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**Children and Religious Expression in School: A Comparative
Treatment of the Veil and Other Religious Symbols in Western
Democracies**

Catherine J. Ross*

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DISCOURSES OF RELIGION AND INTERNATIONAL HUMAN RIGHTS (Ashgate Press)**

Introduction

Struggles over whether and how to accommodate personal religious symbols worn by students in public schools are part of a mounting global debate. In recent years a number of the western democracies—including England, France and Canada—have confronted major controversies over the right of students to wear religious symbols in public schools. In the United States, reported incidents concerning school regulations affecting Muslim head-coverings or ceremonial knives carried by Sikhs have received less public attention; instead, in the United States these battles are embedded in a broader debate about the role of religion in the public square generally and in the public schools in particular. The debate in the U.S. often focuses on red-button issues such as sex education, curricular decisions involving literature and the biological sciences, and prayer in schools.

The competing claims of the body politic and the religious or cultural identity of minority groups came to a head in what the French called the “affair of the veil.” The

problem of the veil generally refers to students who claim the right to wear religious symbols to state-funded schools including, among others, the Muslim hijab (head scarf) and jilbab (head to toe covering), the Sikh turban and kirpan (ceremonial knife) and the orthodox Jewish kippah (skullcap or yarmulke). This chapter examines the problem of the veil from a cross-cultural perspective, comparing the United States to several other western democracies. The comparison involves both legal and cultural premises. In each instance, the analysis must consider the fundamental values of the body politic, the laws and covenants that govern decision-making, and the society's basic premises about the relation between religion and the state. The inquiry is further complicated by broader claims of the sub-groups with which parents and children identify.

Issues surrounding identity pluralism have received a great deal of attention in recent years; far less analysis has been devoted to the specialized dilemmas that arise whenever children's rights are invoked. Any society's response to the question of whether children can wear religious symbols to school reflects its underlying assumptions about whether minors have rights independent of their parents, and how to resolve tensions between the goals of the body politic and the right of parents to inculcate their children with their own values. The classic dilemmas that arise from assertions of children's rights include the tension between the rights of families and the interests of the state, and whether to honor the independent claims of minors.¹ By placing these debates in a comparative legal and cultural context, I hope to illuminate the strengths and weaknesses of the approach we have taken in the United States.

Most countries today—including the western industrialized democracies—are culturally diverse. Increased globalization and international mobility often exacerbate the

civil tensions that accompany pluralism. These profound changes have given rise to a series of complex political and philosophical challenges to traditional liberalism, including abandonment of the post-World War II liberal optimism that an individual rights model could resolve the claims of racial and ethnic minorities. (See , e.g. Kymlicka (1995)). Among other things, such theorists argue for “collective” minority rights to complement traditional individual rights. The foundational premise of human rights doctrine, however, is that the state must protect minorities (whether individuals or groups) from the tyranny of the majority; so human rights arguably already embraces minority rights.

The discussion becomes even more complicated in light of recent acknowledgements that the right to recognition may be multifaceted. In other words, many individuals assert membership in more than one identity group as they construct their identities (Keller, 1998) and shift among identities as they move from one setting to another (Hollinger, 1995). A British Commission underscored in 2000 that just as there is no single British culture in the modern world, so too each sub-culture has diverse sub-parts that are constantly undergoing a process of hybridization (Runnymede Trust, 2000). The individual’s quest to fulfill varied claims to identity and belonging—whether religious, cultural or sexual—pushes the boundaries of classic autonomy rights. But claims of identity must be balanced against the valid claims of the modern nation-state. These include the right to inculcate shared values and identity through the public education of children which creates a unique role for public schools. In addition, some identity claims are so extreme that modern states view them as incompatible with the autonomy rights of others (examples include beatings, sexual mutilation and non-

consensual arranged marriages). These broader concerns and the debates that surround them provide the context in which modern states struggle to resolve the identity claims of public school students.

Part one of this chapter discusses the cultural significance of dress, and briefly summarizes the apparel associated with certain religions and its significance. Part two considers the legal regimes and models that govern student religious garb in the United States, France, Great Britain and Canada. Part three examines the extent to which those four models succeed in balancing all of the potential individual rights claims that arise when students wear symbols to school and in balancing those claims with those of minority groups and the broader collectivity.

The Cultural Significance of Dress

Clothing and wearable symbols may serve significant cultural and ideological functions (Hoodfar, 2003). If clothing sends a non-verbal message, it is protected in the United States as symbolic speech (*Tinker v. Des Moines*, 1968). Clothing may communicate both an affiliation with a collective identity and an individual's distinctive traits. Where clothing proclaims conformity, it is rarely noticed or commented upon (Galeotti, 2002). Thus, the visibility of attire is strongly associated with the wearer's assertion of difference (Galeotti). Controversies over school dress code frequently involve claims of minority religious expression in addition to cultural identity. The response of the collectivity and the body politic to apparel that asserts such differences tests the limits of liberalism and tolerance in many democracies.

Since the 1980s, the decision of some girls to wear the Islamic veil to public school has generated controversy in a number of western countries, and the discussion

here concentrates on the veil. But the veil is not the only wearable symbol of difference. Others include the Sikh kirpan, the Jewish kippah, and even ostentatious versions of the Christian cross. Although the kirpan and kippah are reserved for boys and men, the veil alone carries enormous gender significance to informed and uninformed observers. As one Canadian student remarked,

people ask ...whether I feel discrimination as a woman, since men don't have to wear the veil...I have yet to hear...public outcry about Jewish men suffering discrimination ...because they have to wear a kippah and Jewish women do not. (Hoodfar, p. 31).

This section briefly introduces the veil and other symbols and their respective religious and cultural functions. One thing stands out: in each instance, there are divisions among practitioners of the religion about whether it is a precept of the religion that adherents wear the symbol and about the details of the duty. This division may prove significant to the extent that rights of religious exercise are protected in some legal regimes only to the extent that the religious expression is required. In other regimes, a sincere belief that the practice is mandated for the rigorous adherent is sufficient. For example, the Muslim community itself is sharply divided over whether or not veiling is required as a matter of religious doctrine, and, even if it is, how extensive a covering the veil must provide (Gunn, 2004). The broad term “veil” means different things in different contexts and to different people. It may refer to a simple scarf, the *hijab*, that covers the hair and ears, or it may include a head to toe covering known as a *jilbab*.

Every European court that has considered the question has concluded that although the “mainstream” Muslim religion does not require women to wear the veil,

many women who don the veil do so because they sincerely believe that their religion requires veiling (*R. (on the application of S.B.) v. Governors of Denbigh High Sch. [S.B.]*, 2005; *R. (on the application of Begum) v. Headteacher and Governors of Denbigh High Sch. [Begum]*, 2006; *Sahin v. Turkey*, 2005). Veiling, “in the sense of covering one’s hair,” is not specifically mentioned in the Qur’an, and is a relatively recent phenomenon (Hoodfar, 2003, p.6). Although veiling was widely regarded as a cultural rather than a religious practice until the nineteenth century (Hoodfar), the veil is no stranger to political controversy. By the beginning of the twentieth century, the veil drew fire in the Islamic world as a symbol over which “modernists and conservatives fought out their differences” (Hoodfar, p. 8). Some predominantly Muslim countries, like Turkey, enacted de-veiling laws in order to promote a secular state along the European model (*Sahin*). Turkey’s recent reconsideration of the veil in public facilities such as schools has prompted energetic debate (Tavernise, 2008).

Like Muslim women, Orthodox Jewish males keep certain dress obligations: “to cover their heads at all times except when they are (a) unconscious, (b) immersed in water, or (c) in imminent danger of loss of life” (*Menora v. Ill. High Sch. Ass’n*, 1982, p. 1031). The kippah, also known as a yarmulke, is usually small (with a radius of three to five inches), and the wearer may cover the kippah itself with another hat, whether the distinguishable large black hat favored by some ultra-observant Jews or a baseball cap. Non-Orthodox Jews do not normally wear a kippah except when engaged in religious observance.

Similarly, the Khalsa sub-group of male Sikhs must wear a metal kirpan (or ceremonial knife) at all times (*Multani v. Commission Scolaire Marguerite-Bourgeoys*,

2006). Although the Khalsa are distinguished as fighters, they never use the kirpan as a weapon. Many Sikhs believe that a small, largely symbolic knife satisfies the requirement, but others insist the kirpan must be a dagger at least a foot long. The Khalsa males also leave their hair uncut, wear a wooden comb in their hair covered by a turban, and wear a steel bracelet and special shorts under their pants, styles which some Khalsa girls and women emulate today (Gosal, 2006). As with the Islamic veil, opinion is divided over whether the kirpan is required as a matter of religious observance or is a cultural affirmation (Multani, 2006). While the Sikhs were “originally a religious community...the community is no longer purely religious in character” (Mandla v. Dowell Lee, 1983). It is widely acknowledged, however, that orthodox Sikhs cannot abandon their unique appearance without sacrificing their “distinctive customs and cultural rules” (Mandla, p.1069).

A variety of other symbols of religious belief, ethnicity or cultural heritage may come into conflict with school rules and norms. In Western Europe and North America, the discrete Christian cross is commonly viewed as so ubiquitous that it is not often noteworthy as an expression of identity. As Galeotti (2002) puts it, in France (and presumably other countries where people are accustomed to seeing a cross on a chain), the cross becomes invisible “in much the same way as a man with gray pants does not particularly stand out” (p. 125). Yet even the cross, if ostentatious enough so that it insists on being noticed, may, like a risque outfit, become a controversial item of apparel. In the United States, apparel decorated with the confederate flag, Rastafarian dreadlocks, African head-dress, and the Wiccan pentacle may also conflict with school rules (Davis, 2004; Hamilton, 2005; Howard, 2005). Many schools in the United States have adopted

dress codes expressly designed to bar clothing that indicates gang membership or affinity, some of which interfere with expressions of membership in other groups that have no antisocial overtones.

Models and Legal Standards

The level of legal protection accorded to religious symbols worn in schools is determined by each nation's unique laws and political philosophy. In addition, except for the United States, each of the countries discussed here is bound by the terms of at least one international covenant. All of the European states and Canada have ratified the United Nations Convention on the Rights of the Child (CRC) (1989), which guarantees a number of rights bearing on this discussion, including the "freedom to manifest one's religion or beliefs" (CRC Article 14), the right of the child to "preserve his or her own identity" (CRC Article 8), and the child's right to an education that gives "due weight" to the child's views, based on the child's age and maturity (CRC Article 12) while embracing the cultural identity of children and parents as well as the "national values of the country in which the child is living" (CRC Article 29). Given how pertinent these rights seem to be to the question of respect for identity symbols worn by children, it is noteworthy that none of the legal arguments made to date about religious garb in schools in the countries discussed here have expressly referred to the CRC. All of the European states also subscribe to treaties which provide guidance on the question of religious symbols in schools, including the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (now known as the European Convention on Human Rights (ECHR)), discussed below.

The United States: An Individualized Accommodation Model

The population of the United States is perhaps the most religiously observant of any of the western industrialized nations, and the majority of the population self-identify as some variety of Christian. At the same time, the country has long been home to one of the world's most diverse populations; today about 55 religions are represented in the U.S., and many of them contain "subsidiary sects with different religious beliefs" (*Zelman v. Simmons-Harris*, 2002, p. 723; *see also* Eck, 2001). The U.S. Constitution does not permit the state to favor one religion over another; to the contrary, all religions and the lack of religion are equal under the law.

Despite the apparently widespread belief that the U.S. Constitution protects the right to wear religious symbols in school (Marshall, 2003), the reality is far more complicated. A school may not prohibit a student from wearing religious garb to school solely on the grounds that the garb makes a religious statement because personal religious statements are generally protected. On the other hand, a student does not currently have a right to wear religious garb that is prohibited for other rational reasons. Further, Supreme Court doctrine about the religion clauses of the Constitution is in flux, and the Court has never considered a case that bears directly on the issue of student religious garb. To add to the confusion, legal experts differ about the likely outcome should such a case reach the Supreme Court, and only a handful of cases have reached lower courts. Making matters even murkier, the Executive Branch of the federal government has interpreted the law differently with changes in presidential regimes, and, at the state level, additional protections may apply.

Public schools in the U.S. have discretion to impose a uniform standard of dress. In practice, however, only about three percent of all public schools in the U.S. require students to wear uniforms; students in those schools are disproportionately members of racial and ethnic minority groups and come from low-income families (Nat'l Ctr for Educ. Statistics, 2006b). Yet many schools that permit students to choose their own clothing impose regulations that limit the students' discretion. For instance, many school districts prohibit students from wearing hats or head coverings in school, ostensibly to eliminate gang paraphernalia, to eradicate one means of hiding contraband items, and to teach proper behavior. Since, as seen above, several religions require the observant to cover their heads, these rules provide fertile ground for controversy. In one of the earliest reported opinions on the issue, Judge Posner, writing for the Seventh Circuit Court of Appeals, concluded that Orthodox Jews had no right to an accommodation that would allow them to wear insecurely-fastened kippahs in violation of rules applicable to interscholastic basketball competition; the court urged the plaintiffs to devise a method of securing the kippahs that satisfied the league's safety concerns, since the wearing of a yarmulke is "conventional rather than prescribed" and the "inherently insecure" reliance on bobby pins to secure the yarmulke is "even more obviously a convention rather than a religious obligation" amenable to compromise (*Menora*, 1982, pp. 1033-34).

Such controversies have become more frequent with increasing diversity of religious and ethnic groups and a growing demand for recognition by a range of minority groups. In the wake of the 9/11 attacks the federal government has reported an increase in incidents of "harassment commingled with aspects of religious discrimination against Arab Muslim, Sikh, and Jewish students" (U.S. Dep't of Educ., 2004). Perhaps

counterintuitively, the same report discusses allegations of discrimination against members of the majority Christian community who express conservative religious views in class (Dep't of Educ., 2004).

Some school districts resist accommodation. Although there are no reported cases in U.S. courts involving the right to wear the veil to public school, schools in several states have excluded Muslim girls for dress code violations until litigation prompted settlements (Spaulding, 2004). A teacher in Louisiana ripped a hijab off a student's head during class (Nelson, 2004). In another instance, a middle school student missed weeks of school before the Department of Justice intervened in her case, leading to a settlement and her return to school (Spaulding, 2004). Another student barred from school for wearing a hijab was able to return only after the Council on American-Islamic Relations intervened on her behalf ("*School alters rules. . .*", 2005). Similarly, school districts have regarded the kirpan as a violation of zero tolerance policies that prohibit any form of weapon in school. In Livingston, California, three Sikh boys missed a full semester of school before a court issued an injunction imposing a compromise ("*Settlement Reached in Lawsuit Concerning Rights of Baptized Sikh Students*," 1997; see also *Cheema v. Thompson*, 1995), while in Greenburgh, New York, litigation resulted in a speedy settlement allowing a boy to wear his kirpan to school (Bert, 2005).

The United States operates under unique constitutional constraints—foremost is the tension between the Free Exercise Clause, which protects the individual's beliefs and religious expression from government interference, and the Establishment Clause, which prevents the government from favoring any particular religion and has long been held to require neutrality between religion and non-religious belief systems. For the last fifty

years, the Supreme Court has explored the tensions between these two constitutional principles, frequently in cases arising out of the public schools.

The Religion Clauses reflected the Framers' concerns about "protecting the nation's fabric from religious conflict" (*Zelman v. Simmons-Harris*, 2002, p. 717). According to one influential view, the Establishment Clause prevents the government or its representatives from expressing views about religious beliefs, appearing to "endorse" some religious views or "disapprove" of others (*Lynch v. Donnelly*, 1984, O'Connor, J., *concurring*, p. 688). School officials sometimes erroneously conclude that student expression of religious ideas in school violates the Establishment Clause because it might be attributed to the teacher or institution (*Peck v. Baldwinville Cent. Sch. Dist.*, 2005), and for that reason mistakenly refuse to allow religious garb on the unconstitutional ground that it is religious speech (Beyond the Pledge, 2004 pp. 55, 80, 91), even though such speech is only barred if it is attributable to government speakers, such as teachers or school officials or spokespersons.

When religious beliefs are expressed as pure or symbolic speech, the student's claim may also implicate the Speech Clause of the First Amendment. Students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker v. Des Moines Sch. Dist.*, 1968, p. 306). Where a student is normally permitted to speak, in the sense of expressing a point of view, any conflict between student expression and school rules must be resolved in favor of the student, unless the student's speech would "materially and substantially interfere" with the educational process or collide "with the rights of other students to be secure and let alone," (p. 308), a standard known as the "*Tinker* test". The mere discomfort of other students, or the

unpopularity of the speaker's views, does not suffice to overcome a student's right to express ideas, even ideas associated with the exercise of religious belief.

Finally, the issue of school children and religious symbols is framed in the United States by a line of cases that emphasize the rights of parents to control their children's upbringing and to indoctrinate their children in their belief systems (*Meyer v. Nebraska*, 1923; *Pierce v. Soc'y of Sisters*, 1925; *Wisconsin v. Yoder*, 1972). Summarizing these cases in 2000, the Supreme Court concluded that they protect the "fundamental right of parents to make decisions concerning the care, custody and control of their children" (*Troxel v. Granville*, p. 66). These cases are particularly significant for contemporary discussions of religious and cultural minorities because the early "parents' rights" cases had their origins in disputes over the use of public schools to "Americanize" immigrant children (Carter, 1993; Tyack, 1968; Woodhouse, 1992).

On the other hand, when parents entrust their children to a public school system, they are not entitled to have the school system bend its regulations to suit their preferences in matters of curriculum (*Fields v. Palmdale School District*, 2006, *Mozert v. Hawkins Co. Bd. of Educ.*, 1987). Because of the important role that schools play in crafting citizens who can participate in a pluralist democracy (Gutman, 1987) and because parents have the right to remove their children from the public school system (*Pierce*, 1925), the classic response to parental complaints has been that the unhappy parent may remove the child from the public school system and send him or her to a private school or home school the child. For example, Greenawalt (2005) and others argue that it may serve the broader civic purposes of liberal education better to

accommodate parents rather than risk that they will remove their children from the public schools and place them in an environment that offers less exposure to diverse views.

Generally, parents must bear the full cost of abandoning the public school system. Private schools in the United States traditionally did not receive any public funds. Recently, however, the Supreme Court has sustained both direct subsidies in the form of funds for supplies and computers (*Mitchell v. Helms*, 2000) and funds that travel with students under certain conditions in the form of vouchers (*Zelman*, 2002). But, in contrast to many other countries, the Establishment Clause bars significant direct government subsidies to sectarian schools. To complicate matters further, the applicable law varies depending on the state in which the question arises, even though the underlying claim rests on the federal constitution. In general, the federal courts defer to policies adopted by local school boards, unless the school boards stray beyond the limits of the Bill of Rights (*W. Va. State Bd. of Educ. v. Barnette*, 1943). But the current state of the law governing individuals' freedom of religious exercise is in flux, creating significant confusion for local school authorities.

In 1990, the Supreme Court narrowed the ability of individuals to claim an exemption from generally applicable laws that burdened their exercise of religion, holding instead that the state may enforce "a neutral, generally applicable law," even where it imposes or blocks an individual action that conflicts with the individual's sincerely held belief that the act is "central" to his or her "personal faith" (*Employment Div. v. Smith*, 1990, p. 887). The Court explained, first, that courts could not presume to assess the "centrality" of any particular religious practice to a faith, much less to assess varying interpretations of the same creed (p. 887). Second, it reasoned that the danger of

anarchy flowing from exemptions based on religious practices “increases in direct proportion to the society’s diversity of religious beliefs” and, as a “ ‘cosmopolitan nation made up of people of almost every conceivable religious preference,’ ” the United States could not afford to indulge myriad claims for exemption as a matter of course (p.888). The Court left it to the legislative branch to determine which, if any, religious exemptions were warranted.

However, in *Smith* (1990) the Court opened the door to a piggybacking of constitutional claims, in which two separate constitutional claims—such as the right to free exercise and the parents’ right to control their children’s upbringing—would combine in a so-called “hybrid claim” that might have a greater stature than either claim standing alone (*Smith*, p. 881-82). The Court expressly conceptualized such a claim as involving a parent’s rights against state educational requirements (*Smith*). In response to the holding in *Smith* that narrowed the protections offered to individuals under Exercise Clause, Congress enacted the Religious Freedom Restoration Act (RFRA) (1993). The law was designed to restore the pre-*Smith* status quo which required strict scrutiny of government actions that impinged on religious exercise. RFRA required courts to grant exemptions from federal, state and local laws of general applicability that burdened a petitioner’s exercise of his or her religion, unless the government could demonstrate a compelling interest in uniform enforcement of the law. The Supreme Court subsequently overturned RFRA as applied to state and local laws (*City of Boerne v. Flores*, 1997), which clearly govern school systems. Some states then enacted their own versions of RFRA or found that their state constitutions required strict scrutiny when generally applicable laws inhibited religious practice. As a result, with some exceptions not

relevant here, the Free Exercise Clause does not compel exemptions, but RFRA requires exemptions to federal laws and actions unless the government action survives strict scrutiny. Interpretation of free exercise claims against state and local laws and regulations will depend on the regime of the specific state (Volokh, 2005).

During the Clinton administration, the U.S. Department of Education (1995, 1998) advised educational authorities that the law—what I call the “individualized accommodation model”—afforded “substantial discretion” to local school districts and individual public schools regarding the regulation of school dress, as long as a school does not “single out religious attire” for prohibition. Federal guidelines, revised in 1998, summarized the federal law regarding student garb post-*Boerne*:

Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices. However, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation . . . Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages. (U.S. Dep’t of Educ., p. 7)

Some school districts understood this instruction to mean that they should remain strictly neutral concerning the religious views of students, and read into the directive that accommodation should be the exception rather than the rule. In response, the Department of Justice under the Bush administration put a stronger pro-exercise spin on the 1998 regulations, which it described as “simply a recitation of the current state of constitutional law” (U.S. Memorandum of Law, 2004, p. 18). The Department of Justice urged that

dress codes that permit any exemptions “are subject to strict scrutiny when applied to religious objectors” (U.S. Memorandum of Law, p. 18).

The federal government adopted this position when it intervened to support sixth-grader Nashala Hearn, whose Oklahoma public school suspended her twice for wearing a hijab to school. Nashala had worn the hijab from the time school opened in August 2003 until the second anniversary of 9/11 when a teacher told her to remove it. Even though Oklahoma has a RFRA statute, the principal concluded that the hijab violated the school’s rule barring hats in school and asked Nashala to remove her hijab or leave the building. The school had adopted the no-hats rule to improve safety and discipline, eliminate “unnecessary” disruption, and maintain a “religion-free zone” in an effort to comply with the 1998 federal regulations (U.S. Memorandum of Law, 2004, p. 17).

The Bush administration’s Justice Department agreed with Nashala that the school’s actions should be subjected to strict scrutiny because the policy allowed individual exemptions for secular reasons and because Nashala’s claim constituted a hybrid claim under *Smith* (1990). The Justice Department identified a hybrid claim in Nashala’s right to symbolic speech combined with her right to religious expression. Oddly, in spite of the opening provided by the Supreme Court in *Smith*, the government did not argue that Nashala’s father had liberty interest in his parental right to impart his values to his daughter, which would have led to the classic hybrid claim the Court identified in *Wisconsin v. Yoder* (1972) and *Smith*. The federal government expressly supported Nashala’s claim that she had been singled out for discipline because of her particular faith, arguing that the school had allowed a girl who had lost hair after chemotherapy to cover her head. Moreover, the federal government took the position

that Nashala's symbolic speech could not be restricted under *Tinker* (1969) because she had not disrupted the school or interfered with the rights of others.

The school district ultimately settled the suit in the face of the federal government's advocacy on Nashala's behalf, but the case does not provide a binding precedent for other school districts. The terms of the temporary consent order, which expires after six years, provide that the school will grant an exception to the dress code only when "previously approved by the School Board upon written application for a bona fide religious reason" (*Hearn*, 2004, p. 3). The student and her family bear the burden to file a written application for an exemption, which the School Board may deny if it "finds the religious reasons are not sincerely held beliefs, or that the exception would be likely to cause a material danger to safety and security" (*Hearn*). Moreover, political shifts at the highest levels of the U.S. Department of Justice, which change with presidential administrations, may lead to a different interpretation of the law and, subsequently, different patterns of intervention in local cases.

Very few reported decisions address religious or cultural attire in U.S. schools. Because the legal analysis is intensely fact specific there is no bright line rule on which either schools or students can rely. To further complicate matters, the lower court opinions are in disarray. Lower courts disagree, for example, about whether the Constitution requires a school to accommodate the wearing of an optional symbol that is not mandated by religious law. One district court protected religious expression entirely based on personal belief rather than on the doctrine of an organized religion by holding that a school must accommodate male students who wore rosaries as necklaces to

proclaim their orthodox Roman Catholic beliefs (*Chalifoux v. New Caney Indep. Sch. Dist.*, 1997).

A different federal district court opined that a student's personal belief that she was required her to cover her hair meant that the head covering "may not constitute symbolic speech at all" since an unrecognized symbol is not worn in order to convey a message to others (*Isaacs v. Bd. of Educ.*, 1999). In that case, the court rejected an African-American girl's claim rooted in cultural tradition. The girl argued that she should be exempted from her school's no hats rule in order to wear a headwrap that expressed her African and Jamaican heritage. The court reasoned that cultural, as opposed to religious, expression had no special claim to exemption from generally applicable rules (*Isaacs v. Bd. of Educ.*, 1999). In this instance, the Free Exercise Clause seemed to limit the range of personal beliefs entitled even to request accommodation; because the Constitution does not mention cultural identity, the court found no entitlement to special consideration for cultural, non-religious claims. However, in a case involving the claim by male members of the American Indian Movement that their culture and tradition barred them from cutting their hair as required by school rules, another court held that "religion" is not limited to the traditional faiths but can be discerned "[w]henver a belief system encompasses fundamental questions of the nature of reality and the relationship of human beings to reality," entitling the practice to First Amendment protection whether as a matter of religion or tradition (*Ala. & Coushatta Tribes v. Big Sandy Sch. Dist.*, 1993, p. 1329).

This general approach places a heavy burden on the individual student and his or her family. Because discretion about accommodating parental values, whether religious

or ethnic, is left to the local school board and even to the individual school principal, each family that is the first to seek accommodation in a given district may bear the burden of stating their affirmative claim to an exemption from any dress code of general application and may also bear the burden of proposing a specific compromise.

The U.S. doctrine has been the subject of criticism from two very different directions. First, commentators including Carter (1993) and McConnell (1998) criticize what they regard as the “pervasive secularism” in public schools, which they consider an affront to parents who hold fundamentalist religious beliefs. These critiques are echoed in the political arena in charges that there is “hostility to religious expression in the public square,” including the nation’s schools (Beyond the Pledge, 2004).

One size fits all regulations normally favor the majority. The Supreme Court has only once considered the issue of religious garb, in a case involving an adult in the armed forces. The Court held that an Orthodox Jew serving as a psychologist in the armed forces was not entitled to an exception from the military dress code in order to wear his kippah (*Goldman v. Weinberger*, 1986). Justice Brennan, however, dissented, in a prescient opinion:

The Government characterizes the yarmulke as an assertion of individuality and a badge of religious and ethnic identity, strongly suggesting that, as such, it could drive a wedge of divisiveness between members of the servicesThe Government notes that while a yarmulke may not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidanadnda Ashram-Yogi, nor dreadlocks to a Rastafarian . . . (p. 519)

“To the contrary,” Justice Brennan proclaimed, “a yarmulke worn with a United States military uniform is an eloquent reminder that the shared and proud identity of United States servicemen embraces and unites religious and ethnic pluralism” (*Goldman*, 1986, p. 519). He urged that the armed forces be compelled to present at least a reasoned basis for their restrictions of religious symbols. Otherwise, religions would be divided into

those with visible dress and grooming requirements and those without . . . The practical effect of this categorization is that, under the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths . . . Under the Constitution there is only *one* relevant category – *all* faiths. (pp. 521-22).

The only interest set forth by the government was “uniformity of dress” which, according to Justice Brennan, did not explain how uniformity applied to yarmulkes served any independent functional interests essential to the armed forces (p. 522).

A second line of criticism appears in the theoretical discussions of children’s rights which posit that the United States gives too little weight to children’s rights to explore options and choose among them independent of their parents (Ross, 1999; Woodhouse, 1992). Only one reported opinion concerning school appearance codes in the United States even considers the possibility that the religious or expressive beliefs of parents and children diverge (*Ala. & Coushatta Tribes*, 1993). It supported children’s rights to religious expression that went beyond their parents’ practices. In considering the claims of male Native American students that their traditions and spiritual beliefs barred them from cutting their hair, the court confronted an unusual fact pattern. The parents’ generation, like several generations before them, had converted to Christianity

but retained Native American beliefs as part of an “overall belief system” (p. 1325). As part of their assimilation to Christian and Caucasian culture, the men of the tribe began to cut their hair short and also cut their children’s hair in a ritual ceremony (p. 1325).

After many of the adolescents in the tribe attended a summer program about native cultural and religious traditions, where they learned that long hair has religious significance as part of their cultural heritage, several of the boys refused to cut their hair. In most instances, the parents and tribal officials supported the boys’ position even though they had not trained their children to leave their hair long. The court concluded that the sincerity of the students’ personal beliefs stood on its own and was not dependent on the practices of their parents or the tribe more generally: “plaintiffs are not stripped of their right to free exercise of their own religious beliefs simply because wearing one’s hair long is not absolutely mandated by the Tribe or its religious or cultural leaders” (*Ala. & Coushatta Tribes*, 1993 p. 1330). The teenagers wanted to adopt a more traditional life style than their parents, but one consistent with their parents’ world view. It is less clear that a U.S. court would support accommodation of a practice that directly conflicted with the views of a student’s parents.

In summary, despite a rhetoric that supports diversity of beliefs and cultures, the law in the United States fails to provide bright line protection to children and parents whose minority beliefs or cultures require a unique and symbolic form of dress or appearance. Instead, tolerance and accommodation depend on the goodwill of local officials in each of the more than 94,000 public schools spread among roughly 16,850 school districts in the United States (Nat’l Ctr. Educ. Statistics [NCES], 2006a). This approach imposes a heavy burden on individuals who seek to exercise choices that school

officials may regard as privileges rather than rights. It also requires constant vigilance and raises the specter that each request for accommodation will require negotiation from scratch and even litigation. The resulting uncertainty is likely to limit requests for accommodation to only the most determined children and families, at least until someone else in the district has paved the way.

If we pause at this point in the analysis, a preliminary conclusion based solely on the way the issue is framed in the United States might read as follows. We presume that parents and their children share belief systems and agree about what their beliefs require the children to wear at school. Therefore, it would appear that to promote diversity and respect for minority beliefs, the law should impose an affirmative obligation on school systems to accommodate display of religious beliefs through personal appearance to facilitate the expression of individual religious views, even though current Supreme Court jurisprudence does not require such accommodation.

The analytical framework for this problem in the United States is further muddled by the peculiar political and philosophical alignments of those who advocate mandatory accommodation. Proponents of accommodation generally admit that they also “seek a larger role for religion in public life” (Davis, 2003, p. 429). In the context of American politics, conservative Christians are the primary proponents of a greater role for religion in public life, and they commonly do not limit their crusade to individual expression. Ironically, progressives who normally champion individual liberties under the First Amendment may be wary that accommodation of religious exercise by minorities could ultimately play into the hands of those who wish to restore Christian prayer to the public schools.

The lack of clarity under the individualized accommodation model used in the U.S. law becomes even more apparent in contrast to countries in which the law is stated coherently and applied directly to the issue of student garb, in France by statute, and in England and Canada through decisions of the highest courts. A brief examination of how other western democracies have responded to the competing claims of religious expression, group identity and the state's interest in promoting cohesion helps us to unravel the conflicting claims that surround the issue of student religious garb.

France: The Secularist/Assimilationist Model

French citizens predominantly identify as Roman Catholic. Although there has not been an official state religion since the Revolution, the French state appropriated and continues to own and maintain all church buildings constructed before 1905 (Gunn, 2004). Yet *laicite*, a term resistant to precise translation, has long been a founding principle of the French Republic (Gunn). Under the doctrine of *laicite*, the state and its institutions remain stridently secular. France has entrenched in law and practice the “religion-free” public space that Carter (1993), McConnell (1998) and others argue is encroaching on religious freedom in the United States.

Recent changes to French law pursuant to the principal of *laicite* caused an international controversy, referred to as the affair of the veil. A series of incidents, beginning in the late 1980s, led to the adoption of a statute (Article 141-5-1) which became effective at the start of the fall 2004 school year. The statute provides that “[i]n public elementary schools, middle schools, and high schools it is forbidden to wear symbols or clothes through which students conspicuously [*ostensiblement*] display their religious affiliation.”. Facially applicable to all religious symbols, including large

Christian crosses, it was widely understood that “Christians, even the most devout, do not usually enter schools...carrying large crosses” (Riley, 2004, p. 4). The technically neutral act was aimed at minorities such as Muslims, Sikhs and Jews.

Internal rules require that a dialogue with the student precede the enforcement of any disciplinary procedures. Notwithstanding the required dialogue, by the end of the school year, 44 Muslim girls and three Sikh boys had been expelled from school for refusing to give up their respective veils and turbans (*France: Only 47 Students*, 2005). The rest of the population apparently complied, although some Muslim groups complained that the girls suffered the loss of part of their identity (*French court confirms expulsion*, 2005). French courts have upheld the law (*French court confirms...*). Although some commentators have argued that the law seems to contradict the provisions of the Convention on Human Rights to which France is a party (Riley, 2004), the European Court of Human Rights has upheld similar regulations applicable to university students (*Sahin v. Turkey*, 2005). The French theory rests on the notion that keeping religion private reinforces freedom and tolerance, but many commentators argue that *laïcité* was born of intolerance and continues to prove divisive (Gunn, 2004; Scott, 2007). Some popular observers agree, charging that “efforts at imposed integration, like the celebrated ban on Muslim girls wearing veils in state schools, often serve only to antagonize” and contributed directly to widespread riots by immigrant youth that shook France in the fall of 2005 (*Opinion: Riots in Paris*, 2005).

The specifics of the controversy surrounding the passage and implementation of the law are particularly interesting from a comparative perspective. Whatever the behind the scenes bias against North African immigrants from the former French colonies (which

appears to be substantial), much of the discussion was couched in terms of the rights of Muslim girls to participate in the French community. The Stasi Commission -- whose proposals led to the law -- reported that French citizens widely believed that Muslim girls who come to school in veils are forced to do so by their fathers, brothers, or even the Muslim community at large (Gunn, 2004).² One French feminist went so far as to label the veiling of girls a form of criminal child abuse (Kramer, 2004). Secularists point to the requests that accompany wearing the veil, such as claims to exemption from co-ed physical education and biology classes and opposition to teaching about the Holocaust (Mortkowitz, 2004). Teachers and school principals voiced concerns that in addition to isolating veiled girls from the secular community, the presence of veils would lead to distinctions within the Muslim community between the more traditional and those who are less observant, leading to peer pressure and ostracism. (Eisenberg, 2004).

Some observers feared that girls who refused to wear the veil might be subjected to sexual assaults and pointed to the death of an unveiled Muslim girl who was set on fire in 2002 (Eisenberg, 2004). French feminists expressed fears that banning the veil would be counterproductive, predicting that some Muslim families would pull their daughters out of school altogether or even send them out of the country into non-consensual forced marriages (Kramer, 2004). At least one reported incident substantiated these concerns, when a Moroccan man was arrested and stripped of his parental rights after he kept his four daughters confined at home because they would be forced to remove their veils if they attended school ("*Suspended jail term*", 2006).

Scott (2007) points out, however, that three veiled girls who were the focus of press attention while the Stasi Commission was holding its hearings had each made

individual decisions to wear headscarves over the objections of their families. Indeed, two of the girls were sisters from a non-Muslim leftist family; their father was a secular Jew, their mother a lapsed Catholic (Scott, 2007, pp. 30-31). A third student's Muslim parents opposed her decision to adopt the veil (Scott). Generalized concerns about the rights of hypothetical Muslim girls thus trumped attention to the religious rights claims of at least three real girls.

For Muslim parents who conform to the popular stereotype and insist that their daughters wear hijabs, less drastic alternatives than pulling girls out of school exist. In order to "keep the church out of the classroom" France has long subsidized the budgets of qualifying parochial schools (those that meet the curricular requirements). Most of those are Roman Catholic schools. Although some observers voiced the hope that Roman Catholic schools would educate the veiled girls, Catholic schools officials reported that they would not be "a place of refuge" if the girls demanded special curriculum or religious holidays ("*French Muslims Defy School*", 2004). Another option would be to provide public funds for approved Muslim schools. One subsidized Muslim school opened in Lille in 2003; it accepts students of all faiths, veiled and not ("*France Gets First*", 2003). Resolving the problem of the veil by subsidizing numerous Muslim schools, however, would undermine France's primary goal of assimilating immigrants into mainstream French culture. Instead, it resembles the multicultural model developed in the Netherlands, described by Buruma (2005), under which the state funds Muslim as well as Protestant religious schools, an approach which has been criticized with the advent of Muslim militancy (Scheffer, 2003), and severely undermined following the murder of filmmaker Theo Van Gogh (Burama, 2006)..

The French ideal of assimilation to a secular state appears flawed because it only tolerates the “other” who assumes the features of the majority. It leaves little room for individuals who assert their distinctiveness – especially with respect to religious identity – in a way that makes the majority uncomfortable.

Great Britain: Mutual Reasonable Accommodation Model

In contrast to the U.S. and France, Great Britain has an established church. The monarch is the titular head of the Churches of England and Scotland; the prime minister appoints the Church’s highest official, the Archbishop of Canterbury; places are reserved for bishops in the House of Lords; and a blasphemy law protects the Church of England from written and spoken attack (Sahgal & Yuval-Davis, 1992). Moreover, under the Education Reform Act (1988), all state-supported schools must hold daily religious services (Sahgal & Yuval-Davis) and classes in religious education, though students may be excused at their parents’ request (Poulter, 1997).

As in France, the government subsidizes religious and other privately-run schools (known as “voluntary-aided” or Local Educational Authority [LEA] schools) that satisfy standard curricular requirements. In both state-run and subsidized schools, religious services must “reflect the fact that the religious traditions in Great Britain are in the main Christian, whilst taking into account” other principal religions represented in the country (Poulter, 1997, p. 56). Individual schools however, may be exempted from the requirement that services have a Christian character in recognition of the distinctive religious affiliations of their populations (Poulter). LEA schools make up about one-third of all British schools, and are largely Church of England or Roman Catholic. (Sahgal & Yuval-Davis, 1992). Of the more than 7,000 religious schools receiving public funds in

Great Britain in 2006, 36 are Jewish and only seven were Islamic, while a handful served other minority faiths. (Cowell, 2006). Unregulated, privately-funded schools are also increasingly available to minority religions, including dozens of Muslim schools primarily segregated by gender (Khanum, 1992; Poulter).

Although it has an established church, British law combines elements of the pluralist and assimilationist approaches to diversity, resulting in a system which has been called “pluralism with limits” (Poulter, 1997, p. 49). In particular, British law protects individual freedom of religion. Like France, Great Britain is a signatory to the European Convention on Human Rights, which provides the framework for judicial analysis of claims that a school has infringed a student’s free exercise rights.

In addition, Great Britain’s Race Relations Act of 1976 bars direct or indirect discrimination in a regulation of general applicability that has a disproportionate impact on a particular minority group which is “not justifiable irrespective of the colour, race, nationality, or ethnic or national origins of the person to whom it is applied; and which is to the detriment of that other because he cannot comply with it” (Race Relations Act of 1976, p. 1724). As a result, the question of whether believers are required to wear a particular religious symbol or form of dress may be less important than in the United States, because the Race Relations Act provides that if the regulation interferes with the individual’s expression of identity, the government must justify the regulation to the satisfaction of a reviewing court.

In 1983 the House of Lords held that the Race Relations Act protected the right of a Sikh boy to wear his turban to school because the Act intended the word ethnic to be “construed relatively widely” in a “broad, cultural/historic sense” (*Mandla v. Dowell Lee*,

1983, p. 1067). The court concluded that although the Sikh community is no longer strictly religious in nature, a Sikh boy could not comply with the school dress code requiring him to cut his hair and attend school bare-headed without giving up his community's "distinctive customs and cultural rules" (*Mandla*, p. 1069). This requires a much broader form of accommodation than is even contemplated the United States Constitution because it protects ethnicity and has been extended to protect Jews (treated as an ethnic group in the wake of World War II) and gypsies as well as Sikhs (Poulter, 1997). On the other hand, because Muslims are regarded as a religious group but not an ethnicity, they have thus far been denied special protection under the Race Relations Act (Poulter, 1997), and must rely instead on claims to religious freedom.

In 2006, the Law Lords, the country's highest court, ruled unanimously in favor of an LEA secondary school in a widely publicized and controversial case brought by a 14-year-old who had been denied access to school when she insisted on wearing a full length jilbab (*Begum*, 2006). The details of the case are intriguing. First, the headmistress of the school is a Muslim, raised in the sub-continent and the school population was, at the time of the controversy, almost 90% Muslim. As a result, the school had been exempted from the legal requirement that schools hold broadly Christian religious services (*Begum*, p. 2). Second, the co-educational school had voluntarily adopted a generous dress policy designed to accommodate Muslim girls by providing a "shalweer kameeze" – an outfit consisting of loose trousers, a tunic and a headscarf -- as an alternative to the standard school uniform after considerable consultation with various community groups, including several local mosques. Some observant Muslim students, as well as Hindu and Sikh girls, wore the shalweer kameeze without complaint. Others

simply wore the hijab with the school uniform, while still others left their heads uncovered (*Begum*). Third, the girl's parents were both dead, and her lawyer portrayed the girl's request to be allowed to wear head to ankle covering as the outgrowth of her own beliefs about what was required of her after she began to menstruate (*Begum*). Subsequently, many observers raised questions about the influence of Shabina's older brother who initially informed the school of her decision to abandon the shalweer kameeze and adopt more conservative dress than she had worn previously (*Begum*).

The court applied the legal analysis developed by the international courts for analyzing claims under Article 9 of the European Convention on Human Rights, which provides, in pertinent part, the "freedom to manifest one's religion or beliefs" is "subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, health or morals, or for the protection of the rights and freedoms of others" (ECHR, Article 9). The panel began by asking whether the school infringed on Shabina's religion when it refused to allow her to wear the jilbab. The lead opinion analyzed the "coherent and remarkably consistent body of authority . . . which shows that interference is not easily established" under Article 9 (*Begum*, 2006, p.10). The majority of the panel concluded that, on the facts presented, there was no interference with Shabina's right to manifest her belief in practice or observance (*Begum*)

Lord Bingham reasoned that Shabina's family had freely chosen the school instead of a neighborhood school, and the school had clearly explained its dress code. Three schools in commuting distance would have permitted her to wear the jilbab, and a

number of single sex schools were also available where even Shabina would not have deemed the jilbab necessary. Lord Hoffman agreed, adding:

Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing. Common civility also has a place in the religious life. . . people sometimes have to suffer some inconvenience for their beliefs. (p. 20).

Because the judges regarded the question of interference as “debatable” by reasonable people, they continued their analysis by asking whether the limitation on Shabina's religious practice was justified. To be justified, an interference must be “(a) prescribed by law and (b) necessary in a democratic society for a permissible purpose, that is, it must be directed to a legitimate purpose and must be proportionate in scope and effect” (*Begum*, 2006, p. 11). The school's stated reasons for refusing to bend the dress code to accommodate the jilbab included (i) the discomfort of the other students who were afraid of people wearing forms of dress they associated with extremist views; (ii) the concerns of other Muslim students about one kind of Muslim being regarded as inferior to another and about resulting pressure from peers and outsiders to conform to more traditional dress; and (iii) the fear that a wider diversity of dress codes would undermine cohesion, inclusion and tolerance (*Begum*). The panel concluded that even if the dress code had infringed on Shabina's rights, such infringement would have been justified under Article 9 by the school's need to protect the rights and freedoms of others (*Begum*). This provision of the ECHR, it is worth noting, resembles the second (but seldom cited) justification for limiting student speech in the United States under the *Tinker* test: interference with the rights of other students.

The next question under Article 9 is the proportionality of the regulation. Proportionality review requires an elevated “intensity of review...greater even than the heightened scrutiny test” (*Begum*, p. 13). While this inquiry bears some resemblance to the “strict scrutiny” of limitations on fundamental freedoms in the United States, it differs in significant respects. Proportionality review under European law requires the British court to make what it characterizes as an “objective...evaluation, by reference to the circumstances prevailing at the relevant time” (p. 13).³ The court in *Begum* noted that consideration of proportionality included weighing

[t]he need in some situations to restrict freedom to manifest religious belief; the value of religious harmony and tolerance...and of pluralism and broadmindedness; the need for compromise and balance; the role of the state in deciding what is necessary to protect the rights and freedoms of others...and the permissibility in some contexts of restricting the wearing of religious dress. (p. 14)

The court concluded that the school had not only gone out of its way to respect “Muslim beliefs but did so in an inclusive, unthreatening...way” and that the rules were acceptable to mainstream Muslims (pp. 14-15). Finally, the court concluded that, contrary to her allegations, Shabina had never been “excluded” from school; instead, she chose not to obey the rules and decided to stay home (pp. 27, 28, 33).

In a separate opinion Baroness Hale (*Begum*, 2006) raised two additional concerns, both echoing Shabina’s claim and echoed in commentary about her claims, which place in stark relief the differences in approach between the United States and Europe. First, she concluded that the regulation interfered with Shabina’s manifestation

of her religious beliefs but, like many French observers, insisted that the court must recognize the reality that the choice of both school and dress was likely made by the family, not by the girl student (p. 36). The rights of adult women who chose to veil themselves raise different issues; if the veil offends some feminists, that is no justification for prohibiting women from wearing it. Adults may well adopt the hijab or even the jilbab as a political statement or a protection as she leaves the confines of home to navigate the external world (Parekh, 1996). Girls may make the same arguments (Hoodfar, 2003; Sarroub, 2005), but it may be less clear that they would veil themselves absent pressure from family or community. Unlike adult women, they do not have the legal option (which may not be a culturally plausible option) of claiming independence from their family unit.

In Baroness Hale's view, pluralism proves less significant to assessing the legal claim than the peculiar legal and cultural conceptions that attach to adolescents. Baroness Hale argued that the risk that an adolescent is not speaking for herself makes all the difference to the resolution of the question whether the interference with religious practice was justified and proportionate, especially in the context of schools, which are "different." (*Begum*, p. 39). She opined that the regulation was both justified and proportionate, because it protected not only the rights of other students not to be pressured to adopt more conservative dress (p. 40), but also the right of all students, including girls of all religions, to "achieve their full potential" despite the patriarchal dominance of some families (p. 39). Baroness Hale concluded that the Denbigh school achieved an excellent compromise between social cohesion and individual autonomy.

Further consideration of the facts set forth in the lower court opinion (*S.B.*, 2005) underscores the salience of Baroness Hale's concerns. First, consider the role of Shabina's 20-year-old brother, Shuweb Rahman, played in the controversy. The press reported that Rahman was "a member of a militant Muslim group supporting the creation of an international Islamic state ruled by sharia law" (Carroll, 2006, p. 1), a charge he denied (Gerard, 2006). Accompanied by another Muslim man, Rahman escorted Shabina, wearing the jilbab, to school on the first day of term in 2003. They insisted that she be allowed to wear the jilbab and "talked of human rights and legal proceedings." After it sent Shabina home, the school made several attempts to talk with her guardian. Rahman informed that school that "he was not prepared to let [her] attend school unless she was allowed to wear a long skirt" (*S.B.* p. 4). After the Law Lords ruled against her, Shabina lunched with a reporter, whose "impression that she was not acting of her own free will was reinforced" by the "formidable" entourage that surrounded her (including children's rights lawyers and a publicist) (Gerard, 2006). Rahman insisted he had been ready to compromise, even proposing that Shabina be taught "in solitary confinement," in the reporter's view to shut her off from life in the interests of purity (Gerard). Shabina herself is full of contradictions. She once dreamed of becoming a doctor, a goal that now seems out of reach given the impact the prolonged litigation has had on her grades. At last report, in 2006 she fantasized about becoming a "TV presenter" (Gerard, 2006), a dream that hardly seems like a considered comparison and choice between two paradigms for living.

Concerns about community and peer pressure to wear less revealing outfits also appear to be justified. Not only did other girls at Denbigh voice "concern that if the jilbab

were to be allowed they would face pressure to wear it even though they do not wish to do so” (*S.B.*, 2005, p. 40), but Shabina herself conceded that girls are already “pressured to wear headscarves who don’t want to” (Gerard, 2006).

Fears that family and friends would pressure students to adopt the niqab (a veil which covers the entire face and head except for the eyes) played a similar role in another school’s dress code regulations which resulted in litigation decided in 2007 (*R (on the application of X) v. Head Teacher and Governors of Y School*, 2007, pp. 64, 93). Expressly applying the Article 9 analysis set forth in *Begum*, the Queen’s Bench (Silber, J.) held that “different schools are entitled to adopt their own rational policies” (*R (on the application of X)*, p. 66) with respect to dress, so long as they satisfy the requirements of proportionality.

What would be the likely result in the contra-factual situation that a U.S. court applied the analysis used by the Law Lords to the treatment of Nashala Hearn by her school in Oklahoma? The British approach surely would have encouraged greater responsiveness by the public school and likely would have led to a compromise that would have made litigation unnecessary, at least if the request involved the hijab rather than the jilbab. At the same time, British doctrine would not impose as high a burden on the school as the one urged by the U.S. Attorney General in its pleadings to the *Hearn* (2004) court. Judicial scrutiny under the analysis used in the *Begum* matter would allow a court to weigh the social considerations that entered into the school’s decision.

The current doctrine in the U.S. fails to ascertain the extent to which the student wearing the symbol has freely chosen it, which may be difficult or impossible to ascertain in the face of parental or community pressure. (Buss, 1999). The principles of individual

expression and free exercise presume that the individual invoking rights has freely chosen his or her position. As Baroness Hale's opinion in *Begum* pointed out, the risk that an adolescent is not speaking for herself but rather for her family or community may make all the difference in how to weigh her claim in the context of a public school. It is remarkable that discussion in the U.S. has paid so little attention to this concern, which proves central to the debate in both France and Great Britain.

Canada: A Per Se Accommodation Model

The Canadian approach provides the greatest protection to the individual student who seeks to wear religious symbols in school and is closest to the position urged by the Bush Justice Department. The Canadian Charter of Rights and Freedoms (1982) and the Quebec Charter of Human Rights and Freedoms (2006) both protect the individual's freedom of religion (*Multani*, 2006). Furthermore, Canada has neither one established church nor a principle of anti-establishment. Instead, the Constitution Act of 1867 assured religious minorities⁴ the right to continued public funding for the minority's sectarian schools (Van Praagh, 1999). As a result, Roman Catholic schools receive public funds in Ontario, but no other religions receive similar educational subsidies (Van Praagh). In Quebec, public schools may be sectarian yet open to students of all faiths. It does not appear that public funds subsidize any religious schools that are neither Protestant nor Catholic.

As in other countries examined here, Canada experienced a controversy involving 12-year-old Emilie Oimet who wanted to wear a hijab to school in Montreal in 1994. The school sent her home because its dress code expressly barred any "clothing or accessories that would marginalize a student" (Van Praagh, 1999, p. 1378). At the time

about 4% of the students in Quebec were Muslims (about 3,600 girls and boys) and about 70 girls wore the hijab (Van Praagh, p. 1381, n. 133). Emilie and her family never filed any legal action, but the incident led to widespread popular discussion and a report by the Quebec Human Rights Commission. The Commission—whose report is not binding outside Quebec—concluded that any school that banned the hijab would have to justify its actions by providing “concrete evidence of a real threat to sexual equality or to safety” (Van Praagh, p. 1380). The issue subsequently faded from public view without any formal legal resolution, with some girls continuing to wear the hijab to school. According to Van Praagh, the incident established that children from fundamentalist families may participate in public education and still “claim the promises of multiculturalism” but did not resolve the boundaries of tolerance, even for the province of Quebec (p. 1378).

In 2006, the Supreme Court of Canada ruled on the issue of student religious garb in *Multani*, a case involving the claim of a Sikh boy from Quebec whose school denied him permission to wear a small kirpan secured under his clothing. The court held that “an absolute prohibition against wearing a kirpan infringes the freedom of religion of the student” (*Multani*, p. 15). The court further concluded that, on the facts before it, the infringement on liberty was not justified. First it concluded that the infringement on this student’s personal beliefs, including the right to “undertake practices... having a nexus with religion” was not minimal (p.30). The majority stated that “a total prohibition ... undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others” (p.50). In contrast, accommodating the symbol “demonstrates the importance that our society attaches to

protecting freedom of religion and to showing respect for minorities” (p. 50). This statement resembles the glowing language in which the U.S. Supreme Court explained that because schools

are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. (*West Virginia St. Bd. of Ed. v. Barnette*, 1943, p. 624).

The *Multani* (2006) court further held that while the school’s objective of a safe environment was “sufficiently important to warrant limiting a constitutional right,” the regulation was not proportional to the objective, as required under the Canadian Charter (p. 34). In order to determine whether the school’s policy was proportionate to its goal, the court asked “whether the decision to establish an absolute prohibition against wearing a kirpan ‘falls within a range of reasonable alternatives’” (p. 37). In an approach resembling that used by the British Law Lords, the Canadian court examined the context for the decision and the range of available compromises.

The Canadian court differs most markedly from the doctrine in the United States in taking the position that there is a duty to “make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face,” and that such rules may not cause “undue hardship” to the individual. Thus, a “no knives” rule cannot be applied to a Sikh who agrees, as *Multani* did, to reasonable safety precautions, especially in the absence of a single known incident involving a Sikh using a kirpan as a weapon in a school. As the court reasoned, under the conditions *Multani* agreed to, it would be almost impossible for another student to grab the knife; equally

important, a student determined to commit an act of violence could use other non-contraband objects commonly found in schools such as “scissors, pencils and baseball bats” (*Multani*, 2006, p. 39).

Of the liberal democracies examined here, Canada gives the highest deference to religious symbols worn by students. It appears to require educational institutions to engage in serious discussions and negotiations in an effort to accommodate the student’s religious views. At the same time, it requires some flexibility on the part of the student and his or her family. It seems clear that *Multani* would not have prevailed in his claim if he had insisted on carrying a visible foot-long dagger, because that insistence would make the school’s concerns about safety more than reasonable. Similarly, if Shabala Begum refused to compromise about her jilbab, it is possible that a Canadian school would be able to state convincing reasons for asking her to do her part in compromising in order to reach an accommodation with the school, but arguably the school could not rely on the reasoning that it acted to prevent her “marginalization.” The result might well resemble what actually happened in Great Britain, although the same result would be reached by a different route of legal analysis.

One more aspect of the *Multani* (2006) decision is worth noting. In a concurring opinion, Justice LeBel identified a tension between the “competing rights” of “freedom of religion and the right of children and other persons in educational institutions to security,” also protected by the Canadian Charter (p. 75). He expressly adopted a communitarian approach to the resulting dilemma, concluding, “We not only have rights, we also have obligations It is therefore necessary to find approaches to applying the *Canadian Charter* that reflect the need to harmonize values and reconcile rights and

obligations” (p. 76). Because he concluded that “[w]rapped as it would be, the kirpan does not seem to be a threat to anyone” (p. 78), dispatching any infringement of the right to security, Justice LeBel, agreed with the lead opinion’s proportionality analysis. But Justice LeBel warned that, in general, the “complexity of the situations” involving conflicts of rights under the Charter “is unsuited to simplistic formulas” (p. 77).

Turning the Tables

With the exception of France, all of the legal regimes discussed in the last section would at the very least entertain arguments for accommodating minority religious garb in state-funded schools. The protection for such identity claims is strongest in Canada followed by Great Britain, and is weakest in the United States where the legal status of accommodation is less clear and largely reliant on local officials. From the vantage point of individual rights, standing alone, the Canadian and British approaches have much to recommend them.⁵ What happens, however, if we omit the modifier “minority” from the phrase “minority religious garb”? In other words, what if the traditionalist minority becomes a majority in a given district or school? Do the same legal theories continue to protect the rights of all students as well as the interests of the body politic? The following hypothetical discussion uses the example of the veil, but could easily be about a symbol of a different religion. Indeed, it illustrates by analogy the ways in which public schools that allow a pervasively Christian environment to flourish violate the intent of the Religion Clauses.

Take the example of Dearborn, Michigan, a community with the largest population of Arab-speakers outside the Middle East. As of 1999, 49% of the students in the Dearborn schools spoke Arabic, although they came from many different countries

and cultures. Assume that the Arab-speaking population continues to grow until a significant majority of students are Arab-speakers and Muslims, say 90%. Assume further that, for various reasons including personal belief, family belief or community pressure, the majority of the Muslim girls are hijabat (veil-wearers), so that only a minority of all girls, Muslim and non-Muslim, come to school bare-headed. Would the legal principles that have dominated the discussion so far protect the rights of the new minority: the non-hijabat? Would those principles sufficiently protect the goals of education for citizenship in a democracy that proclaims gender equality?

Sarroub's (2005) sympathetic ethnography of a small group of hijabat in Dearborn helps us flesh out this hypothetical. Sarroub paints a complex picture of teenage girls with one foot in each culture—the American high school and the Yemeni family that maintains strong ties to its country of origin. The families and girls found the hijab advantageous in many ways. The hijab proclaimed the girl's morality, thus gaining her modest additional freedoms outside the house. But it also guaranteed a watchful eye by members of the Yemeni community, sensitive to any misstep, including monitoring by boys at school. Layla, for example, began to wear a veil at her father's insistence in third grade. Although he also wanted her to wear a long, shapeless dress, she refused and they compromised on loose jeans and baggy shirts with sleeves.

The families valued education, though many of the parents lacked formal schooling, but they worried about the social life in schools. They objected to the coeducational gym classes their daughters were required to attend. The price of loss of honor was high, giving credence to some of the concerns voiced in the French debate over the veil: parents pulling their daughters out of school, forcing an early marriage, and

sending them to Yemen (Sarroub, 2005, p. 28; *see also* Keaton, 2006, Killan, 2006). Many of the hijabat still in school were secretly engaged or married to boys from Yemen chosen by their families. Moreover, the hijabat themselves understood that despite the value their parents assigned to high school education, they were unlikely to be allowed to attend college.

One of the greatest tensions for the hijabat was the pull between the value accorded individualism and individual opportunity in the public schools and the norm of collective obligation at home (Sarroub, 2005, p. 63). It is particularly striking that even though Western legal systems regard religious expression such as veiling as a statement of individuality, the girls themselves only seemed comfortable making the statement in a group. When a girl found herself the only hijabat in a classroom, she requested a transfer. In classes with a number of hijabat, and in the cafeteria, the hijabat sat together. According to Sarroub, the hijabat felt particularly isolated because their teachers subscribed to a “classic liberal view of equity—treat all students the same” rather than attempting to understand the particularism and gender norms their students brought to school (p. 93). This attitude suggests that the hijabat want something more than the right to fully participate in public schools while wearing an identifying marker. This is consistent with efforts by other fundamentalist groups to be exempted from the study of evolution, sex education, or literature containing curse words, and even with efforts to modify the general curriculum to conform to their own beliefs.

The process of negotiation and mutual compromise endorsed by both the highest courts in Canada and Great Britain, and relied on by schools in the United States, raises one serious concern under the Establishment Clause. It may involve the state – through

its schools – in the “excessive entanglement” with religion long held to violate the Establishment Clause. The negotiations would involve the state in resolving debates about the details of the required/permitted symbol, thus running the risk of watering down religious observance. Why should a school be the arbiter of whether the four-inch hidden kirpan satisfies the religious and cultural imperative of the Sikh or decide that the hijab is sufficient but the jilbab goes too far?

The classic theories of individual rights that support a student’s right to wear religious garb in public school assume that the student invoking such a right will be one of only a few. What protections, if any, would be needed for a Muslim non-hijabat or a non-Muslim in a school dominated by hijabat? The likelihood of community pressures on Muslim girls and their families might well undermine the argument that the veil reflects personal beliefs and choice. The non-Muslim girl might well feel just as uncomfortable alone in a class as the veiled girl does in Dearborn (or other communities) today. Seating patterns reported by Sarroub suggest the non-hijabat might be ostracized by the majority hijabat. To be sure, pressure from the community and peers cannot be attributed to the state. In the United States, the actions of individuals, undertaken without the active involvement of the state, almost never amount to a violation of the Establishment Clause. Thus, the current doctrine would fail to protect the unveiled.

At some point, toleration of majoritarian public displays of religion might arguably reach a level at which a reasonable observer, in Justice O’Connor’s terms, could infer endorsement by the school, but the threshold seems very high. For example, lower courts have upheld release time from public school classes for religious instruction that left non-Christian students with nothing to do and exposed them to taunts from fellow

students (*Pierce v. Sullivan W. Cent. Sch. Dist.*, 2004), and even curricular modifications that reflected the dominant religious beliefs in a community (*Stark v. Ind. School Dist.*, 1997). These cases suggest that, in my hypothetical, there would be no recourse for the non-hijabat but to leave the public school at their own expense. This outcome presses the limits of the theory that exit is a sufficient remedy for discomfort with prevailing values in schools.

A robust doctrine concerning religious garb must be able to protect three sets of rights: the right of the religious believer, the rights of the non-believers, and the state's interest in education for life in a pluralist society. It must also be sensitive to the possibility that the student and his or her parents have different beliefs or that their beliefs may diverge over time. The classic law school exam question would involve the girl who wants to wear a veil to school against her parents' wishes; none of the legal systems examined here appears to contemplate that possibility.

The hypothetical of the turned tables suggests that the prevailing theories, Canada's per se accommodation approach, mutual reasonable accommodation in Great Britain and individualized accommodation in the United States— all developed in the narrower context of diversity within the Judeo-Christian tradition—lack the resiliency to respond to transformed facts. The French emphasis on secularism and assimilation is lacking in a different way -- it gives short shrift to rights of identity and religious expression. The hypothetical of the majority hijabat, however, reveals some of the advantages of the inflexible French approach. France creates a symbol-free public zone, along with a right of exit for those whose particularized beliefs lead them to insist on denominational schooling.

Why should one group bear the burden of exit and not the other? The answer is simple. Outside theocracies, overt displays of religion, even by private persons, should not be permitted to make other individuals so uncomfortable that they feel compelled to flee the public schools. This approach would apply the part of the *Tinker* test that resembles the decision in *Begum*: when student religious expression rises to a level that infringes on the rights of others it should be subject to reasonable restrictions. As Walzer (1997) argues, schools are entitled to transmit the value of mutual tolerance even at the cost of challenging parental values. That approach would also allow courts to consider context and proportionality, as they do in both Great Britain and Canada, and to attempt to harmonize individual rights with the obligations citizens have to the polity.

Would denial of requests to wear religious garb make schools “religion-free zones”? Not at all. Other forms of expressive rights would remain untouched—including the right to engage in private prayer, to speak about one’s beliefs, to write papers on religious topics as long as they satisfy academic requirements and to participate in religious clubs at school. Of course, students should be allowed to carry their symbols so that they can wear them to and from school—thus clearly manifesting their beliefs to all who see them. This would bear an ironic resemblance to the situation when mini-skirts first became fashionable in the 1960s and violated the rules or uniforms of many schools. Each day after school passers-by witnessed girls frantically rolling up the waistbands of their skirts before leaving the perimeters of the school. So too could the hijabat prepare to re-enter the world outside school.

One important issue remains. Can political symbols—such as the black armbands worn to protest a war in the *Tinker* case—be permitted if religious symbols are barred?

Would not such a distinction violate the foundational principle that religious speech should not be singled out for regulation on the ground that it is religious? In the case of minority groups, how do we distinguish religious expression from political symbolism? These questions require exploration in a separate work.

Students are members of families which may in turn be part of a community based on religion or identity, but they are also members of a broader national community represented by the public schools. The limits of toleration in the face of religious symbols echo a recent philosophical trend that focuses our attention on the obligations of the individual to society and a renewed understanding of what it means to be a member of a national state (Scheffer, 2003). So far, none of the existing models seems to resolve the problem satisfactorily.

Notes

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¹ I have examined other aspects of these broad issues in a series of earlier articles: Ross (2004, 1999, 1996). This chapter grows out of research for a book in progress on pluralism, parental values and children's rights.

² Similar concerns have been voiced in Spain, where at least one school principal grilled a girl who he suspected was forced to wear a head scarf by her father. As in France and the Netherlands, the Spanish government subsidizes religious schools. (McLean, 2004, p. A6).

³ Poulter (1997) argues that the court must also ask whether the impact of the regulation disproportionately affects a particular minority group; this is measured by "whether the proportion of pupils of the plaintiff's [minority] group who can conscientiously comply with the regulation is 'considerably smaller' than the proportion of pupils not of that group who can comply with it" (p. 65), but this inquiry did not enter into the court's analysis.

⁴ Catholics in the Protestant areas of the country and Protestants in the French-speaking Roman Catholic provinces.

⁵ For purposes of this discussion, I shall accept the notion expressed in the *Begum* case in Britain, consistent with the *Meyer/Pierce* line of cases in the United States, that the state should not affirmatively intervene in a family's choices regarding gender role socialization, even though the state exposes children to other ideas at school.

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