Brooklyn Law Review

Volume 78
Issue 2
SYMPOSIUM
Post Zoning: Alternative Forms of Public Land Use Controls

Article 15

2013

An Unveiling: Exploring the Constitutionality of a Ban on Face Coverings in Public Schools

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An Unveiling

EXPLORING THE CONSTITUTIONALITY OF A BAN ON FACE COVERINGS IN PUBLIC SCHOOLS

INTRODUCTION

In the past two years, both France and Belgium have enacted complete bans on face veils in public, with the French law taking effect in April 2011.[1] These "burqa bans," as they are known, represent efforts to harmonize Western societal values with Muslim religious beliefs and practices. Within many European countries and much of the rest of the world, commentators continue to vigorously debate whether Muslim face veils have a place in public.[2] Spain and Germany have both enacted partial bans.[3] For example, Germany has banned the face veil in public schools,[4] while Spain has banned the veil in public administration buildings.[5] Italy, Great Britain, and the Netherlands have also considered such restrictions.[6] Most

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[1] *See* Jennie Ryan, *Belgium Burqa Ban Takes Effect*, JURIST (July 24, 2011, 12:30 PM), http://jurist.org/paperchase/2011/07/belgium-burqa-ban-takes-effect.php; *see also* John Paul Putney, *France Burqa Ban to Take Effect April 11*, JURIST (Mar. 4, 2011, 4:20 PM), http://jurist.org/paperchase/2011/03/france-burqa-ban-to-take-effect-april-11.php.

[2] *See, e.g.*, Christina Mahfouz & Grace Brown, *The Burqa Debate: To Ban or Not to Ban*, PERSPECTIVIST (Apr. 15, 2011), http://www.perspectivist.com/politics/the-burqa-debate-to-ban-or-not-to-ban; *see also* David Mitchell, *If Britain Decides to Ban the Burqa I Might Just Start Wearing One*, OBSERVER (July 24, 2010), http://www.guardian.co.uk/commentisfree/2010/jul/25/david-mitchell-burqa-ban-tattoos.

[3] *France Hardly Alone on Burqa Ban*, NEWSDESK (July 21, 2010), http://newsdesk.org/2010/07/france-hardly-alone-on-burqa-ban/ (Barcelona and several other towns in Spain have banned burqas in government buildings); *Germany's First Burka Ban Imposed by the State of Hesse*, BBC NEWS (Feb. 3, 2011, 11:41 AM), http://www.bbc.co.uk/news/world-europe-12353626 (the German state of Hesse prohibits public sector employees from wearing a burqa).

[4] *Germany's First Burka Ban*, *supra* note 3.

[5] *France Hardly Alone on Burqa Ban*, *supra* note 3.

[6] *See Italy Approves Draft Law to Ban Burqa*, GUARDIAN (Aug. 2, 2011, 9:54 PM), http://www.guardian.co.uk/world/2011/aug/03/italy-draft-law-burqa; *see also Dutch to Ban Full-Face Veils*, N.Y. TIMES, Sept. 17, 2011, at A6; *Dutch Plan Ban on Muslim Face Veils Next* Year, Reuters (Jan. 27, 2012, 12:41 PM), http://www.reuters.com/article/2012/01/27/us-dutch-burqa-ban-idUSTRE80Q1OT20120127 (former Dutch government planned a ban to go in effect in 2013, but the overturn of the government may see that legislation scrapped); *English Schools Get Right to Ban Muslim Veils*, REUTERS (Mar. 20, 2007, 7:31 AM), http://www.reuters.com/article/2007/03/20/us-britain-schools-veil-idUSL2071360120070320 [hereinafter *English Schools Ban*].

recently, Canada declared that women are required to remove face-covering veils when taking the citizenship oath.[7] Reactions on both sides of the debate have been impassioned. Those favoring the ban believe that the face veil limits women's access to society, poses security threats, and robs women of their identity.[8] They claim that the face veil is inconsistent with the values of Western society.[9] Those against the ban believe it represents an attack on women's freedom to choose how to dress and that it is intolerant of Muslim religious practices.[10]

From the American perspective, the First Amendment's protection of religious freedom provides an additional basis for objecting to the face veil, resulting in another set of varying opinions on whether Western society should allow the veil.[11] President Barack Obama addressed the growing European sentiment against face veils during a speech in Cairo on June 4, 2009, stating that "[i]t is important for Western countries to avoid impeding Muslim citizens from practicing religion as they see fit—for instance, by dictating what clothes a Muslim woman should wear. We cannot disguise hostility towards any religion behind the pretense of liberalism."[12] Offering a different perspective, Secretary of State Hillary Clinton, in response to

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[7] *Niqabs, Burkas Must be Removed During Citizenship Ceremonies: Jason Kenney*, NAT'L POST (last updated Dec. 12, 2011, 5:32 PM), http://news.nationalpost.com/2011/12/12/niqabs-burkas-must-be-removed-during-citizenship-ceremonies-jason-kenney/ (banning face veils during citizenship ceremonies to ensure that all citizenship candidates can be seen taking the oath as required by law, "not simply a practical measure . . . [but one] that goes to the heart of our identity and our values of openness and equality.").

[8] *See, e.g.*, Abhijit Pandya, *Why A Burka Ban Defends the Rights of Women*, MAIL ONLINE (Dec. 20, 2011, 7:07 PM), http://www.dailymail.co.uk/debate/article-2076544/Why-Burka-ban-defends-rights-women.html; *see also* Nabiha Meher Sheikh, *In Support of the Burqa Ban*, CHANGING UP PAKISTAN (Apr. 19, 2011), http://changinguppakistan.wordpress.com/2011/04/19/in-support-of-the-burqa-ban-nabiha-meher-sheikh/.

[9] Mahfouz & Brown, *supra* note 2.

[10] *See, e.g.*, Sehmina Jaffer Chopra, *Liberation by the Veil*, ISLAM101, http://www.islam101.com/women/hijbene.html ("Contrary to popular belief, the covering of the Muslim woman is not oppression but a liberation from the shackles of male scrutiny and the standards of attractiveness. In Islam, a woman is free to be who she is inside, and immuned [sic] from being portrayed as [a] sex symbol and lusted after."); *see also* YOUNG MUSLIMS, HIJAB: FABRIC, FAD OR FAITH?, *available at* http://web.youngmuslims.ca/brochures/hijab.pdf.

[11] This note will be limited to a discussion of veils that cover the face and leave the identity of the wearer in question. Thus, this includes burqas, which cover the entire face with a mesh screen across the eyes allowing the wearer to see, as well as niqabs, which cover the entire face with an open slit through which the eyes are seen. The note will not address headscarves that cover only the face and neck and allow the face to be seen.

[12] President Barack Obama, Remarks by the President on a New Beginning (June 4, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-cairo-university-6-04-09.

questions about banning the burqa as a security measure, explained that "if you are looking at other countries that are understandably nervous about extremist activity, like France and other European countries, I think it's a close question."[13]

The First Amendment's Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."[14] The Free Exercise Clause is afforded extraordinary respect in light of the persecution and intolerance that led the drafters to include this protection in the Bill of Rights.[15] Indeed, America has historically provided a haven from religious persecution, attracting immigrants from around the world with the promise of a country where all religions are accepted and embraced. In the Supreme Court's words, "The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions."[16] Nevertheless, while the Court has always held that the First Amendment protects religious *beliefs*, its protection of religious *practices* has varied. In one of its earliest decisions on the Free Exercise Clause, the Court explained that it "embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."[17] Accordingly, in order to receive protection under the Free Exercise Clause, religious practice must be sincerely held and fit within a person's own definition of a religious belief.[18] Indeed, the Supreme Court has held that it is not for the court to determine what constitutes a religious belief.[19]

An absolute federal ban on face veils in public, such as the law enacted in France, would be unconstitutional in the United States.[20] A law that prohibits an activity for the purpose

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[13] Dan Oakes, *Burqa Ban Has Merit, Says Clinton*, AGE (Austl.) (Nov. 8, 2010), http://www.theage.com.au/national/burqa-ban-has-merit-says-clinton-20101107-17iyl.html.

[14] U.S. CONST. amend. I.

[15] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (listing sources supporting this claim).

[16] *Id.* at 523.

[17] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[18] United States v. Seeger, 380 U.S. 163, 184 (1965) ("The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government.").

[19] *Id.*

[20] *See* Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337, 339-40 (2006) (arguing that although textually, France and the United States have similar freedom of religion protections, a few key differences point to why a ban similar to France's would be declared unconstitutional in the United States).

of discriminating against a religion is invalid.[21] Even a law that is facially neutral but otherwise evidences a purpose of infringing upon religious practices would be invalid—unless the government can identify a compelling governmental interest that the law is narrowly tailored to advance.[22] In 1993, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA),[23] which prohibits the federal government from substantially burdening a person's exercise of religion—even if the law is generally applicable—unless the government can prove that, as applied to the person, the law furthers a compelling governmental interest and is the least restrictive means of furthering that interest.[24] Consequently, a national ban on face veils in public would be overbroad and would not be the least restrictive means of furthering a compelling governmental interest.

Although a ban on face veils in public would be unconstitutional in the United States, is it possible that a ban might be constitutional in a context where the government has enjoyed more discretion historically? In the public school domain, the government has a compelling interest in providing a proper school environment and has latitude to regulate to achieve that goal.[25] Courts defer, under certain circumstances, to school-board determinations regarding how public schools should be regulated.[26] Indeed, schools possess greater authority over students' behavior, dress, and activities than the state may have over its adult citizens in their daily lives.[27] Accordingly,

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[21] *Hialeah*, 508 U.S. at 533.

[22] *Id.*

[23] 42 U.S.C. §§ 2000bb to 2000bb-4 (1994). Though this law was declared unconstitutional as applied to states and local government, it is still applicable to the federal government.

[24] *Id.*

[25] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, 'Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'"); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) ("The Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.").

[26] *See, e.g.*, Epperson v. State of Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.").

[27] *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) ("[S]imply because the use of an offensive form of expression may not be prohibited to

while students do not give up all of their rights, it is understood that they do not receive the same protections as adults in society.[28] Nevertheless, Supreme Court jurisprudence has shown that schools must remain neutral where religion is concerned: they may not support, protect, oppose, or disadvantage one religious doctrine or practice over another.[29]

This note argues that in public schools—an area where the government has legitimate, compelling interests that could justify infringing upon the free exercise of religion—a general ban on face coverings would be constitutional.[30] This applies primarily to public high schools and universities, since women who wear a face veil generally begin to do so around puberty.[31] Part I provides a general background on Muslim veils. Part II

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adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. . . . [C]onstitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings." (citation omitted)).

[28] *See, e.g.*, *id.* (holding that a school was within its rights to discipline student for using offensively lewd and indecent speech, and that such discipline did not violate student's First Amendment free speech rights); *see also* Morse v. Frederick, 551 U.S. 393, 419 (2007) (Thomas, J., concurring) ("In light of the history of American public education, it cannot seriously be suggested that the First Amendment 'freedom of speech' encompasses a student's right to speak in public schools.").

[29] RICHARD C. MCMILLAN, RELIGION IN THE PUBLIC SCHOOLS: AN INTRODUCTION 198 (1984).

[30] A restriction on face coverings in public schools has not, as of this writing, been challenged in the court system. However, this does not diminish the importance of hypothesizing a situation in which this may occur. The Supreme Court has not often applied the Free Exercise Clause in the school context, but when it has, its decisions have shown that there is concern that precedents in schools may extend outside of the school system. The Court has expressed concerns that lowering constitutional protections in schools will subsequently lead to lowering constitutional protections elsewhere. *See, e.g.*, James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1389-90 (2000).

> [I]n [Supreme Court cases addressing free speech, Fourth Amendment privacy, and due process], schools are seen as unique institutions for which special rules can be created without setting precedent for other contexts. But in [Supreme Court cases addressing Equal Protection, Establishment and Free Exercise Clause], schools are seen as representative institutions, where constitutional rights must, if anything, be more scrupulously observed lest the Court create a precedent in the school context that could be applied outside of it.

Id. The fact that this note argues that a ban on face coverings would be constitutional does not answer the question of whether this is a precedent that should be set. It is even more important given that restrictions on Muslim face veils seem to be spreading around the world at a steady pace over the past two years. This note does not address whether such a ban is politically, morally, or socially advisable. It merely attempts to look at the issue of the ban on face veils and address whether the United States constitution would permit such a ban in the area of public schools.

[31] Zara Syed, *Hijab: When to Begin?*, ISLAMIC INSIGHTS (Feb. 23, 2009, 8:58 PM), http://islamicinsights.com/religion/religion/hijab-when-to-begin.html ("[G]irls don't have to observe the Hijab until they become Baligh [the age of puberty in Islam] . . . .").

then examines some of the common issues the veil presents and explores how these issues have been addressed by legislatures in Europe and by courts in the United States. Next, Part III describes the history of Free Exercise Clause jurisprudence and shows where the law stands today. Part IV then turns to the public education arena and explores the greater role that government plays in public schools. Finally, Part V proposes a hypothetical regulation prohibiting face veils in schools, analyzes the opposing interests at play, and shows that, whether under minimal scrutiny or some form of strict scrutiny, such a neutral, generally applicable regulation would survive a constitutional challenge.

I. BACKGROUND OF MUSLIM FEMALE HIJAB

According to the Pew Research Center, 23 percent of the world's population in 2009 identified as Muslim, amounting to a total of 1.57 billion people.[32] People who practice the Muslim faith live on all six inhabited continents, and one-fifth of the global Muslim population lives in countries where Islam is not the most practiced religion.[33] Members of the non-Muslim community often develop assumptions and misconceptions regarding the role of women in Islam.[34] Even among Muslim countries, there are different interpretations of the woman's role in society. The difference is most evident when comparing countries such as Afghanistan,[35] where women have historically been oppressed, to Southeast Asian Muslim countries where women are active economic participants.[36] One explanation for these misconceptions lies in the distinction between "Muslim culture" and "Islamic culture."[37] While Islamic culture "adheres

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[32] Of those 1.57 billion, more than 60 percent are in Asia and about 20 percent are concentrated in the Middle East and North Africa. In the United States, the Muslim population totals around 2,450,000, or 0.8 percent of the U.S. population. PEW RESEARCH CTR., MAPPING THE GLOBAL MUSLIM POPULATION 1, 25 (2009), *available at* http://pewforum.org/uploadedfiles/Topics/Demographics/Muslimpopulation.pdf.

[33] *Id.*

[34] This note will not fully examine the role of women in Islam. For further information about this subject, see generally ASGHAR ALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM (2d ed. New Dawn Press Group 2004).

[35] BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, REPORT ON THE TALIBAN'S WAR AGAINST WOMEN 1 (2001).

[36] ASGHAR ALI ENGINEER, THE QUR'AN, WOMEN AND MODERN SOCIETY 60 (2d ed. 2005).

[37] Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 447 (2008).

to the tenets of Islamic principles" as found in the Qur'an, Muslim culture is defined by "the way adherents to the Islamic faith practice the religion."[38] Thus, the way observers interpret the religious tenets (Islamic culture) can be manifested through different forms of practice (Muslim culture). Accordingly, particular Muslim cultures may unduly influence the way the rest of the world perceives Islam in general. Both Islamic and Muslim cultures, however, accept the principle that the Qur'an emphasizes the chastity of women and thus urges women to be modest in their behavior and dress.[39] Indeed, the Prophet Muhammad is quoted as having said that each religion has a distinctive quality, and the quality of Islam is modesty.[40]

The Qur'an tells Muslim women to be modest by following hijab. Hijab is a modesty concept that includes physical aspects, such as covering the hair and the body, as well as mental aspects, including modesty in one's thoughts, actions, and speech.[41] Hijab, as stated by one scholar, is "a woman's assertion that judgment of her physical person is to play no role in social interaction."[42] In that way, the focus is instead on a woman's person and spirituality.[43] Muslim women, however, interpret hijab's requirements for clothing in various ways. The Institute of Islamic Information and Education states that while there is no single standard for the type of clothing a woman must wear, there are several minimum requirements.[44] One requirement is that certain parts of the body must be covered.[45] Further, clothing must be loose enough that the shape of the body cannot be discerned and thick enough that the color of the skin cannot be seen.[46] In countries that interpret the Qur'an very strictly, such as Saudi Arabia, a woman may be punished solely for leaving her home without a veil.[47] Women's dress in some Arab countries such as Egypt, Pakistan, and Iraq, can vary greatly between rural areas—

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[38] *Id.*

[39] ENGINEER, *supra* note 36, at 68.

[40] *The Ideal Muslim in the Community*, ISLAMWEB ENG. (Oct. 25, 2009), http://www.islamweb.net/emainpage/index.php?page=articles&id=65899.

[41] Mary Ali, *Why Do Muslim Women Cover Their Head?*, INST. ISLAMIC INFO. & EDUC., http://www.iiie.net/index.php?q=node/37.

[42] Naheed Mustafa, *My Body Is My Own Business*, GLOBE & MAIL (Can.), June 29, 1993, at A3, *available at* http://www.jannah.org/sisters/naheed.html.

[43] Ali, *supra* note 41.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] ENGINEER, *supra* note 36, at 68.

where the attire is very traditional—and cities—where the clothing can be fairly modern.[48] In countries where women are significant economic players, such as Muslim countries in Southeast Asia, women might not be veiled at all.[49] Although one commentator has observed that "veiling is more of a socio-cultural than purely religious practice,"[50] a woman's interpretation of her religion is generally what compels her to wear a veil or not.[51]

The passage in the Qur'an that governs which parts of a woman's body may be exposed is verse 24:31.[52] It states, "[a]nd say to the believing women that they cast down their looks and guard their private parts and not display their ornaments except what appears thereof, and let them wear their head-coverings over their bosoms, and not display their ornaments . . . ."[53] The phrase at issue is *ma zahara minha*, or in English, "what appears thereof."[54] Some scholars interpret this passage, along with other evidence from Islamic texts, as requiring women to veil their faces.[55] Other scholars have interpreted the passage to mean a number of different things, including that: a woman should show only her external clothing and keep everything else covered, including her face; a woman may expose her eyes and hands; and a woman may show her face, ears, neck, and bracelets, among various other combinations.[56] The scholars who believe that women must be fully covered, including their faces, point to various passages in the Qur'an to support their conclusion.[57] Nevertheless, a mandatory face veil is viewed as the least accepted interpretation, since the four main schools of Islamic jurisprudence believe that it is not required.[58]

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[48] *Id.* at 59-60.

[49] *Id.* at 60.

[50] *Id.*

[51] Martin Asser, *Why Muslim Women Wear the Veil*, BBC NEWS (Oct. 5, 2006, 8:01 PM), http://news.bbc.co.uk/2/hi/middle_east/5411320.stm.

[52] MAULVI MUHAMMAD ALI, THE HOLY QUR-AN: CONTAINING THE ARABIC TEXT WITH ENGLISH TRANSLATION AND COMMENTARY 701-02 (2d ed. 1920).

[53] *Id.*

[54] ENGINEER, *supra* note 36, at 61.

[55] *Religions: Niqab*, BBC, http://www.bbc.co.uk/religion/religions/islam/beliefs/niqab_1.shtml (last updated Sept. 22, 2011).

[56] ENGINEER, *supra* note 36, at 61 (explaining different interpretations as written by Muhammad Jarir Tabari, a prominent Qur'an commentator, in *Jami'al Bayan'an Ta'wil Ayah al-*Qur'an).

[57] Chris Moore, *The Burqa—Islamic or Cultural?*, TRUE ISLAM, http://www.quran-islam.org/articles/part_3/the_burqa_(P1357).html.

[58] *Religions: Niqab*, *supra* note 55.

II. ISSUES POSED BY THE VEIL AND VARIOUS EUROPEAN AND U.S. REGULATIONS

The Muslim face veil raises various considerations for legislators evaluating a ban. As an initial matter, legislators may worry that the face veil poses threats to security and women's rights.[59] Moreover, legislators may worry that the face veil runs counter to core beliefs of Western societies. Nevertheless, while the most oft-cited rationale for the ban is that the veil is contrary to Western principles and behavior, it remains to be seen whether a ban is a truly appropriate measure to address the concerns that the veil raises.

A. Security

A recurring concern for the face veil is that it poses a potential security threat. Any person covering his or her face may benefit from the ability to hide his or her identity. For example, in a separate context, the United States has a federal anti-mask law,[60] as do many states,[61] because the inability to identify a person can often prove problematic. Although it is less common in the United States, individuals throughout the world have used Muslim face veils and loose clothing to conceal themselves in order to facilitate crime. This happens most frequently in Pakistan.[62] There, suicide bombers take

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[59] Indeed, the Belgian legislation justified the enactment of the veil ban on the basis of security. *Belgian Ban Burqa-Type Dress; Law Cites Public Security, Securing Emancipation of Women*, FOXNEWS.COM (Apr. 29, 2010), http://www.foxnews.com/world/2010/04/29/belgiums-lower-house-parliament-supports-burqa-ban-question-arises-senate/. This is not an arbitrary concern given that in Pakistan, the United Kingdom, and the United States, there have been instances of criminals using the burqa in order to facilitate crimes. *See infra* notes 62-70 and accompanying text.

[60] 18 U.S.C. § 241 (2006).

[61] *See generally* Wayne R. Allen, *Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment*, 25 GA. L. REV. 819 (1991). Each of these laws has exceptions for masks used in celebrations, occupationally, during sporting events, for plays, etc. *See, e.g.*, ALA. CODE § 13A-11-9(a)(4); FLA. STAT. §§ 876.12, 876.13 (although these two provisions were called into question by *Nicol v. State*, 939 So. 2d 231, 233 n.2 (Fla. 2006), and § 876.13 was declared unconstitutional by *Robinson v. State*, 393 So. 2d 1076 (Fla. 1980), the Florida legislature enacted § 876.155 which adds a mens rea element in the application of the anti-mask statutes); GA. CODE ANN. § 16-11-38(a); LA. REV. STAT. ANN. § 14:313; MICH. COMP. LAWS § 750.396 (1979); MINN. STAT. § 609.735 (1990); N.C. GEN. STAT. §§ 14-12.7, 14-12.8, 14-12.11 (1986); N.Y. PENAL LAW § 240.35 (McKinney 2010); OKLA. STAT. tit. 21, § 1301 (1981); VA. CODE ANN. § 18.2-422 (1988); W. VA. CODE § 61-6-22 (1989).

[62] *See, e.g.*, Intikhab Amir, *Burqa-clad Terrorists Threaten Sanctity of Female Dress Code*, AL-SHORFA (Iraq) (July 12, 2011), http://al-shorfa.com/cocoon/meii/xhtml/en_GB/features/meii/features/main/2011/07/12/feature-01; *see also* Rob Crilly, *Burqa-Clad Female Suicide Bomber Detonates in Pakistan*, TELEGRAPH (Aug. 11, 2011, 11:28

advantage of the fact that the veil conceals their identities and allows them to be mistaken for women, enabling them to infiltrate crowded areas and conceal weapons beneath their clothing.[63] While this may seem easier to accomplish in a country where women wearing burqas is the norm rather than the exception, the phenomenon is not limited to Pakistan.

In the United States, there have been cases of women robbing banks[64] and gas stations[65] while using veils to hide their identity. A Philadelphia police officer was killed while responding to a burglary carried out by two men wearing burqas.[66] Similar cases of robberies involving criminals disguised in burqas have occurred in Canada, Great Britain, Australia, and France.[67] Three robbers in Ontario were dubbed the "burqa bandits" after they robbed a jewelry store in clothing described as "loose-fitting material which covered their bodies and faces."[68] Following the attempted suicide bombings in London in 2005, prosecutors believed that one of the attackers had escaped in a burqa, disguising himself as a woman.[69] In a separate incident, a man was accused of having fled the country disguised as a woman in full Muslim clothing and veil after he was wanted for questioning in connection with the murder of a female British police officer.[70]

Of course, all of these occurrences involve criminals tainting a religious practice in order to carry out illegal activities. Accordingly, it would be both an absolute overgeneralization and a tremendous injustice to claim that Muslim garb is a tool of criminals. On the other hand, these incidents show that the possibility that criminals will leverage religious practices to carry out illicit objectives cannot be

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AM), http://www.telegraph.co.uk/news/worldnews/asia/pakistan/8694814/Burka-clad-female-suicide-bomber-detonates-in-Pakistan.html; *Pakistan Frets over Burqa Bombers*, TWOCIRCLES.NET (Aug. 13, 2011, 12:23 PM), http://twocircles.net/2011aug13/search_women_burqa_without_exception_pakistani_daily.html.

[63] Crilly, *supra* note 62; *Pakistan Frets over Burqa Bombers*, *supra* note 62.

[64] *Police: Woman Wearing Burqa Robbed Banks*, NBC10 PHILA. (Dec. 13, 2010, 11:40 AM), http://www.nbcphiladelphia.com/news/local/Police-Woman-Wearing-Burqa-Robbed-Banks-111760804.html.

[65] Dana DiFillipo, *Bandit in Burka Foiled in Gas Station Robbery Try*, PHILLY.COM (July 20, 2011, 1:25 PM), http://www.philly.com/philly/blogs/dncrime/Bandit-in-burka-foiled-in-gas-station-robbery-try.html.

[66] *Officer Down: Sgt. Stephen Liczbinski*, POLICEONE.COM (May 5, 2008), http://www.policeone.com/officer-down/1692264/ (last visited Dec. 4, 2012).

[67] Lynn Curwin, *"Burqa Bandits" on CCTV as They Rob Jewellery Store*, DIGITAL J. (Dec. 21, 2010), http://digitaljournal.com/article/301625; *see also English Schools Ban*, *supra* note 6.

[68] Curwin, *supra* note 67.

[69] *English Schools Ban*, *supra* note 6.

[70] *Id.*

ignored. The delicate takeaway is to acknowledge that security concerns exist when individuals, including students, cannot be readily identified by the public.

B. Women's Rights

Another compelling concern for the face veil is whether it facilitates the oppression of women. Commentators suggest that veiling women's faces limits how they can contribute in Western society and thus facilitates their subjugation.[71] Access to certain jobs, educational opportunities, and other elements of the Western way of life are potentially restricted when a woman wears a veil. Although not universally believed, many view the face veil as a way to repress women, precisely because it prevents them from joining society in a way they could without the veil.[72] Certainly, this was the goal of the Taliban when its adherents—acting as the government of Afghanistan—required women to wear burqas.[73] Many argue that women who wear face veils do not wear them voluntarily but instead wear them out of obligation, whether they owe that obligation to their father, their husband, or their government.[74] Advocates for a ban on face veils claim that women will never achieve gender equality if they have a piece of cloth between themselves and society.[75]

Of course, saying that all women are forced to wear a face veil would again be an overbroad generalization.[76] Some women have spoken out about their choice to wear a face veil, viewing it as freeing, comforting, and egalitarian.[77] They claim

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[71] *See, e.g.*, Saira Khan, *Why I, as a British Muslim Woman, Want the Burkha Banned From Our Streets*, MAIL ONLINE (June 24, 2009, 2:40 AM), http://www.dailymail.co.uk/debate/article-1195052/Why-I-British-Muslim-woman-want-burkha-banned-streets.html ("The veil is simply a tool of oppression which is being used to alienate and control women under the guise of religious freedom.").

[72] *See, e.g.*, Bernard-Henri Lévy, *Why I Support a Ban on Burqas*, HUFFINGTON POST (Feb. 15, 2010, 6:47 PM), http://www.huffingtonpost.com/bernardhenri-levy/why-i-support-a-ban-on-bu_b_463192.html ("The burqa is not a dress, it's a message, one that clearly communicates the subjugation, the subservience, the crushing and the defeat of women.").

[73] Simon Robinson, *What Do Afghan Women Want*, TIME (Mar. 29, 2002), http://www.time.com/time/world/article/0,8599,221036,00.html.

[74] *Id.*

[75] *See, e.g.*, Virginia Haussegger, *Ban Un-Australian Burqa*, CANBERRA TIMES (Austl.) (June 27, 2009), *available at* http://www.virginiahaussegger.com.au/column_details.php?id=137.

[76] *See, e.g.*, Shazia N. Nagamia, *Islamic Feminism: Unveiling the Western Stigma*, 11 BUFF. WOMEN'S L.J. 37 (2004) (questioning whether the "norm of a Muslim woman's freedom [should] be dictated by the demands of a Western feministic ideology").

[77] *See, e.g.*, Mustafa, *supra* note 42 (stating that choosing to wear clothing that covers all but her face and hands gives her freedom); *see also* Nesrine Malik,

that prohibiting women from wearing a face veil is just as abhorrent as forcing them to wear one.[78] However, the implications of this debate are most pronounced in societies where wearing a veil puts women at a disadvantage because it prevents them from fully participating in all aspects of society. In many of the Western societies that have enacted bans, it is a fundamental principle that all citizens are equal, no matter their race, religion, or sex.[79] A woman's access to some—perhaps many—jobs is likely to be hindered by wearing a veil, as is the ability to fully participate in society. Thus, women who wear a face veil are bound to encounter difficulty realizing the equality guaranteed to all citizens by such societies.

C. European Approaches to the Face Veil

Both women's rights and security issues have been at the forefront of the discussion in European countries considering a burqa ban. Many of these countries' reactions show that governments have serious reservations as to whether the Muslim face veil can be worn in their societies. The most controversial example comes from France. On April 11, 2011, Loi 2010-1192 du 11 octobre 2010, entitled "interdisant la dissimulation du visage dans l'espace public,"[80] went into effect. The law's language specifically provides that no person shall wear clothing designed to cover his or her face in public.[81]

Burka Ban: Why Must I Cast Off the Veil?, TELEGRAPH (July 17, 2010, 11:19 PM), http://www.telegraph.co.uk/comment/personal-view/7896536/Burka-ban-Why-must-I-cast-off-the-veil.html.

[78] *See, e.g.*, Mustafa, *supra* note 42; *see also* Malik, *supra* note 77.

[79] For example, article 1 of the French Constitution ensures "equality of all citizens before the law" and promotes "equal access by women and men to elective offices and posts as well as to position[s] of professional and social responsibility." 1958 CONST. 1 (Fr.). Article 3 of the German Constitution states "No one may be prejudiced or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith or his religious or political opinions." GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, art. III.

[80] Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 Prohibiting the Covering of the Face in Public Spaces], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344, *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022911670&categorieLien=id.

[81] *Id.* at art. 1. Exceptions are made for any clothing that is authorized by legislative or regulatory provisions; justified for health or professional reasons; required for sporting activities, celebrations, artistic or traditional events, and demonstrations. *Id.* at art. 2. Fines of €150 are imposed on those who violate the law, and can be as much as €30,000 and jail time for those who impose wearing the veil on others because of their sex. *Id.* at art. 4.

Although the law does not specifically mention the burqa, its exceptions reveal why it is widely considered to be France's "burqa ban."[82] In a speech given before Parliament in June 2009, President Nicolas Sarkozy stated that "the burqa is not a sign of religion, it is a sign of subservience. It will not be welcome on the territory of the French republic."[83]

France caused a similar uproar in 2004 when it enacted a law that prohibits wearing symbols or clothing that conspicuously display religious affiliation in public elementary, middle, and high schools.[84] Though this law applies generally to all religious affiliations, it is considered the hijab ban in light of the discourse leading up to its enactment.[85] Both this and the ban on the face veil are founded on France's fundamental principle of *laïcité*, which in broad terms can be understood as secularism.[86] In France, religion is kept in the private sphere and should not interfere in public life.[87] This lies in stark contrast to

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[82] *See, e.g.*, John Paul Putney, *France Burqa Ban to Take Effect April 11*, JURIST (Mar. 4, 2011, 4:20 PM), http://jurist.org/paperchase/2011/03/france-burqa-ban-to-take-effect-april-11.php; *see also* Steven Erlanger, *France Enforces Ban on Full-Face Veils in Public*, N.Y. TIMES, Apr. 12, 2011, at A4, *available at* http://www.nytimes.com/2011/04/12/world/europe/12france.html; Larisa Epatko, *France's Burqa Ban Met With Scattered Protests and Arrests*, PBS NEWS HOUR (Apr. 15, 2011, 9:59 AM), http://www.pbs.org/newshour/rundown/2011/04/france-veil-ban.html

[83] President Nicolas Sarkozy, Statement to Parliament in Congress (June 22, 2009), *available at* http://www.senat.fr/seances/s200906/s20090622/s20090622002.html#SOM5.

[84] Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appurtenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 14, 2004 Concerning, as an Application of the Principle of Secularism, the Wearing of Symbols or Clothing Showing Religious Affiliation in Public Primary and Secondary Schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], March 17, 2004, p. 5190, *available at* http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=392F66470290A187E301F41941F73F27.tpdjo17v_1?cidTexte=JORFTEXT000000417977&categorieLien=*id*.

[85] COMMISSION DE RÉFLEXION SUR L'APPLICATION DU PRINCIPE DE LAÏCITÉ DANS LA RÉPUBLIQUE, RAPPORT AU PRÉSIDENT DE LA RÉPUBLIQUE [COMM'N ON THE APPLICATION OF THE PRINCIPLE OF SECULARISM IN THE REPUBLIC, REPORT TO THE PRESIDENT OF THE REPUBLIC] (Dec. 11, 2003), *available at* http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics//034000725/0000.pdf.

[86] The concept of *laïcité* is difficult to translate or define in English. T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 420 n.2 (2004). Jean-Pierre Raffarin, when he was Prime Minister, described it as "the syntax, the code by which all religions can live and peacefully enter into a dialogue within our Republican State." Jean-Pierre Raffarin, Prime Minister of Fr., Speech to the Conseil représentatif des institutions juives de France [Representative Council of Jewish Institutions of France] (Jan. 31, 2004) (translation available at http://www.ambafrance-uk.org/Speech-by-M-Jean-Pierre-Raffarin.html).

[87] Blandine Kriegel, former advisor to French President Jacques Chirac and the chairperson of the High Council on Integration, was quoted as saying:

> [In France, religion is seen as] organized, bounded, orderly, contained in its buildings and defined by worship practices in those buildings. If it strays into

the United States, where practicing religion in the public sphere is accepted and protected by the First Amendment.

The burqa debate is not confined to France.[88] In 2011, Belgium became the second European country to essentially ban wearing a burqa or niqab.[89] The Belgian law, which was justified on security grounds by some public ministers and on women's equality grounds by others, bans clothing that conceals a person's identity.[90] Various other countries have pursued similar measures. In Italy, a parliamentary commission approved a draft law that would ban a veil that covers one's face.[91] In Spain, a proposed ban on wearing a burqa made its way to the Senate, where it was eventually rejected by a 183-162 vote.[92] In Barcelona and several other smaller Spanish towns, however, individuals are prohibited from wearing a face veil in public buildings.[93] In September 2011, the Dutch government introduced legislation that would ban face-covering veils[94] and stated that "the wearing of clothing that completely or almost entirely covers the face is fundamentally at odds with public life, where people are recognized by their

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> the street, selling tracts or proselytizing, it is out of bounds, and even when it is tolerated it is no longer protected by the French constitution and can easily be quashed in the name of protecting public order.

Britton D. Davis, *Lifting the Veil: France's New Crusade*, 34 B.C. INT'L & COMP. L. REV. 117, 123 (2011) (citing JOHN R. BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE 13-14 (2007)).

[88] *See generally The Islamic Veil Across Europe*, BBC NEWS (June 15, 2010, 11:30 AM), http://news.bbc.co.uk/2/hi/europe/5414098.stm.

[89] *The Belgium Ban on Full Veils Comes into Force*, BBC NEWS (July 23, 2011, 11:14 AM), http://www.bbc.co.uk/news/world-europe-14261921 (Belgian ban enacted with only two abstentions on "the grounds of security, to allow police to identify people . . . [and because] face veils . . . [are] a symbol of the oppression of women").

[90] *Id.* The Belgian law imposes a fine of €137.50 for any violation. *Id.*

[91] *Italy Approves Draft Law to Ban Burqa*, GUARDIAN (Aug. 2, 2011, 9:54 PM), http://www.guardian.co.uk/world/2011/aug/03/italy-draft-law-burqa (the proposed law would "expand a decades-old law that for security reasons prohibits people from wearing face-covering items such as masks in public places.").

[92] Two members of the Spanish Senate abstained from that vote. Ann Riley, *Spain Lower House Rejects Proposal to Ban Burqa*, JURIST (July 21, 2010, 7:55 AM), http://jurist.org/paperchase/2010/07/spain-lower-house-rejects-proposal-to-ban-burqa.php.

[93] *See, e.g.*, *Spanish City Bans Face-covering Islamic Veils in Public Buildings*, GUARDIAN (Dec. 9, 2010, 7:55 AM), http://www.guardian.co.uk/world/2010/dec/09/spanish-city-bans-islamic-veils-public.

[94] *See, e.g.*, *Dutch to Ban Full-Face Veils*, N.Y. TIMES, Sept. 17, 2011, at A6; *see also Dutch Plan Ban*, *supra* note 6.

faces."[95] Because of the recent change in ruling parties, however, this legislation may be removed from consideration.[96]

In England, a country with a rapidly growing Muslim population,[97] both sides of the debate have strong support, including from Muslim women[98] and Muslim groups.[99] The controversy was first sparked in 2006 when it was revealed that Jack Straw, a British Cabinet Minister, had asked female constituents to remove their veils during meetings in his office.[100] Moreover, former British Prime Minister, Tony Blair, has called the face veil a "mark of separation."[101] Another legislator, Philip Hollobone, proposed legislation to ban the wearing of a burqa in public.[102] In 2007, the British Department for Education and Skills released guidelines giving teachers full discretion to decide what students may wear in the classroom.[103] According to these guidelines, if a teacher believes that the way a student is dressed "imposes on a child's ability to learn or is a safety or security issue," the teacher may prohibit such clothing in the classroom.[104]

Other parts of Europe have also witnessed controversy over Muslim religious garb in the classroom. Several German states have prohibited teachers from wearing a hijab[105] while

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[95] *Dutch to Ban Full-Face Veils*, *supra* note 94.

[96] Gilbert Kreijger, *Dutch Burqa Ban May Go After Government Falls*, REUTERS (Apr. 25, 2012, 3:17 PM), http://www.reuters.com/article/2012/04/25/us-dutch-politics-immigration-idUSBRE83O17620120425.

[97] HOUSSAIN KETTANI, PROCEEDINGS OF THE 8TH HAWAII INTERNATIONAL CONFERENCE ON ARTS AND HUMANITIES: 2010 MUSLIM POPULATION (Jan. 2010), *available at* http://www.pupr.edu/hkettani/papers/HICAH2010.pdf.

[98] *See, e.g.*, Saira Khan, *Why I, As a British Muslim Woman, Want the Burkha Banned from Our Streets*, MAIL ONLINE (June 24, 2009, 2:40 AM), http://www.dailymail.co.uk/debate/article-1195052/Why-I-British-Muslim-woman-want-burkha-banned-streets.html; *see also* Malik, *supra* note 77.

[99] *English Schools Ban*, *supra* note 6 (Rajnaara Akhtar, head of the Protect-Hijab group in England stated, "I think the individuals who want to wear the niqab should exercise a degree of flexibility.").

[100] *"Remove Full Veils" Urges Straw*, BBC NEWS (Oct. 6, 2006, 7:28 AM), http://news.bbc.co.uk/2/hi/5411954.stm (explaining that face veils could "make community relations more difficult.").

[101] Alan Cowell, *Blair Criticizes Full Islamic Veils as "Mark of Separation,"* N.Y. TIMES, Oct. 18, 2006, at A3, *available at* http://www.nytimes.com/2006/10/18/world/europe/18britain.html.

[102] *Ban the Burka, Says Tory MP Philip Hollobone*, TELEGRAPH (July 1, 2010, 7:30 AM), http://www.telegraph.co.uk/news/politics/7864697/Ban-the-burka-says-Tory-MP-Philip-Hollobone.html.

[103] *English Schools Ban*, *supra* note 6.

[104] *Id.*

[105] Hijab here refers to a cloth that covers the hair and sometimes neck, as opposed to the modesty concept discussed *supra* notes 41-51.

teaching.[106] These bans stem from a unique social and governance system in Germany. The German Constitution, called the Basic Law, guarantees the freedom of religion and equal treatment of people regardless of their religious beliefs.[107] Germany does not require strict separation of church and state, and in many circumstances, the Basic Law requires cooperation between the two.[108] This includes the area of religious education in public schools.[109] Public schools are largely multidenominational but provide optional courses in Christianity.[110] Christian symbols, such as nuns' habits and crosses, can be found in classrooms and have been permitted by the courts.[111] In Germany, regulation of the school system is delegated to the Länder, or German states.[112] Thus, individual states made the decision to ban the hijab. The impetus for banning the headscarf in German schools was a case known as the *Teacher Headscarf Case*.[113] In 1988, an elementary school teacher, Fereshta Ludin, was denied employment because she wore a headscarf.[114] The case made its way to the Federal Constitutional Court, which declared that she had a fundamental right under Article 3 of the Basic Law to wear a headscarf.[115] Despite this, the court left open the possibility that the legislature could enact a law prohibiting religious garb as long as it was neutral and had a "sufficiently clear legal

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[106] *See* Ruben Seth Fogel, Note, *Headscarves in German Public Schools: Religious Minorities are Welcome in Germany Unless—God Forbid—They are Religious*, 51 N.Y.L. SCH. L. REV. 619, 640-41 (2006–2007).

[107] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] May 23, 1949, art. III, cl. 3, *translated in* BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY 15 (Oct. 2010, Christian Tomuschat et al., trans.) ("No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions."); *id.* art. IV, cl. 1-2 ("Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable. The undisturbed practice of religion shall be guaranteed."); *see also* Stefanie Walterick, *The Prohibition of Muslim Headscarves From French Public Schools and Controversies Surrounding the Hijab in the Western World*, 20 TEMP. INT'L & COMP. L.J. 251, 274-75 (2006).

[108] *See, e.g.*, Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 TUL. L. REV. 1023, 1029 (2004).

[109] *See, e.g.*, Inke Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States*, 28 GA. J. INT'L. & COMP. L. 405, 456 (2000).

[110] *See, e.g.*, Walterick, *supra* note 107, at 270-71.

[111] *Id.* at 271.

[112] *See, e.g.*, Muehlhoff, *supra* note 109, at 454-55.

[113] *See, e.g.*, Cindy Skach, *Religious Freedom–State Neutrality–Public Order–Role of International Standards in Interpreting and Implementing Constitutionally Guaranteed Rights*, 100 AM. J. INT'L L. 186, 190 (2006).

[114] *See* Axel Frhr. von Campenhausen, *The German Headscarf Debate*, 2004 BYU L. REV. 665, 672-73 (2004).

[115] Article 3 of the Basic law guarantees, among other things, equal treatment no matter one's religion. *See id.* at 676.

basis."[116] Almost immediately following this decision, North Rhine-Westphalia, Bavaria, Hesse, Lower Saxony, Baden-Wuerttemberg, and Saarland enacted bans.[117] After further litigation in October 2004, the German Federal Administrative Court held that bans on religious symbols must be neutral and may not single out any religion.[118]

Further indication that officials are concerned over the veil in schools comes from Sweden. Although the Swedish National Agency for Education stated that a ban on religious headgear in schools constitutes religious discrimination, it nevertheless determined that schools would be allowed to ban the burqa because it "impede[d] teacher-pupil communication."[119]

D. Face Veil Conflicts in the United States

To address this issue, the United States has instituted several administrative and legal rules that require the face to be shown in a few narrow circumstances.[120] One circumstance occurs in the context of driver's license photographs. In 2001, Sultaana Freeman, who had converted to Islam at the age of thirty and who wore a niqab, was denied a driver's license in Florida because she refused to sit for the photograph without a niqab.[121] At trial, expert witnesses for the state claimed that under Islamic faith, exceptions to the veil requirement could be made under certain circumstances, while Freeman argued that the doctrine of necessity did not apply for a driver's license photograph.[122] The court held that the state's photograph requirement did not impose a substantial burden on Freeman's exercise of religion.[123] In a previous case, the court defined a substantial burden on religion as "one that either compels the

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[116] *See* Eberle, *supra* note 108, at 1064; *see also* von Campenhausen, *supra* note 113, at 676.

[117] *See, e.g.*, Walterick, *supra* note 107, at 274-75.

[118] *Id.*

[119] *See, e.g.*, *Swedish Education Agency Rejects Veil Ban*, LOCAL (Swed.) (Jan. 23, 2007, 11:00 AM), http://www.thelocal.se/6181/20070123/#.

[120] There have been many more cases of Muslim women and girls being prohibited from wearing a headscarf under certain circumstances. This note will address only a few cases where the issue has come up with respect to the face veil. For a more detailed discussion of conflicts involving hijabs in prisons, in airports during searches by the Transportation Security Administration, and at sporting events, see Abdo, *supra* note 37, at 484-500.

[121] Freeman violated Florida's requirement of having full-face photographs on driver's licenses by wearing a face veil. Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48, 51 (Fla. Dist. Ct. App. 2006).

[122] *Id.* at 52.

[123] *Id.* at 57.

religious adherent to engage in conduct that his religion forbids, or forbids him to engage in conduct that his religion requires."[124] The court reasoned that, based on expert testimony stating that Islamic law permits the removal of the veil in some circumstances, requiring Freeman to remove her veil for the photograph did not substantially burden her free exercise of religion.[125] The court acknowledged that she was "inconvenienc[ed]" by the state requirement, but because Islam does not forbid all photographs, the court held that she was not being required to do something her religion forbids.[126]

Another illustration of the conflict between the Muslim face veil and legal requirements occurred in the courtroom.[127] In 2009, Ginnah Muhammad, an African American convert to Islam who chose to wear a niqab, was called to testify in support of her suit in small claims court.[128] Her claim was dismissed after she refused the judge's request to remove her face veil.[129] The judge's reasoning was based on his understanding that the niqab was "a custom thing" and not an obligation of the Islamic faith.[130] Muhammad insisted that, for her, it was for religious reasons and refused to remove her face veil.[131] This issue has also arisen for Muslim jurors, members of the public who attend the court session, and other litigants,[132] but it has never arisen in the public school context.[133]

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[124] *Id.* at 55 (quoting Warner v. City of Boca Raton, 887 So. 2d 1023, 1033 (2004)) (internal quotation marks omitted).

[125] *Id.* at 57.

[126] *Id.*

[127] This note gives one example of when a face veil in the courtroom became an issue. For additional examples and analysis of the face veil in courts, see Adam Schwartzbaum, *The Niqab in the Courtroom: Protecting Free Exercise of Religion in a Post*-Smith *World*, 159 U. PA. L. REV. 1533, 1534 (2011).

[128] *Id.*

[129] Jeff Karoub, *Muslim Woman Sues Judge Over Veil*, WASH. POST (Mar. 28, 2007, 5:38 PM), http://www.washingtonpost.com/wp-dyn/content/article/2007/03/28/AR2007032801801_pf.html.

[130] Schwartzbaum, *supra* note 127, at 1534.

[131] Karoub, *supra* note 129.

[132] *See* Abdo, *supra* note 37, at 484-500.

[133] There have, however, been several clashes between school officials and Muslim females wearing hijabs (here, veils covering the hair and neck) in schools, but none of them have resulted in litigation. *See id.* at 466-70 (citing incidents in Oklahoma in 2003, Louisiana in 2004, California in 2004 and 2007, and New Jersey in 2003, in which Muslim females were either suspended, asked to remove their hijabs, "humiliated" by school staff, or not allowed to attend a military academy due to their hijabs). In one case that ended up in court, a female challenged her school's no-hat rule because it interfered with her ability to wear a cultural headwrap. Isaacs v. Bd. of Educ. of Howard Cnty., 40 F. Supp. 2d 335 (D. Md. 1999). *Isaacs*, however, did not implicate the Free Exercise Clause.

III. THE VEIL AND THE FIRST AMENDMENT: THE FREE EXERCISE CLAUSE

The United States takes a unique approach to the Muslim face veil. In many of the countries that have enacted a whole or partial ban on face veils, the separation of church and state is strict, whereas that separation is less strict in the United States. As stated above, in France, religion is relegated to the personal sphere,[134] while in Germany, the Basic Law does not implement complete separation of church and state, though religion is recognized to have a "special role in the Nation's public life."[135] In the United States, the First Amendment's protection of religious freedom accommodates religion where its European counterparts may not.

A. Summary

Article VI is the only section of the original Constitution that contains a provision regarding religious freedom. Article VI forbids the use of a religious test to determine a candidate's qualification to hold an office or position within the Federal Government.[136] However, the Bill of Rights introduced two clauses pertaining to religious freedom: the Establishment Clause and the Free Exercise Clause. The two clauses together provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[137] Because wearing a face veil constitutes a religious practice, this note will focus on the Free Exercise clause, which prohibits the government from imposing burdens or providing benefits to people solely because of their religious beliefs.

The text of the Free Exercise Clause is absolute, but this does not prevent the government from burdening the exercise of religion in certain circumstances. For example, the Free Exercise Clause would not shelter a religion that condoned human sacrifice.[138] On the other hand, any law that prohibited an activity specifically because of its religious

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[134] *See supra* notes 86-87 and accompanying text.

[135] *See, e.g.*, Muehlhoff, *supra* note 109, at 219 (citation omitted).

[136] U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

[137] *Id.* amend. I.

[138] Claire Mullally, *Free-Exercise Clause Overview*, FIRST AMENDMENT CTR. (Sept. 16, 2011), http://www.firstamendmentcenter.org/free-exercise-clause.

nature would violate the Free Exercise Clause.[139] Further, even a law that is facially neutral but whose purpose is to discriminate against a religion would violate the Free Exercise Clause.[140] Conflicts arise when religious beliefs conflict with a person's duty as a citizen to comply with a neutral law. As the Supreme Court succinctly summarized the history of its free-exercise decisions, "The government may not compel affirmation of religious belief, . . . punish the expression of religious doctrines it believes to be false, . . . impose special disabilities on the basis of religious views or religious status, . . . or lend its power to one or the other side in controversies over religious authority or dogma . . . ."[141] It took the Court more than one hundred years to arrive at this doctrine.

B. History

The Supreme Court's interpretation of the Free Exercise Clause seems to have come full circle since its early interpretations. The Court's reading was initially very narrow, then broadened and liberalized in the mid-twentieth century, and then narrowed again by the Court's decision in *Employment Division v. Smith*.[142] The first Supreme Court decision to interpret the Free Exercise Clause was *Reynolds v. United States* in 1878.[143] The Court applied a "rational basis test" that became the standard to determine whether a law infringed the Free Exercise Clause.[144] The test stated that the government could regulate religiously motivated practices as long as it had a rational basis to do so.[145] Given that the government could easily satisfy this standard, the Court upheld generally applicable laws against Free Exercise Clause claims until the 1960s.

In 1940, the Supreme Court decided *Cantwell v. Connecticut*, which made the Free Exercise Clause applicable to the states.[146] This decision opened the door for the Supreme

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[139] *Id.*

[140] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[141] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990) (citations omitted).

[142] *See generally* Mullally, *supra* note 138.

[143] Reynolds v. United States, 98 U.S. 145 (1878). In *Reynolds*, a Mormon polygamist was convicted under an anti-polygamy law. In response to the challenge to his conviction, the Supreme Court upheld the law and stated that the Free Exercise Clause protected beliefs, and not practices. *Id.*

[144] *Id.* at 166.

[145] *See id.*

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

Court to hear challenges that came through state courts, giving the Court the opportunity to hear more cases and evolve its interpretation.[147] The Warren and Berger Courts of the 1960s and 1970s began to take a broader view of the Free Exercise Clause. The "rational basis test" was replaced with a two-tier "compelling interest" test in *Sherbert v. Verner*, which required the government to show that it had a compelling state interest in enacting a law that imposed a substantial burden on a challenger's religious beliefs.[148]

This two-part test was upheld in *Wisconsin v. Yoder*, which further held that a generally applicable law may nonetheless violate the Free Exercise Clause if it "unduly burdens the practice of religion."[149] There, the Court held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[150] Under this test, it is likely that a challenge to a face-veil ban would invalidate the law as unduly burdening the exercise of religion.

Toward the end of the 1980s and into the 1990s, the Court began to take a more skeptical view of free-exercise claims, as evidenced by its decisions in 1985,[151] 1986,[152] and 1988.[153] The change in the Supreme Court's view of the Free

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[147] *See generally* Mullally, *supra* note 138.

[148] The challenge was to the denial of unemployment benefits to a woman who was a member of the Seventh-Day Adventist Church. The plaintiff was fired from her job because she refused to work on Saturdays due to her religious beliefs. Since South Carolina denied benefits to people who did not accept suitable employment, the state denied the plaintiff her unemployment benefits. Sherbert v. Verner, 374 U.S. 398, 403-09 (1963).

[149] Wisconsin v. Yoder, 406 U.S. 205, 220 (1972). The challenge in *Yoder* was made by an Amish family to a Wisconsin law that required children to attend school through the age of sixteen. *Id.* at 207. The family claimed that sending their child to school past the age of fourteen would violate their religious beliefs in that school after the age of fourteen would expose the child to influences that go against traditional Amish beliefs. *Id.* The court held that although the government had an interest in requiring education through age sixteen because this helped develop productive citizens who are self-reliant, this interest had to be examined in light of the circumstances of the case. *Id.* at 214.

[150] *Id.* at 215.

[151] Jensen v. Quaring, 472 U.S. 478 (1985) (affirming the Eighth Circuit's decision that prohibited Nebraska from enforcing a law that required picture identification on a driver's license for a challenger who believed that having his picture on a driver's license would violate his religious beliefs; the challenger believed that this would violate the second commandment's warning against worshipping graven images).

[152] Goldman v. Weinberger, 475 U.S. 503 (1986) (rejecting a challenge to a military ban on headgear while on duty by an Orthodox Jewish army psychiatrist who wanted to wear a yarmulke while at work).

[153] Lyng v. Nw. Protective Cemetery Ass'n, 485 U.S. 439 (1988) (adopting a per se rule that the government did not have to determine what impact its land use decisions might have on religious practices and allowing the construction of a road through a region that Native Americans considered sacred).

Exercise Clause was solidified in a seminal and controversial case, *Employment Division v. Smith*, in 1990.[154] In the period between *Sherbert* and *Smith*, the Supreme Court continually applied the two-part balancing test set forth in *Sherbert*. The Court asked whether the government significantly burdened a religious practice and whether that burden could be justified by a compelling governmental interest. The decision in *Smith*, though it did not overturn previous free-exercise cases, was controversial because it held that heightened scrutiny no longer applied to the government's refusal to grant religious exemptions to facially neutral laws that incidentally burden free exercise.[155] The Court held that the government was not required to provide an exemption to a generally applicable criminal law that prohibited the use of peyote, and thus the state could legitimately deny unemployment benefits to someone who was fired for violating a valid criminal law.[156]

In the wake of *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).[157] The purpose of RFRA was to overrule the Court's decision in *Smith*.[158] RFRA requires that the government have a compelling interest and that its regulation is the least restrictive means of furthering that interest whenever a person's exercise of religion is substantially burdened.[159] RFRA did not last long as applied to state governments, however. In *City of Boerne v. Flores*, the Court held that RFRA violated the Fourteenth Amendment and therefore was invalid insofar as it regulated the actions of state and local governments.[160] On the other hand, RFRA was upheld as applied to the federal government in *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*.[161] Nevertheless, although the Supreme Court invalidated RFRA as applied to

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[154] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

[155] *Id.* at 885. The controversy in *Smith* arose when two counselors at a private drug rehabilitation organization were fired because they had smoked peyote, a controlled substance, as part of a religious ceremony of the Native American Church. *See generally id.* Because their dismissal was predicated on "misconduct," they were denied unemployment benefits by the state. *See id.* The case made its way to the Supreme Court where the denial of employment benefits was upheld. *See id.*

[156] *Id.* at 885.

[157] 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

[158] *Id.* § 2000bb(b) ("The purposes of this chapter are . . . 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 . . . .").

[159] *Id.* § 2000bb-1.

[160] City of Boerne v. Flores, 521 U.S. 507 (1997).

[161] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

state and local governments, some states have adopted similar provisions in their state statutes.[162] This represents an important development in the context of face-veil bans in public schools since school boards act as arms of the state and are therefore limited by their state constitutions.

The Supreme Court's decisions following *Smith* demonstrate that laws that target religion will continue to be subject to strict scrutiny. The Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* held that *Smith* applied only to laws that are both facially neutral and generally applicable,[163] explaining that:

> [A] law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice . . . . A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.[164]

C. Sincerely Held Belief

When facing a free exercise challenge, a natural inquiry is the sincerity of a challenger's belief. The clear rule, however, is that judicial review should not evaluate whether the belief is theologically "correct." Instead, the question is whether the individual sincerely holds the belief and considers the belief to be religious in nature. It is not for the courts to decide whether a belief is "correct" or not.[165] In the Supreme Court's words, "Men may believe what they cannot prove . . . . Religious experiences, which are as real as life to some, may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean they can be made suspect before the law."[166]

State v. Hodges provides an example of how much deference courts are willing to give those who claim a religious exemption.[167] Hodges was charged with multiple misdemeanors, and when he appeared in court to face these charges, he was

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[162] *See, e.g.*, Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 597 (1999) (citing RFRAs in Arizona, Connecticut, Illinois, Rhode Island, South Carolina, and Texas, among other states).

[163] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

[164] *Id.* at 531-32 (citation omitted).

[165] United States v. Ballard, 322 U.S. 78, 86-87 (1944).

[166] *Id.*

[167] State v. Hodges, 695 S.W.2d 171 (Tenn. 1985).

dressed as a chicken.[168] The defendant stated that he was wearing such clothing for religious reasons,[169] but the trial judge held Hodges in contempt of court.[170] On appeal, the Supreme Court of Tennessee held that the trial court erred in failing to inquire into the sincerity of Hodges's beliefs.[171] Thus, if the trial court had determined that Hodges genuinely and sincerely believed that his religion compelled him to come to court dressed in such a manner, the Free Exercise Clause would protect his ability to do so. Nonetheless, the Supreme Court of Indiana may have limited this doctrine when it explained that "one can . . . imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[172]

D. Conclusion on Free Exercise

A generally applicable law that has an unintentional or accidental impact on religious practices will not be subject to strict scrutiny unless a state legislature has enacted a RFRA statute, a state legislature has inserted a religious exemption into the law, or a state court's interpretation of the state free exercise clause gives exemptions to general laws. The consequence of less strict judicial scrutiny is that the law will likely be upheld as constitutional.

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[168] The trial judge described his outfit: He was

> dressed in a grossly shocking and bizarre attire, consisting of brown and white fur tied around his body at his ankles, loins and head, with a like vest made out of fur, and complete with eye goggles over his eyes. He had colored his face and chest with a very pale green paint or coloring. He had what appeared to be a human skull dangling from his waist and in his hand he carried a stuffed snake.

Id. at 171 n.1. The Supreme Court of Tennessee describes further that

> the so-called vest consisted of two pieces of fur that covered each arm but did not meet in front or in back, leaving defendant's chest and back naked to his waist. His legs were also naked from mid-way between his knee and waist to his ankles. He appeared to be carrying a military gas mask and other unidentifiable ornaments.

Id.

[169] *Id.* at 172 (stating, "This is a spiritual attire and . . . religious belief").

[170] *Id.*

[171] *Id.*

[172] Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 714-15 (1981) (citing the Indiana Supreme Court).

IV. THE FREE EXERCISE CLAUSE IN AN EDUCATIONAL CONTEXT

A. Government Control over Public Schools

The Supreme Court has explained that although students are not required to "shed their constitutional rights . . . at the schoolhouse gate,"[173] the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings."[174] The Court has also "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[175] The relationship between religion and public schools is an important issue to many citizens, as the numerous challenges to school regulations during the twentieth century demonstrate. Parents and administrators have differed over many subjects, including reciting the Pledge of Allegiance, reading the Bible, praying in school, compulsory education, and teaching evolution.[176] In light of Supreme Court decisions banning prayer and Bible reading in schools, one commentator has remarked that "God was kicked out of the public schools in the 1960s."[177] Essentially, Supreme Court jurisprudence holds that schools cannot help or oppose religion, nor protect or promote one religious theory or doctrine over another.[178]

In light of the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*[179] and the fact that the

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[173] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506-14 (1969).

[174] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

[175] *Tinker*, 393 U.S. at 507.

[176] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (finding teaching creationism in public schools to be a violation of the Establishment Clause because it attempts to advance a particular religion); Wisconsin v. Yoder, 406 U.S. 205, 215-34 (1972) (prohibiting schools from requiring education through age sixteen for Amish who believed children should not be in school past age fourteen); Engel v. Vitale, 370 U.S. 421, 422-36 (1962) (holding that reciting a government-written prayer in public schools violated the Establishment Clause even if the prayer was denominationally neutral); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (prohibiting organized Bible reading in public schools because it was a violation of the Establishment Clause); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding, on free speech grounds, that schools could offer the Pledge of Allegiance but could not require students to recite the Pledge).

[177] JAMES W. FRASER, BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA 2 (1999).

[178] RICHARD C. MCMILLAN, RELIGION IN THE PUBLIC SCHOOLS: AN INTRODUCTION 198 (1984).

[179] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

Constitution fails to mention education specifically, the Tenth Amendment delegates the regulation of education to the states.[180] Absent Congressional legislation on states' authority in this area, state legislatures have plenary power, limited only by their state constitutions.[181] School boards oversee the regulation of schools and are considered arms of the state, entrusted with carrying out the state legislature's directives to educate children within the boards' districts.[182]

Before 1969, the Supreme Court generally deferred to school officials in their attempts to control students who engaged in disruptive expressive activity.[183] The Supreme Court directly addressed student speech for the first time in *Tinker v. Des Moines Independent Community School District*.[184] There, the Court invalidated an Iowa school-board policy that prohibited students from wearing black armbands in protest of the Vietnam War.[185] The Court looked to balance the students' rights against the administration's need to maintain order and found that, because the prohibition was a direct violation of speech that did not "intrude[] upon the work of the school[] or the rights of the other students," the students' rights should prevail.[186] Courts, however, have generally upheld content-neutral dress codes against facial challenges to the dress code as a whole.[187]

B. Free Exercise Clashes with School Regulations

Unlike certain European countries, such as France[188] and Germany, the United States generally does not prohibit wearing religious symbols in schools.[189] So long as such religious symbols do not interrupt the educational environment, they will usually be permitted.[190] Courts also tend to uphold school

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[180] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[181] CHARLES J. RUSSO, REUTTER'S THE LAW OF PUBLIC EDUCATION 169 (7th ed. 2009).

[182] *Id.*

[183] *Id.* at 935.

[184] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[185] *Id.* at 514.

[186] *Id.* at 508-09.

[187] *See, e.g.*, Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 432-33 (9th Cir. 2008); *see also* Long v. Bd. of Educ. of Jefferson Cnty., 121 F. Supp. 2d 621, 625 (W.D. Ky. 2000).

[188] *See supra* notes 80-87 and accompanying text.

[189] *See supra* notes 105-17 and accompanying text.

[190] Derek H. Davis, *Reaction to France's Ban: Headscarves and Other Religious Attire in American Public Schools*, 46 J. CHURCH & ST. 221, 222 (2004).

administrative policies that bear a rational relationship to an educational purpose and are not vague or overbroad.[191] Courts have therefore upheld dress codes in schools that restrict what students are allowed to wear.[192] In one case, the court stated that "[p]ublic schools, . . . while responsible for inculcating the values of the First Amendment necessary for citizenship, are not themselves unbounded forums for practicing those freedoms."[193] Indeed, Supreme Court jurisprudence holds that the rights of students in schools are not coextensive with those of adults in society.[194]

Given this qualified notion of students' freedom within school grounds, courts have heard cases where the free exercise of religion was in direct conflict with school policies or regulations. In Illinois, the Illinois High School Association[195] prohibited a Jewish student from participating in after-school basketball because he violated a "no headwear" rule by wearing a yarmulke.[196] The court compared the burden on the plaintiff in being denied the right to play because of his religion against the burden on the government in allowing him to play when he did not meet the vague requirements.[197] The court held that the association's decision did not violate the Free Exercise Clause because the burden placed on the plaintiff did not outweigh the interest of the government to promote safety since the plaintiff had the choice of participating in other interscholastic sports that did not ban headgear.[198] In California, Sikh students challenged a district-wide ban on weapons, claiming that this prohibition forced them to violate a central tenet of their

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[191] RUSSO, *supra* note 181, at 956.

[192] *See, e.g.*, *Jacobs*, 526 F.3d 419 (finding that school dress code passed intermediate scrutiny and did not violate Free Exercise Clause); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001) (upholding a uniform policy even though it may regulate expressive conduct); Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465 (6th Cir. 2000) (same).

[193] Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 283 (5th Cir. 2001).

[194] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

[195] The Illinois High School Association was considered to be an arm of the state. Menora v. Illinois High Sch. Ass'n, 683 F.2d 1030, 1032 (7th Cir. 1982).

[196] *Id.* ("[The First Amendment] would not forbid a regulation secular in purpose (the purpose of the no-headwear rule is to promote safety); general in application; not motivated by antipathy to any religious group on which the regulation might bear heavily or by sympathy for a competing group (there is no suggestion of any such motivation here); and that does not actually prohibit a religious observance but merely makes it more costly by forcing the observant to give up some government benefit (here, participation in an interscholastic sport sponsored by an arm of the state).").

[197] Brooke E. Newborn, *Public School Dress Codes and the Free Exercise Clause of the First Amendment*, 80 PA. B. ASS'N Q. 172, 178 (2009).

[198] *Menora*, 683 F.2d at 1036-37.

religion.[199] The Ninth Circuit affirmed the district court's decision, which held that the students should be allowed to carry ceremonial knives so long as the knives were dull and "sewn tightly to [their] sheath[s]," students wore them under their clothing, and school officials were allowed to inspect the children to enforce these requirements.[200] Finally, in Texas, students challenged the school board's regulation against gang symbols, which the school administrators interpreted to prohibit wearing rosary necklaces.[201] The court held that the prohibition was not supported by sufficient evidence that the necklaces caused a disruption that would have justified a ban, and therefore the necklaces were protected as a form of religious expression.[202]

The closest that courts have come to addressing face veils in public schools came in *Menora*, where the Seventh Circuit evaluated the validity of religious headgear in schools.[203] In the wake of *Smith*, however, courts seem to agree that a neutral, generally applicable law whose purpose is not to interfere with religious practices will be difficult to challenge. Accordingly, a neutral law that has an incidental impact on religious activity will not be subject to strict scrutiny, unless a state has enacted a RFRA-like law or the state legislature has permitted a religious exemption.

V. THE REGULATION IN PRACTICE: AN ANALYSIS OF HOW A BAN ON FACE COVERINGS IN PUBLIC SCHOOLS WOULD BE CONSTITUTIONAL

A. Proposed Dress Code Regulation 101

The following hypothetical dress-code regulation will provide a model to help analyze the potential attacks challengers would bring in a constitutional challenge based on the Free Exercise Clause:

> Dress Code Regulation 101: Any type of garment that has the effect of covering, concealing, or otherwise masking the identity of the wearer shall be forbidden on school grounds during school hours.

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[199] Cheema v. Thompson, 67 F.3d 883, 884 (9th Cir. 1995).
[200] *Id.* at 886.
[201] Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 663 (S.D. Tex. 1997).
[202] *Id.* at 671.
[203] *See generally Menora*, 683 F.2d 1030; *see also supra* note 133.

B. Implications of Dress Code Regulation 101

Dress Code Regulation 101 clashes with the Muslim religious practice of wearing a face veil because a Muslim female could not comply both with Regulation 101 and her religious obligations. Thus, a Muslim female would claim that Regulation 101 violates the Free Exercise Clause since it interferes with her religious practice of wearing a face veil.

Because school boards are considered arms of the state, their enactment of Dress Code Regulation 101 would constitute state action.[204] Therefore, *Smith* provides the controlling precedent for these actions. Under *Smith*, a neutral, generally applicable law is subject to limited judicial scrutiny.[205] Moreover, the plaintiff bears the burden of proving that the law does not have a rational relationship to a governmental interest. Additionally, free-exercise jurisprudence mandates that any law having an effect on religious practices must be generally applicable and must not directly prohibit a religious practice. Indeed, under *Church of Lukumi*, any direct ban on a religious practice would be a violation of the Free Exercise Clause and thus would be unconstitutional.[206] Moreover, *Church of Lukumi* also stood for the proposition that any law whose purpose is to prohibit a religious practice—even if the law is facially neutral—will be held unconstitutional.[207] Accordingly, any potential ban on face veils would need to ban all variations of face coverings; Regulation 101 is an example of such a policy. A court would also need to verify that the purpose behind Regulation 101's enactment was not to specifically interrupt the Muslim female religious practice of wearing face veils but instead that that outcome was an incidental effect of a generally applicable law.

Further, any challenge to Dress Code Regulation 101 would unquestionably implicate the freedom of religion. An individual's religious beliefs must be considered legitimate in a challenge to a law that places a burden on his or her exercise of

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[204] In some cases, school boards may promulgate dress codes pursuant to state legislative authorization. The Nevada legislature, for example, authorizes school boards of trustees to establish dress code uniforms. Jacobs v. Clark Cnty. Sch. Dist., 373 F. Supp. 2d 1162, 1165-66 (D. Nev. 2005) (citing NEV. REV. STAT. § 392.458, the state legislative authorization to implement uniform requirements).

[205] *See supra* notes 154-61 and accompanying text.

[206] *See supra* notes 163-63 and accompanying text.

[207] *Id.*

religion.[208] Although scholars have debated whether wearing a face veil is compelled by Islam, that issue is not relevant here.[209] Several courts have improperly questioned the obligatory nature of the face veil in ruling on whether compulsory removal was allowed. For example, in *Freeman v. Department of Highway Safety and Motor Vehicles*, the court—after hearing experts from both sides—determined that since Islam allowed for removal of the veil in certain cases, the challenger was not burdened by removing her face veil for a driver's license photograph.[210] Similarly, a judge in Minnesota dismissed a case because a woman refused to remove her niqab, reasoning that as far as he was concerned, the face veil was not a religious requirement.[211] Both judges in these cases were mistaken when they questioned the legitimacy of the religious nature of the face veil. A challenger does not bear the burden of proving that the religious practice that is being impeded is, in fact, religious.[212] The requirement that the belief be sincerely held would surely be met in the case of the face veil, given the history and ideological purpose of hijab.[213]

C. Dress Code Regulation 101 and the Hybrid Rights Doctrine

Under limited scrutiny, it is clear that Regulation 101 would pass a constitutionality test.[214] However, a threshold consideration in determining if something other than limited scrutiny would apply is whether wearing a face veil in public schools invokes a hybrid right. The hybrid rights doctrine is triggered where both the free exercise of religion and an independent constitutional right are implicated.[215] In *Smith*, the Supreme Court refrained from overturning *Wisconsin v. Yoder*, which allowed for a religious exemption from complying with the law where *Smith* did not.[216] Instead, the court distinguished the case by determining that the right in *Yoder* was a hybrid

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[208] *See supra* notes 165-71 and accompanying text.

[209] *See supra* notes 41-51 and accompanying text.

[210] Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48, 57 (Fla. Dist. Ct. App. 2006).

[211] Schwartzbaum, *supra* note 127, at 1534-35.

[212] *See supra* Part III.A.3.

[213] *See supra* Part I.

[214] The plaintiff carries the burden under limited scrutiny to show that the regulation does not have a rational relationship to a government interest, which is a very high standard to meet.

[215] *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881-82 (1990).

[216] *Id.*

right.[217] There, the compulsory-education law burdened plaintiff's freedom of religion and the right of a parent to decide how his or her child should be educated.[218] In *Smith*, the Court stated that "[t]he only decisions in which we have held 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."[219] In the case of Regulation 101, an argument could be made that wearing a face veil is protected by both the freedom of religion and the freedom of speech.

A successful hybrid rights claim allows a plaintiff to challenge a neutral, generally applicable law if the free exercise of religion and an independent constitutional right are burdened by the governmental action. Essentially, when a hybrid rights claim is established, the government action is subject to heightened scrutiny.[220] There are several factors that the court must consider, however, before applying the higher scrutiny required by the hybrid rights doctrine.

First, the federal courts of appeals have not universally accepted the concept of hybrid rights. The Sixth Circuit characterized the doctrine as illogical,[221] and the Eleventh Circuit recognized Justice Souter's concurrence in *Church of Lukumi* in which he called the doctrine "untenable."[222] Courts that reject the hybrid rights claim do not exempt the application of the general rule established in *Smith*.[223] Thus, in

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[217] *Id.*

[218] *Id.* at 881. The right of a parent to control his or her child's education was held to be a fundamental right in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925).

[219] *Smith*, 494 U.S. at 881.

[220] A court in the Fifth Circuit held that wearing rosaries was a combination of free exercise of religion and free speech and therefore applied a heightened level of scrutiny because it was a hybrid claim. Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 671 (S.D. Tex. 1997).

[221] Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med., 5 F.3d 177, 180 (6th Cir. 1993).

[222] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring) ("And the distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.").

[223] *Kissinger*, 5 F.3d at 180.

jurisdictions that do not accept the hybrid right doctrine, the level of review does not change.

Second, in some jurisdictions that accept the doctrine, a hybrid rights claim may still fail if either the free-exercise claim or the independent constitutional claim does not stand on its own.[224] Furthermore, courts have diverged with respect to the strength required in order to make each claim cognizable and establish a hybrid rights claim together.[225] In certain jurisdictions, courts hold that the independent constitutional claim must be at least "colorable."[226] Other jurisdictions hold that there must be a viable claim of an independent constitutional right before the court will apply a higher level of scrutiny.[227] Therefore, much depends on the jurisdiction where a claim is filed.

Plaintiffs who invoke the hybrid rights doctrine and claim that a generally applicable law infringes on their free exercise of religion and right to free speech have been successful in several cases. For example, the court in *Chalifoux v. New Caney Independent School District* held that wearing rosaries implicated a combination of free exercise of religion and free speech, and therefore the court applied a heightened level of scrutiny since the plaintiff presented a hybrid claim.[228] If a court were to decide that Regulation 101 infringed on both freedom of religion and free speech, like in *Chalifoux*, a strict scrutiny test would apply and the government would have to prove that the regulation furthered a compelling interest.

D. Regulation 101's Burden on Free Exercise

If a court applies the hybrid rights doctrine, it must weigh the burden on free exercise against the government's interest. In other words, a heightened form of strict scrutiny would apply to Regulation 101. Undoubtedly, Regulation 101

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[224] *See, e.g.*, Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999) (holding that a colorable claim means that there is a "fair probability" that there would be success on the merits of that claim, but not necessarily certainty); Swanson *ex rel*. Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998) (holding that a "colorable" independent constitutional claim must be made for the court to apply higher scrutiny); Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525 (1st Cir. 1995) (requiring the independent claim to be viable in and of itself in order for the higher level of scrutiny to apply for the hybrid claim).

[225] *See generally* Robin Cheryl Miller, *What Constitutes "Hybrid Rights" Claim Under* Employment Div., Dept. of Human Resources of Oregon v. Smith, 163 A.L.R. FED. 493 (2000).

[226] *Miller*, 176 F.3d 1202; *Swanson*, 135 F.3d 694.

[227] *Brown*, 68 F.3d 525.

[228] Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 671 (S.D. Tex. 1997).

would place a significant burden on the Muslim religious practice of wearing a face veil. The ban on face coverings would prohibit Muslim women from doing something they sincerely believe is required by their religion. The result of a ban on face coverings may put Muslim females in the position of choosing between adhering to Regulation 101—which would compromise their religious beliefs—and refusing to attend school or seeking alternative education. Although education has not been considered a fundamental right and the Constitution fails to mention it, educating the citizenry is considered an important charge of the government. The Supreme Court has said that education plays a "fundamental" and "pivotal role" in maintaining a productive society,[229] and that the "American people have always regarded education and acquisition of knowledge as matters of supreme importance . . . ."[230] Thus, forcing a student to choose between a religious belief and an important right would place a substantial burden on the individual.

E. The Government's Compelling Interest in Enacting Regulation 101

To satisfy strict scrutiny, the next inquiry is what compelling school board interests the burden on free exercise would be measured against. In challenges to dress codes, courts have recognized a variety of compelling governmental interests. One district court held that the government had compelling interests in "bridging socioeconomic gaps between families in the school district," advancing learning rather than allowing students to focus on how peers were dressed, and helping improve security.[231] Similarly, the Fifth Circuit held that maintaining an orderly and safe learning environment, increasing the focus on instruction, promoting safety and life-long learning, and encouraging professional and responsible dress for all students qualified as compelling governmental interests.[232] In another case, the Fifth Circuit summarized the general opinion that "[t]he touchstone for sustaining such regulations is the demonstration that they are necessary to alleviate interference with the educational process."[233]

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[229] Plyler v. Doe, 457 U.S. 202, 221-23 (1982).

[230] Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

[231] Lowry v. Watson Chapel Sch. Dist., 508 F. Supp. 2d 713, 719 (E.D. Ark. 2007).

[232] Palmer *ex rel.* Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502, 510 (5th Cir. 2009).

[233] Stevenson v. Bd. of Educ., 426 F.2d 1154, 1158 (5th Cir. 1970).

The strongest arguments in defense of Regulation 101 align with the justifications offered by the countries that have enacted face veil bans. First, security must always be a major reason for regulation in schools. Chief among school boards' objectives is to ensure a safe and secure environment where education is the primary focus. Thus, if school boards have legitimate concerns that face veils could interfere with school officials' ability to maintain order, then a ban would serve as a compelling reason in favor of Regulation 101.

The access to equal opportunities for women is essential, and it begins in schools. The importance of education need not be elucidated in light of its fundamental nature in American society. Indeed, the Ordinance of 1787 provides, "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[234] Moreover, the importance of women's struggle for equality cannot be respectfully condensed for the limited purposes here. It is sufficient to note that both the ability to obtain a public education and to actively participate and interact in an educational setting are essential for building and maintaining rights to equal treatment for women. The counterargument to this point, of course, is that allowing face veils will educate other students about diversity and cultural awareness. Openness to diversity, however, can be encouraged and experienced in a number of ways, and banning face veils in public schools would not block those alternative opportunities for cultural education.

In the context of public schools, the government can make further arguments in favor of Regulation 101. In a school environment, the process of teaching and learning requires interaction between teachers and students as well as between students and their peers. A compelling argument could be made that a face covering would impede the kinds of interaction that are essential to a productive classroom environment. Indeed, a spokesperson for the Department for Education and Skills in Britain noted that "[s]ome teachers say it is difficult to read a child's expression or understand what is being said [when his or her face is covered by a veil]."[235] Canada's requirement that women must remove their face veils when taking their citizenship oath was enacted to ensure that

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[234] *Meyer*, 262 U.S. at 400 (quoting Ordinance of 1787) (internal quotation marks omitted).

[235] *English Schools Ban*, *supra* note 6.

"judges, and everyone present [can] ensure that all citizenship candidates are, in fact, taking the oath as required by law."[236] Similarly, teachers in classrooms have an interest in ensuring participation from students. This is exactly the interaction that is necessary and that Regulation 101 would guarantee.

School administrations often include a "no hat" rule in their dress codes because hats can be distracting, impede other students from properly viewing the board, and facilitate hiding contraband in certain circumstances. Many of the same arguments could be made regarding a face covering. Similar to hats, face veils may provide a source of distraction, block other students from seeing the board, and enable students to conceal dangerous items.

In conclusion, whether the judicial scrutiny is minimal or strict, there is a strong likelihood that a constitutional challenge to Regulation 101 would fail. In the case of minimal scrutiny, a rational relationship exists between the regulation and a governmental interest, and therefore it is very likely that the regulation would be upheld. In the case of strict scrutiny, although the ban imposes a substantial burden on the free exercise of religion, it is also supported by strong governmental interests. Accordingly, a court is likely to find that the government's interests outweigh the burdens on free exercise.

CONCLUSION

Similar to the United States Constitution, Article 9 of the European Court of Human Rights' Convention for the Protection of Human Rights and Fundamental Freedoms contains a conditional freedom of thought, conscience, and religion provision.[237] In 2005, the European Court of Human Rights upheld a university ban on Islamic headscarves in Turkey, stating that secularist and equality principles allowed the ban of religious symbols in schools and universities.[238] Subsequently, France, Belgium, Germany, the Netherlands,

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[236] *Niqabs, Burkas Must be Removed*, *supra* note 7.

[237] Eur. Ct. H.R., Convention for the Protection of Human Rights and Fundamental Freedoms (June 2010), *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf (The protection of freedom of thought, conscience of religion is "subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.").

[238] Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. (2005), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956.

Spain, Italy, and other non-European countries have all implemented or considered full or partial bans on face veils. Though the issue has not yet been through its paces in the United States, imagining a hypothetical dress-code regulation banning face coverings in public schools shows that no constitutional barriers would stand in the way of its implementation, even if the incidental effect were to prohibit Muslim females from wearing a veil to school. A neutral, generally applicable law such as Dress Code Regulation 101 might even be analyzed under minimal scrutiny. The result may seem troubling for some or logical for others, but the effect that this type of regulation would have on Muslim women who wear face veils—and the implications it carries for religious practices outside of schools—merit solemn reflection.

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