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Laws in the United States and France do not Discriminate Against Muslim Women

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On April 11, 2011, it became illegal in France to hide the female face in a public space. The law did not ban burkas specifically, but rather, it banned all garments which cover the eyes. However, scarves, hats and sunglasses are excluded from the law, thereby causing the law to be commonly referred to as the “burka ban.”¹

Burkas, as well as niqabs, are banned under the French law. The burka (also spelled “burqa”) thoroughly covers the face and body of the person wearing it, leaving only a mesh-like screen to see through. The niqab is a veil in the truest sense, covering everything below the bridge of the nose and the upper cheeks (and sometimes also covering the forehead).²

Under the French law, the hijab, which is a scarf used to cover the hair, neck and sometimes the shoulders, is permissible, as is the full body cloak, as long as it is not covering the face (the full body cloak is what Muslim women are required to wear outdoors in Iran, a country that is well known for its strict Sharia law).³

Critics of the French law, including Muslims, as well as some feminist groups, are opposed to the law, claiming it is discriminatory and that it impedes on the religious freedom of Muslim women in France.⁴ However, Muslim women are not singled out by France’s religious intolerance. France has a century-long history of *laïcité* (French for “secularism”) and egalitarian values, which form a foundation of French society.⁵ Christians, Jews and Sunnis have all had their freedom of religious expression curtailed in France, thanks to a series of French laws that ban outward expression of religion⁶. The burka ban simply follows suit in the laws of a deeply

¹ Britton D. Davis, *Lifting the Veil: France’s New Crusade* 34 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 117,118 (2011).

² *Id.* at 118.

³ Peter Allen, *Burka Ban. New French Law Forbids Islamic Women From Wearing Full-Face Veils in Public (but the only real protest is in London)* April 11, 2011. <http://www.dailymail.co.uk/news/article-1375781>.

⁴ *Id.*

⁵ Davis, *supra* note 1, at 118.

⁶ Ahlul Bayt News Agency, *Call for Muslim Veil Ban in French Universities*, August 7, 2013. <http://www.abna.ir/data.asp?lang=3&id=449696>.

secular French society that also bans crosses, Jewish skullcaps and Sunni turbans from being worn in schools⁷.

Conversely, the First Amendment to the United States Constitution protects freedom of religious expression, as do federal laws and numerous federal court rulings. The United States Supreme Court has ruled that for a law to be upheld that curtails religious freedom, there must be a compelling state interest at issue, and the law in question must bear a direct correlation to that interest.⁸ If a plaintiff can show that a law or governmental practice burdens the free exercise of religious beliefs, the burden shifts to the government to prove that the law or practice is important to the accomplishment of some important or “compelling” secular objective and that it is the least restrictive means for attaining that objective.⁹ There have been numerous cases wherein specifics of this standard have been tested and determined, but the common thread of those cases is that in order for a law that impedes freedom of religion to remain valid, it cannot single out any religion for special or substandard treatment, it cannot be overly broad and it cannot be underinclusive.¹⁰

Accordingly, laws in the United States affecting Muslim women have been upheld only because a compelling state interest has been determined to exist and the law at issue has been directly correlated to that interest. If there is a compelling state interest but there is a way to word or enforce the law so that it does not curtail religious freedom, then that less-discriminatory

⁷ Camille Rustici, *France Burqa Ban Takes Effect: Two Women Detained* (April 11, 2011). http://www.huffingtonpost.com/2011/04/11/france-burqa-ban-takes-ef_n_847366.html.

⁸ See *Church of Lukumi Babalu Ave. v. City of Hialeah*, 508 U.S. 520, 521 (1993).

⁹ Ioanna Tourkochoriti, *The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the US*, 20 WILLIAM AND MARY BILL OF RTS. J. 791, 815, n. 151.

¹⁰ See *Church of Lukumi Babalu Ave.*, 508 U.S. at 521.

method must be utilized¹¹. Unfortunately, at times, there are no other options and the law as it is written must stand.

Although laws in the United States and France are at nearly opposite ends of the spectrum relating to religious expression, one thing they do have in common is that neither gives disparate treatment to Muslim women. On the surface, this may seem difficult to believe, but as the laws and the history of the countries are examined, it becomes clear that Muslim women are not discriminated against by French laws, nor are they discriminated against by American laws.

I. Laws in the United States Do Not Discriminate Against Muslim Women

Sharia – which means "path" in Arabic – governs many aspects of Muslim life and influences the legal code in a majority of Muslim countries. There are many interpretations of what “Sharia” means, but in some countries strict interpretations "are used to justify cruel punishments such as amputation and stoning as well as unequal treatment of women in inheritance, dress and independence," according to the Council on Foreign Relations.¹²

Sharia has gained a toehold in some western countries, notably Great Britain, where five Sharia courts have been established to settle certain disputes among Muslims, with the government's blessing.¹³

In 2010, Oklahoma attempted to become the first state in the nation to ban state judges from relying on Islamic law known as Sharia when deciding cases. The state attempted to do so through an amendment to their state constitution, a referendum for which was placed on a ballot. The amendment was referred to as “Save Our State” and it read, in applicable part:

¹¹ *Id.*

¹² Joel Siegel, *Islamic Sharia Law to be Banned in Oklahoma* (June 14, 2010). <http://abcnews.go.com/US/Media/oklahoma-pass-laws-prohibiting-islamic-sharia-laws-apply/story?id=10908521>.

¹³ *Id.*

This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law.

International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with other persons. The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.

Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teachings of Mohammed. Shall the proposal be approved?¹⁴

The voters had a choice of either “yes” or “no”. Seven out of ten voted “yes”.¹⁵

In a challenge to the law brought by Muneer Awad of the Council of American-Islamic Relations, a federal judge struck down the law as unconstitutional, saying it violated the rights of Muslims. A federal appeals court upheld the ruling, and the law was never implemented. The appeals court said supporters of the law “do not identify any actual problem the challenged amendment sought to solve. Indeed, they admitted at the preliminary injunction hearing they did not know if even a single instance where an Oklahoma court had applied Sharia Law or used the legal precepts of other nations or cultures, let alone that such applications or uses had resulted in concrete problems in Oklahoma.”¹⁶

While there had not, to date, been an instance of courts enforcing or even considering Sharia law in Oklahoma, there have been several instances in which courts in other states considered Sharia law, which is what led proponents of the Save Our State measure to draft the amendment. Some examples of such rulings are:

¹⁴ Michael Kirkland, *Islamic Law in US Courts* (May 19, 2013).
http://www.upi.com/Top_News/US/2013/05/19/Under-the-US-Supreme-Court-Islamic-law-in-US-courts/UPI-64481368948600/#ixzz2eX1oZ200.

¹⁵ *Id.*

¹⁶ *Id.*

Joohi Q. Hosain v. Anwar Malik, Sharia law of Pakistan, Maryland, 1996: Trial and appellate courts upheld foreign Sharia law and denied mother custody. She lost custody because going to custody hearing in Pakistan would have risked prison, torture or execution.; *Laila Adeeb Sawaya Malak v. Abdul*, Shariah law of Lebanon/UAE, California, 1986: Appellate court upheld foreign Sharia law and denied mother custody, reversing trial court; *Parveen Chaudry v. M. Hanif Chaudry, M.D.*, Sharia law of Pakistan, New Jersey, 1978: Appellate court upheld foreign Shariah law, overturned trial court. Wife denied support and child support and division of property; prenuptial agreement signed by parents giving her only \$1,500 from marriage upheld by appellate court.¹⁷

Opponents of the Save Our State amendment cite other religions that have their own judicial system of sorts. For example, the Roman Catholic Church has an estimated 200 diocesan tribunals nationwide, which handle cases such as religious annulments. However, a Catholic tribunal applies to Catholic Church law only, and it has no application in the rest of society. For example, if a person obtains a divorce or civil annulment from a state court, that person is thereby divorced or annulled, as the case may be, according to state law. The Catholic Church does not believe in divorce, so if that person had been married in a Catholic Church, he may not be married again in a Catholic Church without having his first marriage annulled through the church.¹⁸ The Catholic annulment must be subsequent to the state law proceeding in which the marriage is legally dissolved. Accordingly, one cannot obtain a Catholic annulment without being legally divorced (or civilly annulled) first.¹⁹ However, if that person does not wish to have his marriage annulled through the church, then he is welcome to get married again outside of the church, and the church has no say in the matter. In that instance, there is a true separation of church and state.

¹⁷ Kirkland, *supra* note 14, citing American Public Policy Alliance.

¹⁸ Jon Jakoblich, *Divorce, Annulments and Remarriage* (no date listed).

<http://www.aboutcatholics.com/beliefs/divorce-annulments-and-remarriage>.

¹⁹ *Id.*

Conversely, what concerned seven out of ten citizens in Oklahoma was the idea that the separation of church and state could be diminished, as it appeared to be in the cases cited above. In those cases, Sharia law was considered in state court, and the state court ruling was directly affected because of that consideration.

Orthodox Jews sometimes use rabbinical courts to obtain religious divorces, but they take it a step further than Roman Catholic tribunals, in that rabbinical courts may also resolve business disputes and settle other disputes among fellow Orthodox Jews. Once again, there is a stark contrast between Orthodox Jews submitting to the ruling of a rabbinical court and Sharia law being considered in state courts. The difference is that Orthodox Jews are voluntarily permitting the rabbinical court to settle their dispute, which is akin to a private arbitration.²⁰ Most importantly, any party may elect not to participate in rabbinical court and instead litigate the matter in state or federal court.²¹

Because of rising concerns over foreign or religious laws impeding state courts, legislatures in at least 32 of the 50 states introduced bills from 2010 to 2012 to limit consideration of foreign or religious laws in state court decisions. Of the approximately 92 such bills that were introduced nationwide, only 21 mentioned Sharia law specifically.²²

During those two years, Arizona, Kansas, Louisiana, South Dakota and Tennessee enacted such bills, which remain valid, because they are more neutral than the Oklahoma amendment and they do not cite religious laws (including Sharia law) in particular²³. The American Public Policy Alliance supports such bans and has drafted sample legislation, which has been used in an estimated 71 pieces of legislation nationwide. It reads:

²⁰ Beth Dinn of America, *Rules and Procedures*. http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf.

²¹ *Id.*

²² Kirkland, *supra* note 14, *citing* The Pew Forum on Religious and Public Life.

²³ *Id.*

Any court, arbitration, tribunal, or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration or tribunal or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on any law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the U.S. and [State] constitutions, including but not limited to due process, freedom of speech or press, and any right of privacy or marriage as specifically defined by the constitution of this state.²⁴

Critics of these bills argue that they violate the Free Exercise Clause of the First Amendment, that their purpose is bigoted and that they burden the practice of religious faith.²⁵

Currently, in the United States, laws that burden religious freedom or practice are held to the “strict scrutiny” standard of review. Strict scrutiny has a two prong test: (1) is there a compelling government interest in the law at issue; and (2) is the law necessary to achieve that compelling interest. The threshold question applied to such cases is whether the end sought is sufficiently important to justify the harm to the affected group. In strict scrutiny cases, the law must be the least restrictive alternative available.²⁶

A. Our Nation’s Legal History

In order to understand freedom of religion in the United States, it is important to look back at the judicial history of our developing country to determine how religious freedoms have been both challenged and protected over the years.²⁷ We now have a strict scrutiny standard of review for cases that impede on religious freedom, but that was not always the case. The road to get where we are now was fraught with challenge, and at times, ambiguity; and through it all, there was a whole lot of controversy.

²⁴ *Id.*, citing American Public Policy Alliance.

²⁵ (no author listed) *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494, n.1 (2010).

²⁶ *Church of Lukumi Babalu Ave. v. City of Hialeah*, 508 U.S. at 578.

²⁷ A brief explanation of landmark decisions is provided to delineate the ideology of the United States Supreme Court throughout our nation’s history. Some of the cases were overturned by subsequent decisions.

The crucial inquiry has always been distinguishing between acts dictated by religious precepts—which can be protected as dictated by a religious normative system competing to the one imposed by the state—and those that other countervailing considerations render unjustifiable. What justifies the protection is the idea that religious obligations are a form of imperative moral obligations; in other words, there seems to be a conflict of moral duties in this case. Although very sensitive to the protection of freedom of religion, the Supreme Court has not gone as far as accepting polygamy on the basis of religious belief.²⁸

In *Reynolds v. United States*,²⁹ the United States Supreme Court upheld bigamy laws upon a challenge from Mormons, who claimed that polygamy is a religious duty. The rationale for this decision was that Congress may reach actions in violation of social duties or good order. The Court held that polygamy leads to a patriarchal principle, which, when applied to large communities, fetters people in stationary despotism. The Court went on to rule that laws may not interfere with belief and opinion, but they may interfere with practice; and “to permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect, permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”³⁰ This ruling has never been overturned; and thus, polygamy is still illegal.

The underlying rationale in *Reynolds* applies to Sharia law, as well. Just as Mormons are welcome to practice their faith so long as that practice does not violate social duty or good order, and just as Catholics must obtain a civil divorce or annulment rather than just a religious one, Muslims are welcome to practice their faith, but they are not permitted to place Sharia law above state or federal law.

²⁸ Tourkochoriti, *supra* note 9, at 815, nn. 141-142.

²⁹ *Reynolds v. United States*, 98 U.S. 145 (1878).

³⁰ *Id.* at 167.

In *Braunfeld v. Brown*³¹, the Supreme Court upheld “Blue Laws”, which mandated that stores close on Sundays. The challenge was brought by an Orthodox Jew, who argued that because his Sabbath was Saturday, if the State forced him to close on Sundays, he would be placed at such a severe disadvantage that he would be put out of business. The Court rejected this claim, because Sunday closings did not force the challenger to embrace a religion, nor did they hold him criminally responsible for the practice of his religion. The Blue Laws only made the practice of his religion more expensive. The Court went on to say that there are secular reasons for Blue Laws, and to strike legislature which has only an indirect burden on religion would radically restrict the operating latitude of the legislature. “It cannot be expected, much less required, that legislators enact no laws regulating conduct that may, in some way, result in economic disadvantage to some religious sects and not to others because of the various practices of different religions.”³²

On the complete opposite end of the spectrum is the matter of *Sherbert v. Verner*³³, (which currently applies to federal law but not state law), which was brought by a person who was fired from her job because she refused to work on Saturday, because it was her Sabbath. The state argued that if an employee was permitted to collect unemployment benefits for that reason, the state would be open to a multitude of fraudulent claims. The United States Supreme Court ruled in favor of the employee, and held that a person who gets fired because Saturday is her Sabbath is entitled to unemployment benefits; and the state may not apply eligibility provisions so as to constrain a worker to abandon her religious convictions respecting a day of rest.³⁴ The Court distinguished this case from *Braunfeld*, because in that case, it was determined that there

³¹ *Braunfeld v. Brown*, 366 U.S. 599 (1961).

³² *Id.* at 606.

³³ *Sherbert v. Verner*, 374 U.S. 398 (1963).

³⁴ *Id.* at 410.

was a compelling state interest in providing a uniform day of rest for employees. In *Sherbert*, the Court ruled that the state failed to show there was no alternate method to battling fraudulent claims.³⁵

Sherbert was followed in a string of subsequent cases: *Thomas v. Review Board*,³⁶ wherein the Supreme Court ruled in favor of a Jehovah's Witness who quit his job in a munitions factory because of his opposition to war; *Hobbie v. Unemployment Appeals Comm.*³⁷, where the Supreme Court ruled in favor of a person whose religious views changed during her employment, which caused her to lose her job when she would no longer work on her Sabbath; and *Frazee v. Ill. Emp. Security Dept.*,³⁸ wherein the Supreme Court ruled in favor of a person who held Sabbath even though he was not part of a specific church. The Court held that his belief was sincere and religious in nature, so his claim was valid under *Sherbert*.

“The Supreme Court has held that ways of life may be interposed as a barrier to reasonable state regulation if they are rooted in religious belief and not only on purely secular considerations. The rights of the Amish community to educate its members and to instill in them a way of life, which is different from the one taught in public schools, was considered significant enough to outweigh the state interest to compulsory high school education for its citizens,”³⁹ in the matter of *Wisconsin v. Yoder*.⁴⁰ In *Yoder*, the United States Supreme Court determined that Wisconsin's interest in universal education failed under the strict scrutiny standard of review. *Yoder* was centered on an Amish family's challenge to a Wisconsin state law that required children to attend high school. The Court ruled in favor of the Amish family, holding “only those

³⁵ *Sherbert*, 374 U.S. at 407.

³⁶ *Thomas v. Review Board*, 450 U.S. 707 (1981).

³⁷ *Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136 (1987).

³⁸ *Frazee v. Ill. Emp. Security Dept.*, 489 U.S. 829 (1989).

³⁹ *Tourkochoriti*, *supra* note 9, at 813.

⁴⁰ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

state interests of the highest order and those not otherwise served can overbalance claims of free exercise.”⁴¹ The Court based this decision on the determination that the Amish way of life was not merely a personal preference, but one of deep religious conviction, shared by an organized group and intimately related to daily living.⁴²

One expert testified, that compulsory secondary schooling could “ultimately result in the destruction of the Old Order Amish church community as it exists in the United States.”⁴³ Conversely, counsel for Wisconsin argued that the Amish way of life fostered ignorance; but that claim failed, because the Court held that the Amish community has been a highly successful social unit, whose members are productive and law-abiding.⁴⁴ The State further argued that children may choose to leave the Amish community, and then would be ill-equipped for life outside of that community. This claim also failed, because the Court found it to be highly speculative. The Court went on to say that there was nothing in the record to suggest that the Amish qualities of reliability, self-reliance and dedication to work would fail to find ready markets.⁴⁵ Overall, the Court determined that it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exception to the Amish.⁴⁶

Although the United States Supreme Court granted an exception to the Amish with regard to compulsory education, they refrained from granting the Amish an exception from paying Social Security tax, in the matter of *United States v. Lee*.⁴⁷ In *Lee*, an Amish employer claimed that he should be exempted from paying Social Security tax for his employees on

⁴¹ *Yoder*, 406 U.S. at 215.

⁴² *Id.* at 216.

⁴³ *Id.* at 212.

⁴⁴ *Id.* at 236.

⁴⁵ *Id.* at 224.

⁴⁶ *Id.* at 236.

⁴⁷ *United States v. Lee*, 455 U.S. 252 (1982).

religious grounds, because the Amish believe that it is sinful not to provide for their own elderly. In this case, the heightened scrutiny standard of review applied (rather than strict scrutiny), because the act of paying taxes does not impede one's ability to practice his religion. Therefore, the State was charged with justifying a limitation on religious liberty by showing that the act of paying Social Security tax was essential to accomplish an overriding governmental interest.⁴⁸

The United States Supreme Court determined that mandatory participation in the Social Security system was indispensable to the fiscal viability of the system, and therefore the State's burden had been met.⁴⁹ *Yoder* was distinguished in *Lee* because "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."⁵⁰

At times, the United States Supreme Court has been faced with the very complex question of whose rights shall prevail as the most indispensable. In such instances, where religion and race have been at odds, the Court has ruled against granting a religious exception. Such was the case of *Bob Jones Univ. v. United States*,⁵¹ wherein the IRS denied a tax exemption to educational institutions that engaged in race discrimination, even though said institutions claimed the discrimination was required by their religious beliefs. The Court held that there is an overriding State interest in eliminating racial discrimination.

Deference to military regulations was placed above the right to free exercise in the matter of *Goldman v. Weinberger*,⁵² wherein an Orthodox Jewish air force clinical psychologist challenged a disciplinary action against him for wearing a yarmulke, in violation of military dress regulations. The United States Supreme Court held that deference to military regulations

⁴⁸ *Lee*, 455 U.S. at 257.

⁴⁹ *Id.* at 264.

⁵⁰ *Id.*

⁵¹ *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

⁵² *Goldman v. Weinberger*, 475 U.S. 503 (1986).

overrode an Orthodox Jew's right to wear a yarmulke; and the interest in subordinating personal preferences to the group mission was sufficient to place military protocol above deference to religion.

The State's interest overrode that of free exercise in *Lyng v. NW Indian Cemetery Protection Assn.*,⁵³ when American Indian tribes challenged the Forest Service's plan to build a road and permit timber harvesting in an area of forest considered sacred and utilized by Indian tribes for religious purposes. The United States Supreme Court rationalized this decision by stating that government cannot operate if it is required to satisfy everyone's religious needs. The First Amendment applies to everyone equally and citizens cannot veto public programs that do not prohibit religion.⁵⁴ The land at issue in this case belonged to the government, not the tribes. Therefore, the tribes could not prohibit the government from utilizing its own land. Strict scrutiny did not apply in this case, since the action at issue was being taken by the government, rather than the government ordering a citizen to act.

In 1990, the very controversial case of *Unemployment Division v. Smith*⁵⁵ was decided. The respondents in the case were fired from their employment because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both were members. When they applied for unemployment benefits, they were rejected, since they were fired for "misconduct". Respondents based their argument on the precedent set by *Sherbert, Thomas* and *Hobbie*, in which the Court held that "a State could not condition the availability of unemployment insurance on an individual's right to forego conduct required by his religion."⁵⁶

⁵³ *Lyng v. NW Indian Cemetery Protection Assn.*, 485 U.S. 439 (1988).

⁵⁴ *Id.* at 452.

⁵⁵ *Unemployment Division v. Smith*, 494 U.S. 872 (1990).

⁵⁶ *Id.* at 876.

The Court distinguished the earlier cases because “the conduct at issue in those cases was not prohibited by law.”⁵⁷ Since it was unlawful to use peyote, even for religious purposes, in Oregon, the question presented in the case became whether that prohibition was lawful under the Free Exercise Clause. The Court determined that the peyote ban was a neutral law of general applicability, and thus was subject to a rational basis review, rather than a strict scrutiny review. Under the “rational basis test”, there is a two prong criteria: (1) does the government have a legitimate interest; and (2) is the law a rational way to achieve that interest?⁵⁸

The Court held that the use of forbidden substances in religious rituals could not be protected by the First Amendment. Thus, *Smith* appears to reaffirm the principle of equal treatment between religion and non-religion, unless, as the Court insists, the religiously motivated action involves “the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press...”⁵⁹ “In an effort to make the central holding of *Smith* appear consistent with precedent, the *Smith* majority explained away certain prior free exercise cases in which the Court had held that religious objectors were entitled to an exemption from a generally applicable law.”⁶⁰ The Court instead distinguished them from this case on the ground that they had involved a “hybrid situation”, in which the free exercise right was combined with some other constitutional claim.⁶¹ “The present case does not present such a *hybrid* situation, but a free exercise claim unconnected with any communicative activity or parental right.”⁶²

⁵⁷ *Id.*

⁵⁸ *Id.* at 879.

⁵⁹ Tourkochoriti, *supra* note 9, at 816, nn. 157-158.

⁶⁰ James G. Dwyer, *The Good, the Bad and the Ugly of Employment Division v. Smith for Family Law*, 32 CORDOZO L. REV. 1782 (2011).

⁶¹ 123 HARV. L. REV. 1494, *supra* note 25, at 1495.

⁶² *Smith*, 494 U.S. at 882.

The Court likewise distinguished the seminal case of *Sherbert v. Verner* as having involved a unique context: because eligibility for unemployment compensation was based on a statutory “good cause” standard — which necessarily required a case-by-case “governmental assessment of the reasons for the relevant conduct”— a “mechanism for individualized exemptions” was already in place in such cases. Accordingly, the state could not then “refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”⁶³

The Court compared the respondents’ conduct in *Smith* to that of polygamy, as decided in *Reynolds*, because both involved conduct which was illegal. However, even though both actions were illegal, the Court refrained from deciding *Smith* quite as absolutely as it decided *Reynolds*. In *Reynolds*, the Court held that it was permissible for Congress to prohibit polygamy⁶⁴; and in doing so, polygamy became illegal nationwide. In *Smith*, the Court held that states could, if they chose to, permit peyote to be consumed during religious exercise; however, States were not compelled to do so. The Court ruled that ultimately, the determination whether to carve out a religious exception should be left to the political processes of each state.⁶⁵

B. The Current Standard in Free Exercise Jurisprudence

Just three years after the *Smith* holding, the Supreme Court decided the case of *Church of Lukumi Babalu Aye. v. City of Hialeah*.⁶⁶ *Lukumi* is the current threshold case in the United States, and it went further in protecting free exercise than many thought the Court ever would.

The religion at the center of *Lukumi* was Santeria, which involves a high devotion to spirits (referred to as orishas). Those who practice Santeria believe that orishas are powerful but not immortal, and they require animal sacrifice for their survival.⁶⁷

⁶³ 123 HARV. L. REV. 1494, *supra* note 25, at 1500.

⁶⁴ *Reynolds v. United States*, 98 U.S. 145 (1878).

⁶⁵ *Unemployment Division v. Smith*, 494 U.S. 872 (1990).

⁶⁶ *Church of Lukumi Babalu Aye. v. City of Hialeah*, 508 U.S. 520 (1993).

⁶⁷ *Id.* at 525.

In response to the Church of Lukumi Babalu opening in the City of Hialeah, the City passed Ordinance 87-52, which made it illegal to unnecessarily kill, torment, torture or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption. The Ordinance prohibited slaughter outside of areas designed for slaughterhouse use. The Ordinance does not specifically mention Santeria, and the City claimed it was enacted to protect animals. However, at the public meeting wherein the Ordinance was discussed, Santeria was specifically mentioned, and worshippers of the religion were criticized and mocked by the Town Council.⁶⁸

The case made it to the United States Supreme Court, which held that “a law burdening religious practices that is not neutral or not of general application must undergo the most rigorous of scrutiny...where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.”⁶⁹ The Court determined that the focus should be on the effect of the law in question, rather than the wording or the motive; and even if the government interest is compelling, if the law is overbroad or underinclusive, it will not survive judicial scrutiny. Therefore, the Court ruled in favor of the Church and found the Ordinance to be unconstitutional.⁷⁰

The above cases, when read in chronological order (as they are listed herein), show a judicial system that places free exercise of religion on a very high pedestal. No one religion can be singled out as unlawful; and over the course of our history, nearly every religion has had its free exercise curtailed at one point or another, if a compelling State interest was at issue, and the

⁶⁸ *Church of Lukumi Babalu Ave.*, 508 U.S. at 541-542.

⁶⁹ *Id.* at 546-547.

⁷⁰ *Id.* at 579-580.

law in question was essential to that compelling State interest. Overall, the only things that seem to “win out” over free exercise are things that affect the population as a whole, such as use of a highway that the government wishes to build, social security for the elderly, deference to the military and national security.

In the wake of the September 11, 2001 attacks on America, national security has at times been at odds with individual rights. This issue was the center of much debate when Florida revoked the driver’s license of a Muslim woman named Sultaana Freeman, because she was wearing a niqab, covering all but her eyes, in the photo identification. The State asked Ms. Freeman to have her photo retaken, with her face visible, and she refused. As a result of that refusal, the State revoked her driver’s license.⁷¹

Ms. Freeman sued the state of Florida, claiming it would violate her Islamic beliefs to show her face publicly. Assistant Attorney General Jason Vail argued that Islamic law has exceptions that allow women to expose their faces if it serves a public good, and that arrangements could be made to have Freeman photographed with only women present, to allay her concerns about modesty. Prosecutors also argued that allowing people to cover all but their eyes in their identification photos could allow terrorists to hide their identities.⁷²

The Florida court determined that it would set a dangerous precedent to make a religious exception to the law, because the precedent may be exploited by criminals or terrorists. While acknowledging that Freeman herself “most likely poses no risk to national security”, the Court ruled that if full-face coverings were permitted in identification photos, some people might pretend “to ascribe to religious beliefs in order to carry out activities that would threaten lives”

⁷¹ The Associated Press, *Muslim Woman in Florida Cannot Wear Veil in Driver’s License Photo, Judge Rules* (June 6, 2003). <http://www.vendio.com/mesg/READ.HTML?NUM=28&THREAD=181003>.

⁷² *Id.*

and “it would be foolish not to recognize that there are new threats to public safety, including both foreign and domestic terrorism.”⁷³

Interestingly, Florida is not alone in requiring motorists to have a photo identification in which their full face is shown. In many states, including California, drivers are permitted to wear a head scarf in their identification photo, but they are not permitted to cover their face.⁷⁴

Although many states have laws similar to the Florida law discussed above, there have been very few challenges to those laws. What made the Florida case unique was that Florida openly acknowledged that the law was being strictly enforced due to the September 11, 2001 attacks against the United States, and the Muslim woman who challenged it claimed that it violated her right of free exercise. Because of the timing of the case and the fact that Courts must be sensitive to law abiding Muslims and careful not to enforce an anti-Muslim sentiment, while also being very cognizant of the security threats facing our country, this case became national news.

It is important to understand the evolution of legal precedent in the United States when determining whether the *Freeman* case was correctly decided. When reading through the chronology of cases provided herein (which, admittedly, are only a small percentage of the precedent-setting landmark cases that involve free exercise), it becomes apparent that the Courts are careful to protect the First Amendment right to free exercise; and that the right will only be curtailed when the State’s interest in enforcing a law that limits it is compelling. Given the gravity of our national security crisis, combined with the fact that it is impossible to determine who is underneath a veil in a photo, the Florida court fairly ruled that the State’s interest in

⁷³ *Id.*

⁷⁴ John-Thor Dahlburg & Anna M. Virtue, *Veil Barred from ID Photos, Judge Says* (June 7, 2003). <http://www.sfgate.com/news/article/Veil-barred-from-ID-photos-judge-says-2571131.php>.

banning facial coverings in driver's license photos is compelling. Ms. Freeman was not discriminated against by the State of Florida.

This rationale was summarized perfectly in LIBERTY OF CONSCIENCE:

“[T]here has been no massive public outcry against U.S. citizens, residents and visitors who are Muslims; no public demand that they renounce their distinctive articles of dress; and no claim that their visible difference from others, should they refuse to dress ‘like everyone else’, means that they are somehow threatening or disloyal. Indeed, both striking and reassuring is the lack of First Amendment litigation over the rights of Muslims in America.”⁷⁵

The author goes on to discuss the *Freeman* case and states “Here is a case where it seems entirely reasonable for the religious interest to lose... In any case, the prominence and isolation of this truly difficult case show the basic sanity of the U.S. situation concerning Muslim dress and other visible signs of Muslim difference.”⁷⁶

Muslims have not been singled out by American laws. That is apparent by the Oklahoma amendment being struck down by the Courts, and it is further apparent by a reading of our legal precedent, wherein free exercise rights regarding numerous religions have been considered and rejected for a multitude of reasons, but only when the State's interest overrides that of the individual. These laws and the ways they are interpreted are in no way unique to Muslims; and thus, Muslim women are not discriminated against by American laws.

II. Muslim Women Who Wear Facial Veils Are Not Singled Out for Discrimination by French Laws

A. France Has a Deep Rooted History of Secularism, Which Affects All Religions

⁷⁵ MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 346-347 (2008).

⁷⁶ *Id.* at 347.

In 1789, after the French Revolution, the French government reorganized the Catholic Church, and seized the Church's assets. Then, in 1795, a new law passed, formally separating the Church from the government of France. On the surface, France's 1795 law may appear similar to the Establishment Clause of the United States Constitution.⁷⁷ However, France's law goes much further in demanding secularism than does the United States Constitution, because it includes a prohibition on wearing religious clothing or ornaments in public.⁷⁸

In the 1880s, France secularized public school education, thereby replacing Catholic dominance in with a secular outlook. Since then, there has been no religious instruction in public schools and organized prayer has been prohibited.⁷⁹ Private parochial schools, however, are not presently outlawed in France; so if parents wish for their child to receive a religious education, they may attend a parochial school; a choice which approximately 20 percent of parents make (approximately 95 percent of those parochial schools are Catholic).⁸⁰

Catholic schools, while fairly prominent nowadays, were not always permitted in France. In 1904, Prime Minister Emile Combes initiated a law that restricted all religious communities from providing education. Approximately 30,000 members of Catholic orders were expelled from France.⁸¹ The law was modified in 1905, after Prime Minister Combes was forced to resign due to a scandal. The 1905 law was by no means kind to religion, but at least Catholics were no longer being exiled. However, under the 1905 law, the French state largely controlled the Catholic Church. The State changed the structure of the Church hierarchy, it banned the state funding of religion (and as a result over 40,000 priests ceased to be paid) and other than those

⁷⁷ T. Jeremy Gunn, *Religion and Law in France: Secularism, Separation and State Intervention*, 57 *DRAKE L. REV.* 949 (2009).

⁷⁸ Davis, *supra* note 1, at 121.

⁷⁹ AHMET T. KURU, *SECULARISM AND STATE POLICIES TOWARD RELIGION THE UNITED STATES, FRANCE AND TURKEY* 109 (2009).

⁸⁰ *Id.* at 109.

⁸¹ *Id.* at 150.

built solely with private funds, any church built prior to 1905 became public property. Accordingly, religious organizations needed the State's permission to utilize their own buildings. Furthermore, the new law isolated the use of religious symbols to places of worship, museums and cemeteries.⁸²

France enacted a new constitution in 1946, wherein secularism was a key component; and the Preamble to the Constitution stated, in applicable part: "The provision of free, public and secular education at all levels is a duty of the State."⁸³ The French Episcopate then went on to explain that there was, according to the State, acceptable secularism and unacceptable secularism. Summarily, it was stated that the state was autonomous, but there was to be religious liberty. Conversely, atheism and materialism were said to be unacceptable.⁸⁴

In 1959, the Debre Law was passed, wherein public financial support for private schools was maintained, so long as the private schools met certain criteria.⁸⁵

Unlike the United States, France has excluded religious symbols from all areas of public life: when an oath is taken in France, the person taking the oath does not place a hand on the bible; French money does not say anything akin to "In God We Trust" and there is no French pledge that references God. So, for France to outlaw outward manifestations of religious belief is not "out of left field"; instead, it is quite in line with French history.⁸⁶

In October 1989, the principal of a public high school in Creil, France expelled three Muslim female students because they were wearing headscarves. A Council of the State was appointed to determine the appropriateness of the expulsions; and they issued an opinion that

⁸²KURU, *supra* note 79, at 150-152.

⁸³*Id.* at 157.

⁸⁴*Id.* at 154-155.

⁸⁵*Id.*

⁸⁶*Id.*

wearing a headscarf was not incompatible with *laïcité* (secularism).⁸⁷ However, the final decision on their appropriateness was to be made on a case-by case basis. Between 1992 and 1999, the Council overturned 41 expulsion cases and upheld eight of them.⁸⁸ To overrule the Council, supporters of the headscarf ban pressed for a new law on secularism.

Laïcité is a philosophy in France which delineates the relationship between church and state. It is a revered concept that signifies freedom to the French, much like the word “democracy” is respected in the United States.⁸⁹ The French believe that *laïcité* protects their culture from the pressures of minority groups, particularly when the group is religious in nature.⁹⁰

In 2004, France passed a law known as the “secularity law”, which states, in Article I: “In public primary, secondary and high schools, the wearing of signs of dress with which the students manifest ostentatiously a religious affiliation is prohibited.”⁹¹ Large Christian crosses or crucifixes, hijabs, Sikh head coverings and yarmulkes were banned in schools, pursuant to the new law.⁹² The 2004 law was an attempt to strike a balance between the deeply held principle of *laïcité* and freedom of conscience.⁹³ The French history of forbidding overt religious expression was created because outward manifestation of religious beliefs has been, and still is, considered

⁸⁷ KURU, *supra*. note 79, at 103.

⁸⁸ *Id.* at 104.

⁸⁹ T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 B.Y.U. L. REV. 419.

⁹⁰ Patrick Weil, *Why the French Laïcité is Liberal*, 30 CARDOZO L. REV. 2699, 2701 (2009).

⁹¹ *Id.* at 2699.

⁹² B.A. Robinson, *France: Attacks on the Freedom of Religious Expression* (Dec. 13, 2004). http://www.religioustolerance.org/rt_franc2.htm#.

⁹³ Susanna Mancini, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, 30 CARDOZO L. REV. 2629, 2644 (2009).

an affront to French culture.⁹⁴ In the modern era, *laïcité* largely defines the cornerstone of French culture and the public identity of the French people.⁹⁵

B. The “Burka Ban”

France took this a step further in September 2010, when the French Senate voted 246 to 1 in favor of a bill banning the burka-style Islamic veil everywhere from post offices to streets. The bill is believed to affect approximately 2,000 Muslim women residing in France; however, it also applies to women visiting France. Proponents of the law argue that: (1) it protects women and young girls from being forced to cover their faces by males in their family, (2) Islam does not require a woman to cover her face and (3) it allows women and young girls to fit in to French culture and not be singled out as “different.”⁹⁶

Many Muslim leaders have concurred that Islam does not require a woman to hide her face. Rather, facial coverings are a Middle Eastern tradition, utilized largely by Muslim fundamentalists. Opponents to burkas and niqabs argue that oftentimes, the covering of a woman’s face is not done with her consent, but instead is forced on her by her father and/or husband. Nonetheless, some Muslim leaders, despite openly acknowledging that Islam does not require a facial veil, have voiced concerns that a law forbidding them stigmatizes the French Muslim population, which, at an estimated five million, is the second largest in France and the largest in Western Europe.⁹⁷

Interestingly, the fine for an adult woman who wears a facial veil in public in France is approximately the equivalent to \$215; additionally, the woman may be ordered to take

⁹⁴ Davis, *supra* note 1, at 119.

⁹⁵ Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT’L L. 1 (2008).

⁹⁶ Associated Press, *French Senate Bans Burka* (September 14, 2010). <http://www.cbc.ca/news/world/story/2010/09/14/france-burka-ban.html>.

⁹⁷ *Id.*

“citizenship classes”. However, if a man is caught forcing a woman to cover her face in public, he faces a fine of approximately \$39,750 and one year in prison; that penalty is doubled if the female involved is a minor.⁹⁸

Those who support the ban argue that it protects Muslim women from being victimized by males in their family, by being forced to cover their faces. Burka-wearers have written memoirs which describe how full-face veils cause panic attacks, anxiety, fears of suffocation, claustrophobia, depression, low self-esteem and Vitamin D deficiency (due to the lack of exposure to sunlight) and how a full-face veil is a “sensory deprivation chamber.”⁹⁹ The Koran mandates that both men and women dress “modestly.” Yet, Muslim men in France wear modern, Western clothing, while almost 2,000 Muslim women wear burkas¹⁰⁰.

On April 12, 2011, Dr. Taj Hargey, Imam of the Oxford Islamic Congregation, wrote in the DAILY MAIL “The decision by the French government to outlaw all forms of public face-masking, including the burka and niqab, is welcome by all thinking Muslims around the world.”¹⁰¹ However, not all Muslims agree with Dr. Hargey; and when the burka ban was passed, protestors gathered outside Notre Dame Cathedral to express their outrage over then French law. Several people were arrested for protesting without a license; however, no one was arrested solely for wearing a facial veil.¹⁰² French police have been instructed not to use force to remove veils; if a woman refuses to remove her veil, the police officer is to call a prosecutor for further

⁹⁸ The Associated Press, *French Senate Bans Burka* (Sept. 14, 2010). <http://www.cbc.ca/news/world/french-senate-ban>.

⁹⁹ Phyllis Chesler, *France is Brave and Right to Ban the Burka* (April 18, 2011). <http://foxnews.com/opinion/2011/04/13/france-brave-right-ban-burqa>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Rustici, *supra* note 7.

legal action, and only in “very extreme cases” would a woman be jailed for refusal to remove her veil.¹⁰³

France seems to have begun a trend throughout Europe, as similar legislation was enacted in Belgium; in Denmark, schools and public services are allowed to regulate the wearing of headscarves by employees; in the Netherlands, new draft legislation is being prepared to ban burkas and other face coverings; Italy passed a law prohibiting the covering of the face in public places¹⁰⁴. There is an exception in the Italian law that applies to coverings for religious reasons, but members of the Italian Parliament are debating whether to lift it.¹⁰⁵

Although the burka debate seems to be fairly recent, Muslim women successfully fought against wearing burkas for 100 years in countries such as Egypt, Turkey and Morocco. In 1994, the Supreme Court of Malaysia prohibited public servants from covering their faces. Their grounds for doing so included the fact that facial coverings are not required by Islamic law.¹⁰⁶

In 2009, Sheikh Mohammad Sayyid Tantawi, the Grand Sheikh of al-Azhar University (Sunni Islam’s highest institution of religious learning) was touring a Cairo high school and saw a teenage girl wearing a facial veil. He immediately angered and said “The niqab is tradition. It has no connection to religion.” He then instructed the girl never to wear it again, and he issued a fatwa (religious edict) against its use in schools.¹⁰⁷ Proponents of the burka ban cite this story often and argue that if the grand Sheikh of Sunni Islam’s highest institution of religious learning is so certain that facial veils are not required by the Koran, then are the women who wear them being forced or pressured to do so because of Middle Eastern culture? Proponents of the ban

¹⁰³ *Id.*

¹⁰⁴ Chesler, *supra* note 99, at 2.

¹⁰⁵ Ioanna Tourkochoriti, *The Burka Ban: Divergent Approaches to Freedom of Religion in France and the U.S.A.*, 20 WM. & MARY BILL OF RTS. J. 791 (2012).

¹⁰⁶ Chesler, *supra* note 99, at 1.

¹⁰⁷ *Id.*

claim that it does not infringe on religious rights; rather, it is a “blow to the Talibanesque and barbaric subordination of Muslim women on Western soil.”¹⁰⁸

In 2010, Syria banned full facial veils in certain public places, including universities; and in 2010, Iraqi religious authorities issued a fatwa requiring courtroom witnesses to appear unveiled, claiming that only the Prophet Mohammad’s wives were obligated to cover their faces.¹⁰⁹

The current worldwide trend clearly appears to be pointing toward a ban on burkas. For women who are forced to cover their faces against their will, this will be a tremendously liberating victory. However, for women who truly believe that facial veils are their religious duty, the laws are downright tragic. As an American who treasures free exercise, any ban on the outward expression of religion is deeply offensive. However, as a woman who values her personal freedom and independence from oppression, the idea that Muslim women and young girls may be forced to cover their faces against their will is enraging. It is seemingly impossible to find a balance that will protect the rights of Muslim women while also protecting Muslim women from oppression.

Conclusion

Some women may not believe wearing the full veil is mandatory; but rather, they consider it an element of a more pious way of life driven by a deep commitment to their faith. Other women believe that the veil is a religious obligation; while for others, it is cultural. The state is ill-suited to evaluate the theological soundness of a religious practice.¹¹⁰ Therefore, some

¹⁰⁸ Chesler, *supra* note 99, at 3.

¹⁰⁹ *Id.*

¹¹⁰ Bridgette Dunlap, *Protecting the Space to be Unveiled: Why France’s Full Veil Ban Does Not Violate the European Convention on Human Rights*, 35 *FORDHAM INT’L L.J.* 968 (2012).

“standard” must apply for evaluating the necessity of the “burka ban”. Unfortunately, that standard is far from easy to ascertain.

France has determined that secularism is so deep-rooted in French culture that the burka shall be banned based on the secular principles of the country. The 2010 ban follows suit in a string of secular French laws dating back to the French Revolution and affecting every major religion in existence. Accordingly, France’s burka ban may be open to justifiable criticism, but one cannot fairly say that Muslim women are singled out for disparate treatment beyond people of other faiths who wish to wear outward manifestations of their religious beliefs, since all of those manifestations, from every religion, are considered to be offensive towards French culture. Furthermore, Sunni skullcaps and large Christian crosses are banned from being worn in French schools; therefore, facial veils are not the only religious garment to be prohibited.

Secularism is so deeply rooted in French culture that burkas are viewed as an affront to the French ideology. In that way, France is drastically different from the United States, which has stayed true to its First Amendment principles in the wake of the September 11, 2001 attacks on America; because while the government is trampling all over our privacy rights, our free exercise rights have been adequately protected. The United States has made no move to outlaw burkas; and the only concession regarding facial veils at all has been their ban for use in photo identification. Just as France has stayed true to the deeply held principle of *laïcité* by banning burkas, the United States has stayed true to its free exercise ideals by refraining from doing so. While the two countries are at opposite ends of the spectrum with regard to free exercise, neither singles out Muslim women for disparate treatment.

