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The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf

ALIAH ABDO*

Introduction

The hijab, the headscarf worn by many Muslim women, has long been a topic of interest in the Western World, playing a part in feminist, Orientalist, social, religious, and political discourse. It is often misunderstood to be a symbol of oppression or a sign of extremism, resulting in an idea that Muslim women need to be liberated from hijab.1 Although such attention did not originate with the events of September 11, 2001, in its aftermath, Islam and manifestations of Islam, such as hijab, have been reexamined, scrutinized, and further critiqued. This resulted from a combination of fear fed by the media and political agendas, law enforcement practices, social and political influences, cultural practices and norms, and outright religious and cultural ignorance of Islam and Muslims. This view falsely depicts the hijab-wearing woman as an “oppressed, weakened woman, stripped of her ‘equal rights’, forced to ‘veil’ her sexuality, and mandated as inferior by the tenets of Islamic principle.”2 Despite the fact that this view is a severely flawed and false reflection of Islamic principles, it has made the hijab an easy target for post-9/11 backlash and is often used to advance political agendas and facilitate and justify discrimination.

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2. Id.
Such religious ignorance has affected Muslim women in many facets of their lives including education, work, travel, recreation, and the ability to participate in the legal process in the courtrooms of our nation.

Most often, reaction to hijab takes the form of “microaggression,” smaller everyday incidents of racism, committed either consciously or subconsciously. However, in some cases, microaggression has led to greater acts of discrimination, such as unfounded suspicion, islamophobic slurs, employment discrimination, the vandalization of mosques, unwarranted detentions, physical assaults, racial profiling, and even the murder of several Muslims, Sikhs, and other people who stereotypically resemble or are mistaken for Muslims. Human Rights Watch reports that those most likely to be targeted for hate crimes were those most easily identifiable as “Muslim,” such as Muslim women wearing hijab or Sikh men or women wearing turbans. This climate of tension and discrimination has made everyday activities especially difficult for Muslim women and other “Muslim-looking” people.

Critical race theory, a branch of critical legal studies that is concerned with issues of racism, emphasizes the socially constructed nature of race. The “social construction” thesis recognizes that race is a result of societal production. Racial and ethnic categories are invented, manipulated, and abandoned when convenient. The production of such categories often includes a set of dehumanizing stereotypes and depictions dispersed by broadcast media, cartoons, textbooks, movies, and other cultural mediums. In different periods of history, various minority groups have been racialized according to societal fears, often leading to state-sanctioned atrocities such as the internment of 120,000 Japanese Americans during World War II. This racialization of minority groups is usually preceded by a hostile political atmosphere for the affected minority group, and includes extensive propaganda campaigns directed against the group. Common tactics include the use of stereotypes, name substitution, lying, selective presentation of facts, repetition, bold assertion of a single idea, creation of an

5. DELGADO & STEFANCIC, supra note 3, at 7.
6. Id.
7. Id. at 8.
8. Id.
enemy, and appeal to authority.”  

A history of colonialization, Eurocentric and Orientalist discourse depicting non-Western cultures as backward, combined with the Gulf War, the “War on Terror,” and the deteriorating situations in Iraq and Afghanistan, have all contributed to the misunderstandings of Islam and specifically, the hijab.

The previous and current misunderstandings of Islam have fostered several government and private party restrictions placed on hijab, requiring removal in various settings. As discussed below, the suggested rationales for such restrictions range from community relations, to the liberation of Muslim women, to national security. However, many Muslims understand such incidents to be matters of ignorance or islamophobia and have responded in different ways. Some Muslim women try to minimize public outings for fear of harassment or feel a sense of shame or guilt for covering their hair with hats, hoods, or other head coverings that appear to be less identifiable as Muslim. Others have refused to allow such attitudes to dictate their religious practices and societal participation. The overall effect has been to pressure or even force outward assimilation amongst Muslim women. Unfortunately, the judicial response, thus far, has been inadequate to protect Muslim women’s civil liberties, particularly freedom of religion and freedom of speech.

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10. Mohamed Elmasry, The Decolonization of Islamic Culture: The Role of Language, Religion, and Tradition, MEDIA MONITORS NETWORK, Apr. 6, 2007, http://world.mediamonitors.net/headlines/the_de_colonization_of_islamic_culture_the_role_of_language_religion_and_tradition (discussing the effects colonial powers had on Muslim societies). They did not simply overthrow local governments, but over time “destroyed the languages, religions and traditions of native and indigenous peoples, through the imposition of foreign education, media, art forms, literature and propaganda.” Id. Native languages were described as “inadequate,” native religions were described as “backward,” and native traditions were described as “not worth keeping.” Id. According to Elmasry, once the natives “bought into this portrayal of their cultural inferiority, it became an easy matter to recolonize their ‘primitive’ ways with foreign political and economic systems.” Id. Many of these colonial powers often cited religious imperatives when they strove to “civilize” other parts of the world. Id.

11. See EDWARD W. SAID, ORIENTALISM (Pantheon Books 1979) (describing a Western academic and artistic tradition of hostile and deprecatory views of Eastern cultures and peoples, shaped by the attitudes of an era of European imperialism in the Eighteenth and Nineteenth centuries).

12. Elmasry, supra note 10. Elmasry describes the current and cumulative social, political, and economic injustices committed against Muslim countries by the West as “recolonization,” which often takes the form of obtaining natural resources such as oil, obtaining strategic geopolitical positions, and obtaining a potential consumer market of more than 1.2 billion Muslim people. Id. Such acts undoubtedly have a cultural impact as well. Id.
The Free Exercise Clause of the First Amendment of the United States Constitution is understood to guarantee free speech and the free exercise of religion. The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” However, the current sociopolitical climate and treatment of Islam has been reflected and even reinforced in the judicial realm whereby the hijab, and other outward manifestations of ideology, have yet to be adequately protected legally, both internationally and domestically. For a Muslim woman, this means the legally sanctioned removal of hijab, resulting in the outright abandonment of her right to freely exercise her religion. In all of the United States cases addressing discrimination on the basis of hijab, the courts have yet to rule on the merits to protect a Muslim woman’s right to religious freedom regarding the hijab. United States courts in all cases have taken one of three approaches: either the court has failed to protect a Muslim woman’s right to wear hijab; courts have avoided a decision on the merits and ruled against the plaintiff, or; courts have formulated arbitrary or inconsistent standards permitting the hijab only in the event that it is no longer identifiable as Muslim. In the cases where the courts have failed to protect a woman’s right to wear hijab after rendering a decision on the merits, it is often based on misunderstandings about the religious necessity and purpose of hijab. Instead of applying the Free Exercise Clause of the First Amendment to protect a woman’s right to wear hijab, these courts have yielded to the hostile influences of the social and political climate rather than constitutional jurisprudence to determine what our Constitution means.

This note begins by providing a background on American Muslims and the purpose and importance of hijab to Muslim women. The note then proceeds to examine the various contexts where hijab has been an issue in the American legal system; that is where the government or private parties have required the removal of hijab in educational settings, athletic competitions, airports, driver license photos, employment, prison entry, and in court. In the educational realm, the note compares international and domestic trends prohibiting or placing restrictions on hijab for both students and teachers. Finally, this note illustrates the alarming trend of courts failing to protect the constitutional rights of Muslim women because of misunderstandings and bias surrounding the hijab and Islam.

I. American Muslims and the Islamic Significance of Hijab

A. Background on Muslims in America

In order to have a meaningful understanding of hijab and its importance to Muslim women, it is important to be familiar with the Muslim peoples and the basic tenets of Islamic law. The Arabic word “Islam” is derived from the word “salam,” which means peace. The word “Islam” means “submission, surrender, and obedience,” but as a religion, Islam represents the complete submission to God so that one can achieve peace: peace with God, peace with oneself, and peace with the creations of God. Islam is often seen by Muslim followers as a complete way of life in order to achieve inner peace.

Muslims come from every race and nationality across the globe, speak various languages, eat various foods, dress differently, and adhere to different customs. There are approximately 1.3 billion Muslims worldwide; about one in every five people on earth is Muslim. However, contrary to common misconceptions, about 18 percent of Muslims are Arab and about 20 percent are in Sub-Saharan Africa. The world’s largest Muslim population, of more than two hundred million, resides in Indonesia, the world’s fourth most populous nation. There are also substantial groups of Muslims in China, India, Russia, Europe, North America, and South America.

There are about eight million Muslims in the United States, representing more than fifty different ethnicities and nationalities.

15. Id.
16. Some of the major religious practices include the five pillars of Islam: the shahadah, a declaration of faith that “there is no god except Allah, and Muhammad is the messenger of Allah”; salah, the five daily prayers; sawm, fasting during the month of Ramadan; zakat, alms giving to the poor, and; hajj, the pilgrimage to Mecca. See id. at, 115-125.
19. Id.
21. DISCOVER ISLAM, supra note 18.
22. Ali S. Asani, “So That You May Know One Another”: A Muslim American Reflects on
Many of these Muslims were born in the United States, while others came as immigrants or converted to Islam. The first group of Muslims that came to the United States were African Muslims forcibly brought to the United States as slaves, beginning in the 1530s, from Fulas, Fula Jallon, Fula Toro, and Massionia, as well as other parts of West Africa. It is estimated that between 30 percent and 40 percent of West African slaves brought to the United States were Muslim. In the late 1800s, large numbers of immigrants also arrived from Syria, Lebanon, Iraq, Iran, Palestine, and Egypt, many of whom were Muslim. Today, African Americans make up the largest group of Muslims in the United States. Thus, when dealing with issues of hijab in the United States, racial minorities, particularly women of color, are disproportionately affected by restrictions placed on wearing hijab.

As the Muslim population is extremely diverse, both globally and within the United States, so is the way Islam is practiced. There are different sects of Islam and four Sunni schools of Islamic law. As hijab is discussed in this note, it is important to recognize that Muslim women make up a very diverse group of people from different backgrounds; some who wear hijab; some who do not despite religious doctrine; some who began wearing hijab when they were young; some who did so later in life; some who converted to Islam; some who were born into Islam; some who came to the United States as immigrants; and some who were born and raised here in the United States. Accordingly, Muslim women have various styles, understandings, and personal reasons for wearing hijab. However, there is a unifying factor amongst Muslim women who wear hijab: that hijab is a religious obligation and any policy prohibiting the wearing of hijab is a requirement that they violate their religious beliefs.

B. Hijab in Islam

The controversy surrounding hijab in the Western Society is often based on misunderstandings and misperceptions of Islam, particularly in relation to women. Many have been quick to criticize the hijab, as some view Muslim women as oppressed beings, forced
to cover. However, there is a major distinction between “Islamic culture” and “Muslim culture.” Islamic culture, which adheres to the tenets of Islamic principles, is very desirable to the Muslim community, while Muslim culture is the way adherents to the Islamic faith practice the religion and is subject “to the same human weaknesses and inconsistencies of any ethnic community.”

For example, some majority Muslim countries, like many secular societies, do not afford basic human rights, educational opportunities, legal status, and vocational opportunities to women. However, Islam prescribes equality between the sexes.

Muslims believe that every person is responsible for his or her own actions and that all stand equal before God. Women in Islam, like men, are viewed as individuals with specific rights such as the right to learn, earn income, own property, choose a husband, be treated equally, and inherit. Muslim women also keep their own family names rather than adopting her husband’s after marriage. The roles of men and women in Islam are “complementary and collaborative” so that the rights and responsibilities of each sex are “equitable and balanced in their totality.” According to Islamic law, the only characteristic that makes a man or woman “chosen” is his or her piety, not gender. The Qur’an states:

“Lo! Men who surrender unto Allah, and women who surrender, and men who believe and women who believe, and men who obey and women who obey, and men who speak the truth and women who speak the truth, and men persevere (in righteousness) and women who persevere, and men who are humble and women who are humble, and men who give alms and women who give alms, and men who fast and women who fast, and men who guard (their modesty) and women who guard (their modesty), and men who remember Allah much and women who remember Allah – Allah hath prepared for them forgiveness and a vast reward.”

Despite these egalitarian tenets, Muslim women are often misrepresented in the West as being weak, oppressed, passive,

27. Elmasry, supra note 10.
28. Id.
29. DISCOVER ISLAM, supra note 18.
30. Id.
31. Id.
33. AL-QUR’AN 33:35-37. See also AL-QUR’AN 2:256 (“O Mankind! We created you from a single soul, male and female, and made you into peoples and tribes, so that you may come to know one another. Truly, the most honored of you in God’s sight is the greatest of you in piety. God is All-Knowing, All-Aware.”).
voiceless, uneducated, faceless, and subjected to the will of men; often making Muslim women the “object of imperialist rescue.”

The hijab has been the focus of this misconception. Contrary to the stereotype, the Qur’ân itself prohibits forcing one to accept or practice Islam, as “there is no compulsion in religion.”

It is true that some political regimes attempt to force the hijab upon women just as some societies and individuals force its removal. However, forcing one to wear or remove hijab is against the tenets of Islam and the vast majority of Muslim women that wear hijab do so by independent choice.

The most fundamental source of Islamic law is the Qur’ân, which prescribes the hijab. The hijab is explained in greater detail through in the Hadith, the recorded sayings and actions of the Prophet Muhammad (PBUH). Although people usually discuss hijab only in the context of women, the Qur’ân prescribes for both Muslim men and women to be modest, in both character and dress.

Any differences between the Islamic dress of men and women concerns the “differences between men and women in nature, temperament, and social life.”

The Arabic word hijab stems from the word hajaba, meaning “to prevent from seeing.” In Islamic scholarship, hijab refers to broader notions of modesty, privacy, and morality.

The two verses in which hijab is described in the Qur’ân are translated as follows:

And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw veils over their bosoms and not display their beauty....

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34. Saloom, supra note 4, at 71.
35. AL-QUR’AN 2:256.
37. Whenever Muslims refer to the Prophet Muhammad, his name is traditionally followed by (“PBUH”), which stands for “peace be upon him.”
38. AL-QUR’AN 24:30 (“Say to the believing men that they should lower their gaze and guard their modesty: that will make for greater purity for them: and Allah is well acquainted with all that they do.”).
41. Id.
42. AL-QUR’AN 24:31.
O Prophet, tell your wives and your daughters and the women of the believers to draw their cloaks close round them. That will be better, so that they may be recognized and not annoyed. Allah is ever Forgiving, Merciful.\textsuperscript{43}

To fulfill the physical requirements of hijab, the Hadith explains that Muslim women should cover their entire bodies, with the exception of the hands, face, and feet, upon the age of puberty.\textsuperscript{44} This includes wearing opaque and loose clothing in front of all males other than the woman’s husband, father, grandfather, brothers, uncles, sons, nephews, father-in-law, and young children, referred to as \textit{non-mahram} males.\textsuperscript{45} Muslim women are generally not required to wear hijab when they are only in the presence of women, although there are some interpretations of Islamic thought addressing whether Muslim women are required to cover in front of non-Muslim women.\textsuperscript{46} Some Muslim women also cover their face with \textit{niqab}, which is another interpretation of Islamic dress. In addition to the physical aspects of hijab, hijab is also a state of mind, behavior, and lifestyle.

Hijab is not only a hijab of the clothing, but also hijab of the heart and intention.\textsuperscript{47} It is a choice to be modest, both in character and appearance, not just physical modesty, but also in one’s thoughts, speech, and actions.\textsuperscript{48} The idea is to remove focus from the physical aspects of a woman, from a personal perspective as well as that of others, so that the focus may be on the mind, character, and spirituality of the woman, rather than her body and appearance.\textsuperscript{49} It sends a message that she is a Muslim, has respect for herself, and expects to be treated respectfully, especially by the opposite sex.\textsuperscript{50} Hijab is not only meant to guard women from inappropriate leering male attention, but it is considered to be a liberating experience to be free from societal expectations and judgments over a woman’s body and other physical characteristics.\textsuperscript{51} A 17-year-old Toronto high school student described it as “one of the most fundamental aspects of female

\textsuperscript{43} AL-QUR’AN 33:59.
\textsuperscript{45} AL-QUR’AN 24:31.
\textsuperscript{46} Id.
\textsuperscript{47} Ali, \textit{supra} note 40.
\textsuperscript{48} Id.
\textsuperscript{49} Chopra, \textit{supra} note 36.
\textsuperscript{50} Id.
\textsuperscript{51} See Yusufali, \textit{supra} note 36; Chopra, \textit{supra} note 36.
empowerment" because it frees her from "the bondage of the swinging pendulum of the fashion industry and other institutions that exploit females." 52 Another Muslim woman explained that the hijab brings about an "aura of respect, and bestows upon her a separate and unique identity." 53 She explained, "superficial beauty is not the Muslim woman's concern, her main goal is inner spiritual beauty." 54 Hijab also represents egalitarianism, community, identity, privacy, and justice for the Muslim community.

The concept of wearing a veil is not unique to Islam. Roman Catholic nuns often wear veils and many Catholics have traditionally worn ceremonial veils to church. Mormom women wear veils as part of their temple clothing and many Sikh women wear head coverings. Also, Orthodox Jewish women often cover their hair with scarves, hats, or wigs. Hijab is an important aspect to a Muslim woman's identity under the tenets of Islamic law; it is a symbol that she is a person with high moral standards who places her mind and spirituality before physical appearance. 55 However, the American legal system has not yet recognized the importance of hijab to Muslim women, nor has it adequately protected the practice of such a central religious obligation under the Free Exercise Clause of the United States Constitution.

II. The First Amendment: Freedom of Religion

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government of grievances." 56 Within the First Amendment are two religion clauses, the Establishment Clause and the Free Exercise Clause. The Establishment Clause prevents the government from establishing or endorsing an official or de facto state religion while the Free Exercise Clause prevents the government from interfering with a person's religious beliefs. Under the Free Exercise Clause, 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

52. Yusufali, supra note 36.
53. Chopra, supra note 36.
54. Id.
55. Id.
56. U.S. CONST. amend. I.
This includes discriminating against a person for holding beliefs contrary to those of others. The First Amendment applies to actions of the federal government, and is applicable to the states and their subdivisions through the due process clause of the Fourteenth Amendment.

The First Amendment applies to actions of the federal government, and is applicable to the states and their subdivisions through the due process clause of the Fourteenth Amendment. The Free Exercise Clause is an absolute prohibition against governmental regulation of religious beliefs. The Supreme Court has stated that freedom of conscience and the ability to adhere to religious beliefs as an individual chooses cannot be restricted by law. However, there is a fine line between unconstitutional prohibitions on the practice of religion and legitimate governmental conduct in managing its own affairs in relation to an individual’s belief system. Thus, while freedom of belief is absolute, freedom of conduct is not; the government is generally not required to conduct its affairs in accordance with the individual beliefs of particular citizens when it has a legitimate governmental interest.

Traditionally, the Supreme Court held that laws that “substantially burdened” the free exercise of religion must be justified by a “compelling interest” to survive scrutiny under the First Amendment. However, in 1990, the Supreme Court in Employment Division, Department of Human Resources v. Smith tightened the standard and held that a law does not offend the First Amendment if it is neutral towards religion and only incidentally affects religion, as long as it is “generally applicable and otherwise valid.” Although Smith is often viewed as abandoning strict scrutiny, it did not abandon heightened scrutiny for neutral laws of general application under the “hybrid-rights exception.” Under the hybrid-rights exception, “strict scrutiny will be given to a free exercise claim when it is coupled with another, independent constitutional claim,” such as the freedom of expression. In such cases, the First Amendment bars the application of neutral,

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59. Smith, 494 U.S. at 876.
61. Schempp, 374 U.S. at 203.
64. 494 U.S. at 878.
65. Id.
generally applicable law to religiously motivated actions. The state would then need a compelling governmental interest for its action to be upheld as constitutional.

In reaction to Smith, Congress enacted the Religious Freedom Restoration Act ("RFRA"), which provides that the government cannot "substantially burden" religious conduct even by "a rule of general applicability" unless the government proves that the burden is the "least restrictive means of furthering... a compelling governmental interest." If state actions that serve a legitimate state interest also affect an individual's religious beliefs, the state should take the least restrictive means in achieving their goals and respect religious beliefs to the maximum extent possible. Unfortunately, this has not always been the case, especially in relation to hijab.

III. International and Domestic Restrictions on Hijab

There have been many instances where government officials and private parties have required the removal of hijab, some of which have been litigated, some are in pending litigation, and some that have yet to be litigated. The purpose of this section is to examine the many contexts in which such restrictions are placed and the failure of the courts to adequately protect hijab or acknowledge its religious significance. Hijab bans have occurred with regards to education, employment, prison entry, driver license photos, airport security, athletic competitions, and courtrooms. Such categories are by no means comprehensive, but provide a sample of the types of issues that have emerged in recent years.

A. Hijab Bans in the Educational Context

The wearing of hijab in public educational institutions is one of the most controversial contexts regarding hijab in the international arena. Increasing prohibitions on hijab in schools are emerging internationally and within the United States. All these situations have resulted in the failure to protect Muslim women's rights to practice their religion. The majority of education-related hijab bans have occurred in Europe. There have also been bans in Asian and

67. Smith, 494 U.S. at 881.
68. Id.
69. Pub. L. No. 103-141, codified at 42 U.S.C. §2000bb. Note that although the Supreme Court held in City of Boerne v. Flores, 521 U.S. 507 (1997), that RFRA was beyond the scope of congressional power, the fact remains that freedom of belief is unregulated while freedom of conduct is only regulated if it is rationally related a legitimate state objective.
African countries in attempts to appear more "Western" or secular. This xenophobic trend has resulted in the exclusion of many Muslim students and teachers from the classroom.

1. International Hijab Bans in Schools

a. Turkey

Turkey was the first country to ban hijab through a sweeping prohibition applicable to public schools, universities, and in the workplace for official employees. Ninety-nine percent of the Turkish population is Muslim. Modern Turkey is a secular, democratic, unitary, constitutional republic that was established by Mustafa Kamal Ataturk in 1923. Ataturk focused on modernizing and westernizing Turkey through social and political reforms known as "Kemalism," which included secularism, strong nationalism, and western orientation. Kemalism survives today and is a significant part of Turkish social and political thought, especially in relation to hijab. As a result, some view the hijab as a "direct challenge to Western lifestyles, a symbol of ignorance and backwardness." As of the year 2000, more than 37,000 Muslim girls were expelled from school for wearing hijab, and more than 24,000 teachers were fired for wearing hijab. Hijab bans have extended to students who have tried to sidestep the ban by wearing wigs to campus, and has even affected hijab-wearing mothers who have tried to attend their children’s graduations. The hijab ban has also affected elected parliament members, judges, soldiers, and patients seeking treatment in hospitals.

The most highly publicized hijab ban case is Sahin v. Turkey,

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70. U.S. Department of State, Bureau of European and Eurasian Affairs, Background Note: Turkey, http://www.state.gov/r/pa/ei/bgn/3432.htm (last visited Apr. 18, 2008).
71. Id.
73. U.S. Department of State, supra note 70.
76. Birch, supra note 74.
where a Muslim woman in her fifth year at the Faculty of Medicine at the University of Bursa was denied entrance to one of her university exams for wearing hijab, even though she had worn hijab during her first four years at the university. In February 1998, the vice chancellor of the university issued a circular stating that "students whose 'heads are covered' and students with beards must not be admitted to lectures, courses or tutorials" and the "name and number of any student with a beard or wearing the Islamic headscarf must not be added to the lists of registered students." Sahin was thereafter prohibited from entering university lectures and exams.

Sahin brought her case to the European Commission of Human Rights. In June of 2004, the European Court of Human Rights ruled that there had been no violations of her "freedom of thought, conscience and religion under Convention Article 9" of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court reasoned that overarching secularist and equality principles permit the ban of religious manifestations in state institutions, including schools and universities. The Court stated that the limitations placed on wearing hijab were justified as "necessary" for protecting the "public order, health or morals, or the protection of the rights and freedoms of others." However, the

80. Id.
81. Article 9 of the European Convention for the Protection of Human Rights & Fundamental Freedoms, 213 U.N.T.S. 222, provides that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
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.

84. Id.
Court did not specify or explain just how allowing Sahin to wear hijab would have an effect on other peoples' freedoms and rights. The rationales put forth by the European Court of Human Rights in Sahin were later used in other European countries to justify the banning of hijab and other religious items in the classroom.85

The Turkish hijab ban is not limited to students at educational institutions, but also to government employees including teachers, state hospital workers, and elected officials.86 The story of Merve Kavakci is an example of what the hijab ban means for elected Turkish officials. In 1999, Merve Kavakci, was elected to be a member of the Turkish parliament.87 She was precluded from taking her oath of office because she wore hijab and was even booed out of parliament by members of the ruling Democratic Social Leftist Party.88 In the 1980s, Kavakci’s mother was forced to leave her position as a professor at a Turkish university for wearing hijab.89 In 1988, Kavakci herself was kicked out of medical school for the same reason.90 After Kavakci was removed from parliament, she was stripped of her Turkish citizenship.91 She now lives in Washington D.C. with her family and is involved in lobbying Western governments to pressure the Turkish government to protect the human rights and religious freedoms of all Turkish citizens.92 Commenting on the Turkish hijab ban, Kavakci stated: “I have hope for Turkey that it would integrate into the Western world without ending its Islamic bonds with the East. . . . I want to point out the double standard and hypocrisy of the Western world in standing up for women in Afghanistan and Iran, while they ignore the right of the majority of women in Turkey who are precluded from school, work and society for simply covering their hair.”93

Since the Turkish Justice and Development Party (“AKP”) came to power in 2002, the party has been under immense pressure to abolish the headscarf ban.94 On February 9, 2008, Turkish parliament members voted 411-103 to amend the constitution so that

85. See infra text accompanying sections IV.A.1.b-c.
87. Kutty, supra note 75.
88. Id.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
hijabs can be worn in public universities. The amendment does not specifically state that hijab in universities will be permitted, but states that "no one can be deprived of (his or her) right to higher education." In the past, the President would have vetoed this amendment, but Abdullah Gul, the former AKP foreign minister, has taken office and has backed the amendments. Gul stated that "beliefs should be practiced freely and universities should not be places of political controversy."

Despite the reversal of the ban in universities, restrictions remain for pre-university students and government employees. In addition, the types of hijabs that can be worn at universities are limited. Hijabs tied under the chin are permitted because they are said to appear to be more Turkish in nature, but wrap-around headscarves and face veils are not. A vocal Turkish minority believes that the hijab ban is essential because they believe hijab to be a "direct challenge to Western lifestyles, a symbol of ignorance and oppression." One lawmaker, Canan Aritman, of the main opposition, the Republican People's Party, stated that the partial reversal of the ban would be appealed because "we will never allow our country to be dragged into the dark ages." The Constitutional Court is already reviewing an appeal by the secularist Republican People's Party on the validity of the amendment and a state prosecutor has asked Turkey's highest court to shut down the ruling AKP for "undermining secularism." The United States has not taken any steps to support the rights of Muslim Turkish women to wear hijab. Instead, anti-hijab attitudes and bans have spread to other parts of Europe and have crept into the United States as well.

b. France

In France, the current hijab controversy began in 1989 in a case where three Muslim girls were suspended from school for wearing hijabs.\footnote{Id.}  
\footnote{Id.}  
\footnote{Id.}  
\footnote{Birch, supra note 74.}  
\footnote{Id.}  
hijab at a public school in Creil. The Conseil d’Etat, the highest administrative court in France, found that although schools are to remain secular, students could wear religious symbols as long as they are not “ostentatious” and do not pressure, provoke, proselytize, propagandize, or disrupt school functions. The court left it up to school officials to determine whether, on a case by case basis, each religious symbol meets this standard. This decision sparked a national debate and put France’s 5 percent to 10 percent Muslim population on the defensive.

After the Conseil d’Etat’s decision, many schools began and continue to expel Muslim girls from school for wearing hijab on the basis that it disrupts the education of students and constitutes religious and political propaganda. In 1994, the Minister of Education issued a directive prohibiting “ostentatious” religious symbols in public schools to “narrow the circumstances under which the headscarf would be considered permissible.” The debate surrounding hijab escalated in 2003 when politicians called for a hijab ban in public schools, emphasizing the need for secularism and focusing on the so-called “inferior position” of Muslim women.

In early 2004, in an attempt to promote a secular French public sphere, a law was passed prohibiting the wearing of “religious symbols” that “exhibit conspicuously a religious affiliation” including large Christian crosses, Sikh turbans, Jewish yarmulkes, and the Muslim hijab. Although the ban is said to prohibit all “ostentatious” religious symbols, in effect, this ban has been considered to specifically target the hijab and turbans. In practice, there have been no student suspensions for wearing Christian crosses or Jewish yarmulkes, as there have been for Muslims wearing hijab or Sikhs wearing turbans. In addition, although the ban is facially neutral between religious groups, it disparately impacts minority religions because the law does not prohibit the wearing of small Christian crosses, which are not typically viewed

104. Id. at 256.
105. Id. at 257.
107. Walterick, supra note 103, at 257.
108. Id.
109. Id. at 256.
110. Id. at 251.
as a religious requirement like the hijab, the turban, and the yarmulke. Furthermore, the law itself arose out of a long controversy surrounding the wearing of hijab, where discourse focused upon eliminating the hijab specifically, and altogether, from public schools.\(^{112}\) Relying on misconceptions and stereotypes of its Muslim population, the purpose of the ban is to promote assimilation, counter sexism, and reduce Islamic fundamentalism within the Muslim community in France.\(^{113}\)

Although some Muslim girls have reluctantly complied with the hijab ban, many have been expelled from school, forced to relocate or had no choice but to attend a private school.\(^{114}\) Those who do not have the means to find a different school are often denied an education altogether.\(^{115}\) Unfortunately, because of the European Commission of Human Rights decision in \textit{Sahin v. Turkey}, it is unlikely that a challenge to the French law will be successful, and there has been little or no pressure by other nations such as the United States, to lift the ban.\(^{116}\)

c. Germany

Articles Three and Four of the German Constitution guarantee freedom of religion and the equal treatment of people from all religious backgrounds.\(^{117}\) Unlike the United States and France, the separation between church and state in Germany does not require a strict separation between the two in order to effectuate religious freedom.\(^{118}\) Germany is generally considered to be more tolerant of religion in schools, as it is not unusual to see Christian religious symbolism in the classroom such as crosses and nuns' habits.\(^{119}\) However, for minority religions, such as Islam, where Muslims make up less than four percent of the population,\(^{120}\) the situation

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\(^{112}\) Walterick, \textit{supra} note 103, at 251.

\(^{113}\) Baines, \textit{supra} note 111, at 304.

\(^{114}\) Walterick, \textit{supra} note 103, at 261.

\(^{115}\) \textit{Id.}

\(^{116}\) \textit{Id.} at 262.

\(^{117}\) Grundgesetz für die Bundesrepublik Deutschland [federal constitution] art. III, cl. 3 (F.R.G.) ("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."); \textit{Id.} art. IV, cl. 1-2 ("Freedom of faith and of conscience and freedom or creed religious or ideological are inviolable. The undisturbed practice of religion is guaranteed.").


\(^{119}\) Walterick, \textit{supra} note 103, at 271.

has been quite different.

In a case known as the Teacher Headscarf case, a Muslim teacher wearing hijab was prevented from applying for a teaching position in the German state of Baden-Wurttemberg because it was supposedly "not suitable" for a teaching position and had an unspecified "signaling effect" that would undermine state neutrality.\(^1\) Supporting the prohibition, the school district incorrectly argued that because hijab is a cultural and political symbol, not only a religious item, permitting hijab would unduly influence the students and contradict state neutrality principles.\(^2\) After several appeals through the German administrative courts, the German Constitutional Court ruled that the school district could not prohibit hijab without a state law prohibiting the wearing of religious garb, because the regulations relied upon were ambiguous.\(^3\) However, the court noted that the legislature could enact new laws prohibiting hijab if they determine that it is necessary in an age of increasing religious pluralism in order to prevent potential conflict.\(^4\)

The Teacher Headscarf decision was considered to be very controversial for allowing Muslim teachers to wear hijab and for lacking clarity about what would constitute a legitimate reason to ban hijab.\(^5\) With the rising number of Muslim immigrants in Germany and increasing backlash against them, the hijab ban controversy reflects Germany's distrust and discomfort towards its Muslim population. Many proponents of the hijab ban mistakenly view the hijab as a symbol of fundamentalism, oppression, or a refusal to assimilate into German society.\(^6\)

As a result of the court's decision in the Teacher Headscarf case, at least six German states banned the wearing of hijab for teachers in the classroom\(^7\) including North Rhine-Westphalia, Bavaria, Hesse, Lower Saxony, Baden-Wurttemberg, and Saarland.\(^8\) Bavaria and Hesse have specifically prohibited hijab while allowing Christian religious symbols in the classroom.\(^9\) In Hesse, a German state

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\(^1\) Bodansky, supra note 78, at 188.
\(^4\) Id.
\(^5\) Id. at 274.
\(^6\) Id. at 274.
\(^8\) Walterick, supra note 103, at 274.
court even upheld an extended ban on hijab for both public school teachers and civil servants. The Hesse ban includes religious clothing or items that appear religious in nature, but has an exception for Christian symbols. Such policies clearly target Islam based on common misconceptions and stereotypes.

In October 2004, the German federal administrative court responded to a law passed in Baden-Wurttemberg that prohibited teachers from wearing hijab. It declared that bans on religious symbols had to apply equally to all religious symbols, and could not specifically target Muslim religious attire. Now, like France, German states are still permitted to place restrictions on hijab as long as other religious symbols are also prohibited. The laws make no distinction between items that merely express religious belief and items considered to be religious requirements.

d. Other Hijab Bans in Europe

Several other European countries have proposed or implemented hijab bans. In Belgium, legislation was proposed in 2004 to prohibit Muslim students and teachers from wearing hijab in public educational institutions. Relying on misconceptions of Islam, proponents of the law argue that it is necessary to place restrictions on the hijab in an attempt to challenge gender inequality, combat Islamic fundamentalism, and preserve state neutrality. The city of Antwerp, Belgium, declared that in order to promote religious neutrality, those employees hired by local authorities whose jobs entail contact with the public, cannot wear religious symbols. There is an exception for Muslim women working in childcare. They may cover their hair with bandanas, but cannot wear hijab. The exception was considered to be a

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131. Id.
132. Walterick, supra note 103, at 274-75.
133. Id.
134. Although the Muslim population in Belgium is not specified because several minority religious are grouped together in its census, Islam is considered a “recognized” religion in Belgium. U.S. Department of State, Bureau of European & Eurasian Affairs, Background Note: Belgium, http://www.state.gov/r/pa/ei/bgn/2874.htm (last visited Apr. 18, 2008).
135. Walterick, supra note 103, at 275.
136. Id.
138. Id.
"welcome[d] compromise" by Belgium’s Centre for Equal Opportunities and Opposition to Racism, because bandanas are considered to be a more neutral garment with no religious connotations. However, it remains a restriction on the right of Muslim women to practice their religion, forcing outward assimilation on the basis of a mistaken view of Islamic principles.

Sweden and Norway have also considered similar legislation to ban hijab in public schools, but this legislation has not taken widespread effect. In Sweden, Muslims make up about 3 percent of the population. In 2006, a school in the northern town of Umeå, Sweden, banned the hijab. The ban extended to "all headgear in the classroom," regardless of religious necessity. Ultimately, the Swedish National Agency for Education determined that a full headgear ban is not permissible because it excludes students that wear scarves for religious reasons, and constitutes an indirect form of discrimination on the basis of religion. However, schools are allowed to prohibit the niqab, because it is said to "impede teacher-pupil communication."

In Norway, where Muslims make up less than 2 percent of the population, the Progress Party’s parliamentary group proposed a law in 2004 that would ban the hijab from elementary schools, and raised a debate over forbidding hijab in schools altogether. It also considered increasing the ability of employers to enforce dress codes, with the professed goal of integrating Muslim women into society and protecting them from repression. Siv Jensen, the Progress Party leader, explained that the proposal did not consider banning religious symbols such as the crucifix, turban, or calotte, because in his misguided view, the hijab is a political symbol, not a religious one. However, Education Minister Kristin Clemet told

139. Id.
142. Id.
143. Id.
144. Id.
147. Id.
148. Id.
parliament that she had no plans to ban hijab, explaining that the
government had no reason to view the hijab as an “obstacle to
education or integration in schools.” She explained: “It is
typically Norwegian clothing that has caused more problems in
Norwegian schools, from the feedback I have had.”

In March 2007, the British government also announced that
schools can ban hijab for students in the classroom as part of the
uniform policy if the teacher believes that the hijab will affect the
safety or security of the students or student learning. Educators
are urged to speak with the parents and Muslim community leaders
before making such decisions on behalf of the three percent Muslim
population. British Schools Minister, Jim Knight, acknowledged
the importance of trying to accommodate “social, religious, or
medical requirements of individual pupils,” but stated that the
“safety, security, and effective learning in the school must always
take precedence.” Again, there was no explanation of how hijab
would impact such concerns. The hijab ban in Britain is hardly
surprising considering Prime Minister Tony Blair’s October 2006
comments regarding hijab. Blair declared hijab to be a “mark of
separation,” perhaps indicating the true motivation behind such
decisions to permit hijab bans in British schools.

e. Hijab Bans in Tunisia, Singapore, and Somalia

Tunisia, Singapore, and Somalia have also instituted hijab bans
in recent years. In 1981, a decree banning hijab was passed in
Tunisia because certain government officials believed it to be a
political symbol, even though 98 percent of the population of
Tunisia is Muslim. Since Tunisia’s independence from France in
1956, the government has taken a harsh stance against Islamic

149. Id.
150. Id.
18, 2008).
153. Id.
154. English Schools Get Right to Ban Muslim Veils, REUTERS, Mar. 20, 2007,
155. Gabriel Haboubi, Tunisia Presses Enforcement of Muslim Headscarf Ban, JURIST:
library/publications/the-world-factbook/geos/ts.html#People (last visited Apr. 18,
2008).
political opposition, even if that means restricting religious freedom.\footnote{Id.} In 2006, the Tunisian government launched a new campaign against wearing hijab that “prohibits women from wearing Islamic headscarves in public places” including schools and government offices.\footnote{Edward M. Gomez, \textit{Muslim Headscarf Banned – In An Islamic Country}, S.F. CHRON., Oct. 20, 2006, available at http://www.sfgate.com/cgi-bin/blogs/sfgate/detail?blogid=15archive/&entry_id=10052.} Hijab is said to be banned in order to be in accord with “Tunisian traditions”\footnote{Magdi Abdelhadi, Tunisia Attacked Over Headscarves, BBC NEWS, Sept. 26, 2006, http://news.bbc.co.uk/2/hi/africa/5382946.stm.} and to make Islam “anchored in modernity.”\footnote{Gomez, supra note 158.} The Secretary-General of Tunisia’s Constitutional Democratic Rally political party (the party of current President Zine El Abidine Ben Ali), without support for his statements, reasoned: “If we accept today the wearing of the headscarf, tomorrow we’ll be led to accept that a woman’s right to work, to vote and to education should be denied, and that she should be confined to a procreating role.”\footnote{Id.} Despite this severely flawed view of Islamic principles, police officers have been stopping Muslim women on the street, asking them to remove their hijabs, and getting them to sign affidavits promising never to do so again.\footnote{Haboubi, supra note 155.} Tunisian women who refuse to comply with the ban, face losing their jobs.\footnote{Gomez, supra note 158.} Rights activists believe the ban to be unconstitutional, and in violation of Article 18 of the Universal Declaration of Human Rights (“UDHR”), which states that “everyone has a right to freedom of thought, conscience and religion . . . [and] to manifest his religion or belief in teaching, practice, worship and observance.”\footnote{Id.}

In Singapore, a country with a Muslim population of 15 percent,\footnote{Central Intelligence Agency, World Factbook: Singapore, https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html (last visited Apr. 18, 2008).} a hijab ban in public schools was introduced in 2002 in an attempt to promote “religious harmony.”\footnote{Alex Colvin, \textit{Muslim Headscarves Around the World Define Religious Expression Policies}, INT’L RELIGIOUS FREEDOM REP., Summer 2004, http://www.religiousfreedom.com/nwsltr/headscarves.htm.} The ban does not extend to Sikh turbans or other religious head coverings.\footnote{Id.} The hijab ban began when four Muslim girls were suspended from school for wearing hijab.\footnote{Id.} After their suspension, they unsuccessfully applied to various private schools where hijab bans
do not apply but, most of the schools were filled to capacity. The father of one of the girls later moved to Australia with his daughter so that she would be able to get an education, but the remaining girls did not have the same opportunity. Sympathizing with the girls, the Malaysian government offered the students a place in their schools. However, Singapore’s Prime Minister, Goh Chok Tong, warned them and other Muslims not to continue their efforts to reverse the ban or going outside the country with their campaign. He stated: “For them now to try to push the wearing of the tudung (hijab) in schools will only cause greater concern to the non-Muslims, so I would advise them to be quite cautious in this.” The Singapore hijab ban has now spread to other public institutions including hospitals and medical clinics. Opponents of the ban believe it to be in violation of Singapore’s Constitution, which guarantees freedom of religion.

Somalia has also imposed a hijab ban, even though nearly the entire population is Muslim. In February 2007, two months after the Islamic Courts Union regime was removed, the federal government imposed a hijab ban in an effort to transform Somalia into a secular state. Because of Somalia’s long history of political instability, secular government officials fear anything that may undermine their political control, and as a result, have banned hijab because they wrongly view it as a form of political expression. This push towards secularism is not limited to schools, but extends to any public space. To enforce the ban, police officers are allowed to remove the hijab from women’s heads on the street if the women refuse to remove their hijabs themselves.

Although each of the above nations has a unique history and political atmosphere, the adoption of so many hijab bans illustrates an alarming trend. Particularly troubling is that the justifications for

170. Id.
172. Id.
173. Echoes, supra note 169.
174. Id.
177. Id.
178. Id.
the bans are similar from country to country and stem from misunderstandings, ignorance, and biases towards Islam or the belief that these bans will make the country appear more "Western" and secular. In Turkey, the stated concern supporting the ban was for protecting the public morals and rights and freedoms of others. In France, it was to promote assimilation, reduce fundamentalism, and counter sexism. In Germany, the idea was to counter fundamentalism, oppression, and the refusal to assimilate. Belgium also aims to counter gender inequality and, fundamentalism, and to preserve state neutrality. For Britain, state officials claim the allowance of hijab bans is supported by safety, security, and learning concerns. In Singapore, it was to promote religious harmony. And for Somalia, it was to promote a secular state. These stated purposes all raise valid concerns, but all fail to address how the hijab would affect these concerns or hinder their efforts.

If assimilation is the goal, expelling Muslim girls from school is counterproductive. The practice alienates and discriminates against an already marginalized segment of society. If the concern is to counter extremism and protect women's rights, the ban also does not achieve its purpose because Muslim women view the hijab as something that promotes women's rights. Misguided paternalistic restrictions on a woman's right to practice her religion, especially a part of her religion that allows her to define her femininity by focusing on her mind and spirituality over her body and appearance, achieves just the opposite of the intended result. If the concern is extremism, the stated rationales are based on stereotypes, and attempts to force the removal of hijab, if anything, will lead to divisiveness. If the concern is state neutrality, singling out a particular religious group, or placing restrictions on minority groups, is anything but neutral. Such policies are simply based on misconceptions of Muslim women and Islam itself, and unfortunately, cases are now emerging in the United States.

2. The Right to Wear Hijab in American Schools

Although the United States prides itself on being protective of religious freedom, several incidents have occurred in recent years affecting the rights of Muslim students and teachers in public schools. Circumstances requiring the removal of hijab in educational settings are not as widespread in the United States as they are in other parts of the world, but nevertheless are problematic. These incidents are especially troubling because the courts have not taken a firm stance to protect the First Amendment rights of Muslim women in an era rife with post-9/11 backlash against Muslims.
a. Restrictions on Students

In the United States, the Supreme Court has never ruled on the constitutionality of hijab bans in public schools and there are currently no laws prohibiting Muslim students from wearing hijab. However, the Court’s record of religious tolerance is not perfect and there have been several incidents where Muslim girls were suspended from school for wearing hijab. With the War on Terror’s political atmosphere, increasing islamophobia, the international trend to eliminate hijab in the classroom, and recent discriminatory acts regarding the hijab in the United States, it is also not unthinkable that broader hijab restrictions may occur in the future.

On September 11, 2003, an 11-year-old Muslim girl was suspended for the second time from the Ben Franklin Science Academy in Muskogee, Oklahoma, for wearing hijab. The school officials based the suspension on the school’s dress code aimed at preventing gang-related activity by prohibiting hats and other head coverings. The school’s attorney, D.D. Hayes, explained that federal education rules do not allow for exceptions for religious beliefs. He said: “I don’t think we can make a special accommodation for religious wear” since “you treat religious items the same as you would as any other item, no better, no worse. Our dress code prohibits headgear, period.” About a month later, the student was finally allowed to return to school wearing her hijab, and the school changed its dress code to allow students to wear hijab and other religious head coverings. This dress code change occurred as a result of a negotiated six-year settlement agreement between the school district and Justice Department which was filed in the United States District Court in Oklahoma. The new policy provides that students must have a “serious” religious belief and must have a witness vouch for that belief before being permitted to wear hijab.

Similar incidents have occurred in Louisiana and California. On January 30, 2004, a world history teacher at West Jefferson High

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180. Id.
182. Id.
183. Id.
185. Wing & Smith, supra note 140, at 774.
School in Harvey, Louisiana, pulled on the hijab of a 17-year-old student and said "I hope Allah punishes you. I didn’t know you had hair under there." The teacher was later discharged and the case was never litigated. In February of 2004, a Lancaster, California, computer science professor at Antelope Valley College ordered a 19-year-old student to remove her hijab or leave the classroom. He reasoned that the hijab would block the view of other students in the classroom and became "very furious" when the student explained that the hijab was for religious reasons. The professor resigned before the school took disciplinary action against him. Also, on June 19, 2007, a lunchroom supervisor at Seaside High School in the Monterey Peninsula Unified School District, California, demanded that a 13-year-old Muslim student, Issra Omer, remove her hijab, despite her explanation that she wore it for religious reasons. Issra felt humiliated after being yelled at in front of her peers, started crying, and was too embarrassed to attend summer school the next day. She later received an apology from the lunchroom supervisor, but the school refused to issue a public apology.

At the elite Marine Academy of Science and Technology ("MAST"), which is part of the Monmouth County Vocational School District in New Jersey, Mona Elgohail, an eighth-grade honors student, was unable to attend the school because MAST would not permit her to wear hijab. The MAST program includes participation in the Naval Junior Reserve Officers Training Corps ("NJROTC"), which requires the students to wear uniforms supplied by the United States Navy twice a week. The NJROTC program was created by Congress in 1964 to promote leadership in youth and includes a curriculum in leadership and citizenship, naval history, naval operations, seamanship, navigation, maritime

187. Id.
189. Id.
190. Id.
192. Id.
193. Id.
geography, oceanography, astronomy, and military drill. When Mona received her uniform, the academy principal told her that they would “work something out.” It was later suggested that Mona wear a bandana or wig to hide her hair. After Mona’s family made a bandana to match her uniform, it was deemed unacceptable because it was still partly visible under her hat. The principal then told her that the bandana was in violation of the regulations from the Department of the Navy. The principal stated “there is nothing in the regs to provide leeway for her religious garb.” Mona’s parents were also told by the superintendent of the school that “if you want to wear a military uniform you must wear it according to the protocols” because military veterans hold great respect for the uniform and to alter it would not be welcomed. The academy permits yarmulkes, the skullcaps worn by Jewish men, to be worn, but no similar exceptions were made for the hijab. Similar situations had occurred in other parts of the country as well, which raises concerns about the ability of Muslim women to participate in the military.

Although there has not been a case in the United States determining a Muslim student’s right to wear hijab in the classroom, at least one court ruled on whether schools can prohibit students from wearing cultural headwraps. In *Isaacs v. Board of Education of Howard County, Maryland,* Shermia Isaacs, an eighth-grade student at Harper’s Choice Middle School in Maryland, wore a multicolored headwrap to school in order to celebrate her African-American and Jamaican heritage. Shermia had been wearing her headwrap outside of school for the past couple of years, and her mother, aunt, and grandmother all wear headwraps as part of their daily attire. When the assistant principal saw Shermia wearing the headwrap at school, Shermia was taken to the office and asked to remove it because it was in violation of the school’s “no hats” policy. Even after several meetings with Shermia’s mother, the school refused to allow Shermia to go to class wearing the headwrap. After missing several days of school, Shermia returned and finished the school year without wearing the

195. Id.
196. Id.
197. Id.
198. Id.
199. Id.
200. Id.
201. Id.
203. Id. at 336.
204. Id.
headwrap to class, and initiated a lawsuit contending that the “no hats” policy violated her constitutional right to free speech.\textsuperscript{205}

The United States District Court for the District of Maryland ruled that the right to wear an ethnic head covering was not a liberty guaranteed by the First Amendment or a right to be secure in her person under the Fourteenth Amendment of the Constitution.\textsuperscript{206} The court reasoned that the state’s legitimate interest in the adoption of a “no hats rule” outweighed the student’s interests to wear her headwrap.\textsuperscript{207} Although none of the following concerns were raised in the case, the court summarily reasoned that a head covering could potentially cause “a conflict in the hallways, obscure the teacher’s view, obscure (other) students’ view of the blackboard, allow students to hide contraband, and foster a less respectful climate for learning.”\textsuperscript{208} The court failed to detail specifically how such issues could emerge. The court also did not recognize other potential solutions to those problems that would not require Shermia to remove her headwrap. Instead, the court seemed to determine that the student’s interests were outweighed by hypothetical hassle to administrators, that it would be too difficult to “decide on hat-by-hat basis whether a particular hat poses sufficient danger of disruption.”\textsuperscript{209}

The test applied by the \textit{Issacs} court to determine whether the head wrap constituted protected speech under the First Amendment, whether the scarf was intended to convey a particular message, and if so, whether this message would be understood by others,\textsuperscript{210} The court reasoned that although the head wrap sends a message that the student celebrates her Jamaican and African heritage, the court did not find that the message would be understood by others.\textsuperscript{211} The student was required to finish the school year without her headwrap, but continued to wear it outside of school.\textsuperscript{212}

Although the \textit{Issacs} court determined this case as one of symbolic speech, the court did leave the door open for increased protection if additional constitutional rights were invoked, including freedom of religion.\textsuperscript{213} The court noted that invoking “hybrid constitutional protections” could possibly exempt religious

\textsuperscript{205} Id.
\textsuperscript{206} Id. at 339.
\textsuperscript{207} Id. at 336.
\textsuperscript{208} Id. at 340.
\textsuperscript{209} Id.
\textsuperscript{210} Id. at 336-37.
\textsuperscript{211} Id. at 337.
\textsuperscript{212} Id. at 336.
\textsuperscript{213} Id. at 338-39.
headgear from the school’s “no hats” policy.\textsuperscript{214} Although such a case has not yet been litigated, because government imposed hijab bans both target freedom of expression in addition to freedom of religion, they are not “neutral” towards religion and should be determined under the hybrid-rights exception. Thus, prohibiting hijab in the classroom would not fall under the lower level of review of the Free Exercise clause as described in \textit{Smith} because they are not neutral in nature and do not merely incidentally affect religious practices.\textsuperscript{215} Rather, because freedom of religion and expression are both at stake, such cases should fall under the hybrid-rights exception of \textit{Smith}, as described in \textit{Issacs}, and bans restricting hijab should not be permissible.

Another possible approach to government imposed hijab bans would be under the rule set forth in \textit{Church of Lukumi Babalu Aye v. City of Hialeah},\textsuperscript{216} where any governmental attempt to enact a ban on hijab would be required to meet the most stringent standards of strict scrutiny. In this case, the United States Supreme Court stated: “A law burdening the religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny. . . . [It] must advance interest of the highest order and must be narrowly tailored in pursuit of those interests . . . [and] will survive strict scrutiny only in rare cases.”\textsuperscript{217} So, at least in theory, Muslim students should be protected from restrictions on their right to wear hijab. However, considering the fact that \textit{Issacs} was litigated prior to September 11, 2001, and considering the subsequent hijab bans in the classroom in many parts of Europe and the increasing number of incidents in the United States, it is not clear what position the courts would take today. This is especially true considering the judicial standard for Muslim teachers that wear hijab in Pennsylvania, Oregon, and Nebraska, discussed \textit{infra}.

b. Restrictions on Teachers

Currently, three states have statutes that prohibit teachers from wearing religious garb in public school classrooms: Oregon; Pennsylvania; and Nebraska.\textsuperscript{218} Until 1998, North Dakota had a similar statute, which was repealed by the legislature because of potential First Amendment violations.\textsuperscript{219} The Nebraska statute

\begin{itemize}
  \item \textsuperscript{214} Id.
  \item \textsuperscript{215} See \textit{Smith}, 494 U.S. 872.
  \item \textsuperscript{216} 508 U.S. 520, 546 (1993).
  \item \textsuperscript{217} Id.
  \item \textsuperscript{218} NEB. REV. STAT. § 79-898 (2008); OR. REV. STAT. § 342.650 (2008); 24 PA. CONS. STAT. § 11-1112 (2008).
  \item \textsuperscript{219} N.D. CENT. CODE § 15-47-29 (2008); N.D. Legislative Branch, N.D. Legislative
criminalizes teachers wearing religious garb:

Any teacher in any public school . . . who wears, in such school or while engaged in the performance of his or her duty, any dress or garb indicating the fact that such teacher is a member or an adherent of any religious order, sect, or denomination, shall be guilty of a misdemeanor, and . . . be fined in any sum not exceeding one hundred dollars and the costs of prosecution or shall be committed to the county jail for a period not exceeding thirty days or both.220

Although all of the anti-religious garb statutes are facially neutral between religions, the history of the statutes suggests a discriminatory motivation for their enactment, especially because they impose criminal penalties. The statutes were first enacted in the nineteenth and early twentieth centuries as a result of anti-Catholic sentiment,221 but are used today to discriminate against other minority religions.

Oregon’s Revised Statute (“O.R.S.”) section 342.650 under Title 30, Education and Culture, states that “[n]o teacher in any public school shall wear any religious dress while engaged in the performance of duties as a teacher.”222 It further states in O.R.S. section 342.655 that any teacher in violation of these provisions, “shall be suspended from employment from the district school board” and the board then shall report the action to the Superintendent who “shall revoke the teacher’s teaching certificate.”223 In Cooper v. Eugene School District, decided in 1986, the Supreme Court of Oregon applied the statute to revoke a Sikh teacher’s teaching certificate because she wore a turban.224 The court found that the purpose of the statute was to maintain state neutrality and held that the statute neither violated the guarantee of religious freedom in Oregon’s Constitution, nor the First Amendment of the United States Constitution.225 The Cooper court explained that in order for the law to be valid, the statute “must be justified by a determination that the religious dress necessarily contravenes the wearer’s role or function at the time and place
beyond any realistic means of accommodation." Typically, there would have to be some sort of sectarian teaching taking place in the classroom in order to prohibit the religious dress, but the court determined that prohibiting religious garb was permissible to avoid the impression that the school approved or shared the religious beliefs of the teacher, even though wearing religious garb in the classroom does not violate the Establishment Clause of the First Amendment.

The Oregon Supreme Court in Cooper failed to recognize the difference between living in a pluralistic society, where teachers from various backgrounds can adhere to their religious beliefs, and teachers proselytizing in public schools. A teacher with religious or ethnic dress may be more neutral in the classroom than one who wears no physical indication of their religious beliefs. Instead, the court differentiated between the types of religious items that may be permissible in the classroom. The court found that impermissible religious dress is something “beyond the choice to wear common decorations that a person might draw from a religious heritage, such as a necklace with a small cross or Star of David,” even though the apparent need for neutrality in schools is “most obvious when the teacher represents the community’s dominant religion.” In other words, the Cooper court was allowing a religious decoration when it isn’t a required part of the religion and when it is “common,” even though the court acknowledged that symbols of the dominant religion require a greater need for state neutrality. The court then denied the right to wear religious dress even when it is an actual and required aspect of the minority religion and the need for state neutrality, according to the court, is less than if it were a member of a dominant religion wearing religious dress. Despite this obvious hypocrisy, state neutrality is not achieved by prohibiting religious minorities from adhering to their dress requirements. Rather, it promotes intolerance for religious minorities and leaves the impression that only certain forms of religion are acceptable in society, those that are “common” and do not require a particular form of dress. Such practices alienate both teachers and students from minority religions. This is especially true when permitting Christian crosses and Jewish Stars of David, while prohibiting Sikh turbans or Muslim hijab.

Pennsylvania also has a religious garb statute that prohibits

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226. Id. at 307.
227. Id. at 308.
228. Id. at 312.
229. Id. at 310.
teachers from wearing religious garb while teaching. The garb statute provides:

No teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member of adherent of any religious order, sect or denomination.

Violations of the provision may result in suspension from employment for one year, and a five-year suspension upon a second violation. Those who violate the statute may also be guilty of a misdemeanor and fined. The statute's legislative history yields the justification that "it is important that all appearances of sectarianism should be avoided in the administration of public schools of this Commonwealth." In 1990, the Third Circuit, in United States v. Board of Education for the School District of Philadelphia, upheld the Pennsylvania religious garb statute, after it was challenged by a Muslim teacher who was fired for wearing hijab. Alima Delores Reardon wears hijab and was a full time substitute teacher in the Philadelphia School District. Reardon was turned down three times when reporting for duty as a substitute because of her hijab. Reardon brought her case under Title VII, but the Third Circuit relied heavily on First Amendment claims made in Cooper. The court held that because the statute permissibly aided a compelling state interest in maintaining an appearance of neutrality in the classroom, hijab was not permitted in the classroom. At the same time, the court admitted that children would rarely be "sufficiently knowledgeable to recognize which religion" the "sufficiently unusual" garb belonged to, except for some Muslim children that recognized that Reardon's attire was Islamic.

Although the Third Circuit acknowledged that the Cooper court held that wearing religious garb in the classroom did not violate the Establishment Clause of the First Amendment because more is needed to constitute "forbidden sectarian influence in the

231. Id.
232. Id.
233. Id.
235. Id.
237. Id. at 890.
238. Id. at 890-91.
classroom," the court determined that it need not conclude on this point since an Establishment Clause claim was not brought in the suit. Nevertheless, the court prohibited Reardon from teaching while wearing hijab because of state neutrality concerns. Thus, like Cooper, the court rejected Reardon’s right to wear hijab even though it did not find that accommodating her religion would violate the Establishment Clause.

The School District of Philadelphia decision was narrowed in 1991 when the U.S. District Court for the Eastern District of Pennsylvania in EEOC v. Reads, Inc., held that “colorful headscarves” were not “religious garb” within the understanding of the Pennsylvania statute since they are not obviously religious. The facts in Reads, Inc. involved Cynthia Moore who was interviewing for a position as a third-grade counselor when her interviewer was “struck” by her head covering and “suspected” that she was Muslim. When the interviewer asked Moore how she would respond if students asked her about her head covering, she responded that she would tell them that it was a matter of personal choice. Like the other religious garb cases, there was no evidence presented in Reads indicating that Moore’s hijab would in any way interfere with her teaching position or have any influence on the children.

In coming to its conclusion in Reads Inc., the court recognized that “religious garb” has not been sufficiently defined. Thus, the court divided the types of religious garb into several categories: (1) facially religious garb worn for religious reasons; (2) garb worn for religious purposes that is perceived to be religious; and (3) religious garb that is not recognized as religious. The court determined that this third category will not constitute “religious garb” for purposes of the statute. Thus, in order to gain a favorable judgment and be permitted to wear hijab in Philadelphia, Moore had to argue that her hijab was not “religious garb” and that she wore it in “an attempt to accommodate” her religion, not practice her religion. She essentially had to prove that her hijab was inadequate for her religion and would not sufficiently identify her as a Muslim. The court then concluded that Moore’s hijab was

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239. Id.
242. Id.
243. Id.
244. Id.
245. Id. at 1158.
246. Id.
247. Id.
248. Id.
not religious garb because it did not necessarily indicate her religion.\textsuperscript{249}

According to \textit{Reads Inc.}, in order to maintain religious neutrality and determine whether the teacher's dress constitutes "religious garb," the inquiry rests on how the dress is perceived by others, not the teacher's reasons for wearing hijab.\textsuperscript{250} The court made arbitrary distinctions between individual styles of hijab by suggesting that colorful hijabs would likely be permissible because they stereotypically look less Muslim. Although there are different concerns at stake, this reasoning is also contradictory to the court's reasoning in \textit{Isaacs}, where the court denied a student the right to wear a cultural headwrap to school on the basis that her peers would not understand the message that she celebrates her Jamaican and African heritage.\textsuperscript{251} In other words, in order for a teacher to be permitted to wear hijab, the hijab must not appear to be religious; but if the inquiry involves a student, the religious or cultural significance must be understood. In 2003, the same court, the United States District Court for the Eastern District of Pennsylvania, provided that dress codes prohibiting crosses or Stars of David in the classroom are unconstitutional because they violate the First Amendment's Free Exercise Clause and there is no compelling state interest sufficient to require removal.\textsuperscript{252} Thus, as the law stands today in Pennsylvania, some religious groups are permitted to wear religious items that are undisputedly religious in nature, but Muslims are not unless the item hides the fact that they are Muslim. It appears that the right to wear religious dress is not guaranteed in public schools, at least for Muslim students and teachers in some states.

B. Employment Discrimination on the Basis of Hijab

Employment issues surrounding hijab have emerged in a variety of settings. Not only do many Muslim women face obstacles when seeking a job, but there are also challenges once a job is attained. Such issues have emerged in a variety of fields including law enforcement, private security, firefighting, retail, and office settings.

\textsuperscript{249} \textit{Id.} at 1160.
\textsuperscript{250} \textit{Id.}
\textsuperscript{251} \textit{Isaacs}, 40 F. Supp. 2d 335
\textsuperscript{252} \textit{Id.}
1. Title VII

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination, including on the basis of religion, for both public and private employers.\(^\text{253}\) Title VII states:

It is an unlawful employment practice for an employer
(1) to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of the individual's race, color, religion, sex, or national origin.\(^\text{254}\)

A violation of Title VII is demonstrated if the plaintiff can prove that she falls within a protected category, including religion, and that protected category was used as a "motivating factor" in an adverse employment practice, even if other factors were considered.\(^\text{255}\) There are limited exceptions where distinctions based on the protected categories are permissible. For example, employers are allowed to make distinctions if there is a "bona fide occupational qualification" that is reasonably necessary for the position.\(^\text{256}\)

Title VII affirmatively requires employers to accommodate religious practices. Title VII defines "religion" as including "all aspects of religious observance and practice, as well as belief, unless the employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Thus, the law requires employers to make reasonable accommodations for religious practices that do not impose more than \textit{de minimis} costs on the employer.\(^\text{257}\)

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\(^{253}\) 42 U.S.C. §§ 2000e-16 (2007). (prohibiting employment discrimination by the federal government), 200e(a) (stating that the statute applies to local and state governments), 200e(b) (defining "employer" to include any company that affects commerce and has at least fifteen employees for twenty or more weeks in the current or proceeding year).

\(^{254}\) Id. § 200e-2(a).


Title VII cases fall into two main frameworks: disparate treatment and disparate impact. Disparate treatment employment discrimination cases concern incidents of intentional discrimination. The 1973 United States Supreme Court decision, *McDonnell Douglas Corp. v. Green*, crafted the analytical framework for disparate treatment cases.\(^{258}\) The complainant carries the initial burden of establishing a prima facie case of discrimination.\(^{259}\) In order to create an inference of discrimination, the complainant must establish: (1) that he/she belongs to a category protected by Title VII; (2) that he/she applied for and was qualified for a job for which the employer was seeking applicants; (3) that despite his/her qualifications, he/she was rejected; and (4) that after the rejection, the position remained open and the employer continued to seek applicants from person's of complainant's qualifications.\(^{260}\) Although this formula deals with refusal to hire, the Court noted that the *McDonnell Douglas* rule would need to be extended to different fact situations such as discharge or refusal to promote.\(^{261}\) Once a plaintiff has established a prima facie case of discrimination, no further demonstration of employer intent to discriminate is necessary. The burden will then shift to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."\(^{262}\) Once the employer has articulated a non-discriminatory reason, the plaintiff must show that the reason provided by the employer was not legitimate and not nondiscriminatory, but was "pretextual," that is, meant to cover up the real discriminatory motivation in order to prevail on the claim.\(^{263}\)

Unlike disparate treatment cases, disparate impact actions under Title VII involve situations where "practices are fair in form, but discriminatory in operation" towards a member or members of a protected class.\(^{264}\) This often occurs when employers adopt testing devices or educational requirements that screen out the plaintiff or persons of a protected category from hiring, promotions, or employment benefits. In *Griggs v. Duke Power Co.*, the Supreme Court determined that in order to make a prima facie case of discrimination for practices that are neutral on their face, the plaintiff must show, that in effect, the practice operates to disproportionately bar members of plaintiff's class from

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\(^{258}\) 411 U.S. 792 (1973).
\(^{259}\) *Id.* at 802.
\(^{260}\) *Id.*
\(^{261}\) *Id.* at 800.
\(^{262}\) *Id.*
\(^{263}\) *Id.* at 804.
employment. Such disparities are mostly proven with statistical evidence. Once a prima facie showing is made, the burden is then on the defendant to show that the challenged practice is “job related for the position in question and consistent with business necessity.” Once the defendant has put forward such evidence, the plaintiff then has the opportunity to show that the employer’s practice was not job related. The plaintiff can also prevail by demonstrating that an alternative procedure would have achieved the same result with a less discriminatory effect.

2. Case Law

Despite established case law, American courts have not always properly applied Title VII standards to cases dealing with Muslim litigants. In *Wiley v. Pless Security Inc.*, a Muslim woman wearing hijab was employed as a security guard at the Georgia Department of Revenue (“GDR”). Wiley quit after the GDR prohibited the wearing of headgear for uniformed security guards and told Wiley that they would demote and transfer her to another location because she wore hijab. The GDR reasoned that Wiley’s “turban disturbed the people at the GDR.” Wiley filed a discrimination claim based on religion under Title VII. The United States District Court for the Northern District of Georgia ruled for the defendant on two bases. First, the court stated that it was “hesitant to impute discriminatory animus to statements made in the course of attempts to accommodate an employee’s religious practice.” These “accommodations” the court referred to consisted of demotion and transferring the plaintiff to another location. Second, the court held that because the plaintiff resigned, she could not prove an adverse employment action, despite the threatened demotion if she continued to wear hijab.

The court’s decision in *Wiley* failed to recognize that demoting and transferring the plaintiff to another location because of the biases of other employees at the GDR, is not an accommodation of

265. Id.
269. Id. at *1-2.
270. Id. at *2.
271. Id. at *1.
272. Id. at *2.
273. Id. at *2-3.
274. Id. at *3.
religious practices, but an accommodation of religious intolerance. It is an adverse action made on the basis of religion and is just the type of "motivating factor" that Title VII seeks to prohibit. The defendants also could not show that the removal of hijab was a business necessity; there was no evidence indicating that Wiley's hijab affected her ability to do her job or imposed any cost, let alone an unreasonable cost, to the employer. The court's ethnocentricity was evident in its continued references to the plaintiff's hijab as a "turban."

A similar case occurred regarding a police officer's right to wear hijab while in uniform. In August of 2003, a Muslim police officer, Kimberlie Webb, faced dismissal for wearing her hijab while on duty as a police officer in Philadelphia. The recently divorced mother of six had worked for the police force for eight years before converting to Islam. Webb began wearing hijab outside of work only, because when she discussed her desire to wear hijab at work in 1998, her supervisor immediately dismissed the issue. On February 11, 2003, Webb sent a memorandum to her commanding officer, requesting permission to wear hijab while in uniform pursuant to her religious beliefs. The captain denied her request citing Philadelphia Police Department Directive 78, which describes police uniforms. Webb left the matter alone for about six months, but on August 12, 2003, she came to work wearing hijab and the lieutenant on duty asked her to remove it, a request that Webb refused. She was then reprimanded and sent home without pay until she agreed to remove her hijab while at work. Webb returned to work the following two days wearing hijab, and when she declined to remove it, she was again sent home. Thereafter, she returned to work without wearing hijab, but faced disciplinary charges for insubordination and neglect of duty for refusal to remove her hijab on August 13 and 14, 2003. The disciplinary charges against Webb resulted in her suspension from work for thirteen days.

Webb filed a charge with the Equal Employment Opportunity Commission.

276. Id.
277. Id.
279. Id.
280. Id.
281. Id.
282. Id.
283. Id.
284. Id.
Commission ("EEOC") and subsequently a lawsuit alleging religious discrimination under Title VII and retaliation. In order to establish a prima facie case of religious discrimination, Webb demonstrated that: "(1) she holds a sincere religious belief that conflicts with a job requirement; (2) she informed her employer of the conflict; and (3) she was disciplined for failing to comply with the conflicting requirement." The burden then shifted to the city to show it "made good faith efforts to accommodate, or that the requested accommodation would work an undue hardship." The City conceded that it offered no reasonable accommodation, but argued that the police department would suffer undue hardship if it were required to accommodate Webb's religious beliefs.

In Webb v. City of Philadelphia, the United States District Court for the District of Philadelphia held that the City demonstrated a compelling non-discriminatory reason and would suffer undue hardship if required to accommodate Webb by allowing her to wear her hijab with her uniform. The court reasoned that Directive 78 "promote[s] the need for uniformity," and "enhances cohesiveness, cooperation, and the esprit de corps of the police force," yet the court did not indicate just how Webb's hijab would hinder these goals. In addition, the court explained that "prohibiting religious symbols and attire helps to prevent any divisiveness on the basis of religion both within the force itself and when it encounters the diverse population of Philadelphia" because it promotes "religious neutrality." However, this reasoning rests on the unsupported assumptions that diversity in the police force will automatically lead to conflict and that prohibiting the religious practices of minority religions would promote neutrality, rather than hinder it. The court cited the problematic decision in United States v. Board of Education, where the Third Circuit Court of Appeals held that a Muslim teacher could not wear hijab under Pennsylvania's Garb Statute. The court also reasoned that the case was distinguishable from Fraternal Order of Police v. City of Newark, where the Third Circuit held that a policy prohibiting the wearing of beards for religious reasons violated the free exercise clause of the First Amendment. The court distinguished that case because unlike the policy in

285. *Id.* (citing Shelton v. Univ. of Medicine & Dentistry of New Jersey, 223 F.3d 220, 224 (3d Cir. 2000)).  
286. *Id.* at *2.  
287. *Id.* at *3.  
288. *Id.* at *5.  
289. *Id.* at *4.  
290. *Id.*  
291. 911 F.2d 882 (3d Cir. 1990).  
292. 170 F.3d 359 (3d Cir. 1999).
Fraternal Order of Police, which made secular exceptions to uniform and grooming standards and therefore had to permit religious exceptions for men with beards, Directive 78 made no official secular exceptions, even though it made unofficial religious exceptions where other police officers in Webb wore crosses on their lapels and religious necklaces with their uniforms without discipline. The court explained that because Webb could not show that supervisors condoned or were aware of the unofficial religious exceptions, the City's motion for summary judgment was granted.

In contrast to the cases discussed above, the case of Stacy Tobing, a Montgomery County, Maryland, firefighter and paramedic, provides an example of successful negotiation of a religious accommodation. Tobing was placed on administrative leave by her employer, the Montgomery County Fire and Rescue Service, after she began to wear hijab to work. Tobing's supervisors cited safety concerns for the hijab restrictions, fearing that in an emergency or fire, someone might pull off her hijab. Acknowledging that these were valid and important concerns, Tobing had already showed her supervisors a special hijab with Velcro that ripped away when pulled and demonstrated that she could take her scarf off in seconds if necessary. She was willing to make the exception for emergency purposes. After being placed on administrative leave, Tobing involved the Council on American-Islamic Relations ("CAIR"), a Muslim civil-rights group, and proposed a fire-retardant hood. Tobing's supervisors finally agreed that she could wear a navy blue or white hijab while on duty, and could replace it with a fire-retardant hood and helmet in the event of a fire. This incident demonstrates that it is possible to find creative solutions that meet the concerns of both parties, without hindering religious practice.

Another area where hijab removal cases have emerged is in relation to department store dress preferences. In Mohammed v. May Department Stores, an applicant for a sales position filed an action against the department store for refusal to hire on the basis of religion. Najat Mohammed, a United States citizen, was interviewed for a full-time sales associate position with the

294. Id.
296. Id.
297. Id.
298. Id.
When Mohammed explained that she wore hijab for religious reasons, she was asked to return the next day for an interview with the defendant's human resource manager. The next day, Mohammed was told by the human resource manager that wearing a scarf violated the store's dress code policy and was a safety hazard. Defendant did not hire Mohammed. She thereafter filed a charge with the Delaware Department of Labor ("DDOL") and the EEOC on November 2, 1999. The EEOC then filed an action against the defendant.

After September 11, 2001, Mohammed returned to Saudi Arabia. Subsequently, May Department Stores demanded to depose her. The EEOC requested a telephonic deposition because of the difficulty of traveling back to the United States due to Saudi cultural limitations and restrictions imposed upon Mohammed, but the defendant refused. The EEOC then attempted settlement discussions, and agreed to waive the claim in order to recover its costs and stipulated to a dismissal with prejudice because they could not guarantee that Mohammed would appear at her deposition on April 17, 2002. Mohammed arrived back in the United States on April 18, 2002, but was no longer permitted to continue her action. She then filed an action in court contending that the EEOC did not adequately represent her interests and that she was not in privity with the EEOC because she was not in control of the litigation. However, Mohammed's action was dismissed by the United States District Court for the District of Delaware on the basis of res judicata.

Salient about the Mohammed case is the fact that the court dismissed her case challenging the EEOC's handling of the matter in putting its costs before her legal rights. Mohammed returned to Saudi Arabia after September 11, 2001, when the backlash against Muslims skyrocketed and stereotypes about Muslim women were perpetuated pursuant to liberation propaganda. After multiple attempts to return back to the United States for her deposition, she

300. Id. at 532-33.
301. Id. at 533.
302. Id.
303. Id.
304. Id.
305. Id.
306. Id.
307. Id. at 533-34.
308. Id.
309. Id. at 536.
310. Id. at 537.
finally arrived back in the United States, thirty-six hours after her scheduled deposition. That thirty-six hour difference determined the fate of her claim.

Other incidents have emerged requiring the removal of hijab because of work dress codes, but have not yet been litigated. In Florida, Danine Hammond, an employee of the Housing Trust Management Company, was told that she could not wear hijab on the job.311 Hammond arrived for her first day of work in August 2004 as a leasing agent for the company, wearing hijab. Hammond wore her hijab during the interview for the position without incident, but when she arrived wearing hijab she was told, “You cannot work here dressed like that” and was sent home.312 The company policy required employees to wear a uniform consisting of a short-sleeved shirt and pants, and Hammond was told that she could not wear her hijab along with the uniform.313 She lost her job as a result. Hammond remembers being in shock when she was told this and stated, “I went home bawling my eyes out.”314

A similar incident occurred at Walt Disney World. In May 2004, Aicha Baha was told she would not be permitted to wear hijab while working in sales and as a bellhop for the Disney Caribbean Beach Resort after returning from maternity leave wearing hijab.315 Disney policy requires that employees only wear Disney hats and visors unless working in a position out of the public view. Baha was willing to wear Disney attire over her scarf.316 However, Disney would not permit her to work in public view, and removed her to the “backstage.”317 Baha stated that she would not be humiliated by being demoted to the backstage because of her religion.318 Here, it is difficult to see how wearing a Disney visor over a hijab or wearing hijab with the uniform would constitute an undue hardship. These two incidents have yet to be litigated, but represent the types of issues Muslim women face in the workplace.

Under a Title VII analysis, to establish a prima facie case of religious discrimination, a plaintiff must show: (1) that they are a member of a protected religious class; (2) that they hold a sincere

312. Id.
313. Id.
314. Id.
315. Id.
316. Id.
317. Id.
religious belief that conflicts with a job requirement; (3) that the employer was informed of the conflict; and (4) that they were disciplined for failing to comply with the conflicting requirement. The burden would then shift to the employer to show that they made good faith efforts to accommodate the plaintiff, or that an accommodation would constitute undue hardship. In all these employment religious discrimination cases involving hijab, the plaintiffs were able to show a prima facie case of discrimination and that accommodations would not impose undue hardship on the employers. Yet, despite this showing, in all cases, the courts deferred to the employers.

C. Hijab Prohibitions During Prison Visits and Periods of Incarceration

Prison entry is another area where the courts have not ruled to protect a Muslim woman’s right to wear hijab. Both prison visitors and inmates have litigated cases, but none have prevailed.

In Rhouni v. Wisconsin Department of Corrections, Cynthia Rhouni took her son to the Columbia Correctional Institution in Wisconsin (“CCC”) to visit his father. At CCC, Rhouni was informed that she would have to remove her hijab in order to enter pursuant to Wisconsin Administrative Code, Department of Corrections (“DOC”) 309, Internal Management Procedures (“IMP”) 11, the section detailing the identification and dress code policy, which prohibits visitors from wearing hats or other headgear. To no avail, Rhouni explained that she wears hijab for religious reasons and explained how her son was having personal problems and needed to see his father. Rhouni even offered to remove her hijab in the presence of a female guard to ensure that she was unarmed and not carrying any contraband. However, prison officials denied her request. Officials required Rhouni to leave her hijab with the male guard at the front desk for the entire visit, even though she would then appear in front of male guards, visitors, and the inmates without her hijab, in violation of her religious beliefs. Rhouni recalled, “I felt naked. I felt I disgraced my family and my

320. Id.
322. Id.
323. Id.
324. Id.
After the incident, Rhouni brought a lawsuit under 42 U.S.C. § 1983 against the Wisconsin DOC for violations of her constitutional rights. The United States District Court for the Western District of Wisconsin granted the defendant’s motion for summary judgment, based on Eleventh Amendment sovereign immunity, which bars suits against the state and its agencies.

Despite the court’s ruling, on June 15, 2005, the secretary of DOC policy agreed to change the visitation policy of CCC to allow visitors to wear religious head coverings, as long as it would not conceal their identity. The new policy does not even require the removal of hijab prior to clearing the metal detector at CCC.

While this is a great achievement for Rhouni and other Muslims and religious minorities who wish to visit the prison, the policy change was the result of the secretary’s efforts, not the enforcement of the court. The Rhouni court avoided the merits of the case entirely and did not, even in dicta, discuss the constitutional importance of accommodating a person’s religious beliefs.

In Sihlangu v. Hollar, the United States District Court for the Western District of Virginia addressed a similar prison policy denying Muslim women visitors of their right to wear the religiously required “hejab” during prison visits. The case also addressed the right of Muslim males to wear the religiously recommended kufi. Abdullah Sihlangu, an inmate and the Imam of the Muslim prison population, filed an action pro se on January 15, 1992, under 42 U.S.C. § 1983 seeking injunctive relief to protect himself and other Muslims from numerous instances of discriminatory treatment at the Staunton Correctional Center (“Staunton”) and the Virginia Department of Corrections. Sihlangu alleged that Staunton gave state aid to Christian activities while not providing the same support to other religious functions, that correctional officers refused to recognize Muslim names, and that Staunton took away facilities used by Muslims at the prison for religious services. In addition, Sihlangu opposed the prison requirement that Muslim women were forced to remove their hijabs.

325. Id.
327. Id. at *5-6.
329. Id.
331. Id. at *1. (A kufi is a brimless, short, rounded cap worn by some Muslim men).
332. Id. at *1-2.
333. Id.
while visiting, while Mennonite women were permitted to wear their religious bonnets.\textsuperscript{334}

While the action was pending, Sihlangu sought preliminary injunctive relief of the hijab ban in order to allow his family and other Muslim visitors to visit the prison during the Muslim religious holiday \textit{Eid Al-Fitr}.\textsuperscript{335} Sihlangu argued that requiring removal of hijab at Staunton was "not permissible under their own Operating Procedures," which did not include any provision forcing visitors to remove religious head coverings.\textsuperscript{336} However, the judge denied plaintiff's preliminary injunction on the basis that the plaintiff would not be subjected to "irreparable harm in the absence of such relief" if his family was not allowed to visit for the religious holiday.\textsuperscript{337}

When Sihlangu was released on discretionary parole, the defendants moved for summary judgment on the basis that his claims for injunctive relief were now moot.\textsuperscript{338} The court recognized that parole does not necessarily moot an action. The issue is whether "the injunctive relief requested will redress an ongoing injury to the plaintiff in light of the fact that he is no longer incarcerated."\textsuperscript{339} Because Sihlangu was the Imam and would visit inmates regularly, the court concluded that his action was an ongoing controversy and referred the case to a Magistrate Judge.\textsuperscript{340} However, the court denied plaintiff's motion for class certification for twenty-seven other Muslim prisoners who sought to intervene because Sihlangu was a pro se plaintiff and lacked standing to represent the class because he was on parole and thus did not have claims "typical" of those of the putative class.\textsuperscript{341} Although the court did not determine the permissibility of hijab in prisons, it effectively dissolved the action because Sihlangu would no longer have female Muslim visitors.\textsuperscript{342}

In two cases dealing with wearing hijab while incarcerated, the courts have denied the rights of Muslim women to wear hijab. In \textit{Safouane v. Fleck}, Sarah Safouane was incarcerated as a pretrial detainee for obstruction because she would not release her baby to officers in a custody battle.\textsuperscript{343} Safouane alleged that King County,
Washington correctional officers violated her First Amendment right to free exercise of religion because she was not allowed to wear hijab while in jail.\textsuperscript{344} The United States District Court for the Western District of Washington, granted summary judgment for the State and the Ninth Circuit Court of Appeal upheld that decision.\textsuperscript{345} The court held that in order to establish a free exercise claim, the inmate must show that the correctional officers "burdened the practice of [her] religion, by preventing [her] from engaging in conduct mandated by [her] faith, without any justification reasonably related to legitimate penological interests."\textsuperscript{346} Notably, the penological interests of the state were not discussed in the court's opinion, and deferring to the state, the court explained that the state "does not have to present evidence to support its proffered penological interest" when "the inmate does not present enough evidence to refute a common-sense connection between a prison regulation and the objective that government's counsel argues the policy was designed to further."\textsuperscript{347} In addition, the court stated that the inmate must offer an "obvious, easy alternative that fully accommodates their rights at de minimis cost to penological interests."\textsuperscript{348} 

Although Safouane did not explicitly challenge the connection between the prison regulation and wearing hijab, she did provide the court with an alternative arrangement, that she only be handled by female prison guards.\textsuperscript{349} Not only would this address some of her modesty concerns without affording additional costs to the defendant, but it would also afford her beliefs some respect, even if it did not fully accommodate them. In yet another instance of judicial ethnocentrism, the court expressed that it did not see how being handled by female prison guards would have relevance to the hijab policy.\textsuperscript{350} 

There appears to be some disconnect between Safouane's proposed arrangement and the court's reasoning on the issue. Depending on the layout of the prison, it may very well be that having Safouane handled by female prison guards would minimize, or even negate the possibility of her being visible to male guards while she is not wearing her hijab. She might have also been concerned with other modesty concerns in Islam, whereby it is inappropriate for non-mahram males to make physical contact with

\textsuperscript{344} Id. at *7.  
\textsuperscript{345} Id.  
\textsuperscript{346} Id.  
\textsuperscript{347} Id. at *8.  
\textsuperscript{348} Id.  
\textsuperscript{349} Id.  
\textsuperscript{350} Id.
her or restrain her. In addition, other possible arrangements could have been available if the state provided reasons for its hijab concerns, especially because she was merely a pretrial detainee and not a prisoner. If the concern was safety, perhaps she could have been segregated. This would impose minimal cost because she was detained for short duration. However, the court did not address any of these concerns or options.

A similar incident occurred in Pennsylvania, but the court declined to decide whether requiring the removal of hijab while incarcerated because of a mistake violated the First Amendment. In Shabazz v. Nagy, Feheemah Shabazz was driving her mother's new car when she was pulled over by a Philadelphia police officer because the temporary license tag on her car had expired. After the officer called the appropriate authorities by radio, she was told that the tag on the vehicle was reported stolen and took Shabazz into custody. After consulting with Shabazz's parents and the automobile agency that issued the tag, it was clear that Shabazz was entirely innocent of all charges because a mistake had been made. Despite the error, Shabazz remained in custody overnight and was not allowed to wear her hijab, even though she was visible to male persons, in violation of her religious beliefs. Shabazz brought an action against the arresting officers and other police personnel based upon her First, Fourth, and Fourteenth Amendment Constitutional rights. The police officers moved for summary judgment.

The United States District Court for the Eastern District of Pennsylvania granted defendant's motion for summary judgment because the initial stop was justified and the officer had probable cause for the arrest. The court reasoned that "even if it were to assume that plaintiff's right to free exercise of her religion, guaranteed by the First Amendment, was somehow violated when plaintiff was briefly exposed to the view of males without her head covering — an issue I find it unnecessary to decide — none of the named defendants were involved in the alleged violation." The Court found it insufficient to hold defendants liable for First Amendment violations based on the arrest because the arrest was "merely a background circumstance, not a proximate cause of the

352. Id.
353. Id.
354. Id.
355. Id.
356. Id.
357. Id. at *2.
358. Id.
alleged violation."  

Based on the decisions above, the rights of Muslim women visiting prisons and incarcerated Muslim women have not been protected from regulations requiring the removal of hijab. In each case, the court evaded a decision on the merits regarding the permissibility of hijab in prisons, and dismissed on other bases. The courts, in each case, did not acknowledge the importance of accommodating religious beliefs, the emotional and dignitary harms suffered by the plaintiffs, or the possibility of a good faith interactive process to find a compromise.

D. Hijab Prohibitions in Driver License Photos

After receiving several reports from Muslim women who were unable to receive or renew their driver licenses because they wore hijab, CAIR and hundreds of Muslims from across the nation, called on the Alabama Department of Public Safety ("DPS") to review their policy banning all head coverings in state driver license photos.  

Muslim women who wore hijab could not receive their licenses because DPS required them to remove their scarves while being photographed. Not only would these women be required to remove their hijab while being photographed, but the picture of them without their religious scarf would be seen every time they had to show their state-issued identification cards. On February 23, 2004, Muslim women in Alabama won the right to wear hijab in their driver license photos. However, this victory, which was long overdue, did not come through a court ruling.  

Alabama’s new policy requires “full-face” driver license photos. It states that “head coverings or headgear are only acceptable due to religious beliefs or medical conditions, and even then, may not obscure any portion of the applicant’s face.” The new policy went on to further describe what must be shown: “the head of the applicant shall be shown from the top of the forehead to the bottom of the chin and from hairline side-to-side.” The policy also states that “a photograph shall not be taken depicting a person wearing a traditional facemask or veil that does not permit positive identification.” Thus, although the new Alabama policy permits

359. Id.
361. Id.
362. Id.
363. Id.
364. Id.
hijab, it does not permit *niqab*, the form of hijab worn by some Muslim women where the face is covered with the exception of the eyes.

The *niqab* policy for driver license photos was litigated in *Freeman v. State of Florida*.[365] In February of 2001, Sultaana Freeman was issued a driver license wearing full *niqab* in her photo.[366] A few months after September 11, 2001, the Florida Department of Highway Safety and Motor Vehicles ordered Freeman to retake her photo without her *niqab*.[367] When she refused, Freeman's license was revoked.[368] Freeman believed that Islam mandates that she wear a *niqab*, and the Department of Corrections was "clearly making her choose between violating her religious tenets or sacrificing her driver license."[369] Freeman brought a lawsuit under Florida's Religious Freedom Restoration Act ("FRFRA")[370] and under the Equal Protection Clause of the federal Constitution based on the fact that the Department of Motor Vehicles ("DMV") had permitted eight hundred thousand photo-less driver permits and had allowed people to wear wigs, beards, cosmetics, and glasses in their license photographs.[371] In *Freeman*, the court considered whether the state had a compelling interest that outweighed the right to wear *niqab* in driver license photos.[372] The court held that the plaintiff failed to show that the photo requirement "substantially burdened her free exercise of religion" and dismissed her equal protection claim based on the fact that the DMV had records of previous photos for photo-less licenses, enabling identification of the license-holder if necessary.[373] However, the DMV also had a previous photo of Freeman without *niqab* from before she converted to Islam. Although *Freeman* was a difficult case because the plaintiff's face was mostly covered in her new photo, it is important

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367. *Id.*
368. *Id.*
369. *Id.*
370. Florida's FRFRA under section 761.03, Florida Statutes (2003), provides: "(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (a) Is in furtherance of a compelling governmental interest; and (b) Is the least restrictive means of furthering that compelling governmental interest." FLA. STAT. § 761.03 (2003).
371. *Id.*
372. *Freeman*, 924 So. 2d at 52.
373. *Id.*
to note that Freeman was permitted to have a license photo wearing *niqab* prior to September 11, 2001.

The *Freeman* decision relied on so-called experts on the Islamic faith. The DMV's expert discussed exceptions to the hijab requirement on the basis of "necessity," citing examples such as that of medical necessity and identification for burial purposes. In his opinion, he indicated that such exceptions may apply to state photo requirements. He also referred to Saudi Arabian laws requiring full-face photographs for identification purposes for passports and exam-taking. The court then reasoned that the photo requirement "merely inconvenienced" Freeman's religious practices and that "her religion does not forbid all photographs."

In contrast to *Freeman*, there have been a series of cases where courts have ruled *against* states requiring photos on licenses in violation of one's religious beliefs when dealing with Christian plaintiffs. For example, in *Quaring v. Peterson*, the Eighth Circuit acknowledged the importance of the state's interest in the photo requirement, but nevertheless held that such requirements were not so compelling and could not "unduly burden" First Amendment rights for the free exercise of religion when there was a sincere belief. In *Quaring*, the state of Nebraska required all driver licenses to contain a color photograph, but made exceptions for learner's permits, school permits, farm machinery permits, special permits for those with restricted and minimal driving ability, and temporary licenses for residents outside of Nebraska when their licenses expire. Quaring refused to have her license photo taken because as a member of the Christian Pentecostal Church, she believed that the Second Commandment forbids photographs or images of God's creations. The Eighth Circuit recognized that although the plaintiff's religious beliefs were not the same as mainstream Christianity because they were based on her own literal interpretations of portions of the Bible, under the First Amendment analysis, the beliefs to be considered were the subjective beliefs of the individual. Furthermore, the Eighth Circuit ruled that because the state allowed certain photo-less exceptions to the statute, the argument regarding a public safety need to accurately

374. Id.
375. Id.
376. Id.
377. Id. at 57.
378. Quaring v. Peterson, 728 F.2d 1121, 1126 (8th Cir. 1984).
380. Quaring, 728 F.2d at 1123.
381. Id. at 1124-25.
and efficiently identify persons was not an adequate state interest. Similarly, in Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., another case involving Christian members of the Pentecostal Church who believed that the Second Commandment prohibited the taking of photographs, the Indiana Supreme Court ruled that because alternative identification methods were available to maintain safety, the state interest in public safety was not enough to burden religious freedom. The court reasoned that when the free exercise of religion conflicts with federal legislation, "such right may be overbalanced only by those governmental interests 'of the highest order and those not otherwise served.'"

The reasoning of the court in Freeman is problematic for several additional reasons. First, as previously discussed, there are many interpretations of Islamic principles and one expert's opinion may not reflect the religious beliefs of other Muslims. Freeman's expert even testified that the Islamic exceptions did not apply to state license photographs. It is a vast leap of logic for an individual to infer that because Islam makes exceptions for medical necessity and identification for burial purposes in addition to a few other exceptions, that such exceptions extend to DMV photo requirements. Second, the court should not have considered Saudi Arabia's practices to support the idea that photo requirements in the United States should be required. The social and cultural aspects of Saudi Arabian society and American society are incomparable. It is also overly simplistic to assume that Saudi practices would necessarily adhere to Islamic principles, or Freeman's religious beliefs. Freeman is an American convert to Islam, and has no connection to Saudi Arabia or its practices. Finally, the court was in no position to decide what Freeman's religion required. When dealing with Christian plaintiffs in Quaring and Pentecostal House of Prayer, the court did not look to mainstream Christianity to determine whether the religion prohibited photographs, it looked to the individual plaintiff's beliefs. The courts deciding the cases of Muslim women seemingly abandoned the Supreme Court's reasoned caveat that "it is not within judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."

382. Id.
384. Id. at 1227.
385. Freeman, 924 So. 2d at 52.
386. Smith, 494 U.S. 887.
E. The Transportation Security Administration and Mandatory Hijab Searches

Airport security measures have been one of the most accepted and one of the most intrusive practices regarding the removal and search of hijab. While the maintenance of airport security is important, many of the security practices have been arbitrarily enforced without cause. For example, on November 7, 2001, 23-year-old Samar Kaukab, a United States citizen, was traveling to her home in Columbus, Ohio, after attending a conference for her job at Volunteers In Service to America ("VISTA") in Chicago. Kaukab was selected out of a group of airline passengers and subjected to several invasive searches. After clearing the metal detector without setting it off, security staff stopped and searched Kaukab multiple times with a hand-held metal detector, including her head. After a discussion among security, they conducted another search with the detector down Kaukab's legs and around her crotch area before proceeding to a pat-down Kaukab, pulling on her bra straps and asking her to lift her sweater. After no signals by the metal detector or other indications that a further search was needed, the security officials insisted that Kaukab remove her hijab which she refused to do in public and in front of men. After a lengthy discussion, the security officials agreed to take her to a back room where one of the male guards insisted that he search her in the presence of female guards. Kaukab refused until a female guard conducted the search. During the search, the female guard required her to remove her hijab and ran her fingers through Kaukab's hair and along her scalp, neck, and back. The guard conducted a complete body search where she pulled on her bra straps, opened her sweater, patted her breasts underneath her bra, unbuttoned and unzipped her pants revealing her underwear, and patted her crotch area and thighs underneath her pants. At no time during this alarming and intrusive search were there any indications that Kaukab carried any banned materials or posed a threat to airport security. Kaukab believed that she was singled out at O'Hare

388. Id.
389. Id. at *9.
390. Id. at *10.
391. Id.
392. Id.
393. Id. at *11.
394. Id. at *11-13.
395. Id. at *13.
International Airport because she wore hijab. Kaukab filed a civil rights complaint against several National Guard members, Argenbright Security Inc., a contact security provider for United Airlines, and three Argenbright employees. She sued under 42 U.S.C. § 1983 for violations of her First Amendment right to freedom of religion, her Fourth Amendment right to be free from unreasonable searches and seizures, and her Fourteenth Amendment right to equal protection. In Kaukab v. Harris, the United States District Court for the Northern District of Illinois denied Kaukab’s request for relief because there were no further encounters in the five-month lapse between the incident and filing of the complaint. The court explained that there is “no realistic prospect that there will be a need to declare the rights of the parties for any future purpose” and any possibility of a private security company screening is mere speculation. Also, the court noted that the Aviation and Transportation Security Act of 2001 had since required that the Transportation Security Administration (“TSA”) take control over passenger screening in all airports. Again, the court refused a decision on the merits leaving the possibility open that other Muslim women will be subject to unnecessarily extensive and intrusive searches without cause.

On August 4, 2007, a new TSA policy went into effect, subjecting all persons wearing head coverings through security checkpoints in airports to be searched. The new policy has sparked protests from Sikh and Muslim organizations because it often requires Muslims and Sikhs to remove their religious head coverings at the discretion of each screener. People wearing cowboy hats or baseball caps are also required to remove them. The policy was instituted to minimize the possibility of having non-metallic items such as explosives smuggled onto an airplane. If the TSA cannot determine that the “head area is free of a detectable threat item,” passengers will receive a pat-down search, and may be required to “remove the head covering in a private screening area,” even if they have cleared the metal detector. On October 27, 2007,
new screening options became available to those subject to pat downs. They now have the choice to pat down their own turban, hijab, or head covering, walking through a machine that detects explosive chemicals, or have their hands swabbed with a cloth that is tested for chemical traces, but must affirmatively state that they wish to elect one of these options before being told that they have the right to do so.406

Although the TSA maintains that it does not conduct ethnic or religious profiling, Muslim and Sikh community leaders view the mandatory search policy as an “opportunity for profiling and violating civil rights.”407 One Muslim woman said that the new policy was “just a matter of profiling.”408 In reacting to the high level of discretion the policy gives to individual screeners, Maha ElGenaidi, the president of the Islamic Networks Group stated, “There is a problem of abuse depending on who is in charge of a particular airport and if that individual has any bias towards Muslims.”409 Many Sikh organizations also state that their members feel that they are being singled out for religious profiling by the new policy.410 The executive director of the Sikh Coalition, an advocacy group for Sikhs, said that the policy “equated our most precious article of faith with terrorism” and “send[s] a message that the turban is dangerous [which] sends the wrong message to society.”411 Sikh advocates state that if the intent is to look for nonmetallic explosives, they should search passengers randomly.412 Ranjit Singh, an official with the Sikh American Legal Defense and Education Fund, said that the new policy is “misguided” and “subject to abuse,” and to require the removal of a turban is like being “strip-searched.”413 It has also been described as “demoralizing and demeaning” and administered “without a logical or reasonable approach.”414
The TSA maintains that the policy is neutral and does not target certain religions or persons. TSA administrator, Kip Hawley, stated: “Whether it’s a cowboy hat or a turban, this is what it is. And it was not directed at any one type of person or religion. It was directed at keeping bomb parts off of airplanes.” However, Michael Greenberger, law professor and director of the Center for Health and Homeland Security at the University of Maryland, stated that including items like a cowboy hat with the turban, is an attempt by the TSA to “mask the fact that they are focused on people of Middle Eastern or Asian background, and are really going after religious gear.” Greenberger explained, “The idea of universally submitting everyone to headgear screening is overly broad unless TSA can offer a rationale for the policy change and why this is the least intrusive way to do it.” Referring to the new TSA police, Greenberg stated, “It raises constitutional issues of legitimate concern.”

F. Uniform Guidelines and Hijab in Sports Competitions

Although hijab bans in athletic competitions have yet to be litigated in court, it is unclear what stance the courts would take in such circumstances. In recent years, the number of Muslim girls wearing hijab and participating in competitive sports has increased on the basketball court, track, and playing field. Muslim girls often work out uniform issues by wearing sweats and a long sleeved shirt under their uniforms along with a matching hijab. Some Muslim women have even designed athletic wear that adheres to Islamic dress requirements. For example, Shereen Sabet, a Muslim microbiologist at California State University, Long Beach, founded Splashgear, an online swimwear store for Muslim women. Sabet designs special all-body swimsuits made from high-tech synthetic combinations of polyester, nylon, and Lycra that allow for flexible

416. Kaur, supra note 414.
417. Id.
418. Id.
movement in the water, while adhering to religious requirements.421 Several Muslim women have purchased the swimsuits, which include a head cover, in order to participate in swimming, snorkeling, surfing, and scuba diving.422 In other sports, Muslim women often get matching hijabs or uniforms custom made in order to adhere to uniform requirements and participate in competitive sports. Despite these efforts, several prohibitions on female Muslim athletes have occurred in recent years because of their insistence on wearing hijab with uniforms that cover according to Islamic dress requirements. In addition to the “trash-talk that goes beyond usually on-court chatter,” Muslim girls wearing hijab in sports often get called “terrorists” and are told to “go back to their own country” while coaches and referees question or even prohibit uniform modifications.423

In the United States, the National Federation of High School Associations has a rule stating that a player may be allowed to participate in sports while wearing head coverings for religious reasons as long as it is not dangerous to other players, and is unlikely to come off during play.424 However, Muslim athletes often have to produce letters from state athletic associations granting permission to wear hijab on a case-by-case basis, because it is not enshrined in the rules.425 Sometimes the uniform modifications are permitted, but at times, athletic officials and associations deny a Muslim athlete’s participation on the basis of hijab. For example, Dewnya Bakri played basketball, volleyball, track, and swimming in middle school and high school before playing basketball at the University of Michigan-Dearborn.426 In high school, Bakri had to obtain letters from the Michigan High School Athletic Association in order to wear hijab with her uniform during games.427 In college, referees refused to let her play basketball while wearing hijab in out-of-state college tournaments because of her uniform modification.428 Bakri stated, “I just figured I’m going to play basketball... I never thought people might have a problem with it.”429 When asked how she is able to deal with ridicule on the court for wearing hijab, she said that although it was difficult to gain confidence:

421. Id.
422. Id.
423. Karoub, supra note 419.
424. Id.
425. Id.
426. Id.
427. Id.
428. Id.
429. Id.
If you allow people to get into your head it will be a difficult task to focus and do your best. As a Muslim child I was taught patience and respect. When an ignorant person would make comments I would simply do two things: try and teach them about my religion, correcting their misconceptions that they have been accustomed to. If all else fails I ignore them and try to do the best I can to excel on the basketball court and gain some respect that way.\textsuperscript{430}

In Washington, D.C., Juashaunna Kelly, a high school track star at the District of Columbia’s Theodore Roosevelt High School, was disqualified over the custom-made outfit she wore in order to adhere to Islamic dress requirements at the Memorial Invitational track meet.\textsuperscript{431} Kelly was wearing the same uniform that she had worn for three seasons without incident, a custom-made blue and orange unitard that covered her head, arms, and legs, under her uniform.\textsuperscript{432} While the track meet director maintains that Kelly’s uniform violated the rules of the National Federation of State High School Associations because her uniform was multicolored, Kelly’s mother stated that the officials first asked her daughter to remove her head covering and believes the incident to be a matter of religious discrimination.\textsuperscript{433} Kelly held the fastest time of any girl in the city in the one-mile and two-mile races.\textsuperscript{434} She had hoped to qualify at the Montgomery Invitational for the New Balance Collegiate Invitational in New York, which attracts college recruiters, but her disqualification prevented her from doing so.\textsuperscript{435}

In April of 2005 in Tampa, Florida, 12-year-old Briana Canty, a sixth-grade student at Greco Middle School was given a choice at the Amateur Athletic Union basketball tournament to either remove her hijab or sit on the bench.\textsuperscript{436} When asked about her decision to sit out, Briana stated “It’s my religion, and I’d rather follow my religion than to break it to play basketball.”\textsuperscript{437} The tournament officials cited NCAA rules, even though they apply only to college sports, stating that they do not permit the wearing of head coverings during


\textsuperscript{432} \textit{Id}.

\textsuperscript{433} \textit{Id}.

\textsuperscript{434} \textit{Id}.

\textsuperscript{435} \textit{Id}.


\textsuperscript{437} \textit{Id}.
games.  Briana’s mother, Carla Canty, tried to negotiate with the tournament officials to no avail and turned to CAIR for help. The officials stated that Briana would only be allowed to play if her mother would sign an agreement to take responsibility for Briana and any others who would be injured by the hijab. Carla Canty refused, but the officials eventually allowed Briana to participate later in the tournament. In reaction to the incident Carla Canty stated, “It's just kind of sad that they would actually try to tell the child she can’t play because she’s wearing her scarf.”

A similar incident occurred at the University of South Florida in September 2004 when a 22-year-old basketball player, Andrea Armstrong, converted to Islam and attempted to wear the hijab to a team meeting, along with a long-sleeved shirt and pants under her jersey during practice and games. At first, Armstrong’s coach pulled her aside and told her that she could not wear hijab. However, the coach eventually agreed to let Armstrong wear hijab for travel, but not for games or practices. Armstrong initially complied, but felt that she was being forced to compromise her religion and showed up for the team photo wearing hijab. After she refused to remove her hijab for the team photo, the basketball coach forced her to quit the team, revoked her athletic scholarship, and ordered her to empty out her locker and return her textbooks. The coach stated that Armstrong’s hijab would make others feel uncomfortable because Islam oppresses women. He also called Armstrong’s parents and told them that their daughter had joined a cult. When asked about why she personally decided to wear hijab, Armstrong stated that it was part of her religious beliefs and that, “It’s pure to me . . . it’s just beautiful.”

438. Id.
439. Id.
440. Id.
441. Id.
442. Id.
445. Id.
446. Id.
447. Id.
448. Matus, supra note 443.
449. Id.
450. Id.
451. Id.
intolerance, Armstrong’s teammates were supportive of her decision and stated that they would not judge her for her decision. After pressure from CAIR, university officials eventually agreed that the school would accommodate Armstrong’s religious practices and reinstate her athletic scholarship.

G. Hijab in Court

One of the most disturbing limitations on the right to wear hijab that has arisen in recent years is the prohibition on hijab in some courtrooms. Incidents have occurred involving potential Muslim jurors, Muslim members of the court audience, and Muslim litigants themselves. Although prohibiting hijab in the courtroom is not a widespread practice, restricting religious wear in the courtroom is especially troubling because it denies access to justice system based on one’s religious beliefs.

The Equal Protection Clause of the Fourteenth Amendment guarantees that juries be selected pursuant to nondiscriminatory criteria. Yet, at least one case has emerged where a Muslim juror was dismissed on the basis of hijab. In *The People v. Bennett*, a defendant convicted in New York of second degree murder challenged the prosecutor’s exercise of peremptory challenges of several African-American potential jurors including an African-American Muslim woman wearing hijab. The Muslim woman was dismissed because the prosecutor felt that her hijab showed “a certain disrespect for the proceedings.” The prosecutor had stated that if a potential juror’s attire was of concern to her, she would note it, and did note several wardrobe concerns that were never challenged, except in relation to the juror wearing hijab. She also exercised her preemptory challenges for an African-American social worker and an African-American employee of the Department of Income Maintenance. The court reversed the defendant’s conviction and ordered a new trial because the prosecutor could not provide a race-neutral explanation for the challenges.

Although the *Bennett* court properly reversed the conviction for excluding African-American jurors, it did not acknowledge the

452. *Id.*
453. *Id.*
456. *Id.*
457. *Id.*
458. *Id.* at 432.
459. *Id.*
problematic nature of excluding jurors on the basis of religion. The court merely compared hijab to other wardrobe concerns the prosecutor had regarding tattoos, Chicago Bulls jackets, and hunter shirts, which were not challenged, and then concluded the case on the basis of racial discrimination. While there is no doubt that racial discrimination played a major part in the preemptory challenges, the court should have discussed preemptory challenges on the basis of religion as well since the prosecutor specifically noted that her reasons for excluding the Muslim juror was because she personally felt that wearing hijab was "disrespectful" to the court.

Cases have also emerged where members of the court audience are excluded from the courtroom on the basis of religious dress. In United States v. James, a case where a narcotics trafficking conviction was under review, the Seventh Circuit commented on the issue of having members of the court audience wearing hijab or other religious head coverings. In the prior proceedings of the case, which took place in the Southern District of Illinois, the judge did not allow any "headdresses" in the courtroom and had the following exchange with the courtroom spectators.

[The Court]: As a matter of respect for the Court, the dignity of the Court does not allow any headdresses, so individuals wearing any type of headdresses will be asked to leave now or remove them. Also, no hats, no skull caps, nothing like that is permitted. Do you folks hear me in the back?

[Unidentified Speaker]: This is my national headdress and also a part of my religion.

[The Court]: Ma'am, that is not allowed in this courtroom. You are welcome without it, so please leave until you can take it off.

[Unidentified Speaker]: If Jews were to come in here-

[The Court]: Jews will not wear yarmulkes. I am Catholic and the Pope would not wear a miter. Please leave, take it off and come back in, or do not come back in, the choice is yours.

Defense counsel argued that the district judge violated the First
Amendment by excluding spectators whose religions required them to cover their heads, but the Seventh Circuit ruled against the defendant for lack of standing because the defendant did not wear a religious headdress. However, despite the ruling, the Seventh Circuit did comment on the issue of religious head coverings in dicta. The court stated, “The Constitution does not oblige the government to accommodate religiously motivated conduct that is forbidden by neutral rules, and therefore does not entitle anyone to wear religious headgear in places where rules of general application require all heads to be bare or to be covered in uniform ways.” The court explained that although it did not need to permit religious head coverings in the courtroom, the “judicial branch is free to extend spectators more than their constitutional minimum entitlement” and tolerance “usually is the best course in a pluralistic nation.” It also noted that most spectators will continue to remove their head coverings as a sign of respect for the judiciary, and that those who do not should not be cast out of court or threatened with penalties.

Despite the discussion of the Seventh Circuit, forbidding religious head coverings in courthouses is not neutral because it disparately impacts persons of certain minority religious faiths. Wearing hijab in a courtroom is not a matter of disrespect to the court, as it may be with wearing a hat. It is a matter of adhering to one’s dearly held religious beliefs. James is an example of cultural disconnect; for what the court views is a matter of respect, a Muslim, Sikh, or Jew perceives as a religious requirement. Such concerns are magnified when denying litigants access to the courtroom on the basis of their religious requirements. Although the issue has yet to be litigated, instances have occurred where Muslim women were barred from court proceedings based on their wearing of hijab.

In Georgia, a 20-year-old Muslim woman, Aniisa Karim, was prohibited from entering the Valdosta municipal court building on June 26, 2007, unless she removed her hijab. Karim, who works for a Valdosta radio station, was attempting to contest a speeding ticket in court but was stopped by security. Karim explained that she wore her hijab because of her religious beliefs, but was prevented from entering the court because of “homeland security”

464. Id.
465. Id.
466. Id.
467. Id.
469. Id.
reasons. CAIR and the Georgia Association of Muslim Attorneys met with Valdosta representatives to discuss the matter because they believed that the city's policy violated Karim's constitutional rights to free speech, freedom of religion, and equal protection. At this meeting, they were told that changes to the rules prohibiting headwear in court would be considered, but that the current policy would continue to be enforced.

Similar policies have been challenged in other parts of the nation. On January 25, 2006, Mujaahidah Sayfullah, a Muslim real estate agent, was asked to leave the court by Tacoma Municipal Court Judge David Ladenburg's judicial assistant because she wouldn't take off her hijab as required by the court's no-hat policy. She was in court to support a young family member in a hearing for a domestic violence issue, when she was approached and told to either remove her head covering or leave. In response, Sayfullah explained, "For religious reasons, I'm not removing my hijab, and I have a right to be in court." She then said that she would wait for the judge to tell her to leave the courtroom, and when the judge took the bench, she was told to remove her hijab, and when she refused, she was asked to leave. Sayfullah later described how she felt about the incident: "I felt publicly humiliated, like I was just not good enough to sit in court because of my religious beliefs." After involvement by CAIR, the municipal court judges drafted a policy to create exceptions to the no hat policy for religious or medical purposes stating: "We're developing a policy that will remove any future misunderstandings on this issue. We are not a court that discriminates." Judge Landenburg later explained that people are asked to remove their hats out of respect for the court, and issued an apology.

In Detroit, a Muslim woman filed a lawsuit after her small-claims court case was dismissed in the Hamtramck District Court because she refused to remove her niqab. Ginnah Muhammad

470. Id.
471. Id.
472. Id.
474. Id.
475. Id.
476. Id.
477. Id.
478. Id.
479. Id.
was in court to contest a rental car company's charging her $2,750 to repair a vehicle that was damaged after thieves broke into it.481 Instead of having her day in court, Muhammad was forced to choose between her case and her religion. She chose her religion and her case was dismissed.482 Judge Paul Paruk stated that he needed to see her face to assess the truthfulness of her statements.483 Michigan does not have any rules governing religious attire in courtroom, leaving judges with great leeway in running their courtrooms.484 In response to the dismissal, Muhammad stated, "I just feel so sad. I feel that the court is there for justice for us. I didn’t feel like the court recognized me as a person that needed justice. I just feel that I can’t trust the court."485

Since Judge Paruk’s decision, other judges have commented on the incident and disagreed with the decision.486 Steve Leben, the president of the American Judges Association and a Kansas trial court judge stated that judges should try to seek a balance between respecting religious views and running their courtrooms.487 Leben stated, "if it’s a person’s legitimate religious belief, we have a duty to reconcile these competing interests."488 Mark Somers, chief judge of the Dearborn, Michigan District Court, said he would not require a woman to remove her veil during a civil case, "[t]o me, it would not be an issue. I simply as a matter of personal policy would never ask someone to do that."489

Conclusion

Both internationally and domestically, Muslim women wearing hijab are discriminated against. This specific intentional discrimination appears to be rising in various contexts including education, employment, sports, incarceration, air travel, the issuance of state driver licenses, and access to the justice system. In order to “liberate” Muslim women, ensure “national security,” promote “safety,” or appear “neutral,” many actions have been taken against Muslim women. Examples include: suspending young girls from school; preventing teachers from teaching;
disqualifying a high school track star from competing; preventing young girls from playing basketball; preventing spectators and litigants from entering court; refusing to issue driver licenses to hundreds of people; preventing women and children from visiting incarcerated family members; strip searching innocent travelers in airports without cause; racial and religious profiling in airports; and denying jobs to several qualified women, simply because they cover their hair as required by their religion. These incidents have occurred not because of a legitimate societal need, but because of the misunderstandings, stereotypes, and bias against Muslim women and hijab in the current social and political atmosphere.

All of the purported justifications for the discriminatory acts described in this note are inadequate and pretextual. For international hijab bans in Europe, the justifications for hijab bans varied by country. In Turkey, the justification for banning thousands of girls and women from obtaining an education or having government jobs was secularism and “Westernization.” In France and Germany, it was to promote assimilation, reduce fundamentalism, and counter gender inequality. Belgium possessed the same concerns, in addition to state neutrality. Britain justified their ban based on safety and learning concerns. In non-Western countries, hijab bans are the result of social and political efforts to appear more “Western” and secular. However, banning hijab helps none of these concerns. In fact, these bans work against their proponents’ proffered justifications. Discriminating against, alienating, and oftentimes, isolating Muslim women does not help assimilation or promote state neutrality. Preventing Muslim women from defining their femininity through religious practice, so that the focus is on her mind and spirituality instead of her body, does not promote women’s liberation. It promotes ethnocentricism. Concerns over extremism are simply based on unfounded stereotypes.

In the United States, the courts have taken a highly deferential stance to insufficiently articulated state concerns and have created double standards for persons of different faiths in cases challenging discrimination against Muslim women. In the educational context, “no hats” policies and vague concerns over appearing “neutral” in the classroom have resulted in Muslim students being suspended and Muslim teachers being terminated and even criminalized for adhering to their religious beliefs. At the same time, teachers and students of non-Muslim faiths are afforded a much more permissive standard for wearing religious garb. In employment, Muslim women have been disciplined, demoted, suspended, constructively discharged, fired, and not hired on the basis of hijab because employers felt that hijab did not meet uniform or dress code
requirements. Again, the courts were very deferential to any state concern over wearing hijab with a police uniform, even though there were options to accommodate the concerns of both the employer and employee. In prison settings, courts have again avoided judgment on the merits of claims brought by prison visitors and inmates by declaring them moot or barred by the Eleventh Amendment. For driver license photos, photo-less exceptions were made for Christian plaintiffs, but no such exceptions were made for Muslim women. In cases dealing with airport racial and religious profiling, the courts have again declared the cases moot. The suspiciously justified and overbroad mechanisms that have been implemented to screen Muslims and Sikhs in airports, afford great deference to each airport screener and his or her personal opinion of whether a person wearing a hijab or turban should be searched. Finally, for court entry, it is generally within the discretion of each judge to determine who may enter his or her courtroom. Such policies and practices are hypocritical and counterproductive in a nation that prides itself on being the land of the free.

Although there have not yet been blanket prohibitions on hijab in the United States, it seems they may not be far off. The current hostile global climate towards Muslims in many countries, and the concomitant increasing instances requiring the removal of hijab are particularly alarming. Yet, the approaches of the courts dealing with hijab have silenced the voices of Muslim women trying to assert their rights. When a Muslim woman brings a case to court, the courts have taken one of three approaches: (1) either the court has failed to protect the right to wear hijab, usually by deferring to vague or overbroad state concerns; (2) has avoided a judgment on the merits; or (3) has formulated arbitrary or inconsistent standards permitting hijab, only in the context that it is no longer identifiable as hijab. Instead of addressing the Free Exercise Clause of the First Amendment to protect a woman’s right to practice her religion by wearing hijab, the court has yielded to biased and ignorant public opinion of the social and political climate to determine what constitutes a fundamental right, thereby reinforcing the hegemonic norms with facially neutral laws.

Contrary to prevailing misconceptions, Muslim women choose to wear hijab because of its religious significance and are deeply distressed when forced to remove their religious garb simply because dominant western culture has decided it knows what is best for Muslim women. It is not simply a matter of “inconvenience” when a Muslim woman is required to remove her hijab – it is requiring her to violate the tenets of her faith. Such instances of banning hijab and the uncertainties over the right to wear hijab have a tremendous impact on the lives of Muslim women including
severe psychological, spiritual, and emotional repercussions.490

Such pressures to assimilate in appearance are damaging to religious freedom and ineffective; they will only further alienate Muslim women from full participation in society. Some Western feminists criticize hijab because they see hijab as a symbol of oppression. Yet, imposing an interpretation of hijab as symbolizing subordination, imposes the same essentialist control that these women oppose when it comes to patriarchal norms imposed on women. Western policies regarding hijab are often what exclude Muslim women from obtaining the common feminist goals of access to education, work, driving, participation in sports, and travel for all women. Such policies hinder the acceptance of Muslim women into society, which is particularly ironic considering assimilation is often a reason behind the forced removal of hijab. Thus, although Muslim women are summarily characterized by some Western feminists as "oppressed," the oppression Muslim women face wearing hijab in many parts of the world is due to Western policies and pressures to outwardly assimilate.

While courts have often avoided decisions on the merits or ruled against the wearing of hijab, Muslim women have been silenced by hate crimes and fear, in addition to the overbearing nature of everyday hurdles that make it difficult to challenge each instance of discrimination. In times of hostility towards minority groups, minorities cannot depend on the legislature alone for help. The courts must help in protecting the rights of minority groups, especially in cases where constitutional rights are implicated. Only when the courts take a stand to protect the religious freedoms of Muslim women, will Muslim women be able to fully participate in society. Otherwise, an extremely diverse group of people will be silenced, and the complexities, beliefs, attitudes, contributions, and challenges Muslims face will be ignored. It is long overdue. The American legal system and Western Society in general must protect the constitutional rights of Muslim women and learn the true meaning of hijab to those who wear it: it is a sign of piety, respect, protection, pride, egalitarianism, community, identity, privacy, justice, and beauty. That is worthy of legal protection.

490. This trauma is exacerbated as young girls in school are often pressured by administrative officials to violate their religious beliefs. Instead of being able to look at these administrative officials for support and guidance, a strong message is being sent: your religious beliefs are not accepted, not protected, and that you are viewed as an outsider in their own nation. For example, one girl in France who was affected by the hijab ban, grabbed scissors and began to cut all her hair off so that her hair would not show and she could attend school. See Ward, supra note 83, at 779.