Comparative Treatment of Religious Symbols in Schools: The Problem of the Veil and Related Issues

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In the United States, consideration of the rights of children to religious expression in public schools takes place in the context of larger debates about the impact of evangelical Christians on curricular choices, student anti-war protests, and prayer in schools. More recently, these classic cases have been joined by new challenges arising from requests to wear headscarves and other religious garb. Struggles over whether and how to accommodate such religious symbols cannot be viewed parochially, since they are part of a mounting global debate.

In this paper, I attempt to further our understanding of classic dilemmas at the core of children’s rights in American jurisprudence, including the tension between the rights of families and the interests of the state, and whether to honor the independent claims of minors.¹ In addition, we are increasingly confronted by the broader claims of the sub-groups with which parents and children identify. By placing these debates in a comparative legal and cultural context, I hope to illuminate the strengths and weaknesses of the approach we have taken in the United States.

Most countries today – including the western industrialized democracies – are culturally diverse. The 18th century notion of “one people, one state” no longer applies.\(^2\) With increased globalization and global mobility, the civil tensions that often accompany pluralism are increasing. These profound changes have given rise to a series of complex political and philosophical challenges to traditional liberalism. After World War II, many liberals hoped that an emphasis on individual rights for all persons could resolve the problem of racial and ethnic minorities. But, as Will Kymlicka has argued, the notion of universal human rights gives short shrift to the perceived needs of communities of ethnic, national or religious minorities. He argues that leaving decisions to majoritarian processes renders cultural minorities vulnerable to “significant injustice,” and that we need to develop a theory of minority – or “collective” -- rights to complement traditional individual and human rights.\(^3\)

There is much that is appealing in this approach. As Michael Walzer and others have argued, we can not assume that an inevitable conflict exists between individual rights in the liberal state and recognition of claims of communal identity or what some call the “right to recognition”. Indeed, fulfillment of many aspects of individual claims to identity and belonging – whether religious, cultural or sexual – is an extension of classic autonomy rights. But claims of identity must be balanced against the valid claims of the modern nation-state. These include: (i) the right to inculcate shared values and identity through public education of children and the resulting unique role of the public schools;

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\(^2\) Michael Walzer, Pluralism: A Political Perspective, in Kymlicka, The Rights of Minority Cultures, 1995 at 139

\(^3\) Kymlicka, Multicultural Citizenship, 1995.
and (ii) appreciation of the reality that some identity claims are so extreme that they are incompatible with the autonomy rights of others (examples include beatings, sexual mutilation and non-consensual arranged marriages).

The competing claims of religion, identity and the body politic came to a head in the widely publicized French “affair of the veil.” More generally, the problem of the “veil” refers to students who claim the right to wear religious symbols to school, including, among others, the Muslim hijab (head scarf) and jilbab (head to toe covering), the Sikh turban and kirpan (ceremonial knife) and the orthodox Jewish kippah (skullcap). Although the issue has received much less attention in the United States, we have not been immune to legal controversies over religious symbols or garb in public schools. In this paper, I examine the problem of the veil in cross-cultural perspective, comparing the United States to several European countries, in order to better understand the strengths and weaknesses of the approach taken in the United States. The paper is part of a much broader project on the constitutional and political considerations that arise in the United States with respect to the question of whether, how, and to what degree, public schools and other schools that receive public funds should accommodate parental values.4

I. The United States: The Accommodation Model

One might think that the United States, with its long tradition of diversity and its reputation as a melting pot, would provide a clear model for approaching this general problem – and that the model would protect the right to wear religious symbols. But the U.S. Department of Education interprets the legal doctrine – what I call the

4 Working title: COMPETING VALUES AND VISIONS: ACCOMMODATION OF PARENTAL PREFERENCES AND CHILDREN’S RIGHTS IN PUBLIC SCHOOLS.
“accommodation model” -- as affording “substantial discretion” to public schools regarding the regulation of school dress, as long as a school does not “single out religious attire” for prohibition. The United States operates under unique constitutional constraints – foremost is the tension between the free exercise clause and the ban on established religion. When religious exercise is expressed as pure or symbolic speech, the student’s claim may also implicate the Speech Clause, giving rise to a stronger “hybrid” claim. Finally, the issue of school children and religious symbols has been framed by the Meyer/Pierce line of cases which emphasize parental rights.

This approach places a heavy burden on the individual student and his or her family. Because discretion about accommodating parental values, whether religious or ethnic, is left to the local school board and even to the individual school principal, each family that is the first to seek accommodation in their district may bear the burden of stating their affirmative claim to an exemption from any dress code of general application, and may also bear the burden of proposing a specific compromise. While most citizens of the United States probably presume that requests for accommodation are always granted, news stories make clear that at least some school districts initially resist

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accommodation. In the last year both Muslim girls\(^9\) and Sikh boys\(^10\) have been excluded from schools in the United States for dress code violations until litigation prompted settlements. Other school districts have refused to settle in recent years, resulting in reported opinions holding, for example, that schools must accommodate the wearing of rosaries as necklaces as a statement of orthodox Roman Catholic beliefs.\(^11\) However, because the application of the legal doctrine is intensely fact-specific, no bright line rule exists.\(^12\) Lower courts have taken different positions on, for example, whether the Constitution requires a school to accommodate the wearing of a symbol that is a matter of discretion and not mandated by religious law.\(^13\)

The U.S. doctrine has been the subject of criticism from two very different directions. From one perspective, advocates of children’s rights argue that the United States gives too little weight to children’s independent right to explore options and choose among them.\(^14\) From a very different perspective, commentators including

\(^9\) AP Charleston Daily Mail Jan. 14, 2005 (Emily Smith barred from school for three days for wearing a head scarf until the Council on American-Islamic Relations intervened on her behalf); New Orleans Times Picayune, Nov. 15, 2004 (teacher disciplined for ripping a hijab off a student’s head); Cathy Spaulding AP Alert—Oklahoma “She’s just a seventh grader one year after head scarf law suit” Nov. 13, 2004 (suit settled, allowing a girl to wear a hijab to middle school).

\(^10\) Allison Bert, Student may wear symbol of Sikh faith, Journal News (March 16, 2005) (settlement and new policy in Greenburgh, N.Y. Westchester Co.) See also, 1997 ACLU settlement in Livingston CA after three Sikh boys missed a full semester of school because they were not permitted to carry kirpans.


\(^12\) Littlefield v. Forney Ind. Sch. Dist., 268 F.3d 275 (5th Cir. 2001).

\(^13\) Littlefield finds a sincere belief suffices to require accommodation. But in Isaacs v. Bd. Of Ed. of Howard Co. Md., 40 F. Supp. 335,338 (D. Md. 1999), the court observed in dicta that “religious headgear may not constitute symbolic speech at all, since it is worn not to express a message to others but because of a mandate derived from a doctrine of reverence for deity” (holding that the school did not have to exempt an African-American girl from its no-hats rule so that she could express her African and Jamaican heritage).

\(^14\) See e.g., Ross, An Emerging Right for Mature Minors to Receive Information, supra n. 1; Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 WM. &
Stephen Carter and Michael McConnell criticize what they regard as the “pervasive secularism” in public schools, which they consider an affront to parents who hold fundamentalist religious beliefs. To illuminate these competing critiques and others about the limitations of the United States’ approach, it is helpful to look at different ways that other western democracies have responded to the competing claims of religious expression, group identity and the state’s interest in promoting cohesion.

II. European Models: Secularist/Assimilationist, Multicultural and Accommodation.

In contrast to the emphasis on parents’ rights and views in the United States, two quite different themes are sounded in the European debate over religious symbols in schools. First, much of the debate over schoolchildren and religious symbols in Europe focuses on the rights of the child as opposed to the family unit. Second, the European states tend to place the family in the broader context of the family’s community, whether that is defined by religion, race, country of origin or national group. As a result, the Europeans appear to ask whether the child may be subjected to pressure by her community as well as her parents.

Each of the European nations subscribes to protocols which are not applicable in the United States, and which provide guidance on the question of religious symbols in schools. The most important are the United Nations Convention on the Rights of the Child (which the United States has not executed) and the Convention for the Protection of Human Rights and Fundamental Freedoms [see Appendix]. But because of the varying foundational principles and goals in different European countries, as well as the

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provisions of their national Constitutions and statutes, their policies, presumptions, and rhetoric differ greatly.

In this part of the paper, I shall briefly summarize the three dominant models found in Europe, as exemplified by France, the Netherlands and Great Britain.15

A. France: The Secularist/Assimilationist Model

Recent changes to French law under the dominant principal of laicite (or strident secularism) have caused an international controversy. Article 141-5-1 which became effective at the start of the fall 2004 school year, provides “[i]n public elementary schools, middle schools, and high schools it is forbidden to wear symbols or clothes through which students conspicuously ["ostensiblement"] display their religious affiliation. Internal rules require that a dialogue with the student precede the enforcement

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15 In Germany, the controversy has focused primarily on the religious symbols worn by teachers. The highest court sent the question of the veil back to each of the country’s 16 states to clarify their legal positions. Headscarf Decision, BVerfGE 108, NJW 56 (2003). Since then, five states have barred teachers who wear Islamic garb from teaching in public schools. German appeals court upholds state ban on headscarves, Deutsch Presse-Agentur, June 24, 2004. Berlin responded by adopting the French model, passing a law banning all civil servants from wearing visible religious symbols of any sort. Other German states allow Roman Catholic nuns to wear their habits while teaching in public schools. Berlin also agreed to fund Muslim schools. Ernest Gill, Berlin Bans Headscarves – but also crosses, skullcaps, Deutsch Presse-Agentur, March 31, 2004. See generally, Axel Frhr. Von Campenhausen, The German Headscarf Debate, 2004 B.Y.U.L. REV. 665.

A subsequent version of this paper will incorporate the German perspective, with the assistance of Roland Kemper and Alexander Leisten, two German lawyers who recently received LL.M. degrees from George Washington University.
of any disciplinary procedures.\textsuperscript{16} Notwithstanding the required dialogue, dozens of Muslim girls and four Sikh boys were barred from the public schools.\textsuperscript{17}

But it is nature of the controversy surrounding the passage and implementation of the law that is of particular interest from a comparative perspective. Whatever the behind the scenes bias against North African immigrants from the former French colonies (which appears to be substantial), much of the discussion is couched in terms of the rights of Muslim girls to participate in the French community. It is widely believed that Muslim girls who come to school in veils are forced to do so by their fathers, brothers, or even the Muslim community at large.\textsuperscript{18} One French feminist went so far as to label the veiling of girls a form of criminal child abuse.\textsuperscript{19} Secularists point to the requests that accompany wearing the veil, such as exemption from co-ed physical education and biology classes and opposition to teaching about the Holocaust,\textsuperscript{20} as well as the death of an unveiled

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\textsuperscript{17} Elizabeth Bryant, \textit{Headscarf ban played down after holidays}, UPI News, Jan. 3, 2005 (“some 41 Muslim girls and four Sikh boys” had been expelled under new law). (other sources use larger and smaller numbers).

\textsuperscript{18} Similar concerns have been voiced in Spain, where at least one school principal grilled a girl who he suspected was forced to wear a head scarf by her father. As in France and the Netherlands, the Spanish government subsidizes religious schools. The new government is considering expanding subsidies beyond Roman Catholic schools to include Muslim schools, or phasing out such subsidies altogether and barring religious symbols including the crucifix. Renwich McLean, \textit{Spain considers financing for major religions}, New York Times, August 3, 2004 A-6.


\textsuperscript{20} Siegfried Mortkowitz, \textit{For France, 2004 was the year of the veil}, Deutsche Presse-Agentur, Dec. 20, 2004.
Muslim girl who was set on fire in 2002 in Vitry-sur-Seine. Teachers and school principals voice concerns that in addition to isolating veiled girls from the secular community, the presence of veils will lead to distinctions within the Muslim community between the more traditional and those who are less observant, leading to peer pressure and ostracism. On the other hand, some French feminists fear that a segment of girls from Muslim families will be kept out of school altogether if they cannot wear veils, or even sent out of the country into non-consensual forced marriages.

In order the “keep the church out of the classroom” France has long subsidized 85% of the costs of qualifying parochial schools (those that meet the curricular requirements). Most of those have been Roman Catholic schools, an option some Muslim families are reportedly considering. But the city of Lille recently began funding a Muslim school, and more Muslim schools are expected to open at public expense, coming closer to the multicultural model developed in the Netherlands.

B. The Netherlands: The Multicultural Model

Ten per cent of the population of the Netherlands is currently made up of first generation immigrants, most of them Muslims. At the current rate of immigration, it is anticipated that all three of the country’s largest cities will soon have majority-Muslim populations. This demographic pressure, combined with recent tensions among ethnic and religious groups poses a serious challenge to the traditional Dutch tolerance for diversity. Since the nineteenth century, the Dutch government has attempted to diminish inter-religious tensions by funding “confessional schools” run by religious dominations.

21 Carol Eisenberg, *France’s secularism: An uneasy fit*, Seattle Times, Dec. 14, 2004 (discussing popular concerns in France about Muslim girls who were reportedly beaten, gang-raped and, in one case, burned to death in largely Islamic high-rise housing projects).

22 Kramer.
Today, the state funds Muslim as well as protestant confessional schools, and the student population of some largely-secularized protestant schools consists almost entirely of Muslim students. In those schools, some anecdotal data suggests that girls who wear head scarves become symbols of political and gender controversy.\textsuperscript{23}

C. Great Britain: Modified Assimilation Model

At the beginning of March, the Royal Courts of Justice handed down an opinion in a case involving a girl who had been kept out of school for wearing a full jilbab. The world press widely reported a victory for the girl,\textsuperscript{24} but the on closer reading the case is more complex.\textsuperscript{25} The Court pointed out that Great Britain has an established Church and thus is not a secular state like France (or Turkey which also bars religious symbols in schools as well as in government offices). British law provides that each student shall receive daily religious instruction unless exempted at the request of his or her parents.

Among the interesting features of the case are the following. First, the headmistress of the school is a Muslim, raised in the sub-continent. Second, the school had voluntarily adopted a generous dress policy designed to accommodate Muslim girls by providing a “shalweer Kameeze” as an alternative to the standard school uniform. Third, the girl’s parents were both dead, and her lawyer (Cherie Booth) portrayed the girl’s request to be allowed to wear head to ankle covering as the outgrowth of her own beliefs about what was required of her after she began to menstruate.


\textsuperscript{24} \textit{Muslim dress ruling could affect all Europe: Some British Muslims leery of potential for new divisions}, Edmunton Journal (Canada), March 3, 2005.

\textsuperscript{25} The Queen on the application of SB and Headteachers and Governors of Denbigh High School, [2005] EWCA Civ 99.
The court held that the school had not given sufficient weight to the girl’s claims, but threw the issue back to individual schools to decide, based on an analytical framework the court provided. Schools are directed to consider whether the petitioner for an exemption from the school’s dress requirements has established a claim under Article 9 of the European Convention on Human Rights [see Appendix], and if so, whether the school has a justification for denying the request that comports with Article 9. The court noted that a number of considerations have to be balanced “when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim.” Only after weighing all of these issues, the court held, could it determine whether the interference with manifestation of belief violated Article 9.

The school’s reasons for not accommodating the girl’s request to wear a jilbab included: (i) the discomfort of the other students who were afraid of people wearing forms of dress they associated with extremist views; (ii) the concerns of other Muslim students about one kind of Muslim being regarded as inferior to another, and about resulting pressure from peers and outsiders to conform to more traditional dress; and (iii) the fear that a wider diversity of dress codes would undermine cohesion, inclusion and tolerance. The court referred back to individual schools the question of whether the concerns voiced by the school at issue were sufficient to override religious claims.

Intriguingly, the court analyzed the debate over whether the jilbab is mandated by the Muslim religion. It concluded from the expert testimony it received that two main schools of thought compete within the Muslim community. The mainstream opinion, at

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26 This particular case was moot, because after two years at home the girl had enrolled in another school which accommodated her dress requirements. As a result, the school at issue did not have occasion to apply the newly-required analysis.
least among the Muslim population of Great Britain, requires only modesty and is satisfied by the school’s proffered shalwar kameeze. But the court also recognized that the “minority view, sincerely held” required that an adult woman cover her arms and legs. The European Court of Human Rights, like the U.S. Supreme Court, has held that courts may not inquire into the sincerity of asserted religious beliefs.

While the manner of dress at issue in this case was more extreme than a mere head covering, the same debate surrounds the issue of the veil. Muslims themselves do not agree about whether it is mandated by their religion, or is a voluntary expression of belief. That disagreement might prove very significant to the outcome if a court in the United States were to directly consider the issue. It would prove quite significant, as whether the claim to an exemption from a generally applicable rule were analyzed as a matter of free exercise of religion (in which case the observance must be mandatory) or as expression under the speech clause (in which case the expression could be entirely personal and subjective).

In Great Britain, the question of whether believers are required to wear a particular religious symbol or form of dress may be less important than in the United States because of the broad terms of the 1976 Race Relations Act. That statute bars direct or indirect discrimination in a regulation of general applicability that has a disproportionate impact on a particular minority group which is “not justifiable

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27 Similarly, the German Islamic Council, an umbrella group for more than sixty Islamic organizations, issued a statement to the effect that the “headscarf is only a religious accessory – not a political or religious symbol,” and should be worn only by women who choose to do so of their “own free will.” Islamic groups in Germany reject ban on headscarves, Deutsche Presse-Agentur, April 21, 2004.


irrespective of the colour, race, nationality, or ethnic or national origins of the person to whom it is applied; and [] which is to the detriment of that other because he cannot comply with it.” In 1983 the House of Lords held that the Race Relations Act protected the right of a Sikh boy to wear his turban to school because the act intended the word ethnic to be “construed relatively widely” in a “broad, cultural/historic sense.” The court concluded that although the Sikh community is no longer strictly religious in nature, a Sikh boy could not comply with the school dress code requiring him to cut his hair and attend school bare-headed without giving up his community’s “distinctive customs and cultural rules.”

30 This requires a much broader form of accommodation than appears to be mandated under the United States Constitution.

III. Conclusion

What does our whirlwind European tour add to our understanding of the issues posed by requests for accommodation of religious symbols in American schools?

On the positive side, there is something to be said for the emphasis on discretion and flexibility in the United States. The United States has avoided the competing excesses of both France and the Netherlands. The absence of a bright-line policy imposes a burden on individuals, but that burden may help to ensure that only those who are strongly motivated will seek exemptions from generally-applicable rules. Although most Americans believe these issues are behind us, and that the Constitutional right to religious exercise and expression by individuals in schools is clear, controversies and incidents of exclusion continue to take place in every part of the nation.

At this juncture, we have not yet confronted some of the most difficult questions. Consider one hypothetical. What happens when the minority becomes the majority in a

30 Mandla v. Dowell Lee, 1 All ERHL 1063, 1069 (Lord Fraser) (1983).
given school district? What if, for example, 80% of the girls in the Dearborn Michigan schools began to wear hijabs to public school? What if the school also accommodated the students’ request to pray three times during the school day, prostrate on the floor? I do not yet have the answer, but it is not clear that doctrines designed to protect minority rights will serve to protect others when the tables are turned.

The European example also underscores two profound limitations of the doctrine in the United States. First, the approaches in Britain and the Netherlands – and the terms of the applicable conventions – suggest that we should take more seriously the notion that identity claims separate from religion have validity and should be accorded some respect.

Second, the European dialogues highlight a broad problem in the tendency of American law to merge children with their parents and treat them as one unit. I have argued in a number of contexts that children possess autonomous rights -- and that their voices should be heard -- separate and apart from their parents when their opinions differ. The Europeans tend to assume that the child may be resisting the parents’ religious practices. It is possible, however, that the disagreement could involve a minor who prefers more traditional religious observance to the parents’ more moderate practices. Consider a teenage girl who dons a hijab on arriving at school over her parents’ objection. Should a school grant her individual request for an exemption from an existing dress code? Does it make a difference if the school accommodates girls whose parents want them to cover their hair? If the parents are Muslim or Christian?

The French and English legal systems have begun to grapple with the complex reality, so often ignored in the United States, that children’s emerging sense of

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31 *E.g. An Emerging Right for Mature Minors to Receive Information, supra n. 1; From Vulnerability to Voice, supra n. 1.*
themselves and their autonomous identities may be irreconcilable with the religious or cultural identity their parents may wish to impose on them. In such cases, the state’s response should not be a virtually irrebuttable presumption that parents (and minority communities) speak for their children. I am cognizant of the practical difficulties inherent in the real world if schools in any country were to be charged with the responsibility of ascertaining whether children agreed with their parents’ request for accommodation. Nonetheless, the possibility of coercion ought to be taken seriously.

Ultimately, how societies respond to such disagreements will reflect more general assumptions about the proper place of religion and diversity in public life and whether the student’s claim to display a religious symbol is viewed as religious exercise, speech or cultural statement. But such responses will also reflect often disputed answers to equally vexing and divisive questions specific to the function of education in a pluralistic democracy: Should the primary aim of accommodating difference within public schools be to support parents and subcultures in transmitting their own particularistic values? Or should the primary aim of recognizing difference be to make the public schools an environment that is comfortable enough for parents with diverse beliefs so that their children can be educated together in the service of a vibrant civic democracy? Finally, at what point do particularistic requests for accommodation go so far that to grant them would undermine the school’s goal of inculcating a shared vision of a civic life in common?
APPENDIX

Excerpts from Conventions binding on European Nations

I. The United Nations Convention on the Rights of the Child

states in pertinent part:

States Parties shall respect and ensure the rights set forth in the present Convention . . .without discrimination of any kind, irrespective of the child’s or his or her parent’s … religion, …national, ethnic or social origin … (Article 2)

States Parties shall respect the responsibilities, rights and duties of parents, or, where applicable, the members of the extended family or community …. (Article 5)

States Parties undertake to respect the right of the child to preserve his or her own identity, including nationality . . . (Article 8)

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child (Article 12)

States Parties shall repect the right of the child to freedom of thought, conscience and religion. States Parties shall respect the rights and duties of parents … to provide direction to the child in the exercise of his or her right in a manner with the evolving capacities of the child. (Article 14)

Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and necessary to protect the public safety, order, health or morals, or the fundamental rights and freedoms of others. (Article 14)

Education shall be directed to: …. The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own. … tolerance of national and religious groups… (Article 29)
II. The Convention for the Protection of Human Rights and Fundamental Freedoms,\textsuperscript{32} states in pertinent part:

Article 9: Freedom of thought, conscience and religion.

1. Everyone has the right to freedom of thought, conscience and religion; [including the right to] “manifest [one’s] religion or belief in public. . . .

2. Freedom to manifest one’s religion or beliefs shall be 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.
