FRENCH HEADSCARVES AND THE U.S. CONSTITUTION: PARENTS, CHILDREN, AND FREE EXERCISE OF RELIGION

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I. INTRODUCTION

Many Americans were perplexed when they first heard about France's ban on the wearing of religious symbols in public schools.[1] Law No. 2004-228 prohibits students in public schools from wearing any conspicuous symbol by which the pupils openly express a religious membership."[2] The law could theoretically be applied to the wearing of any conspicuous religious symbol, including Jewish skullcaps, large Christian crosses, Sikh turbans, and Muslim veils.[3] The international press, however, largely characterized the law as targeting the Muslim headscarf and as overtly anti-Islamic.[4] Before the ban was passed into law, the U.S. Commission on International Religious Freedom expressed concern that the so-called "headscarf ban" would violate France's obligations as a signatory to the European Convention on Human Rights,[5] as well as other international law commitments that guarantee the freedom to manifest belief both publicly and privately.[6] To many Americans, the idea that such a ban could be legal under the French Constitution, and that it could enjoy such overwhelming national support,[7]

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[1] Justin Vaisse, *Veiled Meaning: The French Law Banning Religious Symbols in Public Schools, in* THE BROOKINGS INSTITUTION, U.S.-FRANCE ANALYSIS SERIES, Mar. 2004, *available at* http://www.brookings.edu/fp/cusf/analysis/vaisse20040229.pdf.

[2] Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190.

[3] Press Release, U.S. Commission on International Religious Freedom, France: Proposed Bill May Violate Freedom of Religion, Feb. 3, 2004, *available at* http://www.uscirf.gov/mediaroom/press/2004/february/02032004_france.html

[4] *The War of the Headscarves,* THE ECONOMIST, Feb. 5, 2004, *available at* http://economist.com/world/europe/PrinterFriendly.cfm?story_id=2404691.

[5] European Convention on Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Council of Europe, Nov. 4, 1950, entered into force Nov. 1, 1998.

[6] Press Release, *supra* note 3.

[7] *See The War of the Headscarves, supra* note 4. Sixty-nine percent of the French populace is in favor of the ban, with only twenty-nine percent opposed. French Muslims themselves are split, with forty-two percent in favor, and fifty-three percent opposed.

seems to conflict with the principles of liberty and equality of France's own Enlightenment thinkers, who contributed so significantly to the legal formation of the American system of government, and particularly to its value of religious freedom.[8] However, a careful examination of the existing circumstances in France as well as its historical view of separation of church and state does much to explain the differences in approach of the two nations.

Though a ban on the wearing of religious symbols in schools could burden students of many different religions, this Note will focus on the particular impact it would have on Muslims. Part II of the Note will examine the history of the 2004 French ban on wearing conspicuous religious symbols in public schools, including the social and political forces that influenced its implementation. Specific emphasis will be on the November 2005 Paris suburb riots are evidence of the growing disillusionment of French Muslims and their sense of isolation from French mainstream society. Part III will compare the social and political elements currently at work in the United States to show how a similar ban, or at least a limitation of the freedom Muslim women should have to wear the veil, could potentially be promulgated in the U.S. Part IV will examine the constitutional bases for such a ban in the United States, concluding that any law having the effect of prohibiting Muslim schoolgirls from wearing the headscarf is unconstitutional, especially when the right to the free exercise of religion and parental rights are combined. Lastly, Part V argues that even if such a ban passed constitutional muster, public policy concerns would discourage implementation of a ban on wearing conspicuous religious symbols in American public schools, as the American situation is very different from that in France and such a ban would deepen the already existing ethnic divide, further criminalize innocent Muslim-Americans, jeopardize the parent-child relationship in the home, violate international law, and legitimize headscarf bans internationally.

II. HISTORICAL AND SOCIAL CONTEXT OF LAW NO. 2004-228

A. The Values of Laïcité and Assimilation

A discussion of the roots of the headscarf ban must begin with the French ideal of *laïcité,* a concept often equated with that of secularism.[9] *Laïcité* is a French term used to describe the balancing of religious freedom and public order, and does not precisely equate with the American term of secularism. Rather, it is a principle of religious neutrality intended to create the conditions necessary for religious freedom.[10] The term represents a collection of many meanings and implications, including the importance of ensuring that individual social and

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[8] *See* Steven L. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1, 2 (2005).

[9] Gey, *supra* note 8, at 9.

[10] *Id.*

political independence are not dominated by powerful social institutions such as religion.[11] Today, France is one of only five countries in the world that legally separates church and state,[12] and even its constitution states that "France is a Republic, indivisible, secular, democratic, and social...."[13] French society strongly opposes anything that threatens this church-state separation, or places religion within the realm of government activity.[14]

While weary that religious domination will threaten the individual, France still values assimilation much more than diversity. Becoming "French" is seen as a way to strengthen the universalism of the secular tradition and acceptance of anyone, from anywhere, is encouraged, as long as the newcomer becomes "French."[15] Immigrants to France are expected to leave behind their past and embrace French culture and identity as their own.[16]

Thus, many consider the headscarf worn by Muslim women and girls as an outright refusal to become French.[17] Overall, the value placed on assimilation leaves little room for the multicultural philosophy and strong emphasis on diversity present in the United States and Canada.[18] French Muslim immigrants and their children face strong pressure to give up the cultures of their homelands and adopt a French identity,[19] which can prove very difficult for people who come from places with strikingly different cultural, religious, social, and linguistic traditions.[20]

B. Historical Context

For centuries, religious differences in France have created deep societal divisions. Beginning in the 16th century, Roman Catholicism was the dominant religion, but there was constant strife between Catholics and Protestants and frequently clashes were violent.[21] After much unrest, the proponents of the 1789 French Revolution aimed to overthrow not only the monarchy, but also the social and political system, including the Church.[22] The Church survived, but Catholics

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[11] *Id.*

[12] Cynthia D. Baines, *L'Affaire des Foulards: Discrimination, or the Price of a Secular Public Education System?*, 29 VAND. J. TRANSNAT'L L. 303, 311 (1996).

[13] *Id.* at n. 51; *See also* 1958 CONST. art. 1

[14] Gey, *supra* note 8, at 9.

[15] Baines, *supra* note 12, at 311.

[16] *Id.* (Jean-Claude Barreau, former head of the French Office of International Immigration, stated that "when someone immigrates, he does not simply change country, he also changes history . . . Foreigners arriving in France must understand that henceforth their ancestors are the Gauls. They have a new fatherland.") *Id.*

[17] *See id.* at 311.

[18] *Id.* at 312.

[19] *See id.* at 311-312.

[20] Baines, *supra* note 12, at 311-312.

[21] Maximilien Turner, *The Price of a Scarf: The Economics of Strict Secularism*, 26 U. PA. J. INT'L ECON. L. 321, 328 (2005).

[22] *See id.*

themselves were repeatedly massacred by revolutionaries during the post-revolution Reign of Terror.[23] The state completely restructured the Church hierarchy, demanding that the clergy first swear allegiance to the French government, and only thereafter to the Church.[24]

The Enlightenment placed value on the inherent rights of individuals, a concept that advanced the French Revolution, emphasizing the link between liberty and *laïcité*.[25] It required that distinctions, especially religious ones, be set aside in order to strengthen one's status as a universal French citizen.[26] For the next century, the Church's continued opposition to liberal values encouraged a formal break between religion and state.[27] Although Napoleon officially recognized Roman Catholicism as the majority religion of the Republic with the Concordat of 1801, and re-instated financial support of some parish priests, his actions were seen to be political only.[28] Anti-clericalism became even stronger during the Third Republic (1875-1940) during which a series of laws were passed to diminish the Catholic Church's influence, especially in the educational sphere.[29] In 1905, a law was passed announcing that the Republic would guarantee the free exercise of religion, that it would not recognize any state religion nor fund any religious activity, and essentially formalized republican notions of *laïcité*.[30]

It wasn't until later that century, however, that France began to see new religious influences in the country. France's Muslim population began to grow with the influx from its former North African colonies in the 1960s.[31] By the 1980s, headscarf issues rose to the forefront, and France went through at least three periods of intense debate which finally culminated in the current legislation.[32] The national conversation was characterized by the following pattern: schools would expel students for refusing to remove their headscarves, which was followed by compromises between schools, students, and the government. This resulted in temporary lulls in the debate that suggested the problem had been solved. The issues then re-emerged and students once again were expelled because they refused to remove their headscarves.[33] It is within this national historical context that France considered its 2004 law.[34]

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[23] *Id.*

[24] T. Jeremy Gunn, *Religious Freedom and Laicite: A Comparison of the United States and France*, 2004 BYU L. REV. 419, at 434-435 (2004).

[25] Turner, *supra* note 21, at 329.

[26] *Id.*

[27] *See id.*

[28] Hannah C. Smith, *Liberte, Egalite, et Fraternite at Risk for New Religious Movements in France*, 2000 BYU L. REV. 1099, at 1105 (2000).

[29] *Id.* at 1106..

[30] Turner, *supra* note 21, at 329.

[31] Elisa T. Beller, *The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L.J. 581, 588 (2004).

[32] *Id.* at 582-586.

[33] *See Id.* (The first debate took place between 1989 and 1990 and ended with the Conseil d'Etat issuing a judgment stating that wearing a veil does not contradict the *laïque* and republican values of a

C. *Social Context: Challenges with a Rising Muslim Population, A Case Study of the November 2005 Riots*

By the end of the twentieth century, the principles of *laïcite*, secularism, and citizenship had become such a part of the French national identity that they were rarely challenged, especially with the decline in religious devotion Europe had experienced.[35] However, with the arrival of new religious and cultural groups from France's former colonies, these principles had to be reevaluated.[36] The experimentation with headscarf bans in the 1980s and 1990s demonstrated France's initial attempt to deal with the new challenges it faced with its growing Muslim minority.[37] Yet the 2004 headscarf ban was a decisive action that sent very clear messages and can be seen as both an impetus for the November 2005 riots—which took place in areas populated predominantly by immigrants from Muslim parts of the world—and an attempt to deal with the social unrest that caused their eruption. It was therefore both a solution to and a cause of the problems the riots exposed.[38]

It is difficult to obtain accurate statistics concerning the number of Muslims in France, as the government, in its efforts to demonstrate its commitment to the

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public school, and that school principals can decide on a case-by-case basis whether or not to admit veiled students. The judgment also stated that religious symbols were permitted as long as they were not "ostentatious" and did not constitute "an act of intimidation, provocation, proselytizing, or propaganda" or "threaten the dignity and freedom" of others.); Natan Lerner, *International Law and Religion: How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance,* 13 WILLAMETTE J. INT'L. & DISPUTE RES. 65, 83-84 (2005). (The then Minister of Education, Lionel Jospin, also issued a directive empowering school officials themselves to determine the appropriateness of wearing the veil. *Supra* note 32, at 584. (The second debate took place between 1993 and 1994 and discussed the impracticalities of the Conseil d'Etat's judgment. During these negotiations the number of headscarf expulsions temporarily dropped. The third debate took place between 1998 and 2003 after a rise in public school expulsion incidents. These incidents prompted the government to mobilize the well-known Stasi Commission to issue a report and make recommendations on the issue, which ultimately resulted in the promulgation of the 2004 law.).

[34] *Turkey: Headscarf Ruling Denies Women Education and Career,* HUMAN RIGHTS WATCH, Nov. 16, 2005, *available at* http://hrw.org/english/docs/2005/11/16/turkey12038.htm. (However, France's decision to codify a headscarf ban is not unprecedented, since Turkey had been experimenting with a headscarf ban since as early as 1925 and had been strictly enforcing it since 1997.); *see* Lerner, *supra* note 33, at 84. (A comparison between the Turkish and French headscarf bans is not out of the question because the Turkish notion of a secular, or "laik" state has roots in French secularism.)

[35] *See* Turner, *supra* note 21, at 329.

[36] *See* Gey, *supra* note 8, at 8.

> Liberalism has always regarded religious faith as irrational and emotional, and as something that must be corralled into safe irrelevance. By the latter half of the 20th century, it was within sight of achieving its goal, as European Christianity crumbled. Nowhere was this more true than in France. That victory only reinforced the French liberal tradition's sense of its own superiority and historical inevitability; the assumption was that wealth and time would between them kill off the last vestiges of religious faith. But this has not proved true of France's Muslims, and now, disastrously, liberalism has resorted to the full force of the law to buttress its supremacy. France is providing an example par excellence of what the French would call a 'dialogue de sourds'—a dialogue of the deaf. *Id.*

[37] *See* Turner, *supra* note 21, at 329.

[38] *See e.g.*, Baines, *supra* note 12, at 314.

republican ideal of equality, does not collect information on ethnic or religious minorities.[39] This refusal to keep statistics demonstrates France's national discomfort in acknowledging the reality of its ethnic make-up. However, media sources estimate that there are between five and six million Muslims in the country.[40] This amounts to almost one-tenth of France's population, and one-third of the total European Muslin population.[41] The majority of French Muslims live in the most disadvantaged sectors of society[42] and tend to reside in areas with poor housing, bad schools, limited access to transportation, and unemployment levels that are twice the national average.[43] In fact, one report even rates youth unemployment in sensitive urban zones at forty percent,[44] while another places the unemployment of minorities at three times the national average.[45]

French language terms demonstrate a refusal to acknowledge the existence of a multicultural society, making it even more difficult for French Muslims to find their place in society.[46] Though the first North African immigrants came to France almost fifty years ago, there is no hyphenated term for their children.[47] While in the United States it is common to refer to someone as African-American, Hispanic-American, or Asian-American along ethnic lines, or even Mexican-American, Chinese-American, or Polish-American along nationality lines, no such terms have developed in France.[48] One cannot simultaneously be French and North African; rather, one must choose. Thus, the inaccurate term "immigrant" is commonly used to encompass a very broad group of people, regardless of whether they identify more with France, or with their countries of origin; whether they were born and raised in France; whether they have lived there generations; or whether they arrived there last week.[49]

France's strong preference for the ideals of integration and assimilation over multiculturalism places Muslim minorities in a difficult situation. For recent immigrants who find themselves in segregated and disadvantaged communities, religion often becomes an identifying cultural tie.[50] For second and third-

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[39] *See Id.* at 334.

[40] *Headscarf Defeat Riles French Muslims,* BBC NEWS, Nov. 1, 2005, http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/4395934.stm (last visited Nov. 15, 2005). France's Muslim population is estimated to be categorized as follows: thirty-five percent Algerian origin, twenty-five percent Moroccan origin, ten-percent Tunisian origin. *Id.*

[41] *France's Failure,* THE ECONOMIST, Nov. 10, 2005, *available at* http://www.economist.com/printedition/displayStory.cfm?Story_ID=E1_VTPGPDV.

[42] Turner, *supra* note 21, at 335.

[43] *France's Failure, supra* note 41.

[44] *An Underclass Rebellion,* THE ECONOMIST, Nov. 10, 2005, http://www.economist.com/agenda/displayStory.cfm?story_id=5138990 (last visited Nov. 15, 2005).

[45] *Id.*

[46] *See id.*

[47] *Id.*

[48] *See id.*

[49] *An Underclass Rebellion, supra* note 44.

[50] Turner, *supra* note 21, at 335.

generation immigrants, the competing cultural values surrounding them may produce a form of identity crisis.[51] Many of the young women who wear the headscarf struggle to retain their parents' values and ties to their homelands, while they fight for acceptance from their French classmates.[52] In this atmosphere, religion can become a unifying force that creates a sense of belonging and identity in the midst of contending ideals.[53] At the same time, there is a fear in France that religion can lead to individual repression, a threat to *laïcité*, or even worse, that it can become a source of fundamentalism.[54]

Just over a year and a half after the implementation of the headscarf ban, France experienced an alarming event that brought the disillusionment of its Muslim population to the forefront. In 2005, for nearly two weeks at the end of October and beginning of November, intense rioting spread across the country and resulted in the torching of over 6,000 cars, 1,500 arrests, one death, and the destruction of numerous establishments.[55] The violence started in a Paris suburb and quickly spread to over 300 towns, forcing the government to declare a state of emergency and implement a curfew.[56] The riots were triggered when two teenagers, one of North African origin and the other of Malian descent, were killed while trying to hide from police in an electricity substation in a Paris suburb.[57] This event triggered a stem of unplanned riots as residents of the Parisian suburbs expressed their anger from being targeted by police and discriminated against in many aspects of their lives.[58]

The riots did not take on a religious tinge, nor is there any suspicion of their being encouraged by Islamic fundamentalists, despite some commentary describing them as "France's Intifada."[59] Though Turkish Prime Minister Recep Tayyip Erdogan did directly link the riots to France's headscarf ban, saying it encouraged feelings of exclusion and stirred racial tensions,[60] his comment suggests that the

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51 *Id.*

52 *Id.* at 336.

53 *See id.* at 335; *see also Headscarf Defeat Riles French Muslims, supra* note 40.

54 *See* Turner, *supra* note 21, at 335 (arguing that many second-generation Muslims in France see the wearing of the veil or turning to religious militancy as a way of expressing their frustration with poverty and unemployment in their communities). Muslim headscarf wearers also fear that the French are suspicious of them, categorizing them as "terrorists." For example, one woman, the daughter of Moroccan immigrants, stated, "[In my community] I feel safe, because everyone is Arab. But the France outside is a France of racism, and the racism has gotten worse since Sept. 11 . . . If you dress with a veil, no one here bothers you . . . but the French, when they see a woman who wears the veil, they think 'terrorist.'" *Id.*

55 *Id.*

56 *See An Underclass Rebellion, supra* note 44.

57 *See id.*

58 *An Underclass Rebellion, supra* note 44.

59 *France's Failure, supra* note 41.

60 Kate Heneroty, *Turkish PM Connects French Headscarf Ban with Rioting,* THE JURIST, Nov. 7, 2005, http://jurist.law.pitt.edu/paperchase/2005/11/turkish-pm-connects-french-headscarf.php (last visited Nov. 15, 2005). Though Erdogan is very religious himself, and his wife wears a headscarf, he has proceeded very cautiously with headscarf ban issues in his own country, where an explicit ban has existed since 1997; *see also* Turner, *supra* note 21, at 327.

riots reflected an underlying disillusionment more than an outright religious movement. This disillusionment felt in areas predominantly populated by France's Muslim minority revealed that population's frustration with a lack of real integration. People of darker complexions, referred to as "visible minorities" by the think-tank Institut Montaigne, felt targeted by the police on a regular basis, and discriminated against when it came to employment.[61] They expressed their discontent through intense rioting, and the fact that the French government could not gain control of the situation for almost two weeks showed both the tangible strength of the immigrant communities as well as the intensity of their disillusionment.

Analysts attribute the November 2005 riots almost exclusively to the social and economic alienation of France's Muslim population isolated in the poor suburbs around major French cities.[62] One article attributed the riots to two policy problems: 1) mass unemployment in spite of the welfare system, and 2) the formation of ethnic ghettos, "even though France prides itself on color-blind equality."[63]

The unfamiliar idea of secularism combined with the lack of incentive to embrace French ideals of citizenship further increases French Muslims' feelings of alienation.[64] The headscarf ban only exacerbates these sensitivities. In Islamic law, or *Shari' a*, secularism does not exist, making it difficult for French Muslims to accept this principle.[65] Although *Shari' a* is not a uniform code of law, as there is no central authority in Islam; followers of Islam believe they have an "obligation to conduct every aspect of their public and private lives according to the principles of Islamic law found in the *Quran*."[66]

The debate over France's tradition of *laïcité* now focuses on whether or not the country is open to change. Traditionalists claim that France must uphold secular principles as firmly as it did against the divine-right monarchists of its past.[67] Others argue that the principles of *laïcité* are dynamic and can accommodate exceptions.[68] Should French ideals of *laïcité* and citizenship

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[61] *An Underclass Rebellion, supra* note 44 (referring to the suburbs as "grim *banlieues*").. According to a study by sociologist Farhad Khosrokhavar, over half of France's prison population is Muslim. *See also France's Failure, supra* note 41.

[62] *France's Failure, supra* note 41.

[63] *An Underclass Rebellion, supra* note 44.

[64] *See* Gey, *supra* note 8, at 15.

> These conditions have fed local feelings of hostility and frustration toward a society that is perceived to have ostracized and marginalized the French Muslim population. These feelings, in turn, have fed a burgeoning fundamentalist religious subculture, which is characterized by periodic violent attempts to enforce the rigid social mores dictated by conservative clerics and their followers. Id.

[65] Baines, *supra* note 12, at 308-309.

[66] *Id.* at 309.

[67] Henri Astier, *The Deep Roots of French Secularism,* BBC NEWS, Sep. 1, 2004, http://news.bbc.co.uk/ go/pr/fr/-/1/hi/world/europe/3325285.stm (last visited Nov. 15, 2005).

[68] *Id.* For example, the provinces of Alsace and Lorraine, both of which were German when

somehow adapt to France's new citizens, or should its new citizens be expected to embrace these traditional ideals and leave behind those values that do not conform?

However, the French government does not completely ignore its Muslim minority. In 2002, it formed the French Council for the Muslim Religion (CFCM) to represent French Muslims in negotiating potential religion-state clashes.[69] The Council has dealt with issues such as the creation of a *halal* meat market, the establishment of Muslim cemeteries, and the building of mosques.[70] However, the government has also drawn bright lines to combat the fear of militant radical Islam, and the prohibition on the wearing of conspicuous religious symbols is one of these.[71]

In the background of this debate, there are sincere questions to be asked about the majority of the French population's real attitude toward its Muslim counterparts. The shocking success of Jean-Marie Le Pen in the 2002 presidential elections caused extreme alarm to the country's immigrants and immigrant supporters.[72] Though Le Pen did not win the final election, he won 17% of the vote in the preliminary elections, just behind Jacques Chirac at 19%, which made him a major contender for the Presidency.[73]

Mr. Le Pen campaigned on an anti-immigrant platform and although he stopped speaking of mass deportations or forcing second-generation immigrants to swear loyalty to France, he still wanted the native French to receive priority in job competition and welfare benefits.[74] In a Marseille rally Le Pen boldly declared, "Our values, our rules," declaring himself a Francophile—though careful to clarify not a racist—and explaining his view that immigration could be fatal to the country.[75] Commentators attributed Le Pen's increased support during elections to this anti-immigrant platform, stating it drew out voters who previously would not have shown.[76] Luckily, enough voters emerged to defeat Le Pen, but the very fact that he could progress so far in national elections demonstrates the public's growing fear that foreigners, many of which are Muslim immigrants, threaten their nation.[77]

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church and state were officially separated in 1905, have kept a system which allows clergy to receive government salaries. *Id.*

69 Vaisse, *supra* note 1, at 4.

70 *Id.*

71 *Id.*

72 Phillip Delves Broughton, *Le Pen's Poll Triumph Rocks France,* THE TELEGRAPH, Apr. 22, 2002, http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2002/04/22/wpen22.xml (last visited Feb. 10, 2006).

73 *Id.*

74 *Id.*

75 *See* Harry de Quetteville, *Le Pen Sees Opportunity as Jews Feel Scared,* THE TELEGRAPH, Apr. 18, 2002, http://www.telegraph.co.uk/news/main.jhtml;jsessionid=KT4JLPK5GAFFFQFIQMFSFFWAVCBQ0IV0?xml=/news/2002/04/18/wfra118.xml (last visited Feb. 10, 2006).

76 Broughton, *supra* note 72.

77 The controversy that sparked massive protests throughout the Muslim world over the publishing

III. SIMILAR FORCES AT WORK IN THE UNITED STATES

An analysis of whether or not a headscarf ban would be constitutional in the United States must begin with the social context in which such a ban would be proposed. In France, the impetus behind the ban stemmed from a growing struggle about the question of how to integrate a population with different values, cultural ties, and languages. The social climate in the United States concerning its Muslim population must be compared with that of France, as the two are significantly different.

No one can ignore that the situation for Muslim-Americans was very different prior to the September 11th terrorist attacks, even considering the on-going anti-immigrant sentiment present in the U.S.[78] Although there was mounting concern over Islamic fundamentalism abroad, Americans were still as yet untouched by this threat. However, post-9/11 attitudes have changed and a growing fear of people of Muslim and Arab origin exists. At the same time, that very population is growing in American cities.[79] The Council on American-Islamic Relations—CAIR—a Washington, D.C. based non-profit organization, and the largest American Muslim civil rights and advocacy organization, published a report in 2005 entitled "The Status of Muslim Civil Rights in the United States: Unequal Protection."[80] The report documents the growing disparity in the treatment of Muslim Americans since 9/11 by examining major federal law enforcement initiatives, high-profile national cases, and statistical evidence of anti-Muslim discrimination in 2004.[81] It found a 49 percent increase in the number of reported cases of discrimination, harassment, and violence against Muslim Americans in just one year.[82] There was a 52 percent increase in the number of reported cases of violent anti-Muslim hate crimes, and ten states alone accounted for almost eighty percent of the incidents.[83] After airports, schools were among the top five places where incidents of discrimination occurred.[84]

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of offensive cartoons of the Prophet Mohammed in a Danish and later French newspaper will do little to alleviate public opinion in the West regarding the threat of Muslim immigrants and their perceived values. *See Chirac Warns Media Over Cartoons,* BBC NEWS, Feb. 8, 2006, http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4693628.stm (last visited Mar. 6, 2006).

[78] *See* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 90 (2003).

[79] *See infra* notes 96-103.

[80] COUNCIL ON AMERICAN-ISLAMIC RELATIONS, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES: UNEQUAL PROTECTION 1-2 (2005), *available at* http://www.cair-net.org/asp/2005CivilRightsReport.pdf [hereinafter UNEQUAL PROTECTION].

[81] *Id.* at 5.

[82] *Id.*

[83] *Id.* These States included California (20.17%), New York (10.11%), Arizona (9.26%), Virginia (7.16%), Texas (6.83), Florida (6.77%), Ohio (5.32%), Maryland (5.26%), New Jersey (4.53%), and Illinois (2.96%). These states also have larger Muslim populations than others. *Id.*

[84] *Id.* at 47. The workplace, governmental agencies, and during police contact were the top three. *Id.*

CAIR attributes the increase in anti-Muslim sentiment to the fear many Americans have developed against Arabs, Muslims, and South Asians since September 11th, and to "the growing use of anti-Muslim rhetoric by some local and national opinion leaders."[85] It also blames the passage of the United States Patriot Act and other policies that infringe upon the civil and constitutional liberties of all Americans.[86] Among the alleged types of abuse, unreasonable arrests accounted for more than twenty-five percent of the total, followed by incidents involving religious accommodation.[87] Of all civil rights violations reported to CAIR in 2004, sixty-nine percent were triggered by the person's race or ethnicity.[88] Additionally, the report acknowledges that most acts of anti-Muslim discrimination were instigated by some identifying Islamic feature, such as the headscarf worn by Muslim women.[89] In fact, the *hijab*, or headscarf, was the second most common feature to trigger mistreatment.[90]

Examples of the growing misunderstanding about the *hijab*, whether religiously, culturally, or politically motivated, are becoming more commonplace.[91] Discrimination based on wearing the veil in schools is escalating. One such example is when a New York high school prohibited two Muslim girls from attending their 2004 graduation because they refused to remove their headscarves.[92] Another Muslim student who was visiting the U.S. on a State Department foreign exchange program was prohibited from wearing the *hijab* to her school in California.[93] Other women report being fired from their jobs for wearing the *hijab* as well.[94]

Overall, Muslims in America are beginning to feel an increase of anti-Muslim sentiment in their everyday lives. Although the United States does not have as high a percentage of Muslims inhabitants, unlike France, Americans still perceive them to be a threat as we continue to associate them with terrorist activity and lump them in the category of general immigrants who threaten the American status

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85 UNEQUAL PROTECTION, *supra* note 80, at 6.

86 *Id.* *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub. L. No. 107-56, 115 STAT. 272, (as codified in 18 U.S.C. 1).

87 UNEQUAL PROTECTION, *supra* note 80, at 48.

88 *Id.*

89 *Id.* at 50.

90 *Id.* at 51.

91 For example, on April 24, 2004 a Muslim woman and her son were harassed and attacked by another woman while shopping in Pennsylvania. The woman shouted that American troops were fighting in Iraq and Afghanistan so women did not have to dress like her, and repeatedly hit her with her shopping cart. Employees of the store refused to assist the Muslim woman in calling the police or stopping the harassment. *Id.* at 52. On June 26, 2004, another Muslim woman was stopped in her car by three individuals who demanded a lighter which she did not have. They said "Stupid Muslims, f-cking Muslims," kicked her car, punched her in the face, and tore off her *hijab*. *Id.* at 52-53.

92 UNEQUAL PROTECTION, *supra* note 80, at 55.

93 *Id.*

94 *Id.* at 56.

quo. Government policies such as the United States Patriot Act, special registration, and other policies enhance this perceived threat.[95]

Statistics regarding the Muslim population in the United States are difficult to find,[96] but there is no doubt that it is increasing in size and influence. A 2001 report estimated the population of Muslims in the U.S. at anywhere between three and nine million,[97] with a concentration in major cosmopolitan areas,[98] and demonstrated that between 1994 and 2001 there was a twenty-five percent increase in the number of mosques in America.[99] Additionally, a significant portion of Muslim Americans are converts,[100] of which a very large percentage consists of white American women who marry Muslim men.[101]

As the American Muslim population increases, non-Muslim Americans are being forced to consider their feelings for their fellow Muslim citizens. There has been a steady increase in fear of Islam since September 11th 2001, such that four months after the attacks 14 percent of those surveyed in an ABC News poll believed Islam encouraged violence, and by 2003 a further 34 percent held this view.[102] Similarly, in 2001, 22 percent of those surveyed believed Islam did not teach respect for non-Muslim beliefs, which increased to 43 percent just two years later.[103] Unless significant efforts are made to educate Americans about Islam, this trend is unlikely to subside, especially in the wake of the violent riots throughout the Muslim world in response to the publishing of cartoons of the Prophet Mohammed in European newspapers in early 2006, and other such incidents.[104] Overall, polls attribute the growth in mistrust and fear of Islam to a lack of

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[95] *See generally* USA Patriot Act, *supra* note 86.

[96] Abdul M. Mujahid, *Muslims in America: Profile 2001*, http://www.soundvision.com/info/yearinreview/2001/profile.asp (last visited Feb. 10, 2006).

[97] *Id.*

[98] *Id.* Twenty percent of all Muslims live in California, sixteen percent in New York state, eight percent in Illinois, four percent in New Jersey and Indiana each, and about three percent in Michigan, Virginia, Texas, and Ohio each. *Id.*

[99] HARTFORD INST. FOR RELIGIOUS RESEARCH, MOSQUE IN AMERICA: A NATIONAL PORTRAIT, VARIETIES OF WORSHIP: DEMOGRAPHIC FACTS, *available at* http://usinfo.state.gov/products/pubs/muslimlife/demograp.htm (last visited Feb. 10, 2006).

[100] Mujahid, *supra* note 96. In Illinois, a growth of about twenty-five percent in the Muslim population was due to conversion. However, about forty-one percent of these new Muslims in Illinois and sixty-one percent in the State of New York left Islam within a few years. *Id.; see also* WORLD RELIEF, NATIONAL ASSOCIATION OF EVANGELICALS, THE MUSLIM WORLD, www.worldrelief.org (last visited Feb. 11, 2006) (stating that the American Muslim Council reports that there are over 80,000 American-born converts to Islam); *see also* 30-DAYS INTERNATIONAL, 2005 VITAL STATISTICS: ISLAM IN THE USA, http://www.30-days.net/statics/statusa1.htm (last visited Mar. 11, 2006) (stating that other estimates place the converts at between seventeen and thirty percent of the total U.S. Muslim population).

[101] WORLD RELIEF, NATIONAL ASSOCIATION OF EVANGELICALS, THE MUSLIM WORLD, www.worldrelief.org (last visited Feb. 11, 2006).

[102] *Critical Views of Islam Grow Amid Continued Unfamiliarity*, ABC NEWS, Sept. 7, 2003, http://abcnews.go.com/images/pdf/931a4Islam.pdf (last visited Nov. 10, 2006).

[103] *Id.*

[104] *See infra* note 77.

familiarity with it and its followers.[105] Those who felt they had a basic understanding of the religion were much more likely to view it positively.[106] Unfortunately, two-thirds of those surveyed in the poll expressed basic unfamiliarity with Islam.[107]

Overall, though the United States faces a very different situation than France regarding its Muslim population, history has shown the very real tendency nations have to restrict vulnerable minority groups that the general population feels uncomfortable toward, or even openly fears, especially in periods of conflict or political tension.[108] Though the implementation of a headscarf ban would appear to some to be a minor inconvenience or limitation of liberty, it poses a very real threat to the basic principles of religious freedom explicit in the U.S. Constitution.

IV. U.S. CONSTITUTIONAL CHALLENGES TO A HEADSCARF BAN

Because of the guarantee of free exercise of religion in the United States Constitution,[109] it is unlikely that a law whose language resembled the 2004 French law would be upheld in the United States. However, other laws that have the same effect could be upheld as constitutional. One could envision the promulgation of a facially benign law, such as one designed to prohibit the wearing of headgear in schools, regardless of affiliation or reason for their use, or a rule enforcing a certain dress code or school uniform. Such laws would have the discriminatory effect of prohibiting Muslim girls from wearing headscarves, Jews from wearing skullcaps, Sikhs from wearing turbans, and possibly other children of other faiths from wearing religious garb. In this section, I will discuss the current state of the law regarding the free exercise of religion, especially in the public school arena, and will then discuss possible outcomes of constitutional challenges to a headscarf ban. Though I will limit my discussion to the free exercise guarantee of the First Amendment and to parental rights guarantees, there are strong Establishment Clause, Free Speech Clause, and Title VII discrimination arguments against a headscarf ban as well.[110]

First of all, the First Amendment of the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...."[111] Additionally, courts have held the First Amendment applicable to the states

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105 *Critical Views of Islam Grow*, *supra* note 102.

106 *Id.*

107 *Id.*

108 *See infra*, note 179.

109 U.S. CONST. amend. I.

110 *See* Gey, *supra* note 8, at 20 (arguing that if the two lines of cases, one protecting the religious speech of students in public schools and the other protecting parents' rights to dictate the religious upbringing of their children, are combined, it is unlikely that courts would uphold a law prohibiting the wearing of religious symbols in public schools).

111 U.S. CONST. amend. I.

through the Fourteenth Amendment.[112] Because regulation of education has traditionally been left to the states, it is unlikely that the federal government would pass a law against wearing conspicuous religious symbols in schools on a nation-wide basis. Therefore questions of constitutionality would first arise at a local level. Either an individual state would pass such a law, or an individual school would enforce a regulation prohibiting Muslim school girls from wearing the headscarf to school. Currently, there has been no such law proposed in any state, but states such as Oregon, Pennsylvania, and Nebraska each have laws prohibiting teachers from wearing religious symbols or garb.[113] Additionally, there have been incidents of individual public schools suspending or expelling students for refusing to remove their headscarves, most often attributing it to a violation of some sort of school dress code.[114] Other states, such as Missouri, have been proactive and passed statutes expressly allowing students to wear religious insignia or emblems as long as they do not promote disruptive behavior.[115]

A. The Free Exercise Clause

The first major case to challenge the nation's Free Exercise of Religion Clause was *Reynolds v. U.S.*, in which a member of the LDS Church, which at the

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[112] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[113] *See* 24 PA. CONS. STAT. ANN. § 11-1112(a) (West 2002); NEB. REV. STAT.§ 79-898 (2003); OR. REV. STAT. § 342.650 (2003). *See also* Gey, *supra* note 8, at 18-19.

[114] THE RUTHERFORD INSTITUTE, RELIGIOUS FREEDOM UNDER SIEGE IN AMERICA: A SPECIAL REPORT FROM THE RUTHERFORD INSTITUTE, June 8, 2004 [hereinafter RUTHERFORD INSTITUTE]. The Rutherford Institute represented Nashala Hearn in *Hearn v. Muskogee Public School District* (E.D. Okla). Nashala was suspended twice for refusing to remove her headscarf pursuant to a school dress code prohibiting "hats, caps, bandannas, plastic caps, and hoods on jackets inside the [school] building." The case eventually settled, but sparked a lively debate in the process. Twelve-year old Nashala Hearn testified before the Oklahoma Senate Judiciary Committee on the issue of "hostility to religious expression in the public square" and said that insisting on wearing her headscarf in school sparked a "battle between being obedient to God by wearing my *hijab* to be modest in Islam versus the school dress code policy." *Oklahoma Girl Testifies on Headscarf Issue,* Associated Press, Jun. 9, 2004, *available at* http://www.kotv.com/main/home/stories.asp?whichpage=1&id=63591 (last visited Mar. 10, 2006). The United States Department of Justice filed an intervenor brief in the case against the school district alleging that the school district violated the equal protection clause of the Fourteenth Amendment to the Constitution because it applied the dress code in an inconsistent and discriminatory manner. The complaint also asked the court to prohibit the school district from discriminating against Hearn, and "to have the dress code policy revised to ensure that discrimination on the basis of religion did not continue." Assistant Attorney General R. Alexander Acosta stated in a press release: "We certainly respect local school systems' authority to set dress standards, and otherwise regulate their students, but such rules cannot come at the cost of constitutional liberties. Religious discrimination has no place in American schools." *Justice Department Files Complaint Against Oklahoma School District Seeking to Protect Student's Right to Wear Headscarf to Public School.* Press Release, United States Department of Justice, Mar. 30, 2004, *available at* http://www.usdoj.gov/opa/pr/2004/March/04_crt_195.htm (last visited Mar. 9, 2006).

[115] A Missouri law, passed in 2005, states:

> No employee of or volunteer in or school board member of or school district administrator of a public school or charter school shall direct a student to remove an emblem, insignia, or garment, including a religious emblem, insignia, or garment, as long as such emblem, insignia, or garment is worn in a manner that does not promote disruptive behavior. MO. REV. STAT. § 167.166 (2005).

time allowed its members to practice polygamy, was tried for violating a bigamy statute.[116] The statute was upheld, Mr. Reynolds was prosecuted, and the Court established that while a government cannot prohibit one's belief, it is free to regulate conduct.[117] All subsequent legal jurisprudence has rested on this principle: that the government can regulate what one does, but not what one thinks.

Subsequent cases further developed the guarantees of the Free Exercise Clause, culminating in the pivotal case of *Employment Division., Oregon Department of Human Resources v. Smith*.[118] The governing test of whether government action violated the Free Exercise Clause before *Smith*, was the *Sherbert* test, which said that state actions which substantially burden a religious practice must be justified by a compelling governmental interest.[119] Instead, *Smith* stands for the proposition that a religion-neutral law of general applicability that has the effect of burdening a particular religious practice does not need to be justified by a compelling interest;[120] it only must bear a rational relationship to some legitimate government interest.[121] In response to *Smith*, Congress, after heavy pressure from religious groups, passed the Religious Freedom Restoration Act (RFRA).[122] The

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116 98 U.S. 145 (1878).

117 *Id.* at 166. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* To permit a person to excuse his/her practices because of religious belief, though against the law, would be to "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 167.

118 494 U.S. 872 (1990).

119 *Id.* at 883; *See* Sherbert v. Verner, 374 U.S. 398 (1963).

120 *Id.* at 883-890.

121 *Id.*

122 42 U.S.C.A. §2000bb-1 (1993). The 1993 RFRA statute stated:

> (a) In general, government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
> (b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. *Id.*

In addition, the statute explicitly lays out the findings and purposes of Congress in its enactment, as follows:

> (a) Findings: The Congress finds that—(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification; (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.
> (b) Purposes: The purposes of this chapter are--(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government. *Id.*

Act attempted to reinstate the compelling interest standard of *Sherbert* by requiring that the restriction on religious conduct be in furtherance of a compelling governmental interest, and that it be the least restrictive means of accomplishing that interest whenever there is a substantial burden on the free exercise of religion.[123] However, in the case of *City of Boerne v. Flores,* the Supreme Court struck RFRA down, upholding the *Smith* test as the standard.[124] RFRA was held to apply only to federal law, no longer to state law—and therefore not to the state public school arena—and its unconstitutional sections are severable.[125] However, many states have subsequently enacted their own versions of RFRA.[126] Therefore, an examination of any type of headscarf ban would require not only a constitutional analysis, but analysis under a state RFRA, if applicable.

Under the current status of Free Exercise Clause law, scrutiny of a public school's headscarf ban must begin by analyzing the surface of the law. The construction and phrasing of a potential headscarf ban law would be determinative of its constitutionality. For example, if a law stated that no Muslim student could wear a headscarf to school, the law would clearly not be religion-neutral. If the law stated that no one at all could wear a scarf over their head, then it would be religion-neutral and generally applicable, satisfying the requirement of *Smith*. Also under *Smith*, the law would not need to show it was related to a compelling government interest, but only that it bore a rational relationship to a legitimate government interest.[127] This would lower the level of scrutiny applied to the law, and increase the likelihood that it would be upheld. However, if a law stated that no student would be allowed to wear a conspicuous religious symbol to school, which is the language of the French law, questions of general applicability and

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[123] *Id.*

[124] 521 U.S. 527 (1997).

[125] *See* Kikumura v. Hurley, 242 F.3d 95 (10th Cir. 2001); Mary L. Topliff, Annotation, *Validity, Construction, and Application of Religious Freedom Restoration Act*, 135 A.L.R. Fed. 121 (2005); *see also* Denson v. Marshall, 44 F. Supp. 2d 400 (D. Mass. 1999); Spies v. Voinovich, 173 F.3d 398 (6th Cir. 1999).

[126] Freeman v. Dept. of Highway Safety and Motor Vehicles, 2005 Fla. App. LEXIS 13904, Sep. 2, 2005, at *11. Florida enacted its own RFRA in 1998 which provides that:

> The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (a) is in furtherance of a compelling governmental interest; and (b) is the least restrictive means of furthering that compelling governmental interest.

Section 761.03, Florida Statutes (2003). In *Freeman*, a Muslim woman challenged a decision by the Department of Motor Vehicles revoking her license because she refused to unveil her face for her driver's license photograph. *Id.* at 11. The court held that in order to show a substantial burden, the plaintiff must "prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates." *Id.* at 18. The court held that the regulation did not "substantially burden" her free exercise of religion because her religion did not forbid all photographs, but merely inconvenienced her. *Id.* at 20. Even though she held a sincere belief that she must remain veiled. *Id.* at 13. *See infra* note 150.

[127] *Smith*, 494 U.S. at 883-890.

neutrality would be raised. The law would no longer be religion-neutral, as it would treat religious symbols differently from non-religious ones.

Issues of neutrality and general applicability are not necessarily clear cut. If the law's purpose is actually to restrict conduct because of its religious motivation, then it is not neutral,[128] and the first step in determining this is to examine the statute on its face.[129] A law lacks facial neutrality if it refers to a religious practice that has no other secular meaning that can be determined by the language or context.[130] Even so, the facial neutrality of a law is not determinative, and the First Amendment protects citizens against government hostility that is "masked as well as overt."[131] For example, in *Church of Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court struck down a law prohibiting the "ritual slaughter" of animals.[132] The law was not facially neutral not only because of its use of the words "ritual" and "sacrifice," which have religious connotations, but because events surrounding the law's enactment suggested it intentionally aimed to suppress the Santeria religion.[133]

The Court in *Lukumi Babalu Aye* also examined whether or not the law was generally applicable.[134] Underlying this requirement is the principle that even in the pursuit of legitimate interests the government cannot burden religious conduct in a selective manner.[135] Although the government claimed that its law was designed to protect public health and to prevent cruelty to animals, the Court said the law was under-inclusive in that it did not prohibit non-religious conduct, even though the non-religious conduct endangered the state interests just as much as the Santeria religious practices did.[136] Overall, a law that fails the neutrality and general applicability requirements established in *Smith* triggers the strictest level of scrutiny.[137] Such a law must advance a compelling state interest—the very standard overruled by *Smith*—and must be narrowly tailored to those interests.[138]

The case of *Nichol v. ARIN* underscores this neutrality principle.[139] Because it involved both a free-exercise and free-speech claim—a hybrid-rights scenario which will be discussed below—and because it involved a public school teacher, the situation was treated differently.[140] A "heightened" or "intermediate" level of scrutiny is used in the public sector because First Amendment rights are limited in

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128 Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 at 533 (1993).

129 *Id.*

130 *Id.* at 534.

131 *Id.* at 534.

132 *Id.* at 520.

133 *Id.* at 533-534, 541.

134 *Lukumi Babalu Aye*, 508 U.S at 542-545.

135 *Id.* at 543.

136 *Id.*

137 *Id.* at 546; Nichol v. ARIN Intermediate Unit 28, 268 F. Supp. 2d 536, at 550 (2003).

138 *Lukumi Babalu Aye*, 508 U.S at 546.

139 *Nichol*, 268 F. Supp. 2d at 536.

140 *See* Employment Div. v. Smith, 494 U.S. 872, 881 (1990).

the public employment context.[141] *Nichol* involved a challenge to a Pennsylvania statute that prohibited public school teachers or other employees from wearing religious emblems or insignia while at work.[142] Nichol was an elementary school assistant who was suspended for refusing to remove or conceal a small cross she regularly wore around her neck.[143] The Court concluded that the policy was "openly and overtly averse to religion" because it singled out only symbolic speech that had religious content, while it ignored jewelry that contained secular messages, or that was absent of messages altogether.[144] Again, this case reaffirmed the principle of neutrality that underlies the Free Exercise Clause of the First Amendment.[145] As a result, a law that would prohibit the wearing of Muslim headscarves would not be constitutional because it would be targeting headgear worn for religious purposes, but not worn for cosmetic purposes, such as hats or bandanas.[146]

The religious garb statute cases which have reached courts thus far have all involved an employee or someone under the control of the state, and therefore a lower level of scrutiny has been applied. However, a law that would have the effect of banning students from wearing the Muslim headscarf would involve individuals who have not contracted, or been required, to give up a certain degree of their rights to the government as a condition of their employment or service. Public school students would merit this higher scrutiny level due to their standing as private individuals.[147]

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[141] *Nichol*, 268 F. Supp. 2d at 550. "The challenged government action must be substantially related (rather than narrowly tailored) to promoting an important (rather than compelling) government interest . . . because First Amendment rights are limited in the public employment context by a government's need to function efficiently." (quoting Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 167 n.27 (3d Cir. 2002)).

[142] *Id.* at 546. The Pennsylvania School Code's Garb Statute stipulates, in part "that no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination." PA. STAT. ANN. TIT. 24, § 11-1112. The school district subsequently incorporated this policy into its Religious Affiliations policy set forth in its employee handbook, which said "employees shall not display any religious emblems, dress, or insignia. This includes jewelry such as crosses or Stars of David." *Nichol*, 268 F. Supp. 2d at 546.

[143] *Nichol*, 268 F. Supp. 2d at 541.

[144] *Id.* at 548. Regarding Nichol's free speech claim, the court stated that "this policy is also a content driven regulation which violates plaintiff's right to free (symbolic or expressive) speech on a matter of public concern, even though, as a public employee, her speech may be somewhat more regulated by her public employer than that of a private citizen." *Id.* at 548. The wearing of the headscarf by a female adherent to the Muslim faith may be considered symbolic speech, just as the wearing of a cross by a Christian was considered so here.

[145] *Id.* at 549.

[146] *See* Fraternal Order of Police Newark Lodge No. 12 v. Newark, 170 F.3d 359 (3rd Cir. 1999) (holding the enforcement of a city police department's order requiring two Muslim officers to shave their religiously required beards unconstitutional as a violation of the Free Exercise Clause because the department allowed exemptions from the order for secular reasons, but not religious ones).

[147] *See* Gey, *supra* note 8, at 20. There are a variety of cases examining other similarly restrictive "religious garb statutes" in public employment or military contexts, but these cases are also subject to a lower level of scrutiny because of this special status. *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that the Air Force's interest in uniformity justified its strict enforcement of a regulation

Another issue courts must consider in evaluating free exercise claims is that of centrality. *Smith* directly states that courts should not consider whether the specific religious conduct being regulated is central to the adherent's faith, or the validity of the litigant's interpretation of that belief.[148] This would be too dangerous, as it would require the court to determine what value to place on another's particular belief as opposed to other beliefs. [149]

Despite the centrality doctrine, courts must inevitably weigh the importance of the conduct to the religious adherent when assessing the degree to which the government action burdens this conduct. There is debate in Islam regarding the headscarf requirement for women, as well as the type of head or facial covering required. It is difficult for courts to determine the sincerity of an individual's belief in the practice, yet courts have still engaged in this discussion.

For example, in a 2005 Florida case, a Muslim woman challenged the Department of Motor Vehicles' requirement that she remove her veil in order to take her driver's license photograph.[150] The court discussed the sincerity of her belief that she must cover her entire face in public and that she should not be photographed.[151] Under Florida's RFRA statute, the test was whether or not the law substantially burdened her free exercise of religion.[152] The court heard expert testimony on both sides of the issue; one expert explaining that Islam accommodates exceptions to veiling out of necessity, and the other explaining that there was no necessity exception to the practice.[153] The court determined that the woman did have a sincere belief that she was required to remain veiled in public and that her religion prohibited her from being photographed, but said that the law did not substantially burden her.[154] While the court stated that it was not permitted to conduct fact-finding as to the centrality of the conduct to the religion, it did engage significantly in a discussion of the religious adherent's sincerity in her beliefs.[155] This is problematic, especially in regard to religions such as Islam where there is no central authority figure, and where followers adhere to many different forms and interpretations of Islamic tenets.

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prohibiting the wearing of headgear indoors, and thus requiring the Jewish petitioner to remove his yarmulke, and that the regulation did not violate his right to free exercise of religion).

148 Employment Div. v. Smith, 494 U.S. 872, 886-887 (1990).

149 *Id.* at 887. This approach would be "akin to the unacceptable 'business of evaluating the relative merits of differing religious claims' or the same as asking the court to determine the importance of ideas in the free speech field." (quoting United States v. Lee, 455 U.S. 252, 263 n. 2(1982)). *Id.*

150 Freeman v. Dept. of Highway Safety and Motor Vehicles, 2005 Fla. App. LEXIS 13904, Sept. 2, 2005, at *11.

151 *Id.*

152 *Id.* at *13.

153 *Id.* at *7.

154 *Id.* at *12-14.

155 *Id.* at *19-20.

B. Hybrid Rights Cases: Parents and Children

Because of the complexities involved in headscarf ban cases, it is likely that more than one constitutional right could be invoked. The Free Exercise Clause is a major initiation point, but other constitutional protections such as the Free Speech Clause, Title VII protection, the Establishment Clause, and parental rights guarantees may come to the forefront. Such situations are considered "hybrid rights" cases, and therefore increased the level of scrutiny courts must apply.[156] While prohibiting Muslim school girls from wearing headscarves to school infringes on their individual rights, it also trespasses on parents' ability to choose how to raise their children, and will require courts to weigh the law's burden on the parents as well as on the child.

Noting that it is difficult to determine the role that a particular Muslim might believe the practice of veiling has in relation to his or her sincere practice of religion, examination is needed in relation to parental rights' in dictating the education of their children. Undoubtedly, what parents feel is central and important to their religion, they also hope their children will adopt.

Part of the French motivation in passing its headscarf ban is to create an environment at school in which children can be free from the constraints or inhibitions they experience at home—presumably from their parents and their cultural communities—in an attempt to foster an environment where children are exposed to diverse opinions and ways of thinking.[157] However, the American approach is that religious and cultural diversity in school settings is encouraged exactly for that purpose—to expose students to more opinions and viewpoints. Important questions arise surrounding whether or not it is the child's choice to wear the veil, or whether she does so only because of pressure from her parents or community. However, an analysis must first begin with pivotal cases in

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[156] Employment Div. v. Smith, 494 U.S. 872, 881 (1990). The Court in *Smith* acknowledged that:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause, in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children.

[157] *See* Gey, *supra* note 8, at 16, arguing that the French law must be seen as a response to attacks experienced by Muslim women and girls from members of their own communities for choosing not to wear the veil and to go against the "strict sexual mores of religious fundamentalists."

> Without question, the new French law represents a paradox. On one hand, the law is a clear limitation on religious expression. On the other hand, the law limits expression in order to provide students in public schools a protected sphere in which the students can experience (perhaps for the first time) intellectual and spiritual independence from the coercive religious measures imposed by their local communities. One could view this law as prohibiting the students' own expression of religious values, or one could view this law as protecting the students from enforced conformity to the comprehensive social and cultural values foisted on the students by others. *Id.*

establishing parental rights to dictate the education of their children, namely *Pierce v. Society of Sisters*,[158] and *Wisconsin v. Yoder*.[159]

In *Pierce*, a private Catholic organization that ran a school for children and orphans challenged an Oregon law requiring all children between age eight and sixteen to attend public schools, and punishing parents for failing to comply.[160] The Court held that the Oregon law unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of their children, affirming the important duty parents have in inculcating moral values in their children.[161]

Yoder went even further. In that case, Amish parents asked for an exemption from a Wisconsin statute that required compulsory school attendance until age sixteen.[162] They claimed that complying with the law would endanger their own salvation and that of their children by exposing them to principles and practices contrary to their religious beliefs.[163] The Court held that since accommodating the religious objections of the Amish would not damage children physically or mentally, affect their ability to be self-supporting, or discharge duties of citizenship, the state's interest in requiring compulsory education was not so compelling that the established religious practices of the Amish had to give way.[164] The Court stated that, "when the interests of parenthood are combined with a free exercise claim, more than a mere reasonable relation to the state's purpose is required to sustain the law's validity under the First Amendment."[165] The only time such a hybrid right may be subject to limitation is when the parental decisions appear to jeopardize the health or safety of the child, or have the potential for significant social burdens.[166]

Although *Yoder* is known as an outlier case because of the extremely unique facts involved,[167] there are other circumstances where its principles can be applied. Just as the Amish were able to claim that requiring their children to attend school beyond the eighth grade substantially interfered with their religious development and integration into the Amish community,[168] Muslim parents may also claim that

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158 268 U.S. 510 (1925).

159 406 U.S. 205 (1972).

160 *Pierce*, 268 U.S. at 530-531.

161 "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535. The additional obligations referred to include "the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Yoder*, 406 U.S. at 233.

162 *Yoder*, 406 U.S. at 205.

163 *Id.* at 209.

164 *Id.* at 221-230.

165 *Id.* at 233.

166 *Id.* at 233-234.

167 *Yoder*, 406 U.S. at 236. The Court notes that very few religious sects would be able to so convincingly meet the state requirements for such an exemption.

168 *Id.* at 218.

forcing their daughter to remove her headscarf causes her to forego a practice that is essential to her development in the faith and integration into her community.

In *Yoder*, none of the children involved claimed a desire to continue their education beyond the eighth grade, and one even expressly stated her desire to forego further education due to her sincere religious beliefs.[169] However, the dissent raised the question of what would happen if the parents' decision to withdraw their child from school after eighth grade was against the wishes of the child.[170] What would happen if a Muslim school girl expressed a desire not to wear the headscarf, but her parents insisted that she follow the practice, in and out of the home? Or, vice versa, what would be the result if a young woman insisted on wearing the headscarf against her parents' will—which is conceivable in the case of a convert to Islam—or in spite of her parents' indifference toward the matter? The Court in *Yoder* was careful to explain that its holding did not address how to resolve competing interests between parents and children, as this case provided no opportunity to decide the issue.[171]

However, the Court explained that when the state attempts to "save" a child from himself or his parents' undesirable religious practices it is, in effect, determining the religious future of the child and trampling on one of the most fundamental rights parents possess.[172] Therefore, as with the motivations France had for its headscarf ban—to save the child from a practice deemed inconsistent with French identity and to save the child from herself or her parents' inducement into this practice—so too, here the state is engaging in a determination of the religious future of the child when it burdens her free exercise of religion in the educational context.

C. RFRAs and Exemptions

There are two last concerns about a headscarf ban: state RFRA statutes and exemption possibilities. If a law arises in a state's public education system that

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[169] *Id.* at 237 (Stewart, J., and Brennan, J., concurring).

[170] *Id.* at 242 (Douglas, J., dissenting).

> If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views.

[171] *Id.* at 231.

[172] *Id.* at 232.

> If the state is empowered, as *parens patriae*, to 'save' a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child . . . therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

has the effect of banning the wearing of headscarves, and the state has passed its own RFRA statute, it is much less likely the law will be upheld.[173] Most state RFRAs, assuming they resemble the federal RFRA passed in 1993, will require courts to apply strict scrutiny when examining any law involving religious freedom, and will require that the law further a compelling interest and be the least restrictive means of achieving that interest.[174]

Furthermore, there is the possibility that a religious group may directly ask its legislature for an exemption from a law that burdens their religious practice.[175] This was the issue in Yoder, where the Amish sought a religious exemption from a generally applicable educational requirement.[176] In such cases, the court generally gives extreme deference to the legislature, as it has an enhanced ability to conduct fact-finding both in the creation of the law, and determining the religious groups' burden by being required to follow the law.[177]

Overall, an outright ban on wearing religious symbols, including the Muslim headscarf in public schools, would violate the Free Exercise Clause of the United States Constitution. Furthermore, such a law would violate a combination of First Amendment rights guaranteed by the Constitution and parental rights, which courts have deemed paramount in deciding cases involving children.[178]

V. PUBLIC POLICY CONCERNS OF A U.S. HEADSCARF BAN

Notwithstanding the potential result a court might reach in a legal challenge over a law prohibiting the wearing of religious symbols in public schools, legislatures and school districts should not implement such regulations for a variety of public policy concerns. Though particularly relevant to the situation in the United States, these public policy concerns are also applicable to France, Turkey, and any other country considering implementation of a headscarf ban, while certainly each country's unique circumstances should be taken into account.

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173 *See* Mary L. Topliff, Annotation, *Validity, Construction, and Application of Religious Freedom Act*, 135 A.L.R. FED. 121 (1996). Many states passed their own RFRAs in the late 1990s, after the Federal RFRA was invalidated as to the states. *Id.*

174 *See generally* Brian L. Porto, Annotation, *Validity, Construction, and Operation of State Religious Freedom Restoration Acts*, 116 A.L.R. 5th 233 (2004).

175 For a history of the development of religious exemptions from civil laws see Phillip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

176 *Yoder*, 406 U.S. at 235.

177 *Id.* at 234-235. In *Yoder*, the Court was careful to note that:

> Our disposition of this case, however, in no way alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the "necessity" of discrete aspects of a state's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements.

178 Gey, *supra* note 8, at 20.

First of all, if a headscarf ban were to be passed in the United States, it would go against the model of diversity the United States has sought to achieve since its inception. America has always prided itself in being a "melting pot" or "salad bowl" of cultures and traditions. Though the idea of a melting pot may suggest that all cultures take on one consistency and fluidity, this does not negate the importance of their maintaining unique flavors, in order to enhance the entire concoction. The notion of a salad bowl, where each ingredient maintains its integrity, may be more accurate. In contrast to the French, Americans place more emphasis on diversity than on assimilation. Requiring students in public schools to conform to the norm in the way they dress is the equivalent of endorsing homogeneity. Though there may be an interest in requiring this in order to erase economic class distinction, discourage gang activity, or prevent students from concealing dangerous weapons, when this homogeneity is designed to erase religious distinctions from the classroom, its effect is to deny students exposure to the very diversity they must be prepared to encounter in the world outside of school.

In addition, there is a risk that such policies will only deepen already existing ethnic divides. When one group is prohibited from an activity the majority deems suspicious or threatening, it further alienates the group, and makes it feel unwelcome. As evidenced by the extreme reactions of Muslims residing in France, demonstrated in the 2005 riots, such treatment is dangerous and may lead to other policies that further marginalize the minority group.

Due to the situation in the United States after the September 11th terrorist attacks, Muslims in America face unique challenges. Their numbers are small, yet they feel misunderstood, as public opinion against them seems to grow with the increasingly tense political climate in the Muslim Middle East. This public opinion affects policy-makers and ultimately legislation. If a ban on wearing the headscarf is passed, it would only foment public opinion against Muslims, legitimizing the idea that their ways are unacceptable and linked with fundamentalist Islam. The development of such events, as seen from American history, can lead to shocking restrictions on civil liberties and basic human rights.[179] Despite the widespread Muslim-American abhorrence and condemnation of terrorist attacks, mainstream society associates terrorism with Muslims in

[179] *See e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (upholding the long-term internment of Japanese-Americans during World War II because of the possibility that disloyal members of the population constituted a threat to national security). During the war, the government invoked the Enemy Alien Act of 1798 to justify the internment of 110,000 Japanese-Americans, two-thirds of whom were U.S. citizens, simply because they had ties with a country with which the U.S. was at war. Historians attribute the Japanese internment to anti-Asian sentiment that was firmly rooted as well as to the racial component that made them particularly susceptible, as opposed to German-Americans or Italian-Americans. COLE , *supra* note 78, at 7, 91. In his dissenting opinion, Justice Murphy described the internment as "one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law." *Korematsu*, 323 U.S. at 235 (Murphy, J. dissenting).

general, fostering fear. A ban on headscarves would result in criminalization of Muslim-Americans for completely unrelated terrorist crimes and ideology, exacerbating mutual fear and distrust.

Additionally, as previously addressed, there is a danger of violating parental rights to make decisions about how to raise their children, and this may also lead to instability in the home. If a parent feels it is morally correct and religiously required for women to wear headscarves after a certain age, a public law prohibiting headscarves at school would create a significant rift in the home. The prohibition would create something akin to a dual life or identity, one at school, and the other at home. Many Muslim children are the children of immigrants, and already are dealing with significant stress in balancing the culture of their parents with the one they are growing up in and making a part of their life. School should be a place where a child is free to choose how to deal with these tensions by feeling free to embrace or reject whatever cultural or religious practices she comes into contact with, which will then prepare her to make her own decisions when she is old enough to be independent. While the influence of the parent should be respected, the rights of the child to freely express herself should also be protected. Children, though still developing, have the capacity to make their own moral judgments about how to live their life and how to express their values. If a student feels compelled to wear a headscarf due to her religious belief, she should have that freedom of expression, with or without the endorsement of her parents.

One legal concern, which traditionally has not been given as much weight in U.S. courts as it deserves, is whether or not a ban on wearing headscarves would violate international law.[180] In *Sahin v. Turkey*, a case before the European Court of Human Rights in 2005, a Turkish national asked the court to hold the Turkish ban on wearing headscarves in institutions of higher learning a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[181] The Court said there was no violation, citing every state's margin of discretion to determine its own legal system.[182] This case represents a failure to label such bans as hostile to international treaties protecting religious freedom, and must be interpreted in the complex context in which it was decided.[183]

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[180] See Baines, *supra* note 12, at 316-324, for a discussion of how the French headscarf ban violates both codified and customary international law.

[181] Sahin v. Turkey, App. no. 44774/98, Eur. Ct. H.R. (2005), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=turkish%20%7C%20headscarf%20%7C%20ban&sessionid=6144202&skin=hudoc-en.

[182] Natan Lerner, *International Law and Religion: How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance*, 13 WILLAMETTE J. INT'L. & DISPUTE RES. 65, 66 (2005).

[183] *See generally id.* at 85:

> From a purely human rights angle, one is tempted to say that the European Court of Human Rights reasserted its respect for the margin of appreciation of states, but ignored the individual right to manifest bona fide religious convictions and did not attempt to show how a total prohibition of such manifestations, at all levels in the educational sphere including universities, was necessary to protect a democratic society. From a

Even so, the United States is a party to various international declarations that could be interpreted as prohibiting a headscarf ban as a violation of religious freedom. The Universal Declaration of Human Rights guarantees the freedom of religion as well as the right to manifest religion in practice.[184] The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief also provides for this, subject only to limitations that are necessary to protect the public good.[185] Regarding the rights of parents and children, this declaration explicitly states that parents have the right to organize the life within the family in accordance with their religion and that every child should enjoy the right to education in the matter of religion according to the wishes of his/her parents.[186] The Universal Declaration gives parents the right to choose the kind of education their children will receive.[187]

Lastly, there is a concern that implementing a ban on headscarf-wearing would legitimize the prohibition such that other countries would feel justified in

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> secular angle, the issue of the headscarf may be seen as a test case regarding the capacity of secularism to be tolerant with such individual manifestations when there are no signs of hidden political intentions. If authorities see individual, dissenting behavior in a secular, democratic, and laicist regime as being a threat to the system, and if so prescribed by law, the state may impose limitations. In any case, the burden of proof is on the state. It has a margin of appreciation which cannot go beyond the limits of international and human rights law. If it does, the international community has the right to intervene, as the European Court of Human Rights has declared it in the past. Secularism cannot be intolerant.

[184] Universal Declaration on Human Rights, G.A. Res. 217A(III) Art. 18, (Dec. 10, 1948) (providing that "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance").

[185] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N. G.A. Res. 36/55 (Nov. 25, 1981). Article 1(1) states that:

> [e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. *Id.*

Article 1(3) provides that "freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others." *Id. See also* Convention on the Rights of the Child, G.A. Res. 44/25, Art. 14 (Nov. 20, 1989) (stating that states "shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right [to freedom of thought, conscience, and religion] in a manner consistent with the evolving capacities of the child").

[186] Article 5 declares that:

> the parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle. Art. 5, G.A. Res. 36/55, *supra* note 185.

[187] Universal Declaration on Human Rights, G.A. Res. 217(A)(III) Art. 26.3.

pursuing a similar course of action. This is already evident in Europe since France's 2004 law passed. Because France is the European nation with the largest Muslim population, many other countries look to it as a model of how to deal with their minority and immigrant populations. Although Britain and Germany have developed their own unique models of integration, France is still a strong European and international force in lawmaking. Likewise, how the United States chooses to deal with its Muslim population, and how the Muslim population responds, can be a force for moderation and integration in the international community, for non-Muslim and Muslim states alike.[188] At a time when the Muslim world is at the forefront of U.S. foreign policy, the manner in which it treats its own Muslims will influence not only how the Muslim world feels about the United States, but how the rest of the world chooses to deal with its growing Muslim populations as well.

Since France's enactment of the headscarf ban in March 2004, other European countries have been faced with headscarf issues and have followed France's example. In October 2004 an Italian woman who had converted to Islam and begun to wear the *nikab*, a veil that covers the entire face, was fined eighty euros pursuant to a 1931 Fascist-era law banning the wearing of masks in public.[189] Her case has sparked a lively debate in Italy as it makes its way through the appeals courts, and an even tougher law that proposes a 5,000 euro fine has been introduced.[190]

Germany has also been involved in a fierce headscarf debate since Fereshta Ludin went to court over her denial of employment because she wore a headscarf in school.[191] The German Constitutional Court ruled five to three that she could wear the scarf, but stated that individual states were not prohibited from banning headscarves.[192] In April 2004 the southern German state of Baden-Wuerttemberg passed a law banning teachers from wearing Islamic headscarves; another five of the sixteen German states are in the process of passing similar bans.[193] Both the Netherlands and Belgium have also begun to implement bans on the wearing of the *nikab* and *burqa*.[194]

Another criticism of the ban is that a flat prohibition on the use of headscarves violates principles of human rights law in the same way that forced headscarf adoption does.[195] This would give ammunition to headscarf-wearing proponents in Iran and Saudi Arabia, where women are punished for not complying

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[188] *See* Baines, *supra* note 12, at 325.

[189] Ian Fisher, *Italian Woman's Veil Stirs More Than Fashion Feud*, N.Y. TIMES, Oct. 15, 2004, at A3.

[190] *Id.*

[191] *German State Backs Headscarf Ban*, BBC NEWS, Apr 1, 2004, http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/3591043.stm (last visited Nov. 15, 2005).

[192] *Id.*

[193] *Id.*

[194] Mark Mardell, *Europe Diary: Banning the Veil.* BBC NEWS, Jan. 19, 2006, http://news.bbc.co.uk/2/hi/europe/4624774.stm (last visited Mar. 11, 2006).

[195] Turner, *supra* note 21, at 344.

with strict dress codes. Under this cultural relativism approach, one culture's justification for forced dress codes in order to achieve cultural, religious, or political aims arrives at a very different result.

VI. CONCLUSION

Overall, though France and the United States each value the ideals of liberty, equality, and fraternity, the United States' approach to ensure liberty should differ. Courts should not uphold any statute passed by a state or school district in a state that results in the inability of students in public schools to freely choose whether or not to wear the headscarf they feel is religiously required by their faith. These statutes would burden children's ability to freely exercise their religion and parents' ability to direct the upbringing of their children. When a minority group is threatened with this burden on religious practice, it is essential that those around it speak up, calling for protection, as each step the government takes towards limiting religious liberty further encroaches on the liberty held by all, and increases the possibility that one day their own freedoms will also be stolen.[196]

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[196] *See* Pastor Martin Niemöller, *First They Came for the Jews*, *available at* http://www.telisphere.com/~cearley/sean/camps/first.html for a poem expressing a similar idea:

> First they came for the Jews and I did not speak out because I was not a Jew. Then they came for the Communists and I did not speak out because I was not a Communist. Then they came for the trade unionists and I did not speak out because I was not a trade unionist. Then they came for me and there was no one left to speak out for me. *Id.*