which is supposedly protected from government pressure by the Free Press Clause of the First Amendment. Despite this protection, the media has contributed in large part to the construction of a terrorist "other" that is defined in part by religious difference.[120] This First Amendment protected activity could be viewed as a particularly potent and insidious form of private profiling. While private profiling has always been an aspect of profiling, it has rarely been included in recent standard definitions. In order to assess the true impact of profiling, however, it must be taken into account.

Second, it is beyond cavil that the USA PATRIOT Act is aimed not just at terrorists acting individually, but also at groups or institutions associated with terrorism.[121] Thus the traditional focus on profiling of individuals is simply inaccurate.[122]

If religion is an integral aspect of construing the terrorist as a racially inferior other,[123] the opposite is also true, if one uses the term "race" as it is typically understood, as tracking census categories. Islam cuts across all racial groups, including the so-called White race. Arabs not all of whom are

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116. Volpp notes:

> These myriad attacks have occurred, despite Bush['s] meeting with Muslim leaders, taking his shoes off before he visited the Islamic Center in Washington, D.C., and stating that we must not target people because they belong to specific groups. His statements have done little to disabuse people of their "common sense" understanding as to who is the terrorist and who is the citizen. This is connected to the fact that the government has explicitly engaged in racial profiling in terms of its targets of our "war on terrorism."

Volpp, *supra* note 29, at 1581.

117. CAIR, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 2004, at 10.

118. *Id*. at 11.

119. Anita Ramasastry, *We Don't Need Citizen Spies: The Problem with the Bush Administration's Proposed "Operation TIPS"* (Aug. 5, 2002), *at* http://writ.news.findlaw.com/ramasastry/20020805.html (on file with Law & Contemporary Problems).

120. *See* Leonard M. Baynes, *Racial Profiling, September 11 and the Media: A Critical Race Theory Analysis*, 2 VA. SPORTS & ENT. L.J. 1 (2002).

121. 8 U.S.C. § 212(a)(3)(B) (2001) (section 411 of the Act, adding new provision to INA that permits designation of foreign *and domestic* groups as terrorist organizations, without procedural safeguards) (emphasis added); 18 U.S.C. §2339B(a) (criminalizing provision of "material support or resources to a foreign terrorist organization"). *See generally* Nancy Chang, Silencing Political Dissent , *supra* note 26, at 44-46, 103-13 (discussing the fact that the USA PATRIOT Act prosecutes people based on their ideology and ideological associations); American Civil Liberties Union, *supra* note 107.

122. Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185 (C.D. Cal. 2004) (striking down as vague the USA PATRIOT Act's prohibition of "expert advice and assistance" to designated foreign terrorist organizations).

123. *See* C. Conclusion, Part II, *supra*.

Muslim are currently classified as White by the U.S. Census Bureau,[124] although their status as "Whites" has shifted over time.[125] The federal government has targeted not only Muslim people of Arab ancestry, but also European Americans such as attorney Brandon Mayfield,[126] Asian Americans such as U.S. Army chaplain James Yee,[127] and Latinos such as enemy combatant Jose Padilla[128] for differential treatment. None is Arab, all are U.S.-born citizens, and Mayfield is White. Yet, their race, ethnicity, and indeed national origin seemed to play a far less important role in terror-profiling than their religious difference from the U.S. Christian majority. A substantial U.S.-born Black Muslim population as well as a growing group of African Muslim immigrants have also experienced selective treatment by public and private entities.[129] Thus a definition of profiling that mentions race, ethnicity or even national origin but excludes religion would be profoundly misleading. It points away from the common denominator that ties these disparate racial groups together as associated with terrorist activity. Although phenotype still matters a great deal it is probably more likely that someone who is a dark-skinned Muslim will be targeted than a light-skinned Muslim[130] perceived religious difference is a critical component of the racial formation of the other in the context of terrorism.

2. Profiling Religion

In the post-9/11 era, the U.S. government has relied on a number of different legal grounds for selective treatment of Muslims. Many of these acts of profiling have resulted in high-profile "mistakes" without any resulting

124. *Cf.* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) (allowing section 1981 brought by an U.S. citizen of Arab ancestry based on "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics" regardless of scientific racial classification as "Caucasian"); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (noting that "Jews and Arabs were among the peoples then considered[ ]to be distinct races" at the time of the enactment of section 1982).

125. Samhan, *supra* note 22; John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 837-42 (2000) (discussing naturalization decisions involving Arab applicants); Bayoumi, *supra* note 63, at 18-26.

126. Mark Larabee, *Portland Cases Fuel Rights Debate*, THE OREGONIAN, May 31, 2004, at A01.

127. Ray Rivera, *Suspicion in the Ranks: Inside the Spy Investigation of Capt. James Yee*, THE SEATTLE TIMES, January 9-16, 2005, *at* http://seattletimes.nwsource.com/news/nation-world/jamesyee (on file with Law & Contemporary Problems); Tim Golden, *Loyalties and Suspicions: The Muslim Servicemen; How Dubious Evidence Spurred Relentless Guantanamo Spy Hunt*, N.Y. TIMES, December 19, 2004, at A1 (detailing how the Yee prosecution fed in part on "antipathy between some Muslim and non-Muslim troops at Guantánamo").

128. Deborah Sontag, *Terror Suspect's Path From Streets to Brig*, N.Y. TIMES, Apr. 25, 2004, § 1, at 1.

129. AMNESTY INTERNATIONAL, THREAT AND HUMILIATION: RACIAL PROFILING, DOMESTIC SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES 15-16 (2004), *at* http://www.amnestyusa.org/racial_ profiling/report/rp_report.pdf (on file with Law & Contemporary Problems); UNCONSTITUTIONAL: THE WAR ON OUR CIVIL LIBERTIES (film directed by Robert Greenwald; written and produced by Nonny de la Pena) (interviewing a young African American, Catholic, U.S. national rowing champion who happens to have a Muslim name, has been stopped frequently at airports and ultimately discovered that his name was on a national security list).

130. *See, e.g.*, AMNESTY INTERNATIONAL, *supra* note 129, at 8.

obvious increase in national security. Examples range from the use of the International Economic Emergency Powers Act, which resulted in the unconstitutional seizure of Somalian businesses in Seattle,[131] to the use of the federal material witness statute to detain at least fifty people for terrorist investigations,[132] such as attorney Mayfield, to the threatened court martial of Army Chaplain Yee on charges, since dropped, of mishandling classified information.[133]

Much of the federal government's terror-profiling has occurred in the context of immigration. The immediate post-9/11 dragnet was overly inclusive, detaining anyone looking "Middle Eastern" or speaking a foreign language, including Israeli Jews.[134] Pursuant to the subsequent Absconder Apprehension Initiative, thousands of immigrants—including women from Middle Eastern countries—none of whom have yet been demonstrated to have links to terrorism, and who were out of status for various reasons, have been detained indefinitely.[135] Of the over twelve hundred men subsequently detained on immigration violations since June 2002, when NSEERS was implemented, many had pending applications for permanent resident status that were not processed due to INS backlog:[136]

> Of the estimated 3.2 to 3.6 million persons in the US who are "out of status," and the 8 million undocumented [persons], Arabs and Muslims constitute a very small proportion, yet they are the target of this initiative. The number of persons who will be "removed" from the US as a result of this program is unknown, but Ashcroft has already removed more Arabs and Muslims (who were neither terrorists nor criminals)

131. Doug Merling, *U.S. to Pay 2 Raided In Error*, SEATTLE TIMES, July 23, 2004, at B1.

132. Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN'S L. REV. 483 (Summer 2002).

133. Rivera, *supra* note 127.

134. By late November 2001, approximately fifty young Israeli Jews were being held, primarily in INS detention facilities, in New York City, San Diego, Houston, Kansas City, St. Louis, and Cleveland, for periods ranging from three weeks to over two months. In one bond hearing, an immigration judge found that "the service has failed to submit any evidence of terrorist activity or a threat to the national security." The government then promptly sought an emergency appeal of her ruling. Tamar Lewin with Alison Leigh Cowan, *Dozens of Israeli Jews are Being Kept in Federal Detention*, N.Y. TIMES, Nov. 21, 2001, at B7. According to an Israeli commentator, the people who conducted the investigation of five Israelis, "are so ignorant of the Middle East that they do not know the difference between Hebrew and Arabic. They did not grasp that young men who tried to fast on Yom Kippur, the Jewish Day of Atonement, were probably not Muslim fanatics." Gershom Gorenberg, *A Foreigner in Solitary in America*, WASH. POST, Dec. 8, 2001, at A25.

135. Under the Absconder Apprehension Initiative, immigration "authorities were ordered to seize some 314,000 people who had previously been ordered to leave the United States [under final deportation orders]. Priority was given to finding 6,000 Arab nationals. A total of 3,348 people of all nationalities . . . have been detained so far." Florangela Davila, *2 In Family From Syria Freed From INS Custody*, SEATTLE TIMES, Nov. 19, 2002, at B1.

136. LAWYERS COMMITTEE FOR HUMAN RIGHTS, IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW AND POLICY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES 43 (2002-2003) [hereinafter IMBALANCE OF POWERS], *at* http://www.humanrightsfirst.org/us_law/loss/imbalance/powers.pdf (on file with Law & Contemporary Problems); *see also* LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 37.

> from the US in the past year than the total number of foreign nationals deported in the infamous Palmer raids of 1919.[137]

Finally, visa applications are increasingly scrutinized through the U.S. VISIT program.[138] A recent case in which a visa application seems to have been denied on the basis of religion is that of Tariq Ramadan, a Muslim scholar from Switzerland who was known for his views on reconciling Islam with Western values and was scheduled to visit at the University of Notre Dame in the fall of 2004.[139]

Young immigrant men from mostly majority Muslim countries are disproportionately a target of terror-profiling in the deportation context. However, the government's overall profiling activities encompass all sorts of people: White, Asian, African, Latino, female, older, U.S. citizen, or non-citizen.[140] For example, the Department of Homeland Security, through its agency U.S. Citizenship and Immigration Services (USCIS, formerly the Immigration and Naturalization Service), has engaged in selective enforcement of immigration orders vis-à-vis individuals from countries of origin associated with terrorism.[141] The key commonality among these diverse individuals is that they share a Muslim religious identity or are from countries with majority

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137. Louise Cainkar, *Targeting Muslims, at Ashcroft's Discretion*, MIDDLE EAST REPORT ONLINE (March 14, 2003), *at* http://www.merip.org/mero/mero031403.html (on file with Law & Contemporary Problems).

138. United States Visitor and Immigrant Status Indicator Technology, which does not affect the implementation of NSEERS. Notice of Privacy Act System of Records, 68 Fed. Reg. 69412 (Dec. 2, 2003). The US VISIT program was never published as a single rule in the CFR. On January 5, 2004, the Department of Homeland Security (DHS) issued an interim final rule and notice, effective the same day, implementing the program. Implementation of the United States Visitor and Immigrant Status Indicator Technology Program ("US-VISIT"), 69 Fed. Reg. 468 (Jan. 5, 2004) (implementing US-VISIT program by amending 8 C.F.R. 214.1(a)(3), 8 C.F.R. 235.1, and adding 8 C.F.R. 215.8).

139. Deborah Sontag, *Mystery of the Islamic Scholar Who Was Barred by the U.S.*, N.Y. TIMES, Oct. 6, 2004, at A1; *see also* Rosemary Bechler, *A Bridge Across Fear: An Interview with Tariq Ramadan*, July 14, 2004, *at* http://www.opendemocracy.net/xml/xhtml/articles/2006.html (open democracy interview with Tariq Ramadan; 8/31) (on file with Law & Contemporary Problems); Tariq Ramadan, *What Does America Have to Fear From Me?* INT'L HERALD TRIBUNE, Aug. 31, 2004, *at* http://www.iht.com/articles/536614.html (International Herald Tribune reply by Ramadan) (on file with Law & Contemporary Problems).

140. Sandi Doughton, *Civil Rights Again Teeter as in WWII, Speakers Say*, SEATTLE TIMES, Feb. 10, 2003, at B1, *available at* http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=intern 10m0&date=20030210&query=hamoui (describing arrest and detention of young female Syrian) (on file with Law & Contemporary Problems).

141. *A Rage Shared by Law*, *supra* note 30, at 1269; *see also* Brief of Yusuf Ali Ali, Mohamed Aweys, Mohamed Hussein Hundiye, Gama Kalif Mohamud, and The Class Of Individuals That They Represent as Amici Curiae in Support of the Petitioner at 19, Jama v. INS, No. 04-674, 2005 WL 49257 (U.S. Jan. 12, 2005), *at* 2004 WL 1148635 [hereinafter Amici Curiae Brief] ("Following the terrorist attacks of September 11, 2001, the Government stepped up efforts to deport aliens from countries suspected of having terrorist connections.") The selective deportation is particularly egregious in the *Jama* case because of the heightened risk that petitioner faced in being deported to Somalia, which has no functioning government and is in a perpetual state of violent conflict. *See* Eric Jeffrey Ong Hing, Comment, *Deportation Into Chaos: The Questionable Removal of Somali Refugees*, 38 U.C. DAVIS L. REV. 309, 326 n.123 (2004); *see also* COLE, *supra* note 34, at 268 (arguing even before 9/11 that group associational rights were violated by selective enforcement of immigration laws against Muslims). Nonetheless, the U.S. Supreme Court recently implicitly endorsed the policy, by allowing deportations to Somalia. Jama v. Immigr. and Customs Enforcement, 125 S. Ct. 694 (2005).

Muslim populations. Furthermore, non-Muslim immigrants are the collateral damage. The Department of Homeland Security, for example, has extended its national security dragnet to arrest and deport Mexicans in the U.S. with no connections to terrorist activity, while harassing and sometimes groundlessly detaining Latino and Latina legal residents and U.S. citizens.[142]

When private profiling is factored in, the social costs of profiling inevitably increase. A 2004 study suggests that almost half of U.S. citizens support the restriction of civil rights of Muslim Americans.[143] A 2002 report released by the FBI reveals 481 hate crimes against Arabs and Muslims in the year 2001, representing an increase of 1600 percent over the previous year.[144] The "false positives" of profiling also increase because much of the general U.S. public has difficulty differentiating between Muslims and non-Muslims who might have physical attributes or other markers similar to Muslims, such as Arab surnames, turbans, facial hair or dark skin. For example, violent hate crimes were committed against Sikhs in the immediate aftermath of 9/11.[145] Even when falling short of violence, private action often targets persons of color

142. Marisa Taylor, *Immigration Sweep Targets 80 People*, SIGNONSANDIEGO.COM (Jan. 22, 2003), *at* http://www.signonsandiego.com/sports/superbowl/metro/20030122-9999_1n22ins.html (on file with Law & Contemporary Problems). For example, INS officials rounded up over 80 foreign-born security guards and transportation workers in San Diego County as part of its on-going security investigations for Super Bowl Sunday. *Id.* Some were in the U.S. illegally, while other legal permanent residents were targeted for deportation because of criminal records. None, however, was suspected of terrorism. Latinos and Latinas in particular were targeted. *Id.*

143. William Kates, *OK to Restrict Muslims, Almost 50% in U.S. Say*, SEATTLE TIMES, December 18, 2004, at A6.

144. IMBALANCE OF POWERS, *supra* note 136, at 42. The FBI's 2003 Annual Report of Hate Crime Statistics indicates that of the 1,489 victims of single-bias crimes motivated by religious intolerance during 2003, 68.8 percent were victims of anti-Jewish bias, 11.5 percent were victims of anti-Islamic bias, 5.4 percent were anti-Catholic 3.6 percent were motivated by anti-Protestant bias. FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS: 2003 (Nov. 2004), *at* http://www.fbi.gov/ucr/03hc.pdf (on file with Law & Contemporary Problems). Based on FBI statistics, the Anti-Defamation League has calculated that in the eleven-year period between 1991 and 2001, from sixteen to nineteen percent of all reported hate crimes in the United States have had a religious bias. Anti-Defamation League, *Hate Crimes: Offenders' Reported Motivations* (table), *at* http://www.adl.org/99hatecrime/offenders_Motivations.asp (on file with Law & Contemporary Problems). In that same period, a decreasing percentage, from 88 to 57, of the crimes with a religious bias have had anti-Semitic motivations. *Id*. A strong inference is that a greater proportion of victims in the later years were Muslims and members of other religious minorities. While forty-four states plus the District of Columbia have enacted hate crime statutes that include religion along with race and ethnicity and other categories of perpetrator motivation, twenty-one states plus DC also have statutes specifically criminalizing interference with religious worship. Anti-Defamation League, *Map: State Hate Crimes Statutory Provisions*, *at* http://www.adl.org/learn/hate_crimes_laws/map_frameset.html (on file with Law & Contemporary Problems); Religious Freedom Watch, *What is a Hate Crime? U.S. State Hate Crime Laws*, *at* http://www.parishioners.org/hcandlaw/law_us3.html (last visited Jan. 4, 2005) (on file with Law & Contemporary Problems).

145. For example, in late 2001, teenagers set fire to a Sikh temple of Gobind Sadan USA, an interfaith worship community in upstate New York, under the mistaken impression that the group was affiliated with Osama bin Laden. Renee K. Gadoua, *Sikhs Welcome the World; Center Marks Anniversary of Arson*, POST-STANDARD SYRACUSE, NY, November 18, 2002, at B1. Among the more well-known examples of this violence is the death of Baldar Singh in the days following the 9/11 attack. *See* Volpp, *supra* note 29, at 1590; *A Rage Shared by Law*, *supra* note 30, at 1265-67 (documenting at least nineteen deaths attributed to post-9/11 animus).

generally.[146] Even European Americans who happen to be in the "wrong" place such as eating in an Indian restaurant being raided by FBI agents can be caught up in racial sweeps.[147] Additionally, places of worship are affected.[148]

In response to an April 2002 request by the United Nations Commission on Human Rights,[149] the Special Rapporteur on racism, Doudou Diène, examined the incidence of physical assaults and verbal attacks on Muslims and Arabs in various parts of the world, particularly North America and Europe.[150] Utilizing the findings of non-governmental organizations such as the American Civil Liberties Union, the Canadian Human Rights Foundation, and the European Monitoring Centre on Racism and Xenophobia, his report documents the following findings:

> The widespread pattern of physical assaults and attacks against the property, places of worship and cultural centres of Muslim and Arab minorities and communities in many non-Muslim countries;
>
> The direct, chronological and explicit link between these physical assaults and attacks and the events of 11 September 2001 in the United States of America;
>
> The ideological dimension of the explicit and public defamation of Islam and the equation of Islam with violence, terrorism and cultural and social backwardness by intellectual, political and media figures in non-Muslim countries, particularly in the United States and Western Europe;
>
> The ambiguous position of the authorities in these countries, whose public statements condemning the assaults and attacks are accompanied by legislative and security measures that discriminate against Muslims and Arabs, whether or not they are citizens of the country concerned; and
>
> The deep sense of insecurity and injustice felt by Muslim and Arab minorities in the countries concerned . . . [including] stereotyping and demonization of the other; a hostile interpretation of diversity, especially religious, cultural and ethnic diversity, as a radical and insurmountable difference . . . and the reemergence of the concept of the foreigner as an alien.[151]

The report highlights hundreds of arbitrary arrests in North America for "crimes of appearance" in which men and women were arrested on account of

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146. Patel, *supra* note 28, at 2 ("As a South Asian woman, when a security guard at the New York ACLU office over-scrutinizes my license and then says, 'Well, you're not a terrorist, are you?' I cannot simply brush off the comment."); *see also A Rage Shared by Law*, *supra* note 30.

147. *See* Jason Halperin, *Commentary: Feeling the Boot Heel of the Patriot Act*, L.A. TIMES, May 2, 2003, at B19.

148. Amnesty International documents profiling directed against places of worship. AMNESTY INTERNATIONAL, *supra* note 129, at 12.

149. *Combating Defamation of Religion*, E.S.C. Res. 2002/19, U.N. ESCOR, 58th Sess., Supp. No. 3, at 56, U.N. Doc. E/CN.4/2002/200 (2002).

150. Doudou Diene, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination: Situation of Muslim and Arab Peoples in Various Parts of the World in the Aftermath of the Events of 11 September 2001,* U.N. ESCOR, 59th Sess., Agenda Item 6, U.N. Doc. E/CN.4/2002/23 (2003).

151. *Id.* at 5-6. In a section of the report titled, "Promotion of Intolerance by the Media and Intellectuals," the Canadian Human Rights Foundation (CHRF) is quoted as finding that the media "consistently confuse 'Arab' with 'Muslim' and make outrageous categorizations and generalizations while neglecting differences. These almost comical errors are sometimes even committed by people presented as 'experts.'" *Id.* at 12, (citing Terrorism and Resisting War: Does Human Rights Education Matter? summary of a forum organized by the CHRF, 6 November 2001.)

their "physical appearance (for looking like Arabs or Middle Easterners) or because they are followers of the Muslim religion (recognizable by the fact that they wear the *hijab*, or headscarf, or attend a mosque)."[152] Likewise, "nowhere in Europe have Muslims been so terrorized" as in the Netherlands, where Mosques were covered with graffiti or targeted by arsonists on almost a daily basis in the two weeks after 9/11.[153] Renewed violence in the Netherlands was catalyzed recently when the film maker Theo van Gogh was murdered by an alleged Muslim militant.[154]

3. Conclusion

The most widely acknowledged way in which law can construct racial subordination through *commission* is by legally sanctioning acts of profiling. And when religion is factored into "race," it is easier to see that the "profile" is expanding far beyond the young Middle-Eastern-looking male. Religious difference is being used as a basis for selective treatment of all sorts of groups of people. If religion is fully accounted for, the social costs of profiling can only go up. Furthermore, foregrounding religion more fully helps us to understand other kinds of private profiling that are arguably linked to the dominant Christian ideology.[155]

It is not the purpose of this essay to delve deeply into the profiling debate.[156] Arguments against profiling can be summarized as based on (1) consistency, (2) effectiveness, and (3) fairness.[157] Arguments in favor are based on assertions that (1) race is usually not the sole factor but one of several; (2) race or ethnic identity is a strong predictor of the characteristics of a possible perpetrator;[158] and (3) some profiling action might be legitimate investigations of individuals that, putting aside mass detentions, has resulted in successful deportations and prosecutions.[159] Where one comes out on the profiling question depends in large part on how one assesses the costs against the benefits. The point is

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152. *Diene, supra* note 150, at 7.

153. *Id.* at 12, *citing De Volkskrant*, 25 September 2001.

154. *See Life of Slain Dutch Filmaker*, BBC NEWS, Nov. 2, 2004, *at* http://news.bbc.co.uk/1/hi/entertainment/film/3975211.stm (on file with Law & Contemporary Problems).

155. Cross-burning is an outgrowth of white supremacy linked with Christian religious symbolism. *See* Ku Klux Klan, *Fiery Cross*, *at* http://www.kkk.net/fierycross.htm (last visited March 6, 2005) (on file with *Law & Contemporary Problems*). *See also* Jeannine Bell, *O Say, Can You See: Free Expression by the Light of Fiery Crosses,* 39 HARV.C.R.-C.L. L. REV. 335, 343 (2004) (describing the KKK practice of cross-burning as sparked by D.W. Griffith's 1915 film, *Birth of a Nation,* and based on Thomas Dixon's novel *The Clansman*). Its allegedly Christian origins are downplayed by the Supreme Court in its various opinions addressing cross-burning.

156. For a more in-depth treatment, see generally *Resurrecting Korematsu*, *supra* note *, at 57-61 and references cited therein.

157. Kang, *supra* note 161, at 197.

158. The argument goes that since all nineteen of the 9/11 perpetrators were Muslim men from Middle Eastern countries of which fifteen were Saudi, it is supposedly logical to have a heightened suspicion of *all* Muslims or Middle Eastern men. This ignores the statistical unlikelihood that any single Muslim is a terrorist, in a population numbering in the millions.

159. Muller, *Inference or Impact? Racial Profiling and the Internment's True Legacy*, *supra* note 109.

simply that the social costs of terror-profiling increase dramatically if the estimated six to seven million Muslims in the U.S. and over one billion worldwide[160] are explicitly factored into what we call "race." The potential for unfair and abusive terror-profiling is also extremely high.

B. Law's Omissions: Rectifying Racialized Religious Discrimination

While profiling is certainly the most overt way of enacting racial "otherness" through law, racial inferiority is also inscribed through law's omissions. The role of these legal silences is discussed far less frequently. Examples already exist of legally endorsed or legally sanctioned profiling based on religion that resulted in discrimination. For many of the individuals wrongly targeted by this process, the remedies for overreaching by private or public profilers may lie in anti-discrimination laws such as domestic civil rights laws or international human rights laws, which may check the inevitable "false positives"[161] associated with overzealous terror-profiling.

However, a brief survey of these potential remedies illustrates major omissions in the law. These legal silences construct the racialized terrorist just as powerfully as does the overreaching of overly broad profiling. And in the realm of law's omissions, as in that of its commissions, religion plays an underacknowledged role in both domestic and international legal frameworks.[162] This is also true of anti-discrimination doctrine, although scattered exceptions exist.[163] While hate crime statutes usually include religion as a basis for prosecution,[164] civil remedies are few and far between. A recent Amnesty International survey of profiling laws finds that only four states specifically proscribe religion as a basis for profiling.[165] This is one example of the way law excises religion out of anti-discrimination protections that might provide meaningful shields to the excesses of terror-profiling. International law is similarly barren of meaningful remedies.

If religion is taken more seriously as a source of group-based harm, where can group-based discrimination claims be developed? Two areas with doctrinal potential that might provide useful approaches are Fourteenth Amendment equal protection jurisprudence and international treaty law.

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160. *See* Table 1, *infra* at p. 144.

161. Kang, *supra* note 109, at 198.

162. Compare this silence about religious minorities to Europe's affirmative protection of certain linguistic minorities. Framework Convention for the Protection of National Minorities, Feb. 1, 1998, CETS No. 157; European Charter for Regional or Minority Languages, Mar. 1, 1998, CETS No. 148.

163. One exception is Title VII's proscription of employment discrimination based on religion. Title VII, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.) (prohibiting discrimination based on race, color, religion, sex, or national origin); *see generally* Richard T. Foltin & James D. Standish, *Reconciling Faith and Livelihood, Religion in the Workplace and Title VII*, HUMAN RIGHTS, Summer 2004, at 19.

164. Anti-Defamation League, *supra* note 144.

165. They are Alaska, Arkansas, California and Massachusetts. AMNESTY INTERNATIONAL, *supra* note 129, at 33 n.3 and Appendix 1.

1. Domestic Remedies: Equal Protection of Religious Minorities

Freedom to practice religion is a fundamental liberty subject to strict scrutiny, but, as emphasized earlier, this essay's focus is not the individual right to practice Islam. Rather, it is the right to claim freedom from discrimination based on group religious affiliation. Thus, cases of religious discrimination based on the Free Exercise Clause are not strictly relevant to the analysis here. Nonetheless, they shed some light on the challenges in the Fourteenth Amendment equal protection context. For example, empirical research shows that "claimants who belonged to mainstream Catholic and Protestant sects were more likely to win [free exercise cases] than were claimants who belonged to other religions (38.9% vs. 24.5%)."[166] The low success rates of all claimants, but particularly those of non-Christian minorities, show the difficulty that religious minorities have generally in making their presence felt in the dominant religious mainstream even when remedies are available.[167]

Whatever their shortcomings, one of the primary legacies of the *Hirabayashi* and *Korematsu* opinions is the Supreme Court's recognition of race as a group category, subject to equal protection analysis. This insight should inform the law's treatment of terror-profiling. Thus a Fourteenth Amendment equal protection claim, as distinguished from a free exercise claim, asserting discrimination based on state action against a particular religious group, as opposed to interference with a particular religious practice, should treat religion the same way that "race" is now treated: as a suspect classification.[168] Indicia of suspectness include the history of societal discrimination, the history of political powerlessness, the presence of a discrete and insular minority, and, most importantly, the fact of immutability.[169] Respecting Muslim group identity, each of these indicia, including immutability, is satisfied.

Cases claiming discrimination based on religious group identity, compared to those couched as free exercise claims, are scarce. Existing cases are typically decided within the context of prisoners' civil rights claims brought under 42

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166. James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to* Employment Division, Department of Human Resources v. Smith *and the Religious Freedom Restoration Act*, 27 AM. POL. Q. 236, 250-51 (1999), *quoted in* Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, The Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 251 (2003) *reprinted in* FRANK S. RAVITSCH, LAW AND RELIGION, A READER: CASES, CONCEPTS, AND THEORY 661 (2004); *cf.* Cantwell v. Connecticut, 310 U.S. 296 (1940) (overturning the conviction of a Jehovah's Witness for breach of the peace while in the act of distributing religious literature and soliciting funds).

167. *See, e.g.*, United States v. Board of Educ., 911 F.2d 882, 894 (3d Cir. 1990) (affirming rejection of claims based on Title VII and on a challenge to a Pennsylvania religious garb act brought by Muslim female plaintiff for not being allowed to wear head scarf and long-sleeved loose clothing, despite evidence that the 1895 act was motivated by anti-Catholic animus).

168. *See e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (couching equal protection rationale in terms of racial diversity in higher education).

169. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.3.2 (2d ed. 2002).

U.S.C. § 1983.[170] Because of the broad administrative discretion of prison officials,[171] these cases are generally unsuccessful[172] and their application to terror-profiling is questionable. Arguably, the prison context not unlike the national security rationale, which serves to disrupt otherwise accepted doctrine in so many areas of U.S. constitutional law is so exceptional as to render rights claims by prisoners to be uniquely undeserving of meaningful judicial scrutiny.[173] Nonetheless, it is instructive to survey them briefly.

In *Cruz v. Beto*,[174] the leading case involving an equal protection claim by a Buddhist prisoner claiming discrimination based on religion, the Supreme Court reversed a dismissal for failure to state a claim.[175] In so doing, the majority did not elaborate on the equal protection claim, although the Court seemed to endorse the claim by allowing the case to proceed. Justice Rehnquist noted in his dissent that

> [a] long line of decisions by this Court has recognized that the "equal protection of the laws" guaranteed by the Fourteenth Amendment is not to be applied in a precisely equivalent way in the multitudinous fact situations that may confront the courts. On the one hand, we have held that racial classifications are "invidious" and "suspect." I think it quite consistent with the intent of the framers of the Fourteenth Amendment, many of whom would doubtless be surprised to know that convicts came within its ambit, to treat prisoner claims at the other end of the spectrum from claims of racial discrimination. Absent a complaint alleging facts showing that the difference in treatment between petitioner and his fellow Buddhists and practitioners of denominations with more numerous adherents could not reasonably be justified under any rational hypothesis, I would leave the matter in the hands of the prison officials.[176]

This dissent suggests that the majority rejected a possibly debilitating binarism between actionable racial discrimination claims, on the one hand, and non-actionable religious discrimination claims, on the other. At the same time, a handful of other published cases in addition to *Cruz* suggests that equal protection claims based on religious discrimination are indeed viable, if rarely

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170. Most of these section 1983 prisoner cases involve free exercise claims. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Hamilton v. Schriro 74 F.3d 1545 (8th Cir. 1996); Wares v. Vanbebber, 319 F. Supp. 2d. 1237 (D. Kan. 2004). Only a handful allege or are construed as alleging equal protection claims. *See, e.g.,* Dehart v. Horn, 227 F.3d 47 (3d Cir. 2000); Allen v. Toombs, 827 F.2d 563 (9th Cir. 1987); Gonzalez v. Litscher, 230 F. Supp. 2d 950 (W.D. Wis. 2002); Sutton v. Stewart, 22 F. Supp. 2d 1097 (D. Ariz. 1998).

171. Turner v. Safley, 482 U.S. 78, 89 (1987) ("When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.")

172.

> We do not suggest, of course, that every religious sect or group within a prison—however few in number—must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand. But reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty.

Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972).

173. We are indebted to Michael Rooke-Ley for this observation.

174. 405 U.S. 319 (1972).

175. Cruz, 405 U.S. at 319.

176. *See, e.g.*, Cruz, 405 U.S. at 325-26.

asserted and even more rarely won.[177] Thus far, the majority of prisoner cases do not exactly raise theories based on the melding of religious and racial identity, nor do they raise facts that suggest religious-group-based discrimination as opposed to individual claims of interference with free exercise.[178]

Like challenges to state regulations governing prisoners, equal protection challenges to selective enforcement of federal immigration law are hindered by a lower level of judicial scrutiny, such as the religion-based terror profiling in the post-9/11 context effected through immigration laws.[179] Moreover, the government argues that it is selectively enforcing immigration laws based on the arguably permissible category of "'country of issuance of passport,'"[180] rather than the impermissible category of race. However, national origin-based immigration enforcement almost always implicates race.[181]

Immigration is not a fortuitous context for the assertion of strong equal protection claims,[182] whether based on a narrow view of race as phenotype only or on the broad view of race advocated here that includes national origin and religion. Nonetheless, some courts are starting to recognize these kinds of claims.[183] It remains to be seen how this area of equal protection doctrine is developed in the context of the war on terror.

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177. DeHart v. Horn, 227 F.3d 47 (3d Cir. 2000) (reversing summary judgment against Buddhist prisoner claiming violation of free exercise and equal protection rights); Allen v. Toombs, 827 F.2d 563 (9th Cir. 1987) (affirming summary judgment against Native American claimants claiming violation of equal protection rights).

178. *E.g.*, Gonzalez v. Litscher, 230 F. Supp. 2d 950, 962 (W.D. Wisc. 2002) (granting summary judgment on equal protection claim based on Native American religious discrimination).

> Although plaintiff has submitted an affidavit in which he alleges that "[a]ll other religions at SMCI are allowed to . . . meet their religious needs" and that "all inmates at SMCI, except Native Americans, are allowed to practice their religious tenets," he does not explain how he acquired the personal knowledge necessary to make such sweeping assertions in a sworn affidavit.

Id.; *accord* Sutton v. Stewart, 22 F. Supp. 2d 1097, 1108 (D. Ariz. 1998) (summary judgment granted against Muslim plaintiff claiming equal protection violation based on inability to receive religious oils or wear prayer caps).

179. *See supra* notes 131-40 and accompanying text; *see also* Victor C. Romero, *DeCoupling "Terrorist" from "Immigrant:" An Enhanced Role for the Federal Courts Post 9/11*, 7 J. GENDER, RACE & JUST. 201 (2003); Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871 (2003).

180. Gross and Livingston, *supra* note 109, at 1419 (quoting Michael Chertoff's testimony before the Senate Judiciary Committee Hearing on Preserving Freedoms While Defending Against Terrorism).

181. *See, e.g.*, Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

182. *See* Saito, *supra* note 45; *cf.* Gerald Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 GEO. IMMIGR. L.J. 313, 339-40 (2000) (arguing that distinctions based on national origin and not race are not constitutionally suspect).

183. An example of this is the Ninth Circuit decision in Ali v. Ashcroft 346 F.3d 873 (9th Cir. 2003), in which claims of discriminatory enforcement were explicitly noted but not used as a basis for an equal protection challenge. *See* Amici Curiae Brief, *supra* note 141, at 19. However, Ali was implicitly overruled by Jama v. INS, 329 F.3d 630 (8th Cir. 2003), *aff'd*, Jama v. Immigr. and Customs Enforcement, 125 S. Ct. 694 (2005).

2. International and Comparative Approaches

International and comparative law suggests two possible approaches. The first would require codification of the 1981 UN Declaration on Intolerance and Discrimination Based on Religion or Belief into a legally binding treaty that could be monitored and implemented through a committee comparable to those that implement the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights.[184] However, there is always the chance that codification may result, due to drafting and negotiation compromises, in a weaker set of provisions. That would be unfortunate, particularly when the Declaration goes beyond the individualism of most human rights instruments to encompass the rights of religious groups, in both their ritualistic and their more broadly communal contexts. Natan Lerner has suggested:

> Such rights cannot be adequately protected, unless the rights of religious organizations, communities, or congregations as such are recognized and ensured beyond the purely individualist freedoms. This may be of great importance for collectivities or communities of a religious origin in which the religious element may appear combined with ethnic and cultural characteristics.[185]

Such a treaty should also incorporate protections for religious minorities that appear in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[186]

A second approach, either in conjunction with or independent of a treaty, is the widespread adoption of national legislation that domestically implements similar rights of religious groups.[187] The discussion underway in the United Kingdom over a new government proposal to criminalize incitement of religious hatred reflects a recognition that the country's existing laws are inadequate to protect Muslims from public and private profiling.[188] Parliament rejected a

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184. *See infra* notes 67 to 105 and accompanying text.

185. Natan Lerner, *Religious Human Rights Under the United Nations*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 92, at 132.

186. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, *supra* note 23. Article 2(1) states:

> Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

Id. at 4. Article 3(1) provides: "Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination." *Id.* at 5.

187. A project to draft such a model law began in 1979. *See* Dinah Shelton and Alexandre Kiss, *A Draft Model Law on Freedom of Religion, With Commentary*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 92, at 559, n.1. The purposes of such a law would include: (a) to guarantee freedom of religion and belief; (b) to promote understanding, tolerance and respect in matters relating to freedom of religion or belief; (c) to establish offenses against freedom of religion or belief and to prohibit discrimination based on religion or belief. *Id*. at 561-62. *See also* DRINAN, *supra* note 81, at 216-20. Additional purposes such as ensuring separation of state and religion would likely be adopted in only some states.

188. Home Secretary David Blunkett gave a speech in July, 2004 to announce the reform, which will "fill a gap" in Britain's patchwork of anti-discriminatory legislation, in order to create a society where

similar bill in the fall of 2001, despite over 600 cases in the U.K. of "Islamophobic" harassment, violence, and criminal damage in the two weeks after 9/11.[189]

Currently, the U.K. Criminal Libel Act of 1819 (the Blasphemy Law), protects only the Anglican Church, not even non-Anglican Christian denominations, let alone non-Christian religions.[190] The Race Relations Act of 1976, as extended by the Public Order Act of 1986, prohibits race discrimination and incitement to racial hatred but confines its scope to "colour, race, nationality or racial or ethnic origins" omitting religion.[191] Case law extended the meaning of "racial group" to encompass mono-ethnic religious communities such as Jews and Sikhs.[192] But multi-ethnic religious communities, which include Christians as well as Muslims, are not considered protected. The Crime and Disorder Act of 1998 and the Anti-Terrorism, Crime and Security Act of 2001 provide higher penalties for racially and religiously aggravated crimes.[193] The latter, which would cover hate crimes against Muslims, was the first law to begin closing the legal lacuna in the United Kingdom. However, many legislative

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"diversity without fear" is possible. Dominic Casciani, *Q&A: Religious Hatred Law*, BBC NEWS (July 7, 2004), *at* http://news.bbc.co.uk/2/hi/uk_news/3873323.stm (on file with Law & Contemporary Problems). "We cannot hope to promote a positive, inclusive sense of British identity and citizenship—which newcomers feel welcome to commit to and which established communities feel proud to be a part of—unless we face down extremism and racism in all their forms." David Blunkett, *New Challenges For Race Equality and Community Cohesion In the 21st Century* 11 (July 7, 2004), *at* http://www.ippr.org.uk/events/files/Blunkettspeech.pdf (originally a speech to the Institute of Public Policy Research) (on file with Law & Contemporary Problems).

189. Forum Against Islamophobia and Racism (FAIR), *Welcome*, *at* http://www.fairuk.org/introduction.htm (last visited Jan. 4, 2005) (on file with Law & Contemporary Problems); *see* Dominic Casciani, *Islamophobia Pervades UK – Report*, BBC NEWS, (June 2, 2004), *at* http://news.bbc.co.uk/2/hi/uk_news/3768327.stm (on file with Law & Contemporary Problems). "'Since the 11 September attacks the single most important concern has been police harassment of Muslims. . . . Even one of the country's Muslim peers, Lord Ahmed, has been stopped twice by police,'" according to a Muslim cleric and advisor to the Commission on British Muslims and Islamophobia. *Id.* (quoting Dr. Abduljalil Sajid). According to the Secretary-General of the Muslim Council of Britain, "'We have been witnessing a relentless increase in hostility towards Islam and British Muslims and it is clear that existing race relations bodies have been either unable or unwilling to combat this phenomenon effectively.'" *Id.* (quoting Secretary-general Iqbal Sacrane). "Islamophobia" has been defined as "dread, hatred and hostility towards Islam and Muslims perpetuated by a series of 'closed views' that imply and attribute negative and derogatory stereotypes and beliefs to Muslims. . . . Tackling Islamophobia, however, can never be a mandate for stifling free and fair comment. It is not Islamophobic to disagree or disapprove of Muslim beliefs." FAIR, *Racism and Islamophobia*, at http://www.fairuk.org/docs/Islamophobia%20&%20Racism.pdf (on file with Law & Contemporary Problems).

190. Criminal Libel Act, 1819, 60 Geo. 3 & 1 Geo. 4, c. 8 (Eng).

191. Race Relations Act, 1976, c. 74, § 1 (Eng.)

192. Mandla v Lee, 1 All ER 1062 (H.L. 1983), *available at* http://www.sikhcoalition.org/LegalUK1.asp (on file with Law & Contemporary Problems); *see also Lifting the Veil on Discrimination,* BBC NEWS, October 29, 1999, available at http://news.bbc.co.uk/1/hi/uk/492516.stm (on file with Law & Contemporary Problems).

193. *See Should "Religious Hatred" Be Illegal?* OPENDEMOCRACY.NET, August 5, 2004, *at* http://www.opendemocracy.net/debates/article.jsp?id=5&debateId=57&articleId=2018 (on file with Law & Contemporary Problems); FAIR, *Protection Against Religious Offences: A Summary of Existing and Proposed Legislation*, *at* http://www.fairuk.org/docs/Legislation.pdf (last visited Jan. 4, 2005) (on file with Law & Contemporary Problems); Peter Cumper, *Religious Liberty in the United Kingdom*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 92, at 205.

inequalities remain, such as the lack of prohibitions on incitement to religious hatred as well as religious discrimination in public services and benefits or in places of public accommodation.[194] Discrimination on religious grounds in employment was not prohibited by UK legislation until December of 2003.[195]

Public debate in Britain over the need for this legislation has also shed light on the nature of non-Muslim attitudes, particularly those on the left, to the British Muslim "other." The Commission on British Muslims and Islamophobia reports that race equality organizations have tended to use the category "Asian" to refer to most non-White people who are not categorized as black, which means that "Muslims [are] rendered invisible. Even local authorities which in other respects [are] at the forefront of implementing race equality legislation, for example, subsumed Muslims under the blanket category of 'Asians.'"[196] The philosopher Julian Baggini, in a debate with journalist Nick Cohen over whether religious hatred should be criminalized, wrote:

> [W]hite secularists like myself are not just failing to do enough to stop it, but our sins of omission may have helped contribute to creating a climate in which such prejudice thrives. Those of us who seek to defend the secular traditions of British civic life have not done enough to distinguish our legitimate objections to Islam from the kind of anti-Muslim prejudice which threatens to tear our communities apart. . . .
>
> The truth is that British Muslims are in a similar position today to black Britons in the 1970s. This time, though, the liberal political establishment is more muted in its defence of the persecuted minority. The reason for this is not, I think, racism pure and simple—though some racism may be involved. The difference is that matters are complicated by religion. Many left-liberals are hostile to Islam.[197]

3. Conclusion

Given that terror-profiling based on crude religious stereotypes will take place regardless of the official rhetoric, it is important to examine potential legal checks and balances to wrongful acts of discrimination. The strong

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194. Hate speech laws are not constitutionally suspect in the United Kingdom, although civil libertarians do raise concerns. When the bill on religious offenses was being considered in 2001, comedians such as Rowan Atkinson had to be assured that they would not be prosecuted and films such as Monty Python's "Life of Brian" would not be banned for satirizing religion. *Should "Religious Hatred" Be Illegal? supra* note 193. The philosopher Julian Baggini would support a law against religious hatred—so long as it carefully distinguished between criticism of religion and hatred of its adherents. *Id.*

195. Geoffrey Bindman, *From Race to Religion: The Next Deterrent Law?* OPENDEMOCRACY.NET, (Aug. 9, 2004), *at* http://www.opendemocracy.net/debates/article-5-57-2049.jsp (on file with Law & Contemporary Problems). Ironically, Parliament has long ago outlawed religious discrimination and incitement against Catholics and Protestants in Northern Ireland. *Id.; see* MUHAMMAD ANWAR, FROM LEGISLATION TO INTEGRATION: RACE RELATIONS IN BRITAIN (1999); *see also* Mandla v. Lee, 2 A.C. 548 (H.L. 1983) (identifying Sikhs as a racial group within the meaning of the U.K. Race Relations Act and articulating a list of characteristics that constitute an ethnic group: a shared history, a cultural tradition, a common geographical origin, a common language, literature and religion, and being a minority or group within a larger community.)

196. Commission on British Muslims and Islamophobia, *Islamophobia and Race Relations*, *at* http://www.insted.co.uk/relations.html (lasted visited Jan. 4, 2005) *adapted and abbreviated from* COMMISSION ON BRITISH MUSLIMS AND ISLAMOPHOBIA, ISLAMOPHOBIA—ISSUES, CHALLENGES AND ACTION (Robin Richardson ed. 2004) (on file with Law & Contemporary Problems).

197. *Should "Religious Hatred" Be Illegal? supra* note 193.

philosophical tradition of liberal individualism in the West means that individual rights are far more easily recognized than group rights. Legal theory and doctrine of American constitutional jurisprudence reflect that strong bias as do some international approaches. Nonetheless, in response to law's *omissions*, anti-discrimination remedies should adapt to the changing circumstances of discrimination.

IV

CONCLUSION: TERROR, FEAR AND RELIGIOUS EQUALITY

The subterranean quality of religious discourse in U.S. law prevents a full understanding of how and where religion is deployed in post-9/11 terror-profiling. At the same time that the government loudly proclaims its respect of religious difference, it engages in selective terror-profiling of groups based on religious difference. Thus, a rhetorical sleight-of-hand is occurring by which the law takes with one hand and gives with the other. More subtly and perhaps more curiously, domestic equal protection doctrine as well as international human rights norms have overlooked religion as a category of analysis upon which group rights claims can be asserted.

Terrorism demands a response. As the epigraphs to this essay suggest, while the fearful creation of an enemy "other" is a natural response, it cannot be the only response, at least in a world still governed in part by reason. The Japanese American internment cases, decided in an equally frightening world, remind us of the first principle in a reasoned, as opposed to fear-based, response: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[198]

The link between the domestic civil rights claims and international human rights is amplified in the context of the war on terror, in which "[b]y justifying its military actions abroad as preemptive attacks on terrorism, America invites scrutiny of its own history of government-sanctioned terror within its borders."[199] Maintaining moral authority under these circumstances requires heightened attention not only to how terror-profiling is deployed, but also to how religiously driven racial discrimination is averted or remedied.

198. Hirabayashi, 320 U.S. at 99.

199. Eric K. Yamamoto, *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1328 (2003).

V
Appendix
Table 1
Estimated Population Figures of Arabs and Muslims

	WORLDWIDE[200]	UNITED STATES[201]
ARAB	300 million	From over 1.2 million to over 3.5 million
Percent Christian	7%	77%
		Catholic 42%
		Orthodox 23%
		Protestant 12%
Percent Muslim	92%	23%
MUSLIM	Over 1.13 billion	6-7 million
Percentage of Muslims who are Arab	12-20%	25%
Percentage of Muslims who are African or African American	27%	25-33%
Percentage of Muslims who are Southeast or South-Central Asian	69%	35%
Percentage of Muslims who are European or "Other"	3%	7%
Note: totals in the above four "percentage of Muslims" rows are greater than 100 due to overlapping identities and reportage from multiple sources and from different bases, including ethnicity and geography. For instance, Arabs live in both Africa and Asia.		

200. *Arab Christians: Who Are They?*, *at* http://www.arabicbible.com/christian/arab_christians_who_are_they.htm (last visited Jan. 4, 2005) (on file with Law & Contemporary Problems); Ibrahim Abdel Gelil & Sherif Kandel, *Renewable Energy Resources in the Arab Countries* (2004), *at* http://www.ics.trieste.it/Documents/Downloads/df1642.pdf (on file with Law & Contemporary Problems); Middle East Policy Council, *Arab World Studies Notebook: Muslims Worldwide*, *at* http://www.mepc.org/public_asp/workshops/musworld.asp (last visited Jan. 4, 2005) (on file with Law & Contemporary Problems); *The Muslim World*, http://islam.about.com/library/weekly/aa120298.htm (on file with Law & Contemporary Problems); Council on American Islamic Relations, *About Islam and American Muslims*, at http://www.cair-net.org/asp/aboutislam.asp (last visited Jan. 4, 2005) (on file with Law & Contemporary Problems).

201. United States Bureau of the Census, *Census 2000 Brief: The Arab Population: 2000*, at 5 (December 2003), *at* http://www.census.gov/prod/2003pubs/c2kbr-23.pdf (on file with Law & Contemporary Problems); Arab American Institute, *Arab American Demographics*, *at* http://www.aaiusa.org/ demographics.htm (last visited Jan. 4, 2005) (on file with Law & Contemporary Problems); Ihsan Bagby, Paul M. Perl, & Bryan T. Froehle, *The Mosque in America: A National Portrait* (April 26, 2001), *at* http://www.cair-net.org/mosquereport/Masjid_Study_Project_2000_Report.pdf (on file with Law & Contemporary Problems); *Ethnicity of Muslims*, *at* http://www.cair-net.org/mosquereport/Ethnicity_of_Muslims.htm (last visited Jan. 4, 2005) (on file with Law & Contemporary Problems).